

J. MCINTYRE AND THE GLOBAL STREAM OF COMMERCE

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INTRODUCTION

The U.S. Supreme Court’s grant of certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*¹ ended the twenty-year hiatus since the Court last visited the doctrinal area of personal jurisdiction. In its last personal jurisdiction decision, *Burnham v. Superior Court*,² the Court issued a highly fragmented ruling in a case raising the question of whether in-state service of process was sufficient to create general jurisdiction over a private defendant who was “tagged” with service of process in a divorce action while on a three-day business trip to the state of California.³ Three years before that, in its immediately previous endeavor, the Court fragmented once again in ascertaining the circumstances under which a foreign manufacturer could be subjected to state-court jurisdiction when a component part it manufactured entered the forum state through the stream of commerce and caused injury.⁴

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¹ 131 S. Ct. 2780 (2010). *See also* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 62 (2010) (granting certiorari).

² 495 U.S. 604 (1990).

³ *Id.* at 607–10.

⁴ *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102 (1987).

In each of these 4-4-1 decisions,⁵ the Court's ultimate result was unanimous,⁶ yet the clarity of the underlying holdings served to mask the stark ideological divisions that polarized the Justices. This was most pronounced in *Burnham*, which erupted into a debate, characteristic of the 1980s, between Justice Brennan, who had consistently maintained that the Due Process Clause and other parts of the Constitution must be read as evolving normative conceptions, and Justice Scalia, who prefers to articulate bright-line rules that are consistent with the purported intention of the Framers.⁷

⁵ By "4-4-1," I refer to decisions characterized by two four-vote plurality opinions with one Justice joining neither and writing separately. Perhaps the most well-known of such decisions was *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁶ In *Burnham*, the Court was unanimous in concluding that California's exercise of jurisdiction over defendant Burnham was proper because he was served process in California, even though he was only present in the state for three days. 495 U.S. at 640. Likewise the *Asahi* Court was unanimous in concluding that California's exercise of jurisdiction over a Japanese firm on a cross-complaint for indemnification was unreasonable and violated due process notions of fair play and substantial justice because neither the original plaintiff nor the state of California had any interest in securing a California forum for the litigation. 480 U.S. at 114-16. Justice Scalia refused to join Section II-B of Justice O'Connor's opinion in *Asahi*, and was thus the only Justice to suggest that the fairness factors could not be utilized to invalidate a finding of minimum contacts. 480 U.S. at 104.

⁷ Justice Scalia argued for a plurality of the Court in *Burnham* that the in-state service of process rule has been firmly in place since *Pennoyer v. Neff*, 95 U.S. 714 (1877), and none of the subsequent developments under the minimum-contacts doctrine, which involved defendants served out-of-state, altered this approach. Therefore, Scalia saw no need for a "fair play and substantial justice" analysis of whether California's exercise of jurisdiction over Burnham violated due process. As Scalia stated:

[T]he concurrence's proposed standard of "contemporary notions of due process" requires more: it measures state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just. Authority for that seductive standard is not to be found in any of our personal jurisdiction cases. It is, indeed, an outright break with the test of "traditional notions of fair play and substantial justice," which would have to be reformulated "*our* notions of fair play and substantial justice."

Burnham, 495 U.S. at 623 (plurality opinion). Justice Brennan argued for a different plurality in *Burnham* that a minimum-contacts analysis had to be performed for *all* assertions of state court jurisdiction as the Court had previously held in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and this included an assessment of whether the exercise of jurisdiction was consistent with a "fair play and substantial justice analysis." *Burnham*, 495 U.S. at 629 (Brennan, J., concurring in judgment). As Brennan stated: "The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process." *Id.* For academic commentary on this debate, see generally, Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on Burnham v. Superior Court*, 22 RUTGERS L.J. 689 (1991); Travis Knobbe, Note, *Brennan v. Scalia: Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265 (2008).

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During this twenty-year interregnum, the composition of the Court changed, almost in its entirety. Justice Brennan was replaced by Justice Souter (1990); Justice Marshall by Justice Thomas (1991); Justice White by Justice Ginsburg (1993); Justice Blackmun by Justice Breyer (1994); Justice Rehnquist by Justice Roberts (2005); Justice O'Connor by Justice Alito (2006); and Justice Stevens by Justice Kagan (2010). Justice Souter sat a full twenty years on the Court without hearing a single personal jurisdiction case, before being replaced by Justice Sotomayor (2009).⁸ Having neglected this area for an entire generation, almost any new decision of the Court would be worthy of close attention. But the case the Court agreed to hear was also clearly a compelling one, addressing the ability of a United States plaintiff to sue the foreign manufacturer of a product in the state where the injury caused by the product occurred. Because of increased globalization, more and more products that have been manufactured abroad are ending up in the United States marketplace,⁹ suggesting that these cases will proliferate in the future. However, in its response to these developments, the Court issued yet another fragmented decision. In a plurality opinion, bolstered into a majority by two votes from Justices who agreed with the result of the plurality but not its reasoning, the Court ruled that a foreign manufacturer who consciously targeted the entire United States market and sold products through an independent American distributor, could not be subject to jurisdiction in a New Jersey state court under the stream of commerce theory, absent a showing that it had sold “sizeable quantities” of its product in the state of New Jersey.¹⁰ As a consequence

⁸ The dearth of Supreme Court personal jurisdiction cases during this twenty-year period cannot be attributed to consensus regarding the doctrine in the lower courts. For a summation of the lower court splits on the stream of commerce theory after *Asahi*, see *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 70–73 (2010). Cf. Rodger D. Citron, *The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of John Paul Stevens*, 88 U. DET. MERCY L. REV. 433, 468–69 (2011) (suggesting that the Court stayed out of the personal jurisdiction area until Justice Stevens retired).

⁹ According to Justice Ginsburg’s dissenting opinion, in 2010 the United States imported nearly 2 trillion dollars in foreign goods. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 n.6 (2011) (Ginsburg, J., dissenting) (citing U.S. Census Bureau data).

¹⁰ *J. McIntyre Mach.*, 131 S. Ct. at 2786–91 (plurality opinion); *id.* at 2795 (Ginsburg, J., dissenting). The Court issued a second personal jurisdiction decision the same day in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2010), a case arising in North Carolina where the North Carolina appellate court allowed an assertion of jurisdiction over the Belgian subsidiary of an American corporation in a suit by plaintiffs in North Carolina regarding a bus accident that took place in France. In *Goodyear*, the Supreme Court unanimously reversed a lower court decision that, in its reach to assert jurisdiction, collapsed the distinction between specific jurisdiction,

of this ruling, a worker-plaintiff who suffered a severe and disabling injury while using the manufacturer's product at his place of employment, and in his state of residence, was forced to abandon his litigation in New Jersey and travel to England to adjudicate his claim before a foreign legal system. The holding was a big win for the business community over plaintiffs,¹¹ and is feared to have established a blueprint for multinational corporations to follow in order to avoid products liability suits in the United States.¹²

As Justice Kennedy stated in his plurality opinion for the Court, *J. McIntyre* presented an opportunity to clarify the circumstances in which a state court can exercise specific jurisdiction over the foreign manufacturer of a product that has entered the state and caused an injury, an issue left unresolved after the *Asahi* decision of 1987.¹³ This Article argues that the Court woefully failed to accomplish that goal. After a summation of the New Jersey litigation, the Article postulates a set of goals that Justice Kennedy sought to attain in his opinion for the Court and the extent to which he satisfied them, in light of the fact that he was only able to get three additional members of the Court, Justices Scalia, Thomas and Roberts, to go along with his reasoning. These goals included: establishing that the far reaching opinion of the New Jersey Supreme Court could not be sustained consistently with the plurality's reading of Supreme Court precedent; reining in the "stream of commerce theory" as a means of establishing state court jurisdiction; minimizing the "fairness factors" as an independent wing of

where the plaintiff's cause of action arises out of or relates to the defendant's contacts with the forum state, and general jurisdiction, where there is no such relationship. Although the Supreme Court has decided a series of general jurisdiction cases, the discussion of these differences first appeared only in brief footnotes, providing some insight into the confusion of the North Carolina courts and others. See *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8 & 9; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.15 (1985).

¹¹ Cf. Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1 (reporting on a study by the Constitutional Accountability Center concluding that the Roberts Court has sided with the Chamber of Commerce 68% of the time compared with 56% of the time during the last eleven years of the Rehnquist Court). The United States Chamber of Commerce is a pro-business advocacy group that files "friend of the court" briefs in Supreme Court cases. The Chamber and its "Chamber Litigation Center" claim to be the "voice of business in the courts on issues of national concern to the business community." *Id.*

¹² Cf. *J. McIntyre Mach.*, 131 S. Ct. at 2795 (Ginsburg, J., dissenting) ("Inconceivable as it may . . . appear[] . . . the splintered majority today turn[s] the clock back to the days before modern long arm statutes when a manufacturer, to avoid being haled into a court where a user was injured, need only Pilate-like wash its hands of a product by having independent distributors market it." (citation and internal quotations omitted)).

¹³ *Id.* at 2786 (plurality opinion).

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the personal jurisdiction analysis that can be used by a plaintiff to establish jurisdiction; and setting Internet-conscious rules for future personal jurisdiction cases. Justice Kennedy's plurality opinion also sought to destabilize Justice Brennan's personal jurisdiction legacy, a jurisprudence that sought to assure that plaintiffs have fair and reasonable access to the courts to adjudicate their claims.¹⁴

While *J. McIntyre* makes it extremely difficult for United States plaintiffs to seek remedies against foreign corporations in the United States, and plaintiff Nicastro now has no alternative to litigating in Britain if he intends to pursue his case, the Article shows that the absence of a clear rationale for the Supreme Court's decision has left room for lower courts to exercise personal jurisdiction in cases presenting facts remarkably similar to those presented in *J. McIntyre*. Ironically, the analysis followed by many lower courts after *J. McIntyre* bears a closer resemblance to the New Jersey Supreme Court decision that *J. McIntyre* reversed, than to Justice Kennedy's plurality opinion. For this reason, this Article gives close attention to the New Jersey Supreme Court's reasoning, and suggests that there is great reluctance amongst lower-court judges to impose the harsh defendant-friendly rules contained in Justice Kennedy's plurality opinion, and that courts have adopted narrow readings of *J. McIntyre* that do not impose such impacts on plaintiffs.

I. FACTS

Robert Nicastro lost four fingers on October 11, 2001, when his right hand was caught in the blade of Model 640 Shearing machine while employed at a scrap recycling facility in Saddle River, New Jersey.¹⁵ The machine was manufactured by J. McIntyre Machinery Ltd., a British company, and sold to Nicastro's American employer, Curcio Scrap Metal. The actual sale was transacted by McIntyre America Ltd., J. McIntyre's exclusive, and now bankrupt, American distributor, which was based in Ohio. Frank Curcio purchased the machine at a trade fair booth in Nevada where he met

¹⁴ Cf. Herman Schwartz, *Opening the Courthouse Door*, in JOSHUA ROSENKRANZ & BERNARD SCHWARTZ, REASON & PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 275 (1997) ("Justice Brennan devoted much of his effort during his thirty-four years on the Court to making the federal courts more accessible to ordinary people seeking justice for their grievances." *Id.*); Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 554 (2012) (describing Brennan's approach as a "flexible fairness-based assessment of personal jurisdiction").

¹⁵ New Jersey is the largest processor of scrap metal in the United States, far exceeding Kentucky, its next rival in amount of tons recycled. See *J. McIntyre Mach.*, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

with representatives of J. McIntyre and McIntyre America. The machine was shipped from McIntyre America's headquarters in Ohio to New Jersey, and paid for with a check made out to McIntyre America.¹⁶

Although McIntyre America was a legally distinct and separate corporation from J. McIntyre Ltd., the two companies shared the same name and worked together to establish a marketing strategy for selling the machines in the United States. At the heart of this strategy was the attendance by the president of J. McIntyre at trade conventions, exhibitions, and conferences throughout the United States with representatives from McIntyre America.¹⁷ The case record is not entirely clear on how individual sales were handled. J. McIntyre claimed that the machines were ordered by McIntyre America, built by J. McIntyre, and then sold back to McIntyre America. Other evidence in the case, however, suggests that some of the machines were sold on consignment basis, with McIntyre America maintaining a stock of machines for which it only received payment of a commission after their sale.¹⁸

Nicastro instituted suit on September 22, 2003, in the Superior Court, Law Division, in Bergen County, New Jersey, against J. McIntyre and McIntyre America, alleging that the shear machine was not reasonably fit, suitable, or safe for its intended purposes, that it failed to contain adequate warnings or instructions, and was so defectively designed as to allow the plaintiff to get injured while oper-

¹⁶ *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 54 (2010). Also included with the machine was an instruction sheet indicating the Nottingham, England address of J. McIntyre Ltd., including its phone and fax numbers and an instruction manual that referenced safety regulations of the United States and the United Kingdom. *Id.* at 55. This recitation of facts is based on the opinion of the New Jersey Supreme Court, which are more complete than those provided by Justice Kennedy's plurality opinion for the Supreme Court. Commentators have noted the different ways the three Supreme Court opinions utilized the facts. See Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 488-91 (2012); Johnjerica Hodge, *Minimum Contacts in the Global Economy: A Critical Guide to J. McIntyre Machinery v. Nicastro*, 64 ALA. L. REV. 417, 438-39 (2012).

¹⁷ These conventions are sponsored by the Institute of Scrap Recycling Industries, Inc., a membership organization that has over 100 members in New Jersey. See *J. McIntyre Mach.*, 131 S. Ct. at 2796 n.1 (Ginsburg, J., dissenting). J. McIntyre attended as many as twenty-six of these events in cities such as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco, but none were in New Jersey. See Oral Argument Transcript, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (No. 09-1343), at 52, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf.

¹⁸ See *Nicastro*, 201 N.J. at 56. At oral argument, counsel for J. McIntyre stated that there was no consignment on the machine that caused the injury to plaintiff Nicastro. See Oral Argument Transcript, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (No. 09-1343), at 60.

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ating the machine in the normal course of employment.¹⁹ The trial court dismissed Nicaastro's suit not once, but twice, due to lack of personal jurisdiction. After the first dismissal, Nicaastro appealed to the New Jersey Appellate Division, which reversed the trial court. In an unreported opinion, the Appellate Division ordered discovery to ascertain whether the trial court could exercise jurisdiction under: 1) a traditional minimum contacts analysis; 2) under Justice O'Connor's plurality opinion in *Asahi*; or 3) under an independent "stream of commerce" theory, identified in the 1986 New Jersey Supreme Court decision, *Charles Gendler Co. v. Telecom Equipment Company*.²⁰ After discovery, the trial court again dismissed the case for lack of personal jurisdiction, concluding that J. McIntyre had no contacts with the state of New Jersey, as it did not solicit business in the state or have any physical presence in the state. While J. McIntyre had contact with the *United States*, the trial court reasoned, such contact was not sufficient to allow jurisdiction to be exercised in New Jersey, absent some indication that J. McIntyre engaged in a nationwide distribution scheme that purposefully brought products into New Jersey and allowed it to benefit from the protection of New Jersey's laws.²¹

The Appellate Division reversed the trial court a second time, stating that it had "no hesitancy" in finding that New Jersey could exercise jurisdiction over J. McIntyre. That court determined that jurisdiction was proper because it would not violate "traditional notions of fair play and substantial justice," and was justified under Justice O'Connor's "stream of commerce" rationale in *Asahi*.²² The court found that J. McIntyre had placed the shearer in the stream of commerce by shipping it to McIntyre America, and had know-

¹⁹ *Nicaastro*, 201 N.J. at 53. This claim was based on the absence of a safety guard that plaintiff asserted would have prevented the accident.

²⁰ *Id.* at 53–54. In *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*, 102 N.J. 460 (1986), the New Jersey Supreme Court held that the stream of commerce theory supports jurisdiction if a manufacturer knew or reasonably should have known that a distribution system has brought the product it manufactured into the forum state, even though the manufacturer did not control the distribution system. In *Gendler*, the court reasoned that the manufacturer's awareness of the distribution system by which it receives economic and legal benefits "justifies subjecting the manufacturer to the jurisdiction of every forum in every jurisdiction within its distributor's market area." *Id.* at 481. Thus, a manufacturer that is aware that its product is being distributed nationwide should be subject to jurisdiction in every state. To avoid this result the manufacturer must "attempt to preclude the distribution and sale of its product in that state." *Id.*

²¹ *Nicaastro*, 201 N.J. at 56.

²² *Nicaastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 565–66 (App. Div. 2008).

ingly participated in a distribution scheme calculated to bring the product into the U.S. market, which included the state of New Jersey. The purchase of the machine and its use in New Jersey served the explicit and intended purposes of the distribution scheme that J. McIntyre had put into effect.²³

The New Jersey Supreme Court affirmed the Appellate Division. It began its analysis with a bold and highly unusual proposition in a case sustaining personal jurisdiction, stating:

We do not find that J. McIntyre had a presence or minimum contacts in this state—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J. McIntyre may be sued in this state must sink or swim with the stream-of-commerce theory of jurisdiction.²⁴

Whereas the Appellate Division had found that J. McIntyre had purposefully availed itself of the U.S. market which includes the state of New Jersey, thus remaining within the parameters of Justice O'Connor's plurality opinion in *Asahi*,²⁵ the language of the New Jersey Supreme Court suggests that it was dispensing with the minimum contacts test altogether, and at least for purposes of the *J. McIntyre* case, substituting in its stead a stream of commerce rationale for the assertion of personal jurisdiction decoupled from a finding of minimum contacts.²⁶

As will be analyzed in greater detail in the following section, the New Jersey Supreme Court, relying on its previous decision in *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*,²⁷ held that J. McIntyre could be held accountable in the New Jersey courts because it was aware of, and engaged in, a distribution scheme conducted in co-partnership with McIntyre America that was carrying its product into each of the fifty states, including New Jersey, thus rendering it immaterial that J. McIntyre had neither advertised, marketed, or sent products into New Jersey.

However, not to be missed by the dissenters in the New Jersey

²³ See *id.* at 559.

²⁴ *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 61 (2010). The Appellate Division had similarly concluded that it was stream of commerce or nothing. See 399 N.J. Super. at 557.

²⁵ *Id.* at 557–58.

²⁶ The court did suggest later on in its opinion, as something of an afterthought, that “arguably” jurisdiction could be asserted under Justice O'Connor's approach. See 201 N.J. at 74.

²⁷ 102 N.J. 460 (1986). Although *Gendler* was the first New Jersey Supreme Court case to adopt the stream of commerce theory, it had been utilized by the New Jersey Appellate Division. See *id.* at 476–77 (citing cases).

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Supreme Court, or by six Justices of the U.S. Supreme Court, this pioneering analysis allowed the New Jersey Supreme Court to conduct an end run around the “traditional” understanding of minimum contacts, substituting in its place the analysis from *Gendler*. Once this had been accomplished, the case was a sure shot for jurisdiction, as the fairness factors all pointed toward New Jersey as a forum for the plaintiff consistent with notions of fair play and substantial justice.

II. ANALYSIS—NEW JERSEY SUPREME COURT

The New Jersey Supreme Court ruling in *Nicastro*²⁸ is one of the most far-reaching decisions ever written in the law of personal jurisdiction. Bold and historical, Justice Albin’s opinion, in its emphasis on providing plaintiff access to the New Jersey courts, bears an uncanny resemblance to the numerous Warren Court-era decisions in which the Supreme Court confidently established ever-broader parameters in its efforts to expand the promises of American democracy through enhanced access to the courts and the political process.²⁹ As the following discussion suggests, *Nicastro* was hardly flawless, but it nonetheless came to a conclusion more consistent with Supreme Court precedent than the Supreme Court’s fragmented ruling in *J. McIntyre*.

The *Nicastro* decision begins with a sweeping historical overview, taking up almost half its length, providing a recap of the law of personal jurisdiction beginning with the rule of *Pennoyer v. Neff*³⁰ and continuing through *Asahi* and lower court decisions construing it. The thrust and underlying premises of the historical analysis was clear: by documenting the Supreme Court’s adjustment of the rules governing personal jurisdiction to remain current with the shifting demands of a dynamic society, particularly changes regarding transportation technology and the organization of the business corporation, the New Jersey Supreme Court suggested that in the thirty years since *Asahi* was decided, further transformations in the American economy mandated additional tweaks in the jurisdictional rules and that, as in the past, the courts should lead the

²⁸ To avoid confusion, I refer to the New Jersey Supreme Court decision as *Nicastro* and the U.S. Supreme Court decision as *J. McIntyre*.

²⁹ See, e.g., James B. O’Hara, *Introduction*, in *THE WARREN COURT: A RETROSPECTIVE* 3 (1996) (noting “the almost revolutionary significance of the Supreme Court’s role in extending the jurisprudence of civil rights, equal protection, and freedom of speech during Warren’s leadership”).

³⁰ 95 U.S. 714 (1877).

way.³¹ Thus, the shift from the rigid defendant-friendly rule of *Pennoyer* to the flexibility of *International Shoe* was necessitated by the “technological progress in communications and transportation” which “increased the flow of commerce between states” and consequently the “need for state courts to exercise jurisdiction over non-residents,”³² especially foreign corporations.³³ While noting that the Court in *World-Wide Volkswagen* refused to sustain jurisdiction for the plaintiff, the New Jersey Supreme Court nonetheless heralded that decision for establishing a “new theory of state court jurisdiction to respond to the contemporary realities of modern commerce,”³⁴ namely the “stream of commerce theory.” In *World-Wide Volkswagen*, Justice White wrote:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.³⁵

The Supreme Court’s opinion in *World-Wide Volkswagen* served as a direct precedent for the New Jersey Supreme Court’s first stream of commerce decision, *Gendler & Co., Inc. v. Telecom Equipment Corp.*,³⁶ which was decided a year after *World-Wide Volkswagen* and heavily relied upon by the New Jersey Supreme Court in *Nicastro*.

Gendler upheld New Jersey state court jurisdiction over a Japanese manufacturer who, through its New York subsidiary, sold an

³¹ The opinion begins:

Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way through purposeful marketing, to our nation’s shores and to our state. The question before us is whether the jurisdictional law of this State will reflect this new reality.

Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 52 (2010).

³² *Id.* at 62, (citing *Hanson v. Denkla*, 357 U.S. 235, 250–51 (1958)).

³³ *Id.* (citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957)).

³⁴ *Id.* at 64 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

³⁵ 444 U.S. at 297–98.

³⁶ *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460 (1986). Although *Gendler* was the first New Jersey Supreme Court case to adopt the stream of commerce theory, it had been utilized by the New Jersey Appellate Division. *Id.* at 476–77 (citing cases).

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allegedly defective telephone system to an independent New Jersey corporation, which then sold it to the New Jersey office of the Gendler company. Recognizing the expansion of state court jurisdiction authorized by numerous decisions of the Supreme Court, the *Gendler* court explained that the enlargement of state court jurisdiction “has special relevance for foreign corporations engaged in commercial activities in the United States” because of the “metamorphosis” of the United States from a domestic to an international economy.³⁷ The *Gendler* court based its holding on the basis that the Japanese manufacturer and distributor placed at the start of a distribution chain served a large market and “purposefully conducted their activities to make their product available for purchase in as many forums as possible. For such a manufacturer, the sale of a product in a distant state is not simply an isolated event but a result of the corporation’s efforts to cultivate the largest possible market for its products.”³⁸

According to the *Gendler* court:

[F]oreign manufacturers derive benefits from the indirect sales of products throughout the United States. By increasing the distribution of its products, the manufacturer not only benefits economically from indirect sales to foreign residents, but also benefits from protection provided by the laws of the forum state. Thus, a manufacturer that distributes its products into the stream of commerce for widespread distribution derives both legal and economic benefits from the states in which its products are sold. In sum, the system through which the manufacturer distributes its products evidences the manufacturer’s purposeful penetration of the market.

A foreign manufacturer that purposefully avails itself of those benefits should be subject to personal jurisdiction, even though its products are distributed by independent companies, or by an independent, but wholly owned subsidiary.³⁹

The *Gendler* court noted the widespread use of middlemen to act as distributors for a manufacturer’s products and asserted that to allow a manufacturer to “shield itself from liability for damages caused by its products distributed by those middlemen would permit a legal technicality to subvert justice and economic reality in the worst sense.”⁴⁰ *Gendler* concluded that if a manufacturer benefits from the sales of its products through a distributor and is aware

³⁷ *Id.* at 474.

³⁸ *Id.* at 477–79.

³⁹ *Id.* at 478–79 (citations omitted).

⁴⁰ *Id.* at 479 (citations omitted).

that a distribution network is carrying its products through a nationwide distribution system, the manufacturer should expect that its products will be sold in each state and furthermore that it will be subject to jurisdiction in each state.⁴¹ *Gendler* was therefore the key guidepost for the New Jersey Supreme Court in deciding *Nicastro*.

Following its extensive discussion of *Gendler*, the New Jersey Supreme Court in *Nicastro* next looked to *Asahi*, to see whether it undermined the *Gendler* analysis. Parsing the three *Asahi* opinions, the court noted that a majority opinion could not be mustered in answer to the question posed by Justice O'Connor at the outset of her plurality opinion.⁴² While four Justices agreed with Justice O'Connor's stream of commerce "plus" theory, requiring some additional intentional conduct by the manufacturer to demonstrate purposeful availment such as advertising, marketing, or use of a distributor to serve the forum state, three different Justices agreed with the theory articulated by Justice Brennan, which did not require any additional conduct but only awareness on the part of the manufacturer that the product it manufactured had entered the forum state causing injury.⁴³

The *Nicastro* court noted the many lower court cases decided after *Asahi*, recognizing that some adopted the O'Connor view, some the Brennan view, while others either refused to choose between the two approaches or somehow combined them.⁴⁴ Even more noteworthy than the continuing conflict amongst the federal circuit and state courts after *Asahi* was the Supreme Court's refusal to grant certiorari in these cases, irrespective of whether they adopted the O'Connor or Brennan view.⁴⁵ With *Gendler* and other

⁴¹ *Gendler & Co. Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 478 (1986). No petition for certiorari was filed in *Gendler*.

⁴² O'Connor framed the question as:

This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"

Asahi Metal Industry Co. v. Superior Ct. of Solano Cnty, 480 U.S. 102, 105 (1987).

⁴³ The New Jersey Supreme Court erroneously concluded that a "unanimous" majority agreed that the exercise of jurisdiction would violate notions of fair play and substantial justice, *Nicastro v. McInyre Mach. Am., Ltd.*, 201 N.J. 48, 67 (2010), by including Justice Scalia, who did not join Section II-B of Justice O'Connor's opinion. See *Asahi*, 480 U.S. at 104.

⁴⁴ *Nicastro*, 201 N.J. at 70–71 nn.10–12.

⁴⁵ For example, in 1995 the Supreme Court denied certiorari in *A. Uberti and C. v.*

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appellate courts upholding the Brennan perspective on stream of commerce cases,⁴⁶ there indeed were few reasons why the New Jersey Supreme Court should not allow for the assertion of jurisdiction in *Nicastro* under the stream of commerce theory articulated in *Gendler*.

Once the stream of commerce requirements under *Gendler* were satisfied, establishing the reasonableness of jurisdiction was straightforward. The fairness factors all pointed toward New Jersey as a forum consistent with notions of fair play and substantial justice. The defendant would not be burdened by coming to New Jersey since it had made over twenty-six visits to the United States to market its product at ISRI scrap metal conventions—indeed attending every ISRI convention held between 1990 and 2005.⁴⁷ Moreover, the plaintiff had an extremely strong interest in litigating the case in New Jersey, where he lived and worked and which

Leonardo, 892 P.2d 1354 (Ariz. 1995), *cert. denied*, 516 U.S. 906 (1995), a case sustaining jurisdiction on facts almost identical to those of *Nicastro*. In that case the Arizona parents of a two-year-old child who was killed in an accident involving a firearm sued the Italian manufacturer of the weapon in a products liability action in an Arizona court. The manufacturer utilized at least eight American distributors who targeted the entire United States market for distribution of the firearm but had not specifically targeted Arizona and had no control over the actions of the U.S. distributors. The Arizona Supreme Court ruled that to reject jurisdiction because Arizona was not specifically targeted “turns common sense on its head” and “defies economic logic” because

[d]ue process does not give foreign companies a safe harbor to manufacture goods designed for and shipped to America and at the same time immunize them from the penalties of noncompliance with American safety standards. Such a rule would drive American manufacturers out of business while allowing foreign businesses to produce, with absolute immunity, unreasonably dangerous and defective products for the American market.

Id. at 1363. This was especially true because the defendant “could have avoided the risk of products liability in Arizona by making some affirmative effort to preclude distribution of its products in [the] state.” *Id.* at 1363 n.8.

The Supreme Court also denied certiorari in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993), *cert. denied*, 510 U.S. 914 (1993). In that case, a Kentucky plaintiff sued a Netherlands-based drug company in a Kentucky court for the ill effects of a drug she had taken during her pregnancy. After removal to the federal court, the defendant moved to dismiss for lack of jurisdiction, claiming that “it has done nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union.” *Tobin*, 993 F.2d at 544. The Sixth Circuit rejected the argument concluding that “[i]f we were to accept defendant’s argument on this point, a foreign manufacturer could insulate itself from liability in each of the fifty states simply by using an independent national distributor to market its products . . .” *Id.*

⁴⁶ See, e.g., *McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2804–06 (2011) (Ginsburg, J., dissenting) (listing “illustrative cases” upholding jurisdiction under similar facts to those presented in Justice Ginsburg’s dissenting opinion).

⁴⁷ *Id.* at 2796.

was also the location of the accident and thus where the cause of action arose. The plaintiff's interest is especially noteworthy, when considering that the only alternative forum was the foreign legal system of the United Kingdom, a long and expensive trek for a severely disabled worker from New Jersey. These reasons also support the interest of the state of New Jersey in adjudicating the action, as it certainly wished to protect its consumers, even if only to the extent of assuring them a fair day in court.⁴⁸

III. IN THE SUPREME COURT

A. *Kennedy's Goals*

Confronted with this extraordinary decision from the New Jersey Supreme Court, Justice Kennedy's plurality opinion was written with a number of purposes in mind, which emanate from the decision itself.

1) A central purpose was to correct the New Jersey Supreme Court's view that the stream of commerce theory provided an *alternative* way of asserting jurisdiction over a nonresident defendant that would obviate the need for a direct finding of minimum contacts. As we have seen, the New Jersey Supreme Court proclaimed the existence of jurisdiction while simultaneously denying the existence of minimum contacts,⁴⁹ an approach that, whether viewed as a remarkable exercise of judicial candor—or the hoisting of the red flag of rebellion—certainly served as a provocation, catching the Court's attention in a way that similar cases had not. If understood as a provocation, the extent of it could only have been exacerbated by the New Jersey Supreme Court's additional suggestion that its decisional preference was to find jurisdiction on the facts of the case.⁵⁰ Although noting that the New Jersey Supreme Court

⁴⁸ *Nicastro*, 201 N.J. at 79–80.

⁴⁹ *Id.* at 61.

⁵⁰ “We cannot evade consideration of the stream of commerce theory for it is the only basis on which the English manufacturer could be subject to the jurisdiction of a New Jersey court.” *Id.* at 72. Similar concerns appeared to motivate the Appellate Division:

To allow a foreign manufacturer to shield itself from liability in damages caused by its products distributed by those middlemen would be to permit a legal technicality to subvert justice and economic reality in the worse sense. Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products.

Nicastro v. McIntyre Mach. Am., Ltd., 399 N.J. Super. 539, 554 (App. Div. 2008) (quoting *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 479 (1986)). Since the Supreme Court has over the years let stand a number of cases

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issued an “extensive opinion with careful attention to this Court’s cases and to its own precedent,”⁵¹ from Justice Kennedy’s perspective, however, the New Jersey decision was driven by a “metaphor” that “cannot be sustained.”⁵²

2) Recognizing, however, that the stream of commerce remains a valid way of establishing minimum contacts, Justice Kennedy had the additional goal of clarifying the confusion surrounding the circumstances in which the stream of commerce theory can provide a basis for minimum contacts.⁵³ As the plurality explained, since the *Asahi* decision, lower courts have been divided on whether to follow Justice Brennan’s approach, which allowed for the assertion of jurisdiction over a defendant if its product caused injury in the forum state and the defendant was aware of a regular and anticipated flow of its commerce into the forum state, or Justice O’Connor’s view that mere awareness isn’t sufficient, and that advertising, marketing, and targeted acts of a distributor are also necessary.⁵⁴ Justice Kennedy’s plurality opinion asserts the view that the correct approach was reflected in the *Asahi* plurality opinion of Justice O’Connor.⁵⁵

3) Justice Kennedy also sought greatly to reduce the role that the fairness factors⁵⁶ play in the “traditional” minimum contacts

authorizing jurisdiction under the Brennan stream of commerce theory, the daring and peculiar formulation used by the New Jersey Supreme Court may very well have triggered the grant of certiorari.

⁵¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (plurality opinion).

⁵² *Id.*

⁵³ Kennedy stated,

Both the New Jersey Supreme Court’s holding and its account of what it called “[t]he stream-of-commerce doctrine of jurisdiction,” were incorrect, however. This Court’s *Asahi* decision may be responsible in part for that court’s error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

Id. at 2786.

⁵⁴ See *Asahi Metal Industry Co. v. Superior Ct. of Solano Cnty.*, 480 U.S. 102, 112 (1987) (plurality opinion). The appellate court splits are summarized in *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 70–71 nn.10–12 (2010).

⁵⁵ See *J. McIntyre*, 131 S. Ct. at 2788–89 (plurality opinion).

⁵⁶ In *World-Wide Volkswagen Corp. v. Woodson*, Justice White described the fairness factors as follows:

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. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately pro-

analysis. In *International Shoe*, Justice Black took strong issue with the suggestion that federal judges should be able to determine the constitutional validity of a state court exercise of jurisdiction by reference to a jurisprudential notion as elastic as “fairness.”⁵⁷ Justice Scalia has strongly echoed Black’s concerns on the contemporary court,⁵⁸ and Justice Kennedy, as indicated by his joining Justice Scalia’s plurality opinion in *Burnham v. Superior Court*, evidently shares that view.⁵⁹ Any lingering questions regarding Kennedy’s views on the fairness factors were resolved in his *J. McIntyre* plurality decision, where he sought to bring the rest of the Court into line with his minimalist role for the fairness factors.⁶⁰ His strategy for accomplishing this, however, was to revive the discredited sovereignty prong of minimum contacts doctrine and reinsert it back

tected by the plaintiff’s power to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

444 U.S. 286, 292 (1980) (citations and internal quotations marks omitted).

⁵⁷ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (opinion of Black, J.) (“There is a strong emotional appeal in the words ‘fair play’, ‘justice’, and ‘reasonableness.’ But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards.”). Professor Freer has noted that after his opinion in *International Shoe*, Justice Black authored majority opinions in the first two specific jurisdiction cases to apply the minimum contacts analysis. See *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 648–49 (1950); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–24 (1957). In both cases, Justice Black used the fairness factors as part of a “ménage” of concerns to be balanced by the courts to determine whether an exercise of jurisdiction was “reasonable,” and found jurisdiction in both instances. Freer, *supra* note 14, at 554–62.

⁵⁸ See *supra* p. 2 and note 7. Justice Scalia’s resemblance to Justice Black is very different from that of Justice Brennan’s. Whereas Black and Scalia *oppose* the use of elastic fairness factors to allow a defendant to *avoid* jurisdiction once minimum contacts have been established, Black and Brennan have both sought *affirmatively to utilize* the fairness factors as a way of gauging whether individual, fact-specific aspects of a case could be juggled to establish jurisdiction for the plaintiff.

⁵⁹ Justice Scalia began his *Burnham* opinion with only three Justices on board, with Justices Rehnquist, Kennedy, and White joining sections I, II-A, II-B, and II-C. See 495 U.S. 604, 607 (plurality opinion). By the time he got to Sections II-D and III, which included his attack on Justice Brennan, he had only two, one of whom was Justice Kennedy. *Id.* at 619–28.

⁶⁰ “Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.” *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion). “Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.” *Id.* at 2789.

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into the analysis, creating additional confusion in an area of law already in great disarray.

4) A final goal for Justice Kennedy was to establish a set of personal jurisdiction rules that are Internet-conscious, that is, rules that are developed with awareness of the role the Internet plays in our contemporary society. None of the current doctrinal understandings of personal jurisdiction can claim such consciousness, as they were developed before today's Internet proliferation. While *J. McIntyre* did not present questions of Internet jurisdiction, one can assume that the Court was aware of its lurking presence because at least one amicus curiae brief argued that it was essential for the Court to clarify the circumstances in which Internet presence in the forum state can be deemed advertising in the forum state.⁶¹ There was also considerable attention directed to Internet jurisdiction at oral argument.⁶² Having been absent from the personal jurisdiction area for twenty years, during which time a tremendous amount of Internet commercial and technical innovation occurred, it would be perplexingly remiss for the Court to ignore the need for present day jurisdictional rules that are attentive to the extraordinary commercial and non-commercial role the Internet has assumed in American life. Moreover, the Court must proceed on the assumption that future cases that do present Internet issues would rely on the personal jurisdiction rules articulated in *J. McIntyre*, even though Internet issues were not present in the case.⁶³ Indeed, the significant concurring opinion of Justice Breyer, joined by Justice Alito, specifically stated that those Justices were *not* joining Kennedy's opinion because it appeared to apply to the Internet "strict rules that limit jurisdiction where a defendant 'does not intend to submit to the power of the sovereign' and 'cannot be said

⁶¹ See Brief for the U.S. Chamber of Commerce as Amici Curiae Supporting Petitioner, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 4803147, at *26 ("Nonetheless, assuming that this Court adopts some form of the 'additional conduct' test, the case does provide an appropriate vehicle to gloss the meaning of 'advertising in the forum state' in light of the rapid technological changes that have occurred over the last decades. Specifically, in order to provide a 'degree of predictability' to companies, the Court should make clear that, at a minimum, the mere presence on the Internet does not constitute 'advertising in the forum state.'")

⁶² See Transcript of Oral Argument, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2011 WL 87745, at *37, *51-57.

⁶³ One early commentator has predicted that after *McIntyre* "geographical borders will become relevant in the Internet context, and thus courts will be more hesitant to look to broader Internet conduct to justify jurisdiction. Instead courts will be forced to determine whether the website operator or seller targeted a particular forum." *Leading Cases*, 125 HARV. L. REV. 311, 319-20 (2011).

to have targeted the forum.”⁶⁴

B. The Supreme Court Decision

The Kennedy plurality held that jurisdiction over Nicastro’s suit was not authorized under current law.⁶⁵ Justice Kennedy concluded, first, that the stream of commerce is not a substitutive way of establishing personal jurisdiction that allows a plaintiff to sidestep a finding of purposeful availment.⁶⁶ Second, even in a case where the stream of commerce theory is being used to ascertain purposeful availment, the correct reading of the *Asahi* precedent is the approach adopted by Justice O’Connor’s plurality opinion, which was not followed by the New Jersey Supreme Court.⁶⁷ Third, no matter how strong the fairness factors may point to the exercise of jurisdiction, they can only be utilized to protect a *defendant* from jurisdiction in circumstances where minimum contacts, through a purposeful availment analysis, have been found—they may *not* be used to justify an exercise of jurisdiction for the plaintiff.⁶⁸

The plurality decision was bolstered into a majority by a two-Justice concurrence that explicitly rejected the reasoning of the plurality but agreed with its result.⁶⁹ Borrowing from the *Asahi* opinions of Justice Brennan, and Justice O’Connor, the concurrence voted to reverse the New Jersey Supreme Court on the extremely narrow ground that not enough of the shearing machines were sold in New Jersey to justify a finding of purposeful availment.⁷⁰ But the concurrence also chastised the plurality for its

⁶⁴ *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring). Justice Breyer goes on to inquire:

But what do these standards mean when a company targets the world by selling products from its website? And does it matter if, instead of shipping the products directly, a company consigns a product through an intermediary (say, Amazon.com), who then receives and fulfills the orders? And what if a company markets its products through pop up advertisements that it knows will be viewed in the forum? . . . I do not agree with the plurality’s strict no-jurisdiction rule.

Id.

⁶⁵ 131 S. Ct. at 2785 (plurality opinion).

⁶⁶ *Id.* at 2788.

⁶⁷ *Id.* at 2789.

⁶⁸ *Id.* at 2787. *See id.* at 2789 (“Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.”).

⁶⁹ *Id.* at 2793 (Breyer, J., concurring).

⁷⁰ *Id.* at 2792 (“None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this

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strict no-jurisdiction rule that requires evidence showing that the defendant “inten[d] to submit to the power of a sovereign” and can “be said to have targeted the forum.”⁷¹ The concurring opinion can thus be read to suggest that if some threshold number of machines had been sold in New Jersey above and beyond the one machine suggested by the *Nicastro* record, the concurring Justices may have allowed a finding of jurisdiction even though J. McIntyre had not engaged in any of the “plus” factors demonstrating purposeful availment demanded by Justice O’Connor’s concurring opinion in *Asahi*.⁷²

The concurring Justices were clearly on to something. While there was ample precedent justifying the New Jersey Supreme Court’s expansion upon current doctrine to accommodate new economies and corporate business practices, and thus allow jurisdiction in New Jersey, there were also reasons that should have led the court to pause. The seeds of the difficulty were planted in *Gendler*, the central New Jersey precedent for *Nicastro*, where they germinated until their eruption in the *J. McIntyre* Supreme Court opinion. The problem identified by the *Gendler* court itself on the facts before it was the puzzling and disturbing lack of clarity as to the exact number of phone systems that were sold to plaintiff Gendler in New Jersey, an important issue for addressing the extent to which Nippon, the Japanese defendant, purposefully availed itself of the benefits of selling its telephones in the state.⁷³ In the con-

Court’s previous holdings suggest the contrary.”). A number of scholars have criticized Justice Breyer for the breadth of this statement and its facial inconsistency with the holding in *McGee v. Int’l Life Insurance Co.*, 355 U.S. 220, 223 (1957), which upheld an exercise of jurisdiction in California over a Texas insurance company based on the sale of a single insurance contract solicited in California from a California resident. See, e.g., Freer, *supra* note 14, at 581–82; Steinman, *supra* note 16, at 508. However, the fact that the dissenting opinion by Justice Ginsburg neglected to criticize Justice Breyer on this point, even while citing *McGee*, see *J. McIntyre*, 131 S. Ct. at 2800 n.9 (Ginsburg, J., dissenting), suggests that the Court understood Breyer to be speaking solely of the stream of commerce precedents—*World-Wide Volkswagen* and *Asahi*—which he specifically references in his surrounding discussion. See *id.* at 2792 (Breyer, J., concurring).

⁷¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (Breyer, J. concurring) (internal quotation marks omitted).

⁷² Cf. Steinman, *supra* note 16, at 511 (noting that “Justice Breyer’s logic would merely require a showing that potential customers were likely to exist in the forum state”).

⁷³ *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 468 (1986). The *Gendler* court noted that “Gendler purchased one of Nippon’s telephone systems, and Telecom installed it in Gendler’s place of business in New Jersey.” *Id.* at 482 (emphasis added). Later, however, the court stated:

Although the sale of a Nippon telephone to Gendler in New Jersey probably was not an isolated transaction, the better practice is for plain-

cluding pages of its decision, the *Gendler* court noted that it was “reluctant to conclude that Nippon is subject to the personal jurisdiction of the New Jersey courts under the stream of commerce theory,”⁷⁴ and left the extremely important and determinative matter of purposeful availment, as determined by the number of phone systems sold in New Jersey, to discovery. In light of this disposition, it is odd that the *Gendler* court nonetheless went on to carve out its expansive and novel jurisdictional rule,⁷⁵ which provided the basis for the New Jersey Supreme Court analysis in *Nicastro*. The way the *Gendler* court brushed aside the purposeful availment problem might have suggested to the New Jersey Supreme Court in *Nicastro* that the number of products flowing into New Jersey via the stream of commerce was not an issue meriting close attention. Even after the discovery ordered by the Appellate Division in *Nicastro*, it was never established, not even in the U.S. Supreme Court, just how many shearing machines actually made their way into New Jersey.⁷⁶ For Justices Breyer and Alito, the number was too small to pass muster even under Justice Brennan’s analysis in *Asahi*.⁷⁷ This was central to their holding that jurisdiction could not be exercised, and was thus crucial to the Court’s ultimate

tiff to submit proof that its purchase of Nippon telephones was not a fortuitous event, but the result of an established distribution system for Nippon’s telephone systems.

Id. at 483–84.

⁷⁴ *Id.* at 482.

⁷⁵ *See id.* at 484 (“It is not necessary that a manufacturing corporation wholly own the distributing subsidiaries. . . . Similarly it is unnecessary that [the manufacturer] control the subsidiaries although any such control would also support the exercise of jurisdiction The crucial question is whether [the manufacturer] was aware or should have been aware of a system of distribution that is purposefully directed at New Jersey residents.”)

⁷⁶ Justice Kennedy stated: “[N]o more than four machines (the record suggest only one) . . . including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.” *See J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion). He later described the number as being “up to four.” *Id.* at 2790. Justice Breyer noted “one” machine shipped to Nicastro’s employer from the American distributor. *Id.* at 2791 (Breyer, J., concurring). Justice Ginsburg, in dissent, does not address the number of McIntyre machines found in New Jersey but does note that J. McIntyre “resisted Nicastro’s efforts to determine whether other McIntyre machines had been sold to New Jersey customers.” *Id.* at 2797 n.3 (Ginsburg, J., dissenting).

⁷⁷ 131 S. Ct. at 2792 (Breyer, J., concurring) (citing Justice Brennan in *Asahi* to the effect that “jurisdiction should lie where a sale in the state is part of ‘the regular and anticipated flow’ of commerce into the State, but not where that sale is only an ‘edd[y],’ i.e., an isolated occurrence.”). Justice Ginsburg argued in dissent that each of the machines was valued at \$24,900, which would represent a “significant sale” if, dollar for dollar, the product sold were flannel shirts, cigarette lighters, or wire-rope splices, each of which were enough to trigger jurisdiction in cases decided by the U.S. Courts of Appeals. *See id.* at 2803 n.15 (Ginsburg, J., dissenting).

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disposition of the case.⁷⁸

Of course, from another perspective, the absence of direct evidence of J. McIntyre's purposeful availment in New Jersey is precisely where the *Nicastro* court demonstrated its greatest creativity. Although the New Jersey Supreme Court did not specifically explain *why* J. McIntyre did not have minimum contacts with the state of New Jersey, the opinion can be read to have concluded that although the number of shearing machines that entered the state was minimal,⁷⁹ the stream of commerce analysis *can* serve as a *substitute* for the purposeful availment requirement, provided that the conditions established in *Gendler* are satisfied, *and* are coupled with a strong showing of the fairness factors.

However, even considering the small number of machines that entered New Jersey, the case can be distinguished from *Asahi* because the shearing machine that caused Nicastro's injury, priced at \$24,000, was of significant value, and was independently hazardous in its own right if defective, thus subject to a different analysis than the valve stem components that allegedly caused injury in *Asahi*.⁸⁰ Moreover, unlike *Asahi*, plaintiff Nicastro and the State of New Jersey had compelling interests in adjudicating the case in New Jersey.⁸¹ In addition, *J. McIntyre* could be distinguished from *World-Wide Volkswagen* because the shearing machine was knowingly delivered into New Jersey through the J. McIntyre's distribution system, not by the unilateral act of the plaintiff taking the regionally dis-

⁷⁸ Cf. *Marks v. United States*, 430 U.S. 188, 193 (1977) (noting that in a case decided by a plurality, the Court must construe the holding as "that position taken by those Members who concurred in the judgments on the narrowest grounds") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

⁷⁹ Professor Peterson has dismissed as "spurious" the suggestion that there has to be more than one product sold in the forum state to establish purposeful availment. See Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 226–28 (2011).

⁸⁰ Compare this with Justice Stevens' opinion in *Asahi*: "Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." *Asahi Metal Industry Co. v. Sup. Ct. Solano Cnty.*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part). At least one *amici* alluded to a distinction between stream of commerce cases where component parts are involved and those where they are not. See, e.g., Brief for the U.S. Chamber of Commerce, *supra* note 61, at 15–16. The point was also discussed in oral argument at the Supreme Court. See *supra* note 62, at *45–50.

⁸¹ Because *Asahi* plaintiff Zurcher settled his claims with defendant Cheng Shin, the Supreme Court held that neither the state of California nor cross-complainant Cheng Shin had an interest in litigating the remaining indemnification claim in the California courts. *Asahi*, 480 U.S. at 114–15.

tributed product into the forum state as in *World-Wide*.⁸²

In 2010, the United States imported nearly 2 trillion dollars in foreign goods and foreign trade with the United States,⁸³ a business process that is largely characterized by U.S. middlemen operating at the behest of foreign corporations who are seeking to penetrate the national United States marketplace. If a foreign corporation has knowledge of this marketing, with sufficient control over it so as to be able to refrain from shipping its products to certain areas, but hasn't done so in order to earn a greater profit, it should be held accountable in jurisdictions where the product causes injury, even if only one product has entered the forum state, provided that the product is a not a component part and is hazardous on its own terms.⁸⁴

The plurality's determination to curtail the power of state courts to exercise jurisdiction over non-resident corporations under the compelling circumstances present in *J. McIntyre* suggests hostility to a minimum contacts doctrine that would uphold an assertion of jurisdiction in circumstances where there is a strong, but not definitive, showing of minimum contacts, coupled with fairness factors that point overwhelmingly in favor of jurisdiction in the forum chosen by the plaintiff. A close reading of Justice Kennedy's opinion suggests that he was aware that an alternative, more plaintiff-friendly approach to the law of personal jurisdiction was possible. Not only had such an alternative been argued by at least one *amici*,⁸⁵ but also Justice Brennan had long been a proponent of a relaxed, pro-access approach to the courts that he articulated in a

⁸² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980). J. McIntyre's situation is closely analogous to the manufacturer (Audi) and importer (Volkswagen of America), also defendants in *World-Wide Volkswagen* who never challenged the personal jurisdiction of the Oklahoma court because they marketed and directed their product throughout the United States and the world, although with no specific focus on Oklahoma.

⁸³ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 n. 6 (Ginsburg, J., dissenting) (citing U.S. CENSUS BUREAU, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES 1 (2011), available at http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf). Justice Ginsburg also noted: "Capital goods, such as the metal shear machine that injured Nicastro, accounted for almost 450 billion dollars in imports for 2010. . . . New Jersey is the fourth-largest destination for manufactured commodities imported into the United States, after California, Texas, and New York." *Id.* (citations omitted).

⁸⁴ *Cf. id.* at 2797.

⁸⁵ See Brief for Public Citizen, Inc. as Amicus Curiae Supporting Respondents, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 5192282, at *3 ("[M]inimum contacts analysis is not purely defendant-centric: its focus is on fairness to the defendant in relation to the forum state's interests, including its interests in protecting its residents.").

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number of decisions, including a stream-of-commerce analysis that would make it easier for plaintiffs to hold non-resident defendant corporations accountable in plaintiff's home state for defective products that have made their way into the forum state's borders. Kennedy's plurality decision was forced to grapple with these decisions but garbled and discussed them with barely veiled contempt. However, in his attempt to refute Justice Brennan's views, Kennedy may have gone so far as to alienate the two Justices necessary to convert his plurality opinion into a majority. To fully grasp this point, it will be necessary to underscore certain aspects of the personal jurisdiction doctrine that are clearly manifest in the Court's analysis even though the Court has yet to explicitly spell them out.

1) Minimum Contacts

Since *International Shoe*,⁸⁶ minimum contacts doctrine has been harnessed by two prongs, carved out from Justice Stone's allowance of personal jurisdiction in cases where (1) the existence of minimum contacts is (2) combined with circumstances where the exercise of jurisdiction does not violate traditional notions of fair play and substantial justice.⁸⁷ Writing in *World-Wide Volkswagen*, Justice White sought to give meaningful content to each of these prongs. In his initial view, minimum contacts was articulated as securing the goals of federalism and state sovereignty by preventing courts from extending their jurisdictional reach beyond their borders to exercise jurisdiction over persons of a different sovereign.⁸⁸ However, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,⁸⁹ decided shortly thereafter, Justice White retreated from this earlier understanding, and identified the minimum contacts doctrine as necessary to protect the "liberty interest" of an out of state defendant in not being subjected to the courts of a foreign sovereign, absent some indication that the defendant had sought to benefit from the laws of that sovereign.⁹⁰

While acknowledging the Court's repudiation of the so-called "sovereignty" prong analysis in *Ireland*, Justice Kennedy nonetheless pivoted his analysis around notions of sovereignty in *J. McIntyre*, at

⁸⁶ 326 U.S. 310 (1945).

⁸⁷ *Id.* at 316.

⁸⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293–94 (1980).

⁸⁹ 456 U.S. 694 (1982).

⁹⁰ *Id.* at 702 ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

times employing terminology strongly reminiscent of *Pennoyer v. Neff*,⁹¹ the foundational case that many scholars condemn as the disastrous wrong turn early in the formulation of personal jurisdiction jurisprudence.⁹² Justice Kennedy's reinsertion of sovereignty notions into the minimum contacts analysis was combined with a deliberate downplay of the role of fundamental fairness, a co-equal part of the minimum contacts doctrine that has traditionally been associated with the Due Process Clause, and further operated to discredit Justice Brennan's approach to minimum contacts.⁹³ Kennedy's challenge proceeded in a unified manner across both dimensions of the minimum contacts analysis: one argument targeted Justice Brennan's approach to the fair play and substantial justice prong of the minimum contacts test,⁹⁴ while another targeted his stream-of-commerce theory enunciated in *Asahi*.⁹⁵

2) Fair Play

Unlike the minimum contacts prong of the analysis, which has evolved through numerous adjudicatory permutations, the mean-

⁹¹ 95 U.S. 714 (1877). For example, Justice Kennedy says: "[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion).

⁹² *Cf.* Wendy Collins Perdue, *What's "Sovereignty" Got to Do With It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 730 (2012) ("[A]lthough at one time the concept of sovereignty provided an important analytic component of personal jurisdiction analysis, this is largely no longer true.").

⁹³ *Cf.* Freer, *supra* note 14, at 579 ("Clearly, Brennan would find nothing to like about the Kennedy opinion."). Although best known for his role in establishing and furthering individual liberties, Justice Brennan was also notable as a proponent of wide ranging access to the federal courts. *Cf.* sources cited *supra* note 14. In the personal jurisdiction field, he wrote more opinions than any other Justice on the Court, including the majority opinion in *Burger King*, significant concurrences in *Asahi*, *Burnham*, and *Shaffer v. Heitner*, and dissents in *World-Wide Volkswagen* and *Helicopteros*. See Freer, *supra* note 14, at 551. In each of these opinions, Justice Brennan argued for an approach that would expand state-court personal jurisdiction in a way that provided plaintiffs greater access to the judiciary. The only exception is his four-Justice concurring opinion in *Burnham*, where he argues that involuntary transient defendants "tagged" by in-state service of process are entitled to the benefit of a "fairness" analysis, which could result in a denial of jurisdiction. However, Brennan would presumably also require that such a fairness analysis be utilized by plaintiffs in cases where those factors weighed heavily toward the exercise of jurisdiction. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). *J. McIntyre* and its companion case, *Goodyear Dunlop Tires*, were in fact the first personal jurisdiction cases decided without Justice Brennan since the Eisenhower Administration. Freer, *supra* note 14, at 551.

⁹⁴ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787, 2789, 2791 (2010) (plurality opinion).

⁹⁵ *Id.* at 2788-90.

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ing of “fair play and substantial justice” has remained stable since its first articulation in *World-Wide Volkswagen*,⁹⁶ in part because of the small role the prong has played in the Supreme Court cases.⁹⁷ On its face, the phrase can mean any number of things—however, Justice White suggested a weighing of five factors to determine whether, even after a finding of minimum contacts, an exercise of jurisdiction over a defendant should be deemed consistent with the Due Process Clause. White’s articulation of these factors was a long delayed response to the 1945 opinion from Justice Black in *International Shoe* chastising the Court for allocating to itself the power to upset a state-court exercise of jurisdiction based on an “elastic” idea of fairness,⁹⁸ even after minimum contacts had been determined.

Although identifying the fairness factors in *World-Wide Volkswagen*, the majority opinion by Justice White did not apply them in that case, on the evident assumption that the Court should only address them if the plaintiff had first shown minimum contacts, which were never established.⁹⁹ Thus, although never explicitly articulated by the Court, this *sub silentio* understanding identified the fairness factors as, in essence, a second-level defense for the defendant once the plaintiff had established some purposeful connection to the forum.¹⁰⁰ Dissenting in *World-Wide*, Justice Brennan instead saw the two prongs operating *together* to determine the “reasonableness” of jurisdiction.¹⁰¹ Under his view, the fairness factors could be utilized not solely to provide an additional level of protection for the defendant, but could also be utilized, when coupled

⁹⁶ See *supra* note 56.

⁹⁷ The only case in which they played a dispositive role was *Asahi*.

⁹⁸ *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 325 (1945) (opinion of Black, J.).

⁹⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). The Court held that Oklahoma could not assert jurisdiction over the New York-based regional distributor and retail seller of a car that exploded on impact in a collision that took place in Oklahoma, finding that those defendants did not benefit from the protection of Oklahoma law, and that the only contact they had with Oklahoma was the fortuitous circumstance that the plaintiff car owner had made the unilateral determination to bring the car into the Oklahoma. *Id.*

¹⁰⁰ Freer, *supra* note 14, at 565–66. This was precisely the objection made by Justice Black—that once the sovereignty aspect of the due process clause was satisfied, the Court was without constitutional power to check the exercise of state court jurisdiction. *International Shoe*, 326 U.S. at 325–26. Professor Freer has referred to this as a “two-step” analysis, first demanding a finding of minimum contacts, and if found, then an assessment of whether exercise of jurisdiction is fair or reasonable. Freer, *supra* note 14, at 567.

¹⁰¹ *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting). See also Freer, *supra* note 14, at 570.

with some showing of minimum contacts, to support state court jurisdiction at the behest of the plaintiff.¹⁰²

In *Burger King Corp. v. Rudzewicz*,¹⁰³ Justice Brennan convinced a majority of the Court that the fairness factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required,”¹⁰⁴ while simultaneously rejecting fairness arguments asserted by Justices Stevens and White,¹⁰⁵ as well as by an Eleventh Circuit panel,¹⁰⁶ that the exercise of jurisdiction by a Florida federal court on behalf of a multinational corporation over two Michigan-based small franchise owners in a breach of contract case violated the Due Process Clause. Instead, Brennan’s majority directed defendant’s argument that he would be inconvenienced by litigation in the Florida forum to the statutory and common law remedies of transfer and forum *non-conveniens*.¹⁰⁷

Asahi re-affirmed the *World-Wide Volkswagen* formula for assessing the interplay of minimum contacts and fair play in a complex decision that had the agreement of the entire Court, with the silent exception of Justice Scalia. Although the Court again did not explicitly articulate a two-step analysis, such an analysis proved to be dispositive of the case. First, the Court addressed whether there were sufficient minimum contacts (purposeful availment) to justify

¹⁰² *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting). Brennan argued that jurisdiction was proper in Oklahoma because the accident took place in Oklahoma, the plaintiffs were hospitalized in Oklahoma, and crucial witnesses were in Oklahoma. There was thus a sufficient relationship, connection, and nexus between the forum and the defendants to justify jurisdiction in Oklahoma. *Id.* at 305–07. This analysis was based on Brennan’s understanding of *International Shoe*, which, Brennan argued, “specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant. . . . The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.” *Id.* at 300. Brennan read *International Shoe* to mean that the Due Process Clause prevents an exercise of jurisdiction only where there were “no contacts, ties, or relations.” *Id.* (citing *International Shoe*, 326 U.S. at 319) (emphasis in original).

¹⁰³ 471 U.S. 462 (1985).

¹⁰⁴ *Id.* at 477 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984); *Calder v. Jones*, 465 U.S. 783, 788–89 (1984); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957)).

¹⁰⁵ See *Burger King*, 471 U.S. at 487–91 (Steven, J., dissenting).

¹⁰⁶ See *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1511 (11th Cir. 1984).

¹⁰⁷ *Burger King*, 471 U.S. at 477, 477 n.20. Justice Brennan’s opinion placed not inconsiderable burdens upon defendants seeking to upend plaintiff’s choice of forum, suggesting that they would have to “become so substantial as to achieve constitutional magnitude.” *Id.* at 484 (emphasis in original).

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an exercise of state court jurisdiction.¹⁰⁸ Were the answer to that question clearly “no,” as Justice O’Connor’s plurality opinion asserted, jurisdiction would have failed in *Asahi* without analysis of the fairness factors.¹⁰⁹ However, there was not a majority for this resolution.¹¹⁰

Rather, a majority of the Court found that there was sufficient contact to exercise jurisdiction because *Asahi* was aware that its valve stems were entering California in large quantities.¹¹¹ The Court was thus forced to address whether the exercise of jurisdiction was consistent with the fairness factors outlined in *World-Wide Volkswagen*. In so doing, and concluding that the exercise of jurisdiction was “unfair,” *Asahi* became the first case where the fairness factors were utilized to *defeat* an exercise of jurisdiction.¹¹² Still left to be determined, however, was whether the fairness factors could be used as a basis to *create* jurisdiction, or at least compensate for a dearth of minimum contacts, as suggested by Justice Brennan in *Burger King*.¹¹³

The *J. McIntyre* case provided a pristine opportunity to address this question. The plaintiff was working in his state of residence when the defendant purposefully sent its arguably defective product into the state of New Jersey through a pre-planned, nationwide distribution scheme, where it caused injury to the plaintiff. Because the distributor, McIntyre America, had declared bankruptcy, there was only one alternative forum where the litigation could have been brought, yet it was at a distant location and embedded in a foreign legal system. The facts suggest that plaintiff Nicastro was neither wealthy, nor highly educated, and that the cost of travel and other expenses necessary to litigate in a foreign jurisdiction would have been prohibitive. Moreover, New Jersey had a strong interest in the litigation because of these same facts, in addition to having a stake in enforcing a cause of action rooted in its state law

¹⁰⁸ *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102, 108–13 (1987) (plurality opinion).

¹⁰⁹ *See id.* at 112–13. Justice Scalia joined only Part II-A of Justice O’Connor’s opinion that reached this conclusion, suggesting that, in his view, this was sufficient to resolve the case.

¹¹⁰ Part II-A of Justice O’Connor’s opinion adopting this position only gathered four votes, those of Chief Justice Rehnquist and Justices Powell and Scalia. *See id.* at 108–13.

¹¹¹ *See id.* at 116–22 (Brennan, J., concurring in part and in the judgment) (joined by White, Marshall, and Blackmun, JJ.). Justice Stevens provided the fifth vote, suggesting a finding of purposeful availment on the facts of the case. *Id.* at 122 (Stevens, J., concurring in part and in the judgment).

¹¹² *See id.* at 113–16 (majority opinion).

¹¹³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985).

products liability provision.¹¹⁴ Indeed, the case for the plaintiff could only have been stronger if the alternative forum had been one that did not share such historic common law roots with the United States, such as China.¹¹⁵

Although neither the plaintiff nor the New Jersey courts specifically addressed the fairness factors buttressing jurisdiction,¹¹⁶ the explicit conclusion of the New Jersey Supreme Court that there were *no* minimum contacts¹¹⁷ suggests that, in its view, it was suffi-

¹¹⁴ See N.J. STAT. ANN. § 2A:58C-2 (“A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.”).

¹¹⁵ Justice Ginsburg was particularly concerned at oral argument as to whether, in the absence of personal jurisdiction in New Jersey, plaintiff could be relegated to something other than a “trusted legal system,” particularly mentioning China, Mexico, and Russia. Transcript of Oral Argument, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2011 WL 87745, at *24–25. Counsel for the defendant responded that these were matters that would have to be addressed in a forum *non-conveniens* motion, which the defendants were never under any obligation to file. *Id.* at *9–12. Neither the plurality nor the concurring opinion of Justice Breyer suggests that the disposition of the personal jurisdiction motion was in way affected by whether an alternative forum would be a “trusted legal system.”

¹¹⁶ The Appellate Division clearly sought to place the case within mainstream minimum contacts jurisprudence, stating: “We conclude that sufficient minimum contacts exist under the ‘stream-of-commerce plus’ rationale espoused by Justice O’Connor in *Asahi* We further conclude that entertainment of jurisdiction in New Jersey would not offend traditional notions of fair play and substantial justice.” *Nicastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 545 (App. Div. 2008) (citations omitted). The quotes below from the decision of the New Jersey Supreme Court suggest a bit more innovation:

Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey. The exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice.

Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 52–53 (2010). “Thus, even under Justice O’Connor’s approach, arguably, a manufacturer would be amenable to jurisdiction in every state that is part of its national distribution scheme.” *Id.* at 73–74. “Because J. McIntyre knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers, it now must present a compelling case that defending a product-liability action in New Jersey would offend ‘traditional notions of fair play and substantial justice.’” *Id.* at 79 (citations omitted).

¹¹⁷ *Nicastro*, 201 N.J. at 61. As the language of the New Jersey Supreme Court cited in note 116 suggests, to say that there were no minimum contacts is an overstatement, or at least a problematic slip of the tongue. Other than the fact that so few machines could be found in New Jersey, the case was a prototypical stream of commerce case.

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cient to base jurisdiction on a finding that J. McIntyre had established a distribution system, that brought its product into the New Jersey causing injury, and fairness factors pointed toward New Jersey as the appropriate forum. Viewed this way, the decision begins to look very much like Justice Brennan's assertion in *Burger King* that a strong showing of the fairness factors could justify an exercise of jurisdiction with a lesser showing of minimum contacts.¹¹⁸

Even without argument from the named parties, Justice Kennedy explicitly rejected the possibility of asserting jurisdiction under these circumstances, concluding that an exercise of general jurisdiction must be based on submission by the defendant to state authority either by explicit consent, presence within the state, citizenship, or domicile, while specific jurisdiction must be predicated on defendant's connections or purposeful availment from the state—a desire to benefit from the protection of the state's laws.¹¹⁹ This otherwise standard formulation of the law, however, was buttressed by additional prerequisites for specific jurisdiction—a requirement that the defendant's activities “manifest an intention to submit to the power of a sovereign” or “target[] the forum.”¹²⁰

Stating that “freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law,”¹²¹ the Kennedy plurality suggested that a judgment for Nicastro by a New Jersey state court, entered absent a finding of minimum contacts, even though consistent with the fairness factors, would be a judgment made without legal authority.¹²² The plurality reached this conclusion despite the indisputable evidence of a significant contact that J. McIntyre had with the state of New Jersey: a hazardous machine entered New Jersey through the actions of the defendant and caused serious injury to a New Jersey resident who was using it

The suggestion that a stream of commerce case is something other than a minimum contacts case may have been no more than a terminological misunderstanding. In any event, the decision to include the infamous paragraph was a mistake with undeterminable consequences for the plaintiff.

¹¹⁸ *Burger King*, 471 U.S. at 477.

¹¹⁹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787–89 (2011) (plurality opinion) (“Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.” *Id.* at 2789.)

¹²⁰ *Id.* at 2788.

¹²¹ *Id.* at 2787.

¹²² *Id.* at 2790–91.

while at work in New Jersey. As Justice Brennan had argued, the Due Process Clause bars “binding a judgment *in personam* against an individual or corporate defendant with which the state has *no* contacts, ties, or relations.”¹²³ *J. McIntyre* was thus not a case where a worker comes to New Jersey from Montana, is injured in New Jersey, but then goes home to Montana and brings suit against J. McIntyre in Montana, as hypothesized by Justice Roberts at oral argument.¹²⁴ Nicastro’s counsel was clear when presented with Roberts’ hypothetical that Montana would not have jurisdiction over J. McIntyre under such circumstances even though J. McIntyre had targeted the entire United States as a market for its product.¹²⁵ The plaintiff’s theory, similar to Justice Brennan’s argument, was that a strong showing of the fairness factors can allow for jurisdiction with a *lesser* showing of minimum contacts—a showing that was established by the facts of the *J. McIntyre* case.

Rather than trace Brennan’s argument to his dissent in *World-Wide Volkswagen*, and its acceptance by a majority of the Court in *Burger King*, Justice Kennedy attaches Justice Brennan’s use of fairness as a means to secure plaintiff jurisdiction to Brennan’s concurrence in *Asahi*, which Kennedy went so far as to denigrate as “inconsistent with the premises of lawful judicial power[.]”¹²⁶ However, Justice Brennan did not discuss the fairness factors in *Asahi*, as he agreed fully with Justice O’Connor’s analysis of them.¹²⁷

Justice Brennan’s *Asahi* concurrence was directed entirely at the minimum contacts analysis contained in Part II-A of Justice O’Connor’s opinion, yet Justice Kennedy also mischaracterized this part of the concurrence, describing it as follows: the “defendant’s ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.”¹²⁸ What Brennan actually said is that the defendant’s knowledge that the product was being marketed in the forum state

¹²³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (emphasis in original) (quoting *Int’l Shoe Corp. v. Washington*, 326 U.S. 310, 319 (1945)) (“Surely *International Shoe* contemplated 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. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations.” *Id.*).

¹²⁴ See Transcript of Oral Argument, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2011 WL 87745, at *40–43.

¹²⁵ *Id.*

¹²⁶ *J. McIntyre Mach.*, 131 S. Ct. at 2789 (plurality opinion).

¹²⁷ See *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and in the judgment).

¹²⁸ *J. McIntyre Mach.*, 131 S. Ct. at 2784 (plurality opinion).

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was indicative of purposeful availment,¹²⁹ a statement fully consistent with the only Supreme Court stream-of-commerce precedent then existent, *World-Wide Volkswagen*.¹³⁰

Justice Kennedy's plurality also disregards the fact that Justice Brennan's *Asahi* concurrence was joined by four Justices (the same number as joined Justice O'Connor's plurality), including Justice White, the author of the majority opinion in *World-Wide Volkswagen*, which first recognized the stream-of-commerce theory. What we know of Justice White¹³¹ suggests that it is extremely unlikely that he would join a concurring opinion in a close case that was based on a theory "inconsistent with the premises of lawful power."¹³²

¹²⁹ Brennan noted:

As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

Asahi, 480 U.S. at 117 (Brennan, J., concurring in part and in the judgment).

¹³⁰ See 444 U.S. 286, 297–98 (1980).

¹³¹ Justice White's biographer Dennis Hutchinson has observed: "Byron White believed more than most justices during his tenure that the proper focus of adjudication was on the individual case as much as on its location in larger doctrine: the lower-court record always came first, the issue second. He was an incrementalist first and foremost, perhaps to a fault." DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 7 (1998).

¹³² Justice Kennedy states that *World-Wide Volkswagen*

merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market. . . .

. . . .

. . . This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

J. McIntyre Mach., 131 S. Ct. at 2788–89 (plurality opinion). *World-Wide Volkswagen*, however, authorizes courts to look at a defendant's expectations as well as allow suits in states where the defendant had only targeted the market "indirectly." Again quoting Justice White:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly *or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that de-

The plurality's assertion that jurisdiction is a question of "authority" rather than "fairness"¹³³ is another troubling denigration of Justice Brennan's jurisprudence and the fairness prong of the minimum contacts analysis. In support of this assertion, Justice Kennedy relies on what he describes as the "principal opinion" in *Burnham*, which, in Kennedy's assessment, "'conducted no independent inquiry into the desirability or fairness' of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant."¹³⁴ Yet, sections II-D and III of Justice Scalia's opinion in *Burnham*, to which Justice Kennedy refers, were joined only by two members of the Court, Chief Justice Rehnquist and Justice Kennedy,¹³⁵ thus substantially eroding Kennedy's substantive claim regarding the role of "fairness" as well as his identification of Justice Scalia's opinion as the "principal" opinion of the Court. Moreover, four members of the Court, Justices Brennan, Marshall, Blackmun, and O'Connor indeed conducted a fairness analysis to determine whether jurisdiction over *Burnham* could be exercised,¹³⁶ while a fifth, Justice White, suggested that such an analysis would be necessary in a case where the defendant was in the forum state unintentionally¹³⁷ or, as phrased by Justice Brennan, "involuntarily."¹³⁸ It is simply not credible to read the *Burnham* opinion in support of the proposition Justice Kennedy assigns to it.

Overall the scholarly commentary regarding *J. McIntyre* has been almost entirely critical, with one noted scholar going so far as to describe it as "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era."¹³⁹ What counts, however, is how the decision is being interpreted in the lower courts. But here too, the early decisions suggest that the Supreme Court will have to review stream-of-commerce jurisdiction again, and the sooner it does so, the better.

livers its products into the stream of commerce *with the expectation* that they will be purchased by consumers in the forum State.

World-Wide Volkswagen, 444 U.S. at 297-98 (emphasis added).

¹³³ *J. McIntyre Mach.*, 131 S. Ct. at 2787 (plurality opinion).

¹³⁴ *Id.* at 2789 (quoting *Burnham v. Sup. Ct. of Calif.*, 495 U.S. 604, 622 (1990)).

¹³⁵ *See Burnham*, 495 U.S. at 619-28 (plurality opinion).

¹³⁶ *See id.* at 637-41 (Brennan, J., concurring in the judgment).

¹³⁷ *Id.* at 628 (White, J., concurring in part and in the judgment).

¹³⁸ *Id.* at 640 (Brennan, J., concurring in the judgment).

¹³⁹ Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2011).

IV. POST-*J. MCINTYRE*

Predictably, the cases decided since *J. McIntyre* reflect the confusions and tensions of that opinion. Just as the stream-of-commerce cases after *Asahi* could be categorized into those that followed the O'Connor plurality, those that followed the Brennan plurality, and those following neither or both, the stream-of-commerce cases after *J. McIntyre* follow Justice Kennedy's plurality, Justice Breyer's concurrence, or conclude that the case made no new law and thus one should either ignore it or distinguish it.¹⁴⁰ Cases that follow the Kennedy plurality see *J. McIntyre* as a repudiation of the Brennan view in *Asahi* and a vindication of the "stream of commerce plus" analysis carved out by Justice O'Connor. Those that follow Justice Breyer do not read *J. McIntyre* as repudiating the Brennan view in *Asahi*, but insist that there must be a continuous stream of products entering the forum as Brennan suggested in *Asahi*, and as Breyer required in *J. McIntyre*.¹⁴¹ Unfortunately, Breyer-based decisions do not address the applicability of Brennan's analysis when the product shipped into the forum state is not a component part as in *Asahi*, or an item that sells in bulk, but is rather an independent, self-standing product.¹⁴² Courts that ignore *J. McIntyre* follow circuit precedent as it existed before *J. McIntyre* was decided, which can mean following Justice O'Connor's or Justice Brennan's view. A sampling of the decided cases in the lower courts¹⁴³ since *J. McIntyre* underscores this analysis,¹⁴⁴ but

¹⁴⁰ The cases that follow neither decision see *J. McIntyre* as not establishing a minimum contacts precedent, and reason from either local precedent or earlier Supreme Court cases; those that follow both decisions reason that if Justice O'Connor's minimum contacts standard is satisfied, those facts will also satisfy the more lenient standard of Justice Brennan.

¹⁴¹ *But see* Steinman, *supra* note 16, at 511 n.208 (emphasis added) (internal citations omitted) ("Justice Breyer's concurrence, therefore, should not be read as endorsing a strict rule that jurisdiction is never proper when only a single sale is made to an in-forum purchaser. If an expectation of in-forum purchases is shown by *other* evidence, then jurisdiction might be proper even if only a single sale is ultimately made.")

¹⁴² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 n.15 (2011) (Ginsburg, J., dissenting).

¹⁴³ The few federal appellate decisions decided since *J. McIntyre* have not necessitated deep exploration of the tension between the Kennedy and Breyer opinions, presumably because none of the cases decided as of this writing involved international stream-of-commerce jurisdiction.

¹⁴⁴ While this Article focuses on international stream-of-commerce jurisdiction after *J. McIntyre*, there are other emanations from that decision that extend beyond the purview of this Article but remain worthy of further exploration. One example is *Océ Fin. Services, Inc. v. Fox Blueprinting Co.*, No. 11 C 4696, 2011 U.S. Dist. LEXIS 77024 (N.D. Ill. July 15, 2011), where a district judge *sua sponte* questioned a forum selection

what is especially noteworthy is the infrequency with which courts follow the Kennedy plurality in circumstances where doing so will require a plaintiff injured in the United States to institute litigation in a foreign jurisdiction.

A. *Cases Following the J. McIntyre Plurality*

In *Gardner v. SPX Corp.*,¹⁴⁵ the plaintiff's husband was killed at work in Utah when a vertical dock leveler collapsed on him. Suit was filed in Utah alleging that a malfunctioning control box, a component part of the dock leveler, caused the accident. The control box was manufactured in Canada by defendant Schneider Canada, which sold "hundreds, if not thousands" of its control boxes in Canada to its various Canadian distributors, who put them in Canadian manufactured dock levelers, then sold them in the United States.¹⁴⁶ Schneider Canada knew that some of its control boxes were placed in dock levelers in the United States but did not know the states in which they would be installed. Schneider Canada was also unaware that the plaintiff's employer in Utah purchased forty-four of the dock levelers.¹⁴⁷ The court denied Utah jurisdiction over Schneider Canada, holding that the Canadian corporation did not purposefully avail itself of the Utah market. The company did not take any active steps to sell its products in Utah, and although it was aware of sales in the United States, and

clause in a lease agreement between the parties that gave exclusive jurisdiction over disputes to state or federal courts in Chicago, Illinois. Borrowing language from Justice Kennedy's plurality opinion in *J. McIntyre*, the district court stated that the Due Process Clause protects a defendant's right to be subject only to lawful authority and noted that "a contractual forum-selection clause or choice-of-law-selection clause will not trigger unquestioning judicial acceptance" unless there is a "material rational connection . . . between any such designation and the underlying transaction." *Id.* at *6-7. While acknowledging that "consent" has traditionally been a basis for asserting personal jurisdiction, the court stated that nothing in the language of the forum-selection clause addressed the question as to the "propriety of instituting this action in this District Court" and directed the *plaintiff* to address the court's concerns. *Id.* at *4. Another outlandish reading of *J. McIntyre* in a non-stream-of-commerce case arose in *Kidston v. Res. Planning Corp.*, 11-cv-2036-PMD, 2011 U.S. Dist. LEXIS 141156 (D.S.C. Dec. 8, 2011), where the court noted that "after *McIntyre*, the relevance of fairness as part of the jurisdictional inquiry is unclear." *Id.* at *10 n.2. Although this may have been a goal of the plurality decision, there is nothing in the concurrence or dissent that supports such a reading. *Cf.* Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 746 (2012) ("Justice Ginsburg invoked several second-branch factors to support her conclusion that jurisdiction over J. McIntyre Machinery, Ltd. in New Jersey was 'fair and reasonable' and comported with 'notions of fair play and substantial justice.'").

¹⁴⁵ 272 P.3d 175 (Utah Ct. App. 2012).

¹⁴⁶ *Id.* at 177.

¹⁴⁷ *Id.*

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that more than one product had entered Utah, “the record here does not show ‘special state-related design, advertising, advice, marketing, or . . . specific effort by the [Canadian] Manufacturer to sell in [Utah].’”¹⁴⁸

Following *J. McIntyre*, the court reached the correct result in this case, which presented a weaker case for jurisdiction than *J. McIntyre*. Canada Schneider sold all of its products in Canada and there was no evidence that it had anything to do with the distribution of its components parts after they had been sold to Canadian distributors. The only connection to Utah was that one of its component products arrived in Utah and caused injury there. Not as many were sold as was the case in *Asahi*, nor was the product potentially hazardous. And unlike *J. McIntyre*, the manufacturer was not intricately involved in distribution of the product in the United States.¹⁴⁹ Moreover, the case came up on appeal after a jury verdict in favor of the designer of the control box, finding that the product was neither negligently designed nor unreasonably dangerous, suggesting that perhaps the appellate court could have avoided the personal jurisdiction claim altogether, and there were few, if any, fairness factors pointing toward jurisdiction.¹⁵⁰

*May v. Osako & Co.*¹⁵¹ is practically on all fours with *J. McIntyre* and the court analyzed the case through a reading of the Kennedy and Breyer opinions. While working in Virginia as a stitching machine operator, plaintiff May was injured by an allegedly negligently designed conveyor belt manufactured by Osako, a Japanese manufacturer. Plaintiff filed suit against Osako in a Virginia state court. Osako had no physical sub-entities in the United States and its products were distributed exclusively by an American-based

¹⁴⁸ *Gardner*, 272 P.3d at 182 (alterations in original) (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792 (2011)). Although the court cites Justice Breyer’s concurrence in support of this requirement, the court earlier cited a Utah precedent, *Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 666 (Utah 1989). Of course, the origin of this requirement is in Justice O’Connor’s concurring opinion in *Asahi*.

¹⁴⁹ Justice Kennedy’s plurality noted that the U.S. distributor “structured [its] advertising and sales efforts in accordance with” *J. McIntyre*’s “direction and guidance whenever possible,” and that “at least some of the machines were sold on consignment to” the distributor. *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 55–56 (2010).

¹⁵⁰ Although the trial court ruled that there was no jurisdiction over Schneider Canada, the case proceeded to trial against SPX, one of the designers of the control box. The jury found that the control box was not negligently designed nor did its design make the product unreasonably dangerous. *Gardner*, 272 P.3d at 178. Schneider Canada argued that this jury determination mooted the appeal against it; the Court of Appeals held that its lack of jurisdiction determination mooted that argument. *Id.* at 182.

¹⁵¹ 83 Va. Cir. 355 (2011).

company. Osako did not specifically target the Virginia market for its products, but knew that its product would be sold generally in the United States. Osako made changes to its product in order to better appeal to an American market, but did not attend any trade shows in Virginia. At least one of the defective machines was sent to Virginia. The court dismissed the complaint with no analysis of either the *J. McIntyre* plurality or concurring opinion, evidently of the view that none of the six Justices forming the majority opinion would view the case any differently from *J. McIntyre*. The court saw *J. McIntyre* as “strongly affirm[ing] Justice O’Connor’s substantial connection analysis set forth in *Asahi Metal Industry Co. v. Superior Court of California* over Justice Brennan’s foreseeability test.”¹⁵² The court was certainly correct in its prediction that the result should be controlled by *J. McIntyre*, as neither the plurality nor Justice Breyer would allow jurisdiction to be exercised where only one machine entered the forum state market and where there was no showing of any further purposeful availment on the part of the Japanese manufacturer.¹⁵³

A more complex case following Justice Kennedy’s plurality opinion is *Windsor v. Spinner Industry Co.*,¹⁵⁴ a products liability and breach of contract case brought by Maryland plaintiffs against a Taiwanese company that manufactures a “quick release skewer,” a bicycle component part that failed, causing injuries to the plaintiff and a minor child when riding the bicycle. The defendant sold its skewers to distributors, manufacturers, and trading companies who marketed them in every state in the U.S., but had no direct contacts with the State of Maryland.¹⁵⁵ To fully understand *J. McIntyre*, the district court reasoned that it must ascertain “that position

¹⁵² *Id.* at 356.

¹⁵³ *See cf.* *Powell v. Profile Design, LLC*, 838 F. Supp. 2d 535, 546 (S.D. Tex. 2012) (dismissing third-party complaint against American distributor of bicycle aerobar stem manufactured in China because distributor did not send *any* product into the forum state of Texas; *Bluestone Innovations Texas, LLC v. Formosa Epitaxy Inc.*, 822 F.Supp. 2d 657, 663 (E.D. Tex. 2011) (dismissing Texas patent action against Taiwanese chip manufacturer because there was no direct evidence that accused products were ever actually sold in the State of Texas); *Baker v. Patterson Medical Supply*, No. 4:11CV37, 2012 WL 380109, at *3 (E.D. Va. Feb. 6, 2012) (dismissing claim against third-party defendant, a British manufacturer of allegedly defective shower chair, because product was “never sold . . . in the United States”); *Eskridge v. Pac. Cycle, Inc.*, No. 2:11-cv-00615, 2012 U.S. Dist. LEXIS 41819, at *21 (S.D. W. Va. Mar. 27, 2012) (dismissing suit against Taiwanese bicycle parts manufacturer because it is insufficient for plaintiff to prove that defendant sold its bicycle parts to companies, and that these parts were incorporated into bikes that were eventually sold in West Virginia, even if in large quantities).

¹⁵⁴ 825 F. Supp. 2d 632 (D. Md. 2011).

¹⁵⁵ *Id.* at 634.

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taken by those members who concurred in the judgment on the narrowest grounds, but recognizing that even the narrowest grounds of the decision should only be given precedential weight if there is substantial overlap between the plurality and concurring opinions, such that the narrowest opinion represents a common denominator of the Court's reasoning and embod[ies] a position implicitly approved by at least five Justices who support the judgment."¹⁵⁶ Under this formulation, the court saw *J. McIntyre* as "rejecting the foreseeability standard of personal jurisdiction, but otherwise left the legal landscape untouched."¹⁵⁷ Applying this reasoning to the facts of the case, the court rejected the plaintiffs' arguments for jurisdiction in Maryland. Noting that the plaintiffs demonstrated that the defendant marketed the skewer throughout the United States, the court was concerned that the plaintiffs had failed to show "additional conduct" that would evince an intent by the defendant to serve the Maryland bicycle market in particular.¹⁵⁸ Rather than dismiss the case, however, the court allowed plaintiff additional discovery, suggesting that the plaintiff might be able to secure jurisdiction if discovery showed that the defendant used distributors who maintained channels of distribution in the state of Maryland.¹⁵⁹ In an unusual aside, the court noted its personal view that "indeed the reasoning of the dissenters in *J. McIntyre*, represents the most sensible approach to personal jurisdiction in the context of global commerce."¹⁶⁰

Justice Kennedy's plurality opinion was also followed in *Lindsey v. Cargotec USA, Inc.*,¹⁶¹ a case involving an Irish corporation (Moffett Engineering Ltd.) sued in Kentucky. The plaintiff employee was injured when a defective forklift manufactured in Ireland and sold in the U.S. by a distributor (Cargotec) ran over his leg. The plaintiff's federal suit alleged that a design flaw of the forklift blocked the visual field of the driver. After summarizing *Asahi* and *J. McIntyre*, the court concluded that the decision in *J. McIntyre* did not change preexisting law and that the court was therefore bound by prior Sixth Circuit precedent, which had previously adopted Jus-

¹⁵⁶ *Id.* at 636–38. The court's understanding was based on a reading of Supreme Court and Fourth Circuit precedents. See *Marks v. United States*, 430 U.S. 188 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226 (4th Cir. 2002).

¹⁵⁷ *Windsor*, 825 F. Supp. 2d at 638.

¹⁵⁸ *Id.* at 639.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 640.

¹⁶¹ No. 4:09CV-00071-JHM, 2011 U.S. Dist. LEXIS 112781 (W.D. Ky. Sept. 29, 2011).

tice O'Connor's "stream of commerce plus" analysis in *Asahi*.¹⁶² The court found that the defendant corporation designed and manufactured the forklifts exclusively in Ireland, had never maintained a physical presence in Kentucky, and did not own, possess, or use any property in Kentucky. The company had no officers, employees, or agents stationed in Kentucky, and it had never sent any of its employees to Kentucky for business purposes, nor had it ever sought authority from the Kentucky Secretary of State to conduct business in Kentucky. It never directly shipped or sold any of its products to customers in Kentucky, never directly solicited business from any company located in Kentucky, and never had any contacts with plaintiff's employer. The employer's only contact was with a sales representative from the distributor, Cargotec, who delivered the forklifts to Kentucky. The court was of the view that the corporate relationship between the Irish manufacturer and the distributor could not serve as a basis for securing jurisdiction over the Irish manufacturer in Kentucky.¹⁶³

While this result is consistent with the plurality determination in *J. McIntyre*, it is inconsistent with the opinion of Justice Breyer. The court failed to attach any significance to the fact that the Irish Company sold 97 forklifts in the state of Kentucky over a ten-year period (2000-2010).¹⁶⁴ Such a continuing flow of heavy duty, hazardous products into the forum state conceivably could have been sufficient to pass muster under Justice Breyer's concurrence since many more machines entered Kentucky than entered New Jersey in *J. McIntyre*. A closer reading of *J. McIntyre* should have relaxed the district court's insistence that it follow Sixth Circuit precedent, because there was an arguable change in the law under a reading of the Breyer concurrence.

B. Cases Not Following *J. McIntyre* Plurality

The above-proposed analysis of *Lindsey v. Cargotec USA* is buttressed by the decision in *Ainsworth v. Cargotec USA*¹⁶⁵ where a Mississippi decedent was killed by a similarly flawed forklift manufactured by the same defendant. *Ainsworth*, however, is one of a growing number of cases that either distinguish *J. McIntyre* or outright refuse to follow it. Plaintiffs in this wrongful death and prod-

¹⁶² See *id.* at *19.

¹⁶³ *Id.* at *20-21.

¹⁶⁴ *Id.* at *23-24.

¹⁶⁵ No. 2:10-CV-236-KS-MTP, 2011 U.S. Dist. LEXIS 109255 (S.D. Miss. Sept. 23, 2011).

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ucts liability case were the survivors of a Mississippi decedent who sued the Irish Company (Moffett) in Mississippi after the decedent was struck and killed by a forklift designed and manufactured by Moffett. Here, as in the Kentucky case, the defendant never maintained a physical presence in Mississippi; did not own, possess, or use any property in Mississippi; had no officers, employees, or agents stationed in Mississippi; and did not send any of its employees to Mississippi for business purposes. It never sought authority from the Mississippi Secretary of State to conduct business in Mississippi, nor had it ever directly shipped or sold any of its forklifts to customers there or directly solicited business from any company located in Mississippi.¹⁶⁶

As in *Lindsay*, the defendant Irish corporation sold all of its forklifts to its co-defendant Cargotec USA, Inc, an American company that, by contract, had the exclusive right to market and sell Moffett's product throughout the United States. Cargotec sold and marketed Moffett forklifts in all fifty states, with no territorial limitations, and handled all the communications with end purchasers, so Moffett was not aware of their identities or locations. Moffett personnel traveled to the United States two or three times a year to discuss products and sales forecasts with Cargotec personnel, and additionally, traveled to the United States periodically for trade shows.¹⁶⁷

Emphasizing Justice Breyer's concurrence, the district court noted that Breyer "declined to choose between the *Asahi* plurality opinions."¹⁶⁸ Because of this, *J. McIntyre* was "limited in its applicability"¹⁶⁹ and "[does] not provide the Court with grounds to depart from the Fifth Circuit precedents establishing Justice Brennan's *Asahi* opinion as the controlling analysis" in stream of commerce cases.¹⁷⁰ Distinguishing *J. McIntyre* on the ground that it involved only a single machine shipped into the New Jersey, the court pointed out that, since 2000, Moffett had shipped over 13,073 forklifts to Cargotec, which then sold 203 of those forklifts to customers in Mississippi, amounting to sales of approximately \$5,350,000. In the court's view, this removed the case from *J. McIntyre*'s scope.¹⁷¹ Although the number of products entering Mississippi was substantially greater than in *J. McIntyre*, a strict adherence to Justice Ken-

¹⁶⁶ *Id.* at *2.

¹⁶⁷ *Id.* at *1-5.

¹⁶⁸ *Id.* at *19.

¹⁶⁹ *Id.*

¹⁷⁰ *Ainsworth*, 2011 U.S. Dist. LEXIS 109255, at *19.

¹⁷¹ *Id.* at *19-20.

nedey's plurality opinion in the case would have defeated jurisdiction because there was no evidence that the Irish defendant, Moffett, as opposed to the distributor American distributor, Cargotec, specifically "targeted" Mississippi or evidenced any intention to submit to the law of Mississippi or any other individual state.¹⁷²

Another narrow reading of *J. McIntyre* can be found in *Merced v. Gemstar Group*,¹⁷³ where jurisdiction was allowed in Pennsylvania over an Italian marble slab producer who, through its distributor, sold heavy, negligently packaged marble slabs to a Philadelphia company. The slabs weighed thousands of pounds and the plaintiff suffered severe leg injuries when the slabs of a container dislodged because they were improperly loaded. The Italian defendant, Margraf S.P.A., produced, packaged, and loaded the containers and distributed them to Gemstar—an Ontario, Canada company—which then sold the slabs to the plaintiff's Philadelphia employer, Belfi Brothers. The marble slabs were shipped to at least seventy United States locations since 2007, with at least three going to Pennsylvania, including one in 2010 valued at over \$19,000, and dozens to other states in the Northeast.¹⁷⁴ The court asserted jurisdiction on the basis that Margraf knowingly shipped its products into Pennsylvania on at least three occasions for pecuniary gain, thus purposefully availing itself of the privilege of conducting activities within the forum state, and invoking the benefits and protections of its laws. The court noted the additional shipments to New Jersey, New York, Maryland, and other neighboring states and concluded that "[b]y disseminating their monopoly product throughout Pennsylvania and many neighboring states, the Defendants obtained an economic benefit in Pennsylvania and could thus have reasonably anticipate[d] being haled into court [] here."¹⁷⁵

In its decision, the court makes only one reference to *J. McIntyre*, distinguishing it on the ground that "[i]n *J. McIntyre Machinery*, the defendant never made a single shipment to the forum state. In the present case, the Margraf Defendants have made at least three—including the one giving rise to this litigation."¹⁷⁶ The

¹⁷² The U.S. Court of Appeals for the Fifth Circuit affirmed the district court following an interlocutory appeal. In affirming, the Court of Appeals adopted fully the reasoning of the district court. *See Ainsworth v. Cargotec USA, Inc.*, No. 12-60155, 2013 U.S. App. LEXIS 9424 (5th Cir. May 9, 2013).

¹⁷³ NO. 10-CV-3054, 2011 U.S. Dist. LEXIS 134781 (E.D. Pa. Nov. 22, 2011).

¹⁷⁴ *Id.* at *4.

¹⁷⁵ *Id.* at *12 (alterations in original) (internal quotation marks omitted).

¹⁷⁶ *Id.* at *13–14 n.1.

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problem with this analysis, however, is that the court specifically notes that the sales to Pennsylvania resulting in plaintiff's injuries were made not by Margraf, but rather by Gemstar, the Canadian distributor.¹⁷⁷ The court also does not specify whether the sales to states outside of Pennsylvania were made by the Italian defendants, Margraf, or by Gemstar. Under this contrary reading of the facts, neither Margraf nor J. McIntyre shipped anything into the forum state. In both cases, the shipment and sale was by the distributor. The decision thus runs afoul of the *J. McIntyre* plurality decision, which looks for evidence that the *defendant* "targeted" or intended to submit to the jurisdiction of the forum state.¹⁷⁸ Jurisdiction, however, perhaps could be asserted pursuant to Justice Breyer's analysis, under the assumption that the three shipments into Pennsylvania by the distributor would satisfy Breyer's threshold.

Another federal district court refusal to follow the Kennedy plurality is *DRAM Technologies v. America II Group, Inc.*,¹⁷⁹ a patent infringement action filed in Texas federal court against Elite Semiconductor, a Taiwanese manufacturer of semiconductor chips. These chips were sold to manufacturers of consumer electronics products outside the United States, who incorporated the allegedly infringing chips into their products, before shipping them to markets worldwide, including the United States, one of the largest consumer electronics markets in the world. Elite Semiconductor was aware that its chips were being used in these devices and that its products were entering the United States via electronics companies. Between 2005 and 2010, Elite Semiconductor shipped approximately 1.02 million packaged memory chips directly to electronics customers in the United States, though none of them was shipped directly into Texas. Some of the chips were contained in electronics products that were on sale in Texas retail stores and available on Internet sites that shipped the products directly into Texas. In addition, Elite Semiconductor's employees regularly visited several of its United States-based customers and, at one time, had a United States affiliate, until it was closed in 2007.¹⁸⁰

¹⁷⁷ "The Marble Slabs were produced, packaged, and loaded into a shipping container by Margraf, S.P.A., an Italian Corporation, who then distributed the container to Gemstar, a tile distributor in Ontario, Canada . . . Gemstar then sold and distributed the marble slabs to Belfi Brothers in Philadelphia, where Plaintiff was injured." *Id.* at *3.

¹⁷⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality opinion).

¹⁷⁹ No. 2:10-CV-45-TJW, 2011 U.S. Dist. LEXIS 112532 (E.D. Tex., Sept. 30, 2011).

¹⁸⁰ *Id.* at *8–10. The decision does not indicate whether the visits were to Texas or whether the affiliate was located in Texas.

After summarizing the plurality and concurring and opinions in *J. McIntyre*, the court concluded that the exercise of jurisdiction was proper under the plurality opinion as well as under the concurring opinion because a substantial number of the infringing semiconductor chips had entered into Texas as incorporated into electronic devices, notwithstanding the defendants' objections that there was no evidence that any of semiconductor chips themselves had been sold by the defendant in Texas.¹⁸¹ The Court noted that even if *J. McIntyre* imposed some kind of "heightened scrutiny" requirement, the Court would allow plaintiff to conduct additional discovery, rather than dismiss the action.¹⁸²

On its facts, *DRAM Technologies* is very similar to *Asahi*, but it is unclear that jurisdiction would have been upheld under Justice O'Connor's plurality opinion. The defendant manufactured its semiconductor chips and knowingly sold them to electronics companies that sent them all over the world, including the United States and Texas. But there was no evidence of any of the additional conduct demanded by O'Connor's *Asahi* plurality,¹⁸³ or any indications that DRAM Technologies specifically targeted the Texas market or manifested an intention to submit to the sovereignty of Texas as demanded by the Kennedy plurality in *J. McIntyre*.¹⁸⁴ The facts, however, would have been sufficient for jurisdiction under the Brennan view in *Asahi* because the defendant was responsible for a steady product stream consisting of large numbers of its components that entered the state of Texas as well as other places throughout the United States. The number was large enough to also satisfy Justice Breyer's concurrence in *J. McIntyre* because there was a steady stream of products entering the forum state.¹⁸⁵

C. State Court Resistance

There are also signs in the state courts of resistance to the plurality opinion in *J. McIntyre*. In *Soria v. Chrysler Can., Inc.*,¹⁸⁶ an Illinois plaintiff bought suit in an Illinois state court against Chrysler Canada, a Canadian automobile manufacturer, after losing her

¹⁸¹ *Id.* at *10.

¹⁸² *Id.* at *11–12.

¹⁸³ *Asahi Metal Industry Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102, 112–13 (1987) (plurality opinion).

¹⁸⁴ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2780 (2011) (plurality opinion).

¹⁸⁵ *Id.* at 2792.

¹⁸⁶ 958 N.E.2d 285 (Ill. App. Ct. 2011).

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sight in an automobile accident that she alleged was caused by a defective minivan airbag module. Chrysler Canada was incorporated in Canada, had its principal place of business in Canada, and had never transacted business, entered into contracts, owned real estate, maintained a corporate presence, or had a telephone number, tax identification number, or employees or agents in Illinois. Further, it contended that it did not ship, deliver, distribute, or sell the minivan in Illinois, and that its website was not directed to or interactive with Illinois residents.¹⁸⁷ Chrysler Canada assembled the minivan based on Chrysler United States' specifications and, once it assembled and tested the vehicle, sold it to Chrysler United States. Chrysler United States imported the vehicle to the United States and made the decision to ship the vehicle to Illinois. In this respect, Chrysler Canada argued, it did not control or determine where the vehicle was to be marketed, sold, or distributed in the United States. Further, it did not decide upon warnings for the minivan or conduct compliance testing.¹⁸⁸

After summarizing the relevant opinions, including some under state law, the court upheld the trial court's conclusion that Illinois could exercise jurisdiction. Purporting to use "either version of the stream-of-commerce theory" the court concluded that *J. McIntyre* did not control the case because Chrysler Canada "was specifically aware of the final destination of every product (i.e., vehicle) that it assembles,"¹⁸⁹ and "that it 'expected' that some of its vehicles would be sold in Illinois."¹⁹⁰ The court's use of this particular terminology is especially noteworthy in light of the *J. McIntyre* plurality's noted displeasure with those exact terms.¹⁹¹ So this decision also does not fit within the language of the plurality in *J. McIntyre*. There is nothing in the Court opinion that suggests that Chrysler Canada "targeted" or "intended to submit to the jurisdiction of Illinois." The court held that Chrysler Canada targeted the United States market that included Illinois and noted that Chrysler Canada shipped over 28,000 vehicles to Illinois dealerships. But there was nothing, other than this huge volume of shipments, suggesting that Chrysler Canada specifically targeted Illinois. Again, it seems

¹⁸⁷ *Id.* at 290.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 297–98.

¹⁹⁰ *Id.*

¹⁹¹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) ("This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."). See also *id.* at 2780.

clear that jurisdiction would be sustainable under Justice Breyer's approach because of the large number of vehicles that had been sold into Illinois by Chrysler Canada.

Similar reluctance by a state court to follow the *J. McIntyre* plurality opinion is evident in *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*,¹⁹² a suit brought by the State of Tennessee to recover deposits for a state-mandated Tobacco Escrow Fund. Sumatra Tobacco, an Indonesian cigarette manufacturer, produced United Brand cigarettes that were marketed throughout the United States. Over 74,600 cartons (11.5 million cigarettes) were sold in Tennessee from 2000 through 2002.¹⁹³ No Sumatra employee ever traveled to Tennessee for the purpose of conducting business, or initiated contact with any individual or entity in Tennessee, nor did the company sell cigarettes directly in Tennessee or through any agent in Tennessee. It did not use a distributor to sell cigarettes in Tennessee, did not advertise in Tennessee, had no agents in Tennessee, and produced no promotional materials to be used in Tennessee.¹⁹⁴ After the trial court dismissed for lack of jurisdiction, the appellate court reversed in a decision remarkably similar in its reasoning to the *Nicastro* New Jersey Supreme Court decision.¹⁹⁵ The court noted that Sumatra not only placed its product into the stream of commerce—it intentionally decided to market its product nationwide with the goal of mass distribution to all fifty states by having its distributors market its product in each and every state. Moreover, Sumatra was aware of the fact that its chosen distribution system was very likely to result in Sumatra's products being sold in every state, and, in fact, this was Sumatra's goal. Furthermore, Sumatra took no steps to exclude Tennessee from selling its products so as to evidence an intent to limit its distribution market in any way. In fact, Sumatra did just the opposite in seeking to distribute its product into all fifty states.¹⁹⁶ It was undisputed that,

¹⁹² No. M2010-01955-COA-R3-CV, 2011 WL 2571851 (Tenn. Ct. App. Jun 28, 2011).

¹⁹³ *Id.* at *3.

¹⁹⁴ *Id.* at *6-7.

¹⁹⁵ The court stated:

[A] manufacturer that intentionally seeks out a distribution system, with the goal of national distribution, should reasonably expect that its products could be sold throughout the fifty states and that it could be subject to the jurisdiction of every state. . . . If the foreign manufacturer attempts to preclude the distribution and sale of its products in the forum state, it may avoid the jurisdiction of the courts of that state (depending, of course, upon the specific facts of the case).

Id. at *18.

¹⁹⁶ *Id.* at *25.

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through intermediaries, Sumatra sold over 11.5 million cigarettes in Tennessee over a three-year period.¹⁹⁷

This decision to allow Tennessee jurisdiction was rendered the same day *J. McIntyre* was decided. Subsequently, the defendant sought a rehearing based on *J. McIntyre* that the court denied, reaffirming its previous decision and distinguishing *J. McIntyre*. According to the court,

[t]he metal-shearing machine in *McIntyre* was an isolated defective product that found its way into the forum state through the stream of commerce. In the instant appeal, the number of Sumatra's United brand cigarettes sold in Tennessee constitutes something more than an isolated event. . . . Here, over 11.5 million of Sumatra's cigarettes were sold in Tennessee over a three-year period. . . . Sumatra's contacts with Tennessee were, therefore, neither isolated, nor incidental.¹⁹⁸

While consistent with the Breyer concurrence, the decision appears to be out of line with the plurality since again there is no indication that the defendant specifically targeted Tennessee or intended to submit to the sovereignty of Tennessee.

The Tennessee Supreme Court, in turn, reversed this decision.¹⁹⁹ However, in doing so, the court also refused to follow the Kennedy plurality opinion, holding that the controlling opinion was that authored by Justice Breyer,²⁰⁰ which in the view of the court "leaves existing law undisturbed."²⁰¹ The court, therefore, undertook an analysis that relied upon an amalgam of Tennessee law and the Supreme Court decisions in *Burger King*, *World-Wide Volkswagen*, and *International Shoe*,²⁰² and concluded that, as a factual matter,

[t]he fundamental issue with the sales of United brand cigarettes in Tennessee is that NV Sumatra had nothing to do with them. . . . The record reveals that the arrival of NV Sumatra's cigarettes in Tennessee was almost wholly attributable to the initiative of Mr. Battah and FTS, his tobacco distribution company.²⁰³

Thus, although there was a substantial flow of cigarettes manufactured by the company that made their way into Tennessee with the

¹⁹⁷ *Id.* at *23.

¹⁹⁸ *Sumatra*, 2011 WL 2571851, at *33 (internal citations omitted).

¹⁹⁹ *State v. NV Sumatra Trading Co.*, No. M2010-01955-SC-R11-CV, 2013 Tenn. LEXIS 335 (Mar. 28, 2013).

²⁰⁰ *Id.* at *80.

²⁰¹ *Id.* at *83.

²⁰² *Id.* at *89.

²⁰³ *Id.* at *101-02.

knowledge of the manufacturer, the manufacturer had “remained mostly aloof from the international marketing and distribution of its cigarettes,”²⁰⁴ and there was thus no purposeful availment.²⁰⁵ Although the court could have reached this conclusion by following the O’Connor view in *Asahi* and the Kennedy view in *J. McIntyre*, it explicitly refused to do so, basing its decision entirely on pre-*Asahi* precedent.²⁰⁶

In one of the most thorough discussions rejecting the plurality reasoning in *J. McIntyre*, the Oregon Supreme Court in *Willemssen v. Invacare Corp.*²⁰⁷ allowed for the exercise of Oregon state jurisdiction over a Taiwanese manufacturer (CTE) of battery chargers that were placed in battery powered wheelchairs sold throughout the United States by Invacare. One of the batteries placed in a wheelchair purchased in Oregon caused a fire that killed the plaintiff’s mother. The defective charger caused the fire. CTE had no contacts with Oregon, did not maintain offices in Oregon, and did not directly transact business there. It did not sell its products directly in Oregon, nor did it direct advertising material to customers in Oregon or directly solicit business there.²⁰⁸ However, in one year (2006–2007), Invacare sold 1,166 motorized wheelchairs in Oregon that Invacare made in Ohio, and of these 1,166 wheelchairs, 1,102 wheelchairs came with battery chargers that CTE had manufactured and sold to Invacare.²⁰⁹ Relying on Justice Breyer’s plurality opinion, the Supreme Court of Oregon found that even though there was no specific targeting of Oregon, as opposed to the rest of the United States, jurisdiction was proper in Oregon. The court stated:

To be sure, nationwide distribution of a foreign manufacturer’s products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state. . . . In this case, however, the record shows that, over a two-year period, Invacare sold 1,102 motorized wheelchairs with CTE battery chargers in Oregon. In our view, the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a “‘regular . . . flow’ or ‘regular course’ of sales” in Oregon. The sale of the CTE battery charger in Oregon that led to the death of plaintiffs’ mother was not an isolated or fortui-

²⁰⁴ *Id.* at *103.

²⁰⁵ *NV Sumatra Trading Co.*, 2013 Tenn. LEXIS 335, at *108.

²⁰⁶ *See id.* at *103–06.

²⁰⁷ 282 P.3d 867 (Or. 2012).

²⁰⁸ *Id.* at 871.

²⁰⁹ *Id.* at 870–71.

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tous occurrence.²¹⁰

And most recently, in *Sproul v. Rob & Charlies, Inc.*²¹¹ the New Mexico Court of Appeals held, in a case almost identical on its facts to *J. McIntyre*, that jurisdiction was proper in New Mexico over the Chinese manufacturer of a front wheel bicycle quick release mechanism which failed, causing a serious bicycling accident in New Mexico. Bypassing *J. McIntyre* completely, the court went back to *World-Wide Volkswagen* to justify jurisdiction:

In any event, neither *World-Wide Volkswagen* nor our cases require that a manufacturer direct activities specifically at the forum state. Rather, *World-Wide Volkswagen* requires that the defendant place the product into the stream of commerce with the *expectation* that it will be purchased by users in the forum state. . . . It is in the very nature of the stream of commerce theory of minimum contacts that a product will reach the forum state after a manufacturer has sold it in such a way that it has passed from distributor to distributor to arrive there. . . . To insulate a foreign manufacturer of an allegedly defective component part that has caused injury in our state, unless it specifically targeted New Mexico or knew that its product will ultimately be resold here, defies logic. . . . Accordingly, we conclude that a manufacturer of an allegedly defective component part that has otherwise placed it into a distribution channel with the expectation it will be sold in our national market cannot be insulated from liability simply because it does not specifically target or know its products are being marketed in New Mexico.²¹²

The court was able to follow such an analysis because it viewed *J. McIntyre* as accomplishing no more than requiring lower courts to “adhere to our precedents.”²¹³

These numerous cases sustaining jurisdiction in the face of *J. McIntyre* focus on the quantity of the injurious product that entered the forum state. They manifest little concern with how the product entered the forum, whether through the foreign manufacturer or a distributor, and they also pay little attention to the corporate relationship between the manufacturer and the distributor. They say nothing about sovereignty, the defendants’ intentions, or indicia that the forum has been “targeted” by the defendant. And even in an exemplary post-*J. McIntyre* case denying jurisdiction, rather than follow the rigid guidelines of Justice Kennedy’s plurality, a state

²¹⁰ *Id.* at 874 (internal citations omitted).

²¹¹ No. 31,167, 2012 WL 6662638 (N.M. Ct. App. Aug. 15, 2012).

²¹² *Id.* at *10.

²¹³ *Id.* at *15.

supreme court preferred to go back to pre-*Asahi* opinions by Justice Brennan in *Burger King* and Justice White in *World-Wide Volkswagen*—neither of whom, for illumination, was part of the O'Connor plurality in *Asahi*.²¹⁴

In essence, the decisions upholding jurisdiction are reaching conclusions consistent with a majority in *J. McIntyre* consisting of Justices Breyer, Alito, Ginsburg, Sotomayor, and Kagan.²¹⁵ Of the cases discussed, only one directly followed the plurality opinion, and that case was virtually indistinguishable from the facts of *J. McIntyre*.²¹⁶ A second case with distinguishable facts followed the *J. McIntyre* plurality, but rather than dismiss, ordered more discovery, meanwhile noting its dissatisfaction with the plurality rule.²¹⁷ Another case followed the plurality opinion in *J. McIntyre* because that opinion was consistent with preexisting Sixth Circuit precedent that followed the O'Connor test in *Asahi*.²¹⁸ Yet in a case in an adjacent circuit, a district court, dealing with the same defendant in a case of similar injuries, did not follow the *J. McIntyre* plurality, reasoning that the plurality opinion provided no basis to depart from Fifth Circuit precedent that followed the Brennan opinion in *Asahi*.²¹⁹ Other state and federal courts that have been presented with international stream-of-commerce issues have come up with reasons for declining to follow the *J. McIntyre* plurality.²²⁰ Indeed, if

²¹⁴ State v. NV Sumatra Tobacco Trading Co., 2013 Tenn. LEXIS 335.

²¹⁵ Cf. Johnjerica Hodge, *Minimum Contacts in the Global Economy: A Critical Guide To J. McIntyre Machinery v. Nicasastro*, 64 ALA. L. REV. 417, 437 (2012) (“Because the concurrence and dissent express many of the same views, foreign based manufacturers should expect a drastic increase in their potential liability.”).

²¹⁶ See *May v. Osako & Co. Ltd.*, 83 Va. Cir. 355 (2011).

²¹⁷ See *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632 (D. Md. 2011).

²¹⁸ See *Lindsay v. Cargotec USA, Inc.*, No. 4:09CV-00071-JHM, 2011 U.S. Dist. LEXIS 112781 (W.D. Ky. Sept. 29, 2011).

²¹⁹ See *Ainsworth v. Cargotec USA, Inc.*, NO. 2:10-CV-236-KS-MTP, 2011 U.S. Dist. LEXIS 109255 (S.D. Miss. Sept. 23, 2011).

²²⁰ See, e.g., *UTC Fire and Sec. Americas Corp. v. NCS Power Inc.*, 844 F. Supp. 2d 366, 375–76 (S.D.N.Y. 2012) (upholding jurisdiction over third-party defendant Hong Kong battery manufacturer in New York under Justice Breyer’s concurrence in *J. McIntyre* because the volume of sales, the presumptive knowledge thereof, and the fact that the batteries were sold to a national company, combined, create a strong inference of an expectation of true national distribution of the batteries); *Russell v. SNFA*, No. 1-09-3012, 2011 WL 6965795, at *7–11 (Ill. App. Ct. Dec. 16, 2011) (upholding Illinois jurisdiction over a French helicopter component parts manufacturer (SFNA) whose bearings allegedly caused a helicopter crash in Illinois); *Simmons v. Big #1 Motor Sports Inc.*, No.: 2:12-CV-01115-RDP, 2012 U.S. Dist. LEXIS 159022, at *3, *10–12 (N.D. Ala. Nov. 5, 2012) (upholding jurisdiction in Alabama over Canadian global vehicle products under Justice Breyer’s concurrence for a defective motorcycle power steering system that was shipped worldwide, including fifteen shipments into Alabama); *Monje v. Spin Master Inc.*, No. CV-09-1713-PHX-GMS, 2013 U.S. Dist.

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we look at these cases along with those cited in the appendix to Justice Ginsburg's dissenting opinion, the true outlier in this area of law is the plurality opinion in *J. McIntyre* itself. What seems to be driving these decisions is a demonstrable reluctance to direct plaintiffs who have been injured by products imported into their state of residence to foreign tribunals for adjudications of their claims. The rationale that best explains them is some kind of amalgamation of the New Jersey Supreme Court decision in *Nicastro*, along with Brennan's and Stevens' opinions in *Asahi*.

CONCLUSION

One should not underestimate the significance of the decision in *J. McIntyre*. As Justice Ginsburg stated, the extremely harsh rule implemented by Justice Kennedy's plurality opinion is not the rule of the Court, but it will be if Justices Breyer or Alito later adopt its reasoning.²²¹ As this Article has shown, most lower-court judges deciding personal jurisdiction motions in the aftermath of *J. McIntyre* have resisted Justice Kennedy's plurality view—these decisions should be affirmed and encouraged because they reflect an analysis which is more consistent with the views adopted by a majority of the Court. The number of international stream-of-commerce cases raising personal jurisdiction issues currently in litigation strongly suggests that international companies seeking to target the United States market, yet avoid U.S. law, will structure their operations to conform to the rules established in the Kennedy plurality. Trial judges presiding over those cases have doctrinal and procedural arguments available that will enable them to prevent future plaintiffs from sharing the unfortunate experience of Robert Nicastro, and should utilize them.

LEXIS 75330, at *13–32 (D. Ariz. May 29, 2013) (upholding jurisdiction in Arizona over Australian manufacturer who distributed millions of toy Aqua Dot beads containing a harmful toxin, throughout the United States, though not targeting Arizona).

²²¹ In non-unanimous cases decided during the October 2010 term, Justice Alito voted with Justice Ginsburg in 28.1% of the cases, with Justice Breyer in 36.8% of the cases, and with Justice Kennedy 70.2% of the cases. His decision to join with Breyer in *J. McIntyre* thus provides much room for speculation. *The Statistics*, 125 HARV. L. REV. 362, 365 (2011).

