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# ARTICLES

# HERE AND THERE AND BACK AGAIN: DROWNING IN THE STREAM OF COMMERCE

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## *I. INTRODUCTION*

The United States Supreme Court's inability to establish a clear analytical path concerning personal jurisdiction in the stream-of-commerce context has confused lower courts and potential plaintiffs alike. The Court should adopt a clear stream-of-commerce analysis that is both consistent with its prior decisions and reflective of the realities of the modern commercial world.

Personal jurisdiction was initially limited to strict territorial limits.[1] Due to advancements in technology, the Court expanded personal jurisdiction with minimum-contacts analysis, which eventually led to the current stream-of-commerce conundrum.[2] The Court's initial expansion of personal jurisdiction from territo-

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1. *See infra* Part II (tracing the historical development of personal jurisdiction).

2. *See infra* Part III (discussing the changes in personal jurisdiction analysis with the development of technology).

rial limits to minimum contacts was predicated on its concern with potential defendants being allowed to enjoy the benefits and protections of a specific state's laws while simultaneously being able to dodge the repercussions of potential liability within that state.

However, in today's global economy a manufacturer's specific intentional contact with an individual state is a rarity. It is easily foreseeable for a product to travel from nation to nation and from state to state. A manufacturer, with assistance from national or international marketing campaigns or through the Internet, can easily turn entire nations into single-target markets without focusing on individual states.

In view of these realities, the Court should create a clear process whereby proper personal jurisdiction, involving potential defendants within a national market, can be easily and predictably analyzed.[3] Some commentators have proposed statutory solutions,[4] while others have proposed the creation of a rebuttable presumption, with the burden on the out-of-forum defendant to show that it took affirmative steps to avoid the forum state when it placed its product into the stream of commerce.[5]

This Article proposes a more balanced, and perhaps more elegant, approach to the stream-of-commerce conundrum, asserting that the Court should adopt a burden-shifting approach. Analysis under this proposal would first require that a plaintiff

3. *See infra* Part VI (proposing that a burden-shifting approach should be adopted).

4. *E.g.*, Elisabeth A. Beal, Comment, J. McIntyre Machinery, Ltd. v. Nicastro*: The Stream-of-Commerce Theory of Personal Jurisdiction in a Globalized Economy*, 66 U. MIAMI L. REV. 233, 254–56 (2011) (discussing proposed legislation that would ensure both that foreign defendants receive adequate warning regarding their potential liability and that injured plaintiffs would "have access to a forum in which to bring suit"); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 434–47 (2012) (discussing legislation that would base jurisdiction on a foreign corporation's registered agent).

5. *E.g.*, Greg Saetrum, *Righting the Ship: Implications of* J. McIntyre v. Nicastro *and How to Navigate the Stream of Commerce in Its Wake*, 55 ARIZ. L. REV. 499, 524–36 (2013); *see* Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 94–95 (2012) (citing Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 PA. L. REV. 151, 1962 (2005)) (noting that advancements in technology provide online retailers with "effective tool[s] for avoiding purposeful availment" of a disfavored state); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 94 (2005) (asserting that in the context of online commerce, businesses "not employing geographically restrictive techniques should anticipate being haled into court wherever their . . . conduct gives rise to a cause of action").

seeking to hale a manufacturing defendant into court in a particular jurisdiction show that the defendant had engaged in a national marketing strategy without regard to state territorial borders. If this burden were met, then the burden would shift to the defendant to show that it took specific steps to avoid marketing or selling its product in the jurisdiction at issue.

Part II of this Article traces the historical development of the Court's personal jurisdiction jurisprudence, from the territorial limitations of *Pennoyer v. Neff*[6] to the abandonment of this analysis with the development of the modern mobile industrial state of the twentieth century. Part III of this Article then looks at the Court's modern development of its personal jurisdiction analysis, beginning with the Court's articulation of minimum contacts as a substitute for actual physical presence in *International Shoe Co. v. Washington*[7] through its development of the split stream-of-commerce analysis presented in both *World-Wide Volkswagen v. Woodson*[8] and *Asahi Metal Industry Co. v. Superior Court of California*.[9] Part IV looks at the *J. McIntyre* decision, the Court's most recent effort to solve the stream-of-commerce conundrum created by its prior opinions.[10] Part V examines various approaches taken by lower courts in light of the Court's failure to resolve this conundrum. In Part VI, this Article's conclusion, the burden-shifting approach is proposed.

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6. 95 U.S. 714 (1877).
7. 326 U.S. 310 (1945).
8. 444 U.S. 286 (1980).
9. 480 U.S. 102 (1986).
10. *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) (describing the Court's opinion in *J. McIntyre* as "a disaster" and stating that the Court "performed miserably"); John N. Drobak, *Personal Jurisdiction in a Global World: A Comment on the Supreme Court's Recent Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. L. REV. 1707, 1729 (2013) (stating that "[t]he finding of a lack of personal jurisdiction in [*J. McIntyre*] is the worst result in any personal jurisdiction case decided by the Supreme Court in the modern era"); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 345 (2012) (stating that the three *McIntyre* opinions—the plurality, concurrence, and dissent—"exacerbated rather than ameliorated the doctrinal confusion" and that each opinion "demonstrated a disappointing level of judicial competence"); 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, 729 (2012) (stating that "[p]ersonal jurisdiction . . . seems to inspire foolish remarks and poor opinions, and [*J. McIntyre*], may set a new low in that regard").

## *II. AT THE CREATION: WHAT DO WE MEAN WHEN WE TALK ABOUT "PRESENCE"?*

The concept of personal jurisdiction has, of necessity, evolved with the growth of commerce and the development of new technology. Before looking at the current state of affairs and toward the future, we must first step back and look at the historical development of the doctrine of personal jurisdiction. While the concept of personal jurisdiction finds its constitutional roots in the Due Process Clause,[11] the first two central cases to discuss the concept of personal jurisdiction were focused on events that occurred prior to the ratification of the Fourteenth Amendment in 1868 and were rooted in the fundamental concept of state sovereignty.[12]

### A. *Galpin v. Page*

In *Galpin v. Page*,[13] both an heir and a grantee claimed title for a piece of real property located in San Francisco, California.[14] At issue before the Court was whether any determination reached by the courts below was valid, given that a necessary party, who was domiciled outside of California and who held a potential interest in the property at issue, had not been served in the state.[15] In fact, the only service on the out-of-state party had been by publication.[16] In reviewing the issue, the Court determined that the judgment reached by the courts below was void because

11. *See generally* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 25–78 (1990) (tracing the history of how personal jurisdiction grew to be understood as an issue of constitutional law).

12. Stephen Higdon, Comment, *If It Wasn't on Purpose, Can a Court Take It Personally?: Untangling* Asahi's *Mess That* J. McIntyre *Did Not*, 45 TEX. TECH. L. REV. 463, 466–67 (2013) (noting that personal jurisdiction initially was a function of state-by-state common law before developing constitutional roots); *see* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) (asserting that a state's attempt to reach out-of-state defendants constituted an unjustified assumption of power); Galpin v. Page, 85 U.S. 350, 367–68 (1873) (finding that state courts lack personal jurisdiction over defendants beyond their territorial boundaries); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L. J. 1, 59 (2010) (noting that both the *Pennoyer* and *Galpin* opinions use nearly identical language to discuss territorial limits on personal jurisdiction).

13. 85 U.S. 350.

14. *Id.* at 351–52.

15. *Id.* at 353.

16. *Id.*

publication service on the out-of-state defendant was invalid.[17] The primary concern of the *Galpin* Court was preserving the sovereign jurisdictions of the individual states.[18]

In reaching this conclusion, the Court stated:

> The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy.[19]

The Court reasoned that "[j]udgment without jurisdiction is unavailing for any purpose."[20] Thus, the Court laid the foundation for a personal jurisdiction problem that has confused and troubled courts to the present.

### B. *Pennoyer v. Neff*: Physical Presence Made Explicit

As most first-year law students discover early in their law school careers, the modern origins of personal jurisdiction began with *Pennoyer v. Neff*.[21] In *Pennoyer*, an attorney brought an action against his client, Neff, for unpaid legal fees in Oregon.[22] As in *Galpin*, service on Neff was attempted by publication in a newspaper, but Neff was not personally served.[23] Default judgment was then awarded to the attorney when Neff failed to respond or appear.[24] To satisfy the judgment, the attorney took action to seize property owned by Neff in Oregon, with the property subsequently being sold at a sheriff's auction.[25] At the auction, the attorney purchased the land and then assigned the rights to the property to Pennoyer.[26]

17. *Id.* at 359.
18. *Id.* at 367.
19. *Id.*
20. *Id.* at 373.
21. 95 U.S. 714 (1877).
22. *Id.* at 719–20.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 719.

Shortly thereafter, Neff brought suit against Pennoyer for quiet title.[27] In effect, Neff argued that the original judgment against him was invalid because the original court did not have proper personal jurisdiction over him, in that he did not reside within the jurisdiction of the Oregon court and, thus, was not properly served.[28] The district court found the original judgment against Neff invalid, determining that the property continued to belong to Neff.[29] The case was appealed, and the United States Supreme Court granted certiorari.[30]

In an opinion by Justice Field,[31] the Court held that the authority of every lower court is restricted by the territorial limits of the state where it is established.[32] In so holding, the Court stated:

> [A] State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.[33]

The Court reasoned:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down . . . as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that

27. Neff v. Pennoyer, 17 F. Cas. 1279, 1280 (C.C.D. Or. 1875), *aff'd*, 95 U.S. 714, (1877).

28. *Id.* at 1280–81.

29. *Id.* at 1290.

30. *Pennoyer*, 95 U.S. 714 (1877).

31. *Id.* at 719.

32. *Id.* at 720.

33. *Id.* at 723; *see* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts; From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 571 (1958) (discussing *Pennoyer*).

> territory so as to subject either persons or property to its decisions.[34]

However, for the development of personal jurisdiction, the critical analysis in *Pennoyer* rested upon linking the concept of personal jurisdiction with the constitutional requirements of the Fourteenth Amendment's Due Process Clause.[35] As stated by the Court in *Pennoyer*:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State . . . .
>
> Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is

34. *Pennoyer*, 95 U.S. at 722.

35. Sarah R. Cebik, *"A Riddle Wrapped in a Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 4 (1998) (stating that "[t]he Court further held that whether a court had personal jurisdiction over the defendant was a constitutional matter rooted in the Due Process Clause of the Fourteenth Amendment"); Higdon, *supra* note 12, at 467 (noting that the Court continued the states' approach, however the Court also utilized the Due Process Clause to check the states' use of personal jurisdiction); Kurland, *supra* note 33, at 572.

> brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*.[36]

Thus, following *Pennoyer* a state court could exercise personal jurisdiction over a non-resident defendant only when that defendant was served within the territorial bounds of the state, when the defendant voluntarily appeared before the court for the proceedings, or when property owned by the defendant within the territorial bounds of the state was attached prior to the filing of the lawsuit.[37]

In the years following *Pennoyer*, the Court continued to wrestle with the concept of personal jurisdiction and due process. For example, in *St. Clair v. Cox*,[38] the Court affirmed its prior holdings that "[p]ersonal service of citation on the party or his voluntary appearance [is], with some exceptions, essential to the jurisdiction of the court."[39] In defining what those exceptions might be, the Court stated: "[t]he exceptions related to those cases where proceedings are taken in a State to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself."[40] The Court also went on in *St. Clair* to confirm that the same requirements applied to corporations that apply to natural persons.[41]

Over the ensuing years, the analysis of personal jurisdiction based on a defendant's physical presence and the territorial sovereignty of the states found in *Pennoyer* formed the linchpin of courts' application of the concept of personal jurisdiction.

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36. *Pennoyer*, 95 U.S. at 733–34.

37. *Id.* at 723, 733; Danielle Keats Citron, *Minimum Contacts in A Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1505 (2006); Higdon, *supra* note 12, at 467–68; Michael B. Mushlin, *The New Quasi in Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1067–68 (1990).

38. 106 U.S. 350 (1882).

39. *Id.* at 353.

40. *Id.* (citing *Pennoyer*, 95 U.S. 714).

41. *Id.*

## *III. WHITHER THE TWENTIETH CENTURY: "PRESENCE" REDEFINED*

As modern commerce emerged in the new century with business entities increasingly engaging in commerce in multiple states, including many states in which the business had no "presence" as that concept had been articulated in *Pennoyer*, the requirement of physical presence, in order for a court to exercise personal jurisdiction over out-of-state business entities conducting commerce within the state, became increasingly unworkable.[42] As a result, to exercise personal jurisdiction over out-of-state entities, courts were increasingly forced to create legal fictions revolving around consent to find the "presence" required by *Pennoyer*.[43]

### A. *International Shoe*: How Many Contacts Create "Presence"?

To address the increasingly complicated jurisdictional conundrums that arose as courts struggled with the need to protect in-state citizens from the in-state activities of out-of-state commercial entities, the Court needed to develop a more flexible approach than it had established in *Pennoyer*.[44] In *International Shoe Co. v. Washington*,[45] the Court moved beyond the rigid requirement of physical presence it had established in *Pennoyer* and articulated a new definition of "presence."[46] The Court in *International Shoe* concluded that the exercise of personal jurisdiction was appropriate when an out-of-state defendant had

42. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE, 214 (3d ed. 2004) (stating that "[a] corporation, like an individual, could consent to suit in a forum . . . [but] [i]n the absence of *actual* consent, the traditional rule was that a corporation could not be sued outside [their] state [of incorporation]"); *see* SAMUEL ISSACHAROFF, CIVIL PROCEDURE, 93–94 (2005) (using automobiles as an example of the growing difficulties in defining personal jurisdiction by "territorial notions of sovereignty").

43. Erik T. Moe, Comment, Asahi Metal Industry Co. v. Superior Court*: The Stream of Commerce Doctrine, Barely Alive but Still Kicking*, 76 GEO. L.J. 203, 206 (1987); *see* Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 688–89 (2009) (examining the creation of legal fictions by courts with the development of corporations throughout the country).

44. *See* ISSACHAROFF, *supra* note 42, at 93–94 (examining the Court's use of the Fourteenth Amendment Due Process Clause to maintain flexibility regarding jurisdictional issues).

45. 326 U.S. 310 (1945).

46. *Id.* at 316–17.

"certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[47]

In *International Shoe*, the State of Washington sued the International Shoe Company in Washington state court.[48] The suit was filed to obtain contribution payments to the state unemployment compensation fund.[49] The International Shoe Company was a Delaware corporation with its principal place of business in St. Louis, Missouri.[50] It maintained places of business in several states, not including Washington, where "its manufacturing [was] carried on and from which its merchandise [was] distributed interstate."[51] International Shoe Company had no office or stock in the State of Washington and maintained only eleven to thirteen salesmen under the direct supervision of a sales manager in St. Louis, Missouri.[52]

Nonetheless, the Court held that the exercise of jurisdiction by the Washington state court was appropriate because constitutional due process requires only that a defendant have certain minimum contacts within the forum state such that maintenance of the suit does not offend "'traditional notions of fair play and substantial justice.'"[53] The Court's opinion redefined what was meant by "presence" in determining whether a state court could exercise personal jurisdiction over an out-of-state defendant, stating "'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."[54]

The Court reasoned that this move away from the rigidity of *Pennoyer* was necessary due to advances in technology and modern commerce.[55] Moreover, in addressing the concept of "presence," the Court stated:

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have . . .

47. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
48. Int'l Shoe Co. v. State, 22 Wash. 2d 146, 147 (1945).
49. *Int'l Shoe*, 326 U.S. at 311.
50. *Id.* at 313.
51. *Id.*
52. *Id.*
53. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
54. *Id.* at 316–17.
55. *Id.* at 316.

> been continuous and systematic . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.[56]

While the Court did not articulate a clear boundary line between those activities that would subject a defendant to suit and those that would not, the Court noted that the criteria could not be "mechanical or quantitative."[57] The Court stated that for the acts to be enough to subject an out-of-state defendant to suit, those acts are to be judged based on their "nature and quality and the circumstances of their commission."[58] The Court reasoned that "to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state" and "[t]he exercise of that privilege may give rise to obligations . . . which requires the corporation to respond to a suit brought to enforce them."[59]

The shift from the analysis established in *Pennoyer* to that found in *International Shoe* is explained by one commentator in the following manner:

> The key outcome of *International Shoe* was that a defendant could be regarded as present in the forum state for purposes of jurisdictional analysis not through fictions such as where notice happened to be served or through creative methods of establishing permanent domicile, but rather by the defendant's conduct towards and within the forum. In doing away with the fictions created over the previous seventy years within the confines of *Pennoyer*, the Court instituted a fairness element such that the contacts a corporation has with the forum state make it "reasonable . . . to require the corporation to defend the particular suit which is brought there."[60]

56. *Id.* at 317 (citations omitted).
57. *Id.* at 319.
58. *Id.* at 318.
59. *Id.* at 319.
60. S. Wilson Quick, Comment, *Staying Afloat in the Stream Of Commerce:* Goodyear, McIntyre, *and the Ship of Personal Jurisdiction*, 37 N.C. J. INT'L L. & COM. REG. 547, 558 (2011) (typeface altered).

## B. Navigating the "Stream of Commerce": *World Wide Volkswagen* and *Asahi Metal*

### *1.* World-Wide Volkswagen Corporation v. Woodson

Stream-of-commerce analysis made its first explicit appearance in the United States Supreme Court with the 1980 case, *World-Wide Volkswagen Corporation v. Woodson*.[61] In short, stream-of-commerce analysis addresses the issue of whether personal jurisdiction exists when a "defendant has placed a product into a distribution chain and that product later causes damage in the forum state."[62] In *World-Wide Volkswagen*, the Court was faced with the question of whether an Oklahoma state court could exercise personal "jurisdiction over a nonresident automobile retailer and its wholesale distributer in a products-liability action" when the retailer and distributor had placed the automobile in the stream of commerce and when the automobile subsequently caused harm in the forum state.[63]

In *World-Wide Volkswagen*, a family purchased a new Audi automobile from a retailer in New York that obtained it from a local distributer, which served New York, New Jersey, and Connecticut.[64] A year after purchasing the automobile, the family left New York to move to their new home in Arizona.[65] En route to Arizona, the family drove the Audi through the state of Oklahoma where another vehicle struck their Audi in the rear.[66] The collision caused a fire that severely burned the mother and her two children.[67]

Subsequently, the family filed suit in Creek County, Oklahoma state court, listing the retailer and distributer as two of many defendants in the family's products-liability action.[68] After the retailer and distributer made a special appearance to contest personal jurisdiction, the District Court for Creek County ruled that they were subject to personal jurisdiction.[69] Similarly, on

61. 444 U.S. 286, 298 (1980).
62. Quick, *supra* note 60, at 548–49.
63. 444 U.S. at 287.
64. *Id.* at 288–89.
65. *Id.* at 288.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 288–89.

appeal, the Oklahoma Supreme Court held that jurisdiction was authorized.[70] The United States Supreme Court subsequently granted certiorari.[71]

The Court held that jurisdiction was not proper because the retailer and distributer had no "'contacts, ties, or relations'" with Oklahoma.[72] The Court reasoned that the retailer and distributer carried on no activity, sales, services, or business with the state and thus "avail[ed] themselves of none of the privileges and benefits of Oklahoma law."[73]

Justice White, writing for the Court, succinctly described the development of the doctrine of personal jurisdiction in prior caselaw. He explained that the concept of minimum contacts from *International Shoe* performed two distinguishable functions.[74] Those functions included protecting defendants against the burden of litigating in a "distant or inconvenient forum" and ensuring that states do not reach "beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[75] Justice White explained that the first function of protecting defendants is "typically described in terms of 'reasonableness' or 'fairness.'"[76]

However, the Court noted that the "Due Process Clause, in its role as a guarantor against inconvenient litigation, [has] been substantially relaxed over the years" because of modern transportation and communication.[77] The Court went on to note that it would be a mistake to assume that the trend would lead to the demise of all personal-jurisdiction restrictions.[78] In addition, Justice White noted that the Court had never accepted the

70. *Id.* at 289–90. The Court further clarified that "[a]lthough the court noted that the proper approach was to test jurisdiction against both statutory and constitutional standards, its analysis did not distinguish these questions, probably because . . . [Oklahoma's "long-arm" statute] has been interpreted as conferring jurisdiction to the limits permitted by the United States Constitution." *Id.* at 290.

71. *Id.* at 291. The Court granted certiorari in this case to resolve the same conflict in Kansas, Colorado, Utah, and Washington. *Id.* at 291 n.9.

72. *Id.* at 299 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

73. *Id.* at 295.

74. *Id.* at 291–92.

75. *Id.* at 292.

76. *Id.*

77. *Id.* at 292–93 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957)). The Court further noted that the technological advances identified in *McGee* had only further accelerated in the generation since. *Id.* at 293.

78. *World-Wide Volkswagen*, 444 U.S. at 294 (citing Hanson v. Denckla, 357 U.S. 235, 250–51 (1958)).

proposition that state lines were irrelevant for jurisdictional purposes because it was vital to remain faithful to the principles of interstate federalism embodied in the Constitution.[79]

The Court also synthesized the factors hinted at in other cases that apply in determining reasonableness.[80] Those factors include: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies."[81]

Next, the Court addressed the requirements of "foreseeability" within a court's analysis of personal jurisdiction.[82] The plaintiffs asserted that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that [it] would cause injury in Oklahoma."[83] In addressing this contention, the Court rejected the plaintiffs' argument and instead held that in addressing the question of foreseeability, a court should focus on whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" rather than the "mere likelihood that a product will find its way into the forum State."[84]

However, for the first time the Court iterated the stream-of-commerce test that had been previously articulated by the Illinois Supreme Court twenty years earlier in *Gray v. American Radiator & Standard Sanitary Corporation*.[85] Specifically, the Court stated that "[t]he 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."[86] However, the Court reasoned that this was not applicable to the defendant retailer and distributer because

79. *Id.* at 293.

80. *Id.* at 292.

81. *Id.* (citing Kulko v. Cal. Superior Court, 436 U.S. 84, 92–93, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977); *McGee*, 355 U.S. at 223).

82. *Id.* at 295–99.

83. *Id.* at 295.

84. *Id.* at 297.

85. *Id.* at 297–98 (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961)).

86. *World-Wide Volkswagen*, 444 U.S. at 297–98.

the movement of the vehicle to Oklahoma was made unilaterally by the family, and not by the retailer or distributer selling the vehicles to Oklahoma consumers.[87]

Although the majority carried six votes, each of the three justices voting against the majority filed a dissent.[88] In his dissent, Justice Brennan made clear that he believed the majority was reading the personal jurisdiction line of cases too narrowly and that the standards enunciated by that line of cases were already obsolete as a result of the development of modern commerce.[89] Justice Brennan noted that "[t]he essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends 'traditional notions of fair play and substantial justice.'"[90] Justice Brennan further stated that "[t]he existence of contacts . . . [is] merely one way of giving content to the determination of fairness and reasonableness."[91] Moreover, he asserted that the "Constitution does not require that trial be held in the State which has the 'best contacts.'"[92] Justice Brennan questioned how the Constitution could distinguish between personal jurisdiction based on stream of commerce and cases in which the seller knew the customer would take the goods there.[93]

Furthermore, Justice Brennan pointed out that the automobile sellers in *World-Wide Volkswagen* also derived benefits from states other than the specific state where the automobile was sold.[94] According to Justice Brennan, businesses cannot and do not assume that the goods they manufacture and sell will remain in the locality where the goods are manufactured and sold.[95] Specifically, he stated that "the interests of the forum State and other parties loom large in today's world and surely are entitled to as much weight as are the interests of the defendant," leading him to conclude that "constitutional concepts of fairness no longer

87. *Id.* at 298.
88. *Id.* at 286.
89. *Id.* at 299 (Brennan, J., dissenting).
90. *Id.* at 300 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (quotations omitted).
91. *Id.*
92. *Id.* at 301 (citing Shaffer v. Heitner, 433 U.S. 186, 228 (1977) (Brennan, J., dissenting)).
93. *Id.* at 306–07.
94. *Id.* at 307.
95. *Id.* at 309.

require the extreme concern for defendants that was once necessary."[96] Justice Brennan then stated, "Jurisdiction is no longer premised on the notion that non-resident defendants have somehow impliedly consented to suit. People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States."[97]

Justice Marshall, in a dissent joined by Justice Blackmun, noted that "it is not surprising that the constitutional standard is easier to state than to apply."[98] Justice Marshall further stated that "jurisdiction is premised on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles."[99] Because of this, Justice Marshall reasoned that the retailer and distributer "must have anticipated . . . that a substantial portion of the cars they sold would travel out of New York."[100] Although Justice Marshall acknowledged the majority's concern that persons should have the freedom to structure their conduct to avoid suit in distant forums, he noted that "[s]ome activities by their very nature may foreclose the option."[101]

Lastly, Justice Blackmun filed a comparatively short dissent in which he asserted that a critical factor for him in the analysis was the "nature of the instrumentality" or plainly stated—the intentional mobility of automobiles.[102] Given that this case involved automobiles and, by necessity, highway usage, Justice Blackmun asserted that it certainly was foreseeable to the seller that its product could end up in Oklahoma.[103] As a result, Justice Blackmun believed it not unreasonable nor unconstitutional to conclude that Oklahoma had personal jurisdiction over the retailer and distributer.[104]

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96. *Id.*
97. *Id.* at 311.
98. *Id.* at 313 (Marshall & Blackmun, JJ., dissenting).
99. *Id.* at 314.
100. *Id.*
101. *Id.* at 316.
102. *Id.* at 318 (Blackmun, J., dissenting).
103. *Id.*
104. *Id.*

While fundamental disagreements existed in the Supreme Court regarding the applicability and analysis of the stream-of-commerce doctrine in determining whether personal jurisdiction existed over an out-of-state defendant whose product causes harm in the forum state, lower courts were simply left with more questions than answers. One commentator describes the aftermath of *World-Wide Volkswagen* in the following manner:

> The contrast between the clear holding by the Court that jurisdiction could not be based upon the foreseeable unilateral actions of a consumer and the pronouncement of the basic stream of commerce doctrine left lower courts operating in the wake of *World-Wide Volkswagen* with the question of precisely what quality and quantity of contacts would demonstrate an "expectation that [a defendant's products] will be purchased by consumers in the forum State" such that jurisdiction could be exercised over a non-forum manufacturer or distributor. Put another way, practitioners and lower courts lacked clear guidance as to whether a defendant's act of placing a product into the stream of commerce that might foreseeably end up in a particular state would satisfy the minimum contacts requirement of the Due Process Clause.[105]

Seven years after the Court's decision in *World-Wide Volkswagen*, the Court again attempted to offer the "clear guidance" needed by lower courts in *Asahi*.

### 2. Asahi Metal Industry Co. v. Superior Court of California

In *Asahi Metal Industry Co. v. Superior Court of California*,[106] a husband and wife were riding a motorcycle on a California highway when a sudden loss of air pressure and explosion in the rear tire caused their motorcycle to collide with a tractor.[107] Sadly, the husband was severely injured and the wife was killed due to the collision.[108] Seeking redress, the husband filed a products-liability action in the California Superior Court, naming Cheng Shin, the Taiwanese manufacturer of the motorcy-

105. Quick, *supra* note 60, at 566.
106. 480 U.S. 102 (1986).
107. *Id.* at 105–06.
108. *Id.* at 105.

cle's tire tube, as a defendant.[109] Cheng Shin subsequently filed a cross-claim seeking indemnification from Asahi, the Japanese manufacturer of the valve assembly for the tire.[110] Eventually, the claims between the husband and Cheng Shin settled, leaving only the action for indemnification between Cheng Shin and Asahi.[111] After the settlement, Asahi filed a motion to quash the summons.[112]

As a tire valve manufacturer, Asahi noted that it sold assemblies to Cheng Shin, along with several other tire manufacturers.[113] Specifically, sales to Cheng Shin accounted for less than two percent of Asahi's income.[114] After review, the California Superior Court denied the motion to quash the summons.[115] However, the court of appeals issued a peremptory writ of mandate commanding the superior court to quash service of the summons.[116] Shortly thereafter, the California Supreme Court reversed and discharged the writ leading the United States Supreme Court to grant certiorari.[117]

Although the Court unanimously held that California lacked jurisdiction, the Court split on the interpretation of the stream-of-commerce test.[118] Justice O'Connor, writing for the plurality, articulated the stream-of-commerce "plus" test in Part II-A of her opinion.[119] She began by quoting *Burger King Corporation v. Rudzewicz*[120] and wrote: "[t]he '*constitutional touchstone*' of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established 'minimum contacts' in the forum State."[121] Justice O'Connor stated further that "[t]he placement of a

109. *Id.* at 105–06.
110. *Id.* at 106.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* (stating that "[s]ales to Cheng Shin accounted for 1.24 [%] of Asahi's income in 1981 and 0.44 [%] in 1982").
115. *Id.* at 107.
116. *Id.*
117. *Id.* at 108.
118. *Id.* at 108–13 (plurality); *id.* at 116–17 (Brennan, J., with White, Marshall, & Blackmun, JJ., concurring in Part II-B and dissenting from Part II-A).
119. *Id.* at 108–13; Quick, *supra* note 60, at 569 (referring to Justice O'Connor's test as the "stream of commerce plus" theory).
120. 471 U.S. 462 (1985).
121. *Asahi*, 480 U.S. at 108–09 (quoting *Burger King Corp.*, 471 U.S. at 474) (emphasis added) (quotations omitted).

product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[122] Specifically, there must be a "'substantial connection' between the defendant and the forum state."[123] According to Justice O'Connor, this can be met through: "[(1)] designing the product for the market in the forum State, [(2)] advertising in the forum State, [(3)] establishing channels for providing regular advice to customers in the forum State, or [(4)] marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[124] Justice O'Connor concluded that Asahi did not meet that criterion and thus did not fall under the jurisdiction of California courts. However, Justice O'Connor did leave open the idea that "Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts," instead of state contacts.[125]

In Part II-B of the opinion, Justice O'Connor concluded that regardless of the disagreement in the Court on the stream-of-commerce analysis, jurisdiction would not be proper in this case because the exercise of jurisdiction by the California courts would be unreasonable and would offend "traditional notions of fair play and substantial justice."[126] In part, this decision rested upon the fact that the defendant was an alien corporation and any interest California might have in the litigation was diminished because none of the remaining parties to the litigation were California residents.[127] Lastly, Justice O'Connor pointed out that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[128]

Justice Brennan, joined by three justices in addressing the stream-of-commerce doctrine, reached a different conclusion on the application of the stream-of-commerce analysis in this case.[129] Although he asserted that there were sufficient minimum con-

122. *Id.* at 112.
123. *Id.* (quoting *Burger King Corp.*, 471 U.S. at 475) (citation omitted).
124. *Id.*
125. *Id.* at 113 n.* (emphasis in original).
126. *Id.* at 113–14 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (quotations omitted).
127. *Id.* at 114.
128. *Id.* at 115 (quoting United States v. First Nat' l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).
129. *Id.* at 116 (Brennan, J., concurring).

tacts in this case to support the exercise of personal jurisdiction over the defendant by California, Justice Brennan agreed that, in this case, "the concept of 'fair play and substantial justice' defeat[s] jurisdiction."[130]

Regarding the application of the stream-of-commerce analysis, Justice Brennan asserted that additional conduct beyond placing a product in the stream of commerce is not necessary to give a state court jurisdiction over an out-of-state defendant.[131] Justice Brennan reasoned that "[t]he stream of commerce refers . . . to the regular and anticipated flow of products from manufacture to distribution to retail sale."[132] According to Justice Brennan, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."[133]

Lastly, Justice Stevens wrote a separate concurrence in which he made clear that he saw no reason for the Court to engage in a discussion of stream-of-commerce analysis because a majority of the Court agreed that the unreasonableness of the exercise of jurisdiction in this case alone warranted reversal.[134] However, Justice Stevens argued that the plurality misapplied the facts and "seem[ed] to assume that an unwavering line can be drawn between 'mere awareness' . . . and 'purposeful availment' of the forum's market."[135] Oddly, Justice Stevens indicated that he would have been inclined to draw an arbitrary line that under a stream-of-commerce analysis, "purposeful availment" would be met when a seller has delivered more than 100,000 units to the forum annually over a period of several years.[136]

As a result of the *Asahi* Court's split regarding what constitutes the necessary "purposeful availment" supporting the exercise of jurisdiction over an out-of-state defendant who has placed a product in the stream of commerce that subsequently injures a plaintiff within the forum state, the "clear guidance" sought by the lower courts on this question was not forthcom-

130. *Id.* at 116, 121 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985)) (Brennan, J., concurring).
131. *Id.* at 117.
132. *Id.*
133. *Id.*
134. *Id.* at 121–22 (Stevens, J., concurring).
135. *Id.* at 122.
136. *Id.*

ing.[137] In fact, the confusion in the lower courts that existed following the Court's opinion in *World-Wide Volkswagen* was not lessened by the fractured opinion in *Asahi* at all. The situation following the Court's decision in *Asahi* has been described as follows:

> Since the decision was issued, *Asahi* has frustrated legal scholars and lower courts regarding the limits of the exercise of personal jurisdiction over foreign defendants under long-arm statutes consistent with the Due Process Clause. With no additional guidance from the Court since the divided opinion in *Asahi*, there is now inconsistency in federal circuit courts and numerous state courts in regards to how the foreseeability test should be applied. The stream of commerce plus test elaborated by Justice O'Connor is being used in the First, Fourth, Sixth, Ninth, and Eleventh Circuits, while the Fifth, Seventh, and Eighth Circuits use Justice Brennan's basic stream of commerce analysis. There are other federal circuit courts that use both tests to analyze personal jurisdiction instead of picking one or the other. There is just as much if not more division between state courts over the use of the two branches of the stream of commerce analysis. Clearly the *Asahi* opinion has left a mess, typified by significant analytical variations and divergent applications by lower courts: It is high time for the Court to straighten out this complicated issue.[138]

## *IV. "THE 21ST CENTURY IS WHEN EVERYTHING CHANGES":[139] OR IS IT?*

In *J. McIntyre Machinery, Limited v. Nicastro*,[140] the United States Supreme Court was provided with an opportunity to clear up the confusion and clean up the mess that the Court's opinion in *Asahi* left for lower courts. However, when the Court issued its opinion on June 27, 2011, it was apparent that the Court had

137. Quick, *supra* note 60, at 566; *see Due Process Limits on Personal Jurisdiction*, 101 HARV. L. REV. 260, 266 (1987) (stating that "*Asahi* makes clear only that the Supreme Court no longer has a strong theory to explain why it requires minimum contacts to exist").

138. Quick, *supra* note 60, at 571–72; *see also* Laughlin, *supra* note 43, at 703–04 nn.129–132 (examining the differing tests used by various federal circuit courts).

139. *Torchwood: Everything Changes* (BBC television broadcast Oct. 22, 2006).

140. 131 S. Ct. 2780 (2011) (plurality).

again failed to provide the guidance needed by the lower courts.[141] In a decision reminiscent of *Asahi*, the Court, in a four–two–three split, reversed the decision of the New Jersey Supreme Court, which held that the exercise of jurisdiction over the out-of-state defendant was appropriate.[142] Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia and Thomas, offered the plurality opinion, with Justice Breyer, joined by Justice Alito, concurring in the decision in a separate opinion.[143] Justice Ginsburg, joined by Justices Kagan and Sotomayor, dissented.[144]

In *J. McIntyre*, a thirty-year employee injured his hand while working at his place of employment, Curcio Scrap Metal.[145] The injury occurred while the employee was using a metal-shearing machine, manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre), a business entity incorporated and operating out of England.[146] The machine had been sold in the United States through an independent exclusive distributor, McIntyre Machinery America, Ltd. (McIntyre America), headquartered in Stow, Ohio.[147]

The employee, employed in New Jersey, sued the manufacturer in New Jersey Superior Court.[148] Upon motion by the manufacturer, the trial court dismissed the action finding that the manufacturer lacked minimum contacts with New Jersey.[149] The New Jersey Appellate Division reversed in an unreported opinion.[150] The New Jersey Supreme Court then reviewed the case and concluded that New Jersey could exercise jurisdiction.[151] Subsequently, in an attempt to answer "decades-old questions left open in *Asahi*,"[152] the United States Court granted certiorari.[153]

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141. *See supra* text accompanying note 10.
142. *J. McIntyre Mach.*, 131 S. Ct. at 2785.
143. *Id.*
144. *Id.*
145. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010), *rev'd*, 131 S. Ct. 2780 (2011). The device blades severed four fingers from the hand of the employee. *Id.*
146. *J. McIntyre Mach.*, 131 S. Ct. at 2786.
147. *Nicastro*, 987 A.2d at 577–78.
148. *J. McIntyre Mach.*, 131 S. Ct. at 2786.
149. *Nicastro*, 987 A.2d at 578.
150. *Id.*
151. *J. McIntyre Mach.*, 131 S. Ct. at 2786.
152. *Id.* at 2785.
153. *Id.* at 2786.

Justice Kennedy, writing for the plurality, reversed the decision of the New Jersey Supreme Court, holding that New Jersey did not have personal jurisdiction over the out-of-state defendant.[154] In reaching this conclusion, Justice Kennedy acknowledged the confusion that remained following *Asahi* regarding the application of stream-of-commerce analysis, stating:

> The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum . . . . The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.[155]

The *J. McIntyre* plurality agreed with Justice O'Connor's *Asahi* plurality opinion, concluding that a defendant simply placing a product in the stream of commerce, without more, was insufficient to confer jurisdiction over that defendant.[156] Justice Kennedy reasoned primarily that "Justice Brennan's concurrence [in *Asahi*], advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful

154. *Id.* at 2791.
155. *Id.* at 2788 (citations omitted).
156. *Id.* at 2790.

judicial power."[157] He asserted that "precedent[ ] make[s] clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."[158] Reinforcing this logic, Justice Kennedy argued that it was this premise that led the plurality in *Burnham v. Superior Court of California*[159] to "'conduct[ ] 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."[160] Additionally, Justice Kennedy reasoned that "[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."[161]

Justice Kennedy again raised an issue that was previously raised in Justice O'Connor's *Asahi* plurality opinion, stating that "a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."[162] Underlying this idea, Justice Kennedy noted, is the notion that our "legal system [is] unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[163] Further justifying this somewhat meaningless logic, Justice Kennedy also noted—while offering no support—that "foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums."[164]

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157. *Id.* at 2789 (plurality).

158. *Id.*

159. 495 U.S. 604 (1990). In *Burnham*, the defendant husband was served with a summons and complaint in a divorce proceeding while he was in California for business and to visit his children. *Id.* at 608. The defendant resided in New Jersey and had no other contacts with California. *Id.* at 607–08. While the Supreme Court was divided over the appropriate approach to the analysis of the due process issues present in the case, all nine justices agreed that it was constitutionally permissible for service in the forum state to serve as the basis for the exercise of personal jurisdiction over the defendant, even when the defendant had no other contacts with the forum state and where the only contact was unrelated to the cause of action. *Id.* at 610–11.

160. *J. McIntyre Mach.*, 131 S. Ct. at 2789 (quoting *Burnham*, 495 U.S. at 610) (citations omitted).

161. *Id.* at 2787.

162. *Id.* at 2789.

163. *Id.* (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring)).

164. *Id.* at 2789–90.

Additionally, Justice Kennedy reasoned that although this case involved a foreign manufacturer, "the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers."[165] By way of example, the Court reasoned that if Justice Brennan's foreseeability test were to control, a small farmer in Florida could be sued in Alaska, for instance, if his distributor were to circulate the farmer's product nationwide.[166] Justice Kennedy noted that simply following Justice O'Connor's stream-of-commerce "plus" test was not sufficient to resolve difficult questions of jurisdiction that arise in particular cases because of the specific conduct of the defendant and economic realities.[167] Justice Kennedy thus acknowledged that many open questions remained to be answered regarding the application of the stream-of-commerce theory and that simply requiring "purposeful availment" on the part of a defendant, as Justice O'Connor required, did not answer all of those questions.[168]

While concurring in the judgment, Justice Breyer quarreled with the plurality's attempt to state a general rule related to stream-of-commerce analysis in this specific case.[169] Justice Breyer thought "it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."[170] He further asserted that because "this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."[171] Further, Justice Breyer questioned both "absolute" approaches posed by the New Jersey Supreme Court and the plurality because each leaves open questions about the effects of each rule.[172] Regarding the rule the New Jersey Supreme Court

165. *Id.* at 2790.

166. *Id.* (stating that "[t]he owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country[, and i]f foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town").

167. *Id.*

168. *Id.*

169. *Id.* at 2791, 2794 (Breyer, J., with Alito, J., concurring).

170. *Id.* at 2791.

171. *Id.* at 2792–93.

172. *Id.* at 2793 (stating that the opinion raises questions about the effect on websites selling products like Amazon.com and on small manufacturers like an Appalachian potter who sells his products exclusively to a large distributer).

employed, Justice Breyer noted that it "would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law."[173]

Justice Breyer concluded by stating that the Court knew "too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach."[174] The opinion suggested that input and participation by the Solicitor General might help in considering changes to the present law.[175] Because of these considerations and effects, Justice Breyer reasoned that the Court should reach its decision based on precedent and on the limited facts from the case.[176] Relying on precedent, Justice Breyer asserted that no prior decision by the Court in this area has found that "a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" to confer jurisdiction over an out-of-state defendant.[177] In this case, Justice Breyer argued that "the relevant facts found by the New Jersey Supreme Court show no 'regular . . . flow' or 'regular course' of sales in New Jersey."[178]

What seems clear from Justice Breyer's concurrence is that he anticipates that the Court will ultimately have to revisit and address the stream-of-commerce doctrine in the near future, but *J. McIntyre* was not the case in which to do so. For Justice Breyer, a future case requiring the Court to finally address the complex issues of stream-of-commerce analysis in the context of modern global commerce would necessarily include issues such as selling over the Internet, marketing through the use of pop-up advertisements, or distribution through an intermediary like Amazon.com.[179]

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173. *Id.* at 2794 (citing THOMAS H. COHEN, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001 at 11 (2004) (reporting percentage of plaintiff winners in tort trials among forty-six populous counties, ranging from 17.9% (Worchester, Mass.) to 69.1% (Milwaukee, Wis.))).

174. *Id.* at 2793.

175. *Id.* at 2794.

176. *Id.*

177. *Id.* at 2792.

178. *Id.* (ellipses in original).

179. *Id.* at 2793.

Finally, Justice Ginsburg offered a dissenting opinion, in which Justice Sotomayor and Justice Kagan joined.[180] Justice Ginsburg began by offering a detailed factual description of the case, placing specific emphasis on those facts that supported the exercise of jurisdiction by New Jersey.[181] According to Justice Ginsburg, the critical goal of the manufacturer was to attract customers from anywhere in the United States, with no instructions given by the manufacturer to its distributor to avoid marketing or sales in certain states or regions of the country.[182] Summarizing the facts, Justice Ginsburg stated, "McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products 'anywhere in the United States.'"[183]

Part II of the dissenting opinion noted several items over which "there should be no genuine debate."[184] Those items included: (1) that the manufacturer was not subject to general jurisdiction; (2) that New Jersey's exercise of jurisdiction "d[id] not tread on the domain, or diminish the sovereignty, of any sister State"; (3) that "constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty"; and (4) that "the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."[185] Further, Justice Ginsburg, following on her fourth point above, argued with the plurality's requirement that jurisdiction "depend[ ] upon the defendant's 'submission.'"[186]

Justice Ginsburg continued by asking whether it is fair, reasonable, or convenient "to require the international seller to defend at the place its products cause[d] injury[.]"[187] She asserted that the defendant, like most foreign manufacturers, was concerned with its subjection to suit anywhere in the United States because it dealt with the United States as a single market.[188]

180. *Id.* at 2794 (Ginsburg, J., with Sotomayor & Kagan, JJ., dissenting).
181. *Id.* at 2795–97.
182. *Id.* at 2797.
183. *Id.*
184. *Id.*
185. *Id.* at 2797–98.
186. *Id.* at 2799 n.5.
187. *Id.* at 2800.
188. *Id.* at 2801.

Moreover, Justice Ginsburg stated that "[t]his case is illustrative of marketing arrangements for sales in the United States common in today's commercial world."[189] Following this logic, Justice Ginsburg reasoned that:

> McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, "purposefully availed itself["] of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. "Th[e] 'purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."[190]

Additionally, the Court noted that "the manufacturer will [likely] have liability insurance covering personal injuries caused by its products."[191]

Further reasoning that jurisdiction was proper, Justice Ginsburg asserted that both state and federal courts confronting facts similar to this case have rejected the plurality's conclusion.[192] Justice Ginsburg distinguished *Asahi* from this case based on the fact that the manufacturer in *Asahi*, "unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no [w]eb site advertising its products to the world."[193] Justice Ginsburg further stated, "none of the Court's [prior personal jurisdiction]

189. *Id.* at 2799. Justice Ginsburg illustrates this fact by stating that "[l]ast year, the United States imported nearly 2 trillion dollars in foreign goods." *Id.* at 2799 n.6.

190. *Id.* at 2801 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

191. *Id.* at 2799 (citing Richard L. Cupp Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 870–71 (1999) ("noting the ready availability of products-liability insurance for manufacturers and citing a study showing, 'between 1986 and 1996, [such] insurance cost manufacturers, on average, only sixteen cents for each $100 of product sales'")).

192. *Id.* at 2801. The dissent further supplemented this by adding an appendix with a non-exhaustive list of cases supporting its conclusion along with a summary of each. *Id.* at 2804–06. The jurisdictions represented included: United States Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits; the United States District Court for the Eastern District of Pennsylvania; the Supreme Court of Alabama; the Supreme Court of Arizona; and the Supreme Court of West Virginia. *Id.*

193. *Id.* at 2803.

decisions tug against the judgment made by the New Jersey Supreme Court."[194]

Lastly, Justice Ginsburg argued that the "judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world."[195] Supporting this argument, Justice Ginsburg compared the jurisdictional constraints required by the plurality with those set forth in the international context, particularly in the European Union.[196]

Justice Ginsburg concluded by stating that she would hold the manufacturer "answerable in New Jersey for the harm" caused to the employee while using the manufacturer's product.[197] Criticizing the majority decision holding that jurisdiction was not proper over J. McIntyre, Justice Ginsburg wrote:

> Inconceivable as it may have seemed yesterday, the splintered majority today turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.[198]

## *V. AND BACK AGAIN: CONTINUED CONFUSION IN THE LOWER COURTS*

Since the *J. McIntyre* decision was handed down in June 2011, the confusion in the lower courts as to how to address personal jurisdiction questions that implicate stream-of-commerce analysis has not abated. Because the United States Supreme Court failed to provide "clear guidance" regarding the proper application of stream-of-commerce analysis, lower courts remain confused. The treatment and application of the *J. McIntyre* ruling by lower courts generally falls into three general categories: (1) lower courts follow the plurality opinion in *J. McIntyre* in their

194. *Id.* at 2802.
195. *Id.* at 2803.
196. *Id.*
197. *Id.* at 2804.
198. *Id.* at 2795 (quotations and citations omitted).

personal jurisdiction analysis;[199] (2) lower courts follow the narrowest holding from *J. McIntyre* because there was no majority as to the specific application of stream-of-commerce analysis in *J. McIntyre*;[200] and (3) lower courts choose to ignore *J. McIntyre* and continue to follow the personal jurisdiction analysis developed since *Asahi*, with many following the analysis set forth by Justice Brennan in *Asahi*, because *J. McIntyre* simply reflected the confusion of the Supreme Court over the application of stream-of-commerce analysis seen in *Asahi*.[201] The following are some illustrative examples of the manner in which lower courts have addressed the *J. McIntyre* holding.

### A. Lower Courts Following the *J. McIntyre* Plurality in Their Personal Jurisdiction Analyses

In *Xia Zhao v. Skinner Engine Co.*,[202] decided by the United States District Court for the Eastern District of Pennsylvania, the plaintiffs brought suit against the defendants after plaintiff Zhao was injured in a machine accident while "operating the machine for its intended purpose."[203] The issue of personal jurisdiction and stream of commerce was relevant because one of the defendants was a company based in the United Kingdom.[204] However, the United Kingdom defendant argued that the court did not possess either general or specific jurisdiction over it.[205] Further, the United Kingdom defendant asserted that it did not have the required minimum contacts with the forum state to justify the exercise of jurisdiction over it in the forum.[206]

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199. *E.g.*, Xia Zhao v. Skinner Engine Co., No. 2:11-CV-07514-WY, 2012 WL 5451817, at *6–8 (E.D. Pa. Nov. 8, 2012); Scorpiniti v. Fox Television Studios, Inc., No. 11-CV-64-LRR, 2012 WL 3791314, at *7 (N.D. Iowa Aug. 31, 2012); King v. General Motors Corp., No. 5:11-CV-2269-AKK, 2012 WL 1340066, at *6–8 (N.D. Ala. Apr. 18, 2012).

200. *E.g.*, AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358, 1363 (Fed. Cir. 2012); Askue v. Aurora Corp. of Am., No. 1:10-CV-0948-JEC, 2012 WL 843939, at *7 (N.D. Ga. Mar. 12, 2012); Willemsen v. Invacare Corp., 282 P.3d 867, 872–75 (Or. 2012), *cert. denied*, 133 S. Ct. 984 (2013).

201. *E.g.*, Sieg v. Sears Roebuck & Co., 855 F. Supp. 2d 320, 326–27 (3rd Cir. 2012); Eastman Chem. Co. v. AlphaPet Inc., No. 09-971-LPS-CJB, 2011 WL 6004079, at *17–18 (D. Del. Nov. 4, 2011); Lindsey v. Cargotec USA, Inc., No. 4:09CV-00071-JHM, 2011 WL 4587583, at *4–7 (W.D. Ky. Sept. 30, 2011).

202. 2012 WL 5451817.

203. *Id.* at *1.

204. *Id.* at *1.

205. *Id.* at *4.

206. *Id.* at *3.

The court, in addressing the personal jurisdiction question, alluded to the confusion created by the United States Supreme Court in *Asahi*.[207] Specifically, the court stated, "[t]he Third Circuit has not specifically adopted either line of reasoning [in reference to Justice O'Connor's theory vs. Justice Brennan's theory], and thus counsels district courts to apply both when evaluating specific jurisdiction under a stream of commerce theory."[208]

The court used the analysis employed by the *J. McIntyre* plurality opinion to support its determination that the United Kingdom defendant was subject to personal jurisdiction based upon stream of commerce.[209] The court indicated that an important element of the analysis of the plurality in *J. McIntyre* is whether the party directly targeted the forum state.[210] The court concluded that, consistent with the plurality decision in *J. McIntyre*, the United Kingdom defendant's "direct targeting of [the forum state] satisfie[d] the first prong of the specific personal jurisdiction analysis."[211]

In *Scorpiniti v. Fox Television Studios, Inc.*,[212] decided by the United States District Court for the Northern District of Iowa, the plaintiff brought suit against the defendant alleging a trademark infringement.[213] The plaintiff company was "a citizen of Iowa," while the defendant company was "a Delaware corporation with its principal place of business in Los Angeles, California."[214] The defendant company argued that the court did not have personal jurisdiction over it because it did not have the required minimum contacts with the forum state.[215]

In deciding the jurisdictional issues, the court distinguished the facts of *Scorpiniti* from those of *J. McIntyre* while employing the analysis of the *J. McIntyre* plurality.[216] Specifically, the court held:

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207. *Id.* at *6 (citing Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 207 n.11 (3d Cir. 1998).

208. *Id.*; *Pennzoil Prods. Co.*, 149 F.3d at 207 n.11 (stating there are two approaches for viewing whether a foreign company availed itself to the jurisdiction).

209. *Id.* at *8.

210. *Id.*

211. *Id.*

212. No. 11-CV-64-LRR, 2012 WL 3791314 (N.D. Iowa Aug. 31, 2012).

213. *Id.* at *1.

214. *Id.* at *2.

215. *Id.* at *4.

216. *Id.* at *7.

> Unlike the circumstances in *J. McIntyre Machinery, Ltd.*, it was highly foreseeable that [the defendant] would broadcast [the television show in question] nationally, including in Iowa. Furthermore, it is well known that [the defendant] has local affiliates across the nation, and it would be natural to expect that a program sold to [the defendant] would be broadcast nationally and be viewed by a national audience, including individuals in Iowa.[217]

In conclusion, the court determined that personal jurisdiction could be extended over the defendant because of the "nature, quality[,] and quantity" of the contacts.[218]

In *King v. General Motors Corporation*,[219] decided by the United States District Court for the Northern District of Alabama, the plaintiff, the representative of the decedent's estate, brought a suit against the defendant after the decedent passed away allegedly as a result of the defendant's negligence, among other things.[220] The plaintiff was a resident of Alabama while the defendant was a "Canadian corporation with its principle office and place of business in Ontario, Canada" that contended it did not do business within the United States.[221] The defendant asserted that the court did not have personal jurisdiction over it because the defendant did not have the required minimum contacts with the forum state.[222]

In resolving the personal jurisdiction issue, the court employed the reasoning of the plurality opinion in *J. McIntyre* to determine that personal jurisdiction was available over the defendant in the case before it.[223] While the court noted the manner in which the justices differed in their respective analyses in *J. McIntyre*, the court determined that "[t]he facts in [*J.*] *McIntyre*, however, differ[ed] significantly from the facts [in *King*] because, purportedly, the [*J.*] *McIntyre* defendant could only *predict* that its product might reach the forum state."[224] However,

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217. *Id.*
218. *Id.*
219. No. 5:11-CV-2269-AKK, 2012 WL 1340066 (N.D. Ala. Apr. 18, 2012).
220. *Id.* at *1.
221. *Id.*
222. *See id.* at *1–2 (arguing that it did not maintain an "office, agency, or representative" in the United States and that it was "not qualified, registered, licensed, or authorized to do business in Alabama").
223. *Id.* at *8.
224. *Id.* at *7 (emphasis in original).

in the case before it, the court determined that the defendant "[could not] genuinely maintain that it [did] not serve the Alabama market."[225]

### B. Lower Courts Following the Narrowest Holding from *J. McIntyre*

In *AFTG-TG, LLC v. Nuvoton Technology Corporation*,[226] decided by the United States Court of Appeals for the Federal Circuit, the plaintiffs filed suit against the defendants alleging patent infringement.[227] The defendants asserted that the court did not have personal jurisdiction over them due to the fact that they did not have the required minimum contacts with the forum state to justify the exercise of jurisdiction over them.[228]

In resolving the jurisdictional issue, the court noted that *J. McIntyre* did not clarify the Supreme Court's holding in *Asahi* related to the application of the stream-of-commerce analysis.[229] The court stressed in its holding that "[t]he Supreme Court has yet to reach a consensus on the proper articulation of the stream-of-commerce theory."[230] Because of this lack of clarity, "this court has assessed personal jurisdiction premised on the stream-of-commerce theory on a case-by-case basis by inquiring whether the particular facts of a case support the exercise of personal jurisdiction."[231]

The court stated that "[b]ecause neither Justice Brennan's nor Justice O'Connor's test garnered a majority of the votes in *Asahi*, neither test prevailed as the applicable precedent."[232] Additionally, the court noted that "[t]he Court declined to resolve the *Asahi* split in [*J.*] *McIntyre*."[233] The court further stated that "[b]ecause [*J.*] *McIntyre* did not produce a majority opinion, we must follow the narrowest holding among the plurality opinions in that case. The narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the

225. *Id.* at *8.
226. 689 F.3d 1358 (Fed. Cir. 2012).
227. *Id.* at 1360.
228. *Id.* at 1360–62.
229. *Id.* at 1362–63.
230. *Id.* at 1362.
231. *Id.*
232. *Id.*
233. *Id.* at 1363.

same after [*J.*] *McIntyre*."[234] In conclusion, the court held that "[b]ecause we must proceed on the premise that [*J.*] *McIntyre* did not change the Supreme Court's jurisdictional framework, we must apply our precedent that interprets the Supreme Court's existing stream-of-commerce precedents."[235]

In *Askue v. Aurora Corporation of America*,[236] decided by the United States District Court for the Northern District of Georgia, the plaintiffs brought suit against the defendants due to injuries one plaintiff sustained allegedly as a result of the defendants' product.[237] One of the defendants, "a Taiwanese corporation with its principal place of business in Taiwan," argued that the court did not possess personal jurisdiction over it because the defendant did not have sufficient contacts with the forum state to warrant the exercise of jurisdiction over it.[238]

In resolving the jurisdictional issue before it, the court noted that the facts before it were "materially similar to those of [*J. McIntyre*]."[239] The court stated that "[g]iven the Supreme Court's failure to clarify its earlier plurality holding in *Asahi*, this Court must construe the holding of [*J. McIntyre*] as 'that position taken by those Members who concurred in the judgment on the narrowest grounds.'"[240] According to the court, therefore, "[t]he 'narrowest grounds' is understood as the 'less far-reaching' common ground."[241]

In *Willemsen v. Invacare Corp.*,[242] a representative of the plaintiffs' estate brought a products-liability suit against the defendant alleging that the manufacturer was the cause of the plaintiff's injuries.[243] While the plaintiffs were residents of Oregon, one defendant was a "Taiwanese corporation with its principal place of business in that country" and another defendant was "an Ohio corporation with its principal place of business in that state."[244] The defendants alleged that the court did not

234. *Id.* (citing Marks v. United States, 430 U.S. 188, 193 (1977)) (citation omitted).
235. *Id.*
236. No. 1:10-CV-0948-JEC, 2012 WL 843939 (N.D. Ga. Mar. 12, 2012).
237. *Id.* at *1.
238. *Id.*
239. *Id.* at *8.
240. *Id.* at *7 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).
241. *Id.* (quoting United States v. Robinson, 505 F.3d 1208, 1221 (11th Cir. 2007)).
242. 282 P.3d 867 (Or. 2012), *cert. denied*, 133 S. Ct. 984 (2013).
243. *Id.* at 869–70.
244. *Id.* at 870.

have personal jurisdiction over them due to the fact that they did not have the required minimum contacts with the forum state.[245] In addressing the jurisdictional question, the Oregon Supreme Court ultimately determined that "in light of [*J. McIntyre*]," it was permitted to exercise personal jurisdiction over the defendants.[246] The defendants subsequently

> filed a petition for certiorari with the United States Supreme Court. After the Court issued its decision in [*J. McIntyre*], the Court granted [the defendant's] petition for certiorari, vacated [the Oregon Supreme Court's] order, and remanded the case to [the Oregon Supreme Court] for further consideration in light of [*J. McIntyre*].[247]

Upon further review, the Oregon Supreme Court determined that the frequent contacts or sales in Oregon met the requirements for personal jurisdiction.[248] In addition, the court pointed to the defendant's insurance policy that covered bodily and personal injury, and property damage.[249] Further, the court determined that the insurance policy was evidence that the defendant "anticipated the need to defend against the very sort of claim that plaintiffs [had] brought."[250]

### C. Lower Courts Ignoring the Supreme Court's Decision in *J. McIntyre*, Maintaining Their Pre-*J. McIntyre* Personal Jurisdiction Analysis

In *Sieg v. Sears Roebuck & Company*,[251] decided by the United States District Court for the Middle District of Pennsylvania, the plaintiffs brought suit against the defendants, alleging strict liability and negligence after a fire damaged the plaintiffs' house.[252] One of the defendants, a Taiwanese company, argued that the court did not have personal jurisdiction over it because it

245. *Id.* at 871–72.
246. *Id.* at 870 (remanding the case to the district court for further consideration).
247. *Id.* at 869–70 (citing J. McIntyre Mach. v. Nicastro, 131 S. Ct. 2780 (2011) (plurality) (citation omitted).
248. *Id.* at 874.
249. *Id.* at 877.
250. *Id.*
251. 855 F. Supp. 2d 320 (3d Cir. 2012).
252. *Id.* at 323.

did not have sufficient contacts with the forum state to justify the exercise of jurisdiction over it.[253]

In addressing the jurisdictional question, the court indicated that it would follow the approach established by the Third Circuit, even in light of the Supreme Court's decision in *J. McIntyre*.[254] Following the fractured opinions by the Supreme Court in *Asahi*, the Third Circuit adopted the approach of applying both of the approaches to stream-of-commerce analysis set forth by Justice O'Connor and by Justice Brennan.[255] Additionally, the court articulated its frustration with the Supreme Court for not providing "clear guidance" as to which of the *Asahi* approaches to stream-of-commerce analysis lower courts were to adopt.[256] Specifically, the court noted that "[i]n light of the failure of a Supreme Court majority to adopt clearly one of the two *Asahi* standards, we will continue with the Third Circuit Court of Appeals' approach."[257]

In *Eastman Chemical Co. v. AlphaPet Inc.*,[258] decided by the United States District Court for the District of Delaware, the plaintiffs brought suit against the defendants, alleging patent infringement, breach of contract, and trade secret misappropriation.[259] One of the defendants moved to dismiss, asserting that the court did not have personal jurisdiction over it.[260]

In resolving the jurisdictional dispute, the court noted that, due to the divided Supreme Court opinions in *Asahi*, "Delaware courts developed their own stream-of-commerce jurisprudence based on the Delaware long-arm statute."[261] The court asserted that the approach by the Delaware courts "is consistent with the overarching principles from *Asa[h]i*" and was confirmed by the Federal Circuit and Third Circuit.[262] The court noted that "[a]t this stage, the impact of [*J. McIntyre*], if any, on the long-standing and well-established Delaware jurisprudence relating to

253. *Id.* at 323, 325.
254. *Id.* at 327.
255. *Id.* at 326.
256. *Id.* at 327.
257. *Id.*
258. No. 09-971-LPS-CJB, 2011 WL 6004079 (D. Del. Nov. 4, 2011).
259. *Id.* at *1.
260. *Id.*
261. *Id.* at *15.
262. *Id.*

stream-of-commerce theory is unclear."[263] As a result of the lack of clarity and guidance from the Supreme Court, the court stated that it would continue to follow the pre-*J. McIntyre* Delaware approach to jurisdiction questions relating to stream-of-commerce analysis.[264]

In *Lindsey v. Cargotec USA, Inc.*,[265] decided by the United States District Court for the Western District of Kentucky, the plaintiff filed suit against the defendant after a co-worker, operating a forklift manufactured by the defendant, injured the plaintiff.[266] Specifically, the plaintiff alleged claims for "strict liability, negligence, and failure to warn."[267] The defendant asserted that the court did not have personal jurisdiction over it because the defendant did not have the required minimum contacts with the forum state to justify the exercise of jurisdiction over it.[268]

In determining the jurisdictional issue, the court noted that "[t]he Sixth Circuit conducts a three-part test for determining whether, consistent with due process, personal jurisdiction may be exercised over a defendant."[269] According to the court, the most important step is the first of the three, namely that "the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state."[270] Regarding this initial analytical step, the court noted that "[t]he Sixth Circuit has adopted Justice O'Connor's approach to purposeful availment as articulated in *Asahi*."[271]

In light of the Supreme Court's *J. McIntyre* decision, the district court further noted that it would continue with the current approach taken by the Sixth Circuit.[272] Specifically, the court observed that "[b]ecause the Supreme Court in [*J.*] *McIntyre* did not conclusively 'define the breadth and scope of the stream of

263. *Id.* at *17–18 (noting that "no single formulation of the stream-of-commerce test garnered a five-justice majority").
264. *Id.* at *18.
265. No. 4:09CV-00071-JHM, 2011 WL 4587583 (W.D. Ky. Sept. 30, 2011).
266. *Id.* at *1.
267. *Id.*
268. *Id.*
269. *Id.* at *3.
270. *Id.* (quoting Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968)) (quotations omitted).
271. *Id.* at *4.
272. *Id.* at *7.

commerce theory, as there was not a majority consensus on a singular test,' and given Justice Breyer's decision to rely on current Supreme Court precedents, the [district court] will continue to adhere to the Sixth Circuit's analysis of purposeful availment."[273]

## *VI. CONCLUSION: A POSSIBLE WAY HOME*

As outlined above in Part IV, the Court had an opportunity in *J. McIntyre* to alleviate the confusion caused by its differing approaches to stream-of-commerce analysis.[274] As can be seen by examining the *J. McIntyre* decision and the continuing confusion experienced by lower courts in the stream-of-commerce context, the Court completely failed to resolve this conundrum or to provide any "clear guidance" to lower courts faced with this issue.[275]

In today's global economy, a manufacturer's specific intentional contact with an individual state is a rarity. In fact, in most manufacturing contexts, it is readily foreseeable to the manufacturer that its product may travel from nation to nation and from state to state. Indeed, the manufacturer's goal is to sell its product to willing buyers, wherever they may be located. In the modern commercial world, a manufacturer, with assistance from national or international marketing campaigns or through the Internet, often seeks to turn entire nations into a single-target market without a thought of addressing individual states.

Given this reality, the Supreme Court must create a clear process whereby proper personal jurisdiction involving potential defendants with a national market can be easily and predictably analyzed. This is a reality recognized by Justice Breyer in his concurrence in *J. McIntyre*, wherein he found "it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."[276]

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273. *Id.* (quoting Oticon, Inc. v. Sebotek Hearing Systems, LLC., 865 F. Supp. 2d 501, 513 (D.N.J. 2011)) (citation omitted).

274. *See supra* Part III(B) (regarding the stream-of-commerce "plus" analysis originally articulated by Justice O'Connor in *Asahi* and the "pure stream-of-commerce" analysis originally articulated by Justice Brennan in *World-Wide Volkswagen* and carried forward in *Asahi*).

275. *See supra* Parts IV and V (discussing *J. McIntyre*, the confusion that remained, and the approaches taken by lower courts in the wake of *J. McIntyre*).

276. J. McIntyre Mach. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring); *see supra* Part IV (examining *J. McIntyre*).

Some commentators have proposed statutory solutions,[277] while others have proposed the creation of a rebuttable presumption, with the burden on the out-of-forum defendant to show that it took affirmative steps to avoid the forum state when it placed its product into the stream of commerce.[278]

This latter proposal appears to offer some foundation for a new approach to the dilemma of how to determine whether a commercial defendant who manufactures products and then places them into the stream of national or international commerce has purposefully availed itself of the forum at issue sufficiently to support the exercise of personal jurisdiction by that forum. One commentator has described this approach, which has been characterized as a "reasonable-commercial-expectations test," in the following manner:

> [T]he reasonable-commercial-expectations test builds on *World-Wide Volkswagen* by incorporating a rebuttable presumption that a marketing agreement with a nationwide U.S. distributor or retailer demonstrates a reasonable expectation of purchase in any state. Under this presumption, if a manufacturer places its product into the stream of commerce through the use of a marketing or sales plan that targets the United States as a whole, then the manufacturer reasonably expected the product to be sold anywhere in the United States. The manufacturer, therefore, should be presumed to have intended to avail itself of the market in each state.
>
> This presumption may be rebutted, as to a particular forum, by evidence indicating a clear intent to carve out certain geographical markets by restricting sales to a specific state or region or prohibiting sales in a certain state altogether.[279]

While such an approach does take seriously the realities of the modern commercial world, it raises concerns about whether a defendant's constitutional due process rights are sufficiently protected. Additionally, this approach is inconsistent with the Court's

277. *See supra* text accompanying note 4 (discussing various legislative proposals aimed at clarifying personal jurisdiction in the stream-of-commerce context).

278. *See supra* text accompanying note 5 (noting that advancements in technology and online commerce enable retailers to avoid disfavored states and that those not employing available tools "should anticipate being haled into court.").

279. Saetrum, *supra* note 5, at 525–26 (typeface altered).

foundational personal jurisdiction holding in *International Shoe*. In *International Shoe*, the Court held that the initial burden was on the plaintiff to show that the defendant had a relevant contact with the forum sufficient to support the exercise of personal jurisdiction.[280] Under the analysis outlined in *International Shoe*, once the plaintiff had met this burden, the burden shifted to the defendant to show that, despite this contact, the exercise of personal jurisdiction by the court would be unfair in the particular case, such that "it would offend traditional notions of fair play and substantial justice to require this defendant to litigate in this forum."[281]

Rather than the creation of a rebuttable presumption that upsets the burden-shifting approach adopted by the Court in *International Shoe*, the Court should adopt a different path that will allow it and lower courts to more clearly navigate the stream-of-commerce analysis. This new path should be consistent with the burden-shifting adopted in *International Shoe*, find a balance between the apparently competing stream-of-commerce tests articulated by Justice Brennan and Justice O'Connor in *Asahi*,[282] and reflect the realities of the modern commercial world, wherein manufacturers are not generally concerned with the territorial boundaries of states in their efforts to sell their products.

Thus, the Court should adopt an analytical framework for determining whether the exercise of personal jurisdiction is appropriate in the stream-of-commerce context that first places the burden on the plaintiff to show that the defendant manufactured and placed its product in the stream of commerce by employing a marketing, advertising, or sales plan that targeted the United States as a whole, without regard to state territorial borders. The initial burden on a plaintiff would be consistent with the Court's analysis in *International Shoe*, requiring a plaintiff to first show that the defendant had a relevant contact with the forum at issue. In effect, in meeting this burden, a plaintiff would meet Justice O'Connor's requirement that there must be a show-

280. Noyes, *supra* note 5, at 49–50.

281. *Id.* at 51.

282. *See supra* Part III (discussing the modern development of the Supreme Court's personal jurisdiction analysis, specifically, the articulation of minimum contacts as a substitute for actual physical presence in *International Shoe* and Justice O'Connor's and Justice Brennan's differing opinions in *Asahi* regarding whether "purposeful availment" was necessary).

ing that a defendant had purposefully availed itself of the relevant forum, while at the same time reflecting the commercial realities of the modern world reflected in Justice Brennan's "pure stream-of-commerce" approach.[283]

Once a plaintiff has met this initial burden, the burden would then shift to the defendant to show that despite the plaintiff's evidence of a national marketing or advertising or sales plan, the defendant had taken intentional and specific steps to avoid the specific forum in which the plaintiff filed suit. This could be shown by evidence that the defendant restricted the actual sales or distribution of its product to specific markets, not including the forum at issue, or specifically excluded sales into the forum at issue.

The Court has struggled with the development of a clear stream-of-commerce analysis since *Asahi*, thus leaving personal jurisdiction jurisprudence totally unsettled and adrift. Given the current globalized market in which manufacturers and sellers now operate, it is imperative that the Court resolve the confusion that remains following its decision in *J. McIntyre*. Clear legal principles and a predictable analytical framework are necessary, not only to guide the lower courts, but also for those who transact commerce in the modern marketplace. Adopting the burden-shifting approach proposed in this article would provide the consistent and predictable framework that has long been lacking in this area of the law, while, at the same time, reflecting the realities of the modern globalized marketplace.

283. *Id.*