

MINIMUM CONTACTS IN THE GLOBAL ECONOMY: A
CRITICAL GUIDE TO *J. MCINTYRE MACHINERY V. NICASTRO*

I. INTRODUCTION	418
II. A BRIEF HISTORY OF SPECIFIC PERSONAL JURISDICTION	420
<i>A. Foundational Principles</i>	420
<i>B. Refinements to the Minimum Contacts Test</i>	421
1. <i>The Addition of the Purposeful Availment Standard</i>	421
2. <i>The Addition of the Stream-of-Commerce Theory</i>	422
III. <i>J. MCINTYRE MACHINERY V. NICASTRO</i>	424
<i>A. Facts of the Case</i>	424
<i>B. Procedural History</i>	425
<i>C. The United States Supreme Court</i>	425
1. <i>The Plurality Stubbornly Ignores Changes in Modern Economy</i>	425
2. <i>A Concurrence in Judgment but Not Rationale</i>	427
3. <i>The Dissent: The Model for Future Personal Jurisdiction Analysis</i>	428
IV. LOWER COURTS' UNSUCCESSFUL ATTEMPTS TO UNTANGLE <i>MCINTYRE</i>	431
<i>A. McIntyre as an Endorsement of O'Connor's Asahi Opinion</i>	432
<i>B. McIntyre Causes Unneeded Hesitance</i>	433
<i>C. Foreseeability Excluded as a Relevant Factor</i>	434
<i>D. McIntyre as an Irrelevant Addition to Personal Jurisdiction Jurisprudence</i>	435
<i>E. The Exclusion of the Dissent</i>	435
<i>F. The Need for a Consensus</i>	436
V. AN EXTENSION OF PERSONAL JURISDICTION ON THE HORIZON	437
<i>A. Indicators from the Supreme Court of a New Trend</i>	437
<i>B. Suggested Interpretation Actually Complies with Precedent</i>	439
<i>C. The Actual Meaning of McIntyre</i>	440
VI. CONCLUSION	441

I. INTRODUCTION

Consider the following situation: A foreign corporation decides to expand its already worldwide market to include the United States.¹ Rather than sell its products directly to American consumers, the corporation decides to, instead, sell its goods to an American distributor to more effectively distribute its goods.² Consequently, the foreign corporation's goods are sold throughout the United States, and yet, the corporation's primary contact with the United States is limited to the state in which its distributor is located.³ Inevitably, an American consumer is injured by a defective product produced by the foreign corporation.⁴ The injured party then seeks to file suit against the foreign corporation only to find that the party's forum state refuses to hear the suit because it claims it cannot constitutionally assert jurisdiction over the corporation.⁵ Before the United States Supreme Court decided *J. McIntyre Machinery v. Nicastro* (*McIntyre*), it was possible for an American plaintiff to successfully bring suit against a foreign corporation in the plaintiff's forum state.⁶ However, that likelihood has been drastically reduced because of a widespread misconception of *McIntyre*.⁷

With its recent decision in *McIntyre*, the Court signaled that a change to its specific personal jurisdiction jurisprudence is forthcoming.⁸ Because the Court had not provided any guidance on personal jurisdiction for more

1. See, e.g., *Lindsey v. Cargotec USA, Inc.*, No. 4:09CV-00071-JHM, 2011 WL 4587583, at *1 (W.D. Ky. Sept. 30, 2011).

2. See *id.* at *7.

3. See *id.*

4. See *id.* at *1.

5. See *id.* The U. S. Supreme Court has suggested that such plaintiffs can bring suit in a federal court in the state; however, this Note focuses on the jurisdictional limitations placed on state courts. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011). The suggestion that federal courts serve as the sole recourse for the increasingly high number of products liability suits filed is baffling considering the already heavy caseload that confronts federal courts.

6. S. Wilson Quick, *Staying Afloat in the Stream of Commerce: Goodyear, McIntyre, and the Ship of Personal Jurisdiction*, 37 N.C.J. INT'L L. & COM. REG. 547, 607 (2011) ("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."). See also *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) ("These are not 'attenuated, random, or fortuitous' contacts with the forum State."); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 198 (5th Cir. 1980) (finding jurisdiction proper over a foreign corporation in a similar case). *But see* *Boit v. Gar-Tee Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (requiring conduct directed specifically to the forum before jurisdiction is proper).

7. Quick, *supra* note 6, at 607–08 ("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 that the manufacturer's actions are not directed at any one state."). See also Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 430 (2012).

8. See *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

than twenty years,⁹ *McIntyre* presented the ideal opportunity for the Court to resolve the confusion surrounding the application of the stream-of-commerce theory stemming from the fractured opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*.¹⁰ Unfortunately, the Court was unable to reach any consensus to resolve this theoretical dispute,¹¹ rendering a fractured opinion that has increased the uncertainty among lower courts as it surely has among legal commentators.¹² However, a close examination of *McIntyre* reveals that the Court appears willing to once again adjust its personal jurisdiction jurisprudence to more effectively contend with the modern economy.¹³

Throughout the development of personal jurisdiction, the Court has demonstrated a willingness to adjust its jurisprudence as needed when the economy changes.¹⁴ In *McIntyre*, a majority of the justices acknowledged that the economy has once again undergone significant changes that require the Court to adjust its personal jurisdiction doctrine.¹⁵ Not only are foreign manufacturers becoming a larger component of the American economy, but the number of claims arising from injuries caused by defective products from foreign manufacturers is also on the rise.¹⁶ Consequently, this Note argues that the *McIntyre* decision signals the Court's intention to change its personal jurisdiction jurisprudence to reflect the changing economy. To implement this change, this Note contends that the Court's next ruling on personal jurisdiction will reflect Justice Ginsburg's dissent in *McIntyre*.

Part II of this Note explores past Supreme Court decisions to present a concise history of the foundational principles underlying personal

9. See *Burnham v. Superior Court*, 495 U.S. 604, 604 (1990).

10. See, e.g., *Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479–80, 483–84 (6th Cir. 2003) (endorsing Justice O'Connor's opinion in *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 106 (1987)). See also *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469–73 (5th Cir. 2006) (endorsing Justice Brennan's opinion in *Asahi*).

11. See *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2791 (plurality opinion), 2793 (Breyer, J., concurring), 2795 (Ginsburg, J., dissenting).

12. *Id.* See also 1 SPENCER WEBER WALLER, *ANTITRUST & AMERICAN BUSINESS ABROAD* § 5:4 (3d ed. 2005); Elisabeth A. Beal, *J. McIntyre Machinery, Ltd. v. Nicastro: The Stream-of-Commerce Theory of Personal Jurisdiction in a Globalized Economy*, 66 U. MIAMI L. REV. 233, 233 (2011); *infra* Part IV.A–F.

13. See *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2793 (Breyer, J., concurring), 2795 (Ginsburg, J., dissenting).

14. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957). As Justice Brennan stated, “There is nothing unreasonable or unfair, however, about recognizing commercial reality.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1979) (Brennan, J., dissenting).

15. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2791 (Breyer, J., concurring), 2802 (Ginsburg, J., dissenting).

16. Beal, *supra* note 12, at 233. See also *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting); Clair Andre and Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, 4 ISSUES IN ETHICS (Spring 1991), available at <http://www.scu.edu/ethics/publications/ie/v4n1/pay.html>.

jurisdiction.¹⁷ Specifically, Part II highlights the factors that previously have spurred the Court to adjust its personal jurisdiction analysis and provides a framework for this Note's argument that the Court is again ready to update its personal jurisdiction analysis. Part III examines *McIntyre* and highlights the key language indicative of the Court's future intentions. Part IV proceeds to summarize the vastly diverging case law interpreting *McIntyre*. Part V then argues that *McIntyre* signals the Court's intent to remove some of the restraints placed on personal jurisdiction by the minimum contacts requirement as currently construed. Part V also outlines the implications of this trend for lower courts presented with cases similar to *McIntyre*. Part VI concludes this Note by advocating that courts adopt this Note's interpretation of *McIntyre* to prevent adding unnecessary burdens on American plaintiffs bringing suit against foreign manufacturers. Rather than adhere to the judgment in *McIntyre*, courts should recognize that the rationale of the majority of Justices in *McIntyre* closely mirrors the dissent's opinion.

II. A BRIEF HISTORY OF SPECIFIC PERSONAL JURISDICTION

A. Foundational Principles

From its inception, personal jurisdiction has been quite fact-specific.¹⁸ However, the Supreme Court has developed a framework for courts to use in evaluating the various personal jurisdiction issues that may arise. The Court's modern approach to personal jurisdiction is founded on its decision in *International Shoe Co. v. Washington* in which it developed the minimum contacts test.¹⁹ Under the minimum contacts test, a court can properly assert jurisdiction over a foreign defendant only if "he ha[s] certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁰

17. It simply would be impractical to include every case in which the Court added to its personal jurisdiction jurisprudence. Thus, this Note instead focuses on the development of the stream-of-commerce theory.

18. See 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1069 (3d ed. 2010). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485–86 (1985) ("We . . . therefore reject any talismanic jurisdictional formulas; 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" (alteration in original) (quoting *Kulko v. California*, 436 U.S. 84, 92 (1978)).

19. 326 U.S. 310 (1945); 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1067 (3d ed. 2010). See also *Burger King*, 471 U.S. at 474; *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction.").

20. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Rather than set a required amount of contacts, the Court stated that courts must look at the “quality and nature of the activity” to determine whether the minimum contacts test is satisfied.²¹ Not only has the minimum contacts test been affirmed in subsequent cases,²² but the Court has consistently rejected its personal jurisdiction jurisprudence before *International Shoe*.²³

B. Refinements to the Minimum Contacts Test

1. The Addition of the Purposeful Availment Standard

The minimum contacts test has undergone a number of refinements in subsequent personal jurisdiction cases. In *Hanson v. Denckla*, the Court proceeded to introduce the purposeful availment requirement, a source of future division among the Justices.²⁴ Upon review of the case, the Court held that a Florida court could not constitutionally assert jurisdiction over a Delaware Bank based solely on the “unilateral activity” of a party moving to Florida.²⁵ Minimum contacts, according to the Court, required that “the defendant purposefully avail itself of the privilege of conducting activities within the forum State.”²⁶

The Court further refined the concept of purposeful availment in *World-Wide Volkswagen Corp. v. Woodson (WWVW)*.²⁷ The Court stressed

21. *Id.* at 319. In fact, the minimum contacts test has been satisfied based on a single contact, as long as a “substantial connection” is created with the forum state. *McGee*, 355 U.S. at 223.

22. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (“[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”).

23. *Id.* at 206 (“It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*.”).

24. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This case arose from a dispute among family members concerning how a deceased family member’s trust should be dispersed. While living in Pennsylvania, Mrs. Donner established a trust and named a Delaware Bank the trustee. Years later, Mrs. Donner moved to Florida where she ultimately died; however, before she died, Mrs. Donner made changes regarding how her trust funds should be dispersed. After her death, Mrs. Donner’s family disputed the changes, and some family members brought suit in Florida. Other family members challenged the constitutionality of a Florida court asserting jurisdiction over the Delaware trustee. *Id.* at 238–42.

25. *Id.* at 253.

26. *Id.* Purposeful availment has been satisfied, however, when a defendant engages in a nationwide business, so long as the state attempting to assert jurisdiction is included in the defendant’s distribution system. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

27. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1979). Before the Court was a personal jurisdiction challenge by defendants World-Wide Volkswagen Corp. and Seaway to a products liability suit in Oklahoma arising from a car accident that occurred in Oklahoma. The defendants were accused of defectively designing and placing the gas tank and fuel system of an Audi sold to the plaintiffs in New York. A year after purchasing the vehicle, the plaintiffs decided to move to Arizona. While traveling to Arizona, the plaintiffs were involved in an accident in Oklahoma during which several of the plaintiffs were injured. Before the plaintiff’s accident, none of the defendants’

that a state cannot constitutionally assert jurisdiction based on a mere “fortuitous circumstance.”²⁸ Furthermore, the Court stated that “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”²⁹ Jurisdiction would have been proper; however, if the defendant had contacts with the forum state “such that he should reasonably anticipate being haled into court there.”³⁰ The Court made sure to note that the reasonableness of bringing suit in a particular forum was not by itself sufficient to satisfy the minimum contacts test.³¹ If, however, a defendant does have sufficient minimum contacts with a state, there must be “a compelling case” that the forum would be unreasonable before it is proper for a court to find that jurisdiction is unconstitutional.³²

2. *The Addition of the Stream-of-Commerce Theory*

WWW is also important for laying the foundation for the stream-of-commerce theory. Although the Court held that jurisdiction was improper, the Court suggested that the minimum contacts test would have been satisfied had the defendant either directly or indirectly attempted to “serve the [forum state’s] market.”³³ While “the mere likelihood that a product will find its way into the forum” does not satisfy the requirements of the minimum contacts test,³⁴ jurisdiction is proper if the defendant foresees the possibility of suit in the forum.³⁵ The Court stressed that the unilateral action of customers by itself is insufficient to subject a corporation to suit in a forum.³⁶ In the Court’s view, it is essential that defendants have the

vehicles had ever entered Oklahoma. In fact, the defendants only did business in New York and surrounding areas. *Id.* at 288–89.

28. *Id.* at 295. At no point had the defendants “avail[ed] themselves . . . of the privileges and benefits of Oklahoma law.” *Id.*

29. *Id.* The Court states later that “[t]his is not to say, of course, that foreseeability is wholly irrelevant.” *Id.* at 297.

30. *Id.* at 297. Foreshadowing a theoretical debate that still binds the Court today, the Court noted two justifications for the minimum contacts test: protecting defendants from unreasonable litigation burdens and imposing the restrictions of state sovereignty. Reasonableness, according to the Court, required a court to consider not only the defendant’s burden in litigating in the forum, but also the plaintiff’s interest in the forum, the forum’s interest in the suit, the interstate judicial system’s interest in resolving the dispute, and substantive social policies.

31. *Id.* at 294. The Court later suggested, however, that a state can be such a reasonable forum that jurisdiction requires fewer minimum contacts than would normally be required. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

32. *Burger King*, 471 U.S. at 477.

33. *World-Wide Volkswagen*, 444 U.S. at 295.

34. *Id.* at 297.

35. *Id.*

36. *Id.* at 298. “Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.” *Id.* at 296.

ability “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”³⁷ Specifically, the Court stated that a forum can constitutionally assert 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.”³⁸

While the stream-of-commerce theory was introduced in *WWW*, the Court’s multiple opinions in *Asahi* are most commonly credited with the stream-of-commerce theory. In that case, a Japanese corporation, Asahi, challenged the constitutionality of a California court asserting personal jurisdiction over an indemnification claim brought by a Taiwanese corporation, Cheng Shin, after it settled with a plaintiff in a products-liability action.³⁹ Although the Court held that the California court could not constitutionally assert jurisdiction over Asahi, it based this ruling on the unreasonableness of requiring the corporation to defend itself in California.⁴⁰ The Court split over whether the defendant’s contacts with California satisfied the minimum contacts requirement.⁴¹ Justice O’Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, argued that “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”⁴² According to O’Connor, purposeful availment required that the defendant engage in additional conduct directed towards the forum.⁴³ “[A]wareness that the stream of commerce may or will sweep” a defendant’s product into a state was, in O’Connor’s view, insufficient to satisfy purposeful availment.⁴⁴

37. *Id.* at 297.

38. *Id.*

39. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 106 (1987). Asahi’s sole contact with California arose from a tire valve it produced that was ultimately incorporated into a motorcycle involved in an accident in California. Asahi sold tire valves to Cheng Shin as well as other tire manufacturers. In fact, Asahi shipped the tire valves to Cheng Shin in Taiwan who subsequently used the tire valves to sell tire tubes worldwide. Conflicting evidence was presented concerning whether Asahi was aware that its tire valves were sold in California. *Id.* at 106–07.

40. *Id.* at 116. (“Considering 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.”)

41. *Id.* at 112 (majority opinion), 117 (Brennan, J., concurring).

42. *Id.* at 112 (majority opinion). O’Connor’s opinion is also known as the “foreseeability plus” approach. Quick, *supra* note 6, at 569 (quoting Edward B. Adams, *Personal Jurisdiction Over Foreign Parties*, in *INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS* 119 (David J. Levy ed., 2003)).

43. *Asahi*, 480 U.S. at 112. O’Connor would require such conduct 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.”

44. *Id.*

Joined by Justices White, Marshall, and Blackmun, Justice Brennan found O'Connor's requirement of additional conduct to be excessive.⁴⁵ Rather, Brennan argued that the minimum contacts requirement is satisfied if a defendant "is aware that the final product is being marketed in the forum State."⁴⁶ In Brennan's view, a defendant receives benefits from each state in which its products are sold once the defendant places his goods in the stream of commerce.⁴⁷ Justice Brennan found his position to comply with the Court's decision in *WWWW*, which he viewed as only prohibiting jurisdiction when a product enters a state based on the unilateral activity of another party.⁴⁸

III. *J. MCINTYRE MACHINERY V. NICASTRO*

A. Facts of the Case

The following Subpart examines *McIntyre* with a focus on the differences among the plurality, concurrence, and dissent. Robert Nicastro, a New Jersey resident, brought a products-liability action against the English company J. McIntyre Machinery, Ltd. (McIntyre) alleging that one of its products was defective and caused his injury.⁴⁹ While working in New Jersey, Nicastro lost four fingers when he was required to use a metal shearing machine manufactured by McIntyre.⁵⁰ Although the machine was manufactured in England, it was actually shipped to Nicastro's employer in New Jersey by McIntyre's American distributor in Ohio.⁵¹

Although McIntyre had limited contacts with New Jersey, the company possessed significant contacts with the United States as a whole.⁵² McIntyre marketed its machines in annual conventions sponsored by the scrap recycling industry.⁵³ Although none of these conventions were located in New Jersey, New Jersey was known to be the state with the

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

46. *Id.* ("The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.")

47. *Id.* ("These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.")

48. *Id.* at 120. Justice Stevens also concurred and wrote a separate opinion; however, his opinion is not discussed because it fails to add any clarity to the dispute between Justices O'Connor and Brennan. *Id.* at 121–22 (Stevens, J., concurring).

49. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

50. *Id.* at 2786, 2795 (Ginsburg, J., dissenting).

51. *Id.* at 2786 (plurality opinion), 2796 (Ginsburg, J., dissenting). There was a debate over whether one or four of McIntyre's machines were actually shipped to New Jersey. *Id.* at 2786 (plurality opinion).

52. *Id.* at 2786.

53. *Id.* The company also sold its products on its website. *Id.* at 2795 (Ginsburg, J., dissenting).

highest level of scrap recycling business.⁵⁴ As part of McIntyre's attempt to market to the entire United States, the company possessed patents for recycling in both the United States and Europe.⁵⁵ In addition, it appeared that McIntyre played a role in the distribution of its products, albeit it is debatable as to how significant of a role it played.⁵⁶ Moreover, high-ranking McIntyre officials repeatedly expressed McIntyre's desire to market to the entire United States.⁵⁷

B. Procedural History

The New Jersey Supreme Court held that jurisdiction was proper over McIntyre.⁵⁸ In the court's view, McIntyre should have foreseen that its products would end up in New Jersey because of the distribution system the company used.⁵⁹ Although the court found that McIntyre did not have sufficient minimum contacts with New Jersey, it held that the stream-of-commerce theory allowed the lower court to constitutionally assert jurisdiction over the company.⁶⁰ The court found that the changing American economy, as well as a number of other policy reasons, supported the lower court's jurisdiction.⁶¹ McIntyre subsequently challenged the court's ruling.⁶²

C. The United States Supreme Court

1. The Plurality Stubbornly Ignores Changes in Modern Economy

Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia and Thomas, held that the New Jersey Supreme Court erred in finding jurisdiction proper over McIntyre.⁶³ Chief among the lower court's mistakes, in the plurality's view, was the misapplication of the stream-of-

54. *Id.* at 2786 (plurality opinion), 2795 (Ginsburg, J., dissenting). Nevertheless, it was at one of the conventions that Nicastro's employer saw one of J. McIntyre's advertisements and decided to purchase the allegedly defective machine. *Id.* at 2795.

55. *Id.* at 2786 (plurality opinion).

56. *Id.* ("It also noted that the U.S. distributor 'structured [its] advertising and sales efforts in accordance with' J. McIntyre's 'direction and guidance whenever possible,' and that 'at least some of the machines were sold on consignment to' the distributor.")

57. *Id.* at 2796 (Ginsburg, J., dissenting) (quoting McIntyre UK's president who wrote that, "All we wish to do is sell our products in the [United] States—and get paid!").

58. *Id.* at 2785 (plurality opinion).

59. *Id.* (quoting *Nicastro v. McIntyre Mach. America, Ltd.*, 987 A.2d 575, 591–92 (N.J. 2010)).

60. *Id.* at 2790–91.

61. *Id.* at 2791 (quoting *Nicastro*, 987 A.2d at 590).

62. *Id.* at 2786.

63. *Id.* at 2785.

commerce theory.⁶⁴ The plurality explained that “[i]n products-liability cases like this one, it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’”⁶⁵ The plurality viewed the stream-of-commerce theory as applying only when the defendant “targeted the forum.”⁶⁶ Jurisdiction should be improper, however, when the facts only suggest “that the defendant might have predicted that its goods will reach the forum State.”⁶⁷

The plurality blamed the multiple opinions in *Asahi* for the lower court’s erroneous ruling.⁶⁸ In particular, the plurality found Justice Brennan’s opinion in *Asahi* to be misleading.⁶⁹ In the plurality’s view, Brennan erred in not recognizing that “it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.”⁷⁰ Brennan’s opinion, according to the plurality, did not comply with precedent, which “‘conducted no independent inquiry into the desirability or fairness’ of the rule . . . to establish jurisdiction over an otherwise foreign defendant.”⁷¹ Focusing primarily on fairness would, in the plurality’s view, allow courts to assert jurisdiction over defendants even when purposeful availment was lacking, a result simply unacceptable to the plurality.⁷²

In the plurality’s view, courts should adhere to Justice O’Connor’s opinion in *Asahi* because it correctly limited jurisdiction to cases in which there is “an act of the defendant purposefully directed toward the forum State.”⁷³ Most pertinent to the plurality was O’Connor’s view that “placement of a product into the stream of commerce” is insufficient to confer proper jurisdiction.⁷⁴ Consequently, the plurality rejected the New Jersey Supreme Court’s ruling because it failed to consider only the defendant’s contacts with New Jersey.⁷⁵ Ultimately, the plurality concluded that “the stream-of-commerce metaphor cannot supersede either the

64. *Id.*

65. *Id.* at 2787.

66. *Id.* at 2788.

67. *Id.* at 2788.

68. *Id.* at 2786.

69. *Id.* at 2789.

70. *Id.*

71. *Id.* at 2789 (quoting *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990)).

72. *Id.* (“But Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power.”).

73. *Id.* Justice Scalia also joined Justice O’Connor for her opinion in *Asahi*. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 105 (1987).

74. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2788–89.

75. *Id.* at 2790 (“Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner’s purposeful contacts with New Jersey, not with the United States, that alone are relevant.”).

mandate of the Due Process Clause or the limits on judicial authority that Clause ensures.”⁷⁶

For the plurality, sovereignty considerations should be the primary inquiry instead of fairness concerns when courts analyze the constitutionality of jurisdiction.⁷⁷ Specifically, the plurality required “a forum-by-forum, or sovereign-by-sovereign, analysis.”⁷⁸ Although the plurality acknowledged that precedent characterized personal jurisdiction limits as protecting a defendant’s liberty, it argued that sovereignty was still the determining factor for whether jurisdiction was proper over a particular defendant.⁷⁹ While concurring in the judgment, Justices Breyer and Alito used a vastly divergent rationale that appeared to align with the dissent.

2. *A Concurrence in Judgment but Not Rationale*

Justice Breyer, joined by Justice Alito, concurred in judgment with the plurality but did not endorse the plurality’s rationale.⁸⁰ The concurrence acknowledged that the New Jersey Supreme Court was correct to note that the American economy has drastically changed, and that these developments might require changes in the Court’s personal jurisdiction jurisprudence.⁸¹ Breyer, however, was not convinced that these economic changes justified the New Jersey Supreme Court’s assertion of personal jurisdiction over McIntyre.⁸²

In Breyer’s view, jurisdiction was not proper over a defendant based on the sale of only one product even if the defendant placed the product into the stream of commerce with the intention that the product would be sold in the state.⁸³ Breyer considered McIntyre’s contacts with New Jersey to “show no ‘regular . . . flow’ or ‘regular course’ of sales.”⁸⁴ Consequently,

76. *Id.* at 2791.

77. *Id.* at 2783 (“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.”).

78. *Id.* at 2789. The plurality suggested that the United States could constitutionally assert jurisdiction over a defendant even though no state would have proper jurisdiction. As noted earlier, this solution is not viable.

79. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2789.

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

81. *Id.* (“I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents.”).

82. *Id.*

83. *Id.* at 2792. Justice Breyer’s contention is questionable considering the Court’s acknowledgement in *Burger King* that a single act could justify jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 n.18 (1985) (“So long as it creates a ‘substantial connection’ with the forum, even a single act can support jurisdiction.”) (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). See also *Quick*, *supra* note 6, at 563.

84. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2792.

neither O'Connor's nor Brennan's test would be satisfied in this case, in Breyer's view.⁸⁵ Justice Breyer did note, however, that there may have been facts in this case that would have justified jurisdiction over McIntyre, but he chose to limit his analysis to the facts considered by the New Jersey Supreme Court.⁸⁶

The concurrence found both the plurality and the New Jersey Supreme Court to misinterpret key concepts concerning personal jurisdiction.⁸⁷ Breyer considered the plurality to apply an overly stringent view of personal jurisdiction in which a court could only assert jurisdiction when the defendant submitted to a state's sovereign power.⁸⁸ Breyer foresaw dire consequences if a state's ability to assert jurisdiction over corporations was limited in such a manner, especially considering the changes in the American economy.⁸⁹ The concurrence considered New Jersey's analysis to be incompatible with the requirement that the defendant have minimum contacts with the forum.⁹⁰ Breyer argued that New Jersey's ruling "would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer."⁹¹

However, Justice Breyer did not state that he was unwilling to institute changes to the Court's personal jurisdiction jurisprudence.⁹² To the contrary, Breyer simply expressed that the Court should be cautious to have wide-ranging holdings "without a better understanding of the relevant contemporary commercial circumstances."⁹³ Because Breyer was unsure of the potential consequences of changing the rules governing personal jurisdiction, Breyer relied on precedent to concur in the judgment.⁹⁴

3. The Dissent: The Model for Future Personal Jurisdiction Analysis

Justice Ginsburg, joined by Justices Sotomayor and Kagan, authored the dissenting opinion.⁹⁵ Of utmost importance to the dissent were the

85. *Id.*

86. *Id.* ("There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts.")

87. *Id.* at 2793.

88. *Id.*

89. *Id.* ("But what do those standards mean when a company targets the world by selling products from its Web site? . . . Those issues have serious commercial consequences . . .").

90. *Id.*

91. *Id.* ("What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer . . .").

92. *Id.* at 2794 (Ginsburg, J., dissenting).

93. *Id.*

94. *Id.*

95. *Id.*

implications of the Court's ruling.⁹⁶ In the dissent's view, the plurality allowed McIntyre to market and profit from the United States but avoid any liability for injuries caused by its products.⁹⁷ Ginsburg argued that "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.'"⁹⁸

The dissent saw no reason to find jurisdiction improper over a company that was fully aware that its products were used throughout the nation.⁹⁹ Ginsburg emphasized that the allegedly faulty machine was sold to Nicastro's employer at one of the annual conventions McIntyre visited to market its products.¹⁰⁰ Furthermore, Ginsburg found it important that McIntyre actively attempted to serve the entire United States market.¹⁰¹ The dissent would have found the case to be different had McIntyre excluded some states from its distribution system.¹⁰² Ginsburg considered it unreasonable to believe that McIntyre did not specifically market to New Jersey considering that it sought to exploit the scrap metal industry and that New Jersey was "the fourth largest destination for imports among all States of the United States and the largest scrap metal market."¹⁰³

In Ginsburg's view, the plurality botched the personal jurisdiction analysis because of its focus on sovereignty principles.¹⁰⁴ Ginsburg read the Court's precedent to characterize personal jurisdiction limitations as protecting liberty interests rather than embodying principles of sovereignty.¹⁰⁵ According to the dissent, due process "is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."¹⁰⁶ Rather, the dissent contended that precedent required the Court to focus on the fairness of asserting jurisdiction.¹⁰⁷ Ginsburg viewed reasonableness as dictating that the Court

96. *Id.*

97. *Id.*

98. *Id.* at 2795 (alteration in original) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).

99. *Id.* at 2795.

100. *Id.*

101. *Id.* at 2796 ("McIntyre UK . . . hop[ed] to reach 'anyone interested in the machine from anywhere in the United States.'" (quoting Joint Appendix at 161a, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343)).

102. *Id.* at 2797. The dissent also found it important that McIntyre could not deny that it sold products to New Jersey. *Id.* at 2797 n.3.

103. *Id.* at 2801.

104. *Id.* at 2798.

105. *Id.*

106. *Id.* at 2798 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

107. *Id.* at 2800.

hold that a New Jersey court could constitutionally assert jurisdiction over McIntyre.¹⁰⁸ The dissent believed the changes in the American economy easily justified an extension of jurisdiction in this case.¹⁰⁹ Ginsburg considered the most sensible state to hold McIntyre liable in a products-liability action would be the state in which the injury occurred.¹¹⁰

The dissent also found precedent and policy considerations to support their position.¹¹¹ Ginsburg noted that jurisdiction usually has been deemed proper in this type of case so often that even the foreign manufacturer in *WWW* did not consider it reasonable to object to Oklahoma's assertion of jurisdiction.¹¹² In Ginsburg's view, the Court suggested in *WWW* "that an objection to jurisdiction by the manufacturer or national distributor would have been unavailing."¹¹³ While the plurality endorsed Justice O'Connor's position in *Asahi*,¹¹⁴ the dissent found *Asahi* to not even apply in this case.¹¹⁵ Whereas the manufacturer in *Asahi* had minimal control over where its products were sold, Ginsburg found that McIntyre did possess considerable control.¹¹⁶ Ultimately, the dissent viewed the plurality as placing injured Americans at an extreme disadvantage compared to people injured outside of the United States.¹¹⁷ The following Part explores the diverging interpretations lower courts have given *McIntyre* and demonstrates their utter inability to reach a consensus.

108. *Id.* at 2800–01 (“Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre’s product at his workplace in Saddle Brook, New Jersey?”).

109. *Id.* at 2801. (“McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States.”).

110. *Id.* The dissent found that most courts deciding similar cases have agreed that jurisdiction should be proper over the foreign defendant. Furthermore, Ginsburg argued that jurisdiction over McIntyre is proper despite the limited number of products the company sold in New Jersey because it would be unreasonable to require a high number of sales of such an expensive product. *Id.* at 2801–03.

111. *Id.* at 2802.

112. *Id.*

113. *Id.*

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

115. *Id.* at 2803 (Ginsburg, J., dissenting) (“In any event, *Asahi*, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world.”).

116. *Id.* at 2797, 2803.

117. *Id.* at 2803 (“Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional.”).

IV. LOWER COURTS' UNSUCCESSFUL ATTEMPTS TO UNTANGLE *MCINTYRE*

The Court's inability to reach a consensus in *McIntyre* perpetuates a judicial system in which a foreign manufacturer's liability for product defects will depend on which state the injury occurs.¹¹⁸ Current personal jurisdiction jurisprudence allows courts to interpret constitutional limitations on personal jurisdiction as they wish.¹¹⁹ While some courts hold foreign defendants liable after they place a product into the stream of commerce,¹²⁰ other courts require that the defendant target the particular state attempting to assert jurisdiction over the defendant.¹²¹ This myriad of diverging views has caused some scholars to suggest that courts should be wary of applying *McIntyre*.¹²² To the contrary, courts should embrace the *McIntyre* decision in its entirety.

Rather than simply following the holding in *McIntyre*, however, courts must recognize the new approach the Court is prepared to implement in its personal jurisdiction jurisprudence.¹²³ While, on its face, the opinion is open to interpretation, the Court clearly endorses a jurisdictional analysis that will provide a forum in state courts for plaintiffs injured by foreign manufactured goods.¹²⁴ Specifically, courts should take notice of the similarities between the concurrence and dissent.¹²⁵ Although the holding of *McIntyre* suggests that the Court intended to restrict personal jurisdiction, the resemblance between the concurrence and dissent demonstrate that the Court is willing to extend the reach of personal jurisdiction to cover defendants like *McIntyre*.

118. See, e.g., *Smith v. Teldyne Cont'l Motors, Inc.*, 840 F. Supp. 2d 927, 929 (D.S.C. 2012) (interpreting *McIntyre* as endorsing Justice O'Connor's opinion in *Asahi*); *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*, No. M2010-01955-COA-R3-CV, 2011 WL 2571851, at *1, *33 (Tenn. Ct. App. June 28, 2011) (holding that a national distribution system does not preclude a state from asserting jurisdiction properly over a manufacturer).

119. See *supra* Parts II–III. See also Quick, *supra* note 6, at 550 (“The lack of predictability resulting from the state of jurisdictional analysis is inefficient and diametrically opposed to due process.”).

120. See *Cooper*, 2011 WL 2571851, at *33. See also *Soria v. Chrysler Can., Inc.*, 354 Ill. Dec. 542, 554 (Ill. App. Ct. 2011).

121. See *Smith*, 840 F. Supp. 2d at 930. This view is shared by some commentators. See Edward D. Cavanagh, *The FTAIA and Claims by Foreign Plaintiffs Under State Law*, 26 ANTITRUST 43, 48 (2011).

122. See, e.g., Megan M. La Belle, *The Future Of Internet-Related Personal Jurisdiction After Goodyear Dunlap Tires v. Brown and J. McIntyre v. Nicastro*, 15 J. INTERNET L. 3, 8 (2012) (“As for *McIntyre*, the highly splintered opinion is so muddled and fact specific, that its application to other cases should be limited.”).

123. See *infra* Part V.

124. See *infra* Part V.

125. See *infra* Part V.

A. McIntyre as an Endorsement of O'Connor's Asahi Opinion

A mere glance at the cases interpreting *McIntyre* demonstrates that courts' interpretations range across the spectrum.¹²⁶ Some courts have incorrectly read *McIntyre* as requiring that Justice O'Connor's stream-of-commerce test in *Asahi* be satisfied before a court can properly assert jurisdiction over a foreign corporation.¹²⁷ In *Smith v. Teledyne Continental Motors, Inc.*, the court interpreted both the plurality and the concurrence in *McIntyre* as endorsing Justice O'Connor's test.¹²⁸ For some cases, this misinterpretation will not cause the defendant any harm because the defendant will have substantial contact with the forum such that jurisdiction would be proper regardless.¹²⁹ However, this mistake will not always be harmless.¹³⁰ The court's endorsement of O'Connor's test, as well as any other court's, is flawed because, while *McIntyre* may have been a fractured opinion, at no point in the opinion did a majority of the court adopt O'Connor's approach to stream of commerce.¹³¹

While not going so far as explicitly endorsing O'Connor's stream-of-commerce test, one court implicitly interpreted *McIntyre* as endorsing O'Connor's approach by focusing solely on the plurality's opinion. In *Bluestone Innovations Texas L.L.C. v. Formosa Epitaxy Inc.*, for example, although the court stated that the concurrence in *McIntyre* controlled, at times, the court merely used the concurrence for a factual comparison rather than as a guideline to analyzing personal jurisdiction.¹³² Instead, the court focused on the plurality's emphasis on state sovereignty.¹³³ However,

126. See *infra* Part IV.B–E.

127. See, e.g., *Smith*, 840 F. Supp. 2d at 930; *Baker v. Patterson Med. Supply, Inc.*, No. 4:11CV37, 2012 WL 380109, at *1, *3 (E.D. Va. Feb. 6, 2012).

128. See *Smith*, 840 F. Supp. 2d at 931.

129. For instance, the defendant in *Smith* had enough contact with the forum that jurisdiction was obviously proper. See *id.* at 932. See also *Original Creations, Inc. v. Ready Am., Inc.*, 836 F. Supp. 2d 711, 718 (N.D. Ill. 2011) (holding that jurisdiction was proper over a defendant who used a distributor that targeted the state).

130. For example, the court in *Baker* also interpreted *McIntyre* as endorsing Justice O'Connor's *Asahi* opinion. In dicta, the court proceeded to state that the court could not properly assert jurisdiction over the defendant even if the defendant made “sales to large retailers or via a nationwide distribution network.” Rather, jurisdiction would only be constitutional if the defendant had contacts specifically with the forum. *Baker*, 2012 WL 380109, at *1, *4. Such misguided analysis is not only unwarranted but will result in jurisdiction being limited unnecessarily.

131. See *supra* Part III.

132. *Bluestone Innovations Tex., L.L.C. v. Formosa Epitaxy Inc.*, 822 F. Supp. 2d 657, 662 (E.D. Tex. 2011). The case, a patent infringement suit, centered around the issue of whether a Texas court could constitutionally assert jurisdiction over three Taiwanese corporations: ForEpi, Tekcore, and Walsin. Fortunately, jurisdiction was inappropriate over all of the defendants, so the plaintiff's ability to bring the company to suit was not unduly jeopardized. *Id.* at 659, 663.

133. *Id.* at 661. (“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 courts' analysis makes it highly probable that a plaintiff's rights will be unnecessarily compromised.¹³⁴

B. *McIntyre Causes Unneeded Hesitance*

Other courts have interpreted *McIntyre* as not limiting personal jurisdiction further.¹³⁵ Nevertheless, courts have demonstrated a need to buttress their decisions regarding proper personal jurisdiction in a manner they likely would not have felt the need to do in the past.¹³⁶ For instance, in *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*, the defendant sold at least 11.5 million cigarettes in Tennessee over the course of three years.¹³⁷ Rather than rely on the fact that the defendant's national distribution system resulted in a large quantity of products being sold in Tennessee, the court saw the need to downplay the importance of the defendant's distribution system and national contacts before it found jurisdiction proper in Tennessee.¹³⁸ It should have been immediately apparent to the court that jurisdiction over the defendant was constitutional because of the sheer amount of contacts between the defendant and the forum state. Instead, the plurality's unjustified skepticism of national contacts in *McIntyre* influenced the court's decision-making unnecessarily.

Other courts limit their use of *McIntyre* to no more than a factual comparison.¹³⁹ Before the court in *UTC Fire & Security Americas Corp., Inc. v. NCS Power, Inc.* was a personal jurisdiction challenge by a Japanese corporation.¹⁴⁰ Because *McIntyre* was a splintered decision, the court

the power to subject the defendant to judgment concerning that conduct.” (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011))).

134. *But see* *Dierig v. Lees Leisure Indus., Ltd.*, No. 11-125-DLB-JGW, 2012 WL 669968, at *1, *11–13 (E.D. Ky. Feb. 28, 2012) (interpreting *McIntyre* as endorsing O'Connor's approach and, yet, still finding jurisdiction proper over a defendant corporation in a product liability suit).

135. *See, e.g., State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*, No. M2010-01955-COA-R3-CV, 2011 WL 2571851, at *1, *33 (Tenn. Ct. App. June 28, 2011); *Schultheis v. Cmty. Health Sys., Inc.*, No. 11-0435-DRH, 2012 WL 253366, at *1, *2 (S.D. Ill. Jan. 26, 2012) (citing *McIntyre* for previously accepted personal jurisdiction principles); *Moore v. R.G. Brinkmann Co.*, No. 3:11-CV-208 JPG-PMF, 2012 WL 407203, at *1, *2 (S.D. Ill. Feb. 8, 2012) (citing *McIntyre* on previously affirmed grounds); *Sieg v. Sears Roebuck & Co.*, No. 3:10cv606, 2012 WL 610961, at *1, *5 (M.D. Pa. Feb. 24, 2012) (refusing to apply *McIntyre* because of the Court's failure to outline a clear approach).

136. *See, e.g., Cooper*, 2011 WL 2571851, at *33–34; *State v. NV Sumatra Tobacco Trading Co.*, 666 S.E.2d 218, 221–23 (S.C. 2008) (finding jurisdiction clearly proper over defendant using national distribution system); *State v. Grand Tobacco*, 871 N.E.2d 1255, 1262–64 (Ohio Ct. App. 2007) (holding jurisdiction constitutional over foreign defendant in a similar factual situation).

137. *Cooper*, 2011 WL 2571851, at *33.

138. *Id.* at *33–34.

139. *See, e.g., UTC Fire & Sec. Americas Corp. v. NCS Power, Inc.*, 844 F. Supp. 2d 366, 375–76 (S.D.N.Y. 2012); *Genetic Technologies Ltd. v. Agilent Technologies, Inc.*, No. 11-cv-01389, 2012 WL 1015355, at *1, *9 (D. Colo. Mar. 23, 2012).

140. *UTC Fire*, 844 F. Supp. 2d at 368.

followed the concurrence; however, rather than actually apply any of the reasoning in the decision, it only compared the facts of *McIntyre* to its case.¹⁴¹ In fact, the court went so far as to question the viability of the stream-of-commerce theory.¹⁴² Ultimately, the court dismissed the jurisdiction challenge because of the corporation's multiple contacts with the forum, but this was not until after the court factually distinguished the case before it from *McIntyre* as much as possible.¹⁴³ This case presents a drastic overreaction to *McIntyre* considering that not even the plurality in *McIntyre* went so far as to question the use of the stream-of-commerce theory.¹⁴⁴

C. Foreseeability Excluded as a Relevant Factor

Still other courts have placed too much emphasis on *McIntyre* and read additional limitations into the opinion that are simply not present.¹⁴⁵ In *Dow Chemical Canada ULC v. Superior Court*, the court went so far as to hold that it did not matter whether it was foreseeable to the defendant that its products would ultimately end up in the state.¹⁴⁶ The court's stubborn insistence on "additional conduct [] directed at the forum" prevented the court from recognizing that foreseeability is based itself on a defendant's conduct.¹⁴⁷ So, if it was foreseeable to the defendant that its products would end up in the forum, then there necessarily had to be at least a certain level of conduct directed towards the forum.¹⁴⁸ Despite acknowledging each of the opinions in *McIntyre*, the court in *Gardner v. SPX Corp.*, also relegated foreseeability to an irrelevant factor in its jurisdictional analysis.¹⁴⁹ The court ignored the fact that Schneider Canada, the defendant, "was aware of potential sales in the United States."¹⁵⁰ Yet, the court denied jurisdiction over Schneider Canada because the company "did not take active steps to

141. *Id.* at 375–76.

142. *Id.* at 375 ("The soundness of the 'stream of commerce' theory has been called into question by the Supreme Court's recent ruling in *J. McIntyre Machinery* . . .").

143. *Id.* at 376–77. The court considered the corporation before it to have engaged in a "true national distribution" of its products compared to the corporation in *McIntyre*.

144. *See supra* Part III.A.

145. *See, e.g.*, *Dow Chem. Can. ULC v. Superior Court*, 134 Cal. Rptr. 3d 597, 599 (Cal. Ct. App. 2011); *Gardner v. SPX Corp.*, 272 P.3d 175, 181–82 (Utah Ct. App. 2012).

146. *Dow Chem. Can. ULC*, 134 Cal. Rptr. 3d at 603. The U.S. Supreme Court has never endorsed the idea that foreseeability is irrelevant to personal jurisdiction analysis. In fact, the Court has emphatically stated the exact opposite. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

147. *Dow Chem. Can. ULC*, 134 Cal. Rptr. 3d at 603.

148. In that case, the defendant sold its product to another party that incorporated the product into goods shipped throughout the United States. *Id.* at 174.

149. *Gardner*, 272 P.3d at 181–82.

150. *Id.* at 182. In fact, Schneider Canada made multiple sales to Utah customers. *See id.* at 177.

sell its products in Utah.”¹⁵¹ Even the *McIntyre* plurality would not have gone so far.¹⁵²

D. McIntyre as an Irrelevant Addition to Personal Jurisdiction Jurisprudence

Some courts, while acknowledging the limited holding in *McIntyre*, still proceeded to misconstrue the meaning present within the case.¹⁵³ In *Windsor v. Spinner Industry Co.*, the court held that *McIntyre* simply left “the legal landscape untouched.”¹⁵⁴ This interpretation led the court to simply adhere to its past interpretation of the stream-of-commerce theory which completely discounted the fact that the defendant intentionally distributed its goods throughout the United States using a distributor.¹⁵⁵ In fact, the defendant used distributors who actually marketed to the state whose court was attempting to assert jurisdiction.¹⁵⁶

E. The Exclusion of the Dissent

Other courts have placed emphasis on each portion of the splintered *McIntyre* decision except the dissent.¹⁵⁷ In *Powell v. Profile Design LLC*, the court began its personal jurisdiction analysis by noting that the plurality and concurrence “shed light on the specific jurisdiction doctrine.”¹⁵⁸ The

151. *Id.* at 182.

152. *See supra* Part III.C.1. Rather, the plurality requested that the corporation target the state.

153. *See, e.g.*, *Englert v. Alibaba.com Hong Kong Ltd.*, No. 4:11CV1560, 2012 WL 162495, at *1, *2 (E.D. Mo. Jan. 19, 2012); *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632, 638 (D. Md. 2011); *Original Creations, Inc. v. Ready Am., Inc.*, 836 F. Supp. 2d 711, 716 (N.D. Ill. 2011); *Lindsey v. Cargotec USA, Inc.*, No. 4:09CV-00071-JHM, 2011 WL 4587583, at *1, *7 (W.D. Ky. Sept. 30, 2011).

154. *Windsor*, 825 F. Supp. 2d at 638. *See also Englert*, 2012 WL 162495, at *2 (citing *McIntyre* as endorsing commonly accepted personal jurisdiction principles); *Original Creations, Inc.*, 836 F. Supp. 2d at 716; *Lindsey*, 2011 WL 4587583, at *7.

155. *Windsor*, 825 F. Supp. 2d at 638–39. *See also* *Prototype Prods., Inc. v. Reset, Inc.*, 844 F. Supp. 2d 691, 704 (E.D. Va. 2012) (interpreting *McIntyre* as holding that marketing to the United States as a whole is insufficient to find conduct directed towards a specific state); *Lindsey*, 2011 WL 4587583, at *8 (refusing to hold a defendant subject to jurisdiction in Kentucky despite the fact that the defendant sold goods to distributor to disperse throughout the United States and ninety-seven of the defendant’s goods were delivered into the state).

156. *Windsor*, 825 F. Supp. 2d at 639. To add insult to injury, the court also cast doubt on the role of foreseeability in determining whether jurisdiction is proper. *Id.* at 638.

157. This approach is particularly troubling since *McIntyre* actually indicates that it will adopt a version of the dissent’s opinion on the constitutional limitations imposed on a state’s ability to assert jurisdiction over foreign corporations. *See Akerblom v. Ezra Holdings Ltd.*, 848 F. Supp. 2d 673, 678–79 (S.D. Tex. 2012) (endorsing the *McIntyre* concurrence’s list of factors relevant to finding jurisdiction over corporations); *Powell v. Profile Design LLC*, 838 F. Supp. 2d 535, 544–45 (S.D. Tex. 2012).

158. *Powell*, 838 F. Supp. 2d at 539. *Powell* involved a product liability suit filed in Texas in which an American distributor for a foreign company challenged the personal jurisdiction of the court. The court focused its analysis on a factual comparison between the American distributor and *McIntyre*.

court relied on language in the concurrence to deny jurisdiction.¹⁵⁹ Specifically, the court found “there is no evidence of ‘something more,’ such as ‘special state-related design, advertising, advice, marketing, or anything else’ to show that [the distributor] specifically availed itself of the privilege of conducting activities in Texas.”¹⁶⁰ It was not until the end of its analysis that the court actually focused on what should have been the determining factor: the corporation only had one product in Texas, the product at issue in the case, and “th[at] product . . . was in fact sold at a retail shop in Arizona.”¹⁶¹ This fact should have starkly stood out to the court and immediately caused it to recognize that jurisdiction was improper rather than engage in a long and needless discussion of *McIntyre*.¹⁶²

F. The Need for a Consensus

The preceding Subparts reinforce one idea: there is a dire need for a consensus among the courts interpreting *McIntyre*. While courts may have avoided extremely questionable decisions, a cursory glance at the opinions demonstrates that this is merely fortuitous.¹⁶³ Litigation will continue to arise that will require courts to apply *McIntyre*. While wrongly applying *McIntyre*, some courts have even acknowledged the shortcomings of their personal jurisdiction analysis. “Although the Court believes that . . . the reasoning of the dissenters in *McIntyre*[] represents the most sensible approach to personal jurisdiction in the context of global commerce, it nevertheless finds that that approach is clearly foreclosed by the precedents of the Supreme Court and of this Circuit.”¹⁶⁴

It is an unfortunate state of judicial affairs when courts feel compelled to apply an approach that is obviously incompetent in the modern world. Ideally, the Supreme Court will address personal jurisdiction as soon as possible and set forth clear guidelines to clarify the complete disarray that is the lower courts’ attempt to apply *McIntyre*. Until that happens, however, courts should be aware of the new direction of the Court’s

There was clear evidence before the court that the American distributor actively sought to sell goods throughout the United States. Similar to *McIntyre*, the distributor attended trade shows across the country and did not take any measures to prevent its goods from being purchased in Texas. *Id.* at 537–38, 545–46.

159. *Id.* at 543–46.

160. *Id.* at 545–46.

161. *Id.* at 546.

162. The defendant’s sole contact with Texas was based on the unilateral activity of a customer who brought the product to Texas. *Powell*, 838 F. Supp. 2d at 546. The U.S. Supreme Court emphatically stated in *WWW* that jurisdiction is not proper based on the unilateral activity of another party. See *World-Wide Volkswagen*, 444 U.S. at 298.

163. See, e.g., *Finley v. Zimmerman*, No. A-1131-11T2, 2012 WL 996598, at *1, *1 n.4 (N.J. Super. Ct. App. Div. Mar. 27, 2012) (describing *McIntyre* as a general jurisdiction case).

164. *Windsor*, 825 F. Supp. 2d at 640.

jurisprudence and adjust their rulings accordingly. The following Part outlines the correct interpretation of *McIntyre* courts should apply.

V. AN EXTENSION OF PERSONAL JURISDICTION ON THE HORIZON

The Court's decision in *McIntyre* has caused a variety of different opinions among legal commentators.¹⁶⁵ Some commentators have mistakenly interpreted the ruling as sparking a new era of defendant-favored judgments.¹⁶⁶ Still others maintain that the opinion adds nothing useful to personal jurisdiction jurisprudence.¹⁶⁷ However, *McIntyre* indicates that the Court is on the verge of making significant changes to its personal jurisdiction jurisprudence. Specifically, the Court appears willing to expand the reach of personal jurisdiction, especially concerning foreign manufacturers like McIntyre. The following Part highlights key language in *McIntyre* that demonstrates this impending change and also draws upon past personal jurisdiction cases for additional support.

A. Indicators from the Supreme Court of a New Trend

While the Court found jurisdiction unconstitutional over McIntyre,¹⁶⁸ the Court's legal analysis actually indicates that the Court will find foreign defendants like McIntyre subject to jurisdiction in the future. Although Justices Breyer and Alito concurred with the Court's ruling, their analysis aligned with the dissent's opinion in a number of key areas. Because the concurrence and dissent express many of the same views, foreign based manufacturers should expect a drastic increase in their potential liability. This Subpart will highlight the similarities between the concurrence and dissent to demonstrate the new approach the Court is likely to embark upon in its personal jurisdiction jurisprudence.

165. See Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1246 (2011) (arguing that *McIntyre* will result in shielding foreign corporations from liability); *The Supreme Court, 2010 Term—Leading Cases, Federal Jurisdiction and Procedure: Personal Jurisdiction, Stream-of-Commerce Doctrine*, 125 HARV. L. REV. 281, 312 (2011) (interpreting *McIntyre* as a signal that the Court will significantly restrict the limits of personal jurisdiction); *supra* Part IV.

166. Lem E. Montgomery III & Fred E. Bourn III, *Why Expansion of Commerce and Trade Does Not Expand the Reach of the Courts: In Personam Jurisdiction and "Stream-of-Commerce" Theory*, FOR THE DEFENSE, Nov. 2011, at 42; see also Andre & Velasquez, *supra* note 16; Derek Harris, *U.S. Supreme Court Shifts Basic Personal Jurisdiction Rules*, LITIGATION NEWS (Aug. 22, 2011), http://apps.americanbar.org/litigation/litigationnews/top_stories/082211-supreme-court-personal-jurisdiction.html.

167. Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 241–42 (2011); Steven Swanson, *Fifth Amendment Due Process, Foreign Shipowners, and International Law*, 36 TUL. MAR. L.J. 123, 136 (2011).

168. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011).

Justice Breyer's concurrence aligned with the dissent far more than the plurality. Significantly, Breyer's main difference with the dissent arose from using *McIntyre* to change the rules governing personal jurisdiction.¹⁶⁹ *McIntyre*, in Breyer's view, was simply not the ideal case for the Court to lay down any new rules affecting personal jurisdiction.¹⁷⁰ However, the concurrence should not be interpreted as averse to enlarging the jurisdictional reach of state courts over foreign manufacturers. To the contrary, Breyer repeatedly suggested that changes to the Court's personal jurisdiction jurisprudence were needed.¹⁷¹ Most importantly, both the concurrence and dissent noted that the country has undergone significant changes economically that justify changes in the Court's personal jurisdiction jurisprudence.¹⁷² Breyer correctly noted that the plurality's analysis is fatally flawed because it is incapable of dealing with the business practices of modern-day corporations.¹⁷³

In fact, Breyer even acknowledged that his opinion was based on an incomplete version of the applicable facts.¹⁷⁴ Breyer's refusal to consider the facts noted by the dissent suggests that had he considered those additional facts he would have been more amenable to finding jurisdiction proper over *McIntyre*. For instance, Breyer argued that there was a lack of a "regular flow" of goods from *McIntyre* to New Jersey.¹⁷⁵ The dissent, however, pointed to evidence in the record that demonstrated activity that would constitute more than the regular flow Breyer required.¹⁷⁶ Breyer also thought a different judgment might have been appropriate if the defendant advertised and marketed to the forum state.¹⁷⁷ This is yet another requirement that the dissent noted was present in this case.¹⁷⁸ A more reasonable interpretation of the facts would have acknowledged, as the dissent did, that *McIntyre*'s participation in scrap metal conferences throughout the country was its attempt to market to every state in the United States.¹⁷⁹ Furthermore, these conventions were such a large draw for

169. *Id.* at 2791.

170. *Id.* at 2792–93.

171. *Id.* at 2791, 2794.

172. *See supra* Part III.B–C.

173. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2793.

174. *Id.* at 2792.

175. *Id.*

176. *Id.* at 2797 (Ginsburg, J., dissenting).

177. *Id.* at 2792 (Breyer, J., concurring).

178. *See id.* at 2801 (Ginsburg, J., dissenting). Because New Jersey is one of the largest markets in the United States for *McIntyre*'s products, it is likely that a sophisticated international company like *McIntyre* would target the market.

179. *Id.*

the entire scrap metal community that surely a number of New Jersey residents regularly attended the conventions.¹⁸⁰

Consequently, the concurrence should be read as an endorsement of the dissent's view, albeit not on the facts of this particular case. Because *McIntyre* is so splintered,¹⁸¹ courts can easily fall victim to misinterpreting the opinion. Merely following the Court's denial of jurisdiction is an insufficient interpretation because it fails to adhere to the core of the Court's decision—acknowledgement of the need to adjust personal jurisdiction to adequately deal with the economic realities of today's society. Therefore, courts interpreting *McIntyre* should not follow the stringent limitations endorsed by the plurality. Breyer simply advocated that whatever new rule the Court developed should adhere to the requirement that there is a "relationship between 'the defendant, the *forum*, and the litigation.'"¹⁸² The dissent's theory, while extending jurisdiction, complied with this requirement because its analysis focused on *McIntyre*'s contacts with New Jersey.¹⁸³ Under the dissent's reasoning, a corporation will not be subject to jurisdiction based solely on the fact that one of the company's products ended up in the state.¹⁸⁴

B. Suggested Interpretation Actually Complies with Precedent

A cursory glance at past cases discussing personal jurisdiction also suggests that the Court is finally prepared to extend the reach of its personal jurisdiction jurisprudence, at least as it reflects states' ability to constitutionally assert jurisdiction over foreign corporations engaged in national marketing schemes. Throughout its past decisions, the Court has striven to ensure that its rulings result in plaintiffs having at least some sort of recourse for their actions.¹⁸⁵ That is, however, the complete opposite of the result the Court reached with its decision in *McIntyre* as it is highly unlikely that plaintiffs will be able to bring suit against foreign corporations

180. See *id.* at 2796. The fact that the machine in question was purchased at one of the conventions supports this contention.

181. See *supra* Part III.

182. See *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2793 (Breyer, J., concurring) (alteration in original). Breyer also suggested that whatever future rule would need to account for the potential unfairness caused by the same jurisdictional rules applying to both large and small corporations.

183. See *id.* at 2794–804 (Ginsburg, J., dissenting).

184. *Id.* at 2797. As the dissent demonstrated, *McIntyre* targeted New Jersey. See *supra* Part III.C.

185. See *International Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945). In *McGee*, the Court found it highly persuasive that the insurance company would be practically "judgment proof" were California not a proper forum for the plaintiff. *McGee v. Int'l Life Insurance Co.*, 355 U.S. 220, 223 (1957). See also *Hanson v. Denckla*, 357 U.S. 235, 259 (1958) (Black, J., dissenting); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 302–03 (1979) (Brennan, J., dissenting).

for injuries sustained by their products.¹⁸⁶ Likewise, the Court has also shown significant respect for the interests of states.¹⁸⁷ If states were to strictly follow the Court's denial of jurisdiction in *McIntyre*, however, state interests in providing a forum for its citizens and holding businesses liable for faulty products, among other things, would be consistently disregarded. States would find themselves in the same position as New Jersey, unable to provide a reasonable forum for their citizens injured by faulty products.¹⁸⁸ Furthermore, the Court has already recognized that a defendant's national marketing scheme does not automatically preclude any particular state from asserting jurisdiction.¹⁸⁹ Moreover, the Court has adjusted personal jurisdiction rules repeatedly to conform to the constantly changing economic circumstances.¹⁹⁰

C. *The Actual Meaning of McIntyre*

Because of the number of similarities between the concurrence and dissent, courts and legal commentators would be amiss to overlook the path the Court appears ready to embark upon. No longer will states be unable to assert jurisdiction over major corporations like *McIntyre* for products-liability actions simply because the corporation utilized a national marketing scheme. Rather, the Court seems willing to adapt its personal jurisdiction jurisprudence to recognize the realities of the modern economy by endorsing an approach similar to the dissent in *McIntyre*. In *Burger King*, the Court stressed that "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."¹⁹¹ As *McIntyre* is currently being interpreted by

186. See *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2800-01.

187. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775-76 (1984) ("We agree that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities."); *Kulko v. California*, 436 U.S. 84, 100 (1978); *McGee*, 355 U.S. at 223. See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950))).

188. See *supra* Part III.

189. *Keeton*, 465 U.S. at 781 ("Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.").

190. See *Burnham v. Superior Court*, 495 U.S. 604, 629 n.2 (1990) (Brennan, J., concurring) ("We recognized that contemporary societal norms must play a role in our analysis."); *Hanson*, 357 U.S. at 250-52 ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."); *McGee*, 355 U.S. at 222-23 ("Today many commercial transactions touch two or more States and may involve parties separated by the full continent. . . . At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").

191. *Burger King*, 471 U.S. at 474.

many courts, that is the result being reached; however, that outcome is unwarranted based on a close analysis of the case as demonstrated by this Note. This is not to suggest that the Court is willing to remove all limitations on personal jurisdiction. Certainly, a corporation must have an adequate amount of contacts with the state before jurisdiction is proper. However, courts should not read *McIntyre* as requiring that they apply stringent jurisdictional rules like those applied by the plurality in *McIntyre*. Such application would result in a farce of due process.

VI. CONCLUSION

There is a general consensus that, after *McIntyre*, American plaintiffs are faced with an increasingly harder chance of holding foreign manufacturers liable in their forum state for defective products.¹⁹² This limitation is particularly troubling considering the number of product-related injuries in the United States.¹⁹³ Approximately thirty-four million people suffer injuries or are killed every year because of product defects.¹⁹⁴ Without the ability to bring suit against foreign manufacturers, American consumers are placed at the mercy of foreign companies.¹⁹⁵ Professor Daniel Klerman even suggests that consumers should receive additional protection when dealing with foreign companies because foreign law often favors manufacturers.¹⁹⁶ American plaintiffs need not suffer, however, from the whims of foreign companies. This Note contends that, while on its face *McIntyre* appears highly detrimental to American plaintiffs, the correct interpretation of the case will avoid these adverse consequences for consumers.

192. See Quick, *supra* note 6, at 550 (“Additionally, the decisions [in *Goodyear* and *McIntyre*] send the message that state courts’ assertion of personal jurisdiction over non-forum defendants had gotten out of control.”); Don Zupanec, *Personal Jurisdiction—Nonresident Manufacturer—Specific Jurisdiction*, 27 NO. 3 FEDERAL LITIGATOR 4 (2012); Laura A. Torchio & Jeffrey J. White, *Court Clarifies Personal Jurisdiction Rules*, CONNECTICUT LAW TRIBUNE, Dec. 12, 2011, at 16, available at <http://tc.com/documents/CTLawTribArticleByWhite&Torchio12.12.11.pdf>; Harris, *supra* note 166; *supra* Part IV.

193. Andre & Velasquez, *supra* note 16 (“Such injuries are the major cause of death for people between the ages of 1 and 36, outnumbering deaths from cancer or heart disease.”).

194. *Id.*

195. Daniel Klerman, *Personal Jurisdiction and Products Liability* 3 (Feb. 3, 2012) (unpublished manuscript), available at http://weblaw.usc.edu/assets/docs/Klerman_Personal%20Jurisdiction.pdf; see also Albert Choi and Kathryn Spier, *Should Consumers be Permitted to Waive Products Liability? Product Safety, Private Contracts, and Adverse Selection 2* (Sept. 21, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680932 (arguing that consumers should not be permitted to waive products liability).

196. Klerman, *supra* note 195, at 4–5 (“As a result, the costs of suing abroad and the low probability of fully compensatory damages mean that injured consumers are likely not to sue at all if the only available forum is outside the United States. . . . In addition, it gives foreign companies a competitive advantage over American firms, and encourages U.S. firms to relocate abroad.”).

At first glance, *McIntyre* is no more than another representation of a deeply divided Court unable or unwilling to come to a consensus on the proper extent of personal jurisdiction. That view, however, barely scratches the surface of the implications of *McIntyre*. It has been suggested that the Court will quickly address personal jurisdiction again.¹⁹⁷ When the Court does choose to re-examine it, courts should expect the Court to remove the restraints on personal jurisdiction that have prevented states from properly asserting personal jurisdiction over corporate defendants who target the entire nation rather than individual states.¹⁹⁸ Specifically, the Court will likely adhere to a version of the dissent's analysis that is more willing to view national contacts as also satisfying the requirement for state contacts.

*Johnjerica Hodge**

197. La Belle, *supra* note 122, at 8–9.

198. Other commentators have argued that it is time for the Court's personal jurisdiction analysis to take the modern global economy. See Richard B. Koch, Jr., *A Non-Resident Defendant Is Only Subject to the Jurisdiction of a State Where That Defendant Displays Intentional, Forum-Directed Conduct and Purposefully Avails Him or Herself of the Benefits and Protections of That State's Laws*: *J. McIntyre Machinery, Ltd. v. Nicastro*, 50 DUQ. L. REV. 199, 228–29 (2012); Swanson, *supra* note 167, at 125.

* I would like to thank Professors Carol Andrews and Bryan Fair for their guidance in the development of this Note.