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NOTES

WHITHER FAIRNESS? IN SEARCH OF A JURISDICTIONAL TEST AFTER *J. MCINTYRE MACHINERY V. NICASTRO*

*Peter R. Bryce**

In 2011, the U.S. Supreme Court ruled on the issue of personal jurisdiction over alien corporations in products liability cases. J. McIntyre Machinery, Ltd. v. Nicastro *was the Court's first statement on the issue in twenty-four years. The opinion, handed down almost ten years after the injury that gave rise to the litigation, could not command a majority of the Justices. Writing for a plurality, Justice Kennedy set forth a strict standard that required that a manufacturer's products be specifically targeted at a given forum state for jurisdiction to be proper.*

This Note argues that, while Kennedy's opinion did not necessarily violate the letter of jurisdictional doctrine—for in reality, there is no discernible letter—it violated the spirit. In analyzing the origins, development, and application of personal jurisdiction over the centuries, this Note concludes that the current palette of jurisdictional tests is not sufficient to meet the demands of fairness in cases like Nicastro. *Using simple tort concepts as analogues, this Note advances a new test capable of doing justice without violating due process.*

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INTRODUCTION

On October 11, 2001, Robert Nicastro showed up at his job at a scrap metal plant in New Jersey.[1] In the usual course of his work, calamity struck: his hand got caught in a shearing machine, and he lost four fingers.[2] He felt that the machine had been poorly designed, and sued in New Jersey state court to recover for his injuries.[3] Ultimately, his case made its way to the U.S. Supreme Court.[4]

The issue driving the litigation had nothing to do with Nicastro's hand. Nobody ever asked whether the machine was, in fact, negligently designed, or even dangerous. Instead, the Supreme Court decided that Nicastro had gone about the process all wrong: he had brought the case in the wrong

1. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010).
2. *See id.*
3. *See id.* at 577–79.
4. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

court![5] Because the company that made the machine—J. McIntyre Machinery, Ltd.—did not have an office in New Jersey, and had not specifically targeted the machine for sale in that state, it could not be sued in New Jersey, even if the defect caused serious and irreparable injury there.[6]

This Note questions why courts are reluctant to hold foreign and alien corporations amenable to suit in jurisdictions where their products cause serious injury.[7] To some, it may be an intuitively agreeable notion that a farmer from Florida should not be forced to defend himself in an Alaska state court simply at the whim of the plaintiff, if the farmer has never had any contact whatsoever with Alaska.[8] But can that intuition also be credibly extended to Nicastro's case? Is it simply unconstitutionally inconvenient to fly back and forth from Tallahassee to Juneau to defend oneself?[9] Is remote litigation an unconstitutional surprise to the luckless farmer?[10] Or does our federal system demand that states avoid meddling in the affairs of far-flung jurisdictions without a good reason?[11]

It seems fair to allow Nicastro to pursue redress for his injuries in the state in which they occurred. Reluctant to adopt such a position, the

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5. *See id.* at 2790–91.

6. *See id.*

7. For the purposes of this Note, the term "foreign" shall be used to identify U.S. entities in states outside the forum asserting jurisdiction. The term "alien" shall be used to identify entities in nations outside those bounds. Because "substantially the same rules of personal jurisdiction have been applied both to domestic and alien defendant corporations," these distinctions are purely semantic herein. Matthew D. Richardson, *The Outer Limits of In Personam Jurisdiction over Alien Corporations: The National Contacts Theory*, 16 GEO. WASH. J. INT'L L. & ECON. 637, 637 (1982).

8. *See, e.g.*, *Nicastro*, 131 S. Ct. at 2790 (grounding a jurisdictional test in this hypothetical).

9. *See* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203–04 (E.D. Pa. 1974); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 38–39 (1984) (noting that the Supreme Court considers inconvenience and unreasonableness of lawsuits in distant forums relevant factors in determining the legitimacy of jurisdiction in federal cases). *But see* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 704–05 (1987) ("[C]onvenience has played a peripheral role" in determining the legitimacy of subjecting defendants to suit in distant forums).

10. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The [Constitution] . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

11. *See id.* at 294 ("[E]ven if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."); *see also* Pennoyer v. Neff, 95 U.S. 714, 733 (1878) (finding a violation of the Due Process Clause of the Fourteenth Amendment where a court "determine[s] the personal rights and obligations of parties over whom [a] court has no jurisdiction"). *But see* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982) (noting that the Due Process Clause does not mention federalism; protecting parties from far-flung adjudicatory proceedings is, rather, an "individual liberty interest"). The *Bauxites* Court also observed that, because a defendant can waive the defense of personal jurisdiction under Federal Rule of Civil Procedure 12(h), the right arguably inheres in the individual who can dispose of it, and not in the several states who wish to preserve their adjudicatory interest. *Id.* at 704.

Supreme Court has made references to federalism[12] and a defendant's purposeful conduct aimed at the forum state[13] as key elements of jurisdictional doctrine. The empathetic desire to provide adequate relief to injured plaintiffs in the forum of their injury is not always sufficient to justify an assertion of jurisdiction.[14]

With respect to corporations, the Supreme Court has held that, for a corporation to be sued in a state not its own, the exercise of jurisdiction must be reasonable.[15] In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court's most recent foray into personal jurisdiction,[16] Justice Kennedy concluded that it was not reasonable to subject an English corporation to a New Jersey state court's jurisdiction, even though: (1) the corporation commissioned an agent to sell its metal-shearing machines in the United States; (2) the corporation's representatives had attended annual conventions in several states to market its machines to U.S. buyers; (3) at least one of these machines wound up in New Jersey; and (4) one of these machines severed four fingers from Robert Nicastro's right hand.[17]

This is not the case of a Floridian farmer suddenly being forced to fly to Juneau to defend himself simply because he sold an orange to a distributor in Tallahassee.[18] A New Jersey resident has four fewer fingers because of something that happened in his home state. These missing digits were allegedly due to the negligence of an alien corporation.[19] This Note concludes that an instinct, based on fairness, to allow a New Jersey court to exercise jurisdiction over J. McIntyre is legitimate, reasonable, and constitutional.[20]

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12. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 293–94.

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

14. *See infra* Part I.C.

15. *See World-Wide Volkswagen*, 444 U.S. at 292. Reasonableness considers not only the inconveniences to and burden on the defendant, but also the "forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (internal citations omitted).

16. 131 S. Ct. 2780 (2011). *Nicastro* was decided by a plurality opinion on June 27, 2011. On the same day, the Court handed down a unanimous decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). In *Goodyear*, the Court invalidated the exercise of general jurisdiction over a corporation, that is, jurisdiction based purely on the systematic presence of a defendant in a given forum. *Id.* at 2851. This Note is concerned only with *specific* jurisdiction: the exercise of judicial authority based on a discernible act, committed by a defendant, and related to the controversy. *See Nicastro*, 131 S. Ct. at 2788; *see also* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–47 (1966).

17. *Nicastro*, 131 S. Ct. at 2785–86.

18. *But see id.* at 2790 (expressing concern that if the defendant corporation were held amenable to suit in *Nicastro*, then an owner of a "small Florida farm" would also be amenable to suit in Alaska if she entered into an agreement with a large-scale distributor who sold her products in all fifty states).

19. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010).

20. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at cxiii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("When Henry Hart taught 'Federal Courts' for the last time, during the Spring Term of

Part I of this Note tracks the evolution of personal jurisdiction from its origins to the modern day. This history will discuss the inconsistencies in the doctrine, which leave it open to interpretation and refinement as new fact patterns present themselves. Part II analyzes the *Nicastro* decision, and argues that the Supreme Court missed an opportunity to clarify the doctrine and achieve a just result for all parties. Part III proposes a standard of jurisdictional analysis that uses principles of tort law as models through which jurisdiction may be more cogently and fairly applied.

I. TWO CENTURIES OF PERSONAL JURISDICTION

Part I explores the winding road that jurisdictional doctrine has traveled. It begins by discussing the support for understanding personal jurisdiction as a constitutional mandate. It then explores various other justifications that the Supreme Court has used to resolve interstate jurisdictional disputes. Part I concludes by analyzing the "stream of commerce" doctrine, an analytical tool that courts use to resolve jurisdictional cases where a plaintiff sues a corporation based upon the existence of its product in a given state, despite the absence of the corporation's actual presence.

A. Protecting Defendants from Unreasonable Power

Maria lives in New York State. Duncan, from Seattle, sues in Washington state court to collect on a debt. Maria might be tempted to sit comfortably in Albany and spurn Duncan's attempt to sue her three thousand miles away. However, if she fails to appear in court, a default judgment will be entered against her, which will prevent her from challenging the merits of the case at a later date. If and when Duncan seeks to collect, Maria can only launch a collateral attack on the issue of jurisdiction.[21] Once a decision is rendered in Washington (or any other state), New York is compelled to recognize it as valid. This is because Article IV, Section 1 of the U.S. Constitution mandates that the judicial proceedings in specific states be given "full faith and credit" in the several states.[22]

1965, he brought into class the Supreme Court's opinion in *Hamm v. City of Rock Hill*. The Court applied the just-enacted Civil Rights Act of 1964 to abate Southern prosecutions of sit-in demonstrators. Hart stated the facts and relevant authorities, including a federal statute creating a presumption against finding abatement of prosecutions by new statutes. It was apparent . . . that the decision was about to be analytically dissected. But, rather than launching into the sort of devastating critique of which he was capable, Hart paused and reflected to himself, his eyes focused on his reprint of the Court's opinion. The class stopped for thirty breathless seconds. Finally, Hart looked up at the class and said: 'Sometimes, sometimes, you just have to do the right thing.'").

21. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982).

22. U.S. CONST. art. IV, § 1; *see also* Mills v. Duryee, 11 U.S. (7 Cranch) 481, 483–85 (1813) (holding that specific state court judgments must be given conclusive effect, and not merely evidentiary effect, in other states); ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS 2-3 to 2-4 (1983).

But it certainly does not seem right to bind Maria to a Washington judgment if she has never even been to Washington in the first place. The doctrine of personal jurisdiction serves to protect Maria, and all those similarly situated, from litigation in states with which they have no contact whatsoever.[23]

The Supreme Court first used the term "personal jurisdiction" in an opinion finding that foreign nations share concurrent jurisdiction with the United States when a crime is committed by an American on a private foreign vessel.[24] In support of this proposition, the Court did not cite the Constitution, but turned to Emmerich de Vattel's *The Law of Nations*, published in 1758, as a governing authority on matters of international personal jurisdiction.[25] Not until fifty-nine years later did the Court first articulate a purely constitutional basis for personal jurisdiction.[26] At the outset, jurisdictional restraint had its origins in international policy, and not in the Constitution.[27]

Personal jurisdiction is therefore a doctrine often explained through the use of hypotheticals with results that seem fair.[28] From its inception, the propriety of the result, and not necessarily the method of arriving at it, has been the relevant jurisdictional inquiry.[29]

Early critics of broad jurisdictional reach expressed concern that the Full Faith and Credit Clause could lead to improper results, as an unbridled system of several state judiciaries could unfairly subject foreign defendants to litigation in states "unconnected" to the underlying controversy.[30] The Supreme Court addressed this concern in *D'Arcy v. Ketchum*, an 1850 case that announced the right of non-resident defendants not to be subject to unanticipated litigation in states where they were not present and had no contacts.[31]

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23. *See* CASAD, *supra* note 22, at 2-5 to 2-6.

24. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 621 (1818).

25. *Id.* at 621 nn.d–e; *see also* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 78 (4th ed. 2007) (early U.S. courts and commentators looked to international law and comity as a basis for jurisdictional principles).

26. Pennoyer v. Neff, 95 U.S. 714, 733 (1878); *see infra* Part I.B.

27. There is evidence that, with respect to state court jurisdiction over international defendants, the framers agreed that jurisdiction over aliens was a prudential rather than constitutional matter. *See* THE FEDERALIST NO. 80, at 485 (Alexander Hamilton) (Bantam Classic ed., 2003) ("So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals."). If jurisdiction is a prudential matter, it is perhaps best to leave it in the hands of judges, whose experience in balancing close jurisdictional questions will obtain more just results than rigid doctrinal analysis. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 516–17 (6th ed. 2009) (doctrines that are arguably prudential or constitutional benefit from an evolving common law supported by judicial expertise in procedure); *infra* Part III.B.

28. *See infra* notes 173, 208 (Supreme Court Justices using hypotheticals to explain their jurisdictional tests).

29. *See infra* notes 120, 229 and accompanying text (a test based on fairness).

30. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485–86 (1813) (Johnson, J., dissenting).

31. *See* 52 U.S. (11 How.) 165, 175–76 (1850) (holding that the Full Faith and Credit Clause did not bind defendants to a state's judgment when they were neither present in the

B. Judicial Developments in the Doctrine

This section follows the Supreme Court's evolution from a strict jurisdictional standard to a more permissive analysis based on fairness. It begins with a case in which jurisdiction was seen purely as a matter of actual presence.[32] It then analyzes the Court's decision to relax that standard in order to achieve more just results. It concludes by demonstrating the doctrinal confusion that resulted from a rule whose origins are uncertain and inconsistently cited.

1. *Pennoyer v. Neff*

The right of non-resident defendants to be safe from litigation in states with which they did not have any contact, first articulated in *D'Arcy*, was affirmed by the landmark case of *Pennoyer v. Neff*.[33] *Pennoyer* held that a person who is not physically present in a state simply cannot be subject to that state's adjudicatory power.[34] Perhaps because of the "power"-based origins of this rule,[35] Justice Field found a constitutional basis for it, declaring that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[36] The Court applied the *Pennoyer* rule to corporations in 1915, finding that the Due Process Clause would not permit suit against a corporation that had no presence whatsoever in the

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adjudicating state nor served with process); *see also* Galpin v. Page, 85 U.S. (18 Wall.) 350, 367 (1873) ("The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated . . . as an act of usurpation . . . ."). *But see* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406–08 (1855) (holding that it was not unreasonable to bind an Indiana corporation to an Ohio court's decision when that corporation had appointed an agent to work in Ohio).

32. The physical presence requirement was, at first, rooted in the physical power of a state to bring a civil defendant under its control by actual arrest in order to subject him to now-antiquated procedural norms. *See* CASAD, *supra* note 22, at 2-10 to 2-11.

33. 95 U.S. 714 (1878).

34. *See id.* at 723–24. *Pennoyer* also explained that jurisdiction over property is different from jurisdiction over a person. *Id.* When a plaintiff's claim is related to a defendant's property, and that defendant is not present in the state, the property in question may be attached as part of a default judgment even when the defendant is not personally found within the state. *Id.*

35. *See supra* note 32; *see also infra* note 47 and accompanying text.

36. *Pennoyer*, 95 U.S. at 733. *But see* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 814–15 (1988) (suggesting that, because *Pennoyer* based its holding in principles of sovereignty with respect to international law, the jurisdiction that is relevant with respect to alien defendants is "American jurisdiction, and not the more specific [state] jurisdiction"); Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1294–95 (1983) (finding fault with *Pennoyer* for grounding its allegedly constitutional holding in principles of international law, where the Full Faith and Credit Clause does not apply).

adjudicating state.[37] In so holding, the Court relied on the fiction of corporate personhood.[38]

The Court's rigid framework, based solely on physical presence, inspired several states to adopt consent-based laws that allowed their courts to exercise jurisdiction over people and corporations who had, at least in a theoretical sense, appointed agents competent to receive service of process on the travelers' behalf.[39] The Court's endorsement of consent-based laws marked its acknowledgement that states have a compelling interest in regulating conduct that transpires within their borders, particularly when issues of public safety are concerned.[40]

2. *International Shoe* and Jurisdiction over Corporations: *Pennoyer* Survives, but Barely

The Supreme Court adapted *Pennoyer*'s in-state requirement to a more technologically advanced era in *International Shoe Co. v. Washington*.[41] In *International Shoe*, the defendant was a non-resident corporation that had no offices, kept no inventory, and made no contracts in the forum state.[42] It employed about a dozen salesmen within the forum, and would ship goods to the forum whenever an order was placed.[43] The Court upheld jurisdiction over the defendant because this comported with traditional conceptions of fairness.[44]

While some commentators viewed *International Shoe* as a rejection of *Pennoyer*'s presence requirement,[45] it has also been read simply as a refinement of the doctrine.[46] Under *International Shoe*, a corporation may be found "present" in a forum, and therefore subject to suit, when it has certain "minimum contacts" with that forum, such that the exercise of jurisdiction does not "offend 'traditional notions of fair play and substantial

37. *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194 (1915).

38. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). Though a corporation is an "artificial being," *id.*, the Court has nevertheless held that corporations are entitled to the due process protections of the Fourteenth Amendment, *see* Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889).

39. *See, e.g.*, Kane v. New Jersey, 242 U.S. 160, 164 (1916) (discussing a law that demanded that out-of-state motorists sign a form appointing the Secretary of State as their attorney, upon whom service of process would be sufficient to establish jurisdiction over the motorists). The Court later upheld a Massachusetts law providing that all motorists within the state had implicitly consented to appoint an agent to receive process on their behalf in any litigation resulting from an automobile accident. *See* Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

40. *See Kane*, 242 U.S. at 167–68.

41. 326 U.S. 310 (1945).

42. *See id.* at 313.

43. *See id.* at 314.

44. *Id.* at 320.

45. *See, e.g.*, Gregory Trautman, *Personal Jurisdiction in the Post*-World-Wide Volkswagen *Era—Using a Market Analysis to Determine the Reach of Jurisdiction*, 60 WASH. L. REV. 155, 157 (1984).

46. *See* Stein, *supra* note 9, at 693.

justice.'"[47] Because the personhood of a corporation is itself a fiction,[48] the Court reasoned that corporate presence was also necessarily fictitious—it was the actions of corporate agents, and not necessarily the corporation itself, that were relevant in the new jurisdictional calculus.[49] Because the cause of action "arose out of [the] . . . activities" that the defendant corporation had conducted within the forum, it was reasonable,[50] according to the *International Shoe* Court, for a state to assert jurisdiction.[51]

But an existence of minimum contacts[52] was not the Court's sole justification for finding jurisdiction proper. Justice Stone also asserted that whenever a corporation "enjoys the benefits and protection of the laws" of a state, the corporation can and should expect to be subject to a suit within that state.[53] The benefits of acting under a state's laws accrue whenever an entity "exercises the privilege of conducting activities within a state."[54] These justifications for jurisdiction—state regulation of tortious conduct

47. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Often overlooked in citations to *International Shoe* is the Court's reliance on the obsolescence of writs of *capias ad respondendum* in justifying the minimum contacts hypothesis. *Id.* Such writs commanded a "sheriff to take the defendant into custody to ensure that the defendant will appear in court." BLACK'S LAW DICTIONARY 236 (9th ed. 2009). Once these writs "[gave] way to personal service of summons," the Court did not find the due process implications of extraterritorial jurisdiction to be quite so grave. *Int'l Shoe*, 326 U.S. at 316. By focusing the analysis on fairness, and less on due process, the Court implicitly acknowledged a compelling state interest in regulating tortious conduct by actors outside the state that causes harm within it. *See* Stein, *supra* note 9, at 698–99.

48. *See supra* note 38 and accompanying text.

49. *Int'l Shoe*, 326 U.S. at 316–17; *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2798 (2011) (Ginsburg, J., dissenting) (noting that *International Shoe* holds that corporate presence and implied consent to suit "should be discarded, for they conceal the actual bases on which jurisdiction rests").

50. Though it did not expressly define what assertions of jurisdiction qualify as reasonable, the Court proposed that, in addition to minimum contacts, an "'estimate of the inconveniences' which would result to the corporation from a trial away from its . . . principal place of business" was a relevant factor in the determination of fair play. *Int'l Shoe*, 326 U.S. at 317 (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)). In response, Justice Black criticized the majority for applying "elastic standards" that did not have any textual basis in the Constitution. *Id.* at 325 (Black, J., concurring).

51. *Id.* at 320; *see also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952) (holding that the reasonableness of subjecting a foreign corporation to suit in a given state must be evaluated on a case-by-case basis, with attention paid to the specific actions the corporation takes within or toward the given forum).

52. It is possible that, when *International Shoe* was decided, the word "minimum" had a definition akin to "minimal," meaning that the doctrine was intended to allow states to enjoy broader jurisdiction across state lines. *See Int'l Shoe*, 326 U.S. at 316 ("due process requires *only* . . . minimum contacts") (emphasis added). Later decisions came to regard "minimum" as an adjectival threshold rather than a permissive proclamation. *Cf.* Fullerton, *supra* note 9, at 10 n.38; *see also infra* Part I.B.3 (discussing judicial swelling and retrenchment of jurisdictional principles after *International Shoe*).

53. *Int'l Shoe*, 326 U.S. at 319.

54. *Id.* While minimum contacts have been interpreted as protecting a state's regulatory interest, this prong of *International Shoe* has been read to be grounded in a contract-based exchange theory, under which a corporation implicitly agrees to hold itself amenable to suit in exchange for the exploitation of a state's inner resources. *See* Stein, *supra* note 9, at 699–700; *see also supra* note 47 (examining the state's regulatory interest in minimum contacts).

and corporate consent to suit—have animated the Court's subsequent jurisdictional jurisprudence.[55]

3. Modern Doctrine: The Court Tries to Apply *International Shoe*, and Nobody Agrees

In *McGee v. International Life Insurance Co.*,[56] the Court upheld the exercise of jurisdiction over a corporate defendant by conducting a minimum contacts analysis with reference to the state's regulatory interest,[57] and not to the forum benefits that the defendant corporation had enjoyed.[58] In other words, following *International Shoe*, if the defendant could cause an actionable harm based upon the activity it conducted within the forum, jurisdiction would be proper.[59]

In *McGee*, an Arizona corporation, having no agents or offices in California, had issued an insurance policy to a California resident.[60] This single policy was the only evidence of the corporation doing any business whatsoever with any person in California.[61] When a litigable claim arose out of this policy, the state's "manifest interest in providing effective means of redress for its residents" was sufficient to justify jurisdiction despite the defendant's very minimal contacts with the forum.[62]

The very next year, in *Hanson v. Denckla*,[63] the Court found jurisdiction improper when a Florida resident sued a Delaware trust company in Florida state court, even though the trustee had been remitting income to the plaintiff in Florida.[64] Jurisdiction was rejected because, at the time the trust was formed, the plaintiff had been a resident of Pennsylvania; at no time had the defendant ever solicited business in Florida.[65] Without mentioning fair play and substantial justice, the Court cited *International Shoe* for the proposition that the defendant had not obtained any benefit or privilege from doing business in the state of Florida, and therefore could not be sued in that state.[66] The state's regulatory interest in this case was not addressed. Instead, the Court found the defendant's "purposeful[] avail[ment] of the privilege of conducting activities within the forum State" to be the essential

55. *See* Stein, *supra* note 9, at 700–03.
56. 355 U.S. 220 (1957).
57. *See supra* note 47 and accompanying text.
58. *McGee*, 355 U.S. at 221–23.
59. *See supra* notes 50–51 and accompanying text.
60. *McGee*, 355 U.S. at 221–22.
61. *See id.* at 222.
62. *Id.* at 223. This reasoning has been found indicative of the Court's willingness, in certain cases, to apply a flexible standard in determining whether jurisdiction is proper. *See* Graham C. Lilly, *Jurisdiction over Alien and Domestic Defendants*, 69 VA. L. REV. 85, 90 (1983). Under this standard, fairness and convenience to the plaintiff are given great weight; this regulatory interest standard inspired one scholar to term *McGee* the "summit of permissible jurisdiction." *Id.* at 89–90.
63. 357 U.S. 235 (1958).
64. *Id.* at 251–52.
65. *Id.* at 252.
66. *Id.*

element.[67] Because the plaintiff's move to Florida had been a "unilateral activity," the defendant's relationship to Florida could not sustain jurisdiction.[68]

Almost twenty years later, in *Shaffer v. Heitner*,[69] the Court considered whether jurisdiction could lie against a defendant purely because his property was within the forum state.[70] In *Shaffer*, the plaintiff had sued directors of a Delaware corporation in a shareholders' derivative suit.[71] Because the activities giving rise to the suit had taken place in Oregon, the plaintiff, suing in Delaware, attempted to attach jurisdiction by filing a motion for sequestration of the directors' corporate stock.[72]

The Court concluded that, even if Delaware had a compelling interest in regulating the conduct of corporations within its borders, that interest was better addressed by a choice-of-law analysis than an assertion of jurisdiction based on a regulatory need.[73] When a state finds itself at the nexus of the controversy, the Court reasoned, the state may have its own law govern the dispute, but that does not empower the state to bring foreign defendants into its courts to be subjected to that law.[74] Because of "our federal system of government," "'[the satisfaction of due process] must depend . . . upon the quality and nature of the [defendant's] activity in relation to the fair and orderly administration of the laws.'"[75]

C. The Stream of Commerce Doctrine

This section explains personal jurisdiction in interstate and international products liability cases. It begins with the tale of *World-Wide Volkswagen Corp. v. Woodson*,[76] the Supreme Court's first analysis of when it might be legitimate to exercise jurisdiction over a corporation that is not at all

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67. *Id.* at 253.

68. *Id.* The *Hanson* Court found state lines relevant not for the purpose of determining whether litigation was fair or convenient for the defendant, but for the purpose of preserving a federal system that respects the "territorial limitations on the power of the respective States." *Id.* at 251.

69. 433 U.S. 186 (1977).

70. *Id.* at 199. This type of jurisdiction, known as "quasi in rem" jurisdiction, had its foundations in the idea that it was legitimate for a plaintiff to have access to a defendant's assets located within a forum state, as long as those assets were related to the controversy. *See* Pennoyer v. Neff, 95 U.S. 714, 725–26 (1878). This doctrine was later expanded to provide for jurisdiction over all defendants in general claims when they possessed any amount of property in the forum state. *See* Harris v. Balk, 198 U.S. 215, 223 (1905).

71. *Shaffer*, 433 U.S. at 189–90.

72. *Id.* at 190.

73. *Id.* at 215–16. Choice of law and personal jurisdiction are related but distinct constitutional inquiries. A court's decision to apply a particular state's law to a given controversy can be justified only when a *state's* contacts with the dispute demonstrate a regulatory interest, whereas the jurisdictional inquiry focuses on whether the *defendant's* contacts with the forum are such that an assertion of jurisdiction to promote a regulatory interest does not violate the defendant's individual liberty. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807–08, 821–23 (1985).

74. *Shaffer*, 433 U.S. at 215.

75. *Id.* at 203–04 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317, 319 (1945)).

76. 444 U.S. 286 (1980).

physically present—even with the benefit of a fiction[77]—in a given forum. It continues with an analysis of how courts and scholars interpreted the *World-Wide Volkswagen* decision. It concludes with *Asahi Metal Industry Co. v. Superior Court of California*,[78] a case in which the Court attempted to clarify the doctrine, but only succeeded in muddying the waters.

1. Origins

As personal jurisdiction lurched into the final two decades of the twentieth century, finding itself grounded alternately in conceptions of fairness to the plaintiff, fairness to the defendant, and notions of territorial federalism,[79] the Supreme Court analyzed the propriety of exercising jurisdiction in a products liability case. Harry and Kay Robinson, the plaintiffs in *World-Wide Volkswagen*, bought a car in the State of New York.[80] A year later, the Robinsons left New York to move to Arizona.[81] While driving their new car across the country, they were involved in a car accident in Oklahoma.[82] The resulting fire severely burned Kay Robinson and her children.[83] The Robinsons brought suit in Oklahoma, alleging negligent design of the gas tank.[84] Among those named as defendants were the regional distributor and retail dealer of the car.[85] These defendants did not have any specific or direct contacts with the state of Oklahoma.[86]

The Court held that *International Shoe*'s minimum contacts test insulated these defendants from suit for two reasons. First, a lack of contacts "protects the defendant against the burdens of litigating in a distant or inconvenient forum," and second, the minimum contacts test "acts to ensure that the States . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[87] In denying jurisdiction, the Court acknowledged that the forum state's interest in regulating conduct is a relevant factor in determining jurisdictional fairness, and even conceded that protecting a defendant from inconvenient litigation was of diminishing importance in the same calculation.[88] But the Court ultimately set fairness and regulatory interests aside, declaring:

> Even if the defendant would suffer . . . no inconvenience . . . even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may

77. *See supra* note 49 and accompanying text.
78. 480 U.S. 102 (1987).
79. For a discussion of each justification, see *supra* Part I.B.
80. *World-Wide Volkswagen*, 444 U.S. at 288.
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.* at 288–89.
87. *Id.* at 292.
88. *See id.* at 292–93.

> sometimes act to divest the State of its power to render a valid judgment.[89]

The Court held that even though the defendant could theoretically foresee that a car—an inherently mobile product[90]—could wind up in Oklahoma, the foreseeability of harm was not enough to confer jurisdiction on Oklahoma state courts.[91] It was the "foreseeability . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" that was key.[92] The Court concluded that federalism concerns would have yielded to this foreseeability if the defendants had purposefully availed themselves of the privileges of doing business in Oklahoma.[93]

Foreseeable litigation in a distant forum would be reasonable when a corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[94] The Court referred to the "stream of commerce" as the course of trade when a manufacturer makes an effort "to serve directly or indirectly, the market for its product in other States."[95] Because the Robinsons had unilaterally

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89. *Id.* at 294. This declaration of the primacy of federalism appeared to herald an era in which the Court was no longer willing to balance equities to determine jurisdictional fairness. *See* Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 756–57 (1988). Interstate federalism did not hold the championship belt for long. Two years later, the Court cautioned that "[the Due Process] Clause is the only [constitutional] source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns." Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

90. In dissent, Justice Marshall argued that cars, because they travel on and are served by a "nationwide service network," put sellers on notice that they may be subject to suit in states to which these cars are driven. *See World-Wide Volkswagen*, 444 U.S. at 314 (Marshall, J., dissenting).

91. *See id.* at 297 (majority opinion).

92. *See id.* This foreseeability inquiry has come under criticism for circularity. If due process depends on reasonable anticipation of a suit, then it plainly does not matter what the jurisdictional standard is, as long as putative defendants are on notice that such a standard exists. *See* BORN & RUTLEDGE, *supra* note 25, at 95; CASAD, *supra* note 22, at 2-60. Moreover, the fairness standard adopted in *International Shoe* was authored by the Court sua sponte, without the parties having briefed or argued the case with reference to traditional notions of fair play and substantial justice. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 81 (6th ed. 2004). If a landmark jurisdiction case led to a result that surprised both parties, foreseeability of litigation is troublesome as a jurisdictional precept.

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

94. *Id.* at 298.

95. *Id.* at 297. In support of this proposition, the Court cited *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961). *See World-Wide Volkswagen*, 444 U.S. at 298. The *Gray* court found jurisdiction proper in a products liability claim over a foreign manufacturer that, through a middleman, sent its products into the forum state in which they were alleged to have injured the plaintiff. *See Gray*, 176 N.E.2d at 762, 766 ("[I]t is seldom that a manufacturer deals directly with consumers in other States . . . the use of [its] products in the ordinary course of commerce is sufficient contact with [the forum state] to justify a requirement that [it] defend [t]here."); *see also* R. Lawrence Dessem, *Personal Jurisdiction After* Asahi*: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 52–55 (1988) (analyzing federal appeals court decisions written between *World-Wide Volkswagen* and *Asahi*, and determining that "a majority of the federal appellate circuits upheld an expansive exercise of stream of commerce jurisdiction, in several cases premised solely

moved the car into Oklahoma, a state the defendants had not been trying to serve even indirectly, the Court concluded that Oklahoma did not have jurisdiction.[96]

2. Interpreting *World-Wide Volkswagen*

The Court decided *Rush v. Savchuk*[97] on the same day it issued its *World-Wide Volkswagen* opinion. In *Rush*, the Court reiterated its position that, in deciding jurisdictional questions, "the inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'"[98] The Court had already held that a relationship based on a single contact could be sufficient to justify jurisdiction.[99] Yet the Court did not articulate what it actually meant for a contact to be related to the litigation.[100]

The stream of commerce test is used to determine whether an out-of-state manufacturer's act constitutes a contact that is related to a jurisdictional event that is alleged to have caused harm to a plaintiff.[101] But a unilateral act by the plaintiff, in which she moves herself and any relevant goods to an unanticipated state, satisfies the Court that the stream of commerce has dried up before it reached the forum.[102]

A question remained open, however: How would a court view a defendant's relationship with the forum in a stream-of-commerce case where the plaintiff took no action to bring the product into her home state? What if the product was delivered there?[103]

While that question percolated in the lower courts, the Supreme Court continued to hold that, when the harmful effects of a defendant's conduct should reasonably be expected to be felt in the forum state, jurisdiction was proper.[104] This test, which sustains jurisdiction over foreign defendants

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upon a manufacturer's foreseeability or awareness"); Trautman, *supra* note 45, at 175 (citing cases to show that, after *Gray*, courts considered the size of the benefit that a foreign corporation received by doing business in a forum in determining the propriety of enforcing jurisdiction, and that "the defendant's interests can be adequately protected without requiring jurisdiction over the defendant to hinge on a literal showing of purposeful contacts with the forum state").

96. *World-Wide Volkswagen*, 444 U.S. at 298 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

97. 444 U.S. 320 (1980).

98. *Id.* at 327 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

99. *See supra* notes 56–62 and accompanying text.

100. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82.

101. *See* Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766–67 (Ill. 1961).

102. *See supra* note 96 and accompanying text.

103. *See* Trautman, *supra* note 45, at 162–64 (foreseeing problems in applying the *Hanson* doctrine to stream of commerce cases, and suggesting that the appropriate way to view the corporate defendant's relationship with the forum would be centered on the benefits it received in connection with the forum).

104. *See* Calder v. Jones, 465 U.S. 783, 786–90 (1984) (finding jurisdiction in California proper over Floridian defendants who had written and edited an allegedly libelous story, published in the *National Enquirer*, about a California resident, despite the defendant's objections that they, as writer and editor, were not responsible for the distribution scheme that led the article to be circulated in California); Keeton v. Hustler Magazine, Inc., 465 U.S.

based on actual or constructive knowledge that their out-of-state conduct could cause harm within a forum, has also been endorsed in an international context.[105] Minimum contacts remained the touchstone of the jurisdictional test,[106] but once sufficient contacts have been established, their existence unlocks the door for courts to consider several other factors in a balancing of the equities to determine whether the exercise of jurisdiction is "reasonable."[107] The regulatory justification for jurisdiction survived, recast as the state's "manifest interest" in giving its residents adequate relief if they are injured by out-of-state actors.[108]

The stream of commerce test was used as one mechanism through which reasonableness might be demonstrated.[109] But independent of that stream, and independent of any notions of consent to suit, a defendant who "purposefully directs" goods or activities toward a forum state was also subject to the forum's jurisdiction.[110] Courts generally required a specific geographical nexus, such that the defendant can be on notice that it is subject to suit in a distinct locale, and might buy insurance or simply remove itself or its goods from the state to insulate itself from suit there.[111] All that is necessary to provoke defendants to engage in such precaution is "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign."[112]

3. *Asahi* and the Stream of Commerce Doctrine's Application to Alien Defendants: Nobody Agrees

In 1987, the Court attempted to apply the stream of commerce analysis to an alien defendant. Gary Zurcher, whose wife was killed in a motorcycle accident in California, filed suit against Cheng Shin Rubber, a Taiwanese

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770, 781 (1984) (where a defendant has "continuously and deliberately exploited [a] market, it must reasonably anticipate being haled into court there").

105. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 49(1) (1971) ("A state has power to exercise judicial jurisdiction over a foreign corporation which has done, or *has caused to be done*, an act in the state with respect to any cause of action in tort arising from the act.") (emphasis added). The Restatement uses "foreign" in the conventional sense, describing cases involving international litigation. *See id.* § 41 (test of jurisdiction over "domestic corporations").

106. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

107. *See supra* note 50 and accompanying text.

108. *Burger King*, 471 U.S. at 473.

109. *See id.*

110. *Id. But see* C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 629–31 (2006) (arguing that an analysis of a defendant's "purpose" is necessarily subjective, and that it should therefore be irrelevant to the foreseeability inquiry); *see also* Stravitz, *supra* note 89, at 778 (suggesting that in *Burger King*, Justice Brennan chose the phrase "purposefully directed" in order to broaden the narrower "purposefully availed" standard announced in *Hanson v. Denckla*, thereby creating a more inclusive standard that subjects "out-of-state actors causing in-state effects" to suit more frequently).

111. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

112. *Burger King*, 471 U.S. at 472 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

company that manufactured an allegedly defective tire tube.[113] Cheng Shin filed a cross-complaint seeking indemnification by Asahi, a Japanese manufacturer of the tube's component valve assemblies.[114] After Zurcher settled his claims with all defendants, the trial court was left with Cheng Shin's indemnity claim against Asahi, and the question whether a California court might properly exercise jurisdiction over Asahi for the purposes of that dispute.[115]

Asahi had not done any business directly in California.[116] All of the valve assemblies it had made for Cheng Shin were sent to Taiwan.[117] While Asahi's sales to Cheng Shin accounted for approximately 1 percent of its business, Cheng Shin asserted that 20 percent of its U.S. sales were conducted in California.[118]

Based on the balancing test outlined in *World-Wide Volkswagen*,[119] the Court considered the totality of the facts, and unanimously concluded that, given the "international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair."[120] Because (1) the burden on the defendant was high; (2) the indemnity plaintiff was not a California resident; and (3) California had little interest in the resolution of an indemnity claim between alien defendants, the Court held that an exercise of jurisdiction would violate "'traditional notions of fair play and substantial justice.'"[121] Quoting *United States v. First National City Bank*, Justice O'Connor noted, "'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'"[122]

One reason that Justice O'Connor was hesitant to sustain jurisdiction over an alien corporation was that the burden of litigating in such a distant forum would be "severe," since Asahi would be required "not only to

113. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105–06 (1987).
114. *Id.* at 106.
115. *Id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See supra* note 15 and accompanying text.
120. *Asahi*, 480 U.S. at 114–16.
121. *Id.* at 113–15 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). *But see* Stravitz, *supra* note 89, at 794–97 (finding the *Asahi* Court's fairness analysis "overly conclusory," because, among other reasons: (1) the burden on an alien defendant will usually be high; (2) an increasingly global economy negates, in part, travel concerns for alien defendants; and (3) the absence of a California plaintiff, due only to settlement, should not be sufficient to defeat jurisdiction because "subsequent litigational developments" such as settlement should not be found to "dislodge[]" jurisdiction if it had been present at the outset).
122. *Asahi*, 480 U.S. at 115 (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting). *But cf.* FEDERALIST NO. 80, *supra* note 27, at 485 (failing to anticipate the technological advances that might render state court jurisdiction over alien torts a constitutional question); Degnan & Kane, *supra* note 36, at 813 (arguing that "[i]n the international order, there is no such thing as [states]," and therefore other nations are indifferent as to whether jurisdiction is exercised over their residents in one state or another, as long as jurisdiction in the United States as a whole is valid).

traverse the distance between [Japan and California], but also to submit its dispute with Cheng Shin to a foreign nation's judicial system."[123] As another policy justification for her reluctance, Justice O'Connor cited Professor Born,[124] who called for "heightened constitutional scrutiny" of jurisdiction over aliens.[125]

The concern was not that U.S. plaintiffs would suddenly start launching frivolous claims against alien defendants because jurisdiction would be made easier to acquire.[126] Rather, it was that alien courts would grow weary of unreasonable extensions of U.S. jurisdiction, and thereby be prompted to terminate a relationship of comity.[127] In that sense, Justice O'Connor appeared to consider "fairness" not only with respect to the issue before her, but with respect to the possibility that future litigants would be unable to achieve fair results due to a breakdown in comity.

This principle, while valid, can be difficult to apply in a jurisdictional context for several reasons. First, the Court had previously referenced fairness to future litigants only obliquely.[128] Second, at the time *Asahi* was decided, different nations employed different models of jurisdictional fairness,[129] many of which are still more favorable to the plaintiff than the various models applied in the United States.[130] And finally, international

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123. *Asahi*, 480 U.S. at 114. *But see* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 174 (4th ed. 2001) ("The Court's description of defendant's burden reads as though Asahi would travel by canoe, had no product liability insurance, and could not, as it did, hire excellent lawyers.").

124. *Asahi*, 480 U.S. at 115.

125. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 35 (1987). Professor Born's warning aside, it is not at all apparent that there is a pressing international concern to make sure that close jurisdictional cases are decided one way or another. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 174–77, 212–14, 226–27 (1973).

126. *See* Dessem, *supra* note 95, at 80.

127. "Comity" refers to the international practice of nations giving respect to each other's judicial acts. *See* BLACK'S LAW DICTIONARY 303 (9th ed. 2009). The principles of comity with respect to international cooperation are similar to the principles of the Full Faith and Credit Clause with respect to federal cooperation. *See supra* notes 22, 31 and accompanying text. For a full discussion of recognition and enforcement of foreign judgments, see generally STEPHEN C. MCCAFFREY & THOMAS O. MAIN, TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE 587–670 (2010).

128. *See supra* note 15 and accompanying text.

129. *See* Degnan & Kane, *supra* note 36, at 847–50 (arguing that because of these discrepancies, a state jurisdictional standard based on national contacts will "receive at least no worse a reception than those obtained under the current state contacts standard"); von Mehren & Trautman, *supra* note 16, at 1122 ("[N]o fundamental distinction needs to be drawn between the jurisdictional problems raised by litigation involving international elements arising in an American [state] court . . . and those raised by litigation in which the nonlocal elements are connected with sister states.").

130. Germany, for instance, grants jurisdiction over a defendant whenever she owns property in Germany, even if that property is unconnected to the litigation. *See* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 143 (3d ed. 2001). France allows jurisdiction over any defendant as long as a French citizen is suing in French court. *See id.* And in the Brussels Convention on Jurisdiction, the EU allows for jurisdiction by necessity, where a defendant may be sued in any EU jurisdiction in which a fellow defendant is domiciled. Council Regulation 44/2001, art. 6.1, 2001 O.J. (L 12) 1, 4–5 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=

corporations sell different goods and carry on business in vastly different ways—given this diversity of scope and scale, a jurisdictional inquiry that is not fact-based and hews instead to "talismanic formulas" can lead to problems in application.[131]

Regardless of O'Connor's justifications, a majority of the Justices agreed that a fairness analysis is only appropriate if, in the first instance, the defendant is found to have the "minimum contacts" necessary to justify the equitable inquiry.[132] On the question of minimum contacts, the Court splintered into three separate opinions, unable to form a majority on the question of whether Asahi had sufficient contacts to unlock the question of fairness.[133]

Because Asahi did no business on its own initiative in California, and did not purposefully direct its wares or products at the forum,[134] the analysis came down to an interpretation of the stream of commerce doctrine.[135] Justice O'Connor, writing for four Justices, opined:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct . . . to serve the market in the forum State [is required]. . . . [D]esigning the product for the market in the forum State, advertising in the forum State, . . . or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State [may suffice]. But a defendant's awareness that the stream of commerce may . . . sweep the product into the forum State does not [create minimum contacts.][136]

Justice Brennan, also writing for four Justices, disagreed. He asserted, "As long as a [defendant] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit."[137] This idea was not new—the notion that a

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OJ:L:2001:012:0001:0023:en:PDF; *see also* McCaffrey & Main, *supra* note 127, at 127–29.

131. David Epstein et al., International Litigation: A Guide to Jurisdiction, Practice, and Strategy 6-14.1 (3d ed. 1998).

132. *See Asahi*, 480 U.S. at 108–09; *see also supra* note 107 and accompanying text.

133. *See* Stravitz, *supra* note 89, at 788.

134. *But see supra* note 103 and accompanying text (noting that purposeful availment may be an inappropriate standard in stream of commerce cases).

135. *Asahi*, 480 U.S. at 112, 119–20. Because of the factual dissimilarities between *World-Wide Volkswagen* and *Asahi*, it has been suggested that the stream of commerce analysis in the former case (product unilaterally moved by consumer) is inapplicable to the latter (product set in stream of commerce by manufacturer and alleged to have been sold in the forum state). *See* Dessem, *supra* note 95, at 69–70.

136. *Asahi*, 480 U.S. at 112. O'Connor's theory of jurisdiction has come to be known as the "stream of commerce 'plus' theory." *E.g.*, Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 479 (6th Cir. 2003).

137. *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment). The language Justice Brennan uses is likely a tip of the cap to the foreseeability analysis in *World-Wide Volkswagen*, where it was the defendant's ability to foresee a lawsuit in a forum, and not the eventual presence of goods therein, that counted. *See supra* notes 91–93 and accompanying text.

manufacturer benefits from the efforts of distributors in foreign states, and should therefore be subject to suit where its products are sold, was interpreted by at least one circuit court to have been the lesson of *World-Wide Volkswagen*.[138]

Finally, Justice Stevens, writing for three Justices, concluded that the Court had mixed up the order of the steps in its jurisdictional test, reasoning that fairness should be considered before minimum contacts.[139] Because he agreed with O'Connor's holding that a California court's exercise of jurisdiction over Asahi would be unreasonable and unfair, he concurred in the result.[140]

Apparently for the sake of argument, Justice Stevens scrutinized the stream of commerce "plus" test and found that O'Connor's distinction between "mere awareness" that a product will wind up in a forum state and "purposeful availment" of that forum was drawn too sharply.[141] Although Asahi may not have aimed its products toward California, or availed itself of the protections of its laws, Justice Stevens believed that Asahi's "quantum of conduct" could satisfy a minimum contacts test.[142] Evaluating whether this quantum was sufficient to establish minimum contacts required a "constitutional determination that is affected by the volume, the value, and the hazardous character of the components" in question.[143] Though he begged off actually conducting this determination, Justice Stevens suspected Asahi's conduct would, "[i]n most circumstances," be sufficient to satisfy minimum contacts scrutiny.[144]

4. Judicial Confusion and Scholarly Criticism After *Asahi*

The dueling *Asahi* opinions left lower courts and critics with a muddled rubric for deciding future stream of commerce cases involving the torts of alien corporations. On one hand, the entire Supreme Court united over the visceral notion that jurisdiction over Asahi would be unfair under *International Shoe*.[145] But collectively, nobody knew which opinion to follow, or how the Due Process Clause interacted with "minimum contacts" in the international corporate context.[146] The battle between Justices

138. *See* Oswalt v. Scripto, Inc., 616 F.2d 191, 198 (5th Cir. 1980).

139. *Asahi*, 480 U.S. at 121–22 (Stevens, J., concurring in part and concurring in the judgment) (first finding that an exercise of jurisdiction would be unreasonable, and therefore finding a minimum contacts analysis inappropriate).

140. *Id.* at 121.

141. *Id.* at 122.

142. *Id.*

143. *Id.* In 1974, for instance, a federal district court found that the sale of a single construction crane within a state constituted "doing business" within that state, thereby leaving the defendant subject to personal jurisdiction. Gorso v. Bell Equip. Corp., 376 F. Supp. 1027, 1029, 1031–32 (W.D. Pa. 1974). *But see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 n.11 (1980) (rejecting the argument that jurisdiction should be sustained solely because a car is a "dangerous instrumentality").

144. *Asahi*, 480 U.S. at 122.

145. *Id.* at 113–14.

146. *See, e.g.*, Degnan & Kane, *supra* note 36, at 812–13 (because the Due Process Clause "regulates only what the courts of one American state can do to persons who are in

O'Connor and Brennan, waged over the correct definition of minimum contacts in the stream of commerce, had come out a draw,[147] while Stevens's brief concurrence picked up support where it could.[148]

Each of the leading stream of commerce opinions was attacked as an inadequate model that departed from the goals, constitutional underpinnings, and precedential history of personal jurisdiction.[149] Even the fairness inquiry, on which each Justice had agreed, fell under criticism.[150] In the end, the lower courts were left with a splintered set of plurality opinions that provided little guidance.[151] This is where the doctrine stood in October 2001, when Robert Nicastro set to work on a J. McIntyre metal-shearing machine.[152]

II. THE *NICASTRO* CASE

Part II examines *Nicastro*, the Supreme Court's latest pronouncement on the issue of personal jurisdiction. First, it tells the story of Robert Nicastro and the company whose machine came to remove four of his fingers. It then examines the Supreme Court's plurality opinion, which set forth a strict test that insulated the company from the exercise of jurisdiction. Next, this part considers the dissent's argument, which sharply criticizes the

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another American state," O'Connor's test impermissibly "transformed [the] interest of the 'several States' into the interests of nations").

147. *See* Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 727–28 app. A (2009) (charting each circuit and state court's position on whether O'Connor's, Brennan's, or neither's stream of commerce test was correct); *see also* Matthew R. Huppert, Note, *Commercial Purpose as Constitutional Purpose: Reevaluating* Asahi *Through the Lens of International Patent Litigation*, 111 COLUM. L. REV. 624, 642 n.110 (2011) (compiling cases indicating disharmony among the circuits).

148. *See* Stravitz, *supra* note 89, at 793 (finding that Justices O'Connor and Brennan failed to sufficiently analyze the "unique problems posed by component part manufacturers," and that only Stevens's equitable framework was capable of considering the shades of gray inherent in international products liability litigation).

149. *See* Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 311–13 (1989) (finding that O'Connor's standard was underinclusive, and Brennan's overinclusive with respect to finding jurisdiction over foreign corporations); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 118 (2011) (faulting both opinions for failing to link their minimum contacts analysis to the Due Process Clause in any way); David E. Seidelson, *A Supreme Court Conclusion and Two Rationales that Defy Comprehension:* Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 53 BROOK. L. REV. 563, 574–75, 579 (1988) (finding the "plus" test to be impossible to satisfy in some cases where jurisdiction is clearly warranted); Stravitz, *supra* note 89, at 791 (criticizing O'Connor's opinion for failing to account for the precedential value of *Gray* as hailed by *World-Wide Volkswagen*).

150. *See supra* notes 120–21 and accompanying text.

151. Several models have been proposed to help lower courts arrive at coherent readings of a set of Supreme Court plurality opinions. *See* Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1596–1604 (1992). A splintered set of plurality opinions essentially sends the judicial question back down to the lower courts to struggle with, and to select, those opinions with which they agree based on whatever criteria they deem persuasive. *See* Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 774–76 (1980).

152. *See* Nicastro v. McIntyre Mach. Am. Ltd., 987 A.2d 575, 577 (N.J. 2010).

plurality for hewing too rigidly to jurisdictional tests and failing to achieve a fair result. Then, Breyer's concurrence is analyzed. Finally, a brief look at two recent district court cases calls *Nicastro*'s precedential relevance into question.

A. A Unique Set of Facts

On October 11, 2001, Robert Nicastro was working at the Curcio Scrap Metal Plant in Saddle Brook, New Jersey.[153] On that day, he found himself in front of the McIntyre Model 640 Shear, a metal-cutting machine.[154] In the course of his work, Nicastro's right hand became entangled with the blades of the machine, and four of his fingers were thereby severed from his hand.[155] The machine had been manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre).[156] J. McIntyre was incorporated in the United Kingdom and sold its machines through McIntyre Machinery America, Ltd. (McIntyre America), its exclusive U.S. distributor.[157]

Despite their similar names, J. McIntyre and McIntyre America were separate corporations, with no common operation or ownership.[158] McIntyre America did, however, "'structure[] [its] advertising and sales efforts in accordance with [J. McIntyre's] direction and guidance whenever possible.'"[159] While J. McIntyre asserted that it simply sold its machines to McIntyre America for distribution, there was some evidence to indicate that some machines were sold on consignment to the distributor.[160]

Seeking compensation for his injury, Nicastro filed suit against both J. McIntyre and McIntyre America in New Jersey state court. The complaint alleged that J. McIntyre's machine was dangerously unsafe because it did not include a safety guard, "'failed to contain adequate warnings or instructions,' and . . . 'allow[ed] the plaintiff to become injured while operating the machine in the normal course of his employment.'"[161]

Prior to the sale of the machine in question, J. McIntyre officials had "attended trade conventions, exhibitions, and conferences throughout the United States . . . [while] McIntyre America fielded any requests for information about . . . products at the scrap metal conventions and trade shows in the United States."[162] It was at one such trade show, in Las Vegas, where the owner of Curcio Scrap Metal first met with representatives of J. McIntyre (the U.K. company) and became interested in

153. *See id.* at 577–78.
154. *See id.* at 577.
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.* at 579.
159. *Id.* (quoting a January 2000 letter from McIntyre America to J. McIntyre).
160. *See id.*
161. *See id.* at 578 (quoting the plaintiff's initial complaint).
162. *Id.* at 579.

purchasing one of its machines.[163] Within a year of that meeting, Curcio purchased the machine for $24,900.[164]

B. The Plurality Announces a Strict Jurisdictional Rule

The description of Nicastro's injury in each opinion forecasts the opinion's ultimate conclusion.[165] In penning the plurality opinion, Justice Kennedy focused on the strict jurisdictional calculus.[166] Justice Kennedy believed that the "traditional practice" of international jurisdiction was best articulated by the stream of commerce "plus" theory,[167] and found that a New Jersey state court could not entertain a claim against J. McIntyre based on the facts of the case.[168] In so finding, Justice Kennedy held close to the principle that a manufacturer must "'seek to serve' a given State's market."[169] A defendant's "intention to submit to the power of a sovereign" is the controlling factor in determining whether it has sought to serve the market.[170] It is here that Justice Kennedy trotted out a surprising[171] hypothetical, warning that Brennan's test,[172] if it had been adopted would have left a small-time Florida farmer amenable to suit

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163. *See id.* at 578.

164. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2795 (2011) (Ginsburg, J., dissenting).

165. *Compare id.* at 2786–87 (plurality opinion) ("Robert Nicastro seriously injured his hand while using a metal-shearing machine."), *with id.* at 2795 (Ginsburg, J., dissenting) ("[A] three-ton metal shearing machine severed four fingers on Robert Nicastro's right hand.").

166. *Id.* at 2787 (plurality opinion) ("Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."); *cf.* Burnham v. Superior Court, 495 U.S. 604, 621–22 (1990) (finding that no fairness inquiry is necessary when jurisdiction is traditionally valid under a given set of facts, because the historical "pedigree" of the exercise of jurisdiction is de facto proof of traditional fairness). *But see id.* at 630 (Brennan, J., concurring) (history itself cannot be "decisive," and "'traditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage'" (quoting Shaffer v. Heitner, 433 U.S. 186, 212 (1977))).

167. *See supra* note 136 and accompanying text. Though Justice Kennedy did not explicitly state that O'Connor's test is appropriate and Brennan's is not, the language of the opinion implicitly adopts the "plus" standard. *See Nicastro*, 131 S. Ct. at 2788 ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.").

168. *Nicastro*, 131 S. Ct. at 2790–91.

169. *Id.* at 2788 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)). The plurality's reasoning in this section of the opinion, which attempts to balance notions of state sovereignty against individual liberty, while still taking account of fairness, has been cited by at least one commentator as evidence of incoherence in the doctrine. *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1255–56 (2011).

170. *Nicastro*, 131 S. Ct. at 2788. *But see* Dessem, *supra* note 95, at 68–69 (because "intent" is rarely black and white, "to include [it] as an element of personal jurisdiction will further complicate an already complex determination").

171. *See infra* notes 227–31 and accompanying text.

172. *See supra* note 137 and accompanying text.

should his products somehow reach Alaska through a national distribution chain.[173]

In applying his view of the doctrine to the facts, Justice Kennedy found that J. McIntyre had not sought to serve the specific forum of New Jersey.[174] Because J. McIntyre "had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees" there, J. McIntyre had not "purposefully availed itself of the New Jersey market."[175] There was, therefore, no lawful jurisdiction in New Jersey.[176]

C. The Nicastro *Dissent: Whither Fairness?*

Justice Ginsburg's argument in dissent was simple: Kennedy's analysis was just not fair.[177] In a key paragraph, Justice Ginsburg explained why:

> Is it not fair and reasonable . . . to require the international seller to defend at the place its products cause injury? . . . On what measure of reason and fairness can it be considered undue to require [J. McIntyre] 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

173. *Nicastro*, 131 S. Ct. at 2790; *see also supra* note 18 and accompanying text. There are a number of problems with this hypothetical. First, Justice Kennedy does not offer support for his assertion that a jurisdictional rule that applies to large alien corporation defendants must necessarily also apply to small individual domestic defendants. *See Nicastro*, 131 S. Ct. at 2790. Second, the facts of the hypothetical and *Nicastro* itself are vastly dissimilar. A corporation that attends trade shows across the country and seeks to sell its machines from across an ocean cannot be said to be analogous to an "owner of a small . . . farm [who] sell[s] crops to a large nearby distributor." *Id.* Third, Justice Kennedy fails to account for the possibility of supplementing Brennan's stream of commerce theory with a fairness analysis. For instance, if courts were to apply Justice Stevens's standard, *see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 122 (1987) (Stevens, J., concurring), the international distribution of metal-shearing machines capable of severing fingers should indeed be regarded differently than the sale of citrus fruits, the occasional poisonous orange notwithstanding.

174. *Nicastro*, 131 S. Ct. at 2790.

175. *Id.* This line of reasoning had been anticipated by at least one scholar in the wake of the *World-Wide Volkswagen* decision. *See* Trautman, *supra* note 45, at 163–64 ("A dealer goes into business with the expectation (indeed, the hope) that many different consumers will frequent [its] business. . . . For purposes of asserting jurisdiction, the significant factor often is not whether the dealer 'purposefully' conducts activities in another state, but rather whether the dealer receives a sizeable benefit from the connection with the other states."). Justice Stevens's proposed case-by-case analysis of the value and hazardous nature of the actual *product* to determine the appropriateness of jurisdiction over alien defendants squares with Trautman's observation much more easily than Justice Kennedy's bright-line availment test. *See supra* note 143 and accompanying text.

176. *Nicastro*, 131 S. Ct. at 2791. At oral argument, Justice Kennedy was sympathetic to the doctrinal notion that Nicastro could have sued J. McIntyre in Ohio, where McIntyre America was located, but not in New Jersey. The relationship between manufacturer and distributor seemed to persuade Justice Kennedy that it would not offend notions of fair play and substantial justice to have Nicastro travel to Ohio to file suit in a state where neither the alleged tort nor the resulting injury took place. *See* Oral Argument at 12:30, *Nicastro*, 131 S. Ct. 2780 (No. 09-1343), *available at* http://www.oyez.org/cases/2010-2019/2010_09_1343?page=1.

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

> not the burden on [J. McIntyre] to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally . . . ?[178]

Ginsburg felt that *Nicastro* presented a unique set of facts.[179] Given these facts,[180] the case presented a much better opportunity to apply the stream of commerce test in evaluating minimum contacts than *Asahi*, where the Justices could agree on a fairness analysis, but found themselves in disarray with respect to the stream of commerce inquiry.[181]

In *Asahi*, it had been plainly unfair for a California state court to exercise jurisdiction over a Japanese corporation that "did not itself seek out customers in the United States, . . . engaged no distributor to promote its wares here, . . . appeared at no tradeshows in the United States, and . . . had no Web site advertising its products to the world."[182] Given these distinctions from the facts of the case before her,[183] Ginsburg found that reliance on *Asahi* as controlling authority was "dead wrong."[184]

Finally, the dissent raised a point of policy: the plurality's holding would set the United States at a disadvantage because the Brussels agreement,[185] which is the European Union's jurisdictional agreement, would have

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178. *Id.* at 2800–01. At oral argument, Ginsburg's objections became particularly strenuous when J. McIntyre's counsel acknowledged that the corporation would be subject to suit in Ohio (where the company that distributed its machines was located), an admission that all but conceded that litigating in New Jersey could not be a comparatively undue burden on J. McIntyre. *See* Oral Argument at 5:44, *Nicastro*, 131 S. Ct. 2780 (No. 09-1343), *available at* http://www.oyez.org/cases/2010-2019/2010_09_1343 ?page=1.

179. *Nicastro*, 131 S. Ct. at 2802–03. Here Justice Ginsburg wrote in direct conflict with Justice Breyer, who believed that *Asahi* controlled the case as a matter of precedent. *See infra* note 206 and accompanying text. As discussed earlier, a rigid interpretation of *Asahi* may be problematic when unanticipated fact patterns are presented. *See supra* note 131 and accompanying text.

180. *Nicastro*, 131 S. Ct. at 2795–96. The dissent proposed a holistic understanding of jurisdiction, and considered: (1) the size of the New Jersey scrap metal industry; (2) the prominence and breadth of the U.S. trade conventions that J. McIntyre had attended; and (3) the fact that J. McIntyre's sales had generally been better in the United States than in other international markets. This understanding supported Ginsburg's belief that J. McIntyre cared little about which particular states its machines wound up in, and intended to serve a national market. *But see id.* at 2792 (Breyer, J., concurring) (asserting that these facts could not be considered in the Court's decision because they had not been considered by the Supreme Court of New Jersey).

181. *See supra* Part I.C.4.

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

183. *See supra* notes 153–64.

184. *Nicastro*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting). If Justice Ginsburg sought any guidance from the splintered *Asahi* opinions, she found it in Stevens's model of considering fairness before conducting a minimum contacts analysis. *See supra* notes 139–40 and accompanying text. Justice Ginsburg did not cite Justice Stevens directly. But she argued that it would be incredible, given the size of New Jersey's scrap metal industry, to assert that a corporation who seeks to distribute its metal-shearing machine to the United States did not intend to sell products in New Jersey. *Nicastro*, 131 S. Ct. at 2795–96, 2801 (Ginsburg, J., dissenting). To Justice Ginsburg, this intuitive notion was dispositive of J. McIntyre's purposeful availment of New Jersey, and therefore of the existence of minimum contacts. *Id.* at 2801. Further, Justice Ginsburg echoed Justice Stevens in acknowledging the hazardous character of a metal-shearing machine with a "massive cutting capacity." *Id.* at 2795 (internal citation omitted).

185. *See supra* note 130 and accompanying text.

allowed for jurisdiction against J. McIntyre anywhere within the EU for a claim brought under the same set of facts.[186] That the United States is not a party to such an agreement may not be surprising, given international recalcitrance to face the "fabulous damage awards"[187] handed out by U.S. juries in products liability cases, and the U.S. litigational advantages that prospective plaintiffs covet.[188] But even if conceded,[189] these points do not make the absence of jurisdiction any fairer to Nicastro, nor the disadvantage any less bitter to any U.S. plaintiff injured under similar circumstances.[190]

D. Is the Doctrine Old Fashioned? Modern Technology, the Supreme Court of New Jersey, and the Nicastro *Concurrence*

Before *Nicastro* reached the Supreme Court, the Supreme Court of New Jersey had grappled with *Asahi*, concluding that state precedent aligned more closely with the Brennan standard than the O'Connor standard.[191] This was old stuff; state and federal courts had been choosing between these two standards for decades.[192] But having reached that conclusion, the Supreme Court of New Jersey put its own spin on the fairness discussion.[193]

The court noted that "traditional notions of fair play and substantial justice" evolve, and "must also reflect modern truths—the radical transformation of the international economy."[194] The court posited that because of air travel, defending a suit in New Jersey would not be terribly inconvenient for a U.K. defendant who expected to serve at least some

186. *Nicastro*, 131 S. Ct. at 2803–04.

187. J.K. Hetrick & Gregg T. Nunziata, *Foreign Product Liability Actions in United States Courts*, *in* LIABILITY FOR PRODUCTS IN A GLOBAL ECONOMY: THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 59, 60 (Dennis Campbell & Susan Woodley eds., 2004).

188. *See id.* at 59–62.

189. The concession is for argument's sake. If J. McIntyre had been exposed to unreasonably high damage awards in New Jersey state court, it may have been more appropriate to respond to such challenges by removing the action to federal court. *See* 28 U.S.C. §§ 1332(a)(2), 1441(a) (2006); *see also* Stephan Wilske & Todd J. Fox, *The So-Called "Judicial Hellholes" in US Jurisdictions and Possible Means to Avoid Them*, DISP. RESOL. INT'L, Sept. 2008, at 235, 241–42, 247 (discussing venue and removal). If timely effected, removal to federal court does not deprive the defendant of the opportunity to contest jurisdiction. *See* EPSTEIN ET AL., *supra* note 131, at 6-9.

190. *See* Borchers, *supra* note 169, at 1260. Even if adverse state court judgments have become prohibitively expensive for alien corporations, *Asahi* arguably went too far to protect these corporations. *See In re* DES Cases, 789 F. Supp. 552, 575 (E.D.N.Y. 1992) ("The *Asahi-Volkswagen* approach is particularly pernicious in the advantage it gives to foreign producers whose goods enter the American common market. These firms can organize themselves to avoid jurisdiction in any state or federal court. . . . Because jurisdictional due process allows many foreign manufacturers to circumvent the American courts altogether, United States residents often will be unable to avail themselves of the strong protections of American tort law.").

191. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 589–90 (N.J. 2010).

192. *See supra* note 147 and accompanying text.

193. *See Nicastro*, 987 A.2d at 591–94.

194. *Id.* at 591. See also *supra* note 166 for the Supreme Court's analysis of the role of "tradition" in the jurisdictional framework.

American states; moreover, "foreign manufacturers, plying overseas markets, should be covered by insurance . . . providing a fund for consumers who may be injured by their products."[195] Thus, the court found that the exercise of jurisdiction against J. McIntyre in New Jersey was neither inconvenient nor unfair.[196]

Of course, airplanes and insurance existed in 1945 when *International Shoe* was decided, and the facts of Nicastro's case did not implicate technological concerns that Justice Stone could not have envisioned when he wrote *International Shoe*.[197] Nonetheless, in a concurring opinion in *Nicastro*, Justice Breyer took the state court's theory seriously, if not the application of it.[198] Summoning the specter of the internet, Justice Breyer speculated that the plurality's strict reliance on "submi[ssion] to the power of a sovereign" and a defendant's having "targeted the forum" might lead to unfair results if sellers of products in an ever-shrinking world could insulate themselves from suit simply by doing business exclusively through internet distributors, and never in person.[199]

In the end, Justice Breyer determined that Kennedy's minimum contacts analysis[200] was too narrow, while the New Jersey Supreme Court's was too broad.[201] Noting that only one of J. McIntyre's machines had been conclusively proven to have reached New Jersey,[202] Justice Breyer felt that the case could nevertheless be decided simply as a matter of precedent.[203]

Justice Breyer did not address the Court's prior holding that a state has an interest in regulating tortious or harmful conduct, and may constitutionally exercise jurisdiction based upon the sale of just one item within its

195. *Nicastro*, 987 A.2d at 591.

196. *Id.* at 591–92.

197. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring) ("[T]here have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues.").

198. *See id.* at 2793.

199. *See id.* Though the Supreme Court has yet to hear a case on internet personal jurisdiction, the issue is by no means new. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), is the "seminal authority regarding personal jurisdiction based upon the operation of an Internet web site." Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003). In *Zippo*, the U.S. District Court for the Western District of Pennsylvania adopted a "sliding scale" that anticipated Breyer's concerns. *Zippo*, 952 F. Supp. at 1124. The scale took into account "the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* The opinion goes on to describe three different points on the scale on which jurisdiction would be proper, improper, and factually dependent. *Id.* This analysis is beyond the scope of this Note. But courts have already addressed Breyer's technological concerns about the internet, with a model not unlike Stevens's balancing test in *Asahi*. *Compare Zippo*, 952 F. Supp. at 1124, *with* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part and concurring in the judgment).

200. *See supra* note 176 and accompanying text.

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

202. *Id.* at 2792.

203. *Id.* ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient [to establish jurisdiction].").

borders.[204] In *McGee*, the defendant had directly solicited the purchase of an insurance policy from the plaintiff, who lived in the forum, while in *Nicastro*, the machine wound up in the forum through an intermediary. But rather than assessing whether an international distribution scheme made *Nicastro* analogous to, or distinguishable from, *McGee*,[205] Justice Breyer looked to *Asahi* as the governing precedential authority.[206] Without deciding which test was the better one, he concluded that, under either O'Connor's or Brennan's *Asahi* rubric, there was no way J. McIntyre could have reasonably foreseen being haled into New Jersey state court when only one of its machines actually wound up there.[207] Like Justice Kennedy, Justice Breyer sought to protect very small manufacturers and sellers,[208] and therefore found that *Asahi* governed this case, and that there simply were not enough contacts to establish personal jurisdiction over J. McIntyre.[209]

E. Initial Interpretations of Nicastro

Trial courts have had to consider the implications of *Nicastro* when a dangerous product, such as a forklift, allegedly causes an injury.[210] In doing so, trial courts have found the precedential weight of *Nicastro* to be limited. Because *Nicastro* was decided by a plurality, it has been applied only on its most narrowly decided grounds: that is, a strict reliance on Breyer's concurrence and the precedential weight of the *Asahi* opinion.[211]

But in *Nicastro*, Justice Breyer had applied *Asahi* without declaring whether the stream of commerce "plus" test or Brennan's foreseeability test was appropriate.[212] Therefore, if *Nicastro*'s only jurisprudential relevance is to be extracted from Breyer's concurrence, very little has changed.

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204. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957); *see also supra* notes 56–62 and accompanying text.

205. When an alien corporation sells its products to a U.S. distributor and says, "sell these where you will," there is at least some question as to whether the corporation has solicited all fifty states generally. *See supra* note 122 and accompanying text.

206. This is an interesting maneuver, given that *Asahi* concerned the sale not of a single good to a forum through a domestic distributor, but of several thousand component parts to a forum through an alien manufacturer. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 121 n.4 (1987).

207. *Nicastro*, 131 S. Ct. at 2792. Using foreseeability of litigation as a jurisdictional test has been criticized by scholars as circular. *See supra* note 92 and accompanying text.

208. Whereas Justice Kennedy feared that local Floridian farmers would be imperiled by a contrary result in *Nicastro*, *see supra* note 173 and accompanying text, Breyer indicated that upholding jurisdiction based upon a single sale could force an "Egyptian shirt maker" and a "Kenyan coffee farmer" who used international distributors to "respond to products-liability tort suits in virtually every State in the United States," *Nicastro*, 131 S. Ct. at 2794 (Breyer, J., concurring).

209. *Nicastro*, 131 S. Ct. at 2792 (plurality opinion).

210. *E.g.*, Ainsworth v. Cargotec USA, Inc., No. 2:10-CV-236, 2011 WL 6291812, at *1 (S.D. Miss. Dec. 15, 2011) (wrongful death action in which the plaintiff had been struck and killed by the forklift); Lindsey v. Cargotec USA, Inc., No. 4:09-CV-00071, 2011 WL 4587583, at *1 (W.D. Ky. Sept. 30, 2011) (the plaintiff's leg was run over by a forklift that was alleged to have been negligently designed).

211. *Ainsworth*, 2011 WL 6291812, at *2; *Lindsey*, 2011 WL 4587583, at *7.

212. *See supra* note 207 and accompanying text.

Lower courts can continue to decide personal jurisdiction cases based on whichever *Asahi* test they prefer.[213] If that is the state of the law today,[214] then J. McIntyre—and all alien corporations—continue under the uncertainty of the old regime.[215]

III. A MISSED OPPORTUNITY: HOW THE SUPREME COURT FAILED TO GIVE ROBERT NICASTRO JUSTICE

As discussed in Parts I and II, modern jurisdictional doctrine is grounded in a variety of different concepts. This part argues that the breadth of personal jurisdiction's doctrinal underpinnings presents trial courts with the opportunity to achieve more just results.

This part begins by demonstrating the problems that result if the plurality opinions in *Asahi* and *Nicastro* are given continued precedential effect. Then, mindful of the fact that the exercise of jurisdiction must be fair and just, this part proposes a new test grounded in tort law, a field well acquainted with balancing the interests of society against the interests of litigants to achieve just results.

Part III is meant to demonstrate that no jurisdictional test is perfect. There will always be close cases, where the exercise of jurisdiction may or may not be fair depending on who is being asked. Close cases undoubtedly pose difficult questions—but the fact that questions are difficult does not diminish their relevance to the litigants.

A. As Precedent, Asahi *and* Nicastro *Are Problematic*

Relying on *Asahi* to decide jurisdictional cases with respect to alien defendants would cause significant problems going forward. First, *World-Wide Volkswagen* held that fairness dictates that defendants be able to reasonably anticipate being haled into a forum to make jurisdiction proper.[216] But different circuits have interpreted *Asahi* and *Nicastro* in

213. *See Lindsey*, 2011 WL 4587583, at *12 n.6 (noting that after *Nicastro*, trial courts may continue to apply whichever *Asahi* test is still precedential authority in their circuit); *see also supra* note 151 and accompanying text.

214. The Supreme Court has endorsed the "narrowest grounds" theory with respect to the application of plurality opinions. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). But that raises the question: By what metric is Breyer's (or any) concurrence decided on the narrowest grounds available? *See* United States v. Johnson, 467 F.3d 56, 63–65 (1st Cir. 2006) (observing that the narrowest grounds are often difficult to discern, and are dependent on the facts of a given case); *see also* Kimura, *supra* note 151, at 1604 (noting that the "narrowest grounds model is inconsistent with the principle of majoritarianism" and has not been satisfactorily explicated by the Supreme Court).

215. Arguably, if the "narrowest grounds" are to be used in construing the precedential authority of plurality opinions, Stevens's *Asahi* concurrence should be given weight going forward. In declining to create and apply an expansive view of the stream of commerce doctrine, Justice Stevens proposed a fairness-based model that would allow courts to make a case-by-case determination of jurisdiction. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 121–22 (1987) (Stevens, J., concurring).

216. *See supra* notes 91–93 and accompanying text.

different ways.[217] Surely the lesson of *World-Wide Volkswagen* is not that alien corporations should expect to be haled into courts in certain states strictly because of the jurisdictional approach of the circuit in which that state sits. Such a scheme would disadvantage small corporations who wish to do business in the United States, but do not have the time or resources to pore over every circuit's personal jurisdiction case law, hoping to determine which (if any) part of *Asahi* that circuit has decided to follow.[218]

Moreover, the facts of *Asahi* endow it with dubious precedential authority. *Asahi* was about resolving a third-party claim against a manufacturer of component parts.[219] The Court's reasoning focused on how jurisdiction would offend fair play and substantial justice given that set of facts.[220] But, as J. McIntyre demonstrated, a corporation can take significant steps to market its product throughout the United States, derive substantial benefit therefrom, and still be insulated from jurisdiction based on the rigidity of O'Connor's test.[221]

On the opposite side of the spectrum, Brennan's test could leave orange growers[222] and shirt makers[223] alike accountable to suit whenever their goods find their way to a distant forum.[224] Jurisdiction over such entrepreneurs of limited resources might restrain both domestic and international trade, and would therefore be undesirable as a matter of policy.[225]

Nobody can agree on the appropriate test,[226] but Stevens's *Asahi* concurrence seems to at least result in the desired answers to everyone's hypotheticals. If jurisdiction was premised upon the hazardous nature of goods getting shipped across state and international boundaries,[227] neither Kennedy's farmer nor Breyer's shirt maker would be subject to unreasonable jurisdiction. Oranges are not generally dangerous.[228] Neither are shirts.[229] Clearly, one man who sells a crate of oranges to a local

217. *See supra* notes 146–47, 211–13 and accompanying text.
218. *See supra* note 147 and accompanying text.
219. *See supra* note 114 and accompanying text.
220. *See supra* note 120 and accompanying text.
221. For a counter to O'Connor's test, see *supra* note 175 and accompanying text.
222. *See supra* notes 167–72 and accompanying text.
223. *See supra* note 208 and accompanying text.
224. *See supra* note 137.
225. *See supra* notes 122–29 and accompanying text.
226. *See supra* Part I.C.4.
227. *See supra* note 143 and accompanying text.
228. *See* J.W.B. v. State, 419 So. 2d 407, 409 (Fla Dist. Ct. App. 1982) (hurled oranges do not generally cause death or great bodily harm).
229. Fruit does get poisoned sometimes. And shirts are occasionally made out of flammable material due to negligent design. *See* Smith v. J.C. Penney Co., 525 P.2d 1299, 1301, 1305–06 (Or. 1974). But one must step back and ask reasonable, fair questions. Which is more important: that orange growers exercise care to make sure their fruits do not poison Alaskans, or that airplane manufacturers exercise care to make sure that their planes do not fall apart in the air? Between these two extremes, there will be close cases, where the product in question is of a moderately dangerous nature, and a court must evaluate the propriety of holding a manufacturer of such a product subject to jurisdiction. But courts are intimately familiar with this sort of balancing test, and are well suited to settle the issue through the evolution of common law. *See infra* Part III.C.1.

distributor should not be subject to nationwide jurisdiction, even if one orange winds up in each of the fifty states. The benefit to the seller and the risk to society are simply too slight. On the other hand, when a corporation produces massive metal-shearing machines, and sells as many of them as possible for tens of thousands of dollars,[230] the benefit to the seller and concomitant risk to the eventual market each go up substantially.[231] How dangerous must the good be? How much benefit is enough to make jurisdiction appropriate? The lower courts are ready, willing, and able to supply competent answers to these very questions.[232]

After all, courts have been unable to agree on the proper jurisdictional bedrock in these types of cases, or from what source that foundation is derived.[233] Initially, residents of separate states were protected from suits elsewhere as a means of honoring the Full Faith and Credit Clause while still safeguarding state sovereignty.[234] But interstate federalism no longer carries much water as a jurisdictional principle, and has even been discarded in recent decades.[235] The best argument for the primacy of sovereignty in jurisdictional cases is that "the 'fairness' assured the defendant by the due process clause presupposes adjudication of the defendant's substantive rights by a legitimate sovereign."[236] But this proposition produces a chicken-and-egg problem. Does legitimate sovereignty beget fair decisions? Or is fairness a prerequisite to legitimate sovereignty?

Finding state courts hamstrung by the rigidity of a corporate presence requirement, the Supreme Court grounded jurisdiction in a theory of "traditional notions of fair play and substantial justice."[237] Fairness has been defined as emanating from a number of sources, including a state's regulatory interest,[238] a defendant's purposeful availment of a forum,[239] holistic case-by-case analyses,[240] and federalism concerns.[241]

In some instances, it is permissible for state courts to assert jurisdiction over alien corporations that shipped goods into the forum.[242] But the

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230. *See supra* note 164 and accompanying text.

231. Standing in the way of this reasonable analysis is *World-Wide Volkswagen*'s position that a "dangerous instrumentality" test is not sufficient to convey jurisdiction upon a state. *See supra* note 143. But it is not merely the dangerous nature of the good in question that controls. Because volume and value must also be considered, Stevens's test is not expressly forbidden by *World-Wide Volkswagen*. *See supra* note 143.

232. *See infra* Part III.C.

233. *See supra* Part I.C.

234. *See supra* notes 30–37 and accompanying text.

235. *See supra* notes 11, 89 and accompanying text.

236. Murphy, *supra* note 149, at 291; *see also* Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979) ("[T]he 'fairness' standard . . . relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum.").

237. *See supra* note 47 and accompanying text.

238. *See supra* notes 40, 55–59 and accompanying text.

239. *See supra* notes 65–68 and accompanying text.

240. *See supra* note 175 and accompanying text.

241. *See supra* note 89 and accompanying text.

242. *See supra* Part I.C.

specific situations under which such exercises are legitimate are still subject to substantial debate.[243] With the doctrine still unsettled, the Supreme Court was free to approach Nicastro's case holistically but declined to do so.[244] In so declining, the Court neglected to ask itself the beguilingly simple question that should have controlled the case: given this unique set of facts, what would be the traditionally fair jurisdictional result?[245] Despite this omission, *Nicastro*'s applicability appears to be limited.[246] Courts may therefore achieve just results based upon the diverse fact patterns that international products liability cases present.

The accident that befell Robert Nicastro represented an unfair lot in life. The pain and suffering that attends the loss of four digits to a saw's blade is unimaginable to the full-fingered among us.[247] But is it also fundamentally unfair to force J. McIntyre to defend itself in the state in which the injury occurred, instead of the places where J. McIntyre actually entered into contracts or delivered the machines?[248] In a jurisdictional sense, that very same question might be phrased: when Robert Nicastro's claim against J. McIntyre is adjudicated in New Jersey, has J. McIntyre received due process? The answer to that question lies in the one jurisdictional precept that the Court has consistently applied over the last seventy years: an exercise of jurisdiction must comport with "traditional notions of fair play and substantial justice."[249]

B. Filling the Void with Fairness

Assuming that it is the Due Process Clause that insulates foreign defendants from suits in state courts,[250] it is essential to know what process is traditionally and fairly due. The Supreme Court's precedent demonstrates that such conclusions may be drawn only by balancing individual liberty against state interests:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . [T]hrough the course of this

243. *See supra* Part I.C.4.

244. *See supra* notes 179–84 and accompanying text.

245. *See supra* note 20 and accompanying text. The dissent did attempt to arrive at the right result through a holistic understanding of the case. *See supra* notes 179–84 and accompanying text.

246. *See supra* notes 211–12 and accompanying text.

247. It is often the province of juries to imagine the unimaginable when computing damage awards. The case of Robert Nicastro would have been no different had it reached trial and a verdict been rendered for the plaintiff. *Compare, e.g.*, Murphy v. L & J Press Corp., 472 F. Supp. 411, 413 (E.D. Mo. 1979) (holding that a damages award of one million dollars to a plaintiff who had lost four fingers was excessive), *with* Burnett v. Mackworth G. Rees, Inc., 311 N.W.2d 417, 420 (Mich. Ct. App. 1981) (finding that a damages award of over one million dollars to a plaintiff who had lost four fingers was not excessive because it did not "shock the judicial conscience").

248. *See supra* notes 176, 178 and accompanying text.

249. *See supra* note 47 and accompanying text.

250. Although this is the rule emphatically announced in *Pennoyer v. Neff*, it is still open for debate whether, after *International Shoe*, due process is still the bedrock of jurisdictional doctrine. *See supra* notes 33–36, 47 and accompanying text.

> Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.[251]

Essentially, a state's regulatory interest[252] may be considered, using "careful scrutiny," to determine whether a defendant's right to due process has been afforded traditional protection.[253]

International Shoe therefore correctly identified traditional fairness as the sine qua non of due process.[254] Determining what is fair enough to comport with due process, much like determining what processes are traditional,[255] requires balancing a state's regulatory interest against individual liberties.[256] Standards of fairness, however, necessarily evolve over time, as judicial decisions adapt to the conceptions of the day.[257] In a global economy, where a manufacturer produces machines hoping to sell them in as many places as possible,[258] it is not unfair to subject that manufacturer to suit in a place where it hopes, but does not necessarily anticipate, to do business.[259]

C. A Tort-Based Analysis Provides a New Test

This section explores why the motivating ideas behind certain classic common law torts are also applicable to personal jurisdiction, which can itself be seen as a matter of common law.[260] It proceeds to analyze jurisdiction by examining classic tort concepts (products liability, transferred intent, and causation) and applying their modes of analysis to jurisdictional questions. This model of analysis is intended to demonstrate that courts will not be lost without a talismanic jurisdictional precept,[261] and are quite capable of achieving equitable jurisdictional results.

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251. Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

252. *See supra* notes 47, 62 and accompanying text.

253. *Moore*, 431 U.S. at 502 (quoting *Poe*, 367 U.S. at 542) (Harlan, J., dissenting). *But see supra* note 54 and accompanying text.

254. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981).

255. *See supra* note 166 and accompanying text.

256. *See Lassiter*, 452 U.S. at 24–25 (Because "'due process' . . . can never be[] precisely defined[,] . . . [a]pplying the Due Process Clause is . . . an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

257. *See* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("'[D]ue process' . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions." (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 160 (1951) (Frankfurter, J., concurring))). With respect to personal jurisdiction, it appears that *World-Wide Volkswagen* has come the closest to defining a jurisdictional balancing test that comports with traditional notions of fair play. *See supra* note 15.

258. *See infra* note 299 and accompanying text.

259. *See supra* note 175 and accompanying text.

260. *See supra* notes 23–29 and accompanying text.

261. *See supra* note 131 and accompanying text.

1. Why Classic Tort Law—and Therefore a State's Regulatory Interest—Is an Appropriate Bedrock of Fairness in International Products Liability Claims

Because the doctrine of personal jurisdiction remains unsettled, trial courts still find themselves free to choose which jurisdictional model they implement.[262] In its earliest form, personal jurisdiction was a corollary of international law.[263] As a nascent doctrine, it protected out-of-state defendants from a broad reading of the Full Faith and Credit Clause.[264] It became a constitutional principle when the Court came to fear that the state might exert physical power against unresponsive defendants, thereby depriving them of their liberty.[265] This principle weakened as forms of exerting adjudicatory power became antiquated.[266] Furthermore, corporate presence in a given forum became challenging to define with precision, necessitating a case-by-case inquiry.[267] Today, the various iterations of the stream-of-commerce test have come to govern cases against corporate defendants, like Robert Nicastro's.[268] Essentially, after two centuries of doctrinal development, jurists still do not agree about why the doctrine exists. The only tenet approaching unanimity is that the exercise of personal jurisdiction over a defendant has to be fair.[269]

But what does fairness require in an international marketplace, where goods often land in unforeseeable forums? A court's adjudicatory power, at its most nefarious extreme, represents an impingement on a defendant's liberty interest. The subsequent lawsuit threatens to deprive the defendant of her property. And the applicable tort law in the resulting litigation will often ascribe liability to people whose actions give rise to unintended or unforeseeable consequences.[270] Nonetheless, it is fair to hold these people liable, and thereby deprive them of their property, in order to regulate society's conduct in the future. There is no due process violation when one is held liable for throwing a stick at a person, missing, and hitting someone who was not within his vision.[271] These are results that have been intuited as fair, and they have become acceptable to courts and citizens alike.[272]

In determining whether an exercise of personal jurisdiction comports with due process, courts can use similar balancing tests to those that they have used to determine whether such an exercise is traditionally fair. After all, the goal of tort law is to arrive at a fair and just result by "appropriately balanc[ing] the implicated public policies and the autonomy of the

262. *See supra* notes 211–13 and accompanying text.
263. *See supra* note 25 and accompanying text.
264. *See supra* notes 30–31 and accompanying text.
265. *See supra* notes 34–35 and accompanying text.
266. *See supra* note 47 and accompanying text.
267. *See supra* notes 48–50 and accompanying text.
268. *See supra* notes 135–41, 211–13 and accompanying text.
269. *See supra* notes 47, 254 and accompanying text.
270. *See infra* Part III.C.2.b.
271. *See infra* note 300 and accompanying text.
272. *See infra* Part III.C.2.b.

tortfeasor."[273] A tort-based test will enable courts to conduct the "claim-specific"[274] analyses that Justices Stevens and Ginsburg have called for.[275] By focusing on the specific details of each case, courts will be able to avoid anomalous and unfair results yielded by strict doctrines.[276] Moreover, courts have already become comfortable applying tort law principles to the question of whether a cause of action is related to the defendant's contacts with the forum.[277]

Assume for a moment that jurisdiction had not been contested in *Nicastro*. Barring a settlement, at the end of the trial the jury would have been confronted with a products liability case. Although the metal-shearing machine had been adrift in the stream of commerce for a period of time, the negligence that caused the alleged defect could not have any harmful consequences until that machine came to rest, was purchased, and used for its intended purpose—here, cutting metal at a plant, which happened to be located in New Jersey.[278]

The allegations in Nicastro's complaint, if proven to a jury's satisfaction, would have likely been sufficient to result in tort liability. But why is this fair? For now, let it suffice to say that, if liability in tort were ascribed to the defendant based on the facts in *Nicastro*, the defendant would be deprived of its property. But there would be no constitutional problem because due process would have been given.[279]

When jurisdiction, and not liability, is asserted based on these same facts, thereby impinging upon the defendant's individual liberty interest,[280] due process is not violated. The defendant's liberty has been adequately balanced against the state's interest in regulating the production and distribution of hazardous materials.[281]

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273. Stein, *supra* note 9, at 691.

274. Floyd & Baradaran-Robison, *supra* note 110, at 652 (noting that "claim-specific" analysis is appropriate "because the geographic locus of the harm that the law seeks to prevent may vary depending on the type of claim for relief that the plaintiff asserts").

275. *See supra* notes 143, 180 and accompanying text.

276. *Cf. supra* note 131 and accompanying text.

277. *See* Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1838–41 (2003) (reciting cases that apply "but-for" and "proximate cause" tests in resolving whether the cause of action arises from, or relates to, the defendant's contact with the forum). For a discussion of the "arise from or relate to" test, see Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1269–72 (1993).

278. *See supra* notes 153–54 and accompanying text.

279. Apart from the jurisdictional inquiry, due process will be given when a defendant has both notice of the litigation and an opportunity to be heard. *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

280. *See supra* note 8 and accompanying text.

281. *See supra* notes 11, 169 and accompanying text. *But see* Dessem, *supra* note 95, at 76–77 (noting that the hazardous nature of products in both the jurisdictional phase and the liability phase of a trial subjects defendants to a "type of 'double counting' disapproved by the Supreme Court in the first amendment context" (quoting Calder v. Jones, 465 U.S. 783, 790 (1984))).

2. Which Tort Laws Are Appropriate Models for Jurisdictional Questions in International Products Liability Claims?

a. Products Liability Law

The generally accepted principle that a plaintiff who is unknown to a corporate defendant may recover in a products liability suit was not always settled law. In the nineteenth century, privity of contract between the manufacturer and user of the product was generally required to establish liability.[282] Judge Cardozo, however, recognized that when substantial danger is likely to result from negligent design or assembly of a given product, a contract-based theory of products liability was insufficient to protect users from undue harm.[283]

Cardozo's theory, now widely accepted,[284] is that the state's regulatory interest in ensuring that potentially dangerous goods are produced with care[285] supersedes the defendant's interest in not being sued by a previously unknown plaintiff with whom it had not been in contractual privity.[286] If a state's interest in carefully manufactured goods is sufficient to expose a defendant to liability and thereby deprive it of its property,[287] even when the defendant had no contact with the plaintiff, the state interest may justify an impingement of an alien corporation's liberty interest—even when it has not given consent to be sued in a given forum where its products wind up.[288] This conclusion fits with Stevens's suggestion to consider the state's interest in regulating trade in hazardous products.[289]

"'[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."[290] When Judge Cardozo extended the law of liability in *MacPherson*, he recognized that ancient

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282. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055–57 (N.Y. 1916) (Bartlett, C.J., dissenting).

283. *See id.* at 1053 (majority opinion).

284. *See, e.g.*, Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440–42 (Cal. 1944) (Traynor, J., concurring).

285. *MacPherson*, 111 N.E. at 1051 ("Because the danger is to be foreseen, there is a duty to avoid the injury."). Rejecting the argument that only "imminently dangerous" things such as "explosives [and] deadly weapons" should trigger liability absent privity, Judge Cardozo stressed that manufacturers should be held to a duty of care "[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made." *Id.* at 1053.

286. *See Escola*, 150 P.2d at 440–41 (Traynor, J., concurring).

287. Justice Holmes had long been a proponent of using tort law as a means to achieve regulatory ends; when Cardozo discarded the privity rule, he arguably brought the law of products liability in line with Holmes's vision of law as regulation. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1754, 1768 (1998).

288. This conclusion squares with *International Shoe*'s abandonment of the theory of implied corporate consent in favor of a standard that upholds jurisdiction based on the impact of the corporation's conduct. *See supra* notes 50–51 and accompanying text.

289. *See supra* note 143 and accompanying text.

290. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

forms had left too many injuries uncompensated. Because, after *Nicastro*, the old jurisdictional tests have become problematic and inconsistently applied,[291] because the old tests are unfair to plaintiffs in alien products liability cases,[292] and because the negative foreign policy implications of asserting jurisdiction over alien corporations are debatable,[293] a new model that focuses on where the dangerous goods are meant to be used, rather than sold, should be adopted. The ancient form of jurisdictional "privity"[294] should be discarded in favor of a more just model.[295] Cardozo has given us the first element of a new test: Was the alien corporation hoping and prepared to serve a national market on its own initiative?

b. Transferred Intent as Purposeful Availment

One may now reasonably object: even assuming a strong state interest in regulation of dangerous goods, it is nevertheless an unfair deprivation of due process to subject a defendant to jurisdiction when it has not purposefully availed itself of the privileges and immunities of doing business in the forum state.[296] While this is true, it fails to tell the whole story with respect to the facts of the *Nicastro* case. J. McIntyre had produced and sent a dangerous product[297] to a large geographical area, the boundaries of which were irrelevant[298] to the final goal—selling the product.[299]

Such conduct is valid to establish liability over defendants in simple tort cases. In one famous case, a defendant threw a stick at someone within a crowd; the stick hit another person whom the defendant had not seen, and was still liable for battery.[300] It cannot be said that the defendant in this case purposefully directed the stick toward the plaintiff. Nonetheless, he was compelled to give up his property to compensate the person he had injured.

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291. *See supra* notes 92, 213 and accompanying text.

292. *See supra* Part II.C.

293. *See supra* notes 128–31 and accompanying text.

294. *See supra* notes 282–86 and accompanying text.

295. When old doctrines become obsolete, cases like *MacPherson* are useful (and perhaps necessary) to move the law in a direction more suited to achieving beneficial ends through regulation. *See* Goldberg & Zipursky, *supra* note 287, at 1845–46. Arguably, notions of due process that overprotect individual rights at the expense of state regulatory ends are as outmoded as the notion of privity that *MacPherson* discarded. *See id.* at 1842–46.

296. *See supra* notes 67–68 and accompanying text.

297. *See supra* note 165.

298. *See supra* note 122 and accompanying text.

299. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2796 (2011) (Ginsburg, J., dissenting) (quoting J. McIntyre's president, who had said "[a]ll we wish to do is sell our products in the [United] States—and get paid!").

300. Talmage v. Smith, 59 N.W. 656, 657 (Mich. 1894) ("The right of the plaintiff to recover . . . depend[s] upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon some one. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility."); *see also* RESTATEMENT (SECOND) OF TORTS § 16 cmt. a (1965).

Much in the same manner, J. McIntyre did not purposefully direct its machine toward New Jersey. J. McIntyre did, however, direct its wares toward the national market—essentially, a crowd—of which New Jersey was a member.[301] The machine was sent to Ohio; from there, it might have been launched into any state where McIntyre America could find a buyer.[302] Given the size of New Jersey's scrap metal market,[303] it was altogether possible that, even if J. McIntyre did not aim the machine at New Jersey, it might nonetheless "hit" someone there.[304] Just as fairness and due process permit a plaintiff to recover from a defendant who never wished to hurt him, due process permits a state to exercise jurisdiction over a defendant who purposefully directed potentially dangerous goods at a large area without explicitly stating an intention to serve particular states within that area.

Transferred intent applies only to intentional torts, but in the jurisdictional context, the purposeful availment of a forum is the relevant intent. And that availment, when directed from abroad at a generalized location, may be transferred when predictable harm results.[305] Imagine that a mad scientist in Glasgow set up a long-range rocket launcher in his backyard. If he were to negligently handle the launcher, and his rocket traversed the Atlantic and caused harm in Kansas, he cannot be heard to complain that he could not have foreseen litigation in Topeka. A rocket launcher is dangerous; long-range rockets may land anywhere, even though it cannot be said precisely where.

As a jurisdictional matter, there is little difference between this scientist and J. McIntyre. Each constructed a dangerous product that might cause harm in some unidentified location. Neither should be allowed to back out if their constructions are alleged to cause harm in an unforeseen forum. The second element of the new test thus becomes clear: Did the alien corporation send a potentially hazardous product to a general area of which the forum state was a foreseeable member?

c. Negligence "at Rest"

In 1919, a young lady was let off a train approximately a mile past her intended stop, a mishap occasioned by the negligence of the railroad on which she traveled.[306] Soon after she got off the train and began to walk back to her intended destination, the lady was raped.[307] The Supreme Court

301. *See supra* note 180 and accompanying text.
302. *See supra* note 299 and accompanying text.
303. *See supra* note 180 and accompanying text.
304. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. b (2010) ("[S]o long as the injury to the actual victim arises from the risks that made the actor's conduct tortious, that harm can be deemed within the scope of the actor's liability.").
305. *See supra* notes 143, 228–29.
306. *See* Hines v. Garrett, 108 S.E. 690, 691 (Va. 1921).
307. *See id.* at 691–92.

of Appeals of Virginia held that the railroad's negligence proximately caused the misfortune she suffered.[308]

Nineteen years before this incident, a different woman was let off a train one stop past her destination, also through the negligence of the railroad.[309] But in that case, the conductor escorted the passenger to a hotel room. That night, a kerosene lamp exploded in the room and caused her hands to be badly burned.[310] There, because the conductor had taken the plaintiff to a place at which his negligence could no longer be the foreseeable cause of the injury suffered, the Supreme Court of Georgia found that the railroad's negligence was not a proximate cause of the injury suffered.[311]

The difference between the foregoing cases is intuitively clear. In the former, the railroad's negligence was still at work when harm befell the woman. The very type of harm that a mistaken drop-off tends to cause was still in the air—that of a traumatic assault in an unfamiliar area.[312] In the latter case, however, the railroad's negligence was at rest. Being dropped off at the wrong station does not tend to cause one's hands to be burned by a kerosene lamp.[313]

But how does this matter in a jurisdictional sense? It is a question of the type of harm a negligently designed product tends to cause. A scrap metal machine cannot cause its usual sort of foreseeable harm until it arrives at the sort of place where its blades are set spinning. The machine is not likely to do harm while sitting in an Ohio warehouse waiting to be shipped. And until it begins shearing metal, it cannot possibly inflict the sort of harm that Nicastro suffered. In a common case like this, the machine's arrival in the forum precedes its activation. In other words, the foreseeability question—whether J. McIntyre could reasonably anticipate being haled into court in a given forum—is not "at rest" until the machine starts shearing. Kennedy's belief that J. McIntyre is rightly subject to suit in Ohio when its machines can only cause harm in New Jersey (or any state of initial use)[314] is misplaced. While the machine waits in Ohio, the locus of potential jurisdictional sites is still "in the air"; the machine is not yet in a place where it might conceivably do harm. This provides the third and final element of a jurisdictional test in such cases: Could the defendant's alleged

308. *Id.* at 693–94 ("The precise injury need not have been anticipated. It is enough if the act is such that the party ought to have anticipated that it was liable to result in injury to others." (internal citations omitted)).

309. *See* Cent. of Ga. Ry. v. Price, 32 S.E. 77, 77 (Ga. 1898).

310. *See id.*

311. *Id.* at 77–78.

312. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1238–40 (2009) (arguing that the result in *Hines* was justified because railroads and carriers are expected to bring customers to their destination, and are therefore subject to a heightened standard of liability when they fail to meet the goal of safe arrival).

313. *See* Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 438–39 (1984).

314. *See supra* notes 175–76 and accompanying text.

misconduct have caused the plaintiff harm in any other forum?[315] If not, jurisdiction in the state where the harm occurred should be proper.

CONCLUSION

In a separate opinion in *International Shoe*, Justice Black said that he could not settle jurisdictional precepts on the Court's notion of "'fair play,' however appealing that term may be."[316] But after decades of confusion, difficulty, and dissonant voices in the field of personal jurisdiction, it appears that little else is left.

There will be times when a court is confronted with a situation where the fair result is not clear; where it must struggle to balance the equities, and perhaps even come up with a result that the litigants could not have foreseen.[317] But Robert Nicastro probably could not have foreseen coming in to work on October 11, 2001, and leaving with four fewer fingers than he had when he awoke. Less could he have foreseen that he might have had to sue for redress not in the state where the tort happened, but in England, or more incomprehensibly, Ohio, simply because of some obscure doctrine, unknown to most tort victims, and too incoherent to be fully comprehended by sophisticated corporations.

Courts that attempt to apply fair and just jurisdictional standards often look to hypotheticals to justify their chosen rules.[318] In dreaming up unfair consequences to imagined litigants, the Supreme Court has applied jurisdictional rules to tort victims with regard only to how their rules apply on the margins.[319] But in resorting to such hypotheticals, the Court stands to ignore the most compelling fact patterns of all—the cases that actually sit before it. This Note's proposed test would give courts the flexibility to consider particularized harm to particularized litigants without being unduly burdensome to alien corporations. Such a rule might, on occasion, expose these corporations to jurisdiction in cases that might not have met the plurality's standards in *Nicastro* or *Asahi*. But that is simply a reasonable price of selling hazardous materials to U.S. consumers and businesses. Shirt makers and orange growers will not be exposed to additional liability under the proposed rule because of the less harmful nature of their products. But corporations who sell large, dangerous machines will be. And if J. McIntyre had deemed this too great a price to pay for the opportunity to do business in the United States, Robert Nicastro might still have a full right hand. Jurisdictional questions aside, that might have been the fairest outcome of all.

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315. This element of the proposed test is reconcilable with the Court's finding that there was no jurisdiction in *World-Wide Volkswagen* and *Hanson v. Denckla*. Unilateral border-crossing by plaintiffs may defeat jurisdiction because the harm could have occurred in the state of origination. *See supra* notes 68, 96 and accompanying text.

316. Int'l Shoe Co. v. Washington, 326 U.S. 310, 325 (1945) (opinion of Black, J.).

317. The Court in *International Shoe* arrived at just such a result. *See supra* note 92 and accompanying text.

318. *See supra* note 28 and accompanying text.

319. *See supra* notes 173, 208 and accompanying text.