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**Staying Afloat in the Stream of Commerce: Goodyear, McIntyre, and the Ship of Personal Jurisdiction**

S. Wilson Quick

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Staying Afloat in the Stream of Commerce: Goodyear, McIntyre, and the Ship of Personal Jurisdiction

S. Wilson Quick†

Extra territorium jus dicenti impune non paretur.¹

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† B.A., N.C. State University, 2007; M.B.A., N.C. State Jenkins Graduate School of Management, 2009; J.D. Candidate, UNC School of Law, 2012. I would like to thank my wife, Meghan, for her endless support and my parents for their encouragement over the years. I am grateful to North Carolina Supreme Court Justice Mark D. Martin for introducing me to this topic. Finally, I appreciate the work the staff of ILJ did in editing this piece.

¹ Latin for “One who exercises justice outside of his territory is not obeyed with impunity.” BLACK’S LAW DICTIONARY 466 (6th ed. 1991).
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I. Introduction

Prior to the current term and since the landmark decision nearly seventy years ago in International Shoe Co. v. Washington,\(^2\) the United States Supreme Court has issued only two decisions regarding a non-forum state defendant's amenability to suit based solely on its forum state activities not related to the plaintiff's cause of action.\(^3\) Unfortunately, neither Perkins v. Benguet Consolidated Mining Co.,\(^4\) nor Helicopteros Nacionales de Colombia, S.A. v. Hall,\(^5\) gave litigants involved in international or multi-state disputes clear guidance regarding the due process boundaries of general in personam\(^6\) jurisdiction. Similarly, in the bifurcated wake of Asahi Metal Industry Co., Ltd., v. Superior Court,\(^7\) practitioners and lower courts have struggled to determine how to apply the stream of commerce doctrine, which at its most basic level permits a forum to exercise personal jurisdiction over a defendant where the defendant has placed a product into a

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\(^2\) 326 U.S. 310 (1945).
\(^3\) Charles W. Rhodes, Clarifying General Jurisdiction, 34 Seton Hall L. Rev. 807, 808 (2004).
\(^4\) 342 U.S. 437 (1952).
\(^6\) In personam jurisdiction or personal jurisdiction, also known as, "jurisdiction in personam; jurisdiction of the person; [and] jurisdiction over the person," is defined as a "court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests." Black's Law Dictionary 930-31 (9th ed. 2009).
\(^7\) 480 U.S. 102 (1987).
distribution chain and that product later causes damage in the forum state. Absent additional guidance from the Court, lower federal and state courts have lacked a basic framework or even a clear theoretical foundation for satisfying complicated questions that must be answered before subjecting non-forum state defendants to a court’s authority.

Despite extensive review and critique by academics, no single jurisdictional framework has been adopted across the federal circuits and state courts, such that our judicial landscape presents, in the words of Judge Learned Hand, an incoherent “morass” of conflicting decisions. Not even the most basic jurisdictional principles may be reconciled across the jurisdictional holdings of federal and state courts, and thus they are of minimal


9 Rhodes, supra note 3, at 808; see, e.g., LSI Indus., Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir. 2000) (noting that there has never been a test for determining whether a defendant’s activities within a state are sufficient for general jurisdiction); Linda Sandstrom Simard, Hybrid Personal Jurisdiction: It’s Not General Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?, 48 CASE W. RES. L. REV. 559, 567 (1998) (noting that the Supreme Court’s holdings on the matter provide very limited guidance on the criteria necessary to confer general jurisdiction).

10 See, e.g., Patrick J. Borchers, The Problem with General Jurisdiction, 2001 U. CHI. LEGAL F. 119, 137 (2001) (proposing that general jurisdiction could also be appropriate in states where a corporate defendant has a branch facility but not where the defendant merely has customers or advertises a product); Sarah R. Cebik, “A Riddle Wrapped in a Mystery Inside an Enigma:” General Personal Jurisdiction and Notions of Sovereignty, 1998 ANN. SURV. AM. L. 1, 36 (1998) (proposing that general jurisdiction could be exercised over a defendant if it is incorporated, shapes its corporate policy to comport with, or conducts its core activities within the forum state); B. Glenn George, In Search of General Jurisdiction, 64 TUL. L. REV. 1097, 1129 (1990) (proposing that the only requirement for the minimum contacts analysis for general jurisdiction is whether the defendant has a corporate office in the forum); Allan R. Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 TEX. L. REV. 689, 758 (1987) (stating that the appropriate standard should be whether the defendant has treated the forum state as its home); Mary Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 610, 676 (1988) (noting that general jurisdiction should be clearly limited to “defendant’s home base, that is, the defendant’s domicile, principal residence, state of incorporation, or principal place of business”). The only clear conclusion one can draw from the myriad of academic approaches is that a defendant should only be subject to general jurisdiction in a reasonably limited number of forum states. Rhodes, supra note 3, at 808-09.

11 Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 142 (2d Cir. 1930) (“It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass.”).
practical assistance to the judiciary as a body.\textsuperscript{12} Indeed, the variety of "'formulas used to justify the exercise of... jurisdiction...' lack coherence [and] appear to summon one line of decisions and then another to support the varying moods of their opinions."\textsuperscript{13} The lack of predictability resulting from the state of jurisdictional analysis is inefficient and diametrically opposed to due process. The "bewildering array of seemingly inconsistent results" coming out of our judicial system has been predicted to continue "'until the Court itself draws the lines as the umpire of federalism.'"\textsuperscript{14}

By granting certiorari on petitions from the New Jersey Supreme Court in \textit{J. McIntyre Mach., Ltd. v. Nicastro},\textsuperscript{15} and from the North Carolina Court of Appeals in \textit{Goodyear Dunlop Tires Operations, S.A., v. Brown},\textsuperscript{16} the Supreme Court acknowledged the need to tackle the confusing issues that lower courts have been grappling with since the last time the Court addressed either general in personam jurisdiction or the stream of commerce doctrine nearly twenty-five years ago.\textsuperscript{17} On June 27, 2011, the Court issued its decisions on these two cases. The \textit{Goodyear} decision should provide some comfort to litigants by clarifying that the overly complicated stream of commerce theory of personal jurisdiction does not apply to general in personam jurisdiction analysis. Additionally, the decisions send the message that state courts’ assertion of personal jurisdiction over non-forum defendants had gotten out of control.\textsuperscript{18} Unfortunately, the decisions did not go nearly as far as they could have to provide a comprehensible framework for practitioners and lower courts faced with personal jurisdiction questions.

\textsuperscript{12} Rhodes, \textit{supra} note 3, at 809-10.

\textsuperscript{13} Severinsen v. Widener Univ., 768 A.2d 200, 203 (N.J. Super. Ct. App. Div. 2001) (quoting Twitchell, \textit{supra} note 10, at 636-37). The Severinsen court was speaking directly to the confusion amongst lower courts surrounding general jurisdiction, but the idea applies just as readily to the confusion with the stream of commerce doctrine.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} 131 S. Ct. 2780 (2011).

\textsuperscript{16} 131 S. Ct. 2846 (2011).


\textsuperscript{18} It is unclear how this message will be received in light of the lack of a majority in \textit{McIntyre}. 
This Comment addresses jurisdictional problems faced by foreign defendants involved in transnational litigation within the United States court system, specifically in light of recent decisions from New Jersey and North Carolina. This Comment is divided into five sections: (I) the preceding introduction; (II) a selected history of personal jurisdiction and the stream of commerce theory; (III) a summary of the state court decisions that led to Goodyear and McIntyre; (IV) an analysis of the oral arguments before the Court and a look at the Court’s decisions; and (V) a conclusion discussing the impact the Supreme Court decisions will have on corporations involved in transnational litigation.

II. The Foundation: A History of Personal Jurisdiction in the Supreme Court

It is possible that personal jurisdiction has been the subject of more academic commentary than any other area of American law.\footnote{See Andrew L. Strauss, Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts, 36 HARV. INT’L L.J. 373, 381 (1995).} Complicated jurisdictional issues can make the most seasoned attorney cringe at the thought of first year civil procedure lectures on Pennoyer v. Neff,\footnote{95 U.S. 714 (1877).} International Shoe,\footnote{326 U.S. 310 (1945).} and Asahi Metal.\footnote{480 U.S. 102 (1987); see also Earl M. Maltz, Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669, 670 (1987); Strauss, supra note 19, at 380.} The complex questions inherent in jurisdictional analysis have even become a source of lighthearted humor among attorneys and law students alike.\footnote{Sean H. Hornbeck, Transnational Litigation and Personal Jurisdiction Over Foreign Defendants, 59 ALB. L. REV. 1389, 1393 (1996); see also John M. Brumbaugh & William L. Reynolds, The Straight-Line Method of Determining Personal Jurisdiction, 44 J. LEGAL EDUC. 130, 131 (1994) (proposing that a plaintiff who is located in a state different than the defendant’s home should choose a court halfway between each, thereby equally dividing the inconvenience and burdens of the litigation among the parties and the forum).} Much of the confusion confronting attorneys, and the courts in which they practice, stems from conflicting applications of the theories of specific jurisdiction and general jurisdiction.\footnote{See Charles W. Rhodes, The Predictability Principle in Personal Jurisdiction
The basic premise of the personal jurisdiction doctrine requires that a court have the necessary authority to engage in binding adjudication over a person.\\footnote{See, e.g., Fleming James, Jr. et al., Civil Procedure § 2.3, at 60 (5th ed. 2001). As previously noted, personal jurisdiction may also be referred to as \textit{in personam} jurisdiction. \textit{Id.} § 2.4, at 65. A court’s adjudicatory jurisdiction over property rather than a person is called \textit{in rem} jurisdiction. \textit{Id.} For purposes of this comment, “person” may refer to an individual or a corporate person.}

It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. The existence of personal jurisdiction, in turn, depends upon . . . a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum.\\footnote{Kulko v. Superior Court of California, 436 U.S. 84, 91 (1978) (citations omitted).}

Indeed, judgment of a person by a court lacking personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment.\\footnote{See, e.g., Burnham v. Superior Court, 495 U.S. 604, 609-10 (1990) (plurality opinion).}

Thus, personal jurisdiction is a prerequisite to compelling a defendant to appear and defend against a lawsuit. Without personal jurisdiction, a court may not hear a dispute nor render binding judgment because a judgment rendered against a party in its absence is generally invalid and unenforceable.\\footnote{\textit{Id.} at 609-10.}

Stated otherwise, personal jurisdiction is required whenever a court wishes to exercise its power over a defendant.\\footnote{Edward B. Adams, Personal Jurisdiction Over Foreign Parties, in \textit{International Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts} 113 (David J. Levy ed., 2003).}

It is highly unlikely that any reader intrigued enough to have continued this far into this Comment is unfamiliar with the Supreme Court’s first significant encounter\\footnote{See, e.g., Samuel Issacharoff, Civil Procedure 87 (2005) (“The Supreme Court’s first great confrontation with questions of jurisdiction came in the landmark case} with personal jurisdiction.
jurisdiction questions in the famous (infamous to many first year law students) case of *Pennoyer v. Neff*.

Indeed, the following subsections should serve as refreshers to the first year of law school for most readers. While an abbreviated history of personal jurisdiction is in order to make this piece complete, it is certainly not the author’s intent to call up repressed memories of late nights huddled over a civil procedure textbook or the dreaded multi-hour comprehensive end of semester exam. Instead the reader should sit back, grab a nice cup of coffee (or other preferred beverage), and read the following sections with the confidence one gains by mastering (or at least comprehending) the material taught in the first year of law school.

**A. In the Beginning: Pennoyer v. Neff**

*Pennoyer*, decided in 1878, served for nearly a century as the basic statement of the limits on state court jurisdiction imposed by the Fourteenth Amendment Due Process Clause. The case arose over a dispute between Marcus Neff and an attorney named John Mitchell with whom Neff had contracted for legal services in Oregon. Before completing his payment obligations under the contract with Mitchell, Neff packed up and moved to California. To protect his financial interests, Mitchell initiated legal action to

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31 *95 U.S. 714* (1878). For an anecdote about the fabled facts of *Pennoyer*, read the opening to Professor Linda Silberman’s article relating the story of a New York street beggar who convinced the professor that he was an out-of-luck former Harvard law graduate and attorney by calling out “*Pennoyer!*” and then describing the case to her satisfaction. *See* Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 33-34 (1978).

32 *See* *Pennoyer v Neff*, *95 U.S.* 714, 722 (1878).


34 *See id.* at 79.
recovery in contract; he proceeded as if Neff’s move to California had no bearing on the action. Fortunately for Mitchell, Neff continued to own a piece of property in Oregon. This allowed Mitchell to utilize Oregon’s alternative notice provision, which permitted service of process by posting notice of the suit on property belonging to the defendant and making notice of the suit public in the local newspaper for six weeks. Unfortunately for Neff, he never saw either notice and did not appear in court. Subsequently, the Oregon state court entered a default judgment against Neff, seized his Oregon property, and sold the land at auction to Sylvester Pennoyer to cover Mitchell’s contract judgment for his unpaid legal fees.

When Neff later returned to Oregon to check on the property he thought he still owned, he discovered it in the possession of Pennoyer and brought suit in federal court to void the sale to Pennoyer. Neff sought to void the sale on the theory that the Oregon court lacked personal jurisdiction over him, and thus had no power to adjudicate the original dispute, because he was no longer domiciled in Oregon. The lower federal court granted Neff’s reversal of the default judgment. After review, the Supreme Court agreed that the judgment was void because Neff had not been physically served with process while present in Oregon, and the property had not been properly seized before the judgment was pronounced. The Court held that jurisdiction was proper in only three separate circumstances: (1) Where service of process was made in the state establishing the defendant’s physical presence in the territory; (2) where the defendant was domiciled in the state; or (3) where the defendant consented to the exercise of jurisdiction over his person. The decision firmly entrenched the
territorial power theory as the key to personal jurisdiction over a defendant. For the next seventy years, the *Pennoyer* requirements based on territorial sovereignty remained at the center of personal jurisdiction analysis. While modern jurisdictional analysis no longer clings to the strictures set out by the Court in *Pennoyer*, the most significant legacy of the decision is undoubtedly the insertion of Fourteenth Amendment due process considerations into the law of personal jurisdiction. Justice Stephen Field, writing for an eight to one court, securely tied the Fourteenth Amendment Due Process Clause to jurisdictional analysis across all American jurisdictions by linking the jurisdictional requirements of the Full Faith and Credit Clause with the Due Process Clause. Following *Pennoyer*, a judgment lacking proper jurisdiction could not be enforced in other states or federal courts, and more importantly, neither could it be enforced in the original rendering state. The doctrine restricted the ability of state courts to adjudicate claims brought by aggrieved citizens against nonresidents, even when the actions upon which the suit was based occurred in the state, and even when the defendant could be found and given actual notice. By tying personal jurisdiction to due process concerns, the Court, perhaps unwittingly, created a limitation that would eventually cause the jurisdictional analysis of *Pennoyer* to fall out of step with the economic and geographic realities of the twentieth century.

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46 See, e.g., Tocklin, supra note 33, at 94-95.

47 Id. at 94, 138-39.

48 Id. at 138.

49 Mushlin, supra note 45, at 1067-68.

50 Ashe et al., supra note 45, at 1179-80. But see, Tocklin supra note 33, at 138-139 (arguing that Justice Field, as a "master at planting seeds that might yield later harvest," deliberately provided later courts with the means to protect "individuals against
B. So Began the Twentieth Century: International Shoe

As this country entered the twentieth century, the rise of the modern corporation increasingly brought state judicial systems into conflict with corporate entities who were legally incorporated elsewhere, but who undertook activities that affected the forum state’s citizens on a regular basis. The jurisdictional standard of the time, as established in Pennoyer, restricted jurisdictional authority to persons or corporate entities “present” within the state’s territorial boundaries. For many years, courts across the country had strained the limits of the Pennoyer decision by creating legal fictions that satisfied the “presence” or consent requirements, thereby allowing states to assert jurisdiction over nonresidents and foreign corporations. These fictions pushed the boundaries of personal jurisdiction analysis to near absurdity and were inadequate to deal with the economic complexities of the twentieth century.

In order to mete out justice in complex personal and business disputes spanning state and international borders, the states needed a transactional approach that would permit jurisdiction over non-forum state parties in disputes that arose from specific in-state activities. Over half a century ago, the Supreme Court heard the defining case that started the American judicial system along the arbitrary actions of the government”).

51 See, e.g., ISSACHAROFF, supra note 30, at 92; FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 70-71 (3d ed. 2004).
53 Id.
54 Erik T. Moe, Comment, Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive But Still Kicking, 76 GEO. L.J. 203, 206 (1987). Following Pennoyer, courts began to adopt fictions that provided alternatives to a defendant’s physical presence in the forum state. See Angela M. Laughlin, This Ain’t the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit, 37 CAP. U. L. REV. 681, 688 (2009). Some of the more prevalent fictions included not recognizing the legal existence of foreign corporations in a state unless the corporation had first appointed an agent for service or premising corporate presence in a state on the presence of employees or bank accounts. Id. at 689. These developments allowed states to enter judgments on persons served with process while located within a state, against property located in a state, or against a person who “consented” to jurisdiction. Id. at 688.
55 See Laughlin, supra note 54, at 689.
56 ISSACHAROFF, supra note 30, at 92.
path to its current jurisdictional posture. In *International Shoe Company v. Washington*, the Supreme Court established the principle that personal jurisdiction is proper when a nonresident defendant has "certain minimum contacts with [the forum] such that the maintenance of suit does not offend traditional notions of fair play and substantial justice." The International Shoe Company, a Delaware corporation with headquarters in Missouri, employed roving salesmen to sell shoes door-to-door during the Depression. The sales workforce of between eleven and thirteen people in the State of Washington was paid on commission, met with prospective customers in motels and hotels, and occasionally rented space to put up displays. All orders taken in Washington were sent to St. Louis, Missouri for acceptance and, once accepted, the shoes were then shipped from points elsewhere into Washington.

The State of Washington attempted to enforce the state labor code against International Shoe by asserting that the company owed the state unemployment compensation fund contributions. When the company refused to pay, Washington initiated administrative proceedings to collect the funds. International Shoe maintained that because it was not physically present in the state and conducted no business in the state, there was no jurisdictional basis for haling the company into the Washington court system. International Shoe seemed untouchable.

That is, until the Court rejected International Shoe’s argument based on lack of physical presence and established a new test for personal jurisdiction. As the Court explained, 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.” 66 Since International Shoe, personal jurisdiction analysis has required that two tests be satisfied: (1) The defendant must have “minimum contacts” with the forum to justify the state courts’ jurisdiction over it; and (2) the exercise of jurisdiction must not “offend traditional notions of fair play and substantial justice.” 67 The key outcome of International Shoe was that a defendant could be regarded as present in the forum state for purposes of jurisdictional analysis not through fictions such as where notice happened to be served or through creative methods of establishing permanent domicile, but rather by the defendant’s conduct towards and within the forum. 68 In doing away with the fictions created over the previous seventy years within the confines of Pennoyer, the Court instituted a fairness element such that the contacts a corporation has with the forum state make it “reasonable . . . to require the corporation to defend the particular suit which is brought there.” 69

By establishing a new personal jurisdiction doctrine based on minimum contacts with the forum, the Court in International Shoe opened the door to modern personal jurisdiction analysis. It expanded the ability of states to provide justice for their citizens when they were injured by non-forum defendants, and it became the bedrock upon which other theories of jurisdiction have been built.

C. The Path to General (and Specific) Confusion: Perkins and Helicopteros

In a series of cases decided in the years since International Shoe, the Supreme Court has revisited the issue of personal jurisdiction on thirteen notable occasions. 70 Arguably, the Court

66 International Shoe, 326 U.S. at 316-17.
67 Id. at 314.
68 See ISSACHAROFF, supra note 30, at 93.
69 International Shoe, 326 U.S. at 319.
70 See Burnham v. Superior Court, 495 U.S. 604 (1990) (holding that personal service of process over a nonresident who was temporarily in the forum is enough to establish jurisdiction); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (outlining the two branches of the stream of commerce theory); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (stating that due process protects an individual’s liberty interest in not being subject to jurisdiction in a forum where he lacks minimum contacts); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (stating that the traditional
has advanced the personal jurisdiction doctrine in those cases. One of the doctrinal advancements following *International Shoe* under the umbrella of personal jurisdiction analysis was the categorization of jurisdiction as either general or specific in nature. The Court began to develop the two types of in personam jurisdiction in a case dealing with jurisdictional matters that followed seven short years after *International Shoe*.71

1. Perkins

In 1952, the Supreme Court heard arguments in *Perkins v. Benguet Consolidated Mining Company*.72 The case revolved around the actions of Benguet Mining, a company created under the laws of the Philippines.73

The company had made the strategic decision to cease operations of its gold and silver mines in the Philippines during World War II while the Japanese occupied the region.74 The

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72 342 U.S. 437 (1952).

73 Id. at 439.

74 Id. at 439, 448.
president of the company, who was also the principal stockholder, returned to his home in Ohio for the duration of the occupation.\textsuperscript{75} In order to maintain the company during the war, Benguet Mining opened an office in Ohio, from which it continued basic operations.\textsuperscript{76} The Ohio office consisted of the president and two secretaries. The activities undertaken at the Ohio office consisted of opening two bank accounts for the company, paying salaries and other expenses for the company, holding directors’ meetings, corresponding on the company’s behalf, and supervising the rehabilitation of the company’s properties in the Philippines.\textsuperscript{77}

The suit arose when Idonah Perkins, a nonresident of Ohio, filed an action in Ohio against the company for alleged dividends due to her as a stockholder and for damages resulting from the company’s failure to issue to her certificates for shares of its stock.\textsuperscript{78} The lower courts, including the Ohio State Supreme Court, all agreed that Ohio did not have personal jurisdiction over the company as it was a foreign corporation and the claims upon which the suit was brought did not relate to any of the defendant’s actions in Ohio.\textsuperscript{79}

The United States Supreme Court reversed, stating that Ohio could validly exercise personal jurisdiction “to enforce a cause of action not arising out of the [defendant’s] activities in the state of the forum.”\textsuperscript{80} The Court based its decision on the company president’s “continuous and systematic supervision of the necessarily limited wartime activities of the company” from his office in Ohio.\textsuperscript{81} Despite the fact that the cause of action did not arise in Ohio, nor did it relate to the company’s actions there, the Court applied a contacts test and found jurisdiction proper to ensure “general fairness.”\textsuperscript{82} The Court’s holding ultimately built on the language from \textit{International Shoe}, stating that “continuous corporate operations within a state” could be “so substantial and of

\textsuperscript{75} Id. at 447.
\textsuperscript{76} Id. at 447-48.
\textsuperscript{77} Perkins, 342 U.S. at 438-39.
\textsuperscript{78} Id. at 448.
\textsuperscript{79} Id. at 439-42.
\textsuperscript{80} Id. at 446.
\textsuperscript{81} Id. at 448.
\textsuperscript{82} Perkins, 342 U.S. at 445.
such a nature” that a state could exercise adjudicatory jurisdiction over a defendant for any causes of action, even those unrelated to the defendant’s forum contacts.83

2. Helicopteros

The jurisdictional theory supporting Perkins became known as general jurisdiction, while the exercise of jurisdiction based on contacts giving rise to the claim itself is what we recognize today as specific jurisdiction. The Supreme Court first explicitly recognized the bifurcation in jurisdictional analysis in Helicopteros Nacionales de Colombia, S.A. v. Hall,84 when it addressed the question of whether a Colombian corporation could be sued in Texas over a helicopter crash in Peru.85

Helicopteros Nacionales de Colombia, S.A. (“Helicol”) was a Colombian corporation that specialized in providing helicopter transportation for oil and construction companies over difficult South American terrain.86 The plaintiffs in Helicopteros were the representatives and survivors of four American citizens killed in the crash of a helicopter owned and operated by Helicol that occurred in Peru.87 The case took on jurisdictional significance because of Helicol’s ongoing relationship with Texas-based Bell Helicopter Company, which prompted the plaintiffs to file suit in that state.88 Ultimately, both parties conceded that the claims regarding the helicopter accident did not arise from or have any relationship to Helicol’s previous contacts with the state of Texas, but the nature of Helicol’s contacts prompted the courts to examine whether adjudicative authority over the company was proper in the state on any cause of action regardless of the relation to those contacts.89

The contacts the plaintiffs put forward to support jurisdiction over Helicol were that the corporation purchased a majority of its helicopters in Texas, trained its pilots in Texas, and conducted the

83 Id. at 446 (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 318-19 (1945)).
85 Id. at 409-10.
86 Id. at 409.
87 Id. at 410.
88 Id. at 411.
89 Helicopteros, 466 U.S. at 411.
negotiation session in Texas, which led to Helicol’s service agreement to transport employees of American companies in South America.\textsuperscript{90} The Supreme Court reversed the Texas high court decision, holding that Texas did not have the authority to exercise jurisdiction over Helicol.\textsuperscript{91} The Court stated that the aforementioned contacts were not “the kind of continuous and systematic general business contacts... found... in \textit{Perkins}.”\textsuperscript{92} The Court also reaffirmed the holding in \textit{Perkins}\textsuperscript{93} that a showing of continuous and systematic contacts with the forum state would support jurisdiction over the defendant in a suit there, “[e]ven when the cause of action [did] not arise out of or relate to the foreign corporation’s activities in the forum State.”\textsuperscript{94} The argument supporting the Court’s holding that there was no basis for personal jurisdiction was the Court’s first explicit acknowledgement of general jurisdiction analysis.\textsuperscript{95} In a series of footnotes, the Court clearly set out the meanings of the general jurisdiction and specific jurisdiction labels, noting, “when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum, the State is exercising ‘specific jurisdiction,’”\textsuperscript{96} but “[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction.’”\textsuperscript{97}

\textsuperscript{90} \textit{id.} at 415-16.
\textsuperscript{91} \textit{id.} at 418-19.
\textsuperscript{92} \textit{id.} at 416.
\textsuperscript{93} \textit{Helicopteros}, 466 U.S. at 414.
\textsuperscript{94} \textit{id.} at 414.
\textsuperscript{95} See Borchers, \textit{supra} note 30, at 71-72 (“Applying the test for general jurisdiction of ‘continuous and systematic’ activities first suggested in \textit{International Shoe}, and developed somewhat in \textit{Perkins}, the Court found the defendant’s contacts insufficient to support jurisdiction.”) (footnotes omitted). In \textit{Helicol}, the Court further noted that no specific jurisdiction analysis was needed because the point had been conceded when no party advanced arguments regarding a relationship between the cause of action and the company’s forum contacts. \textit{Helicopteros}, 466 U.S. at 415-16 n.10.
\textsuperscript{96} \textit{Helicopteros}, 466 U.S. at 414 n.8 (citing Arthur T. von Mehren & Donald T. Trautman, \textit{Jurisdiction to Adjudicate: A Suggested Analysis}, 79 \textit{Harv. L. Rev.} 1121, 1144-64 (1966)).
\textsuperscript{97} \textit{id.} at 415 n.9 (citations omitted).
D. Adrift in the Stream of Commerce: World-Wide and Asahi

In another line of cases following International Shoe, the Court limited the contacts required to confer jurisdiction over an out-of-state defendant to those contacts through which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State." Purposeful availment arises where the defendant's contacts with the forum "proximately result from actions by the defendant... that create a 'substantial connection' with the forum," or where the defendant's efforts are "purposefully directed" at the state.

The rationale behind the "purposeful availment" requirement is to ensure that non-forum defendants will have some warning of whether they are subject to lawsuits. Stated another way, purposeful availment protects foreign defendants from being subjected to the authority of local courts solely as the result of "random, fortuitous or attenuated" contacts over which they had no control. Following this line of reasoning, the Court has found that a single act may be enough to support jurisdiction if the contact with the forum is a result of the defendant's conduct and created a "substantial connection" with the forum state. Difficult questions arise in the tort context when a plaintiff seeks to subject a product manufacturer to jurisdiction in a state that its products reached despite no effort of the manufacturer to intentionally sell or market goods in the forum state.

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98 326 U.S. 310 (1945).
101 Id. at 472 (citations omitted) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum... and the litigation results from alleged injuries that 'arise out of or relate to' those activities.").
102 Id. at 475.
103 Id. (internal citations omitted).
104 McGee, 355 U.S. at 223.
105 Adams, supra note 29, at 118.
I. World-Wide

In the critical case of *World-Wide Volkswagen Corp. v. Woodson*, the Court focused on creating some guidelines for out-of-state product manufacturers and in doing so articulated the well-known stream of commerce doctrine for products liability actions. The plaintiffs in the case purchased a new Audi vehicle from a car dealer in New York. Shortly after purchasing the vehicle, the plaintiffs decided to move from New York to a new home in Arizona. To get to their new home, the plaintiffs set out on a cross-country trip in their vehicle, but unfortunately got into a serious accident while passing through Oklahoma. The gas tank caught fire and caused several of the passengers in the car to be burned. The injured occupants of the vehicle filed a products liability lawsuit in state court in Oklahoma against a ranging group of defendants that included the following: the New York dealer that sold the plaintiffs the car; the regional distributor that distributed Audi vehicles in New York, New Jersey, and Connecticut; the Volkswagen importer that imported all Audi vehicles from Germany into the United States; and the automobile manufacturer that manufactured the vehicle at issue in Germany. The basis of the claim was that the plaintiffs’ injuries resulted from the defective design of the gas tank and fuel system in their new car.

The New York car dealer and the regional distributor made special appearances in the Oklahoma court to assert that the court did not have proper authority to exercise jurisdiction over them. The trial judge denied the petition and allowed personal jurisdiction over the car dealer and the regional distributor. The

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107 *Id.* at 297-98.
108 *Id.* at 288.
109 *Id.*
110 *Id.*
111 *World-Wide Volkswagen*, 444 U.S. at 288.
112 *Id.* Neither the importer nor the foreign car manufacturer challenged jurisdiction in this particular action. *Id.*
113 *Id.*
114 *Id.*
115 *Id.* at 289.
defendants then submitted a writ of prohibition to the Oklahoma Supreme Court to restrain the trial judge from exercising personal jurisdiction, but that court denied their request. The United States Supreme Court granted certiorari to consider the important constitutional questions implicated in the case.

In its opinion, the Court observed that the limits on state jurisdiction imposed by the Fourteenth Amendment had been substantially relaxed over the years, primarily due to the challenges presented by the modern economy. The Court found that neither defendant had purposefully reached out to create a contact with Oklahoma, and held that the "the mere unilateral activity" by the plaintiffs of taking their vehicle to the forum state did not satisfy the requirements of minimum contacts with Oklahoma. The court subsequently dismissed the claims against the New York auto dealer and the regional Audi distributor for lack of personal jurisdiction.

The plaintiffs in *World-Wide Volkswagen* argued that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that [it] would cause injury in Oklahoma." The Court dismissed this assertion by explaining that foreseeability cannot by itself support the exercise of personal jurisdiction over a defendant. The Court then went on to explain the way in which foreseeability is relevant:

> [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. 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.

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117 *Id.* at 291.
118 *Id.* at 292-93 (citing *McGee v. Int'l Life Ins. Co.*, 335 U.S. 220, 222-23 (1957)).
119 *Id.* at 298.
120 *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1957)).
121 *Perkins*, 342 U.S. at 299.
122 *Id.* at 295.
123 *World-Wide Volkswagen*, 444 U.S. at 295.
124 *Id.* at 297.
Interspersed within the Court’s holding that jurisdiction was not proper over the car dealer or regional distributor was dicta that implied that the foreign importer of the car and the foreign manufacturer of the car would be subject to personal jurisdiction in the forum. Specifically, the Court stated that:

"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 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."

The contrast between the clear holding by the Court that jurisdiction could not be based upon the foreseeable unilateral actions of a consumer and the pronouncement of the basic stream of commerce doctrine left lower courts operating in the wake of World-Wide Volkswagen with the question of precisely what quality and quantity of contacts would demonstrate an "expectation that [a defendant’s products] will be purchased by consumers in the forum State" such that jurisdiction could be exercised over a non-forum manufacturer or distributor. Put another way, practitioners and lower courts lacked clear guidance as to whether a defendant’s act of placing a product into the stream of commerce that might foreseeably end up in a particular state would satisfy the minimum contacts requirement of the Due Process Clause.

125 Simard, supra note 9, at 578.
126 World-Wide Volkswagen, 444 U.S. at 297-98 (emphasis added) (citations omitted).
127 Id. at 298.
128 See id.
2. Asahi

Given the conflicting messages presented by *World-Wide Volkswagen*, it should not be surprising that lower courts differed in their interpretation. *Asahi Metal Industry Company, Ltd., v. Superior Court of California,* gave the Court the opportunity to clarify the confusion over the stream of commerce doctrine. Unfortunately, no majority conclusion came out of the Court’s deliberations.

The *Asahi* case revolved around a 1978 motorcycle accident in California. While traveling on the highway, the motorcycle operator lost control and collided with a tractor-trailer. The motorcycle operator was seriously injured, and the passenger, who was also the operator’s wife, was killed in the crash. The operator alleged that the reason he lost control of the motorcycle was that the rear tire failed and then exploded while he was driving on the highway. The operator filed a products liability action in California alleging that the motorcycle tire, tube, and sealant were all defective. The operator filed the suit against Cheng Shin Rubber Industrial Co., Ltd. (“Cheng Shin”), the Taiwanese manufacturer of the tire tube on the motorcycle. Cheng Shin filed a cross-claim for indemnification against Asahi Metal Industry Co., Ltd. (“Asahi”), the Japanese manufacturer of the valve assembly on the tube. The claims against Cheng Shin and other defendants were settled prior to the case coming before

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130 See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110 (1987) (O’Connor, J., plurality opinion) (“Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant’s act of placing the product in the stream of commerce. Other courts have understood . . . *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.”).
131 Id.
132 Id. at 105.
133 Id.
134 Id.
135 Asahi, 480 U.S. at 105-06.
136 Id. at 106.
137 Id.
138 Id.
the California Supreme Court; by that time only the cross-claim for indemnity against Asahi remained.139

Asahi asserted that California could not exercise jurisdiction over it because the company did not have sufficient contacts with the forum state.140 The California Supreme Court found that the trial court’s exercise of jurisdiction over Asahi was proper because Asahi knew that some of its tire valve assemblies sold to Cheng Shin would eventually be sold in California.141 The Court unanimously reversed the California Supreme Court decision that personal jurisdiction over Asahi was proper,142 but was once again divided on the reasoning behind that decision.143 While both sides could agree that Asahi did not possess “minimum contacts such that the exercise of personal jurisdiction [would be] consistent with fair play and substantial justice,”144 there was disagreement on the question of whether the company could be said to have purposefully availed itself of the privilege of doing business in California.

The Court, in a plurality opinion, advanced two different views of the stream of commerce doctrine, one by Justice Sandra Day O’Connor and the other by Justice William Brennan, with each view supported by four different members of the Court.145

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139 Id.

140 Asahi, 480 U.S. at 105-06. Asahi and Cheng Shin submitted detailed descriptions of their business relationship. Id. Asahi asserted that all business between Cheng Shin and Asahi was conducted in Asia. Id. The president of Asahi submitted an affidavit that “declared that Asahi ‘has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.’” Id. at 107 (citations omitted). But in contrast, there was also an affidavit of a Cheng Shin manager stating that he believed that Asahi “was fully aware that valve stem assemblies sold to my company and to others would end up throughout the United States and in California.”” Id. (citation omitted). Furthermore, there was evidence that twenty percent of Cheng Shin’s sales in the United States were in California. Id. at 106.

141 Asahi, 480 U.S. at 108 (“The [California Supreme Court] considered Asahi’s intentional act of placing its components into the stream of commerce—that is, by delivering the components to Cheng Shin in Taiwan—coupled with Asahi’s awareness that some of the components would eventually find their way into California, sufficient to form the basis for state court jurisdiction under the Due Process Clause.”).

142 Id.

143 Id. at 105.

144 Id. at 116.

145 Id. at 105, 116.
division was centered along basic ideological lines, with the Court's three generally conservative members supporting Justice O'Connor's view and the Court's three generally liberal Justices agreeing with Justice Brennan.\textsuperscript{146}

Justice O'Connor, joined by Chief Justice William Rehnquist, and Justices Lewis Powell and Antonin Scalia, set out what is commonly known as the "foreseeability plus" or "stream of commerce plus" theory of minimum contacts.\textsuperscript{147} O'Connor believed that Asahi did not have the minimum contacts with California necessary to establish jurisdiction because it did not purposefully avail itself of the market in California.\textsuperscript{148}

In support of this position, she reasoned that the simple knowledge that some of its component parts might end up in products that would be sold in California was not a sufficient basis for jurisdiction.\textsuperscript{149} Some sort of "[a]dditional conduct" by the defendant such as "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" is necessary.\textsuperscript{150} Justice O'Connor stated that the sale of components that made their way into the forum, absent any of the other factors indicating a purposeful relationship with the forum and intent to serve the forum, were insufficient to establish the minimum contacts requirement.\textsuperscript{151} Applying this rule to the facts of Asahi, O'Connor concluded that since the company had merely placed its component products into the stream of commerce that swept the products into California on Cheng Shin's order, the minimum contacts requirement had not been met.\textsuperscript{152}

In a concurring opinion, Justice Brennan, joined by Justices

\begin{footnotes}
\item[146] Vespole, supra note 17. It is important to note that Justice Scalia, one of the more conservative members of the Court, is the only Justice from the Asahi Court who is still presently on the Court. Id.
\item[147] See Adams, supra note 29, at 119; Vespole, supra note 17.
\item[148] See Asahi, 480 U.S. at 112 (O’Connor, J., plurality opinion).
\item[149] Id. ("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.").
\item[150] Id.
\item[151] Id. at 112-13.
\item[152] Id.
\end{footnotes}
Byran White, Thurgood Marshall, and Harry Blackmun, disagreed with the interpretation of the stream of commerce theory put forward by Justice O’Connor as well as her conclusion that Asahi had not purposefully availed itself of the privileges of California. Justice Brennan argued that Justice O’Connor’s opinion that something considerably more than foreseeability was needed was a “minority view” of the stream of commerce theory. Justice Brennan further noted that Justice O’Connor’s view “represented a marked retreat” from the Court’s analysis in World-Wide. Justice Brennan argued that simply placing a product into the stream of commerce with knowledge that the product will eventually be used in the forum state constitutes purposeful availment. The Brennan group defined the stream of commerce as “the regular and anticipated flow of products from manufacture to distribution to retail sale” and stated that a company cannot be surprised by a lawsuit where their product knowingly arrives in the forum through the stream of commerce.

With the issue of purposeful availment dividing the Court, the decision to deny California jurisdiction over Asahi was based on other factors. Part II.B. of the opinion, which was supported by all the justices except Justice Scalia, gives the most comprehensive look at what other factors the Court considered. In Part II.B. of the opinion, Justice O’Connor explained the traditional five-factor test that analyzes “the burden on the defendant, the interests of the forum State, . . . the plaintiff’s interest in obtaining relief, . . . the interstate judicial system’s interest in . . . efficient resolution of controversies; and the shared interest of the several States in

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153 Asahi, 480 U.S. at 116-17 (Brennan, J., concurring).
154 Id. at 118 (Brennan, J., concurring).
155 Id.
156 Id. at 118-21. Justice Brennan highlighted the distinction between the facts in World-Wide Volkswagen and those at issue in Asahi, where the key point was how the car that caused injury traveled into the forum state. In Asahi the valve assembly “reach[ed] a distant State through a chain of distribution” whereas in World-Wide the vehicle reached the “[s]tate because a consumer . . . took [it] there.” Id. at 120 (internal citations omitted). Justice Brennan then argued that mere awareness by Asahi that Cheng Shin’s world-wide distribution system included shipping valve assemblies to California was sufficient to bring Asahi within the definition of purposeful availment from World-Wide. Id. at 120-21.
157 Id. at 117.
158 Maltz, supra note 22, at 679.
Justice O'Connor noted that the burden on Asahi was "severe," the interest of California was slight, and the plaintiff's interest was slight. Justice O'Connor then discussed the final two factors in tandem, noting that the Court must consider "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court." The opinion cautioned that courts must undertake "a careful inquiry into the reasonableness of the assertion of jurisdiction" over foreign defendants and maintain an "unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." Citing a dissenting opinion by Justice Harlan in the Court's earlier case of United States v. First National City Bank, Justice O'Connor clearly felt that the Court should be very careful not to extend American "'notions of personal jurisdiction into the international field' unless absolutely necessary. Finally, Justice O'Connor concluded that, given "the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair."

Since the decision was issued, Asahi has frustrated legal scholars and lower courts regarding the limits of the exercise of

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159 Asahi, 480 U.S. at 113.
160 Id. at 114 ("Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi’s headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation’s judicial system.").
161 Id. ("Because the plaintiff is not a California resident, California’s legitimate interests in the dispute have considerably diminished.").
162 Id. ("Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.").
163 Id. at 115.
164 Asahi, 480 U.S. at 113.
166 See Asahi, 480 U.S. at 115 (citing First Nat’l, 379 U.S. at 404 (Harlan, J., dissenting)).
167 Id. at 116.
personal jurisdiction over foreign defendants under long-arm statutes\textsuperscript{168} consistent with the Due Process Clause. With no additional guidance from the Court since the divided opinion in \textit{Asahi}, there is now inconsistency in federal circuit courts and numerous state courts in regards to how the foreseeability test should be applied. The stream of commerce plus test elaborated by Justice O’Connor is being used in the First, Fourth, Sixth, Ninth, and Eleventh Circuits, while the Fifth, Seventh, and Eighth Circuits use Justice Brennan’s basic stream of commerce analysis.\textsuperscript{169} There are other federal circuit courts that use both tests to analyze personal jurisdiction instead of picking one or the other.\textsuperscript{170} There is just as much if not more division between state courts over the use of the two branches of the stream of commerce analysis.\textsuperscript{171} Clearly the \textit{Asahi} opinion has left a mess, typified by significant analytical variations and divergent applications by lower courts: It is high time for the Court to straighten out this complicated issue.

\textbf{E. The Court’s Most Recent Foray into Personal Jurisdiction: Burnham}

Prior to the current matters before the court in \textit{Goodyear} and \textit{McIntyre}, the last Supreme Court case to deal significantly with personal jurisdiction was \textit{Burnham v. Superior Court of California.}\textsuperscript{172} The case centered on the interstate divorce proceedings of Dennis and Francie Burnham.\textsuperscript{173} The couple was married in West Virginia, but later moved to and had children in

\textsuperscript{168} State long-arm statutes grant authority to trial courts to assert jurisdiction over non-forum state defendants. “Statutes authorizing courts to reach beyond their own borders came to be known as ‘long-arm’ statutes: states were extending their jurisdictional ‘arms.’ The name has stuck.” \textsc{Steven C. Yezell}, \textit{Civil Procedure} 187 (4th ed. 1996). There are two basic models of long-arm statutes: (1) the statute may state that jurisdiction extends to the limits provided by the United States Constitution; or (2) the statute limits the application of jurisdiction to some point within the constitutional boundaries. \textsc{Louis U. Gasparini}, Comment, \textit{The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century Under the New York CPLR}, 12 \textit{Alb. L.J. Sci. & Tech.} 191, 209 (2001).

\textsuperscript{169} See Laughlin, supra note 54, at 704 n.129-132.

\textsuperscript{170} \textit{Id.} at 704 n.132.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} 495 U.S. 604 (1990).

\textsuperscript{173} \textit{Id.} at 607.
New Jersey. Several years later, the Burnhams separated and agreed that the wife would file for divorce in New Jersey due to irreconcilable differences, move to California, and retain custody of the children. Contrary to their agreement, the husband filed for divorce claiming desertion after the wife moved to California with the children. The husband did not serve the wife with process, and after unsuccessfully attempting to get the husband to adhere to their agreement, the wife filed for divorce herself in California. Later that year, the husband travelled to the southern part of California for a short business trip and while there proceeded to visit his children. When he returned his children to the wife’s new California home, the husband was served with the divorce papers. After returning to New Jersey, the husband entered a special appearance in California to contest the superior court’s assertion of personal jurisdiction. The California trial court rejected the motion, and on appeal, the California Court of Appeals denied mandamus relief.

In 1990, the United States Supreme Court unanimously upheld the exercise of jurisdiction over the nonresident husband. Despite common agreement that jurisdiction over the husband was proper in this situation, the factions on the Court could not resolve the broader personal jurisdiction issues involved in the case. Justice Scalia, joined by three other justices, concluded that tag jurisdiction remains a valid basis for jurisdiction such that states may continue to exercise jurisdiction based only on physical presence. Justice Brennan, joined by another three justices,

174 Id.
175 Id.
176 Id.
177 Burnham, 495 U.S. at 607-08.
178 Id. at 608.
179 Id.
180 Id.
181 Id. at 608. The Supreme Court of California then denied a hearing, which allowed the United States Supreme Court to direct a writ of certiorari to the intermediate California appellate court in order to review the grounds for jurisdiction. Id.
182 Burnham, 495 U.S. at 628.
183 Robert Taylor-Manning, Note, An Easy Case Makes Bad Law—Burnham v. Superior Court of California, 110 S. Ct. 2105 (1990), 66 WASH L. REV. 623, 630-31 (1991) (noting that the Scalia plurality did not agree with the husband’s assertion that
agreed that the California courts could exercise jurisdiction over the husband, but did not base this conclusion solely on the assertion of tag jurisdiction; Brennan argued that the due process concerns “developed in International Shoe and Shaffer invalidated physical presence as a sufficient basis on which to justify jurisdiction.”

Justice Brennan went on to conduct a minimum contacts analysis that found it was proper to assert in personam jurisdiction over the husband.

The *Burnham* decision, like *Asahi*, has provided very limited value to practitioners because of the Court’s lack of consensus.

The fundamental issues underscoring the division between the two main factions in *Burnham* are deeply rooted in opposing philosophical, political, and legal positions. The Scalia group stressed the importance of adhering to common law precedent on transient jurisdiction and gave weight to the state sovereignty concerns involved with limiting the jurisdictional authority of state courts.

Justice Brennan, writing for his faction, obviously...
"valued due process and defended the modern minimum contacts approach," but was overly broad in his application of the doctrine. One critic notes that "Justice Scalia's analysis cannot be reconciled with due process concerns or personal jurisdiction developments since International Shoe," but that Justice Brennan's "broad definition [of minimum contacts] is little better than the bright line rule of transient jurisdiction." Perhaps the true value in the Burnham decision lies not in the clarification, or lack thereof, that it provides to attorneys and their clients faced with jurisdictional questions, but rather in the fact that it serves as a poignant reminder for the current Court of the need to come to a consensus in order to clarify the murky waters of personal jurisdiction.

III. Recent State Decisions on Personal Jurisdiction

A. North Carolina Court of Appeals Applies the Stream of Commerce Theory to General Jurisdiction

The North Carolina Court of Appeals decided Brown v. Meter on August 18, 2009. Judge Sam Ervin, writing for a three-judge panel, found that North Carolina could assert personal jurisdiction over a group of foreign manufacturers so long as they had intentionally placed their products into the stream of commerce without excluding North Carolina from distribution of their product. The case arose from a wrongful death action involving two teenage boys who died following a bus accident in France. Julian Brown and Matthew Helms, two thirteen-year-old soccer players from the state of North Carolina, died from injuries sustained after a tire on the bus allegedly failed, causing it...

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188 "Id. at 631-32, 638-39 ("Justice Brennan recognized that most situations involving individuals' physical presence also involve intentional, purposeful or knowing risk that their presence makes them subject to state court jurisdiction . . . however, Justice Brennan's application of minimum contacts was too broad.")."

189 "Id. at 640.

190 "Id. at 632.


192 "Id. at 384.

193 "Id."
to careen off the road and crash near Paris, France, on April 18, 2004.\textsuperscript{194} The accident occurred while the boys and their coaches were riding in the bus to the airport to return to the United States after competing in an international soccer tournament.\textsuperscript{195}

The specific tire in question was manufactured by Goodyear Lastikleri T. A. S. ("Goodyear Turkey").\textsuperscript{196} Two other affiliates, which manufactured a similar tire, Goodyear Dunlop Tires France SA ("Goodyear France") and Goodyear Luxembourg Tires SA ("Goodyear Luxembourg"), were named as defendants.\textsuperscript{197} As their names suggest, all three foreign companies are subsidiaries of the parent company, Goodyear Tire & Rubber Company.\textsuperscript{198} All three of the aforementioned foreign Goodyear entities, as well as the parent corporation, were named as defendants in the original action.\textsuperscript{199}

The parents of the boys, as administrators of the estates, initiated an action in a North Carolina superior court against the manufacturer and distributors of the tire, despite the accident having occurred in France.\textsuperscript{200} The parents alleged that the accident was caused by the failure of one of the tires on the bus when the plies separated from the rubber.\textsuperscript{201} The plaintiffs' theory was that the foreign Goodyear companies negligently designed, constructed, tested, and inspected the tire at issue and that the companies failed to give proper warning of latent defects.\textsuperscript{202}

At trial, the three foreign Goodyear entities filed motions to dismiss for lack of personal jurisdiction and supported their motions with affidavits from each of the companies' officers stating that each company did no business within North Carolina.\textsuperscript{203} The trial court found additional evidence that in the

\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Brown, 681 S.E.2d at 384.
\textsuperscript{197} Id. Since the beginning of this action Goodyear Luxembourg Tires SA has changed its name to Goodyear Dunlop Tires Operations SA. Br. for Pet'rs at 2, Goodyear Dunlop Tires Operations S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76).
\textsuperscript{198} Id. Goodyear Tire & Rubber Company is an Ohio corporation. Id.
\textsuperscript{199} Brown, 681 S.E.2d at 384.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 384-85. Notably, the United States-based parent company did not contest
years from 2004 to 2007, tires manufactured by each of the foreign companies had been shipped into North Carolina, though "not by the original manufacturer."204 The parents of the deceased soccer players submitted evidence from an expert who examined the tire involved in the accident.205 The expert found that the tire on the bus in the accident, as well as the tires shipped to North Carolina, were made for the United States market and had instructions and information on them written in English.206 The trial court denied the motion to dismiss, and its decision was upheld by the North Carolina Court of Appeals.207

In determining that all three foreign Goodyear corporations had the requisite minimum contacts with North Carolina under its long-arm statute,208 Judge Ervin, writing for the three-judge court of appeals panel, found that the foreign Goodyear companies had "continuous and systematic contacts" with the state to justify the assertion of general personal jurisdiction.209 In his opinion, Judge Ervin specifically noted that because "[t]he present dispute is not related to, nor did it arise from, Defendants' contacts with North Carolina," the case "involves general rather than specific

North Carolina's jurisdiction over the company and remains a party to the original action. Br. for Pet'rs, supra note 197, at 4. In fact, the parent company has been registered to do business in North Carolina since 1956, maintains a registered agent in Raleigh, NC, and operates three manufacturing plants in the state. Id. at 5.

204 Brown, 681 S.E.2d at 385-86. Specifically, the trial court found that during that time period 5,906 tires manufactured by Goodyear Turkey, 33,923 tires manufactured by Goodyear France, and 6,402 tires manufactured by Goodyear Luxembourg were shipped to North Carolina for sale through a distribution system orchestrated by the Goodyear parent company. Id.

205 Brown, 681 S.E.2d at 392.

206 Id. at 392-93.

207 Id. at 384. In denying the motion to dismiss, the trial court noted that the foreign companies ""knew or should have known that some of [their] tires were distributed for sale to North Carolina residents"" and that they should have ""reasonably anticipate[d] being haled into court [in North Carolina]" on claims arising anywhere in the world." Br. for Pet'rs, supra note 197, at 5 (internal citations omitted).

208 North Carolina's long-arm statute was intended to reach to the full extent of the constitutional limits on jurisdiction. Brown, 681 S.E.2d at 388. ""By the enactment of [the long-arm statute] it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process."" Dillon v. Numismatic Funding Corp., 231 S.E.2d 629, 630 (N.C. 1977).

209 Brown, 681 S.E.2d at 392-93.
jurisdiction." After establishing that the facts should be analyzed under a general rather than a specific jurisdiction standard, the North Carolina Court of Appeals stated that the key jurisdictional question was "whether [the] Defendants have 'purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina.' The foreign Goodyear entities argued that the stream of commerce doctrine did not apply in instances involving general jurisdiction; however, Judge Ervin noted that the defendants did not cite any North Carolina cases in support of that proposition in their brief, nor was he aware of any such cases.

In what seems to be a deliberate effort by Judge Ervin to frame the opinion in such a way that it would catch the attention of higher courts, the opinion includes an analysis of the way in which North Carolina courts have interpreted the purposeful availment requirement and the stream of commerce doctrine following Asahi. After outlining the basics of the Supreme Court's decisions in World-Wide Volkswagen and Asahi, Judge Ervin notes that prior North Carolina Court of Appeals decisions have "expressly declined . . . to follow the approach to the 'purposeful availment' issue advocated by Justice O'Connor" in Asahi.

Instead of the stream of commerce plus test elaborated in Asahi, the North Carolina Court of Appeals decision purports to follow the analysis used in World-Wide Volkswagen, which requires mere foreseeability as a basis for personal jurisdiction. Under the reasoning in the opinion, once a product is placed into the stream of commerce without any indication that the manufacturer intended to exclude North Carolina from distribution of its

\[\text{\footnotesize \textsuperscript{210}} \text{Id. at 388.}\]
\[\text{\footnotesize \textsuperscript{211}} \text{Id. at 391 (quoting Bush v. BASF Wyandotte Corp., 306 S.E.2d 562, 568 (N.C. Ct. App. 1983)). If the reader understands the distinction between general and specific jurisdiction and the basics of the stream of commerce doctrine, warning bells should be going off at this point.}\]
\[\text{\footnotesize \textsuperscript{212}} \text{Id. at 394.}\]
\[\text{\footnotesize \textsuperscript{213}} \text{See id. at 389-91.}\]
\[\text{\footnotesize \textsuperscript{214}} \text{Brown, 681 S.E.2d at 389-90.}\]
\[\text{\footnotesize \textsuperscript{215}} \text{See Asahi, 480 U.S. at 112 (O'Connor, J., plurality opinion).}\]
\[\text{\footnotesize \textsuperscript{216}} \text{444 U.S. 286 (1980).}\]
\[\text{\footnotesize \textsuperscript{217}} \text{Id. at 298.}\]
product, then the manufacturer should have an expectation that its products will be purchased by consumers in that state. Such a manufacturer has purposefully availed itself of the benefits and privileges of doing business in North Carolina and should reasonably anticipate being subject to the state’s jurisdiction.

Notably, the North Carolina Supreme Court declined to hear the case, denying discretionary appeal in early 2010.\textsuperscript{218}

B. The New Jersey Supreme Court Rewrites the Stream of Commerce Doctrine to Comport with its Vision of the Twenty-First Century Economy

The Supreme Court of New Jersey issued its decision in \textit{Nicastro v. McIntyre Machinery America, Ltd.}\textsuperscript{219} on February 2, 2010. Justice Barry Albin, writing for a five to two majority on the court, held that “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.”\textsuperscript{220} The \textit{Nicastro} case arose from an industrial accident that occurred in Saddle Brook, New Jersey, on October 11, 2001.\textsuperscript{221} Plaintiff Robert Nicastro, a thirty-year employee of Curico Scrap Metal, was injured while operating a McIntyre Model 640 Shear recycling machine used to cut metal.\textsuperscript{222} While cutting a piece of metal, Nicastro’s hand accidentally slipped forward and was caught in the machine’s blade, slicing off four of his fingers.\textsuperscript{223} In 2003, Nicastro initiated a product-liability action in New Jersey Superior Court against the foreign manufacturer and the American distributor of the machine alleging that the shear machine was defective because it did not have a safety guard that would have prevented the accident.\textsuperscript{224}

The machine in question was manufactured by J. McIntyre Machinery, Ltd. (“J. McIntyre”), a British corporation. The

\begin{itemize}
  \item \textsuperscript{218} Brown v. Meter, 695 S.E.2d 756, 757 (N.C. 2010).
  \item \textsuperscript{219} 987 A.2d 575 (N.J. 2010).
  \item \textsuperscript{220} \textit{Id.} at 589.
  \item \textsuperscript{221} \textit{Id.} at 577-78.
  \item \textsuperscript{222} \textit{Id.} at 577.
  \item \textsuperscript{223} \textit{Id.} at 577.
  \item \textsuperscript{224} \textit{Nicastro}, 987 A.2d at 577.
\end{itemize}
shearing machine was sold in the United States through an independent exclusive distributor, McIntyre Machinery America, Ltd. ("McIntyre America"), which was headquartered in Stow, Ohio.\footnote{Id. at 578. McIntyre America filed for bankruptcy in 2001. \emph{Id.} at 578 n.2. The company was granted Chapter 7 bankruptcy on July 23, 2003, before the \emph{Nicastro} case was filed. Br. for Pet'r at 3, J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343). Therefore, McIntyre America never participated in the lawsuit. \emph{Nicastro}, 987 A.2d at 578 n.2.} During the discovery phase of trial, the following relevant information regarding the contacts of the manufacturer were revealed. McIntyre America set up display booths at annual tradeshows in various cities throughout the United States from 1990 to 2005 for the purpose of promoting J. McIntyre product sales within the United States.\footnote{\emph{Nicastro}, 987 A.2d at 579.} Various J. McIntyre employees, including the company president, attended the tradeshows where these booths were set up during that time period to promote the sale of its products.\footnote{\emph{Id.}}

In the mid-1990s, the owner of Curico Scrap Metal attended a tradeshow in Las Vegas, Nevada, and visited the booth set up by J. McIntyre’s exclusive distributor, McIntyre America.\footnote{\emph{Id.} at 578.} Shortly after the trade show, Curico Scrap Metal purchased from McIntyre America the McIntyre Model 640 Shear that was involved in Robert Nicastro’s accident.\footnote{\emph{Id.}} At trial, there was disagreement over whether the written material that accompanied the machine represented that J. McIntyre would undertake maintenance and repair of the machine if it ever required any.\footnote{\emph{Id.} at 578 n.3.} Curico Scrap Metal maintained that it was under the belief that any questions regarding the machine should be directed to J. McIntyre in England, while J. McIntyre itself maintained that it did not provide such services in New Jersey.\footnote{\emph{Nicastro}, 987 A.2d at 578 n.3.}

Following initiation of the action in the New Jersey Superior Court, J. McIntyre entered a motion to dismiss for lack of personal jurisdiction.\footnote{\emph{Id.}} The New Jersey trial court granted the motion to
dismiss the complaint against the foreign manufacturer because the state lacked the authority to exercise personal jurisdiction over the company.\(^{233}\) The trial court supported its decision by stating that the British company had no reason to expect that its products would be “purchased and utilized in New Jersey” and that therefore the stream of commerce doctrine did not apply because the company did not purposefully avail itself of the benefits and protections of New Jersey law.\(^{234}\)

On appeal, Judge Joseph Lisa wrote the New Jersey Appellate Division opinion reversing the trial court’s dismissal of the complaint, noting that jurisdiction over \(J.\) McIntyre “would not offend traditional notions of fair play and substantial justice.”\(^ {235}\) The appellate division based the exercise of jurisdiction by New Jersey courts on Justice O’Connor’s stream of commerce plus theory from \textit{Asahi}.\(^ {236}\) The appellate division went on to outline the differences in the stream of commerce theories put forward by Justice O’Connor and Justice Brennan.\(^ {237}\) In doing so, the appellate division concluded that because the facts surrounding Nicastro’s accident met the more stringent stream of commerce plus test, then it must also satisfy the requirements of Justice Brennan’s less restrictive test.\(^ {238}\) The Court found that \(J.\) McIntyre had intentionally placed the machine into the stream of commerce with the expectation that it might end up in New Jersey, and thus, the company had also “engaged in additional conduct indicating an intent or purpose to serve the New Jersey market.”\(^ {239}\) The appellate division panel highlighted several factors that supported this statement\(^ {240}\) and “emphasized New Jersey’s ‘strong interest in

\(^{233}\) \textit{Id.}

\(^{234}\) \textit{Id.}

\(^{235}\) \textit{Id. at 579-80} (citations omitted).

\(^{236}\) \textit{Nicastro}, 987 A.2d at 580.

\(^{237}\) \textit{Id.}

\(^{238}\) \textit{Id.}

\(^{239}\) \textit{Id. at 580.}

\(^{240}\) \textit{Id.} The Appellate Division noted that,

(1) \(J.\) McIntyre ‘designated McIntyre America as its exclusive distributor for the entire United States,’ and did so ‘for the purpose of selling its machines in all fifty states,’ \ldots; (2) \(J.\) McIntyre knew ‘that McIntyre America was not the end user of the many machines it sold to McIntyre America,’ \ldots; (3) when \(J.\) McIntyre’s management officials attended trade conventions in cities in this
providing a forum for its injured workers’ . . . and the practical benefits of litigating in [the] State” before concluding that jurisdiction was proper.241

J. McIntyre appealed to the New Jersey Supreme Court, which upheld jurisdiction over the British company under New Jersey’s long arm statute.242 From the very start, the opinion by Justice Albin frames the main issue in the case as one that is complicated by the global economy of the twenty-first century.243 The opinion begins with a thought-provoking statement:

Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation’s shores and into our State. The question before us is whether the jurisdictional law of this State will reflect this new reality.244

As the opening lines indicate, the New Jersey Supreme Court felt that it could not ignore the realities of the global marketplace.245 The State supreme court refused to create legal fictions that would ignore the impact of a global marketplace or pretend that a company with a system of worldwide product

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241 Nicastro, 987 A. 2d at 580.
242 A New Jersey court may exercise personal jurisdiction over a non-resident defendant to the outermost limits of federal due process. Id. at 589. “Our long-arm rule, unlike statutes in some other states, permits service on nonresident defendants subject only . . . to the utmost limits permitted by the United States Constitution.” Avdel Corp. v. Mecure, 277 A.2d 207 (N.J. 1971).
243 See Nicastro, 987 A.2d at 577.
244 Id.
245 See id.
distribution was totally unaware that its products might wind up in any state in the Union.\textsuperscript{246} Noting that jurisdiction must always "comport with traditional notions of fair play and substantial justice," the court nonetheless said that jurisdictional analysis "must also reflect... the radical transformation of the international economy."\textsuperscript{247}

After observing that the undisputed facts of the case showed that J. McIntyre had no presence in, or minimum contacts with, the state of New Jersey, Justice Albin noted that the plaintiff's case "must sink or swim with the stream-of-commerce theory of jurisdiction."\textsuperscript{248} With this admonition in mind, Justice Albin wrote that "[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 [the] jurisdiction" of any state in which "one of its defective products is sold to a... consumer, causing injury."\textsuperscript{249} Instead of basing the analysis on whether the manufacturer had control of the distribution scheme, the State supreme court found it more instructive to examine whether the manufacturer had "knowledge of the distribution scheme through which it [received] economic benefits in each state where its products are sold."\textsuperscript{250} Justice Albin wrote that the only way a manufacturer can ensure that it does not become subject to the jurisdiction of the New Jersey courts would be to take reasonable steps to prevent its products from being distributed in that state.\textsuperscript{251}

In McIntyre, the State supreme court found that jurisdiction was proper over J. McIntyre because it "knew or reasonably should have known that its distribution scheme would make its

\textsuperscript{246} See id. at 590-91 ("[W]e discard outmoded constructs of jurisdiction in product-liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.").

\textsuperscript{247} Id. at 591.

\textsuperscript{248} Id. at 582.

\textsuperscript{249} Nicastro, 987 A.2d at 592.

\textsuperscript{250} Id. The state Supreme Court further stated "[a] manufacturer cannot shield itself merely by employing an independent distributor—a middleman—knowing the predictable route the product will take to market." Id.

\textsuperscript{251} Id.
products available to New Jersey consumers." Even though the State supreme court found that the stream of commerce doctrine supported jurisdiction, it maintained that if the company could "present a compelling case that defending a product-liability action in New Jersey would offend traditional notions of fair play and substantial justice" then the defendant could escape being subjected to jurisdiction in New Jersey courts. However, it was clear that the company could not make out such a case. The State supreme court reasoned that it would not be "onerous or an unfair burden" to require the company to defend itself in New Jersey because J. McIntyre’s executives regularly traveled throughout the United States to promote the company’s business interests, and because New Jersey was better suited to handle this particular case than those other locales. The New Jersey supreme court also noted that it had a strong interest in keeping the case in New Jersey because it centered on actions that took place in New Jersey that caused injury to a New Jersey resident by a product purchased for use in a New Jersey workplace. Further, where most of the witnesses were located in New Jersey and the lawsuit would likely be governed by the law of that State.

The opinion concludes with a statement that jurisdictional analysis does not take place in a bubble. According to the New Jersey supreme court:

Due process . . . must reflect the economic and social realities of the day. The exercise of jurisdiction by New Jersey in this case is a reasoned response to the globalization of commerce that permits foreign manufacturers to market their products through

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252 Id. at 593.
253 Id.
254 Nicastro, 987 A.2d at 593. ("Certainly, defending the product-liability action in Ohio, where J. McIntyre’s now-defunct exclusive distributor conducted business, or in Nevada, the site of the 1994 and 1995 trade conventions, would be no more convenient than in New Jersey. Indeed, New Jersey is a shorter distance from England than those locales, and neither the Ohio nor Nevada courts would seem to have an interest in resolving a product-liability action in which an English manufacturer’s product injured a New Jersey resident in New Jersey.").
255 Id. at 593-94.
256 Id. at 594.
distribution systems that bring those products into this State.\textsuperscript{257}

It is obvious from the court’s constant reference throughout the opinion to the “the economic and social realities of the day” that the it felt compelled to deal with complicated jurisdictional issues without reverting to legal fictions of past decades. If nothing else, Justice Albin certainly succeeded in framing the decision in such a way that it caught the attention of the nation’s highest court.

In a well-reasoned dissent, Justice Helen Hoens showed deference to state and federal precedent and concluded that jurisdiction was not supported under the facts in this case.\textsuperscript{258} Justice Hoens argued that the majority had failed to follow New Jersey precedent as it related to the stream of commerce doctrine.\textsuperscript{259} He noted that well-established New Jersey precedent held that mere placement of a product into the stream of commerce alone was not enough to trigger personal jurisdiction over a manufacturer.\textsuperscript{260} Under Justice Hoens’ analysis, neither would the facts of the \textit{Nicastro} case support jurisdiction under either of the two tests for personal jurisdiction detailed in \textit{Asahi}.\textsuperscript{261}

The dissent went on to point out that the majority opinion would effectively subject a foreign manufacturer to New Jersey’s jurisdiction even if the manufacturer had never targeted New Jersey residents and had no other actual contact with the state.\textsuperscript{262} Finally, Justice Hoens addressed the majority’s reliance on the realities of operating in a global economy by stating that the decision “avoids faithful application of the fundamental fairness concerns that have long guided this Court, and the United States Supreme Court, by relying on circular rhetoric about the global economy.”\textsuperscript{263}

Justice Roberto Rivera-Soto joined in Hoens’ dissent, but also wrote a separate dissent that chastised the majority for reaching its decision in a manner that conflicted with well-settled constitutional law, and suggested that the majority

\begin{footnotes}
\item[257] \textit{Id.}
\item[258] \textit{See id.} at 594-95 (Hoens, J., dissenting).
\item[259] \textit{Nicastro}, 987 A.2d at 596-97.
\item[260] \textit{Id.} at 597.
\item[261] \textit{Id.}
\item[262] \textit{Id.} at 603.
\item[263] \textit{Nicastro}, 987 A.2d at 605 (Hoens, J., dissenting).
\end{footnotes}
decision was "ripe for review and correction by the Supreme Court of the United States."\textsuperscript{264}

IV. Before the Highest Court in the Land: \textit{Goodyear} and \textit{McIntyre}

Crafting lower court decisions in such a way as to catch the eye of the United States Supreme Court is no easy task. Far more petitions by litigants are denied certiorari from the Court than are granted an opportunity to be heard. In both \textit{Goodyear} and \textit{McIntyre}, the lower court opinions were sufficiently intriguing and the briefs submitted by the parties framed the issues involved in the case as significant enough for the Court to take interest. On September 28, 2010, the Court granted the petitions for certiorari for both the \textit{Goodyear} and \textit{McIntyre} cases, but specified that the cases were to be argued in tandem.\textsuperscript{265} On June 27, 2011, the Court issued its decisions in both cases. While \textit{Goodyear} does clarify that the stream of commerce doctrine is not applicable to general jurisdiction analysis, neither decision provides the degree of clarity going forward that practitioners had hoped for when the Court agreed to hear the cases in tandem at the beginning of the term.\textsuperscript{266}

A. Goodyear Dunlop Tires S. A. v. Brown

1. Goodyear Oral Argument

At oral argument, petitioner Goodyear's attorney began by stressing that his clients were foreign companies that do not conduct any business in North Carolina.\textsuperscript{267} He was interrupted when he asserted that if the lower court decision were to stand, "every significant seller of products would be subject to suit everywhere on any claim arising anywhere."\textsuperscript{268} The first question came from Justice Ruth Ginsberg, possibly foreshadowing the fact that she would later write the Court's opinion. She wished to

\textsuperscript{264} \textit{Id.} (Rivera-Soto, J., dissenting).


\textsuperscript{266} \textit{See} discussion infra Parts IV.A. – B.

\textsuperscript{267} \textit{Tr. of Oral Arg. at 3}, Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76) [hereinafter Goodyear \textit{Tr. of Oral Arg.}].

\textsuperscript{268} \textit{Id.} at 3-4.
clarify that petitioners were not contesting jurisdiction over the parent Goodyear corporation. Petitioners’ attorney answered that there was no objection to jurisdiction over the parent and later clarified the distinction between a subsidiary and an agent. Throughout the argument, several Justices returned to the issue of liability over the parent corporation; in fact, much of the oral argument period was related to the relationship between the parent and its subsidiaries. It is obvious from the Justices’ questions that they felt it would be difficult to use the facts of the case to clarify the jurisdictional split on the stream of commerce doctrine without also dealing with the parent-subsidiary relationship between Goodyear and its foreign subsidiaries. Justice Scalia made this clear when he noted that unless the parent-subsidiary question was clarified, it would be difficult to write the “opinion that the world is waiting for.”

When asked point blank why the respondents were so anxious to go after the foreign subsidiaries when the parent company did not contest jurisdiction, the attorney for respondents answered that “North Carolina has particularly Draconian requirements for piercing the corporate veil and alter ego” such that it would be difficult to establish proximate cause and other necessary elements for recovery. This answer gets to the heart of the conflict the respondents had to deal with between the realities of operating in a global economy and navigating the complicated protections provided by the personal jurisdiction doctrine. In general, the petitioners’ attorney agreed that under North Carolina law, it would be difficult to establish grounds for the plaintiffs to recover in North Carolina.

When the Court asked about the appropriateness of the North Carolina Court of Appeals basing its justification for general

269 Id. at 4.
270 Id.
271 Id. at 6-7.
273 Id. at 8.
274 Id. at 37.
275 See id.
jurisdiction on the stream of commerce analysis traditionally reserved for specific jurisdiction fact patterns, respondents’
attorney replied that it was an incorrect interpretation of the law
that was a “detour” from established doctrine.\(^{276}\) Despite this
concession, respondents’ attorney still felt general jurisdiction was
proper in this case because “the defendant was part of a
continuous business system or enterprise” that conducted general
business in North Carolina.\(^{277}\) Justice Ginsburg was not satisfied
that the activities of the foreign Goodyear entities were enough to
justify general jurisdiction in North Carolina.\(^{278}\) She seemed
particularly uncomfortable with the thought that three foreign
subsidiaries could “be sued on any and all claims” in North
Carolina.\(^{279}\) Justice Sonia Sotomayor expressed a slightly different
corn when she asked whether respondents were asking the
Court to create a “reverse principal-agent” theory that would allow
jurisdiction on the basis that the subsidiary companies had used
the parent company as an agent without actually making it an
official agent.\(^{280}\)

There was also a brief argument by an attorney from the
United States Solicitor General’s office that echoed the
jurisdictional concerns of the petitioners. The fact that the United
States chose to weigh in on the issues in this case supports the
significance of this case to foreign corporations. While the United
States’ argument simply echoed many of the arguments for lack of
personal jurisdiction that were put forward by the petitioners, the
brief submitted by the United States clearly stressed that finding
jurisdiction over the foreign Goodyear manufacturers could
“potentially threaten the United States foreign trade and
diplomatic interests.”\(^{281}\) After paying lip service to North
Carolina’s interest in providing a forum for its citizens, the United
States claimed that the “exercise of jurisdiction here exceeds what

\(^{276}\) Id. at 24.

\(^{277}\) Goodyear Tr. of Oral Arg., supra note 267, at 27.

\(^{278}\) Id. at 33-34.

\(^{279}\) Id.

\(^{280}\) Id. at 35.

many nations would recognize as reasonable." At oral argument, an Assistant Solicitor General pointed out that the United States was interested in the outcome of the Goodyear case because of its great "magnitude."

While the magnitude of the case might have been great, it was clear by the end of oral argument that the Justices were of a mind jurisdiction over the foreign tire manufacturers was not proper; and regardless of whom the Court chose to write Goodyear, it was clear that there would be a high degree of concurrence among the members. There was also an overarching sense that the Court was ready to move on with the Goodyear case so that it could get to more complicated issues.

2. Goodyear: There's No Place Like Home

Writing for a Court that unanimously agreed to reverse the decision from the North Carolina Court of Appeals, Justice Ginsberg began with a clear declaration that the opinion would be about general jurisdiction and nothing else. Any hope that the Court might use Goodyear to clarify a broader spectrum of issues in the personal jurisdiction realm was dashed by the opening lines of the opinion. Nonetheless, a clear line between specific and general jurisdiction was needed, and it is good the Court spent time on the point. The lower court decision made it evident that the two types of personal jurisdiction can be confused

282 Id. at 30.
284 See id.
285 See id.
287 Id. at 2850 ("We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?"). The Goodyear decision dismissed without discussion of the merits the contention by respondents' attorney that the Court should "pierce Goodyear corporate veils" in order to view the foreign Goodyear companies and Goodyear USA as a single entity for jurisdictional purposes. Id. at 2857. Justice Ginsberg noted that the respondents had not brought up this argument before the lower court or in their brief in response to the petition for certiorari, thereby forfeiting that argument in front of the highest court in the land. Id.
288 Id.
289 See Rhodes, supra note 3, at 818-19.
and the tests for each incorrectly applied. The Goodyear opinion sends the overarching message that the use of the stream of commerce doctrine to assert general jurisdiction over defendants directly opposes the intent of the Court. The decision, which clearly denounces the North Carolina Court of Appeals’ position, provides international companies with “fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.”

Following a brief description of the case, the Court summarized the differences between general and specific jurisdiction. General jurisdiction is appropriate in forums where the defendant is “essentially at home.” Specific jurisdiction “depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”

The two types of jurisdiction are vastly different in that once general jurisdiction is established, the defendant can be prosecuted in the forum on any cause of action, whereas specific jurisdiction is limited to issues or controversies that give rise to a particular cause of action.

The first hint, besides the Court’s unanimity, that the decision would not favor the respondents is a line suggesting that the North Carolina Court of Appeals had “confus[ed] or blend[ed] general and specific jurisdictional inquiries.” Clearly it would be difficult to find general jurisdiction over the petitioners under the facts of the case at hand:

See Brown v. Meter, 681 S.E.2d 382, 391-92 (N.C. Ct. App. 2009); see also Rhodes, supra note 3, at 837-38 (“It is not uncommon for a general jurisdiction opinion to draw parallels on the substantiality of contacts from specific jurisdiction cases, despite the oft-recognized maxim that a more stringent test must be employed for general jurisdiction. Without a coherent decisional foundation, precedential comparisons will only deepen the mire in the swamp.”).


See Goodyear, 131 S. Ct. at 2851.

Id. at 2851 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)). This language regarding a defendant’s “home” is new and intriguing, but ultimately will cause increased confusion as discussed below.

Id. (quoting von Mehren & Trautman, supra note 96, at 1136).

Id.

Id.
[P]etitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. . . . Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.298

Even assuming, as the North Carolina Court of Appeals did, that some of the tires made by the foreign Goodyear entities had entered North Carolina through a distribution scheme, the Court held that “[a] connection so limited between the forum and the foreign corporation . . . is an inadequate basis for the exercise of general jurisdiction.”299 The Court cautioned that traditional concepts of specific jurisdiction, such as the stream of commerce analysis, should not be imported into the general jurisdictional inquiry.300 Therefore, the Court provided a clear message that the stream of commerce analysis does not apply in general jurisdiction cases and unanimously held that the foreign Goodyear defendants were not properly subject to the jurisdiction of North Carolina courts under a stream of commerce theory with respect to the bus accident in France.

It would have been better had the Court stopped with that basic holding, but the Court may have unintentionally muddled the general jurisdiction waters further by introducing some metaphorical language to explain under what circumstances general jurisdiction might be appropriate. As Justice Ginsburg summarized: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”301

298 Id. at 2852.
299 Goodyear, 131 S. Ct. at 2851.
300 Id. at 2855 (“The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction.”).
301 Id. at 2853-54 (citing Lea Brilmayer et al., A General Look at General Jurisdiction, 66 TEX. L. REV. 723, 728 (1988)). Brilmayer’s article identifies domicile,
The question then becomes, where is a corporation’s metaphorical home for purposes of general jurisdiction? The Court clearly did not find that the Goodyear foreign entities were at home in North Carolina under the facts of the case, but unfortunately, the Court never expanded upon what the “home test” means in a way that would provide much guidance to future litigants dealing with facts different than those at issue in Goodyear. Instead, the Court pointed back to a seminal case as the textbook example of an appropriate assertion of general jurisdiction over a foreign corporation: “Unlike the defendant in Perkins, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina.”

While the idea of home connotes a single place in day-to-day conversation, and while the mining company in Perkins conducted its activities from a “sole” location, the Court in Goodyear clearly did not mean to imply that a business is at home in only one location. The Court cited Brilmayer’s article, which posits that general jurisdiction would be appropriate over a corporation in at least two places: the place of incorporation and the principal place of business. While the Court made clear that general jurisdiction is not limited to only one place, there will likely be confusion going forward regarding whether general jurisdiction under the “home test” would be appropriate in more than the two places listed by Professor Brilmayer. This is because in the sentence directly following the one in which the Court found that the Goodyear petitioners were not “at home in North Carolina,” the Court noted that the Goodyear petitioners did not have the place of incorporation, and principal place of business as the paradigmatic bases for the assertion of general jurisdiction. Brilmayer, supra, at 728.

302 Id. at 2856. The Court compared the lack of ties of the Goodyear foreign companies with North Carolina to the insufficient ties to Texas discussed in Helicopteros. Id. (“We see no reason to differentiate from the ties to Texas held insufficient in Helicopteros, the sales of petitioners’ tires sporadically made in North Carolina through intermediaries. . . . North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction.”).

303 See Goodyear, 131 S. Ct. at 2856.

304 Id. at 2856-57.

305 Id. at 2853-54.

306 Id.

307 See id.; Brilmayer, supra note 301, at 728.
“continuous and systematic general business contacts” necessary for general jurisdiction. 308 By connecting the new “home test” with the traditional test for continuous and systematic general business contacts, the Court seemed to imply that, depending on a corporation’s business structure and operations, there may be an infinite number of places where a business could be found at home for purposes of general jurisdiction.

At the same time, the Court limited where a defendant could be found at home by rejecting the lower court’s “sprawling view” of general jurisdiction under which “any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.” 309 That statement implies that a defendant’s home for purposes of general jurisdiction means something more than intentionally distributing a product in the forum. At the very least, it would seem that a company must have formally registered to do business in a state, established a physical presence in the state, appointed agents in the state, and so on before general jurisdiction might attach. However, it is possible that even those types of forum activities would not be enough for the home test of general jurisdiction. Certainly those examples are not as continuous and systematic as the paradigms of place of incorporation and principal place of business, nor are they as substantial as having a home office in the state, as in Perkins. 310 Therefore, the home test for general jurisdiction would be satisfied by a fact pattern that falls somewhere between the vast spectrum of Goodyear, where there were virtually no attenuated contacts with the forum, at the lower end, and Perkins, where the corporation had its sole headquarters in the forum, at the upper end.

To illustrate the problem, think about McDonald’s, which is incorporated in Delaware and has its corporate headquarters in Illinois. 311 McDonald’s has a significant physical presence in

308 Goodyear, 131 S. Ct. at 2857 (internal quotations omitted).
309 Id. at 2856-57.
311 See Restated Certificate of Incorporation of McDonald’s Corporation (June 1, 2011) (on file with author), available at http://www.aboutMcDonald’s.com/etc/medialib/aboutMcDonald’s/corporate_governance/articles_of_incorporation.Par.74089.File.dat/RESTATED.pdf.
every state in the nation, indeed throughout most of the industrialized world. If a North Carolinian were injured in California by a scalding hot cup of McDonald’s coffee, then he could presumably sue McDonald’s under a theory of general jurisdiction at its Delaware “home” or at its Illinois “home” (he could also sue in California under a theory of specific jurisdiction since the cause of action would have arisen out of activities that took place there). But what if he wanted to sue in North Carolina because of the inconvenience of having to travel to one of those other states to prosecute his claim against the company? To proceed in North Carolina the fictional plaintiff would have to bring suit under a theory of general jurisdiction claiming that McDonald’s also had a home in North Carolina. Given that McDonald’s likely does millions of dollars in sales each year through its physical stores across North Carolina, this does not seem to be a far-fetched theory. McDonald’s contacts with the forum of North Carolina are certainly more continuous, systematic, and substantial than those of the foreign Goodyear entities, although maybe not as continuous, systematic, and substantial as the contacts of the mining company in Perkins with Ohio. Do McDonald’s contacts make them at home in North Carolina or are they simply on an extended vacation stay there?

That the Court did not further narrow the home test parameters for general jurisdiction is unsurprising given that the decision below was so clearly incorrect. The Court appropriately dealt with the issues in front of it and moved on; in doing so, the Court made it clear that stream of commerce analysis does not apply in general jurisdiction cases. Nonetheless, in light of the decision’s precedential effect, it is frustrating that the Court did not provide a blueprint outlining how to construct, or avoid unintentionally constructing, a jurisdictional home for corporations. Lower courts and the attorneys who practice in front of them must now frame up jurisdictional homes with the understanding that they are building on shaky ground that might collapse beneath their feet. On the bright side, corporations can take some comfort in knowing that state courts cannot use the stream of commerce, which has risen steadily over the past decades, to threaten jurisdictional home

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313 Goodyear, 131 S. Ct. at 2857.
construction based on a theory of general jurisdiction.

B. J. McIntyre Machinery, Ltd. v. Nicastro

1. McIntyre Oral Argument

Throughout the oral argument by both parties, members of the Court posed a number of questions and hypothetical situations evincing its desire to really figure out which facts should turn the case and what limitations should be placed on the stream of commerce doctrine. More so than in Goodyear, the McIntyre oral argument highlighted the Court’s difficulty in grappling with the complicated jurisdictional issues at play in the case. The main issue seemed to be whether there should be a national standard allowing jurisdiction in any state in the United States over foreign manufacturers that target the entire United States without specifying or avoiding particular states for their sales.  

At argument, the attorney for petitioners barely got out an entire sentence before Justice Scalia asked the first question. Justice Scalia set the tone for much of the rest of the argument when he asked about the relationship between J. McIntyre, the British manufacturer, and McIntyre America, the domestic distributor. Throughout the argument several Justices seemed very interested in the amount of control that J. McIntyre exhibited over its American distributor. Petitioners’ attorney conceded that J. McIntyre wanted its distributor in the United States to sell as many J. McIntyre products as possible, but held fast to the line that J. McIntyre had made no attempt to target any specific state, including New Jersey. It was the distributor’s choice as “market manager” where to actually sell products in the United States. The petitioner’s attorney felt that the Court’s jurisprudence made it clear that jurisdiction may only attach by a “direct act” of a foreign manufacturer that “look[s] toward a specific State.”

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315 Id.
316 See id. at 3-4.
317 Id. at 4-5.
318 Id. at 5.
319 McIntyre Tr. of Oral Arg., supra note 314, at 6.
When asked by Justice Ginsburg where in the United States jurisdiction would be appropriate against J. McIntyre, petitioners’ attorney answered that Ohio would be an appropriate venue because that is where its American distributor was located and where J. McIntyre had direct contact with the United States. However, the attorney became so tripped up trying to explain why jurisdiction in Ohio would be appropriate in an action that involves specific and not general jurisdiction that Justice Scalia interrupted him by stating, “I don’t think it’s worth your time, because frankly it doesn’t make a whole lot of difference to me whether they can sue in Ohio or not.”

The respondents’ attorney began by reminding the Court that the manufacturer purposefully availed itself of the entire United States market and knew or should have known that it could be haled into court in any jurisdiction where its products were sold. Upon being questioned about this theory, respondents’ attorney elaborated that putting a product into the stream of commerce by itself was not enough to confer jurisdiction in every state in which a plaintiff is injured by a foreign manufacturer’s product without “some additional conduct, some concrete steps taken.” In this case, respondents’ attorney noted that the additional conduct by J. McIntyre consisted of attending trade shows and hiring an exclusive distributor to sell in the United States. According to the respondents, these actions or others like them, such as designing the product for the forum, coupled with injury in the forum, should combine to allow jurisdiction over foreign manufacturers.

There were several policy concerns mentioned by the Court throughout the respondents’ argument. Justice Breyer expressed a significant concern with creating a rule that “subjects every small business ... in every developing country to have to be aware of the law in 50 States simply because they agreed to sell to an independent company who is going to sell to America.”

320 Id. at 8-10.
321 Id. at 13.
322 See id. at 26-27.
323 See id. at 28-32.
324 McIntyre Tr. of Oral Arg., supra note 314, at 32.
325 Id. at 30.
Breyer noted that such a policy would impede world development.\textsuperscript{326} Both Justices Ginsburg and Scalia indicated their concern that finding that jurisdiction was proper over J. McIntyre might open the door for other nations to insist that the United States begin recognizing the assertion of jurisdiction over American companies based on skeptical jurisdictional models in those foreign nations: Justice Scalia described the potential landscape in the aftermath of such a decision as "a little scary."\textsuperscript{327}

Another interesting theme of the argument that received little discussion in the parties' briefs was the potential effect that modern Internet communication has on the question of jurisdiction.\textsuperscript{328} The Justices were curious whether some level of Internet activity between a product manufacturer and buyer would create purposeful availment of the benefits and privileges of a forum state. Respondents' attorney noted that he had deliberately not briefed the Internet complications, but attempted to answer the Justices' questions based on his theory of purposeful availment.\textsuperscript{329} Respondents' attorney characterized the key to finding jurisdiction based on Internet sites as whether the site is interactive.\textsuperscript{330} If the customer can "press buttons on his computer and complete the transaction with the result that the product comes to New Jersey," then jurisdiction is proper.\textsuperscript{331} In contrast, if the website is more like a "billboard," then it is just "pure advertising" and insufficient to support jurisdiction.\textsuperscript{332}

At the end of argument it was clear that there were persuasive arguments on both sides and that the Court could potentially go either way. The Court appeared to be divided as to whether or not targeting the entire United States could support specific jurisdiction in individual states. There certainly appeared to be at least two general factions among the Court.\textsuperscript{333} The faction made up of Justices Ginsburg, Kagan, and Sotomayor seemed more

\textsuperscript{326} See id. at 31.
\textsuperscript{327} Id. at 36.
\textsuperscript{328} See id. at 37, 55.
\textsuperscript{329} McIntyre Tr. of Oral Arg., supra note 314, at 55.
\textsuperscript{330} Id.
\textsuperscript{331} Id. at 57-58.
\textsuperscript{332} Id. at 56.
\textsuperscript{333} See id.
inclined to allow jurisdiction over J. McIntyre. The faction made up of Justices Alito and Scalia, and Chief Justice Roberts seemed less inclined to permit jurisdiction. The difference in these two main factions centered on whether actual knowledge by the British manufacturer that its machinery would be sold in New Jersey was necessary to the stream of commerce theory. As usual, Justice Thomas did not ask any questions so it was impossible to judge his impression from the oral argument transcripts. Both Justices Breyer and Kennedy seemed to straddle the fence with their questions and comments; Justices Breyer and Kennedy were also the two Justices who expressed the most concern about the policy implications of allowing the New Jersey courts to extend jurisdiction over J. McIntyre. More so than any of the other Justices, Justice Breyer seemed to be very uncertain of his feelings about the case. At one point during the discussion, Justice Breyer acknowledged that the case was complicated when he stated, "I mean, I'm nervous. I see a lot of rather deep issues here, and... that's what [is] making me nervous."

2. McIntyre: Another Divided Decision

When the Court released a divided plurality opinion on June 27, it was immediately obvious that McIntyre was unlikely to clean up the jurisdictional landscape in the way that practitioners had hoped when the Court accepted certiorari. While the Court did reverse the decision of the court certiorari, it did so with a 4-2-3 split. Justice Kennedy, joined by Chief Justice Roberts, and Justices Scalia and Thomas, announced the reversal of the lower court decision and delivered the plurality opinion. Justice Breyer, joined by Justice Alito, issued a concurring opinion. Justice Ginsburg, joined by Justices Kagan and Sotomayor, wrote a dissent. While disappointing, the breakdown is not that surprising given the tenor of questioning at oral argument.

334 See discussion infra Part IV.B.2.c.
335 See discussion infra Part IV.B.2.b.
336 See discussion infra Parts IV.B.2.a.-b.
337 McIntyre Tr. of Oral Arg., supra note 314, at 35.
339 See id. at 2785.
a. The Kennedy Plurality

The Kennedy plurality almost immediately acknowledged that the Court's past decision in Asahi had muddled the jurisdictional waters through use of the stream of commerce metaphor. In an attempt to acknowledge the confusion that past decisions had created, Justice Kennedy noted that while the New Jersey Supreme Court was incorrect in its holding and application of the stream of commerce doctrine, "[t]his Court's Asahi decision [might have been] responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity."  

Justice Kennedy then went into a discussion of the due process concerns at play in cases like the one before the Court. In all situations, due process mandates that maintenance of a suit not offend "traditional notions of fair play and substantial justice." This requires that the defendant have sufficient contacts with the forum such that the defendant can be said to have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." "[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter." However, under the theory of specific jurisdiction a corporation "submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the [corporation’s] activities touching on the State."

Justice Kennedy then expounded at length upon the confusion created by Asahi:

The imprecision arising from Asahi, for the most part, results in

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341 Id. at 2785-86 ("The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in Asahi.") (internal citations omitted).
342 See McIntyre, 131 S. Ct. at 2786-87.
343 Id. at 2787 (citations omitted).
344 Id. (internal quotation marks and citation omitted).
345 Id.
346 Id. at 2788.
from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum... The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.347

Subsequently, the plurality rejected the Brennan concurrence approach to the stream of commerce doctrine in Asahi, which suggests that jurisdictional decisions may be based on notions of "fairness and foreseeability."348 Justice Kennedy found fault with Brennan's contention that

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.349

347 McIntyre, 131 S. Ct. at 2788 (internal citations omitted).
348 Id.
349 Id. (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., concurring)).
Rejecting Brennan's theory, the plurality found that the authority to exercise personal jurisdiction over a defendant is a "forum-by-forum" decision based not on a defendant's expectations, but upon his actions.\textsuperscript{350} "The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."\textsuperscript{351} Mere foreseeability was rejected as a criterion for judging whether personal jurisdiction might be appropriate.\textsuperscript{352}

This is consistent with Justice O'Connor's opinion in \textit{Asahi} that purposeful availment, and purposeful availment alone, of the benefits and privileges of the sovereign is the key to deciding whether a defendant should be subjected to the authority of a court.\textsuperscript{353} As Justice Kennedy wrote, "Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."\textsuperscript{354} The primary question in jurisdictional cases is not one of fairness; it is a question of whether a defendant, by his or her activities, has manifested an intention to submit to a sovereign's power.\textsuperscript{355}

Applying Justice O'Connor's purposeful availment theory of jurisdiction to the facts at hand, the plurality concluded that J. McIntyre had not purposefully directed any conduct at the forum of New Jersey.\textsuperscript{356} The facts evinced no contacts between the British manufacturer and the forum of New Jersey other than the single machine that had ended up in the factory where respondent was injured.\textsuperscript{357} Rather, all that the facts showed was a desire by J. McIntyre to direct its "marketing and sales efforts at the [entire] United States," and it "is petitioner's purposeful contacts with

\textsuperscript{350} \textit{Id.} at 2789.
\textsuperscript{351} \textit{Id.}
\textsuperscript{352} See \textit{McIntyre}, 131 S. Ct. at 2788.
\textsuperscript{353} \textit{Id.} at 2790; see also \textit{Asahi}, 480 U.S. at 112.
\textsuperscript{354} \textit{McIntyre}, 131 S. Ct. at 2787.
\textsuperscript{355} See \textit{id.}
\textsuperscript{356} \textit{Id.} at 2790-91.
\textsuperscript{357} See \textit{id.} at 2790.
New Jersey, not with the United States, that alone are relevant.\textsuperscript{358} The Court held that because J. McIntyre did not engage in any specific activities in or toward New Jersey that revealed "an intent to invoke or benefit from the protection of its laws [the forum] is without power to adjudge the rights and liabilities" of the British manufacturer.\textsuperscript{359} Therefore, New Jersey’s exercise of jurisdiction in this context violated the principles of due process.\textsuperscript{360}

While Justice Kennedy started the plurality opinion with a clear acknowledgement and seeming desire to rectify the confusion caused by the dueling theories of the stream of commerce in \textit{Asahi},\textsuperscript{361} he conceded in his writing that there will be further work to do on this subject following the \textit{McIntyre} opinion.\textsuperscript{362} The holding "that the authority to subject a defendant to judgment depends on purposeful availment... does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases."\textsuperscript{363} Personal jurisdiction questions must be analyzed in light of the conduct and economic realities present in individual cases.\textsuperscript{364} Each case must be decided on its own merits, and by this process "judicial exposition will, in common-law fashion, clarify the contours" of purposeful availment.\textsuperscript{365} This is an encouraging line, but without an actual majority opinion from the Court, judicial exposition at the lower court level is just as likely to muddy the waters as it is to set things straight.

\textit{b. The Breyer Concurrence}

By contrast, Justice Breyer, joined by Justice Alito, would not accept \textit{McIntyre} as a vehicle to begin clearing up some of the confusion left in the wake of \textit{Asahi},\textsuperscript{366} though he did agree with the plurality that the lower court should be reversed.\textsuperscript{367} Noting rapid

\begin{itemize}
\item \textsuperscript{358} \textit{Id.}
\item \textsuperscript{359} \textit{See McIntyre,} 131 S. Ct. at 2791.
\item \textsuperscript{360} \textit{Id.}
\item \textsuperscript{361} 480 U.S. 102 (1987)
\item \textsuperscript{362} \textit{See McIntyre,} 131 S. Ct. at 2791.
\item \textsuperscript{363} \textit{Id.} at 2790.
\item \textsuperscript{364} \textit{See id.}
\item \textsuperscript{365} \textit{Id.}
\item \textsuperscript{366} 480 U.S. 102 (1987).
\item \textsuperscript{367} \textit{See McIntyre,} 131 S. Ct. at 2791 ("I agree with the plurality that the contrary
changes to modern commerce and communication, Justice Breyer wrote that it would be “unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.” In his view, the case could be reversed solely on Court precedent because it seemingly did not present any novel concepts requiring a new rule. Precedent dictated that “a single isolated sale, even if accompanied by the kind of sales effort indicated here, is [not] sufficient” to support jurisdiction. Without some greater evidence of a desire to serve the New Jersey market, there could be no jurisdiction over J. McIntyre under either version of the stream of commerce theory. Therefore, there was no reason to create “strict rules that limit jurisdiction” as the plurality did.

Justice Breyer did indicate that he expected (hopefully in the near future) a case to come before the Court that will serve as a suitable vehicle to refashion the current jurisdictional conundrum. That case would contain more complicated jurisdictional issues such as Internet sales, marketing through the use of popup advertisements, or distribution through an intermediary like Amazon.com. Justice Breyer conceded that arguments, including one by the Solicitor General of the United States, in that type of case might very well bring about a change in the law as it currently stands.

judgment of the Supreme Court of New Jersey should be reversed.”) (Breyer, J., concurring).

368 Id.
369 See id.
370 Id. at 2792 (“[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.”)
371 See id.
372 McIntyre, 131 S. Ct. at 2793.
373 See id. at 2792-93.
374 Id. at 2793.
375 Id. at 2794 (“I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances. Insofar as such considerations are relevant to any change in present law, they might be presented in a case (unlike the present one) in which the Solicitor General participates”).


c. The Ginsburg Dissent

The dissenting Justices, led by Justice Ginsburg, would have held that jurisdiction over the British manufacturing company was appropriate based on what she called principles of fundamental fairness. In rebuke of the six Justices who held that jurisdiction was not proper over J. McIntyre, Justice Ginsburg wrote:

Inconceivable as it may have seemed yesterday, the splintered majority today turn[s] the clock back to the days before modern long arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.

This view is overly dramatic given that the fractured majority opinion falls far short of a comprehensive solution to the questions facing lower courts and practitioners. In any case, not even the Kennedy plurality implied that using an independent distributor would absolve a defendant of all liability in all cases.

Not surprisingly, the “story” behind the case is prominently featured in Justice Ginsburg’s dissent. The dissent conducted a thorough review of J. McIntyre and its American distributor, and also provided an overview of the scrap metal recycling industry in the United States. The focus on J. McIntyre’s business and marketing efforts was tailored to show what Justice Ginsburg saw as the company’s desire to market and sell its metal recycling equipment throughout the United States, and by extension in every individual state. In the dissenting Justices’ view, the American distributor should not have shielded the British

376 See McIntyre, 131 S. Ct. at 2795.
377 Id. (internal quotations and citations omitted) (Ginsburg, J., dissenting).
378 See id. at 2788-89.
379 See id. at 2795-97 (noting evidence such as references to America in the company’s product brochures, instruction manuals, and other material as well as a letter by J. McIntyre’s president that implied the company’s goal was to sell its products in America).
380 See id. at 2801 (“[B]y 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 . . . [but] the market of all States.”).
manufacturer from liability in individual states. The dissent also provided some interesting information about New Jersey, namely that in 2008, more recycled scrap metal was processed in New Jersey than in any other American state. Surely, Justice Ginsburg posited, J. McIntyre intended that its scrap metal recycling machinery be used in the state that recycled the most scrap metal. The weight of the evidence led Justice Ginsburg to conclude that “[t]he machine [that injured respondent] arrived in . . . New Jersey . . . not randomly or fortuitously, but as a result of the U.S. connections and distribution system that [J.] McIntyre UK deliberately arranged.”

One of the main contentions the dissent had with the plurality opinion is the belief that “the constitutional limits on a state court’s adjudicatory authority derive from considerations of due process [i.e., fairness and foreseeability], not state sovereignty.” In the dissent’s view, the entire idea behind the Court’s modern approach to jurisdiction over corporations is based on principles of reason and fairness. Justice Ginsburg wrote that the facts in McIntyre were representative of the types of marketing and distribution schemes common in the modern global economy. Therefore, the dissent held that it was “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.”

In the final lines of the dissent, Justice Ginsburg took a parting shot at the six Justices who made up the fractured majority. She

381 See McIntyre, 131 S. Ct. at 2796-97 (citing a letter from J. McIntyre to McIntyre America purporting to assure the distributor that the British manufacturer would take responsibility for any problems with the manufacturer’s machines).
382 Id. at 2795 (“New Jersey recycling facilities processed 2,013,730 tons of scrap iron, steel, aluminum, and other metals—more than any other State”).
383 Id. at 2801 (“How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?”).
384 Id. at 2797.
385 Id. at 2798.
386 McIntyre, 131 S. Ct. at 2800.
387 Id. at 2799-800.
388 See id. at 2800.
389 See id. at 2804.
reminded them that the lower court might have been reversed, but ultimately the decision changed little regarding personal jurisdiction analysis. She wrote, "[w]hile I dissent from the Court’s judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the ‘notions of fair play and substantial justice.’"390

V. Conclusions

In the Goodyear391 and McIntyre392 cases, the Court had one of its best opportunities to clear the murky waters of the stream of commerce theory of personal jurisdiction. To say it missed that opportunity entirely would not give the Court its due credit, but surely practitioners and lower courts have a right to be disappointed that the confounding plurality opinions in Asahi393 have been replaced by yet another set of plurality opinions on the same basic subject. While the nuances of the Court’s decision and what the Court could or should have done will surely engender significant academic and legal scholarship until the next time the Court chooses to address personal jurisdiction, corporate players in the global economy are left to pick up the pieces left behind in Goodyear and McIntyre in order to structure their business operations for the here and now. With that in mind, I turn now to what corporations with multi-state and international operations should take away from these decisions.

In Goodyear, the Court explained the basic difference between general and specific jurisdiction and emphatically held that the stream of commerce analysis does not apply to general jurisdiction.394 While helpful as a point of practice, it was an all but inevitable outcome as several federal circuits and state high courts in the past have uniformly adopted the bright-line rule that a defendant’s mere placement of a product into the stream of commerce cannot support an assertion of general jurisdiction over that defendant.395 A corporate defendant’s systematic and

390 Id.
394 131 S. Ct. at 2857.
395 See, e.g., D’Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd., 566
continuous contacts with a forum must be substantial in order for a forum to invoke general jurisdiction. While the "home test" outlined by Justice Ginsburg might provide lower courts with a chance to expand (incorrectly in my view) general jurisdiction under certain facts, in most instances, foreign corporations can rest easy given that the systematic and continuous contacts necessary to assert general jurisdiction will be found only in a place of incorporation or a principal place of business.396

McIntyre,397 which is clearly a more difficult case, presented the Court with the chance to clarify the stream of commerce doctrine as it applies in specific jurisdiction situations. From the start, the impact of this case was likely to be more consequential, as questions of specific jurisdiction over non-forum defendants arise much more frequently in the lower courts. A fractured majority of the Court signaled that a foreign corporation may take certain steps to circumvent a forum’s specific jurisdiction, even though damage to the plaintiff occurred within the state.398 The chief action that foreign manufacturers should take to limit a forum’s jurisdiction is to conduct sales in the United States through an independent nationwide distributor. In McIntyre, the British manufacturer conducted its sales through an independent American distributor, so it stands to reason that other foreign corporations would benefit equally from the use of an independent distributor. Use of an independent distributor does not necessarily mean that a manufacturer must relinquish all control over where its products end up. McIntyre supports the idea that a manufacturer may target the United States market generally and may even have a hand in the general marketing effort, provided

F.3d 94, 106 (3d Cir. 2009) (declining to “unjustifiably . . . treat the stream-of-commerce theory as a source of general jurisdiction”); Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 788 (7th Cir. 2003) (holding that “the stream of commerce theory . . . provides no basis for exercising general jurisdiction over a nonresident defendant”); Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 216 (5th Cir. 2000) (“We have specifically rejected a party’s reliance on the stream-of-commerce theory to support asserting general jurisdiction over a nonresident defendant.”); Spir Star AG v. Kimich, 310 S.W.3d 868, 874 (Tex. 2010) (holding that the stream of commerce analysis is not relevant to general personal jurisdiction).

396 See supra text accompanying note 416.
398 See discussion infra Part IV.B.2.a.
that the manufacturer's actions are not directed at any one state. 399

Business-minded individuals might also take some solace from the decisions in *Goodyear* and *McIntyre*. It was apparent from the oral arguments and briefs in both cases that upholding the lower court decisions might have had a negative impact on American business relationships with foreign nations. If either decision had been allowed to stand, then foreign manufacturers whose products are indirectly distributed in America by third parties without the manufacturers' knowledge would have been deprived of the right to structure operations in such a way as to give some control over where they might expect to be sued. This would have encouraged forum shopping for the best place to sue a foreign defendant. Further, under the lower court in *McIntyre*, a foreign defendant might have to be aware of the law in every state where its product might potentially end-up should an individual be injured by the product there. That a majority of the Court rejected this scenario is a positive outcome to most business-minded thinkers.

The impact of the decisions in these cases will soon become apparent as lower courts grapple with how to properly apply them to disparate fact patterns. As is the way with a common law system, the boundaries of the Court's decision will be tested, and almost inevitably the jurisdictional lines will be redrawn. The beauty of our legal system is that if the lower courts get things "wrong," then in good time the Court can try to set things "right" again. In light of our complex global economy and our ever-growing interconnectedness, Justice Breyer's hypothetical jurisdiction case involving a foreign defendant who markets through the Internet or distributes through dotcom intermediaries is sure to arise sometime in the near future. 400 More than likely, we will not have to wait another quarter century for the ship of personal jurisdiction to sail down the stream of commerce. 401

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399 *See* discussion *infra* Part IV.B.2.a.

400 *See* discussion *infra* Part IV.B.2.b.

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