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Paddling Up The Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine, 55 Baylor L. Rev. 503 (2003)

Diane S. Kaplan
John Marshall Law School, 7kaplan@jmls.edu

PADDLING UP THE WRONG STREAM: WHY THE STREAM OF COMMERCE THEORY IS NOT PART OF THE MINIMUM CONTACTS DOCTRINE

Diane S. Kaplan*

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*Diane S. Kaplan graduated from Yale Law School in 1975 where she was an editor of the Yale Law Journal. She clerked for the Honorable Herbert L. Will of the United States District Court of the Northern District of Illinois. She was a litigation associate at the Chicago law firm of Mayer, Brown & Platt before joining the faculty of the John Marshall Law School in 1983. The Author thanks Prof. Allen Kamp for patiently listening to her ideas, Prof. Joel Cornwell for his editorial comments, Prof. Francis Morrissey for his historical accounts of the *Gray* case, and research assistants Shannon Speese, Sandra Young, Christy Lee, Brian Nielson, David Bickel, Edwin Mills, and Nancy Paulen.

I. INTRODUCTION

There are many reasons why a case may be considered "good law." A case may be considered "good law" because its reasoning and holding are consistent with standards set by contemporary doctrine. A case may be considered "good law" because of the utility of the values it serves or the frequency of its use. A case may be considered "good law" because of judicial acquiescence, or because it has not been reevaluated in light of evolving standards. The perception that a case is "good law" increases the longevity of a case which, upon reevaluation, may be of little contemporary value. This Article reevaluates the seminal stream of commerce case, *Gray v. American Radiator & Standard Sanitary Corp.*, in light of contemporary personal jurisdiction jurisprudence to determine if it is still "good law."[1] The study of *Gray's* lifecycle as a case will demonstrate how its version of stream of commerce jurisdiction poisoned the well for the development of a cogent jurisdictional theory.

Gray's stream of commerce theory[2] empowered a single state courtroom to bring within its jurisdictional reach virtually every participant

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

[2]Although the phrase "stream of commerce" is attributed to *Gray*, the *Gray* opinion actually never used that phrase. *See generally, id.* Instead, the opinion used the phrase "in the ordinary course of commerce." *Id.* at 766; *see* Electro Med. Equip. Ltd. v. Hamilton Med. AG, No. 99-579, 1999 U.S. Dist. LEXIS 18483, at *9 (E.D. Pa. Nov. 16, 1999) ("The first notable appearance of the stream of commerce theory was the Illinois Supreme Court's decision in *Gray v. American Radiator*."); *In re* San Juan Dupont Plaza Hotel Fire Litig., 742 F. Supp. 717, 721 (D.P.R. 1990) ("In *Gray*, where the principles of the 'stream of commerce' theory first appeared . . . .").

in a commercial chain of distribution.[3] The result ignited the field of product liability litigation.[4] Not surprisingly, *Gray's* influence soon exceeded the scope of its product liability origins.[5] The stream of commerce theory became the genus for every species of long-arm jurisdiction–tort,[6] contract,[7] domestic relations,[8] fraud,[9] antitrust,[10]

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[3]*See* Kim Dayton, *Personal Jurisdiction and The Stream of Commerce*, 7 REV. LITIG. 239, 260, 260 n.69 (1988) (stating stream of commerce jurisdiction "created the incentive" for product liability plaintiffs to sue all the defendants in a chain of distribution). The article further stated "[S]ubstantive [products liability] tort law . . . contemplates that all entities within the distribution chain should be liable to a consumer who is injured by a defective product." *Id.* at 274. Stream of commerce jurisdiction seeks to render all such entities amenable to jurisdiction in the same action. *Id.* at 274; William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 624 (1993) (adapted from WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAW, (2d ed. 1993)) (stating stream of commerce jurisdiction ensures that the "manufacturer, distributor, or retailer of defective goods . . . be amenable to jurisdiction wherever those goods are distributed, either directly or indirectly . . . .").

[4]*See* Dayton, *supra* note 3, at 259-62 (tracing the relationship between the development of product liability theory and stream of commerce jurisdiction); Richman, *supra* note 3, at 624 ("The [stream of commerce] theory allowed the expansion of jurisdictional doctrine to match the expansion of interstate and international commerce."); Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 259 (1988-89) ("[T]he [stream of commerce] theory provided a basis for satisfying the increasing jurisdictional needs created by sophisticated distribution systems . . . ."); *Electro Med. Equip. Ltd.*, 1999 U.S. Dist. LEXIS 18483, at *17 (stating that "the stream of commerce theory 'evolved to sustain jurisdiction in products liability cases'" (quoting Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 298 (3d Cir. 1985))).

[5]*See* E.H. Schopler, Annotation, *Applicability, to Actions not Based on Products Liability, of State Statutes or Rules of Court Predicating in Personam Jurisdiction over Foreign Manufacturers or Distributors upon Use of their Goods Within State*, 20 A.L.R.3d 957, 957-59 (1968) (discussing the application of the stream of commerce theory to actions not based on product liability).

[6]*See generally, e.g.*, Florendo v. Pan Hemisphere Transp., Inc., 419 F. Supp. 16 (N.D. Ill. 1976); Lindley v. St. Louis-S.F. Ry., 276 F. Supp. 83 (N.D. Ill. 1967); Keckler v. Brookwood Country Club, 248 F. Supp. 645 (N.D. Ill. 1965).

[7]*See generally, e.g.*, Jay v. Troxel Mfg. Co., No. 83-C4796, 1984 U.S. Dist. LEXIS 20024 (N.D. Ill. Jan. 27, 1984); Gen. Aviation Servs., Inc. v. Hensarling, No. 80-C5956, 1980 U.S. Dist LEXIS 15578 (N.D. Ill. Nov. 21, 1980); Chicago Silver Exch. v. United Refinery, 394 F. Supp. 1332 (N.D. Ill. 1975); Rovin Sales Co. v. Socialist Republic of Rom., 403 F. Supp. 1298 (N.D. Ill. 1975); Cohan v. Mun. Leasing Sys., Inc., 379 F. Supp. 1022 (N.D. Ill. 1974); Tatham-Laird & Kudner, Inc. v. Johnny's Am. Inn, Inc., 383 F. Supp. 28 (N.D. Ill. 1974); Magnaflux Corp. v. Foerster, 223 F. Supp. 552 (N.D. Ill. 1963); Stansell v. Int'l Fellowship, Inc., 318 N.E.2d 149 (Ill. App. Ct. 1974).

[8]*See generally, e.g.*, Haymond v. Haymond, 377 N.E.2d 563 (Ill. App. Ct. 1978).

[9]*See generally, e.g.*, Markarian v. Garoogian, 767 F. Supp. 173 (N.D. Ill. 1991); Club Assistance Program, Inc. v. Zukerman, 594 F. Supp. 341 (N.D. Ill. 1984); Alford v. Alford, No.

intellectual property,[11] libel,[12] defamation,[13] unfair competition[14]–to name a few. And, *Gray*, the case, gained acceptance as the shorthand reference for this new procedural convention. In the four decades since its inception, *Gray* has been cited no fewer than 792 times[15] in courtrooms throughout the nation, and no less than six times in the United States Supreme Court cases of *Shaffer v. Heitner*,[16] *World-Wide Volkswagen v. Woodson*,[17] and *Calder v. Jones*.[18] For decades, it seemed indisputable that *Gray* was considered "good law." Then in 1987, the United States Supreme Court issued *Asahi Metal Industry Co. v. Superior Court*,[19] in which the Court failed to reach a principled consensus on how the minimum contacts doctrine satisfied due process in the stream of commerce context.

This Article asserts that the Court's confusion in *Asahi* is traceable to the origins of the stream of commerce theory in *Gray*. The Article argues

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79-C4235, 1980 U.S. Dist. LEXIS 10379 (N.D. Ill. Feb. 22, 1980); Bodine's, Inc. v. Sunny-O, Inc., 494 F. Supp. 1279 (N.D. Ill. 1980); Ragold, Inc. v. Ferrero, U.S., Inc., 506 F. Supp. 117 (N.D. Ill. 1980); Godwin Aircraft, Inc. v. Houston, 851 S.W.2d 816 (Tenn. Ct. App. 1992); Schocket v. Classic Auto Sales, Inc., 817 P.2d 561 (Colo. Ct. App. 1991).

[10]*See generally, e.g.*, Dayton, *supra* note 3, at 261, 261 n.73; Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139 (N.D. Ill. 1977); U.S. Dental Inst. v. Am. Ass'n of Orthodontists, 396 F. Supp. 565 (N.D. Ill. 1975).

[11]*See generally, e.g.*, Habitat Wallpaper & Blinds, Inc. v. K.T. Scott, Ltd. P'ship, 807 F. Supp. 470 (N.D. Ill. 1992) (trademark infringement); Store Decor Div. of Jas Int'l, Inc. v. Stylex Worldwide Indus., Ltd., 767 F. Supp. 181 (N.D. Ill. 1991) (copyright infringement); Acrison, Inc. v. Control & Metering Ltd., 730 F. Supp. 1445 (N.D. Ill. 1990) (patent infringement); Burwood Prod. Co. v. Marsel Mirror & Glass Prod., Inc., 468 F. Supp. 1215 (N.D. Ill. 1979) (copyright infringement); Kogan v. Longstreet, 374 F. Supp. 47 (N.D. Ill. 1974) (copyright infringement); Waltham Watch Co. v. Hallmark Jewelers, Inc., 336 F. Supp. 1010 (N.D. Ill. 1971) (trademark infringement).

[12]*See generally, e.g.*, Can. M.T. Fruit, Inc. v. W. Growers Ass'n, No. 81-C5623, 1982 U.S. Dist. LEXIS 11939 (N.D. Ill. Mar. 12, 1982); Process Church of the Final Judgment v. Sanders, 338 F. Supp. 1396 (N.D. Ill. 1972); Novel v. Garrison, 294 F. Supp. 825 (N.D. Ill. 1969).

[13]*See generally, e.g.*, Rice v. Nova Biomedical Corp., 38 F.3d 909 (7th Cir. 1994); Cohen v. Charell, No. 82-C4408, 1983 U.S. Dist. LEXIS 14656 (N.D. Ill. Aug. 12, 1983).

[14]*See generally, e.g.*, Schering Corp. v. W.A. Butler Co., No. 83-C1820, 1984 U.S. Dist. LEXIS 20216 (N.D. Ill. Jan. 20, 1984).

[15]As of June 20, 2002, *Gray* has been cited by 621 citing decisions and by 792 citing references. 1 SHEPARD'S NORTHEASTERN REP. CITATIONS (Shepard's/McGraw-Hill, Inc., 1999-2002 Supp.); 1 SHEPARD'S NORTHEASTERN REPORTER CITATIONS (Shepard's/McGraw-Hill, Inc., 1995-1999 Supp.); 7 SHEPARD'S NORTHEASTERN REPORTER CITATIONS (Shepard's/McGraw-Hill, Inc., 1995).

[16]433 U.S. 186, 223 (1977) (Brennan, J., concurring in part and dissenting in part).

[17]444 U.S. 286, 298 (1980).

[18]465 U.S. 783, 789 (1984).

[19]480 U.S. 102 (1987).

that two developments created the schism between stream of commerce jurisdiction and the minimum contacts doctrine. The first development was *Gray's* statutory and due process analyses which, when taken together, misconceived the constitutional justifications for stream of commerce jurisdiction. The second development arose from doctrinal problems within the minimum contacts doctrine itself, such as its increasing emphasis on the fairness analysis and its decreasing emphasis on the relationship of reciprocal benefits and obligations between the defendant and the state. The coincidence of these two developments, one emerging from a flawed case, the other emerging from a flawed jurisdictional doctrine, resulted in the erroneous assumption that stream of commerce jurisdiction and the minimum contacts doctrine were one. They are not. Just as the theories of general relativity and quantum physics are mutually exclusive yet apply to the same universe,[20] so are the stream of commerce and minimum contacts theories mutually exclusive yet consistent with procedural due process. Like string theory, this Article attempts to separate, clarify and then unify both doctrines.[21]

To prove this thesis, the Article examines *Gray's* historical development in light of the evolving relationship between the minimum contacts and stream of commerce doctrines. The Article argues that both doctrines satisfy procedural due process although they do so for different reasons because they serve different values. Accordingly, the Article argues for the disentanglement of stream of commerce jurisdiction from the minimum contacts doctrine and for recognition of the stream of commerce doctrine as a *sui generis* form of jurisdiction.

II. THE OPINION

Gray was not the kind of case that had a strong initial impact but lost vitality over time. To the contrary, *Gray* was flawed from its inception yet gained influence as the stream of commerce theory evolved. The opinion itself was a concoction of transposed concepts: locus was confused with cognizability; cognizability was confused with jurisdictional amenability; jurisdictional amenability was confused with the "last act doctrine;" the "last act doctrine" was confused with the "effects" test; the concept of a "tort" was confused with the concept of "tortious conduct;" statutory jurisdiction was confused with constitutional jurisdiction; inferences

[20]STEPHEN HAWKING, A BRIEF HISTORY OF TIME 12 (Bantom Books 10th ed. 1996) (1988).

[21]BRIAN GREENE, THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY 117-31 (W.W. Norton & Co. 1999).

lacking foundation gave rise to inferences of expectations, which gave rise to inferences of benefits, which ultimately gave rise to a finding of jurisdiction. As if to season the brew, the opinion tossed in bits of the statute of limitations, the forum's interest, and the convenience of the parties and witnesses.

Despite the analytical confusion, *Gray* was actually a very simple case. In 1960, Titan Valve Manufacturing Company ("Titan") was an Ohio manufacturer of safety valves. Titan shipped some of its valves to American Radiator & Standard Sanitary Corporation ("American") of Pennsylvania, which installed the valves into water heaters manufactured in Pennsylvania.[22] American then shipped the water heaters to retailers throughout the country.[23] One of the water heaters was located in the home of the plaintiff, Phyllis Gray, where the valve manufactured by Titan allegedly failed, causing the water heater to explode and injure her.[24] Gray brought suit against Titan and American in her home state of Illinois.[25]

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[22]Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 762 (Ill. 1961).

[23]*Id.*

[24]*Id.*

[25]*Id.* In the course of analyzing the legal issues in *Gray*, I became curious about the question of Titan's ultimate liability for manufacturing a defective hot water valve. In pursuit of my curiosity, I asked one of my students, David Bickel, an experienced hot water tank installer, to explain to me how Phyllis Gray's hot water heater could have exploded. With the aid of a somewhat oxidized hot water valve, he provided the following explanation: The function of a hot water tank is simple. A gas supply provides the fuel to heat the water. A maximum water temperature is preset to prevent scalding. The gas enters through a thermostatic gas valve that regulates the temperature to which the water will be heated. The thermostatic gas valve functions like the burner control on a stove. However, this valve shuts off the gas supply when the water reaches the set temperature, thus shutting off the burner. When hot water is used (or a faucet is opened), the heated water exits the hot water tank through an outlet. As the hot water leaves, the cold water enters the tank through an inlet, displacing the hot water. Thus, the hot water tank always remains full. As the hot water leaves and the cold water enters, the temperature in the tank drops, triggering the thermostatic gas valve to turn on and relight the burner. The process starts again, and repeats depending on the amount of hot water used. The process will also begin when hot water has been sitting in the tank and cools below the set temperature. If the gas going to the burner does not shut off when the set temperature is reached, the pressure and the temperature will quickly rise to unsafe levels resulting in a vat of steaming hot water that will explode if the pressure is not released. Proper function of the thermostatic gas valve is essential to avoid such an explosion.

Thermostatic gas valves rarely malfunction. In the rare event that such a valve does malfunction and the gas does not shut off, a backup safety mechanism called the "temperature pressure release valve" is built into all hot water tanks. This pressure relief valve has a spring inside, preset to compress at a specific pressure setting. The overheated water in the tank pushes against the underside of the valve, compressing the spring, opening the valve, and allowing the

The complaint alleged that Titan negligently constructed the valve that American had incorporated into the water heater,[26] which, "in the ordinary course of commerce," was sold to an Illinois consumer.[27] Titan was served with Illinois process in Ohio.[28] Titan filed a special appearance and a motion to quash service on the grounds that it sold its valves to American outside of Illinois, had no agent physically present in Illinois, did no business in Illinois, and had not committed a tortious act in Illinois.[29] Gray argued that jurisdiction over Titan was proper under Chapter 110, section 17(1)(b) of the Illinois Long-Arm Statute, which provided that "[A]ny person, whether or not a citizen or resident of this State, who does any of the acts hereinafter enumerated, therby submits . . . to the jurisdiction of the courts of this State as to any cause of action arising from . . . the commission of a tortious act in this State."[30] The circuit court agreed with Titan and dismissed the complaint. Since a constitutional issue was involved, Gray appealed directly to the Illinois Supreme Court.[31]

The supreme court appeal raised both statutory and constitutional issues.[32] The statutory issue required the court to construe section 17(1)(b)

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water to escape. If the hot water tank is full when the gas valve malfunctions, the pressure relief valve will open when its preset pressure setting is reached. The heated water will escape through the valve and out the discharge line, quickly relieving the excessive pressure inside the tank. As with normal operation, when the hot water exits, cold water enters at the same rate, further cooling the tank's temperature. If the gas constantly remains on, this whole process repeats itself, which should prevent an explosion. It is important to note that the pressure relief valve is designed to open only when the temperature and pressure in the tank rise to unsafe levels.

The explosion of Phyllis Gray's hot water tank probably occurred because the gas valve malfunctioned, keeping the burner lit and the water boiling. However, the pressure relief valve on her tank must also have malfunctioned in order for the tank to blow up. For an explosion to have occurred, both the gas valve *and* the pressure relief valve must have malfunctioned simultaneously. Alternatively, Gray's hot water tank may have exploded because of improper installation of the pressure relief valve. In sum, in order for Phyllis Gray's hot water tank to have exploded, the thermostatic gas valve must have malfunctioned before Titan's pressure relief valve needed to operate. Only if both valves failed could the tank explode.

[26]*Gray*, 176 N.E.2d at 762.

[27]*Id.* at 766. The opinion assumed that Gray was the Illinois consumer of the heater. The opinion did not inquire whether Gray was a first, second, or successive owner of the heater.

[28]*Id.* at 762.

[29]*Id.*

[30]*Id.* (quoting ILL. REV. STAT., ch. 110, para. 17(1)(b) (1959) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003)).

[31]*Id.*

[32]*Gray* was argued before the Illinois Supreme Court at the University of Chicago pursuant to the Illinois Supreme Court's longstanding (but since discontinued) tradition of hearing significant cases at the University of Illinois on Washington's Birthday and at the University of

Chicago on Lincoln's Birthday. Phyllis Gray was represented by Leo S. Carlin, who at that time, was the president of the American Trial Lawyers Association. Francis D. Morrissey, of Baker, McKenzie & Hightower, represented American Radiator. Jay M. Smyser of Lord, Bissell & Brook, represented Titan Valve. At the trial level, American cross claimed against Titan for indemnification and Titan moved to dismiss Gray's complaint on the grounds that Titan had not committed a tortious act in Illinois as required by § 17(1)(b). The court agreed and Titan prevailed.

On appeal, Gray and American Radiator joined forces against Titan. In fact, American financed Gray's appeal to the Illinois Supreme Court in part to protect American's cross claim and in part because of Carlin's professional interest as a plaintiff's personal injury lawyer in expanding the jurisdictional reach of the Illinois courts.

The lower court ruling left the appellants with two concerns. First, American recognized that Mrs. Gray was an endearing salt-of-the-earth woman who would make a "dynamite witness." However, they also expected that her scars would fade over time, thus giving American an incentive to prolong the case. Second, the appellants recognized that the language of section 17(1)(b) requiring "the commission of a tortious act within the State" posed a problem in proving statutory jurisdiction because Titan had committed no acts in Illinois. In order to prevail, the appellants realized that they had to convince the court that the true legal issue was constitutional, not statutory.

To achieve this shift in focus the appellants made both legal and policy arguments. First, they relied on the 1957 case of *Nelson v. Miller*, in which the Illinois Supreme Court upheld jurisdiction over a Wisconsin appliance retailer whose employee injured an Illinois customer's hand while delivering a stove. 143 N.E.2d 673, 681-82 (Ill. 1957). The defendant challenged the court's jurisdiction on the ground that section 17(1)(b) was unconstitutionally overbroad. *Id.* at 676. The court disagreed, holding instead that § 17 was to be as broadly construed as the due process clause permitted. *Id.* at 681-82. The facts of the *Gray* case, however, did not fit neatly within the *Nelson* holding because Titan, unlike *Nelson's* Wisconsin defendant, had not done anything in Illinois. To minimize this discrepancy, the appellants developed the following syllogism: The tort of negligence does not become cognizable until the injury occurs; plaintiff's injury occurred in Illinois; therefore, Titan committed a tortious act in Illinois.

The syllogism may have lacked mathematical exactitude but it gave the court the leverage it needed to shift the focus of the argument from § 17(1)(b) to the broader constitutional bases of jurisdiction. Second, the appellants argued that *Gray* should be bound by *Nelson*'s constitutional construction of § 17. Anything less, they argued, would put Illinois law out of touch with post-World War II economic realities and deny injured Illinois residents recourse in their own courts.

Jay Smyser, Titan's attorney, was a former clerk to Illinois Supreme Court Justice Schaeffer, the author of the *Nelson* opinion. Notwithstanding the appearance of his former law clerk, Justice Schaeffer remained concerned that Illinois's jurisdictional reach be capable of meeting the demands of the post-World War II economic era. Frank Morrissey, arguing for American Radiator, commenced his argument by stating, "Titan Valve is no stranger to the courts of Illinois." In fact, Morrissey continued, Titan had been the defendant in numerous suits filed by Illinois plaintiffs for injuries arising from its products. This fact, although not a record fact, was not disputed by Titan and eventually became the basis for the court's finding that Titan had a "substantial connection with [Illinois]." *Gray*, 176 N.E.2d at 764.

to determine whether Titan had committed a "tortious act" in Illinois.[33] The court acknowledged that if Titan engaged in wrongful conduct, such conduct took place in Ohio, the place of manufacture, with "[o]nly the consequences occur[ing] in Illinois."[34] These facts, however, did not convince the court that Titan had not committed a "tortious act" in Illinois. To construe the phrase "tortious act," the court relied on "the last act doctrine" of Section 377 of the Restatement of Conflict of Laws which provided that the "place of a wrong" for resolving conflict of laws issues was "where the last event [took] place which [was] necessary to render the actor liable."[35] Using this definition of the "place of a wrong," the court reasoned that Titan should be subject to Illinois's jurisdiction because the injury, the last act necessary to render the actor liable, occurred there.[36]

Trying to redirect the locus of its allegedly tortious conduct to Ohio, Titan argued that by specifying "tortious act" rather than "tort," section 17(1)(b) referred not to a fully cognizable tort, but rather to *any* wrongful conduct that constituted an element of a prima facie tort claim.[37] The court, finding no difference between a "tort" and a "tortious act," rejected Titan's distinctions as "technicalities of definition."[38] In aid of its

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In the aftermath of the Illinois Supreme Court argument, Titan declared bankruptcy. No judgment was ever entered against Titan nor did it participate in the eventual settlement between American Radiator and Gray. Professor Frank Morrissey, Presentation at The John Marshall Law School (Mar. 6, 2000).

[33] *Gray*, 176 N.E.2d at 762.

[34] *Id.*

[35] *Id.* at 762-63 (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934)).

[36] *Id.* at 763.

[37] *Id.*

[38] *Id.* The distinction between "tort" and "tortious act," and the use of the "last act doctrine" to determine jurisdiction was previously raised in the 1957 case of *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718, 720-21 (N.D. Ill. 1957). In that case, the plaintiff sued the component part manufacturer (Power Products Corp.), manufacturer (Newark Stove Co.), and distributor/retailer (Sears Roebuck & Co.) for injuries sustained from an allegedly defective lawn mower. *Id.* at 719. The court noted the Illinois Supreme Court's statement "that the words 'commission of a tortious act' cannot, in the context of [the long-arm] statute, 'mean the same thing as commission of a tort.'" *Id.* at 720 (quoting Nelson v. Miller, 143 N.E.2d 673, 680 (Ill. 1957)). Although the *Hellriegel* court did not elaborate on the distinction, it did cite to the English Court of Appeal case of *George Monro Ltd. v. American Cyanamid & Chemical Corp.*, 1 K.B. 432, 438-40 (1944), which upheld the distinction between "tort" and "tortious act" where the wrongful conduct (negligence in the manufacture of rat poison) took place outside of the jurisdiction where the injury had occurred:

> The opinion of Goddard, L.J., is of particular interest here. He rejected the role that the words 'tort committed within the jurisdiction' must be interpreted in the light of the old learning as to what constitutes an action on

conclusion that Titan had committed a tortious act in Illinois, the court noted that this construction was consistent with its prior ruling in *Nelson v. Miller*[39] that Section 17(1)(b) was to be construed to its constitutional limits.[40]

Having found statutory jurisdiction, the court next considered whether the exercise of jurisdiction over Titan satisfied constitutional jurisdiction.[41] The court acknowledged the record's failure to disclose "the volume of Titan's business or the territory in which appliances incorporating its valves [were] marketed,"[42] or whether Titan had done "any other business in Illinois, either directly or indirectly."[43] Nonetheless, the court found that Titan had established minimum contacts with Illinois based on the "reasonable inference"[44] that because this particular valve caused injury in Illinois, Titan's other valves, "like those of other manufacturers,"[45] had in the "ordinary course of commerce"[46] "result[ed] in substantial use and consumption in [Illinois]."[47] The court offered two justifications for this finding. First, because of "the increasing specialization of commercial activity and growing interdependence of business enterprises it [was] seldom that a manufacturer [dealt] directly with consumers in other States."[48] Second, because "[a]dvanced means of distribution and other commercial activity . . . largely effaced the economic significance of State lines," it would be unfair to allow a component part manufacturer to escape jurisdictional amenability simply because it did not deal directly with the consuming public.[49] Based on these concerns, the court concluded that

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> the case, learning which has the tendency to place the tort where the damage occurs.

Id. Interestingly, the *Gray* opinion dealt with neither *Hellriegel* nor *George Monro, Ltd.*, and it is unknown if either were raised by Titan in its motion to quash. *See id.*

[39] 143 N.E.2d 673, 680-82 (Ill. 1957).

[40] *Gray*, 176 N.E.2d at 763.

[41] *Id.* at 762-63.

[42] *Id.* at 766.

[43] *Id.* at 764.

[44] *Id.* at 766.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 766; *see* Murphy, *supra* note 4, at 257 (observing that the jurisdictionally significant act in *Gray* was the plaintiff's use of the defendant's product "in the ordinary course of commerce").

[48] *Gray*, 176 N.E.2d at 766.

[49] *Id.*

Titan "benefited, to a degree, from the protection which [Illinois] law has given to the marketing of hot water heaters containing its valves."[50]

Thus, based on a record that lacked factual evidence of purposeful activities directed toward the forum, or forum-related activities giving rise to the cause of action, or continuous and systematic activities within the forum related, or even unrelated, to the cause of action, the *Gray* court asserted personal jurisdiction over Titan, whose only record contact with Illinois was the presence of one valve that had been manufactured in Ohio, incorporated into a water heater in Pennsylvania, and which, in the "ordinary course of commerce," entered Illinois and caused injury there.[51] In so doing, *Gray* announced the proposition that the mere placement of a product into a stream of commerce, without more, exposed a component part manufacturer to the jurisdiction of any state where the final product caused injury.[52]

III. THE JURISDICTIONAL ERA

A. The National Level

Gray was written in an era of expanding personal jurisdiction.[53] In 1945, the landmark case of *International Shoe Co. v. Washington* announced the minimum contacts doctrine which set forth a litany of due process requirements to be satisfied before a state court could exercise personal jurisdiction over an absentee defendant:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam, if he be not present*

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[50] *Id.*

[51] *See* Karl G. Sorg, World-Wide Volkswagen*: Has the United States Supreme Court Taken the Illinois Civil Practice Act Section 17-1(b) Out of the Gray Zone?*, 1980 S. ILL. U. L.J. 137, 140 (1980) (agreeing that the *Gray* court's analysis was unsupported by the record).

[52] *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 88-96 (1980) (addressing the concept of presumptive jurisdiction in terms of "jurisdictional causation" and arguing that unlike substantive strict liability, jurisdictional strict liability is unconstitutional because it deprives a defendant of the opportunity to avoid amenability to jurisdiction).

[53] *See* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 54-55 (2nd ed., reprint 2000) (stating that "[1945-1977] was the great, freewheeling period of extraterritorial jurisdiction"); Martin B. Louis, *The Grasp Of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C. L. REV. 407, 407 (1980) (describing the period between 1945 and 1977 as "one of unparalleled expansion for state judicial jurisdiction").

> *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."[54]

The immediate effect of the minimum contacts doctrine was the extension of jurisdiction over an increasing number of defendants by state courts.[55]

The Supreme Court revisited the minimum contacts doctrine twelve years later in *McGee v. International Life Insurance Co.*[56] Based on a California statute that subjected foreign insurance companies to suit in California for insurance-based disputes with California residents,[57] *McGee* based jurisdiction on a single insurance contract between a California

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[54]326 U.S. 310, 316 (1945) (emphasis added) (citations omitted). The State of Washington sued International Shoe Co., a Missouri corporation, in Washington, for contributions due under Washington's Unemployment Compensation Act. Washington served notice on International Shoe by registered mail in Missouri and by serving one of its salesmen in Washington. The defendant filed a special appearance and motion to quash, arguing that it was not incorporated in the State of Washington, was not doing business within the state, had no agent within the state upon whom service could be made, was not a statutory employer, and therefore, did not owe the taxes. *Id.* at 311-14.

The Supreme Court of Washington held that the defendant's "regular and systematic" business contacts within that state rendered it amenable to jurisdiction in Washington there since it had employed between eleven and thirteen salesmen in Washington, compensated the sales force with commissions based on sales totaling more than $31,000 a year, furnished the salesmen with samples, and reimbursed them for the cost of renting display rooms. *Id.* at 313-14.

Chief Justice Stone, writing for the United States Supreme Court, noted that a corporation's presence in a foreign forum could be manifest only through the actions of its agents within that forum and that such conduct could satisfy due process requirements. *Id.* at 316-17. The Court further stated that the constitutionality of jurisdiction depends "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319. Additionally, the Court reasoned that the privilege of conducting business within a state gave rise to obligations by a defendant who received the benefits and protections of the laws of that state. *Id.* Therefore, jurisdiction was proper as long as the obligation (i.e., the tax) was connected to the corporation's activity within the state. *Id.*

[55]*See* Gregory Trautman, *Personal Jurisdiction in the Post*-World-Wide Volkswagen *Era–Using a Market Analysis to Determine the Reach of Jurisdiction*, 60 WASH. L. REV. 155, 164 (1984) (stating that jurisdiction should be based on the defendant's receipt of a benefit from the foreign state rather than on the defendant's purposeful business activity in the foreign state).

[56]355 U.S. 220 (1957). The Court upheld California's jurisdiction over a Texas insurance company because the insurance contract was delivered in California, premiums were mailed from there, the insured was a resident of California at the time of death, and a state statute expressly subjected foreign corporations to California's jurisdiction on suits involving disputes over insurance contracts with state residents. *Id.* at 223-24.

[57]*See id.* at 221 (citing CAL. INS. CODE §§ 1618-1620 (West 1953)).

resident and a Texas insurance company.[58] The Supreme Court recognized that the defendant did not have "any office or agent in California . . . [and] never solicited . . . any insurance business in California apart from the policy involved [there]."[59] Nonetheless, the Court ruled that contracting to insure a resident of a state that specifically regulated such transactions rendered the insurer amenable to that state's jurisdiction.[60] *McGee's* approach was subsequently dubbed "the single act doctrine" because it authorized jurisdiction based on a single contact between the defendant and the forum.[61]

One year after *McGee*, the Court refined the minimum contacts doctrine by recasting it in terms of the nature of the act and the identity of the actor. In *Hanson v. Denckla*, the Court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum . . . [because] it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[62]

By eliminating the jurisdictional significance of nondefendant conduct, the *Hanson* Court attempted to rein in the increasing expansion of state jurisdictional power.

Hanson notwithstanding, the permissive jurisdictional climate continued until the 1980 decision of *World-Wide Volkswagen Corp. v. Woodson*.[63] The *World-Wide Volkswagen* Court reevaluated the scope of the *International Shoe*, *McGee*, *Hanson* trilogy and, again, recast the minimum contacts doctrine.[64] The Court explained that contacts alone may

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[58]*Id.* at 223-24.

[59]*Id.* at 222.

[60]*Id.* at 223-24.

[61]For discussion of the "single act doctrine," *see infra* note 462.

[62]357 U.S. 235, 253 (1958). The Supreme Court held a Delaware trustee was an indispensable party over whom Florida could not assert personal jurisdiction because the trustee had not engaged in purposeful conduct in Florida. *Id.* at 255-56.

[63]444 U.S. 286 (1980). The Court rejected Oklahoma's exercise of personal jurisdiction over a New York automobile retailer and wholesale distributor whose only connection with Oklahoma was that an automobile sold in New York to New York residents became involved in an accident in Oklahoma. *Id.* at 295. The Court found that the claim arose from one isolated occurrence fortuitously occurring in Oklahoma and was not foreseeable by the defendants. *Id.* at 295-99.

[64]*Id.* at 291-99.

not be dispositive of the due process issue.[65] Rather, even if minimum contacts exist, the reasonableness, or lack thereof, of exercising jurisdiction over a defendant was to be considered in light of other factors; such as the plaintiff's interest in convenient and effective relief, the judicial system's interest in the efficient resolution of disputes, the nation's interest in maintaining the status of the states as co-equal sovereigns in a federal system, and the states' interests in promoting shared social policies.[66] The Court stated that the purpose of the minimum contacts doctrine was to minimize jurisdictional surprise by providing a standard by which a defendant could assess its amenability to suit in a foreign forum.[67] Consequently, the Court deemed as jurisdictionally insignificant the fact that the product, a car, had the capability of entering a forum and causing injury there.[68] Instead, the Court focused on the actual conduct of the defendant vis-à-vis the forum and asked whether that conduct rendered suit in that forum foreseeable by that defendant.[69] The Court concluded that to be jurisdictionally significant, a "contact" had to be a purposeful act of the defendant rather than the consequence of fortuitous circumstances beyond the defendant's control.[70]

At the local level, however, the die had been cast as many state courts and legislatures already had invested their long-arm statutes with the ubiquity of the *International Shoe*, *McGee*, *Hanson* due process agenda.

B. The Local Level

1. The Illinois Supreme Court

In the aftermath of *International Shoe*, in 1955 the Illinois legislature amended its Civil Practice Act to include a long-arm statute.[71] The

[65] *See id.* at 292-94.

[66] *Id.* at 292.

[67] *Id.* at 297.

[68] *Id.* at 297-99.

[69] *Id.*

[70] *Id.*

[71] ILL. REV. STAT. ch. 110, para. 17 (1959) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003)).

> (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this State;

International Shoe, McGee, Hanson trilogy provided broad yet uncertain authority for Illinois courts to construe this new legislation. In the 1957 case of *Nelson v. Miller*, the Illinois Supreme Court gave full reign to the Illinois long-arm statute by construing it to be co-extensive with due process.[72]

Like *Gray*, *Nelson* was a simple case. The plaintiff was an Illinois resident who purchased a stove from the defendant, a Wisconsin appliance retailer.[73] While delivering the stove in Illinois, defendant's employee negligently severed plaintiff's finger.[74] Plaintiff sued in Illinois and defendant appeared specially to challenge jurisdiction on the grounds that the new long-arm statute was unconstitutionally overbroad.[75] In an

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(b) The commission of a tortious act within this State;
(c) The ownership, use, or possession of any real estate situated in this State;
(d) Contracting to insure any person, property, or risk located within this State at the time of contracting.

Id. According to Wright & Miller, Illinois's long-arm statute, was "[t]he first truly comprehensive long-arm statute." 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1068 (2d ed. 2002).

See generally also David P. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533 (1963). According to Professor Currie, Illinois's long-arm statute was the first of its kind although not the first long-arm statute per se. *See id.* at 537. Maryland and Vermont both passed long-arms in 1937. *Id.* Maryland's statute authorized jurisdiction over "suits arising from contracts made or acts done within the State." *Id.* (citing Md. Acts 1937, ch. 504, § 118, at 1057, now MD. ANN. CODE art. 23, § 92(d) (1957)). Vermont's statute permitted jurisdiction over "suits arising from contracts to be performed or torts committed 'in whole or in part'" in Vermont. *Id.* (citing Vt. Laws 1937, No. 40, now VT. STAT. ANN. tit. 12, § 855 (1958)). Both statutes were limited to suits by residents against foreign corporations. *Id.* at n.23. The Uniform Unauthorized Insurers Act, which provided for jurisdiction over insurers of forum residents, was enacted in 1938 and adopted in Arkansas and California. *Id.* (citing UNIF. UNAUTHORIZED INSURERS ACT § 5, 9C U.L.A. 308 (1938)); *e.g.*, ARK. STAT. §§ 66-244(a) (1957); CAL. INS. CODE §§ 1610-20 (1953)). In 1959, Wisconsin enacted a long-arm statute similar to Illinois's long-arm statute. *Id.* (citing WIS. STAT. ANN. § 262.05 (West Supp. 1963)); *see also* Beh v. Ostergard, 657 F. Supp. 173, 176 (D. N.M. 1987) (noting that New Mexico's long-arm statute was based on Illinois's long-arm statute); Wilmington Supply Co. v. Worth Plumbing & Heating, Inc., 505 F. Supp. 777, 779-80 (D. Del. 1980) (noting that Delaware's long-arm statute was based on Illinois's long-arm statute); David v. London Shirt Co., 259 F. Supp. 848, 850 (D. Or. 1966) (noting that Oregon's long-arm statute was based after Illinois's long-arm statute).

[72] 143 N.E.2d 673, 679-80 (Ill. 1957).

[73] *Id.* at 675.

[74] *Id.*

[75] *Id.*

analysis based more on convenience than contacts, the Illinois Supreme Court upheld jurisdiction over the Wisconsin defendant:

> While he was here, the employee and the defendant enjoyed the benefit and protection of the laws of Illinois, including the right to resort to our courts. In the course of his stay here the employee performed acts that gave rise to an injury. The law of Illinois will govern the substantive rights and duties stemming from the incident. Witnesses, other than the defendant's employee, are likely to be found here, and not in Wisconsin. In such circumstances, it is not unreasonable to require the defendant to make his defense here.[76]

The opinion noted that the enactment of the long-arm statute eliminated the need for Illinois courts to resort to the "implied consent" fiction that based jurisdiction not on consent, but on the state's need to justify "making reasonable provision for redress in local courts against nonresident tortfeasors . . . ."[77]

Nelson may have been progressive for its time,[78] but by contemporary standards its constitutional analysis was primitive. First, by construing Illinois's long-arm statute to be co-extensive with due process, *Nelson* overrode specific statutory provisions that limited such jurisdiction to business transactions,[79] tortious acts,[80] ownership, use or possession of real property,[81] and contracting for insurance.[82] Under *Nelson's* holding, these categories became surplusage since each, logically, would be subsumed within the broader due process language.[83]

Second, the *Nelson* court collapsed the statutory analysis into the constitutional analysis as if satisfaction of the former were a *per se* satisfaction of the latter.[84] Contemporary jurisdictional analysis, however, treats the two levels of analysis quite distinctly. The statutory analysis

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[76] *Id.* at 680.

[77] *Id.* at 678.

[78] *See* Currie, *supra* note 71, at 538-44.

[79] ILL. REV. STAT. ch. 110, para. 17(1)(a) (1959) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003)).

[80] *Id.* § 17(1)(b).

[81] *Id.* § 17(1)(c).

[82] *Id.* § 17(1)(d).

[83] *See* Diane S. Kaplan & Donald L. Beschle, *Survey of Illinois Law–Civil Procedure*, 14 S. ILL. U. L.J. 699, 700-03 (1990).

[84] *See* Nelson v. Miller, 143 N.E.2d 673, 675-81 (Ill. 1957).

asks: "Did this defendant engage in this act?" The constitutional analysis asks: "Does the commission of this act by this defendant satisfy the minimum contacts requirement of the due process clause?" Each level of inquiry must be answered separately and affirmatively before a court can exercise personal jurisdiction. Collapsing the statutory analysis into the due process analysis suggested that due process could alter the nature of the statutory offense or could subsume a statutory offense that would not otherwise satisfy minimum contacts.

Third, *Nelson* argued that Illinois's new long-arm statute replaced the "implied consent" fiction by providing statutory "justification" for jurisdiction over nonresident defendants.[85] Under *Nelson*, this "justification" imputed constitutional significance to the place of injury, the applicability of local law, the convenience of the forum for trial, the state's interest, and the location of witnesses.[86] While not irrelevant, these factors also are not jurisdictionally significant if the defendant has no other constitutionally adequate contacts with the forum. When permitted to displace the contacts analysis, however, these factors provide a ubiquitous basis for jurisdiction that is far broader than the relationship among the defendant, the forum, and the litigation.

These analytical shortfalls did not affect the result in *Nelson*. However, once adopted by *Gray* they laid the foundation for many of its analytical flaws.

2. Other Courts in Illinois

Despite the invitation, other courts in Illinois did not jump on the *Nelson* bandwagon. Not one of the four cases following *Nelson* approved the assertion of jurisdiction over defendants whose acts outside of Illinois caused injury within Illinois. In *Hellriegel v. Sears Roebuck & Co.*, the plaintiff filed a diversity action in the Northern District of Illinois alleging personal injuries sustained from the negligent manufacture of a lawn mower.[87] The court found that neither defendant manufacturer had minimum contacts with Illinois because the power units had been manufactured in Wisconsin, installed in Ohio, and delivered as the final product to Sears in Ohio.[88] The court was unimpressed that one defendant came to Illinois several times a year to negotiate and execute contracts for

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[85] *Id.* at 681.
[86] *Id.* at 677-80.
[87] 157 F. Supp. 718, 718-19 (N.D. Ill. 1957).
[88] *Id.*

the sale of the lawn mowers because the cause of action arose from negligent acts committed outside of Illinois, not from business transactions occurring within Illinois.[89] The court, similarly unimpressed that the injury occurred within Illinois,[90] stated that injury alone did not satisfy the "tortious act" language of the long-arm statute as that construction would be a return to an "action on the case, learning which has the tendency to place the tort where the damage occurs."[91] Taking care to note the distinction between a "tort" and a "tortious act," the court concluded that the defendants' acts of negligent manufacture occurred outside of Illinois, with only "the damage" occurring within Illinois.[92]

Nelson suffered a second rebuff in *Grobark v. Addo Machine Co.*, the Illinois Supreme Court's only personal jurisdiction opinion issued between *Nelson* and *Gray*.[93] *Grobark* is of special interest because it exposed the schisms within that court over the stream of commerce concept and its compatibility with United States Supreme Court personal jurisdiction jurisprudence.

The *Grobark* complaint alleged that the New York defendant breached an exclusive distributorship agreement with an Illinois plaintiff and then misappropriated the plaintiff's customer list by giving it to the new distributors.[94] In an effort to conform Illinois's jurisdictional doctrine to evolving constitutional standards, the court recited Supreme Court case law from *Pennoyer* to *Hanson* and explained *Nelson*'s compatibility with that scheme.[95] In so doing, the court issued two admonitions: First, it criticized the use of the forum nonconveniens analysis as a substitute for the minimum contacts analysis.[96] Second, it asserted that *Hanson* stood "for the proposition that there are still important territorial limitations on a State's power of *in personam* jurisdiction."[97] Then, relying heavily on *Hanson*, the *Grobark* court refused to recognize the concept of stream of

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[89] *Id.* at 720-21.

[90] *Id.*

[91] *Id.* at 720.

[92] *Id.* at 721.

[93] 158 N.E.2d 73 (Ill. 1959). In an action by Illinois adding machine distributors against a New York adding machine manufacturer, the Illinois Supreme Court declined jurisdiction because the manufacturer's sales were consummated in New York and its products were delivered to an independent carrier in New York. *Id.* at 79-80.

[94] *Id.* at 74-75. Jurisdiction was sought under the "transaction of any business" section of Illinois's long-arm statute, ILL. REV. STAT., ch. 110, para. 17(1)(a) (1955). *Id.* at 75.

[95] *Grobark*, 158 N.E.2d at 75-79.

[96] *Id.* at 78.

[97] *Id.* at 79.

commerce jurisdiction.[98] Instead, the court characterized the defendant as an individual seller who shipped machines to individual distributors over whom it "did not at any time have the right to exercise any control . . . ; the relationship between defendant and distributor being that of seller and purchaser."[99] The court concluded that the defendant had not engaged in jurisdictionally significant conduct in Illinois and refused jurisdiction.[100]

Justice Davis wrote a dissent that was joined by Justice Schaefer, *Nelson*'s author.[101] The dissent argued that *Hanson* stood for an entirely different proposition than the one raised in *Grobark*.[102] It defended *Nelson* for upholding the "foundations of jurisdiction," which "include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy."[103] More importantly, the dissent objected to the court's characterization of the parties as unrelated individual buyers and sellers who lacked control over one another.[104] Instead, the dissent argued that the plaintiff and defendant had been voluntary participants in a long term, profitable, and mutually dependent business relationship that specifically targeted Illinois for business development.[105] It was this business relationship, the dissent concluded, that constituted "the qualifying contact with the forum."[106]

The disagreement between the majority and the dissent regarding whether the commercial relationship between the defendant and the distributors was mutually dependent and continuous, or unrelated, autonomous and independent, went to the heart of the stream of commerce concept. Thus, *Grobark* raised a question that the Illinois Supreme Court justices had yet to resolve amongst themselves: In an era of increasing economic interdependence and mutual benefits, how were relationships among buyers, sellers, manufacturers and retailers to be characterized for jurisdictional purposes?

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[98] *See id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 80-82 (Davis, J., dissenting).
[102] *Id.* at 81 (Davis, J., dissenting).
[103] *Id.* (Davis, J., dissenting) (citing Nelson v. Miller, 143 N.E.2d 673, 676 (Ill. 1957)).
[104] *Id.* at 80 (Davis, J., dissenting).
[105] *Id.* (Davis, J., dissenting).
[106] *Id.* at 80-81 (Davis, J., dissenting).

Trippe Manufacturing Co. v. Spencer Gifts, Inc. was the next case to apply Illinois's long-arm statute.[107] The case involved a New Jersey catalogue distributor accused of misappropriating an Illinois plaintiff's product.[108] The opinion did not cite to *Nelson*, perhaps assuming that it had been overruled by *Grobark*. Instead, the court cited directly to *Grobark*, whose defendant, it observed, had stronger jurisdictional contacts with Illinois than the *Trippe* defendant, but still did not have sufficient contacts to satisfy due process.[109] So finding, the Seventh Circuit declined jurisdiction.[110]

Shortly after *Trippe*, the Seventh Circuit again applied Illinois's long-arm statute in *Insull v. New York, World-Telegram Corp.*[111] The plaintiff charged the defendants, newspaper owners and publishers, with libel[112] in newspapers printed outside of Illinois but published and sold within Illinois.[113] The plaintiff asserted jurisdiction under the "tortious act" and "transacting of business" sections of the long-arm statute.[114] The plaintiff invoked the last act doctrine to support his argument that jurisdiction was proper where "the last event necessary to make the defendant liable in tort occurs."[115] While acknowledging that the injury occurred in Illinois, the court relied on *Grobark* to decline jurisdiction.[116] *Nelson* was cited with a "Cf." for the proposition that none of the defendants had been present in Illinois.[117]

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[107]270 F.2d 821, 822 (7th Cir. 1959). In a suit by an Illinois corporation against a New Jersey corporation engaged in a mail order business, the Seventh Circuit held the New Jersey corporation conducted no business in Illinois other than the mailing of catalogues to Illinois residents, and therefore, did not have minimum contacts with Illinois. *Id.* at 821-23.

[108]*Id.* at 821-22.

[109]*Id.* at 822-23.

[110]*Id.*

[111]273 F.2d 166, 167 (7th Cir. 1959). In a libel suit by an Illinois resident against non-Illinois corporate defendants engaged in the subscription newspaper business, the Seventh Circuit held that the defendants conducted no business in Illinois other than mailing magazines to Illinois residents, and therefore, were not subject to Illinois's jurisdiction. *Id.* at 168-70.

[112]*Id.* at 167.

[113]*Id.* at 169.

[114]*Id.* at 170-71; ILL. REV. STAT., ch. 110, paras. 17(1)(a), (b) (1957) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003)).

[115]*Insull*, 273 F.2d at 171.

[116]*Id.* at 170-71.

[117]*Id.* at 171. The "Cf." signal "is used to introduce any authority which supports a statement, conclusion, or opinion of law different from that in the text but sufficiently analogous to lend some support to the text. 'Cf.' is never used to support a statement of fact." A UNIFORM SYSTEM OF CITATION 86 (Columbia Law Review Ass'n et al. eds., 10th ed. 1959), *reprinted in* 1

3. Summary

Nelson and *Grobark* revealed the disagreement in the Illinois Supreme Court over the scope of the long-arm statute. Succeeding cases did not follow *Nelson's* broad and empowering grant of jurisdictional authority, but rather retreated from *Nelson's* expansive application of Illinois's long-arm statute and, instead, followed *Grobark's* more cautionary approach. As the schism deepened, two issues surfaced that later confronted the court head-on in *Gray*. The first issue was concrete and specific: What was the proper construction and application of section 17(1)(b) of the long-arm statute? The second issue was theoretical and abstract: Should the court recognize a stream of commerce theory of jurisdiction?

IV. RESPONSES TO *GRAY*

A. Followers

1. The United States Supreme Court

In its first three decades, *Gray* became an integral phrase in the personal jurisdiction conversation. For the most part it gained uncritical acceptance. *Gray's* influence reached its highest levels between 1977 and 1983 when it was invoked by the Supreme Court in a majority opinion,[118] a plurality opinion,[119] and a dissent,[120] with approval[121] and without criticism.[122] Although the Supreme Court never specifically articulated its position on *Gray*, these citations were tributes to *Gray's* contribution to jurisdictional jurisprudence. But what did they mean? What did the Court find so enduring and endearing about *Gray*? It could not have been *Gray's* statutory analysis because the Court was not bound by Illinois's construction of its long-arm statute. The only remaining possibilities were *Gray's* stream of commerce theory or its due process analysis.

THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE (Columbia Law Review Ass'n et al. eds., 1998).

[118]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

[119]Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 120 (1987).

[120]*World-Wide Volkswagen*, 444 U.S. at 307 n.12 (Brennan, J., dissenting); Shaffer v. Heitner, 433 U.S. 186, 223 (1977) (Brennan, J., dissenting and concurring).

[121]*World-Wide Volkswagen*, 444 U.S. at 298.

[122]Calder v. Jones, 465 U.S. 783, 789 (1983); *World-Wide Volkswagen*, 444 U.S. at 307 n.12 (Brennan, J., dissenting).

a. Shaffer v. Heitner

Justice Brennan cited *Gray* in a concurring and dissenting opinion in *Shaffer v. Heitner*, the first Supreme Court case on personal jurisdiction issued after *Gray*.[123] Brennan argued in favor of allowing Delaware to exercise personal jurisdiction over nonresident corporate directors based on its significant state interest in providing a forum for disputes involving its domestic corporations.[124] To support this position, Brennan cited *Gray* for two closely related propositions: the "effects test" and the "physical absence test."[125] As to the former, Brennan observed that other states had sought to "acquire jurisdiction over [a] nonresident tortfeasor[ ] whose purely out-of-state activities produce[d] domestic consequences. *E.g., Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961)."[126] As to the latter, Brennan asserted that the defendants' physical absence from the forum was "not decisive, for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum State. *E.g.*, . . . *Gray v. American Radiator & Standard Sanitary Corp., supra.*"[127]

Although both propositions were viable components of the jurisdictional analysis, neither was uniquely remarkable nor uniquely attributable to *Gray*. Why then did Brennan cite *Gray* as support for these propositions? One possibility is that these propositions, like *Gray,* were consistent with Brennan's own expansive view of jurisdiction. Interestingly, Brennan did not cite *Gray* for its stream of commerce theory, but rather for its broad due process analysis.[128] Since Brennan expressed a minority view, a second possibility is that the majority did not share his opinion that the mere foreseeability of effects occurring within the forum satisfied due process.

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[123]Shaffer, 433 U.S. at 226 (Brennan, J., dissenting and concurring). Plaintiff brought a derivative action against Greyhound and twenty-eight of its directors in Delaware and attempted to serve notice pursuant to Delaware's sequestration statute by attaching the defendants' stock that was statutorily located in Delaware. *Id.* at 189-92. The Court struck down the sequestration statute on the grounds that it violated due process because ownership of stock in a Delaware corporation was not sufficiently related to the claim to give defendants notice of the suit. *Id.* at 216-17. Instead, the Court held that attachment jurisdiction must satisfy minimum contacts requirements to be constitutional. *Id.*

[124]*Id.* at 222-23 (Brennan, J., dissenting and concurring).

[125]*Id.* at 226 (Brennan, J., dissenting and concurring).

[126]*Id.* at 223 (Brennan, J., dissenting and concurring).

[127]*Id.* at 226 (Brennan, J., dissenting and concurring).

[128]*Id.*

b. World-Wide Volkswagen v. Woodson

This theme recurs in *World-Wide Volkswagen Corp. v. Woodson* where both the majority[129] and Justice Brennan's dissent cite *Gray*.[130] The Court rejected the plaintiffs' argument that the presence of the car in the forum was foreseeable and that such foreseeability supported jurisdiction.[131] Instead, the Court stated:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[132]

The Court concluded by stating:

> The forum State does not exceed its power[ ] under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d [sic] 761 (1961).[133]

According to the *Uniform System of Citation of 1976*, the signal "Cf." meant that the "[c]ited authority supports a proposition different from [the main proposition] but sufficiently analogous to lend support."[134] Hence,

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[129]444 U.S. 286, 298 (1980). The Court declined to assert jurisdiction over a New York retailer and a distributor who sold a car to the plaintiff that was involved in an accident in Oklahoma on the grounds that neither defendant purposefully directed any activity to the forum and, thus, suit over them in Oklahoma for conduct committed elsewhere was unforeseeable. *Id.* at 297-99.

[130]*Id.* at 307 n.12 (Brennan, J., dissenting).

[131]*Id.* at 295-96.

[132]*Id.* at 297 (citing Kulko v. Cal. Superior Court *ex rel.* S.F. , 436 U.S. 84, 97-98 (1978)).

[133]*Id.* at 297-98.

[134]A UNIFORM SYSTEM OF CITATION 7 (Columbia Law Review Ass'n et al. eds., 12th ed. 1976), *reprinted in* THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE (Columbia Law Review Ass'n et al. eds., 1998). "Cf." means "compare." *Id.* The "true" meaning of *World-Wide's* "Cf." citation to *Gray* has been the subject of considerable speculation among courts and commentators. A brief sampling of the field follows: *World-Wide Volkswagen's* "Cf." citation to *Gray* signaled its approval: Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1358 (9th Cir. 1983); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 290-91 (3d Cir. 1981) (Gibbons,

the majority's "Cf." signal suggested that there was a difference between *Gray's* rationale and the one the Court adopted but does explain the difference.

This "difference" was addressed in Brennan's dissenting opinion in *World-Wide Volkswagen* where he reminded the Court that the "essential inquiry" in determining the constitutionality of personal jurisdiction was whether the particular exercise of jurisdiction offended "traditional notions of fair play and substantial justice."[135] He criticized recent case developments that gave too much weight to contacts between the forum and the defendant and "too little weight to the strength of the forum State's interest" without regard to "whether there would be any actual inconvenience to the defendant."[136] Brennan argued instead that "the significance of the contacts necessary to support jurisdiction would diminish if *some other consideration* helped establish that jurisdiction would be fair and reasonable."[137] Brennan concluded that "[b]ecause lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts."[138]

In essence, Brennan proposed a proportionality test by which the defendant's contacts could be displaced by "other consideration[s]" to determine whether the exercise of personal jurisdiction would be fair and

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J., dissenting); Oswalt v. Scripto, Inc., 616 F.2d 191, 201-02 (5th Cir. 1980); Santiago v. BRS, Inc., 528 F. Supp. 755, 758 (D.P.R. 1981); Yvonne Luketich Blauvelt, *Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 49 OHIO ST. L.J. 853, 861 (1988); *see* Dayton, *supra* note 3, at 274; Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 881 (1987); Erik T. Moe, Asahi Metal Industry Co. v. Superior Court: *The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203, 210 (1987); Stephen E. Quesenberry, *Civil Procedure–Muddying The Steam of Commerce Theory*–Asahi Metal Industry Co. v. Superior Court, 36 U. KAN. L. REV. 191, 196 (1987); Howard B. Stravitz, *Sayonara To Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 791 (1988); Trautman, *supra* note 55, at 160 n.36, 161 n.39. Other commentators find *World-Wide's* "Cf." citation to *Gray* to be ambiguous: Brilmayer, *supra* note 52, at 94 n.78; Murphy, *supra* note 4, at 270, 270 n.118. To add a bit more spice to the brew, Professor Seidelson wrote that *World-Wide Volkswagen's* approving "Cf." signal to *Gray* was rejected in *Asahi's* plurality opinion. *See* David E. Seidelson, *A Supreme Court Conclusion and Two Rationales That Defy Comprehension:* Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 53 BROOK. L. REV. 563, 573 n.54 (1987).

[135]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[136]*Id.* at 299-300 (Brennan, J., dissenting).

[137]*Id.* at 300 (Brennan, J., dissenting) (emphasis added).

[138]*Id.* at 301 (Brennan, J., dissenting).

reasonable to the plaintiff, the defendant, and/or the state in any particular case.[139] Because contacts were "merely one way" of establishing fairness and reasonableness, the entire minimum contacts analysis could be trumped by a fairness/reasonableness analysis.[140]

When Brennan's version of the minimum contacts doctrine is viewed in light of his version of stream of commerce jurisdiction, the "differences" between Brennan's position and the majority's position become apparent. Unlike the majority's position, Brennan's stream of commerce theory did not end with the last participant in the chain of distribution, but rather with use by the consumer, because "[i]n each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are *used* in the forum State."[141] In support of this position, Brennan observed that "[t]he manufacturer in the case cited by the Court, *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), had no more control over which States its goods would reach than did the petitioners in this case."[142]

Purposefulness and predictability, then, arose as the points of departure between Brennan's view of the stream of commerce and that of the *World-Wide Volkswagen* majority. For Brennan, purposefulness of conduct was satisfied by participation in a stream of commerce since, as demonstrated by the Court's citation to *Gray*, the defendant in that case had no control over the product's destination.[143] Predictability, according to Brennan, meant the forecasting of reasonable possibilities or consequences, i.e., the tort concept of foreseeability.[144] By that analysis, the correlation between predictability and place of injury becomes direct because it is reasonably possible that suit will arise in the place of injury. The
World-Wide Volkswagen opinion, however, rejected the tort concept of "foreseeable injury" in favor of the jurisdictional concept of "foreseeable suit."[145] Under *World-Wide Volkswagen*, "jurisdictional foreseeability"[146]

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[139]*See id.* at 300 (Brennan, J., dissenting).
[140]*Id.* (Brennan, J., dissenting).
[141]*Id.* at 307 (Brennan, J., dissenting) (emphasis added).
[142]*Id.* at 307 n.12 (Brennan, J., dissenting).
[143]*Id.* at 307 (Brennan, J., dissenting).
[144]*See id.* at 299-301 (Brennan, J., dissenting).
[145]*Id.* at 297.
[146]*Id.*

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's

became the basis for evaluating the purposefulness of the defendant's relationship, or lack thereof, with the forum. Thereafter, the purposefulness inquiry shifted from: "Did the defendant engage in activities that predictably could cause *injury* in the forum?" to "Did the defendant engage in activities that could render *suit* in the forum foreseeable?" Using this analysis, there is little correlation between predictability and injury since the acts that give rise to jurisdiction need not occur in the place of injury. Although these two points of departure recur in later Supreme Court opinions authored by Brennan, their underpinnings can be traced to his dissent in *World-Wide Volkswagen*.

c. Calder v. Jones

Gray enjoyed a cameo appearance in *Calder v. Jones*, but not for any proposition asserted by the Court.[147] In *Calder*, actress Shirley Jones sued the Florida-based publication, THE NATIONAL ENQUIRER, a reporter, and an editor, in California state court for libel.[148] The editor and reporter challenged the court's jurisdiction, arguing that because all of their activities took place in Florida, the mere foreseeability that the article would circulate and have an effect in California was not sufficient to satisfy minimum contacts.[149] To illustrate their point, the defendants analogized themselves to a welder crafting a boiler in Florida that later exploded in California.[150] Like the welder, they had no direct economic stake in their employer's sales in California and no control over their employer's marketing activities there, or anywhere.[151] They cited *Gray* for the proposition that "[c]ases which hold that jurisdiction will be proper over the manufacturer . . . should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that

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conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. The term "jurisdictional foreseeability" was first used by Leonard G. Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U. L. REV. 363, 420 (1980) (criticizing the application of "jurisdictional foreseeability that resurrects the old implied consent fiction" to domestic relations disputes).

[147] 465 U.S. 783, 789 (1984).

[148] *Id.* at 784.

[149] *Id.* at 789.

[150] *Id.*

[151] *Id.*

distant State."[152] The Court rejected the analogy because it assumed the welder's negligence was untargeted whereas the *Calder* defendants had been charged with intentional conduct "expressly aimed at California."[153] The Court then enumerated those intentional acts and sustained California's jurisdiction over the defendants.[154]

d. Asahi Metal Industry Co. v. Superior Court

The last and most recent Supreme Court citation to *Gray* appeared in *Asahi Metal Industry Co. v. Superior Court.*[155] In *Asahi*, a California resident was injured when a tire on his motorcycle exploded.[156] The plaintiff sued Cheng Shin, the Taiwanese manufacturer of the tire.[157] Cheng Shin then impled Asahi, the Japanese manufacturer of the valve assembly for the tire. Once the primary action settled, only the third-party action between the Taiwanese and Japanese companies remained.[158] The California Court of Appeal dismissed the third-party action on the grounds that the exercise of jurisdiction over Asahi was unreasonable.[159]

The California Supreme Court reversed, relying heavily on *Gray*.[160] The court noted that cases subsequent to *World-Wide Volkswagen* had distinguished local retailers and distributors at the end of the distribution system from manufacturers and distributors at the beginning of the distribution system on the basis of intent to serve a particular market and ability to control the product's ultimate destination.[161] Based on its understanding of *Gray*, however, the court did not think these distinctions made a constitutional difference.

Instead, the court read *World-Wide Volkswagen's* citation to *Gray* as support for two related propositions: (1) "that jurisdiction over a nonresident defendant is constitutional where the defendant 'delivers its products into the stream of commerce with the expectation that they will be purchased in the forum State;'"[162] and (2) that *Gray's* exercise of the

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[152] *Id.* (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)).

[153] *Id.*

[154] *Id.* at 790.

[155] 480 U.S. 102, 120 (1987) (Brennan, J., concurring in part and concurring in judgment).

[156] *Id.* at 105.

[157] *Id.* at 105-06.

[158] *Id.* at 106.

[159] *Id.* at 107-08.

[160] Asahi Metal Indus. Co. v. Superior Court, 702 P.2d 543, 548-49 (Cal. 1985), *rev'd*, 480 U.S. 102 (1987).

[161] *Id.* at 548 (citing Nelson v. Park Indus., Inc, 717 F.2d 1120, 1126-27 (7th Cir. 1983)).

[162] *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 298).

stream of commerce jurisdiction over component part manufacturers was condoned.[163] In effect, the court assumed that since *World-Wide Volkswagen* had approved of *Gray's* exercise of jurisdiction over a component part manufacturer, who was aware of, but lacked control over its product's distribution system, that mere awareness of the distribution system satisfied due process:

> [A] critical fact is whether those defendants were *aware* of that distribution system. If they were aware, they were indirectly serving and deriving economic benefits from the national retail market established by [the retailer], and they should reasonably anticipate being subject to suit in any forum within that market where their product caused injury.[164]

The rift in the relationship between the minimum contacts doctrine and the stream of commerce theory came into sharp relief when *Asahi* was appealed to the United States Supreme Court.[165] The issue centered on how jurisdiction over a component part manufacturer could satisfy due process in the stream of commerce context. More specifically, the Court split on the nature and function of the "purposeful availment" requirement of *World-Wide Volkswagen*.[166] The competing camps have been categorized as Brennan's, requiring "mere placement" of the product into the stream of commerce,[167] and O'Connor's, requiring "placement plus" some additional activity evincing the defendant's purposeful availment of some forum benefit.[168]

O'Connor contended that the minimum contacts doctrine required a "substantial connection" between the defendant and the forum that could

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[163] *Id.*

[164] *Id.* at 551 (citing *Park Indus., Inc.*, 717 F.2d at 1126) (emphasis added).

[165] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987). The *Asahi* opinion was written by Justice O'Connor and was organized as follows: Part I set forth the facts and procedural history and was joined by all members of the Court. Part II.A. set forth O'Connor's theory of the stream of commerce jurisdiction in the minimum contacts context and was joined by Rehnquist, Powell and Scalia. Part II.B. set forth the Court's due process analysis, and was joined by all the Justices except Scalia. Part III set forth the Court's conclusion, and was joined by Rehnquist, Powell and Scalia. Justice Brennan wrote a partial concurrence that was joined by Justices White, Marshall and Blackmun. Justice Stevens also wrote a partial concurrence that was joined by Justices White and Blackmun.

[166] 444 U.S. 286, 297 (1980).

[167] *Asahi*, 480 U.S. at 116-17.

[168] *Id.* at 112.

not be satisfied merely by participating in a chain of distribution: "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State. . . ."[169] O'Connor added that the defendant's awareness that the product would enter the forum did "not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[170] Since the *Asahi* defendant did no more than place its product into a stream, O'Connor concluded that the minimum contacts requirement had not been met.[171]

Brennan's analysis of the relationship between minimum contacts and the stream of commerce was less restrictive than O'Connor's. He asserted that, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."[172] Brennan found "purposeful availment" in the benefits inevitably received by a defendant's participation in a stream of commerce.[173] Such benefits, according to Brennan, accrued to the defendant "whether that participant directly conduct[ed] business in the forum State, or engage[d] in additional conduct directed toward that State."[174] As confirmation of this proposition, Brennan cited *World-Wide Volkswagen's* citation to *Gray*:

> A well-known stream-of-commerce case in which the Illinois Supreme Court applied the [stream of commerce] theory to assert jurisdiction over a component-parts manufacturer that sold no components directly in Illinois, but did sell them to a manufacturer who incorporated them into a final product that was sold in Illinois. . . . The Court in *World-Wide Volkswagen* thus took great care to distinguish 'between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there.'"[175]

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[169] *Id.* (citations omitted).
[170] *Id.*
[171] *Id.* at 113.
[172] *Id.* at 117.
[173] *Id.*
[174] *Id.*
[175] *Id.* at 120 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 306 (1980)).

Brennan's reliance on *Gray* is understandable since his "mere placement" position, after all, was *Gray's* version of stream of commerce jurisdiction. Perhaps Brennan assumed that *World-Wide Volkswagen's* endorsement of *Gray's* use of the stream of commerce concept meant that *World-Wide Volkswagen* also approved *Gray's* version of the stream of commerce concept.

Thus, the question of what conduct satisfied due process in the minimum contacts context was raised, but not resolved, since both *Asahi* camps tallied only four votes each.[176] Despite the ambiguity, *Asahi's* effect on *Gray* was profound. At the very least, it could no longer be assumed that "mere placement" of a product into a stream of commerce would insure jurisdiction over the manufacturer in the state where the injury occurred. Even if "mere placement" was treated as a heavily weighted contact, it still could be trumped by a countervailing burden on the defendant, or the absence of an interest of the plaintiff or the forum. The irony, of course, was that the proportionality test espoused by Brennan in *World-Wide Volkswagen* was the most direct route to defeating his "mere placement" position in *Asahi.*

2. Illinois State Courts

a. Overview

The *International Shoe*[177]*-Nelson*[178]*-Gray*[179] trilogy imparted a broad but uncertain license to Illinois's personal jurisdiction jurisprudence. From 1961 to 2002, approximately eighty-six[180] Illinois cases cited *Gray* for the following propositions: due process and/or minimum contacts issues;[181]

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[176]*See supra* note 165.

[177]Int'l Shoe Co., v. Washington, 326 U.S. 310 (1945).

[178]Nelson v. Miller, 143 N.E.2d 673 (Ill. 1957).

[179]Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).

[180]*See* SHEPARD'S NORTHEASTERN REPORTER CITATIONS (2002) (listing Illinois court cites to *Gray,* 176 N.E.2d 761 as of January 1, 2002).

[181]Dep't of Revenue v. Nat'l Bellas Hess, Inc., 214 N.E.2d 755, 760 (Ill. 1966); Hayden v. Wheeler, 210 N.E.2d 495, 496 (Ill. 1965); People v. W. Tire Auto Stores, Inc., 207 N.E.2d 474, 477 (Ill. 1965); Koplin v. Saul Lerner Co., 194 N.E.2d 304, 306 (Ill. 1963); Dombrowski v. Larson Lodge, 630 N.E.2d 973, 977 (Ill. App. Ct. 1994); Alpert v. Bertsch, 601 N.E.2d 1031, 1035 (Ill. App. Ct. 1992); Gen. Elec. Railcar Servs. Corp. v. Wilmington Trust Co., 567 N.E.2d 400, 405 (Ill. App. Ct. 1990); Wiles v. Morita Iron Works Co., Ltd., 504 N.E.2d 942, 945 (Ill. App. Ct. 1987); Ill. Nat'l Bank & Trust Co. v. Gulf States Energy Corp., 429 N.E.2d 1301, 1306 (Ill. App. Ct. 1981); Coca-Cola Co. v. A. Epstein & Sons Int'l, Inc., 411 N.E.2d 917, 921 (Ill. App. Ct. 1980); Hurletron Whittier, Inc. v. Barda, 402 N.E.2d 840, 842 (Ill. App. Ct. 1980); Bevins v. Comet Cas. Co., 390 N.E.2d 500, 504 (Ill. App. Ct. 1979); United Air Lines,

statutory construction of the "tortious act" [182] provision of Illinois's long-arm statute;[183] general principles of statutory construction;[184] construing Illinois's long-arm statute to be coextensive with due process;[185] the last act doctrine;[186] the single act doctrine;[187] the stream of commerce theory;[188] the statute of limitations;[189] privity of contract;[190]

Inc. v. Conductron Corp., 387 N.E.2d 1272, 1276 (Ill. App. Ct. 1979); Dalton v. Blanford, 383 N.E.2d 806, 809 (Ill. App. Ct. 1978); Sears Bank & Trust Co. v. Luckman, 377 N.E.2d 1156, 1158 (Ill. App. Ct. 1978); Haymond v. Haymond, 377 N.E.2d 563, 568 (Ill. App. Ct. 1978); Stupar v. Bank of Westmont, 352 N.E.2d 29, 32 (Ill. App. Ct. 1976); First Nat'l Bank v. Screen Gems, Inc., 352 N.E.2d 285, 291 (Ill. App. Ct. 1976); Bania v. Royal Lahaina Hotel, 347 N.E.2d 106, 108 (Ill. App. Ct. 1975); Stansell v. Int'l Fellowship, Inc., 318 N.E.2d 149, 151 (Ill. App. Ct. 1974); Hawes v. Hawes, 263 N.E.2d 625, 627 (Ill. App. Ct. 1970); Lurie v. Rupe, 201 N.E.2d 158, 162 (Ill. App. Ct. 1964).

[182]Yates v. Muir, 492 N.E.2d 1267, 1268 (Ill. 1986); Wimmer v. Koenigseder, 484 N.E.2d 1088, 1092 (Ill. 1985); Jones v. Searle Labs., 444 N.E.2d 157, 162 (Ill. 1982); Connelly v. Uniroyal, Inc., 389 N.E.2d 155, 162 (Ill. 1979); *Hayden,* 210 N.E.2d at 496; Talbert & Mallon, P.C. v. Stokes Towing Co., 572 N.E.2d 1214, 1218 (Ill. App. Ct. 1991) (Goldenhersh, J., dissenting); Longo v. AAA-Michigan, 569 N.E.2d 927, 932 (Ill. App. Ct. 1990); *Wiles*, 504 N.E.2d at 945; Unarco Indus., Inc. v. Frederick Mfg. Co., 440 N.E.2d 360, 362 (Ill. App. Ct. 1982); Mergenthaler Linotype Co. v. Leonard Storch Enters., Inc., 383 N.E.2d 1379, 1384 (Ill. App. Ct. 1978); Int'l Merch. Assocs., Inc. v. Lighting Sys. Inc., 380 N.E.2d 1047, 1054 (Ill. App. Ct. 1978); Wiedemann v. Cunard Line Ltd., 380 N.E.2d 932, 940 (Ill. App. Ct. 1978); Boyer v. Boyer, 373 N.E.2d 441, 444 (Ill. App. Ct. 1978); Braband v. Beech Aircraft Corp., 367 N.E.2d 118, 121 (Ill. App. Ct. 1977); *Stansell*, 318 N.E.2d at 152; Bolf v. Wise, 255 N.E.2d 511, 512 (Ill. App. Ct. 1970).

[183]735 ILL. COMP. STAT. ANN. 5/2-209 (West Supp. 2002).

[184]Brown v. Burdick, 307 N.E.2d 409, 411 (Ill. App. Ct. 1974); Poindexter v. Willis, 231 N.E.2d 1, 3 (Ill. App. Ct. 1967); Tidwell v. Smith, 205 N.E.2d 484, 486 (Ill. App. Ct. 1965).

[185]Doolin v. K-S Telegage Co., 393 N.E.2d 556, 560 (Ill. App. Ct. 1979); *Boyer*, 373 N.E.2d at 444; *Braband*, 367 N.E.2d at 121.

[186]*Yates*, 492 N.E.2d at 1268; Poplar Grove State Bank v. Powers, 578 N.E.2d 588, 596 (Ill. App. Ct. 1991); *Longo*, 569 N.E.2d at 932; Arthur Young & Co. v. Bremer, 554 N.E.2d 671, 676 (Ill. App. Ct. 1990); Zielinski v. A. Epstein & Sons Int'l, Inc., 534 N.E.2d 644, 646 (Ill. App. Ct. 1989); McLeod v. Harmon, 500 N.E.2d 724, 725 (Ill. App. Ct. 1986); Veeninga v. Alt, 444 N.E.2d 780, 782 (Ill. App. Ct. 1982); Lind v. Zekman, 395 N.E.2d 964, 966 (Ill. App. Ct. 1979); Guebard v. Jabaay, 381 N.E.2d 1164, 1166 (Ill. App. Ct. 1978); Roper v. Markle, 375 N.E.2d 934, 936 (Ill. App. Ct. 1978); E.J. Korvette v. Esko Roofing Co., 350 N.E.2d 10, 12 (Ill. App. Ct. 1976).

[187]Kutner v. DeMassa, 421 N.E.2d 231, 234 (Ill. App. Ct. 1981). For an explanation of the last act doctrine see *infra* note 462.

[188]Connelly v. Uniroyal, 389 N.E.2d 155, 159 (Ill. 1979); Kadala v. Cunard Lines, Ltd., 589 N.E.2d 802, 808 (Ill. App. Ct. 1992); Wiles v. Morita Iron Works Co., 504 N.E.2d 942, 947 (Ill. App. Ct. 1987); Natural Gas Pipeline Co. v. Mobil Rocky Mountain, Inc., 508 N.E.2d 211, 213 (Ill. App. Ct. 1986); R.W. Sawant & Co. v. Allied Programs Corp., 473 N.E.2d 496, 500 (Ill. App. Ct. 1984); Unarco Indus., Inc. v. Frederick Mfg. Co., 440 N.E.2d 360, 362 (Ill. App. Ct.

strict liability;[191] general jurisdiction;[192] course of dealing;[193] notice;[194] witness availability,[195] including Illinois's substantive law in the personal jurisdiction analysis;[196] and deciding personal jurisdiction on a case-by-case basis.[197]

These observations demonstrate that *Gray* has been cited as a generic figure of speech for myriad propositions, some of which are not germane to jurisdiction and most of which are not germane to *Gray*. The variability of these citations suggests that while some Illinois courts struggled to determine what *Gray* stood for, others deemed it a veritable magic wand to sanction any jurisdictional proposition.

b. The Illinois Supreme Court

The Illinois Supreme Court cited *Gray* in thirteen cases between 1963 and 2002.[198] Personal Jurisdiction was not an issue in four of these

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1982); Clements v. Barney's Sporting Goods Store, 406 N.E.2d 43, 45 (Ill. App. Ct. 1980); *Braband*, 367 N.E.2d at 123; Bolf v. Wise, 255 N.E.2d 511, 512 (Ill. App. Ct. 1970).

[189]Williams v. Brown Mfg. Co., 261 N.E.2d 305, 313 (Ill. 1970); *Zielinski*, 534 N.E.2d at 648; Thornton v. Mono Mfg. Co., 425 N.E.2d 522, 525 (Ill. App. Ct. 1981).

[190]Suvada v. White Motor Co., 210 N.E.2d 182, 185 (Ill. 1965).

[191]*Connelly*, 389 N.E.2d at 162.

[192]*Braband*, 367 N.E.2d at 124 (Stamos, J., concurring).

[193]Huffman v. Inland Oil & Transp. Co., 424 N.E.2d 1209, 1213 (Ill. App. Ct. 1981); Stephens v. N. Ind. Pub. Serv. Co., 409 N.E.2d 423, 429 (Ill. App. Ct. 1980); Hurletron Whittier, Inc. v. Barda, 402 N.E.2d 840, 842 (Ill. App. Ct. 1980); Ward v. Formex, Inc., 325 N.E.2d 812, 814 (Ill. App. Ct. 1975).

[194]Dept. of Rev. v. Nat'l Bellas Hess, Inc., 214 N.E.2d 755, 760 (Ill. 1966); *Huffman*, 424 N.E.2d at 1213; Bania v. Royal Lahaina Hotel, 347 N.E.2d 106, 108 (Ill. App. Ct. 1976).

[195]*Connelly*, 389 N.E.2d at 159; Doolin v. K-S Telegage Co., 393 N.E.2d 556, 560 (Ill. App. Ct. 1979); Haymond v. Haymond, 377 N.E.2d 563, 568 (Ill. App. Ct. 1978).

[196]*Connelly*, 389 N.E.2d at 162; *Doolin*, 393 N.E.2d at 561.

[197]Dombrowski v. Larson Lodge, 630 N.E.2d 973, 977 (Ill. App. Ct. 1994); Johnston v. United Presbyterian Church, Inc., 431 N.E.2d 1275, 1278 (Ill. App. Ct. 1981); Woodfield Ford, Inc. v. Akins Ford Corp., 395 N.E.2d 1131, 1134 (Ill. App. Ct. 1979); AAAA Creative, Inc. v. Sovereign Holidays, Ltd., 395 N.E.2d 66, 68 (Ill. App. Ct. 1979); *Doolin*, 393 N.E.2d at 561; Bevins v. Comet Cas. Co., 390 N.E.2d 500, 504 (Ill. App. Ct. 1979); United Air Lines, Inc. v. Conductron Corp., 387 N.E.2d 1272, 1276 (Ill. App. Ct. 1979); Mergenthaler Linotype Co. v. Leonard Storch Enters., Inc., 383 N.E.2d 1379, 1384 (Ill. App. Ct. 1978); Int'l Merch. Assocs., Inc. v. Lighting Sys. Inc., 380 N.E.2d 1047, 1054 (Ill. App. Ct. 1978); Weidemann v. Cunard Line Ltd., 380 N.E.2d 932, 938 (Ill. App. Ct. 1978); Sears Bank & Trust Co. v. Luckman, 377 N.E.2d 1156, 1158 (Ill. App. Ct. 1978); Stansell v. Int'l Fellowship, Inc., 318 N.E.2d 149, 152 (Ill. App. Ct. 1974).

[198]Yates v. Muir, 492 N.E.2d 1267, 1268 (Ill. 1986); Wimmer v. Koenigseder, 484 N.E.2d 1088, 1092 (Ill. 1985); Jones v. Searle Labs., 444 N.E.2d 157, 162 (Ill. 1982); Green v.

cases.[199] Taking into account only those cases in which personal jurisdiction was an issue, jurisdiction was upheld in all cases arising in the 1960's,[200] upheld once[201] and denied once[202] in the two cases decided in the 1970's, and denied in every case decided in the 1980's.[203] There have been no Illinois Supreme Court citations to *Gray* since 1988.

(i) The Sixties

The first two cases that cited *Gray* did not involve personal jurisdiction issues. In *Koplin v. Saul Lerner & Co.*,[204] the Illinois Supreme Court rejected a party's attempt to apply *Gray's* jurisdictional analysis to determine if a constitutional question could be appealed directly from a trial court to the Illinois Supreme Court. In *Suvada v. White Motor Co.*, the issue was privity of contract, not jurisdiction, and *Gray* was cited only because the liability of a component part manufacturer was involved.[205]

The next Illinois Supreme Court citation to *Gray* appeared in *Hayden v. Wheeler*,[206] which sustained jurisdiction over a nonresident decedent's administrator based on *Gray's* statutory construction of § 17(b)(1). This opinion reversed the appellate court decision, which had also cited *Gray*, but for the opposite result.[207] Thereafter, *Gray* was cited twice as authority for the minimum contacts doctrine.[208]

Except for *Hayden's* statutory construction cite, the Illinois Supreme Court's reliance on *Gray* as authority for minimum contacts, notice, and

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Advance Ross Elecs. Corp., 427 N.E.2d 1203, 1206 (Ill. 1981); *Connelly*, 389 N.E.2d at 162; Boyer v. Boyer, 383 N.E.2d 223, 224 (Ill. 1978); Williams v. Brown Mfg. Co., 261 N.E.2d 305, 313 (Ill. 1970); *Dept. of Rev.*, 214 N.E.2d at 760; Hayden v. Wheeler, 210 N.E.2d 495, 496 (Ill. 1965); Suvada v. White Motor Co., 210 N.E.2d 182, 185 (Ill. 1965); People v. W. Tire Auto Stores, Inc., 207 N.E.2d 474, 477 (Ill. 1965); Koplin v. Saul Lerner Co., 194 N.E.2d 304, 306 (Ill. 1963); Wiles v. Mortia Iron Works Co., 504 N.E.2d 942, 945 (Ill. App. Ct. 1987).

[199]*See Jones*, 444 N.E.2d at 159; *Williams*, 261 N.E.2d at 313; *Suvada*, 210 N.E.2d at 185; *Koplin*, 194 N.E.2d at 306.

[200]*Dept. of Rev.*, 214 N.E.2d at 762; *Hayden*, 210 N.E.2d at 497; *W. Tire Auto Stores, Inc.*, 207 N.E.2d at 477.

[201]*Connelly*, 389 N.E.2d at 160.

[202]*Boyer*, 383 N.E.2d at 226.

[203]*Yates*, 492 N.E.2d at 1267; *Wimmer*, 484 N.E.2d at 1088; *Green*, 427 N.E.2d at 1203; *Wiles*, 504 N.E.2d at 942.

[204]194 N.E.2d 304, 306 (Ill. 1963).

[205]210 N.E.2d 182, 185 (Ill. 1963).

[206]210 N.E.2d 495, 496 (Ill. 1965).

[207]*Id.*

[208]Dept. of Rev. v. Nat'l Bellas Hess, Inc., 214 N.E.2d 755, 760 (Ill. 1966); People v. W. Tire Auto Stores, 207 N.E.2d 474, 477 (Ill. 1965).

the liability of a component part manufacturer was either off-point or inapposite. The only unifying link among these otherwise disparate cases was their reliance on *Gray* to sustain personal jurisdiction.

(ii) The Seventies

The Illinois Supreme Court's indiscriminate reliance on *Gray* continued well into the next decade, during which time *Gray* was cited for the accrual of the statute of limitations,[209] the statutory construction of a "tortious act,"[210] constitutional limitations on the jurisdictional power of state courts,[211] the stream of commerce theory,[212] due process,[213] and the strict liability of a component part manufacturer.[214] Unlike the sixties, however, reliance on *Gray* did not always result in affirmance of jurisdiction.

In the 1978 case of *Boyer v. Boyer*,[215] the Illinois Supreme Court refused to extend *Gray's* "tortious act" construction to a father's failure to make child support payments in Illinois. Instead, the court cited *Gray* for the opposing proposition that due process imposed limitations on the personal jurisdiction of state courts.[216]

Boyer's retreat from *Gray's* expanding jurisdictional reach was reversed the following year in *Connelly v. Uniroyal, Inc.*[217] *Connelly* was a pre-*Asahi* case in which a Belgium tire manufacturer and its parent company were sued by an Illinois plaintiff who was driving his car in Colorado when one of the tires malfunctioned. The tire, which bore the name "Uniroyal," was manufactured by the defendant in Belgium, installed on the car by General Motors in Belgium, and then shipped by General Motors to the United Sates for distribution.[218] The plaintiff purchased the car with the tire in Illinois.[219] The Belgium tire manufacturer contested jurisdiction on the grounds that it neither had "transacted business" nor committed a "tortious act" in Illinois.[220] However, the Illinois Supreme

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[209]Williams v. Brown Mfg. Co., 261 N.E.2d 305, 313 (Ill. 1970).

[210]Connelly v. Uniroyal, Inc., 389 N.E.2d 155, 159 (Ill. 1979); Boyer v. Boyer, 383 N.E.2d 223, 224 (Ill. 1978).

[211]*Boyer*, 383 N.E.2d at 224.

[212]*Connelly*, 389 N.E.2d at 160.

[213]*Id.*

[214]*Id.* at 162.

[215]383 N.E.2d at 223.

[216]*Id.* at 224.

[217]*See generally* 389 N.E.2d 155.

[218]*Id.* at 157.

[219]*Id.*

[220]*Id.* at 157-58.

Court, citing *Gray*,[221] sustained jurisdiction because the Belgian defendant had introduced its tires "into the stream of commerce in obvious contemplation of their ultimate sale or use in other nations or states," and because its tires came "into Illinois on a regular basis and in substantial numbers."[222] The court's ruling was based solely on due process and its assumption that participation in a stream of commerce satisfied minimum contacts. However, participation in the former may not automatically satisfy the latter, especially when the forum has a long-arm statute that limits jurisdiction to specific conduct.

The *Connelly* court found it unnecessary to "reach the question whether defendant committed a tortious act in Illinois,"[223] preferring instead to "express no opinion concerning the correctness of the appellate court's holding on that issue."[224] The appellate court cited *Gray* for the proposition that a tortious act had been committed in Illinois because "the phrase 'commission of a tortious act' as employed in the long-arm statue, applies not *only* to an injury which occurs in Illinois, but *also to all elements and conduct which significantly relate to or have significant causal connection with the injury suffered.*"[225] This construction of "tortious act," had it been adopted by the Illinois Supreme Court, would have turned *Gray* on its head since it attributed jurisdictional significance to *any* place where *any* conduct related to the tort occurred.

A later section of *Connelly* also cited *Gray* for the issue of whether a parent corporation could be held strictly liable for the negligence of its subsidiary.[226] Here the Illinois Supreme Court said, "*[L]iability* in tort for a defective product extends to a seller, a contractor . . . a supplier . . . and the manufacturer of a component part."[227] *Gray*, however, addressed the issue of jurisdiction, not liability.

To summarize, the Illinois Supreme Court's citations to *Gray* in the 1970's were inconsistent, inappropriate, and sometimes wrong. *Williams v. Brown Manufacturing Co.* cited *Gray* where there was no jurisdictional

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[221] *Id.* at 160 (citing Gray v. Am. Radiator & Standard, 176 N.E.2d 761, 766 (Ill. 1961)).

[222] *Id.*

[223] *Id.*

[224] *Id.* at 161.

[225] Connelly v. Uniroyal, Inc., 370 N.E.2d 1189, 1193 (Ill. App. Ct. 1977) (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)) (emphasis added).

[226] Connelly, 389 N.E.2d at 162.

[227] *Id.* (quoting Suvada v. White Motor Co., 210 N.E.2d 182, 184 (Ill. 1965) (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961))) (citations omitted) (emphasis added)).

issue.[228] *Boyer v. Boyer* cited *Gray* to support due process restrictions on state court jurisdictional authority.[229] *Connelly* correctly cited *Gray* for the application of the stream of commerce theory to a component part manufacturer,[230] but then incorrectly cited it as authority for imposing strict liability on a component part manufacturer.[231] These cases suggest that in the seventies, the Illinois Supreme Court did not have a firm fix on the *Gray* principle and cited it instead as generic justification to expand or contract jurisdiction, or whenever a component part manufacturer was a defendant.

(iii)The Eighties

The Illinois Supreme Court's citations to *Gray* in the 1980's evidenced a significant shift in that court's personal jurisdiction agenda: Jurisdiction was denied in every case in which *Gray* was cited.[232] In *Green v. Advance Ross Electronics Corp.*,[233] an Illinois corporation sued its former president, a Texas resident, as a counter-defendant for misappropriation, corporate diversions, and breach of fiduciary duties occurring in Texas.[234] The

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[228]261 N.E.2d 305, 313 (Ill. 1970).

[229]383 N.E.2d 223, 224 (Ill. 1978).

[230]Connelly v. Uniroyal, Inc., 389 N.E.2d 155, 159 (Ill. 1979).

[231]*Id.* at 162 (quoting Suvada v. White Motor Co., 210 N.E.2d 182, 184 (Ill. 1965) (citing *Gray*, 176 N.E.2d at 761)).

[232]*See generally* Yates v. Muir, 492 N.E.2d 1267 (Ill. 1986); Wimmer v. Koenigseder, 484 N.E.2d 1088 (Ill. 1985); Green v. Advance Ross Elecs. Corp., 427 N.E.2d 1203 (Ill. 1981).

[233]427 N.E.2d 1203. Roy Green Jr. (Jr.) and Roy Green Sr. (Sr.) were employed in Texas by Advance Ross Steel Corp., a Delaware corporation having its principal place of business in Illinois. Jr. was fired for distributing unauthorized severance pay to Sr. and brought suit in Illinois for breach of contract against Advance Ross. When Advance Ross countersued against Sr. to recover the money, Sr. filed a special appearance arguing that the Illinois courts did not have personal jurisdiction over him. *Id.* at 1205. Advance Ross argued that jurisdiction over Sr. was proper because the Greens, Jr. and Sr., had engaged in tortious conduct in Texas but the injury was felt in Illinois through the depletion of Advance Ross's bank accounts there. *Id.* at 1206. This scenario resembled *Gray* in that the only event to occur in Illinois was the injury. Nonetheless, the appellate court rejected the analogy to *Gray*, holding instead, that the link between Sr.'s "activities in Texas and the alleged economic injury in Illinois . . . [was] too tenuous to support the exercise of personal jurisdiction." Green v. Advance Ross Elecs. Corp., 408 N.E.2d 1007, 1010 (Ill. App. Ct. 1980). The court concluded that "it would be an improper expansion of the long-arm statute for an Illinois court to assert jurisdiction over a nonresident defendant whose only connection with this state is that he works for a Texas-based corporation which is incorporated in Illinois." *Id.* at 1012. The court went on to state, "We therefore hold that Green, Sr.'s conduct in Texas, regardless of its potentially tortious nature, was not 'committed' in Illinois under section 17(l)(b)." *Id.*

[234]*Green*, 427 N.E.2d at 1205.

plaintiff corporation argued that the Texas defendant had committed a tortious act in Illinois by depleting corporate accounts held by an Illinois bank.[235] The analogy to *Gray* was clear: A tortious act had been committed in Illinois because the last act necessary to complete the tort, i.e., the economic injury, occurred in Illinois.[236] The court rejected this analogy, however, observing that "[t]he last event in *Gray* was in Illinois, where the injury to the plaintiff occurred, for to be tortious the act alleged in *Gray* had to cause injury."[237] In *Green*, however, the defendant's conduct occurred in Texas, and only "the consequences of his misconduct were felt in Illinois."[238] The court found these "consequences" to be "too remote" from the situs of the defendant's conduct to support the conclusion that it had committed a tortious act in Illinois.[239] Instead, it concluded that extending *Gray's* last act analysis to economic injury would open "the gates of long-arm jurisdiction to every Illinois resident who incurs loss as the result of the fraud of a nonresident, no matter how distant the misconduct and circumstances of the loss are from Illinois. A less tenuous and contrived connection between the tortious act and this State is required. . . ."[240]

By refusing to extend *Gray's* last act analysis to economic injury, the *Green* Court, as a matter of policy, attempted to hold the line on the increasing expansion of the *Gray* rationale that was taking place in the lower courts. As a matter of logic, however, the court's attempt to distinguish the tortious act in *Gray* from the tortious act in *Green* is difficult to accept. In both cases, each defendant's conduct occurred outside of Illinois while each plaintiff's injuries occurred within Illinois. Furthermore, the court did not explain why economic injury within the forum was more "tenuous" or "remote" than physical injury within the forum.

The court also refused to extend *Gray's* last act analysis in *Yates v. Muir* where an Illinois plaintiff argued that an attorney's malpractice in Kentucky constituted a tortious act in Illinois because the plaintiff suffered the consequences there.[241] In fact, the *Yates* court went so far as to recast the last event in *Gray* as the "exploding of the water heater"[242] rather than

[235] *Id.* at 1207.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] 492 N.E.2d 1267, 1268 (Ill. 1986).
[242] *Id.*

the plaintiff's injury. Nonetheless, by refusing to equate injury with consequences the court was clearly trying to limit the reach of *Gray's* tortious act construction *qua* the last act doctrine.

In *Wimmer v. Koenigseder*,[243] a decedent's administrator brought a Dram Shop action against Wisconsin tavern owners. The Illinois Appellate Court upheld jurisdiction[244] but the Illinois Supreme Court reversed.[245] Both opinions cited *Gray* to support their contrary results. The appellate court cited *Gray* for the proposition that under the last act doctrine a tortious act had been committed in Illinois since the injury had occurred there.[246] Conversely, the supreme court found that no tortious act had occurred in Illinois because the defendants owed no legal duty to the plaintiff.[247] The court concluded that the last act doctrine could not support jurisdiction for an injury occurring in Illinois that did not arise from tortious conduct.[248]

The last Illinois case to cite *Gray* was *Wiles v. Morita Iron Works Co.*[249] The plaintiff had been employed by Astro Packaging Co., of New

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[243]484 N.E.2d 1088 (Ill. 1985).

[244]Wimmer v. Koenigseder, 470 N.E.2d 326, 332 (Ill. App. Ct. 1984), *rev'd*, 484 N.E.2d 1088 (Ill. 1985).

[245]*Wimmer*, 484 N.E.2d at 1088.

[246]*Wimmer*, 470 N.E.2d at 331.

[247]*Wimmer*, 484 N.E.2d at 1092-93.

[248]*Id.*

[249]530 N.E.2d 1382 (Ill. 1988). *Wiles* was a product liability action filed by an Illinois plaintiff who was injured by a machine manufactured by a Japanese company. *Id.* at 1383. The machine had been purchased by the plaintiff's employer who took delivery in Japan before shipping the machine to Illinois. *Id.* The trial judge dismissed the case for lack of personal jurisdiction over the defendant. *Id.* Plaintiff appealed to the Illinois Appellate Court. *See* Wiles v. Morita Iron Works Co., 504 N.E.2d 942 (Ill. App. Ct. 1987), *rev'd*, 530 N.E.2d 1382 (Ill. 1988). The appellate court's opinion relied heavily on *Gray*, ruling that Morita either knew or could have foreseen that its machine would end up in Illinois. *Id.* at 945. Moreover, the court did not like the possibility that Morita could be insulated from Illinois's jurisdiction simply because it delivered the machine to the employer in Japan. *Id.* at 947. The bottom line, according to the appellate court, was that "Morita . . . voluntarily entered into a contract that resulted in its product going to the forum state." *Id.* at 946. The court expressly adopted the *Gray* rationale for both "tortious conduct" and the stream of commerce. *Id* at 947. Six days after the *Wiles* opinion was issued the United States Supreme Court issued its *Asahi* opinion. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

In the wake of *Asahi*, *Wiles* was appealed to the Illinois Supreme Court. Wiles v. Morita Iron Works Co., 530 N.E.2d 1382 (Ill. 1988). That court placed considerable emphasis on the factual similarities between *Wiles* and *Asahi*, particularly the presence of the Japanese defendant. *Id.* at 1386. The court examined the divergent rationales of *Asahi* in order to find a consensus

Jersey and Illinois, which had purchased a machine in Japan from Morita Iron Works Co., which it transported to its plant in Illinois where the plaintiff was injured.[250] The appellate court upheld jurisdiction over Morita, citing *Gray* to support its conclusion that Morita had transacted business in Illinois by participating in a stream of commerce that brought its product there.[251]

The Illinois Supreme Court treated *Wiles* as its opportunity to align Illinois's stream of commerce doctrine with recent developments in the federal minimum contacts doctrine. It cited *World-Wide Volkswagen*,[252] *Burger King*,[253] *Hanson*,[254] *Kulko*[255] and *Asahi*.[256] The court carefully analyzed the two competing stream of commerce theories posed by *Asahi* and found that under either its "broad" or "narrow" version, jurisdiction could not lie over Morita in Illinois.[257] When referring to Justice Brennan's "broad" version of the stream of commerce theory, which required only placement of a product into a chain of distribution, the court cited Fifth and Ninth Circuit cases,[258] not *Gray*. Instead, the court distinguished *Gray* on its facts. It said, "In *Gray*, which involved a

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among the justices but could not do so. Instead, relying on Justice Brennan's opinion, the court stated:

> The record in this case is totally devoid of any evidence that the defendant was aware either during contract negotiations or at the time of delivery of the products to Astro in Japan that Astro intended to transport . . . to Illinois, or that Astro even had a plant in Illinois. Without any evidence of such knowledge on the part of the defendant, on this basis alone we would have to conclude, under either theory, that Asahi made no effort, directly or indirectly, to serve the market for its product in Illinois.

Id. at 1389. The court explicitly rejected the plaintiff's reliance on *Gray* as "misplaced." *Id.* at 1390. The court stated that "while it would be reasonable to assume that Morita had availed itself of the United States market, there is no showing in the record that Morita purposefully directed its products into Illinois." *Id.*

[250] *Wiles*, 530 N.E.2d at 1383-84.

[251] *Wiles*, 504 N.E.2d at 945, *rev'd*, 530 N.E.2d 1382 (Ill. 1988).

[252] *Wiles*, 530 N.E.2d at 1385, 1386, 1389, 1390, 1391 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

[253] *Id.* at 1391 (citing Burger King Corp. v. Rudzewiez, 471 U.S. 462, 475 (1985)).

[254] *Id.* at 1385, 1390 (citing Hanson v. Denckla, 357 U.S. 235 (1958)).

[255] *Id.* at 1385 (citing Kulko v. Superior Court of Cal. *ex rel.* S.F., 436 U.S. 84 (1978)).

[256] *Id.* at 1386, 1387, 1388, 1389 (citing Asahi v. Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)).

[257] *Id.* at 1389.

[258] *Id.* at 1388 (citing Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081 (5th Cir. 1984) and Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983)).

Wisconsin manufacturer, the court held that it was a fair inference from the record that a manufacturer of a commercial product in a state *bordering* Illinois had purposefully availed itself of the Illinois market"[259] whereas, in the instant case, "there [was] no showing in the record that Morita purposefully directed its product into Illinois."[260]

This analysis may raise a few eyebrows as well as a few questions. First, the court's attempt to distinguish *Gray* on the facts misstated the facts. The *Gray* defendants were from Ohio and Pennsylvania, neither of which borders Illinois and neither of which is Wisconsin. Why did the Illinois Supreme Court purport to distinguish *Gray* on the facts by distorting the facts? Was the error merely a mistake, or a purposeful attempt to marginalize *Gray*? Did the court really fail to see the connection between *Gray's* formulation of stream of commerce jurisdiction and Brennan's "broad" stream of commerce theory? Second, *Wiles* has been regarded as Illinois's *Asahi*, in part because it cites *Asahi* as precedent and bases its analysis on the stream of commerce theory and, in part, because the defendant was a Japanese manufacturer. Notwithstanding these similarities, *Wiles* more appropriately should have been analyzed as a "unilateral acts" case because it involved a direct sale from the manufacturer to the purchaser and did not involve a chain of distribution, a middleman, or a component part manufacturer.

In sum, the *Gray* cites of the 1980's show consistent results but no coherent fix on how *Gray* fit into the larger constitutional scheme. It is curious that while in *Wimmer*, *Wiles*, *Yates* and *Green* the court restricted the expansion of *Gray*, it still failed to commit to a principled or consistent application of *Gray*. Even more interesting is that there have been no additional Illinois Supreme Court cites to *Gray* since 1988, although the lower Illinois courts continue to use, and sometimes, abuse it.[261]

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[259] *Id.* at 1390 (emphasis added).

[260] *Id.*

[261] *See, e.g.*, Cameron v. Owens-Corning Fiberglass Corp., 695 N.E.2d 572, 580 (Ill. App. Ct. 1998) (*Gray* cited by concurrence for proposition that the distribution of a product with the expectation that it will be used in Illinois is an act in furtherance of a conspiracy to cause injury in Illinois); Bradbury v. St. Mary's Hosp., 652 N.E.2d 1228, 1230 (Ill. App. Ct. 1995) (citing *Gray* for application of the "last act doctrine" to a venue analysis); Dombrowski v. Larson Lodge, 630 N.E.2d 973, 977 (Ill. App. Ct. 1994) (citing *Gray* as general support for the minimum contacts doctrine); Alpert v. Bertsch, 601 N.E.2d 1031, 1035 (Ill. App. Ct. 1992) (citing *Gray* to support jurisdiction in a forum where the defendant invoked the benefits and protections of its laws); Poplar Grove State Bank v. Powers, 578 N.E.2d 588, 596 (Ill. App. Ct. 1991) (rejecting plaintiff's reliance on *Gray* to support jurisdiction in Illinois because economic injury was felt there); Talbert & Mallon, P.C. v. Stokes Towing Co., 572 N.E.2d 1214, 1218 (Ill. App. Ct.

3. The Seventh Circuit

On the federal level, *Asahi's* failure to resolve the issue of how stream of commerce jurisdiction satisfied either the minimum contacts doctrine or procedural due process[262] left the Seventh Circuit without clear guidance on the constitutional issue. Lacking such guidance, the Seventh Circuit was constrained by the Illinois Supreme Court's statutory construction of its long-arm statute but was not similarly constrained by its due process analysis since *Erie*[263] does not bind federal courts to a state's analysis of federal constitutional law.

In the immediate post-*Gray* sixties and seventies, the Seventh Circuit gave wide berth to Illinois's jurisdictional developments.[264] When *Green* retracted Illinois's jurisdictional reach by refusing to extend *Gray's* last act analysis to economic losses felt in Illinois but caused outside of

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1991) (*Gray* cited by dissent to support jurisdiction in a "tort" case that was characterized as a "contract" case by the majority which denied jurisdiction); Longo v. AAA-Michigan, 569 N.E.2d 927, 932-33 (Ill. App. Ct. 1990) (rejecting plaintiff's reliance on *Gray* to support jurisdiction in Illinois because economic injury was felt there); Arthur Young & Co. v. Bremer, 554 N.E.2d 671, 676 (Ill. App. Ct. 1990) (citing *Gray* for application of the "last act doctrine" to determine the situs of a tort); Gen. Elec. Railcar Servs. Corp. v. Wilmington Trust Co., 567 N.E.2d 400, 404-05 (Ill. App. Ct. 1990) (citing *Gray* for the proposition that jurisdiction is proper in a state whose laws provide benefits and protections to the defendant).

[262]*See supra* text accompanying notes 155-176; *see also* Dehmlow v. Austin Fireworks, 963 F.2d 941, 946 (7th Cir. 1992) (stating that *Asahi* "casts some doubt on the future viability of the stream of commerce theory"); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 625 (1993) adapted from WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAW, (2d ed. 1993) (stating stream of commerce jurisdiction ensures that the "manufacturer, distributor, or retailer of defective goods . . . be amenable to jurisdiction wherever those goods are distributed, either directly or indirectly . . . ."); Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 66 (1988); Christine M. Wiseman, *Reconstructing the Citadel: The Advent of Jurisdictional Privity*, 54 OHIO ST. L.J. 403, 437-39 (1993).

[263]Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The Rules of Decision Act, 28 U.S.C. § 1652 (1994), commanded federal courts, when exercising diversity jurisdiction, to apply state rather than federal law when deciding issues of state substantive law. *See also* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 3.7 (2d ed., reprint 2000) (1994).

[264]*See, e.g., Dehmlow,* 963 F.2d at 946; John Walker and Sons, Ltd. v. DeMert & Dougherty, Inc., 821 F.2d 399, 404 (7th Cir. 1987) (citing *Gray* for the "benefits and protections" test); Telco Leasing, Inc. v. Marshall County Hosp., 586 F.2d 49, 50 (7th Cir. 1978) (citing *Gray* for the "benefits and protections" test); O'Hare Int'l. Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971) (citing *Gray* for the "benefits and protections" test); *Consol. Labs.*, 384 F.2d at 800-01 (citing *Gray* for the "benefits and protections" test).

Illinois,[265] the Seventh Circuit followed.[266] When *Asahi* cast a pall over the stream of commerce doctrine, the Seventh Circuit took note but reaffirmed its allegiance to *Gray's* version of the doctrine.[267]

a. *The Seventh Circuit's Treatment of* Gray*'s Statutory Analysis*

Two Seventh Circuit opinions issued in the 1970's cited *Gray* for application of the last act doctrine to determine the situs of a tort. *Honeywell, Inc. v. Metz Appartewerke* ruled that the tort of inducement to infringe a patent occurred in Illinois because the patent holder had suffered injury there.[268] One year later, *McBreen v. Beech Aircraft Corp.* accepted as "well established that for purposes of the Illinois 'long-arm' statute a tort is committed in the place where the injury occurs."[269]

In the eighties, the Seventh Circuit took its cues from *Green* and began to restrict application of the last act doctrine. In *Young v. Colgate-Palmolive Co.,* the court rejected a shareholder's claim that the defendants had committed a tortious act in Illinois because the "impact" of their fiduciary breaches were felt there.[270] In *Turnock v. Cope*, a plaintiff invoked the last act doctrine to claim economic injury in Illinois caused by the commercial torts of three Michigan defendants.[271] The Seventh Circuit rejected this argument, citing a series of recent Illinois decisions that held fast to *Green's* refusal to extend the last act doctrine to economic losses.[272]

Then, in 1990, the Seventh Circuit decided *Heritage House Restaurants v. Continental Funding Group, Inc.*,[273] which sharply contradicted its

[265]Green v. Advance Ross Elecs. Corp., 427 N.E.2d 1203, 1207-08 (Ill. 1981) (stating that to so hold would "open the gates of long-arm jurisdiction to every Illinois resident who incurs loss as the result of the fraud of a nonresident . . . [t]o permit no-holds-barred long-arm jurisdiction of that type, even if contemplated by a State statute, would not pass muster under the due process requirements.").

[266]*See, e.g.*, *Turnock*, 816 F.2d at 334-35; *Young*, 790 F.2d at 570-71.

[267]*See Dehmlow*, 963 F.2d at 946 (citing Mason v. Lli Luigi & Franco Dal Maschio, 832 F.2d 383, 386 (7th Cir. 1987), endorsing the stream of commerce theory and reaffirming the Seventh Circuit's "belief in the continued validity of *Gray* . . . .") (citations omitted); Vioski v. Calaveras Asbestos, Ltd., 929 F.2d 352 (7th Cir. 1991) (discussed *infra* notes 279-294); Heritage House Rests., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276 (7th Cir. 1990).

[268]Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1142-43 (7th Cir. 1975).

[269]543 F.2d 26, 28 (7th Cir. 1976) (citations omitted).

[270]790 F.2d 567, 571-72 (7th Cir. 1986).

[271]816 F.2d 332, 334 (7th Cir. 1987). The complaint alleged conspiracy, conversion of funds, interference with employment and unjust enrichment.

[272]*Id.* at 335. See citations therein.

[273]906 F.2d 276 (7th Cir. 1990).

rulings in *Turnock* and *Honeywell*. In *Heritage*, the plaintiffs sought jurisdiction over a New York financial institution for economic losses suffered in Illinois.[274] The district court, basing its ruling on the last act doctrine as applied in *Green* and *Gray*, found that the situs of the tort was either New York (the place from which the defendant gave investment advice) or Arkansas (the location of the investment) but not Illinois, even though the plaintiffs suffered financial losses there.[275] The Seventh Circuit reversed,[276] finding that the defendant had demonstrated an "intent to affect an Illinois interest"[277] by making telephone calls to an Illinois plaintiff who subsequently suffered economic losses there.[278]

The following year Judge Easterbrook authored *Vioski v. Calaveras Asbestos, Ltd.*, which did not defer to *Heritage*.[279] *Vioski* held that an asbestos supplier had not submitted to Illinois's jurisdiction when its California customer relocated its plant to Illinois where the plaintiff was employed and subsequently contracted asbestosis.[280] The plaintiff argued that the asbestos supplier's failure to warn of the dangerous nature of its product constituted a "tortious act" in Illinois.[281] Judge Easterbrook replied that Illinois's "tortious act" provision applied only to acts of the defendant that actually occurred in Illinois.[282] Since the defendant neither delivered nor anticipated its product's ultimate use in Illinois, the court refused to "push this warning obligation farther up the chain of supply"[283] and, accordingly, denied jurisdiction. Instead, Judge Easterbrook explained "that if Calaveras launched a ballistic missile from California into Illinois, the Supreme Court of Illinois would characterize this as a tortious act 'in' Illinois, the place of the actual and intended injury."[284] The court also noted that jurisdiction would exist under *Gray* if the

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[274] *Id.* at 278-81.

[275] *Id.* at 281.

[276] *Id.* at 284.

[277] *Id.* at 282.

[278] *Id.* (citing FMC Corp. v. Varonos, 892 F.2d 1308, 1313 (7th Cir. 1990), where the court held that a district court in Illinois had jurisdiction over a defendant who sent telexes and telecopies of allegedly fraudulent monthly reports to Illinois, and Club Assistance Program, Inc. v. Zukerman, 594 F. Supp. 341, 345-46 (N.D. Ill. 1984), where defendant allegedly sent money and made telephone calls which contained misrepresentations to Illinois); *see also id.* at 282 n.8.

[279] 929 F.2d 352 (7th Cir. 1991).

[280] *Id.* at 352-53.

[281] *Id.* at 353.

[282] *Id.* at 352-53.

[283] *Id.* at 352.

[284] *Id.* at 353.

defendant had "sold its product anticipating that the asbestos would come to Illinois. . . ."[285] However, since this defendant's conduct was less direct and more attenuated than either example, the court declined to uphold jurisdiction in Illinois.[286]

Vioski is interesting for several reasons. It was the first Seventh Circuit case to break rank with that court's historical deference to *Gray*. It cited *Gray* with a "Cf." for the principal that jurisdiction may be exercised only over a defendant who anticipated its product's entry into a specific market.[287] It refused to apply *Gray's* last act construction of "tortious act" to a supplier whose only contact with Illinois was that its product caused injury there.[288] By refusing to imbue every injury occurring in Illinois with jurisdictional significance, the Seventh Circuit treated § 17(1)(b) as a principle of limitation rather than of expansion.[289]

Although Judge Easterbrook's analysis was clever, it was also inappropriate. The *Erie* doctrine required the Seventh Circuit to defer to Illinois's construction of its long-arm statute.[290] Per *Gray*, the Illinois Supreme Court construed the phrase "tortious act" to include out-of-state conduct having in-state consequences. Accordingly, Easterbrook should have given the same construction to the "tortious act" issue in *Vioski* that the Illinois Supreme Court would have given it. Instead, Easterbrook relied on *Yates v. Muir*,[291] in which the Illinois Supreme Court rejected jurisdiction over a Kentucky attorney who performed legal services in Kentucky for an Illinois resident.[292] *Yates*, however, was not analogous to *Vioski*. *Yates* was a malpractice case that fell well within an established line of Illinois cases that reject jurisdiction over professional service providers who perform services outside of Illinois for Illinois residents.[293] *Vioski* was a product liability case in which the plaintiff was

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[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.* at 352.

[289] *Id.* The Seventh Circuit continued to limit *Gray* in Rice v. Nova Biomedical Corp., 38 F.3d 909 (7th Cir. 1994), where Chief Judge Posner rejected application of *Gray*'s last act analysis to determine the applicable substantive law in a multi-state defamation case. *Id.* at 916.

[290] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding federal courts presiding over a diversity case must apply the substantive laws of the state in which they are sitting).

[291] 492 N.E.2d 1267 (Ill. 1986).

[292] *Vioski*, 929 F.2d at 353.

[293] *Yates*, 492 N.E.2d at 1269 (citing Veeninga v. Alt, 444 N.E.2d 780 (Ill. App. Ct. 1982)); *see generally also* Ballard v. Rawlins, 428 N.E.2d 532 (Ill. App. Ct. 1981); Muffo v. Forsyth, 345 N.E.2d 149 (Ill. App. Ct. 1976).

injured by a product used in Illinois.[294] Hence, *Yates* did not provide either the factual basis or the doctrinal shift in Illinois's long-arm jurisdiction that to justify Easterbrook's reconstruction of Illinois's "tortious act" doctrine.

With the exceptions of *Heritage*, *McBreen*, and *Vioski*, the Seventh Circuit largely adhered to Illinois's expansion and contraction of § 17(1)(b). Ironically, both *McBreen* and *Heritage* would have been consistent with these developments had they been decided later and earlier, respectively. *McBreen*, although out of step with other seventies cases, presaged *Vioski's* limitation on commercial tort claim theories that attempted to masquerade as stream of commerce claims. *Heritage*, decided in the nineties, was a quirky throwback to the pre-*Green* cases of the seventies that had applied *Gray's* last act analysis with abandon. Furthermore, *Heritage*, like most of the other Seventh Circuit cases, involved a commercial tort rather than a product tort and, hence, did not fit neatly into *Gray's* stream of commerce paradigm. *Vioski* may have reflected the disdain of the Seventh Circuit, or at least Easterbrook, for Illinois's jurisdictional jurisprudence, but it did not properly follow *Erie's* command to federal diversity courts to defer to state judicial common law.

*b. The Seventh Circuit's Pre-*Asahi *Treatment of* Gray's *Constitutional Analysis*

The early Seventh Circuit cases embraced *Gray's* due process analysis with vigor but without discrimination.[295] Such cases as *Hutter Northern Trust v. Door County Chamber of Commerce*,[296] *Honeywell Inc. v. Metz Apparatewerke*,[297] and *Nelson by Carson v. Park Industries, Inc.*,[298] presaged Brennan's position in *Asahi* with their broad transactional treatment of the stream of commerce doctrine. Each case based its jurisdictional analysis on the relationship between the transaction and the forum rather than the relationship between the defendant and the forum. Each case substituted the question, "Was this *defendant's conduct* sufficiently related to Illinois to satisfy due process?" for the question, "Was this *transaction* sufficiently related to Illinois to satisfy due process?" Each case found placement of the product into a transactional network to be a jurisdictionally significant act.

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[294] *Vioski*, 929 F.2d at 352.

[295] *See generally* O'Hare Int'l Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971).

[296] 403 F.2d 481 (7th Cir. 1968).

[297] 509 F.2d 1137 (7th Cir. 1975).

[298] 717 F.2d 1120 (7th Cir. 1983).

In *Hutter Northern Trust v. Door County Chamber of Commerce*, the Seventh Circuit extended *Gray's* due process analysis to a libel action that based jurisdiction on the "transacting business" provision of Illinois's long-arm statute.[299] *Hutter* cited *Gray* for the proposition that the constitutional relationship between the defendant and the forum was satisfied if the "'act or *transaction* itself' ha[d] a substantial connection with the forum state."[300] The "transaction" that *Gray* referred to was the defendant's participation in a network of manufacturers and distributors that comprised a stream of commerce.[301] The "transaction" that *Hutter* referred to was the mailing of information from Wisconsin to Illinois.[302] Hence, *Hutter's* so-called "transaction" was really the unilateral act of the defendant that required no other participants. In contrast, *Gray's* "transaction" referred to a network of many actors where the success of each was dependant on the success of all. By superimposing *Gray's* transactional stream of commerce analysis onto the "transacting business" provision of Illinois's long-arm statue, the Seventh Circuit was doing more than mixing metaphors. It was following the cues of its Illinois state counterparts by adapting a *Gray*-based analysis to fit any jurisdictional issue.

In *Honeywell, Inc. v. Metz Apparatewerke*, the Seventh Circuit upheld Illinois's jurisdiction over a patent infringer who allegedly placed the infringing product into a stream of commerce "under such circumstances that it should reasonably have anticipated that injury through infringement would occur [in Illinois]."[303] Citing *Gray*, the court concluded that participation in a stream of commerce should not permit a manufacturer "to insulate himself from the long arm of the courts by using an intermediary or by professing ignorance of the ultimate destination of his products."[304]

In *Nelson v. Park Industries, Inc.*, the plaintiff brought a product liability claim for injuries sustained when her flannel shirt caught fire.[305] Among others, she sued the retailer's Hong Kong purchasing agent and the

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[299]403 F.2d at 486.

[300]*Id.* at 484-85 (quoting Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 764 (Ill. 1961)) (emphasis added).

[301]*Gray*, 176 N.E.2d at 764.

[302]*Hutter*, 403 F.2d at 481.

[303]509 F.2d 1137, 1144 (7th Cir. 1975).

[304]*Id.*

[305]717 F.2d 1120, 1122 (7th Cir. 1983).

Hong Kong shirt manufacturer.[306] Both defendants challenged Illinois's jurisdiction on the grounds that they lacked control over the distribution of the shirts.[307] The court rejected this argument, citing *Gray* for the proposition that neither control nor management of the distribution system were necessary to satisfy stream of commerce jurisdiction[308] as long as the defendant had placed the product into the stream and was "aware" of the distribution system.[309]

c. *The Seventh Circuit's Post-*Asahi *Treatment of* Gray's *Constitutional Analysis*

The Seventh Circuit's enthusiasm for *Gray's* stream of commerce theory waned once it attempted to reconcile *Gray* with *Asahi*. In *Mason v. F. LLI Luigi and Franco Dal Maschio Fu G.B.*,[310] the court applied *Gray's* stream of commerce theory to an Italian manufacturer whose machine allegedly injured an Illinois employee.[311] The court distinguished *Asahi* because the Italian manufacturer had custom built the machine for an Illinois company and provided training for its use there.[312] Citing *Gray*, the court held that the defendant had "elected to sell its product for ultimate use in Illinois and therefore its 'association with this State [Illinois] is sufficient to support the exercise of jurisdiction.'"[313]

The Seventh Circuit again tried to reconcile *Gray* with *Asahi* in *Dehmlow v. Austin Fireworks*.[314] In *Dehmlow*, the plaintiff was injured by fireworks that were manufactured in Kansas and later exploded in Illinois by a Wisconsin fireworks display company.[315] The court upheld Illinois's jurisdiction over the Kansas manufacturer because it advertised nationally and knew that its product was being purchased for use in Illinois.[316] The court asserted its continuing endorsement of *Gray* and the stream of commerce doctrine,[317] although it recognized that the plurality

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[306] *Id.* at 1122-23.

[307] *Id.* at 1124.

[308] *Id.* at 1126 n.6.

[309] *Id.* at 1126.

[310] 832 F.2d 383 (7th Cir. 1987).

[311] *Id.* at 384-85.

[312] *Id.* at 386.

[313] *Id.* at 386-87. The court observed that four Justices had cited *Gray* with approval in *Asahi*. *Id.* at 386 n.4.

[314] 963 F.2d 941 (7th Cir. 1992).

[315] *Id.* at 942-44.

[316] *Id.*

[317] *Id.* at 946.

opinions in *Asahi* may have cast some doubt upon the "future viability" of that doctrine.[318] Nonetheless, the court found that the defendant's knowledge of the firework's ultimate use in Illinois would satisfy even O'Connor's "more stringent minimum contacts test."[319] The court also found that the defendant's additional activities in Illinois such as sales, displays, and training sessions for other clients, supported jurisdiction because they demonstrated the defendant's "concerted attempt to serve the market for fireworks in Illinois."[320] A concurring opinion added that the defendant's knowledge of the product's ultimate use in Illinois was sufficient to support stream of commerce jurisdiction[321] and that the majority's reliance on the defendant's additional but unrelated Illinois activities was inappropriate because such activities were not "contemporaneous or antecedent to the incident at issue."[322]

Dehmlow is a good example of the multiple levels of confusion wrought by *Asahi's* indecision. For example, did the *Dehmlow* majority correctly include the defendant's unrelated business activities in Illinois to support stream of commerce jurisdiction? If so, can unrelated business activities in the forum transform a weak case of minimum contacts into a more certain case of stream of commerce jurisdiction? If not, then the only reason to consider the defendant's unrelated forum activities is to establish general jurisdiction. But, if general jurisdiction exists, there is no need to establish specific jurisdiction.[323] The majority opinion reached this impasse by conflating specific and general jurisdiction as if they were interchangeable. Does *Asahi* support that proposition?

On the other hand, the concurrence argued that the defendant's knowledge of the product's intended market satisfied the purposeful availment requirement. Does *Asahi* support that proposition? What if the defendant knew that the product was to be delivered for use in Illinois but when something changed, the product was ultimately delivered for use in Nebraska? What does the defendant's knowledge of ultimate use anywhere at any point in time have to do with due process? That is like saying that if the Robinsons told Seaway they were driving the Audi through Oklahoma then Seaway would have been amenable to jurisdiction

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[318] *Id.*
[319] *Id.* at 947.
[320] *Id.* at 948.
[321] *Id.* at 949.
[322] *Id.*
[323] *Id.*

in Oklahoma because it knew the car was destined for use there. Does *Asahi* support that proposition?

B. Critics

Despite its followers, *Gray* was not without its detractors. Of the approximately six hundred twenty-one cases that cite to *Gray*,[324] only seven cases (four federal and three state)[325] actually reject its analysis. Few though they are, these cases are worthy of comment because they articulate *Gray*'s defects and offer insights into the relationship between stream of commerce jurisdiction and the minimum contacts doctrine.

1. Attacks on *Gray's* Statutory Construction: The New York Court of Appeals

In 1965, three years after *Gray* was decided, the New York Court of Appeals issued *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*,[326] a consolidation of three cases that construed that state's newly enacted long-arm statute.[327] Of the three cases under review, only one, *Feathers v. McLucas*,[328] expressly criticized *Gray* while the other two incorporated those criticisms by reference.[329]

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[324]*See supra* note 15.

[325]*See, e.g.*, In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Tomashevsky v. Komori Printing Mach. Co., 715 F. Supp. 1562 (S.D. Fla. 1989); Beaty v. M.S. Steel Co., 276 F. Supp. 259 (D. Md. 1967); Longines-Wittnauer Watch Co. v. Barnes & Reinecke Inc., 209 N.E.2d 68 (N.Y. 1965).

[326]209 N.E.2d 68, 84 (N.Y. 1965). The three cases under review were *Longines-Wittnauer v. Barnes & Reinecke Inc.*, 251 N.Y.S.2d 740 (N.Y. App. Div. 1964), *Feathers v. McLucas*, 251 N.Y.S.2d 548 (N.Y. App. Div. 1964), and *Singer v. Walker*, 250 N.Y.S.2d 216 (N.Y. App. Div. 1964).

[327]N.Y. C.P.L.R. 302 (McKinney 2002). New York's Civil Practice Law & Rules § 302 is modeled after Illinois's long-arm statute.

[328]*Longines-Wittnauer Watch Co.*, 209 N.E.2d at 78-80.

[329]*Id.* In *Longines-Wittnauer Watch Co.*, a New York corporation sued Barnes, a Delaware corporation having its principal place of business in Illinois, for breach of warranty. *Id.* at 74. Barnes manufactured and sold specially designed machines to plaintiff. *Id.* Barnes mailed contract proposals to Longines in New York and later sent key officers to Illinois. *Id.* The terms of the contract recited that it was "made in the State of New York and governed by the laws thereof." *Id.* When performance problems arose, meetings between the plaintiff and defendant took place in both New York and Illinois. *Id.* A supplemental contract followed, executed in both states. *Id.* The defendant eventually shipped the machines to the plaintiff's New York plant where it performed installation and testing. *Id.* When Longines discovered defects in the machines, it brought suit pursuant to the "transaction of business" section of New York's long-arm statute and served Barnes in Illinois. *Id.* Barnes challenged New York's jurisdiction,

In *Feathers*, the plaintiffs were seriously injured in New York when a truck hauling flammable liquid propane gas exploded.[330] The propane tank was manufactured by Darby Co., a Kansas corporation, under a contract with Butler Manufacturing Co., the Missouri corporation that mounted the tank onto a wheelbase and sold it to Matlack, a Pennsylvania corporation. All three companies were named as defendants.[331]

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arguing that its activities in New York before and after the execution of the contract did not amount to the "transaction of business." *Id.* In reviewing *Longines-Wittnauer Watch Co.*, the court upheld jurisdiction for the following reasons: First, the court pointed out that the New York legislature chose to follow Illinois's long-arm example by providing broad, inclusive language for the "transaction of *any* business within the state" provision. *Id.* at 75. Second, according to *International Shoe*, so long as a nonresident defendant engaged in some purposeful activity in the state in connection with the suit, both due process and the statutory test would be satisfied. *Id.* Third, the parties' contract provided a "substantial connection" with New York and the defendant's contacts with New York were such that "traditional notions of fair play and substantial justice" were not offended. *Id.* Fourth, the defendant "purposefully availed itself of the benefits and protections of New York's laws." *Id.*

In the third case of the trilogy, *Singer v. Walker*, 209 N.E.2d at 80, the court's treatment of New York's "tortious act" provision was similar to *Feathers* and, hence, the outcome identical. The plaintiff, then ten years old and a New York resident, was injured in Connecticut when a hammer he was using broke and a chip penetrated his right eye. *Id.* The hammer was manufactured by defendant Estwing Manufacturing Co., an Illinois corporation that did not conduct business in New York. *Id.* The defendant originally had shipped the hammer to a New York dealer where it was purchased by the plaintiff's aunt. *Id.* Estwing was served in Illinois and subsequently brought a motion to dismiss, arguing that New York had no jurisdiction over it because (i) the allegedly tortious act of faulty design and manufacture took place in Illinois, and (ii) the allegedly tortious act did not arise from the transaction of any business by defendant in New York. *Id.* The court agreed with the second argument: "The mere fact that a product defectively manufactured and misleadingly labeled in one state is marketed and sold in another cannot serve to change the place where the original tortious acts were committed or to create a new tortious act." *Id.* at 81. Here, the defendant's tortious conduct consisted solely of manufacturing a defective hammer and attaching a misleading label, both of which "unquestioningly took place in Illinois." *Id.* Thus, jurisdiction could not be sustained under New York's "tortious act" provision. *Id.* Furthermore, the court reiterated that "liability has nothing to do with the problem of jurisdiction." *Id.* The court, however, did find jurisdiction under New York's "transacting business within the state" provision because the defendant's voluntary actions of marketing and selling the hammer to a New York dealer provided sufficient minimum contacts to meet that statutory requirement. *Id.*

[330] *Id.* at 76.

[331] *Id.* at 68. The complaint alleged that Darby was subject to the court's personal jurisdiction under the "doing business" and "tortious act" provisions of New York's long-arm statute. *Id.* Darby argued that it did not do business in New York because all of its operations took place in Kansas. *Id.* Once the court agreed, the issue shifted to whether Darby had "committed a tortious act within" New York. *Id.* at 76.

The complaint charged Darby with improper design and assembly of the propane tank.[332] Darby responded that no tort had been committed in New York because it designed and manufactured the tank in Kansas.[333] The trial court disagreed, finding that Darby had committed a tortious act in New York because its out-of-state conduct had foreseeable in-state consequences, the combination of which satisfied both the long-arm statute and due process.[334]

The Court of Appeals reversed, finding that the plain language and legislative intent of New York's long-arm statute clearly required the commission of a "tortious act *within* the state."[335] According to the court, the "tortious act within the state" language was too precise to be construed "as if it were synonymous with . . . 'a tortious act *without* the state which causes injury within the state.' The mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording."[336]

The Court of Appeals expressly rejected the plaintiffs' argument to adopt *Gray*'s statutory analysis because the New York legislature had relied heavily on Illinois's long-arm statute when drafting New York's statute.[337] The court's criticism of *Gray* was specific: *Gray*'s statutory construction was defective because its reliance on the antiquated lex loci choice of law rule[338] confused conflicts principles with jurisdictional principles. Such construction of Illinois's long-arm statute "disregard[ed] its plain language and exceed[ed] the bounds of sound statutory construction."[339]

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[332] *Id.*

[333] *Id.*

[334] *Id.* at 76.

[335] *Id.* at 77 (emphasis in original).

[336] *Id.*

[337] *Id.* at 79.

[338] *Id.* The *lex loci* choice of law rule holds that "the place of a wrong is where the last event takes place which is necessary to render the actor liable." *Id.* When *Gray* was decided, *lex loci* was part of the prevailing conflicts doctrine in Illinois. It was not, however, part of the prevailing jurisdictional doctrine in Illinois. The Second Restatement replaced the *lex loci* rule in 1963 with Section 145 that provides that the state which has the "most significant relationship to the occurrence and the parties" will determine the applicable law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). The Illinois Supreme Court adopted the Second Restatement in *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970). *See* Gregory E. Smith, *Choice of Law in the United States,* 38 HASTINGS L.J. 1041, 1172-74 (1987).

[339] *Longines-Wittnauer Watch Co.*, 209 N.E.2d at 79. Interestingly, the court pointed out that prior to *Gray*, the Illinois federal courts had given a contrary construction to Illinois's long-arm statute, which, in accordance with its plain language, "was not meant to sanction jurisdiction over

> It certainly does not follow that, if the "place of [the] wrong" for purposes of conflict of laws is a particular state, the "place of the commission of a tortious act" is also that same state for purposes of interpreting a statute conferring jurisdiction, on that basis, over nonresidents. Not only are these separate and distinct problems but the rules formulated to govern their resolution embody different concepts expressed in different language.[340]

Consequently, the Court of Appeals dismissed Darby from the suit, finding that it had not committed a tortious act within New York.[341]

2. Attacks on *Gray's* Due Process Analysis

a. The Northern District of Illinois

Gray has never been repudiated expressly under Illinois law. Although several Illinois cases have distinguished *Gray*,[342] only one, *Keckler v. Brookwood Country Club*,[343] has criticized it. Yet, in keeping with the constraints of *Erie*,[344] even these criticisms were cloaked in a ubiquitous display of respect and deference.

Keckler was written by Judge Bernard Decker four years after *Gray* was issued.[345] The plaintiff had been injured by a motorized golf cart that was manufactured by Versal, Inc., an Indiana corporation, and then sold in

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a nonresident manufacturer whose wrongful act outside the state caused an injury *within* the state." *Id.* at 78 n.14 (emphasis added).

[340]*Id.* at 76 (citations omitted).

[341]*Id.* at 80. *See generally also* Harvey v. Chemie Grunenthal, 354 F.2d 428 (2d Cir. 1965). Based on the New York Court of Appeal's rejection of *Gray*'s statutory analysis in *Longines-Wittnauer*, 209 N.E.2d 68, 79 (N.Y.1965), *cert. denied*, *Estwing Mfg. Co. v. Singer*, 382 U.S. 905 (1965), the *Harvey* court rejected jurisdiction over a West German pharmaceutical company, finding that its alleged failure to warn of the dangerous effects of thalidomide was not "a tortious act within the state" under New York Civil Practice Law and Rules 302(a)(2). *Id.* at 431; Allen v. Toshiba Corp., 599 F. Supp. 381, 389 (D.N.M. 1984) (limiting *Gray's* stream of commerce rationale to tort claims for personal injuries).

[342]*See* Wiles v. Morita Iron Works Co., Ltd., 530 N.E.2d 1382 (Ill. 1988); Wimmer v. Koenigseder, 484 N.E.2d 1088 (Ill. 1985); Green v. Advance Ross Elec., 427 N.E.2d 431 (Ill. 1981); McLeod v. Harmon, 500 N.E.2d 724 (Ill. App. Ct. 1986); Stephens v. N. Ind. Pub. Serv. Co., 409 N.E.2d 423 (Ill. App. Ct. 1980); Sears Bank & Trust Co. v. Luckman, 377 N.E.2d 1156 (Ill. App. Ct. 1978). *See also* discussion *infra* notes 204-261.

[343]248 F. Supp. 645 (N.D. Ill. 1965).

[344]Erie R.R. Co. v. Tompkins, 304 U.S. 64, 87 (1938).

[345]The Honorable Bernard Decker became a judge on the Northern District of Illinois in 1962.

Indiana to Motorized Golf Co., which sold the cart to Brookwood Country Club in Illinois, where it caused the plaintiff's injury.[346] Jurisdiction over Versal was sought under the same "tortious act" provision of Illinois's long-arm statute that had been construed in *Gray*.[347] Judge Decker set out his game plan at the beginning of the opinion:

> There are two questions to be answered in determining whether Versal may be served as to Count IV under the Illinois statute. The first is whether the "long-arm" statute was intended to reach defendants such as Versal under the circumstances of the case–a question of state law. If Illinois does purport to exercise jurisdiction over Versal, then the question arises whether such an attempt violates the due process clause of the federal constitution. This is a question of federal law, and state authorities are not binding on it.[348]

As to the statutory question, the court deferred to *Gray's* instruction "that negligent manufacture of a product constitutes the doing of a 'tortious act' in Illinois, where the resulting injury occurs in Illinois,"[349] and concluded that statutory jurisdiction over the defendant was proper.[350] As to the constitutional question, the court stated that jurisdictionally significant conduct had to be "directly aimed at the forum state."[351] Like the camel under the tent, Decker praised "[t]he learned opinion in *Gray*,"[352] quoted it at length, and applauded the utmost reasonableness of its stream of commerce theory.[353] Then, in three terse paragraphs, Decker lowered the boom. First, he criticized the inadequate record on which *Gray* had based its due process analyses:

> When the plaintiff seeks to bring a defendant into court under the 'long-arm' statute, he must state sufficient facts in the complaint to support a reasonable inference that the defendant has done the required act. *In Gray, the Illinois*

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[346] *Keckler*, 248 F. Supp. at 646.

[347] *Id.* (citing Ill. Rev. Stat., ch. 110 para. 17 (1959) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003))).

[348] *Id.* at 646 (citations omitted).

[349] *Id.* at 647.

[350] *Id.*

[351] *Id.* at 648.

[352] *Id.*

[353] *Id.* at 649.

> *court explicitly disclaimed reliance on the existence of such facts in the record, and stated its willingness to presume that the defendant was engaged in a business of the kind necessary for jurisdiction.*
>
> I think that jurisdiction must rest on a firmer foundation if the requirements of the due process clause are to be met.[354]

Second, Decker criticized *Gray*'s characterization of jurisdictionally sufficient conduct: "*Entry into the manufacturing business is not enough.* Rather, the complaint must affirmatively show that defendant's distribution volume or pattern is of the kind from which a reasonable inference may be drawn that the national channels of commerce have been chosen."[355] Finally, Decker dismissed the complaint, finding that it failed to allege sufficient facts from which the court reasonably could infer jurisdictionally sufficient conduct.[356]

b. The Supreme Court of Vermont

In *O'Brien v. Comstock Foods, Inc.*[357] a Vermont plaintiff was injured when she swallowed glass contained in a can of beans that had been prepared and packed by Comstock of New York.[358] The complaint alleged only that the product had been "placed in the stream of commerce" in New York state.[359] The Supreme Court of Vermont found this "bare allegation"[360] insufficient to satisfy due process and that the insufficiency was not cured because the injury had occurred in Vermont. The court stated:

> Unlike the Supreme Court of Illinois in *Gray* . . . we cannot infer that the defendant's products have substantial use and consumption in Vermont. . . . *Our inquiry is confined to those facts which are established by the record* . . . .

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[354] *Id.* at 650 (emphasis added).
[355] *Id.* (emphasis added).
[356] *Id.*
[357] 194 A.2d 568 (Vt. 1963).
[358] *Id.* at 569.
[359] *Id.*
[360] *Id.* at 571.

> . . . Without any presentation in the record of these basic requirements due process is not achieved and personal jurisdiction fails.[361]

Accordingly, the Vermont court dismissed *Comstock* for lack of jurisdiction.[362]

3. Total Repudiation of *Gray*

Courts called upon to construe their state's newly enacted long-arm statutes were not bound by *Gray*'s due process analysis. Federal courts sitting in Maryland, Ohio and Florida, and the Colorado Supreme Court voiced strong objections to *Gray*'s constitutional analysis.

a. The District of Maryland

In *Beaty v. M.S. Steel Co.*,[363] two iron workers were injured when fabricated bar joists collapsed. Defendant M.S. Steel insisted that it was not subject to Maryland's long-arm statute because all of its conduct took place outside of Maryland.[364] It argued that the bar joists had been manufactured in Alabama, ordered in Massachusetts, and consigned to a Maryland corporation before they reached the plaintiffs.[365] The plaintiffs urged the court to follow *Gray*.[366] The court, however, rejected *Gray* as "unconvincing"[367] and arrived at a different result. It observed that Maryland's legislature had acknowledged *Gray's* stature in the jurisdictional scheme but purposefully had drafted its long-arm statute to avoid *Gray*'s result.[368] Consequently, Maryland's long-arm statute contained two "tortious act" provisions, unlike Illinois's, which contained only one.[369] Maryland's section 96(a)(3) authorized jurisdiction when both the tortious act and the plaintiff's injury occurred in Maryland.[370] Maryland's section 96(a)(4) authorized jurisdiction when an injury occurring within Maryland was caused by conduct occurring outside of

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[361] *Id.* (emphasis added).

[362] *Id.* at 572.

[363] 276 F. Supp. 259 (D. Md. 1967).

[364] *Id.* at 260.

[365] *Id.*

[366] *Id.*

[367] *Id.* at 262 n.5.

[368] *Id.* at 262-63.

[369] MD. ANN. CODE art. 75, § 96 (1965) (current version at MD. CODE ANN., CTS & JUD. PROC. § 6-103 (2002)).

[370] *Beaty*, 276 F. Supp. at 262.

Maryland if the defendant regularly conducted business, solicited business, engaged in any persistent course of conduct or derived substantial revenue in Maryland.[371] The court also noted that Maryland's long-arm statute was based on section 1.03(a)(3) of the Uniform Intrastate and International Procedure Act, which in its commentary stated that its "rule [was] more restrictive than the Illinois statute, as interpreted in *Gray*. . . ."[372] Consequently, the court found that reliance on *Gray* was not appropriate.[373]

Before concluding, however, the *Beaty* court stated that application of *Gray*'s due process analysis "would offend traditional notions of fair play and substantial justice"[374] because the result subjected a nonresident corporation to jurisdiction "merely because on one occasion its product manufactured in another state was shipped into and used within this state."[375] Citing *Hanson v. Denckla*[376] and *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*,[377] the court found such activity inadequate to establish a jurisdictional relationship between the defendant and the state:[378]

> We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure.[379]

b. *The Sixth Circuit*

The U.S. Court of Appeals for the Sixth Circuit decided *In-Flight Devices Corp. v. Van Dusen Air, Inc.* in 1972.[380] Plaintiff In-Flight, a manufacturer of airplane parts, was incorporated and solely operated in

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[371] *Id.*

[372] *Id.* at 263 (citing UNIF. INTERSTATE & INT'L PROCEDURES ACT § 1.03 commissioners' note, 9B U.L.A. 312 (1966)).

[373] *Id.* at 262.

[374] *Id.* at 263.

[375] *Id. See* Christian Book Distribs., Inc. v. Great Christian Books, Inc., 768 A.2d 719, 730 (Md. Ct. Spec. App. 2001) (reiterating Maryland's deliberate effort to distinguish its long-arm jurisprudence from that of Illinois).

[376] 357 U.S. 235, 253 (1958).

[377] 239 F.2d 502 (4th Cir. 1956).

[378] *Beaty*, 276 F. Supp at 263-64.

[379] *Id.* at 264 (quoting Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956)).

[380] 466 F.2d 220 (6th Cir. 1972).

Ohio.[381] Defendant Van Dusen, a distributor of airplane parts, was incorporated and had its principal place of business in Minnesota.[382] It also had a purchasing operation in Missouri and a network of wholly owned subsidiaries that sold parts throughout the country.[383] One wholly owned subsidiary, Van Dusen Aircraft Supplies, Inc., purchased parts from Van Dusen and resold them to retailers.[384]

The parties entered into a contract for the sale of airplane parts that was negotiated in Minnesota, Missouri, and Ohio.[385] Parts were shipped from In-Flight's Ohio factory to Van Dusen's Missouri purchasing center.[386] Van Dusen made payment by a check drawn upon its Minnesota bank but stopped payment three days later alleging that the merchandise was unsatisfactory.[387] In-Flight, however, already had cashed the check.[388] When the check bounced, In-Flight sued Van Dusen in Ohio for breach of contract and damage to business reputation.[389] Van Dusen was served with Ohio summons at its Minnesota headquarters.[390]

Arguing a *Gray*-type analysis, In-Flight argued that Van Dusen was subject to Ohio's long-arm statute, which provided:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> . . . .
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of

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[381] *Id.* at 222.
[382] *Id.*
[383] *Id.*
[384] *Id.*
[385] *Id.* at 222-23.
[386] *Id.*
[387] *Id.* at 223.
[388] *Id.* at 222.
[389] *Id.* at 224.
[390] *Id.* at 223-24.

> conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.[391]

Like *Beaty,* the Sixth Circuit noted the Ohio legislature's intent, when enacting its long-arm statute, to repudiate a *Gray*-type construction of its tortious injury provisions.[392] Like *Beaty,* the Sixth Circuit noted that in rejecting *Gray* the Ohio legislature had adopted the Uniform Interstate and International Procedure Act[393] which expressed "reluctance to follow *Gray* in the products liability field."[394] Unlike *Beaty*, the Sixth Circuit was quite forthcoming with its criticisms of *Gray.* It charged that *Gray*'s analysis was based on two partial premises, neither of which completed the other nor made sense by itself:[395] First, *Gray* assumed that a nonresident defendant subjected itself to out-of-state jurisdiction when it engaged in conduct that might bring its product into the forum state;[396] Second, *Gray* assumed that the acts of manufacture and placement of a product into a stream of commerce were dispositive jurisdictional acts.[397] The Sixth Circuit deemed the first premise so broad as to be meaningless, especially in the product liability field where a defendant's expectations were difficult to gauge.[398] The Sixth Circuit deemed the second premise so narrow that it contradicted the first, because mere placement of a product into a stream of commerce did not necessarily constitute jurisdictionally foreseeable conduct or consequences.[399] The combination of the two premises, said the court, generated a "gap between fiction and reality" that had been considerably misused and misunderstood by *Gray*-inspired courts.[400] The court concluded that *Gray*'s progeny had freely found jurisdiction "in situations where the defendant could not realistically have anticipated that his product would wind up in the particular forum state. In many instances, the defendant's expectations

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[391] *Id.* at 224 n.84 (quoting OHIO REV. CODE ANN. § 2307.382 (1970)).

[392] *Id.* at 230.

[393] *Id.* at 224 (citing UNIF. INTERSTATE & INT'L PROC. ACT § 1.03 commissioners' note, 9B U.L.A. 312 (1966)).

[394] *Id.* at 230.

[395] *See id.*

[396] *Id.*

[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] *Id.*

have become a construction of the judicial imagination, more fictional than real."[401]

c. *The Southern District of Florida*

Tomashevsky v. Komori Printing Machinery Co.,[402] was the first post-*World-Wide Volkswagen*,[403] post-*Asahi*[404] case to criticize *Gray*.[405] The plaintiff was injured by a printing press that had been manufactured by defendant Komori, a Japanese company.[406] Komori sold the press to Imperial Equipment, Inc., in California, which sold the press to Blue Ridge Printing Co. in North Carolina, which sold the press to Delta Printing, the Florida company that employed the plaintiff.[407]

The plaintiff sought jurisdiction over Komori based on a *Gray*-type argument that the court distinguished, criticized, and ultimately rejected.[408] As in *Gray*, the plaintiff developed no record facts of the defendant's purposeful conduct directed toward Florida.[409] Instead, the plaintiff argued that because Komori had placed its product into a stream of commerce the court could infer that it had knowledge of the product's ultimate destination.[410] Relying heavily on *World-Wide Volkswagen* and *Asahi*, the *Tomashevsky* court did not take the bait.

First, the court found that mere placement of a product into a stream of commerce, without more, did not justify the inference that the defendant knew of the product's ultimate destination.[411] Second, the court refused to treat the distributor's sale of the press as the purposeful act of the defendant Komori. The court noted that absent record facts it could not infer the latter from the former.[412] Finally, the court observed that after

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[401] *Id.* The court ultimately upheld jurisdiction under the "doing business" section of Ohio's long-arm statute. *Id.* at 236.

[402] 715 F. Supp. 1562 (S.D. Fla. 1989).

[403] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[404] Asahi Metal Indus. Co. v. Superior Court, 480 U.S.102 (1987).

[405] Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).

[406] *Tomashevsky*, 715 F. Supp. at 1563.

[407] *Id.*

[408] *Id.* at 1565. *Gray* had previously been adopted by the Florida Supreme Court in Ford Motor Co. v. Atwood Vacuum Mach. Co., 392 So. 2d 1305 (Fla. 1981).

[409] *Tomashevsky*, 715 F. Supp. at 1564.

[410] *Id.* at 1563-64.

[411] *Id.* at 1565.

[412] *Id.*

World-Wide Volkswagen and *Asahi*, *Gray's* status as good law was doubtful.[413]

The *Tomashevsky* opinion was the first, and perhaps the only, post-*Asahi* case to both criticize *Gray's* inference-based analysis and refuse to apply its stream of commerce theory of jurisdiction to a chain of distribution case. Citing *World-Wide Volkswagen*, the court said, "The mere fact that Komori could foresee that a purchaser, after the initial sale of the press by the distributor, would resell the product to plaintiffs' employer in Florida is not a sufficient basis for haling them into court here."[414] *Tomashevsky*'s effect on *Gray* was clear: If *Tomashevsky* was correct, then *Gray* was incorrect. After *World-Wide Volkswagen* and *Tomashevsky,* the mere fact that Titan could foresee the eventual entry of its valve into Illinois, without more, would not be a sufficient basis for subjecting it to Illinois's jurisdiction.

d. The Supreme Court of Colorado

In 1992, twenty-four years after *Gray* was decided, the Supreme Court of Colorado issued an *en banc* personal jurisdiction decision in *Classic Auto Sales, Inc. v. Schocket*.[415] The plaintiff allegedly purchased an automobile that the defendants advertised as a 1968 Porsche 911S Targa, but which did not contain a 911S Targa engine.[416] Plaintiff sued the defendants for fraud, concealment, negligent misrepresentation and deceptive trade practices.[417] Once served, the defendants filed a joint motion to dismiss the complaint under the "tortious act" section of Colorado's long-arm statute.[418] The district court ruled in favor of the defendants, but the court of appeals reversed.[419]

The issue before the Colorado Supreme Court was whether a nationally circulated advertisement that originated outside of Colorado but caused injury within Colorado constituted a tortious act within Colorado.[420] The defendants argued that the situs of the last act necessary to complete the tort was Nebraska because the plaintiff wrote the check there to pay for the

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[413] *Id.* at 1566.
[414] *Id.*
[415] 832 P.2d 233 (Colo. 1992).
[416] *Id.* at 234-35.
[417] *Id.* at 235.
[418] *Id.* (COLO. REV. STAT. § 13-1-124(1)(b) (1987)).
[419] *Id.*
[420] *Id.*

Porsche.[421] The Colorado Supreme Court rejected this last act argument as both outdated and irrelevant to the jurisdictional analysis.[422] Instead, the court found that the last act doctrine imposed on the jurisdictional analysis a level of inflexibility that was inconsistent with the "ad hoc analysis of the facts" required by the minimum contacts doctrine.[423] The court also found that the last act doctrine, which located the situs of the tort at the place of injury, produced results that were more restrictive than those allowed under Colorado's long-arm statute, which had been construed to be co-extensive with due process.[424] By articulating the relationship between the last act and minimum contacts doctrines, the Colorado Supreme Court recognized that the two doctrines could not co-exist within the same due process framework.

4. The United States Supreme Court

The Supreme Court was not oblivious to *Gray's* distortions of the minimum contacts doctrine. Although no opinion ever expressly repudiated *Gray's* constitutional analysis, over time virtually every one of *Gray's* doctrinal premises has been rejected, restricted or transformed by subsequent Supreme Court case law.

Hanson[425] and *Kulko*[426] rejected application of the "center of gravity test" of jurisdiction; *Shaffer*[427] and *Keeton*[428] rejected application of the "choice of law doctrine" to jurisdiction; *Shaffer*[429] and *Burger King*[430] delimited the convenience analysis in light of advances in transportation

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[421] *Id.* at 238.

[422] *Id.* at 238-39.

[423] *Id.* (quoting Fleet Leasing Inc. v. District Court, 649 P.2d 1074, 1079 (Colo. 1982)).

[424] *Id.* at 239-40.

[425] Hanson v. Denckla, 357 U.S. 235, 254 (1958) (stating "[The state] does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law.").

[426] Kulko v. Superior Court of Cal. *ex rel.* S.F., 436 U.S. 84, 98 (1978) (rejecting plaintiff's argument that California's jurisdiction was proper because its laws were applicable and, therefore, it was the "center of gravity" of the dispute).

[427] Shaffer v. Heitner, 433 U.S. 186, 215 (1977) (quoting *Hanson*, 357 U.S. at 254).

[428] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) (stating that New Hampshire's statute of limitations should become an issue only *after* jurisdiction is determined because "we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry.").

[429] *Shaffer*, 433 U.S. at 215 (quoting *Hanson*, 357 U.S. at 254).

[430] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)(stating that distant litigation is not necessarily burdensome due to advances in transportation and communication).

and communication that reduced litigation burdens; *Kulko*[431] and *World-Wide Volkswagen*[432] declined to apply the "effects test" to non-purposeful activity; *Calder*[433] and *Keeton*[434] narrowly applied the "effects test" to jurisdictional issues involving publication of defamation; *Keeton*[435] and *Burger King*[436] converted the "forum's interest" from a contact to a reasonable/fairness factor; and *World-Wide Volkswagen*[437] specifically revived the call for record proof of jurisdictional facts.

Finally, *Asahi's* plurality opinion poignantly exposed the Court's inability to resolve the relationship between stream of commerce jurisdiction and the minimum contacts doctrine.[438] Brennan's position that mere placement of a product into a stream of commerce satisfied minimum contact[439] requirements came directly from *Gray*. It treated the relationship among the transaction, the forum, and the litigation as jurisdictionally significant. O'Connor's position that minimum contacts were satisfied only by placing a product into a stream plus additional purposeful activity directed toward the forum[440] was contrary to *Gray*. It treated the relationship among the defendant, the forum and the litigation as jurisdictionally significant. The competing theories left unresolved the most critical questions: What kind of relationships and what level of

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[431]*Kulko*, 436 U.S. at 96 (rejecting plaintiff's reliance on the "effects test" because its application was properly limited to wrongful out-of-state conduct).

[432]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (declining jurisdiction over an automobile wholesaler and retailer even though the car they sold to plaintiff exploded in Oklahoma).

[433]Calder v. Jones, 465 U.S. 783, 789 (1984) (upholding "effects" jurisdiction in California over Florida defendants who researched and wrote an allegedly defamatory story about plaintiff Shirley Jones because California was "the focal point both of the story and of the harm suffered.").

[434]Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (upholding jurisdiction in New Hampshire over an Ohio company that published allegedly defamatory material nationwide because such publication had an effect in New Hampshire).

[435]*Id.* (upholding jurisdiction in New Hampshire over an Ohio publication in part because of New Hampshire's strong state interest in adjudicating the dispute).

[436]Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (stating that once minimum contacts are established, the court may consider the forum's interest to determine if its exercise of jurisdiction would be reasonable).

[437]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (stating, "[t]here is no evidence of record" that World-Wide sold automobiles outside of New York, New Jersey and Connecticut).

[438]*See Asahi* discussion *supra* note 160.

[439]Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987).

[440]*Id.* at 112.

individual participation in a stream of commerce satisfied minimum contacts requirements?

5. Summary

But for these handful of cases, *Gray*'s status as "good law" has not been seriously challenged. Taken in toto, this small body of case law raises the following criticisms of *Gray*:

First, due process requires that a finding of jurisdictionally sufficient conduct be based on record facts not inferences;[441] Second, *Gray*'s reliance on the last act doctrine resulted in the inappropriate confusion of conflict of laws and jurisdictional principles;[442] Third, *Gray*'s statutory construction failed to distinguish between acts committed within and without Illinois, thereby straining the literal meaning of the "tortious act" language of the long-arm statute;[443] Fourth, after *World-Wide Volkswagen* and *Asahi*, it was doubtful that *Gray*'s version of stream of commerce jurisdiction satisfied due process because neither the act of manufacture nor the act of placing a product into a stream of commerce were regarded as jurisdictionally dispositive conduct.[444]

V. WHAT IS REALLY WRONG WITH *GRAY*?

A. *Methodology*

1. Inference

Since *Pennoyer v. Neff*,[445] and probably long before,[446] jurisdictional discretion has been constrained by the same rules of record proof that bind all other aspects of judicial power. The *Gray* record, however, lacked the threshold factual information necessary to sustain a finding of personal

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[441] *See* Tomashevsky v. Komori Printing Mach. Co., 715 F. Supp 1562, 1565-66 (S.D. Fla. 1989); Keckler v. Brookwood Country Club, 248 F. Supp. 645, 650 (N.D. Ill. 1965); O'Brien v. Comstock Foods, Inc., 194 A.2d 568, 571 (Vt. 1963).

[442] *See* Classic Auto Sales, Inc. v. Schocket, 832 P.2d 233, 238 (Colo. 1992); Longines-Wittnaver Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68, 79 (N.Y. 1965).

[443] *See* In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 230-31 (6th Cir. 1972); Beaty v. M.S. Steel Co., 276 F. Supp. 259, 261-63 (D. Md. 1967); *Longines-Wittnaver*, 209 N.E.2d at 79.

[444] *See In-Flight*, 466 F.2d at 230-31; *Tomashevsky*, 715 F. Supp. at 1565-66; *Keckler*, 248 F. Supp. at 650.

[445] 95 U.S. 714, 719 (1877) ("It appears from the record . . . .").

[446] *See, e.g.*, Neff v. Pennoyer, 17 F. Cas. 1279, 1288 (D. Ore. 1875) (No. 10,083) ("Every fact necessary to sustain the jurisdiction, must appear from the record or the judgment is void.").

jurisdiction.[447] It was not that the opinion failed to ask the right questions; to the contrary, many of the issues it raised were prescient. The problem, instead, was that when there was no factual support for the right answers, the court made them up.

For example, Titan argued that it had no jurisdictionally significant contacts with Illinois because it had no agents or offices there, solicited no business there, and had no physical presence there.[448] The court conceded that "[t]he record fail[ed] to disclose whether defendant ha[d] done any other business in Illinois, either directly or indirectly"[449] and that "the record [did] not disclose the volume of Titan's business or the territory in which appliances incorporating its valves [were] marketed."[450] Nonetheless, the court assumed that because one valve had entered Illinois, a "reasonable inference" could be drawn that Titan's commercial transactions, "like those of other manufacturers, result[ed] in substantial use and consumption in this State."[451] The court evidently bore some discomfort with this inference-based analysis since its entire discussion was hedged with such modifiers as "may be," "undoubtedly," "to a degree," and "presumably."[452]

On this basis alone it would be easy to dismiss *Gray*. However, since inferences do serve a legitimate function in the jurisdictional analysis, it is appropriate to inquire as to the nature of that function and then determine if it was properly applied in *Gray*.

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[447] *See* Sorg, *supra* note 51 (stating that *Gray's* inference of substantial contacts was "unsupported by the record").

[448] Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 762 (Ill. 1961).

[449] *Id.* at 764.

[450] *Id.* at 766.

[451] *Id.*

[452] *Id.*

> While the record does not disclose the volume of Titan's business or the territory in which appliances incorporating its valves are marketed, it is a *reasonable inference* that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State. To the extent that its business *may be* directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has *undoubtedly* benefited, *to a degree*, from the protection which our law has given to the marketing of hot water heaters containing its valves. Where the alleged liability arises, as in this case, from the manufacture of products *presumably* sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State.

Id. (emphasis added).

What function, then, do inferences serve in the jurisdictional analysis? In the best case scenario, the defendants will concede that they engaged in conduct purposefully directed toward the forum whose benefits and protections they received. These defendants, however, will not be contesting jurisdiction. In a more realistic scenario, the defendant's forum-related activities will be extracted during discovery and may give rise to inferences of jurisdictionally significant contacts. Therefore, because the minimum contacts analysis arises only in the context of a dispute, and because a disputing defendant will surely never concede such contacts, a finding of jurisdictionally sufficient conduct necessarily must be based on inferences. The question then becomes, when is the drawing of inferences reasonable?

The United States Supreme Court has addressed this issue in several personal jurisdiction cases. *World-Wide Volkswagen Corp. v. Woodson* made recurring references to the need for record proof of jurisdictional facts.[453] It rejected the plaintiff's effort "to base jurisdiction on one, isolated occurrence and whatever *inferences* can be drawn therefrom."[454] The Court criticized "the *inference* that because one automobile sold by petitioners had been used in Oklahoma, others might have been used there also" as less than compelling on the facts.[455]

Similarly, *Shaffer v. Heitner* referred to the lack of record facts when it rejected Heitner's argument that the acceptance of board and executive positions with a Delaware corporation were jurisdictionally significant acts.[456] Both *Calder v. Jones*[457] and *Keeton v. Hustler Magazine, Inc.*[458] relied on statistical analyses of the volume of the defendants' market activity to support inferences of targeting and intent to cause effects within the forum. For example, the *Calder* opinion stated that the disputed issue of the National Enquirer had international and national circulation of 5,292,200 copies, 604,431 of which had been sold in California.[459] The

[453]444 U.S. 286, 295 (1980) (declining jurisdiction over the retailer and wholesaler because it found "in the *record* before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.") (emphasis added). Later in the opinion the Court reiterated that "[t]here is *no evidence of record* that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area." *Id.* at 298 (emphasis added).

[454]*Id.* at 295 (emphasis added).

[455]*Id.* at 298 (emphasis added).

[456]433 U.S. 186, 215-16 (1977).

[457]465 U.S. 783, 785 n.2 (1984).

[458]465 U.S. 770, 772 (1984).

[459]465 U.S. at 785 n.2.

Keeton opinion upheld New Hampshire's jurisdiction over an Ohio corporation because it regularly sold between 10,000 and 15,000 copies of its magazine in New Hampshire every month.[460] Even the *Asahi* opinions recounted the record facts that "Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982."[461]

These Supreme Court cases uniformly instruct that the correct use of inferences in the jurisdictional analysis requires a critical threshold of record facts. *Gray* inverted this principle. Based on the presence of Titan's single valve in Illinois, *Gray* inferred that Titan had engaged in substantial commercial activity in Illinois that satisfied minimum contacts. In short, *Gray* inferred facts from which it then inferred their jurisdictional significance. However, without evidence of a more substantial connection between Titan and the forum, a contemporary inference-based analysis will not support jurisdiction resting on even the acknowledged presence of a single valve within the forum.[462]

2. Burden of Proof

Gray's inference-based analysis also altered the burden of proof that is required to establish minimum contacts. In a typical minimum contacts analysis, the plaintiff bears the initial burden of proving the defendant's jurisdictionally sufficient contacts with the forum.[463] If met, the burden then shifts to the defendant to rebut the reasonableness of asserting jurisdiction.[464] *Gray*'s inference-based analysis, however, created a virtual presumption of jurisdictionally sufficient contacts once the plaintiff

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[460]465 U.S. at 772.

[461]Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 106 (1987).

[462]*See* Dayton, *supra* note 3, at 263 (raising the possibility that the stream of commerce theory evolved from the "single act doctrine" of jurisdiction). The "single act doctrine" upheld jurisdiction on the basis of a defendant's single contact that had a substantial connection to the forum. As applied to the instant case, would Titan's single contact with Illinois by virtue of the presence of its one valve there have satisfied the "single act doctrine?" The answer to this question may be found in *Keckler v. Brookwood Country Club*, 248 F. Supp. 645, 650 (N.D. Ill. 1965), which stated that to satisfy due process the record must contain sufficient facts to support a reasonable inference. *Keckler* was decided two years after *Gray* by a federal district court sitting in the Northern District of Illinois. *See also supra* notes 344-357.

[463]*See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469 (1985) (explaining that the initial burden is on the plaintiff to establish the defendant's minimum contacts with the forum).

[464]*Id.* at 477.

established a connection between the injury and the product.[465] At that point, the burden shifted to the defendant to rebut the significance of the presumed contacts.[466] The only way Titan could have rebutted that presumption was to disprove inferences of jurisdictional facts that did not exist in the record. The burden of proving a double negative was compounded by the fact that as a bit player in the chain of distribution, Titan was perhaps the least likely of defendants to have control over the destination of its valve. Hence, *Gray*'s inference-based analysis posed a heads-I-win-tails-you-lose proposition, leaving no way for Titan to oust the Illinois court of jurisdiction.

B. Statutory Construction

Gray found that Titan had committed a "tortious act" in Illinois[467] notwithstanding Titan's argument that there was an important distinction between the commission of "a tortious act" and the commission of a "tort": a "tort" was the series of occurrences that became cognizable only after every element of the prima facie case was complete, whereas a "tortious act" was the breach of duty element of the prima facie case.[468] Titan argued that by specifying a "tortious act" rather than a "tort," section 17(1)(b) required the breach of duty element to occur in Illinois. Because Titan's duty could have been breached only in Ohio, it could not be subject to Illinois's statutory jurisdiction.[469] The court, however, dismissed Titan's distinctions as "technicalities of definition"[470] because its wrongful conduct resulted in an injury in Illinois.[471]

In retrospect, it is easy to find fault with this conclusion. From a literal point of view, there clearly is a difference between "in" and "out," and

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[465]*See* Hutson v. Fehr Bros., 584 F.2d 833, 836 (8th Cir. 1978) (denying jurisdiction, and criticizing *Gray* for the proposition that "jurisdiction is presumed unless the defendant can prove that the presence of the product in the forum state was an unforeseeable event.") (emphasis omitted).

[466]*See supra* note 51

[467]Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 762-63 (Ill. 1961).

[468]*Id.* at 763. For support of this argument *see, e.g.*, E.H. Schopler, Annotation, *Construction and Application of State Statutes or Rules of Court Predicating In Personam Jurisdiction over Nonresidents or Foreign Corporations on the Commission of a Tort Within the Sta*te, 24 A.L.R. 3d. 532, 577 (1969). *See also* Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige,* 74 MINN. L. REV. 37, 55 n.85 (1989) (characterizing *Gray's* statutory construction of "tortious act" as "tortuous").

[469]*Gray*, 176 N.E.2d at 762.

[470]*Id.* at 763.

[471]*Id.* at 762.

"tort" and "tortious act." Section 17(1)(b) called for the commission of a *tortious act in* Illinois *by* the defendant.[472] Since Titan had no activities in Illinois, the court connected Titan's Ohio conduct to Illinois via the last act doctrine to make the place of injury the jurisdictionally dispositive fact. By giving "place of injury" jurisdictional significance, the court confused the cognizability of the claim with the jurisdictional amenability of the defendant. However, even assuming that injury in Illinois renders a claim cognizable there, it is not inevitable that jurisdiction will exist wherever cognizability arises. That is why the jurisdictional analysis is separate from the cognizability analysis. However, once the cognizability and amenability analyses are collapsed into each other, all subsequent jurisdictional analysis becomes meaningless.

Even assuming that a "tortious act" did occur in Illinois, section 17(1)(b) required the act to be committed by the defendant.[473] *Gray*'s statutory analysis would have been plausible had section 17(1)(b) called for the commission of a tortious act by the defendant outside of Illinois having effects in Illinois.[474] Section 17(1)(b), however, did not base jurisdiction on the consequences of conduct in Illinois, but rather on conduct in Illinois.[475] The effect of imputing jurisdictional significance to plaintiff's place of injury was that the defendant's conduct became both jurisdictionally irrelevant yet actionable anywhere the plaintiff suffered the injury.[476]

In sum, the confusion of cognizability with amenability, conduct with consequences, tort with tortious act, and plaintiff with defendant combined to create the proposition that tortious conduct committed anywhere is actionable wherever its effects are felt. This analysis permits a construct of

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[472]ILL. REV. STAT., ch. 110, para. 17(1)(b) (1959) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003)).

[473]*Id.*

[474]*See, e.g.*, MASS. GEN. LAWS ch. 223A, § 3(d) (2003) (allowing personal jurisdiction over a person "causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth."); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(4) (2002) (empowering courts to assert jurisdiction over a defendant causing "tortious injury in the State . . . by an act or omission *outside* the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.") (emphasis added).

[475]ILL. REV. STAT., ch. 110, para. 17(1)(b) (1959) (current version at 735 ILL. COMP. STAT. 5/2-209 (2003)).

[476]*See* Brilmayer, *supra* note 52, at 95 (discussing legal causation and responsibility).

"strict jurisdiction" that is analogous to the construct of "strict liability": It creates jurisdictional amenability wherever the plaintiff suffers injury, not where the defendant engages in misconduct.[477] As applied to the stream of commerce, strict jurisdiction yields a principle without limitation since it permits jurisdictional amenability to travel with the product. In 1980, the *World-Wide Volkswagen* Court expressly repudiated this concept lest "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. . . . [W]e . . . are unwilling to endorse an analogous principle in the present case."[478]

C. *Constitutional Analysis*

Gray's due process analysis profoundly distorted the relationship between the minimum contacts doctrine and stream of commerce jurisdiction. The discordance was based on two false assumptions. First, *Gray* assumed that stream of commerce jurisdiction had to satisfy the minimum contacts doctrine in order to satisfy procedural due process. Second, *Gray* assumed that stream of commerce jurisdiction was tort-based rather than contract-based. Both of these assumptions were consistent with the prevailing jurisdictional norms of the 1950s. However, both assumptions have proven to be false in light of subsequent jurisdictional developments.

1. How *Gray* Distorted the Relationship Among Procedural Due Process, the Minimum Contacts Doctrine and Stream of Commerce Jurisdiction

a. Procedural Due Process

Procedural due process is rooted in the relationship between the individual and the state as constrained by constitutional limitations on the state's power to take action against such person's life, liberty, or property.[479] In the civil context, jurisdictional due process[480] seeks to

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[477]*See* Brilmayer, *supra* note 52. *But see* Currie, *supra* note 68, at 533 (agreeing with *Gray's* statutory construction of §17(1)(b)).

[478]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980).

[479]*See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (holding that due process protects the individual's liberty interest); Brilmayer, *supra* note 52, at 89 (stating that due process places limitations on a state's ability to deprive an individual of property and requires justification for a state's imposition of legal burdens); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419 (Aspen Law & Business (1997)) ("The

balance a defendant's liberty interest in protecting property against the state's interest in compelling the defendant to submit to judicial proceedings that place such property at risk.[481] The defendant's liberty interest has been characterized as freedom from inconvenient[482] or distant[483] or extraterritorial litigation[484] that is so burdensome[485] as to

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Fifth and Fourteenth Amendments . . . provide that neither the United States nor [any] state governments shall deprive any person 'of life, liberty or property without due process of law.'").

[480]Richman, *supra* note 3, at 609-10 (proposing that jurisdictional theory may be rooted in either substantive or procedural due process or may be an independent third category of due process, "jurisdictional due process").

[481]Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (setting forth a three part proportionality test by which the adequacy of procedural safeguards are balanced against the importance of the individual's interest and the burden imposed on the government in providing the additional safeguards).

[482]*World-Wide Volkswagen*, 444 U.S. at 292 (stating that minimum contacts protect a "defendant against the burdens of litigating in a distant or inconvenient forum"); Richman, *supra* note 3, at 610 (stating that one of the limitations on jurisdiction is protecting a defendant from inconvenience); Currie, *supra* note 71, at 535 (explaining that due process protects a defendant from inconvenience).

[483]*World-Wide Volkswagen*, 444 U.S. at 292 (stating that minimum contacts protect a defendant from "the burdens of litigating in a distant or inconvenient forum"); Brilmayer, *supra* note 52, at 84-85 (implying that due process protects a defendant from distant travel). *But see* Currie, *supra* note 71 (stating that due process protects a defendant not from distant litigation but from submission to a foreign sovereign since a courthouse within the forum state could be further away from the defendant than a neighboring state's courthouse).

[484]The distinction between "burdensome" and "extraterritorial" litigation was first raised by Currie, *supra* note 71, at 534 (stating that due process would permit a resident of Texarkana, Texas to be sued 900 miles away in El Paso but not across town in Texarkana, Arkansas if minimum contacts did not otherwise exist between the defendant and Arkansas). The distinction was also raised by Brilmayer, *supra* note 52, at 80-87; *see also* Phillips Pet. Co. v. Shutts, 472 U.S. 797, 808 (1985) (stating that travel to another forum is a litigation burden entitled to protection in the context of personal jurisdiction over absent plaintiff class members).

[485]*See World-Wide Volkswagen*, 444 U.S. at 291-92 (stating that minimum contacts protect a defendant from burdensome litigation); Shaffer v. Heitner, 433 U.S. 186, 204 n.20 (1977) (implying that due process protects a defendant from burdensome litigation); Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) ("To require the corporation . . . to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."). *But see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("[M]odern 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."). *See also* Murphy, *supra* note 4, at 291 ("When a state asserts jurisdiction over a nonresident in excess of its sovereign power it acts without authority and, thus, in violation of defendant's due process interests."); Richman, *supra* note 3, at 609 (stating that the assertion of personal jurisdiction may violate due process "if the

impair or destroy the defendant's ability to defend in a "meaningful way."[486] The defendant's due process interest has been described as freedom from the jurisdictional surprise[487] of being haled into a forum with which it lacks the requisite constitutional relationship.[488]

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forum is so distant and the defendant's witnesses and evidence so difficult to transport that, as a practical matter, trial at the forum amounts to no process at all").

[486]*Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Monzo, 380 U.S. 545, 552 (1965)).

[487]*See World-Wide Volkswagen*, 444 U.S. at 297 ("The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.") (internal citation omitted); *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring) (stating due process requires that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign"). *See also* Currie, *supra* note 71, at 535 (stating that due process protects against unfair surprise); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 4 (1984) (explaining that one function of the minimum contacts test is to determine "whether a reasonable person in the defendant's position should be surprised by having to defend . . . in the plaintiff's chosen forum"). *But see* Richman, *supra* note 3, at 610 ("Sometimes protecting the defendant from jurisdictional surprise . . . is an important consideration; other times not.").

[488]*See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (stating that due process protects an individual's liberty interest in not being subject to jurisdiction in a forum where he lacks minimum contacts); *World-Wide Volkswagen*, 444 U.S. at 295 (refusing to exercise jurisdiction over a nonresident defendant where the record presented "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction"); *Shaffer*, 433 U.S. at 204 (stating that personal jurisdiction requires a "relationship among the defendant, the forum, and the litigation"). Other relationships between the defendant and the state traditionally have been held to satisfy jurisdiction. For example, the doctrine of general jurisdiction allows a state to exercise personal jurisdiction over a defendant who has engaged in substantial activities over time within the forum even if the lawsuit is not related to such activities. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952) (holding that substantial business activities within the forum justify the exercise of personal jurisdiction); Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory–A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689, 698 (1991) (asserting that jurisdictional due process is based on a reciprocal relationship between the defendant and the forum state); Lewis, *supra* note 487, at 4 (implying that jurisdiction requires a reciprocal relationship between the defendant and the forum state); Currie, *supra* note 71, at 533-42 (stating that due process constrains a state from compelling a defendant to litigate in a forum with which he has no relevant connection). *See also* Richman, *supra* note 3, at 635-37 (noting that appearance, waiver, consent, physical presence in a forum when served, domicile, waiver by sanction, failure of absent class plaintiff to opt out of class, and plaintiff's constructive consent to be served with a counterclaim have been upheld as permissible justifications for personal jurisdiction).

As against the defendant's interests, the state must protect two fundamental interests. The state has an interest in protecting the integrity of its political[489] and geographic sovereignty from both internal and external threats, e.g., a nonresident who enters the state, violates its law, harms a state citizen, and then absconds without accountability for either the injury or the violation.[490] The state also has an interest in maintaining the respect of other sovereigns that may be called upon to recognize and enforce that state's judicial authority over the absconding defendant.

Procedural due process balances the competing interests of the defendant and the state against the standard of "fundamental fairness."[491]

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[489]*See World-Wide Volkswagen*, 444 U.S. at 292 (stating that the minimum contacts doctrine "acts . . . to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *Shaffer*, 433 U.S. at 204 n.20 (asserting that due process protects defendants from burdensome litigation and the states from each other); Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (holding that one of the principal purposes of due process is to preserve the territorial sovereignty of the several states). *See generally* Bruce N. Morton, *Contacts, Fairness and State Interests: Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 9 PACE L. REV 451, 459 (1989) (observing that limitations on state sovereignty have traditionally served as limitations on state jurisdiction).

[490]*See* Hansen v. Denckla, 357 U.S. 235, 251 (1958) (stating that restrictions on state jurisdiction are in part "a consequence of territorial limitations on the power of the respective States"); *Pennoyer*, 95 U.S. at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory."). *See also* Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 363 (1992) (stating that territoriality has historically justified the exercise of personal jurisdiction). The function of geographic borders in the jurisdictional context was addressed by Terry S. Kogan, *Geography And Due Process: The Social Meaning of Adjudicative Jurisdiction,* 22 RUTGERS L.J. 627, 627-53 (1991). Critical human geography theorists contend that human perceptions of "geographic space" have changed dramatically since *Pennoyer v. Neff* due to developments in transportation, communication, etc., thus rendering state geographic borders less important today than in the past. This proposition is clearly correct, especially when viewed in the context of cyberspace jurisdiction. The second half of the proposition, however, assumes that because communication and transportation have changed so has human nature. While there may be some validity to this proposition, it is probably still reasonable to expect that state elected judges and local jurors will tend to favor the familiar local plaintiff over the unfamiliar, non-local defendant.

[491]*See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (stating that jurisdiction must not be unfair); Philips Pet. Co. v. Shutts, 472 U.S. 797, 808 (1985) (explaining that due process requires that forum-imposed litigation burdens be fair); *Burger King*, 471 U.S. at 487 (explaining that jurisdiction must be fundamentally fair); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984) (stating that due process is satisfied when the defendant's relationship with the forum does not offend "fair play and substantial justice")

Fundamental fairness requires the existence of a constitutionally sufficient relationship between the defendant and the state to justify the state's exercise of jurisdictional authority over the defendant. Historically, the justifications for this relationship have been based on the doctrines of presence and consent and their various conceptual permutations.[492] For example, a state's jurisdictional authority will be justified by a defendant's presence in the state when served,[493] or consent to suit before the tribunals of that state.[494]

When there is no actual presence or consent, the minimum contacts doctrine permits jurisdiction over a defendant who has developed a

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(internal citation omitted); *World-Wide Volkswagen*, 444 U.S. at 292 ("The protection against inconvenient litigation is typically described in terms of . . . 'fairness'."); *Shaffer*, 433 U.S. at 207 (holding that the standards of fairness and substantial justice set forth in *International Shoe* apply to *in rem* as well as *in personam* actions); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that the exercise of personal jurisdiction must not offend "traditional notions of fair play and substantial justice" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). *See also* Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 682 (1991) ("*International Shoe* . . . attempted to introduce into jurisdictional analysis the traditional due process concern with fundamental procedural fairness."); Currie, *supra* note 71, at 535 (stating that "due process embodies a test of fundamental fairness").

[492]*See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction."). *See also* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla*: a Review,* 25 U. CHI. L. REV. 569, 578-84 (1958) (presenting a history of the consent and presence doctrines in the jurisdictional context which sets forth as traditional justifications for the exercise of jurisdiction domicile, physical power, voluntary submission, express consent, coerced implied consent, appearance and engaging in business activities within the state that give rise to the claim); Mullenix, *supra* note 490, at 363 (stating that historically personal jurisdiction looked to territoriality, presence, domicile or consent to validate personal jurisdiction).

[493]Burnham v. Superior Court, 495 U.S. 604, 612 (1990). The Court agreed to this proposition but split four-four over whether service in the forum on a physically present defendant satisfied due process because it satisfied minimum contacts requirements or because such service has historically always been acceptable. *See also* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (upholding Arkansas's jurisdiction over a defendant who was served with Arkansas process while on an airplane flying over Arkansas); SHREVE AND RAVEN-HANSEN, *supra* note 53, at 30-34 ("Amenability to suit can be seen as a fair exchange for the benefits and protection which the defendant enjoys from state citizenship.").

[494]In addition to express consent and the filing of a general appearance, courts have also based "consent" on contractual provisions, Nat'l Equip. Rental Ltd. v. Szukhent, 375 U.S. 311, 316 (1964); waiver, Lewis, *supra* note 487, at 3; discovery sanctions, Ins. Corp. of Ir., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705 (1982); and statutory presumptions, Hess v. Pawloski, 274 U.S. 352, 356 (1927).

constitutionally sufficient relationship with the forum. The justification for minimum contacts jurisdiction is the implied consent of the defendant to be sued in a state for claims arising from activities it purposefully directed there and from which it derived benefits.[495] The exchange of forum benefits for forum obligations creates the constitutional relationship that satisfies procedural due process. In this sense, the minimum contacts doctrine is a means, but not the sole means, of satisfying procedural due process.

b. Minimum Contacts

(i) Quid Pro Quo

According to the minimum contacts doctrine,[496] if by the "quality and nature"[497] of the defendant's acts in the forum, or acts outside of the forum having effects in the forum, the defendant purposefully avails itself of the benefits and protections of the forum, then the exercise of personal jurisdiction will comport with "traditional notions of fair play and substantial justice" because litigation in the forum related to those acts will be reasonably foreseeable by that defendant.[498] To be jurisdictionally significant, the defendant's acts must be purposeful,[499] the possibility of

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[495] *See Int'l Shoe*, 326 U.S. at 316.

> Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power of the defendant's person. . . . But now . . . due 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 suit does not offend "traditional notions of fair play and substantial justice."

Id. (citation omitted) (quoting *Milliken*, 311 U.S. at 463).

[496] *See id.*

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present in 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."

Id. (quoting *Milliken*, 311 U.S. at 463).

[497] Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("The application of that rule will vary with the quality and nature of the defendant's activity . . . ."); *see Int'l Shoe*, 326 U.S. at 319 ("Whether due process is satisfied must depend rather upon the quality and nature of the activity . . . .").

[498] *See supra* note 496.

[499] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) ("The 'substantial connection,' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant *purposefully* directed toward the forum

suit in the forum foreseeable,[500] and all must arise from the relationship among the defendant, the forum and the litigation.[501] Activities occurring outside of that relationship are not jurisdictionally significant.[502] Thus, the unilateral acts of others are not jurisdictionally significant,[503] nor are the fortuitous, isolated, or casual acts of the defendant that are unrelated to the claim.[504] Jurisdictional significance is achieved only when the defendant purposefully engages in forum directed activities that give rise to the lawsuit and from which it derives forum benefits.[505] Case law and custom

State.") (citation omitted) (emphasis added); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("[T]he constitutional touchstone remains whether the defendant *purposefully* established 'minimum contacts' in the forum State.") (emphasis added); *Hanson*, 357 U.S. at 253 ("[I]t is essential in each case that there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.") (citing *Int'l Shoe*, 326 U.S. at 319) (emphasis added).

[500]*See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("But the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

[501]*See* Rush v. Savchuk, 444 U.S. 320, 327 (1980) ("In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on 'the relationship among the defendant, the forum and the litigation.'" (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977))); *World-Wide Volkswagen*, 444 U.S. at 292 ("The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'") (quoting *Int'l Shoe*, 326 U.S. at 317).

[502]*See World-Wide Volkswagen*, 444 U.S. at 296 (rejecting the jurisdictional significance of the defendant's out of state commercial sales activities that were not directed to the forum lest "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."); *Shaffer*, 433 U.S. at 216 (rejecting the jurisdictional significance of the defendant's ownership of stock located in Delaware and the assumption of board and executive positions with a Delaware corporation because neither had anything "to do with the State of Delaware"); *Int'l Shoe*, 326 U.S. at 317 (stating that a corporation's "single or isolated . . . activities in a state . . . are not enough to subject it to suit on causes of action unconnected with the activities there").

[503]*Hanson*, 357 U.S. at 253 ("The *unilateral activity* of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.") (emphasis added).

[504]*See Burger King*, 471 U.S. at 480 (stating that minimum contacts were satisfied because defendant's relationship with a forum company could "in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated'"). *See also supra* note 502.

[505]*See Int'l Shoe*, 326 U.S. at 319.

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a

have come to characterize this relationship among the defendant, the forum, and the litigation as "the purposeful acts doctrine."[506]

However, it is more accurate to say that minimum contacts jurisdiction is based on a reciprocal relationship of mutual obligations and benefits as between the defendant and the forum; in essence, a quid pro quo of constitutional significance.[507] The defendant's receipt of benefits from its purposeful forum-related activities justifies the state's authority to adjudicate claims against that defendant based on those activities.[508] Hence, minimum contacts theory gives the defendant a choice: It can engage in conduct that gives rise to the quid pro quo or it can avoid the quid pro quo by refraining from such conduct.[509]

Courts have given broad rein to the manner in which the quid pro quo relationship can be established. Conduct satisfying this relationship has been variously described as "purposeful,"[510] "deliberate,"[511]

> suit brought to enforce them can, in most instances, hardly be said to be undue.

Id.

[506] *See Hanson*, 357 U.S. at 253. *See also supra* note 499.

[507] *See* Maltz, *supra* note 488, at 698 (providing the following explanation for the quid pro quo:

> The individuals are entitled to invoke the protection of the government for themselves and their property; in return, they are required to submit to the laws and institutional controls of that government. This view of the relationship between individuals and government was central to nineteenth century jurisprudence. Moreover, it remains intact and unchallenged [today].

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[508] *See supra* note 505.

[509] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

> When a corporation "purposefully avails itself of the privilege of conducting activities in the forum State," it has clear notice that it is subject to suit there, and *can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs onto customers, or, if the risks are too great, severing its connection with the State.*

Id. (citation omitted) (emphasis added) (quoting *Hanson*, 357 U.S. at 253).

[510] *See supra* note 499.

[511] *See generally* W. Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983) (denying jurisdiction because the record lacked evidence of the defendant's deliberate contact with Minnesota); Brilmayer, *supra* note 52, at 91 (stating that finding jurisdiction is easy "when the defendant has a 'deliberate impact' in the forum"); Moe, *supra* note 134, at 212, 212 n.66 and cases cited therein.

"intentional,"[512] or "voluntary"[513] with respect to either the acts themselves or their consequences.[514] The quid pro quo establishes the defendant's knowledge,[515] awareness,[516] expectation,[517] or control[518] of its conduct. By requiring some level of volition on the defendant's part, the minimum contacts doctrine strives to satisfy procedural due process concerns with the fair and fore warning 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."[519] To this end, the quid pro quo protects an unsuspecting defendant from being haled into a foreign forum to defend against litigation arising from circumstances about which the defendant lacked knowledge, awareness, or control. It is at this juncture of the analysis, however, where the harmony among the minimum contacts doctrine, procedural due process and stream of commerce jurisdiction breaks down.

There are significant behavioral and legal differences between "intentional," "purposeful," "knowledgeable" and "merely aware" states of mind. Each implicates a different degree of volition and control.

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[512]*See* Moe, *supra* note 134, at 213, 213 n.67 and cases cited therein.

[513]*See* JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 4 (2d ed., Little, Brown & Co. 1992) ("[B]ecause the court's power to exercise jurisdiction derives from the defendant's voluntary relation to the state, the power should be limited to cases arising out of that relation.").

[514]*See* Comments, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300, 308 (1970) (arguing that the purposeful act doctrine does not require the defendant to "voluntarily" or "knowingly" associate with the forum, but rather, that the defendant purposefully engage in conduct that results in an association with the state). "Purposefulness," by this definition modifies the defendant's conduct, not the defendant's association with the state. Other cases and commentators have held the opposite to be true: that the defendant must "directly or indirectly" involve the forum state for its actions to satisfy the purposeful availment requirement. *See also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) ("The 'substantial connection,' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state.") (internal citation omitted) (emphasis omitted).

[515]*See* Moe, *supra* note 134, at 212, 212 n.63 and cases cited therein.

[516]*See* Moe, *supra* note 134, at 212, 212 n.63 and cases cited therein. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (stating that the defendant must be aware that its product will enter a consumer market in a foreign state in order to take measures to protect itself).

[517]*See* Moe, *supra* note 134, at 219, 223 (discussing expectation theory).

[518]*See* Brilmayer, *supra* note 52, at 95 (discussing the reasons for limiting jurisdiction to cases where the defendant has control over the location of the product).

[519]*World-Wide Volkswagen*, 444 U.S. at 297. *See also* Brilmayer, *supra* note 52 (discussing Professor Brilmayer's analysis of why such jurisdictional exercises are unconstitutional).

Intentional conduct implies intended consequences. The same inference cannot be drawn from conduct arising from a "merely aware" state of mind. Similarly, differences exist between "deliberate" and "voluntary" conduct. Nonetheless, the "purposeful act doctrine" has been loosely drawn to encompass forum-related activities that are not otherwise isolated, singular, fortuitous, unrelated to the claim,[520] or committed unilaterally by others.[521]

Pursuant to the minimum contacts doctrine, a component part manufacturer could "purposefully" sell its widget to an ultimate manufacturer with "knowledge" that the final product will course its way to destinations "unknown" and beyond the defendant's "control." The vagaries of these states of mind raise many questions: Which of these states of mind is jurisdictionally significant? Will the purposefulness of the sale of the widget trump the lack of knowledge of the product's destination, or vice versa? If the claim is for personal injuries arising from a defective widget rather than for economic injuries arising from the sale of the widget between manufacturers and merchants, will the "purposefulness" of the sale be relevant when the court is exercising specific jurisdiction? Similarly, when jurisdiction is specific, will the lack of control or knowledge of the product's ultimate destination cancel out the component manufacturer's purposeful placement of the widget into the stream of commerce? Consider also, that the conduct that connects the component manufacturer to the forum requires the commercial transactions of numerous stream participants. Will the unilateral act/purposeful act doctrines cancel out these direct and indirect forum connections as well? These questions are raised simply to illustrate the rift between stream of commerce jurisdiction and the minimum contacts doctrine.

(ii) Fairness

The second level of the minimum contacts doctrine requires the exercise of jurisdiction over the defendant to be "fair" notwithstanding the existence of the quid pro quo.[522] The "fairness" analysis examines factors

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[520] *See supra* note 504.

[521] *See supra* note 503.

[522] *See World-Wide Volkswagen*, 444 U.S. at 292 (stating that the evaluation of the litigation burdens imposed on the defendant "is typically described in terms of 'reasonableness' or 'fairness'"); Kulko v. Superior Court of Cal. *ex rel.* S.F., 436 U.S. 84, 91 (1978) (stating that jurisdiction will be fair if there is "a sufficient connection between the defendant and the forum State . . . to require defense of the action in the forum"); Shaffer v. Heitner, 433 U.S. 186, 206

that are extrinsic to the quid pro quo, such as the plaintiff's interest in convenient and effective relief in an available forum,[523] the forum state's interest in adjudicating the dispute,[524] and the judiciary's interest in the efficient administration of justice.[525]

The relationship between the quid pro quo and the fairness factors is unclear. Although fairness factors extrinsic to the relationship between the defendant and the forum may be considered "in an appropriate case," theoretically such factors should not displace the quid pro quo.[526] For example, the fairness analysis may weigh in favor of personal jurisdiction when minimum contacts are weak.[527] Or, the fairness analysis may inveigh against personal jurisdiction when minimum contacts are strong. But the fairness analysis should not unilaterally create jurisdiction in the absence of the quid pro quo. In other words, the fairness analysis may strengthen a weak case of minimum contacts to enable personal jurisdiction to comply with procedural due process; or, the fairness analysis may weaken a strong case of minimum contacts when personal jurisdiction would offend due process; but there should be no case for exercising personal jurisdiction when there is no quid pro quo relationship between the defendant and the forum, notwithstanding the strength of the fairness factors.

The fairness analysis, like the quid pro quo requirement, is a means to the end of linking the minimum contacts doctrine to procedural due

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(1977) ("[T]he standard of fairness . . . set forth in *International Shoe* should be held to govern actions in rem as well as in personam.") (emphasis omitted).

[523]Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (finding that the plaintiff had only a slight interest in California's assertion of jurisdiction over Asahi); *World-Wide Volkswagen*, 444 U.S. at 292 (stating that the evaluation of the litigation burdens imposed on the defendant can take into account "the plaintiff's interest in obtaining convenient and effective relief").

[524]*Asahi*, 480 U.S. at 114 (finding that the forum state's interest in exercising jurisdiction over *Asahi* was slight); *World-Wide Volkswagen*, 444 U.S. at 292 (stating that the reasonableness of imposing litigation burdens on a defendant may be evaluated in terms of "the forum State's interest in adjudicating the dispute"). *See also* Brilmayer, *supra* note 52, at 105-06 (discussing the redundancy of including the forum state's interest in the fairness analysis).

[525]*World-Wide Volkswagen*, 444 U.S. at 292 (stating that the reasonableness of imposing litigation burdens on a defendant may take into account "the interstate judicial system's interest in obtaining the most efficient resolution of controversies").

[526]*Id.* (stating that the reasonableness of imposing litigation burdens on a defendant "will in an appropriate case be considered in light of other relevant factors").

[527]Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (upholding jurisdiction over a nonresident defendant whose forum contacts were weak but over whom the exercise of jurisdiction satisfied the fairness factors, which "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required").

process. The fairness analysis serves as an additional check on the state's imposition of litigation burdens on the defendant. However, fairness alone, without the quid pro quo, can never be constitutionally sufficient to satisfy due process. Thus, jurisdictional due process can never fundamentally be about fairness.

c. *Stream of Commerce Jurisdiction*

Stream of commerce jurisdiction renders a participant in a chain of distribution subject to the personal jurisdiction of a distant forum if, in placing a product into a manufacturing or distribution network for ultimate purchase by a consumer, the defendant engages in purposeful forum-directed activity from which it derives forum benefits.[528] The imposition of litigation burdens on a stream participant is based on the assumption that the entry of a product into a distant forum renders

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[528]Stream of Commerce jurisdiction has been variously defined as follows:

> The stream-of-commerce theory developed as a means of sustaining jurisdiction in products liability cases in which the product had traveled through an extensive chain of distribution before reaching the ultimate consumer. Under this theory, a manufacturer may be held amenable to process in a forum in which its products are sold, even if the products were sold indirectly through importers or distributors with independent sales and marketing schemes. Courts have found the assumption of jurisdiction in these cases to be consistent with the due process requirements identified above: by increasing the distribution of its products through indirect sales within the forum, a manufacturer benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents. Underlying the assumption of jurisdiction in these cases is the belief that the fairness requirements of due process do not extend so far as to permit a manufacturer to insulate itself from the reach of the forum state's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products.

DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 285 (3rd Cir. 1981). *See also* Richman, *supra* note 3, at 624 (stating that the stream of commerce theory allows jurisdiction to be asserted over a manufacturer, distributor or retailer of defective goods wherever these goods are distributed, directly or indirectly, through a chain of distribution); Dayton, *supra* note 3, at 241 (stating that the stream of commerce doctrine permits jurisdiction to be asserted over a defendant who markets its products to be carried by a stream into a remote jurisdiction); Moe, *supra* note 134, at 204 and n.9 (stating that the stream of commerce theory "permits the exercise of jurisdiction over a manufacturer in a forum in which its products are sold indirectly through importers or distributors with independent marketing schemes" and that its purpose is to subject component part manufacturers to jurisdictional amenability notwithstanding their lack of direct contact with the plaintiff, ignorance of the product's ultimate destination or control over the distribution scheme).

jurisdiction there foreseeable if the claim is related to the product's use in that forum. Thus, it is participation in the chain of distribution accompanied by the expectation of consumer use in the forum that creates the quid pro quo relationship between the defendant and the state.[529] For example, *Gray* upheld personal jurisdiction over Titan because it placed its valve into the chain of distribution in Ohio, presumably for use by a consumer elsewhere.[530] Conversely, *World-Wide Volkswagen* rejected personal jurisdiction over the Audi wholesaler and retailer who participated in a chain of distribution but had not directed their commercial endeavors in or toward the forum.[531]

After *World-Wide Volkswagen*, the idea of directing one's activities to a particular forum gave rise, in the commercial context, to the concept of "targeting a market."[532] If a defendant targeted a market by directing its commercial activities there, and if the defendant derived benefits and protections from that market, then jurisdiction over the defendant in that forum for claims related to those activities satisfied minimum contacts.

What happens, however, when a defendant does not "target a market," but rather, is only one participant among many in a succession of sales of a product that causes injury in a forum from which that defendant received only indirect or intangible benefits?[533] *Asahi's* plurality opinions exposed

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[529]*World-Wide Volkswagen*, 444 U.S. at 297-98 ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

[530]Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961).

[531]444 U.S. at 298.

[532]Two of the earliest post-*World-Wide Volkswagen* cases to coin this phrase were: Stoutco, Inc. v. Amma, Inc., 570 F. Supp. 1376, 1379 (N.D. Ind. 1983) (stating that when a foreign corporation "carr[ies] on conscious and deliberate activities within the state of Indiana *with the purpose of targeting the Indiana market*," due process is satisfied and the corporation's activities thereby provide it with "notice that it is subject to suit in Indiana.") (emphasis added); and Strick Corp. v. A.J.F. Warehouse Distribs., Inc., 532 F. Supp. 951, 956 (E.D. Pa. 1982) (holding that a Pennsylvania court could not exercise personal jurisdiction over an Illinois corporation under 42 PA. CONS. STAT. ANN. § 5301(a)(2) (West 1981), which required that a defendant maintain "continuous and systematic" business within the state, unless the plaintiff demonstrated that the defendant "solicit[ed] business regularly and advertise[d] in a way *specifically targeted at the forum market*") (emphasis added).

[533]*See* Glannon, *supra* note 513, at 9 (stating that the component part manufacturer does not bring the product into the forum or initiate contact with the forum. Rather, it participates in a succession of sales to others who eventually sell the finished product within the forum.); Murphy, *supra* note 4, at 307 (stating that stream participants receive economic and legal benefits from the efforts of other stream participants to market the product in the forum).

the confusion underlying this issue.[534] The *Asahi* Court was unable to agree on the nature or extent of the conduct that was jurisdictionally significant in the stream of commerce context. The Court agreed, in principle, on minimum contacts as a jurisdictional doctrine.[535] It agreed, in principle, on the relationship between minimum contacts and due process.[536] However, it could not agree, in principle or in fact, on how a stream participant demonstrated purposeful availment of forum benefits.[537] Justice Brennan argued that mere placement of a product into a commercial stream satisfied the purposeful availment requirement.[538] Justice O'Connor argued that purposeful availment required conduct in addition to mere awareness of the stream's course, such as advertising, marketing, or developing customer relations in the forum.[539] Legal commentators quickly noted that Brennan's theory was so broad that it lacked limiting principles,[540] while O'Connor's theory was so narrow that it excluded many stream participants who did not engage in the kind of activities that she deemed jurisdictionally significant.[541]

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[534]*See generally* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-12 (1987) (The *Asahi* Court rendered three opinions on the issue of whether placing goods into a stream of commerce was constitutionally sufficient to sustain jurisdiction under the minimum contacts doctrine.). Justice O' Connor, joined by the Chief Justice and Justices Powell and Scalia, argued that a defendant's mere awareness that a product would follow a stream's course was insufficient to satisfy minimum contacts if it was not attended by additional purposeful activity directed toward the forum. *Id.* at 112. Justice Brennan, joined by Justices White, Marshall, and Blackmun, argued that mere placement of the product into a commercial stream was, itself, sufficiently purposeful to satisfy minimum contacts. *Id.* at 116-21 (Brennan, J., concurring). Justice Stevens argued that the jurisdictional significance of stream activity had to include an evaluation of the volume, value and hazardous character of the product. *Id.* at 122 (Stevens, J., concurring).

[535]*See id.* at 109. "'The constitutional touchstone' of . . . due process [is] 'whether the defendant purposefully established "minimum contacts" in the forum State.'" *Id.* at 108 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

[536]*Id.* at 108.

[537]*See* Glannon, *supra* note 533; Dayton, *supra* note 3, at 251-55 (stating that the Court's disagreements in *Asahi* over the stream of commerce theory stem from fundamental differences concerning the meaning of purposeful availment).

[538]*Asahi*, 480 U.S. at 116-17 (Brennan, J., concurring).

[539]*Id.* at 112.

[540]*See* Murphy, *supra* note 4, at 301-11 (stating that Brennan's theory permits jurisdiction whenever a purchaser brings the product into the forum); Moe, *supra* note 134, at 224 (stating that Brennan's stream of commerce theory in *Asahi* requires proof of the defendant's knowledge of forum sales which may be difficult to obtain)..

[541]*See* Sean K. Hornbeck, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1414 (1996) (stating that O'Connor's opinion would

Not surprisingly, post-*Asahi* case law became suffused with confusion, controversy, and unresolved issues: Where does a stream begin? Where does a stream end? Who are stream participants? What stream conduct constitutes purposeful availment of forum benefits? Must a stream defendant "know" of a product's destination, "intend" its destination, or only be "aware" that the product is entering a stream somewhere and going somewhere else? How much "control" if any, must a stream participant exercise, or be capable of exercising, over the manufacture/distribution/economic network or its participants/the final product and/or the product's destination to satisfy the purposeful availment requirement?[542] Is the mass and geographically diffused marketing of

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eliminate jurisdiction over component parts manufacturers because they do not or only rarely engage in consumer-oriented activities in the forum state such as advertising or marketing); Richman, *supra* note 3, at 625 (characterizing O'Connor's limitations on the stream of commerce theory as "ominous" because they would insulate some stream participants from suit); Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction,* 18 HASTINGS CONST. L.Q. 441, 446, 446 n.31 (1991) (noting that stream of commerce jurisdiction provides no guidelines to persons seeking to avoid jurisdiction); Murphy, *supra* note 4, at 311-14 n.274 (stating that O'Connor's theory may exclude component part manufacturers because a stream participant may lack intent to target a specific market); Stravitz, *supra* note 134, at 790 (stating that component part manufacturers do not engage in the "designing," "advertising," or "marketing" activities that O'Connor argues would demonstrate their purposeful targeting of the forum's market. Rather, these are the activities of the manufacturer of the final products or their replacement parts.); Moe, *supra* note 134, at 222-23 (stating that O'Connor's position "endangers" the stream of commerce theory by imposing artificial barriers and failing "to comport with the realities of international commerce"); Seidelson, *supra* note 134, at 578-79 (stating that component part manufacturers do not do the things characterized by O'Connor as "additional purposeful activity").

[542] *See* Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So. 2d 881, 887 n.5, 888-89 n.7 (La. 1999) (setting forth a detailed account of lower state court, as well as federal court responses to the split *Asahi* decisions); Hornbeck, *supra* note 541, at 1420-23 (discussing lower court confusion in applying the stream of commerce theory and citing specific case examples of post-*Asahi* inconsistencies); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593 (1992) (stating that the lack of clear guidelines in stream of commerce theory has caused confusion, inconsistent holdings and unpredictable results); Moe, *supra* note 134, at 213-15 (setting forth two "polar extreme" stream of commerce cases that reach opposite holdings on similar facts: Volkswagenwerk, A.G. v. Klippen GmbH, 611 P.2d 498, 511 (Alaska 1980), in which the Alaska Supreme Court permitted stream of commerce jurisdiction over a German seat belt manufacturer because the defendant designed, manufactured and sold the seat belts to a company that it knew would market the product throughout the U.S., and, in contrast, Humble v. Toyota Motor Co., 727 F.2d 709, 710 (8th Cir. 1984) (per curiam), which rejected stream of commerce jurisdiction over a Japanese car seat manufacturer because, while use of the product in the forum was foreseeable, suit there was not); Quesenberry, *supra* note 134, at 197

voluminous quantities of product the constitutional equivalent of a single instance of targeted marketing of a product specifically designed and designated for a particular forum?[543]

In addition to these unanswered questions, stream of commerce jurisdiction also suffers from the ubiquity of its scope. Stream of commerce jurisdiction encompasses local, regional, national, pan-American, and inter-global component part manufacturers, final manufacturers, wholesalers, retailers, designers, and advertisers.[544] Consequently, it is difficult for a stream participant to know in advance either what or where stream conduct will be jurisdictionally significant. For example, the Court in *World-Wide Volkswagen* declined to exercise jurisdiction over World-Wide Volkswagen and Seaway because they had conducted their primary commercial activities in New York and New Jersey.[545] Contrarily, the court in *Gray* upheld jurisdiction over Titan even though it had conducted its primary commercial activities in Ohio.[546] In *Asahi*, Justice O'Connor refused to impute jurisdictional significance to Cheng Shin's placement of a valve assembly into an international economic network,[547] while Justice Brennan found jurisdictional significance in the placement of the same valve into the same international network.[548]

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n.59 (noting that seven circuits follow Brennnan's approach while no more than three follow O'Connor's approach). After *Asahi,* the application of the stream of commerce theory in product liability cases has yielded unpredictable results. Quesenberry, *supra* note 134, at 197 n.58.

[543]Rockwell Int'l. Corp. v. Costruzioni Aeronautiche Giovanni Agusta S.p.A. and S.N.F.A., 553 F. Supp. 328, 333 (E.D. Pa. 1982) (upholding stream of commerce jurisdiction where the product was "uniquely designed for incorporation" into the forum state's product).

[544]Hornbeck, *supra* note 541, at 1447 (stating that in the international context,

> Until the Supreme Court decidedly defines the role of minimum contacts and the stream of commerce theory, litigants must gather a wide range of evidence concerning a foreign manufacturer's design processes, marketing, advertising, distribution system, customer support services, numerical sales, and any other activity which proves or disproves that the manufacturer is directly or indirectly servicing the forum's consumer market.

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[545]*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (rejecting jurisdiction in Oklahoma over New York and New Jersey defendants who confined their primary commercial activities to those states).

[546]Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961) (holding that jurisdiction is proper in a distant forum when a manufacturer has contemplated that its product will be used there).

[547]*See supra* note 534.

[548]*See supra* note 534.

Is it possible that one procedural construct can provide constitutional justification for such diametrically opposed applications? The various and inconsistent applications of the stream of commerce doctrine create expensive and inefficient litigation burdens for defendants who cannot predict the jurisdictional consequences of their actions and therefore cannot protect themselves from jurisdictional amenability. Is this problem itself a violation of due process?

The answer to this question is both "yes" and "no." The doctrinal flaws of the stream of commerce theory are not a result of its economic network premise, or the ubiquity of its scope. Rather, the problem with the stream of commerce doctrine is that it has been presumed to be a subset of the minimum contacts doctrine since its inception in *Gray*. Stream of commerce jurisdiction was rooted in the assumption that it could satisfy procedural due process only if it "fit" within the minimum contacts rubric. Like the square peg that is pounded into the round hole, the stream of commerce theory has been retrofitted into the minimum contacts doctrine. The result is a jurisdictional doctrine that is forced and distorted. Thus, the determination of whether stream of commerce jurisdiction satisfies due process must begin with a challenge to the assumption that it must also satisfy the minimum contacts doctrine. To do so we must return to *Gray*.

VI. WHY STREAM OF COMMERCE JURISDICTION IS NOT PART OF THE MINIMUM CONTACTS DOCTRINE

It was important to the Illinois Supreme Court to frame the controlling issue in *Gray* as constitutional rather than statutory.[549] However, by framing the constitutional analysis in terms of "contacts," the *Gray* decision imputed jurisdictional significance to conduct in which Titan did not engage and overlooked conduct in which Titan did engage that also satisfied procedural due process.

A. The Stream Of Commerce Bargain

What, then, did Titan do to justify jurisdictional amenability in Illinois? Titan volitionally and voluntarily, albeit implicitly, entered into a bargain with other stream participants to relinquish control over its product in order to realize profit along the stream's course.[550] In effect, Titan consensually

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[549] *See supra* note 41.

[550] *Gray*, 176 N.E.2d at 765-66; *see* Dayton, *supra* note 3, at 270 (stating that a manufacturer's contacts may be purposeful even though they are not direct). Asahi's contacts

participated in a stream of commerce in order to benefit from the stream's markets. By so doing, Titan entered into a relationship of reciprocal benefits and obligations with a transactional network, not a forum. Titan's role in that network both enabled and required it to forego specific contacts with any particular forum in order to benefit from the network's access to multiple forums.

If this characterization of Titan's conduct is true, then stream of commerce jurisdiction is a very different construct than minimum contacts jurisdiction. The following examples illustrate this proposition.

1. Forums vs. Markets

The minimum contacts model of jurisdiction is forum-based. It requires a relationship among the defendant, the forum, and the litigation.[551] The stream of commerce model of jurisdiction is market-based. It requires the defendant to relinquish a direct relationship with any particular forum in order to benefit from all the forums along the stream's path.[552] Similarly, minimum contacts jurisdiction requires the defendant to avail itself purposefully of a specific forum,[553] whereas stream of commerce jurisdiction requires its participants to relinquish control over their products in order to benefit from the transactional networks that course

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with California were the result of its own decision to sell its parts to a manufacturer who sold on an international basis. Dayton, *supra* note 3, at 265.

[551] *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) ("[T]he relationship among the defendant, the forum, and the litigation" has become "the central concern of the inquiry into personal jurisdiction.").

[552] *See* Hutson v. Fehr Bros., 584 F.2d 833, 836-37 (8th Cir. 1978). The dissent argued that due process does not insulate a stream participant from personal jurisdiction in a product liability case because it used an intermediary in the sale and distribution of its product. *Id.* at 837-38 (Stephenson, J., dissenting). *See also* Dayton, *supra* note 3, at 270 (stating that stream participants profit from the sales of their products by intermediaries); Murphy, *supra* note 4, at 307 (stating that although a stream defendant has no intent to market its product in a specific forum it still receives substantial economic and legal benefits from the distribution efforts of others in the forum); Stuart M. Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 518-19 (1984) (stating that a stream defendant's contacts can be purposeful even though indirect).

[553] *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.") (citing Int'l Shoe Co. v. Washington, 326 U.S. 316, 319 (1945); Dayton *supra* note 3, at 256-58 (discussing the role of the "purposeful availment" requirement in the minimum contacts doctrine); Currie, *supra* note 71, at 536 (discussing *Hanson's* purposeful act doctrine);.

through the markets of many forums.[554] As a result, participation in a stream of commerce often precludes a stream participant from dealing directly with any particular forum and, consequently, from satisfying the purposeful availment requirement of the minimum contacts doctrine.[555]

2. Time and Space Barriers vs. Stream of Cosmos

The minimum contact doctrine is bounded by *Pennoyeresque* notions of time and space.[556] The defendant, or its conduct, or the consequences of its conduct, must be placed in a specific place within a specific time frame. Specific jurisdiction requires the claim to be based on the defendant's activities occurring within those space-time boundaries. These time and space requirements, however, are antithetical to stream of commerce jurisdiction which, by definition, can be interstate, interglobal, and indeterminate in destination and duration.[557] Indeed, with the increasing globalization of commerce[558] a component part manufacturer can come from one place[559] and do great harm in another place without ever "purposefully" directing its conduct or its product anywhere.[560]

3. Consent vs. Control

Under the minimum contacts doctrine, a defendant must have some degree of control, knowledge, or awareness of its conduct, or the consequences of its conduct, in order to satisfy the "purposeful availment"

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[554]*See* Riback, *supra* note 552, at 519 (stating that a defendant who avails itself of a channel of distribution reaching into several states benefits from the privilege of delivering its product into each state and therefore should be subject to jurisdiction in those states).

[555]*See supra* note 552; Trautman, *supra* note 55, at 162 (stating that the unilateral and purposeful act doctrines are difficult to apply in stream of commerce cases).

[556]Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 108 (1983) (stating that because of *Pennoyer's* influence, "state boundaries continue to be artificial barriers to the exercise of jurisdiction").

[557]*See* Seidelson, *supra* note 134, at 583 (questioning Justice O'Connor's reluctance to impose jurisdiction over a foreign defendant when commerce is becoming increasingly globalized).

[558]*See* Quesenberry, *supra* note 134, at 206 (suggesting that the increasing internationalization of trade is decreasing the importance of national borders).

[559]*See* Seidelson, *supra* note 134, at 583 (suggesting that with the increasing internationalization of trade, a component manufacturer could come from anywhere).

[560]*See* Hornbeck, *supra* note 541, at 1440 n.312 (stating that a defendant can inflict great harm within a forum without ever actively engaging in commerce there).

requirement.[561] "Control," "knowledge," and "awareness," however, are misnomers in the stream of commerce context since many stream participants neither know nor care where a stream routes their product.[562] Nor may such information be market-knowable since a product can remain in a stream years after it has been manufactured, discontinued, or its manufacturer, itself, has relocated or gone out of business. This lack of knowledge, control, or concern over a product's route renders the issue of "foreseeable suit" in a particular forum, so important to the minimum contacts analysis, meaningless as applied to stream participants with no ability independently to access specific forums.[563]

Lack of control, knowledge, or awareness of a product's route does not mean, however, that the stream participant's conduct is jurisdictionally insignificant. To the contrary, component part manufacturers purposefully participate in networks that connect to other networks in order to access distant markets.[564] In fact, a component manufacturer without a network of other manufacturers, sellers, and distributors would be a jurisdictional nonstarter since it has no independent access to consumer markets. Absent a stream, the only "control" a component manufacturer could exercise over its jurisdictional amenability would be to withdraw its product from the stream and confine its distribution to its immediate locale.[565] Such

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[561] *See* Murphy, *supra* note 4, at 298-99 (discussing the function of "control" when the minimum contacts doctrine is applied to a stream participant); Brilmayer, *supra* note 52, at 96 (discussing the function of "control" in the minimum contacts doctrine)..

[562] *See* Glannon, *supra* note 513 (stating that a stream participant may neither know nor care where a stream takes its product); Murphy *supra* note 4, at 308 (stating that as a practical matter a stream defendant may not have knowledge of a stream's markets).

[563] *See* Murphy, *supra* note 4, at 308 (explaining why a stream participant's position in a distribution chain may eliminate its control over and knowledge of its product's route and destination); Harry B. Cummins, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions,* 63 MICH. L. REV. 1028, 1031 (1965) (stating that a manufacturer's lack of control over the process by which its product reaches the forum makes the requirement of purposeful availment less meaningful).

[564] *See* Dayton, *supra* note 3, at 270 (stating that stream participants purposefully place their products into a stream with the expectation of profit); Cummins, *supra* note 563, at 1033-34 (stating that a manufacturer's economic objectives are achieved wherever its product is consumed).

[565] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by . . . severing its connection with the State.") (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958); Dayton, *supra* note 3, at 278 (stating that a stream participant can control its jurisdictional amenability by contracting to limit its product's distribution or by

"control," however, could significantly reduce the product's profitability and possibly put the manufacturer out of business–an ironic perversion of a jurisdictional theory that must accommodate, not frustrate, a capitalist economy.

More importantly, minimum contacts' concern with "control" masks the real issue of consent. Even though the jurisdictional consequences of stream participation may be beyond a defendant's control, they are not beyond its consent.[566] More likely, the commercial conduct that enables a defendant to participate in, and benefit from, a stream's transactional networks is both voluntary and consensual, not constructive or coerced. It is indisputable that a defendant's voluntary and consensual conduct that creates a cognizable relationship with a forum has a jurisdictional pedigree that satisfies procedural due process.[567]

Although the Court has not directly addressed the issue of consent in the stream of commerce context, two cases come close to illustrating this point. *International Shoe* addressed the jurisdictional significance of transacting business in the forum state by a defendant who had no physical presence there.[568] It upheld Washington's jurisdiction over a Missouri corporation that had volitionally and consensually exploited business opportunities in that forum.[569] Similarly, *Burger King* took within its jurisdictional ambit the entire transaction that gave rise to a contract and its breach–the pre-contract negotiations, contract terms, and post-contract performance–and concluded that the defendant's volitional and consensual bargain with the plaintiff satisfied procedural due process.[570] Like *International Shoe* and *Burger King*, the stream of commerce theory attaches jurisdictional significance to the bargain made between a stream participant and a transactional network for the mutual benefit of each.[571] By recognizing the jurisdictional significance of the transactional network,

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dealing with distributors who limit the geographical distribution of their sales); Murphy, *supra* note 4, at 308, 308 n.262 (stating that a defendant can avoid jurisdiction by limiting the distribution of its product). *See also supra* notes 561 and 563.

[566]*See* Philip B. Kurland, *supra* note 492, at 578-82 (discussing the historical development of consent in jurisdictional theory).

[567]*See infra* note 610.

[568]Int'l Shoe Co. v. Washington, 326 U.S. 310, 313-14 (1945).

[569]*Id.* at 320-21.

[570]Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-85 (1985).

[571]*See* Hornbeck, *supra* note 541, at 1415-16 (discussing Brennan's theory of stream of commerce jurisdiction).

stream of commerce jurisdiction also recognizes jurisdictional amenability to suit wherever the defendant's bargain takes its product.[572]

4. Tort vs. Transaction

The minimum contacts doctrine casts stream of commerce jurisdiction as tort-based because it arises in the product liability context. However, product liability claims are fundamentally non-waivable contract claims.[573] The failure of the stream of commerce doctrine to recognize this point has resulted in considerable doctrinal confusion. For example, under the tort model, the acts of design, manufacture, and distribution are jurisdictionally significant but the commercial transactions that deliver the product to the plaintiff are not.[574] Furthermore, specific jurisdiction renders the commercial transactions of the component part manufacturer irrelevant because the claim arises from the commission of a tort, not from a failed business transaction. This distinction is important for several reasons. First, a network of commercial transactions can span multiple forums whereas a tort is generally localized to the place of manufacture, design, or distribution. Consequently, jurisdictional amenability will expand under the transactional model and contract under the tort model. Second, under the unilateral acts doctrine, the commercial transactions of other stream participants must be disregarded.[575] In the stream of commerce context, however, each participant's commercial success is dependent upon the competence and success of the other stream participants.[576] These networks not only connect the product to the plaintiff, but also, are volitionally and consensually entered into by stream participants in order to

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[572]*See* Dayton, *supra* note 3, at 278 (stating that due process is not offended when a forum exercises jurisdiction over a stream participant who enjoys economic benefits flowing from the sale of its product within the state); Seidelson, *supra* note 134, at 573.

[573]William A. Klein et al., BUSINESS ASSOCIATIONS TEACHERS MANUAL 154 (Foundation Press 2000).

[574]*See* Glannon, *supra* note 513, at 35 (explaining that tort claims require tort-based jurisdiction and business claims require transacting business or contract-based jurisdiction).

[575]*See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

[576]*See* Dayton, *supra* note 3, at 271 (stating that the unilateral act doctrine does not render irrelevant contacts created with the help of third parties); Murphy, *supra* note 4, at 308 (discussing the relationship among stream participants); Blauvelt, *supra* note 134, at 865 (stating that stream participants are often "at the mercy of another").

pursue their economic goals.[577] Accordingly, these transactional networks are as significant to stream of commerce jurisdiction as the relationship among the defendant, the forum and the litigation is to minimum contacts jurisdiction.[578]

a. *There is No Specific Jurisdiction in Stream of Commerce Jurisdiction*

The minimum contacts doctrine permits a court to exercise specific jurisdiction over a defendant who has engaged in forum-related activities that give rise to the claim.[579] The defendant's acceptance of forum benefits in exchange for forum activities justifies the inference that the defendant constructively consented to be sued in that forum, but only for conduct related to the claim. In the stream of commerce context, specific jurisdiction requires a direct causal link between a plaintiff's injury and a specific widget.[580] However, too few widgets may be too isolated or fortuitous to justify specific jurisdiction, while too many widgets may be jurisdictional surplusage if one of them does not give rise to the claim.[581] When this happens, specific jurisdiction does not easily apply and, consequently, some stream participants may avoid jurisdictional amenability.

The applicability of specific jurisdiction to the stream of commerce theory is based on the assumption that procedural due process requires compliance with the minimum contacts doctrine and, hence, with its attendant specific jurisdiction construct. This assumption, however, is based largely on a misconception about the role that specific jurisdiction plays in framing the jurisdictional discussion in product liability cases.

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[577] *See* Dayton, *supra* note 3, at 239 (stating that a product enters into a chain of distribution because a defendant chooses to put it there for the purpose of deriving economic benefit from its sale by intermediaries within the forum); Cummins, *supra* note 563, at 1034 (stating that the manufacturer's economic purposes are effectuated wherever its product is consumed).

[578] *See supra* note 551.

[579] *See* SHREVE AND RAVEN-HANSEN, *supra* note 53, at 73, 73 n.2 ("Specific jurisdiction proceeds from a relationship between the forum and the noncitizen defendant funneled through the facts of the controversy.").

[580] *See* Morton, *supra* note 489, at 465 (observing that *World-Wide Volkswagen* requires a causal connection between the sale of the specific product that caused the injury and the defendant's effort to serve the market).

[581] *See* Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292, 297-98 (6th Cir. 1964) (refusing to exercise jurisdiction based on the presence of only a few products in the forum).

For example, specific jurisdiction requires the facts giving rise to the claim to be related to the facts giving rise to jurisdiction.[582] Presumably, if the claim sounds in tort, the court's jurisdictional authority must be tort-based as well, i.e., jurisdiction will be sanctioned by a long-arm provision that authorizes jurisdiction over "torts" or "tortious acts." As applied to product liability, specific jurisdiction bases a court's jurisdictional authority on the activities of the defendant that create the product defect that causes the injury that gives rise to the claim. Consequently, the commercial transactions that bring the product to the plaintiff will not support specific jurisdiction because they do not give rise to the claim. In sum, stream of commerce jurisdiction has been cast in the tort model to create the specific jurisdiction that satisfies minimum contacts.

If, however, the assumption that procedural due process requires compliance with the minimum contacts doctrine is false, then specific jurisdiction is irrelevant to stream of commerce jurisdiction since specific jurisdiction has no independent significance outside of the minmum contacts doctrine.[583] Once specific jurisdiction has been eliminated from the stream of commerce analysis, the tort model of stream of commerce jurisdiction becomes irrelevant as well. Shorn of this doctrinal misconception, the real relationship between stream of commerce jurisdiction and procedural due process can be reevaluated.

b. Transactional Jurisdiction

The construct of specific jurisdiction is inapplicable to stream of commerce jurisdiction which imputes jurisdictional significance, not to one widget or one million widgets, but to the transactional network that brings the widget to the plaintiff. The concept of transaction-based jurisdiction is not a new idea. Several renowned scholars have offered compelling arguments for recharacterizing some aspects of minimum contacts jurisdiction as "transactional" rather than "tortious." For example, in 1957, Chief Justice Traynor theorized that minimum contacts should be based on the relationship between the forum and the transaction.[584] In 1965, Professor Hazard proposed that minimum contacts between the transaction and the forum could justify personal jurisdiction in foreign attachment

[582] *See supra* note 579.

[583] *See* LANDERS, MARTIN & YEAZELL, CIVIL PROCEDURE 88 (2d ed., Little, Brown & Co. 1988) (explaining the differences between general and specific jurisdiction and stating that minimum contacts do not apply to general jurisdiction).

[584] Atkinson v. Superior Court, 316 P.2d 960, 965-66 (Cal. 1957).

proceedings.[585] In 1983, Professor Seidelson wrote in a footnote that "a manufacturer's vulnerability to jurisdiction should be as broad as the market enjoyed by the manufacturer's product."[586] In 1984, Professor Trautman proposed "that courts should apply a market analysis to all 'stream of commerce' cases"[587] because a stream participant's receipt of significant benefits from a specific forum satisfies minimum contacts.[588] Professor Trautman added that *Gray* represented a good example of the market analysis approach to jurisdiction.[589]

These commentators recognized the discord between stream of commerce jurisdiction and minimum contacts jurisdiction but offered the transactional or market models as alternative means of satisfying the minimum contacts doctrine.[590] This article proposes a different solution. It proposes that the absorption of stream of commerce jurisdiction into minimum contacts jurisdiction was a doctrinal error that arose in *Gray* and has yet to be sorted out.[591] When evaluated independently, it becomes clear that both jurisdictional constructs are distinct and separate, yet each distinctively and separately satisfies procedural due process.

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[585]Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241, 285 (1965).

[586]Seidelson, *supra* note 134, at 20, 20 n.79 ("[T]o the extent . . . that the manufacturer's vulnerability to jurisdiction should be as broad as the markets enjoyed by the manufacturer's product, I would concur.").

[587]Trautman, *supra* note 55, at 156.

[588]Trautman, *supra* note 55, at 171.

[589]Trautman, *supra* note 55, at 171-72. "Transactional jurisdiction" was also discussed in Lilly, *supra* note 556, at 113. *See also* Cummins, *supra* note 563, at 1031 (arguing that the minimum contacts inquiry asks the wrong questions when applied to stream of commerce jurisdiction since the "how" and the "where" of a stream's course is not a significant concern of many stream participants).

[590]The proposition that stream of commerce jurisdiction satisfies the minimum contacts doctrine was also consistent with the overwhelming majority of cases that addressed the issue. *See* Dayton, *supra* note 3, at 267-68 ("By the time the Court rendered its *Asahi* decision early in 1987, courts in at least sixteen states, and most federal appellate courts had ruled that the stream of commerce theory comported with the principles articulated in *International Shoe* and its progeny.").

[591]Murphy, *supra* note 4, at 316 (stating that the confusion about stream of commerce jurisdiction is partly due to the ambiguities in *Gray*).

B. *Procedural Due Process and the Quid Pro Quo*

All exercises of personal jurisdiction must satisfy procedural due process.[592] According to *World-Wide Volkswagen*, procedural due process is satisfied when "the orderly administration of the laws gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[593] Accordingly, a forum's exercise of personal jurisdiction will satisfy due process when its laws are administered with sufficient regularity and order to forewarn a defendant of the jurisdictional consequences of its conduct.[594] Once forewarned, the defendant can invite or avoid jurisdiction by structuring its conduct according to the forum's legal requirements.[595] If the defendant refrains from such conduct, it will not be subject to the forum's jurisdictional authority. If the defendant engages in such conduct, it may be subject to the forum's jurisdictional authority. The difference between the two possibilities is that in the latter the defendant enters into a relationship of reciprocal benefits and obligations with the forum, whereas in the former no such relationship arises. The receipt of forum benefits forewarns the defendant that it may be obligated to account for the consequences of its conduct in that forum.[596] Hence, the essence of procedural due process is a relationship of reciprocal benefits and obligations between the defendant and the forum: a quid pro quo of constitutional significance.[597]

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[592]Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of . . . judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

[593]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (citation omitted).

[594]*See* Quesenberry, *supra* note 134, at 196 (discussing how *World-Wide Volkswagen's* "predictability" requirement applies to the stream of commerce).

[595]*World-Wide Volkswagen*, 444 U.S. at 297; *see* Quesenberry, *supra* note 134, at 196.

[596]*See* Greenstein, *supra* note 134, at 868 (theorizing that under the communitarian approach jurisdiction is justified when society, through a forum, has conferred benefits on a defendant).

[597]*See* Greenstein, *supra* note 134, at 868 (theorizing that *International Shoe's* requirements amount to a quid pro quo of forum benefits for jurisdictional obligations); *id.* at 867 (theorizing that the concept of purposeful availment is based on a quid pro quo by which the individual becomes indebted to society for the benefits it has bestowed on him); *see also* Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time For A Change,* 63 OR. L. REV. 485, 520 (1984) (describing jurisdiction as the quid pro quo for choosing to deal with a nonresident supplier or buyer).

The quid pro quo theory of procedural due process applies easily to both stream of commerce and minimum contacts jurisdiction. Stream of commerce jurisdiction looks to the nature of the bargain the defendant made in order to participate in a stream's transactional network, and asks: What obligations did the defendant incur? What benefits did the defendant receive? Does this bargain forewarn the defendant of the jurisdictional consequences of its conduct?[598] Bargains made in which obligations incurred are exchanged for benefits received from a transactional network suggest a straightforward constitutional proposition: The defendant will be amenable to jurisdiction wherever its bargain yields benefits.[599]

The minimum contacts doctrine utilizes a quid pro quo when it permits a state to exercise jurisdiction over a defendant who received benefits from its forum-related activities that gave rise to the lawsuit. Minimum contacts jurisdiction, however, is not the only way to satisfy the quid pro quo. Despite *Shaffer's* admonition that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[600] personal jurisdiction can be exercised absent contacts.[601] The defendant's presence in the forum when served[602] and consent to the forum's jurisdiction have long been

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[598]*See* Hornbeck, *supra* note 541, at 1403 (stating that to determine a stream defendant's amenability to jurisdiction courts ask: "Did the defendant plan, assist, or promote activities within the forum?"); Murphy, *supra* note 4, at 260 ("[C]ourts [identify] the following factors as relevant to stream of commerce analysis: the defendant's role in the distribution system, the defendant's receipt of substantial benefits from the forum, and the defendant's ability to foresee that its products would reach the forum.").

[599]*See supra* note 585.

[600]Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

[601]*See* Richman, *supra* note 3, at 636-37 (discussing non-contact bases of jurisdiction); Mullenix, *supra* note 490, at 363 n.207-10 (discussing non-contact bases of personal jurisdiction); Greenstein *supra* note 134, at 866 (stating that due process is not limited to contacts); Lewis, *supra* note 487, at 3-6 (discussing why contacts are not the exclusive measure of jurisdictional justification); Kurland *supra* note 492, at 578-89 (discussing the development of "presence" and "consent" as bases for jurisdiction).

[602]*See* Burnham v. Superior Court, 495 U.S. 604, 609 (1990); Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."). The issue in *Burnham* was whether the minimum contacts requirements applied when a defendant was served while physically present in the forum. Joined by three justices, Justice Scalia stated in Section II. B: "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Id.* at 610. Four justices disagreed, arguing that absent minimum contacts, jurisdiction over a defendant merely because it

jurisdictionally sufficient despite the absence of minimum contacts.[603] Jurisdiction also can be validly exercised when a defendant waives a jurisdictional objection,[604] is subject to implied consent,[605] consents to jurisdiction by contract,[606] is estopped to deny consent to jurisdiction as a discovery sanction,[607] or is domiciled[608] or incorporated[609] in a forum. The sin qua non of procedural due process is not contacts, but the quid pro quo relationship between the defendant and the forum that provides fair and forewarning of the jurisdictional consequences of the defendant's conduct.[610]

These non-contact bases of jurisdiction satisfy procedural due process because each arises from a relationship of obligations and benefits between the defendant and the forum. If the defendant does not want to be sued in State X, it should not be present there, domiciled there, consent to be sued there, or waive consent to suit there by mistake or misbehavior. According to *World-Wide Volkswagen*, these non-contact bases of jurisdiction can satisfy procedural due process only if they give "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."[611] Historically, domicile, incorporation, presence, and consent have met that test because the consistent manner in which they have been applied over time satisfies the forewarning function of due process.[612] Whether jurisdiction is contact or

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was physically present in the forum when served violates due process. *Id.* at 628-40 (Brennan, J., concurring).

[603]*See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-20 (1972); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 317-18 (1964). *See also supra* note 601 this section.

[604]FED. R. CIV. P. 12(h)(1) (a jurisdictional objection is waived if it is not timely asserted). *See supra* note 600.

[605]*See* Hess v. Pawloski, 274 U.S. 352, 356-57 (1927).

[606]*See Nat'l Equip. Rental*, 375 U.S. at 314-16. S*ee also supra* note 601.

[607]*See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704-09 (1982). *See also supra* note 601.

[608]*See generally* Milliken v. Meyer, 311 U.S. 457 (1940). *See also supra* note 601.

[609]*See supra* note 601. *See also* Landers, Martin & Yeazell, *supra* note 583, at 89 (stating that it is "generally accepted that a corporation may be sued in its state of incorporation for all claims"); Lewis, *supra* note 487, at 3.

[610]*See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Seidelson, *supra* note 134, at 18 (stating that *World-Wide Volkswagen's* primary rationale was that the due process clause is entitled to protect the nonresident from jurisdictional surprise).

[611]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[612]*See* Brilmayer, *supra* note 52, at 87-88, 88 n.56 (stating that domicile, incorporation, doing business and other bases of jurisdiction that are unrelated to the claim satisfy procedural due

non-contact based, the function of procedural due process remains the same: If a forum sufficiently forewarns a defendant of the jurisdictional consequences of its conduct, and the defendant accepts the benefits of the forum to pursue such conduct, then the forum can hold the defendant accountable for that conduct: Quid pro quo.[613]

Applying the minimum contacts doctrine to stream of commerce conduct cannot satisfy procedural due process. As many commentators have recognized, stream of commerce jurisdiction *qua* minimum contacts has yielded a highly inconsistent, confused, and unpredictable body of law.[614] The stream of commerce theory has been applied so broadly and inconsistently for the last forty years that it is conceivably impossible for a defendant to "structure" its behavior to avoid jurisdictional amenability. Consequently, the forewarning function of procedural due process cannot be fulfilled.

The stream of commerce theory and the minimum contacts doctrine are distinct and separate theories of jurisdiction. Although both serve the same purpose, each attaches jurisdictional significance to conduct in which only one or the other, but not both, can engage. Like an emotionally estranged couple who share the same bed but compete for its comforts by pulling the blankets off of each other, stream of commerce jurisdiction and the minimum contacts doctrine need to be disentangled from each other so that each can fulfill its constitutional function.[615]

VII. CONCLUSION

The purpose of the minimum contacts doctrine is to prevent the unpredictable ensnaring of a defendant whose relationship with a state is

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process because the defendant "is enough of an 'insider' that he may safely be relegated to the State's political processes").

[613] *See supra* note 610.

[614] *See* Hornbeck, *supra* note 541, at 1404 (asserting that courts apply stream of commerce jurisdiction in four distinct ways); Hornbeck, *supra* note 541, at 1421-1432 (stating that stream of commerce jurisdiction has been applied inconsistently); Murphy, *supra* note 4, at 282 (stating that application of stream of commerce jurisdiction is confusing and unpredictable); Dayton, *supra* note 3, at 245 (arguing that post-*Asahi* stream of commerce jurisdiction has been applied broadly and inconsistently); Quesenberry, *supra* note 134, at 203-205 (arguing that post-*Asahi* courts have applied stream of commerce jurisdiction in such conflicting and inconsistent ways that jurisdictional amenability is unpredictable); Louis, *supra* note 53, at 432 (stating that stream of commerce cases "have only limited precedential value" because they are intensely fact specific).

[615] This metaphor is attributed to Prof. Wendy Gordon, Boston University School of Law.

insufficient to exact the quid pro quo of forum benefits for litigation burdens. The purpose of the stream of commerce doctrine is to provide jurisdictional justification for the joinder of related claims against multiple participants in an economic network. To satisfy its joinder function, stream of commerce jurisdiction must provide litigation efficiencies that permit entire controversies against transactionally related defendants to be resolved in one lawsuit in one forum. To accomplish its jurisdictional function, stream of commerce jurisdiction must satisfy procedural due process. Procedural due process requires a system that is sufficiently regular, consistent, and predictable to provide fair and forewarning to a potential defendant of the possibility of suit in one place and the opportunity to avoid suit in another. Absent predictability, neither the state nor the defendant can satisfy the quid pro quo because neither can assess ex ante the consequences of the other's conduct.

Stream of commerce jurisdiction, when viewed through the minimum contacts lens, has never satisfied the regularity and predictability requirements of procedural due process. *Gray*'s distortion of the relationship between stream of commerce and minimum contacts jurisdiction and *Asahi's* resulting plurality opinions have rendered the stream of commerce construct more metaphorical than meaningful. Stream of commerce jurisdiction, however, satisfies procedural due process, not because of its adherence to the minimum contacts doctrine, but because participation in transactional networks satisfies the relationship of reciprocal benefits and obligations that is the *sin qua non* of jurisdictional due process. Ironically, while stream of commerce jurisdiction has gained stature as "good law," the case from which it emerged, *Gray v. American Radiator,* has devolved into "bad law" when evaluated in light of contemporary jurisdictional jurisprudence.