

1-1-2012

# Foreword: A Critical Appraisal of the Supreme Court's Decision in *J. McIntyre Machinery, Ltd. v. Nicastro*

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## Recommended Citation

Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 Loy. L.A. L. Rev. 341 (2012).

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**FOREWORD: A CRITICAL APPRAISAL OF  
THE SUPREME COURT’S DECISION IN  
*J. MCINTYRE MACHINERY, LTD. V. NICASTRO***

*Allan Ides\**

*It is emphatically the duty of the U.S. Supreme Court to say what the law is. The constitutional law of personal jurisdiction is entirely judge-made and, therefore, Court decisions have serious consequences for those who seek redress for their injuries. In the October 2010 term, when the Court granted certiorari in the products-liability case *J. McIntyre Machinery, Ltd. v. Nicastro*, it was poised to ameliorate a state of confusion surrounding the personal jurisdiction “stream-of-commerce” doctrine. Since 1987, lower courts, litigants, and scholars have struggled to apply the conflicting personal jurisdiction standards that the Court announced in *Asahi Metal Industry Co., Ltd. v. Superior Court*. Some courts have applied the “pure” stream-of-commerce standard that Justice Brennan championed in *Asahi*, while others have required litigants to meet Justice O’Connor’s more stringent “plus” stream-of-commerce model.*

*This Foreword explains how those who look to the *J. McIntyre* opinion to clarify the law of personal jurisdiction in products liability cases—and to fulfill the Court’s responsibility to attend well to constitutional doctrines—will be sorely disappointed. First, this Foreword criticizes Justice Kennedy’s plurality opinion for its flawed interpretation of precedent, for its conclusory legal analysis, and for failing to clarify the doctrinal standards. Then, this Foreword laments how Justice Breyer’s concurrence manipulates the facts of the case to fit his fabrication of the applicable doctrine. Finally, this Foreword shows how Justice Ginsburg’s dissent focuses on the narrative while it fails to address the central question in *J. McIntyre*; thus, it plays an active role in the Court’s giant leap backward. With each opinion so*

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*lacking in care and judgment, lower courts will continue to muddle through the questions left open in Asahi, questions now burdened with the unhelpful J. McIntyre overlay. In the judiciary's role to say what the law is, the U.S. Supreme Court in J. McIntyre let us all down.*

TABLE OF CONTENTS

I. INTRODUCTION.....	344
II. THE FACTUAL NARRATIVE .....	346
III. THE DOCTRINAL LANDSCAPE.....	350
IV. THE PROCEEDINGS IN STATE COURT .....	354
V. THE OPINIONS OF THE SUPREME COURT OF THE UNITED STATES .....	358
A. The Plurality .....	358
1. Minor Flaws: Doctrinal Indifference .....	358
2. Not-So-Minor Flaw: Interpretive Laxity .....	361
3. Major Flaws: Concepts over Facts.....	368
B. The Concurrence.....	370
1. Outcome Determined by Precedents.....	370
2. An Absence of “Modern Concerns” .....	377
C. The Dissent .....	381
VI. CONCLUSION .....	386

## I. INTRODUCTION

“It is emphatically the province and duty of the judicial department to say what the law is.”<sup>1</sup> From this firmly established proposition, it follows that the U.S. Supreme Court’s interpretations of the Constitution are the supreme law of the land.<sup>2</sup> The consequences of that principle are particularly profound when the Constitution’s text speaks in sweeping terms, as does the Due Process Clause of the Fourteenth Amendment, for such broadly worded texts invite a level and form of judicial activity that inseparably blends the roles of lawmaker and law interpreter. The constitutional law of personal jurisdiction presents a case in point, because 100 percent of that law is judge-made and therefore subject to the Supreme Court’s unchecked authority.

The Supreme Court’s constitutional interpretations matter. They not only determine the winners and losers in the cases to which they apply but they also channel government policy into currents that flow from Court-established doctrine. The decisions often touch on issues that enflame public debate and may even go so far as to select the next President of the United States.<sup>3</sup> And while the constitutional law of personal jurisdiction may not be headline-grabbing—at least not for all of us—the doctrine developed under that rubric has serious consequences for those seeking redress for injuries suffered and for everyone participating in our market-driven economy as a producer, seller, or consumer of goods. It is, therefore, fitting to demand that the High Court, as the unchecked maker of the constitutional law of personal jurisdiction, attend well to the doctrines that it fabricates, for as our friendly neighborhood Spider-Man reminds us, “With great power comes great responsibility.”<sup>4</sup>

This Foreword focuses on a particular decision by the Supreme Court during its October 2010 term: *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>5</sup> At issue in that case was whether New Jersey courts could exercise personal jurisdiction over a foreign manufacturer of

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

3. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000); *Roe v. Wade*, 410 U.S. 113 (1973).

4. *SPIDER-MAN* (Columbia Pictures 2002). Yes, I know, Spidey’s Uncle Ben says it first.

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

industrial machines, one of whose machines was sold in New Jersey, where it allegedly injured an employee who was using it in the normal course of business.<sup>6</sup> The jurisdictional issue revolved around the “stream-of-commerce” doctrine.<sup>7</sup> U.S. courts have used that doctrine for several decades as a basis for justifying the exercise of personal jurisdiction in products liability suits brought against out-of-state manufacturers whose products are sold in the forum state and cause injury there.<sup>8</sup> The law in this critical area, however, has been in a state of confusion for many years. In 2010, the Supreme Court stepped in and granted certiorari in *J. McIntyre*, ostensibly to ameliorate that confusion.

The Court heard oral argument in *J. McIntyre* on January 11, 2011, and announced its judgment 167 days later, on the closing day of the term.<sup>9</sup> The relatively lengthy delay between argument and decision was a sign that the Court had struggled with the decision. The sign was correct. The *J. McIntyre* Court issued no majority opinion, and the three opinions that it did issue (a plurality, a concurrence, and a dissent)<sup>10</sup> exacerbated rather than ameliorated the doctrinal confusion. Moreover, each of the opinions, to varying degrees, demonstrated a disappointing level of judicial competence well below that which we can rightfully expect from Supreme Court Justices. I will save the details of my critique for later. At this point, suffice it to say that the separate opinions showed an individual and a collective lack of judgment, as well as a troubling willingness to dispose of an important case in a haphazard and indeterminate fashion. We should expect and demand much more from these exalted, life-tenured jurists.

Part II of this Foreword describes the facts of the case. Part III provides a brief survey of the relevant doctrinal landscape, focusing particularly on the status of the stream-of-commerce doctrine as it stood prior to the grant of certiorari in *J. McIntyre*. Part IV summarizes the decisions of the lower courts in this case. Part V examines and criticizes the *J. McIntyre* plurality, concurring, and

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6. *Id.* at 2786.

7. *Id.*

8. *See, e.g.*, *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

9. 131 S. Ct. at 2780.

10. *Id.* at 2785 (plurality opinion); *id.* at 2791 (Breyer, J., concurring); *id.* at 2794 (Ginsburg, J., dissenting).

dissenting opinions for their lack of craftsmanship, integrity, and judgment. Part VI offers a few concluding remarks regarding the minimal standards of professionalism that ought to guide the Supreme Court and shape every opinion that a Supreme Court Justice issues.

## II. THE FACTUAL NARRATIVE

On October 11, 2001, Robert Nicastro (“Nicastro”), a long-time employee at Curcio Scrap Metal in Saddle Brook, New Jersey, was operating a three-ton metal-shearing machine, a McIntyre Model 640 Shear.<sup>11</sup> His right hand became lodged in the machine and the blade severed four fingers off that hand.<sup>12</sup> He sued the foreign manufacturer and its U.S. distributor in a New Jersey superior court on a theory of products liability.<sup>13</sup> The manufacturer filed a motion to dismiss for lack of personal jurisdiction.<sup>14</sup> The distributor declared bankruptcy and did not participate in the lawsuit.<sup>15</sup>

The manufacturer of the machine, J. McIntyre Machinery, Ltd. (“McIntyre UK”), was a British company with its principal place of business in Nottingham, England.<sup>16</sup> It manufactured heavy industrial machinery used in scrap metal recycling and, during the relevant time frame, sold its products throughout the world, including in the United States. From at least 1994 through 2001, McIntyre Machinery America, Ltd. (“McIntyre America”), an Ohio corporation with its principal place of business in Ohio, served as the exclusive distributor and agent for McIntyre UK products sold in the United States.<sup>17</sup> McIntyre America was not a subsidiary of McIntyre UK, and neither company participated in the ownership or management of the other.<sup>18</sup>

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11. *Nicastro v. McIntyre Mach. Am., Ltd. (Nicastro I)*, 945 A.2d 92, 96 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

12. *Nicastro v. McIntyre Mach. Am., Ltd. (Nicastro II)*, 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

13. *Id.* at 577–78.

14. *Id.* at 578.

15. *Id.* at 578 n.2.

16. *Id.* at 579.

17. *Id.* at 577–78, 592.

18. *Nicastro I*, 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

In 1994 or 1995, Frank Curcio (“Curcio”), the owner of Curcio Scrap Metal, attended the annual Institute of Scrap Metal Industries (ISRI) convention in Las Vegas, Nevada.<sup>19</sup> The ISRI convention, which is held annually in a U.S. city, is “the world’s largest scrap recycling industry trade show.”<sup>20</sup> It attracts “owners [and] managers of scrap processing companies” and others “interested in seeing—and purchasing—new equipment.”<sup>21</sup> Representatives of McIntyre UK attended each of the annual ISRI conventions between 1990 and 2005,<sup>22</sup> and McIntyre UK and McIntyre America operated a jointly sponsored booth at the ISRI Las Vegas conventions held in 1994 and 1995, at which they displayed and sold McIntyre UK’s machines, including the Model 640 Shear.<sup>23</sup>

While at the ISRI convention, Curcio visited the McIntyre booth and learned about the Model 640 Shear.<sup>24</sup> Upon his return home, his company ordered a Model 640 Shear from McIntyre America at a price of \$24,900.<sup>25</sup> The machine was constructed in England and shipped from there by McIntyre UK to McIntyre America in Ohio, which then delivered the machine to Curcio Scrap Metal in New Jersey.<sup>26</sup> There was no evidence that McIntyre UK knew that the machine was destined for New Jersey when it shipped the Model 640 Shear to Ohio.<sup>27</sup> The invoice indicated that Curcio had purchased the machine from McIntyre America, but a metal plate on the machine and the accompanying documentation, both of which included McIntyre UK’s address and telephone number, indicated that McIntyre UK in England had manufactured the machine.<sup>28</sup> Given

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19. Joint Appendix at 78a, *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343).

20. *Id.* at 47a.

21. *Id.* at 48a–49a.

22. *Id.* at 114a–115a.

23. *Nicastro I*, 945 A.2d at 96.

24. Joint Appendix, *supra* note 19, at 78a–79a.

25. *Nicastro I*, 945 A.2d at 96.

26. Joint Appendix, *supra* note 19, at 78a–79a.

27. *Id.* at 117a. During discovery, McIntyre UK was unable to locate any of the purchase orders it had received from McIntyre America. The UK company admitted, however, that “additional documents may exist . . . but they would be contained in the large volume of [McIntyre UK’s] business records that were appropriated by the receiver appointed to oversee the receivership of [McIntyre UK’s] former parent company.” *Id.* at 118a.

28. *Nicastro II*, 987 A.2d 575, 578 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).



this information, Curcio concluded that if he needed any repairs or parts, he would contact McIntyre UK.<sup>29</sup>

It is possible that other McIntyre UK products were sold in New Jersey, but the record clearly establishes only the one sale to Curcio.<sup>30</sup> With respect to sales throughout the United States, McIntyre UK claimed to have no access to the records, but in 2002 a McIntyre UK spokesperson described McIntyre UK's shears as being well-established in the United States.<sup>31</sup> In addition, in answers to interrogatories, McIntyre UK stated that its commissioning engineer had installed McIntyre UK products in Virginia, Illinois, Washington, Iowa, and Kentucky.<sup>32</sup> Answers to other interrogatories indicated that McIntyre UK had been sued in Illinois, Kentucky, Massachusetts, and West Virginia.<sup>33</sup>

Between 1990 and 2005, representatives of McIntyre UK attended twenty-six scrap metal marketing events held in the United States, including each of the annual ISRI conventions.<sup>34</sup> These events were held in various U.S. cities, including Chicago, Las Vegas, New Orleans, Orlando, San Antonio, San Diego, and San Francisco.<sup>35</sup> McIntyre UK attended the events for the purpose of promoting the sale of the company's products to "anyone interested in the machine from anywhere in the United States."<sup>36</sup> No area of the United States was deemed off limits under this distribution scheme. Michael Pownall, the president of McIntyre UK, attended the conventions held in Las Vegas in 1994 and 1995, as well as several others held in different U.S. cities.<sup>37</sup>

The distribution arrangement under which McIntyre UK and McIntyre America operated is somewhat elusive. This is due, in part, to the unavailability of critical business records, such as McIntyre

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29. Joint Appendix, *supra* note 19, at 78a.

30. *Nicastro I*, 945 A.2d at 99.

31. *Id.* at 98 (quoting Brian Taylor, *McIntyre Names North American Distributor*, RECYCLING TODAY, May 16, 2002, available at [http://www.recyclingtoday.com/Article.aspx?article\\_id=18315](http://www.recyclingtoday.com/Article.aspx?article_id=18315)).

32. Joint Appendix, *supra* note 19, at 119a.

33. *Id.* at 108a; see, e.g., *Whitaker v. J. McIntyre Mach., Ltd.*, 2004 WL 1586989 (Ky. Ct. App. July 16, 2004).

34. Joint Appendix, *supra* note 19, at 114a–117a.

35. *Id.*

36. *Id.* at 161a.

37. *Nicastro I*, 945 A.2d 92, 96 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

America purchase orders, as noted above. Correspondence and e-mail exchanges between the companies do make it clear, however, that McIntyre UK sought to exploit the entire U.S. market, that McIntyre America took direction and guidance from McIntyre UK in the advertising and sales of McIntyre UK products,<sup>38</sup> that McIntyre America was responsible for sales and distribution in the entire U.S. market, and that the two companies jointly sponsored McIntyre booths at ISRI conventions.<sup>39</sup> As to the actual operation of the distribution scheme, McIntyre UK claimed that the Model 640 Shears were made “to order,” i.e., only after McIntyre America had completed a sale and submitted a purchase order to McIntyre UK.<sup>40</sup> McIntyre UK further claimed that it sold the Model 640 Shear directly to McIntyre America without knowledge of the ultimate purchaser.<sup>41</sup> But the record reveals a somewhat more fluid system under which the “sale” to McIntyre America was not deemed complete until McIntyre America remitted the ultimate purchaser’s payment to McIntyre UK, less a “commission.”<sup>42</sup> Moreover, McIntyre UK retained the right to collect any unsold stock sitting in the McIntyre America warehouse.<sup>43</sup> Consistent with the foregoing, McIntyre UK monitored the size of the McIntyre America inventory and asserted a right to “collect” unsold merchandise sitting in McIntyre America’s Ohio warehouse.<sup>44</sup>

In short, McIntyre UK manufactured a three-ton industrial metal-processing machine known as the Model 640 Shear; McIntyre UK actively promoted the sale of that machine and some of its other products throughout the United States, both directly and through its exclusive distributor, McIntyre America; McIntyre UK sought to serve the entire U.S. market but made no special effort either to serve or exclude the New Jersey market; as a direct consequence of McIntyre UK’s national marketing effort, a New Jersey business—Curcio Scrap Metal—ordered a Model 640 Shear from McIntyre America, which had either previously obtained the machine from McIntyre UK or submitted a purchase order for the machine based

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38. Joint Appendix, *supra* note 19, at 123a–124a.

39. *Id.* at 123a–128a.

40. *Id.* at 170a.

41. *Id.* at 171a.

42. *Id.* at 131a.

43. *Id.* at 135a.

44. *Id.*

on the potential sale to Curcio Scrap Metal; McIntyre America delivered the Model 640 Shear to Curcio Scrap Metal in New Jersey, where it was used in the regular course of business, which use led to Nicastro's injuries.<sup>45</sup>

### III. THE DOCTRINAL LANDSCAPE

Nicastro filed a products liability suit against McIntyre UK in a New Jersey superior court claiming that the Model 640 Shear was unreasonably dangerous.<sup>46</sup> His wife joined him in the suit, alleging a loss of consortium.<sup>47</sup> After being served, McIntyre UK filed a motion to dismiss for lack of personal jurisdiction.<sup>48</sup> Before examining the state court proceedings on McIntyre UK's motion<sup>49</sup> it might be helpful, especially for those who are not steeped in the lore of procedure, to describe the doctrinal landscape as it stood when McIntyre UK filed its motion.

The basics, at least, are easy and should be familiar to anyone who has survived a first-year course in civil procedure. A state court may exercise personal jurisdiction over a nonresident defendant only if that defendant is served while the defendant is physically present in the state, consents to the exercise of jurisdiction, waives any objection to the exercise of jurisdiction, or has established "minimum contacts" with the forum state such that the exercise of jurisdiction under a state long-arm statute over her would not offend "traditional notions of fair play and substantial justice."<sup>50</sup> As to the minimum-contacts test, the threshold requirement of this due process standard is that the nonresident defendant must have engaged in conduct purposefully directed at the forum state.<sup>51</sup> From a due process perspective, this purposeful affiliation with the forum provides the

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45. *Nicastro I*, 945 A.2d 92, 96 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

46. *Id.* at 95. Nicastro also sued McIntyre America, but the latter declared bankruptcy and did not participate in the litigation. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2796 n.2 (2011) (Ginsburg, J., dissenting).

47. *Nicastro II*, 987 A.2d 575, 578 n.1 (N.J. 2010), *rev'd sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

48. *Nicastro I*, 945 A.2d at 95.

49. *See infra* Part IV.

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

51. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985).

nonresident defendant fair warning that she may be sued in that state on claims arising out of her volitional affiliation.<sup>52</sup>

In general, questions of purposeful direction or purposeful availment tend to be of one of the following types: (1) activities engaged in by the nonresident defendant or her agents in the forum state; (2) contractual relations between the nonresident defendant and a resident of the forum state; (3) the placement by the nonresident defendant of a product into the stream of commerce with an eventual retail sale of that product in the forum state; or (4) tortious activity engaged in by the nonresident defendant outside of the forum state that causes a foreseeable effect in the forum state. Each type requires a “highly realistic”<sup>53</sup> appraisal of the facts in light of the appropriate legal standards, the goal being to determine whether the nonresident defendant’s conduct can be properly characterized as purposefully directed at the forum state and thereby provide her with fair warning of a potential lawsuit in that state.<sup>54</sup>

Nicastro’s lawsuit against McIntyre UK implicated the stream-of-commerce form of purposeful affiliation.<sup>55</sup> The stream-of-commerce test typically applies in products liability cases. The basic outline is simple. A manufacturer located in one state (or foreign country), say State A, sells or transfers its product to a second entity, which then delivers the product into another state, say State B, where the product is sold at retail and where it then causes an injury. The stream starts in the state (or country) of manufacture—State A—and ends in the state of retail sale—State B. The ultimate question in any such case is whether, under the given facts, the manufacturer’s placement of the product into the stream of commerce in State A constitutes the manufacturer’s purposeful contact with State B, the

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52. *Id.* at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

53. *Burger King*, 471 U.S. at 479.

54. See generally ALLAN IDES & CHRISTOPHER N. MAY, *CIVIL PROCEDURE: CASES AND PROBLEMS* 84–86, 90–91 (4th ed. 2012) (providing background on proper jurisdiction under the applicable long-arm statute and the minimum-contacts test).

55. One could also have plausibly argued that McIntyre UK’s conduct fell into each of the other three categories. Thus, if McIntyre America were deemed the agent for McIntyre UK, one could argue that McIntyre America’s sale of the Model 640 Shear to Curcio Scrap Metal in New Jersey was attributable to McIntyre UK. Similarly, the sales contract between McIntyre America and Curcio Scrap Metal and any warranty of the Model 640 Shear by McIntyre UK might be seen as contractual relations with a New Jersey resident. Finally, if the effects test were read broadly (it generally is not), one could argue that that the design and manufacture of the Model 640 Shear in England had a foreseeable, injurious effect in New Jersey.

state of retail sale and injury. Stated somewhat differently, we want to know whether our manufacturer purposefully availed itself of the benefits and protections of State B's laws.

The Supreme Court first endorsed the stream-of-commerce theory in *World-Wide Volkswagen v. Woodson*<sup>56</sup> but held that the standards of the theory were not satisfied under the facts presented since the suit was not brought in the state of retail sale (New York) but in a state to which the purchaser of the automobile in question had later traveled (Oklahoma) after the retail sale had been consummated.<sup>57</sup> Given that the doctrine did not apply, the Court provided no further guidance as to its scope or operation.

The Court next examined of the stream-of-commerce theory in *Asahi Metal Industry Co., Ltd. v. Superior Court*.<sup>58</sup> That case involved a motorcycle accident that took place in California and was alleged to have been caused by the failure of a defective tire tube or by the valve on that tube. Asahi manufactured the valve in Japan, then shipped it to Taiwan, where Cheng Shin bought the valve and incorporated it into a Cheng Shin tire tube, which Cheng Shin then shipped to California, where the plaintiff purchased the tube at retail. The plaintiff sued several defendants in a California state court, including Cheng Shin but not Asahi. Cheng Shin filed a cross-claim against Asahi for indemnification. The case settled between the plaintiff and the defendants, and all that remained before the state courts was the cross-claim between Cheng Shin and Asahi.<sup>59</sup> The question before the Supreme Court was whether California courts could exercise personal jurisdiction over Asahi under these circumstances. Eight members of the Court agreed that, regardless of whether Asahi had purposeful contacts with California, it would be unreasonable for the courts of California to exercise jurisdiction over the Japanese company under the circumstances presented: a claim between foreign parties on a question likely subject to foreign law over which the state of California had no legitimate interest given that the resident plaintiff's claims had been settled.<sup>60</sup>

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56. 444 U.S. 286 (1980).

57. *Id.* at 297-98.

58. 480 U.S. 102 (1987).

59. *Id.* at 105-08.

60. *Id.* at 113-16.

While a strong majority of the Court agreed that the exercise of jurisdiction over *Asahi* would be unreasonable, the Court could not agree on the appropriate standards to apply under the stream-of-commerce test. Four Justices (Justices Brennan, et al.) said that placing a product in the stream was itself sufficient to establish purposeful availment, as long as the defendant had been aware that the final product was being marketed in the forum state as part of the “regular and anticipated flow of products from manufacture to distribution to retail sale.”<sup>61</sup> Four other Justices (Justices O’Connor, et al.) insisted that a more “substantial connection” was required, i.e., some additional “action of the defendant purposely directed toward the forum State,” such as advertising or soliciting sales in the forum state; establishing channels for providing regular advice to customers in the forum state; or creating, controlling, or employing the distribution system that brought its products into the forum state.<sup>62</sup> The ninth Justice (Justice Stevens) declined to endorse either approach but emphasized the importance of taking the volume, value, and hazardous nature of the product into account, and on that basis he suggested that purposeful availment had been satisfied.<sup>63</sup>

*Asahi* was decided in 1987, and for the next twenty-four years the Court offered no clarification of the stream-of-commerce theory. As a consequence, state courts and lower federal courts grappled with the conflicting messages emanating from the *Asahi* stream-of-commerce opinions; some adopted Justice Brennan’s “pure” stream-of-commerce model, some adopted Justice O’Connor’s “something more” or “plus” stream-of-commerce model, and others adopted a hybrid approach that depended on whether the product at issue was a finished product or a component part. There were also a lot of nuances in between each of the chosen approaches.<sup>64</sup> In short, when McIntyre UK filed its motion to dismiss before the New Jersey trial court, the doctrinal scope of the stream-of-commerce theory was unsettled and had been in that state for just shy of a quarter of a century.

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61. *Id.* at 116–21 (Brennan, J., concurring).

62. *Id.* at 108–13 (plurality opinion).

63. *Id.* at 121–22 (Stevens, J., concurring).

64. See IDES & MAY, *supra* note 54, at 129.

IV. THE PROCEEDINGS  
IN STATE COURT

As noted above, after being served, McIntyre UK filed a motion to dismiss for lack of personal jurisdiction.<sup>65</sup> The trial court initially granted the motion, but the Appellate Division of the New Jersey Superior Court reversed and remanded the case to allow for jurisdictional discovery.<sup>66</sup> After the completion of that discovery, McIntyre UK renewed its motion to dismiss, which the trial court again granted, finding that the defendant “does not have a single contact with New Jersey short of the machine in question ending up in this state.”<sup>67</sup> Moreover, the trial court explained, the defendant “had no knowledge of the business dealings between [McIntyre America] and its customers, including Curcio, concerning the at-issue shear.”<sup>68</sup> The trial court further found “no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey.”<sup>69</sup>

The appellate court again reversed.<sup>70</sup> The court issued a lengthy opinion that provided a detailed account of the facts, a survey of the law of jurisdiction—with a specific focus on the stream-of-commerce theory, including an application of Justice O’Connor’s something-more standard—and concluded that McIntyre UK was subject to personal jurisdiction in New Jersey.<sup>71</sup> The essence of the appellate court’s reasoning is captured in the following passage:

Defendant designated McIntyre America as its exclusive distributor for the entire United States. Therefore, anyone in any state that wished to purchase one of defendant’s machines was required to purchase it from McIntyre America, defendant’s exclusive sales agent in this country. This was not a temporary or fleeting arrangement. From at least as early as 1995, when Curcio purchased the machine, until its bankruptcy in 2001, McIntyre America enjoyed this relationship with defendant on an ongoing

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65. *Nicastro I*, 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008), *aff’d*, 987 A.2d 575 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

66. *Id.* at 99 n.1.

67. *Id.* at 99.

68. *Id.*

69. *Id.*

70. *Id.* at 95.

71. *See id.* at 99–109.

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basis. The relationship was established by defendant for the purpose of selling its machines in all fifty states. The machines were designed to conform with United States standards as well as those in the United Kingdom. McIntyre America traded on defendant's name and held itself out as "America's Link to Quality Metal Processing Equipment."

....

Defendant was well aware that McIntyre America was not the end user of the many machines it sold to McIntyre America over the years. By definition, McIntyre America was defendant's distributor and its function was to resell the machines to end users. These are large, potentially dangerous, industrial machines, designed for a limited market of users engaged in the metal recycling industry. The machines are designed for use in a stationary location in an industrial setting. Thus, it would reasonably be anticipated by defendant and McIntyre America that upon sale to the end user, the machine would remain at its location for use by workers there.

When defendant sold and shipped machines to McIntyre America in Ohio, defendant did not do so with the purpose of availing itself of the Ohio market. When defendant's senior management personnel attended trade conventions in Las Vegas and other United States cities to display its machines and seek buyers for them (through McIntyre America), its purpose was not to sell machines for use in Las Vegas or those other cities. Defendant was engaged in purposeful conduct to avail itself of the entire United States market, namely to effect sales, through its exclusive distributor, to end users in all fifty states, including New Jersey.

The sale of the machine to Curcio was not the result of conduct by a party unrelated to defendant and it was not an isolated transaction. It was the result of the very distribution scheme purposefully established by defendant for the sale of its machines to potential customers located anywhere



within the exclusive sales territory of McIntyre America. That territory included New Jersey.<sup>72</sup>

McIntyre UK appealed to the New Jersey Supreme Court.<sup>73</sup>

The New Jersey Supreme Court began its opinion with a long—very long—windup that included a description of the facts; the proceedings, including the Appellate Division of the New Jersey Superior Court’s opinion; the arguments by the parties and a participating amicus; and a history lesson on the development of the law of jurisdiction, both nationally and in New Jersey, with a specific discussion of stream-of-commerce theory, including Justice O’Connor’s something-more standard.<sup>74</sup> As to the something-more standard, the opinion noted that several courts had interpreted Justice O’Connor’s standard as having been satisfied in the context of foreign manufacturers that employed national marketing schemes resulting in sales and injuries in the forum state.<sup>75</sup> The state high court then pitched the following stream-of-commerce standard down the middle of the plate:

A foreign manufacturer will be subject to this State’s jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey. A manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states must expect that it will be subject to this State’s jurisdiction if one of its defective products is sold to a New Jersey consumer, causing injury. The focus is not on the manufacturer’s control of the distribution scheme, but rather on the manufacturer’s knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold.<sup>76</sup>

The court found that the standard was satisfied under the facts presented:

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72. *Id.* at 104–05.

73. *Nicastro II*, 987 A.2d 575, 577 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

74. *Id.* at 577–92.

75. *Id.* at 589–90.

76. *Id.* at 591–92 (citations omitted).

[W]e find that the record supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine. J. McIntyre, a company incorporated in the United Kingdom, targeted the United States market for the sale of its recycling products. It did so by engaging McIntyre America, an Ohio-based company, as its exclusive United States distributor for an approximately seven-year period ending in 2001. J. McIntyre knew or reasonably should have known that the distribution system extended to the entire United States, because its company officials, along with McIntyre America officials, attended scrap metal trade shows and conventions in various American cities where its products were advertised. Indeed, J. McIntyre's president was present at the Las Vegas trade convention where his exclusive distributor introduced plaintiff's employer to the allegedly defective McIntyre Model 640 Shear that severed four of plaintiff's fingers.

It is clear that those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events, and that the joint appearances by J. McIntyre and McIntyre America were calculated efforts to penetrate the overall American market. Plaintiff's employer, a New Jersey businessman, is just one example of a person who traveled thousands of miles to a convention where, by dint of a sales effort, he purchased one of J. McIntyre's machines. J. McIntyre may not have had access to McIntyre America's customer list, but J. McIntyre knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States.<sup>77</sup>

The Supreme Court of the United States granted certiorari.<sup>78</sup>

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77. *Id.* at 592–93.

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

V. THE OPINIONS OF THE  
SUPREME COURT OF  
THE UNITED STATES

*A. The Plurality*

Justice Kennedy authored a plurality opinion announcing the judgment of the Court reversing the New Jersey Supreme Court's decision.<sup>79</sup> The Chief Justice and Justices Scalia and Thomas joined the opinion.<sup>80</sup> Justice Kennedy's opinion disappoints on a number of levels, the most important of which is that it utterly fails to clarify the doctrinal standards. It will also disappoint anyone who expects the Supreme Court Justices to take language seriously, to interpret precedents fairly, or to explain in cogent terms why the applicable law demands a particular outcome.

1. Minor Flaws: Doctrinal Indifference

Part II of the plurality opinion begins with a four-paragraph mini-survey of the law of personal jurisdiction. The survey gets some things right, gets some things wrong, and leaves much unsaid. From one point of view, minor "flaws" in the introductory passages of a Supreme Court opinion are of little import and easily ignored. But details do matter (at least that's what I teach my students), and when an opinion begins its foray into the law with a careless exposition of the underlying doctrine, at a minimum one loses confidence in the Justice's ability to reason through the case's more critical aspects. And all too often today's minor flaw becomes tomorrow's new doctrine. So even if such peccadilloes do not poison the well of reasoning, they should serve as a warning to anyone who is about to draw the water.

The first two paragraphs of Part II are unremarkable. They reaffirm the threshold minimum-contacts standard of purposeful availment and make it clear that this standard applies in products liability cases.<sup>81</sup> Regardless of what one may think the law of

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79. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (plurality opinion).

80. *Id.*

81. *Id.* at 2786–87.

jurisdiction ought to be, the plurality correctly states what the law is and has been for some time.<sup>82</sup>

The next two paragraphs are a bit more problematic. In the first of these, the plurality describes three traditional ways in which “[a] person may submit to a State’s [jurisdictional] authority”: “explicit” consent, presence, and domicile.<sup>83</sup> As the plurality explains it, “These examples support exercise of the general jurisdiction of the State’s courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere.”<sup>84</sup> That is not entirely correct. While presence and domicile will validate the exercise of general jurisdiction, explicit consent is significantly less likely to do so. For example, most explicit-consent forum selection clauses include an “arise out of” or “relates to” requirement<sup>85</sup> and do not, therefore, subject a party who is bound by the clause to general jurisdiction in the selected forum. I doubt that the plurality intended to signal a change in the law of forum selection clauses. So we can count this as an example of confident carelessness. Note as well that the plurality makes no mention of a fourth traditional basis for asserting jurisdiction,

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82. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The plurality does, however, make one odd observation toward the end of the second paragraph in Part II. “[I]n some cases,” says the plurality, “as with an intentional tort, the defendant might well fall within the State’s authority by reason of his attempt to obstruct its laws.” *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion). The plurality cites no authority for this somewhat ambiguous and extraneous proposition. On the one hand, the proposition appears sound to the extent that it describes a sufficient condition for the assertion of jurisdiction over a nonresident defendant whose extraterritorial tortious act causes a foreseeable effect (obstruction of the laws) in the forum state. This would be a special instance of the effects test established in *Calder v. Jones*, 465 U.S. 783 (1984). On the other hand, the plurality’s proposition, which is stated as an exception to a general principle of purposeful availment, can be interpreted to mean that “obstruction” is a necessary component of the effects test. If this is the intended sense of the quoted language, the proposition represents a significant narrowing of the standard established by a unanimous Court in *Calder*—a standard that focuses on the focal point of the harm and not in any fashion on a concept of obstruction. *Id.* at 789–90. Why describe a narrow instance of a particular jurisdictional standard without referencing the standard, if not to narrow that standard to the particularized instance? Or is the proposition nothing more than a chatty and somewhat careless statement signifying nothing about the overarching standard? Or does the author actually know what the standard is?

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

84. *Id.*

85. See Maxwell J. Wright, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1627 (2011) (“A forum-selection clause is a contract provision under which the parties agree to file any suit *arising under* their contract in a specified forum.” (emphasis added)).

voluntary appearance, which could be seen as a form of consent but not necessarily explicit consent.

The next paragraph describes specific jurisdiction as “a more limited form of submission to a State’s authority.”<sup>86</sup> In the plurality’s words, “[S]ubmission through contact with and activity directed at a sovereign may justify specific jurisdiction ‘in a suit arising out of or related to the defendant’s contacts with the forum.’”<sup>87</sup> This is correct, though one might quibble with the “submission” characterization, but we will want to see what the plurality means by “activity directed at a sovereign.” Hint: we won’t be told.

Overall, with respect to these latter two paragraphs, the plurality’s attempt to define the line between general jurisdiction and specific jurisdiction as being a demarcation between an incomplete list of traditional forms of jurisdiction (explicit consent, presence, and domicile) and contacts-premised jurisdiction is both artificial and incomplete. I have already mentioned the absence of voluntary appearance as a traditional form of jurisdictional submission to the sovereign. Like consent, a voluntary appearance can trigger either general or specific jurisdiction depending on the nature of the case in which the voluntary appearance is made. In addition, general jurisdiction is not limited to the traditional bases of jurisdiction but can be based on the substantiality of the nonresident defendant’s purposeful contacts with the forum state.<sup>88</sup> Perhaps the plurality would say that, in the latter circumstance, the nonresident defendant is “present” in the state, signaling a return to the “fiction” approach to jurisdiction abandoned in *International Shoe Co. v. Washington*.<sup>89</sup> In any event, a reader seeking a basic understanding of the law of personal jurisdiction would be sorely misled by the plurality’s exegesis.

In short, the plurality’s discussion of the foundational legal standards is imprecise, incomplete, and at points mistaken. None of this matters much, except that it leaves the reader with a sense that

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86. *Id.*

87. *Id.* at 2788 (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.414 (1984)).

88. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). Notably, *Goodyear Dunlop* was decided the same day as *J. McIntyre* and, being a unanimous decision, was joined by each member of the plurality. *Id.* at 2846, 2850.

89. 326 U.S. 310, 316–19 (1945).

the plurality has either a muddled view of the background principles or simply does not care enough about them.

## 2. Not-So-Minor Flaw: Interpretive Laxity

Having set a purposeful-availment foundation afloat in murky waters, the plurality next focuses on what it characterizes as the stream-of-commerce metaphor. Here the plurality correctly observes that this metaphor (or theory, test, or doctrine) was never meant to “amend the general rule of personal jurisdiction.”<sup>90</sup> In the plurality’s words, the stream-of-commerce metaphor “merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors ‘seek to serve’ a given State’s market.”<sup>91</sup> In other words, stream-of-commerce analysis is not a substitute for purposeful availment but a method through which to determine whether the purposeful-availment standard has been satisfied. So far, so good. But now the plurality leaps from the analytical utility of the metaphor to a fixed definition of it: “The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum.”<sup>92</sup> Perhaps the plurality is invoking Justice O’Connor’s something-more or stream-of-commerce-plus model. Or, on the theory that new words may signify a new direction, it could be that the plurality is endorsing a new and stricter standard. We’ll return to this “target” metaphor momentarily.

The plurality saw its mission as presenting “an opportunity to provide greater clarity”<sup>93</sup> to the “decades-old questions left open in *Asahi*.”<sup>94</sup> One would expect, then, a careful exegesis of the *Asahi* opinions and their unsettled aftermath. Oddly enough, the plurality’s discussion of *Asahi* and lower courts’ efforts to apply that case is remarkably brief. The bulk of it consists of three paragraphs:

In *Asahi*, an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of

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

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

92. *Id.* (emphasis added).

93. *Id.* at 2786.

94. *Id.* at 2785.

considerations of fairness and foreseeability. As that concurrence contended, “jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause,” for “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” It was the premise of the concurring opinion that the defendant’s ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan’s concurrence was rejected in an opinion written by Justice O’Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: “The ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. 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.”

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court’s precedents make clear that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.<sup>95</sup>

Let’s begin by examining what Justice Brennan actually said in *Asahi*. He began his *Asahi* opinion with this sentence, “I do not agree with [Justice O’Connor’s] interpretation . . . of the stream-of-commerce theory, nor with the conclusion that *Asahi* did not ‘purposefully avail itself of the California market.’”<sup>96</sup> He then explained his theory as follows:

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95. *Id.* at 2788–89 (citations omitted).

96. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) (emphasis added).

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.<sup>97</sup>

After this introductory discussion, Brennan provided a detailed account of the Court's decision in *World-Wide Volkswagen*, and quoted, with approval, the following passages from that opinion:

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

. . . Hence if the *sale* of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not

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97. *Id.* at 117.



exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State.<sup>98</sup>

Brennan ended his *Asahi* opinion by explaining why, in his view, “the facts found by the California Supreme Court support its finding of *minimum contacts*.”<sup>99</sup> Here he focused on “Asahi’s regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California.”<sup>100</sup>

One could certainly disagree with Justice Brennan’s application of the purposeful-availment standard in *Asahi*, though a majority of the *Asahi* Court apparently did not.<sup>101</sup> But whatever one might say about his *Asahi* opinion, a description of it as endorsing a “fairness and foreseeability” theory or as premised on “general fairness” principles is not even marginally credible.<sup>102</sup> Among other things, Justice Brennan only alluded to fairness once in his stream-of-commerce discussion, and then only in reference to the contacts-premised rationale of the Court in *World-Wide Volkswagen*.<sup>103</sup> Instead of “fairness,” the clear focus of Brennan’s *Asahi* opinion was on what he thought constitutes purposeful availment.

As to foreseeability, Brennan did endorse the foreseeability-of-being-haled-into-court-standard, but that standard is premised on the nonresident’s contacts with the forum state, for it is the purposeful contacts with the forum that lead to the foreseeability of being sued

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98. *Id.* at 119–20 (citations omitted).

99. *Id.* at 121 (emphasis added).

100. *Id.* at 121.

101. Three members of the Court (Justices White, Marshall, and Blackmun) joined Justice Brennan’s plurality, and Justice Stevens, writing separately, seemed to agree:

In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute “purposeful availment” even though the item delivered to the forum State was a standard product marketed throughout the world.

*Id.* at 122. Notably, Justices White and Blackmun joined this opinion, suggesting a strong commonality between the Brennan and Stevens models. *Id.* at 121.

102. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788–89 (2011) (plurality opinion).

103. *Asahi*, 480 U.S. at 119 (“The [*World-Wide Volkswagen*] Court reasoned that when a corporation may reasonably anticipate litigation in a particular forum, it cannot claim that such litigation is unjust or unfair, because it ‘can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State.’” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))).

there. Moreover, Brennan's acceptance of that version of foreseeability was hardly noteworthy since the Court had endorsed precisely that standard in both *World-Wide Volkswagen*<sup>104</sup> and *Burger King Corp. v. Rudzewicz*.<sup>105</sup> But more to the point, Brennan's *Asahi* opinion affirmatively rejected the more generalized approach to foreseeability that the plurality had accused him of adopting: "[T]he foreseeability that is critical to due process analysis is *not* the mere likelihood that a product will find its way into the forum State."<sup>106</sup> And lest there be any doubt, in *Burger King*, decided two years before *Asahi*, Brennan had authored the opinion for the Court and in that opinion specifically rejected the generalized approach to foreseeability as not providing a "sufficient benchmark" for the exercise of personal jurisdiction.<sup>107</sup>

Whatever stream-of-commerce metaphor the plurality would like to endorse, the road to that metaphor should not be paved with such an obvious interpretive gaffe.

Equally flawed, but for a different reason, is the plurality's "interpretation" of Justice O'Connor's *Asahi* opinion. In essence, the plurality offers no interpretation. Aside from quoting O'Connor's "something more" admonition,<sup>108</sup> the plurality makes no effort to examine the O'Connor version of stream of commerce, either in the abstract or in practical application. In fact, the plurality's only other allusion to O'Connor's opinion is the following: "The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*, does not by itself resolve many difficult questions of

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

105. 471 U.S. 462 (1985). "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state . . . . '[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court here.'" *Id.* at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

106. *Asahi*, 480 U.S. at 119 (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

107. *Burger King*, 471 U.S. at 474. Prior to the decision in *Burger King*, Justice Brennan had endorsed the foreseeability-of-injury-in-the-forum standard. See *World-Wide Volkswagen*, 444 U.S. at 306 (Brennan, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 226 (1977) (Brennan, J., concurring in part and dissenting in part). But in his *Burger King* majority opinion, Justice Brennan abandoned that endorsement, describing his previous position as having been "consistently" rejected by the Court. *Burger King*, 471 U.S. at 474 n.16. Nothing in Brennan's *Asahi* opinion even hints at a return to his previously held views. Indeed, that opinion reiterates Brennan's acceptance of the haled-into-court standard. *Asahi*, 480 U.S. at 119.

108. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792 (2011) (plurality opinion).

jurisdiction that will arise in particular cases.”<sup>109</sup> Of course this is true. No doctrinal standard (aside from an absolutist one) can solve all the difficult, fact-based questions that arise under the standard. But, given the plurality’s mission of clarification, one would expect a relatively careful examination of the something-more option.

Here is what Justice O’Connor had to say about her proposed standard, followed by her application of that standard to the *Asahi* facts:

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 of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Assuming, *arguendo*, that respondents have established Asahi’s awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.<sup>110</sup>

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109. *Id.* at 2790.

110. *Asahi*, 480 U.S. at 112–13 (plurality opinion) (citations omitted).

We can see from this passage that there is a clear distinction between the O'Connor and Brennan approaches. Both demand purposeful availment, but O'Connor insists on additional forum-directed contacts beyond the nonresident defendant's participation in the regular and anticipated flow of the commercial stream into the forum state. And she provides a nonexclusive list of possibilities to elucidate what she believes would satisfy her standard. Further, O'Connor explains why she thinks this "something more" was lacking in *Asahi* since the nonresident defendant there had done nothing affirmative to promote sales of its product in California. Among other things, the Japanese manufacturer "did not create, control, or employ the distribution system that brought its valves to California."<sup>111</sup> True, Justice O'Connor's approach does not provide a litmus-test solution to the question of purposeful availment, but both her description of the factors she considered relevant and her application of those factors did help to "clarify the contours of [the] principle,"<sup>112</sup> to borrow the *J. McIntyre* plurality's description of the ultimate goal of the case-by-case lawmaking method.

The plurality's "clarification" of the *Asahi* opinions thus takes us nowhere. The mischaracterization of Justice Brennan's approach as a fairness-and-foreseeability model is a complete non-starter. It seems to be premised on the notion that words don't matter, that interpretation is a type of freestyle wrestling match with no holds barred. And the plurality's failure to examine the "contours" of Justice O'Connor's something-more model leaves the reader without any hold whatsoever. Justice O'Connor's invitation to engage in a fact-based examination of the question of purposeful availment is treated as nothing more than a generalized, free-floating doctrine, unworthy of careful examination or application.

The plurality ends Part II with platitudes about sovereignty and the "genius" of our constitutional system and with a promise that "judicial exposition will, in common-law fashion, clarify the contours of [the purposeful-availment] principle."<sup>113</sup> But we're already off to a fairly bleak start.

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111. *Id.* at 112.

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

113. *Id.*

### 3. Major Flaws: Concepts over Facts

One of the notable features of the plurality opinion is its minimalist and somewhat loaded description of the facts. Part I of the opinion purports to describe the “three primary facts” that the plaintiffs’ counsel stressed, but the description is more argumentative than descriptive and leans heavily toward the defendant’s version of those facts:

First, an independent company agreed to sell J. McIntyre’s machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre’s control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre’s machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines . . . , including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.

In addition to these facts emphasized by respondent, the New Jersey Supreme Court noted that J. McIntyre held both United States and European patents on its recycling technology. It also noted that the U.S. distributor “structured [its] advertising and sales efforts in accordance with” J. McIntyre’s “direction and guidance whenever possible,” and that “at least some of the machines were sold on consignment to” the distributor.<sup>114</sup>

The plurality returns to these facts in Part III of its opinion, in which it purports to apply its “target” standard of purposeful availment. Supposedly, this is the “exposition” that will “clarify” the key legal principles by focusing on the “defendant’s conduct and the economic realities of the market the defendant seeks to serve . . . .”<sup>115</sup> Here is that promised exposition in total:

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.

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114. *Id.* at 2786 (citations omitted).

115. *Id.* at 2790.

Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.<sup>116</sup>

Quite obviously, there is no analysis here. This is a restatement of the facts at a broad level of generality, followed by a conclusion. The most we can say is that the target standard has not been satisfied, but why that is the case is difficult to ascertain.

Suppose the plurality had written a competent opinion that accurately described the differences between the Brennan and O'Connor stream-of-commerce theories, then explained why it preferred one over the other, then followed that with a detailed application of the chosen theory. Let's assume that the O'Connor model was deemed the more suitable. A competent (not brilliant, just competent) opinion applying that theory would note that McIntyre UK did not design its Model 640 Shear specifically for the New Jersey market, nor did the company market or advertise its products within New Jersey (other than through ads in trade magazines that were distributed nationally). On the other hand, our careful application of the O'Connor theory would note that McIntyre UK did, at least arguably, establish a channel for providing advice and customer support by affixing the manufacturer's name, address, and telephone number to its machines sold in the United States. More importantly, Justice O'Connor's emphasis on the distribution system would, at a minimum, require us to ask whether McIntyre UK had created, controlled, or employed the distribution system that brought the Model 640 Shear into New Jersey. (More on this later.)

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116. *Id.* (citation omitted).

Regardless of what one might conclude from such an analysis, the exposition would clarify the principle being applied. Of course, by treating the case as presenting an abstract question pertaining to “submission to sovereignty,”<sup>117</sup> the plurality avoids the difficult questions and succeeds only at making the law less clear than it was before Justice Kennedy (or his clerks) took pen in hand.

In the end, we’d like to know precisely what standard the plurality has adopted. We know that it is not a fairness-and-foreseeability model; we can presume that it is not Justice Brennan’s regular-and-anticipated-flow model (although the plurality never actually confronts that model); and we now must doubt that it is O’Connor’s something-more model, since the plurality rather assiduously avoids asking the questions demanded by that model. Perhaps we can describe the target model as some form of “plus/plus” under which the nonresident defendant must aim its arrow precisely at the bull’s-eye of the forum state. For it is apparently the case, from the plurality’s perspective, that if the nonresident defendant uses a scattershot weapon with a wider range and aims at the states more generally, the fact that any particular state finds itself on the receiving end will be of no avail.

### B. *The Concurrence*

Justice Breyer, joined by Justice Alito, concurred in the judgment reversing the New Jersey Supreme Court.<sup>118</sup> Don’t look for satisfaction here. Justice Breyer’s opinion reads like a casual tête-à-tête. Think tea and biscuits. As he sees it, the case is just too easy. Given the unremarkable facts, which have no bearing on “recent changes in commerce and communication,” and the established precedent, which requires no elaboration, there is no apparent reason to tarry with the details or the consequences.<sup>119</sup>

#### 1. Outcome Determined by Precedents

The concurrence relies on the same “three primary facts” as the plurality (albeit worded somewhat differently):<sup>120</sup>

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117. *See id.* at 2787.

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

119. *Id.*

120. *Compare id.* at 2786 (plurality opinion) (“three primary facts”), *with id.* at 2791 (Breyer, J., concurring) (“three primary facts”).

(1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco."<sup>121</sup>

Consider the word choice: "on one occasion . . . permitted, indeed wanted . . . attended trade shows . . ." Gosh. One senses McIntyre UK pining for a sale somewhere, anywhere in America, wandering from trade show to trade show, hoping on hope for just a little luck. Dr. Watson might have called it, "The Curious Case of the Wistful Manufacturer." Well it is a clever and useful technique. Essentially, Justice Breyer reduces the narrative to the fortuitous and inconsequential sale of a widget machine. Coincidentally, that reduction fits perfectly with the concurrence's fabricated (as we will see) version of the applicable doctrine. Thus, the concurrence instructs the reader that none of the Court's "precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here ['permitted, indeed wanted'], is sufficient. Rather, this Court's *previous holdings* suggest the contrary."<sup>122</sup> Of course, if Justice Breyer had been out for a stroll instead of chatting in his parlor, he might have tripped over *McGee v. International Life Insurance Co.*,<sup>123</sup> the classic single-solicitation case. (Think of *McGee* as a case in which a nonresident defendant targeted one solicitation at a forum resident.)

For his holdings-suggest-to-the-contrary thesis (note his use of the plural), Justice Breyer cites one (and only one) case—*World-Wide Volkswagen Corp. v. Woodson*. He describes that case (in full) as follows: "The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting

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121. *Id.* at 2791 (Breyer, J., concurring) (quoting *Nicastro II*, 987 A.2d 575, 578–79 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011)).

122. *Id.* at 2792 (emphasis added).

123. 355 U.S. 220 (1957).



jurisdiction.”<sup>124</sup> Anywhere? Not even in the state of retail sale? If we add the phrase “in the state in which that accident occurred” to the end of the foregoing quotation, the sentence becomes descriptively accurate, but remains somewhat misleading in the present context. The holding in *World-Wide Volkswagen* instead turned on how the product reached the forum state.

One might have thought that the more relevant aspect of the *World-Wide Volkswagen* decision was the Court’s endorsement of the stream-of-commerce theory: “The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>125</sup> But no. Somehow (unexplained), the concurrence wrings from *World-Wide Volkswagen* an aspersion on the jurisdictional sufficiency of a single sale in the forum state, regardless of how that sale came about.

The only other support Breyer offers for his single-sale-insufficiency thesis is in reference to the plurality and concurring opinions in *Asahi*:

And the Court, in separate opinions [in *Asahi*], has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.<sup>126</sup>

(Again with the wistful manufacturer.) Here is his unexpurgated defense of that assertion:

See *Asahi Metal Industry Co.* . . . (opinion of O’Connor, J.) (requiring “something more” than simply placing “a product into the stream of commerce,” even if defendant is “awar[e]” that the stream “may or will sweep the product into the forum State”); (Brennan, J., concurring in part and concurring in judgment) (jurisdiction should lie where a sale in a State is part of “the regular and anticipated flow” of commerce into the State, but not where that sale is only

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124. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

125. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

126. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

an “edd[y],” *i.e.*, an isolated occurrence); (Stevens, J., concurring in part and concurring in judgment) (indicating that “the volume, the value, and the hazardous character” of a good may affect the jurisdictional inquiry and emphasizing Asahi’s “regular course of dealing”).<sup>127</sup>

A quick read of the foregoing quotation might lead one to conclude that Justice Breyer basically gets it right: stream-of-commerce-plus, stream-of-commerce-pure, and multi-factored balancing. But keep in mind that these nutshell descriptions are presented as suggesting a specific doctrinal standard—single-sale-insufficiency—that will reduce this case to a biscuit crumb, easily brushed off the docket. So a closer look is warranted.

Clearly, Justice O’Connor did endorse a something-more standard. But her something more had nothing to do with the volume of sales, single or otherwise. Rather, the entire focus of that standard was on whether the nonresident defendant had engaged in additional purposeful conduct directed at the forum state, *i.e.*, conduct beyond the “placement” and “awareness” elements of the stream-of-commerce theory:

Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.<sup>128</sup>

As previously noted, in finding that this something-more standard had not been satisfied in *Asahi*, Justice O’Connor specifically pointed out that Asahi “did not create, control, or employ the distribution system that brought its valves to California.”<sup>129</sup>

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127. *Id.* (citations omitted).

128. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 112 (1987).

129. *Id.* at 112–13. Following the quoted material, Justice O’Connor used a “Cf.” cite to a district court opinion that upheld jurisdiction over a foreign corporation that had no direct contacts with the forum state but that used a distributor to market its products throughout the nation. *Hicks v. Kawasaki Heavy Indus.*, 452 F. Supp. 130 (M.D. Pa. 1978). Justice O’Connor’s reference to *Hicks* may not have been an endorsement of the opinion, but it does suggest her support of a somewhat more fluid and nuanced approach to the something-more standard than one might glean from the plurality and concurring opinions in *J. McIntyre*.

Thus, Justice O'Connor provided a clear idea of what types of facts would support a finding of "something more," none of which referenced the quantity of the sales. Presumably, a single sale would do the trick, if that sale were heavily promoted or if the defendant had employed the distribution system that brought the product into the state. While this might be unusual in the case of consumer products (the issue in *Asahi*), it certainly would not be unusual in a case involving the sale of heavy, costly industrial machinery (the issue in *J. McIntyre*). Justice Breyer never explains how O'Connor's qualitative-plus translates into a quantitative-minus. He apparently assumes that the reader will take the lure. But there is, quite simply, no logical chain of reasoning that leads from one to the other.<sup>130</sup>

As to the Brennan standard, while Justice Breyer does not adopt Justice Kennedy's fairness-and-foreseeability interpretation of the Brennan approach, he offers his own form of interpretive surgery. Here's Brennan: "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."<sup>131</sup> Here's Breyer on Brennan: "[J]urisdiction should lie where a sale in a State is part of 'the regular and anticipated flow' of commerce into the State, but not where that sale is only an 'edd[y],' i.e., an isolated occurrence."<sup>132</sup> For the real Brennan, an "eddy" is something that is unpredictable; for the Breyer version of Brennan, an "eddy" is an isolated occurrence.<sup>133</sup> These are different things.<sup>134</sup> And, most importantly, an isolated occurrence can be predictable. For example, the single sale of heavy industrial equipment may well be an isolated occurrence, but such a sale is not necessarily unpredictable. It is also worth mentioning that Brennan's "regular and anticipated flow" pertains to the "retail sale" of consumer goods and not to the

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130. Justice Breyer's lapse in logic calls to mind to the old Catskills joke, "Boy, the food at this place is really terrible . . . and such small portions." ANNIE HALL (United Artists 1977).

131. *Asahi*, 480 U.S. at 117 (Brennan, J., concurring).

132. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

133. Breyer's revision of Brennan's *Asahi* opinion is much more troubling than Kennedy's fairness-and-foreseeability misinterpretation of that same opinion. The Kennedy misinterpretation has no bearing on the plurality's endorsement of the target standard. With or without that misinterpretation, the outcome would be the same. Breyer, on the other hand, uses his revision of Brennan as the key grounds on which to resolve the case.

134. Webster's dictionary defines "isolated" as "placed alone or apart: being alone: solitary." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1199 (1993). It defines "unpredictable" as "not to be foretold." *Id.* at 2506.

marketing and sale of heavy industrial equipment.<sup>135</sup> Justice Breyer simply and simplistically assumes that the language Justice Brennan used to describe the flow of consumer products is freely transferable to describe the sale of heavy industrial machinery; and Breyer makes no effort to justify this beyond-the-context leap. In short, if a single-sale-insufficiency inference is to be drawn from Brennan, it is only because Breyer has rewritten and decontextualized Brennan's standard.

Finally, the concurrence accurately quotes the Stevens balancing formula ("the volume, the value, and the hazardous character of the components"<sup>136</sup>), with the addendum that Stevens "emphasiz[ed] Asahi's regular course of dealing."<sup>137</sup> Here's what Stevens said in full:

Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than "[t]he placement of a product into the stream of commerce, without more . . . ." Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.<sup>138</sup>

Nothing in the above quotation suggests that volume operates as anything other than one of the factors in the determination of whether the exercise of jurisdiction comports with due process. It is just as plausible to infer that Justice Stevens would uphold jurisdiction in a case involving the single sale (low volume) of an expensive (high value) and dangerous (hazardous character) piece of industrial equipment as it is to infer the opposite. Note as well that

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135. Webster's dictionary defines "retail" as "the sale of commodities or goods in small quantities to ultimate consumers," and "retailing" as "the activities involved in the selling goods to ultimate consumers for personal or household consumption." *Id.* at 1938.

136. *Asahi*, 480 U.S. at 122 (Stevens, J., concurring).

137. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

138. *Asahi*, 480 U.S. at 122 (Stevens, J., concurring) (citation omitted).

Stevens was describing his approach to the sale of a “component part,” not to the sale of a finished product such as the Model 640 Shear. Moreover, Justice Stevens’s reference to Asahi’s “regular course of dealing” does not introduce an additional element to his standard but merely (and obviously) describes a sufficient basis for establishing purposeful availment over Asahi. Breyer, however, invites the reader to treat the regular-course-of-dealing reference as imposing a necessary condition on the exercise of jurisdiction. This is a common LSAT error—mistaking a sufficient condition for a necessary one—and provides no grounds from which to conclude that Stevens endorsed or even suggested anything like a single-sale-insufficiency standard.

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If we add up the nine votes of the *Asahi* plurality and concurring opinions (four-four-one), and toss in the seven-person majority opinion in *World-Wide Volkswagen*, we arrive at a big zero for Justice Breyer’s proposed single-sale-insufficiency inference. That inference is either wholly illogical from the perspective of what the opinions he relies on actually said, or, to the extent the inference rests on logic, it flows from reconstructed and recalibrated versions of those opinions. Keep in mind that this is the inference that makes the case go away. Thus, Justice Breyer runs his “primary facts” through the funnel of his ersatz inference and (surprise, surprise) readily concludes that jurisdiction cannot be sustained under the present state of the law. In the concurrence’s words, “Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.”<sup>139</sup> Yes, but only if adhering to precedents means revising those precedents to fit the conclusion.

One cannot have confidence in a conclusion derived from such a factually abstract and intellectually flawed reasoning process. Yet, while a mistaken path can sometimes lead to the correct destination, I do not think that is the case here. Although it is not my purpose to demonstrate that the Court (or the plurality or concurrence) arrived at an incorrect result, it is instructive to consider how easy it is to demonstrate that the stream-of-commerce doctrine, as it stood prior to *J. McIntyre*, would support a finding of jurisdiction. Taking Justice O’Connor as our guide—on the assumption that her stream-

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139. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

of-commerce standard is the strictest of the three *Asahi* standards—one can reasonably argue that her something-more standard has been met. Unlike *Asahi*, a relatively passive component part manufacturer that didn't market its products in the United States and that didn't employ the distribution system that took its valve from Taiwan to California, McIntyre UK actively marketed its product in the United States and did, in fact, choose (“create, control, or employ”<sup>140</sup>) the exact distribution system that brought its machine predictably and not fortuitously to New Jersey. If this argument is wrong, it was Justice Breyer's burden to explain why that is so. His abstraction of the facts and his seeming ignorance of doctrine allows him to duck that responsibility under the pretense of *stare decisis*.

## 2. An Absence of “Modern Concerns”

Part II of Justice Breyer's concurrence does three things. First, it expresses disagreement with Justice Kennedy's “submission” or target standard, a standard that the concurrence describes as a “strict no-jurisdiction rule.”<sup>141</sup> That disagreement, coupled with Justice Ginsburg's implicit rejection of the Kennedy standard in her three-person dissent, translates into a five-person majority disfavoring the target standard. Hence, although we don't know exactly what the target standard is, we do know that a majority of the Court disfavors it. We should be thankful for this morsel of clarity.

Second, the concurrence rejects what Justice Breyer characterizes as the “absolute approach adopted by the New Jersey Supreme Court . . . .”<sup>142</sup> But neither the New Jersey Supreme Court nor the Appellate Division of the New Jersey Superior Court used the word “absolute” or any derivation of that word. Both state courts ultimately premised their decisions on a detailed discussion of the facts connecting McIntyre UK to the marketing and sale of the Model 640 Shear that was sold to Curcio Scrap Metal in New Jersey.

Justice Breyer premises his absolutist case against the New Jersey Supreme Court on what seems to be a calculated misreading (or a casually sloppy reading) of the state court's opinion. As Breyer tells it, the New Jersey Supreme Court would hold a manufacturer “subject to jurisdiction for a products-liability action so long as it

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140. *Asahi*, 480 U.S. at 112 (plurality opinion).

141. *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring).

142. *Id.*

‘knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.’”<sup>143</sup> That’s Justice Breyer’s emphasis. He’s right. “Might” is a thin reed from which to hang the assertion of jurisdiction, but the New Jersey Supreme Court did no such thing. Justice Breyer simply deletes the second half of the above quoted sentence (without ellipses). Here’s what the New Jersey Supreme Court actually said:

A manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states must expect that it will be subject to this State’s jurisdiction if one of its defective products *is sold to a New Jersey consumer, causing injury*.<sup>144</sup>

In other words, the premise of the state court’s standard was not on a possible sale under a national marketing scheme but on an actual sale in a state within that marketing scheme’s targeted range. This may or may not be an acceptable standard, but it isn’t premised on the word “might.” It is premised on the calculated success of the marketing scheme, as the New Jersey Supreme Court explained in some detail.<sup>145</sup>

Interestingly enough, Justice Breyer’s worries over the consequences of adopting an absolutist rule underscore the deficiency of his own opinion:

What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii).<sup>146</sup>

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143. *Id.* (quoting *Nicastro II*, 987 A.2d 575, 592 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)).

144. *Nicastro II*, 987 A.2d at 592 (emphasis added).

145. *See supra* text accompanying notes 76–77.

146. *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring).

This faux concern for an imaginary potter encapsulates the critical flaw in the concurrence, namely, a complete failure to confront the actual case (facts and law) pending before the Court. *J. McIntyre* was not about an Appalachian potter who makes and peddles consumer products through a large distributor over which the potter has no apparent control. It was about a well-established manufacturer of expensive three-ton industrial machines used in the processing of scrap metal; it was about a manufacturer that directly employed and participated in a marketing and distribution system with the express goal of exploiting the entire U.S. market; it was about a manufacturer that didn't sit at a potter's wheel hoping for a sale somewhere in America but that traveled on an annual basis to the largest and most relevant marketing conventions held in cities throughout the United States and that brought its machines there for display and hawked those machines from booths it shared with its exclusive U.S. distributor. If one were to conclude that jurisdiction could be exercised over this manufacturer in those states in which its marketing scheme met with success, it would not be difficult to distinguish the case of the "wistful potter." In any event, let's worry about the aggressive manufacturer and marketer actually before the Court and not about the potter who may (but likely never will) be asked to defend an injury caused by one of his or her coffee mugs in Hawaii.<sup>147</sup> (Actually, the idea of a retailer in Hawaii selling Appalachian coffee mugs is pretty amusing. I guess that's the type of thing you come up with at tea time.)

Finally, and in partial explanation for his reluctance to adopt "new" jurisdictional rules in this case, Justice Breyer asserts that Nicaastro's lawsuit presented "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."<sup>148</sup> I believe that I've demonstrated that there was no need to "refashion" jurisdictional rules to sustain jurisdiction in this case. But even if some refashioning were required, the premise of the statement is unsound. Breyer's point is that the modern phenomenon of Web

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147. To be fair to Justice Breyer, he extends his worries beyond Appalachia to Egyptian shirt makers, Brazilian manufacturing cooperatives, and Kenyan coffee farmers. *Id.* at 2794. He worries about them every bit as much as he worries about the potter and the manufacturer of industrial machines. I do note, however, that all of his worries are directed toward potential defendants with no parallel concern for the consumers who may be injured by the products sold into the U.S. market by his imaginary defendants.

148. *Id.* at 2792–93.



marketing presents the Court with jurisdictional challenges quite unlike those that arise in quotidian cases such as this one. Apropos of this concern, he observes:

But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.<sup>149</sup>

Implicit in these observations is that Web marketing differs in some jurisdictionally relevant fashion from non-Web marketing. But is that true? Justice Breyer references an imaginary company that targets the world through its website. He does not explain how that type of targeting differs in any jurisdictionally significant fashion from a worldwide marketing scheme that uses non-Web media or practices to sell its products. For example, there is no doubt that McIntyre UK targeted the entire U.S. market. If, instead of a convention-based marketing scheme, McIntyre UK had used the Web to sell its machines, would the national e-targeting, accessible in New Jersey, have altered the jurisdictional outcome? Should it? On what sensible grounds? Would a popup ad appearing on a New Jersey-accessible website cross the line between unilateral contact and purposeful contact? Again, Justice Breyer's conceptual worries over abstract cases not before the Court leads him to misunderstand and undervalue the actual case before the Court. He doesn't seem to know that he's comparing apples to apples.<sup>150</sup>

Here's where we end up: tea and biscuits served with a superficial chat about everything except those things that actually matter—the factual and doctrinal details most pertinent to resolving the pending case. Personally, I've had my fill of tea.

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149. *Id.* at 2793.

150. In *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), Justice Breyer, writing for a unanimous Court, adopted a more circumspect approach to cyberspace concerns not before the Court. In that case, he endorsed a generally applicable standard for measuring a corporation's principal place of business, while leaving open the question of how that standard might be applied in the commercial arrangements of cyberspace. *Id.* at 1194–95. It is not clear why that sensible and circumspect approach was not available to him in *J. McIntyre*.

*C. The Dissent*

The dissent, authored by Justice Ginsburg and joined by Justices Sotomayor and Kagan, begins with a dramatic and slightly Kafkaesque narrative in which an anonymous “foreign industrialist” simultaneously seeks to develop a market in the United States and avoid liability in those places in which its marketing succeeds.<sup>151</sup> After providing a few details describing the industrialist’s game plan, the dissent asks, “Has [the industrialist] succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?”<sup>152</sup> The reader wants to say, “Of course not!” But alas, dear reader, the dissent informs, although the law agrees with you, a “splintered majority” of the Court does not.<sup>153</sup> Rather, that majority has “turn[ed] the clock back” to a “Pilate-like” jurisprudence under which the foreign industrialist may wash its hands of the matter.<sup>154</sup>

Then a jump cut to the facts: “On October 11, 2001, a three-ton metal shearing machine severed four fingers on Robert Nicastro’s right hand.”<sup>155</sup> By starting with this stark and highly personalized detail, one that both the plurality and the concurrence ignore, Justice Ginsburg announces an alternative perspective from which to view the case, one that is less worried about abstractions or imaginary defendants and more concerned with the pending case’s realities. She continues that reality-driven theme with a thorough and detailed description of the facts, gathering information from the lower court opinions, the joint appendix, and, to a small extent, materials beyond the record.<sup>156</sup> She ends the narrative with a charged summation:

In sum, McIntyre UK’s regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products “anywhere in the United States.” At least as purposeful was McIntyre UK’s

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

152. *Id.*

153. *Id.* at 2795.

154. *Id.*

155. *Id.*

156. *Id.* at 2795–97. For a similarly detailed description of the facts, see *supra* text accompanying notes 5–33. See also *Nicastro II*, 987 A.2d 575, 577 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (describing the facts of the case); *Nicastro I*, 945 A.2d 92, 96 (N.J. Super. Ct. App. Div. 2008), *aff’d*, 987 A.2d 575 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (describing the facts of the case).

engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicasastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicasastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged.<sup>157</sup>

And thus the dissent sets the stage for a careful application of the law as it stood prior to the retrograde transgressions of the "splintered majority."<sup>158</sup> Now that's just the ticket.

After disposing of a few preliminary points, Justice Ginsburg describes the premise of her jurisdictional assessment as follows:

The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicasastro to go to Nottingham, England to gain recompense for an injury

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157. *J. McIntyre*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting). In her description of the facts, Justice Ginsburg notes that as of 2008, New Jersey was by far the largest processor of scrap metal in the United States. *Id.* at 2795. This fact, however, post-dates the events relevant to this case and is not part of the record. I agree with Justice Breyer that such facts should not be a factor in the jurisdictional inquiry. *Id.* at 2792 (Breyer, J., concurring). This fact does not reappear in Justice Ginsburg's jurisdictional analysis.

158. *Id.* at 2795 (Ginsburg, J., dissenting). The adjective "splintered" is evocative. It suggests the chaos of scattered splinters and the crippling fragility of having to wear a splint.

he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?<sup>159</sup>

What? Something has gone awry. The dissent opens with a volley condemning the plurality and concurrence for "turn[ing] the clock back" to achieve a result "[i]nconceivable" under the regime of *International Shoe*.<sup>160</sup> But instead of applying the standards of that regime, Justice Ginsburg revs the clock to fast-forward toward a new and more highly evolved standard that she later describes as representing the "full growth" of jurisdictional doctrine.<sup>161</sup>

And to where do Justice Ginsburg's rhetorical questions lead? Clearly, one could answer each of them with the anticipated response (yes, yes, none, yes) and still fall short of establishing jurisdiction under the "modern approach to jurisdiction . . . ushered in by *International Shoe*."<sup>162</sup> For while *International Shoe* may have given "prime place to reason and fairness,"<sup>163</sup> that "prime place" was constructed from precedents, and each of those precedents involved purposeful activity in or directed toward the forum state.<sup>164</sup> Indeed, under the regime of *International Shoe*, it is the fact of purposeful contact with the forum that sustains the presumption of reason and fairness by providing the defendant with a fair warning of a potential lawsuit in the forum. And even if *International Shoe* itself did not make the interlocking nature of purposeful contacts and the presumption of reasonableness clear, cases following it did.<sup>165</sup> More to the point, the Court has been unwavering in its rejection of the center of gravity or choice of law alternatives to purposeful direction.<sup>166</sup> In *Hanson v. Denckla*, for example, the Court specifically held that a state "does not acquire [personal] jurisdiction by being the 'center of gravity' of the controversy, or the most

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159. *Id.* at 2800–01.

160. *Id.* at 2795.

161. *Id.* at 2804.

162. *Id.* at 2800.

163. *Id.*

164. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–19 (1945) (citing cases).

165. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (holding that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state"); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (holding minimum contacts with the forum state to be a "prerequisite to the exercise of power" over a nonresident defendant).

166. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (rejecting convenience as the touchstone of due process); *Hanson*, 357 U.S. at 253–54 (rejecting "center of gravity" and "choice of law" alternatives to minimum contacts).

convenient location for litigation. The issue is personal jurisdiction, not choice of law.”<sup>167</sup>

There is nothing inherently wrong with the center-of-gravity approach. Among other benefits, it simplifies the jurisdictional inquiry by eliminating artificial complexities pertaining to purposefulness and by focusing a court’s attention on the fundamental due process questions of reasonableness and fairness. And from an academic point of view, Justice Ginsburg writes a delightfully intellectual opinion. I do question, however, the tactical choice of abandoning a more prosaic resolution if only as prelude to her grander themes. Certainly, her invitation to adopt a convenience model as an opening gambit is not likely (predictably not likely) to attract a majority of the current Court, and, unfortunately, the invitation’s prominent placement in her opinion validates the concurrence’s claim that only a change in the law could sustain jurisdiction in this case. Thus, by relying exclusively on a giant leap forward, Justice Ginsburg plays an active role in the Court’s giant leap backward.

This poor tactical choice is doubly vexing since Justice Ginsburg quite clearly does not think that jurisdiction is D.O.A. under the standard minimum contacts test. Tucked into her effort to press the arc of the law to its full-growth potential, Justice Ginsburg offers a glimpse of the more prosaic, minimum-contacts resolution of *Nicastro*’s case:

McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, “purposefully availed itself “ of the United States market nationwide, not a market in a single State or a discrete collection of States. *McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.* “Th[e] ‘purposeful availment’ requirement,” this Court has explained, simply “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”<sup>168</sup>

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167. *Hanson*, 357 U.S. at 254.

168. *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting) (emphasis added) (quoting *Burger King*, 471 U.S. at 475).

The emphasized sentence encapsulates the very essence of this case: a nationwide marketing plan that leads to jurisdiction in those states in which the plan succeeds. The essential question implicit in these facts is whether success in the state constitutes purposeful availment of that state. Justice Ginsburg never addresses that question. Instead she offers more rhetorical questions. First this: “If McIntyre UK is answerable in the United States at all, is it not ‘perfectly appropriate to permit the exercise of that jurisdiction . . . at the place of injury?’”<sup>169</sup> And then this: “How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?”<sup>170</sup> And finally she finds solace in two lower court opinions that have upheld jurisdiction under such circumstances, describing the rationale of those cases as premised on “fundamental fairness.”<sup>171</sup> However, both cited decisions premised the exercise of jurisdiction over the foreign manufacturer on a fact-specific satisfaction of Justice O’Connor’s something-more standard,<sup>172</sup> not on an open-ended reason-and-fairness standard.

In an apparent response to the plurality and concurring opinions, the dissent provides an accurate and capable description of *World-Wide Volkswagen* and *Asahi*, the point being to demonstrate that neither of these decisions controlled the pending case’s outcome. Toward the end of that discussion, the dissent distinguishes between the component part manufacturer in *Asahi*, which did not seek out customers in the U.S. market or control distribution to that market, and McIntyre UK, which clearly did both. From this the dissent concludes, “To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.”<sup>173</sup> Of course, this statement is dead wrong. The correct statement would be, “To hold that *Asahi* precludes the exercise of jurisdiction in this case would, to put it bluntly, be dead wrong.” Why? Because given the distinction drawn by the dissent, it appears quite likely that Justice O’Connor’s something-more

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169. *Id.*

170. *Id.*

171. *Id.* Justice Ginsburg’s opinion also includes an Appendix of lower court opinions favorable to the exercise of jurisdiction under similar circumstances. *Id.* at 2804–06.

172. *Toben v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 543–44 (6th Cir. 1993); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1361–62 (Ariz. 1995).

173. *J. McIntyre*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting).

standard has been satisfied here. Instead of making that affirmative point, the dissent's otherwise intelligent discussion of *World-Wide Volkswagen* and *Asahi* skids to a halt at an analytical dead end.

In short, the dissent starts in a scrap metal yard and winds up in the faculty lounge. High-minded, but shortsighted. And what of Nicastro's severed fingers? Well, isn't that a shame.

## VI. CONCLUSION

If we assume that the role of the judiciary is to decide cases based on a fair assessment of the facts and applicable law, it would be difficult to conclude anything other than that the *J. McIntyre* Court utterly failed at this task. I have detailed the lack of care and judgment reflected in each of the separate opinions. The resulting confusion emanating from the Court's collective failure to articulate a coherent standard should also be self-evident. But perhaps even more disappointing than either of the foregoing is the fact that not a single Justice on the Court offers a factually sound or well-reasoned alternative to the respective opinions of Justices Kennedy, Breyer, and Ginsburg. To my way of thinking, the clerks let their Justices down, the Justices let their colleagues down, and the Court let us all down.

True, *J. McIntyre* does not presage the end of the jurisprudential world. Lower courts will continue to find a way to muddle through the questions left open in *Asahi*, questions now burdened with the unhelpful *J. McIntyre* overlay. And lawyers will still find a way to seek compensation for victims of industrial accidents. It is also not the case that the current Supreme Court is uniformly dysfunctional. In the context of procedural law, for example, the sensible and clearly written opinion in *Smith v. Bayer*,<sup>174</sup> decided this same term, stands in marked contrast to the Court's performance in *J. McIntyre*. But neither is *J. McIntyre* exceptional in its display of poor judgment and faulty reasoning.<sup>175</sup> No law professor would want any of the opinions in *J. McIntyre* to serve as an exemplar of acceptable legal analysis. Yet, two or more Justices of the U.S. Supreme Court endorsed each of those opinions. That is surely something to be

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174. 131 S. Ct. 2368 (2011).

175. In the context of procedural law, two recent and obvious examples of dismal reasoning come to mind: *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Republic of the Philippines v. Pimental*, 553 U.S. 851 (2008).

reckoned with. To what extent is the lack of attention to detail in *J. McIntyre* endemic to the Supreme Court's decision making process? Do the *J. McIntyre* opinions reflect the Court's mode of reasoning in cases about which the Justices, in the end, are not much concerned?<sup>176</sup> Or shall we conclude that the more competently executed exemplars of reasoning are just masks for a feckless jurisprudence of results? And try teaching *J. McIntyre* without inducing students to plummet into a pit of cynicism. Not the end of the world as we know it, but not a portent of good things to come either.

Of course, there are cases in which there is no possibility of achieving a consensus or even a bare majority, due either to the complexity of the issues presented or to the subject matter of the controversy. As to the latter, the underlying politics of a case may be so rigidly drawn that one side of the Court simply cannot see or hear the other. No one rejoices in such cases, but I accept their inevitability. *Nicastro's* case, however, surely did not fall into either category. It was neither doctrinally complex nor politically charged. True, the scope of the stream-of-commerce test was in need of clarification, but that clarification did not require the unwinding of a Gordian knot or a rigid adherence to any particular interpretive, political, or moral position. Instead, it required nothing more than a carefully considered judgment that a majority of the Court could endorse. That majority might have adopted Justice O'Connor's something-more standard and then explained, with clear and careful reasoning, why that standard was or was not satisfied. A sensible dissent might have offered an alternative standard but, accepting the inevitable, could then have explained why "proper application" of the O'Connor standard required a result contrary to the one the majority achieved. Such a solution would have decided *Nicastro's* case on its own terms while at the same time providing the kind of clear exposition of the law that we can rightfully expect and demand of the Supreme Court in its combined roles of lawmaker and law interpreter.

God save the United States and this Honorable Court.

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176. In such cases, perhaps the better alternative, once the Justices discover their seeming indifference, would be to dismiss the case on the basis that certiorari was improvidently granted, rather than going on to issue opinions that only muddy the waters and damage the Justices' image.



