J. MCINTYRE MACHINERY, LTD. V. NICASTRO, 131 S. CT. 2780 (2011): PERSONAL JURISDICTION AND THE STREAM OF COMMERCE DOCTRINE

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I. INTRODUCTION

AMERICAN citizens expect American law to provide remedies when their rights are abridged. American citizens expect manufacturers who produce injurious and unsafe products and introduce those products into the American stream of commerce to answer for the injuries caused by defective products. They expect American courts to provide a venue through which citizens may seek a remedy for the injuries caused by those defective products. In a post-industrial economy, where goods are no longer primarily manufactured within United States territorial boundaries, American citizens might be surprised to find that in addition to manufacturing jobs, their rights have been off-shored as well. If foreign manufacturers are immunized from products liability in American courts by virtue of their territorial location, then American citizens may lose access to remedies for losses they incur through the tortious activities of foreign manufacturers. If American citizens are forced to seek justice abroad, then the rights of American citizens would be defined not by the U.S. Constitution, but instead by some other instrument.

In February, 2010, the Supreme Court of New Jersey held that personal jurisdiction was proper in *Nicastro v. McIntyre Machinery America, Ltd.*, where J. McIntyre Machinery (J. McIntyre), a U.K. company, had placed its machinery into the stream of commerce by manufacturing its metal shearing machine and marketing it for sale in the United States through an American distributor.[1] The court found J. McIntyre answerable in the State of New Jersey for product liability based upon the stream-of-commerce theory, finding in accordance with controlling New Jersey case law,[2] the "globalization of the world economy has removed national borders as barriers to trade."[3] Because J. McIntyre had targeted the entire United States as its market, including the State of New Jersey, the court found the state's interest in providing a forum to enable its citizens to

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1. 987 A.2d 575, 589 (N.J. 2010).
2. Charles Gendler & Co. v. Telecom Equip. Corp., 508 A.2d 1127, 1140 (N.J. 1986).
3. *McIntyre Mach. Am.*, 987 A.2d at 577.

seek redress to be properly within the requirements of due process.[4] The court reasoned that J. McIntyre should have reasonably foreseen that its product would be sold in New Jersey, and thus subject to suit in the event that its machine was defective and injurious to a New Jersey citizen.[5]

In June 2011, the United States Supreme Court reversed the New Jersey *Nicastro* decision,[6] holding that J. McIntyre had insufficient contacts with the State of New Jersey to justify personal jurisdiction. In deciding *Nicastro*, the Court had an opportunity to clarify "decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court of Cal, Solano County*."[7] *Nicastro* reopened the question of the stream-of-commerce theory and neither adopted it nor rejected it—leaving *Asahi* in its former state as persuasive authority, offering little assistance to lower courts in future decisions, and leaving an open invitation to revisit the question in the future with a different set of facts. Like *Asahi*, the *Nicastro* Court was unable to reach a majority decision. Instead, the decision fractured into three parts comprised of a plurality by Justice Kennedy, a concurrence by Justice Breyer, and a dissent by Justice Ginsburg.[8]

In his concurrence, Justice Breyer, joined by Justice Alito, declined to decide the larger question, urged by the dissent and rejected by the plurality, of whether the globalization of commerce changes the personal jurisdiction equation.[9] While the plurality opinion attempted to limit, if not abandon, the stream-of-commerce theory in favor of the *Asahi* plurality opinion, the dissent took a more expansive approach to the stream-of-commerce theory given the globalization of commerce and New Jersey's interest in providing a forum for its citizens.[10] The dissent found the New Jersey decision consistent with requirements of *World-Wide Volkswagen Corp. v. Woodson*[11] and *Asahi*,[12] and therefore that the New Jersey Supreme Court's decision in *Nicastro* should have been upheld.[13]

This case note will start by providing a background summary of relevant personal jurisdiction law in order to provide context for the *Nicastro* decision, and then proceed with a brief presentation of the facts in *Nicastro*. After providing context and factual background information, this note will dissect the *Nicastro* opinions, individually exploring the plurality opinion, concurrence, and dissent, and will ultimately conclude that the better argument was made by the dissent.

4. *Id.* at 577, 593-94.

5. *Id.* at 577.

6. 131 S. Ct. 2780, 2783 (2011).

7. *Id.* at 2785 (quoting Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 105 (1987)).

8. *Nicastro*, 131 S. Ct. at 2785.

9. *Id.* at 2794 (Breyer, J., concurring).

10. *Id.* at 2804 (Ginsburg, J., dissenting).

11. 444 U.S. 286, 298 (1980).

12. *Asahi Metal Indus. Co.*, 480 U.S. 102.

13. *Nicastro*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

Because the globalization of commerce over the past 50 years presents a dramatic shift in American society, and because the *Asahi* decision was narrow, *Asahi* inadequately addresses the issue of determining personal jurisdiction in the twenty-first century. The traditional rules of presence and consent under *Pennoyer v. Neff*[14] were insufficient to address the changes in society with the advent of the automobile and its impact upon travel and interstate commerce in the twentieth century, which necessitated the introduction of a more expansive theory of personal jurisdiction under *International Shoe Co. v. Washington.*[15] Likewise, the abandonment of a manufacturing-based economy in the late twentieth century has resulted in the explosive growth in foreign goods, which necessitates an expanded stream-of-commerce theory in order to enable states to provide redress to their citizens for injuries caused by defective goods manufactured abroad.

II. BACKGROUND

A. The Early Years

Personal jurisdiction embodies the idea that a court may assert power over an individual's personal rights.[16] Submission to a court's adjudication is the process by which due process, guaranteed under the Fourteenth Amendment, is implemented. The power asserted by a court over the individual includes the individual's rights and personal property.[17] Because the United States is a federation of sovereign states, citizens must submit to the authority of both state and federal courts, and because states may not exercise power over the citizens of sister states, jurisdictional conflicts naturally arise when disputes involve diverse citizenry.[18] The evolution of personal jurisdiction law has generally followed the evolution of commerce and the societal changes introduced as a result of changes in commercial activity.[19] Before public investment in transcontinental-transportation infrastructure, such as railroad and highways, commerce was generally conducted locally, and disputes tended to be local as well.[20] Thus it was in the late nineteenth century that the Court decided the landmark case, *Pennoyer v. Neff*, where it held that personal jurisdiction was not proper over the property of a non-resident when the defendant had not received fair notice of the action through either of two acceptable means: service of process or prejudgment attachment.[21] Because Neff had not been notified of the suit, Justice Field found

14. 95 U.S. 714, 734-36 (1877).

15. 326 U.S. 310, 321 (1945). *See also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957).

16. BLACK'S LAW DICTIONARY 870 (8th ed. 2004).

17. *Id.*

18. *See, e.g.*, *Pennoyer*, 95 U.S. at 734-36.

19. *See generally* JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE CASES AND MATERIALS 81 (10th ed. 2008).

20. *See, e.g.*, *id*.

21. *Pennoyer*, 95 U.S at 720 (discussing Oregon Code where prejudgment attachment was a means to notify an individual of suit by seizure of his property at the outset of the litigation).

the default judgment against him void.[22] The court had never achieved jurisdiction over Neff's person or property, and without jurisdiction, the court had no power to hear the claim or render a verdict.[23] Under *Pennoyer*, the Court established a requirement of presence, property, or consent to suit within a jurisdiction, which could be satisfied by physical presence within the jurisdiction or the presence of an assigned agent for personal service of process.[24] Notably, under *Pennoyer*, a defendant was essentially immune from suit by virtue of his ability to avoid personal service through his absence from the forum state.[25] *Pennoyer* marks the Court's introduction of an inquiry into the constitutionality of personal jurisdiction under the "due process clause [as] the source of jurisdictional limitations that operate directly on the states."[26]

The advent of the age of the automobile rendered the presence theory of personal jurisdiction of limited use.[27] The ease of travel into and out of a forum state increased the likelihood of disputes between citizens of different states, making the presence theory inadequate to address the changes to society brought by technological advances and the growth in interstate commerce.[28] A new theory of implied consent, under *Hess v. Pawloski*, was introduced to diminish the ability of a non-resident to avoid suit in a forum where he had caused an injury.[29] The *Hess* Court created the legal fiction of implied consent to expand the notion of consent under *Pennoyer* to include individuals who avail themselves of the benefits of the forum state, including the benefits of transportation infrastructure.[30] Under *Hess*, it was a defendant's presence with the forum state that implied his consent to suit, and one injurious contact within a forum state was deemed sufficient to make him answerable therein.[31]

If one contact is sufficient for personal jurisdiction to be proper, could jurisdiction also be proper if there was no direct contact at all? The question of the kind and quality of contacts necessary to make jurisdiction was further refined in *International Shoe Co. v. Washington*, where the Court changed the inquiry from the defendant's physical presence within the state to the defendant's minimum contacts with the state.[32] The Court construed that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain

22. *Id.*

23. *Id.*

24. Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

25. *See id*. at 736-37.

26. 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, 51 (1990). *See also* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 25 (3d ed. 2002).

27. *See generally* Hess v. Pawloski, 274 U.S. 352, 356 (1927).

28. *Id.*

29. *See id.*

30. *Id.*

31. *Id.*

32. 326 U.S. 310 (1945); JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE 117 (3d ed. 1999).

> minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[33]

The Court found systematic and continuous contact with the State of Washington through the activities of shoe salesmen such that jurisdiction was proper.[34]

Having determined systematic and continuous contact sufficient to subject a defendant to personal jurisdiction, the Court next addressed whether a defendant's contact with a single customer could satisfy the minimum-contacts requirement. In *McGee v. International Life Insurance Co*., the Court found minimum contacts where a single life insurance contract was sufficient to make the company amenable to suit, and the state's interest in insurance and contract law was strong enough to overcome inconvenience to the insurance company.[35] The Court found that the insurance company should have expected to answer a dispute over the payment of the contract in the forum state because the company was constructively notified of the existence of the contract when it acquired the originating company.[36] Here, in addition to satisfaction of minimum contacts derived from interstate commerce, the Court explicitly introduced the idea of foreseeability of answering in the forum state as a reasonable factor in determining jurisdiction.[37] But was foreseeability enough? One year later, in *Hanson v. Denckla*, the Court held that foreseeability of suit was not enough, that an individual or company must have "purposely avail[ed]" itself of the benefits of the forum state in order for personal jurisdiction to be proper.[38]

B. Modern Personal Jurisdiction Law

By 1980 the transcontinental freeway system had been in place for decades. As a result, interstate commerce flourished and it had become common for individuals to change their state of residence.[39] What effect would movement of goods as a result of the movement of individuals, not commerce, have upon the question of minimal contacts? In *World-Wide Volkswagen Corp. v. Woodson*, the Court determined that the unilateral action of a third party in bringing a defective product into the state does make a defendant liable in a forum.[40] Due process requires that the defendant be able to direct his conduct, activities, and contacts such that he can reasonably predict where he will be amenable to suit.[41]

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

34. *Id*. at 320.

35. 355 U.S. 220, 223-24 (1957).

36. *Id.* at 220-22.

37. *Id.*

38. 357 U.S. 235, 253 (1958).

39. *See generally* U.S. DEP'T OF COM., BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION: GEOGRAPHICAL MOBILITY FOR STATES AND THE NATION, PC80-2-2A, *available at* http://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8022uns_bw.pdf (illustrating changes of residence based on age, sex, race, Spanish origin, years of school completed, persons in the armed force, and persons attending college).

40. 444 U.S. 286, 297 (1980).

41. *Id.*; FRIEDENTHAL ET AL., *supra* note 32, at 123.

The Court introduced a two-part analysis to determine whether jurisdiction was proper.[42] First and foremost, the due process requirement of minimum contacts must be satisfied.[43] If, and only if, the minimum-contacts requirement had been met, then the Court would inquire into the fairness and substantial justice element by balancing the state's interest in providing a forum against the inconvenience to the defendant.[44] Thus, the state's interest in providing a forum, and the convenience to the defendant was not to be considered unless it was determined that the defendant had met the minimum-contacts test.[45] This was important because it established the battlefield over minimum contacts as a central theme that has subsequently occupied the attention of the Court in questions of personal jurisdiction. Furthermore, the Court articulated a stream-of-commerce theory and placed it within the minimum contacts prong of the test.[46]

In *World-Wide Volkswagen*, the manufacturer of the automobile was presumed amenable to suit throughout the United States and did not contest jurisdiction.[47] It was the local regional distributor, whose business had no contact with the forum state, that was determined not to have met the minimum-contacts test.[48] The Court never addressed the question of the manufacturer's jurisdiction because the question was not raised; it was presumed true by all parties. This is important because under *World-Wide Volkswagen*, the plaintiff was not barred from recovery for lack of jurisdiction.[49] The opportunity for redress and remedy remained available to the plaintiff.[50]

Until *Asahi Metal Industry Co. v. Superior Court of California*, the Court had been able to reach a majority decision not only on the outcome of the personal jurisdiction cases before it, but also on how it applied the precedents and tests to reach its decisions. In *Asahi*, the analytical framework to achieve the result was deeply fractured.[51] The Court's narrow holding in *Asahi* reached an agreement upon the application of the fairness prong of the *World-Wide Volkswagen* test, but revealed a deep split on the question of minimum contacts and the stream-of-commerce theory, yielding two competing plurality opinions.[52] Thus, while *Asahi* is binding authority on the fairness and substantial justice requirements for personal jurisdiction, it is unhelpful in refining the minimum contacts inquiry.

In an opinion by Justice O'Connor, four justices found that the minimum-contacts requirement was not met because the stream-of-commerce theory was,

42. *World-Wide Volkswagen Corp.*, 444 U.S. at 297; RICHMAN & REYNOLDS, *supra* note 26, at 41.

43. RICHMAN & REYNOLDS, *supra* note 26, at 41.

44. *Id.*

45. *Id.*

46. *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98.

47. *Id.* at 288 n.3.

48. *Id.* at 288-89.

49. *Id.* at 286-87.

50. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286-87 (1980).

51. *See id.* at 102-04.

52. *See id.*

by itself, not enough to establish minimum contacts; "something more" was required.[53] Under the *World-Wide Volkswagen* test, if minimum contacts are not found, then the fairness prong need not even be addressed. Yet three of the four justices in the O'Connor opinion did analyze the fairness prong, and it was only this analysis upon which the majority agreed.[54] In an opinion by Justice Brennan, four justices found that the minimum-contacts requirement was satisfied and used the stream-of-commerce theory to satisfy the requirement, but agreed with four other justices that the case failed on the fairness prong.[55]

The facts in *Asahi* were peculiar and therefore fairly easily distinguishable in subsequent cases. The original California plaintiff settled with one of the foreign defendants, and thus had dropped out of the suit, leaving an indemnity complaint between two foreign companies for a transaction that occurred in Asia.[56] The Court agreed that the State of California had little interest in the outcome between two foreign companies, and that the inconvenience to the defendant having to answer in California for a transaction that occurred in Asia was so burdensome that it would be unfair to proceed in California.[57]

There are two important points from *Asahi* which will significantly inform the discussion in *Nicastro*. First, Justice O'Connor's opinion that the stream of commerce is not enough by itself to establish minimum contacts, if taken to its logical conclusion, could substantially limit the opportunity for a plaintiff to seek redress for injury in the forum state by an alien entity that had placed a defective product into the stream of commerce. This result could effectively immunize the defendant from suit because the state's interest in providing a forum is only analyzed in the fairness prong of the *World-Wide Volkswagen* test. If the minimum-contacts test is not satisfied, a court need not even address fairness to the state and plaintiff.[58] This is important because the law proposed in Justice O'Connor's opinion could immunize defendants from suit—an outcome not seen since *Pennoyer*, effectively taking a giant step backward in personal jurisdiction theory to a framework that had become inadequate by the end of World War II. Secondly, the decision in *Asahi* did not involve the interests of an American citizen injured by a foreign manufactured product on American soil.[59] The *Asahi* Court may well have reached a different conclusion on the fairness prong of the *World-Wide Volkswagen* test had the American plaintiff not settled and dropped from the case. Significantly, it was never suggested in *Asahi* that the foreign manufacturer of the end-product was not answerable in the forum state, but instead *Asahi* merely held that the component manufacturer was not answerable in the forum state under the narrow facts of the case.[60]

53. *Id.* at 111-12.

54. RICHMAN & REYNOLDS, *supra* note 26, at 41; *World-Wide Volkswagen Corp.*, 444 U.S. at 297; Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 103 (1987).

55. *Asahi Metal Indus. Co.*, 480 U.S. at 116 (Brennan, J., concurring).

56. *Id.* at 106.

57. *Id.* at 115.

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

59. *See Asahi Metal Indus. Co.*, 480 U.S. at 115-22.

60. *Id.*

The deep split and narrow holding in *Asahi* left state courts great latitude in finding minimum contacts through the stream-of-commerce theory when analyzing the contacts prong of the *World-Wide Volkswagen* test because it left the contacts inquiry unchanged since *World-Wide Volkswagen*. After *Asahi*, courts had two options: first, the option of adopting Justice O'Connor's requirement of minimum contacts and "something more," adopting Justice Brennan's finding that placing a product in the stream of commerce is sufficient to establish minimum contacts, employing some hybrid of the two approaches; or second, disregarding *Asahi* altogether and returning to a stream of commerce analysis based entirely upon *World-Wide Volkswagen*.[61] Because *Asahi* was decided on the fairness prong of *World-Wide Volkswagen*, it did not actually add to the contacts analysis. Instead, it narrowly focused upon the fairness of holding a foreign entity answerable for a transaction that took place outside the United States and did not reach any agreement upon the question of minimum contacts.[62] Consequently, *Asahi* was, at best, a wasted opportunity to advance personal jurisdiction law, and at worst an unhelpful muddling of the contacts inquiry.

It is within the context of established precedents of the stream-of-commerce theory and its role in satisfying the minimum-contacts requirement of the two-part *World-Wide Volkswagen* test that an analysis of *Nicastro* must necessarily begin and end. Like *Asahi*, the *Nicastro* Court fractured along the stream-of-commerce line of inquiry; but in contrast to *Asahi*, the *Nicastro* result immunized a foreign manufacturer from suit essentially threatening to return the state of personal jurisdiction analysis to nineteenth century concepts not seen since *Pennoyer*. While the *Asahi* Court was able to reach a consensus on the outcome, the *Nicastro* Court did not.[63] Peculiarly, the outcome of *Nicastro* was achieved through a plurality of four and a concurrence of two justices.[64] The primary indicator that the Court reached an incorrect result is that it failed to address the important and pressing implications of globalized commerce at precisely the time a more robust and encompassing stream-of-commerce theory is needed.

III. FACTS OF *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*

Nicastro lost four fingers in a workplace accident involving a J. McIntyre metal sheering machine, and alleged a defective product, and improper or inadequate safety features and instructions.[65] The three-ton machine was manufactured in the U.K. and sold in the United States through an American distribution company.[66] J. McIntyre, the manufacturer, was not directly involved in the sale of its products in the United States, but it held a U.S. patent on its machine, attended marketing conferences and conventions in the United States,

61. Kristin R. Baker, Comment, *Product Liability Suits and the Stream of Commerce After* Asahi*:* World-Wide Volkswagen *Is Still the Answer*, 35 TULSA L.J. 705, 705 (2000).

62. *Id.* at 706.

63. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

64. *Id*. at 2791.

65. *Id*. at 2795.

66. *Id.* at 2794.

and intended to sell its products nationally.[67] The machine that injured Nicastro was the only machine sold in New Jersey, and J. McIntyre had no contact with New Jersey except indirectly through its distributor.[68] J. McIntyre did, however, attend trade shows in the United States in conjunction with its distributor, and it did assume responsibility for the repair of its machinery.[69] Perhaps most significantly, it had purchased liability insurance to protect its exposure in the event of loss, and had been haled into several other state courts on numerous prior occasions to answer claims.[70]

IV. PLURALITY OPINION: AUTHORED BY JUSTICE KENNEDY AND JOINED BY THE CHIEF JUSTICE, JUSTICE SCALIA, AND JUSTICE THOMAS

In his plurality opinion, Justice Kennedy embraced Justice O'Connor's opinion in *Asahi* requiring a substantial connection with the forum state to meet the minimum-contacts test.[71] Merely placing its products within the stream of commerce was by itself not enough to subject the manufacturer to jurisdiction.[72] In rejecting Justice Brennan's plurality opinion, and with it, the stream-of-commerce theory, Justice Kennedy rejected Justice Brennan's more expansive view of due process, and instead, construed the due process concerns for personal jurisdiction narrowly as only protecting "petitioner's right to be subject only to lawful authority."[73] For Justice Kennedy, the due process question was not about fairness—it was about the sovereign authority of a court to exercise jurisdiction over a party.[74] "Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty,' for due process protects the individual's right to be subject only to lawful power."[75] In Justice Kennedy's view, without sovereign authority, the Court had no power to issue or enforce a judgment.[76]

In other words, a state court may not reach beyond its domain of power. The limits of its sphere for jurisdiction require the party to have purposely availed itself of the benefits and protections of the state. How far a state's sphere may reach is to be decided on a sovereign-by-sovereign and case-by-case basis,

67. *Id.* at 2795-96.

68. *Id.* at 2797 n.3 (Ginsburg, J., dissenting) (citing App. at 100a).

69. *Id.* at 2797.

70. *Id.* (citing App. at 129a).

71. *Id.* at 2790 (Kennedy, J., plurality).

72. *Id.*

73. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Kennedy, J., plurality).

74. *Id.* at 2789 (Kennedy, J., plurality) (explaining that no inquiry into fairness was conducted in *Burnham* and that *Burnham* was decided on a basis of a kind of sovereign authority, through presence in the forum state). *See also* Burnham v. Superior Court of Cal., 495 U.S. 604, 621 (1990).

75. *Nicastro*, 131 S. Ct. at 2789 (Kennedy, J., plurality) (quoting Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)).

76. *Id.* (Kennedy, J., plurality).

but in all cases there must be some conduct or act by the party that constitutes purposeful availment of the benefits or protections of the state.[77]

Justice Kennedy confined the sphere of sovereign authority established through purposeful availment to concepts of presence and consent.[78] A party may submit to jurisdiction through express consent, or by his presence in the state, through state citizenship, domicile, incorporation, or by presence in the forum for service of process.[79] Conversely, those who do not live in or act primarily within a forum have a due process immunity from judgment in its courts.[80] In addition to purposeful availment arising from presence creating general jurisdiction, the sovereign power to adjudge may extend to include individuals whose presence is more transitory: where the plaintiff's claim arises out of the defendant's conduct or activities performed in forum.[81]

Justice Kennedy explained that activities or conduct which may meet the minimum contacts necessary for the purposeful availment requirement could include "manufacturers or distributors 'seek[ing] to serve' a given State's market."[82] However, purposeful availment requires more than a manufacturer knowing its products are sold in a state market; it means the manufacturer must have specifically targeted that market.[83] Thus, consistent with Justice O'Connor's opinion in *Asahi*, Justice Kennedy's view of purposeful availment required not only awareness, but conduct. Foreign corporations may be subject to specific jurisdiction within a forum state when they "target or concentrate on [the] particular State[]."[84]

Justice Kennedy then applied the presence and consent analysis to J. McIntyre and found that J. McIntyre was never physically present in New Jersey, nor did it specifically target New Jersey in its marketing activities.[85] The purposeful availment conduct of "'seek[ing] to serve' a given State's market" was not satisfied by J. McIntyre's general desire to market its products throughout the United States.[86] The fact that the defective machine ended up in New Jersey as a result of J. McIntyre's marketing efforts outside of New Jersey was not sufficient to establish an effort to target or seek to serve the New Jersey market.[87] Justice Kennedy narrowly construed contacts with New Jersey to exclude the stream of commerce, and included only such contacts as would constitute some form of consent or presence within the forum.[88] Finding

77. *Id.*

78. *Id.* at 2787-88.

79. *Id.*

80. *Id.*

81. *Id*. at 2787 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

82. *Id*. at 2788 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)).

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

84. *Id.* at 2789-90.

85. *Id.* at 2790-91.

86. *Id.* at 2788, 2790.

87. *Id.*

88. *Id.* at 2791.

insufficient contacts through presence or consent, Justice Kennedy resolved the dispute in favor of the foreign defendant and against Nicastro, the injured New Jersey citizen.[89]

V. DISSENT BY JUSTICE GINSBERG, JOINED BY JUSTICES SOTOMAYOR AND KAGAN

Justice Ginsburg began her dissent by highlighting the troubling result of the majority opinion: that a foreign manufacturer, whose goal was to sell as much of its product as possible anywhere it could, avoided liability for injuries caused by its defective products in the United States by marketing its goods though a third-party distributor.[90] While neither the plurality nor the concurrence explicitly overruled *International Shoe*, Justice Ginsburg asserted that by embracing long-abandoned theories of sovereign power, the plurality had effectively abandoned *International Shoe* and returned to discredited notions of presence and implied consent.[91]

She then presented four generally accepted principles of jurisdiction deemed beyond dispute. The first principle was that specific jurisdiction requires a nexus between the controversy and the forum.[92] The second principle was the "issue of the fair and reasonable allocation of adjudicatory authority among States of the United States," which was not present here because the dispute was between a foreign citizen and a state citizen, not between citizens of two sister states.[93] However, even if the dispute had been between citizens of two sister states, this issue could not stand on its own as a limitation of state sovereignty because individuals "'cannot change the powers of sovereignty.'"[94] The third principle was that due process, not state sovereignty, is the source for constitutional limitations on state authority.[95] The fourth and final generally accepted principle of jurisdiction was that the Court discarded presence and implied consent as bases for jurisdiction in *International Shoe* and subsequent decisions.[96]

Applying the first principle, that the affiliation between the forum and the underlying controversy lies at the heart of specific jurisdiction, Justice Ginsburg performed a fact-intensive inquiry into the nexus between J. McIntyre and New Jersey.[97] While she did not find a link through direct contact between the two, she did find affiliation through a stream-of-commerce analysis because J.

89. *Id.*

90. *Id.* at 2798 (Ginsburg, J., dissenting).

91. *Id.* at 2795.

92. *Id.* at 2797-98.

93. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2798 (2011) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

94. *Id.* (quoting Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)).

95. *Id.*

96. *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

97. *Id.* at 2795-97.

McIntyre regularly targeted every state, including the New Jersey market, at the world's largest annual convention for the scrap metal industry.[98] New Jersey represented the fourth-largest destination for manufactured commodities in the United States and thus comprised a share of the U.S. market that would necessarily be significant for a manufacturer seeking to develop a U.S. market.[99] With almost one hundred Institute of Scrap Recycling Industries (ISRI) members,[100] and with New Jersey recycling facilities having the distinction of leading all other states in scrap metal processing,[101] New Jersey's importance as a market for this kind of machinery in the United States justified the inference that J. McIntyre would not only be aware of the New Jersey market for its products, but would direct its marketing efforts with a goal to obtain as much New Jersey business as possible.[102]

To further support an inference of affiliation between J. McIntyre and New Jersey, Justice Ginsburg pointed out that J. McIntyre attended the annual ISRI convention each year for 15 years as part of its marketing efforts in whichever U.S. city held the ISRI convention.[103] The record revealed J. McIntyre's intent to sell its equipment, either directly or through its exclusive United States distributor, throughout the United States, including in New Jersey.[104] Justice Ginsburg's exhaustive review of the appellate record supported a conclusion that J. McIntyre put its product into the stream of commerce.[105] J. McIntyre's forum-neutral marketing approach was, in fact, forum inclusive. Thus, its regular attendance at the ISRI conventions constituted "a purposeful step" to reach every forum, including New Jersey.[106] Justice Ginsburg cited *Burger King Corp. v. Rudzewicz* to support her assertion that the Court had adopted the term "purposeful availment" to ensure that a foreign party will not be arbitrarily or randomly subjected to jurisdiction based upon attenuated contacts.[107] Here, J. McIntyre's efforts to market to the entire United States, including New Jersey, provided sufficient contacts to dispel any concerns of random or arbitrary imposition of jurisdiction.[108] Justice Ginsburg did not embrace Justice O'Connor's *Asahi* requirement for "something more" than the stream of commerce. Instead, she suggested that even under the O'Connor analysis, minimum contacts were met because J. McIntyre sought to market its goods

98. *Id.* at 2795 (citing App. 47a).

99. *Id.* at 2799 n.6. (citations omitted).

100. *Id.* at 2796 n.1.

101. *Id.* at 2795.

102. *Id.* at 2801 (Ginsburg, J., dissenting).

103. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2796 (2011) (citing App. 114a-115a).

104. *Id.* at 2797.

105. *Id.* at 2795-96.

106. *Id.* at 2797.

107. *Id.* at 2801 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 465 (1985) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum.")).

108. *Id.*

throughout the United States, including New Jersey.[109] She asked rhetorically how J. McIntyre's actions could have intended anything else.[110] Thus, if conduct or action is a critical factor, J. McIntyre certainly acted affirmatively to seek a market in New Jersey as well as the rest of the United States.

Justice Ginsburg pointed out that modern international commerce has evolved to such an extent that liability insurance is both inexpensive and readily available.[111] This observation was consistent with J. McIntyre's possession of liability insurance to cover costs incurred as a result of having placed its products into the stream of commerce in the United States.[112] J. McIntyre took out liability insurance presumably to answer tort claims in the United States; therefore, it reasonably expected to answer suit in the United States. In fact, J. McIntyre was not only aware of and prepared for the possibility of litigation in the United States, the company had already been sued in several states.[113] Under these facts, Justice Ginsburg had no difficulty finding sufficient contacts with New Jersey through the stream of commerce to satisfy the minimum-contacts test in *World-Wide Volkswagen*.[114]

Having found sufficient contacts with New Jersey to satisfy the first prong of the *World-Wide Volkswagen* test, Justice Ginsburg next evaluated the fairness of finding jurisdiction.[115] Under the fairness prong of the *World-Wide Volkswagen* test, the convenience to the defendant is balanced against the state's interest in providing a forum for the dispute.[116] In evaluating the convenience to the defendant, Justice Ginsburg was concerned with whether J. McIntyre expected to be amenable to suit in the United States, and if so, whether New Jersey would be a convenient forum.[117] J. McIntyre's interests were to be balanced against the state's interests in discouraging defective and unsafe industrial machinery sales within its borders and in providing a forum for its injured citizens.

In evaluating whether J. McIntyre expected to face suit in the United States, Justice Ginsburg looked into how J. McIntyre specifically, and foreign companies in general, view the U.S. market.[118] She produced ample support for the assertion that foreign companies, including J. McIntyre, view the U.S. market

109. *Id.*

110. *Id.*

111. *Id.* at 2799 (citing Richard L. Cupp Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 870-71).

112. *Id.* (Ginsburg, J., dissenting).

113. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2797 (2011).

114. *Id.* at 2802 ("[W]hen a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable 'to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury ….'") (analogizing to World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

115. *Id.* at 2803.

116. *World-Wide Volkswagen Corp.*, 444 U.S. at 292; RICHMAN & REYNOLDS, *supra* note 26, at 41.

117. *Nicastro*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting).

118. *Id.* at 2801.

as a whole.[119] Foreign companies are generally concerned about whether they are amenable to suit in the United States as a whole, and less concerned about the particular state in which they are amenable to suit.[120] From a foreign party's perspective, the convenience of suit in New Jersey is similar to the convenience of suit in Nevada, Ohio, or anywhere else in the United States.[121] Since the foreign party's concern is not which state, but whether or not it should face suit at all in a foreign country, Justice Ginsburg looked to European Union Law to determine what J. McIntyre's expectations would be within its own jurisdiction.[122] J. McIntyre is a United Kingdom company, and through the United Kingdom's participation in the European Union, J. McIntyre would expect to face suit according to European Union laws of jurisdiction.[123] Justice Ginsburg pointed out that under European law, J. McIntyre would expect to face a tort suit at the location of the event or injury.[124] Thus, Justice Ginsburg did not find a strong argument of inconvenience to J. McIntyre should it be required to answer suit for liability in New Jersey. On the other side of the fairness balancing equation, Justice Ginsburg evaluated the state's interest in providing a

119. *Id.*

120. Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 812-15 (1988) ("[F]airness concerns involving where suit takes place need not be abandoned if the jurisdictional inquiry in suits against alien defendants properly is focussed [sic] solely on what contacts the defendant has had with the nation as a whole. The burdens imposed by defending abroad rightly may be considered on a *forum non conveniens* inquiry."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 cmt. f (1987) ("Jurisdiction of State of United States. International law addresses the exercise of jurisdiction by a state; it does not concern itself with the allocation of jurisdiction among domestic courts within a state for example, between national and local courts in a federal system."); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (citing Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.")).

121. Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 434 (1984).

> The case law since World-Wide Volkswagen has almost uniformly sustained the assertion of state court jurisdiction over the foreign-country defendant, especially the foreign manufacturer in products liability suits. One rationale for this trend is that the foreign-country manufacturer deals with the United States as a single market. Its concern is presumably less with whether the defendant is subject to suit in state X or state Y, but rather whether it is subject to suit in the United States at all.

Id.

122. *Id.* (Ginsburg, J., dissenting).

123. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2803 (2011).

124. *Id.* (citing Case 21-76, Handelskwekerij G.J. Bier BV v. Mines de potasse d'Alsace SA, 1976 ECJ EUR-Lex LEXIS 159, at *7 (Nov. 30, 1976)) (EU regulation creating personal jurisdiction at "[t]he place of the happening of the event which may give rise to liability in tort, delict or quasidelict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred', in article 5(3) of the convention … must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it. The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.").

forum for Nicastro. In that evaluation, she was concerned that not allowing for changes in commerce unfairly constrains states' interests in providing a forum for its citizenry by precluding jurisdiction whenever the manufacturer of the goods insulates itself through a third party distribution channel.[125] Thus, Justice Ginsburg found a strong argument in favor of jurisdiction in New Jersey, and a weak argument against it. Under the fairness prong of the *World-Wide Volkswagen* test, jurisdiction was permissible, and had been found so on similar facts by countless state and federal courts.[126] To underscore this point, Justice Ginsburg included an appendix to her opinion listing an impressive body of case law where jurisdiction was found permissible over a foreign party or out-of-state party that had targeted the U.S. market as a whole through a third-party distributor.[127]

Inherent in Justice Ginsburg's application of the *World-Wide Volkswagen* test was the principle that due process, not state sovereignty, is the source for constitutional limitations on state authority.[128] Furthermore, she asserted that the Due Process Clause does not require a formalistic distinction between a plaintiff answerable in federal court in New Jersey, using the New Jersey long-arm statute, and the same plaintiff answerable in New Jersey state court.[129] The New Jersey long-arm statute, allows for jurisdiction up to the limits of due process.[130]

The last generally accepted principle of jurisdiction, according to Justice Ginsburg, was that the Court had long ago discarded presence and implied consent as bases for jurisdiction.[131] Quoting *International Shoe*, she noted the Court's long-held decision that "legal fictions, notably 'presence' and 'implied consent,' should be discarded [in favor of fairness inquiry], for they conceal the actual bases on which jurisdiction rests."[132] Further addressing the plurality's objection to abandoning tradition in expanding jurisdiction, Justice Ginsburg cited *McGee* to support her assertion that the Court's tradition long ago accepted expanding jurisdiction in order to accommodate changes in the economic

125. *Id.* at 2794-95.

126. *See id.* at 2804-06 (citing App., including Clune v. Alimak AB, 233 F.3d 538, 544 (8th Cir. 2000); Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 242-44 (2d Cir. 1999); Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613-15 (8th Cir. 1994); Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 544 (6th Cir. 1993); Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1358 (9th Cir. 1983); Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980); Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292, 293 (Mont. 1972); *Ex parte* DBI, Inc., 23 So. 3d 635, 654-55 (Ala. 2009); A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362 (1995); Hill v. Showa Denko, K.K., 425 S.E.2d 609, 616 (1992)).

127. *Id.*

128. *Id.* at 2798 (citing Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)).

129. *Nicastro*, 131 S. Ct. at 2800-01 (Ginsburg, J., dissenting) (citing N.J. Ct. R. 4:4-4(b)(1) (2011) (stating that a state's long arm statute is the vehicle through which a state may reach outside its own borders in order to reach foreign defendants)).

130. N.J. Ct. R. 4-4-4(b)(1) (2011).

131. *Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (citing Int'l Shoe Co. v. Wash., 326 U.S. 316, 318 (1945)).

132. *Id. See also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957).

landscape of the nation.[133] In *McGee*, jurisdiction was found proper with scant contacts, all of which were via mail.[134]

Having supported the four generally accepted principles of jurisdiction, and having satisfied both prongs of the *World-Wide Volkswagen* test in favor of upholding the New Jersey Supreme Court's decision, Justice Ginsburg's final task in her opinion was to address Justice Breyer's concern that there was nothing within this case that merits a decision contrary to established precedent. Under both *World-Wide Volkswagen* and *Asahi*, Justice Ginsberg provided sound analysis to show that the New Jersey Supreme Court decision was well within Supreme Court precedent and should have been be upheld.

In *World-Wide Volkswagen*, the Court stated that "when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable 'to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury.'"[135] Additionally, the foreign manufacturer in *World-Wide Volkswagen* did not attempt to dodge jurisdiction, and would not have been successful had it tried.[136]

Asahi, on the other hand, was distinguishable from *Nicastro* on the facts.[137] In distinguishing *Asahi*, Justice Ginsburg pointed out that the case was never decided between the California resident and the foreign company because they settled out of court.[138] Both parties in *Asahi* were foreign companies, and the transaction around which the remaining controversy depended occurred on foreign soil.[139] The State of California had no interest in the case, and regardless of the differing competing minimum contacts analyses, the controversy failed on the fairness prong of the *World-Wide Volkswagen* test because it was unreasonable to find jurisdiction when the burden to the foreign parties was great and the benefit to California negligible.[140] How the case would have been resolved had the original injured party, a California resident, maintained the suit was not determined.[141]

Justice Ginsburg further distinguished the facts in *Asahi* by noting that Asahi neither sought customers in the United States nor engaged a third-party

133. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2800 n.9 (2011) (Ginsburg, J., dissenting) (citing *McGee*, 355 U.S. at 222-23).

134. *McGee*, 355 U.S. at 223-24.

135. *Nicastro*, 131 S. Ct. at 2802 (Ginsburg, J., dissenting) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

136. *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98 ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."). *Cf.* Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (1962) ("Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State.").

137. *Nicastro*, 131 S. Ct. at 2802-03 (Ginsburg, J., dissenting).

138. *Id.* at 2802.

139. *Id.* at 2802-03.

140. *Id.* at 2803.

141. *Id.*

distributor to sell its products.[142] In *Asahi*, the parts were in the United States only because they were used as component parts in another company's product.[143] By contrast, J. McIntyre both sought to develop a market in the United States by regularly participating in marketing activities, and engaged a third-party distributor to sell its products throughout the United States.[144] Additionally, J. McIntyre's machines were end-products themselves, not components in another company's product.[145] With such strong factual dissimilarities between *Asahi* and *Nicastro*, Justice Ginsburg concluded by stating unequivocally that *Asahi* was not controlling over this case.[146]

Of special note in Justice Ginsburg's dissent was her unwillingness to choose between the two competing plurality decisions in *Asahi*, and her unwillingness to embrace the *Nicastro* plurality's proposed revived analysis of jurisdiction based on consent and presence. Indeed, lest there be any doubt of the outcome of *Nicastro*, she explicitly pointed out that the majority of the Court did not share plurality's implied consent approach to jurisdiction where the dispositive issue is whether the defendant must submit to the authority of state.[147]

VI. HOLDING BY JUSTICE BREYER, JOINED BY JUSTICE ALITO (CONCURRING IN THE JUDGMENT)

Justice Breyer's opinion joined the Kennedy plurality to resolve the case in favor of J. McIntyre, finding insufficient contacts to support jurisdiction over a foreign party, while at the same time joining with the dissent in upholding the stream of commerce as a viable framework for analyzing minimum contacts. Adhering to existing precedent and finding no justification for change, Justice Breyer's opinion rejected both the plurality's invitation to discard the stream-of-commerce theory in favor of a test based upon presence and implied consent in place of minimum contacts, as well as the New Jersey Supreme Court's invitation to expand the stream-of-commerce theory on the basis of the diminished significance of national and state borders in a global economy.[148] Like the dissent, Justice Breyer neither adopted nor rejected either competing *Asahi* plurality, yet reached the opposite conclusion.[149] Where the dissent found minimum contacts under both pluralities' tests in *Asahi*, Justice Breyer found insufficient contacts under both tests.[150] The holding in *Nicastro* left the settled law of personal jurisdiction largely unchanged, with *World-Wide Volkswagen* maintaining its crown as the dominant controlling precedent for minimum

142. *Id.* at 2803.

143. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2803 (2011) (citing Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 115 (1987)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 2799 n.5.

148. *Id.* at 2791 (Breyer, J., concurring).

149. *Id.* at 2792.

150. *Id.*

contacts, and *Asahi* adding to the fairness analysis of the *World-Wide Volkswagen* test. The single addition to the minimum contacts analysis offered by the holding was Justice Breyer's announcement that a single contact is not sufficient by itself to establish minimum contacts.[151] There must be an actual stream of commerce, and a single drop does not make a stream, even if it is a large drop.

In applying the *World-Wide Volkswagen* test, Justice Breyer confined the facts to those in the record, with the burden squarely upon Nicastro to prove minimum contacts on the facts.[152] In contrast to Justice Ginsburg, who took into consideration factors outside of the record, such as the size and scope of New Jersey's scrap metal business, Justice Breyer "[took] the facts precisely as the New Jersey Supreme Court stated them" and was therefore unwilling to consider additional facts in support of finding minimum contacts.[153] Justice Breyer did not find a stream of commerce because there was only one sale, which was through a third-party distributor, and because there was no specific marketing campaign directed at New Jersey.[154] With no stream of commerce or other conduct or activities showing purposeful availment, Justice Breyer could not find minimum contacts to support the New Jersey Supreme Court's decision.[155]

Having resolved the case based upon existing precedent, Justice Breyer briefly explained his rejection of the plurality's requirement of consent and presence as a basis for finding jurisdiction.[156] Justice Breyer was concerned with the implications and practical result of the application of the proposed rule—not the rule's derivation from constitutional principles.[157] He therefore limited his focus to how such a rule would apply to hypothetical facts in the global economy, for example through an internet transaction.[158] Ultimately, he saw no justification on the facts of this case for embracing a different test, and refused to do so.[159]

Justice Breyer took a similar approach to the New Jersey Supreme Court's expansion of the stream of commerce, finding it suspect. He rejected foreseeability as a test to find sufficient contacts, emphasizing the hypothetical and presumably indeterminate nature of foreseeability.[160] He found that adopting foreseeability would be unfair because it would discard the generally accepted principle that the defendant's affiliation with the forum and the underlying

151. *Id.* at 2792 (Breyer, J., concurring) (citing *Asahi Metal Industry Co.*, 480 U.S. at 111-12).

152. *Id.* at 2792, 2794.

153. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2792 (2011).

154. *Id.* at 2792, 2794.

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

156. *Id.* at 2793.

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.* (rejecting New Jersey's assertion that "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states'").

controversy is the central inquiry when analyzing minimum contacts.[161] Here, a majority of the Court, both in Justice Breyer's concurrence and Justice Ginsburg's dissent, affirmed this generally accepted principle of fairness and its importance in evaluating minimum contacts.[162] On this principle of fairness, Justice Breyer was reluctant to embrace New Jersey's expansion of the stream-of-commerce theory. Again, Justice Breyer focused upon the practical implications of such a rule in its application to future cases, and was unconvinced of its fairness.[163] While foreseeability may be fair for large manufacturers, it could be unfairly burdensome to small businesses and entrepreneurs, especially small, foreign entrepreneurs, and Justice Breyer was reluctant to adopt a rule that could have such uneven results.[164]

Justice Breyer did not foreclose the possibility of expanding the stream-of-commerce theory in the future to accommodate changes in the economic landscape. Instead, he was unwilling to do so here "without a better understanding of the relevant contemporary commercial circumstances" to define the parameters of the issue.[165] Simply put, he found *Nicastro* a poor vehicle to justify expansion of the stream-of-commerce theory because it could be resolved according to existing precedent.[166]

VII. CRITIQUE

What do we want law to do? In *Marbury v. Madison*, Justice Marshall reasoned that where there is a legal right and a corresponding remedy for its abridgement, a citizen may prevail upon the court to apply the law to seek redress provided that the law is constitutional.[167] State tort law provides remedies to citizens who are injured by defectively made products, holding the manufacturer liable for the injury. State citizens have a right to be compensated for bodily injury or harm resulting from defective products. States create laws and provide courts to ensure the rights of their citizens are addressed, and to advance state policy.

Americans need American law to provide remedies for the abridgement of their rights and to advance state policy interests. The last question is how well does American law perform these essential functions? It is this last question that is most important. It is axiomatic that American law should advance the interests of its citizens and its policies, be guided by fundamental principles of fairness, and be constrained by the U.S. Constitution.

In the law of personal jurisdiction, the question becomes how far beyond its borders can a state reach to provide remedies for its citizens and advance its

161. *Id.* at 2793 (Breyer, J., concurring) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

162. *See id.*; *id*. at 2798 (Ginsburg, J., dissenting) (citing Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2851 (2011)).

163. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring).

164. *Id.* at 2793-94.

165. *Id.* at 2794.

166. *Id.*

167. 5 U.S. 137, 177 (1803).

policies, particularly when the liable party is not a citizen of the state? The answer to that question generally lies within the states' long-arm statutes,[168] some of which articulate limits, and many others of which provide for personal jurisdiction up to the limits of the Fourteenth Amendment's Due Process Clause.[169]

In *Nicastro*, American law failed to protect the rights of a New Jersey citizen; instead, the law succeeded in providing a cloak of immunity from civil litigation to a foreign manufacturer whose defective products injured a New Jersey citizen. A foreign company's escape from liability is an unacceptable result unless it is manifestly unfair to hold the foreign party accountable in the United States. The result in *Nicastro* is regrettable for several reasons. First, the decision fails to resolve the competing plurality decisions in *Asahi*. Second, it fails to provide a rationale to explain why the Due Process Clause constrains personal jurisdiction to begin with. And finally, it provides a get-out-of-court-free card to foreign manufacturers who engage a third-party distribution company to perform its marketing and sales activities. This last point was most clearly articulated in Justice Ginsburg's dissent. Because upholding the New Jersey Supreme Court's decision was the only fair result, and because Justice Ginsburg gave a well-reasoned opinion which remained faithful to precedent in reaching her conclusion, her opinion was the most persuasive of the three, and should have prevailed. The majority of the criticism of the opinions that follows will focus on the weaknesses of the plurality and concurrence opinions.

A. The Nicastro *Decision Failed to Clarify or Resolve the Competing* Asahi *Tests*

The *Asahi* decision was essentially a draw on the question of minimum contacts. Foreign businesses were left with no way to predict whether or not they would be subject to personal jurisdiction in product liability suits, and courts were left with no clear guidance or rule to assist their contacts analysis. As would be expected, courts responded differently in different jurisdictions. A useful commentary noted four different patterns of analysis that emerged after *Asahi*.[170] Some courts chose to diplomatically avoid the conflict and apply all

168. *See, e.g.*, N.J. Ct. R. 4:4-4(b)(1) (2011); N.Y. C.P.L.R. ANN. § 302(a)(3)(ii) (McKinney 2008); CONN. GEN. STAT. § 52-59b(a) (2011).

169. *See* U.S. CONST. amend. XIV, § 1.

170. Baker, *supra* note 61, at 712.

> Three of the circuit courts are avoiding the debate over the proper minimum contacts analysis by basing their decisions upon the facts presented in the record. The Third, Sixth, and Eleventh Circuits choose to apply all three minimum contacts analyses used in Asahi to the facts in the record without supporting one analysis over the other. The Fourth and Tenth Circuits reconciled the decisions in World-Wide Volkswagen and Asahi in order to apply one test. The First Circuit is the only circuit to conclusively adopt the position of Justice O'Connor in applying the stream of commerce analysis in product liability suits.

Id.

three *Asah*i tests.[171] Other jurisdictions attempted to reconcile *World-Wide Volkswagen* with *Asahi*, and in so doing, discarded *Asahi* in favor of analyzing the stream of commerce under *World-Wide Volkswagen*.[172] Still other jurisdictions have ignored *Asahi* and continued to analyze contacts exclusively under *World-Wide Volkswagen*.[173] One jurisdiction, the First Circuit, chose to apply Justice O'Connor's "something more" test in *Asahi* to resolve minimum contacts.[174]

Given the array of tests to resolve minimum contacts, it is not surprising the Supreme Court would need to revisit the issue, as it chose to do in *Nicastro*. What is surprising and disappointing about the *Nicastro* decision is that it did not resolve the *Asahi* split at all. If it achieved anything, the *Nicastro* decision further complicated the minimum-contacts analysis. Two justices analyzed the facts and found insufficient contacts under both *Asahi* tests, and three justices analyzed the same facts and found sufficient contacts under both tests. Both Justice Breyer's concurrence and Justice Ginsburg's dissent determined that it was not necessary to choose between the competing *Asahi* opinions, but arrived at opposite conclusions. The majority of five justices, upholding the stream-of-commerce theory against a plurality bid to discard it altogether, is the only redeeming outcome in an otherwise disappointing result. Given the continued split on the minimum-contacts test, it is reasonable to predict that jurisdictions will split in applying *Nicastro* much as they have in applying *Asahi*. There is little doubt that after *Nicastro*, *World-Wide Volkswagen*, as limited by Justice Breyer, remains the controlling law.

B. The Due Process Clause in Personal Jurisdiction Analysis

With two Supreme Court cases over the course of 25 years failing to reach a majority decision regarding the application of the Due Process Clause in personal jurisdiction analysis, and with a number of scholars suggesting the reason for this failure is due to the faulty foundation for analysis provided by the Due Process Clause, it is worth exploring how it fits into the analytical equation. The Due Process Clause first made its appearance in dicta in *Pennoyer v. Neff*.[175] Justice Field did not explain why or how the Due Process Clause was implicated in *Pennoyer*—he merely announced its application.[176] Subsequently, a number of scholars have argued that he got it wrong.[177] Notwithstanding the question

171. *Id.* at 713.

172. *Id.*

173. *Id.* at 724.

174. *Id.* at 721.

175. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 821 (1981) (commenting on the court's decision and citing Pennoyer v. Neff, 95 U.S. 714, 722-32 (1877)).

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

177. *Id.* ("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 deter mine [sic] the personal rights and

whether Justice Field was correct in implicating the Due Process Clause in his analysis of personal jurisdiction, what did the term due process of law mean in 1877? Most likely, Justice Field's interpretation was narrow, and meant no more than fair notice and an opportunity to be heard.[178] The meaning of due process in personal jurisdiction law expanded after *Pennoyer*;[179] and yet, the "Court has never explained why being subject to jurisdiction is a taking of liberty, at least where the defendant has had notice and a full opportunity to defend."[180] Critics to expanding the meaning of due process within the context of personal jurisdiction point out that instead of facilitating the analysis, it has added unnecessary and unjustifiable complexity.[181]

With regard to a foreign defendant, the Due Process Clause should apply narrowly. If the foreign defendant is engaged in business nationally, and the event at the root of the controversy occurs in the plaintiff's state, then the most logical forum for litigation is the plaintiff's state. This is particularly true if the foreign defendant is "regularly engaged in extensive multistate activity that will produce litigation from time to time, while the plaintiff[] … [is] localized in [his] activities."[182] In other words, in any due process analysis of contacts, the defendant's national contacts should factor into the due process calculus when the defendant is a foreign company doing business with the United States as a national market.[183] This is especially true given the fact that the United States now imports almost two trillion dollars in goods and services from abroad in any given year.[184]

C. The Plurality Argument Is Flawed

The plurality decision in *Nicastro* found jurisdiction wanting based upon lack of activity within the forum. At first glance, the notion of lack of activity within the forum does not appear to depart significantly from *World-Wide Volkswagen*. However, a careful reading of Justice Kennedy's opinion reveals

obligations of parties over whom that court has no jurisdiction do not constitute due process of law."); Whitten, *supra* note 175, at 840; Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 851-52, 876 (1989).

178. Whitten, *supra* note 175, at 803-04.

179. *See* Borchers, *supra* note 26, at 79-81.

180. Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 535 (1991).

181. *See* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995). *See also* Borchers, *supra* note 26, at 78 ("In my view, however, personal jurisdiction is more of a constitutional tumbleweed. It has no original roots in the Constitution. The suggestion in Pennoyer that due process has anything to do with the territorial reach of state courts was ill-considered.").

182. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1168 (1966).

183. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 36, 43 (1987).

184. News Release, U.S. Dep't of Commerce Bureau of Econ. Analysis, U.S. International Trade in Goods and Services, April 2011 (June 9, 2011), *available at* http://www.bea.gov/newsreleases/international/trade/2011/pdf/trad0411.pdf.

the abandonment of the stream-of-commerce theory in an argument that resurrects presence within the forum as the test for jurisdiction. He started by acknowledging the lack of clarity in the *Asahi* decision, explaining that a person may not be deprived of property except by the exercise of lawful power, and offering a glimmer of hope that a workable solution to the question of minimum contacts would be offered within the opinion. Disappointingly, no such workable solution emerged.

Instead, Justice Kennedy embarked upon an expansion of theory introduced by Justice Scalia's plurality opinion in *Burnham v. Superior Court of California* that resurrects ancient jurisdictional theory based upon presence and territory and Justice Scalia's interpretation of the state of precedent in 1868 at the time of the enactment of the Fourteenth Amendment.[185] In order to fall within the authority of the state, one may consent to the authority through old territorial notions of presence[186] or contract, or have sufficient contacts with the state so as to "purposely avail" itself of the benefits of the state's laws.[187] Justice Kennedy remained firmly within the generally accepted principles of personal jurisdiction, until he leveraged *Burnham* to destroy the long-established importance of fairness in the overall analysis. In *Burnham*, due process was satisfied where a defendant was considered amenable to suit by virtue of presence within the forum at the time of service, even if the amount of time spent in the forum was minimal.[188]

Kennedy departed from modern notions of fairness and substantial justice when, following the *Burnham* plurality, he concluded that "jurisdiction is in the first instance a question of authority rather than fairness."[189] Here he retreated to doctrine developed over a century ago in *Pennoyer* and based upon presence within the forum.[190] "At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws."[191] As an abstract line of academic or intellectual debate, his reasoning is interesting, but as an actual framework upon which to build a body of law in a post-industrial economy, it is inadequate. It is little wonder a majority of justices declined to join him in a return to a theory of personal jurisdiction that had long ago failed to meet the commercial realities of modern society.

In attempting to dispatch the stream-of-commerce theory, Justice Kennedy asserted that it is unfair to domestic producers, as well as foreigners, and offered a hypothetical farmer who might be held answerable in many states merely by introducing his produce into the stream of commerce without ever leaving town.

185. 495 U.S. 604, 608 (1990).

186. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (Kennedy, J., plurality) (citing *Burnham*, 495 U.S. 604). In *Burnham*, the defendant was found to be within the jurisdiction of the forum while traveling within the forum. This form of jurisdiction is based upon physical presence within the forum regardless of its brevity. *Burnham*, 495 U.S. at 604.

187. *Id.* at 2787 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

188. *Burnham*, 495 U.S. at 628-29.

189. *Nicastro*, 131 S. Ct. at 2789 (Kennedy, J., plurality) (citing *Burnham*, 495 U.S. 604).

190. *See* Borchers, *supra* note 26, at 79-81.

191. *Nicastro*, 131 S. Ct. at 2791.

One hardly needs resort to hypotheticals to give flesh to product liability in the food supply. In August 2011, a farm in Colorado placed Listeria-contaminated melons into the food supply in numerous states, and as a result, over two dozen people lost their lives.[192] Should the farmer be immune from suit based upon his personal lack of presence within the states where his product was sold and consumed? Apparently, the Kennedy plurality would answer yes, the farmer should be immune from suit. But one could just as easily and quite emphatically insist the farmer should be answerable for the harm caused by his deadly produce. The looming specter of tort liability acts as a check upon commercial activity which ultimately protects not only consumers, but also enterprise, because it engenders trust in the general safety of products in the market.

Justice Kennedy's opinion attempted to unravel the past century of personal jurisdiction law, while simultaneously relying upon Justice O'Connor's *Asahi* opinion. This yielded a strange result wrought by cobbling together theory from long discarded jurisdiction jurisprudence and breathing new life into it. It is difficult to imagine how basing jurisdiction upon consent and presence could be useful in a twenty-first century global economy. Certainly weighing heavily against abandoning precedent and returning to the long discarded theory of jurisdiction based upon presence and implied consent is the efficacy of providing legal predictability to businesses engaged in economic activity.

In his book, *The World Is Flat: A Brief History of the Twenty-First Century*, Thomas Friedman describes the profound shift in economic activity from industrial to post-industrial that has occurred over the past 20 years.[193] In the latter half of the twentieth century, the United States dominated the manufacturing and financial sectors of the world economy.[194] By the end of the first decade of the twenty-first century, the United States had lost its manufacturing base, and its hold upon finance had become more tenuous.[195] The United States currently retains its dominance in the financial sector of the world economy, but that dominance is waning with the phenomenal growth of foreign financial markets.[196] It is at best difficult to predict the contours of our economic future, but it is hardly a revolutionary expectation that our laws evolve to embrace the economic changes that have already occurred. Formalistic contrivances of due process, which are limited to territoriality within the forum state and implied consent to sovereign authority, ignore the realities that confront courts in modern disputes, and are therefore unhelpful in resolving them. Because Justice Kennedy's opinion is so firmly rooted in long-ago-discarded legal theory of jurisdiction, and because it abandons 100 years of legal precedent

192. *Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms, Colorado*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/index.html (last updated Sept. 4, 2012).

193. THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 9-10 (updated & expanded ed. 2006).

194. FAREED ZAKARIA, THE POST-AMERICAN WORLD 180-86 (1st ed. 2008).

195. *Id.* at 187.

196. *Id.* at 26 (noting that emerging markets now hold 75% of the world's foreign exchange reserves).

aimed at advancing jurisdictional theory to accommodate modern realities, the opinion is flawed.[197]

D. Justice Breyer's Concurring Opinion Is Flawed

Justice Breyer was correct to reject Justice Kennedy's plurality opinion, and his caution about expanding the stream-of-commerce theory was reasonable. However, when applying the facts to existing precedent, he reached the wrong result. Even if he found the New Jersey Supreme Court decision to be an expansion of the stream-of-commerce theory, he could have rejected the expansion and still preserved a citizen's right to redress a wrong. The creation of a cloak of immunity for a foreign manufacturer in a products liability case where the foreign manufacturer has actively sought to develop business throughout the United States through a distributor is unfair. When the manufactured goods are especially dangerous, immunity from liability is more than unfair; it is unjust.

Justice Stevens in his *Asahi* concurring opinion suggested that even under the more stringent O'Connor test, the value and hazardous nature of goods should be considered when determining purposeful availment in the stream-of-commerce analysis.[198] Additionally, even under O'Connor's more stringent test, minimum contacts should have been met in *Nicastro* because one of the enumerated conditions in her "something more" test included "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state."[199] J. McIntyre did market its product through a distributor who had an exclusive contract to sell its machinery in every state. Justice Breyer should have had little difficulty finding minimum contacts satisfied under both *Asahi* tests.

Since the Due Process Clause constrains the inquiry, then that constraint should be met under the *World-Wide Volkswagen* contacts test, where the Court found "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" to be consistent with due process.[200] *Asahi* tests notwithstanding, *World-Wide Volkswagen* is the proper test for this analysis; and finding minimum contacts under the stream-of-commerce theory, there is little doubt that J. McIntyre intended for its products to be purchased by consumers in every state, including New Jersey.

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197. *See* Weintraub, *supra* note 182, at 534-35. Weintraub notes that in *Int'l Shoe Co. v. Washington*:

> Fumbling attempts to justify jurisdiction by fictions of "presence" or "consent" were repudiated and replaced by a new approach based on the requirement that the defendant "have certain minimum contacts with (the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

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

198. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 122 (1987).

199. *Id.* at 112.

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

VIII. CONCLUSION: JUSTICE GINSBURG'S DISSENT WAS THE BETTER ARGUMENT AND SHOULD HAVE PREVAILED

The New Jersey Supreme Court decision was sound and should have been upheld. Justice Ginsburg's argument is superior to both Justice Breyer's and Justice Kennedy's opinions because her argument is both sound and well supported by legal precedent, and because denying a citizen the ability to pursue a remedy for the abridgment of his rights is fundamentally unfair when the foreign manufacturer of the defective product intended to sell its product in any and all states in the nation. It was not manifestly unfair to hold J. McIntyre answerable for its defective product in New Jersey. Justice Ginsburg's opinion best satisfies fundamentally important qualities for American law: that it serves the interest of American citizens as well as state interests, is constrained by the Constitution, and is the fairest result given the facts of the controversy and the economic context within which those facts exist. Unfortunately, her opinion did not prevail. Because the split opinion in *Nicastro* follows a split opinion in *Asahi*, the *Nicastro* result did little to advance personal jurisdiction law. *World-Wide Volkswagen*, limited by Justice Breyer to require an actual stream, and more than a drop, is still the test for personal jurisdiction, and the stream-of-commerce theory remains a valid method to find minimum contacts.