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Paddling Past Nicastro in the Stream of Commerce Doctrine: Interpreting Justice Breyer's Concurrence as Implicitly Inviting Lower Courts to Develop Alternative Jurisdictional Standards

Kaitlyn Findley

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**PADDLING PAST NICASTRO IN THE STREAM OF
COMMERCE DOCTRINE: INTERPRETING JUSTICE
BREYER'S CONCURRENCE AS IMPLICITLY INVITING
LOWER COURTS TO DEVELOP ALTERNATIVE
JURISDICTIONAL STANDARDS**

ABSTRACT

The Supreme Court established the stream of commerce doctrine in its World-Wide Volkswagen Corp. v. Woodson opinion in response to the rapid emergence of complex personal jurisdiction questions in products liability cases involving nonresident manufacturers whose products were sold and caused injury in U.S. forums. Although the doctrine was initially intended to clarify jurisdictional analysis in these cases, its application has been ambiguous and judicially divisive due to the Court's chronic inability to explicate the quantity and quality of contacts that the doctrine requires a nonresident defendant to establish with a forum state before that state may exercise personal jurisdiction over it.

The Court first attempted to clarify the stream of commerce doctrine's application in Asahi Metal Industry Co. v. Superior Court, which instead resulted in the issuance of a split decision that announced two competing analytical standards for determining the requisite quantity and quality of a nonresident defendant's contacts with a forum state asserting jurisdiction: (1) the "pure stream of commerce test," requiring only a nonresident defendant's placement of its products in the stream of commerce with the expectation that the products will be sold in the forum state, and (2) the "stream of commerce plus test," requiring evidence of a nonresident defendant's "additional conduct" directed at the forum state beyond merely placing its goods in the stream of commerce. For nearly a quarter of a century following Asahi, lower courts grappled with how to apply these competing tests without any further guidance from the Court.

In 2011, the Court finally made its second attempt to clarify the stream of commerce doctrine by granting certiorari in J. McIntyre Machinery, Ltd. v. Nicastro. Unfortunately, the Court issued another disappointing split decision, prompting a torrent of law review articles conjecturing the theoretical impact of Nicastro and criticizing the Court for failing to provide meaningful

analytical guidance. In contrast, this Comment is devoted to critically analyzing the three patterns in which lower courts have actually responded to Nicastro, and it posits that although the criticism of the Court may be valid, it is counterproductive to moving the stream of commerce doctrine past Nicastro to a state of much-needed stability.

This Comment argues that Justice Breyer structured his concurrence, which constitutes the holding of Nicastro under the Marks Rule, in a manner that enables lower courts to interpret his opinion as an implicit invitation to develop alternative jurisdictional approaches for the Court to survey the next time it grants certiorari to clarify the doctrine. Providing the Court with a more varied doctrinal landscape to survey has the potential to break the persistent analytical deadlock that caused the Court to issue split decisions in Asahi and Nicastro. Thus, this Comment argues that reading Justice Breyer's concurrence as this implicit invitation is the only interpretation that will assist the Court in moving the stream of commerce doctrine past Nicastro toward the adoption of a stable and uniform personal jurisdiction analysis.

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INTRODUCTION

The Supreme Court announced the stream of commerce doctrine to facilitate complicated personal jurisdiction analyses in complex products liability cases involving nonresident¹ manufacturers whose products were sold in U.S. forum states² and caused injury. Under the stream of commerce doctrine, as originally described in *World-Wide Volkswagen Corp. v. Woodson*,³ a state's exercise of personal jurisdiction over a nonresident defendant is reasonable so long as the defendant "delivers its products into the stream of commerce with the expectation they will be purchased by consumers in the forum State."⁴

Despite the Court's simple phraseology, the actual application and requirements of the doctrine have remained fraught with ambiguity since its initial announcement in *World-Wide*, which should not come as a shock given the Court's interminable battle in squaring a state's exercise of personal jurisdiction with Fourteenth Amendment due process⁵ requirements more generally.⁶

In the Court's first foray into clarifying the stream of commerce doctrine, *Asahi Metal Industry Co. v. Superior Court*,⁷ the Court issued a split, plurality decision that announced two analytical standards for determining the quantity and quality of contacts that the doctrine requires a nonresident defendant to establish with a forum state before that state may exercise personal jurisdiction over the defendant: the "pure stream of commerce" test and the "stream of commerce plus" test. The pure stream of commerce test only requires that a nonresident defendant place its products in the stream of commerce with the expectation that the products will be sold in the forum state asserting

¹ For the purposes of this Comment, the term "nonresident" refers to an international defendant who is not domiciled in the U.S. forum state asserting personal jurisdiction over it in a domestic products liability action.

² This Comment defines a "forum state" as the U.S. state in which a particular court asserting personal jurisdiction over a defendant is located. It will also be referred to as "state" or "forum."

³ 444 U.S. 286, 293–94 (1980).

⁴ *Id.* at 298.

⁵ U.S. CONST. amend. XIV, § 1; *see Int'l Shoe Co. v. Washington*, 326 U.S. 310, 313–16 (1945) (establishing that Fourteenth Amendment due process requires that a nonresident defendant has sufficient minimum contacts with a forum such that the state's exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted)).

⁶ *See, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977); *Int'l Shoe*, 326 U.S. at 316; *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

⁷ 480 U.S. 102 (1987).

jurisdiction.⁸ Conversely, the stream of commerce plus test requires evidence of a nonresident defendant's "additional conduct" directed at the state asserting jurisdiction beyond merely placing its goods in the stream of commerce.⁹

Following *Asahi*, lower courts were forced to choose between and apply the case's competing tests, resulting in the development of a significant split among lower courts and amplifying the analytical instability already present in the doctrine.¹⁰ After nearly twenty-five years of leaving lower courts to grapple with the application of these jurisdictional tests, the Court made its second, and most recent, attempt to clarify the stream of commerce doctrine by granting certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*.¹¹ Yet again, the Court issued a split decision, reinforcing the divide between the competing tests in *Asahi* and seemingly cementing the doctrine's analytical instability.¹²

Unfortunately, as the stream of commerce doctrine has become progressively unstable since its announcement in *World-Wide*, the need for its stability has exponentially increased due to the dramatic growth in injuries caused by product defects and the subsequent rise in products liability actions. The number of annual injuries in the United States caused by product defects has grown to over 34 million.¹³ And as the world becomes increasingly globalized and interconnected, domestic and international nonresident manufacturers, whose products have come to these consumers through the stream of commerce,¹⁴ are causing a growing portion of these injuries.¹⁵ Thus, as the number of injuries from defective products increases in the United States, so does the number of difficult products liability cases involving these nonresident manufacturers, intensifying the need for analytical clarity and stability in the stream of commerce doctrine as courts endeavor to apply it on an increasingly regular basis.

⁸ *Id.* at 116–17 (Brenan, J., concurring).

⁹ *Id.* at 112 (O'Connor, J., plurality opinion).

¹⁰ 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, 703 (2009).

¹¹ 131 S. Ct. 2780 (2011).

¹² *See id.* at 2785 (Kennedy, J., plurality opinion).

¹³ *See* Clair Andre & Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, ISSUES IN ETHICS, Spring 1991, <http://www.scu.edu/ethics/publications/iie/v4n1/pay.html>.

¹⁴ "Stream of commerce" refers to the formal and informal distribution networks manufacturers use to serve, directly or indirectly, the market for their products in other states.

¹⁵ *See* Daniel M. Klerman, *Personal Jurisdiction and Products Liability* 3 (Univ. of S. Cal. Law Sch., Law & Econ. Working Paper No. 143, 2012), http://weblaw.usc.edu/assets/docs/Klerman_Personal%20Jurisdiction.pdf.

In the aftermath of *Nicastro*, many scholars have attempted to predict the theoretical impact of the case and criticized the Court for failing to provide meaningful analytical guidance. In contrast, this Comment is devoted to critically analyzing the three patterns in which lower courts have responded and argues that although the criticism of the Court may be valid, it is counterproductive to moving the stream of commerce doctrine past *Nicastro* toward a state of much-needed stability.

Part I of this Comment will create a jurisprudential context for the later discussion of *Nicastro* by providing a brief history of personal jurisdiction law and the besetting confusion of the stream of commerce doctrine. Part II presents the facts of *Nicastro* and evaluates the three *Nicastro* opinions, placing a particular emphasis on Justice Breyer's concurrence, which is the holding of the case under the *Marks* Rule.¹⁶

Finally, Part III identifies and critically analyzes the three general patterns in which lower courts have interpreted the *Nicastro* decision: (1) mistakenly treating the plurality as binding, (2) factually distinguishing *Nicastro* and applying the competing tests from *Asahi*, and (3) accepting Justice Breyer's concurrence as an implicit invitation to develop alternative jurisdictional standards. Part III employs *Smith v. Teledyne Continental Motors, Inc.*,¹⁷ a post-*Nicastro* district court decision, as a case study to examine more closely the third response pattern—accepting Justice Breyer's concurrence as an implicit invitation—in an effort to demonstrate this pattern's significance and propitious implications with respect to moving jurisdictional jurisprudence past *Nicastro*.

Ultimately, this Comment concludes that Justice Breyer's concurrence in *Nicastro* is structured in such a way that enables lower courts to interpret its text and spirit as implicitly inviting them to develop alternative jurisdictional approaches¹⁸ for the Court to consider the next time it grants certiorari in a stream of commerce case to clarify the doctrine. Providing the Court with this

¹⁶ *Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that if “no single rationale explaining the result [in a case] enjoys the assent of [a majority of the Court], the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (internal quotation marks omitted)).

¹⁷ 840 F. Supp. 2d 927 (D.S.C. 2012).

¹⁸ For the purposes of this Comment, an “alternative approach” constitutes a jurisdictional standard or test that does not necessarily depart dramatically from traditional personal jurisdiction analyses or the *Asahi* tests, but instead applies them in a fresh or modified way, balancing the range of analytical concerns expressed in Justice Breyer's *Nicastro* concurrence.

varied doctrinal landscape dramatically enhances the Court's future ability to break the persistent analytical deadlock that caused it to issue split decisions in *Asahi* and *Nicastro*. Thus, this Comment argues that lower courts should, like the *Smith* court, respond by accepting Justice Breyer's implicit invitation to use the post-*Nicastro* interim to develop fresh jurisdictional standards because this is the *only* lower court response with the potential to assist the Court in moving the doctrine past *Nicastro* toward the announcement of a stable and uniform personal jurisdiction analysis.

I. PERSONAL JURISDICTION JURISPRUDENCE AND THE STREAM OF COMMERCE DOCTRINE

Part I of this Comment briefly explores the tortuous path jurisdictional jurisprudence has taken throughout the nineteenth, twentieth, and twenty-first centuries as the Supreme Court has responded to changing social, political, and economic realities. A court's exercise of personal jurisdiction represents a state's power to compel individuals to respond to allegations within a particular judicial system.¹⁹ Historically, this power to force individuals to submit to adjudication in a particular state's court was limited by the state's geographical boundaries.²⁰ However, expansions in U.S. territory and increases in the number of people, corporations, and products traveling across state lines impelled the Supreme Court to expand this traditional territorial approach to personal jurisdiction, resulting in a complex jurisprudential history.²¹ Understanding this history provides the necessary context for this Comment's analysis of lower courts' responses to *Nicastro*.²² It also lays the requisite foundation for this Comment's argument that Justice Breyer's concurrence in *Nicastro* must be read as an implicit invitation to lower courts to develop alternative jurisdictional standards for stream of commerce cases to move the muddled doctrine past *Nicastro* and toward a stable, universal approach.

Part I is divided into three sections. Section A provides an overview of the Supreme Court's foundational case with regard to personal jurisdiction, *Pennoyer v. Neff*,²³ which imposed Fourteenth Amendment due process

¹⁹ RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 21–22 (5th ed., 2008); *see, e.g.*, *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (“The foundation of jurisdiction is physical power . . .”).

²⁰ *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

²¹ FREER & PERDUE, *supra* note 19, at 32–33.

²² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

²³ 95 U.S. at 722.

limitations on the exercise of personal jurisdiction by U.S. courts.²⁴ Section B discusses *International Shoe Co. v. Washington*,²⁵ which laid the foundation for contemporary jurisdictional law by establishing that personal jurisdiction is appropriate when a nonresident defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²⁶ Section C examines the origin of the stream of commerce doctrine, as articulated in *World-Wide*,²⁷ and the muddled state of the law following the Court’s conflicting applications of the doctrine in *Asahi*.²⁸ Because every civil procedure casebook has chronicled the facts of these four foundational cases, there is no need for this Comment to recount them in great detail; however, understanding the underlying rationales and holdings of these cases creates a crucial foundation for this Comment’s analysis in Part III.

A. *The Beginning of Fourteenth Amendment Due Process Limitations on Personal Jurisdiction: Pennoyer v. Neff*

*Pennoyer*²⁹ established the principle that jurisdiction flowed from a state’s territorial sovereignty and permanently inserted Fourteenth Amendment due process considerations into the law of personal jurisdiction.³⁰

The Court equated personal jurisdiction and judicial power over a defendant with a state’s territorial limits by explaining that a person or piece of property found within a state’s borders was inherently susceptible to the jurisdiction of that particular forum state.³¹ The Court restricted a state’s valid exercise of personal jurisdiction over a defendant to its territorial sovereignty and explained that a state’s exercise of personal jurisdiction was only proper in three circumstances: (1) when the defendant is served with process while

²⁴ Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 95 (1997).

²⁵ 326 U.S. 310 (1945).

²⁶ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

²⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

²⁸ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

²⁹ *Pennoyer v. Neff*, 95 U.S. 714 (1878).

³⁰ *See id.* at 722.

³¹ *Id.*; *see also* S. Wilson Quick, Comment, *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, 555 n.45 (2011) (explaining that Justice Field expressed the territorial power theory twice in the Court’s opinion: first, “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,” and second, “no tribunal established by [a state] can extend its process beyond that territory” (alteration in original) (quoting *Pennoyer*, 95 U.S. at 722) (internal quotation marks omitted)).

physically present in the state's territory, (2) when the defendant is domiciled in the state, or (3) when the defendant consents to the state's exercise of personal jurisdiction.³²

In addition to imposing territorial limits on state courts' exercise of personal jurisdiction, *Pennoyer* inserted due process concerns into jurisdictional law.³³ The Court held that the Constitution *required* in-state service of process or defendant waivers for a state's exercise of personal jurisdiction over nonresident defendants to be valid and enforceable.³⁴ By linking the jurisdictional requirements of the Full Faith and Credit Clause to the Due Process Clause, *Pennoyer* permanently intertwined constitutional due process with the jurisdictional analysis of every forum in the United States.³⁵ Following *Pennoyer*, no state or federal court could enforce a judgment if the original issuing court lacked proper jurisdiction.³⁶

After *Pennoyer* was decided in 1878, its stringent requirements based on territorial sovereignty dictated personal jurisdiction analysis in American jurisprudence for nearly seventy years.³⁷ The changing social, economic, and geographic realities of the twentieth century forced the Supreme Court to create legal fictions to ensure that state and federal courts' exercise of personal jurisdiction over nonresident defendants was consistent with one of the three proper jurisdictional circumstances³⁸ identified by *Pennoyer*.³⁹ These legal fictions were premised on the ideas of constructive presence and implied consent.⁴⁰ For example, states often required a nonresident corporation to appoint an agent for service within the forum or declared a corporation "present" in a forum by virtue of its business activities in the state.⁴¹ For individuals, states often relied on the idea of "implied consent" to force a nonresident defendant to answer for certain acts she committed in a state. For

³² See *Pennoyer*, 95 U.S. at 727, 733.

³³ *Id.* at 733. See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 499–500 (1987) for a discussion about why introducing the Due Process Clause of the Fourteenth Amendment into jurisdictional analysis was "startling[.] . . . unnecessary and surprising." *Id.*

³⁴ *Pennoyer*, 95 U.S. at 721–22.

³⁵ Tocklin, *supra* note 24, at 94, 138–39.

³⁶ *Id.* at 138.

³⁷ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³⁸ See *Pennoyer*, 95 U.S. at 727.

³⁹ Laughlin, *supra* note 10, at 688.

⁴⁰ FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* 78–79 (3d ed. 1985).

⁴¹ *Id.* at 79.

example, in *Hess v. Pawlowski*,⁴² the Court upheld a Massachusetts statute that stated a nonresident's use of Massachusetts highways constituted her implied consent to the state's exercise of personal jurisdiction over her for any causes of action arising from her use of the state's highways.⁴³

The legal fictions created in the seventy years following *Pennoyer* insufficiently responded to the socioeconomic complexities of the twentieth century and rendered traditional notions of personal jurisdiction inane.⁴⁴ This prompted the Court finally to adapt the law to align with a more technologically advanced era in *International Shoe*.

*B. The Foundation for Contemporary Personal Jurisdiction Law:
International Shoe*

Decided in 1945, the Court's holding in *International Shoe* laid the foundation for contemporary personal jurisdiction law by establishing the principle that jurisdiction is proper when a nonresident defendant has "certain minimum contacts with [the forum state] such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.'"⁴⁵

The case arose from the State of Washington's attempt to enforce the state labor code against a nonresident defendant.⁴⁶ The defendant employed thirteen salesmen in Washington who were paid on commission, met with prospective customers in hotels, and rented space for advertisements.⁴⁷ The defendant argued that Washington had no jurisdictional basis for haling it into Washington's court system because the defendant was not physically present in the state.⁴⁸

The Court rejected the argument that the defendant lacked physical presence in the forum by explaining "the terms 'present' or 'presence' are used merely to symbolize those activities of the [defendant] corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."⁴⁹ Thus, the Court adopted a new, two-part test for establishing

⁴² 274 U.S. 352 (1927).

⁴³ *Id.* at 356–57.

⁴⁴ *See* Quick, *supra* note 31, at 556.

⁴⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁴⁶ *Id.* at 313–14.

⁴⁷ *Id.*

⁴⁸ *Id.* at 311–12.

⁴⁹ *Id.* at 316–17.

personal jurisdiction over a nonresident defendant: (1) the defendant must have sufficient “minimum contacts” with the forum such that (2) the exercise of jurisdiction comports with “traditional notions of fair play and substantial justice.”⁵⁰ The Court held that because the State of Washington’s cause of action arose out of the defendant’s activities in the state, it was reasonable for the state to assert personal jurisdiction over the corporation.⁵¹

International Shoe eliminated courts’ use of legal fictions that focused on where notice was served and the need to create methods of establishing implied consent.⁵² Instead, it required courts to begin analyzing a nonresident’s conduct toward and within a forum to determine whether a defendant’s contacts with the state made it “reasonable . . . to require the corporation [or individual] to defend the particular suit which [was] brought there.”⁵³

Since its decision in *International Shoe*, the Court has developed several tests to determine if a defendant has established minimum contacts in a forum state:

- (1) whether the defendant “purposefully direct[s] his activities at residents of the forum and [whether] the litigation results from alleged injuries that arise out of or relate to those activities”;
- (2) whether the defendant “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”;
- and (3) whether a “defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”⁵⁴

After determining that a nonresident defendant has established sufficient minimum contacts in a forum state, courts must separately determine whether the proposed exercise of personal jurisdiction would comport with traditional notions of fair play and substantial justice. To make this separate determination, the Court in *Burger King v. Rudzewicz*⁵⁵ listed five factors for consideration: (1) “the burden on the defendant,” (2) the forum state’s interest in adjudication, (3) “the plaintiff’s interest in obtaining convenient and effective relief,” (4) “the [national] judicial system’s interest in obtaining the

⁵⁰ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted).

⁵¹ *Id.* at 320.

⁵² Laughlin, *supra* note 10, at 690–91.

⁵³ *Int’l Shoe*, 326 U.S. at 317.

⁵⁴ Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 752 (2012) (alterations in original) (footnotes omitted) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472–75 (1985)) (internal quotation marks omitted).

⁵⁵ 471 U.S. 462.

most efficient resolution of [the litigation],” and (5) the systemic interest in “furthering . . . substantive social policies.”⁵⁶

Ultimately, *International Shoe*’s two-part test for establishing personal jurisdiction “became the bedrock upon which other theories of jurisdiction have been built,”⁵⁷ including the stream of commerce doctrine implicated by *J. McIntyre Machinery, Ltd. v. Nicastro*, which will be discussed in Part II of this Comment.⁵⁸

C. *The Muddled Stream of Commerce Doctrine: World-Wide and Asahi*

The Supreme Court originally announced the stream of commerce doctrine to assist in analyzing the validity of a forum state’s exercise of personal jurisdiction over nonresident manufacturers whose products entered the state’s territory through established channels of modern commerce and caused injury, prompting products liability suits by the state’s citizens.⁵⁹ Specifically, the doctrine was intended to facilitate a court’s determination of whether a nonresident manufacturer’s actions could constitute sufficient minimum contacts to sustain a forum state’s assertion of personal jurisdiction.⁶⁰

The Court first announced the stream of commerce doctrine in 1980 when it decided *World-Wide*.⁶¹ In its next opportunity to explain the doctrine, *Asahi*,⁶² the Court issued a plurality opinion that failed to clearly define the amount of conduct required to establish that a nonresident manufacturer has sufficient minimum contacts with a forum to warrant its exercise of personal jurisdiction. *Asahi*’s lack of guidance muddled the doctrine and resulted in the adoption of divergent analytical approaches among lower courts⁶³ prior to the Court’s decision to grant certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*.⁶⁴

⁵⁶ *Id.* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)) (internal quotation marks omitted).

⁵⁷ Quick, *supra* note 31, at 558.

⁵⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

⁵⁹ See *World-Wide*, 444 U.S. at 294.

⁶⁰ See *id.*

⁶¹ *Id.* at 297–98. *But see* Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E. 2d 761, 766 (Ill. 1961) (demonstrating that state courts applied versions of the stream of commerce doctrine prior to the Court’s announcement in *World-Wide* due to the language in state long-arm statutes).

⁶² *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

⁶³ See Laughlin, *supra* note 10, at 725 (detailing the differences in stream of commerce analyses among lower courts).

⁶⁴ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

Part C of this section is divided into three subsections: (1) a discussion of the Court's holding and rationale in *World-Wide*, (2) a discussion of the Court's opinions in *Asahi*, and (3) an examination of the muddled state of the stream of commerce doctrine after *Asahi*.

1. *The Stream of Commerce Doctrine's Announcement: World-Wide*

The cause of action in *World-Wide* arose after the plaintiffs purchased an Audi in New York and drove it to Oklahoma, where they were involved in a car accident that caused the Audi to catch fire and severely burn them.⁶⁵ The plaintiffs brought a products liability suit in Oklahoma against the manufacturer of the allegedly defective Audi and members of the distribution network.⁶⁶ The regional distributor, World-Wide Volkswagen, and retail dealer, Seaway, were both citizens of New York, and as such, argued that Oklahoma could not assert personal jurisdiction over them.⁶⁷

In its analysis of the case, the Court introduced the stream of commerce doctrine by explaining that a forum state may constitutionally assert jurisdiction over a nonresident manufacturer when that manufacturer "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."⁶⁸ According to the Court, the stream of commerce referred to the formal or informal distribution networks that manufacturers use to "serve, directly or indirectly, the market for [their] product[s] in other States."⁶⁹ The Court further explained "foreseeability . . . that [a] defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" satisfies the constitutional requirement of minimum contacts under the stream of commerce doctrine.⁷⁰ According to the Court, nonresident defendants should foresee being haled into a state's courts if they spent effort to serve the forum state's market either directly or indirectly.⁷¹

⁶⁵ *World-Wide*, 444 U.S. at 288.

⁶⁶ *Id.*

⁶⁷ *Id.* Both defendants claimed that they did not do any business in Oklahoma, ship or sell any product to or in that state, have an agent to receive process there, or purchase advertisements "in any media calculated to reach Oklahoma." *Id.* at 289.

⁶⁸ *Id.* at 298.

⁶⁹ *Id.* at 297.

⁷⁰ *Id.* But see GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 95 (4th ed. 2007) (explaining that *World-Wide's* foreseeability inquiry has come under criticism for circularity).

⁷¹ *World-Wide*, 444 U.S. at 297.

Unfortunately for the plaintiffs, the Court found an absence of any circumstances to justify Oklahoma's exercise of personal jurisdiction over the defendants.⁷² Because the defendants did not attempt to sell or advertise in Oklahoma, the Court found that they did not make any direct or indirect efforts to serve the state's market.⁷³ Thus, the defendants could not reasonably anticipate being haled into Oklahoma's courts regardless of the theoretical foreseeability that the plaintiffs' car could eventually be driven into the state and cause injury.⁷⁴ Ultimately, the Court held that it was the plaintiffs' "unilateral activity," and not the efforts of the defendants, that brought the allegedly defective Audi to Oklahoma, and therefore, the defendants did not establish sufficient contacts with Oklahoma to sustain the state's assertion of jurisdiction.⁷⁵

By holding that the plaintiffs' unilateral action could not sustain Oklahoma's assertion of jurisdiction, the Court did not provide further guidance about the precise quality and quantity of contacts that would cause a nonresident defendant to reasonably anticipate being haled into a forum's courts.⁷⁶ Due to this lack of guidance about exactly what conduct would be sufficient to establish personal jurisdiction over a nonresident defendant, lower courts varied in how they applied the doctrine after its announcement in *World-Wide*.⁷⁷

When presented with the opportunity to clarify the stream of commerce doctrine in *Asahi*,⁷⁸ the Court failed to issue a majority opinion. This further exacerbated lower courts' confusion by thwarting the establishment of a uniform standard for jurisdictional analysis in stream of commerce cases.

⁷² *Id.* at 295.

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *Id.* at 298 (quoting *Hansen v. Denckla*, 357 U.S. 235, 253 (1958)) (internal quotation mark omitted).

⁷⁶ *See id.* at 299.

⁷⁷ *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.").

⁷⁸ *See Asahi*, 480 U.S. 102.

2. *The Court's First Failed Attempt to Clarify the Stream of Commerce Doctrine: Asahi*

The Supreme Court's splintered plurality opinion in *Asahi* thwarted the establishment of a uniform jurisdictional standard in stream of commerce cases by announcing two competing tests for determining what constitutes a nonresident defendant's establishment of sufficient minimum contacts with a forum state.⁷⁹ The two competing tests were each supported by four Justices⁸⁰: (1) Justice O'Connor's stream of commerce plus test,⁸¹ and (2) Justice Brennan's pure stream of commerce test.⁸² Because understanding the impact of *Asahi's* competing tests is key to contextualizing the Court's plurality opinion in *Nicastro*, this subsection will briefly discuss the case and the fundamental differences between the two tests it announced.⁸³

The cause of action in *Asahi* arose after the plaintiff lost control of his motorcycle and collided with a tractor, seriously injuring himself and killing his wife.⁸⁴ Alleging that a defective motorcycle tire tube caused the accident, the plaintiff filed a products liability action in California state court against the Taiwanese tire tube manufacturer (Cheng Shin Rubber Industrial Company)⁸⁵ and the Japanese tube valve assembly manufacturer (Asahi Metal Industry Company).⁸⁶ The Taiwanese manufacturer subsequently filed a third-party suit for indemnification against the Japanese manufacturer.⁸⁷ The plaintiff settled his claims against both foreign defendants out of court, leaving only the indemnification action for the California court to decide.⁸⁸ The Japanese

⁷⁹ Compare *id.* at 112 (O'Connor, J., plurality opinion) ("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."), with *id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) ("[J]urisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and [does] not require[] a showing of additional conduct.").

⁸⁰ Justice Stevens did not endorse either of the tests articulated by Justice O'Connor and Justice Brennan. See *id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment). Instead, he articulated a standard that seemingly departed from the *International Shoe* precedent by suggesting that jurisdictional analysis in stream of commerce cases should focus on the volume, value, and hazardous nature of the nonresident defendant's products rather than the defendant's "minimum contacts" with the forum. *Id.* at 122.

⁸¹ See *id.* at 112 (O'Connor, J., plurality opinion).

⁸² See *id.* at 116–17 (Brennan, J., concurring in part and concurring in the judgment).

⁸³ See Laughlin, *supra* note 10, at 702, 704, for a discussion of Justice Stevens's opinion and its limited impact on lower courts.

⁸⁴ *Asahi*, 480 U.S. at 105 (O'Connor, J., plurality opinion).

⁸⁵ *Id.* at 105–06.

⁸⁶ *Id.* at 106.

⁸⁷ *Id.*

⁸⁸ *Id.*

manufacturer alleged that it did not have sufficient minimum contacts with California to sustain the state's assertion of personal jurisdiction.⁸⁹

The California Supreme Court held that the Japanese manufacturer's "intentional act of placing its components into the stream of commerce . . . by delivering the components to [the Taiwanese manufacturer]—coupled with [the defendant's] awareness that some of the components would eventually find their way into California" satisfied the minimum contacts requirement of the Due Process Clause under the stream of commerce doctrine.⁹⁰ The U.S. Supreme Court granted certiorari and reversed the California Supreme Court's decision.⁹¹

In reversing the decision, the Court held that California's exercise of personal jurisdiction over the Japanese manufacturer was unconstitutional because it offended traditional notions of fair play and substantial justice.⁹² However, members of the Court disagreed about whether the defendant had established sufficient minimum contacts with California under the stream of commerce doctrine.⁹³ Thus, Justice O'Connor and Justice Brennan wrote separate opinions that announced competing tests for determining whether a nonresident defendant has established sufficient minimum contacts with a forum state under the doctrine.⁹⁴

Justice O'Connor's stream of commerce plus test required "additional purposeful actions directed at the forum besides simply putting a product in the stream of commerce with knowledge that the product would be sold in the forum state."⁹⁵ According to Justice O'Connor, these additional contacts must "indicate an intent or purpose to serve the market in the forum State."⁹⁶ Evidence of additional conduct indicating this intent included "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

⁸⁹ *Id.*

⁹⁰ *Id.* at 108.

⁹¹ *Id.* at 116.

⁹² *Id.* The Court held that California's exercise of personal jurisdiction over Asahi would be unreasonable because (1) Asahi was a foreign defendant and the burden of litigating in California was great, (2) California's interest in litigating the case was nonexistent, and (3) Cheng Shin did not demonstrate that it was more convenient to litigate against Asahi in California rather than Taiwan. *Id.* at 114.

⁹³ *Id.* at 116–17 (Brennan, J., concurring in part and concurring in the judgment).

⁹⁴ Compare *id.* at 112 (O'Connor, J., plurality opinion), with *id.* at 116 (Brennan, J., concurring in part and concurring in the judgment).

⁹⁵ Laughlin, *supra* note 10, at 702 (citing *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion)).

⁹⁶ *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion).

State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”⁹⁷

Applying her stream of commerce plus test, Justice O’Connor believed the defendant did not establish sufficient minimum contacts with California because the defendant did not participate in any of the indicia of purposeful additional conduct listed above.⁹⁸ To bolster her argument, Justice O’Connor explained “[the] defendant’s awareness that the stream of commerce may . . . sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”⁹⁹

In contrast, Justice Brennan announced the pure stream of commerce test, which required no showing of additional conduct because he felt that “putting a product in the ‘stream of commerce’ with the knowledge that ‘the final product is being marketed in the forum state,’ should be sufficient to sustain jurisdiction in the forum where that product causes injury.”¹⁰⁰ According to Justice Brennan, “[a]s long as a participant [in the regular flow of products from manufacture to retail sale] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”¹⁰¹ To further elucidate his test’s underlying rationale, Justice Brennan explained that a defendant who places goods in the stream of commerce also purposefully avails itself of a forum state because it “benefits economically from the retail sale of the final product . . . and indirectly benefits from the State’s laws that regulate and facilitate commercial activity.”¹⁰²

Thus, Justice Brennan’s pure stream of commerce test would allow a court to find that a nonresident defendant established minimum contacts with any forum where its products were sold and caused injury if the defendant placed its products in the stream of commerce and knew that they were being marketed in the particular forum asserting jurisdiction.¹⁰³ Applying his test, Justice Brennan believed the defendant established minimum contacts with California just by selling its tire valve assemblies to the Taiwanese

⁹⁷ *Id.*

⁹⁸ *Id.* at 112–13.

⁹⁹ *Id.* at 112.

¹⁰⁰ Laughlin, *supra* note 10, at 701 (quoting *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment)).

¹⁰¹ *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment).

¹⁰² *Id.*

¹⁰³ *See id.*

manufacturer for use in its tire tubes with the knowledge that the Taiwanese manufacturer's tire tubes were being marketed in California.¹⁰⁴

Asahi's competing tests for determining the requisite minimum contacts to establish personal jurisdiction over nonresident defendants under the stream of commerce doctrine provided little analytical guidance to lower courts about how to constitutionally resolve these cases.¹⁰⁵ State courts and lower federal courts struggled with how to apply these competing tests for the next twenty-four years without any further clarification from the Court.¹⁰⁶

3. *The Muddied Stream of Commerce Doctrine After Asahi*

After *Asahi*, lower courts were split when forced to decide between the case's competing tests.¹⁰⁷ The First, Fourth, Sixth, Ninth, and Eleventh Circuits adopted Justice O'Connor's stream of commerce plus test.¹⁰⁸ The Fifth, Seventh, and Eighth Circuits adopted Justice Brennan's pure stream of commerce test.¹⁰⁹ Other circuits, such as the Second and Federal Circuits, declined to choose one test over the other, and instead applied both tests in deciding whether a nonresident defendant established sufficient contacts with a state to sustain jurisdiction.¹¹⁰ State courts were similarly divided on which test to apply in these cases.¹¹¹

As lawyers, judges, and law professors became increasingly dissatisfied with the unsettled state of the law, both of *Asahi's* competing tests were "attacked as . . . inadequate model[s] that departed from the goals, constitutional underpinnings, and precedential history of personal jurisdiction."¹¹² Even the propriety of applying the fairness factors in stream of

¹⁰⁴ *Id.* at 121.

¹⁰⁵ See Laughlin, *supra* note 10, at 703–04; Kristin R. Baker, Comment, *Product Liability Suits and the Stream of Commerce After Asahi: World-Wide Volkswagen Is Still the Answer*, 35 TULSA L.J. 705, 712 (2000).

¹⁰⁶ Allen Ides, *Supreme Court—October Term 2010—Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 353 (2012).

¹⁰⁷ *Id.*

¹⁰⁸ Laughlin, *supra* note 10, at 704.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Courts in these jurisdictions conducted two jurisdictional analyses for each case, using both tests, and only upheld jurisdiction if the facts were such that both tests were satisfied. *See id.*

¹¹¹ Laughlin, *supra* note 10, at 704 n.132.

¹¹² Peter R. Bryce, Note, *Whither Fairness? In Search of a Jurisdictional Test After J. McIntyre Machinery v. Nicastro*, 80 FORDHAM L. REV. 2975, 2994 (2012).

commerce cases, which persuaded a majority of the Court in *Asahi*, was criticized.¹¹³

This precarious state of the law persisted for nearly twenty-five years until it finally impelled the Court to make a second attempt at clarifying the stream of commerce doctrine by granting certiorari in *Nicastro*. Unfortunately, the Court failed at this second clarification attempt and again issued a plurality decision with three different opinions, which this Comment discusses in Part II. Although the *Nicastro* Court itself failed to bring clarity and stability to the doctrine, Part III of this Comment argues that lower courts must interpret Justice Breyer's concurrence as implicitly inviting them to create alternative jurisdictional standards to assist the Court in moving the doctrine past *Nicastro* and toward a more stable approach in the future.

II. THE COURT'S SECOND FAILED ATTEMPT TO CLARIFY THE STREAM OF COMMERCE DOCTRINE: *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*

This Part examines the *Nicastro* case—the Court's most recent foray into the stream of commerce doctrine. Understanding *Nicastro*'s unique facts and the three separate opinions the Court produced provides essential context for Part III's critical analysis of lower courts' responses to the case and the argument that Justice Breyer's concurrence must be read as an implicit invitation to lower courts to develop alternative jurisdictional standards. Thus, Part II is divided into four sections: (A) The Facts of *Nicastro*, (B) Justice Kennedy's Plurality Opinion, (C) Justice Ginsburg's Dissent, and (D) Justice Breyer's Concurrence.

A. *The Facts of Nicastro*

The products liability cause of action in *Nicastro* arose after a metal-cutting machine severed four fingers from the plaintiff's right hand while he was working at a scrap metal plant in New Jersey.¹¹⁴ The metal-cutting machine that mangled the plaintiff's hand had been manufactured by J. McIntyre Machinery, Ltd. (McIntyre UK), a metal-cutting machine manufacturer incorporated in the United Kingdom.¹¹⁵ Although its principal place of business was in Nottingham, England, McIntyre UK heavily marketed its

¹¹³ *Id.*

¹¹⁴ *Nicastro v. McIntyre Mach. Am. Ltd. (Nicastro II)*, 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). The plaintiff was named Robert Nicastro. *Id.*

¹¹⁵ *Id.*

machines in the United States through its exclusive U.S. distributor, McIntyre Machinery America, Ltd. (McIntyre America), an Ohio corporation with its principal place of business in Ohio.¹¹⁶

McIntyre UK and McIntyre America were separate corporations with no common ownership, although their strikingly similar names suggested otherwise.¹¹⁷ McIntyre America, however, did structure its “advertising and sales efforts in accordance with [McIntyre UK’s] direction and guidance whenever possible.”¹¹⁸ McIntyre UK and McIntyre America also attended several trade conventions, exhibitions, and conferences together throughout the United States.¹¹⁹ In fact, the plaintiff’s employer purchased the machine at issue in *Nicastro* after speaking with McIntyre UK representatives at one such trade convention.¹²⁰

The plaintiff filed a products liability action in 2003 against both McIntyre UK and McIntyre America in New Jersey superior court.¹²¹ McIntyre UK filed a motion to dismiss for lack for personal jurisdiction.¹²² The trial court granted McIntyre UK’s motion to dismiss, but the appellate court remanded the case for jurisdictional discovery.¹²³ Following the jurisdictional discovery, the trial court again granted McIntyre UK’s motion to dismiss for lack of personal jurisdiction because McIntyre UK “d[id] not have a single contact with New Jersey short of the machine in question ending up in [the] state.”¹²⁴

After applying Justice O’Connor’s stream of commerce plus test, the appellate court reversed the trial court, once again.¹²⁵ The appellate court explained that McIntyre UK purposefully established the distribution scheme that brought the machine at issue into New Jersey, which constituted sufficient additional conduct beyond merely placing a product in the stream of commerce

¹¹⁶ *Id.* at 577–79.

¹¹⁷ *Id.* at 593.

¹¹⁸ *Id.* at 579 (quoting a letter from McIntyre America to McIntyre UK written in January 2000) (internal quotation mark omitted).

¹¹⁹ *See id.*

¹²⁰ *Id.* at 578.

¹²¹ *Id.* at 577–78.

¹²² *Nicastro v. McIntyre Mach. Am., Ltd. (Nicastro I)*, 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008), *aff’d*, 987 A.2d 575 (N.J. 2010), *rev’d sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). McIntyre America filed bankruptcy immediately after it was served. *Id.*

¹²³ *Id.* at 99 n.1.

¹²⁴ *Id.* at 99 (internal quotation marks omitted).

¹²⁵ *Id.* at 104–05.

to establish McIntyre UK's minimum contacts with New Jersey and sustain the state's exercise of personal jurisdiction.¹²⁶

The New Jersey Supreme Court affirmed the appellate court, holding that New Jersey's exercise of personal jurisdiction over McIntyre UK did not violate due process.¹²⁷ In its lengthy opinion, the court noted that several courts had interpreted Justice O'Connor's stream of commerce plus test as being satisfied "in the context of foreign manufacturers that employed national marketing schemes resulting in sales and injuries in the forum state."¹²⁸ The court explained that if a manufacturer reasonably should know its products are distributed through a nationwide distribution system, then it must expect to be subject to New Jersey's jurisdiction if one of its defective products is sold to a consumer in the state, causing injury.¹²⁹

Thus, the New Jersey Supreme Court found that the facts of this case satisfied Justice O'Connor's stream of commerce plus test because McIntyre UK knew that McIntyre America distributed its products through a nationwide distribution system that targeted every state in the United States, including New Jersey.¹³⁰ Therefore, McIntyre UK must have expected that it would be subject to New Jersey's jurisdiction if one of its machines was sold to a New Jersey consumer and caused injury in the state.¹³¹ McIntyre UK appealed the New Jersey Supreme Court's decision to the U.S. Supreme Court, which granted certiorari in 2010.¹³²

B. Justice Kennedy's Plurality Opinion

Justice Kennedy, writing for the plurality, reversed the New Jersey Supreme Court's decision.¹³³ Justice Kennedy reasoned that a forum state could only exercise personal jurisdiction over a nonresident defendant when that defendant engaged in conduct *specifically* targeting the forum state, thereby invoking the protections and benefits of that state's laws.¹³⁴ Thus, Justice Kennedy directly rejected the New Jersey Supreme Court's holding by

¹²⁶ *Id.*

¹²⁷ *Nicastro v. McIntyre Mach. Am., Ltd. (Nicastro II)*, 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

¹²⁸ *Ides*, *supra* note 106, at 356 (citing *Nicastro II*, 987 A.2d at 589–90).

¹²⁹ *Nicastro II*, 987 A.2d at 591–92.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 62 (2010).

¹³³ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (Kennedy, J., plurality opinion).

¹³⁴ *See id.* at 2787.

finding that an attempt to exploit the entire United States was not sufficient to establish jurisdiction in a particular state without a showing of additional evidence that a nonresident defendant targeted that state specifically.¹³⁵

In explaining this reasoning, Justice Kennedy stated that the plurality relied on *International Shoe* and its precedent to provide the basic framework for its jurisdictional analysis in *Nicastro*.¹³⁶ Thus, Justice Kennedy first determined how nonresident defendants establish minimum contacts in cases implicating the stream of commerce doctrine by analyzing Justice Brennan's and Justice O'Connor's competing tests¹³⁷ from *Asahi*.

Justice Kennedy ultimately endorsed Justice O'Connor's stream of commerce plus test because he felt the Court's precedents made clear that a nonresident defendant's actions—not its expectations—empowered a state's courts to force the defendant to submit to jurisdiction.¹³⁸ According to Justice Kennedy, a nonresident defendant has established sufficient minimum contacts with a forum only after taking specific actions to target the forum state, thereby rendering the pure stream of commerce test's endorsement of personal jurisdiction predicated on a defendant's mere expectation of sales in a forum constitutionally invalid.¹³⁹ Additionally, Justice Kennedy argued that the pure stream of commerce test violated constitutional due process by permitting the exercise of jurisdiction over nonresident defendants who never purposefully availed themselves to a *specific* forum.¹⁴⁰ Justice Kennedy believed that permitting the exercise of personal jurisdiction over these defendants violated the constitutional importance of state sovereignty inherent in the theoretical propriety of personal jurisdiction itself.¹⁴¹

In *Nicastro*, the plurality found that McIntyre UK never engaged in any additional conduct that demonstrated intent to specifically target New Jersey.¹⁴² Thus, the plurality held that New Jersey's exercise of personal jurisdiction over McIntyre UK was constitutionally invalid.¹⁴³

¹³⁵ See *id.* at 2788.

¹³⁶ See *id.* at 2787.

¹³⁷ See *supra* Part I.C.2 for an in depth discussion of the competing tests announced in *Asahi*.

¹³⁸ *Nicastro*, 131 S. Ct. at 2788–89 (Kennedy, J., plurality opinion).

¹³⁹ See *id.* at 2789.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² *Id.* at 2790.

¹⁴³ *Id.* at 2791. Justices Breyer and Alito concurred in the judgment. *Id.* (Breyer, J., concurring in the judgment); see *infra* Part II.D.

C. Justice Ginsburg's Dissent

Justice Ginsburg's dissent directly contradicted the plurality's reasoning and found that New Jersey's exercise of personal jurisdiction over McIntyre UK did not violate the Due Process Clause of the Fourteenth Amendment.¹⁴⁴

In constructing her argument, Justice Ginsburg loosely adhered to the traditional two-part analytical framework for personal jurisdiction. To begin, she evaluated McIntyre UK's minimum contacts with New Jersey by applying the traditional purposeful availment inquiry¹⁴⁵ and contrasting the facts of *Nicastro* with the two leading cases on the stream of commerce doctrine: *World-Wide* and *Asahi*.¹⁴⁶ To conclude, Justice Ginsburg analyzed whether New Jersey's exercise of jurisdiction over McIntyre UK comported with traditional notions of fair play and substantial justice by engaging in an arguably abstract discussion¹⁴⁷ of fundamental fairness in products liability cases involving injured U.S. citizens and foreign manufacturers.¹⁴⁸

With respect to the minimum contacts inquiry, Justice Ginsburg affirmed the New Jersey Supreme Court's reasoning and opined that when a foreign manufacturer deliberately creates a distribution system targeting every state in the United States, that manufacturer purposefully avails itself of all the states in which its exclusive distributor sold its products.¹⁴⁹ Justice Ginsburg explained that in *Nicastro*, McIntyre UK purposefully recruited an exclusive distributor to solicit business from *any* potential customer in all fifty states.¹⁵⁰ Additionally, she explained that McIntyre UK itself attended numerous national scrap metal recycling conventions to market its machinery to potential customers from across the United States.¹⁵¹ Justice Ginsburg argued that the machine at issue did not enter New Jersey "randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged."¹⁵² Thus, Justice Ginsburg found that McIntyre UK

¹⁴⁴ See *id.* at 2797 (Ginsburg, J., dissenting).

¹⁴⁵ *Id.* at 2801.

¹⁴⁶ *Id.* at 2802–03.

¹⁴⁷ See *Ides*, *supra* note 106, at 385–86 ("In short, the dissent starts in a scrap metal yard and winds up in the faculty lounge. High-minded, but shortsighted. And what of *Nicastro*'s severed fingers? Well, isn't that a shame.").

¹⁴⁸ *Nicastro*, 131 S. Ct. at 2800–01 (Ginsburg, J., dissenting).

¹⁴⁹ *Id.* at 2801.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2796.

¹⁵² *Id.*

established sufficient minimum contacts with New Jersey to warrant the state's exercise of personal jurisdiction.¹⁵³

To bolster this finding of sufficient minimum contacts, Justice Ginsburg distinguished *Nicastro* from *World-Wide* and *Asahi*.¹⁵⁴ She explained that *Nicastro* was dissimilar to *World-Wide*, because *World-Wide* involved regional distributors with restricted distribution schemes that did not include the forum state.¹⁵⁵ In distinguishing *Nicastro* from *Asahi*, Justice Ginsburg explained that the foreign defendant in *Asahi* was a components manufacturer that did not create a distribution system in the United States to market its products.¹⁵⁶ Justice Ginsburg further explained that the splintered *Asahi* Court ultimately resolved the case by holding that California's exercise of personal jurisdiction would violate traditional notions of fair play and substantial justice because both parties to the adjudication were foreign.¹⁵⁷ Thus, Justice Ginsburg found that the plurality's reliance on *Asahi* as controlling authority was "dead wrong."¹⁵⁸

Justice Ginsburg began her discussion of fundamental fairness by posing a series of rhetorical questions that seemed to suggest that "litigational convenience" and "choice-of-law considerations" made it fair and reasonable to force foreign manufacturers, like McIntyre UK, to submit to jurisdiction in forums where their products are sold and cause injury.¹⁵⁹

Additionally, Justice Ginsburg asserted a general policy concern that the plurality's holding allowed foreign manufacturers to escape liability in the United States by simply targeting the country as a whole, rather than specific states.¹⁶⁰ In particular, Justice Ginsburg was concerned that the plurality's holding would set an unfair precedent that placed U.S. plaintiffs at a significant disadvantage relative to European plaintiffs due to the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, which allows for jurisdiction over nonresident manufacturers, like McIntyre UK, in any

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2802–03.

¹⁵⁵ *Id.* at 2802 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289 (1980)).

¹⁵⁶ *Id.* at 2802–03.

¹⁵⁷ *See id.* at 2803.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2800–01.

¹⁶⁰ *Id.* at 2794–95.

European Union country where their products are purchased and cause injury.¹⁶¹

Justice Ginsburg concluded her dissent by advocating for the following jurisdictional rule in stream of commerce cases: When “a local plaintiff [is] injured by the activity of a manufacturer seeking to exploit a multistate or global market . . . jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury.”¹⁶²

D. Justice Breyer’s Concurrence

Justice Breyer concurred in the judgment to reverse the New Jersey Supreme Court’s finding of personal jurisdiction.¹⁶³ However, Justice Breyer fundamentally disagreed with the plurality’s reasoning because he believed (1) the plaintiff did not prove that McIntyre UK established minimum contacts with New Jersey under either of the competing stream of commerce tests from *Asahi*, (2) precedents dictated that a single isolated sale could not serve as sufficient minimum contacts to sustain jurisdiction, and (3) the Court should not endorse a new standard because the case did not implicate novel jurisdictional issues “[un]anticipated by [the Court’s] precedents.”¹⁶⁴

Although Justice Breyer did not believe *Nicastro* necessitated the articulation of a modified jurisdictional standard, he acknowledged “there have been many recent changes in commerce and communication, many of which are not anticipated by [the Court’s] precedents.”¹⁶⁵ Thus, Justice Breyer concluded his concurrence with a critique of both Justice Kennedy’s “strict no-jurisdiction rule” and Justice Ginsburg’s “absolute” jurisdiction rule.¹⁶⁶

First, Justice Breyer argued that McIntyre UK did not establish minimum contacts with New Jersey under either of the competing *Asahi* tests.¹⁶⁷ Applying the stream of commerce plus test, Justice Breyer found that the plaintiff failed to show that McIntyre UK made any “specific effort . . . to sell in New Jersey” and failed to introduce a “list of potential New Jersey

¹⁶¹ *Id.* at 2803–04.

¹⁶² *Id.* at 2804. Justice Ginsburg’s jurisdictional standard seems to mirror Justice Brennan’s pure stream of commerce test from *Asahi* despite her claim that the case did not control *Nicastro*. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and concurring in the judgment).

¹⁶³ *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring in the judgment).

¹⁶⁴ *Id.* at 2791–92.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2793.

¹⁶⁷ *Id.* at 2792.

customers who might . . . have regularly attended trade shows.”¹⁶⁸ Applying the pure stream of commerce test, Justice Breyer pointedly stated that the plaintiff failed to show that McIntyre UK even “delivered its goods in the stream of commerce ‘with the expectation that they [would] be purchased’ by New Jersey users.”¹⁶⁹

Second, Justice Breyer argued that the Court has never held that a “single . . . sale, even if accompanied by the kind of sales effort indicated [in *Nicastro*],” could be sufficient to establish the minimum contacts required for a state to assert personal jurisdiction.¹⁷⁰ To support this assessment of the Court’s precedents, Justice Breyer misconstrued¹⁷¹ *World-Wide* as holding that a “single sale” to a customer could *never* constitute the minimum contacts required for a state to assert personal jurisdiction over a nonresident defendant.¹⁷² And because Justice Breyer found that the only McIntyre UK product to ever enter New Jersey was the machine that caused the plaintiff’s injuries, that “single sale” could not constitute sufficient minimum contacts to sustain New Jersey’s exercise of personal jurisdiction.¹⁷³

Third, because Justice Breyer found that *Nicastro* could easily be resolved on past precedents and did not implicate novel issues arising from “modern” commerce (referring to the Internet), he felt that it was inappropriate for the Court to endorse a jurisdictional standard.¹⁷⁴

Finally, Justice Breyer concluded his concurrence by critiquing both Justice Kennedy’s and Justice Ginsburg’s endorsed standards.¹⁷⁵ Justice Breyer explained that Justice Kennedy’s “strict no-jurisdiction” test’s unnecessarily stringent reliance on states’ territorial sovereignty and high threshold for proving that a defendant targeted a specific forum would cause unfair results if nonresident defendants could completely insulate themselves from suit simply

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)).

¹⁷⁰ *Id.*

¹⁷¹ *See id.* (citing *World-Wide*, 444 U.S. 286). Remember, the holding in *World-Wide* was based on the plaintiff’s unilateral conduct, not the fact that only a single product entered the forum. *See World-Wide*, 444 U.S. at 297.

¹⁷² *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment) (citing *World-Wide*, 444 U.S. at 297). *Contra McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221–22, 224 (1957) (upholding personal jurisdiction over a nonresident defendant on the basis of only a *single* sale to a forum resident).

¹⁷³ *Nicastro*, 131 S. Ct. at 2791–92 (Breyer, J., concurring in the judgment).

¹⁷⁴ *Id.* (“[I]t [is] unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.”)

¹⁷⁵ *Id.* at 2793.

by advertising and selling products through independent Internet¹⁷⁶ distributors, rather than in person.¹⁷⁷

Although he felt that Justice Kennedy's jurisdictional standard was too narrow, Justice Breyer believed that Justice Ginsburg's "absolute approach" was too broad because it would permit every state to assert jurisdiction in a products liability suit against any "manufacturer who [sold] its products . . . to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue."¹⁷⁸ Justice Breyer was concerned that this "absolute" jurisdictional standard may appear to be fair in cases involving a large manufacturer while producing fundamentally unfair results in cases involving a small producer, like a Kenyan coffee bean farmer,¹⁷⁹ who sold her products to a distributor that sold only one package of this farmer's coffee beans in a distant state using the Internet or another channel of modern commerce.¹⁸⁰

After speculating about the possible impacts of an "absolute" jurisdictional standard, Justice Breyer explained that he knew "too little about the range of . . . in-between possibilities to abandon . . . what has previously been th[e] Court's less absolute approach," which is why he ultimately chose not to affirmatively endorse any jurisdictional standard in *Nicastro*.¹⁸¹

¹⁷⁶ Although the Supreme Court has never heard a case on Internet personal jurisdiction, several lower courts have addressed the issue, and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), is "a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003). The *Zippo* court adopted a "sliding scale," balancing "the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

¹⁷⁷ See *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2794. Justice Breyer felt that "manufacturers come in many shapes and sizes" and that "[i]t may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States." *Id.*

¹⁸⁰ *Id.* at 2793.

¹⁸¹ *Id.*

III. INTERPRETING JUSTICE BREYER'S CONCURRENCE AS AN IMPLICIT INVITATION WOULD BRING STABILITY TO THE STREAM OF COMMERCE DOCTRINE

Disillusioned law professors and legal professionals alike have heavily criticized the *Nicastro* opinions for failing to clarify personal jurisdiction analysis in stream of commerce cases after decades of widespread confusion.¹⁸² At least one academic commentator has called the *Nicastro* opinions three of the most poorly reasoned opinions in Supreme Court history, and specifically attacked Justice Breyer's concurrence for manipulating precedent to avoid endorsing a jurisdictional analysis.¹⁸³

Justice Breyer's concurrence is particularly important due to the *Marks* Rule,¹⁸⁴ which states that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority], the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."¹⁸⁵ Thus, Justice Breyer's narrow concurrence in the judgment based on existing precedent is the holding of *Nicastro* and binding on all lower courts. As such, Justice Breyer's concurrence has been subjected to even harsher criticism for exacerbating the analytical ambiguity¹⁸⁶ surrounding the stream of commerce doctrine by (1) refusing to address the decades-old jurisdictional questions implicated by *Nicastro*, (2) engaging in a hypothetical discussion about the novel jurisdictional challenges created by globalization and the Internet, and

¹⁸² See, e.g., Ides, *supra* note 106, at 371–72; Bryce, *supra* note 112, at 3002–04; Richard B. Koch, Jr., Recent Decision, *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, 222–24 (2012); Sean Wajert, *Lower Courts Grapple with Nicastro Meaning*, MASS TORT DEF. (Nov. 11, 2011), <http://www.masstortdefense.com/2011/11/articles/lower-courts-grapple-with-nicastro-meaning/>. *But see* Quick, *supra* note 44, at 606 (“To say [the Court] missed [the] opportunity [to clarify the stream of commerce doctrine] entirely would not give the Court its due credit . . .”).

¹⁸³ See Ides, *supra* note 106, at 345, 371–76.

¹⁸⁴ *Marks v. United States*, 430 U.S. 188, 193 (1977).

¹⁸⁵ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (first alteration in original) (quoting *Marks*, 430 U.S. at 193) (internal quotation marks omitted); see also Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 514 (2012) (explaining in greater detail how, under the *Marks* Rule, Justice Breyer's concurrence is the holding of *Nicastro*).

¹⁸⁶ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (providing courts with at least two relatively concrete tests to apply despite the split decision).

(3) rejecting the competing stream of commerce tests without propounding a substitute.¹⁸⁷

Although these criticisms are not without merit, this Comment contends that they are counterproductive by preventing lower courts from effectively interpreting and applying Justice Breyer's concurrence in a way that moves jurisdictional jurisprudence past *Nicastro* and beyond the confusion surrounding the stream of commerce doctrine. Thus, this Comment argues that instead of reading Justice Breyer's concurrence as flawed with limited precedential value, lower courts must interpret it as implicitly inviting them to act as "laboratories"¹⁸⁸ in generating alternative jurisdictional standards that ameliorate the analytical complications arising from a globalized economy while remedying the deficiencies inherent in the competing tests endorsed by the *Nicastro* plurality and dissent. Only this interpretation of the case enables lower courts to help move the stream of commerce doctrine toward stability by creating a richer doctrinal landscape. This varied landscape will provide the Court with a broader range of jurisdictional standards to survey the next time it grants certiorari in a stream of commerce case, which should equip the Court with the background and assurance¹⁸⁹ needed to clearly announce a uniform analysis in this facet of personal jurisdiction law.

The following section explicates this Comment's argument and is divided into three sections. Section A establishes how the text and spirit of Justice Breyer's concurrence implicitly invite lower courts to develop alternative jurisdictional approaches in stream of commerce cases by drawing on their comprehensive familiarity with personal jurisdiction law.

Sections B and C critically analyze the three general patterns in which lower courts have responded to *Nicastro*: (1) mistakenly treating the plurality as binding, (2) factually distinguishing *Nicastro* and applying the competing

¹⁸⁷ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791–95 (2011) (Breyer, J., concurring in the judgment); see also *Ides*, *supra* note 106, at 371–76.

¹⁸⁸ Justice Brandeis coined the phrase "states as laboratories of democracy" to support his proposition that a "[s]tate may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In drawing a parallel with Justice Brandeis's reasoning, this Comment argues that Justice Breyer's concurrence implicitly invites lower courts to act as laboratories to try novel jurisdictional approaches in stream of commerce cases that address the shortcomings of the existing tests and the challenges created by modern commerce.

¹⁸⁹ See generally *Burnham v. Superior Court*, 495 U.S. 604, 615–16 (1990) (demonstrating that lower courts' application of ambiguous language from past Supreme Court cases informs the Court's analysis when it grants certiorari to clarify the law).

tests from *Asahi*, and (3) accepting Justice Breyer's implicit invitation to develop alternative jurisdictional standards. Section B examines the first two response patterns, illustrating how they perpetuate the instability that has beset the stream of commerce doctrine since its incipiency. Understanding these two response patterns provides an essential context for this Comment's analysis in section C.

Section C uses *Smith v. Teledyne Continental Motors, Inc.*¹⁹⁰ as a case study to demonstrate that lower courts can both detect and accept Justice Breyer's implicit invitation to develop fresh jurisdictional standards that balance the competing concerns discussed in his concurrence while responding to the challenges created by global commerce. After evaluating the stabilizing implications of the case study and extrapolating this analysis to the response pattern more generally, section C concludes that only interpreting *Nicastro* as an implicit invitation to fashion alternative jurisdictional approaches will bring stability to the stream of commerce doctrine by providing the Court with a broader range of workable standards to consider the next time it grants certiorari.

A. The Text and Spirit of the Concurrence Permit Its Interpretation as an Implicit Invitation

This Part explores how Justice Breyer constructed his concurrence in such a way that permits lower courts to interpret the text and spirit of his opinion as an implicit invitation to draw on their expertise to advance alternative jurisdictional standards after *Nicastro*. Justice Breyer implicitly created this invitation by (1) writing a narrow opinion limiting *Nicastro* to its facts, (2) identifying the issues an alternative standard must address, and (3) stating that he, and the Court more generally, knew "too little" about the daily application of the doctrine to confidently construct this alternative standard.

First, Justice Breyer's concurrence strongly suggests that his concern for the potential injurious impact that *Nicastro* would have on the Court's *future* adoption of a uniform jurisdictional standard in stream of commerce cases prompted him to write an exceedingly narrow opinion that essentially limited *Nicastro* to its facts. In his concurrence, Justice Breyer spent more time identifying the potential challenges that could arise in hypothetical cases involving contemporary commerce, globalization, and the Internet, than he did

¹⁹⁰ 840 F. Supp. 2d 927 (D.S.C. 2012).

actually analyzing the judicial resolution of *Nicastro*.¹⁹¹ As previously discussed, Justice Breyer resolved *Nicastro* by focusing almost entirely on the fact that the case involved only a single sale in the forum state.¹⁹² And according to Justice Breyer, *Nicastro* did not necessitate the endorsement of any particular jurisdictional analysis because the case could easily be resolved on existing precedent alone due to the fact that the Court has never upheld personal jurisdiction in a case involving only a single sale in the forum.¹⁹³

Based on his brief analysis of the case and narrow “single sale” discussion, it appears that Justice Breyer did everything he could to write an opinion that did not create any “new” law, essentially limiting *Nicastro* to its facts. Justice Breyer’s motive for writing such a limited opinion, in spite of the stream of commerce doctrine’s desperate need for clarification, can only be explained by his repeatedly expressed concern that *Nicastro* was “an unsuitable vehicle” for the Court to use in announcing a uniform standard because the facts of the case did not sufficiently implicate novel jurisdictional challenges associated with modern commerce.¹⁹⁴ Justice Breyer reiterated throughout his concurrence that these contemporary challenges were not anticipated by the Court’s precedents, and therefore required careful consideration in the context of a case that actually implicated these concerns.¹⁹⁵ This implied Justice Breyer believed the Court would alter its jurisdictional approach in a future case, and that he was cognizant that any law affirmatively created in *Nicastro* would operate as precedent that the Court would have to reconcile when attempting to announce this altered standard.¹⁹⁶

Thus, it can be inferred from Justice Breyer’s concern for the Court’s future announcement of a uniform jurisdictional standard that he deliberately attempted to limit *Nicastro* to its facts because he was worried about the inimical impact of prematurely endorsing an existing stream of commerce test.

Second, Justice Breyer devoted a significant amount of time to detailing the issues that must be addressed by any future jurisdictional standard adopted in stream of commerce cases. Justice Breyer began his concurrence by acknowledging that global commerce, modern business practices, and

¹⁹¹ See *Nicastro*, 131 S. Ct. at 2791–94 (Breyer, J., concurring in the judgment).

¹⁹² See *supra* Part II.D.

¹⁹³ See *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment). *Contra* *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221–22, 224 (1957).

¹⁹⁴ See *Nicastro*, 131 S. Ct. at 2791–94 (Breyer, J., concurring in the judgment).

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* at 2791–93.

specifically the Internet, have created several jurisdictional challenges that the Court's precedents did not adequately anticipate.¹⁹⁷ This frank acknowledgment alluded to Justice Breyer's belief that the Court needed to abandon its traditional jurisdictional approach to these cases in favor of a more flexible standard.¹⁹⁸

The *Nicastro* concurrence's in-depth analysis of both the pure stream of commerce and stream of commerce plus tests affirms this allusion that Justice Breyer felt the Court needed to diverge from *Asahi's* rule-like tests toward a more flexible standard. Ultimately, Justice Breyer found that neither competing *Asahi* test possessed the capacity to resolve the full range of jurisdictional complications presented by modern commerce, globalization, and the Internet.¹⁹⁹ Justice Breyer feared that Justice Kennedy's strict no-jurisdiction rule would allow large corporations to exploit the U.S. market, but nevertheless circumvent liability simply by evading jurisdiction in any U.S. forum through the manipulation of independent distributors, and particularly Internet distributors like Amazon.²⁰⁰

In contrast, Justice Breyer explained that the pure stream of commerce test endorsed by Justice Ginsburg was potentially too broad and could produce grossly unjust results.²⁰¹ He theorized that under this "absolute" jurisdiction rule, small and primarily local merchants using an Internet distributor without the intent to sell their products in a distant state or country would nevertheless be subject to jurisdiction in even the most remote U.S. forum if the distributor sold their products there.²⁰² Justice Breyer's juxtaposition of the countervailing concerns in these competing "rules" demonstrated his desire for greater flexibility in a jurisdictional standard.

Justice Breyer's upfront acknowledgment of the problems presented by modern commerce and his subsequent analysis of the existing stream of commerce tests' inadequacies strongly alluded to his recognition that the Court must adopt a divergent jurisdictional standard in the future. Additionally, this analysis identified a list of issues any future standard must be equipped to handle, including the effects of globalization, the Internet, and the dramatic

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* at 2791, 2793.

¹⁹⁹ *See id.* at 2793–94.

²⁰⁰ *See id.* at 2793.

²⁰¹ *See id.*

²⁰² *See id.* at 2793–94.

differences in sizes and motivations of manufacturers selling products in the United States through independent distributors.²⁰³

Finally, and most saliently, Justice Breyer concluded his concurrence by expressing a desire for broader external input. He indicated that, the next time the Court grants certiorari in a stream of commerce case, he would like the Solicitor General to be involved and provide oral testimony about the impact issues like globalization and the Internet actually have on personal jurisdiction analyses in stream of commerce cases.²⁰⁴ Additionally, Justice Breyer stated he “kn[ew] too little about the range of these . . . in-between possibilities” of the jurisdictional concerns he raised, and therefore could neither endorse nor announce a standard in *Nicastro*.²⁰⁵ Thus, Justice Breyer’s concurrence suggested that he was willing to adopt a uniform test, but needed more information and assurance that the test the Court ultimately announces would be workable.

While Justice Breyer, and the Court more generally, may “know too little” about the ambit of potential personal jurisdiction issues, lower courts have been forced to resolve them on a regular basis since the stream of commerce doctrine’s announcement in *World-Wide*. And it is precisely because of their extensive experience reconciling these conflicting issues that the spirit of Justice Breyer’s concurrence implied it is lower courts that are best positioned to develop an adequate approach to jurisdictional analyses in stream of commerce cases.

By way of synthesis, Justice Breyer (1) wrote the narrowest opinion possible in *Nicastro* to avoid creating a uniform standard in stream of commerce cases, (2) stated that a new standard is needed, (3) found the competing tests from *Asahi* inadequate, and (4) asserted that he, and arguably the Court more generally, knows too little about how these personal jurisdiction issues manifest themselves, especially in the current global economy, to endorse or announce an adequate standard.²⁰⁶

This Comment asserts that the combination of these elements in Justice Breyer’s concurrence permits lower courts to interpret both its text and spirit as

²⁰³ *See id.*

²⁰⁴ *See id.* at 2792; *supra* Part I.C.1–2.

²⁰⁵ *See Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).

²⁰⁶ *See id.* at 2791–94.

an implicit invitation to act as laboratories²⁰⁷ when applying the *Nicastro* opinion. This combination—identifying the need for a new standard; providing the list of issues this new standard must address; and essentially requesting more information and assistance in developing this standard from entities, like lower courts, that have extensive experience navigating the jurisdictional complications created by the modern economy in stream of commerce cases—implicitly invites lower courts to use the post-*Nicastro* interim to develop alternative jurisdictional standards by giving them the requisite judicial space to experiment without the risk of defying Supreme Court precedent.

Now that this Comment has established that Justice Breyer’s concurrence *can* be read as an implicit invitation to lower courts, it argues that this interpretation is the *only* meaningful way to move the stream of commerce doctrine past *Nicastro* and the instability that has plagued the doctrine for over a quarter of a century.

Although all parties agree that personal jurisdiction must comport with traditional notions of fair play and substantial justice, the exercise of jurisdiction over nonresident defendants in stream of commerce cases often depends *solely* on the competing *Asahi* tests adopted by particular U.S. forums, causing unpredictable and unjust results.²⁰⁸ And as evinced in Justice Breyer’s concurrence, the Court must eventually announce a uniform jurisdictional standard in stream of commerce cases to remedy these undesirable outcomes; however, neither the pure stream of commerce nor the stream of commerce plus test, as they stand, can muster a majority of the current Justices.²⁰⁹

If lower courts continue applying these same competing *Asahi* tests, they will only perpetuate the Court’s apparent analytical deadlock. Therefore, reading Justice Breyer’s concurrence as an implicit invitation to fashion alternative jurisdictional approaches is the *only* lower court interpretation of *Nicastro* with the potential to force the Court to consider fresh jurisdictional standards, thereby providing it with the information and assurance needed to announce a uniform standard the next time it grants certiorari.

²⁰⁷ Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“[A] single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²⁰⁸ See, e.g., Laughlin, *supra* note 10, at 725; Zach Vosseler, Note, *A Throwback to Less Enlightened Practices: J. McIntyre Machinery, Ltd. v. Nicastro*, 160 U. PA. L. REV. PENNUMBRA 366, 385–86 (2012), <http://www.pennumbra.com/casenotes/5-2012/Vosseler.pdf>.

²⁰⁹ See *supra* Part II.C.

However, as intimated earlier in Part III, not all lower courts have interpreted *Nicastro* as an implicit invitation to generate alternative jurisdictional approaches. Thus, the next section will identify and evaluate the other two patterns of lower court responses to *Nicastro*, which further destabilize the stream of commerce doctrine. Understanding these other patterns, and how they perpetuate the creation of undesirable, unpredictable, and unjust jurisdictional results in stream of commerce cases, provides essential context for this Comment's deeper analysis of the stabilizing implications stemming from interpreting Justice Breyer's concurrence as an implicit invitation.

B. Critical Analysis of the Lower Court Responses to Nicastro that Further Destabilize the Doctrine

Although many scholars have written articles about the theoretical implications of *Nicastro* and the ways in which the Court should have resolved the case,²¹⁰ few have seriously analyzed how lower courts have *actually* responded to the Court's decision.²¹¹ Thus, this Comment has identified three

²¹⁰ See, e.g., Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617 (2012); Oscar G. Chase & Lori Brooke Day, *Re-examining New York's Law of Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown and J. McIntyre Machinery, Ltd. v. Nicastro*, 76 ALB. L. REV. 1009, 1010–11 (2012/2013) (focusing on *Nicastro*'s implications for New York's long-arm statute); Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1490 (2013) (arguing that "a U.S. court should have power to exercise personal jurisdiction over an alien defendant not served with process within a state's borders when (1) the defendant has received constitutionally adequate notice, (2) the state has a constitutionally sufficient interest in applying its law . . . , and (3) the policies of other interested nations whose laws would be arguably applicable are given due respect and consideration and would not be adversely affected by the exercise of jurisdiction"); Ides, *supra* note 106, at 386–87; Stephen Higdon, Comment, *If It Wasn't on Purpose, Can a Court Take It Personally?: Untangling Asahi's Mess that J. McIntyre Did Not*, 45 TEX. TECH L. REV. 463, 466 (2013) (arguing that the appropriate purposeful availment standard accords with the Court's prior personal jurisdiction jurisprudence and that "horizontal federalism can anchor personal jurisdiction analysis in the twenty-first century"); Greg Saetrum, Note, *Righting the Ship: Implications of J. McIntyre v. Nicastro and How to Navigate the Stream of Commerce in Its Wake*, 55 ARIZ. L. REV. 499, 499 (2013) (advocating "a reasonable-commercial-expectations test, derived from *World-Wide Volkswagen* and *Asahi* and adapted for modern international commerce, that lower courts should utilize to navigate the stream of commerce moving forward"); Shane Yeagan, Note, *Purpose and Intent: Seeking a More Consistent Approach to Stream of Commerce Personal Jurisdiction*, 90 WASH. U. L. REV. 543, 544 (2012) (arguing that "the focus when determining personal jurisdiction in a stream of commerce context should be on the intent of the defendant regarding the forum, which serves as a means of determining whether there is purposeful availment that creates the necessary minimum contacts between the forum and defendant.").

²¹¹ One law review article and one law student's note have discussed initial lower court impressions of *Nicastro* more generally. See Stravitz, *supra* note 54, at 760–61; Johnjerica Hodge, Note, *Minimum Contacts in the Global Economy: A Critical Guide to J. McIntyre Machinery v. Nicastro*, 64 ALA. L. REV. 417, 430, 437

general lower court response patterns: (1) mistakenly treating the *Nicastro* plurality as binding, (2) factually distinguishing *Nicastro* and applying the competing tests from *Asahi*, and (3) accepting Justice Breyer's implicit invitation to develop alternative jurisdictional standards.

Although this Comment advocates for response pattern three and will discuss it at length in section C, understanding the implications of the other two response patterns creates the requisite foundation upon which this Comment can further construct its argument that interpreting Justice Breyer's concurrence as an implicit invitation to lower courts is the only response that can bring stability to the stream of commerce doctrine by enabling the Court to move past *Nicastro* and toward the announcement of a uniform standard. Thus, the remainder of this section will be divided into two subsections, with each subsection discussing one of the first two response patterns identified by this Comment.

1. *Mistakenly Treating the Nicastro Plurality's Standard as Binding*

Nicastro has served as the primary foundation for the holding of eleven²¹² lower court stream of commerce cases in the one-and-a-half years since it was decided.²¹³ Out of these eleven cases, four lower courts have mistakenly interpreted *Nicastro* to mandate the application of Justice Kennedy's stringent version of the stream of commerce plus test.²¹⁴ For example, in *May v. Osako*

(2012) (arguing that Justice Breyer's concurrence in *Nicastro* signals a significant future expansion in personal jurisdiction law). However, both relied, in part, on lower court patent/trademark infringement and breach of contract cases (and even a rape case). See Stravitz, *supra* note 54, at 760–61. In contrast, this Comment primarily limits itself to products liability cases, which implicate the *traditional* stream of commerce analysis. A legal blog has also been monitoring lower courts' responses to *Nicastro*. See Wajert, *supra* note 182.

²¹² *Nicastro* has served as the primary foundation for the holding of only eleven lower court cases as of August 2013, but this number will certainly continue to grow.

²¹³ Several breach of contract and patent/trademark infringement cases have discussed and even attempted to apply *Nicastro*, but these cases do not implicate the traditional stream of commerce analysis applied in products liability cases, which this Comment is primarily limited to. See, e.g., Harrelson v. Lee, No. 09-11714-RGS, 2012 U.S. Dist. LEXIS 10988 (D. Mass. Jan. 31, 2012); RBC Bank (USA) v. Hedesh, 827 F. Supp. 2d 525 (E.D.N.C. 2011); Furminator, Inc. v. Wahba, No. 4:10CV01941 AGF, 2011 U.S. Dist. LEXIS 96695 (E.D. Mo. Aug. 29, 2011). *Contra* Keranos, LLC v. Analog Devices, Inc., No. 2:10-CV-207-TJW, 2011 U.S. Dist. LEXIS 102618 (E.D. Tex. Sept. 12, 2011) (implicating the traditional stream of commerce analysis despite being a patent infringement case).

²¹⁴ See Powell v. Profile Design LLC, 838 F. Supp. 2d 535 (S.D. Tex. 2012) (relying heavily on the *Nicastro* plurality's reasoning in determining that the state's exercise of jurisdiction was improper while also briefly analogizing the facts of the case to the *Nicastro* concurrence's "single-sale" reasoning), *withdrawing in part* 825 F. Supp. 2d 842 (S.D. Tex. 2011); *Keranos*, 2011 U.S. Dist. LEXIS 102618; *Dow Chem. Can. ULC v. Superior Court*, 202 Cal. App. 4th 170 (Ct. App. 2011), *cert. denied sub nom.* *Bombardier Inc. v. Dow Chem. Can. ULC*, 133 S. Ct. 427 (2012); *May v. Osako & Co.*, 83 Va. Cir. 355 (Cir. Ct. 2011).

& Company,²¹⁵ the circuit court of the city of Roanoke, Virginia, applied *Nicastro* as if it were a majority opinion that fundamentally changed the analysis in stream of commerce cases and required the application of Justice Kennedy's version of the stream of commerce plus test.²¹⁶

Similarly, the district court in *Keranos, LLC v. Analog Devices*²¹⁷ stated that *Nicastro* required the court to depart from Fifth Circuit precedent and abandon the application of the pure stream of commerce test in favor of Justice Kennedy's stream of commerce plus test.²¹⁸ Interestingly, the district court in *Ainsworth v. Cargotec USA, Inc.*,²¹⁹ also located in the Fifth Circuit, decided that *Nicastro* did not alter the Circuit's precedent.²²⁰ However, in recognizing the discord its decision created, the district court certified *Ainsworth* for interlocutory appeal, making the Fifth Circuit the first federal appellate court to interpret *Nicastro*.²²¹ On appeal, the Fifth Circuit affirmed the district court's decision in *Ainsworth* that *Nicastro* did not alter the Circuit's precedent by holding that Justice Breyer's concurrence, not Justice Kennedy's plurality opinion, was the only binding precedent from *Nicastro*.²²² The Fifth Circuit then distinguished *Ainsworth* from *Nicastro* and affirmed Mississippi's exercise of jurisdiction over the defendant by relying on Justice Breyer's assertion that "a single isolated sale" has never been an adequate basis for personal jurisdiction under Supreme Court precedent and subsequently finding that the defendant manufacturer in *Ainsworth* had sold 203 forklifts in the jurisdiction.²²³ This interpretation fits squarely within the second general lower court response pattern identified by this Comment, which will be discussed in greater detail in the next section.

²¹⁵ 83 Va. Cir. 355.

²¹⁶ *Id.* at 356.

²¹⁷ 2011 U.S. Dist. LEXIS 102618, at *32–33.

²¹⁸ *See id.*

²¹⁹ No. 2:10-CV-236-KS-MTP, 2011 U.S. Dist. LEXIS 109255 (S.D. Miss. Sept. 23, 2011), *denying reconsideration of* No. 2:10-CV236-KS-MTP, 2011 U.S. Dist. LEXIS 49665 (S.D. Miss. May 9, 2011), *aff'd sub nom.* *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174 (5th Cir. 2013), *cert denied*, 134 S. Ct. 644 (2013).

²²⁰ *Id.* at *19.

²²¹ *Ainsworth v. Cargotec USA, Inc.*, No. 2:10-CV-236-KS-MTP, 2011 U.S. Dist. LEXIS 144817 (S.D. Miss. Dec. 15, 2011) (certifying the case for interlocutory appeal to the Fifth Circuit).

²²² *Ainsworth*, 716 F.3d at 178.

²²³ *Id.* (internal quotation marks omitted). Since *Asahi*, the Fifth Circuit has applied Justice Brennan's pure stream of commerce test finding that "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce . . ." *Id.* at 177 (first alteration in original) (quoting *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006)) (internal quotation marks omitted).

The courts treating the *Nicastro* plurality's standard as binding have gone astray and severely misinterpreted the case. As discussed previously, under the *Marks* Rule, Justice Breyer's concurrence is the holding of *Nicastro*.²²⁴ And at the very least, Justice Breyer made clear that he concurred *only* in the plurality's judgment and did not endorse Justice Kennedy's stringent stream of commerce plus test.²²⁵ Thus, the plurality's reasoning failed to garner a majority of the Court, and therefore, it cannot bind lower courts' decisions.

By mistakenly treating the *Nicastro* plurality's standard as binding rather than interpreting Justice Breyer's concurrence as an implicit invitation, these lower courts do nothing to help move the stream of commerce doctrine toward stability. Instead, they perpetuate the Court's analytical deadlock by not attempting to develop alternative, workable standards for the Court to consider the next time it has the opportunity to announce a uniform jurisdictional test.

Additionally, this response pattern further destabilizes the stream of commerce doctrine by continuing the creation of unpredictable and unjust jurisdictional results. If courts continue mistakenly treating the *Nicastro* plurality's test as binding, the incidence of *intrastate* and *intracircuit* splits, similar to the *Keranos/Ainsworth* split in the Fifth Circuit, will increase exponentially. This will result in unpredictable and unjust jurisdictional decisions based solely on lower courts' misguided applications of *Nicastro*, rather than on fair play and substantial justice.

2. *Factually Distinguishing Nicastro and Applying the Competing Tests from Asahi*

Six lower courts²²⁶ have factually distinguished their cases from *Nicastro* and proceeded to apply whichever competing test they adopted after *Asahi*. Relying heavily on the *Marks* Rule and Justice Breyer's "single sale" discussion,²²⁷ courts like the district court in *Windsor v. Spinner Industry*

²²⁴ See *supra* Part III.A.

²²⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring in the judgment).

²²⁶ *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632 (D. Md. 2011); *Lindsey v. Cargotec USA, Inc.*, No. 4:09CV-00071-JHM, 2011 U.S. Dist. LEXIS 112781 (W.D. Ky. Sept. 29, 2011); *Ainsworth*, 2011 U.S. Dist. LEXIS 109255; *Russell v. SNFA*, 965 N.E.2d 1 (Ill. App. Ct. 2011), *aff'd*, 987 N.E.2d 778 (Ill. 2013), *cert. denied*, 134 S. Ct. 295 (2013); *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Or. 2012), *cert. denied sub nom. China Terminal & Elec. Corp. v. Willemsen*, 133 S. Ct. 984 (2013); *Gardner v. SPX Corp.*, 2012 UT App 45, 272 P.3d 175.

²²⁷ *Supra* Part III.D.

*Co.*²²⁸ have concluded that *Nicastro*'s precedential value is limited to cases involving an identical fact pattern, "otherwise leaving the legal landscape untouched."²²⁹ After factually distinguishing their cases from *Nicastro* by showing they involved more than a single sale in the forum, these six lower courts proceeded to apply the jurisdictional test they adopted after *Asahi*.²³⁰

Factually distinguishing *Nicastro* and continuing to apply the competing tests from *Asahi*, rather than accepting Justice Breyer's implicit invitation, only perpetuates the instability in the stream of commerce doctrine. Although this interpretation is not blatantly incorrect, it contradicts the *Nicastro* concurrence's spirit by ignoring Justice Breyer's fears about the analytical incapacity of the existing stream of commerce tests.²³¹ Justice Breyer explicitly stated that the existing *Asahi* tests inadequately respond to the complications created by modern commerce, and by not accepting his invitation to remedy these inadequacies through the development of alternative jurisdictional approaches, these lower courts hinder the Court's opportunity to formulate an adequate test in the future.

Additionally, as illustrated by law student Zach Vosseler in his recent case note, the continuing split among circuits, created by courts' divergent applications of the *Asahi* tests, does not result in the exercise of personal jurisdiction predicated on fair play and substantial justice.²³² Instead, personal jurisdiction often rests solely on the particular *Asahi* test applied by the state or circuit in which the court is located, which increases unjust results and incentivizes undesirable forum shopping.²³³

To bolster his argument, Vosseler analyzed the two post-*Nicastro* cases involving Cargotec USA, Inc., both of which involved the same foreign manufacturer, distributor, distribution agreement, defective forklift model, and Supreme Court precedent.²³⁴ Despite the nearly identical fact patterns, the cases resulted in opposite holdings due to the location of the courts and the

²²⁸ 825 F. Supp. 2d 632.

²²⁹ *Id.* at 638.

²³⁰ Two courts applied the pure stream of commerce test. *Ainsworth*, 2011 U.S. Dist. LEXIS 109255; *Willemssen*, 282 P.3d 867. The other four applied the stream of commerce plus test. *Windsor*, 825 F. Supp. 2d 638; *Lindsey*, 2011 U.S. Dist. LEXIS 112781; *Russell*, 965 N.E.2d 1; *Gardner*, 2012 UT App 45.

²³¹ *See supra* Part III.D.

²³² Vosseler, *supra* note 208.

²³³ *Id.* at 384.

²³⁴ *Id.* at 384–85.

different jurisdictional tests their circuits follow.²³⁵ As Vosseler rightly asked, “Where is the fair play and substantial justice in that?”²³⁶

The lower court response patterns analyzed in subsections 1 and 2 only work to further destabilize the stream of commerce doctrine post *Nicastro*. Continuing to apply the old *Asahi* tests, under either response pattern, does not provide the Court with any fresh jurisdictional alternatives to consider the next time it grants certiorari in a case implicating the stream of commerce doctrine. Justice Breyer made clear that the Court needs additional information and reassurance that the standard it eventually adopts is a workable one. And by not contributing to a more varied doctrinal landscape, these courts fail to provide this additional information and reassurance, dramatically increasing the likelihood that the Court will slip into the same analytical deadlock that has existed since *Asahi*. Therefore, only interpreting Justice Breyer’s concurrence as an implicit invitation has the potential to move the stream of commerce doctrine past *Nicastro* and toward stability.

*C. Stabilizing the Doctrine by Accepting Justice Breyer’s Implicit Invitation:
The Smith v. Teledyne Continental Motors, Inc. Case Study*

Only one lower court, the U.S. District Court for South Carolina, has accepted Justice Breyer’s implicit invitation to develop alternative jurisdictional standards in stream of commerce cases. This section will proceed by treating this court’s decision in *Smith v. Teledyne Continental Motors, Inc.*,²³⁷ as a case study to evaluate the implications of this response pattern.

First, this section briefly reviews the facts of *Smith*. Second, it evaluates the court’s analysis of *Nicastro* and argues that the court accepted Justice Breyer’s implicit invitation by developing an alternative jurisdictional standard that seems to acknowledge and resolve many of the concerns raised in the *Nicastro* concurrence. Finally, this section assesses the stabilizing impact of the case study as it relates to this response pattern more generally, ultimately concluding that *Smith* proves lower courts can bring stability to the stream of commerce doctrine if they accept Justice Breyer’s implicit invitation to generate alternative jurisdictional standards by drawing on their breadth of experience in personal jurisdiction law.

²³⁵ See *Lindsey*, 2011 U.S. Dist. LEXIS 112781, at *35 (granting defendant’s motion to dismiss for lack of personal jurisdiction); *Ainsworth*, 2011 U.S. Dist. LEXIS 109255, at *21 (upholding jurisdiction).

²³⁶ Vosseler, *supra* note 208, at 387.

²³⁷ 840 F. Supp. 2d 927 (D.S.C. 2012).

1. *Facts of Smith*

The cause of action in *Smith* arose after a husband and father of two was struck and killed by a single-engine airplane while he was jogging on the beach in Hilton Head, South Carolina, in 2010.²³⁸ The pilot, Mr. Smith, was flying his single-engine Teledyne aircraft along the Atlantic coast, about ten miles offshore, when the propeller suddenly fell into the ocean.²³⁹ While Mr. Smith was en route to make an emergency landing at the Hilton Head Airport, he crashed violently, killing the thirty-eight-year-old vacationer.²⁴⁰

The widow sued the pilot,²⁴¹ Teledyne (the engine manufacturer), the airframe manufacturer, a company that serviced the plane prior to the crash, and the propeller manufacturer.²⁴² The pilot subsequently sued Teledyne for indemnification, and the U.S. District Court for South Carolina consolidated the cases.²⁴³

Teledyne, a nonresident defendant incorporated in Delaware with its principal place of business in Alabama, challenged South Carolina's exercise of personal jurisdiction.²⁴⁴ Teledyne based its challenge on a provision in South Carolina's long-arm statute involving substantial revenue, the specifics of which are beyond the scope of this Comment.²⁴⁵ The court ultimately upheld South Carolina's exercise of personal jurisdiction²⁴⁶ due in part to Teledyne's substantial amount of purposeful contacts with South Carolina, including (1) over 400 sales directly to South Carolina purchasers in the preceding ten years, (2) the use of its engines in approximately one-third of general aviation aircrafts based in South Carolina, (3) the maintenance of a continuous relationship with the owners of these engines through warranty programs, (4) magazine advertisements in South Carolina, (5) the use of the Internet to sell parts for engines and other products to South Carolina customers, (6) the investigation of crashes in South Carolina involving airplanes containing its engines, and, finally, (7) contracts with at least eleven "fixed based operators"

²³⁸ *Id.* at 928.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* Yes, the pilot, Edward Smith, remarkably survived the crash.

²⁴² *Id.* at 928–29.

²⁴³ *Id.* at 929.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 933. Teledyne did not make a constitutional challenge to personal jurisdiction.

²⁴⁶ *Id.* at 934.

located in South Carolina's airports to actively promote the sale of Teledyne's products.²⁴⁷

Thus, even if Teledyne had challenged the constitutionality of South Carolina's exercise of personal jurisdiction, the extent of its purposeful activities *within* South Carolina would have rendered *Smith* an easy case to resolve in favor of upholding jurisdiction, even under the *Nicastro* plurality's stringent stream of commerce plus test.²⁴⁸

However, what makes *Smith* such an important case is that *in spite of* Teledyne's overwhelming contacts with South Carolina, it is the only decision that has accepted Justice Breyer's implicit invitation. In doing so, the *Smith* court engaged in a detailed analysis of Supreme Court precedent and subtly developed a modified jurisdictional standard that seems to balance Justice Breyer's competing concerns about the existing *Asahi* tests and respond to the complications created by modern commerce, including globalization, the Internet, and the relative sizes and intentions of manufacturers selling products in the United States. The court's modified standard includes (1) a liberalized minimum contacts inquiry and (2) a rigorous reasonableness analysis. The following section evaluates the *Smith* court's analysis and development of this modified jurisdictional standard.

2. *The Smith Court's Alternative Jurisdictional Standard*

The *Smith* court commenced its opinion with an analysis of the *Nicastro* decision, acknowledging that it was "somewhat difficult to interpret because no single opinion was adopted by a majority of the Justices."²⁴⁹ Thus, the court decided that to determine the appropriate jurisdictional standard to apply in stream of commerce cases after *Nicastro*, the "three opinions . . . must be synthesized."²⁵⁰

In synthesizing these opinions, the court found that the "common denominator" of at least six Justices was, to a certain extent, the "'stream-of-commerce plus' rubric enunciated in an opinion by Justice O'Connor in

²⁴⁷ *Id.* at 932–33. The court did not specify whether the particular engine at issue entered the forum as the result of any of these contacts, but nevertheless found the connection constitutionally sufficient to sustain jurisdiction. *Id.*

²⁴⁸ See *supra* Part II.B for a discussion of Justice Kennedy's stringent no-jurisdiction rule.

²⁴⁹ *Smith*, 840 F. Supp. 2d at 929.

²⁵⁰ *Id.*

Asahi.²⁵¹ Although the court acknowledged that defendants must make “deliberate decisions to market their products in the forum state,”²⁵² it flatly rejected Justice Kennedy’s stringent application of the stream of commerce plus test based on rigid “concepts of national or state sovereignty rather than on foreseeability, convenience or the interests of the judicial system.”²⁵³ Instead, the *Smith* court quoted the broad range of activities beyond merely placing a product in the stream of commerce that Justice O’Connor stated could support a finding of minimum contacts.²⁵⁴

Interestingly, the court expanded Justice O’Connor’s minimum contacts analysis by acknowledging that beyond Justice O’Connor’s list of specific examples, neither the *Asahi* nor the *Nicastro* Court clearly delineated the parameters of the requisite “deliberate decisions” that nonresident defendants must make beyond placing their products in the stream of commerce.²⁵⁵ Thus, the court turned to the parameters identified in *World-Wide* and explained that the critical factor in determining if a defendant made the requisite “deliberate decisions” to support a finding of minimum contacts was whether the “defendant’s conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there.”²⁵⁶

This combination of Justice O’Connor’s stream of commerce plus test with what the *Smith* court identified as the critical factor from *World-Wide* liberalized the court’s minimum contacts analysis by shifting the analytical focus from nonresident defendants’ conduct specifically within or toward the forum state, to any conduct that should cause the defendants to reasonably anticipate being haled into court. Put another way, the *Smith* court essentially developed a minimum contacts analysis that still requires a nonresident defendant to engage in additional conduct beyond merely placing a product in the stream of commerce, but evaluates that conduct in light of whether the defendant should have anticipated suit in the forum.

²⁵¹ *Id.* at 929, 931. The court said it was complying with the Fourth Circuit’s precedent, but then it modified the traditional approach. *Id.* at 929.

²⁵² *Id.* at 930 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (O’Connor, J., plurality opinion)) (internal quotation mark omitted).

²⁵³ *Id.* at 931 (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789–90 (2011) (Kennedy, J., plurality opinion)).

²⁵⁴ *Id.* at 930.

²⁵⁵ *See id.*

²⁵⁶ *Id.* at 932 (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (internal quotation marks omitted).

Thus, the *Smith* court found a middle ground between the existing stream of commerce tests by still requiring nonresident defendants to engage in additional conduct, but broadening the range of activities that could constitute “additional conduct” by expanding the definition to anything that should have caused nonresident defendants to anticipate being haled into a forum’s courts. This broadened definition of additional conduct seems to suggest that a Brennan-like “foreseeability” of suit in a forum could transform a defendant’s activities into constitutionally sufficient minimum contacts.

The overwhelming evidence of minimum contacts in *Smith* makes it difficult to appreciate the implications of the court’s subtle expansion. However, if this liberalized minimum contacts analysis were applied to a more difficult case like *Nicastro*, the Court could have found that McIntyre UK established sufficient contacts with New Jersey for two reasons: (1) McIntyre UK made a “deliberate decision” to hire an exclusive distributor to market McIntyre products across the United States and (2) this decision could have been construed as “additional conduct” that should have caused McIntyre UK to reasonably anticipate being haled into any of the fifty states it contracted to have its products sold in if those contractual efforts were successful.

The *Smith* court’s subtle liberalization of the constitutional minimum contacts analysis seems to remedy Justice Breyer’s concern that the *Nicastro* plurality’s “strict no-jurisdiction rule” would unjustly enable manufacturers to evade any state’s exercise of personal jurisdiction by targeting the entire United States through contracted independent distributors, rather than directly engaging with individual states.²⁵⁷ After all, the *Smith* court’s analysis would allow for a strong argument that these deliberate contracts with independent distributors themselves constitute sufficient minimum contacts to sustain a forum’s exercise of personal jurisdiction over nonresident defendants if their products were sold to forum citizens and caused injury.

Additionally, this liberalized minimum contacts analysis seems to partially respond to Justice Breyer’s desire for a more flexible standard with the capacity to adequately evaluate cases involving nonresident defendants’ connections with forums through the Internet. Again, the facts of *Smith* weigh so heavily in favor of jurisdiction that it is difficult to imagine how the court’s analysis would apply to a case involving complicated Internet facts. However, despite not providing any specific guidelines for analyzing a defendant’s

²⁵⁷ See *Nicastro*, 131 S. Ct. at 2793.

“additional conduct” over the Internet, the *Smith* court’s approach seems flexible enough that it could be applied in an Internet case and enable the court to adequately consider whether the conduct was such that the defendant should have reasonably anticipated being haled into a particular forum’s courts.

While the *Smith* court’s minimum contacts analysis seems to ameliorate several of Justice Breyer’s concerns related to the plurality’s strict no-jurisdiction rule and the Internet, it also seems similar to Justice Ginsburg’s absolute jurisdiction rule, which Justice Breyer feared was exceedingly broad with the potential to cause unjust results by forcing substantially local manufacturers to defend in distant U.S. forums. However, the *Smith* court’s second prong of its modified jurisdictional standard, a reasonableness analysis, responds to this concern by explicitly considering the size and national presence of nonresident defendants.²⁵⁸

After finding that Teledyne had sufficient minimum contacts with South Carolina to support the state’s exercise of personal jurisdiction, the *Smith* court applied a reasonableness analysis to ensure that the proposed exercise of personal jurisdiction comported with fair play and substantial justice.²⁵⁹ In this analysis, the court applied the traditional *Burger King* fairness factors,²⁶⁰ but placed a considerable emphasis on Teledyne’s “national presence and organization.”²⁶¹ Due in part to Teledyne’s large size and national presence, the court ultimately found that South Carolina’s proposed exercise of personal jurisdiction over Teledyne comported with traditional notions of fair play and substantial justice.²⁶²

The *Smith* court’s unique emphasis on a manufacturer’s size and national presence seems to address concerns raised by Justice Breyer in his evaluation of both competing stream of commerce tests. First, this emphasis on size and national presence indicates a forum’s exercise of personal jurisdiction will be readily upheld over a large manufacturer with sufficient minimum contacts under the court’s liberalized test, which further alleviates Justice Breyer’s trepidations about large manufacturers evading liability under the plurality’s strict no-jurisdiction rule.

²⁵⁸ See *Smith*, 840 F. Supp. 2d at 933.

²⁵⁹ *Id.*

²⁶⁰ See *supra* text accompanying notes 55–56.

²⁶¹ *Smith*, 840 F. Supp. 2d at 933.

²⁶² *Id.*

Second, this marked focus on size also suggests the court could apply this reasonableness analysis in future cases to determine that exercising personal jurisdiction over substantially local, nonresident defendants without a national presence *does not* comport with traditional notions of fair play and substantial justice. Again, the facts of *Smith* make it difficult to envision how the court would apply this reasonableness test to a case involving a small manufacturer. But for the sake of analysis, imagine the next case the *Smith* court analyzes involves Justice Breyer's Kenyan coffee bean farmer,²⁶³ and this farmer sold her beans to a local Kenyan distributor that also sold products in the United States through a website. The cause of action arose after a South Carolina citizen purchased a single package of the Kenyan farmer's coffee beans through the distributor's website, causing the citizen to become ill.

Under the *Smith* court's liberalized minimum contacts analysis, it is conceivable that the Kenyan coffee bean farmer established sufficient minimum contacts with South Carolina by virtue of her deliberate decision to enter into a contractual relationship with the independent distributor to sell her products anywhere. The argument for personal jurisdiction under *Smith*'s minimum contacts analysis is that the Kenyan farmer knew the local distributor also sold products in the United States, and so the farmer should have reasonably anticipated being haled into any forum where her products were sold and caused injury—including South Carolina.

Assuming sufficient minimum contacts were established, the court's more rigorous reasonableness analysis would probably find that South Carolina's exercise of personal jurisdiction over this Kenyan coffee farmer would not comport with fair play and substantial justice due to the small size of the farmer, her dearth of national presence, her lack of concerted intent to exploit the U.S. market, and her inability to defend in such a distant forum.²⁶⁴

This differs from the result that the *Nicastro* dissent's absolute jurisdiction rule would reach.²⁶⁵ Under the absolute jurisdiction rule, the Kenyan farmer's small size, lack of national presence or direct intent, and monetary inability to defend in distant U.S. forums would not outweigh her establishment of sufficient minimum contacts with the forum. In fact, advocates of this absolute jurisdiction rule assert that defendants, regardless of size, should have

²⁶³ See *supra* text accompanying note 179.

²⁶⁴ See *Smith*, 840 F. Supp. 2d at 933.

²⁶⁵ See *supra* Part I.I.C (discussing Justice Ginsburg's absolute jurisdiction rule).

insurance to cover the costs of litigating in distant forums where their products are sold and cause injury.²⁶⁶

Although this hypothetical case contains several unknown facts and colorable arguments for different outcomes, it demonstrates that the *Smith* court's reasonableness analysis directly responds to Justice Breyer's concerns about the varying "shapes and sizes" of defendants and the potential unjust jurisdictional results in cases involving small manufacturers.²⁶⁷ In cases involving local manufacturers whose products are sold in the United States via distributors through globalized channels of modern commerce without these manufacturers' concerted efforts to exploit the U.S. market, Justice Breyer posited that a forum's exercise of personal jurisdiction may not comport with traditional notions of fair play and substantial justice.²⁶⁸ By explicitly incorporating a nonresident defendant's size and national presence into its reasonableness analysis, the *Smith* court seemed to alleviate Justice Breyer's fears by creating a safety valve to prevent a forum's unjust exercise of jurisdiction in cases involving substantially local defendants whose products were sold in distant U.S. forums through distributors *purely* as the result of globalization and the Internet.

The defendant in the *Smith* case possessed so many substantial contacts with the forum that the district court could have easily written a simple opinion, stating that even under the *Nicastro* plurality's strict no-jurisdiction rule, the forum's exercise of personal jurisdiction over the defendant satisfied constitutional due process requirements. However, the *Smith* court insisted the three *Nicastro* opinions and past Supreme Court holdings must be thoughtfully synthesized and evaluated to uncover the appropriate jurisdictional standard to apply in stream of commerce cases post *Nicastro*. This Comment argues that the *Smith* court's synthesis of Supreme Court precedent and subsequent modifications constituted the development of an alternative jurisdictional standard and an acceptance—albeit not explicit—of Justice Breyer's invitation to assist the Court in bringing stability to the stream of commerce doctrine.²⁶⁹

The *Smith* court's alternative standard itself did not depart significantly from existing precedent, as the court found that the commonality underlying

²⁶⁶ J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2801 (2011) (Ginsburg, J., dissenting) (defending a products liability action in a distant forum is "a reasonable cost of transacting business internationally").

²⁶⁷ See *supra* note 179 and accompanying text.

²⁶⁸ See *supra* note 176 and accompanying text.

²⁶⁹ But see Hodge, *supra* note 211, at 431 (stating that the *Smith* court merely applied its pre-*Nicastro* test).

the three *Nicastro* opinions was, at least in part, an endorsement of Justice O'Connor's version of the stream of commerce plus test from *Asahi*.²⁷⁰ The court initially stated that this finding adhered to Fourth Circuit precedent,²⁷¹ but then made subtle modifications to the existing standard's minimum contacts and reasonableness analyses throughout the remainder of the opinion. These modifications—a liberalized minimum contacts inquiry and more rigorous reasonableness analysis—seemed to effectively navigate and ameliorate Justice Breyer's concerns about the inadequacies of both stream of commerce tests and the potential jurisdictional complications stemming from globalization, the Internet, and the relative sizes and marketing motivations of manufacturers whose products are sold in the United States.²⁷²

3. *Extrapolating the Stabilizing Implications of Smith to the Pattern of Accepting Justice Breyer's Implicit Invitation*

Smith demonstrates that if lower courts accept (either implicitly or explicitly) Justice Breyer's invitation to develop modified jurisdictional standards, they can share their wealth of experience in personal jurisdiction law through the creation of a more varied doctrinal landscape, thereby providing the Court with the information and assurance needed to stabilize the stream of commerce doctrine. Although the *Smith* court was only a single federal district court, it managed to thoughtfully evaluate and synthesize Supreme Court precedent in a way that balanced the competing concerns raised by Justice Breyer's concurrence.

The final standard the *Smith* court developed was an adaptation of Justice O'Connor's *Asahi* test that addressed Justice Breyer's concerns by liberally defining how to evaluate a defendant's requisite "additional conduct" and by considering the size and national presence of manufacturers when determining if a forum's exercise of jurisdiction would comport with traditional notions of fair play and substantial justice.²⁷³ Thus, this court's modified standard balanced the competing ideologies between the existing tests and propounded an approach to resolve the complications created by modern commerce.

²⁷⁰ See *supra* note 251 and accompanying text.

²⁷¹ See *Smith v. Teledyne Cont'l Motors, Inc.*, 840 F. Supp. 2d 927, 929 (D.S.C. 2012).

²⁷² See *supra* notes 253–54 and accompanying text.

²⁷³ See *supra* Part III.C.2.

Although the *Smith* court's modified standard may not be endorsed as an absolute solution to jurisdictional analysis in stream of commerce cases,²⁷⁴ the real value of this case lies in its significance with respect to its demonstration of the potential stabilizing implications that flow from lower courts accepting Justice Breyer's implicit invitation more generally.

The *Smith* court's decision lends legitimacy to this Comment's argument that Justice Breyer's concurrence can be interpreted as an implicit invitation to lower courts. Additionally, and most importantly, *Smith* demonstrates that if lower courts accept Justice Breyer's implicit invitation, the immediate implications would be the creation of a varied doctrinal landscape, rather than the inimical perpetuation of the Court's ideological split that occurs when lower courts methodically apply the *Asahi* tests. A richer and more varied doctrinal landscape would provide the Court with a broader range of workable standards and information to survey the next time it grants certiorari in a stream of commerce case. As Justice Breyer's concurrence indicated, this broader range of information and flexible jurisdictional standards would ameliorate the Court's hesitancy by equipping it with the sufficient background and assurance it needs to announce a uniform jurisdictional approach and finally stabilize the stream of commerce doctrine.

Some commentators may challenge whether the Court would actually survey this broader range of workable jurisdictional standards when attempting to clarify the law the next time it grants certiorari. However, the analysis in *Burnham v. Superior Court* directly contradicts this challenge by demonstrating that, at least with respect to personal jurisdiction, the Court does evaluate how lower courts apply its ambiguous language from past cases when attempting to clarify the law.²⁷⁵ Writing the plurality opinion in *Burnham*, Justice Scalia seemed to recognize that the majority of lower courts "still favored" the "time honored approach" of allowing a forum to exercise personal jurisdiction over an individual served while physically present in the state despite the ambiguous language in *Shaffer v. Heitner*²⁷⁶ that suggested an *International Shoe* minimum contacts analysis was required for every assertion of jurisdiction.²⁷⁷ Because Justice Scalia found that the "jurisdictional principle

²⁷⁴ See BORN & RUTLEDGE, *supra* note 70, at 95 (explaining that *World-Wide's* foreseeability inquiry has come under criticism for circularity).

²⁷⁵ 495 U.S. 604, 615–16 (1990) (Scalia, J., plurality opinion).

²⁷⁶ 433 U.S. 186 (1977).

²⁷⁷ See *Burnham*, 495 U.S. at 621–22 (Scalia, J., plurality opinion); see also *id.* at 631–32 (Brennan, J., concurring in the judgment) (considering some lower court interpretations of *Shaffer*).

is both firmly approved by tradition and still favored,” he concluded that a court’s exercise of jurisdiction over an individual only transiently present in the forum state when served did not violate the Fourteenth Amendment.²⁷⁸

If the Court was willing to consider lower courts’ views of personal jurisdiction doctrine in *Burnham*, it seems unlikely that it would not survey the alternative ways in which lower courts respond post *Nicastro*, especially when members of the Court, like Justice Breyer, have acknowledged that they know “too little” about the stream of commerce doctrine’s daily application to announce a coherent standard without some additional guidance.

Commentators may also argue that if this Comment’s argument were correct, as many as fifty states and ninety-four federal districts could announce their own modified jurisdictional approaches, bringing even greater analytical confusion and instability to the stream of commerce doctrine post *Nicastro*. However, if lower courts accept Justice Breyer’s implicit invitation by carefully considering his concerns about global commerce and the inadequacies of the existing stream of commerce tests, then the substantive range of modified approaches lower courts develop should be fairly limited. And this cannot result in any greater confusion than that which already exists in the tumultuous subject area.

Additionally, the more thoughtfully reasoned that lower court decisions like *Smith* are, the more likely lower courts will begin citing each other’s decisions. Thus, lower courts would inadvertently form a more unified standard, similar to the widely accepted Second Circuit approach to analyzing personal jurisdiction in Internet cases,²⁷⁹ thereby lessening some confusion in this area of the law even *before* the Supreme Court has another chance to clarify it.

Regardless of which of the three response patterns lower courts follow, stream of commerce jurisprudence immediately following *Nicastro* is not going to be stable due to the Court’s second split decision in this area of personal jurisdiction law. The takeaway from this section, however, is that only one response pattern—accepting Justice Breyer’s implicit invitation—has the potential to help move the stream of commerce doctrine past *Nicastro*, toward stability. The *Smith* case study represents a significant step in the right direction, demonstrating that lower courts can detect and accept Justice

²⁷⁸ *Id.* at 621–22 (Scalia, J., plurality opinion).

²⁷⁹ *See supra* note 197 and accompanying text.

Breyer's implicit invitation to develop alternative jurisdictional standards, thereby assisting the Court in bringing stability to the stream of commerce doctrine.

CONCLUSION

The muddled state of the stream of commerce doctrine produces undesirable, unpredictable, and unjust jurisdictional results based solely on the location of a forum, rather than on traditional notions of fair play and substantial justice. The annual number of U.S. products liability cases involving nonresident defendants has grown exponentially as modern commerce has become increasingly globalized and interconnected, amplifying the desperate need for stability in the stream of commerce doctrine.²⁸⁰

Bringing stability to the doctrine, however, is a feat that has always proven difficult for the Court. In its most recent attempt, the *Nicastro* Court made clear that it requires additional information and assurance from entities more familiar with the daily application of the doctrine before it can announce an unambiguous and uniform standard. Thus, this Comment concludes that the *only* way to bring stability to the doctrine is by interpreting Justice Breyer's concurrence as an implicit invitation to lower courts to produce this additional information and assurance by developing alternative jurisdictional approaches post *Nicastro*.

If the Court felt it did not have enough background or knowledge about the daily application of the stream of commerce doctrine to articulate an unambiguous standard with the capacity to respond to the demands of global commerce, then that task is certainly not one for this Comment either. Instead, this Comment merely seeks to resolve the stream of commerce doctrine's instability by establishing that Justice Breyer created an implicit invitation, which has been overlooked by so many courts and commentators, and elucidating how lower courts would help stabilize the doctrine if they accepted it.

The *Smith* court's development of an alternative jurisdictional standard proves that courts can in fact detect and accept, either explicitly or implicitly, this invitation. Thus, this Comment concludes that lower courts must rise to the challenge and capitalize on this post-*Nicastro* opportunity to break out of the

²⁸⁰ See Klerman, *supra* note 15 and accompanying text; Andre & Velasquez, *supra* note 13 and accompanying text.

rigid *Asahi* dichotomy and develop fresh jurisdictional approaches that balance the competing concerns identified by Justice Breyer's concurrence and ameliorate the complications associated with modern commerce. By developing these alternative standards, lower courts like the *Smith* court will create a richer doctrinal landscape for the Court to survey the next time it grants certiorari to clarify the law. Only this varied doctrinal landscape will provide the Court with the additional information and assurance needed to break its analytical deadlock and finally bring stability to the stream of commerce doctrine.

Although the individual standards developed by lower courts during this post-*Nicastro* interim may not be absolute solutions to jurisdictional analysis under the stream of commerce doctrine, they each provide a little piece of the personal jurisdiction puzzle for the Court to assemble the next time it grants certiorari, resulting in the announcement of a uniform standard. This approach might not produce a dramatic change in the stream of commerce doctrine as quickly as many would like, but it certainly lays the foundation for eventual stability.

KAITLYN FINDLEY*

* Notes & Comments Editor, *Emory Law Journal*; Juris Doctor Candidate, Emory University School of Law (2014); Bachelor of Arts in Anthropology and International Studies, Emory University College of Arts and Sciences (2011). Thank you to Professor Thomas Arthur, my faculty advisor, whose lectures taught me to love Civil Procedure as a first year and who provided invaluable mentorship and guidance throughout this Comment's development. Thank you to the staff of the *Emory Law Journal*, especially William Bradbury and Joel Langdon, for the countless hours they spent thoughtfully editing this Comment. Finally, for their endless support and loving tolerance of my peculiar fascination with the stream of commerce doctrine, thank you to my family and friends.