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J. Mcintyre Machinery, Ltd. v. Nicastro: The Stream-of-Commerce Theory Of Personal Jurisdiction In A Globalized Economy

Elisabeth A. Beal

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I. INTRODUCTION

"It has been said that arguing against globalization is like arguing against the laws of gravity," proclaimed Kofi Annan, former Secretary-General of the United Nations.[1] The issue of exercising specific personal jurisdiction over foreign manufacturers has become increasingly important, particularly given the "101 percent increase in imports of consumer products into the United States over the last decade."[2] Along with this increase in the importation of products, there has been an increase in injuries related to defective products. In 2007, 82.4% of product recalls issued by the United States Consumer Product Safety Commission were

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1. *Secretary-General Kofi Annan's opening address to the fifty-third annual DPI/NGO Conference*, DEP'T OF PUB. INFO./NON-GOVERNMENTAL ORGS., http://www.un.org/dpi/ngosection/annualconfs/53/sg-address.html (last visited Feb. 5, 2011).

2. U.S. CONSUMER PRODUCT SAFETY COMMISSION, IMPORT SAFETY STRATEGY 3 (2008) *available at* http://www.cpsc.gov/BUSINFO/importsafety.pdf.

related to imported consumer products.[3] The importance of globalization and the integration of the world economy to the issue of specific personal jurisdiction in a federalist system is illustrated by *J. McIntyre Machinery, Ltd. v. Nicastro*, a case that was recently decided by the United States Supreme Court.[4]

The important issue decided by the United States Supreme Court is whether, consistent with the Due Process Clause of the Fourteenth Amendment, specific personal jurisdiction can be exercised in New Jersey over a foreign manufacturer that sought to sell its products to the United States market through an exclusive American distributor.[5] The significance of this case is twofold. Firstly, the case provided the United States Supreme Court with an opportunity to determine the requirements for specific personal jurisdiction to be exercised over a foreign defendant that markets its products to the United States as a whole, with particular attention to the tension between globalization and the federalist system that characterizes this country. Secondly, the case provided the Court with an opportunity to clarify its personal jurisdiction jurisprudence by assessing the plurality opinions in *Asahi Metal Industry Co. v. Superior Court of California*.[6]

The plaintiff, Robert Nicastro, was employed by Curcio Scrap Metal in New Jersey, where he severed four of his fingers when his right hand was caught in the blades of the McIntyre Model 640 Shear.[7] Mr. Nicastro filed suit in the Superior Court, Law Division, Bergen County, in New Jersey, naming J. McIntyre Machinery Ltd. ("J. McIntyre") and McIntyre Machinery America, Ltd. ("McIntyre America") as defendants.[8] McIntyre America filed for bankruptcy and is not a party to this action.[9] J. McIntyre is incorporated in the United Kingdom.[10] Mr. Nicastro alleged that the shear machine that severed his fingers was not safe for its intended purpose, that the machine did not have adequate warnings or instructions, and that the machine was defectively designed due to its failure to have a safety guard.[11]

J. McIntyre filed a motion to dismiss the action for lack of personal

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3. *Id.*

4. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343 (U.S. June 27, 2011).

5. Brief for Respondents at 1–11, *Nicastro*, 131 S. Ct. 62 (Sept. 28, 2010) (No. 09-1343); U.S. CONST. amend. XIV, § 1.

6. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987).

7. *Nicastro*, 987 A.2d at 577.

8. *Id.* at 577–78.

9. *Id.* at 578.

10. *Id.* at 577.

11. *Id.* at 578.

jurisdiction, which was granted by the trial court.[12] The Appellate Division reversed, and the parties engaged in jurisdictional discovery.[13] After this period of discovery, the trial court again granted the defendant's motion to dismiss for lack of personal jurisdiction.[14] The Appellate Division again reversed the decision of the trial court, finding that J. McIntyre was subject to personal jurisdiction in New Jersey.[15] The Supreme Court of New Jersey granted J. McIntyre's petition for certification and affirmed the Appellate Division's decision, holding "a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action."[16] J. McIntyre then petitioned the United States Supreme Court for a writ of certiorari, which was granted on September 28, 2010.[17] The United States Supreme Court issued its decision on June 27, 2011.[18]

Part II of this note presents an overview of the United States Supreme Court's personal jurisdiction jurisprudence, beginning with *International Shoe Co. v. Washington* and concluding with an analysis of *Asahi Metal Industry Co. v. Superior Court of California.*[19] Part III of this note provides a detailed presentation of *Nicastro v. McIntyre Machinery America, Ltd.*, with particular attention to the reasoning of the majority of the Supreme Court of New Jersey, and the plurality opinion of the United States Supreme Court. Part IV of this note presents an argument in favor of the United States Supreme Court's adoption of a modified "stream-of-commerce plus" test, as articulated by Justice O'Connor in *Asahi*. The adoption of such a test would ensure that the status of the states as coequal sovereigns in a federal system is preserved while recognizing the unique realities created by a global economy.[20] Part V briefly concludes this note.

12. *Id.*

13. *Id.*

14. *Id.* at 579.

15. *Id.* at 579–80.

16. *Id.* at 589.

17. Petition for Writ of Certiorari, *Nicastro*, 131 S. Ct. 62 (Sept. 28, 2010) (No. 09-1343).

18. J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343 (U.S. June 27, 2011).

19. Pennoyer v. Neff, 95 U.S. 714 (1877); Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987).

20. *Asahi Metal Indus. Co.*, 480 U.S. at 112 (O'Connor, J., concurring).

II. HISTORICAL ANALYSIS OF THE UNITED STATES SUPREME COURT'S PERSONAL JURISDICTION JURISPRUDENCE

A. *International Shoe Co. v. Washington: The Foundation of Modern Personal Jurisdiction Jurisprudence*

The tension between federalist principles and increased interstate commerce evident in much of the United States Supreme Court's personal jurisdiction jurisprudence became apparent in 1945 when the Court decided *International Shoe Co. v. Washington.*[21] In *International Shoe*, the Court determined that the defendant, a Delaware corporation with its principal place of business in Missouri, was subject to personal jurisdiction in Washington, where it employed several salesmen who exhibited samples and solicited orders from buyers in Washington.[22] The Court recognized that "historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person."[23]

However, in an increasingly mobile nation, where the corporate fiction had become an ever more important structure for operating a business, the Court noted that "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."[24] As such, the Court recognized that a defendant's presence in a state could no longer be the sole criterion that would permit a court to exercise personal jurisdiction. Rather, if a defendant "be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[25]

This fundamental statement has become the paradigm through which courts analyze questions of personal jurisdiction. Courts must first assess the minimum contacts of a nonresident defendant, and upon a finding of such contacts, courts then determine whether the exercise of personal jurisdiction would comport with "traditional notions of fair play and substantial justice." In assessing this second criterion of personal jurisdiction, courts typically analyze "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial systems' interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in

21. International Shoe Co. v. Wash., 326 U.S. 310 (1945).
22. *Id.* at 313–14.
23. *Id.* at 316.
24. *Id.* at 316–17.
25. *Id.* at 316.

furthering fundamental substantive social policies."[26]

The Court recognized that while the Due Process Clause limits a state's ability to exercise personal jurisdiction over out-of-state defendants, it simultaneously ensures that the due process rights of in-state citizens are preserved by granting to states "the power to protect [citizens] in their business dealings within its boundaries with representatives of foreign corporations."[27] The Court's reasoning ensured that out-of-state corporate defendants could not avoid accountability for their actions in a state through the use of the corporate fiction and lack of presence. As such, the Court recognized that while principles of federalism limit a state court's powers under the Due Process Clause, the realities of modern economics must be addressed in order to ensure that personal jurisdiction is not used as a tool to render a defendant judgment-proof. The Court's analysis in *International Shoe* became the foundation for the Court's modern personal jurisdiction jurisprudence, which has continued to emphasize "minimum contacts" and "traditional notions of fair play and substantial justice" into the present day.

B. *Modern Personal Jurisdiction Jurisprudence and the Stream-of-Commerce Theory*

The Court first addressed the "stream-of-commerce" theory of personal jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*.[28] In *World-Wide Volkswagen*, the Court held a regional distributor of vehicles and a retail dealer of vehicles could not be subject to personal jurisdiction in Oklahoma where they did not conduct or solicit business in the state, did not advertise in the state, and did not regularly sell cars to Oklahoma residents.[29] While the Court recognized that standards for establishing personal jurisdiction had become increasingly flexible as a result of changes in the national economy and modern technology and transportation, the Court insistently noted, "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."[30] Further, the Court stated:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of

26. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).
27. *International Shoe Co.*, 326 U.S. at 323.
28. *World-Wide Volkswagen Corp.*, 444 U.S. 286.
29. *Id.* at 295.
30. *Id.* at 293.

> interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[31]

The Court thus has continually emphasized the principles of federalism and the status of states as "coequal sovereigns in a federal system" in its personal jurisdiction jurisprudence.[32]

Nevertheless, the Court suggested that delivering a product into the stream-of-commerce may be sufficient to permit the exercise of personal jurisdiction, consistent with the Due Process Clause and principles of federalism.[33] The Court stated "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[34] In discussing the stream-of-commerce theory of personal jurisdiction, the Court continued to emphasize the requirement of "purposeful availment," in order to ensure that defendants have notice that their activities will render them subject to personal jurisdiction. The Court merely asserted that delivering a product into the stream-of-commerce with an expectation that it would be purchased in the forum state may be sufficient to constitute "purposeful availment."[35]

The defendants in *World-Wide Volkswagen* did not have such an expectation, as the regional distributor limited its activities to New York, New Jersey, and Connecticut, and the retail dealer sold vehicles only in New York.[36] In contrast, the delivery of the vehicles into the stream-of-commerce by the automobile manufacturer and its American importer, neither of whom contested the exercise of personal jurisdiction in this case, could be sufficient to permit the exercise of personal jurisdiction in any of the fifty states, given that both the manufacturer and importer would expect that their products would be purchased throughout the nation. The Court stated:

> 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 others.[37]

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31. *Id.* at 294.
32. *Id.* at 292.
33. *Id.* at 298.
34. *Id.* at 297–98.
35. *Id.* at 297.
36. *Id.* at 298.
37. *Id.* at 297.

The Court did not specifically address the stream-of-commerce theory in *Burger King v. Rudzewicz*, though it did cite the theory's announcement in *World-Wide Volkswagen* with favor in noting that, consistent with the Due Process Clause, the theory provides a defendant with notice that it may be subject to personal jurisdiction in a state for the consequences of its commercial activities.[38] In addition, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, the Court seemed to retreat from its concern for principles of federalism in its personal jurisdiction jurisprudence by stating,

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[39]

Thus, the status of the stream-of-commerce theory remained uncertain after the Court's decision in *World-Wide Volkswagen*, particularly given that the theory was not central to the Court's determination that the defendants were not subject to personal jurisdiction in Oklahoma. Furthermore, the Court's dicta in *Insurance Corp. of Ireland*, created further confusion in assessing the limitations on the exercise of personal jurisdiction that were a function of the states' status as coequal sovereigns, as opposed to those limitations that were a function of protecting the defendant's individual liberty interest under the Due Process Clause.

These sources of confusion were not alleviated by the Court's decision in *Asahi Metal Industry Co. v. Superior Court of California*.[40] *Asahi* arose out of a product-liability claim between an injured resident of California and the Taiwanese manufacturer of the allegedly defective tube of a motorcycle tire.[41] Cheng Shin, the manufacturer, filed a cross-complaint seeking indemnification from Asahi Metal Industry Co., the manufacturer of a component part of the tube.[42] The plaintiff settled with the defendants, leaving only Cheng Shin's indemnification claim

38. Burger King v. Rudzewicz, 471 U.S. 462, 473 (1985).

39. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982).

40. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987).

41. *Id.* at 105.

42. *Id.*

against Asahi Metal Industry Co.[43] Asahi moved to dismiss the cross-complaint for lack of personal jurisdiction, but the Supreme Court of California determined that the exercise of personal jurisdiction over Asahi would comport with the Due Process Clause of the Fourteenth Amendment under the stream-of-commerce theory.[44] The Supreme Court reversed, but no justice could garner a majority of the Court.

Justice O'Connor, joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia (notably, the only member of the *Asahi* Court who sits on the current Court) argued that,

> [t]he 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.[45]

This has become known as the "stream-of-commerce plus" test.[46] Justice O'Connor argued that this additional conduct was required in order to comport with the requirement that a defendant "purposefully avail" itself of the privileges of conducting activity in the forum state, while mere awareness that a product will be swept into the forum state by the stream-of-commerce is insufficient to constitute "purposeful availment."[47] Justice O'Connor claimed that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state."[48]

In contrast, Justice Brennan, joined by Justice White, Justice Marshall, and Justice Blackmun, argued that a finding of "additional conduct" was not required to establish personal jurisdiction over a defendant consistent with the Due Process Clause of the Fourteenth Amendment.[49] Rather, Justice Brennan understood the stream-of-commerce theory to refer to "the regular and anticipated flow of products from manufacture to distribution to retail sale."[50]

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43. *Id.*

44. *Id.* at 108.

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

46. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 587 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343 (U.S. June 27, 2011).

47. *Asahi Metal Indus. Co.*, 480 U.S. at 112 (O'Connor, J., concurring).

48. *Id.*

49. *Id.* at 117 (Brennan, J., concurring).

50. *Id.*

As such, Justice Brennan argued that "[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."[51] In addition, Justice Brennan argued that given that the defendant will benefit economically from the sale of its product in the forum state, and will benefit from the state's laws regarding commercial activity, subjecting the defendant to personal jurisdiction is a reasonable burden to bear.[52] Finally, Justice Brennan asserted that the majority of the Federal Courts of Appeal were in accord with his view that the stream-of-commerce theory of personal jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment.[53] This theory has become known as the "mere awareness" test for personal jurisdiction.

Justice Brennan seemed to suggest that given that the stream-of-commerce theory is predicated on a regular flow of goods from the defendant to the forum state, and the defendant's awareness of this flow of goods, the defendant has purposefully availed itself of the privilege of conducting activity in the forum state such that the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. In contrast, Justice O'Connor suggested that additional conduct was required in order for the defendant to have purposefully availed itself of the privilege of conducting activities in the forum state.

Despite their differences of opinion with regards to the stream-of-commerce theory, a majority of the Court agreed that subjecting Asahi to personal jurisdiction in California would not comport with "traditional notions of fair play and substantial justice."[54] The Court noted the burden on Asahi would be severe, given that Asahi would have to travel from its headquarters in Japan to court in California, and would have to navigate the foreign American legal system.[55] Furthermore, the Court found the interests of the plaintiff and the state of California were negligible given that the plaintiff was no longer a party to the action.[56] In addition, the Court noted that the federal interests in the realm of foreign relations counseled against exercising personal jurisdiction over Asahi in this indemnification matter.[57]

Given that no Supreme Court Justice was able to garner a majority of the votes of the Court in *Asahi*, the importance of the Court's decision in *J. McIntyre Machinery, Ltd. v. Nicastro* is clear. Nevertheless, no

51. *Id.*
52. *Id.*
53. *Id.* at 118.
54. *Id.* at 113 (O'Connor, J., concurring).
55. *Id.* at 114.
56. *Id.* at 114–15.
57. *Id.* at 115.

member of the Court could obtain a majority of the votes, and thus the status of the stream-of-commerce theory of personal jurisdiction remains unclear. As a result of the Court's fragmented jurisprudence, foreign defendants still cannot predict when their "conduct and connection with the forum State are such that [they] should reasonably anticipate being haled to court there."[58]

III. *J. McINTYRE MACHINERY, LTD. v. NICASTRO*: AN ANALYSIS OF THE CASE

A. *Factual Background of the Case*

J. McIntyre Machinery, Ltd. v. Nicastro arose out of a product-liability action in New Jersey.[59] The plaintiff, Robert Nicastro, had been employed by Curcio Scrap Metal for thirty years when he severed four of his fingers while operating the McIntyre Model 640 Shear.[60] The McIntyre Model 640 Shear was manufactured in the United Kingdom by J. McIntyre Machinery, Ltd.[61] The machine was sold by McIntyre Machinery America, Ltd., J. McIntyre's exclusive American distributor, to Curcio Scrap Metal.[62]

The period of jurisdictional discovery ordered by the Appellate Division in New Jersey revealed that Frank Curcio, the owner of Curcio Scrap Metal, had been introduced to the machine in question at a trade show in Las Vegas, Nevada.[63] The president of J. McIntyre was present at this trade show in Las Vegas, and had attended other trade shows throughout the United States, in cities including Chicago, New Orleans, San Diego, San Francisco, and Orlando.[64]

McIntyre America was J. McIntyre's exclusive distributor in the United States, and was headquartered in Ohio.[65] McIntyre America was a distinct corporate entity from J. McIntyre, and did not have any common ownership with J. McIntyre.[66] However, McIntyre America did proceed with its advertising and sales efforts in accordance with the direction of J. McIntyre.[67] In addition, at least some of the machines in the possession of McIntyre America were the property of J. McIntyre

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

59. *See* discussion *supra* Part I.

60. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343 (U.S. June 27, 2011).

61. Nicastro, 987 A.2d at 577.

62. *Id.*

63. *Id.*

64. *Id.* at 579.

65. *Id.* at 578.

66. *Id.* at 579.

67. *Id.* at 579.

until they were paid for in full, suggesting that some machines were merely on consignment to McIntyre America.[68]

The machine in question was shipped from McIntyre America's headquarters to New Jersey, with instructions to submit payment to McIntyre America.[69] Upon the machine was a label with the address of J. McIntyre, and an information sheet with J. McIntyre's address in the United Kingdom, and its telephone and fax numbers.[70] In addition, the instruction manual referenced safety regulations from both the United States and the United Kingdom.[71] As such, the president of Curcio Scrap Metal testified that repair parts would have been ordered from J. McIntyre in the United Kingdom should they have been needed.[72]

After discovery had been completed, the trial court again granted J. McIntyre's motion to dismiss for lack of personal jurisdiction, finding there was no connection between J. McIntyre and New Jersey, and J. McIntyre would not have anticipated that its product would have been purchased in New Jersey.[73] The court emphasized that J. McIntyre's minimum contacts with the United States as a whole were insufficient to subject it to personal jurisdiction in New Jersey.[74] The Appellate Division reversed, finding that J. McIntyre could be subject to personal jurisdiction in New Jersey under Justice O'Connor's "stream-of-commerce plus" test since it employed an exclusive distributor to sell its machines in all fifty states, such that it purposefully availed itself of the United States market as a whole, including New Jersey.[75]

B. *The Supreme Court of New Jersey's Analysis of the Case*

The Supreme Court of New Jersey then granted J. McIntyre's petition for certification, and decided the case.[76] The Supreme Court of New Jersey found J. McIntyre did not have minimum contacts with New Jersey, and thus turned to the stream-of-commerce theory in order to support the exercise of personal jurisdiction over the defendant.[77]

The Supreme Court of New Jersey reviewed the historical personal jurisdiction jurisprudence of the United States Supreme Court and its own stream-of-commerce jurisprudence in *Charles Gendler & Co. v.*

68. *Id.*
69. *Id.* at 578.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 579.
74. *Id.*
75. *Id.* at 580.
76. *Id.*
77. *Id.* at 582.

Telecom Equipment Corp.[78] before announcing its holding in the present case.[79] The court held "a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action."[80]

The Supreme Court of New Jersey noted that it sought to ensure that a forum was available in which injured New Jersey residents could seek relief, and that it merely recognized through this rule the "radical transformation of the international economy."[81] Furthermore, it noted that being subject to suit in the United States is no longer burdensome for foreign defendants, due to the advent of modern methods of communication and transportation.[82] The court reaffirmed the holding of *Charles Gendler*, and stated "[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."[83] The court reasoned that the focus of personal jurisdiction jurisprudence under the stream-of-commerce theory must be upon "the manufacturer's knowledge of the distribution scheme" in order to ensure that "[a] manufacturer cannot shield itself merely by employing an independent distributor—a middleman—knowing the predictable route the product will take to market."[84]

The court then continued its analysis to find that J. McIntyre's activities supported the exercise of personal jurisdiction in accordance with its stream-of-commerce theory. The court asserted J. McIntyre "knew or reasonably should have known that the distribution system extended to the entire United States," given that its officers had traveled to trade shows throughout the United States and it targeted the United States market as a whole through its engagement of an exclusive United States distributor.[85] In addition, though J. McIntyre may not have known the precise location where each machine was sold, the court stated that J. McIntyre should have known McIntyre America would distribute products throughout all fifty states, including New Jersey.[86]

The court also noted that J. McIntyre maintained ownership of

78. Charles Gendler & Co. v. Telecom Equip. Corp., 508 A.2d 1127 (N.J. 1986).
79. *Nicastro*, 987 A.2d at 589.
80. *Id.* at 589.
81. *Id.* at 591.
82. *Id.*
83. *Id.* at 591–92 (citing *Charles Gendler*, 508 A.2d at 1137–38).
84. *Id.* at 592.
85. *Id.*
86. *Id.* at 593.

some of its products until McIntyre America sold the products to American customers, supporting its conclusion that J. McIntyre knew or should have known that its products were being sold throughout the United States, including New Jersey.[87] Given these findings, the court held J. McIntyre may be subject to personal jurisdiction in New Jersey since it "knew or reasonably should have known that its distribution scheme would make its products available to New Jersey customers."[88]

The court concluded by determining that subjecting J. McIntyre to personal jurisdiction in New Jersey would not offend "traditional notions of fair play and substantial justice." The court asserted it would not be burdensome for J. McIntyre to travel to New Jersey to defend itself, particularly given that its officials have made numerous visits to the United States to promote its products at trade shows.[89] Furthermore, New Jersey has a strong interest in the lawsuit given that the plaintiff is a New Jersey resident, the accident occurred at a New Jersey workplace, the plaintiff was treated by New Jersey medical personnel, and most of the evidence would be located in New Jersey.[90] As such, the court found that exercising personal jurisdiction over J. McIntyre would comport with the Due Process Clause of the Fourteenth Amendment.

C. *The United States Supreme Court's Analysis of the Case*

The United States Supreme Court issued its decision in *J. McIntyre Machinery, Ltd. v. Nicastro* on June 27, 2011, the final day of the October 2010 term.[91] Justice Kennedy announced the judgment of the Court, in which Chief Justice Roberts, Justice Scalia and Justice Thomas joined. Justice Breyer and Justice Alito concurred in the Court's judgment, while Justice Ginsburg, Justice Sotomayor, and Justice Kagan dissented.

The Court reversed the decision of the Supreme Court of New Jersey, holding that "New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process."[92] Justice Kennedy emphasized that the exercise of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment unless the defendant "'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"[93]

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 593–94.
91. J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343 (U.S. June 27, 2011).
92. *J. McIntyre Mach.*, No. 09-1343, slip op. at 12 (U.S. June 27, 2011) (plurality opinion).
93. *Id.* at 2 (*quoting* Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

Justice Kennedy argued that J. McIntyre did not purposefully avail itself of the privilege of conducting activity in New Jersey since J. McIntyre officials never traveled to New Jersey for trade shows, it had no office in New Jersey, it did not pay taxes in New Jersey, nor did it own property there.[94] Furthermore, J. McIntyre did not advertise in, nor send any employees to New Jersey.[95] As such, Justice Kennedy determined that while J. McIntyre intended to serve the United States market, it did not purposefully avail itself of the New Jersey market, and thus it could not be subject to personal jurisdiction in New Jersey.[96]

Justice Kennedy argued that the stream-of-commerce theory merely recognizes that "a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market."[97] Justice Kennedy rejected Justice Brennan's "mere awareness" test, which would permit the exercise of personal jurisdiction so long as the defendant "is aware that the final product is being marketed in the forum state. . . ."[98] Rather, Justice Kennedy stated that "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."[99] As such, the defendant's actions in the forum state must "reveal an intent to invoke or benefit from the protection of its laws" in order to be subject to personal jurisdiction.[100]

While Justice Kennedy recognized that "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State," he did not find that such a circumstance was presented in the case at bar.[101] Rather, he reserved judgment on such circumstances, noting that "[t]he defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle."[102] Interestingly, Justice Kennedy noted that where the defendant markets its products to the United States as a whole, "the Congress could authorize the exercise of jurisdiction in appropriate courts."[103]

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94. *Id.* at 11.
95. *Id.*
96. *Id.*
97. *Id.* at 7 (*quoting* World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 295 (1980)).
98. *Id.* (*quoting* Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 117 (1980) (Brennan, J., concurring)).
99. *Id.* at 8.
100. *Id.* at 12.
101. *Id.* at 9.
102. *Id.* at 10.
103. *Id.*

While Justice Kennedy emphasized the "purposeful availment" requirement for the exercise of personal jurisdiction, the plurality opinion failed to offer criteria illustrating how this requirement may be fulfilled in the modern global economy.

Though Justice Breyer and Justice Alito concurred in the judgment of the Court, they noted that "[b]ecause the incident at issue in this case does not implicate modern concerns . . . this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."[104] As such, Justice Breyer disagreed with the strict standard of purposeful availment and targeting of the forum state emphasized by Justice Kennedy.[105] Rather, Justice Breyer asked "what do those standards mean when a company targets the world by selling products from its Web site?"[106]

While a majority of the Court agreed that J. McIntyre Machinery cannot be subject to personal jurisdiction in New Jersey, the Court remained uncertain about the jurisdictional implications of corporations that target the United States market, without regard to state boundaries.[107] In fact, Justice Kennedy's inability to garner a majority of the Court, despite the uncertainty of the Court's personal jurisdiction jurisprudence after the plurality opinions of *Asahi*, demonstrates the difficulty of applying traditional personal jurisdiction principles such as "purposeful availment" in the modern global economy. While the Court failed to seize its opportunity to clarify the "stream-of-commerce" theory in *J. McIntyre*, clear principles are needed to ensure that corporations are able to structure their activities with certainty as to where they may be haled to Court consistent with the Due Process Clause of the Fourteenth Amendment.

IV. ANALYSIS: A SUGGESTION FOR THE FUTURE OF PERSONAL JURISDICTION JURISPRUDENCE IN A GLOBALIZED WORLD

A. *A Proposal for the United States Supreme Court: The Future of Personal Jurisdiction Jurisprudence in a Globalized World*

The decision of the United States Supreme Court in *J. McIntyre Machinery, Ltd.* essentially brings to the forefront the issue of federalism and personal jurisdiction, a theme that has predominated much of the

104. J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343, slip op. at 4 (U.S. June 27, 2011) (Breyer, J. concurring).

105. *Id.* at 4.

106. *Id.*

107. *J. McIntyre Mach.*, No. 09-1343, slip op. at 9 (plurality opinion); *J. McIntyre Mach.*, No. 09-1343, slip op. at 4 (Breyer, J., concurring).

United States Supreme Court's personal jurisdiction jurisprudence.[108] While the Court noted the relevance of the changing national and world economies, the Court failed to analyze how the globalized world in which we live, where communication is instantaneous, global travel is inexpensive, and products are rapidly shipped from one end of the globe to another, impacts the question of personal jurisdiction in a federal system. Rather, a plurality of the Court adhered to traditional principles of "purposeful availment," and continued to emphasize the importance of state lines for personal jurisdiction.[109] However, the highly divided opinions in *J. McIntyre Machinery, Ltd.* have, once again, created uncertainty and confusion in the Court's personal jurisdiction jurisprudence.[110] This section offers a proposal for the Court's future personal jurisdiction jurisprudence.

In reality, it matters little to a foreign defendant whether they are subjected to suit in California or Maine. This is particularly true where, as here, a foreign defendant targets the United States market as a whole.[111] However, in a federalist system comprised of coequal sovereigns, the Court has repeatedly held "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."[112] The Court has only once suggested that principles of interstate federalism are not at the heart of personal jurisdiction jurisprudence, as stated in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.[113] As such, it seems unlikely that the Court will retreat from its requirement that the foreign defendant purposefully avail itself of the privileges of conducting activity in the forum state, and the Court will likely continue to require that the defendant's activities be such that it should reasonably foresee being haled to court in the forum state.[114]

Nevertheless, the United States Supreme Court recognized that the realities of the global marketplace mean that foreign defendants regularly target the United States market as a whole.[115] That being so, the Court continues to require evidence of "purposeful availment" of the

108. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

109. J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343, slip op. at 11 (U.S. June 27, 2011) (plurality opinion).

110. *See also* Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987).

111. *J. McIntyre Mach.*, No. 09-1343, slip op. at 1 (Ginsburg, J., dissenting).

112. *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

113. *Ins. Corp. of Ir.*, 456 U.S. at 702–03 n.10.

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

115. *J. McIntyre Mach.*, No. 09-1343, slip op. at 9 (plurality opinion); *J. McIntyre Mach.*, No. 09-1343, slip op. at 4 (Breyer, J., concurring).

privilege of conducting activities in each of the fifty states before personal jurisdiction may be exercised.[116] The purposeful availment requirement reflects "a reciprocal relationship of mutual obligations and benefits as between the defendant and the forum; in essence, a quid pro quo of constitutional significance."[117]

In order to ensure that defendants have purposefully availed themselves of the United States market as a whole, the Court may be well advised to adopt a modified version of Justice O'Connor's concurrence in *Asahi*. Justice O'Connor argued that "[t]he 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 . . . ."[118]

The Court may thus adopt a rule that would require conduct by the defendant, such as creating a national marketing campaign, or establishing means to provide product assistance to American consumers throughout the nation, which would indicate that the defendant had an intent to serve the United States market as a whole. If such additional conduct is found, the defendant may be haled to court in any of the fifty states, so long as "traditional notions of fair play and substantial justice" are satisfied. Adoption of such a modified national "stream-of-commerce" plus test would reflect the realities of the modern globalized world, while also remaining faithful to principles of federalism and the traditional analysis of personal jurisdiction by essentially permitting a finding that the defendant has purposefully availed itself of the privileges of acting in each of the fifty states.

By adopting such a national stream-of-commerce test, the Court can recognize the reality that commercial defendants often target a national market, as opposed to particular state markets. The placement of a product into the stream-of-commerce "requires the defendant to relinquish a direct relationship with any particular forum in order to benefit from all the forums along the stream's path."[119] Thus, "participation in a stream of commerce often precludes a stream participant from dealing directly with any particular forum."[120] By adopting a national stream-of-commerce test, the Court will simply acknowledge the reality that commercial defendants target the United States market as a whole,

116. *J. McIntyre Mach.*, No. 09-1343, slip op. at 2 (plurality opinion).

117. Diane S. Kaplan, *Paddling Up The Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503, 577 (2003).

118. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 112 (1987) (O'Connor, J., concurring).

119. Kaplan, *supra* note 117, at 589.

120. *Id.* at 590.

and "many stream participants neither know nor care where a stream routes their product."[121]

Since the ultimate use of a product in a particular state is often not the concern of the defendant, the traditional minimum contacts test leads to unfair results, as defendants can avoid jurisdiction by claiming that they did not "purposefully avail" themselves of the benefits of acting in the state. However, "[i]f a defendant targeted a market by directing its commercial activities there, and if the defendant derived benefits and protections from that market, then jurisdiction over the defendant in that forum for claims related to those activities" is constitutional.[122] This is so because "participation in transactional networks satisfies the relationship of reciprocal benefits and obligations that is the *sin qua non* of jurisdictional due process."[123]

In addition, the Court would be well advised to emphasize the importance of "traditional notions of fair play and substantial justice" in a modified national "stream-of-commerce" plus analysis. In assessing this second component of the personal jurisdiction analysis, courts typically analyze "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial systems' interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies."[124]

Through emphasizing the importance of these factors, the Court can ensure that the "stream-of-commerce" analysis does not lead to the exercise of personal jurisdiction where being haled to court would be unduly burdensome for defendants. These factors ensure that the forum state is the most appropriate venue for the litigation, from the perspective of both the plaintiff and the defendant, and from the perspective of the interstate judicial system. By weighing the availability of an economically feasible forum for the plaintiff, the availability of evidence and witnesses, and the burden on the defendant in being haled to court in the forum state, the Court can ensure that the exercise of personal jurisdiction is fair and reasonable.

These factors, as eight members of the Court agreed in *Asahi*, would ensure that courts would not exercise personal jurisdiction over

121. *Id.* at 591. *See also J. McIntyre Mach.*, No. 09-1343, slip op. at 1 (Ginsburg, J., dissenting) (Referring to foreign manufacturers, Justice Ginsburg stated, "[w]here in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can.").

122. Kaplan, *supra* note 117, at 584.

123. *Id.* at 601.

124. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

foreign defendants where doing so would be manifestly unreasonable.[125] As Justice O'Connor stated, "[a] consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce."[126]

In this highly divided opinion, it is illustrative that eight of the nine United States Supreme Court Justices agreed the exercise of personal jurisdiction over Asahi would not comport with "traditional notions of fair play and substantial justice." The Court's agreement on this matter in *Asahi* indicates that these factors can ensure that even if the modified national "stream-of-commerce" plus test is met, a defendant will not be haled to court if the exercise of personal jurisdiction would be unduly burdensome on the defendant, another forum is available to the plaintiff, or the interests of the interstate judicial system would not be served by the exercise of personal jurisdiction.

Where this modified national "stream-of-commerce" plus test is not met, the Court could rely on its traditional personal jurisdiction jurisprudence, requiring a finding of minimum contacts with the forum state and a finding that the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice.

The Court should retreat from Justice Brennan's "mere awareness" test in *Asahi* due to its potential for abuse. Such abuse is illustrated by the reasoning of the Supreme Court of New Jersey, which would permit the exercise of personal jurisdiction where the defendant "should have been aware" that its products would enter the forum state.[127] Given that principles of personal jurisdiction have enabled defendants to structure their conduct so that they know where their activities will render them liable to suit, it seems to drastically depart from these principles to impose the uncertainty of a "should have known" rule.

Likewise, the Court should not adopt a rule that allows personal jurisdiction to be exercised where "the defendant's product is 'substantially certain' to enter the state" or where "the defendant will be aware only that a certain percentage of its product will be shipped into the forum state."[128] Such "awareness" based rules require courts to assess the defendant's state of mind in entering its products into the stream-of-commerce, and also fail to account for the reality that many stream par-

125. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 114 (1987) (O'Connor, J., concurring).

126. *Id.*

127. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343 (U.S. June 27, 2011).

128. Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 808 (2003).

ticipants neither know nor care where a stream routes their product."[129]

Alternative solutions such as more clearly specifying the jurisdictional significance of "transacting business" by establishing "a minimum dollar amount of business done in a specified period or a minimum percentage of the defendant's business being done in the state" would only exacerbate the problem of defendants structuring their businesses to avoid the exercise of personal jurisdiction.[130] Defendants could simply ensure that the sale of their goods within a specific state remains below the specified dollar amount or percentage of business to avoid being held accountable for injuries caused by their products.

If the United States Supreme Court adopted this modified national "stream-of-commerce" plus test, it seems likely that J. McIntyre could be subject to personal jurisdiction in New Jersey. Even though J. McIntyre did not target New Jersey specifically, J. McIntyre clearly had a national marketing scheme that sought to target each of the fifty states.[131] J. McIntyre entered into a contract with an American corporation to assist it in marketing its products to the United States, its officials traveled to national trade shows which attracted buyers from across the nation, and it asserted that its products comported with United States safety regulations.[132]

These activities indicate J. McIntyre intended to serve the United States market as a whole, without concern for the actual state in which its products were sold. As such, J. McIntyre could be haled to court in any of the fifty states, provided that the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice." Given the plaintiff's interest in trying this case in New Jersey, the location of evidence and witnesses in New Jersey, and the slight burden on the defendant in traveling to New Jersey, it seems likely that the Court would find that exercising personal jurisdiction comports with "traditional notions of fair play and substantial justice."[133]

In order to fully understand this proposal for a modified national "stream-of-commerce" plus test, another example is illustrative. Suppose a Japanese car manufacturer produces cars in Japan, and ships them to key ports in coastal cities across the United States. American car dis-

129. Kaplan, *supra* note 117, at 591.

130. Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction Over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 166 (2009).

131. *Nicastro*, 987 A.2d at 578–79. *See also* J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343, slip op. at 13 (Ginsburg, J., dissenting) ("In sum, 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.").

132. *Nicastro*, 987 A.2d at 578–79.

133. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

tributors purchase these vehicles from the Japanese manufacturer, and the American car distributors are completely independent of the Japanese manufacturer. While the Japanese manufacturer plays no role in selling the vehicles after their arrival in the United States, the manufacturer has engaged in a marketing scheme throughout the United States, advertising its cars on billboards and in television commercials in all fifty states.

Under a modified national "stream-of-commerce" plus test, a court could find that the Japanese manufacturer had purposefully availed itself of the privilege of conducting activity in all fifty states, due to its national marketing scheme that sought to promote the sale of its products throughout the nation. As such, the Court could find the Japanese manufacturer could be haled into court in any state in which a plaintiff was injured by its product, so long as the exercise of personal jurisdiction would comport with "traditional notions of fair play and substantial justice."

The Court would then assess "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial systems' interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies."[134] If the Court determined the exercise of jurisdiction was fair and reasonable, the modified national "stream-of-commerce" plus test would be met, and the foreign defendant would be required to defend itself in the forum state.

This solution would ensure foreign defendants have notice of where their activities will render them liable to suit, and will reflect the reality that many defendants target the United States market as a whole, without regard to state lines. Furthermore, injured plaintiffs will be assured that foreign defendants cannot use the structure of their corporate activities in the United States to enjoy the benefits of the American marketplace without being liable for the injuries they cause. An increased emphasis on "traditional notions of fair play and substantial justice" will ensure that the exercise of personal jurisdiction is not unreasonable, as eight members of the United States Supreme Court recognized in the circumstances of *Asahi*.[135] Finally, by adopting a conclusive resolution to this unsettled area of its jurisprudence, the Court will promote certainty for foreign defendants such that they will be able to procure adequate liability insurance and will be able to assess their marketing methods in the

134. *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

135. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 114 (1987) (O'Connor, J., concurring).

United States to determine where their activities will render them liable to suit.

B. *An Alternative Solution: The Proposal of the United States Congress*

Since the United States Supreme Court has failed to reach a conclusive resolution as to the status of the "stream-of-commerce" theory of personal jurisdiction, Congress may take action to ensure that foreign defendants are given adequate warning of whether their activities in the United States will render them liable to suit and to ensure that injured plaintiffs have access to a forum in which to bring suit.[136]

A bill has been introduced in both the United States House of Representatives and the Senate that has as its purpose "[t]o require foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes."[137] Congress has expressly recognized in these bills that injured Americans have often had difficulty in recovering damages from foreign manufacturers due to an inability to hale such manufacturers to court in the United States.[138] In addition, these bills reflect the unfairness of foreign manufacturers avoiding being held accountable for the injuries caused by their products by asserting that American courts lack personal jurisdiction over them, while they are benefitting from the importation and sale of their products in the United States.[139] As such, these bills would ensure that foreign manufacturers would be subject to personal jurisdiction in the state in which they appoint a registered agent for the receipt of service of process.[140]

If the bills were to pass, the Food and Drug Administration, the Consumer Product Safety Commission, the Environmental Protection Agency, and the National Highway Traffic Safety Administration would be charged with determining, based on the quantity and value of goods produced, which foreign manufacturers would be required to appoint a registered agent and consent to personal jurisdiction.[141] In addition, the bill would prohibit the importation of goods from foreign manufacturers

136. *See* J. McIntyre Mach., Ltd. v. Nicastro, No. 09-1343, slip op. at 10 (plurality opinion) ("It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts.").

137. Foreign Manufacturers Legal Accountability Act of 2009, S. 1606, 111th Cong. (2009); Foreign Manufacturers Legal Accountability Act of 2010, H.R. 4678, 111th Cong. (2010).

138. S. 1606 §2; H.R. REP. No. 111-683, pt. 1, at 6 (2010).

139. S. 1606 §3.

140. S. 1606 §3; H.R. 4678 §3.

141. H.R. REP. No. 111-683, pt. 1, at 6 (2010).

who fail to designate a registered agent.[142]

Outside of the scope of the bill are those American entities that distribute covered products from a foreign manufacturer, where the covered product is distributed through a U.S. parent company that has assets in excess of those of the foreign manufacturer or assets that exceed the average of the assets of each related foreign manufacturer, or the covered product is distributed through a U.S. subsidiary company that certifies that it is responsible for any liability arising out of the covered product.[143]

In addition, the bill requires that the Secretary of Commerce and other agencies create a searchable Internet database containing information about the appointed agents for service of process, the U.S. entities that have agreed to be liable for the products of their foreign related entities, and the U.S. entities that have failed to abide by the requirements of the bill.[144]

The foreign manufacturer's consent to personal jurisdiction and appointment of a registered agent only ensures that American plaintiffs have access to courts in at least one state, though it does not mean that plaintiffs are limited to bringing suit in that particular state.[145] However, foreign manufacturers are free to contest the exercise of personal jurisdiction outside of the state in which the registered agent is present.[146] In addition, the scope of the consent to personal jurisdiction extends only to injuries caused by the covered product, and does not extend to injuries caused by products that are not covered by the Act.[147] Finally, the consent to personal jurisdiction does not extend to actions brought by foreign plaintiffs for injuries that occurred outside the United States.[148]

The supporters of the bill argue that the Hague Convention on Service would not be contravened by the enactment of the law, as the Hague Convention relates only to service of process abroad, while this bill relates only to service within the United States.[149] In addition, the supporters of the bill argue that the United States and foreign manufacturers would compete on a level playing field through enactment of the bill, as an American manufacturer will always be subject to personal jurisdiction in at least one state.[150] Thus, American manufacturers,

142. *Id.*
143. *Id.* at 13.
144. *Id.* at 15.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 16.
149. *Id.* at 15.
150. *Id.* at 16.

unlike foreign manufacturers, are unable to avoid being held accountable for injuries caused by their products. Furthermore, the bill's supporters argue that enactment of the law would not lead to foreign retaliation against American companies abroad, as "[t]he problem of establishing jurisdiction over foreign manufacturers is one of American law."[151] In contrast, "[m]ost other countries follow the general rule of tort law that the forum is governed by *lex loci delecti*—the law of the place of the wrong."[152]

According to the Report of the Committee on Energy and Commerce, the implementation of House Bill 4678 would cost $170 million over four years, from 2011-2015.[153] These costs are primarily the result of developing and enforcing the new regulations, and would be incurred by the agencies tasked with determining which foreign manufacturers are required to appoint an agent, and what products are covered.[154]

The cost to private entities to comply with the requirements of appointing a registered agent and reporting on recalls would be insignificant.[155] However, a very significant cost would be imposed on importers and manufacturers in the United States, as they would be prohibited from importing products and component parts if the foreign manufacturer of those imports has not appointed a registered agent in the United States.[156] Thus, these importers and manufacturers would incur costs through having to track the origin of imports, and may incur additional costs in having to purchase goods from only those foreign manufacturers that comply with the bill.[157]

Those members of the Committee on Energy and Commerce who oppose enactment of this legislation argue that it will "severely disrupt supply chains, potentially violate our international trade agreements, and open our domestic industries to retaliatory actions."[158] Furthermore, they argue that "[e]ven if a consumer obtains a judgment under this purportedly easier procedure, there is less incentive for a foreign court to enforce a U.S. judgment when the treaty procedures (to which we are a party) have been circumvented."[159] They assert that our treaty obligations would be violated by the bill's treatment of "foreign companies differently from U.S. companies."[160] Finally, the dissenters argue that

151. *Id.*
152. *Id.*
153. *Id.* at 12.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 18.
159. *Id.*
160. *Id.* at 22.

the bill is unconstitutional under the Due Process Clause, as it "would strip foreign nationals of their due process right to object to personal jurisdiction by mandating consent to the personal jurisdiction of U.S. courts."[161]

This final reason of the dissenters illustrates the importance of the Court rendering a clear decision with regards to whether the stream-of-commerce theory of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. The Court was presented with an ideal opportunity in *J. McIntyre Machinery* to clarify its own reasoning in this area of law. The Court's failure to seize this opportunity may allow Congress to address personal jurisdiction in the piecemeal manner in which legislation is written and passed.

As is evident in the opinion of Congressional members who oppose House Bill 4678, legislation may be deemed unconstitutional and it is inherently limited by the legislative need to render clear black-and-white guidelines, as opposed to the fact-specific inquiry inherent in judicial decisions. Furthermore, given the constitutional dimensions of the exercise of personal jurisdiction, it is the Court that must ultimately determine the constitutional limits on the exercise of personal jurisdiction over foreign manufacturers that inject their goods into the American marketplace. After all, as the Court declared in the early years of the Republic, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[162]

V. CONCLUSION

While the stream-of-commerce analysis in the United States Supreme Court's personal jurisdiction jurisprudence has been unsettled since *Asahi* in 1987, the importance of clear legal principles in this realm is evident. In a globalized marketplace where commerce occurs world-wide twenty-four hours a day, it is imperative that the United States Supreme Court recognize the justice and fairness of subjecting foreign defendants to jurisdiction in any of the fifty states where they purposefully avail themselves of the United States market as a whole, while remaining faithful to the issues of federalism and Due Process that form the foundation of this jurisprudence. As such, the Court's modern jurisprudence must continue to shape the foundational principles and guidelines that have ensured consistency and predictability in this area of the law, while reflecting the realities of a global market.

161. *Id.* at 19.

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