
CASE NOTE

A THROWBACK TO LESS ENLIGHTENED PRACTICES: *J. MCINTYRE MACHINERY, LTD. v. NICASTRO*

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INTRODUCTION

In 1953, the Supreme Court decided *Polizzi v. Cowles Magazines, Inc.*, a case arising from an Iowa corporation’s publication of an article about Al Polizzi, an individual living in Coral Gables, Florida.¹ The article—which referred to Polizzi as “one of the ringleaders of a national gang of murderous, blackmailing prostitute-pandering criminals”—was printed in *Look* magazine and circulated throughout Florida.² Affronted by the article, Polizzi demanded the publisher retract it.³ When the publisher refused, Polizzi filed a libel suit in the state court in his home county.⁴ The Court reversed the lower courts’ grant of a motion to dismiss for lack of personal jurisdiction,⁵ but more importantly, it “express[ed] no opinion” as to whether the publisher

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¹ *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 667 (1953) (Black, J., concurring in part and dissenting in part).

² *Id.*

³ *Id.*

⁴ *Id.* at 667-68.

⁵ *Id.* at 665 (majority opinion).

was “doing business” in Florida within the meaning of the requirements established eight years prior in *International Shoe Co. v. Washington*.⁶

Justice Black strongly opposed the Court’s holding. He was incensed that the Court had bypassed the “doing business” question in making its narrow determination.⁷ The personal jurisdiction landscape had changed greatly since *International Shoe*,⁸ and Justice Black was concerned that the Court would revert to old practice, as it had “refused to be bound by old rigid concepts about ‘doing business’” until it decided this case.⁹ As he wrote: “Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness, unless, as seems possible, this case represents a throwback to what I consider less enlightened practices.”¹⁰

While the rationale of *International Shoe* and its progeny were, as Justice Burton rightly predicted in his *Polizzi* opinion, neither “abandoned” nor “impaired”¹¹ after the decision, the personal jurisdiction doctrine may today be facing a variant of Justice Black’s fears.

After two decades of dormancy, the sleeping giant of personal jurisdiction has finally awakened with the Supreme Court’s opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*.¹² However, as in its two most recent personal jurisdiction opinions, the Court was less than univocal.¹³ This Note attempts to understand the reasoning behind *J. McIntyre*, to determine the status of the second prong of the Court’s (in)famous two-part test for personal jurisdiction;¹⁴ to analyze *J. McIntyre*’s effect on personal jurisdiction jurisprudence in the immediate future; and,

⁶ *Id.* at 666 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

⁷ *Id.* at 669 (Black, J., concurring in part and dissenting in part).

⁸ See Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 3 (1998) (observing that *International Shoe* represented a “paradigm shift” in the Court’s jurisprudence).

⁹ *Polizzi*, 345 U.S. at 669-70 (Black, J., concurring in part and dissenting in part).

¹⁰ *Id.* at 670.

¹¹ *Id.* at 672 (Burton, J., concurring in part and dissenting in part).

¹² 131 S. Ct. 2780 (2011).

¹³ *Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality opinion), was decided in a 4-4-1 ruling, and in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) (plurality opinion), the minimum contacts issue (which arguably also caused the split in *J. McIntyre*) was decided in a 4-4-3 ruling (Justices White and Blackmun joined both Justice Brennan’s and Justice Stevens’s concurrences).

¹⁴ A defendant must have “certain minimum contacts with . . . [the forum State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court’s ever-changing opinion of what constitutes fairness and reasonableness, as well as how much weight should be afforded those considerations (if any at all), provided the impetus for this Note.

ultimately, to question whether *J. McIntyre*, too, represents a “throw-back to . . . less enlightened practices.”¹⁵

I. THE DOCTRINE: A THEMATIC REVIEW IN REASONABLE TERMS

Following *International Shoe's* firm proclamation that “traditional notions of fair play and substantial justice” were a dominant feature of personal jurisdiction analysis,¹⁶ the Supreme Court decided several important cases that advanced this fairness standard.¹⁷ In *McGee v. International Life Insurance Co.*,¹⁸ the “high-water mark of personal jurisdiction,”¹⁹ the Court extended the doctrine under “evolving standards of due process”²⁰ when it held that the defendant, a Texas insurance company, was amenable to jurisdiction in California.²¹ Justice Black explained that *McGee's* holding fit within a “clearly discernible” trend “toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.”²² This trend was in large part driven by the “increasing nationalization of commerce” and “modern transportation and communication [that] . . . made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”²³ When the insurance

¹⁵ *Polizzi*, 345 U.S. at 670 (Black, J., concurring in part and dissenting in part).

¹⁶ *International Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

¹⁷ Scholars have thoroughly examined the fifteen or so major cases that make up the Supreme Court's personal jurisdiction jurisprudence. See generally Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 8-28 (2006); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993). In a departure from the typical recitation of the history of the doctrine, however, this Note analyzes why the decision to exercise or deny jurisdiction in each case was the fair and reasonable decision, given that jurisdiction has been defined as a power to create or affect legal interests based on a “relationship to [a] state . . . such as to make the exercise of such jurisdiction reasonable.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24(1) (1971). While power and sufficient contacts are important elements of personal jurisdiction analysis, reasonableness has always been paramount. See, e.g., *id.* cmt. b (“One basic principle underlies all rules of jurisdiction. . . . [A] state does not have jurisdiction *in the absence of some reasonable basis for exercising it.*” (emphasis added)).

¹⁸ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

¹⁹ Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 489 (1984).

²⁰ See *Kulko v. Superior Court*, 436 U.S. 84, 101 (1978) (explaining the holding in *McGee*).

²¹ See *McGee*, 355 U.S. at 224.

²² *Id.* at 222.

²³ *Id.* at 223.

company actively sought to reinsure the plaintiff, and mailed a contract to the plaintiff's home in California, it should reasonably have expected to be sued in California on a cause of action arising from that contract.²⁴ Justice Black's invocation of the expanding scope of state jurisdiction signaled an expansion in the Court's view of the circumstances under which the exercise of personal jurisdiction is reasonable.

In the years following *McGee*, the Court continued to push back on the notion of territorial sovereignty that the minimum contacts test seemed to champion, in favor of a more reasonable and equitable approach. In *Kulko v. Superior Court of California*²⁵—a child custody dispute filed by a California plaintiff-mother against a New York defendant-father—the Court stated that, like any standard requiring a determination of reasonableness, “the ‘minimum contacts’ test of *International Shoe* is not susceptible of mechanical application.”²⁶ Instead, the test requires a case-specific weighing of facts.²⁷ Justice Marshall, writing for the majority, held that “the circumstances in this case clearly render[ed] ‘unreasonable’ California’s assertion of personal jurisdiction”²⁸ and supported that conclusion by “appeal[ing] to communitarian values—objective, public concerns for fairness and reasonableness.”²⁹ In *Kulko*, the Court began to question the notion of territorial sovereignty implicit in the minimum contacts test, advocating a more reasonable and equitable approach and invoking what the Court termed “basic considerations of fairness.”³⁰ According to Justice Marshall, these fairness considerations pointed “decisively in favor of [New York] as the proper forum for adjudication of this case,

²⁴ *Id.*

²⁵ 436 U.S. 84 (1990). In *Kulko*, two New York domiciliaries married in California during a three-day stopover while the husband was en route to military duty overseas. Mrs. Kulko returned to New York, and she was joined by Mr. Kulko at the conclusion of his tour of duty, whereupon they had two children. The couple separated in 1972, and Mrs. Kulko moved to California. Later, Mr. Kulko sent their daughter (at her request) to live with her mother. Two years later, their son went to join his mother in California without Mr. Kulko's consent. Mrs. Kulko then brought an action in California against her ex-husband seeking, *inter alia*, full custody of her children. Mr. Kulko made a special appearance, claiming he lacked minimum contacts with California to warrant its assertion of personal jurisdiction over him. *Id.* at 86-88.

²⁶ *Id.* at 92.

²⁷ *Id.*

²⁸ *Id.* at 96. Justice Marshall specifically refuted the plaintiff's reference to *McGee*, writing that the defendant's activities “cannot fairly be analogized to an insurer's sending an insurance contract and premium notices into the State to an insured resident of the State.” *Id.* at 96.

²⁹ Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 869 (1986).

³⁰ *Kulko*, 436 U.S. at 97.

whatever the merits of [the mother's] underlying claim."³¹ The defendant had merely acquiesced to his daughter's desire to live in California with her mother, and this single act "surely" could not be considered "one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away."³² The Court thus found no basis for the claim that the defendant could reasonably have anticipated being haled before a court in California.³³

Two years later, the Court took these nascent beginnings of a reasonableness test, and endeavored to provide more concrete guidance for courts attempting to apply the "traditional notions of fair play and substantial justice" in the future.³⁴ In *World-Wide Volkswagen Corp. v. Woodson*, the Court refused to allow a state to exercise personal jurisdiction over a nonresident corporation when the only connection between the corporation and the forum was a single product sold in the corporation's home state that proved defective in the forum state.³⁵ Looking to reasonableness, the Court adumbrated several factors for courts to consider, including

the forum State's interest in adjudicating the dispute . . . ; the plaintiffs interest in obtaining convenient and effective relief . . . at least when that interest is not adequately protected by the plaintiffs power to choose the forum . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.³⁶

However, because the Court found that Oklahoma failed the minimum contacts test, the Court chose not to apply these factors to the

³¹ *Id.*

³² *Id.*

³³ *See id.* at 97-98; *see also* Greenstein, *supra* note 29, at 870 (discussing the Court's references to the "nationalization of commerce" and to "modern transportation and communication" from *McGee* in order to distinguish this family law dispute "from the kind of commercial activity in which the significance of state borders diminishes").

³⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

³⁵ *See* 444 U.S. 286, 296-98 (1980) (explaining that the unilateral activity of a consumer taking a company's product into a distant forum is not sufficient to render the company subject to jurisdiction in that forum). *World-Wide Volkswagen* was the first case to address the issue of corporations injecting into the "stream of commerce" products that subsequently injure consumers in the forum state—the plaintiff had purchased a car in New York from a New York corporation and unilaterally brought it to Oklahoma. *See id.* at 306 (Brennan, J., dissenting) (describing the novelty of the majority's reasoning in finding that Oklahoma did not have jurisdiction).

³⁶ *Id.* at 292 (majority opinion).

particular facts of the case.³⁷ Had it done so, the Court most likely would have regarded the exercise of jurisdiction over a small upstate New York car dealership and its regional distributor in regard to an accident that occurred in Oklahoma as unreasonable.

Though the Court discussed the relationship between these new “fair play and substantial justice” factors and minimum contacts in *Burger King Corp. v. Rudzewicz*,³⁸ the Court finally applied the factors in *Asahi Metal Industry Co. v. Superior Court of California* when eight Justices agreed that California’s attempt to obtain jurisdiction over a foreign corporation violated “fair play and substantial justice.”³⁹ First, the burden on the defendant was tremendous given the distance between Japan and California and the differences in both language and legal systems.⁴⁰ Second, although the underlying accident occurred in California, the State had no real interest in the outcome of the ultimately litigated dispute: whether a Japanese parts manufacturer had to indemnify a Taiwanese company.⁴¹ Finally, there was no need to consider the plaintiffs’ interest in the case, as the plaintiff in the original accident (who was not a California resident) had settled and was no longer a party to the suit.⁴² With these factors in mind, the Court held that the suit did not belong in California.⁴³

³⁷ Justice Brennan did apply some of the standards to the facts of the case in his dissent. *See id.* at 300-01, 305 (Brennan, J., dissenting).

³⁸ 417 U.S. 462, 476 (1985) (holding that minimum 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’” (quoting *International Shoe*, 326 U.S. at 320)).

³⁹ *See* 480 U.S. 102, 116 (1987) (plurality opinion). By the time this case reached the Supreme Court, all that remained of the initial products liability action was a dispute between a Taiwanese tire manufacturer (Cheng Shin) and a Japanese valve assembly manufacturer (Asahi) against whom Cheng Shin had cross-claimed, seeking indemnification. Asahi, who had shipped its valves to only Cheng Shin in Taiwan, moved to quash the summons, claiming that California did not have personal jurisdiction over it. *Id.* at 105-08.

⁴⁰ *See id.* at 114 (“The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”)

⁴¹ *See id.* (reasoning that with only foreign parties left in the suit, California’s interest in the case was “considerably diminished”).

⁴² *See id.*

⁴³ *Id.* at 116.

II. THE CASE: NEITHER FAIRLY PLAYED NOR SUBSTANTIALLY JUST

Looking through the lens of reasonableness and fairness, we can now critique *J. McIntyre* in an effort to discern why six members of the Court decided to subsume the “fair play and substantial justice” prong of the personal jurisdiction test under the minimum contacts prong when the former had previously functioned as an *independent*⁴⁴ and essential part of the analysis.⁴⁵

A. *Background*

Robert Nicastro, an employee of Curcio Scrap Metal in Saddle Brook, New Jersey, was operating a recycling machine used to cut metal when his right hand was accidentally caught in the machine’s blades, severing four of his fingers.⁴⁶ The machine, the McIntyre Model 640 Shear, was manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre or J. McIntyre Machinery), a company incorporated in the United Kingdom.⁴⁷ The machine had been sold to Curcio Scrap Metal through J. McIntyre’s exclusive United States distributor,

⁴⁴ See Wendy Collins Perdue, *Sim, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 509-10 (1987) (asserting that the Court in *Asahi* did treat the minimum contacts and reasonableness “as distinct elements, with both necessary in order to support jurisdiction”).

⁴⁵ To be clear, this Note makes no claim either that the Court should absolutely have upheld personal jurisdiction purely on the basis of the fairness standard, or that fairness should take precedence over minimum contacts. Instead, this Note acknowledges that personal jurisdiction had developed into a two-prong standard and argues that it should have remained that way. The *Asahi* Court felt it necessary to engage in a minimum contacts analysis even though eight members of the Court agreed that the result of the Court’s fairness analysis was sufficient to keep the case out of California. See *Asahi*, 480 U.S. at 121 (Stevens, J., concurring in part and concurring in the judgment) (“An examination of minimum contacts is not always necessary to determine whether a state court’s assertion of personal jurisdiction is constitutional.”). The reverse should have been true in *J. McIntyre*—the fairness factors deserved at least some examination, but they were ignored. Cf. Richard D. Freer, Robert Howell Hall Professor of Law, Emory Univ. Sch. of Law, Justice Brennan’s Jurisdictional Jurisprudence: Did He Really Have it His Way?, Speech at the South Carolina Law Review Symposium: Personal Jurisdiction for the Twenty-First Century: The Implications of *McIntyre* and *Goodyear Dunlop Tires* (Oct. 14, 2011), available at <http://video.sc.edu/law/lawrev4brennan.mov>, at 9:34 (stating that Justice Brennan’s opinion in *Burger King* “[c]ame] very close to guaranteeing that fairness factors will always be on the table”).

⁴⁶ See *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010) (providing information on the underlying facts of the case), *rev’d*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

⁴⁷ *Id.*

McIntyre Machinery America, Ltd. (McIntyre America).⁴⁸ Nicastro filed a products liability action against both J. McIntyre and McIntyre America, claiming that the Model 640 Shear “failed to contain adequate warnings or instructions” and that it was lacking a safety guard that would have prevented the accident.⁴⁹

Before the accident, Robert Curcio, the owner of Curcio Scrap Metal, attended an Institute of Scrap Recycling Industries convention in Las Vegas.⁵⁰ During the convention, he visited McIntyre America’s booth and was introduced to the Model 640 Shear.⁵¹ He purchased the machine from McIntyre America for \$24,900 and it was shipped to Curcio from McIntyre America’s headquarters in Ohio.⁵² Although the check was payable to “McIntyre Machinery of America, Inc.,” the Model 640 Shear was affixed with a label stating J. McIntyre Machinery’s name and United Kingdom address.⁵³

It was unclear which company was responsible for J. McIntyre products reaching American hands. Although J. McIntyre and McIntyre America were distinct corporate entities, McIntyre America “structured its advertising and sales efforts in accordance with J. McIntyre’s direction and guidance whenever possible.”⁵⁴ Furthermore, J. McIntyre may have retained ownership of the machines it sent to McIntyre America, evidenced by a letter from J. McIntyre’s president to McIntyre America, which stated, “Please note that th[e] machines are our property until they have been paid for in full.”⁵⁵ The president of J. McIntyre Machinery had attended the convention in Las Vegas, and other officials from J. McIntyre had attended conventions and similar events in Chicago, New Orleans, Orlando, San Diego, and San Francisco, among other cities.⁵⁶ Despite the presence of J. McIntyre officials, however, McIntyre America fielded all requests for information about J. McIntyre’s products at these events.⁵⁷

The New Jersey trial court granted J. McIntyre’s motion to dismiss, stating that J. McIntyre had “no contacts” with the state.⁵⁸ The Appellate

⁴⁸ *Id.*

⁴⁹ *Id.* at 578.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 579.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (emphasis added) (citation omitted). McIntyre America never participated in the lawsuit. The company filed for bankruptcy in 2001. *Id.* at 578 n.2.

Division reversed, holding that New Jersey's exercise of personal jurisdiction "would not offend traditional notions of fair play and substantial justice."⁵⁹ The New Jersey Supreme Court affirmed that decision, holding that a foreign manufacturer that places a product in the stream of commerce "through a distribution scheme that targets a national market, which includes New Jersey" should be subject to personal jurisdiction in New Jersey.⁶⁰ Subsequently, J. McIntyre appealed to the Supreme Court.⁶¹ The Court reversed the judgment of the New Jersey Supreme Court in a 4-2-3 decision, holding that New Jersey could not exercise personal jurisdiction over J. McIntyre.⁶²

B. Justice Kennedy's Plurality Opinion

Patrick Borchers describes Justice Kennedy's plurality opinion as "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era."⁶³ Whether Professor Borchers is correct or not, *J. McIntyre* does represent a "throwback to . . . less enlightened practices"⁶⁴—a retreat to a *Pennoyer v. Neff*-esque⁶⁵ jurisprudence of territorial sovereignty. In *J. McIntyre*, Justice Kennedy purported to answer the "decades-old questions left open in *Asahi*"⁶⁶—questions that had arisen only because none of the writing Justices in *Asahi* could command a majority, thereby leaving the stream-of-commerce theory broken and forcing the lower courts to pick up the pieces.⁶⁷ However, his opinion appears to have abandoned considerations of reasonableness, which is the core of post-*Pennoyer* personal jurisdiction theory.

Attempting to do away with fairness and reasonableness considerations, Justice Kennedy wrote, "Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment

⁵⁹ *Nicastro v. McIntyre Mach. Am., Ltd.*, 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008).

⁶⁰ *McIntyre America*, 987 A.2d at 589.

⁶¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 62 (2010) (granting certiorari).

⁶² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality opinion).

⁶³ Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2011). Professor Borchers goes on to state that the plurality's "saving grace, if one can call it that, is that it attracted only four votes." *Id.*

⁶⁴ *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 670 (1953) (Black, J., concurring in part and dissenting in part).

⁶⁵ 95 U.S. 714 (1878), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

⁶⁶ *J. McIntyre*, 131 S. Ct. at 2785.

⁶⁷ See *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 587-88 nn.10-12 (N.J. 2010) (surveying the landscape of various courts' responses to the *Asahi* opinions).

rendered in the absence of authority into law.”⁶⁸ In the place of fairness and reasonableness analysis, Justice Kennedy described the “general rule” of a sovereign’s exercise of jurisdiction over a defendant as requiring “some act by which the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’”⁶⁹ Justice Kennedy added that “in some cases . . . the defendant might . . . fall within the State’s authority by reason of his attempt to obstruct its laws.”⁷⁰ Applying this general rule, Justice Kennedy found that New Jersey should not be permitted to exercise jurisdiction over J. McIntyre Machinery.⁷¹

Allan Ides portrays Justice Kennedy’s discussion of obstruction of the laws as a version of the *Calder v. Jones*⁷² effects test, in that it describes a condition sufficient for exercising jurisdiction when an out-of-state defendant causes an obstruction of the law in the forum state.⁷³ If Professor Ides is correct, Justice Kennedy’s opinion merely raises the question: How is J. McIntyre Machinery *not* obstructing the laws of New Jersey, or of the United States as a whole, by sending products into its jurisdiction but evading its courts?⁷⁴ Though this is not an intentional tort case, which the Court in *Calder* confronted when creating the effects test, the New Jersey Supreme Court believed that the “preeminent issue” in this case was whether it would “read the Due Process Clause in a way that renders a state powerless to provide relief to a resident who suffers injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey consumer.”⁷⁵ The New Jersey court also believed important policy considerations supported its exercise of jurisdiction, including the state’s compelling and “paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective

⁶⁸ *J. McIntyre*, 131 S. Ct. at 2787.

⁶⁹ *Id.* at 2787 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

⁷⁰ *Id.* at 2787.

⁷¹ *Id.* at 2791.

⁷² 465 U.S. 783 (1984).

⁷³ Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicasro*, 45 LOY. L.A. L. REV. 341, 359 n.82 (2012).

⁷⁴ See Borchers, *supra* note 63, at 1265 (hypothesizing that even Ohio, the location of the U.S. distributor, would fail the plurality’s targeting test, because Ohio was “merely a way station for machines destined for other states,” which would result “in the bizarre conclusion that a foreign distributor, intentionally exploiting the U.S. market (even on the plurality’s account), is nonetheless not amenable to jurisdiction in any state.”).

⁷⁵ *Nicasro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 590 (N.J. 2010).

products in the workplace.”⁷⁶ The New Jersey court acknowledged that it would be “strange indeed” if a New Jersey manufacturer of a defective product—which would clearly be subject to the jurisdiction of New Jersey’s courts—could relocate its operation to a foreign country, sell its products through an exclusive independent distributor to New Jersey consumers, and by virtue of its relocation “suddenly become beyond the reach of one of our injured citizens through this State’s legal system.”⁷⁷ Although J. McIntyre was never based in New Jersey, this hypothetical exposes the Supreme Court’s strange logic and the unfairness of the plurality’s opinion.

Later in his opinion, Justice Kennedy characterized Justice Brennan’s *Asahi* concurrence—which allegedly “discarded the central concept of sovereign authority”⁷⁸ in order to “advocat[e] a rule based on general notions of fairness and foreseeability”—as being “inconsistent with the premises of lawful judicial power.”⁷⁹ According to Justice Kennedy, this conclusion was supported by the fact that the Court in *Burnham v. Superior Court of California* “‘conducted no independent inquiry into the desirability or fairness’ of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant.”⁸⁰ It should be noted, however, that five of the nine Justices in *Burnham*, including Justice Brennan, *did* discuss the fairness of the decision. Justice Brennan stated that unlike the plurality, he “*would* undertake an ‘independent inquiry into the . . . fairness,’”⁸¹ and Justice Stevens stated that the “considerations of fairness identified by Justice Brennan” demonstrated that *Burnham* was “a very easy case.”⁸²

In *J. McIntyre*, Justice Kennedy sought to demonstrate the undesirability of Justice Brennan’s stream-of-commerce theory by describing the hypothetical plight of a small-time Florida farmer.⁸³ In this hypothetical, the small-time farmer sells crops to a distributor who then sells those same crops to supermarkets across the country.⁸⁴ “If foreseeability were the controlling criterion,” Justice Kennedy wrote, “the

⁷⁶ See *id.* at 590 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

⁷⁷ *Id.* at 591.

⁷⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality opinion).

⁷⁹ *Id.* at 2789.

⁸⁰ *Id.* (quoting *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (plurality opinion)).

⁸¹ *Burnham*, 495 U.S. at 629 (Brennan, J., concurring in the judgment) (emphasis added) (quoting *id.* at 621 (plurality opinion)).

⁸² *Id.* at 640 (Stevens, J., concurring in the judgment).

⁸³ *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion).

⁸⁴ *Id.*

farmer could be sued in Alaska or any number of other States' courts without ever leaving town."⁸⁵

In constructing this hypothetical, Justice Kennedy ignores the reasoning of *World-Wide Volkswagen* that if the risks of litigation in a particular state are too great, a corporation (or small-time farmer) can alleviate the risk of adverse litigation by severing ties with that forum.⁸⁶ If the farmer was worried about litigation in Alaska, and was aware that the distributor sent its crops to Alaska, he could stop doing business with the distributor or dictate to the distributor the states to which his products should be shipped.⁸⁷ By basing jurisdiction on contacts alone,⁸⁸ Justice Kennedy creates a line of reasoning that would seem to rule out not only Alaska, but also Georgia and Alabama as possible fora for plaintiffs seeking redress against the farmer.⁸⁹ But if Justice Kennedy had simply based jurisdiction on the fairness analysis discussed in *World-Wide Volkswagen* and other cases—and made binding in *Asahi*—the Alaska court could *reasonably* reject jurisdiction as simply unfair. The burden on a small-time Florida defendant litigating in Alaska would be immense and would be a substantial consideration

⁸⁵ *Id.*

⁸⁶ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (explaining how companies might deal with the likelihood of burdensome litigation under the “purposeful availment” test).

⁸⁷ See Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 374 (2005) (“A defendant exercises control over its jurisdictional exposure at the time that it decides whether to reach out to a forum state. It is at this time that the defendant must consider whether the ‘benefit’ of the contact is worth the ‘burden’ of answering to potential claims in the jurisdiction.”).

⁸⁸ See Freer, *supra* note 45, at 19:50-21:00 (discussing Justice Kennedy’s reasoning as “putting all the eggs in the contacts basket”).

⁸⁹ See Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 234 (2011) (suggesting that Justice Kennedy would allow the denial of jurisdiction for a Manhattan manufacturer who shipped a product to Jersey City—a distance of 9.6 miles); *cf.* Weintraub, *supra* note 19, at 502 (“[T]he reasoning of [*World-Wide Volkswagen*] would have led to the same result if the Audi had been rear-ended and the suit had been brought in Pennsylvania, just across the state line from a courthouse in New York in which the regional distributor was in litigation.”). It is worth noting that there is no explicit basis for the inverse of *World-Wide Volkswagen’s* holding—i.e., that reasonableness would *mandate* jurisdiction in a closer forum—in the Court’s jurisprudence. However, the notion was implied by Justice Brennan in *Burger King*. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 253 n.318 (2004) (addressing Justice Brennan’s implication that a *lack* of a burden on a defendant could be a factor that would support jurisdiction).

in determining whether Alaska should exercise jurisdiction under the fairness standard.⁹⁰

Not only does Justice Kennedy ignore *World-Wide Volkswagen's* reasonableness rationale, he appears to rely on aspects of that decision that were later affirmatively repudiated by the Court. Justice White, writing for the majority in *World-Wide Volkswagen*, attempted to battle against what he viewed as a “substantial[] relax[ation]” of Due Process limitations on personal jurisdiction by adhering to territorial sovereignty as a source of authority.⁹¹ “The sovereignty of each state,” he wrote, “implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.”⁹² However, this mandate was “short-lived.”⁹³ Only two years after arguing that interstate federalism was an additional source of personal jurisdiction authority, Justice White retreated from his *World-Wide Volkswagen* position—perhaps in response to academic criticism⁹⁴—in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.⁹⁵ In a footnote to that opinion, he wrote that the invocation of federalism in *World-Wide Volkswagen* “must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause [which is] the only source of the personal jurisdiction requirement.”⁹⁶ The Court later confirmed *Insurance Corp. of Ireland's* rejection of the sovereignty rationale.⁹⁷

⁹⁰ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985) (“[M]inimum requirements inherent in the concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.” (quoting *World-Wide Volkswagen*, 444 U.S. (plurality opinion) at 292)); see also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (denying jurisdiction on reasonableness grounds).

⁹¹ *World-Wide Volkswagen*, 444 U.S. at 292-93. According to Justice White, if reasonableness factors weigh against a finding of jurisdiction, it is only because the Due Process Clause has acted “as an instrument of interstate federalism” in divesting a sovereign of its power to render a valid judgment. *Id.* at 294.

⁹² *Id.* at 293.

⁹³ Weinstein, *supra* note 89, at 212.

⁹⁴ For arguably the harshest critique of Justice White’s rationale, see Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981). See also Robert J. Condlin, “Defendant Veto” or “Totality of the Circumstances”? *It’s Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 79 n.163 (2004) (“The difficulty of justifying the use of sovereignty factors had been recognized for a long time, but the Redish article made the objection too powerful to be ignored any longer.”).

⁹⁵ 456 U.S. 694 (1982).

⁹⁶ *Id.* at 702 n.10.

⁹⁷ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (“[W]e explained [in *Insurance Corp. of Ireland*] that the requirement that a court have personal jurisdiction . . . represents a restriction on judicial power *not as a matter of sovereignty*, but as a

Despite this rejection, and despite his acknowledgement that “[p]ersonal jurisdiction, of course, restricts ‘judicial power not as a matter of sovereignty, but as a matter of liberty,’” Justice Kennedy maintains that sovereignty is the single determinant of a judgment’s lawfulness.⁹⁸ He argues that, because of the “unique genius of our Constitution,” it is possible that an individual or entity could be subject to the jurisdiction of the courts of the United States but not of the courts of any particular state.⁹⁹ Justice Kennedy posits that the balance of power between states requires that a state not unlawfully intrude upon the sovereignty of another state,¹⁰⁰ but he offers no example of a state sovereignty that would be unlawfully intruded upon should New Jersey exercise jurisdiction over this matter.¹⁰¹

As a final note, Justice Kennedy offers no guidance as to how Robert Nicastro would be able to pursue his suit in *any* forum. He suggests that perhaps Congress would legislate on the issue to authorize jurisdiction in “appropriate courts.”¹⁰² But the meaning of that term is unclear, and regardless, how likely is it that Congress will take action on behalf of Mr. Nicastro?¹⁰³ Justice Kennedy’s opinion posits that, short of traveling to the United Kingdom, Nicastro will be unable to recover for his injuries.¹⁰⁴

C. Justice Breyer’s Concurrence

Justice Breyer, in his concurrence in the judgment joined by Justice Alito, states that the Court has never found that a “single isolated sale,” and indeed even a sale accompanied by a sales effort of J. McIntyre Machinery’s caliber, is sufficient to establish personal jurisdiction.¹⁰⁵

matter of personal liberty.” (emphasis added) (internal quotation marks omitted)); see also Parrish, *supra* note 17, at 14 (arguing that any doubt that personal jurisdiction has a basis in sovereign authority was “eradicated” by the Court in *Insurance Corp. of Ireland*).

⁹⁸ J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (plurality opinion) (quoting *Insurance Corp. of Ireland*, 456 U.S. at 702).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 2798 (Ginsburg, J., dissenting) (“Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.”).

¹⁰² *Id.* at 2790 (plurality opinion).

¹⁰³ Cf. Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 137 (1983) (“The fact that Congress has singled out certain classes of cases for extended service [of process], while leaving the balance to be governed by state long-arm statutes, again weakens the argument for enlarging jurisdiction by federal common law.”).

¹⁰⁴ See Richman, *supra* note 17, at 602 n.19 (“When the plaintiff’s alternative forum is another country, rather than another state, a jurisdictional dismissal is often fatal.”).

¹⁰⁵ *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment).

Citing only *World-Wide Volkswagen*, he wrote, “The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction.”¹⁰⁶

But this proposition is incorrect. Unlike *World-Wide Volkswagen*, the metal shearing machine was not sold in another state and taken, “uni-lateral[ly],”¹⁰⁷ to the forum where it caused injury to the plaintiff.¹⁰⁸ This machine was delivered—quite possibly directly from J. McIntyre Machinery itself¹⁰⁹—to New Jersey, the state where it caused the injury.¹¹⁰ Furthermore, J. McIntyre is not the small-time upstate New York dealership suddenly subject to a products liability suit in Oklahoma.¹¹¹ Yet, one could infer from Justice Breyer’s opinion that he finds J. McIntyre Machinery and the New York dealership in *World-Wide Volkswagen* to be indistinguishable.¹¹² First, let us not forget the Court’s words in *World-Wide Volkswagen*—a case Justice Breyer is all too eager to compare to *J. McIntyre*—that where the sale of a product arises from a manufacturer’s efforts to sell its product in several states, “it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or others.”¹¹³ Second, unlike the dealership in *World-Wide Volkswagen*, J. McIntyre Machinery is a well-established manufacturer of scrap

¹⁰⁶ *Id.*

¹⁰⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁰⁸ In *World-Wide Volkswagen* the plaintiff brought the car from New York to Oklahoma. See Ides, *supra* note 73, at 372 (describing Justice Breyer’s retelling of the Court’s holding in *World-Wide Volkswagen* as “descriptively accurate, but . . . somewhat misleading in the present context, [as t]he holding in *World-Wide Volkswagen* instead turned on how the product *reached* the forum state,” not the fact that it was *sold* there (emphasis added)).

¹⁰⁹ Scholars have questioned the path the metal shearing machine took to reach New Jersey. See Alan B. Morrison, *The Impacts of McIntyre on Minimum Contacts*, 80 GEO. WASH. L. REV. ARGUENDO 1, 3 (2011), http://groups.law.gwu.edu/LR/ArticlePDF/Morrison_SME_Arguendo.pdf (suggesting that it would have been more practical for J. McIntyre Machinery to ship the machine directly to New Jersey rather than to McIntyre America in Ohio to then be shipped to New Jersey).

¹¹⁰ See Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 109-10 (1991) (discussing how, in *World-Wide Volkswagen*, the Court “left the lower courts . . . to grapple with the distinction . . . apparently made between goods which are brought into a state by consumers and cause injury and goods which are sent into the state by a manufacturer or distributor, purchased there by a ‘consumer,’ and then cause injury”).

¹¹¹ *World-Wide Volkswagen*, 444 U.S. at 288.

¹¹² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring in the judgment).

¹¹³ *World-Wide Volkswagen*, 444 U.S. at 297.

metal shearing machines that chose to employ an exclusive distribution system “with the express goal of exploiting the entire U.S. market.”¹¹⁴

Later in his opinion, Justice Breyer offers his own hypothetical:

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).¹¹⁵

Professor Ides lambasts Justice Breyer for using this hypothetical to avoid confronting the issues present in this case.¹¹⁶ He argues that while Justice Breyer “worries” about the harm and inconvenience that could befall potential defendants under such a broad jurisdictional regime, he has “no parallel concern” for any consumers who would be injured by his imaginary defendants’ products sold into the U.S. market.¹¹⁷ Regardless of the implications of the comparison between J. McIntyre Machinery and the Appalachian potter, Justice Breyer’s hypothetical case could, just as Justice Kennedy’s, be disposed of easily, reasonably, and fairly.¹¹⁸ But by framing the case in this way, Justice Breyer, like Justice Kennedy, has essentially (and unnecessarily) ruled out allowing jurisdiction in a closer forum.¹¹⁹

Now, if one were to take a page out of the Kennedy-Breyer play-book and compare J. McIntyre Machinery to any of the past personal jurisdiction defendants (real or hypothetical), the corporation is much more akin to the Court’s characterization of the defendants in *Burger King*—savvy businessmen who were aware of the nature of the franchising business and knew how to negotiate a contract¹²⁰—than anyone else. There seem to be two defendant archetypes: the “Appalachian potter”-type and the “experienced and sophisticated businessman”-type. It is well within the “traditional notions of fair play and substantial justice”¹²¹ to consider subjecting one of these types of defendants to jurisdiction, and not the other. Identifying whether a

¹¹⁴ Ides, *supra* note 73, at 379.

¹¹⁵ *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).

¹¹⁶ Ides, *supra* note 73, at 379.

¹¹⁷ *Id.* at 379 n.147.

¹¹⁸ See *supra* text accompanying notes 86-90.

¹¹⁹ See Freer, *supra* note 45, at 20:00.

¹²⁰ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80, 484 (1985) (discussing the “sophisticated” franchisees’ “deliberate” choice to negotiate the franchise agreement).

¹²¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

defendant is one type or the other in personal jurisdiction cases should be fairly straightforward.

D. *Justice Ginsburg's Dissent*

Justice Ginsburg, who “has been quoted more than once as saying that she would write the opinions for all the procedure cases that come before the Court if only her colleagues would let her,”¹²² was only able to garner the votes of Justices Sotomayor and Kagan in her dissent. According to Justice Ginsburg, “the splintered majority . . . ‘turn[ed] 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.’”¹²³

Justice Ginsburg, though not specifically mentioning the fair play and substantial justice analysis from *World-Wide Volkswagen*, *Burger King*, and *Asahi*, argued that holding J. McIntyre Machinery amenable to suit in New Jersey would be both fair and reasonable under the circumstances.¹²⁴ She attacked the plurality’s adherence to sovereignty first by invoking *Shaffer v. Heitner*, which stated that, in then-contemporary personal jurisdiction jurisprudence, “the mutually exclusive sovereignty of the States [is not] . . . the central concern of the inquiry into personal jurisdiction.”¹²⁵ She also maintained that the Court had already clarified that the Due Process Clause, which contains no mention of federalism or state sovereignty concerns, is the *only* constitutional source of the personal jurisdiction requirement.¹²⁶

Justice Ginsburg argued that the modern approach to jurisdiction, beginning with *International Shoe*, “gave prime place to reason and fairness.”¹²⁷ With that primacy in mind, she reasoned that convenience and choice-of-law considerations “point in th[e] direction” of requiring the burden to be placed on J. McIntyre Machinery.¹²⁸ “On

¹²² Tobias Barrington Wolff, *Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy*, 70 OHIO ST. L.J. 839, 840 (2009).

¹²³ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2795 (2011) (Ginsburg, J., dissenting) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).

¹²⁴ *Id.* at 2804.

¹²⁵ 433 U.S. 186, 204 & n.20 (1977).

¹²⁶ *J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting); see also *supra* note 96 and accompanying text.

¹²⁷ *J. McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

¹²⁸ *Id.*; see also Freer, *supra* note 45, at 22:40 (relating Justice Ginsburg’s discussion of various reasonableness factors to Justice Black’s approach in *McGee*).

what measure of reason and fairness,” she asked, “can it be considered undue to require [J.] McIntyre [Machinery] to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?”¹²⁹ Justice Ginsburg subscribed to the theory, rejected by the plurality, that the United States be considered a single national market.¹³⁰ When a party has purposefully availed itself of the benefits in that single market, any state can hale that party into its courts.

The requirement of purposeful availment “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”¹³¹ Justice Ginsburg was not concerned with specific state markets, emphasizing instead that the company’s products were sold somewhere in the United States. Because J. McIntyre itself (through its exclusive distributor) targeted the United States as a whole, states within the United States should be able to exercise jurisdiction over J. McIntyre. Further, when J. McIntyre sold the offending machine to a consumer in New Jersey, its affiliation with the forum—which is the determinative issue in specific jurisdiction cases—could not be called “random,” “fortuitous,” or “attenuated.”¹³²

Justice Ginsburg urged that the burden be placed on the distributor to defend in New Jersey because defending in such a forum is a “reasonable cost of transacting business internationally,” compared to the burden on Robert Nicastro to travel to England to recover for his injuries.¹³³ “[I]t would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer’s products caused injury.”¹³⁴ And yet that is just what the plurality did.

¹²⁹ *Id.*

¹³⁰ *See id.* at 2801 (concluding that McIntyre “purposefully availed itself of the United States market nationwide, not a market in a single State or a discrete collection of States” (internal quotation marks omitted)); *see also* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 805 (1987) (noting that, after *Asahi*, some lower courts have found a minimum contacts analysis satisfied by “allowing consideration of the defendant’s contacts with the nation as a whole, rather than simply those with the forum”).

¹³¹ *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

¹³² *Id.* (quoting *Burger King*, 471 U.S. at 475).

¹³³ *Id.*; *see also supra* notes 103-104 and accompanying text.

¹³⁴ *J. McIntyre*, 131 S. Ct. at 2801-02 (Ginsburg, J., dissenting). Justice Ginsburg cites several cases in support of this proposition, in which “an alien or out-of-state corporation . . . through a distributor, targeted a national market, including any and all States” and jurisdiction over that entity was maintained). *Id.* at 2804.

III. THE AFTERMATH: STICKING TO THE STATUS QUO?

After waiting over two decades for clearer guidance on personal jurisdiction cases, lower courts have once again been tasked with the interpretation of a Supreme Court plurality opinion. Without binding authority from above, it is not surprising that, in the wake of *J. McIntyre*, few courts have changed their personal jurisdiction framework. Most courts have either explicitly stated that *J. McIntyre* has changed nothing¹³⁵ or have *sub silentio* continued to use their pre-*J. McIntyre* tests for personal jurisdiction.¹³⁶ Such a division in lower courts leads not only to uncertainty in the law and “undesirable” forum shopping,¹³⁷ but also engenders a system in which litigants’ right to access the courts is determined on a court-by-court basis. The confusion caused by the Court’s abandonment of a reasonableness and fairness standard is evident in the *Cargotec* cases,¹³⁸ a pair of post-*J. McIntyre* cases whose facts bear a striking resemblance to their predecessor.

The *Cargotec* cases involve forklifts designed and manufactured by Moffett Engineering, Ltd., an Irish corporation with its principal place of business in Dundalk, Ireland.¹³⁹ In both cases, the company claimed no direct connection with the forum state.¹⁴⁰ The company has no employees or agents stationed in the forum states, it never ships products directly to those states, and it never directly solicited business from companies located in those states.¹⁴¹

¹³⁵ See, e.g., *Windsor v. Spinner Indus. Co.*, No. 10-0114, 2011 WL 5005199, at *4 (D. Md. Oct. 20, 2011) (considering *J. McIntyre* in detail and concluding that the case generally “affirms the status quo”).

¹³⁶ See, e.g., *Adelson v. Hananel*, 652 F.3d 75, 80-84 (1st Cir. 2011) (applying the same test the First Circuit used prior to *J. McIntyre*); *Furminator, Inc. v. Wahba*, No. 10-1941, 2011 WL 3847390, at *3 (E.D. Mo. Aug. 29, 2011) (applying previously existing Circuit precedent). In fact, now more than ever, “the courts are rediscovering that plurality opinions do not mean that much.” Gary A. Magnarini, *Jurisdiction Over Foreign-Nation Manufacturers: Tracking the Resurgent “Stream of Commerce” Theory*, 68 FLA. B.J. 38, 40 (March 1994).

¹³⁷ Angela M. Laughlin, *This Ain’t the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 682 (2009).

¹³⁸ The individual cases are *Ainsworth v. Cargotec USA, Inc.*, No. 10-0236, 2011 WL 4443626 (S.D. Miss. Sept. 23, 2011), and *Lindsey v. Cargotec USA, Inc.*, No. 09-0071, 2011 WL 4587583 (W.D. Ky. Sept. 30, 2011).

¹³⁹ *Lindsey*, 2011 WL 4587583, at *1; *Ainsworth*, 2011 WL 4443626, at *1.

¹⁴⁰ *Lindsey*, 2011 WL 4587583, at *1; *Ainsworth*, 2011 WL 4443626, at *1.

¹⁴¹ *Lindsey*, 2011 WL 4587583, at *1; *Ainsworth*, 2011 WL 4443626, at *1.

Moffett sells all of its products to Cargotec USA, Inc., which, in turn, markets and sells Moffett's products throughout the United States.¹⁴² Under a contract between the two companies, Cargotec has the "exclusive right" to market and sell Moffett's products.¹⁴³ The contract defines Cargotec's sales territory as the "United States," and Cargotec markets and sells Moffett products in all fifty states.¹⁴⁴ Moffett does not direct and has no knowledge of Cargotec's sales activity; it does not communicate with the retail purchasers of its products.¹⁴⁵ According to the evidence submitted, "Moffett remains wholly unaware of who the purchaser is or where they are located."¹⁴⁶ Despite its alleged ignorance of Cargotec's activities, Moffett products have sold well in the United States; since the year 2000, Moffett has sold 13,073 forklifts to Cargotec,¹⁴⁷ and the value of these forklifts exceeds \$460 million.¹⁴⁸

In *Ainsworth v. Cargotec USA, Inc.*, a Mississippi resident was struck and killed by one of Moffett's forklifts.¹⁴⁹ The U.S. District Court for the Southern District of Mississippi had previously denied Moffett's motion to dismiss for lack of personal jurisdiction, but Moffett filed a motion for reconsideration in the wake of *J. McIntyre*.¹⁵⁰ In response to Moffett's motion for reconsideration, the district judge stated that because Justice Breyer did not choose between the *Asahi* opinions,¹⁵¹ and because he did not reject the notion that "mere foreseeability or awareness is a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the

¹⁴² *Ainsworth*, 2011 WL 4443626, at *1.

¹⁴³ *Id.*; see also *Lindsey*, 2011 WL 4587583, at *8 ("Cargotec has the exclusive right to market and sell Moffett's products in the United States.").

¹⁴⁴ *Ainsworth*, 2011 WL 4443626, at *1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ The opinion cited an amount of 254 million Euro. *Id.* at *1. The figure above was calculated using the exchange rate the judge utilized later in the opinion. See *id.* at *7 (calculating the likely value of the sales in American currency).

¹⁴⁹ *Id.* at *1.

¹⁵⁰ See *id.* at *2.

¹⁵¹ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion) (O'Connor, J.) (stating that without "[a]dditional conduct," "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum State."); see also *id.* at 117 (Brennan, J., concurring in the judgment) ("As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.")

stream of commerce,”¹⁵² *J. McIntyre* “is rather limited in its applicability.”¹⁵³ Justice Breyer’s opinion did not provide the district court with any grounds to depart from binding Fifth Circuit precedent, which had “establish[ed] Justice Brennan’s *Asahi* opinion as the controlling analysis.”¹⁵⁴ Stating that, at best, *J. McIntyre* is applicable to cases in which the facts are the same, the court cited the sale of 203 forklifts to Mississippi customers over the previous decade as sufficient minimum contacts to remove the case from “the scope of *McIntyre*’s applicability,” and the motion for reconsideration was denied.¹⁵⁵

A second suit alleging similar facts, *Lindsey v. Cargotec USA, Inc.*, was filed in the U.S. District Court for the Western District of Kentucky.¹⁵⁶ Unlike the Fifth Circuit, the Sixth Circuit follows Justice O’Connor’s *Asahi* plurality opinion.¹⁵⁷ But, as in *Ainsworth*, because the Supreme Court in *J. McIntyre* did not conclusively define the scope of the stream-of-commerce theory, and because Justice Breyer chose to rely on current Court precedent, the *Lindsey* court decided that *J. McIntyre* had given it no cause to abandon Justice O’Connor’s standard.¹⁵⁸ *However*, on roughly the same facts regarding the relationship between

¹⁵² *Id.* at *5 (citing *Luv N’ Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006)).

¹⁵³ *Id.* at *7.

¹⁵⁴ *See id.*; *see also* *Garland v. Roy*, 615 F.3d 391, 399 (5th Cir. 2010) (explaining that in the Fifth Circuit, “[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 judgment on the narrowest grounds.” (citation omitted) (internal quotation marks omitted)).

¹⁵⁵ *Ainsworth*, 2011 WL 4443626, at *7.

¹⁵⁶ *Lindsey v. Cargotec USA, Inc.*, No. 09-00071, 2011 WL 4587583 (W.D. Ky. Sept. 30, 2011). The Kentucky Supreme Court recently ruled that Kentucky’s long-arm statute, KY. REV. STAT. ANN. § 454.210(2)(a) (Lexis Nexis 2008), is not coterminous with the Due Process Clause of the Constitution and instead involves a two-step process. *See Hinners v. Robey*, 336 S.W.3d 891, 895 (Ky. 2011) (“[T]he proper analysis of long-arm jurisdiction over a nonresident defendant consists of a two-step process under which review first proceeds under [section] 454.210 and, if jurisdiction is permissible under the long-arm statute, only then is jurisdiction under federal due process examined.” (internal quotation marks omitted)). The court in *Lindsey* opted to skip the first step, because, according to the court, an exercise of jurisdiction would violate due process regardless of the analysis under the statute. *Lindsey*, 2011 WL 4587583, at *2. Although the court skipped the first of the two steps, it seems as though the corporation would be within the reach of the long-arm statute, given the facts of the case. *See, e.g., Hinners*, 336 S.W.3d at 896 (“A plain reading of the statutory language produces the interpretation that . . . the contract provide for the supplying of services or goods to be transported into, consumed or used in Kentucky.”).

¹⁵⁷ *See Lindsey*, 2011 WL 4587583, at *4 (asserting that the Sixth Circuit does not consider a defendant’s placement of a product into the stream of commerce sufficient to constitute an act of purposeful direction).

¹⁵⁸ *Id.* at *7.

Moffett and Cargotec,¹⁵⁹ the court determined that “[b]ecause Moffett’s distribution agreement with Cargotec to market and sell forklifts to the national market is *not* conduct that targets any specific forum State, . . . and in light of Moffett’s lack of control over the distribution,” Moffett showed no purposeful availment of Kentucky’s laws sufficient to meet Justice O’Connor’s standard.¹⁶⁰ Thus the motion to dismiss for lack of personal jurisdiction was granted.¹⁶¹ These two cases involved the same manufacturer, the same distributor, the same distribution agreement, the same defective forklift model, and the same Supreme Court case, but resulted in opposite holdings. Where is the fair play and substantial justice in that?

CONCLUSION

With *Asahi*, the Court inaugurated a period of great uncertainty in personal jurisdiction jurisprudence, and now, over twenty-five years later, state and lower federal courts still find themselves in the dark. Faced with obvious doctrinal confusion, and an opportunity to correct the problem, the Court in *J. McIntyre* failed to clear the murky waters. The damage to the reasonableness and fairness standard may be irreparable. If the Court’s reasoning in *J. McIntyre* holds, defendants could, by having sufficiently few contacts with any single state, escape jurisdiction in *all* states.

The Court in *McGee* spoke of the “increasing nationalization of commerce”¹⁶² as the grounds for expanding the “permissible scope of state jurisdiction.”¹⁶³ Nearly six decades after that decision, the increasingly *global* nature of commerce is undeniable. The Court recognized more than 50 years ago that concepts such as “‘consent,’ ‘doing business,’ and ‘presence’” were poor standards for “measuring the extent of state judicial power over [foreign] corporations.”¹⁶⁴ What was true in 1957 should be true in 2012; the New Jersey Supreme Court reasoned in this case that, in light of our changing global economy, we must “discard outmoded constructs of jurisdiction” in products liability cases like the one then before the court and choose

¹⁵⁹ See *id.* at *7-12 (outlining the business arrangement between Moffett and Cargotec).

¹⁶⁰ *Id.* at *10 (quoting *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, No. 08-5489, 2011 WL 3702423, at *12 (D.N.J. Aug. 22, 2011)) (internal quotation marks omitted).

¹⁶¹ *Id.*

¹⁶² *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

¹⁶³ *Id.* at 222.

¹⁶⁴ *Id.*

a standard that will provide relief to those “harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.”¹⁶⁵

The *Cargotec* dichotomy shows that, whatever else the Court does, it must at least choose a standard. Unless justice is different in Mississippi than it is in Kentucky, the present mode is unsustainable. Although this Note argues that the “traditional notions of fair play and substantial justice”¹⁶⁶ standard is the best standard, it is in the best interests of future litigants that the Court at least agree on *a* standard. Whatever the personal jurisdiction standard may be, it must take into account current business practice and the foreseeable needs of plaintiffs who seek redress in the courts of their home states.

Preferred Citation: Zach Vosseler, Case Note, *A Throwback to Less Enlightened Practices: J. McIntyre Machinery, Ltd. v. Nicastro*, 160 U. PA. L. REV. PENNUMBRA 366 (2012), <http://www.pennumbra.com/casenotes/5-2012/Vosseler.pdf>.

¹⁶⁵ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 591 (N.J. 2010).

¹⁶⁶ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).