The Stream of Commerce Flows On

"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."[1]

I. INTRODUCTION

The Supreme Court's 2011 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*[2] marked the first time the Court explored personal jurisdiction in a "stream-of-commerce" conflict since its 1987 decision in *Asahi Metal Industry Co. v. Superior Court of California*.[3] While many analysts and litigators hoped for clarification of the law, the Court's decision did little to refine the lines originally blurred in *Asahi*.[4] The Court failed to deliver a majority decision on the facts of the case, leaving circuit courts to rely on their own analytical devices.[5]

McIntyre highlights a conflict that occurs when an American foreign defendant hires a national distributor to merchandise products to the United States.[6] While the corporation may aggressively target the United States as a

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

2. 131 S. Ct. 2780 (2011).

3. *See* 480 U.S. 102, 116 (1987) (holding no jurisdiction based on three concurring opinions articulating varying stream-of-commerce theories). Following *Asahi*, circuit courts became divided over personal jurisdiction. *See infra* notes 71-77 and accompanying text (highlighting division and confusion among courts following *Asahi*).

4. *See McIntyre*, 131 S. Ct. at 2785 (plurality opinion) (asserting personal jurisdiction standards unclear following *Asahi* decision); *see also* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1247 (2011) (discussing anticipation surrounding *McIntyre*). Despite such anticipation, *McIntyre* failed to create a clear-cut personal jurisdiction test. *See* Borchers, *supra*, at 1247.

5. *See* Lindsey v. Cargotec USA, Inc., No. 4:09CV–00071–JHM, 2011 WL 4587583, at *7 (W.D. Ky. Sept. 30, 2011) (pointing to limited application and inconclusive personal jurisdiction analysis in *McIntyre*). The court in *Lindsey* explained that because *McIntyre* failed to define the breadth and scope of the stream-of-commerce theory, the court would continue to adhere to the Sixth Circuit's approach to purposeful availment. *See id.*; *see also* Original Creations, Inc. v. Ready Am., Inc., 836 F. Supp. 2d 711, 716-17 (N.D. Ill. 2011) (noting *McIntyre* does not disrupt federal circuit law concerning stream of commerce). In *Original Creations*, the court explained that the *McIntrye* decision was unclear as to whether it adopted Justice Brennan's or Justice O'Connor's stream-of-commerce analysis. *See Original Creations*, 836 F. Supp. 2d at 717 n.7; *see also infra* notes 57-64 and accompanying text (describing dueling stream-of-commerce opinions of Justice O'Connor and Justice Brennan in *Asahi*).

6. *See McIntyre*, 131 S. Ct. at 2786 (plurality opinion) (recounting McIntyre's distribution efforts).

whole, it often may not market its products and services to a specific state.[7] When an injury occurs in the forum state, the question remains: Are the defendant's contacts significant enough to warrant jurisdiction in that state?[8] The stream-of-commerce theory often comes into play in these cases.[9]

Although the concurring Justices in *McIntyre* agreed the defendant's contacts did not warrant jurisdiction in the forum state, the Court did not produce a majority decision.[10] Moreover, the outcome in *McIntyre* suggests that foreign defendants could be insulated from jurisdiction throughout the United States, despite specifically targeting the country.[11] Unlike American businesses, which will be subject to jurisdiction at least in their home forum, the decision in *McIntyre* suggests that a foreign company could conceivably avoid litigation in the United States altogether, simply by hiring a national distributor.[12]

This Note will track the evolution of personal jurisdiction by analyzing the current status of the stream-of-commerce theory in light of the decision in *McIntyre*.[13] Part II.A discusses the origins of personal jurisdiction, while Part II.B outlines the progression of the stream-of-commerce analysis.[14] Part II.C details the plurality's decision from *McIntyre*'s forerunner, *Asahi*, and Part II.D presents the three-way circuit split prior to *McIntyre*.[15] Finally, Part II.D summarizes the *McIntyre* opinion.[16] Part III analyzes the decision in *McIntyre*, critiques the outcome, and suggests the implementation of a revised approach to personal jurisdiction, by adopting elements from Justice Stevens's concurring opinion in *Asahi*.[17]

7. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011) (plurality opinion) (describing personal jurisdiction issues with foreign defendant). During oral arguments, the defendant explained that the issue before the Court concerned what particular contacts with the United States would be sufficient for jurisdiction in a particular state. *See id.*; Transcript of Oral Argument at 29-30, *McIntyre*, 131 S. Ct. 2780 (No. 09-1343) (arguing jurisdiction should remain state specific).

8. *See McIntyre*, 131 S. Ct. at 2787 (plurality opinion) (acknowledging jurisdiction proper when defendant's contacts meet "traditional notions of fair play and substantial justice"). The Court acknowledged that in products liability cases, the defendant's contacts are what makes jurisdiction in that state fundamentally fair. *See id.*

9. *See infra* notes 47-51 (describing stream-of-commerce conflict).

10. *See McIntyre*, 131 S. Ct. at 2785 (plurality opinion) (demonstrating three distinct approaches to personal jurisdiction analysis).

11. *See id.* at 2802 (Ginsburg, J., dissenting) (expressing fairness concerns for manufacturer's ability to evade jurisdiction in United States).

12. *See id.* at 2789 (plurality opinion) (explaining potential for foreign defendant to escape American litigation by hiring national distributor).

13. *See infra* Part II (highlighting evolution of personal jurisdiction).

14. *See infra* Part II.A-B (examining personal jurisdiction beginnings).

15. *See infra* Part II.C-D (reviewing *Asahi* and subsequent circuit split).

16. *See infra* Part II.D (analyzing *McIntyre*'s outcome).

17. *See infra* Part III (critiquing *McIntyre* and offering possible solution to personal jurisdiction analysis).

II. HISTORY

A. Personal Jurisdiction Beginnings

The Due Process Clause of the Fourteenth Amendment prevents a state from depriving an individual of "life, liberty, or property," unless a court exercises its power lawfully.[18] Generally, personal jurisdiction requires that a defendant take some action toward a particular state for a court to gain power to hear a claim over the defendant in that state.[19] There are four ways a court may obtain jurisdiction over a defendant: A defendant may explicitly consent, be present in the state at the time of service, be a citizen or domiciled within the state, or initiate contacts arising out of, or connected to, activities within that state.[20]

The Supreme Court first attempted to analyze personal jurisdiction in the late nineteenth century.[21] Asserting that a state only possesses power over persons and property within its boundaries, the Court in *Pennoyer v. Neff* explained that a plaintiff may not blindly bring suit wherever he chooses.[22] Citing the Fourteenth Amendment, the Court reasoned that judgments rendered by a court that lacks jurisdiction are unenforceable as a violation of due process.[23] Following *Pennoyer*, physical presence became the touchstone for a

18. *See* U.S. CONST. amend. XIV, § 1 (prohibiting deprivation of "life, liberty, or property, without due process of law"); *see also* JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 4-7 (5th ed. 2006) (summarizing when defendant subject to personal jurisdiction). Glannon explains that states must follow a fair judicial process to comply with the Due Process Clause. *See* GLANNON, *supra*, at 3.

19. *See* GLANNON, *supra* note 18, at 4-7 (reviewing basic personal jurisdiction concepts).

20. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (outlining four ways to obtain personal jurisdiction). A court may assert general jurisdiction when a defendant possesses sufficient contacts in the forum. *See* Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2851 (2011) (requiring defendant located "at home" for general jurisdiction purposes); *see also infra* notes 33-37 and accompanying text (describing general jurisdiction requirements). Jurisdiction is also proper when a defendant is physically present in the forum. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990) (allowing personal jurisdiction based on presence alone). In *Burnham*, the Court held that jurisdiction was proper when a defendant was served with process while physically present in the State of California. *See id.* at 611. Although the defendant had no other ties or relations to California, the Court reasoned that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Id.* at 610. Finally, a defendant's consent is sufficient for personal jurisdiction. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (stating defendant may waive personal jurisdiction rights by consenting). The Court in *Ireland* held that failure to object to personal jurisdiction in a timely fashion is a waiver of personal jurisdiction rights. *See id* at 705.

21. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (examining personal jurisdiction, explaining court limited in power to adjudicate), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977); *see also* GLANNON, *supra* note 18, at 3 (describing fundamental personal jurisdiction standards).

22. *See Pennoyer*, 95 U.S. at 722 (declaring no state may assert jurisdiction over persons outside of its territorial control). The Court explained that the laws of one state do not operate outside of its boundaries. *See id.*

23. *See id.* at 733-34 (characterizing jurisdiction over persons outside state lines as violation of due process). The Court stressed the importance of state sovereignty to determine when a court possesses the power to exercise jurisdiction. *See id.* at 722.

court's ability to gain jurisdiction over a defendant.[24]

While *Pennoyer* laid the initial groundwork for analyzing personal jurisdiction, the Court first articulated the modern framework during the 1940s in *International Shoe Co. v. Washington*.[25] International Shoe, a Delaware corporation with its principal place of business in Missouri, was not physically present in Washington State, but employed about a dozen salesmen devoted to generating business there.[26] The *International Shoe* Court crafted a new test for personal jurisdiction, requiring not only mere presence within the state, but "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[27] This often quoted language set forth new guidelines to determine when a defendant has sufficient contacts with a forum state.[28]

The Court suggested that a state's jurisdiction over a defendant depends on the "quality and nature" of the defendant's contacts within the state, concluding that a defendant must possess ties, relationships, or contacts with the forum to satisfy minimum contacts.[29] The Court further proposed that a defendant is only subject to jurisdiction if the suit either arises out of those contacts, or the contacts are continuous and substantial enough to permit unrelated suits.[30] Additionally, the Court concluded that International Shoe could be subjected to suit in Washington because it took advantage of the "benefits and protection of the laws" of the state by conducting business there.[31] Although *International*

24. *See id.* at 733 (explaining physical presence required for court to obtain jurisdiction). According to *Pennoyer*, personal jurisdiction requires that an out-of-state defendant either voluntarily appear or be served with process while located within the forum state. *See id.*; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing *Pennoyer* and noting physical presence as prerequisite to binding judgment). The Court explained that, traditionally, power over a defendant was based on "territorial jurisdiction" and physical presence within the forum state. *See Int'l Shoe*, 326 U.S. at 316.

25. *See Int'l Shoe*, 326 U.S. at 320 (holding contacts established with state sufficient for jurisdiction); *see also* Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 563 (1998) (noting modern doctrine of personal jurisdiction originated in *International Shoe*).

26. *See Int'l Shoe*, 326 U.S. at 313 (recounting facts at issue). International Shoe had no offices, made no contracts, and stored no merchandise in Washington. *See id.* The company required salesmen to transmit all orders to Missouri, but International Shoe shipped a "substantial volume" of its merchandise to Washington. *See id.* at 314-15.

27. *See id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940) (distinguishing facts in *International Shoe* from holding in *Pennoyer*)).

28. *See id.* (explaining minimum contacts required if defendant not present within forum state).

29. *See id.* at 319 (cautioning due process not satisfied without activities within forum state). The Court suggested that due process depends on the "quality and nature" of the defendant's actions. *See id.*

30. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (suggesting substantiality of contacts determines if suit must relate to hail defendant into court); *cf. infra* notes 33-37 and accompanying text (outlining general and specific jurisdiction requirements and differences).

31. *See Int'l Shoe*, 326 U.S. at 320 (stressing benefits of conducting business within state give rise to obligations within forum). The Court explained that when conducting business within a state, the state's laws protect a company. *See id.* The Court reasoned that when a lawsuit "arise[s] out of," or is "connected with," those activities, jurisdiction within that state is proper. *See id.* at 319.

Shoe introduced a new test for establishing personal jurisdiction, the decision left many questions unanswered.[32]

The Court's analysis in *International Shoe* identified two separate types of personal jurisdiction: general and specific.[33] General jurisdiction requires that the defendant be considered "at home" in the forum state.[34] Under general jurisdiction, the cause of action may be completely unrelated to the defendant's contacts with the state, so long as the defendant possesses considerable contacts within the forum.[35] Conversely, specific jurisdiction will subject a defendant to jurisdiction in the forum state only if the current cause of action arises out of, or is closely related to, the defendant's contacts with the state.[36] Thus, it is often suggested that specific jurisdiction is "dispute specific," whereas general jurisdiction is "dispute blind."[37]

Defining the "nature and quality" of contacts significant enough to warrant specific jurisdiction continues to create controversy, and analysis is frequently centered on the defendant's purposeful acts in the forum.[38] In *Hanson v. Denckla*,[39] the Court held that jurisdiction is proper only when a defendant "purposefully avails itself of the privilege of conducting activities within the

32. *See* GLANNON, *supra* note 18, at 4 (explaining rationale of *International Shoe* helpful, but decision too vague to provide much guidance). The Court explained that based on the particular facts, the defendant's contacts were "systematic and continuous," and suggested that "irregular [or] casual" contacts would not be sufficient for jurisdiction. *See Int'l Shoe*, 326 U.S. at 320 (explaining general guidelines).

33. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1143-44 (1966) (articulating two separate types of jurisdiction first outlined in *International Shoe*).

34. *See* Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2851 (2011) (reviewing requirements for general jurisdiction). In *Goodyear*, a North Carolina resident was injured in France by a foreign-made tire. *See id.* at 2851. A small percentage of these tires were sold in North Carolina. *See id.* The plaintiffs attempted to bring suit against the foreign company in North Carolina by suggesting that the tires sold in the state satisfied general jurisdiction requirements. *See id.* at 2850. The Court held that the connection between North Carolina and the tire company's business activities was not sufficient for general jurisdiction. *See id.* at 2851. Noting the attenuated connection, the Court insisted contacts must be more substantial to establish general jurisdiction. *See id.*

35. *See id.* at 2851 (asserting general jurisdiction allows court to hear any claim against defendant). In *Goodyear*, the Court explained that for general jurisdiction purposes, a defendant's contacts with the forum state must be "continuous and systematic." *See id.* Normally, general jurisdiction cases include corporate defendants. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 610 n.1 (1990) (suggesting general jurisdiction applicable only to corporations); *see also* GLANNON, *supra* note 18, at 7 n.2 (suggesting general jurisdiction most applicable in corporate defendant cases).

36. *See* von Mehren & Trautman, *supra* note 33, at 1144-45 (articulating defendant's contacts with forum must relate to specific cause of action). Von Mehren and Trautman argued that specific jurisdiction was one of the most important and controversial concepts in contemporary American thinking. *See id.*

37. *See* Simard, *supra* note 25, at 564-65 (articulating difference between specific and general jurisdiction).

38. *See* GLANNON, *supra* note 18, at 8 (recognizing serious problem defining "quality and nature" of contacts sufficient for jurisdiction). *See generally* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (demonstrating division amongst Justices).

39. 357 U.S. 235 (1958).

forum State, thus invoking the benefits and protections of its laws."[40] The Court asserted that while the nature and quality of a defendant's contacts may vary from case to case, the actions must be purposeful.[41]

In 1980, the Court further analyzed both purposeful availment and foreseeability in a products liability case.[42] In *World-Wide Volkswagen Corp. v. Woodson*,[43] the Court determined that the New York Audi dealers did not purposefully avail themselves to Oklahoma, even though they could foresee their transient product landing in the forum state.[44] The Court reasoned that the defendants could not be hailed into a state based on an isolated incident or "fortuitous circumstance."[45] Believing that jurisdiction must arise out of an effort to directly or indirectly serve the market, the Court explained that the defendant must reasonably anticipate the possibility of suit in the forum state.[46]

B. Evolution of Stream of Commerce

The issue of purposeful availment is often at the forefront of what are known as "stream-of-commerce" cases.[47] In the first type of stream-of-commerce

40. *Id.* at 253 (requiring "some act" by defendant to obtain jurisdiction in particular forum). In *Hanson*, a Delaware trust company created a trust for a settlor residing in Pennsylvania. *See id.* at 238. The trust's settlor later moved to Florida, where she amended the trust. *See id.* at 238-39. The question remained whether a court in Florida could obtain jurisdiction over the Delaware trust company. *See id.* at 243. The Court held Florida had no such jurisdiction. *See id.* at 250. It suggested a unilateral act by the plaintiff would not satisfy personal jurisdiction. *See id.* at 253. Although the Floridian settlor contacted the trustee while in Florida, the Court concluded these contacts were not sufficient to establish a "substantial connection" with the state. *See id.* at 252.

41. *See id.* at 253 (maintaining defendant must invoke benefits and protections of forum state's laws for proper jurisdiction). The Court suggested that requiring minimum contacts, under due process principles, was "a consequence of territorial limitations on the power of the respective States." *See id.* at 251.

42. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 288-89 (1980) (describing facts at issue). In *Woodson*, a couple purchased a car in New York and were subsequently injured in a car accident in Oklahoma. *See id.* at 288. The couple brought an action in Oklahoma against the manufacturer (Audi), the importer (Volkswagen), the regional distributor (World-Wide), and the retail dealer (Seaway). *See id.* Seaway and World-Wide Volkswagen—both New York corporations with no direct contacts in Oklahoma—contested personal jurisdiction. *See id.* at 288-89.

43. 444 U.S. 286 (1980).

44. *See id.* at 297-98 (stating foreseeability relevant when determining defendant's contact with forum state). Reasoning that jurisdiction must arise out of intent to directly or indirectly serve the market, the Court rejected the argument that the transient nature of a car made it foreseeable an injury could occur in a distant forum. *See id.*

45. *See id.* at 295-97, 314 (contending isolated contacts with forum state insufficient to establish jurisdiction).

46. *See id.* at 297-98 (outlining purposeful availment requirements). The Court suggested that if a defendant seeks to serve a market in a specific state, due process is not violated by subjecting the defendant to suit in that state. *See id.* Additionally, the Court rejected the argument that a car should be treated differently than other products simply because it is a "dangerous instrumentality," suggesting the dangerousness standard should not apply to personal jurisdiction. *See id.* at 296 n.11. *But see infra* notes 66-70 and accompanying text (discussing Justice Stevens's analysis from *Asahi* and suggesting nature of product essential to determine purposeful availment).

47. *See* GLANNON, *supra* note 18, at 8-10 (analyzing debate over "stream of commerce" and purposeful availment); *see also* Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A*

case, an out-of-state component manufacturer sells its product to an out-of-state manufacturer, who then incorporates the component into a final product and distributes it into the forum state.[48] In this type of stream-of-commerce case, it is questionable whether the out-of-state component manufacturer may be hailed into court, despite having no direct contacts with the forum state.[49] The second instance typically occurs when a manufacturer employs a wholesaler or distribution representative outside of the forum, who markets the product to retailers in multiple states.[50] The retailer then sells the product to an individual within the forum state.[51]

The second type of stream-of-commerce conflict is illustrated in the *Asahi* case.[52] In *Asahi*, Gary Zurcher was severely injured in California when his motorcycle tire exploded.[53] Zurcher filed a complaint against Cheng Shin, a Taiwanese company that manufactured the tire tube.[54] Cheng Shin then filed a cross complaint against Asahi, the Japanese corporation that manufactured the tube's valve.[55] The initial claims against Cheng Shin were eventually settled, but the question of whether California could assert jurisdiction over Asahi remained.[56]

In a series of concurring opinions, the Court decided that litigation in California was improper.[57] In the plurality opinion, Justice O'Connor explained that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[58] Justice O'Connor argued that jurisdiction requires additional conduct, such as advertising or marketing within the state, to indicate intent to

Reappraisal and a Revised Approach, 77 KY. L.J. 243, 252-55 (1989) (explaining modern interstate economy gave birth to stream-of-commerce analysis).

48. *See supra* note 47 (providing examples of stream-of-commerce conflicts).

49. *See* GLANNON, *supra* note 18, at 9 (citing typical stream-of-commerce conflicts). A component manufacturer may know its products are sold in the forum state, may think it is likely its products are sold in the forum state, or may be unaware of the ultimate destination of its product. *See id.*

50. *See supra* note 49 and accompanying text (describing typical stream-of-commerce conflict).

51. *See* GLANNON, *supra* note 18, at 9 (reviewing stream-of-commerce debate); *see also* Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415 (5th Cir. 1993) (demonstrating stream-of-commerce debate when wholesaler involved in distribution efforts). In *Ruston*, a wholesaler sold its products to a Minnesota corporation, but knew the products' ultimate destination was Texas. *See Ruston*, 9 F.3d at 417. The court considered whether the sales subjected the wholesaler to jurisdiction in Texas. *See id.*

52. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 105 (1987) (questioning ability to compel component maker into court).

53. *See id.* at 105-06 (recounting facts at issue).

54. *See id.* at 106 (providing procedural history). Zurcher filed a products liability action against Cheng Shin, alleging that a sudden loss of air and explosion caused his accident. *See id.* He contended the tire, tube, and sealant were all defective. *See id.*

55. *See id.* at 106 (recounting Cheng Shin's actions). Cheng Shin sought indemnification from Asahi because it manufactured the tube's valve. *See id.*

56. *See Asahi*, 480 U.S. at 106 (questioning whether California may assert jurisdiction over Asahi).

57. *See id.* at 114-16 (holding no jurisdiction in California).

58. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987) (plurality opinion) (articulating stream-of-commerce-plus analysis).

serve the market there.[59] Implying that due process requires a connection between the forum and the defendant, Justice O'Connor concluded that Asahi did not control its distribution in California.[60] Further, Justice O'Connor suggested that even if Asahi possessed sufficient contacts within the state, jurisdiction in California was unreasonable.[61]

Concurring in judgment, Justice Brennan referred to the stream of commerce not as "unpredictable currents," but rather as the "regular and anticipated flow of products from manufacture to distribution to retail sale."[62] According to Justice Brennan, as long as the defendant is aware his products could land in the forum state, jurisdiction should be proper.[63] Although Justice Brennan argued that Asahi possessed sufficient contacts with California, he also suggested that jurisdiction in California was unreasonable.[64] Justice Brennan agreed with Justice O'Connor's fairness analysis and believed that Asahi's burden outweighed both the state's interest and the plaintiff's convenience.[65]

Justice Stevens, in turn, took a third approach to the stream-of-commerce analysis.[66] Justice Stevens argued that the plurality assumed there was an "unwavering line" between "mere awareness" and "purposeful availment."[67] He believed that Asahi did not merely place a product into the stream of commerce, but purposefully availed itself based on value, volume, and

59. *See id.* at 112 (citing purposeful availment requirement). Justice O'Connor explained that several actions could indicate purposeful conduct, such as specifically designing a product for the market, or creating customer service channels. *See id.* Justice O'Connor noted, however, that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.*

60. *See id.* at 109-11 (applying *Woodson* analysis to facts at hand).

61. *See id.* at 114-15 (suggesting Asahi's foreign domicile made burden severe). Justice O'Connor pointed out that once minimum contacts are established, a plaintiff's interest will often outweigh the burden on a foreign defendant. *See id.* at 114. Justice O'Connor also suggested that because the plaintiff was not a California resident, the plaintiff's interests did not outweigh the burden on Asahi. *See id.*

62. *See Asahi*, 480 U.S. at 117 (Brennan, J., concurring) (outlining pure stream-of-commerce argument). Justice Brennan explained that a lawsuit is not a "surprise" if the defendant is aware that his final product is marketed in a forum state. *See id.* He argued this type of defendant benefits economically from the sale of its product in the forum, and that litigation there comports with due process concerns. *See id*. at 117-19.

63. *See id.* at 117 (Brennan, J., concurring) (reasoning if defendant aware of final product's placement, lawsuit not surprising).

64. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 116 (1987) (Brennan, J., concurring) (citing jurisdiction over Asahi inconsistent with "fair play and substantial justice"); *see also* 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, 707-08 (2009) (recognizing Justice Brennan's approach could burden small businesses unable to limit liability).

65. *See Asahi*, 480 U.S. at 116 (1987) (Brennan, J., concurring) (joining Justice O'Connor's fairness analysis). Justice O'Connor explained that serious burdens on alien defendants are sometimes appropriate. *See id.* at 114. She argued that because both Asahi and Cheng Shin were foreign companies, forum convenience and the state's interest in handling the dispute was not weighed heavily. *See id.*

66. *See id.* at 121-22 (Stevens, J., concurring); *see also* Laughlin, *supra* note 64, at 722-24 (providing Justice Stevens's analysis based on principles of "common sense").

67. *See Asahi*, 480 U.S. at 122 (Stevens, J., concurring) (arguing Asahi engaged in conduct greater than simply placing product into stream of commerce).

hazardous nature.[68] Based on this analysis, Justice Stevens believed Asahi met Justice O'Connor's stream-of-commerce-plus threshold.[69] Like Justice Brennan, Justice Stevens found that Asahi had sufficient contacts with California, but decided that fairness trumped the minimum contacts analysis.[70]

*C. The Post-*Asahi *Tangle*

The decades following *Asahi* did little to clarify the stream-of-commerce confusion, as circuit courts attempting to follow the Court's analysis became

68. *See id.* at 122 (Stevens, J., concurring) (declaring constitutional determination of purposeful availment depends on type of conduct). Justice Stevens noted that Asahi delivered more than 100,000 units over several years, which exceeded "mere awareness." *See id.* He also suggested that Justice O'Connor misapplied the facts, as Asahi "arguably engaged in a higher quantum of conduct than '[t]he placement of a product into the stream of commerce, without more. . . .'" *See id.*; *see also* Abuan v. Gen. Elec. Co., 735 F. Supp 1479, 1486 (D. Guam 1990) (citing "reasonable expectation" product will land in forum sufficient for jurisdiction). In *Abuan*, the defendant manufactured Polychlorinated Biphenyls (PCBs) in Alabama, but sold them by railcar to General Electric. *See Abuan*, 735 F. Supp at 1487. The court believed the defendant not only put the PCBs into the stream of commerce, but by marketing a large volume of the product, also had a "reasonable expectation" of litigation in the particular forum. *See id.* at 1486-87. The court reasoned that Justice Stevens's test satisfied its concerns, and further, that it correlated with the holding in *Woodson*. *See id.* at 1486. Characterizing Justice O'Connor's analysis as "rigid," the court held that Justice Stevens's reasonable expectation test required a case-by-case analysis. *See id.* It further suggested that Justice O'Connor's "plus" factors were less realistic than Justice Stevens's "common sense" approach. *See id.*; *see also* Murphy, *supra* note 47, at 251 (outlining Justice Stevens's personal jurisdiction test). Murphy explains that Justice Stevens believed Asahi satisfied due process because the company engaged in a regular and substantial course of business. *See* Murphy, *supra* note 47, at 251-52; *see also* Rodger D. Citron, *The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of Justice John Paul Stevens*, 88 U. DET. MERCY L. REV. 433, 470 (2011) (observing Justice Stevens's *Asahi* opinion more nuanced and fact dependent than Justice O'Connor's or Justice Brennan's arguments); Laughlin, *supra* note 64, at 722 (indicating Justice Stevens's test focuses on manufacturer's specific actions). Laughlin suggests focusing on value, volume, and hazardous nature will create fundamentally fair results, and will not allow a company to simply hide behind a national distributor. *See* Laughlin, *supra* note 64, at 722-23; *see also Abuan*, 735 F. Supp at 1487 (indicating defendant cannot escape litigation through use of distributor). The court in *Abuan* concluded that by hiring a distributor, the defendant reaped the benefits of extensive distribution, noting that to "piggy-back" on the distributor saved the defendant "great expense." *See Abuan*, 735 F. Supp at 1487. The court noted that when this occurs, and a significant amount of products are sold in a forum, the company will be subjected to jurisdiction there. *See id.*

69. *See Asahi*, 480 U.S. at 122 (Stevens, J., concurring) (suggesting stream-of-commerce-plus analysis satisfied); *see also* Citron, *supra* note 68, at 452-53 (analyzing Justice Stevens's decision in *Asahi*). Citron argues that Justice Stevens's analysis acknowledges the particularities of each case, and is similar to common-law decision-making. *See* Citron, *supra* note 68, at 470. While Citron believes Justice Stevens's analysis offers an effective approach to decision making, he notes that Justice Scalia disagrees. *See id.* at 470-71. According to Justice Scalia, a fact-based decision allows the judiciary to make arbitrary decisions, and he believes courts should provide guidance through narrow rule-based decisions. *See id.*; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989) (arguing fact-based analysis does not comport with Supreme Court jurisprudence). According to Justice Scalia, a "totality of the circumstances" test will not produce nationally uniform results. *See* Scalia, *supra*, at 1178-79.

70. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 122 (1987) (Stevens, J., concurring) (asserting minimum contacts analysis not always necessary when determining personal jurisdiction). By failing to join either Justice O'Connor's or Justice Brennan's personal jurisdiction analysis, Justice Stevens precluded a majority on either argument. *See id.*; *see also* Citron, *supra* note 68, at 453 (noting Justice Stevens denied fifth vote to each decision).

largely divided.[71] This division produced three distinct approaches to personal jurisdiction analysis: stream-of-commerce-plus, pure stream-of-commerce, and a fact-based analysis depending on the specific events of the case at hand.[72] The circuit split inevitably made it difficult for companies to discern where they could be vulnerable to litigation.[73]

This division creates vastly different results based on relatively similar fact patterns.[74] For example, in a stream-of-commerce-plus circuit, a court found there was no jurisdiction where a plaintiff placed a written order for a product after receiving a mail-order catalog in the forum state.[75] Conversely, in a pure stream-of-commerce circuit, a court held that there was jurisdiction when a fireworks manufacturer employed a distributor who did not advertise or specifically sell products in the forum.[76] The court held that by hiring a distributor, the company intended to place the product into the stream of commerce throughout the United States.[77]

Despite the significant division amongst the circuits, courts rarely conform to Justice Stevens's opinion, and usually apply his analysis in conjunction with Justice O'Connor's or Justice Brennan's analysis.[78] However, in *Morris v.*

71. *See* Packerware Corp. v. B & R Plastics, Inc., 15 F. Supp. 2d 1074, 1079 (D. Kan. 1998) (highlighting confusion created by *Asahi* decision). In *Packerware*, the court noted that circuits generally separate into either a Justice Brennan or Justice O'Connor school of thought when applying personal jurisdiction analysis. *See id.* at 1079; *see also* Murphy, *supra* note 47, at 245 (reiterating *Asahi* prolonged personal jurisdiction confusion). *See generally* Melissa A. Murphy-Petros, *"Stream of Commerce Plus" or Minus?: Advancing the Law of Personal Jurisdiction in Product Liability Cases*, WILSON ELSER (April 2008), http://www.wilsonelser.com/files/repository/PL_PersonalJurisdiction_eNewsApril08.pdf (exposing deep split over stream of commerce amongst federal and state courts).

72. *See* Murphy, *supra* note 47, at 245 (reiterating circuits adopted three separate approaches).

73. *See id.* at 245 (claiming no uniform stream-of-commerce analysis). Without a uniform standard, companies remain uncertain where they may be subject to litigation in future cases. *See id.*

74. *See id.* (citing various stream-of-commerce cases with similar fact patterns decided differently).

75. *See* Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 681-82 (1st Cir. 1992) (applying stream-of-commerce-plus rational). In *Gar-Tec*, the plaintiff sued an Indiana corporation in the district court in Maine when the company's hot air gun allegedly caused a fire. *See id.* at 673. The contractor who purchased the gun testified that he placed a written order with Brookstone for the product after receiving its catalog. *See id.* at 674. While the court was unable to determine the validity of this contention, it held that such contacts were not sufficient to warrant jurisdiction. *See id.* at 674, 683. Adopting Justice O'Connor's approach, the court held that "mere awareness" did not rise to the level of "purposeful availment." *See id.* at 683.

76. *See* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 615 (8th Cir. 1994) (holding company subject to jurisdiction based on distributer relationship). In *Barone*, a Japanese corporation (Hosoya) was sued in Nebraska. *See id.* at 610-11. Hosoya sold fireworks throughout the United States, and employed distributors in six states, not including Nebraska. *See id.* at 611. Hosoya did not advertise, send products to, or have an office in Nebraska. *See id.*

77. *See id.* at 613 (holding hiring of regional distributor satisfies purposeful availment). Although Hosoya claimed to have no actual knowledge of its products distribution in Nebraska, the court held Hosoya was subject to personal jurisdiction. *See id.* The court reasoned that Hosoya strategically covered the midwest market by using regional distributers, intending to place its products into the stream of commerce throughout the United States. *See id.*

78. *See* Laughlin, *supra* note 64, at 722. (noting Justice Stevens's analysis requires more than Justice Brennan's theory but also addresses the majority's concerns).

SSE, Inc.,[79] the Eleventh Circuit held that jurisdiction was proper in Alabama, even though the defendant was principally located in New Jersey and Pennsylvania.[80] At the request of an Alabama sporting company, the defendant repaired a defective parachute that later injured the victim when it failed to deploy.[81] The court relied on the Alabama sporting company's purposeful actions in reaching its decision, but also applied Justice Stevens's reasoning to the facts.[82] Citing the hazardous nature of parachutes, the court held that jurisdiction was proper in Alabama, even though the company did not specifically target the forum state.[83]

D. McIntyre *Adds to the Confusion*

The Supreme Court's most recent stream-of-commerce decision only adds to the confusion surrounding personal jurisdiction.[84] In *McIntyre*, a British Corporation, J. McIntyre Machinery, hired a national distributor that marketed and sold metal-shearing machines throughout the United States.[85] The plaintiff's employer purchased the machine while attending a scrap-metal

79. 843 F.2d 489 (11th Cir. 1988).

80. *See id.* at 493-94 (holding jurisdiction proper in Alabama).

81. *See id.* at 490-91 (describing SSE's contacts with Alabama). At the request of Alabama-based Gulf Air Sports, SSE repaired three products, including the product that caused the injury. *See id.* SSE then returned the devices to Air Sports in Alabama. *See id.*

82. *See id.* at 493-94 (noting contacts complied with Justice O'Connor's *Asahi* test); *see also* Murphy, *supra* note 47, at 281 (suggesting court used Justice Stevens's hazardous nature test to support its conclusion).

83. *See Morris*, 843 F.2d at 494 (explaining "parachute" falls within Justice Stevens's *Asahi* analysis). The court reasoned that parachuting is a hazardous activity, and based on SSE's dealing with Alabama, the company was aware that someone in the state would be using its product. *See id.* The court further noted that the product did not meet Justice Stevens's "value and volume" requirements, as the parachute repair cost $123.21, and involved just one transaction. *See id*. at 494 n.10. Interestingly, the court explained that "minimum contacts" may be satisfied with only one of Justice Stevens's factors. *See id.*; *cf.* Abuan v. Gen. Elec. Co., 735 F. Supp. 1479, 1486-87 (D. Guam 1990) (deciding jurisdiction proper under Justice Stevens's *Asahi* analysis). In *Abuan*, an Alabama manufacturer sold a large volume of its products to a distributor who shipped the products to Guam. *Abuan*, 735 F. Supp. at 1481, 1486. The court held that the manufacturer "piggy-backed" on the distributor's network of customers, and received benefits by selling its products to a variety of forums. *See id.* at 1487.

84. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2783 (2010) (plurality opinion) (demonstrating division amongst justices); *see also* Borchers, *supra* note 4, at 1271 (suggesting personal jurisdiction law clearer prior to *McIntyre*).

85. *See McIntyre*, 131 S. Ct. at 2786 (plurality opinion) (recounting facts of case). McIntyre hired an independent company to sell its products throughout the United States. *See id.* The distributor, similarly named McIntyre America, was incorporated in Ohio and also based in Ohio. *See* Nicastro v. McIntrye Mach. Am., Ltd., 987 A.2d 575, 592 (N.J. 2010) (permitting jurisdiction over defendant), *rev'd*, J. McIntyre Mach., Ltd. V. Nicastro, 131 S. Ct. 2780 (2011). Although the two companies shared the same name, they were independent corporate entities, and the distributor was not a subsidiary of the defendant. *See id.* Additionally, the record suggests that the two companies were engaged in a "close ongoing business relationship," but there was no written business contract. *See* Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd*, J. McIntyre Mach., Ltd. V. Nicastro, 131 S. Ct. 2780 (2011).

convention in Las Vegas.[86] The national distributor then shipped the product to New Jersey, where the plaintiff severely injured his hand while using it.[87] J. McIntyre Machinery never traveled to New Jersey, had neither offices nor employees in New Jersey, and never specifically targeted New Jersey consumers.[88] The New Jersey Supreme Court held that New Jersey possessed jurisdiction over the British company, but the United States Supreme Court disagreed.[89]

In the plurality opinion, Justice Kennedy explained that McIntyre was not subject to jurisdiction because the company did not specifically target the New Jersey forum.[90] Finding for the defendant, Justice Kennedy acknowledged that general fairness considerations are not the "touchstone" of personal jurisdiction.[91] Justice Kennedy emphasized that McIntyre did not control its distributor, never attended a convention in New Jersey, and at most four—the record showed only one—of McIntyre's machines landed in New Jersey.[92] Justice Kennedy concluded that personal jurisdiction requires a forum-by-forum analysis, theorizing that a defendant may be subject to the jurisdiction of

86. *See Nicastro*, 987 A.2d at 592 (allowing jurisdiction over defendant). Plaintiff's employer attended the Institute of Scrap Recycling Industries Convention, where he visited a booth featuring both McIntyre and its national distributor. *See id.*

87. *See id.* at 577-78 (reviewing facts of case). The plaintiff purchased the three-ton machine in 1995 for $24,900. *See id.* at 578. Subsequently, he injured his right hand, severing four fingers, when his hand accidentally got caught in the machine's blades. *See id.* at 577.

88. *See McIntyre*, 131 S. Ct. at 2782 (plurality opinion) (describing McIntyre's contacts). McIntyre manufactured the injury-causing machine in England. *See id.* The company's officials attended multiple scrap-metal conventions throughout the United States, but never attended a convention in New Jersey. *See id* (plurality opinion). *But see id.* at 2803 (Ginsburg, J., dissenting) (declaring sale of one metal-shearing machine significant). Justice Ginsburg argued that if a company sold $24,900 worth of shirts to New Jersey, the plurality would find this value significant. *See id.* at 2803 n.15.

89. *See id.* at 2791 (plurality opinion) (overturning New Jersey Supreme Court's holding). The New Jersey Superior Court held that a foreign manufacturer that purposefully avails itself by distributing a product and reaping the benefits of sales in a particular state should be subject to personal jurisdiction "even though its products are distributed by independent companies or by an independent, but wholly-owned, subsidiary." *See Nicastro*, 945 A.2d at 101 (allowing for jurisdiction over defendant). The court went on to suggest that "[i]n today's complex business world, foreign manufacturers rarely deliver products directly to consumers . . . ." *Id.* According to the superior court in New Jersey, independent "middlemen" act as a foreign company's "distribution arms," granting them the ability to market a product to the United States as a whole. *See id.*

90. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788-89 (2010) (plurality opinion) (arguing defendant's actions, not expectations, subject him to jurisdiction).

91. *See id.* (citing fairness inconsistent with "premises of lawful judicial power"). Justice Kennedy asserted that if fairness considerations were determinative, purposeful availment could be circumvented through judicial procedures or plaintiff's inconvenience. *See id.* According to Justice Kennedy, these considerations should not be the sole determining factor. *See id.*

92. *See id.* at 2790 (stating McIntyre did not purposefully avail itself to New Jersey). McIntyre did not pay taxes, own property, or advertise in New Jersey. *See id.* According to Justice Kennedy, McIntyre did not have a single contact with New Jersey, other than the machine that caused the injury. *See id.* Furthermore, McIntyre claimed to have no knowledge of the domiciles of the American residents who purchased the machine from the U.S. distributor. *See* Nicastro v. McIntrye Mach. Am., Ltd., 945 A.2d 92, 99 (N.J. Super. Ct. 2008) (concluding no evidence defendant had expectation product would be purchased in New Jersey), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd*, J. McIntyre Mach., Ltd. V. Nicastro, 131 S. Ct. 2780 (2011).

the United States, but not subject to jurisdiction of any one particular state.[93]

Rejecting Justice Brennan's *Asahi* analysis for its "undesirable consequences," Justice Kennedy explained that the stream-of-commerce metaphor is most applicable when the defendant seeks to serve a specific market.[94] Additionally, Justice Kennedy expressed concern for small domestic producers who, by merely inserting their products into the marketplace, could be forced to litigate in a distant forum.[95] He believed his decision was consistent with Justice O'Connor's opinion in *Asahi*, and thus rejected a pure stream-of-commerce analysis.[96]

A concurring opinion written by Justice Breyer did little to provide any further clarification.[97] Justice Breyer saw *McIntyre* as an "unsuitable vehicle" to "refashion basic jurisdictional rules," and rejected the plurality's strict stream-of-commerce-plus analysis.[98] Furthermore, Justice Breyer articulated a variety of modern concerns not contemplated by the plurality's forum-by-forum analysis, and questioned the consequences of companies targeting the entire world through the internet.[99]

93. *See McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (explaining defendant must direct his activities to particular state). Justice Kennedy asserted that personal jurisdiction restricts judicial power "'as a matter of individual liberty,'" and stated that authority is only lawful if "the sovereign has authority to render it." *Id.* (quoting Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)). Justice Kennedy explained that because the United States is a distinct sovereign, a defendant could be subject to jurisdiction in the United States as a whole, without being subject to the jurisdiction of any one state. *See id.* Although Justice Kennedy believed this irregularity followed constitutional principles, he cautioned that in rare cases, a foreign defendant could completely avoid jurisdiction in the United States. *See id.*; *see also* Borchers, *supra* note 4, at 1254 (explaining Justice Kennedy's sovereignty analysis as evocative of *Pennoyer* era). *Pennoyer* also focused on concerns of state sovereignty. *See* Pennoyer v. Neff, 95 U.S. 714, 721-22 (1877) (articulating sovereignty concerns); *see also* Borchers, *supra* note 4, at 1254 (explaining *Pennoyer*'s focus on sovereignty).

94. *See McIntyre*, 131 S. Ct. at 2788-90 (plurality opinion) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)) (suggesting stream-of-commerce and purposeful availment theories not mutually exclusive).

95. *See id.* at 2790 (plurality opinion) (expressing concern for small domestic producers). Justice Kennedy explained that under Justice Brennan's stream-of-commerce analysis, a small Floridian farmer who sells to a nearby national distributor could be forced to litigate in Alaska, even though the small crop grower never left the state of Florida. *See id.*

96. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2784 (2011) (plurality opinion) (considering *McIntyre* as consistent with Justice O'Connor's decision in *Asahi*).

97. *See id.* at 2793 (Breyer, J., concurring) (arguing outcome determined strictly by precedent); *see also* Borchers, *supra* note 4, at 1265 (suggesting courts will most likely follow Justice Breyer's concurrence). Borchers also argues that Justice Breyer's opinion gives no guidance concerning which analysis should be applied in future cases. Borchers, *supra* note 4, at 1265. According to Borchers, it is unclear whether the pure-stream-of-commerce or stream-of-commerce-plus analysis will be applied in future personal jurisdiction cases. *Id.*

98. *See McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring) (observing current issue not affecting modern concerns). Justice Breyer was particularly concerned that *McIntyre* did not present more modern personal jurisdiction issues. *See id.*

99. *See id.* (questioning plurality's strict rules in website-related cases). Justice Breyer highlighted his concern in applying the plurality's analysis to a number of web-related situations. *See id.* He questioned the personal jurisdiction standard for a company who sells through an intermediary, or markets its products through

In rejecting the plurality's reasoning, Justice Breyer also critiqued the New Jersey Supreme Court's relaxed jurisdictional rule.[100] Like Justice Kennedy, Justice Breyer expressed concern for a small manufacturer hailed into a distant forum simply because that manufacturer sells his product to a distributor, who then sells that product in a specific state.[101] Justice Breyer understood the New Jersey Supreme Court's holding to mean that any state could assert jurisdiction against a defendant manufacturer who sells its products in another state—even if the defendant is a small business and its home state is located far from the forum state.[102] While critiquing the rationales of both the New Jersey Supreme Court and Justice Kennedy, Justice Breyer chose not to adhere to a single conclusion, instead pointing to potential developments in personal jurisdiction litigation.[103]

Writing for the dissent, Justice Ginsburg vigorously critiqued the plurality's reasoning.[104] Justice Ginsburg characterized McIntyre Machinery as a "foreign industrialist" who chose to maximize the sale of its machines throughout the

pop-up advertisements visible in the forum. *See id.* His concern regarding websites and personal jurisdiction is shared by legal analysts who argue that the case law is conflicting. *See* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 939 (1998) (observing internet case law appears "irreconcilable"). Stravitz suggests that it is unclear what actions a web-based company must take to "purposefully avail" itself to the forum. *See id.* He further questions whether a website that is accessible at any moment is sufficient purposeful conduct to warrant jurisdiction in a specific state. *See id.*

100. *See McIntyre*, 131 S. Ct. at 2793-94 (Breyer, J., concurring) (rejecting New Jersey Supreme Court's rationale). Justice Breyer believed applying the New Jersey Supreme Court's reasoning would abandon the focus on the relationship between "the defendant, *the forum*, and the litigation." *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

101. *See id.* at 2793 (suggesting small manufacturer at risk of burdensome litigation under pure-stream-of-commerce rationale). According to Justice Breyer, under the New Jersey Supreme Court's holding, a producer is subject to jurisdiction if he "'knows or reasonably should know that its products are distributed through a nationwide distribution system . . . .'" *See id.* (quoting Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 591-92 (N.J. 2010), *rev'd*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011)) (citing and disagreeing with New Jersey Supreme Court's approach); *see also* Transcript of Oral Argument at 23, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (No. 09-1343) (articulating concern over small businesses subject to jurisdiction in all fifty states). During oral arguments, Justice Breyer highlighted concern for a small potter from West Virginia who makes a few thousand pots a year. *See* Transcript of Oral Argument at 26, *McIntyre*, 131 S. Ct. 2780 (No. 09-1343). Justice Breyer questioned the personal jurisdiction standard where the potter is presented with the opportunity to sell his pots "everywhere." *See id.*

102. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring) (critiquing New Jersey Supreme Court's decision); *see also* Transcript of Oral Argument at 31, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (No. 09-1343) (articulating concerns for accident victims forced to travel to distant state to pursue litigation).

103. *See McIntyre*, 131 S. Ct. at 2794 (Breyer, J., concurring) (expressing uncertainty in current case over personal jurisdiction standard); *see also* Borchers, *supra* note 4, at 1265-66 (commenting on lack of certainty of *McIntyre*'s personal jurisdiction analysis). According to Borchers, the only area of certainty in the Court's opinion is that the sale of one $24,000 machine will not satisfy personal jurisdiction in a particular forum. Borchers, *supra* note 4, at 1265.

104. *See McIntyre*, 131 S. Ct. at 2794-2804 (Ginsburg, J., dissenting) (maintaining New Jersey possessed jurisdiction over McIntyre based on stream of commerce).

United States.[105] She argued that McIntyre hoped not only to reap monetary benefits from United States consumers, but also to avoid litigation in the United States.[106] Furthermore, Justice Ginsburg believed that the machine in question did not arrive in New Jersey by chance, but rather because of McIntyre's deliberate efforts to target the United States market.[107] Arguing that McIntyre's contacts satisfied personal jurisdiction in the United States, Justice Ginsburg believed that holding otherwise would be a "giant step away from the 'notions of fair play and substantial justice'"[108]

Disagreeing with the plurality's forum-by-forum analysis, Justice Ginsburg suggested that New Jersey's jurisdiction over McIntyre would not detract from sister-state sovereignty.[109] She further stated that due process, not state sovereignty, limits a state court's ability to adjudicate the claim.[110] In

105. *See id.* at 2794 (outlining McIntyre's purposeful business and marketing plan).

106. *See id.* at 2797 (contending McIntyre hired American distributor to avoid United States litigation). Similarly, the superior court in New Jersey explained that if a foreign manufacturer could shield itself from liability by hiring a national distributor, it would "subvert justice and economic reality in the worst sense." *See* Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 101 (N.J. Super. Ct. 2008) (allowing for jurisdiction over defendant), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd*, J. McIntyre Mach., Ltd. V. Nicastro, 131 S. Ct. 2780 (2011). Additionally, the court explained that "[f]oreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products." *Id.* at 101-02.

107. *See McIntyre*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (maintaining McIntyre deliberately targeted United States market, including New Jersey). Justice Ginsburg explained that New Jersey is a "hotbed" for the scrap-metal industry. *See id.* at 2795. She further highlighted that McIntyre's representatives actively marketed its products at annual scrap-metal conventions from 1990 until 2005. *See id.* at 2795-96.

108. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2804 (2011) (Ginsburg, J., dissenting) (rejecting plurality opinion and stating it does not speak for Court).

109. *See id.* at 2798 (asserting state where injury occurred most interested in adjudicating case). Justice Ginsburg suggested that the Due Process Clause is the sole constitutional limit to personal jurisdiction, and that it is based on basic concepts of fairness. *See id.* She further quoted *Ireland*, which noted that the Due Process Clause "'is the only source of the personal jurisdiction requirement and . . . makes no mention of federalism concerns.'" *See id.* (quoting Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982)) (portraying no connection between state sovereignty and personal jurisdiction). The Court in *Ireland* reasoned that if personal jurisdiction may be waived by failure to object, then state sovereignty should not play a role in the analysis. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982). According to the Court, if federalism "operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected." *Id.* The question of a state's constitutional authority to assert jurisdiction is often the subject of debate. *See* Murphy, *supra* note 47, at 295 (suggesting source of constitutional limitation up for debate). Many analysts argue that the Due Process Clause should protect persons and not states. *See id.* at 288 (noting commentators suggest Due Process Clause only limitation on state's assertion of jurisdiction). Still others suggest that territorial limits and state sovereignty play an important role. *See id.* Murphy contends that the Supreme Court failed to identify a clear analysis concerning the source of personal jurisdiction. *See id.* According to Murphy, the Court's historical analysis of purposeful availment has produced "cryptic pronouncements" to describe the applicable standard, which lower courts must apply. *See id.* at 294.

110. *See McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (citing constitutional constraints over personal jurisdiction). Justice Ginsburg quoted *Woodson*, which noted that the Due Process Clause is the only source for personal jurisdiction. *See id.* She contrasted this view with the plurality's opinion and argued that fairness, not state sovereignty, must be applied when analyzing personal jurisdiction. *See id.*

expressing concern for the plaintiff's inability to litigate in its home forum, Justice Ginsburg asserted that "reason and fairness" must be analyzed.[111]

Justice Ginsburg further differentiated *McIntyre* from *Asahi*, explaining that unlike Asahi, McIntrye engaged in diligent marketing efforts throughout the United States.[112] Seeing very few factual similarities, Justice Ginsburg concluded that *Asahi* did not control the outcome of *McIntyre*, and expressed concern that the Court's judgment put American plaintiffs at a disadvantage to plaintiffs elsewhere in the world.[113]

III. ANALYSIS

A. McIntyre *Critique*

The outcome in *McIntyre* creates further controversy over when a defendant's actions are sufficient to warrant jurisdiction in a particular forum.[114] The plurality and dissent appear to disagree on the ideology behind personal jurisdiction.[115] The plurality, for instance, spends a significant portion of the decision discussing state sovereignty, while the dissent believes it should not be a main consideration.[116] Additionally, the concurring decision fails to offer much guidance in creating a uniform personal jurisdiction standard.[117]

As the dissent suggests, it is concerning that a foreign corporation can target the United States in an attempt to reap maximum sales, yet avoid jurisdiction

111. *See id.* at 2800-01 (stressing international company less burdened by litigating in distant forum than plaintiff).

112. *See id.* at 2803 (distinguishing *Asahi* from facts at hand). Justice Ginsburg argued that Asahi merely sold its components to a distributor, and that those products were later marketed to the United States. *See id.* However, she highlighted that unlike Asahi, McIntyre controlled its product's final destination and specifically chose to sell its products in the United States. *See id.*

113. *See id.* at 2803-04 (critiquing outcome of case). Justice Ginsburg noted other countries faced with a similar fact pattern would subject a defendant to jurisdiction at the place of injury. *See id.* Additionally, she compared European and American personal jurisdiction standards, and explained that if this accident had occurred in the United Kingdom, jurisdiction in New Jersey would not be "exceptional." *See id.* at 2803; *see also* Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 550-55 (1995) (comparing United States personal jurisdiction standards to European Union standards). According to Weintraub, the stream-of-commerce metaphor should be "discarded," and a defendant who releases his product into the marketplace should be subject to jurisdiction at the place of injury when the product is purchased in the forum, or arrives at the forum through normal distribution efforts. *See* Weintraub, *supra*, at 554-55. Weintraub argues that applying another standard would allow a corporation to "Pilate-like wash its hands of a product by having independent distributors market it." *See id.* at 555.

114. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2780 (plurality opinion) (demonstrating differing opinions of personal jurisdiction requirements amongst justices).

115. *Compare id.* at 2785-91 (plurality opinion) (holding foreign manufacturer did not engage in purposeful conduct in New Jersey), *with id.* at 2794-2804 (Ginsburg, J., dissenting) (rejecting majority's decision, opining foreign manufacturer should be subject to jurisdiction).

116. *See supra* notes 93, 109-11 and accompanying text (discussing Justice Ginsburg's and Justice Kennedy's opinions on state sovereignty and personal jurisdiction).

117. *See supra* notes 97-103 and accompanying text (describing Justice Breyer's view of personal jurisdiction debate).

based on a loophole in the law.[118] By creating a system where foreign corporations need only hire national distributors to avoid litigation, the plurality's decision protects foreign defendants, while subjecting American companies to jurisdiction at least in their home forum.[119] A foreign company hoping to avoid jurisdiction in a specific state can do so by targeting the United States as a whole, rather than limiting its distribution efforts.[120]

For example, a company could sell its products to a national distributor based in Seabrook, New Hampshire, knowing the town is less than ten miles from the Massachusetts border.[121] Under the plurality's analysis in *McIntyre*, the company would not be subject to jurisdiction in Massachusetts, even if it hoped—and was relatively certain—its products would land in Massachusetts.[122] Conceivably, if the company did not specifically target New Hampshire, but rather the United States in general, then the foreign company could completely avoid litigation in this country.[123]

Despite the plurality's strict jurisdictional rule, the dissent's analysis is also troublesome.[124] The dissent contends that McIntyre's product landed in New Jersey through targeted distribution efforts to the United States; this expansive analysis, however, could cause companies to be subject to limitless jurisdiction.[125] Based on the dissent's argument, McIntyre would be subject to jurisdiction if its product was sold and caused injury in any state, simply because it hired a national distributor.[126] While it may be fair to subject a multinational foreign company to jurisdiction across the country, it is less desirable to subject small domestic producers to litigation in a distant forum, simply because a company engages in national commerce.[127]

Take for example a struggling toy inventor domiciled in Maine that sells its

118. *See supra* notes 105-07 and accompanying text (explaining Justice Ginsburg's analysis of McIntyre's business activities); *supra* note 93 and accompanying text (explaining McIntyre's relationship sufficient with United States, but no state in particular).

119. *See McIntyre*, 131 S. Ct. at 2790 (Ginsburg, J., dissenting) (maintaining defendant's contacts with New Jersey, not U.S., relevant); *see also supra* notes 33-37 and accompanying text (describing requirements for specific and general jurisdiction).

120. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794-95 (2011) (Ginsburg, J., dissenting) (arguing McIntyre avoids personal jurisdiction because of national distributor).

121. *Cf.* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613 (8th Cir. 1994) (articulating similar factual scenario).

122. *Cf. McIntyre*, 131 S. Ct. at 2785-91 (plurality opinion) (concluding no jurisdiction over foreign defendant).

123. *See supra* note 93 and accompanying text (examining possibility of no jurisdiction in United States).

124. *Cf. McIntyre*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (arguing McIntyre subject to jurisdiction based on one sale in New Jersey).

125. *See id.* (providing machine did not arrive in New Jersey "randomly or fortuitously"); *see also supra* notes 100-02 and accompanying text (analyzing Justice Breyer's concern with dissent's view of personal jurisdiction).

126. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794-2804 (2011) (Ginsburg, J., dissenting) (suggesting foreign manufacturer subject to jurisdiction if using national distributer).

127. *See id.* at 2793 (Breyer, J., concurring) (highlighting fairness concerns).

product to a distributor, who then sells a half dozen of the inventor's products to a toyshop in Hawaii.[128] If the injury occurs to a consumer in Hawaii, under the dissent's view, the small inventor would be subject to jurisdiction there, even though the inventor did not control the distributor's decision to sell the product to a distant forum.[129] This framework could have a stifling effect on small independent producers who, out of fear of distant litigation, may choose to sell products only to nearby states, or may choose to avoid selling products to distributers, ultimately hindering potential growth.[130]

B. A Proposed Personal Jurisdiction Solution

Perhaps the best solution to personal jurisdiction arises out of Justice Stevens's analysis in *Asahi*.[131] Justice Stevens's argument is most notably characterized as a value, volume, and hazardous nature analysis.[132] In other words, according to Justice Stevens, a company that sells millions of its products to a national distributor is more likely to purposefully avail itself to a variety of states than a company with a one-time contract with a distributor for a half dozen products.[133]

If the value, volume, and hazardous nature test is used, it is likely that McIntyre purposefully availed itself to New Jersey.[134] The metal-shearing machine in question was of significant value, and carried with it a significant risk of danger.[135] While potentially only one of McIntyre's products was sold in New Jersey, the company would still be subject to jurisdiction based on the product's overall value and hazardous nature, coupled with the volume of products placed into the national stream of commerce.[136] Based on these factors, McIntyre had a "reasonable expectation" that it would be subject to jurisdiction in New Jersey.[137]

128. *Cf.* Transcript of Oral Argument at 19, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343) (articulating similar fact pattern concerning small potter manufacturer).

129. *See supra* note 95 and accompanying text (articulating concerns for small producers).

130. *See McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (describing issues for small domestic producers); *see also supra* note 64 and accompanying text (cautioning burden of Justice Brennan's analysis on small businesses).

131. *See* Citron, *supra* note 68, at 470-71 (advocating adoption of Justice Stevens's analysis).

132. *See supra* notes 66-70 and accompanying text (outlining Justice Stevens's analysis).

133. *See supra* notes 66-70 and accompanying text (illustrating Justice Stevens's value, volume, and hazardous nature analysis).

134. *Compare* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 110-11 (1987) (Stevens, J., concurring) (providing Justice Stevens's reasoning in *Asahi*), *with* Nicastro v. McIntyre Mach Am., Ltd., 987 A.2d 575, 577 (N.J. 2010) (allowing for jurisdiction over defendant), *rev'd*, J. McIntyre Mach., Ltd. V. Nicastro, 131 S. Ct. 2780 (2011) (overturning New Jersey Supreme Court's decision).

135. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2803 n.15 (2011) (Ginsburg, J., dissenting) (arguing $24,900 worth of product constitutes substantial value).

136. *See supra* notes 66-70 and accompanying text (noting Justice Stevens's value, volume and hazardous nature analysis).

137. *See* Abuan v. Gen. Elec. Co., 735 F. Supp 1479, 1486 (D. Guam 1990) (delineating reasonable expectation standard). In *Abuan*, the court found that the volume of products inserted into the stream of

When analyzing a foreign company attempting to target the Massachusetts market through a New Hampshire distributor, under Justice Stevens's view, the company would meet the purposeful availment standard if a significant number of its products were sold to consumers in Massachusetts.[138] Therefore, if the company sold sixty percent of its products to Massachusetts's customers, it would be subject to jurisdiction even if the company did not specifically target Massachusetts's consumers directly.[139] The company's efforts to serve the Massachusetts market through a third-party distributor would not insulate the company from liability.[140] Based on this analysis, the volume of the product sold would be sufficient to show that the company purposefully availed itself to the Massachusetts market.[141]

Justice Stevens's position will also help solve the issue of the small manufacturer that, much like the toy inventor, employs a national distributor to sell its products.[142] If only a half dozen of the inventor's products were sold in Hawaii, and the products were insignificant in value, it is unlikely the court would find the company purposefully availed itself to Hawaii.[143] If nearly all the inventor's products were sold in Hawaii, the outcome—even for a small company—would be quite different.[144] Furthermore, if the inventor's products were inherently dangerous, jurisdiction would be more likely in that state.[145]

The analysis suggested by Justice Stevens requires a fact-dependent investigation and does not necessarily offer a clear cut rule.[146] Additionally, this type of analysis often rests on a judicial-value test, and requires examining the character and volume of the product within the forum state.[147] While Justice Stevens's argument may not always be clear-cut, it allows distributors and manufacturers to gauge where they will be vulnerable to litigation, and allows them to weigh the possibility of litigation against the benefits of serving a specific market.[148]

commerce subjected the defendant to litigation in Guam because there was an "expectation" the product could cause injury in the forum. *See id.*

138. *See supra* notes 66-70 and accompanying text (articulating Justice Stevens's value, volume, hazardous nature test).

139. *See supra* note 68 and accompanying text (reviewing Justice Stevens's personal jurisdiction opinion).

140. *See supra* note 68 and accompanying text (describing application of Justice Stevens's analysis).

141. *See supra* note 68 and accompanying text (discussing requirements for Justice Stevens's value, volume, and hazardous nature test).

142. *See supra* notes 66-70 and accompanying text (outlining Justice Stevens's analysis in *Asahi*).

143. *See supra* note 83 and accompanying text (applying Justice Stevens's analysis).

144. *See supra* note 68 (articulating Justice Stevens's analysis).

145. *See supra* note 83 and accompanying text (describing courts' use of Justice Stevens's value, volume, and hazardous nature analysis).

146. *See supra* note 69 (realizing downside of fact-based Supreme Court jurisprudence).

147. *See supra* note 69 and accompanying text (examining issues with Justice Stevens's factor-based analysis).

148. *See supra* note 68 and accompanying text (explaining benefits of Justice Stevens's value, volume, and hazardous nature test).

For instance, if a foreign company sells products to a New Hampshire distributor, but truly wants to avoid litigation in Massachusetts, it will be forced to choose a distributor that does not sell its products to Massachusetts, or alternatively to inform the distributor it would like to limit sales in Massachusetts.[149] Moreover, if the toy inventor chooses to sell a large volume of his products to a national distributor, the act of purposefully selling a large volume of the product would make him vulnerable to litigation in a distant forum.[150]

Arguably, the analysis proposed by Justice Stevens will occasionally place a burden on plaintiffs forced to travel to pursue litigation.[151] Nonetheless, Justice Stevens's argument will produce mostly fair results, as it allows for a fact-based analysis that caters to the specific outlines of each case.[152] While it may not resolve every personal jurisdiction issue, it serves as a foundation that can be applied to a variety of modern issues.[153]

IV. CONCLUSION

McIntyre did little to clarify the law of personal jurisdiction. The Court once again failed to deliver a majority decision, leaving companies with little clarification as to what circumstances will subject them to jurisdiction in a particular state. By failing to create a uniform standard, the Court suggested that foreign defendants may actually escape litigation simply by hiding behind a national distributor. While it is uncertain what contacts with a particular state will be sufficient to warrant jurisdiction, it is clear that McIntyre's contacts with New Jersey did not satisfy the Court's threshold.

Personal jurisdiction has evolved substantially since the days of *Pennoyer*, but its true application is still debatable. Requiring defendants to travel to distant forums where they have little contact is troublesome. Conversely, it is also concerning that plaintiffs may be unable to pursue American litigation against a foreign defendant, especially where the defendant reaps substantial financial benefits from engaging in commerce throughout the United States. Additionally, the growth and expansion of e-commerce create new personal jurisdiction issues that will require careful examination and a solidified

149. *See supra* note 68 and accompanying text (analyzing defendant's ability to control jurisdiction under Justice Stevens's analysis).

150. *See supra* note 68 (detailing reasonable expectation requirement).

151. *See* Transcript of Oral Argument at 27, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343) (illustrating concerns for accident victim). It is concerning that a victim will be forced to litigate in a distant forum, while the defendant escapes jurisdiction in that particular state. *See id.*

152. *See supra* note 68 and accompanying text (articulating benefits of Justice Stevens's factor-based analysis). At least one court suggested Justice Stevens's argument appeals to "common sense." *See supra* note 69 and accompanying text.

153. *See supra* note 68 and accompanying text (pointing to Justice Stevens's commonsensical, case-by-case approach).

jurisdictional approach. In choosing its next decision, the Supreme Court should bear in mind the continued confusion lower courts face in analyzing personal jurisdiction, by adopting the standard proposed by Justice Stevens that will be fair and appropriate for both foreign and American defendants and plaintiffs alike.

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