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### The Lay of the Land: Examining the Three Opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*

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THE UNIVERSITY OF  
**ALABAMA**  

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**SCHOOL OF LAW**

**The Lay of the Land: Examining the Three  
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Nicastro**

Adam Steinman

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**THE LAY OF THE LAND: EXAMINING THE THREE OPINIONS IN  
J. MCINTYRE MACHINERY, LTD. v. NICASTRO**

Adam N. Steinman\*

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It was a long time coming. A quarter-century ago—before most of my current civil procedure students entered this world—the Supreme Court decided *Asahi Metal Industry Co. v. Superior Court*.<sup>1</sup> *Asahi* failed to generate a majority opinion on how to assess whether jurisdiction is proper over a defendant whose products reach a state through the so-called “stream of commerce.”<sup>2</sup> Shortly

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\*Professor of Law & Michael J. Zimmer Fellow, Seton Hall University School of Law. This Article benefitted greatly from the comments and insights of my co-panelists at this Symposium—Judge Joseph Anderson, Richard Freer, Danielle Holley-Walker, Arthur Miller, Wendy Perdue, Justice Costa Pleicones, Linda Silberman, Allan Stein, Howard Stravitz, and John Vail. I am also grateful to Jenny Carroll, Robin Efron, Ed Harnett, Denis McLaughlin, and Charles Sullivan, whose thoughts about the *McIntyre* case have been very helpful to me in preparing this Article. Finally, thanks to the board and members of the *South Carolina Law Review*, both for organizing a terrific symposium and for their excellent editorial work on this Article.

1. 480 U.S. 102 (1987).

2. *See id.* at 105 (“This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes ‘minimum contacts’ between the defendant and the forum State such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted)). *Compare id.* at 111–13 (O’Connor, J., joined by Rehnquist, C.J., Powell, J., Scalia, J.), *with id.* at 117, 121 (Brennan, J., joined by White,

thereafter, the Court's decision in *Burnham v. Superior Court*<sup>3</sup> yielded no majority opinion on how to evaluate the constitutionality of transient or "tag" jurisdiction.<sup>4</sup> In the wake of these back-to-back inconclusive decisions, the Supreme Court avoided personal jurisdiction for more than two decades.

That hiatus ended last Term, when the Supreme Court decided two personal jurisdiction cases: *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>5</sup> and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>6</sup> The more controversial of the two is *McIntyre*—a stream of commerce case raising issues similar to those that were left unresolved in *Asahi*. As with the last time the Court waded into that stream, the Supreme Court generated three non-majority opinions. It is a remarkable coincidence, given that eight of the nine current Justices were not on the Court when *Asahi* was decided.<sup>7</sup> The more things change, the more they stay the same.

Six of the Justices in *McIntyre* conclude that the plaintiff, Mr. Nicastro, did not meet his burden of establishing personal jurisdiction in New Jersey over the British manufacturer.<sup>8</sup> But the Justices split 4-to-2-to-3 in analyzing this question. The "four" are led by Justice Kennedy, who writes a plurality opinion rejecting jurisdiction on behalf of himself, Chief Justice Roberts, and Justices Scalia and Thomas.<sup>9</sup> The "three" are led by Justice Ginsburg, who writes a dissenting opinion that would have upheld jurisdiction on behalf of herself and Justices Sotomayor and Kagan.<sup>10</sup> Justices Breyer and Alito tip the scale by providing two more votes against jurisdiction, but their concurring opinion, written by Justice Breyer, rejects the reasoning used by the Kennedy plurality.<sup>11</sup> As explained below, the legal principles on which Justices Breyer and Alito rely are generally consistent with Justice Ginsburg's approach, but they vote against jurisdiction based on a narrow view of the factual record in *McIntyre*.<sup>12</sup>

Despite the lack of a majority opinion in *McIntyre*, the decision is potentially quite significant. As an initial matter, *McIntyre* may be instructive on where the current Justices stand on these issues. Justice Scalia is the only current Justice

J., Marshall, J., Blackmun, J., concurring), and *id.* at 122 (Stevens, J., concurring). See also *infra* text accompanying notes 42–59 (discussing *Asahi*).

3. 495 U.S. 604 (1990).

4. See *id.* at 607 ("The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State."). Compare *id.* at 609–19 (Scalia, J., joined by Rehnquist, C.J., White, J., Kennedy, J.), with *id.* at 629–40 (Brennan, J., joined by Marshall, J., Blackmun, J., O'Connor, J., concurring), and *id.* at 640 (Stevens, J., concurring).

5. 131 S. Ct. 2780 (2011).

6. 131 S. Ct. 2846 (2011).

7. See *Asahi*, 480 U.S. at 105.

8. See *J. McIntyre*, 131 S. Ct. at 2791 (plurality opinion); *id.* at 2794 (Breyer, J., concurring).

9. *Id.* at 2785 (plurality opinion); see also discussion *infra* Part III.

10. *Id.* at 2794 (Ginsburg, J., dissenting); see also discussion *infra* Part IV.

11. *Id.* at 2791 (Breyer, J., concurring); see also discussion *infra* Part V.

12. See *infra* Part V.A.

who was involved in *Asahi*.<sup>13</sup> And Justices Scalia and Kennedy are the only current Justices who were involved in *Burnham*.<sup>14</sup> So despite *McIntyre*'s inconclusive nature, it gives us insight into how the current Justices are thinking about personal jurisdiction.

Furthermore, *McIntyre* may indicate a renewed interest—at least for some Justices—in how jurisdictional doctrine operates in the current technological landscape. Justices Breyer and Alito note that “there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents;”<sup>15</sup> they cite the development of the internet in particular.<sup>16</sup> Although they express concern that *McIntyre* was “an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules,”<sup>17</sup> they signal that they might be open to a “change in present law” if presented with a case that provides “a better understanding of the relevant contemporary commercial circumstances,” especially “a case (unlike the present one) in which the Solicitor General participates.”<sup>18</sup> Such commentary suggests a desire to consider these overarching questions more comprehensively in light of modern realities, although how eagerly the Justices will seek out that opportunity remains to be seen.

Until that next case reaches One First Street, judges and litigants may ask themselves whether any aspect of the *McIntyre* decision generates binding precedent going forward. The Supreme Court has stated that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”<sup>19</sup> Given this principle (known as the *Marks* rule), it is hard to see how Justice Kennedy’s plurality opinion—standing alone—could qualify as the *McIntyre* holding. If any opinion qualifies under *Marks* as the one “concur[ring] . . . on the narrowest grounds,”<sup>20</sup> it would seem to be Justice Breyer’s.<sup>21</sup> As explained below, Justice Breyer’s rejection of jurisdiction in *McIntyre* is premised on a restricted understanding of the factual record in that case, and his position is consistent with upholding jurisdiction in a similar case

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13. See *supra* note 7 and accompanying text.

14. See *Burnham v. Superior Court*, 495 U.S. 604, 606–07 (1990).

15. *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring).

16. *Id.* at 2793 (criticizing Justice Kennedy’s jurisdictional standards by asking: “[W]hat do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?”).

17. *Id.*

18. *Id.* at 2794.

19. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

20. *Id.*

21. See *infra* text accompanying notes 218–222.

where the record contains slightly more robust evidence on certain issues relating to actual or potential purchasers in the forum state.<sup>22</sup> Although the Court's ultimate conclusion in *McIntyre* is to reverse the New Jersey court's exercise of jurisdiction,<sup>23</sup> *McIntyre* should not be read to impose more significant restraints on jurisdiction as a general matter.

This Article proceeds as follows: Part I summarizes the two most significant pre-*McIntyre* decisions on personal jurisdiction and stream of commerce—*World-Wide Volkswagen Corp. v. Woodson*<sup>24</sup> and *Asahi*. Part II describes the Court's long-awaited return to personal jurisdiction last Term in *McIntyre*, as well as its companion case *Goodyear*. Parts III, IV, and V examine the three *McIntyre* opinions—Justice Kennedy's plurality, Justice Ginsburg's dissent, and Justice Breyer's concurrence.

## I. BEFORE *MCINTYRE*

When discussing the modern approach to personal jurisdiction and the stream of commerce, one often begins with *World-Wide Volkswagen*. The plaintiffs in *World-Wide Volkswagen* were injured while driving an automobile through Oklahoma.<sup>25</sup> They had purchased the car from a dealership in New York.<sup>26</sup> They filed a lawsuit in Oklahoma state court against several defendants, including the New York car dealership and a New York distributor that served dealers in New York, New Jersey, and Connecticut.<sup>27</sup> These two defendants argued that personal jurisdiction was improper in Oklahoma.<sup>28</sup>

The Supreme Court held that exercising jurisdiction over these defendants in Oklahoma violated the Due Process Clause.<sup>29</sup> In doing so, however, the Court recognized that it *is* appropriate for a state to “assert[] 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.”<sup>30</sup> It further explained:

[I]f the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly

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22. See *infra* text accompanying notes 199–207.

23. *J. McIntyre*, 131 S. Ct. at 2791.

24. 444 U.S. 286 (1980).

25. *Id.* at 288.

26. *Id.*

27. *Id.* at 288–89.

28. *Id.* at 288.

29. *Id.* at 295–99.

30. *Id.* at 298.

defective merchandise has there been the source of injury to its owner or to others.<sup>31</sup>

Jurisdiction was ultimately denied in *World-Wide Volkswagen* because these two New York defendants had *not* sought to serve, either directly or indirectly, the market for their product in the forum state of Oklahoma.<sup>32</sup> The local dealer and the regional distributor served the markets in New York and surrounding states.<sup>33</sup> The automobile involved in the accident had been sold to a local New York customer,<sup>34</sup> but it found its way to Oklahoma via the *customer's* “unilateral activity,”<sup>35</sup> not by any effort on the part of the defendants to reach the Oklahoma market with their products.<sup>36</sup> Accordingly, it did not matter whether Oklahoma had a strong interest in adjudicating a dispute arising from an accident that occurred in Oklahoma, or whether Oklahoma would be “the most convenient location for litigation.”<sup>37</sup> The defendants’ lack of “contacts, ties, or relations” with Oklahoma made jurisdiction unconstitutional.<sup>38</sup>

Thus, *World-Wide Volkswagen* presaged a two-step approach to personal jurisdiction that crystallized during the 1980s. First, the defendant must “purposefully establish[] ‘minimum contacts’ in the forum State.”<sup>39</sup> Second, “[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’”<sup>40</sup> Factors relevant to this second prong—which confirms “the reasonableness of jurisdiction”—include “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of

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31. *Id.* at 297.

32. *See id.* at 298.

33. *Id.*

34. *Id.* at 288.

35. *Id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

36. *See id.*

37. *Id.* at 294 (citing *Hanson*, 357 U.S. at 251, 254). The Court explained that the Due Process Clause might forbid jurisdiction “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation.” *Id.* (citing *Hanson*, 357 U.S. at 251, 254).

38. *Id.* at 299 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *see also id.* at 295 (“[W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.”).

39. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *Int’l Shoe*, 326 U.S. at 316).

40. *Id.* at 476 (quoting *Int’l Shoe*, 326 U.S. at 320).

controversies, and the shared interest of the several States in furthering fundamental substantive social policies.”<sup>41</sup>

The Court’s next stream of commerce case was *Asahi*.<sup>42</sup> In this case a California plaintiff was injured, and his wife killed, while riding a motorcycle on a California highway.<sup>43</sup> The plaintiff filed a lawsuit in California state court against several defendants, including the Taiwanese company (Cheng Shin) that manufactured the motorcycle’s tire tube.<sup>44</sup> Cheng Shin then filed a claim seeking indemnification from the Japanese company (Asahi) that manufactured the tube’s valve assembly but had not been named as a defendant.<sup>45</sup> Asahi objected to jurisdiction.<sup>46</sup> The plaintiff’s claims eventually settled, “leaving only Cheng Shin’s indemnity action against Asahi.”<sup>47</sup>

*Asahi* was, in one sense, a mirror image of *World-Wide Volkswagen*. In *World-Wide Volkswagen*, the lack of minimum contacts by the defendants made jurisdiction unconstitutional, regardless of whether the reasonableness factors weighed in favor of jurisdiction.<sup>48</sup> In *Asahi*, the reasonableness factors prevented jurisdiction regardless of whether the defendant had established the required minimum contacts.<sup>49</sup> The Court’s holding that jurisdiction was unreasonable in *Asahi* was based on that case’s fairly unique posture, especially the fact that the original plaintiff—who had been injured in the forum state—had settled and was not seeking any relief from Asahi.<sup>50</sup> A question of more general interest was whether a defendant in *Asahi*’s position had established minimum contacts with the forum state; on that issue, the Court generated no majority opinion.

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41. *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (internal quotation marks omitted).

42. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

43. *Id.* at 105.

44. *Id.* at 105–06.

45. *Id.* at 106.

46. *Id.*

47. *Id.*

48. *See supra* text accompanying notes 32–38.

49. *See Asahi*, 480 U.S. at 113–14 (“We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. . . . A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over *Asahi*, even apart from the question of the placement of goods in the stream of commerce.”); *id.* at 114 (“[T]he interests of the plaintiff and the forum in California’s assertion of jurisdiction over *Asahi* are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against *Asahi*. . . . Because the plaintiff is not a California resident, California’s legitimate interests in the dispute have considerably diminished.”). Justice Scalia was the only Justice in *Asahi* who did not join Justice O’Connor’s opinion with respect to the reasonableness factors. *See id.* at 105.

50. *Id.* at 106; *see* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.1 (3d ed. 2002) (noting that the Court “refused to exercise personal jurisdiction . . . because of the particular circumstances of the case”).



Four Justices, led by Justice O'Connor, concluded that Asahi had not established minimum contacts with California.<sup>51</sup> Four Justices, led by Justice Brennan, concluded that Asahi had established minimum contacts with California.<sup>52</sup> Justice Stevens joined neither of the four-Justice coalitions in *Asahi*. Given the conclusion “that California’s exercise of jurisdiction over Asahi in this case would be ‘unreasonable and unfair,’” he saw “no reason” to endorse any particular “test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.”<sup>53</sup>

The different perspectives offered by Justices Brennan and O'Connor in *Asahi* would go on to shape much of the jurisdictional debate in the decades following *Asahi*.<sup>54</sup> Quoting *World-Wide Volkswagen*, Justice Brennan reasoned that “[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State.”<sup>55</sup> Justice O'Connor, however, wrote that “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”<sup>56</sup> Rather, she would require “[a]dditional conduct” that would,

[I]ndicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.<sup>57</sup>

Thus, it is often said that Justice Brennan endorsed a “stream of commerce” analysis while Justice O'Connor endorsed a “stream of commerce plus” analysis.<sup>58</sup> It should not be overlooked, however, that both Justices Brennan and

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51. *See id.* at 112–13 (O'Connor, J.).

52. *Id.* at 121 (Brennan, J., concurring).

53. *Id.* at 121–22 (Stevens, J., concurring) (quoting *id.* at 116). That said, Justice Stevens wrote that he was “inclined to conclude” that Asahi’s contacts were sufficient given “the volume, the value, and the hazardous character of the components.” *Id.* at 122.

54. *See, e.g., Nat'l Union Fire Ins. Co. v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096, 1105 (D. Idaho 2003) (“[T]he circuits have split over whether to follow Justice O'Connor or Justice Brennan’s articulation of the ‘stream of commerce’ theory.” (citing cases)).

55. *Asahi*, 480 U.S. at 119–20 (Brennan, J., concurring) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)) (internal quotation marks omitted).

56. *Id.* at 112 (O'Connor, J.).

57. *Id.*

58. *See, e.g., Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1546–49 (11th Cir. 1993) (distinguishing between a “stream of commerce” analysis and a “stream of commerce plus” analysis); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1067.1 (3d ed. 2002) (noting that Justice O'Connor’s *Asahi* opinion “developed what has now become known as the ‘stream-of-commerce-plus’ theory of jurisdiction”).

O'Connor explicitly embraced the idea that a manufacturer establishes minimum contacts with the forum when it seeks to serve the market in the forum state and its product thereby causes injury in that state.<sup>59</sup>

## II. THE SUPREME COURT'S 2011 PERSONAL JURISDICTION DECISIONS

In September 2010, the Court granted certiorari in two cases involving jurisdiction over defendants whose products reached the forum state via the stream of commerce.<sup>60</sup> The two cases—*McIntyre* and *Goodyear*—were decided on June 27, 2011, the last day of the October 2010 Term.<sup>61</sup> In *Goodyear*, the claim involved a product that both was purchased and caused injury outside of the forum state (North Carolina).<sup>62</sup> The court thus sought to assert *general* jurisdiction based on other sales of the defendants' products in North Carolina.<sup>63</sup> The Supreme Court unanimously held that general jurisdiction was improper, concluding that “even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”<sup>64</sup>

*McIntyre* was a more traditional stream of commerce case. It implicated *specific* jurisdiction because the lawsuit was brought in the state where the product was purchased and where the injury occurred.<sup>65</sup> The plaintiff, Robert Nicastro, suffered serious injuries to his hand while operating a metal-shearing machine at Curcio Scrap Metal, the New Jersey company for which he worked.<sup>66</sup> Mr. Nicastro filed a lawsuit in a New Jersey state court against J. McIntyre

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59. See *Asahi*, 480 U.S. at 110 (O'Connor, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *id.* at 119 (Brennan, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98); see also *id.* at 112 (O'Connor, J.) (stating that jurisdiction is permissible if the defendant's conduct “indicate[s] an intent or purpose to *serve the market* in the forum State” (emphasis added)).

60. See *Goodyear Lux. Tires, S.A. v. Brown*, 131 S. Ct. 63 (2010) (granting certiorari); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 62 (2010) (granting certiorari).

61. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (decided June 27, 2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (same).

62. See *Goodyear*, 131 S. Ct. at 2850.

63. *Id.* at 2851 (“Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. . . . Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? . . . [T]he North Carolina courts answered yes.”).

64. *Id.* at 2850, 2857 n.6.

65. See *J. McIntyre*, 131 S. Ct. at 2797–98 (Ginsburg, J., dissenting) (noting that *Goodyear* was a case purporting to exercise “general (all-purpose) jurisdiction” while *McIntyre* was “one of specific jurisdiction, which turns on an ‘affiliatio[n] between the forum and the underlying controversy’” (quoting *Goodyear*, 131 S. Ct. at 2851)).

66. *Id.* at 2786 (plurality opinion); *id.* at 2795 (Ginsburg, J., dissenting) (“Nicastro operated the [machine] in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey.” (citing Joint Appendix at 7a, 43a, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 4642529)).

Machinery, the British corporation that manufactured the shearing machine.<sup>67</sup> J. McIntyre had entered into an agreement with an Ohio-based company, McIntyre Machinery of America, to sell J. McIntyre's machines to customers in the United States.<sup>68</sup> J. McIntyre also helped to facilitate sales of its machines in the United States by sending its officials to U.S. trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco."<sup>69</sup>

Beyond these basic points, the Justices' opinions describe the facts relevant to jurisdiction in different ways. For example, the opinions by Justices Breyer and Ginsburg state, and the record confirms, that the machine involved in the accident was sold by J. McIntyre to its U.S. distributor, which in turn sold the machine directly to Mr. Nicaastro's employer in New Jersey.<sup>70</sup> Justice Kennedy's opinion, however, states that the machine somehow "ended up in New Jersey."<sup>71</sup>

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67. *Id.* at 2786 (plurality opinion); *id.* at 2795 (Ginsburg, J., dissenting) (stating that J. McIntyre was "[e]stablished in 1872 as a United Kingdom corporation, and headquartered in Nottingham, England" (citing Joint Appendix, *supra* note 66, at 22a)).

68. *Id.* at 2786 (plurality opinion) ("[A]n independent company agreed to sell J. McIntyre's machines in the United States."); *id.* at 2790 ("The distributor agreed to sell J. McIntyre's machines in the United States . . ."); *id.* at 2791 (Breyer, J., concurring) ("J. McIntyre Machinery, Ltd. [is] a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States . . ."); *id.* at 2796 (Ginsburg, J., dissenting) ("From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. . . . as its exclusive distributor for the entire United States.") (quoting *Nicaastro v. McIntyre Mach. Am., Ltd.*, 945 A.2d 92, 104 (N.J. Super. Ct. App. Div. 2008), *rev'd*, *J. McIntyre*, 131 S. Ct. 2780); *Nicaastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578 (N.J. 2010) (noting that McIntyre Machinery of America's headquarters were in Stow, Ohio, *rev'd*, *J. McIntyre*, 131 S. Ct. 2780; *Nicaastro*, 945 A.2d at 95 (noting that McIntyre Machinery of America was "an Ohio corporation with its principal place of business in Stow, Ohio"); *id.* at 96 ("Notwithstanding the apparent absence of a written contract, defendant does not dispute that McIntyre America was its sole United States distributor during the relevant time period.").

69. *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring) (quoting *Nicaastro*, 987 A.2d at 578–79); *see also id.* at 2786 (plurality opinion) ("J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.").

70. *See id.* at 2791 (Breyer, J., concurring) (noting that J. McIntyre's U.S. distributor "sold and shipped one machine to a New Jersey customer, namely, Mr. Nicaastro's employer, Mr. Curcio"); *id.* at 2797 (Ginsburg, J., dissenting) ("The machine arrived in Nicaastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged."). The machine that caused Nicaastro's injuries was manufactured by J. McIntyre, Ltd. in the United Kingdom and then sold for \$24,900 in 1995 through its exclusive United States distributor, McIntyre America, to a New Jersey business, Curcio Scrap Metal. *Nicaastro*, 987 A.2d at 577–78. Defendant shipped the machine from England to McIntyre America's headquarters in Stow, Ohio, which then shipped it to Saddle Brook, New Jersey, with an invoice instructing that a check be made payable to "McIntyre Machinery of America, Inc." for the machine. *Id.*; *Nicaastro*, 945 A.2d at 96. Nicaastro's employer purchased the machine "after the employer attended a national trade convention in Las Vegas, Nevada and learned about the machine at a booth exhibit jointly operated by the manufacturer and distributor." *Id.* at 95; *see also* Joint Appendix, *supra* note 66, at 43a (Copy of Invoice).

71. *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion); *id.* at 2790 ("[U]p to four machines ended up in New Jersey."); *see also id.* (describing the trial court's finding that "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state"

Justice Ginsburg's opinion states, and the record confirms, that Mr. Nicaastro's New Jersey employer first learned of the machine at one of the very same trade conventions that J. McIntyre's officials attended in an effort to promote their machines to potential U.S. customers.<sup>72</sup> Neither Justice Kennedy's nor Justice Breyer's opinion addresses this link between J. McIntyre's own activities in the United States and the purchase of the machine by the New Jersey company for whom Mr. Nicaastro worked.<sup>73</sup> In addition, Justice Ginsburg's opinion cites several facts regarding the role these industry trade shows play in the market for such machines, the number of New Jersey businesses belonging to the industry group that hosted the trade shows, the amount of scrap metal recycling activity in New Jersey, and New Jersey's share of the overall U.S. market for imports of manufactured goods.<sup>74</sup> Justice Kennedy's opinion does not acknowledge these facts. Justice Breyer does not consider them either,

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(quoting Petition for Certiorari App. F at 130a, *J. McIntyre*, 131 S. Ct. 2780 (No. 09-1343) 2010 WL 1789706) (internal quotation marks omitted)).

72. See *id.* at 2795–96 (Ginsburg, J., dissenting). “Frank Curcio ‘first heard of [McIntyre UK’s] machine while attending an Institute of Scrap Metal Industries [ISRI] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor.’” *Id.* at 2795 (alteration in original) (quoting Joint Appendix, *supra* note 66, at 78a) (affidavit of Frank Curcio). “McIntyre UK representatives attended every ISRI convention from 1990 through 2005.” *Id.* at 2796 (citing Joint Appendix, *supra* note 66, at 114a–115a) (answers to interrogatories). See also *Nicaastro*, 987 A.2d at 579 (“Michael Pownall, the president of J. McIntyre, attended the scrap metal conventions held in Las Vegas in 1994 and 1995, including the one where Curcio visited the McIntyre America booth.”); *Nicaastro*, 945 A.2d at 95 (“Plaintiff’s employer purchased the machine new from the manufacturer’s exclusive United States distributor, an Ohio corporation, after the employer attended a national trade convention in Las Vegas, Nevada and learned about the machine at a booth exhibit jointly operated by the manufacturer and distributor.”); *id.* at 96 (“Curcio learned that the machine was manufactured by defendant in England and distributed throughout the United States by its sole United States distributor, McIntyre America. Based upon that contact, Curcio ordered the machine.”).

73. Other aspects of the record are also handled differently by the three opinions. Regarding J. McIntyre’s direct efforts to access the U.S. market, Justice Kennedy’s opinion acknowledges (and the record confirms) that: (1) J. McIntyre “held both United States and European patents on its recycling technology”; (2) J. McIntyre’s “U.S. distributor ‘structured [its] advertising and sales efforts in accordance with’ J. McIntyre’s ‘direction and guidance whenever possible’”; and (3) “‘at least some of the machines were sold on consignment to’ the [U.S.] distributor.” *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion) (first alteration in original) (quoting *Nicaastro*, 987 A.2d at 579). Justice Ginsburg’s opinion recognizes these facts as well, and it also adds (as confirmed by the record) that: (1) J. McIntyre’s “manual advises ‘owner[s] and operators . . . [to] make themselves aware of [applicable health and safety regulations],’ including ‘the American National Standards Institute Regulations (USA) for the use of Scrap Metal Processing Equipment’”; (2) J. McIntyre’s U.S. distributor described itself in invoices and other communications as J. McIntyre’s “national distributor, ‘America’s Link’ to ‘Quality Metal Processing Equipment’ from England”; and (3) J. McIntyre engaged its U.S. distributor “to attract customers ‘from anywhere in the United States,’” instructing the distributor that “[a]ll we wish to do is sell our products in the [United] States—and get paid!” *Id.* at 2795–97 (Ginsburg, J., dissenting) (first three and last alterations in original) (quoting Joint Appendix, *supra* note 66, at 43a, 46a, 78a 134a, 161a) (last set of internal quotation marks omitted). Justice Breyer’s opinion does not acknowledge these facts.

74. See *infra* text accompanying notes 96–100.

suggesting that they were not part of “the record present here.”<sup>75</sup> Rather, Justice Breyer’s analysis considered only three facts—those on which, in his view, “the Supreme Court of New Jersey relied most heavily.”<sup>76</sup>

Finally, there appears to be some disagreement about how many of J. McIntyre’s machines ultimately reached the New Jersey market. Justice Kennedy recognizes that “up to four machines” may have been purchased by New Jersey customers,<sup>77</sup> but Justice Breyer’s reasoning hinges on the assumption that only a single machine—the one that injured Mr. Nicastro—was ever sold to a New Jersey user.<sup>78</sup>

As Justice Kennedy puts it in his plurality opinion, the *McIntyre* case “present[ed] an opportunity to provide greater clarity” about the permissible scope of jurisdiction in stream-of-commerce cases,<sup>79</sup> noting in particular the “decades-old questions left open in *Asahi*.”<sup>80</sup> The lack of any majority opinion in *McIntyre* largely thwarts the possibility of “greater clarity,” at least in the short term. Going forward, however, the three *McIntyre* opinions are an important part of the jurisdictional corpus. The next three Parts of this Article will examine these opinions in greater detail.

### III. JUSTICE KENNEDY’S *MCINTYRE* PLURALITY

While Justice Kennedy’s reasoning appears to take the most restrictive approach to jurisdiction of the three *McIntyre* opinions, it leaves many open questions and should not necessarily be read to support significant new limits on

75. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring) (“Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.”); *id.* (“There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. But the plaintiff bears the burden of establishing jurisdiction . . . .” (citations omitted)).

76. *Id.* at 2791 (for a discussion of these facts see *infra* text accompanying note 193); see also *id.* at 2792 (“There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. [*Id.* at 2795–96 (Ginsburg, J. dissenting).] But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them.” (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982); *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 557 (N.J. 2000))).

77. *Id.* at 2790 (plurality opinion).

78. *Id.* at 2791 (Breyer, J., concurring) (“The American Distributor *on one occasion* sold and shipped *one machine* to a New Jersey customer, namely, Mr. Nicastro’s employer, Mr. Curcio.” (emphasis added) (citing *Nicastro*, 987 A.2d at 578–79)); see also *id.* at 2792 (describing the machine as “a single isolated sale”); *id.* (relying on the notion that “a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant” (emphasis added)). Justice Ginsburg’s dissent adds that “McIntyre UK resisted Nicastro’s efforts to determine whether other McIntyre machines had been sold to New Jersey customers,” *id.* at 2797 n.3 (Ginsburg, J., dissenting), citing to McIntyre UK’s objections to interrogatories asking for information about sales to New Jersey buyers, see Joint Appendix, *supra* note 66, at 100a-101a.

79. *Id.* at 2786 (plurality opinion).

80. *Id.* at 2785 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987)).

the permissible scope of jurisdiction. Many of the principles on which Justice Kennedy relies are not fundamentally inconsistent with a more lenient approach. That said, it is difficult to draw coherent lessons from Justice Kennedy's opinion because he fails to explain adequately why those basic principles dictate the conclusion he reaches in *McIntyre*. The opinion is also perplexing for how it handles some of the Court's prior opinions on personal jurisdiction, and because of its failure to consider other opinions that conflict with some aspects of Justice Kennedy's reasoning.

A. *Justice Kennedy's Basic Principles*

Many of the basic principles that Justice Kennedy employs are fairly uncontroversial and fully consistent with upholding jurisdiction in a case like *McIntyre*. In particular, Justice Kennedy does not rule out the possibility that the transmission of goods into the forum state can be sufficient to establish jurisdiction. The requirement that a defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State," he explains, can be met by a defendant "sending its goods rather than its agents."<sup>81</sup>

Justice Kennedy clarifies that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum."<sup>82</sup> This is admittedly a new gloss on how to assess jurisdiction in the stream of commerce scenario.<sup>83</sup> Whether it represents a significant change, however, depends on what it *means* to target the forum. Justice Kennedy does not provide much guidance on this critical question, but what he does say is neither reactionary nor revolutionary. He argues, for example, that "it is not enough that the defendant *might have predicted* that its goods will reach the forum State."<sup>84</sup> This idea is nothing new. More than thirty years ago, *World-Wide Volkswagen* dismissed the idea that jurisdiction is proper merely because it was "foreseeable" that a defendant's product might enter the forum and cause injury there.<sup>85</sup> Justice Kennedy also recognizes that jurisdiction is appropriate over a manufacturer or distributor who "'seek[s] to serve' a given State's market."<sup>86</sup> In this sense, Justice Kennedy's basic principles are

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81. *Id.* at 2788 (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted) (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704–05 (1982)).

82. *Id.* (emphasis added).

83. In his concurrence, Justice Breyer referred to this aspect of Justice Kennedy's opinion as a "strict no-jurisdiction rule." *Id.* at 2793 (Breyer, J. concurring).

84. *Id.* (emphasis added).

85. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (rejecting the argument that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that the Robinsons' Audi would cause injury in Oklahoma").

86. *J. McIntyre*, 131 S. Ct. at 2788 (plurality opinion) (quoting *World-Wide Volkswagen*, 444 U.S. at 295) ("[A] defendant may in an appropriate case be subject to jurisdiction without entering

consistent with those espoused by the *World-Wide Volkswagen* majority and by both Justice O'Connor and Justice Brennan in *Asahi*.<sup>87</sup>

*B. How Justice Kennedy Applies His Basic Principles*

What is more difficult to understand from Justice Kennedy's opinion is why the principles he endorses dictate his conclusion that J. McIntyre had not targeted or sought to serve the New Jersey market.<sup>88</sup> In particular, Justice Kennedy fails to confront this key question: Why is it not the case that a manufacturer who seeks to serve the U.S. market as a whole *necessarily* seeks to serve the states that comprise the United States? Justice Kennedy does write that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," and that "the United States is a distinct sovereign."<sup>89</sup>

The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign . . . .

. . . .

. . . Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.<sup>90</sup>

These observations do not resolve the issue, however. To emphasize "conduct directed at the society or economy existing within the jurisdiction of a given sovereign" does not prevent the conclusion that a defendant's conduct is "directed at" the forum state when the defendant's conduct is directed at a territorial entity (such as the entire United States) that *includes* the forum state.<sup>91</sup> Indeed, a host of strange results would ensue if courts were to conclude that a defendant does *not* seek to serve the forum state when it seeks to serve a territorial area that includes the forum state. Suppose a defendant seeks to serve the New York City tri-state area, which includes portions of Connecticut, New

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the forum—itself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market." (quoting *World-Wide Volkswagen*, 444 U.S. at 295)).

87. See *supra* note 59 and accompanying text.

88. See *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion) ("Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.").

89. *Id.* at 2789.

90. *Id.* at 2789–90 (emphasis added).

91. See, e.g., *id.* at 2801 (Ginsburg, J., dissenting) ("McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States. . . . McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, 'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.").

Jersey, and New York. Would a court following Justice Kennedy's logic have to conclude that such a defendant has not targeted *any* of these three states? Or suppose a defendant seeks to serve an area bounded by particular latitudes and longitudes. If that area includes State X, would courts following Justice Kennedy's approach have to conclude that the defendant is not targeting State X because it has not explicitly defined its area of service with reference to that state?

Justice Kennedy also writes: "At no time did [J. McIntyre] engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws."<sup>92</sup> But why is it not the case that J. McIntyre intended to benefit from the protection of New Jersey law because (1) the larger U.S. market that J. McIntyre targeted included New Jersey; and (2) the New Jersey market exists because it is supported by an array of New Jersey laws, including New Jersey's tort laws, that give its citizens confidence to engage in economic activity knowing that they can seek compensation when other economic actors breach their duties?

In addition, Justice Kennedy's opinion emphasizes the fact that the U.S. trade shows attended by J. McIntyre officials were located in states other than New Jersey.<sup>93</sup> Yet this fact cannot be dispositive either, because Justice Kennedy himself instructs that jurisdiction can be appropriate even if the defendant (or here, the defendant's officers or employees) never entered the state.<sup>94</sup> A narrow focus on the particular states in which national trade shows were held also seems to be in tension with Justice Kennedy's acknowledgement that courts must consider "the economic realities of the market the defendant seeks to serve" in examining the propriety of jurisdiction.<sup>95</sup> In an integrated national economy like the United States, it is hard to imagine that trade shows would be held in every single state in the union.

Furthermore, Justice Ginsburg's dissent identifies several facts that would seem to constitute relevant "economic realities," but Justice Kennedy does not address them. For example, Justice Ginsburg notes the important role that the annual industry trade show plays in the market for scrap metal processing and recycling equipment.<sup>96</sup> J. McIntyre representatives attended these trade shows in

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92. *J. McIntyre*, 131 S. Ct. at 2791 (plurality opinion).

93. *Id.* at 2790 ("J. McIntyre officials attended trade shows in several States but not in New Jersey . . .").

94. *Id.* at 2788 (calling it an "unexceptional proposition" that "a defendant may in an appropriate case be subject to jurisdiction without entering the forum").

95. *Id.* at 2790 ("The conclusion that the authority to subject a defendant to judgment depends on purposeful availment . . . does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct *and the economic realities of the market the defendant seeks to serve* will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle." (emphasis added)).

96. *See id.* at 2796 (Ginsburg, J., dissenting) ("[M]ore than 3,000 potential buyers of scrap processing and recycling equipment attend its annual conventions, 'primarily because th[e]



the United States for sixteen consecutive years—including the year Mr. Nicaastro’s employer attended the trade show and, as a result, purchased the machine at issue.<sup>97</sup> Close to 100 New Jersey businesses belonged to the industry group that hosted the U.S. trade shows that J. McIntyre’s officers attended.<sup>98</sup> Justice Ginsburg also notes that New Jersey had the fourth-highest overall share of the U.S. import market for manufactured commodities.<sup>99</sup> With respect to scrap metal in particular, New Jersey recycling facilities process over two million tons annually, more than any other State in the United States, “outpacing Kentucky, its nearest competitor, by nearly 30 percent.”<sup>100</sup>

Justice Kennedy’s opinion does not consider any of these facts in reaching the conclusion that New Jersey lacked jurisdiction. Perhaps he believed that the information Justice Ginsburg cites was not properly in the record.<sup>101</sup> Perhaps these are not the sort of “economic realities” he has in mind. There is no way of knowing from the opinion itself. Justice Kennedy does note that a maximum of four J. McIntyre machines “ended up in New Jersey.”<sup>102</sup> Putting aside the fact that four machines would have a total value of around \$100,000,<sup>103</sup> perhaps Justice Kennedy is suggesting that a small quantity of purchases by customers in the forum is an “economic realit[y]”<sup>104</sup> that weakens the case for jurisdiction. If so, would he reach a different result if more of J. McIntyre’s machines had ultimately been purchased by New Jersey customers? Considering economic realities might even support a more open-ended approach to minimum contacts similar to the one alluded to by Justice Stevens in his enigmatic *Asahi* opinion. Justice Stevens wrote that the jurisdictional inquiry “is affected by the volume, the value, and the hazardous character” of the relevant product.<sup>105</sup> Justice

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exposition provides them with the most comprehensive industry-related shopping experience concentrated in a single, convenient location.” (quoting Joint Appendix, *supra* note 66, at 47a)).

97. *See id.* (“McIntyre UK representatives attended every ISRI convention from 1990 through 2005.” (citing Joint Appendix, *supra* note 66, at 114a–115a)).

98. *Id.* at n.1.

99. *Id.* at 2799 n.6 (citing U.S. BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COMMERCE, U.S. INT’L TRADE IN GOODS AND SERVS. 37 (2011), available at [http://www.census.gov/foreign-trade/Press-Release/current\\_press\\_release/ft900.pdf](http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf)). This figure is from 2011.

100. *See id.* at 2795 (citing Rob van Haaren et al., *The State of Garbage in America*, BIOCYCLE, Oct. 2010, at 16, 19 tbl.3, available at <http://www.seas.columbia.edu/earth/wtert/sofos/SOG2010.pdf>). These figures are from 2008.

101. Justice Breyer, by contrast, made this point explicitly. *See supra* note 76.

102. *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion).

103. *See id.* at 2795 (Ginsburg, J., dissenting) (noting that the shear machine at issue “sold in the United States for \$24,900 in 1995”); *cf. id.* at 2803 n.15 (“The plurality notes the low volume of sales in New Jersey. [*Id.* at 2786, 2790–91 (plurality opinion)]. A \$24,900 shearing machine, however, is unlikely to sell in bulk worldwide, much less in any given State. By dollar value, the price of a single machine represents a significant sale. Had a manufacturer sold in New Jersey \$24,900 worth of flannel shirts, cigarette lighters, or wire-rope splices, the Court would presumably find the defendant amenable to suit in that State.” (citations omitted)).

104. *Id.* at 2790 (plurality opinion).

105. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring) (“I would be inclined to conclude that a regular course of dealing that results in

Kennedy's reference to economic realities is potentially an encouraging sign for those who support a more flexible approach to jurisdiction, but it ultimately yields more questions than answers.

### C. *Of Sovereignty and Submission*

Justice Kennedy's *McIntyre* opinion also raises questions because of two features that are difficult to square with the Supreme Court's case law on personal jurisdiction. One is his focus on *sovereign power* in examining the constitutionality of a state court's exercise of jurisdiction. He writes:

[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, *so that the sovereign has the power to subject the defendant to judgment concerning that conduct.*<sup>106</sup>

This emphasis on sovereignty is in tension with earlier Supreme Court decisions rejecting the notion that constitutional limits on personal jurisdiction derive from "an independent restriction on the sovereign power of the court."<sup>107</sup> In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, the Court wrote: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power *not as a matter of sovereignty*, but as a matter of individual liberty."<sup>108</sup>

deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world.')

106. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (emphasis added).

107. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982); *see also J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (noting that Justice Kennedy's emphasis on "sovereign authority" is inconsistent with earlier Supreme Court decisions (citing *Shaffer v. Heitner*, 433 U.S. 186, 204 & n.20 (1977)); Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 580 (2012) ("The Court rejected this notion in *Insurance Corp. of Ireland . . .*").

108. *Ins. Corp. of Ir.*, 456 U.S. at 702 (emphasis added). Justice Kennedy's attempt to handle *Insurance Corp. of Ireland* is puzzling. He writes:

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. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

*J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702). As explained below, whether we define jurisdictional limitations as a function of sovereignty or of individual liberty might ultimately accomplish very little in terms of informing the ultimate content of those limitations. *See infra* notes 115–119 and accompanying text. But if the distinction means anything, it cannot be elided as easily as Justice Kennedy suggests. In essence, he claims consistency with *Insurance Corp. of Ireland* by saying that the "individual liberty" interest is defined by "whether the sovereign has authority to render [judgment]." *J. McIntyre*, 131 S. Ct. at

A second aspect of Justice Kennedy's opinion is his insistence that jurisdiction is appropriate only when a person "*submi[ts]* to a State's authority."<sup>109</sup> Justice Kennedy writes that "[t]he principal inquiry," for purposes of personal jurisdiction, "is whether the defendant's activities manifest an intention to submit to the power of a sovereign."<sup>110</sup> This focus on "submission to a State's powers"<sup>111</sup> calls to mind the anachronistic view of jurisdiction that the Court rejected nearly seven decades ago in *International Shoe*. Prior to *International Shoe*, jurisdiction over defendants who were not present in the State was often legitimized by the idea that their "consent to service and suit" could be "implied" from their actions.<sup>112</sup> But *International Shoe* put to rest this "legal fiction," recognizing instead that a defendant's "acts were of such a nature as to justify the fiction."<sup>113</sup> In developing the notion of "minimum contacts," *International Shoe* rejected a jurisdictional framework based on the defendant's implied consent or submission to the state's authority. Yet Justice Kennedy seems to embrace that long-discarded framework.<sup>114</sup>

Justice Kennedy's invocation of sovereignty and submission makes it difficult to discern confidently his jurisdictional philosophy. Does he truly intend to break from decades of established precedent and to reconceptualize personal jurisdiction?<sup>115</sup> Or does he not appreciate the tension between his reasoning and earlier decisions? Ultimately, choosing to speak in terms of

2789 (plurality opinion) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702) (internal quotation marks omitted). That, it seems, is to turn *Insurance Corp. of Ireland* on its head.

109. *Id.* at 2787 (plurality opinion) (emphasis added); see also *id.* (noting "a more limited form of submission to a State's authority for disputes that 'arise out of or are connected with the activities within the state'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945))); *id.* (noting situations that "reveal[] circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State").

110. *Id.* at 2788.

111. *Id.* at 2787 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011)).

112. *Int'l Shoe*, 326 U.S. at 318 (citing five previous Supreme Court cases that have used this "legal fiction").

113. *Id.* at 318–19 (citing *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 151 (1915)); see also *J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[I]n *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."); *id.* at 2799 ("[T]he Court has explained [that] a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.").

114. See *J. McIntyre*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting) ("[T]he plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court."); *id.* at 2799 n.5 ("The plurality's notion that jurisdiction over foreign corporations depends upon the defendant's 'submission,' seems scarcely different from the long-discredited fiction of implied consent." (citation omitted)).

115. Although "*stare decisis* is not an inexorable command," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (citation omitted), to deviate from earlier holdings requires a justification more compelling than "a present doctrinal disposition to come out differently from the [earlier] Court," *id.* at 864.

sovereignty or submission does not necessarily entail a substantive difference in terms of the permissible scope of jurisdiction. Even if we accept the sovereignty notion that Justice Kennedy articulates, we are still left with the question of precisely *when* “a defendant has followed a course of conduct *directed at* the society or economy existing within the jurisdiction of a given sovereign.”<sup>116</sup> To emphasize sovereignty does not, in and of itself, foreclose the conclusion that a defendant’s conduct is directed at the forum state when its conduct is directed at a territorial entity (such as the entire United States) that *includes* the forum state.<sup>117</sup>

Similarly, the desirability of inquiring whether a defendant has “submit[ted] to the power of a sovereign”<sup>118</sup> depends entirely on what sort of conduct by a defendant is deemed to *constitute* submission to that power. In fact, most of Justice Kennedy’s more general articulations of what will constitute such submission are uncontroversial and consistent with past precedent.<sup>119</sup> As with a focus on sovereignty, a focus on submission is fully reconcilable with the idea that a defendant submits to a state’s jurisdiction when it seeks to serve a broader market that encompasses that state. My point here is not that sovereignty and submission are necessarily undesirable concepts (although given their current state of refinement they do not seem to be particularly helpful). It is rather that Justice Kennedy embraces these ideas without adequately confronting their tension with prior Supreme Court case law.

#### D. Justice Brennan’s *Asahi* Opinion

Another puzzling aspect of Justice Kennedy’s opinion is his discussion of Justice Brennan’s *Asahi* concurrence. Justice Kennedy critiques Justice Brennan for “discard[ing] the central concept of sovereign authority in favor of considerations of fairness and foreseeability.”<sup>120</sup> According to Justice Kennedy, Justice Brennan’s “premise” in *Asahi* was “that the defendant’s *ability to anticipate suit* renders the assertion of jurisdiction fair,” which thereby “made *foreseeability* the touchstone of jurisdiction.”<sup>121</sup>

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116. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (emphasis added).

117. *See supra* notes 89–91 and accompanying text.

118. *J. McIntyre*, 131 S. Ct. at 2788 (plurality opinion) (emphasis added).

119. *See supra* Part III.A; *see also J. McIntyre*, 131 S. Ct. at 2787–88 (plurality opinion) (noting “a more limited form of submission to a State’s authority for disputes that ‘arise out of or are connected with the activities within the state,’” which includes the situation “where manufacturers or distributors ‘seek to serve’ a given State’s market” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945))); *id.* at 2787 (“Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State’s powers.” (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011))).

120. *J. McIntyre*, 131 S. Ct. at 2788 (plurality opinion).

121. *Id.* (emphasis added).

It is odd for Justice Kennedy to treat fairness and foreseeability as considerations that are exclusive to Justice Brennan's *Asahi* concurrence. Supreme Court decisions as old as *International Shoe* (and even older) have tethered the propriety of jurisdiction to whether "maintenance of the suit [would] offend 'traditional notions of fair play and substantial justice.'"<sup>122</sup> And it was the *World-Wide Volkswagen* majority that endorsed foreseeability as relevant to the constitutionality of jurisdiction.<sup>123</sup> According to *World-Wide Volkswagen*, it was "critical to due process analysis" that "the defendant's conduct and connection with the forum State are such that he should *reasonably anticipate being haled into court there*."<sup>124</sup> Indeed, that is precisely how Justice Brennan used the idea of foreseeability in his *Asahi* concurrence. Quoting *World-Wide Volkswagen* verbatim, Justice Brennan wrote:

[T]his is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there.<sup>125</sup>

One could certainly make the case that fairness and foreseeability are not particularly useful concepts for defining the permissible scope of personal jurisdiction. Fairness is a notoriously imprecise standard. And there is potentially a circular quality to the idea that jurisdiction must be foreseeable in the sense that defendants "should reasonably anticipate being haled into court" in the forum state.<sup>126</sup> It is, after all, the jurisdictional principles *themselves* that would make jurisdiction foreseeable.<sup>127</sup> For better or worse, however, these

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122. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *id.* at 320 ("It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our *traditional conception of fair play* and substantial justice, to permit the state to enforce the obligations which appellant has incurred there." (emphasis added)); *see also J. McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting) ("The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness.").

123. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("This is not to say, of course, that foreseeability is wholly irrelevant.").

124. *Id.* (emphasis added).

125. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 119 (1987) (Brennan, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (internal quotation marks omitted).

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

127. *See, e.g.,* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1134 (1981) ("[A] potential defendant can only have such an expectation because the law so provides."). If applied unthinkingly, a focus on foreseeability could yield problematic results at both ends of the jurisdictional spectrum. At one extreme, it could legitimate a state's plainly exorbitant exercise of jurisdiction so long as the state's law was clear enough to give defendants notice of its desired jurisdictional scope. At the other extreme, it could foreclose *any* evolution of jurisdictional principles; *International Shoe's*

ideas have been part of the Supreme Court's jurisprudence in this area. If Justice Kennedy believes that these are improper considerations, then it is he—not Justice Brennan—who would “discard[] the central concept[s]”<sup>128</sup> of existing doctrine. Does Justice Kennedy truly wish the sort of jurisprudential rewiring that his attack on fairness and foreseeability suggests, or does his opinion simply misperceive existing case law?

*E. Justice O'Connor's Asahi Opinion*

Another difficult aspect of Justice Kennedy's *McIntyre* opinion is its relationship to Justice O'Connor's approach to minimum contacts in *Asahi*. Justice Kennedy claims that his opinion is “consistent with Justice O'Connor's opinion in *Asahi*.”<sup>129</sup> And indeed, both Justice Kennedy and Justice O'Connor embrace the principle that a defendant establishes the requisite contacts with the forum when it “seek[s] to serve” the market in the forum state.<sup>130</sup> It should be emphasized, however, that Justice O'Connor's reasoning in *Asahi* does not reject the idea that a defendant who seeks to serve the U.S. market as a whole also seeks to serve the individual states that comprise the U.S. market. In fact, lower court decisions that Justice O'Connor cited favorably in her *Asahi* opinion adopted precisely this approach.

In concluding that *Asahi* had not “designed its product in anticipation of sales in California,”<sup>131</sup> Justice O'Connor compared the facts of *Asahi* to *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, a federal district court case.<sup>132</sup> The defendant in *Rockwell International* was SNFA, a French corporation that manufactured ball-bearing assemblies designed to be used in a particular helicopter called the A-109.<sup>133</sup> SNFA sold these assemblies to its Italian subsidiary, which sold them to the Italian helicopter manufacturer (Agusta), which then incorporated the bearings into its A-109

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recognition that an absent defendant can be subject to jurisdiction if it establishes minimum contacts with the forum state, *Int'l Shoe*, 326 U.S. at 316, would have foundered on the argument that such a defendant could not have “reasonably anticipate[d] being haled into Court” on that basis, *World-Wide Volkswagen*, 444 U.S. at 297.

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

129. *Id.* at 2790.

130. *Id.* at 2788 (“[A] defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors ‘seek to serve’ a given State’s market.” (quoting *World-Wide Volkswagen*, 444 U.S. at 295)); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1980) (O’Connor, J.) (noting that jurisdiction is proper when the defendant’s conduct “indicate[s] an intent or purpose to serve the market in the forum State”).

131. *See Asahi*, 480 U.S. at 113 (O’Connor, J.).

132. *Id.* (citing *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328 (E.D. Pa. 1982)).

133. *Rockwell Int'l*, 553 F. Supp. at 329.

helicopters.<sup>134</sup> Agusta then sold the helicopters to a U.S. distributor in Delaware that would, in turn, sell to consumers in the United States.<sup>135</sup>

Even though SNFA played no role in distributing the finished helicopters in the United States (much less distributing them in particular states within the United States), jurisdiction was appropriate in Pennsylvania because SNFA had purposefully designed its bearing assemblies for use in the A-109 helicopter and “was aware that the A-109 helicopter was targeted for the executive corporate transport market in the United States and Europe.”<sup>136</sup> The district court explained: “Given the distribution system, SNFA had ample reason to know and expect that its bearing, as a unique part of a larger product, would be marketed in any or all states, including the Commonwealth of Pennsylvania.”<sup>137</sup>

Similarly, Justice O’Connor cited the federal district court decision in *Hicks v. Kawasaki Heavy Industries*.<sup>138</sup> Unlike in *Hicks*, Justice O’Connor noted, Asahi “did not create, control, or employ the distribution system that brought its” product to the forum.<sup>139</sup> In *Hicks*, a Japanese motorcycle manufacturer established minimum contacts with Pennsylvania even though it did not sell its products to particular consumers in Pennsylvania or other U.S. states; rather, the Japanese manufacturer—like the British manufacturer in *McIntyre*—sold its products destined for the U.S. market *only* to its U.S. distributor.<sup>140</sup> The court in *Hicks* reasoned that “[t]he manufacturer has the minimum contacts [with Pennsylvania] required by due process and is doing business by means of indirect shipments of goods into the state.”<sup>141</sup> It was irrelevant, therefore, that “the product was not directly placed in the state by [the Japanese manufacturer], but rather was marketed by one whom the [manufacturer] could foresee would cause the product to enter Pennsylvania.”<sup>142</sup> It was also not necessary to show that the Japanese manufacturer had exercised “corporate control” over its U.S. distributor.<sup>143</sup> The *Hicks* court concluded that to deny jurisdiction “would permit a foreign corporation to market its product in this state, profit from its sale here and yet retain immunity simply by structuring its business operations so as to avoid direct activity in the Commonwealth.”<sup>144</sup>

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134. *Id.*

135. *Id.*

136. *Id.* at 330–32.

137. *Id.* at 333.

138. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–13 (1987) (O’Connor, J.) (citing *Hicks v. Kawasaki Heavy Indus.*, 452 F. Supp. 130 (M.D. Pa. 1978)).

139. *Id.* (citing *Hicks*, 452 F. Supp. 130).

140. *Hicks*, 452 F. Supp. at 132, 134 (citing *Kitzinger v. Gimbel Bros.*, 368 A.2d 333 (Pa. Super. Ct. 1976)).

141. *Id.* at 134 (emphasis added) (citing *Kitzinger*, 368 A.2d 333).

142. *Id.*

143. *Id.* at 134–35 (noting that the court didn’t need to decide whether the Japanese manufacturer had corporate control over their United States distributor, as they had already found personal jurisdiction).

144. *Id.* at 134 (citing *Crucible, Inc. v. Stora Kopparbergs Berslags AB*, 403 F. Supp. 9 (W.D. Pa. 1975)).

Justice O'Connor's citations to these cases reveal that, under her approach, endeavors to serve the U.S. market generally can indeed constitute purposeful efforts to serve the individual states that comprise the United States.<sup>145</sup> Justice Kennedy's ultimate conclusion in *McIntyre* appears to be in tension with this idea, even though he endorses Justice O'Connor's reasoning in *Asahi*.

#### F. Empty Rhetoric?

There are a few parts of Justice Kennedy's opinion that seem more rhetorical than substantive, but they are worth recognizing. One is Justice Kennedy's challenge to what he calls the "the stream-of-commerce metaphor"; he writes that "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures."<sup>146</sup> That may be true, but it sheds no light on the key question of what "the mandate of the Due Process Clause" actually is. As discussed above, Justice Kennedy himself recognizes that due process can be satisfied by a defendant "sending its goods rather than its agents," such as when a defendant "'seek[s] to serve' a given State's market."<sup>147</sup> Labeling the stream of commerce a mere "metaphor" does not dictate any particular answer to what the Due Process Clause requires in cases like *McIntyre*.

Similar in this regard is Justice Kennedy's comment that "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."<sup>148</sup> Justice Kennedy makes this statement during his critique of Justice Brennan's *Asahi* opinion, but Justice Kennedy's doctrinal point is unclear. The only time Justice Brennan used the word "expectation" in his *Asahi* opinion was when he stated, quoting verbatim from *World-Wide*

145. Although Justice O'Connor found that *Asahi* had not established minimum contacts with California, *Asahi* was a component manufacturer who played no role at all in defining where the finished tire tubes manufactured in Taiwan would be sold. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (O'Connor, J.) ("[*Asahi*] did not create, control, or employ the distribution system that brought its valves to California."). Under the logic of Justice O'Connor's opinion, one might say that such a component manufacturer acts to serve the needs of the finished-product manufacturer in Taiwan, not the market where the finished product is ultimately purchased. *J. McIntyre*, on the other hand, took numerous purposeful steps to access the U.S. market. See *supra* notes 68–78 and accompanying text; *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (Ginsburg, J., dissenting) ("*Asahi*, unlike *McIntyre UK*, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world. Moreover, *Asahi* was a component-part manufacturer with 'little control over the final destination of its products once they were delivered into the stream of commerce.'" (quoting *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1361 (Ariz. 1995))).

146. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality opinion).

147. *Id.* at 2788 (citation omitted) ("[A] defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market." (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980))).

148. *Id.* at 2789.



*Volkswagen*, that “[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State.”<sup>149</sup> Contrary to Justice Kennedy’s suggestion, this principle is *not* one that would vest jurisdiction based on a defendant’s “expectations” alone.<sup>150</sup> When a defendant “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State,”<sup>151</sup> jurisdiction is based on an *action* (“deliver[ing] its products into the stream of commerce”) that is *taken* with a particular expectation (“that they will be purchased by consumers in the forum State”). Accordingly, Justice Kennedy’s quip that jurisdiction must be based on actions rather than expectations does little more than attack a doctrinal straw man; it does not meaningfully clarify his approach to personal jurisdiction.

Finally, Justice Kennedy’s plurality opinion asserts that “[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”<sup>152</sup> Insofar as this comment fails to clarify the circumstances in which there is such an “absence of authority,” it also appears to be mere rhetorical flourish. It would certainly be wrong to say that jurisdiction may never expand beyond “traditional practice.” If so, *International Shoe*’s recognition that an absent defendant can be subject to jurisdiction if it establishes “minimum contacts” with the forum state would have failed as contrary to then-traditional practice.<sup>153</sup>

In any event, it is unclear whom Justice Kennedy himself is “target[ing]” with his critique of “[f]reeform notions of fundamental fairness.”<sup>154</sup> Justice Ginsburg’s dissent does not propose that jurisdiction should be acceptable as long as it comports with freeform notions of fundamental fairness. Justice Ginsburg does recognize that “[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and *fairness*.”<sup>155</sup> But it was hardly her view that “fairness” alone (much less “[f]reeform . . . fairness”) ought to be the test for jurisdiction. Rather, Justice Ginsburg employs the same “purposeful availment” test that

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149. *Asahi*, 480 U.S. at 119–20 (Brennan, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 298).

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

151. *World-Wide Volkswagen*, 444 U.S. at 298.

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

153. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also J. McIntyre*, 131 S. Ct. at 2800 n.9 (Ginsburg, J., dissenting) (noting the plurality’s objection to “a jurisdictional approach ‘divorced from traditional practice’” and responding that “‘the fundamental transformation of our national economy,’ this Court has recognized, warrants enlargement of ‘the permissible scope of state jurisdiction over foreign corporations and other nonresidents’” (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957))).

154. *J. McIntyre*, 131 S. Ct. at 2787–88 (plurality opinion).

155. *Id.* at 2800 (Ginsburg, J., dissenting) (emphasis added).

Justice Kennedy insists is the “general rule” for a “sovereign’s exercise of power.”<sup>156</sup>

#### IV. JUSTICE GINSBURG’S *MCINTYRE* DISSENT

Justice Ginsburg authors a dissenting opinion in *McIntyre*, joined by Justices Sotomayor and Kagan.<sup>157</sup> Justice Ginsburg’s dissent does not disagree with the basic premise that a defendant must “purposefully avail[] itself” of the forum state in order to be subject to jurisdiction there.<sup>158</sup> She concludes, however, that J. McIntyre unquestionably did so with respect to New Jersey. Justice Ginsburg writes (referring to J. McIntyre as “McIntyre UK”):

McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, “purposefully availed itself” of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of *all States* in which its products were sold by its exclusive distributor.<sup>159</sup>

She further explains:

McIntyre UK’s regular attendance and exhibitions at ISRI conventions [in the United States] was surely a purposeful step to reach customers for its products “anywhere in the United States.” At least as purposeful was McIntyre UK’s engagement of McIntyre America as the conduit for sales of McIntyre UK’s machines to buyers “throughout the United States.” Given McIntyre UK’s endeavors to reach and profit from the United States market as a whole, Nicaastro’s suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. . . . The machine arrived in Nicaastro’s New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged. On what sensible view of the allocation of adjudicatory authority could the place of Nicaastro’s injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the

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156. *Id.* at 2787 (plurality opinion); *see infra* text accompanying notes 158-160 (describing Justice Ginsburg’s application of the purposeful availment standard). Justices Kennedy and Ginsburg disagree, of course, about what result that test commanded in *McIntyre*.

157. *J. McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

158. *Id.* at 2801 (noting “[t]he ‘purposeful availment’ requirement” (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))).

159. *Id.* (emphasis added).

United States (including all the States that constitute the Nation) as the territory it sought to develop?<sup>160</sup>

Accordingly, Justice Ginsburg criticizes “the splintered majority” for “turn[ing] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.”<sup>161</sup> She also observes that the *McIntyre* decision “puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world,” particularly in Europe.<sup>162</sup> She explains:

[W]ithin the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction “in matters relating to tort . . . in the courts for the place where the harmful event occurred.” The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury.<sup>163</sup>

Justice Ginsburg’s dissent concludes by endorsing the following jurisdictional rule: when “a local plaintiff [is] injured by the activity of a manufacturer seeking to exploit a multistate or global market . . . jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury.”<sup>164</sup> She indicates, however, that this principle could be limited to “cases involving a substantially local plaintiff, like Nicastro, injured by the activity of a defendant engaged in interstate or international trade.”<sup>165</sup> Thus, jurisdiction might not be proper if “the defendant is a natural or legal person whose economic activities and legal involvements are largely home-based, *i.e.*, entities without designs to gain substantial revenue from sales in distant

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160. *Id.* at 2797 (footnote omitted).

161. *Id.* at 2795 (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)) (internal quotation marks omitted).

162. *Id.* at 2803.

163. *Id.* at 2803–04 (footnote omitted) (quoting Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 4) (citing Case 21/76, *Bier v. Mines de Potasse d’Alsace S.A.*, 1976 E.C.R. 1735, 1748–49, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0021:EN:PDF>); see also *id.* at 2804 n.17 (citing Weintraub, *supra* note 161, at 550–54) (citing as a reference “[f]or a concise comparison of the European regime and this Court’s decisions”).

164. *Id.* at 2804.

165. *Id.*

markets.”<sup>166</sup> This suggests an approach that would “[a]ssign[] weight to the local or international stage on which the parties operate.”<sup>167</sup>

This aspect of Justice Ginsburg’s opinion—how to measure and to account for the “local or international stage on which the parties operate”<sup>168</sup>—could potentially raise important questions going forward. Justice Ginsburg also does not indicate how this consideration ought to be situated within the two-prong jurisdictional analysis that the Supreme Court articulated during the 1980s. This well-known framework provides that *first*, the defendant must “purposefully establish[] ‘minimum contacts’ in the forum State” and *second*, “these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’”<sup>169</sup> Factors relevant to the second prong include “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.”<sup>170</sup>

Doctrinally, Justice Ginsburg’s concern for “the defendant . . . whose economic activities and legal involvements are largely home-based”<sup>171</sup> might be vindicated under either of the two prongs. One could argue under the first prong that such a defendant—who lacks “designs to gain substantial revenue from sales in distant markets”<sup>172</sup>—does not “seek to serve”<sup>173</sup> those markets. Therefore, it has not purposefully established minimum contacts with them. Other aspects of Justice Ginsburg’s dissent, however, frame this concern with language that resonates more with the second prong of the standard jurisdictional analysis. The distinction between “a defendant engaged in . . . international trade” and one “whose economic activities and legal involvements are largely home-based” seems to derive from the role that “considerations of litigational convenience and the respective situations of the parties” play in “determin[ing] when it is

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166. *Id.* (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167–69 (1966)).

167. *Id.* at 2804 n.18.

168. *Id.*

169. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 476 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 320 (1945)); *see also supra* text accompanying notes 39–41.

170. *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)) (internal quotation marks omitted).

171. *J. McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

172. *Id.*

173. *Id.* at 2788 (plurality opinion) (“[A] defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors ‘seek to serve’ a given State’s market.” (quoting *World-Wide Volkswagen*, 444 U.S. at 295)); *see also supra* note 59 (discussing Justice O’Connor’s and Justice Brennan’s opinions in *Asahi*, which recognized that a defendant establishes minimum contacts by seeking to serve the market in the forum state).

appropriate to subject a defendant to trial in the plaintiff's community."<sup>174</sup> Such considerations have traditionally been addressed at the second step of the prevailing jurisdictional framework (the reasonableness or fairness prong).<sup>175</sup>

Justice Ginsburg's *McIntyre* dissent may ultimately reflect an approach to jurisdiction that does not draw such a stark boundary between the two inquiries that crystallized during the 1980s. Recognizing that "[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness,"<sup>176</sup> Justice Ginsburg seamlessly presents arguments that sound in both the first<sup>177</sup> and the second<sup>178</sup> prongs. Indeed, some commentators have argued in favor of a less-regimented approach.<sup>179</sup> Such an approach might also find support in the *Burger King* decision. Although *Burger King* was arguably the first Supreme Court case to explicitly disentangle the two inquiries, it suggested that there ought to be some interplay between the two. The Court noted that the second-prong factors might "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."<sup>180</sup> Conversely, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case

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174. *Id.* at 2804 (Ginsburg, J., dissenting) (citing von Mehren & Trautman, *supra* note 166, at 1166–69).

175. *See supra* text accompanying note 170 (listing factors relevant to the reasonableness of jurisdiction).

176. *J. McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

177. *See id.* at 2801 ("McIntyre UK dealt with the United States as a single market . . . McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.").

178. *See id.* at 2800 (arguing that "litigational convenience and choice-of-law considerations point in [the] direction" of "requir[ing] the international seller to defend at the place its products cause injury"); *id.* at 2800–01 ("Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastrò to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?").

179. *See, e.g.*, Linda J. Silberman, "Two Cheers" for *International Shoe* (and None for *Asahi*): *An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 758–59 (1995) (arguing that it was "troublesome" for the Court to "introduce[] an additional layer of analysis—a 'reasonableness' standard—to *International Shoe*'s 'minimum contacts'" and arguing that the minimum contacts test *itself* should be "understood . . . to require that the defendant's activities in the state be balanced against the state's regulatory and litigation interests—hence the requirement that the defendant have 'certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" ). It is harder to tell how the other six *McIntyre* Justices feel about the two-pronged approach. As a logical matter, there was no need for either Justice Kennedy or Justice Breyer to confront the reasonableness or fairness factors, because they had each concluded that *J. McIntyre* had not purposefully established minimum contacts with New Jersey, which is the first requirement of the traditional test. *See* Linda J. Silberman, *Goodyear and Nicastrò: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 595 (2012).

180. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

that the presence of some other considerations would render jurisdiction unreasonable.”<sup>181</sup>

#### V. JUSTICE BREYER’S *MCINTYRE* CONCURRENCE

Justices Breyer and Alito join neither Justice Kennedy’s plurality opinion nor Justice Ginsburg’s dissenting opinion in *McIntyre*.<sup>182</sup> They do concur in the ultimate result reached by the plurality, thus providing the fifth and sixth votes against allowing the New Jersey court to exercise jurisdiction in *McIntyre*. But Justice Breyer’s concurring opinion explicitly rejects the reasoning put forward by Justice Kennedy. In particular, Justice Breyer’s opinion challenges Justice Kennedy’s use of “strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’”<sup>183</sup> Rather, Justice Breyer recognizes (quoting *World-Wide Volkswagen*) that jurisdiction would have been proper if J. McIntyre had “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”<sup>184</sup>

In concluding that jurisdiction was not proper in *McIntyre*, Justice Breyer emphasizes that J. McIntyre’s U.S. distributor “on *one occasion* sold and shipped *one machine* to a New Jersey customer, namely, Mr. Nicaastro’s employer, Mr. Curcio.”<sup>185</sup> He then writes that prior Supreme Court decisions “strongly suggest[] that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.”<sup>186</sup> However, Justice Breyer does not acknowledge a significant tension between his “single sale” idea and the Court’s decision in *McGee v. International Life Insurance Co.*<sup>187</sup> *McGee* upheld jurisdiction in California even though the defendant had “never solicited or done any insurance business in California *apart from the policy involved here.*”<sup>188</sup>

181. *Id.*

182. *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring).

183. *Id.* at 2793 (quoting *id.* at 2788 (plurality opinion)).

184. *Id.* at 2792 (rejecting jurisdiction because Nicaastro “has not otherwise shown that the British Manufacturer ‘purposefully avail[ed] itself of the privilege of conducting activities’ within New Jersey, or that it delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users” (alteration in original) (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98)).

185. *Id.* at 2791 (emphasis added) (citation omitted).

186. *Id.* at 2792.

187. 355 U.S. 220 (1957).

188. *Id.* at 222 (emphasis added). It is puzzling that Justice Breyer relies on *World-Wide Volkswagen* as a “previous holding[]” that “suggest[s]” that a single sale in the forum in insufficient. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring) (citing *World-Wide Volkswagen*, 444 U.S. 286). As Justice Breyer recognizes, *World-Wide Volkswagen* involved “a single sale to a customer who *takes* an accident-causing product to a *different State* (where the accident takes place).” *Id.* (emphasis added). It was not a case where the defendant’s product was

In addition, Justice Breyer's concurrence fails to make a clear connection between some of the underlying jurisdictional principles and the result he reaches. Again, Justice Breyer accepts that jurisdiction would be proper if J. McIntyre had "delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users."<sup>189</sup> However, he does not explain why such an expectation is lacking when a defendant like J. McIntyre retains a U.S. distributor for the express purpose of accessing the U.S. market as a whole. The purpose of such an arrangement is to make sales within the territory that comprises the United States, territory that includes New Jersey. This idea is at the heart of Justice Ginsburg's dissent,<sup>190</sup> and it is significant that Justice Breyer does not call Justice Ginsburg's legal reasoning into question.<sup>191</sup> His only critique of Justice Ginsburg's approach is that she considers information beyond, as he put it, "the facts precisely as the New Jersey Supreme Court stated them."<sup>192</sup>

These aspects of Justice Breyer's concurring opinion prompt several significant questions, some of which are examined in the following two sections. Section A proposes one understanding of Justice Breyer's opinion that can explain why he reaches Justice Kennedy's result but rejects Justice Kennedy's reasoning, and why he disagrees with Justice Ginsburg's result but does not challenge the legal principles Justice Ginsburg employs. Section B then considers potential implications of Justice Breyer's concurrence going forward.

#### A. *Situating Justice Breyer's Concurrence*

One way to make sense of Justice Breyer's opinion is to focus on that single point on which he explicitly disagrees with Justice Ginsburg—the factual record. Justice Breyer's conclusion in *McIntyre* is based on a narrow view of that record.

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both purchased in the forum and caused injury there. See *id.* at 2802 (Ginsburg, J., dissenting) ("Jurisdiction, the [*World-Wide Volkswagen*] Court held, could not be based on the customer's unilateral act of driving the vehicle to Oklahoma." (citing *World-Wide Volkswagen*, 444 U.S. at 298)).

189. See *supra* text accompanying note 184.

190. See *supra* text accompanying notes 159–160 & 164; see also *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting) ("McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States.").

191. Justice Breyer does reject what he calls the "absolute approach adopted by the New Jersey Supreme Court and urged by respondent and his amici." *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring). He explains: "Under that view, 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.'" *Id.* (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010), *rev'd*, *J. McIntyre*, 131 S. Ct. 2780). Notably, Justice Breyer does not attribute this "absolute approach" to Justice Ginsburg.

192. *Id.* at 2792 (citations omitted).

He proceeds on the assumption that the *only* facts offered in support of jurisdiction were these:

(1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco."<sup>193</sup>

What is so telling about Justice Breyer's recounting of the factual record in *McIntyre* is that it excises J. McIntyre's overarching purpose of accessing the entire U.S. market for its products. Whereas Justice Ginsburg saw a defendant who "engaged" a U.S. distributor in order "to promote and sell its machines in the United States,"<sup>194</sup> and who took "purposeful step[s] to reach customers for its products anywhere in the United States,"<sup>195</sup> Justice Breyer saw a defendant who passively "permitted" and "wanted" such sales to occur.<sup>196</sup> With the record framed as Justice Breyer does, it is hard to see how a jurisdictional standard that hinges on a defendant's "purpose[]"<sup>197</sup> could ever be satisfied.

Justice Breyer's view of the factual record also explains how he is able to reach the conclusion that J. McIntyre had not even "delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users."<sup>198</sup> In this regard, much can be learned from what Justice Breyer notes was *missing* from the factual record. Specifically, Justice Breyer indicates that a different result could be justified if the record contained a "list of potential New Jersey customers who might . . . have regularly attended [the] trade shows" that J. McIntyre officials attended;<sup>199</sup> if the record had contained evidence of "the size and scope of New Jersey's scrap-metal business";<sup>200</sup> or if the record revealed more than a single sale to a single New Jersey customer.<sup>201</sup>

193. *Id.* at 2791 (quoting *Nicastro*, 987 A.2d at 578–79); *see also id.* (calling these the "three primary facts" on which the New Jersey Supreme Court "relied most heavily").

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

195. *Id.* at 2797.

196. *Id.* at 2791 (Breyer, J., concurring) (citation omitted).

197. *Id.* at 2793 (noting the "constitutional demand for 'minimum contacts' and 'purposeful[ly] avail[ment]'" (alterations in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 291, 297)).

198. *Id.* at 2792 (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98).

199. *Id.* ("He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows."); *cf. id.* at 2796 n.1 (Ginsburg, J., dissenting) (citing a 2011 member directory listing nearly 100 New Jersey businesses as belonging to the industry group that sponsored the trade shows).

200. *Id.* (Breyer, J., concurring) (noting these as "other facts that Mr. Nicastro could have demonstrated in support of jurisdiction"); *cf. id.* at 2795 (Ginsburg, J., dissenting) (citing van Haaren, *supra* note 100, at 19 tbl. 3) (using 2008 data on scrap metal recycling in New Jersey,



In recognizing that these facts could tip the scale in favor of jurisdiction, Justice Breyer's opinion can be reconciled with Justice Ginsburg's idea that minimum contacts are established when a defendant "seek[s] to exploit a multistate or global market" that includes the forum state.<sup>202</sup> Justice Breyer's logic would merely require a showing that potential customers were likely to exist in the forum state.<sup>203</sup> If the *McIntyre* record had contained (in Justice Breyer's words) a "list of potential New Jersey customers who might . . . have regularly attended [the] trade shows" that J. McIntyre officials attended,<sup>204</sup> or evidence of "the size and scope of New Jersey's scrap-metal business,"<sup>205</sup> then that could create an expectation of purchases by New Jersey consumers. Either fact would confirm—even before any sales were made—that there was a potential market for J. McIntyre's products in New Jersey. Even without such facts, however, the consummation of an actual sale to a New Jersey customer would create that expectation going forward.<sup>206</sup> At that point, J. McIntyre either would know or should know of the potential New Jersey market for its machines.<sup>207</sup> Once an "expectation" of purchases by New Jersey users exists, the act of "delivering its goods in the stream of commerce" could be sufficient to establish minimum contacts if its goods are then purchased in New Jersey and cause injury there.<sup>208</sup> For Justice Breyer, however, no such expectation is

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indicating that New Jersey facilities processed over two million tons of scrap metal in 2008, which was the largest of all the states by a substantial margin).

201. See *supra* text accompanying notes 185–186.

202. *J. McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

203. See *supra* notes 199–201 and accompanying text.

204. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring); see *supra* note 199 and accompanying text.

205. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring); see *supra* note 200.

206. Although Justice Breyer notes that "the relevant facts found by the New Jersey Supreme Court show 'no regular . . . flow' or 'regular course' of sales in New Jersey," *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring), he does not state that such a "regular flow" is required for jurisdiction to be proper. A regular flow or course of sales in New Jersey would have been *sufficient* for jurisdiction, see *id.*, but Justice Breyer makes clear that Mr. Nicastro might also have "otherwise shown that the British Manufacturer . . . delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users." *Id.* (emphasis added) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

207. Accordingly, such additional facts would justify jurisdiction without adopting the "absolute approach" that Justice Breyer rejects. See *id.* at 2793. Under that approach, "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.'" *Id.* (quoting *Nicastro v. McIntyre Machinery Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010), *rev'd*, *J. McIntyre*, 131 S. Ct. 2780). Facts confirming the existence of actual or potential customers in the forum create an "expectation that [the defendant's products] will be purchased" by users in the forum, *id.* at 2792 (internal quotation marks omitted), rather than the mere speculation that a distribution system "*might* lead to those products being sold in any of the fifty states," *id.* at 2793 (citation omitted).

208. See *supra* text accompanying note 184. Justice Breyer's concurrence, therefore, should not be read as endorsing a strict rule that jurisdiction is never proper when only a single sale is made to an in-forum purchaser. If an expectation of in-forum purchases is shown by *other* evidence, see

created when (1) there is only a single sale of the defendant's product to a customer in the forum state, and (2) there is no other evidence in the record suggesting potential customers in the forum state.

One can envision situations where *some* facts of the sort Justice Breyer identifies would be necessary to create a true expectation of purchases by customers in the forum state. Consider, for example, scenarios where a defendant seeks to access the U.S. market as a whole but, as a practical matter, the market for the defendant's products exists only in some states (and not others). A manufacturer of grapefruit-harvesting equipment might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Alaska, North Dakota, or other states where grapefruit are not harvested. A manufacturer of cross-country skis might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Florida, Hawaii, or other states where cross-country skiing does not take place.

This is not to say that the machinery at issue in *McIntyre* presented such a scenario. But if we accept the premise that the burden is on the plaintiff to establish personal jurisdiction over the defendant,<sup>209</sup> one might need some evidence to confirm that a potential market exists in the particular state *within* the United States that seeks to exercise jurisdiction. Such evidence would support the conclusion that the defendant delivered its goods in the stream of commerce with the expectation that they will be purchased by customers in the forum state.<sup>210</sup> This sort of approach is not fundamentally inconsistent with the approach outlined by Justice Ginsburg in her dissent. It would simply require a slightly more robust factual record than Justice Breyer believed was present in *McIntyre*.

### B. Implications of Justice Breyer's Concurrence

This Article examines the potential implications of Justice Breyer's concurrence in two ways. One is what it reveals about how Justices Breyer and Alito would confront jurisdictional issues in future cases. Another is its likely impact on lower courts—state and federal—going forward. On the first issue,

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*supra* text accompanying notes 204–205, then jurisdiction might be proper even if only a single sale is ultimately made. This understanding also reconciles Justice Breyer's concurrence with *McGee*. See *supra* text accompanying notes 186–188. The defendant in *McGee* had only a single customer in the forum (California), but it had a direct relationship with that customer and was unquestionably aware that it was providing life insurance to a California purchaser during the course of that relationship.

209. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) (noting the plaintiff's "burden of proof" with respect to personal jurisdiction). But see John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 517 (2012) (arguing that the defendant should bear the burden of proving that a state court's assertion of jurisdiction is unconstitutional).

210. See *supra* text accompanying note 184.

the most significant aspect of Justice Breyer's opinion may be that he and Justice Alito express a willingness, in some future case, to hit the reset button on existing jurisdictional doctrine. Provided they are able to obtain "a better understanding of the relevant contemporary commercial circumstances," they are potentially open to a "change in present law."<sup>211</sup> In particular, they recognize that "there have been many recent changes in commerce and communication"—notably the development of the internet—that "are not anticipated by our precedents."<sup>212</sup> Justices Breyer and Alito are also keen to learn the U.S. government's views on these issues, noting that the U.S. Solicitor General did not participate in *McIntyre*.<sup>213</sup>

It would be a mistake, therefore, to assume that Justices Breyer and Alito would necessarily follow the logic of their *McIntyre* concurrence when the next case on personal jurisdiction reaches the Supreme Court. We do have a sense, however, that Justices Breyer and Alito are concerned about the effect of a more expansive approach to jurisdiction on smaller manufacturers: "[M]anufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States . . . ."<sup>214</sup> This concern could be vindicated, of course, along the lines that

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211. *J. McIntyre*, 131 S. Ct. at 2794 (Breyer, J., concurring). As discussed *supra* note 115, changing jurisdictional doctrine in some future case would require a justification more compelling than "a present doctrinal disposition to come out differently from the [earlier] Court." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992). The sorts of considerations identified by Justice Breyer, however, are consistent with those that could support a reexamination of prior law. See *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring) ("I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents."); *id.* at 2794 (expressing a desire for "a better understanding of the relevant contemporary commercial circumstances . . . [i]nsofar as such considerations are relevant to any change in present law"); *Planned Parenthood*, 505 U.S. at 855 (noting that a reexamination of prior doctrine is justified when "premises of fact have so far changed . . . as to render it[] . . . somehow irrelevant or unjustifiable in dealing with the issue it addressed").

212. *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring); *id.* at 2793 (criticizing Justice Kennedy's jurisdictional standards by asking "what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?").

213. *Id.* at 2794 (noting that "such considerations . . . might be presented in a case (unlike the present one) in which the Solicitor General participates" and recognizing that the Solicitor General participated in the *Goodyear* case, but declined an invitation at oral argument to give its views on *McIntyre*).

214. *Id.* Justice Breyer's concurrence expresses similar concern for smaller domestic manufacturers who are sued "in a distant State." *Id.* at 2793 ("What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii).").

Justice Ginsburg suggests in her *McIntyre* dissent,<sup>215</sup> or more generally by using the reasonableness prong<sup>216</sup> of the Court's jurisdictional doctrine to protect the smaller manufacturers identified by Justice Breyer.

Whatever ultimately transpires in future Supreme Court cases, Justice Breyer's concurrence may play a significant role in state courts and the lower federal courts because of what is known as the *Marks* rule. In *Marks v. United States*,<sup>217</sup> the Supreme Court wrote that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"<sup>218</sup> Although the contours of the *Marks* rule are murky in some regards,<sup>219</sup> *Marks* certainly means that Justice Kennedy's four-Justice plurality would not constitute the Supreme Court's holding in *McIntyre*. If any opinion qualifies under *Marks* as the one "concurr[ing] . . . on the narrowest grounds,"<sup>220</sup> it would seem to be Justice Breyer's concurrence.<sup>221</sup>

If state and lower federal courts look to Justice Breyer's concurrence as the *McIntyre* holding under the *Marks* rule, they should recognize the points described above as crucial features of that holding: (1) Justice Breyer recognizes the principle articulated in *World-Wide Volkswagen*—that jurisdiction is proper when a manufacturer or distributor "deliver[s] its goods in the stream of commerce 'with the expectation that they will be purchased' by [forum-state] users";<sup>222</sup> (2) Justice Breyer rejects Justice Kennedy's "strict rules that limit

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215. See *id.* at 2804 n.18 (Ginsburg, J., dissenting) ("Assigning weight to the local or international stage on which the parties operate would, to a considerable extent, answer the concerns expressed by Justice Breyer."); see *supra* text accompanying notes 164–167 (describing this part of Justice Ginsburg's dissent).

216. See *supra* text accompanying notes 39–41.

217. 430 U.S. 188 (1977).

218. *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

219. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (stating that the *Marks* test "is more easily stated than applied to the various [Supreme Court] opinions," and that "[i]t does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it" (quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)) (internal quotation marks omitted)).

220. *Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15) (internal quotation marks omitted).

221. For examples of decisions treating Justice Breyer's concurrence as the *McIntyre* holding, see *Ainsworth v. Cargotec USA, Inc.*, No. 2:10-CV-236-KS-MTP, 2011 WL 6291812, at \*2 (S.D. Miss. Dec. 15, 2011) ("[I]n applying [*McIntyre*], the Court must consider Justice Breyer's concurring opinion as the holding of the Court, as he concurred in the judgment on the narrowest grounds." (citing *Ainsworth v. Cargotec USA, Inc.*, No. 2:10-CV-236-KS-TMP, 2011 WL 4443626, at \*6 (S.D. Miss. Sept. 23, 2011)); and *Dram Techs. LLC v. America II Group, Inc.*, No. 2:10-CV-45-TJW, 2011 WL 4591902, at \*2 (E.D. Tex. Sept. 30, 2011) ("Under the rule from *Marks*, the concurring opinion by Justice Breyer, which concurs in the Judgment on much narrower grounds, is the binding holding from the Supreme Court.").

222. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum’;<sup>223</sup> (3) Justice Breyer premises his conclusion that jurisdiction was not proper in *McIntyre* on a narrow view of the factual record in that case;<sup>224</sup> and (4) Justice Breyer recognizes that exercising jurisdiction would be consistent with Supreme Court precedent if the evidentiary record suggested potential customers in the forum state.<sup>225</sup>

## VI. CONCLUSION

The lack of a majority opinion in *McIntyre* is certainly disappointing for those who hoped for “greater clarity” about the permissible scope of jurisdiction in stream of commerce cases,<sup>226</sup> and to resolve the “decades-old questions left open in *Asahi*.”<sup>227</sup> Nonetheless, the three opinions in *McIntyre* are likely to play important roles as the debate over personal jurisdiction unfolds in this new millennium. Those opinions merit close examination, even if they fail to conclusively resolve questions that have long lingered about the Supreme Court’s doctrine on personal jurisdiction.

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223. *Id.* at 2793 (alteration in original) (quoting *id.* at 2788 (plurality opinion)).

224. *See supra* text accompanying notes 193–201.

225. *See supra* text accompanying notes 202–207.

226. *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion).

227. *Id.* at 2785.