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A FORK IN THE STREAM:
THE UNJUSTIFIED FAILURE OF THE CONCURRENCE IN *J. MCINTYRE MACHINERY LTD. V. NICASTRO* TO CLARIFY THE STREAM OF COMMERCE DOCTRINE
Cody Jacobs*

I. Introduction

A foreign manufacturer sells a product to an American distributor in State A, who then resells the product to an American consumer in State B. The consumer is injured by the product and attempts to sue the foreign manufacturer in State B. Can State B exercise personal jurisdiction over the manufacturer? This deceptively simple and seemingly common question, and related questions involving the so-called ‘stream of commerce’ have fractured the United States Supreme Court for over 20 years, leaving consumers, manufacturers and distributors unsure of their rights and potential liabilities. This article is about a recent missed opportunity the Court had to solve that problem, and why two of its Members erred in declining to do so.

In 1987, in *Asahi Metal Industry Co. v. Superior Court*,¹ the Court split four to four on the level of ‘purposeful availment’ of a particular state’s laws a foreign manufacturer must engage in to trigger the assertion of personal jurisdiction over a foreign manufacturer. Two opinions for four Justices each presented competing approaches to this problem. One approach allowed jurisdiction to be asserted whenever a manufacturer placed its wares into the stream of commerce with the knowledge or expectation that those goods were likely to end up in a

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¹ 480 U.S. 102 (1987).

particular state. Another approach required ‘something more’ before jurisdiction could be asserted to show that the manufacturer specifically intended to target the forum at issue. This split left lower courts without clear guidance on this issue and created uncertainty for litigators and companies in an area of the law that was already without many ‘bright line’ rules.

In 2011, it seemed as if the Court was going to finally clear up this ambiguity in *J. McIntyre Machinery, Ltd. v. Nicaastro*,² a case with facts roughly similar to the question presented in *Asahi*. However, the Court again could not come up with five votes for one particular test. A plurality of four Justices essentially supported the ‘something more’ approach, while a dissent for three Justices supported something akin to the ‘knowledge or expectation’ approach outlined in *Asahi*. Justices Breyer and Alito, concurring in the judgment, declined to choose between these competing approaches because they felt *Nicaastro* presented an inappropriate vehicle to decide this issue since it did not concern issues of modern technology, such as issues raised by the internet.

This article critiques that concurrence by arguing that either of the competing approaches to the stream of commerce test presented in *Asahi* and reiterated in *Nicaastro* would be preferable to the current uncertainty in this area of the law. This article argues that modern technology does not significantly change the calculus in this area because a relatively well-established test for evaluating internet ‘contacts’ already exists and would be largely unaffected by the choice between the two approaches to the stream of commerce doctrine. Part II describes the history of the Supreme Court’s modern personal jurisdiction jurisprudence starting with *International Shoe*

² 564 U.S. ___, 131 S.Ct. 2780 (2011).

and ending with *Asahi*. Specifically, it focuses on the development of two principles in personal jurisdiction jurisprudence during this time period and the tension between those two concepts: the requirement of purposeful availment and the expansion of the stream of commerce test. Part III examines *Nicastro* itself and the reaction to that decision. Part IV discusses why a clear rule is particularly desirable and important in this area both for practical reasons and for doctrinal consistency with other due process clause jurisprudence. Part V explains why the concerns expressed by the *Nicastro* concurrence about modern technology should not be an impediment to choosing between the two competing approaches to the stream of commerce theory. Finally, Part VI concludes with the hope that the next time the Supreme Court confronts this issue; a majority of Justices will be able to choose one of these approaches to provide a little more clarity for companies, consumers, litigators, and courts.

II. History Of The Supreme Court’s Personal Jurisdiction Jurisprudence And The Stream Of Commerce Theory

In the years leading up to the Court’s 1987 decision in *Asahi*, two trends emerged that seemed to be at loggerheads with each other. On the one hand, the Court consistently required some sort of intent on the part of the defendant to avail itself of the forum before personal jurisdiction could be exercised.³ At the same time, the scope of personal jurisdiction expanded to adapt to the realities of the rapidly expanding national and global marketplace⁴ and some lower courts advocated a “stream of commerce” test whereby the act of placing a chattel into the

³ See *Burger King*, 471 U.S. at 474-75.

⁴ See Lindy Burris Arwood, *Personal Jurisdiction: Are the Federal Rules Keeping Up with (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 997-98 (2005) (noting the Supreme Court’s expansion of personal jurisdiction in the second half of the twentieth century in response to the modern market place and modern technology).

stream of commerce where it was likely to end up in a particular forum was enough to subject a defendant to jurisdiction in that forum.⁵

The Court had an opportunity to reconcile these issues in *Asahi*, but instead produced a fractured opinion, with four Justices favoring a stricter test of purposeful availment⁶ and four Justices favoring adoption of a broad version of the “stream of commerce” test.⁷

a. Background

Modern personal jurisdiction jurisprudence began with the famous case of *International Shoe v. Washington*.⁸ There, the defendant, a Delaware corporation, hired a team of salesmen to sell shoes in Washington.⁹ The state of Washington sought to collect certain taxes from the defendant and the defendant refused arguing, among other things, that it was not subject to personal jurisdiction in Washington.¹⁰

⁵ See Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 259 (1989) (“Under this standard, as liberally interpreted, jurisdiction was upheld not only over manufacturers who intentionally marketed their products in the forum but over manufacturers who merely knew or should have known that their products would or could reach the forum.”).

⁶ 480 U.S. at 112 (opinion of O’CONNOR, J.).

⁷ *Id.* at 116-18 (opinion of BRENNAN, J.).

⁸ 326 U.S. 310 (1945).

⁹ *Id.* at 313-14.

¹⁰ *Id.* at 312-14.

The Court used this case to move away from traditional rules of personal jurisdiction that only allowed the assertion of jurisdiction when a defendant was physically present in a forum.¹¹ Instead, the Court turned the focus to whether a defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹² In the context of corporate defendants the Court noted that whether the Due Process Clause allows the assertion of personal jurisdiction “must depend . . . upon the quality and nature of the activity [engaged in by the corporation in the forum] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause [sic] to ensure.”¹³ The Court went on to hold that the exercise of jurisdiction was proper in that case because the defendant’s operations in Washington had “resulted in a large volume of interstate business, in the course of which [the defendant] received the benefits and protections” of the laws of Washington, and “the current suit arose out of those very activities.”¹⁴

In the years since *International Shoe*, the Court refined the test for personal jurisdiction into one having two distinct requirements. First, the defendant must have sufficient minimum contacts with the forum to avail itself of the laws of the forum.¹⁵ For corporate defendants, these sorts of contacts typically involve things such as having offices in the forum, conducting

¹¹ *Id.* at 316.

¹² *Id.* (quoting *Milliken v. Meyer*, 311 U. S. 457, 463 (1940))

¹³ 326 U.S. at 319.

¹⁴ *Id.* at 320.

¹⁵ See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); see also *Burger King Corp.*, 471 U.S. at 475 (contacts for purposes of personal jurisdiction are “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.”).

business in the forum, sending employees to the forum or advertising in the forum.¹⁶ Second, even if minimum contacts are established, the exercise of personal jurisdiction must be consistent with “traditional notions of fair play and substantial justice.”¹⁷ “[T]he reasonableness of the exercise of jurisdiction in each case . . . depend[s] on an evaluation of several factors[:.]” the burden on the defendant, the interests of the forum state and the plaintiff’s interest in obtaining relief.¹⁸ A court must also consider “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.”¹⁹

The Supreme Court has also delineated two different types of personal jurisdiction, general jurisdiction and specific jurisdiction.²⁰ General jurisdiction allows a state to hear any and all claims against a corporation, whether or not those claims are connected to the state’s contacts with the state.²¹ A showing that general jurisdiction may be asserted over a foreign corporation requires that the corporation have “affiliations with the State [which] are so ‘continuous and systematic’ as to render them essentially at home in the forum state.”²² This is a

¹⁶ See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1984) (examining a corporation’s contacts with a state including purchases supplies from the state, sending an executive to the state to negotiate a deal and sending employees to the state for trainings); *Hanson*, 357 U.S. at 251 (noting the defendant’s lack of advertising in the forum, offices in the forum or business conducted in the forum).

¹⁷ See, e.g., *Asahi*, 480 U.S. at 113.

¹⁸ *Id.*

¹⁹ *Id.* (quoting *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980)).

²⁰ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___, 131 S.Ct. 2846, 2851, 2853-54 (2011); *Helicopteros*, 466 U.S. at 414 nn. 8, 9.

²¹ See *Goodyear*, 131 S.Ct. at 2851.

²² *Id.* (quoting *International Shoe*, 326 U.S. at 317).

high bar,²³ and the Supreme Court has found the exercise of general jurisdiction appropriate in only a single case in the sixty-five years since *International Shoe* was decided.²⁴ Perhaps in part because of the difficult standard required for general jurisdiction, after “the emergence of specific jurisdiction in the twentieth century, the exercise of general jurisdiction has become rare.”²⁵

Specific jurisdiction arises when the claim against the defendant is connected to the defendant’s activities within the forum.²⁶ Specific jurisdiction is triggered when (1) the defendant “purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws,”²⁷ which gives rise to a court’s ability to adjudicate “issues deriving from, or connected with, the very controversy that establishes jurisdiction.”²⁸ It is in these sorts of cases that the controversy over the “stream of commerce” test has arisen.²⁹

²³ See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (noting that the standard for general jurisdiction “is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.”)

²⁴ That case was *Perkins v. Benguet Bonsol. Mining Co.*, 342 U.S. 437 (1952), where the Court upheld Ohio’s exercise of general jurisdiction over a Philippine corporation where the company was essentially run from Ohio during World War II. *Id.* at 437, 447-48.

²⁵ See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630 (1988); see also Taylor Simpson-Wood, *In the Aftermath of Goodyear Dunlop: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 130 (2012) (opining that *Goodyear* represented “the final nail into the coffin of the doctrine of general personal jurisdiction.”)

²⁶ See *Goodyear*, 131 S.Ct. at 2854 (collecting cases).

²⁷ See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

²⁸ See, e.g., *Goodyear*, 131 S.Ct. at 2851.

²⁹ Cf. *id.* at 2855 (noting that the stream of commerce test is relevant to the specific jurisdiction inquiry, not general jurisdiction).

b. Purposeful Availment

Beginning with the Supreme Court's decision in *Hanson v. Denckla*, the Court has required that, in order to be subject to specific jurisdiction, a defendant must engage in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum."³⁰ In *Hanson*, a woman living in Pennsylvania executed a deed of trust making a Delaware trust company the trustee of some of her assets.³¹ Several years after executing the trust, the woman moved to Florida, where she later died.³² Upon her death, one of the beneficiaries of her will brought a declaratory judgment action in Florida seeking to have the trust voided.³³ The beneficiaries of the trust argued that the Florida court lacked personal jurisdiction over the Delaware trust company, an indispensable party.³⁴

The Supreme Court held that Florida courts could not exercise personal jurisdiction over the Delaware trust company.³⁵ The Court noted that although it may have been relatively easy for the defendant to respond to this suit, the restrictions placed on jurisdiction by the Due Process Clause "are more than a guarantee of immunity from inconvenient or distant litigation."³⁶ Instead, the Clause requires that "the defendant purposefully avail itself of the privilege of

³⁰ *Hanson*, 357 U.S. at 253; see, e.g. *Burger King*, 471 U.S. at 474-76 (noting the Court's frequent reliance on the purposeful availment requirement from *Hanson*).

³¹ *Hanson*, 357 U.S. at 238.

³² *Id.* at 239.

³³ *Id.* at 240-41.

³⁴ *Id.* at 240-42.

³⁵ *Id.* at 251.

³⁶ See *Hanson*, 357 U.S. at 251.

conducting activities within the forum State, thus invoking the benefits and protections of its laws.”³⁷ Here, the Court found that the trust company had virtually no contacts with Florida at all other than the decedent’s decision to move there after creating the trust.³⁸ “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”³⁹

The Supreme Court continued its focus on the defendant’s actions and intentions in *World Wide Volkswagen v. Woodson*.⁴⁰ There, a family bought a car from a dealership in New York and later drove the car across the country where they got in a car accident in Oklahoma and the car caught on fire, injuring the family.⁴¹ The family sued the car dealership and the distributor of the car (also based in New York, which distributed cars in New York, New Jersey and Connecticut)⁴² in a products liability action in Oklahoma state court.⁴³ The Oklahoma Supreme Court held that personal jurisdiction was appropriate, despite the lack of contacts between the defendants and Oklahoma, because a car, “by its very design and purpose” is mobile, so the defendants could foresee that it could end up in Oklahoma.⁴⁴

³⁷ *Id.* at 253.

³⁸ *Id.* at 251.

³⁹ *Id.*

⁴⁰ 444 U.S. 286 (1980).

⁴¹ *Id.* at 288.

⁴² The plaintiffs also sued the manufacturer of the car, a German corporation, and its importer, however neither of those parties challenged the assertion of personal jurisdiction over them by the Oklahoma court. *See id.* at 288 & n.3.

⁴³ *Id.*

⁴⁴ *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351, 354 (Okla. 1978).

The Supreme Court rejected this approach and held that the defendants were not subject to personal jurisdiction in Oklahoma.⁴⁵ The Court noted that “foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”⁴⁶ The Court argued that because it is foreseeable that all kinds of products could be moved after they are sold that adopting an approach focused on foreseeability would result in “[e]very seller of chattels[,] . . . in effect[,] appoint[ing] the chattel his agent for service of process.”⁴⁷

The Court explained, however, that foreseeability did have an important role in the personal jurisdiction inquiry:

This 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. The Due Process Clause, by ensuring the “orderly administration of the laws,” *International Shoe Co. v. Washington*, 326 U. S., at 319, gives a degree of predictability to the legal system that allows potential defendants to structure their

⁴⁵ *World-Wide Volkswagen*, 444 U.S. at 288.

⁴⁶ *Id.* at 259 (quotations omitted).

⁴⁷ *Id.* at 296.

primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.⁴⁸

Thus, the Court held that here, since the *defendants* did not take any action to avail themselves of Oklahoma's laws that would put them on notice that they could be subject to suit there, personal jurisdiction could not be asserted.⁴⁹

c. The Stream of Commerce Theory

At the same time the Court was focusing on the intentions of the defendant, however, it was also expanding the reach of personal jurisdiction in recognition of evolving commerce and technology. The Court explicitly acknowledged this trend in *McGee v. International Life Insurance*,⁵⁰ where the Court upheld the exercise of jurisdiction by California courts over a non-resident insurance company where that company had entered into an insurance contract with a California resident and that contract was the subject of the litigation, even where the company had no other contacts with California.⁵¹ After describing the recent history of the Court's personal jurisdiction jurisprudence the Court noted:

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state

⁴⁸ *Id.* at 297 (citations omitted).

⁴⁹ *Id.*

⁵⁰ 355 U.S. 220 (1957).

⁵¹ *Id.* at 223.

jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.⁵²

The Court's acknowledgement of the influence of technology on commerce is even more striking in light of the fact that *McGee* was decided in 1957.⁵³

Building off of this acknowledgement, the Supreme Court of Illinois first enunciated the stream of commerce test in *Gray v. American Radiator & Standard Sanitary Corp.*⁵⁴ In that case, the defendant, an Ohio corporation, sold a safety valve to a company in Pennsylvania which incorporated the valve into its water heater, and then sold that heater to a consumer in Illinois.⁵⁵ The water heater exploded and injured the consumer, and the consumer brought a product

⁵² *Id.* at 222-23.

⁵³ See *World Wide Volkswagen*, 444 U.S. at 293 (“The historical developments noted in *McGee* of course, have only accelerated in the generation since that case was decided”).

⁵⁴ 176 N.E.2d 761 (1961); see also, e.g., *Murphy*, *supra* note 5, at 256 (noting that *Gray* is “the case from which the stream of commerce theory originated”).

⁵⁵ 176 N.E.2d at 764.

liability action against the defendant in Illinois state court.⁵⁶ The defendant argued that it had insufficient contacts with Illinois to be subject to personal jurisdiction there.⁵⁷

The Illinois Supreme Court disagreed, holding that it was sufficient for personal jurisdiction purposes if “the act or transaction itself has a substantial connection with the State.”⁵⁸ The court began its analysis by examining recent Supreme Court cases, including *McGee*, as well as recent cases from other states expanding the scope of personal jurisdiction to account for modern business practices.⁵⁹ Then, the court explained the rationale for the stream of commerce theory:

With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient

⁵⁶ *Id.* at 762. The defendant apparently had no other contacts with the state of Illinois, but the court did observe that it was a “reasonable inference” that some of its products (other than the particular valve at issue) ended up being substantially used and consumed within Illinois. *See id.* at 764, 766.

⁵⁷ *Id.* at 762.

⁵⁸ *Id.* at 764.

⁵⁹ *Id.* at 764-66.

contact with this State to justify a requirement that he defend here.⁶⁰

Thus, the court held that the defendant could be subject to personal jurisdiction in Illinois because it could have reasonably assumed that the water heater containing its valves would be sold in Illinois.⁶¹

Many courts subsequently adopted *Gray*'s approach, and focused on whether or not it was foreseeable that a product put into the stream of commerce would end up in the place where the injury occurred.⁶² However, other courts were reluctant to adopt it, or at least to go as far as *Gray* had because of the Supreme Court's requirement in *Hanson* that a defendant *purposefully* avail itself of the forum.⁶³

The Supreme Court's decision in *World Wide Volkswagen* appeared to clear up some of the confusion by rejecting total reliance on foreseeability.⁶⁴ However, the Court also seemed to implicitly endorse at least some version of the stream of commerce test:

⁶⁰ *Id.* at 766.

⁶¹ *See id.* at 766.

⁶² Murphy, *supra* note 5, at 259 & nn. 77,78,79.

⁶³ *Id.* at 260 (citing *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978), *cert denied*, 439 U.S. 983 (1978)) (rejecting jurisdiction in Arkansas over an Italian corporation whose product reached Arkansas through a British intermediary, in part because there was no showing that the defendant had intentionally availed itself of Arkansas' laws)).

⁶⁴ *See World Wide Volkswagen*, 444 U.S. at 295-97; *see also* Part II(b), *supra*.

Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but 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 defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation* that they will be purchased by consumers in the forum State. *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).⁶⁵

Without any explanation of what was meant by “expectation” in the context of the stream of commerce, the Court’s opinion in *World Wide Volkswagen* left the fate of the stream of commerce theory unclear.⁶⁶

d. *Asahi*

The Court had an opportunity to clarify things in *Asahi Metal Industry Co. v. Superior Court*.⁶⁷ There, one of the defendants, a Japanese corporation (Asahi) which manufactured tire

⁶⁵ *World Wide Volkswagen*, 444 U.S. at 297-98 (emphasis added).

⁶⁶ See Murphy, *supra* note 5, at 270.

⁶⁷ 480 U.S. 102 (1987).

valve assemblies, sold its products to a tire manufacturer in Taiwan which sold its tires in California.⁶⁸ One of the tires was involved in a motorcycle accident in California and the plaintiff sued the Taiwanese manufacturer, which in turn sued Asahi seeking indemnification.⁶⁹ The Supreme Court of California upheld jurisdiction over Asahi because, although Asahi had no contacts with California, it had intentionally placed its products into the stream of commerce with the awareness that some of the components would eventually be sold in California.⁷⁰

The Supreme Court unanimously reversed.⁷¹ An eight Justice majority,⁷² in an opinion by Justice O'Connor, held that, whether or not Asahi had sufficient minimum contacts with California to satisfy the first prong of the personal jurisdiction inquiry, exercising jurisdiction in this context would not be consistent with "traditional notions of fair play and substantial justice" as required by the second prong.⁷³ The Court noted that while it would be very inconvenient for Asahi to defend itself in California, the state of California and the plaintiff (the Taiwanese company) had only a "slight" interest in adjudicating the suit in California.⁷⁴ The Court's agreement, however, ended there.

⁶⁸ *Id.* at 106.

⁶⁹ *Id.* at 106.

⁷⁰ *Asahi Metal Industry Co. v. Superior Court*, 702 P.2d 543, 550 (1985).

⁷¹ *Asahi*, 480 U.S. at 108.

⁷² Justice Scalia did not join this portion of the opinion.

⁷³ *Id.* at 113.

⁷⁴ *Id.* at 114-15.

In a portion of her opinion joined by three other Justices,⁷⁵ Justice O'Connor rejected the expansive version of the stream of commerce theory exemplified by the California Supreme Court's decision.⁷⁶ She stressed that the minimum contacts that give rise to personal jurisdiction "must come about by *an action of the defendant purposefully directed toward the forum State.*"⁷⁷ Given that principle, this group of Justices would have held that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state."⁷⁸ Instead, a defendant must exhibit "[a]dditional conduct" to indicate an intent or purpose to serve the market in the forum state such as advertising in the forum or designing a product for the market in that forum.⁷⁹ Since Asahi had exhibited no such additional conduct, Justice O'Connor would have found its contacts with California insufficient to satisfy due process.⁸⁰

Justice Brennan, in an opinion also joined by three other Justices,⁸¹ sharply disagreed with Justice O'Connor's approach.⁸² This group of Justices argued that because "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale," a lawsuit in a forum where a final

⁷⁵ Justice O'Connor was joined by Chief Justice Rehnquist, and Justices Powell and Scalia.

⁷⁶ *Id.* at 112 (opinion of O'CONNOR, J.).

⁷⁷ *Id.* (emphasis in original).

⁷⁸ *Id.*

⁷⁹ 480 U.S. at 112.

⁸⁰ *Id.* at 112-13.

⁸¹ Justice Brennan was joined by Justices White, Marshall, and Blackmun.

⁸² *See id.* at 116-18 (opinion of BRENNAN, J.).

product was being marketed “cannot come as a surprise” to a defendant manufacturer of component parts like Asahi.⁸³ Justice Brennan noted, echoing the court in *Gray*, that a manufacturer who places its product into the stream of commerce in this manner “indirectly benefits from the [forum] State’s laws that regulate and facilitate commercial activity.”⁸⁴ Thus, he concluded that because Asahi was aware of the distribution system that carried its valves into California and knew that that distribution system would benefit it economically, sufficient minimum contacts had been established for California to assert jurisdiction over Asahi under the first prong of the specific jurisdiction inquiry.⁸⁵

Justice Stevens, although he said he was “inclined” to agree with Justice Brennan’s conclusion, did not join either opinion because the determination of the minimum contacts issue was unnecessary to the decision in the case in light of the majority’s conclusion that asserting jurisdiction here was not in accord with traditional notions of fair play and substantial justice.⁸⁶

Thus, *Asahi* did not reconcile the stream of commerce test with the purposeful availment requirement. Following *Asahi*, lower courts were left to choose for themselves whether to follow Justice Brennan’s approach, Justice O’Connor’s approach or some combination of the two.

⁸³ *Id.* at 117.

⁸⁴ *Id.*

⁸⁵ *Id.* at 121.

⁸⁶ *See id.* at 121-22 (opinion of STEVENS, J.). Justice Stevens’ opinion was also joined by Justices White and Blackmun.

Unsurprisingly, this created a split in authority, with a fairly even number of courts applying each approach and several courts trying to apply both approaches.⁸⁷

III. *Nicastro*

After *Asahi*, it would be another twenty-four years before the Court revisited the stream of commerce test.⁸⁸ Finally, the Court took an opportunity to address this issue in *J. McIntyre Machinery, Ltd. v. Nicastro*.⁸⁹

The facts of *Nicastro* were fairly straightforward. The plaintiff was injured while using a metal recycling machine at his workplace in New Jersey.⁹⁰ The manufacturer of the machine was a company incorporated in the United Kingdom.⁹¹ That company sold the machine at issue to its distributor in the United States, based in Ohio, which then sold the machine to the plaintiff's New Jersey employer.⁹² Although the manufacturer had no direct contacts with New Jersey, its president had attended several trade shows in Nevada to promote the machine, one of

⁸⁷ See Dustin Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 115-116 & nn. 60, 61, 62 (2012) (collecting cases applying each approach and avoiding the question). Some courts and commentators refer to Justice O'Connor's approach as the "stream of commerce-plus" approach and refer to Justice Brennan's approach simply as the "stream of commerce" theory. See, e.g., *Bridgeport Music, Inc. v. Still N the Water Publishing*, 327 F.3d 472, 479-80 (6th Cir. 2003) (adopting the "stream of commerce plus" approach and noting the varying approaches other courts have taken).

⁸⁸ In fact, the Court barely addressed personal jurisdiction issues at all during this period, with the exception being *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), where a divided Court affirmed the assertion of jurisdiction over a defendant who had insufficient minimum contacts with the state under *International Shoe*, but was physically present in the state when he was served with process.

⁸⁹ 564 U.S. ___, 131 S.Ct. 2780 (2011).

⁹⁰ *Nicastro v. J. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 577 (N.J. 2010).

⁹¹ *Id.* at 577.

⁹² *Id.* at 578.

which was attended by a representative from the plaintiff's employer.⁹³ The plaintiff sued both the distributor⁹⁴ and the manufacturer in New Jersey state court, but the manufacturer argued that it was not subject to personal jurisdiction in New Jersey.⁹⁵

The Supreme Court of New Jersey found that New Jersey courts could exercise jurisdiction over the manufacturer.⁹⁶ First, the court noted that the manufacturer did not have any contacts with New Jersey that would ordinarily justify the exercise of personal jurisdiction, so the exercise of jurisdiction over the manufacturer “must sink or swim with the stream of commerce theory of jurisdiction.”⁹⁷ Next, the court surveyed the history of the United States Supreme Court's personal jurisdiction jurisprudence as well as its own, and noted “[t]he expanding reach of a state court's jurisdiction, as permitted by due process, has reflected . . . historical developments” in the nature of the economy and technology.⁹⁸ Against this backdrop, the court reaffirmed earlier New Jersey law following Justice Brennan's *Asahi* opinion; “[a] foreign manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey.”⁹⁹

⁹³ *Id.* at 579.

⁹⁴ The distributor apparently filed for bankruptcy before the events giving rise to the lawsuit occurred and, as of the date of the Supreme Court's opinion “ha[d] not participated in th[e] lawsuit.” *See Nicastro*, 131 S.Ct. at 2796 n.2 (GINSBURG, J. dissenting). The fact that the distributor was bankrupt, leaving the plaintiff potentially without anyone to seek recovery from in New Jersey, or even anywhere in the United States, was an issue of concern to some Justices at oral argument. *See* Transcript of Oral Argument at 12:11-13:1, *Nicastro*, 131 S.Ct. 2780 (No. 09-1343).

⁹⁵ *See Nicastro*, 987 A.2d at 578.

⁹⁶ *Id.* at 577.

⁹⁷ *Id.* at 582.

⁹⁸ *See id.* at 582-589.

⁹⁹ *Id.* at 589-92.

Under that rule, the court found that if “[a] manufacturer that knows . . . its products are distributed through a nationwide distribution system that might lead to those products to be sold in any [state] must expect that it will be subject to this State’s jurisdiction if one of its . . . products is sold to a New Jersey consumer[.]”¹⁰⁰ Thus, the Court concluded that J. McIntyre knew or reasonably should have known that its distribution system might lead to its products entering New Jersey because representatives from the national distributor and the manufacturer attended trade shows in various cities around the country (albeit not in New Jersey).¹⁰¹ The Court reasoned that it was clear that those attending these trade shows came from areas other than the cities hosting those events, meaning that while “J. McIntyre may not have known the precise destination of [each of its products,] it clearly knew or should have known that its products were intended for sale and distribution to customers located anywhere in the United States.”¹⁰² Therefore, the Court concluded that the exercise of jurisdiction over the defendant was permissible.

In a spirited dissenting opinion, Justice Hoens sharply criticized the majority for misconstruing both *Asahi* opinions and prior New Jersey law to effectively render “any effort by a manufacturer to sell its product anywhere in the nation as the only act needed for assertion of . . . jurisdiction.”¹⁰³ The dissent argued that the majority’s analysis impermissibly moved the focus away from the actions of the defendant and towards a balancing of the burden on the defendant

¹⁰⁰ *Id.* at 592.

¹⁰¹ *Nicastro*, 987 A.2d at 592.

¹⁰² *Id.* at 592-93.

¹⁰³ *Id.* at 594 (HOENS, J., dissenting).

and the benefit to the plaintiff of litigating in New Jersey.¹⁰⁴ In a separate dissenting opinion, Justice Rivera-Soto presciently urged the United States Supreme Court to review the case.¹⁰⁵

a. The Court's opinions

In a six to three decision, the United States Supreme Court reversed.¹⁰⁶ However, despite a quarter century and the addition of eight new Justices since *Asahi*, the Court again produced no majority opinion, and ended up with a plurality and dissent echoing many of the same themes Justices O'Connor and Brennan argued over in *Asahi* so many years earlier.

In an opinion for a plurality of four Justices,¹⁰⁷ Justice Kennedy staked out a strong defense of Justice O'Connor's position in *Asahi*.¹⁰⁸ Justice Kennedy noted that "[t]he stream of commerce, like other metaphors, has its deficiencies as well as its utility."¹⁰⁹ Justice Kennedy's focus, like Justice O'Connor's, was on the defendant's specific intent. Thus, while a defendant

¹⁰⁴ *See id.* at 602-05.

¹⁰⁵ *Id.* at 605 (SOTO, J., dissenting) ("Because the majority 'has decided an important federal question in a way that conflicts with' settled federal constitutional principles, creates a new, unsubstantial, and meaningless standard for the unbounded exercise of long-arm jurisdiction, and disturbs the careful balance that limits the exercise of judicial power between and among the several states, this decision is ripe for review and correction by the Supreme Court of the United States.") (quoting SUP. CT. R. 10(b)) (citation omitted).

¹⁰⁶ *Nicastro*, 131 S.Ct. at 2791 (plurality opinion).

¹⁰⁷ Justice Kennedy's opinion was joined by Chief Justice Roberts, Justice Scalia and Justice Thomas.

¹⁰⁸ *But see* Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1563 (2012) ("Whether Justice Kennedy's opinion is more stringent than Justice O'Connor's plurality opinion in *Asahi* is unclear. The fact that Justice Kennedy requires targeting the forum could lead to different results when the manufacturer advertises in regional or national media. Justice O'Connor might find such advertising sufficient to show that the manufacturer had 'an intent or purpose to serve the market in the forum State,' while Justice Kennedy might find such advertising insufficiently targeted to give rise to jurisdiction.").

¹⁰⁹ *Id.* at 2788.

may subject itself to the jurisdiction of a state by introducing products into the stream of commerce in an effort to “seek to serve” a given state’s market, it cannot be subject to jurisdiction without some action that “manifest[s] an intention to submit to the power of the” state at issue.¹¹⁰ “[A]s a general rule, it is not enough that the defendant might have predicted that its goods will reach a forum state.”¹¹¹

The plurality explicitly rejected Justice Brennan’s approach. In the plurality’s view, Justice Brennan’s approach impermissibly “discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability.”¹¹² The plurality noted that although personal jurisdiction doctrine protects individual liberty, it does so by preserving the individual’s right to be subject only to lawful power, and the exercise of lawful power is dependent on whether the sovereign has the authority to render a judgment in a given case.¹¹³ Therefore, instead of fairness, the primary concern of the personal jurisdiction inquiry should be whether the defendant has consented to the exercise of jurisdiction by “follow[ing] a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign.”¹¹⁴

Under this analysis, the result required in this case was obvious: J. McIntyre could not be subject to personal jurisdiction in New Jersey courts. The plurality conceded that that the

¹¹⁰ *Id.* (quotations and citations omitted).

¹¹¹ *Id.*

¹¹² *Id.* at 2788-89.

¹¹³ *Nicastro*, 131 S.Ct. at 2789.

¹¹⁴ *Id.*

defendant had directed marketing and sales efforts at the United States as a whole.¹¹⁵ In the plurality's view however, this fact was irrelevant since the case involved a New Jersey state court attempting to exercise jurisdiction, thus it was the defendant's "purposeful contacts with New Jersey, not with the United States, that alone [were] relevant."¹¹⁶ Therefore, the fact that the defendant had engaged a distributor to sell its products into the United States did not reveal an intent to serve the New Jersey market in particular because the defendant had taken no action to target the New Jersey market such as advertising in New Jersey or directing its distributor to sell to specific New Jersey customers.¹¹⁷

In a dissent for three Justices,¹¹⁸ Justice Ginsburg sharply disagreed. In the dissent's view, the plurality's approach "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court . . . need only Pilate-like wash its hands of a product by having independent distributors market it."¹¹⁹ The dissent rejected the plurality's distinction between directing products to the United States as a whole and directing products to a particular state.¹²⁰ According to Justice Ginsburg, J. McIntyre's arrangement with its US distributor was "illustrative of marketing arrangements for sales in the United States common in today's commercial world. A foreign-country manufacturer engages a U.S. company

¹¹⁵ *Id.* at 2790.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2790-91.

¹¹⁸ Justice Ginsburg's dissent was joined by Justices Sotomayor and Kagan.

¹¹⁹ *Nicastro*, 131 S.Ct. at 2794-95 (GINSBURG, J., dissenting).

¹²⁰ *Id.* at 2797, 2799.

to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers."¹²¹

While declining to specifically side with Justice Brennan's *Asahi* opinion over Justice O'Connor's,¹²² the dissent did mount a strong defense of notions of fairness and convenience factoring into personal jurisdiction analysis:

The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK 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? 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 Nicastro to go to Nottingham,

¹²¹ *Id.* at 2799.

¹²² *See id.* at 2803 (noting that in light of the Court's agreement in *Asahi* that subjecting the defendant to jurisdiction did not comport with traditional notions of fair play and substantial justice, "the dueling opinions of Justice Brennan and Justice O'Connor were hardly necessary."); *see also id.* (finding *Asahi* distinguishable because it did not involve a California plaintiff and *Asahi* was a component parts manufacturer who had "little control over the final destination of its products") (citations and quotations omitted).

England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?¹²³

Although the dissent would still take into account the defendant's intent, it would do so in a much more general way than the plurality. In the dissent's view, the purposeful availment requirement "simply 'ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts.'"¹²⁴ It does not prevent the assertion of jurisdiction where a manufacturer, like J. McIntyre, hires a distributor knowing it is likely that distributor will sell its products in a particular forum.¹²⁵

The dissent suggested a possible distinction between cases involving local plaintiffs injured by the activity of a defendant seeking to exploit a multi-state or global market and cases involving defendants whose economic activities are "largely home-based" who do not have "designs to gain substantial revenue from distant markets."¹²⁶ In the latter cases, the dissent found that the place where the product at issue causes injury seems to usually be the most

¹²³ *Id.* at 2800-01.

¹²⁴ *Id.* at 2801-02 (citation omitted).

¹²⁵ *See id.* at 2801 ("How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?").

¹²⁶ *Id.* at 2804.

appropriate place for a suit.¹²⁷ From this framework, the dissent would have found that J. McIntyre could be subject to personal jurisdiction in New Jersey.¹²⁸

In a concurrence joined by Justice Alito, Justice Breyer expressly declined to endorse either the plurality or the dissent's approach.¹²⁹ He began by noting that the Supreme Court of New Jersey's opinion had adopted a "broad understanding of the scope of personal jurisdiction" based on its view of increasing globalization and recent changes in communication technology.¹³⁰ However, in Justice Breyer's view, this case did not present any of the issues raised by modern technology and commerce, thus making it an inappropriate vehicle to "mak[e] broad pronouncements that refashion basic jurisdictional rules."¹³¹

According to the concurrence, this case could be decided on the narrow grounds that the defendant had sold only a single machine in New Jersey.¹³² Justice Breyer argued that in *Asahi*, all the Members of the Court agreed that a single sale of a product in a state cannot form an adequate basis for asserting personal jurisdiction over an out-of-state defendant even where the defendant places its goods in the stream of commerce, "fully aware (and hoping) that such a sale

¹²⁷ *Id.*

¹²⁸ *Id.* at 2804. Justice Ginsburg also noted that she took "heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underling *International Shoe*[".]” *Id.*

¹²⁹ *Nicastro*, 131 S.Ct. at 2791, 2792-93 (BREYER, J., concurring in judgment).

¹³⁰ *Id.* at 2791.

¹³¹ *Id.* at 2791, 2792-93.

¹³² *See id.* at 2791-92

will take place.¹³³ Such an isolated sale, in the concurrence’s view, was not enough to show the “‘regular . . . flow’ or ‘regular course’ of sales in New Jersey required for the assertion of jurisdiction under any formulation of the stream of commerce test.¹³⁴

The concurrence argued that both the plurality and the dissent’s approach would present unanticipated and potentially negative consequences if applied to situations raised by modern commerce. Justice Breyer took the plurality to task for stating what he implicitly suggested was an overly strict rule limiting jurisdiction to situations where the defendant specifically intends to submit to the power of the sovereign at issue:

But 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? Those issues have serious commercial consequences but are totally absent in this case.¹³⁵

¹³³ *Id.* at 2792 (citing *Asahi*, 480 U.S. at 111-12 (opinion of O’CONNOR, J.) (requiring “something more” than simply placing “a product into the stream of commerce,” even if defendant is “awar[e]” that the stream “may or will sweep the product into the forum State”); *id.*, at 117 (opinion of BRENNAN, J.) (jurisdiction should lie where a sale in a State is part of “the regular and anticipated flow” of commerce into the State, but not where that sale is only an “edd[y],” *i.e.*, an isolated occurrence); *id.*, at 122 (STEVENS, J., concurring in part and concurring in judgment) (indicating that “the volume, the value, and the hazardous character” of a good may affect the jurisdictional inquiry and emphasizing *Asahi*’s “regular course of dealing”)).

¹³⁴ *Nicastro*, 131 S.Ct. at 2792 (BREYER, J., concurring in judgment) (citations omitted; alteration in original).

¹³⁵ *Id.* at 2793.

However, Justice Breyer went on to note that he did not agree with the “absolute approach adopted by the New Jersey Supreme Court” that in his view focused only on whether the defendant knew or reasonably should have known that its distribution system might lead to its products being sold in the forum at issue.¹³⁶ Such an approach, the concurrence warned, could have seemingly unfair consequences:

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). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach.

Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain. . . . [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

¹³⁶ *Id.*

Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.¹³⁷

Thus, Justice Breyer declined to pick between the plurality and the dissent, but implied that he might be more willing to “work such a change in the law” in a case that implicated the “relevant contemporary commercial circumstances.”¹³⁸ Since in his view, this case did not implicate those issues and could be easily resolved by the fact that the defendant only sold a single product into New Jersey, Justice Breyer concurred only in the judgment.

b. The confusion created by the opinions

The lack of a majority rationale in *Nicastro*, just like in *Asahi* so many years before, has generated some controversy, and perhaps provided the framework for defense arguments against jurisdiction in some stream of commerce cases, but has failed to provide courts and companies with clear guidance. Although split decisions of the Court can occasionally still provide useful guidance for lower courts and the public, that is particularly unlikely here because of the extremely narrow grounds on which the “controlling” concurrence was based. Indeed, as one court put it “[l]ike one of Dr. Rorschach's amorphous ink blots, Justice Breyer's opinion is

¹³⁷ *Id.* at 2793-94.

¹³⁸ *Id.* at 2794.

susceptible to multiple interpretations.”¹³⁹ Bearing this out, courts and commentators have been unable to come to any agreement on the meaning of *Nicastro*, other than perhaps some consensus that no significant guidance can be gleaned from it.

i. *Public and Scholarly Reaction*

The Court’s split decision in *Nicastro*, after its long silence on personal jurisdiction issues, also predictably generated quite a bit of commentary. Some commentators, particularly those sympathetic to the defense side of the civil litigation bar, were quick to declare an end to the “foreseeability” analysis put forward by Justice Brennan in *Asahi*.¹⁴⁰ Similarly, many observers more sympathetic to the plaintiffs’ side of the equation were quick to sound the alarm that *Nicastro* marked the beginning of an age where foreign corporations can easily insulate themselves from suit in the United States.¹⁴¹ However, most initial reaction and analysis focused on the continuing uncertainty the decision maintained from *Asahi*.¹⁴²

¹³⁹ *State v. NV Sumatra Tobacco Trading Company*, -- S.W.3d --, 2013 WL 1248285, at *29 (Tenn. Mar. 28, 2013).

¹⁴⁰ See, e.g., Kim M. Watterson & Paige H. Forster, *Where Can You Sue? - International Arena - Personal Jurisdiction - Due Process*, Kimbusinesslaw.com, Jun. 29, 2011, <http://kimbusinesslaw.com/2011/07/10/where-can-you-sue-international-arena-personal-jurisdiction-due-process/> (“McIntyre . . . provide[s] solid footing on which a defendant can fight jurisdiction in any state where it has not “purposefully availed” itself of the privilege of conducting activities, even if its products make their way to that forum. Under McIntyre, courts going forward will look at the defendant’s conduct in targeting the forum state, rather than the foreseeability that the defendant would be sued there. The decision adds a welcome level of clarity and concreteness to the personal jurisdiction inquiry.”); Drug and Device Law, *Personal Jurisdiction 2.0*, <http://druganddevicelaw.blogspot.com/2011/07/personal-jurisdiction-20.html> (Jul. 14, 2011) (“[I]t seems pretty clear that [Justices Breyer and Alito] are two more votes [in addition to the plurality] against the dissent’s – and the Brennan *Asahi* concurrence’s – reliance on pure foreseeability as sufficient for stream of commerce personal jurisdiction. That issue seems dead.”).

¹⁴¹ See, e.g., Press Release, American Association for Justice, *SCOTUS Ruling in McIntyre v. Nicastro Adds Obstacles to Holding Foreign Corporations Accountable in the U.S.* (Jun. 27, 2011) (“The U.S. Supreme Court’s decision in *McIntyre Machinery v. Nicastro* today makes it more difficult to hold foreign manufacturers accountable in the U.S. court system”); Maxwell Kennerly, *Supreme Court Term In Review For Consumers, Employees and Injured Persons*, *Litigation and Trial*, <http://www.litigationandtrial.com/2011/07/articles/attorney/personal-injury-1/supreme-court-term-in-review-for-consumers-employees-and-injured-persons/> (Jul. 5, 2011) (“[*Nicastro*] makes it

Later scholarly reaction has been similarly varied. Law review pieces have interpreted *Nicastro* to be everything from the harbinger of a new era of virtual immunity from suit for foreign defendants in the United States¹⁴³ to suggesting that the combination of the views of the dissent and the concurrence signals the court's willingness "to once again adjust its personal jurisdiction jurisprudence to more effectively contend with the modern economy."¹⁴⁴ Still, most reaction (like this article) laments the lack of guidance provided by *Nicastro*'s split decision after so many years of silence from the Court.¹⁴⁵

ii. *The Marks Test*

harder [to] hold foreign companies accountable for dangerous products, since the foreign companies typically conduct their activities through distributors").

¹⁴² See, e.g., Buehler, *supra* note 87, at 120 (after *Nicastro*, "the stream of commerce doctrine will be very much in flux in the years ahead"); Howard Wasserman, *Clarifying personal jurisdiction . . . or not*, PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2011/06/clarifying-personal-jurisdiction-or-not.html> (Jun. 28, 2011) ("As we all remember from 1L, the *Asahi* Court divided 4-4-1[.] . . . Twenty-five years later, still no resolution. Four justices, lead by Justice Kennedy, emphatically rejected the Brennan view[.] . . . But we still do not have a majority view on the question. Justice Breyer concurred in the judgment, joined by Justice Alito, to again punt the question."); Kendall Gray, *J. McIntyre Machinery v. Nicastro: Declarifying Asahi*, The Appellate Record, <http://www.appellaterecord.com/2011/06/articles/new-opinions/j-mcintyre-machinery-v-nicastro-declarifying-asahi/> (Jun. 28, 2011) ("*Nicastro* gave the Court a chance to pick [between the competing approaches in *Asahi*]. But alas, five cats could not be herded into a single corral."; "For want of a fifth vote, we are about 14,000 words the richer after today's three opinions, but none the wiser.")

¹⁴³ See Kristianna L. Sciarra, *A Gap in Personal Jurisdiction Reasoning: An Analysis of J. McIntyre Machinery Ltd. v. Nicastro*, 31 Quinnipiac L. Rev. 195, 195 (2013) ("Following the Supreme Court's recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, a foreign corporation can now deliberately target the United States market and sell products anywhere in the country but escape personal jurisdiction in a state where one of its products injures a customer as long as the corporation did not 'purposefully avail' itself of the market in that particular state.").

¹⁴⁴ See Johnjerica Hodge, *Minimum Contacts in the Global Economy: A Critical Guide to J. McIntyre Machinery v. Nicastro*, 64 ALA. L. REV. 417, 418-20 (2012).

¹⁴⁵ See, e.g., Danielle Tarin and Christopher Macchiaroli, *Refining The Due-Process Contours of General Jurisdiction Over Foreign Corporations*, 11 J. Int'l Bus. & L. 49, 49 (2012) (describing *Nicastro* as a "missed . . . opportunity to provide needed guidance to state and federal courts tasked with determining the level of business contacts that may subject a foreign corporation to a forum's general personal jurisdiction."); Simpson-Wood, *supra* note 25, at 124 n.74.

Under the Supreme Court’s 1977 decision in *Marks v. United States*,¹⁴⁶ the way to divine a binding rule from a decision with no majority opinion such as *Nicastro* is to look for the “position taken by those Members [of the Court] who concurred in the judgments on the narrowest grounds[.]”¹⁴⁷ However, the Court has, on at least two occasions, questioned the workability of this rule, noting that it is “is more easily stated than applied” and declining 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.”¹⁴⁸

Even if the *Marks* test remains viable, it is not particularly helpful in this case. It does seem clear that the Members of the Court who “concurred in the judgment[t]” on the narrowest ground appear to be Justices Breyer and Alito. However, their concurrence explicitly disclaims the creation of any “new” personal jurisdiction rules, noting that “resolving this case requires no more than adhering to our precedents” which, in the concurrence’s view, have never allowed “a single isolated sale” in a forum to form the basis for the assertion of personal jurisdiction.¹⁴⁹ Therefore, at most, *Nicastro* stands for the proposition that a single sale from a national distributor to a particular state does not subject the manufacturer to personal jurisdiction in that

¹⁴⁶ 430 U.S. 188 (1977).

¹⁴⁷ *Id.* at 193 (internal quotations and citations omitted).

¹⁴⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U. S. 738, 745-746 (1994) (quotations omitted)); see also *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (ROBERTS, C.J., concurring) (lamenting that even with the *Marks* test, when the Supreme Court fails to reach a majority opinion, “[l]ower courts [must] feel their way on a case-by-case basis.”).

¹⁴⁹ *Nicastro*, 131 S.Ct. at 2792 (BREYER, J., concurring in the judgment)

state, but this proposition is of limited value to manufacturers seeking to plan for or avoid liability in particular jurisdictions.¹⁵⁰

A manufacturer cannot be expected to tell its distributor to only make (at most) a single sale of a particular product in a jurisdiction. In fact, such an instruction might even constitute the type of particularized targeting of a sovereign required by the plurality, ensnaring the manufacturer in the jurisdiction they were attempting to avoid. Also, while this “rule of one” makes some sense in the context of the \$ 24,900 machine at issue in *Nicastro*, it starts to lose coherence when applied to other types of goods.¹⁵¹ A company selling prescription drugs to a national distributor cannot practically limit itself to “one sale” in any jurisdiction even if it does not target any particular jurisdiction, while a company selling private jets may adhere to this limit and be subject to personal jurisdiction anyway because of the large amount of purposeful contacts that would probably be required to make such a sale. Thus, the *Marks* test is unlikely to provide much relief from *Nicastro*’s opacity.

iii. *Court Reaction*

¹⁵⁰ See *Ainsworth v. Cargotec USA, Inc.*, 2011 WL 4443626, at *7 (S.D. Miss. Sep. 23, 2011) (“As Justice Breyer declined to choose between the Asahi plurality opinions, McIntyre is rather limited in its applicability. It does not provide the Court with grounds to depart from the Fifth Circuit precedents establishing Justice Brennan’s *Asahi* opinion as the controlling analysis. At best, it is applicable to cases presenting the same factual scenario that it does.”)

¹⁵¹ See *Nicastro*, 131 S.Ct. at 2803 n.15 (GINSBURG, J., dissenting) (“A \$24,900 shearing machine . . . is unlikely to sell in bulk worldwide, much less in any given state . . . 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).

Not surprisingly, courts have not found *Nicastro* particularly helpful in settling jurisdictional disputes over the stream of commerce doctrine. Despite the hopes of critics of a broad stream of commerce test and the fears of a broad test's supporters, courts have mostly found Justice Breyer's opinion controlling—and mostly found that it does not have much to say. Two circuit courts, that have taken an in depth look at *Nicastro* have reached the conclusion that, given the narrowness of Justice Breyer's opinion, the end result of *Nicastro* is that “the law remains the same” as it was before, “including the conflicting articulations of [the stream of commerce] theory in *Asahi*[.]”¹⁵² Similarly, state courts have largely declined to alter their pre-existing jurisdictional framework based on *Nicastro*, even when those frameworks would seem to conflict with the plurality's approach.¹⁵³

For example, the Fifth Circuit—which had previously adopted a test similar to Justice Brennan's *Asahi* approach for stream of commerce cases—dealt with the impact of *Nicastro* very directly in a case bearing striking similarities to *Nicastro*, *Ainsworth v. Moffett Engineering*.¹⁵⁴ In that case, the Fifth Circuit reviewed a products liability claim against an Irish company that

¹⁵² See *Ainsworth v. Moffett Engineering*, 2013 U.S. App. LEXIS 9424, at *11 (5th Cir. May 9, 2013); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012).

¹⁵³ See, e.g., *Russell v. SNFA*, No. 113909, 2013 Ill. LEXIS 557, at *36-40 (Ill. Apr. 18, 2013) (“*McIntyre* has not definitively clarified the proper application of the stream of commerce theory”); *Sumatra Tobacco*, 2013 WL 1248285, at *27 (“Most courts that have applied the *Marks* rule to *J. McIntyre Machinery* have determined that Justice Breyer's opinion was the judgment that concurred “on the narrowest grounds.” . . . Nevertheless, while Justice Breyer's opinion may be controlling, it fails to resolve the United States Supreme Court's impasse over the stream of commerce theory and, therefore, leaves existing law undisturbed”) (collecting cases); *Willemsen v. Invacare Corp.*, 282 P. 3d 867, 875 (Or. 2012) (“If [the *Nicastro* plurality] opinion were controlling, it might be difficult for plaintiff to show that, on this record, CTE's contacts with Oregon were sufficient to establish jurisdiction over it. As explained above, however, the rule that the Court announced in *Marks* for construing splintered decisions leads us to conclude that the rationale expressed in Justice Breyer's opinion concurring in the judgment controls our resolution of this case.”).

¹⁵⁴ *Ainsworth*, 2013 U.S. App. LEXIS 9424, at *1.

hired an Ohio based distributor to distribute its forklifts.¹⁵⁵ The plaintiff's husband was killed by an allegedly defective forklift while working at his job in Mississippi.¹⁵⁶ The plaintiff sued both the distributor and the manufacturer in federal court in Mississippi, and the district court denied the manufacturer's motion to dismiss for lack of personal jurisdiction.¹⁵⁷ Like the manufacturer in *Nicastro*, the manufacturer in *Ainsworth* did not specifically direct any of its products to the state of Mississippi but rather hired its distributor to distribute its products in the United States generally.¹⁵⁸ The manufacturer did nothing to limit the scope of the distributor's sales of its products by state.¹⁵⁹

The Fifth Circuit explicitly acknowledged that its stream of commerce test¹⁶⁰ is “in tension with the plurality opinion” in *Nicastro*, but declined to change that test in light of *Nicastro*.¹⁶¹ Instead, the court found that the plurality was “not binding precedent” and applied the *Marks* test to determine that Justice Breyer's opinion was the controlling opinion in

¹⁵⁵ *Ainsworth*, 2013 U.S. App. LEXIS 9424, at *1.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at *10-11.

¹⁵⁹ *Id.*

¹⁶⁰ That test allows the assertion of personal jurisdiction over a non-resident defendant where a court “finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state.” *Ainsworth*, 2013 U.S. App. LEXIS 9424, at *5 (quotations and citations omitted). “Under that test, ‘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 stream of commerce,’ but ‘[t]he defendant's contacts must be more than ‘random, fortuitous, or attenuated, or of the unilateral activity of another party or third person.’” *Id.* (citations omitted).

¹⁶¹ *Id.* at *9-8.

Nicastro.¹⁶² It found, echoing the Federal Circuit’s similar conclusion, that Justice Breyer’s concurrence did not require the abandonment of the Brennan-like approach the Fifth Circuit had previously adopted.¹⁶³ The court found that all Justice Breyer’s opinion stood for was that a “single isolated sale” could not support jurisdiction.¹⁶⁴ In this case, since the manufacturer had sold 203 forklifts worth nearly four million dollars in Mississippi, the court found the exercise of jurisdictional compatible with Justice Breyer’s opinion and affirmed the district court.¹⁶⁵

The Illinois Supreme Court reached a similar conclusion in *Russell v. SNFA*.¹⁶⁶ Although the court acknowledged the “isolated sale” rule from the *Nicastro* concurrence, it rejected the defendant’s argument that Justice Breyer also endorsed Justice O’Connor’s *Asahi* approach.¹⁶⁷ Accordingly, as it had done in the past, the court declined to adopt either the broad or narrow theory of the stream of commerce doctrine articulated in the dueling opinions in *Asahi* and *Nicastro*.¹⁶⁸

Other courts have purported to glean slightly more from *Nicastro*. In *Bombardier v. Dow Chemical*, the California Court of Appeal concluded that the plurality and concurrence agreed

¹⁶² *Id.* at *7-8.

¹⁶³ *Id.* at *8-11 (citing *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012)).

¹⁶⁴ *Ainsworth*, 2013 U.S. App. LEXIS 9424 at *8-11.

¹⁶⁵ *Id.* at *10-11

¹⁶⁶ No. 113909, 2013 Ill. LEXIS 557, at *36-40 (Ill. Apr. 18, 2013).

¹⁶⁷ *Id.* (“Justice Breyer quite clearly disagreed with the plurality’s decision to rely on ‘strict rules’ to limit jurisdiction to only situations when the defendant intended to submit to a state’s sovereign power.”).

¹⁶⁸ *Id.* at *40. The court concluded in that particular case that it need not decide between the competing approaches because the defendant would be subject to personal jurisdiction in Illinois under either one because the defendant had taken specific steps to target Illinois as a market for its products.

that “mere foreseeability, at least where products are not sold in a state as part of the regular and anticipated flow of commerce into that state, is not enough to establish minimum contacts with the forum state.”¹⁶⁹ However, the court found that beyond this conclusion (which, arguably was evident before *Nicastro* anyway¹⁷⁰), the opinions in *Nicastro* did “not significantly add to the state of personal jurisdiction jurisprudence.”¹⁷¹ Other courts have similarly concluded that a test based on foreseeability alone is ruled out by *Nicastro*.¹⁷²

There are a few outlier courts who have gone even further. For example, in *Smith v. Teledyne Continental Motors, Inc.*,¹⁷³ the court determined that the “common denominator of the Court’s reasoning and a position approved by at least five Justices who support the judgment is the ‘stream of commerce plus’ rubric enunciated in an opinion by Justice O’Connor in *Asahi*.”¹⁷⁴ The court pointed to Justice Breyer’s approving citation of Justice O’Connor’s *Asahi* opinion in his analysis as proof that “six Justices agree[d] [that] at a minimum, the limitations of Justice

¹⁶⁹ *Bombardier v. Dow Chem. Canada*, 2013 Cal. App. LEXIS 399, at *9 (2013).

¹⁷⁰ Indeed, Justice Brennan’s *Asahi* opinion itself endorses the “regular flow” concept. *See Asahi*, 480 U.S. at 117 (“The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.”) (BRENNAN, J. concurring).

¹⁷¹ *Id.*

¹⁷² *See, e.g., Windsor v. Spinner Industry Co., Ltd.*, 825 F. Supp. 2d 632, 638 (D. Md. 2011) (“McIntyre clearly rejects foreseeability as the standard for personal jurisdiction.”). At least one court also found that *Nicastro* stood for the proposition that targeting a national market was insufficient to give rise to specific jurisdiction in any one state. *See Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F. Supp. 2d 501, 513 (D.N.J. 2011) (“[W]hether or not the plurality’s strict rule is the de facto standard for stream of commerce cases going forward, there is no doubt that *Nicastro* stands for the proposition that targeting the national market is not enough to impute jurisdiction to all the forum States.”).

¹⁷³ 840 F. Supp. 2d 927 (D.S.C. 2012).

¹⁷⁴ *Id.* at 930 (some internal quotations omitted).

O'Connor's test should be applied.”¹⁷⁵ Similarly, in *Northern Ins. Co. of New York v. Construction Navale Bordeaux*,¹⁷⁶ the court cited Justice Breyer’s opinion to justify applying Justice O’Connor’s *Asahi* test to a motion to dismiss by a foreign defendant.¹⁷⁷

However, cases applying this interpretation are not widespread and with good reason.¹⁷⁸ It is hard to justify reading Justice Breyer’s opinion as changing the status quo when he explicitly disclaimed doing so in his own opinion. He stated flatly that *Nicastro* presented “an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules” and that resolving the case simply required “adher[ing] strictly to [the Court’s] precedents.”¹⁷⁹ Although Justice Breyer does cite Justice O’Connor’s “something more” rule from *Asahi*, in that very same string citation, he also cites Justice Brennan’s distinction between the regular and anticipated flow of commerce and the occasional “eddy.”¹⁸⁰ Justice Breyer was merely using these citations to support his argument that a “single isolated sale” cannot give rise to jurisdiction under any of the tests articulated by *Asahi*, not to endorse one test over another.¹⁸¹

¹⁷⁵ *Id.* at 931.

¹⁷⁶ No. 11-60462-CV, 2011 WL 2682950 (S.D. Fla. July 11, 2011).

¹⁷⁷ *Id.* at *5.

¹⁷⁸ See Buehler, *supra* note 87, at 120 (“[I]t would be a mistake for lower courts and scholars to overreact to the *Nicastro* Court’s limited holding. Justice Breyer did not reject the plurality’s rule or the New Jersey Supreme Court’s approach out of hand For now, the law remains unsettled.”).

¹⁷⁹ *Nicastro*, 131 S. Ct. at 2794 (BREYER, J. concurring).

¹⁸⁰ *Id.* at 2792. He also cited Justice Stevens’ opinion for the proposition that the “the volume, the value, and the hazardous character” of a good may affect the jurisdictional inquiry[.]” *Id.*

¹⁸¹ This is a somewhat dubious argument with respect to Justice Brennan’s approach. Although Justice Brennan does distinguish between the usual flow and the eddies, that distinction had much more to do with whether the movement of the defendant’s products could have been *anticipated* by the defendant, rather than what the volume of those products happened to be. See *Asahi*, 480 U.S. at 117 (BRENNAN, J., concurring) (“The stream of commerce refers not to *unpredictable* currents or eddies, but to the regular and *anticipated* flow of products from manufacture

Thus, except perhaps in situations involving a single sale, *Nicastro* leaves courts without guidance about the proper application of the stream of commerce doctrine, particularly in the context of foreign manufacturers. While the *Nicastro* plurality provides a lot of ammunition for defense arguments against assertions of personal jurisdiction, *Nicastro* does not lay out a clear rule that will be of much help to foreign manufacturers in structuring their conduct to avoid (or account for) potential liability in particular jurisdictions. Instead, the decision in *Nicastro* leaves foreign manufacturers, distributors and consumers (not to mention litigation attorneys) to “feel their way on a case-by-case basis” without definitive guidance from the Court.¹⁸²

IV. Predictability In Personal Jurisdiction Is Critical

This state of affairs is unacceptable, both from an economic and legal standpoint. International manufacturers seeking entry into the American market and the domestic distributors who sell their products have no way to apportion the risk of liability between themselves, or to plan to avoid liability in certain jurisdictions altogether. This may make foreign manufacturers likely to raise prices to account for this uncertainty, or hesitate to enter the American market altogether.¹⁸³

to distribution to retail sale. 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.”) (emphasis added). It is hard to argue that J. McIntyre could not have anticipated that one of its machines could end up in New Jersey. *Nicastro*, 131 S.Ct. at 2801 (GINSBURG, J., dissenting).

¹⁸² See *Rapanos v. U.S.*, 547 U.S. 715, 758 (2006) (ROBERTS, C.J., concurring in the judgment).

¹⁸³ See Brief of the Organization for International Investment and Association of International Automobile Manufacturers Inc. as Amici Curiae In Support of Petitioner at 10, *Nicastro v. J. McIntyre Machinery America, Ltd.*, 564 U.S. ___, 131 S.Ct. 2780 (2011) (No. 09-1343) (noting that several studies have concluded that unpredictability in the US legal market is one of the top concerns of businesses considering entering the American market).

At the same time, from a doctrinal perspective, this situation creates exactly the situation that Justices with nearly all perspectives on personal jurisdiction jurisprudence have routinely said they were seeking to avoid: placing potential defendants in a situation where they are unsure whether they will be subject to liability. Placing defendants in this situation does not comport with the traditional notions of fairness that personal jurisdiction under the Due Process Clause is supposed to be based upon. In other words, the uncertainty created by the Court's inability to reach a consensus on this issue may itself be creating violations of defendants' due process rights.

- a. International companies seeking entry to the US market and their domestic distributors cannot apportion the risk of liability between themselves or incorporate the costs of risk into their products without a clearer rule.

Lack of clarity about personal jurisdiction rules creates a lack of clarity about the risk of liability that a manufacturer or distributor will be subject to because of variations in the product liability law and related procedure of different forums. Although it is true in theory that the choice of the forum for a lawsuit does not necessarily require the application of that forum's law, as Professor Daniel Klerman demonstrated in a recent article, in practice, the choice of forum has a substantial effect on the choice of law and ultimately the outcome of product liability suits.¹⁸⁴ Most obviously, different jurisdictions have different choice of law rules, so the choice of forum

¹⁸⁴ See Klerman, *supra* note 108, at 1566.

in that sense literally dictates the choice of law.¹⁸⁵ Moreover, “most choice-of-law methodologies are relatively malleable, and many commentators have noted that judges frequently conclude that choice-of-law principles require application of the forum state’s substantive law.”¹⁸⁶ Even if a forum does choose to apply another state’s law, it will still apply its own procedural rules,¹⁸⁷ which can have a substantial impact on liability and the extent of damages.¹⁸⁸ Finally, judicial selection methods and the composition of juries vary from forum to forum, which can also have a substantial impact on the outcome of a case.¹⁸⁹ Thus, the lack of clear jurisdictional rules leaves companies selling across state and international boundaries

¹⁸⁵ See Klerman, *supra* note 108, at 1566.

¹⁸⁶ *Id.* at 1566 & n.50.

¹⁸⁷ See, e.g., GEORGE W. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 133 (3d ed. 1963).

¹⁸⁸ *Id.* at 1566. For example, some states limit the availability of punitive damages, and one state and many foreign jurisdictions disallow them altogether. See, e.g., Idaho Code Ann. § 6-1604(3) (limiting punitive damages awards to \$250,000 dollars or three times the compensatory damages award); Ind. Code Ann. § 34-51-3-4 (limiting punitive damages awards to \$50,000 or three times the compensatory damages award); Va. Code Ann. § 8.01-38.1. (2010) (limiting punitive damages awards to \$350,000 regardless of the compensatory damages award); *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (noting that punitive damages are not available under Washington law); Jessica J. Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, 19 MINN. J. OF INT’L LAW 55, 78 (noting that no European Union countries other than the United Kingdom allow the award of punitive damages). Additionally, states have widely divergent standards for determining the admissibility of expert testimony—an issue that often has a determinative impact on product liability litigation. Compare *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 264-65 (Tenn. 1997) (noting that differences in the Tennessee Rules of Evidence and the Federal Rules of evidence required the adoption of a heightened standard for the admissibility of expert testimony; “This distinction indicates that the probative force of the testimony must be stronger before it is admitted in Tennessee.”) (quotations and citations omitted) with *State v. Swope*, 762 N.W.2d 725, 730-32 (Wis. App. 2008) (Applying a “relevancy test” that is less strict than *Daubert* to the admissibility of expert testimony); see, e.g., Margaret A. Berger, *What Has a Decade of Daubert Wrought?*, 95 Am. J. Pub. Health. S59, S59 (2005) (noting that the outcome of a *Daubert* motion can be dispositive in many civil cases).

¹⁸⁹ Klerman, *supra* note 108, at 1566. Indeed, Justice Breyer’s opinion in *Nicastro* recognizes that there are wide disparities in how states apply their products liability laws in practice. See *Nicastro*, 131 S.Ct. at 2794 (BREYER, J. concurring) (noting that in one study the percentage of plaintiff winners in tort trials among 46 populous counties, ranged from 17.9% (in Worcester, Mass.) to 69.1% (in Milwaukee, Wis.)) (citing Dept. of Justice, Bureau of Justice Statistics Bulletin, Tort Trials and Verdicts in Large Counties, 2001, p. 11).

unable to determine the degree of liability they may be opening themselves up to with their conduct.

This uncertainty is economically troublesome for at least three reasons. First, international manufactures are unable to apportion the risk of liability appropriately between themselves and domestic distributors without knowing the types of liability risks to which they are being subject. Second, companies may not appropriately account for the risk of liability in setting their prices, undermining the “signaling” affect product liability rules are supposed to create for consumers. Third, companies may not be able to appropriately account for the differing risks of liability created by different state tort law regimes.

i. *Personal Jurisdiction Uncertainty Impedes Efficient Transactions Between Distributors and Manufacturers*

When an international company wants to distribute its products in the United States, it is often easiest for that company to work through a domestic distributor.¹⁹⁰ Domestic distribution of foreign products is a multi-billion dollar business in the United States.¹⁹¹ Unclear personal jurisdiction rules can present a problem for distributors and manufactures in this system because

¹⁹⁰ See Amit K. Ghosh, W. Benoy Joseph, John T. Gardner, and Sharon V. Thach, *Understanding industrial distributors' expectations of benefits from relationships with suppliers*, 19 J. BUS. & INDUS. MARKETING 433, 434-35 (noting that “The status of distributors has risen almost continuously over the past few decades as they increase their domination over the sales channel. The reduction of trade barriers and the resultant increase in potential suppliers has further enhanced the nature of vertical competition, thereby increasing the importance of distributors.”) (citations omitted).

¹⁹¹ See Press Release, United States Census Bureau, United States Department of Commerce, U.S. Goods Trade: Imports & Exports by Related-Parties 2012, at 4 (May 2, 2013), http://www.census.gov/foreign-trade/Press-Release/2012pr/aip/related_party/rp12.pdf (noting that there were over 1 trillion dollars worth of goods imported into the United States in 2012 by non-related parties, nearly 50% of the total imports for that year).

of the existence of strict liability combined with joint and several liability in products liability cases.

Because of strict product liability rules, manufacturers and their distributors can both be on the hook for a plaintiff's injuries in a product liability case.¹⁹² In a case where the manufacturer and the distributor are both subject to personal jurisdiction, the burden of defending such a claim (and of paying any settlement or judgment) will fall on both the manufacturer and the distributor. Conversely, in a case where the manufacturer cannot be subject to personal jurisdiction (like in *Nicastro* itself), the distributor is left holding the bag and must take the entire burden of defending the claim (and of potential liability) onto its own shoulders.

In a world where the *Nicastro* dissent's "expectations" based test was applied, the former situation would occur much more often.¹⁹³ In a world where the *Nicastro* plurality's test was applied, the latter situation would be more common.¹⁹⁴ If the "expectations" test were the law, manufacturers and distributors would likely buy an amount of liability insurance coverage commensurate with the risks of defending these claims (but doing not doing so alone). If the plurality's test were the law, distributors would either have to purchase more liability insurance

¹⁹² See, e.g., JAMES A. DOOLEY, MODERN TORT LAW § 32.64 (1977).

¹⁹³ Indeed, it would seem that it would almost always work that way assuming that the manufacturer had some understanding of the territory in which the distributor was selling its products.

¹⁹⁴ Although it would not necessarily always be that way since a manufacturer could take specific actions that would subject it to jurisdiction in a given forum, such as specifically directing a distributor to target a specific state, or advertising in that state independently of the distributor.

(and pass these costs onto consumers and/or demand lower prices from manufacturers) or seek broad indemnification clauses in purchase contracts with foreign manufacturers.

Unfortunately, distributors and manufacturers do not live in either of these worlds. Instead, they must continue these transactions in an environment where the manufacturer's level of exposure to personal jurisdiction (and by extension, liability), is unclear. Because of this, negotiations between manufacturers and distributors will be impeded, and deals will be made that may ultimately turn out to have been inefficient. Distributors may end up "holding the bag" when they did not (and could not) anticipate doing so. Or, manufacturers may have to pay "twice" for the risk of liability, once by having to sell to a distributor at lower prices to account for the distributor's risk of being subject to liability alone and again if it turns out that the manufacturer actually is subject to suit after all.

ii. *Unclear Personal Jurisdiction Rules Weaken Pricing Signals Reflecting Product Safety*

Another problem with this uncertainty is that it undermines one of the core purposes of tort liability in general, and strict product liability in particular, building the "riskiness" of a product into its price as a "signal" to consumers.¹⁹⁵ Most people lack information about the safety of consumer products. However, product liability suits force manufacturers to either change their products to make them safer or raise prices of their products to reflect the risk of liability that those products carry. When manufactures do that, consumers can make optimal

¹⁹⁵ See Buehler, *supra* note 87, at 123.

purchasing decisions even without knowing technical information about product safety, because the price they pay will reflect the full “cost” of the product, including its risk of causing harm.¹⁹⁶

Because uncertain jurisdictional rules make it difficult for distributors and manufacturers to properly apportion the risk of liability between themselves, the ultimate result will likely be that products’ end prices to consumers may be increased to account for this uncertainty. This price increase will not be a “signal” of anything other than the difficulty of doing business in an uncertain legal environment, which may drown out any price signaling that would differentiate products based on the actual level of risk associated with them.

iii. *Unclear Personal Jurisdiction Rules Weaken Pricing Signals Reflecting Variations in State Law*

The current regime (or lack thereof) also undermines another set of pricing “signals”: those associated with different states’ product liability rules. Because different states have different substantive and procedural rules governing liability, some states will expose manufacturers to more exacting scrutiny of their products by the court system. This increased scrutiny has two primary effects in these jurisdictions: increased costs for manufactures and increased safety of consumer products. When manufacturers raise their prices (or abandon a jurisdiction altogether) in response to such rules, it gives consumers a “signal” that they are paying for the higher safety level imposed by their state’s law. By reading these signals, consumers can balance the level of consumer protection they desire with the pricing and

¹⁹⁶ *Id.*

availability of products they want by choosing what jurisdictions to purchase products in (and/or where to live).¹⁹⁷

Just like the direct signaling of product safety, signals about state law are only effective if manufacturers and consumers are able to predict with some reliability which laws (and which courts) will govern each purchase. For the reasons discussed above in part IV(a), being subject to personal jurisdiction in a state at least results in the application of that state's procedural rules and often results in being subject to the substantive law of that state as well. Because of the uncertainty that currently exists in this area, manufacturers often will be unable to build the "price" of different states' tort laws into their products because they will not know whether they can be subject to personal jurisdiction in that state. Thus, as long as the "stream of commerce" doctrine remains undefined, consumers not get the benefit of the pricing signals reflecting state law differences. Instead, consumers may end up "paying for" consumer protections they are not getting if a manufacturer erroneously believes it will be subject to jurisdiction in a particular state and raises prices on that basis. Conversely, manufacturers may be unexpectedly subject to liability that they were unable to price into their products.

¹⁹⁷ Just like consumers without adequate information about product safety can benefit from price-signaling, so too can consumers without adequate information about applicable legal rules benefit from price signaling. Consumers lacking information about comparative tort law regimes are likely to be even more common than those with little knowledge of relative product safety. See Klerman, *supra* note 108, at 1572-74 (noting that it would be "absurd" to suggest that "consumers . . . have detailed knowledge of the laws and procedures of the relevant states so that they could figure out how each state's laws and procedures impact the amount they would be willing to pay for [a] product and so that they could make informed choices between competing products. . . . Very few tort professors could tell you whether Ohio or Colorado has more favorable product liability law, much less put a dollar amount on the difference. In addition, it is simply not worth anyone's time to figure out the relevant laws and their impacts. The probability of an actionable accident for any mass-produced product is negligible, so it would be irrational for any consumer to spend the time to read a forum-selection clause much less research the relevant state's laws or try to calculate how those laws affect their valuation of the product.").

Thus, bringing clarity to the stream of commerce theory would provide positive economic benefits by removing the cloud of uncertainty hanging over consumers, distributors, and manufacturers.

b. Due Process Requires A Clear Rule

Economic concerns aside, the lack of a clear rule on the stream of commerce test creates a level of uncertainty that is itself a violation of the due process principles that have formed the underpinning of modern personal jurisdiction jurisprudence. The Court has emphasized that predictability for the defendant is an important part of what makes the assertion of personal jurisdiction fair. Indeed, this animating principle underlies both the *Nicastro* plurality and dissent's approach to the stream of commerce test. However, by declining to choose between these competing approaches, the Court has undermined this principle by creating the exact unpredictability that an overwhelming majority of the current Court (and its Members since *International Shoe*) has agreed is unacceptable under the Due Process Clause.

Ever since the introduction of the minimum contacts test in *International Shoe*, the Court has emphasized that whether a defendant subjects himself to personal jurisdiction should be, on some level, entirely within the defendant's control.¹⁹⁸ Even prior to the "*International Shoe* era" of personal jurisdiction, the doctrine has always been aimed at allowing the defendant to make a *choice* to submit him or herself (or itself) to personal jurisdiction. Under the prior regime, a defendant could do that simply by choosing whether or not to be physically present in the

¹⁹⁸ See, e.g., *International Shoe*, 326 U.S. at 319; *Hanson*, 357 U.S. at 253.

forum.¹⁹⁹ “Historically, the jurisdiction of courts to render judgment in personam [was] grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding on him.”²⁰⁰ This system was justified in part because the defendant “voluntarily entered [the forum and] has no one but himself to blame” for being subject to suit there.²⁰¹

The modern stream of commerce debate focuses on the *type* of control that a defendant exercises (i.e., taking actions that foreseeably could lead to a product being sold in a forum vs. taking actions that are directly targeted to a forum), but all sides agree that the defendant’s *choices* should ultimately underlie the personal jurisdiction inquiry. The debate is really just over what type of choices are relevant.

The Court recognized as much in two of its seminal personal jurisdiction opinions, *World Wide Volkswagen* and *Burger King*. In *World Wide Volkswagen*, the Court emphasized that subjecting the defendant to jurisdiction in Oklahoma would not comport with due process because one of the primary purposes of the Due Process Clause, “ensuring the orderly administration of the laws,” would be undermined by creating a system where defendants were

¹⁹⁹ See, e.g., *Burnham*, 495 U.S. at 610-11 (opinion of SCALIA, J.) (noting the historical practice of states exercising jurisdiction over any defendant who is physically present in the state).

²⁰⁰ *International Shoe*, 326 U.S. at 316.

²⁰¹ See *Burnham*, 495 U.S. at 625 (opinion of SCALIA, J.); *id.* at 635-36 (BRENNAN, J., concurring in the judgment) (however murky the jurisprudential origins of transient jurisdiction, the fact that American courts have announced the rule for perhaps a century (first in dicta, more recently in holdings) provides a defendant voluntarily present in a particular State today “clear notice that [he] is subject to suit.”). In keeping with this justification, states traditionally exempted from valid service defendants who were coerced into entering the state. See *id.* at 613 (opinion of SCALIA, J.).

unable to “structure their primary conduct with some minimum assurance as to whether that conduct will and will not render them liable to suit.”²⁰²

Two of the three dissenters also agreed with the majority on the importance of allowing the defendant to structure its primary conduct to control its amenability to suit in a particular forum.²⁰³ Although they would have held that the act of selling a mobile product and being part of a national chain of dealerships was sufficient conduct to subject the defendant to jurisdiction in Oklahoma, they still understood due process as requiring that the defendant be put on notice that their activities could cause them to be subject to personal jurisdiction in Oklahoma.²⁰⁴

In *Burger King*, a case that approved the exercise of jurisdiction by Florida courts over a Michigan franchisee of a Florida corporation, the Court made even clearer the importance of predictability in the personal jurisdiction inquiry. The Court began its analysis by noting that the due process clause requires that potential defendants “have ‘fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.’”²⁰⁵ In this case, the Court held that the franchisee could be subject to jurisdiction in Florida because he had “deliberately reached

²⁰² *World Wide Volkswagen*, 444 U.S. at 297.

²⁰³ *See id.* at 316 (MARSHALL, J., dissenting). The exception was Justice Brennan who argued for a rule based on the contacts between both parties and the forum, where the defendant’s contacts with the forum would not necessarily be decisive. *See id.* at 309-12 (BRENNAN, J., dissenting). However, by the time he wrote the opinion of the Court in *Burger King*, Justice Brennan apparently came to agree that a defendant should be able to choose, through its actions, which forums it will be subject to jurisdiction in. *See* 471 U.S. at 475-76.

²⁰⁴ *World Wide Volkswagen*, 444 U.S. at 316 (MARSHALL, J., dissenting) (“a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell may cause injury in distant States and that they may be called on to defend a resulting lawsuit there”).

²⁰⁵ *Burger King*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (STEVENS, J., concurring)) (alteration in original).

out” to the Florida corporation to enter into the franchise agreement, making it reasonably foreseeable that he would be subject to personal jurisdiction in Florida if a dispute arose out of that agreement.²⁰⁶

Thus, concerns about predictability have long been important to the personal jurisdiction inquiry. Yet, the concurrence’s indecision in *Nicastro* has left manufacturers in a situation where, even with the help of sophisticated lawyers, they cannot structure their primary conduct to avoid or accept liability in particular forums. Instead they are relegated to guessing whether courts in a particular jurisdiction will apply the plurality’s approach, the dissent’s approach, or some combination of the two. This state of affairs neither “ensur[s] the orderly administration of the laws,” nor gives defendants “fair warning that [their] activit[ies] may subject [them] to the jurisdiction of a foreign sovereign.”²⁰⁷

V. Either The Plurality Of The Dissent’s Approach Can Be Readily Applied To The “Modern” Issues That Troubled the Concurrence

The concurrence’s primary justification²⁰⁸ for declining to settle the stream of commerce issue was that making such a choice was inappropriate in *Nicastro* because the case did not

²⁰⁶ *Burger King*, 471 U.S. at 479-80, 482, 487.

²⁰⁷ See also S. Wilson Quick, *Staying Afloat in the Stream of Commerce: Goodyear, McIntyre, and the Ship of Personal Jurisdiction*, 37 N.C.J. Int’l L. & Com. Reg. 547, 550 (2012) (“The lack of predictability resulting from the state of jurisdictional analysis is inefficient and diametrically opposed to due process.”).

²⁰⁸ The concurrence also mentioned that it might be more appropriate to finally settle the issue in a case where the Solicitor General participated. *Nicastro*, 131 S.Ct. at 2794 (Breyer, J., concurring). This objection is puzzling. The fate of the stream of commerce doctrine will primarily impact the ability of state courts to adjudicate disputes arising under state law, not federal courts. See Fed. R. Civ. Proc. 4(k) (allowing the assertion of personal jurisdiction in lawsuits arising under federal law where “the defendant is not subject to jurisdiction in any state’s courts of general

“implicate modern concerns.” These modern concerns include situations where a company “targets the world by selling products from its Web site” or “consigns products through an intermediary (say, Amazon.com) who then receives and fulfils the orders” or “market[s] its products through popup advertisements that it knows will be viewed in a forum.”²⁰⁹ In the concurrence’s view, without a case that presented such concerns, it would be inappropriate to “work such a change in the law the way either the plurality or the New Jersey Supreme Court suggest[ed].”²¹⁰

On the surface, this seems like a reasonable and pragmatic approach, but a closer examination reveals that this hesitation is unjustified. As the plurality points out, common law processes always work by establishing broad principles which are then adapted to specific situations, such as the ones the concurrence is concerned with:

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor’s opinion in *Asahi*, 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

jurisdiction”); Brief of Arkansas, Arizona, Hawai’i, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, & West Virginia as Amici Curiae In Support of Respondents at 1, *Nicastro v. J. McIntyre Machinery America, Ltd.*, 564 U.S. ___, 131 S.Ct. 2780 (2011) (No. 09-1343) (noting the states “interest in the articulation of a clear rule governing personal jurisdiction in the products liability context to provide guidance to our courts and our citizens.”). Moreover, nothing about *Nicastro* prevented the Court from calling for the Solicitor General’s views in that case.

²⁰⁹ *Nicastro*, 131 S.Ct. at 2793 (Breyer, J., concurring).

²¹⁰ *Id.* at 2794.

the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.²¹¹

More importantly, there are specific reasons to expect that choosing between the competing approaches to the stream of commerce theory would not present a problem with respect to the “modern concerns” identified by the concurrence. Lower courts have already successfully applied both versions of the stream of commerce test to the e-commerce situations that give the concurrence pause. The outcomes of these cases suggest that the plurality and dissent’s approaches actually would not differ as much in their application to e-commerce issues as they would in their application to more “traditional” cases like *Nicastro*. Although one can imagine—as the concurrence does—cases involving the Internet where the stream of commerce rule would be decisive, these situations do not call for a fundamentally different analysis than the one called for in *Nicastro*.

a. The Application of the Stream-of Commerce Test Is Usually Distinct From Issues Presented By The Internet

Courts adopting both approaches to the stream of commerce test appear to approach internet commerce the same way: by making a distinction between websites that are “passive” and websites that are “interactive.”²¹² Websites simply presenting information about a business

²¹¹ *Id.* at 2790 (plurality opinion).

²¹² See *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549-50 (7th Cir. 2004) (collecting cases). This test appears to have originated from *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). See David

that do not provide any option for communication or commerce between the user and the business are usually not considered “contacts” with any particular forum.²¹³ Conversely, websites allowing the user to directly communicate with the company, such as by purchasing products, are considered significant “contacts” for purposes of the personal jurisdiction inquiry.²¹⁴ The stream of commerce test is usually, at most, ancillary to these cases, which focus on objective characteristics of the websites at issue, rather than on the defendant’s awareness or intention.

For example, in *Jennings v. AC Hydraulic A/S*, 383 F.3d 546 (7th Cir. 2004), the Seventh Circuit, which applies Justice Brennan’s *Asahi* approach,²¹⁵ affirmed a district court’s finding that Indiana lacked personal jurisdiction over a Danish manufacturer of a jack that allegedly caused the plaintiff’s death at his workplace.²¹⁶ The defendant sold its products into the United States through a distributor in Florida, although the record did not reflect any sales into Indiana

Swetnam-Burland & Stacy O. Stitham, *Back to the Future: Revisiting Zippo in Light of “Modern Concerns”*, 29 J. MARSHALL J. COMPUTER & INFO. L. 231, 236-40 (2011).

²¹³ See, e.g., *id.* at 550 (“[A] defendant’s maintenance of a passive website does not support the exercise of personal jurisdiction over that defendant in a particular forum just because the website can be accessed there.”) (collecting cases); *ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707, 714-15 (4th Cir. 2002) (rejecting personal jurisdiction over a corporation whose internet contacts with the forum were “at most, passive”).

²¹⁴ See, e.g., *ESAB Group, Inc. v. Centrucut, LLC*, 34 F. Supp. 2d 323, 329-31 (D.S.C. 1999) (describing the “sliding scale” of interactivity between websites “doing nothing more than advertising [a] product on the internet [and] ‘interactive’ websites in which individuals enter into contracts with [companies] via the internet[.]”).

²¹⁵ See *Dehmlow v. Austin Fireworks*, 963 F. 2d 941, 947 (7th Cir. 1992); see also *Sullivan v. Author Solutions, Inc.*, No. 07-C-1137, 2008 WL 2937786, at *4 n.9 (E.D. Wis. Jul. 23, 2008) (finding the assertion of personal jurisdiction appropriate where “Here, defendant placed its books into the stream of commerce by delegating its printing and sales functions to its printers and distributors. Defendant expected that the books printed and distributed by these entities would be distributed in all of the states they serviced.”).

²¹⁶ See *Jennings*, 383 F.3d at 548-49, 552.

or the volume of total sales through the distributor.²¹⁷ The defendant also maintained a website, in English, that was accessible throughout the United States.²¹⁸ The website contained information about the defendant's products and contact information, but did not allow consumers to place orders directly through the website.²¹⁹

The plaintiff argued that the website was sufficient to support the exercise of personal jurisdiction in Indiana since it was essentially soliciting business from anywhere, including Indiana, by being accessible from anywhere (and being available in English).²²⁰ The court rejected that argument as “sweep[ing] too broadly” since “it is unusual to find a company that does not maintain at least a passive website [so] [p]remising personal jurisdiction on the maintenance of website, without requiring some level of ‘interactivity’ between the defendant and consumers . . . , would create almost universal personal jurisdiction[.]”²²¹ The court found that since the defendant's website allowed for no interaction at all and instead just made information available, it could not be a sufficient contact to support the exercise of personal jurisdiction in Indiana.²²²

²¹⁷ *See id.* at 548. Although it was clear that the jack at issue in the case was manufactured by the defendant, the record did not clearly reflect whether the jack was sold into Indiana through the distributor, directly from the manufacturer, or through some other channel. *See id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.* at 549-50.

²²¹ *Id.*

²²² *Jennings*, 383 F.3d at 549-50.

Separately, the court rejected the argument that an undetermined number of sales to the Florida distributor could support personal jurisdiction in Indiana because of a lack of evidence presented by the plaintiff regarding how the jack at issue in the case got to Indiana, and what the volume of sales was from the distributor to Indiana.²²³

Similarly, in *Brown v. Geha-Werke GmbH*, 69 F. Supp. 2d 770 (D.S.C. 1999), a district court in a jurisdiction that has adopted Justice O'Connor's *Asahi* approach,²²⁴ rejected the assertion of personal jurisdiction by South Carolina against a German manufacturer of paper shredders.²²⁵ The plaintiff in that case was making a product liability claim against the manufacturer because of injuries she sustained from a paper shredder in her father's office.²²⁶ The manufacturer sold its products to an American distributor,²²⁷ who then sold the shredders to a third company, which sold the shredder at issue to the plaintiff's father's employer.²²⁸ The plaintiff argued that the defendant was aware that its shredders could end up in South Carolina, and that the 'additional conduct' requirement of Justice O'Connor's *Asahi* test was satisfied by the defendant maintaining a website accessible to South Carolina consumers, which the plaintiff attempted to equate with advertising in South Carolina.²²⁹

²²³ *Id.* at 550-51.

²²⁴ See *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944-46 (4th Cir. 1994).

²²⁵ 69 F. Supp. 2d at 772-74.

²²⁶ *Id.* at 772.

²²⁷ Although the case does not explicitly mention where the distributor was based, it is apparent from the court's analysis that the distributor must have been based in a state other than South Carolina.

²²⁸ *Id.* at 772-74.

²²⁹ *Id.* at 777.

The court rejected that argument, reasoning that the website at issue was a “passive” website which only presented information about the defendant’s products and contact information.²³⁰ The court noted that there was no evidence that the defendant had done anything to encourage South Carolina consumers to visit the website or that a substantial number of them had done so.²³¹ Thus, the court concluded that there was no evidence “that this web site was directed at South Carolina any more than any other place in the world [and] [c]onsequently, . . . [the defendant’s] website cannot provide a basis for an assertion of personal jurisdiction[.]”²³²

As these cases show, the issue of how websites impact the personal jurisdiction inquiry is analytically distinct from the issue of how to apply the stream of commerce test to the use of a distribution network, even when both issues are present in the same case. In both *Jennings* and *Brown* the court looked at a passive website and applied the same test to reach the same conclusion, even though each jurisdiction applies a different version of the stream of commerce doctrine. *Jennings* and *Brown* did analyze the defendant’s website in different parts of their analysis, with *Jennings* analyzing it as another potential contact to support jurisdiction and *Brown* analyzing it as a potential ‘something more’ under Justice O’Connor’s version of the stream of commerce test. However, both courts applied the same, relatively well settled approach,²³³ to the actual determination of the website’s impact by looking at objective

²³⁰ *Id.*

²³¹ *Id.* at 777-78.

²³² *Brown*, 69 F. Supp. 2d at 778.

²³³ Many have argued that the *Zippo* interactivity test is outmoded and should be replaced. *See, e.g.*, Swetnam-Burland, *supra* note 212, at 238-43. However, even if the interactivity test were to be replaced with something else, that analysis would likely focus either on other characteristics of the defendant’s web presence or on other contacts the defendant makes with the forum in the non-virtual world. *See id.* at 249-50 (suggesting treating the internet as just another method of making a “contact” for purposes of personal jurisdiction, rather than as a contact in itself).

characteristics of the websites in question: specifically, the level of interaction each website fostered with forum state consumers. Thus, making a choice between the competing approaches to the stream of commerce from *Asahi* and *Nicastro* would make very little difference to the analysis of internet issues in personal jurisdiction cases.

b. Either Version Of The Stream Of Commerce Test Is Readily Applicable To E-Commerce

The concurrence presents a few hypothetical situations that purport to explain why “modern concerns” must be present in a case deciding the stream of commerce question; however, none of these is persuasive. The most obvious type of situation where the applicable stream of commerce test might be outcome determinative in an e-commerce case is one where a manufacturer sells its product over the Internet through third party such as Amazon or E-Bay. While this situation on the surface seems to present a novel question of “modern concerns,” it is actually not fundamentally different from what happened in *Nicastro* itself.

The manufacturer in such a situation is using Amazon or E-Bay as its’ “distributor” and is targeting the United States as a whole (since the internet is accessible from anywhere), just as J. McIntyre did in a more traditional way by hiring its domestic distributor. As demonstrated by the discussion above, the third party distributor (Amazon or E-Bay) would be subject to jurisdiction under the approach the Courts of Appeal have taken to Internet commerce in any

Such an analysis would still be distinct from the fundamental question of whether the manufacturing defendant must intentionally send its products directly to a particular forum, or whether the manufacturing defendant’s knowledge that a product is likely to end up in that forum is sufficient.

state since they maintain an “interactive” websites. Whether the manufacturer would be subject to jurisdiction would turn on exactly the same issues as whether J. McIntyre could be subject to jurisdiction in *Nicastro*.

While the answers the plurality and the dissent give to that question diverge sharply, the answer is clear under either approach. A manufacturer who provides its products to a third party seller who sells those products over the internet to a purchaser in a particular state would not be subject to personal jurisdiction under the plurality’s approach unless the manufacturer took some other action to specifically target *that particular state* (such as advertising its products in that state or designing its products for use in that state). Conversely, under the dissent’s approach, since a manufacturer could reasonably expect that a product being sold over the internet by a third party could end up in any state, the manufacturer would be subject to jurisdiction in any state where the product was sold, without taking any additional action to target that state. Thus, the issue presented in *Nicastro* regarding the stream of commerce test is independent from the issue of how to deal with issues presented by the internet.

Finally, the concurrence suggests that, especially when applied to an internet based third party distributor, the plurality and the dissent’s approach could each lead to extreme and undesirable consequences in particular cases. In critiquing the plurality, the concurrence implies that a corporation targeting its products “to the world” through a third party internet distributor could get away with not being subject to jurisdiction in any state because there would be no purposeful targeting of any given state.²³⁴ In critiquing the dissent, the concurrence suggests that

²³⁴ See *Nicastro*, 131 S.Ct. at 2793 (BREYER, J., concurring).

a hapless small manufacturer, such as an Appalachian potter, who sells its products to a large national distributor, could be forced to defend lawsuits in “virtually any” jurisdiction in the United States.²³⁵ Neither of these critiques should have prevented the concurrence from fashioning a rule for at least two reasons.

First, as with any clear legal rule, a clear stream of commerce rule would occasionally produce results that do not seem fair. Nevertheless, this occasional unfairness is far outweighed by the unfairness created by a lack of any rule at all. Once a clear rule is set and businesses are able to structure their primary conduct to avoid or account for the situations where they will be subject to personal jurisdiction, such ‘unfair’ situations will become less common.

Secondly, and more importantly, both approaches have sufficient flexibility to prevent (or at least potentially prevent) these seemingly unjust outcomes. Where a corporation employs a distributor (over the internet or otherwise), to target the United States as a whole, the plurality specifically left the door open to a legislative solution, suggesting that “[i]t may be that . . . Congress could authorize the exercise of jurisdiction in” federal courts for state law claims against defendants with sufficient contacts with the United States as a whole.²³⁶ Thus, to deal with corporations that target the United States as a whole, Congress could pass a statute empowering federal courts to hear those cases.²³⁷ And, of course, at least in the products liability

²³⁵ *Id.* at 2793-94.

²³⁶ *Id.* at 2790 (plurality opinion).

²³⁷ Another potential legislative solution is to require foreign manufacturers to consent to jurisdiction in a particular state as a condition of selling goods into the United States. Several bills have been introduced to that effect. *See, e.g.*, H.R. 3646, 112th Cong. (2011); H.R. 4678, 111th Cong. (2010); S.1606, 111th Cong. (2009).

context, in most states the injured consumer would still have the option of suing the distributor.²³⁸

As for the hypothetical Appalachian potter in a world governed by the dissent's approach, the concurrence forgets that the stream of commerce test only deals with the first half of the personal jurisdiction inquiry, whether the defendant has the requisite "minimum contacts" with the forum to be subject to jurisdiction in that forum. The second prong of the test, whether the assertion of jurisdiction in the particular case is consistent with traditional notions of fair play and substantial justice would still have to be satisfied even where minimum contacts were established through the stream of commerce test.

Indeed, *Asahi* itself is an illustration of this principal. While Justice Brennan took the broader expectations or awareness based approach to the stream of commerce test, he and the three other Justices joining him agreed that the assertion of personal jurisdiction was still inappropriate in that case because it would not comport with traditional notions of fair play and substantial justice to hale the Japanese part manufacturer into court in California in part because of the "severe" burden such a defense would place on the defendant.²³⁹ Such an approach would probably yield similar results for the Appalachian potter Justice Breyer's concurrence is concerned about.²⁴⁰

²³⁸ See, e.g., DOOLEY, *supra* note 192, § 32.64.

²³⁹ *Asahi*, 480 U.S. at 113-16 (majority opinion).

²⁴⁰ Indeed, as discussed in Part III, *supra*, the dissent in *Nicastro* elaborated on this point to suggest a distinction between "cases involving a substantially local plaintiff, like *Nicastro*, injured by the activity of a defendant engaged in interstate or international trade [where jurisdiction presumably would be consistent with fair play and substantial justice] and . . . cases in which the defendant is a natural or legal person whose economic activities and legal

Thus, either approach to the stream of commerce test would be readily applicable to cases involving modern technology and would apply to that area in much the same way as they would apply to cases not involving such technology. Moreover, each test has either built-in or legislatively available mechanisms to prevent unfair results being created by their application to e-commerce cases.

VI. Conclusion

At the heart of personal jurisdiction since *International Shoe* has always been a concern for fairness and efficiency. Yet, as the stream of commerce test stands now, personal jurisdiction is uniquely unfair to certain businesses and consumers who are left in uncertainty as to what conduct will subject a business to jurisdiction . Such uncertainty is not just unfair; it is also economically detrimental since so much of today's commerce flows through international channels.

While adapting personal jurisdiction jurisprudence to products flowing through the international "stream of commerce" is a challenge, the Supreme Court laid out two clear and relatively easily applied approaches to the problem in *Asahi* and *Nicastro*. As demonstrated above, the concurrence's refusal to choose between the two approaches in *Nicastro* because of imagined "modern concerns" was both destructive and unnecessary. Next time the Supreme

involvements are largely home-based, *i.e.*, entities without designs to gain substantial revenue from sales in distant markets." 131 S.Ct. at 2804 (GINSBURG, J., dissenting). The dissent suggested that this approach "would, to a considerable extent, answer the concerns expressed by Justice Breyer." *Id.* at 2804 n.18.

Court confronts the stream of commerce, hopefully it will not engage in such faux restraint, and instead will finally choose one of the clear approaches available to address this problem.