RIGHTING THE SHIP: IMPLICATIONS OF *J. MCINTYRE V. NICASTRO* AND HOW TO NAVIGATE THE STREAM OF COMMERCE IN ITS WAKE

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A foreign manufacturer attempts to develop a market in the United States and, to that end, hires a U.S. distributor to sell its products across the United States. The manufacturer excludes no region or state from the market it seeks to reach, but, if possible, prefers to avoid personal jurisdiction in the United States. Has the manufacturer escaped an assertion of personal jurisdiction in a state where its product causes injury? The U.S. Supreme Court considered this question in J. McIntyre v. Nicastro *and answered yes. While leaving several questions unresolved, this decision has several disconcerting implications for international products-liability litigation. After reviewing the* Nicastro *decision and analyzing its several troubling aspects, this Note proposes 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.*

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INTRODUCTION

> [McIntyre UK] seeks to develop a market in the United States for machines it manufactures. . . . Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. . . . [A]ll things considered, it prefers to avoid products-liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?[1]

The stream-of-commerce theory of personal jurisdiction has been a source of controversy and litigation since its inception. It is understandable, then, that the controversy has only grown along with the increasingly global commercial marketplace. Although the Supreme Court recently had an opportunity to establish a clear course for lower courts to follow when navigating the stream of commerce, the Justices paddled in different directions and drifted notably off course.

Part I of this Note reviews the Supreme Court's foundation for the stream-of-commerce theory of personal jurisdiction set out in *World-Wide Volkswagen Corp. v. Woodson*[2] and *Asahi Metal Industry Co. v. Superior Court of California*.[3] Parts II and III explore the Court's recent *Nicastro* decision, the opinion's troubling implications, and its effects on the current state of personal jurisdiction law. After *Nicastro*, the Supreme Court left lower courts with an incomplete and complicated framework for applying the stream-of-commerce analysis, particularly in the international products-liability context. The three opinions took widely divergent approaches in evaluating the *Nicastro* case, ultimately deciding the issue on narrow grounds.[4]

Consequently, Part IV proposes a judicial solution—a reasonable-commercial-expectations test—to the jurisdictional quagmire created by *Nicastro*. This Note concludes that lower courts forced to navigate the stream of commerce in the wake of *Nicastro* should use a reasonable-commercial-expectations test, derived from *World-Wide Volkswagen* and *Asahi*, in future products-liability cases. A reasonable-commercial-expectations test satisfies all the traditional constitutional concerns; provides a workable political justification for the assertion of personal jurisdiction in stream-of-commerce cases; and also provides the flexibility necessary to accommodate evolving business practices.[5] The test simplifies the personal jurisdiction analysis, reduces litigation, and provides international manufacturers an incentive to address jurisdictional issues *ex ante* through contracts.[6] Furthermore, the reasonable-commercial-expectations test is

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1. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J., dissenting).
2. 444 U.S. 286 (1980).
3. 480 U.S. 102 (1987).
4. *See infra* Part II.
5. *See infra* Part IV.A–D.
6. *See infra* Part IV.C.

consistent with the *Nicastro* decision and should be supported by five of the current Supreme Court Justices if the Court revisits its decision.[7]

I. FOUNDATIONS OF THE STREAM-OF-COMMERCE THEORY OF PERSONAL JURISDICTION

A. Minimum Contacts

Early Supreme Court jurisprudence held that the power of the states to subject a defendant to *in personam* jurisdiction depended on the actual presence of the defendant or the defendant's real property within the forum state.[8] With the growth and development of business entities, interstate commerce, and interstate communication, however, this system soon proved unworkable.[9] Unlike an individual with an actual physical presence, a corporate person is a fiction whose presence can only be manifested by the activities of authorized individuals.[10] Consequently, in *International Shoe*, the Supreme Court adopted a jurisdictional standard that focused on the defendant's contacts with the forum state.[11] Under this new analysis, to satisfy the due process requirements of the Fourteenth Amendment, a defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[12]

Over time, the Supreme Court has distilled the *International Shoe* minimum contacts doctrine into a three-part test: (1) whether the defendant purposefully availed itself of the forum state; (2) whether the claim arose out of the defendant's contacts with the forum; and (3) whether the exercise of jurisdiction comports with notions of fair play and substantial justice.[13] If a court determines that all three prongs of the minimum contacts test have been satisfied, its exercise of personal jurisdiction is constitutionally proper. Although designed to provide a workable guide for determining whether a court has jurisdiction, the minimum contacts test has become increasingly complicated in application, particularly in the context of manufacturer liability. This is largely due to the Supreme Court's stream-of-commerce theory of personal jurisdiction.[14]

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7. *See infra* Part IV.E.

8. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

9. Erin F. Norris, Note, *Why the Internet Isn't Special: Restoring Predictability to Personal Jurisdiction*, 53 ARIZ. L. REV. 1013, 1014 (2011).

10. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

11. *Id.* at 316; Thomas L. Cronan, III, Note, Bauxites *"Individual Liberty Interest" and the Right to Control Amenability to Suit in Personal Jurisdiction Analysis*, 51 FORDHAM L. REV. 1278, 1279–80 (1983) (citing *Int'l Shoe*, 326 U.S. at 316).

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

13. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–88 (2011).

14. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 90 (1990) ("[M]any assertions of jurisdiction that are sensible and 'rational' do not pass muster under the minimum contacts test."); Hayward D. Reynolds, *The Concept of Jurisdiction:*

B. Stream of Commerce: The World-Wide Volkswagen *and* Asahi *Decisions*

Due to the globalization of today's economy and the free movement of goods and services both domestically and internationally, few issues of personal jurisdiction are more important than the *World-Wide Volkswagen* and *Asahi* stream-of-commerce theory of personal jurisdiction.[15]

In *World-Wide Volkswagen*, the Court set the stage for what is now known as the stream-of-commerce theory of personal jurisdiction, stating:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there . . . . Hence if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.[16]

The Supreme Court expounded on this foundation while applying it to the international products-liability context in its *Asahi* decision seven years later.[17] The *Asahi* case began as a products-liability action brought against several defendants in California state court.[18] The important aspects of the case for personal jurisdiction purposes, however, occurred after the primary claims had settled. The tire's Taiwanese manufacturer, Cheng Shin Rubber Industrial Company, cross-claimed against Asahi, the Japanese manufacturer of the tire's valve assembly, for indemnification.[19] Asahi sought to quash the summons issued against it on the cross-claim, alleging that the California state court could not exert jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment.[20]

Conflicting Legal Ideologies and Persistent Formalist Subversion, 18 HASTINGS CONST. L.Q. 819, 847 (1991) ("[The Court's] notions of federalism, instead of protecting powers of the states, very often hamper states' attempts to effectuate their legitimate needs and interests in the modern era."); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995) (stating that the complexity of the due process test for personal jurisdiction has resulted in the threshold determination of personal jurisdiction becoming one of the most litigated issues in state and federal courts).

15. 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1067.4 (3d ed. 2012).

16. 444 U.S. 286, 297–98 (1980) (citation omitted).

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

18. *Id.* at 105–06.

19. *Id.* at 106.

20. *Id.*

Eight Justices agreed that the California court's exercise of personal jurisdiction over Asahi was unreasonable because it would not comport with "traditional notions of fair play and substantial justice" given the defendant's limited contacts with the forum.[21] However, the splintered plurality decision left a highly muddled view regarding the proper scope of the stream-of-commerce theory of personal jurisdiction.[22]

Both Justice O'Connor and Justice Brennan agreed that Asahi did not have sufficient contacts with California to comport with traditional notions of fair play and substantial justice.[23] But, under Justice O'Connor's view, Asahi also did not purposefully avail itself of the California market, even if Asahi was aware that some of the valves it sold to Cheng Shin would be incorporated into tire tubes sold in California.[24] In contrast, Justice Brennan found that because of Asahi's regular sales of component parts to a manufacturer that Asahi knew was making regular sales in California, Asahi had sufficient minimum contacts with California.[25]

The difference in their opinions centers on what action is sufficient to demonstrate purposeful availment.[26] Under Justice Brennan's approach, regular sales of a product to a distributor, with awareness that the product is being marketed in the forum, is enough in and of itself to satisfy the purposeful availment requirement.[27] Justice O'Connor, in contrast, would require some additional act by the defendant evidencing intent to serve the market, beyond mere sales and awareness.[28]

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21. *Id.* at 113–16.

22. *Compare id.* at 114–16 (plurality opinion), *with id.* at 116–21 (Brennan, J., concurring). *See* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 602 (1993); Linda J. Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 572 (1991); Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB. L. REV. 1389, 1392–94 (1996).

23. *Compare Asahi*, 480 U.S. at 113–16 (plurality opinion), *with id.* at 116 (Brennan, J., concurring).

24. *Id.* at 112–13 (plurality opinion).

25. *Id.* at 121 (Brennan, J., concurring).

26. *Compare id.* at 112 (plurality opinion), *with id.* at 117 (Brennan, J., concurring).

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

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id.

28. *Id.* at 112 (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. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum . . . . But a defendant's

As a result of the competing views given in *Asahi*, lower courts began taking a variety of approaches when dealing with stream-of-commerce questions.[29] Many courts first attempted to satisfy Justice O'Connor's more stringent test, noting that if this standard was met, Justice Brennan's test would be met as well.[30] Others specifically adopted Justice O'Connor's test.[31] And a few completely disregarded both and relied on *World-Wide Volkswagen* instead.[32]

II. *J. MCINTYRE V. NICASTRO*

In 2010, the Supreme Court granted certiorari to *J. McIntyre Machinery, Ltd. v. Nicastro*—the Court's first stream-of-commerce case since *Asahi*.[33]

Nicastro arose out of a products-liability suit filed in New Jersey state court.[34] On October 11, 2001, the plaintiff, Robert Nicastro, was operating a McIntyre Model 640 Shear (a recycling machine used to cut metal) when his right hand was caught in the machine's blades, severing four of his fingers.[35] The machine was manufactured by J. McIntyre Machinery, Ltd. ("J. McIntyre"), a company incorporated in the United Kingdom. McIntyre Machinery America, Ltd. ("McIntyre America"), J. McIntyre's exclusive U.S. distributor, sold the machine to Nicastro's employer, Curcio Scrap Metal.[36]

In September of 2003, Nicastro filed a products-liability action against J. McIntyre and McIntyre America in New Jersey Superior Court.[37] J. McIntyre responded by filing a motion to dismiss on the grounds that it did not have sufficient minimum contacts for New Jersey to exercise personal jurisdiction.[38] Inquiries into J. McIntyre's contacts with New Jersey and the United States revealed the following: (1) representatives of J. McIntyre attended trade conventions in the United States, but not in New Jersey; (2) J. McIntyre hired McIntyre America as its exclusive U.S. distributor as part of a nationwide distribution scheme; (3) J. McIntyre and McIntyre America were distinct corporate

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> awareness that the stream of commerce may or will sweep the product into the forum State does not [constitute purposeful availment].

Id.

29. Matthew R. Huppert, Note, *Commercial Purpose as Constitutional Purpose: Reevaluating* Asahi *Through the Lens of International Patent Litigation*, 111 COLUM. L. REV. 624, 625 (2011).

30. *See, e.g.*, Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 206–07 (3d Cir. 1998); A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362 (Ariz. 1995).

31. *See, e.g.*, Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 682–83 (1st Cir. 1992); Belden Techs., Inc. v. LS Corp., 829 F. Supp. 2d 260, 268–69 (D. Del. 2010).

32. *See, e.g.*, Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993).

33. 131 S. Ct. 62 (2010).

34. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (2010) *cert. granted*, 131 S. Ct. 62 (2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

35. *Id.*

36. *Id.*

37. *Id.* at 577–78.

38. *Id.* at 578.

entities, but McIntyre America followed J. McIntyre's direction and guidance whenever possible; and (4) Nicastro's employer purchased the machine in question from McIntyre America for $24,900.[39]

The Supreme Court of New Jersey found that because J. McIntyre had targeted the entire U.S. market, including New Jersey, through its distribution scheme, it was constitutionally permissible for New Jersey to exercise personal jurisdiction over J. McIntyre in a products-liability action arising out of an injury occurring in New Jersey.[40] The court explained that where a foreign manufacturer targets the U.S. market as a whole through the use of an independent distributor, this conduct not only satisfies Justice Brennan's stream-of-commerce test, but constitutes sufficient additional conduct to satisfy Justice O'Connor's stream-of-commerce plus test as well.[41]

After more than two decades of continued conflict in lower courts and with eight new Justices sitting on the Court, the Supreme Court revisited its decision in *Asahi* by granting J. McIntyre's petition for writ of certiorari.[42] In a divided 4–2–3 decision, the Supreme Court reversed the New Jersey Supreme Court's decision, finding that New Jersey's exercise of jurisdiction would violate due process.[43]

A. The Plurality Opinion

The plurality opinion, authored by Justice Kennedy and joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, provided the most restrictive interpretation of stream-of-commerce personal jurisdiction of the three *Nicastro* opinions. The plurality opted for a strict application of the "territorial sovereignty" thread of the minimum contacts doctrine, made abundantly clear by the plurality's 17 uses of the word "sovereign" or "sovereignty," and 8 references to the requirement that the defendant submit to the power of the sovereign.[44]

The plurality stated that "the principal inquiry" in a minimum contacts analysis is whether the defendant "manifest[ed] an intention to submit to the power of a sovereign."[45] Purposeful availment, they concluded, was simply another way a defendant may "submit to a State's authority," along with the traditional bases of presence, consent, and citizenship or domicile; each of which, in the plurality's view, "reveals circumstances, or a course of conduct, from which it is proper to

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39. *Id.* at 578–79.
40. *Id.* at 589.
41. *Id.* at 589–90.
42. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 62 (2010); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 414 (2012).
43. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011).
44. Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism:* Shady Grove *Versus* Nicastro, 16 LEWIS & CLARK L. REV. 905, 917 (2012).
45. *Nicastro*, 131 S. Ct. at 2788.

infer an intention to benefit from and thus an intention to submit to the laws of the forum State."[46]

With submission to the power of a particular sovereign as a prerequisite to jurisdiction, the plurality concluded that before asserting personal jurisdiction over an alien corporation, there must be a state-by-state analysis of the defendant's conduct.[47] If the defendant has followed a course of conduct directed specifically at the particular forum, the sovereign has the power to subject the defendant to judgment concerning that conduct.[48] However, where the defendant cannot be said to have "targeted" a specific forum, "as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."[49] Under the plurality's view, therefore, a defendant may have sufficient minimum contacts with the United States but not enough contact with any particular state for a constitutional assertion of personal jurisdiction.[50]

Somewhat consistent with their sovereignty-focused analysis and narrow interpretation of purposeful availment, the plurality promoted Justice O'Connor's stream-of-commerce plus test from *Asahi* as the correct constitutional standard for analyzing minimum contacts under the stream-of-commerce theory of personal jurisdiction.[51] Further, the plurality expressly rejected Justice Brennan's stream-of-commerce test from *Asahi*.[52] Specifically, the plurality found that Justice Brennan's concurrence "advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power."[53]

Turning to the contacts at issue in *Nicastro*, the plurality noted that although J. McIntyre directed marketing and sales efforts at the United States as a whole, it did not specifically direct its conduct at New Jersey.[54] Therefore, J. McIntyre did not purposefully avail itself of the New Jersey forum and could not be haled into New Jersey state court consistent with due process of law.[55]

B. The Dissent

The dissenting opinion, authored by Justice Ginsburg and joined by Justices Sotomayor and Kagan, sets the tone in its introduction, stating: "[T]he splintered majority today 'turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent

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46. *Id.* at 2787.
47. *Id.* at 2789.
48. *Id.*
49. *Id.* at 2788.
50. *Id.* at 2789.
51. *Id.* at 2790.
52. *Id.* at 2789.
53. *Id.*
54. *Id.* at 2790.
55. *Id.* at 2791.

distributors market it.'"[56] The dissent continued by attacking three main points underpinning the plurality's decision.

First, the dissent rejected the plurality's reliance on interstate federalism as a basis for defeating personal jurisdiction.[57] The dissent noted that New Jersey's exercise of personal jurisdiction over Nicastro did not infringe on the sovereignty of any other state, and the state where the injury occurred was the most suitable forum for products-liability litigation.[58] Further, the dissent stated that any constitutional limits on state court authority originate from the Due Process Clause, not state sovereignty, and thus, interstate federalism concerns were inapplicable to the matter at hand.[59]

Second, the dissent disagreed with the plurality's interpretation of "purposeful availment."[60] The dissent found that by hiring McIntyre America to promote and sell its machines in the United States, J. McIntyre had purposefully availed itself of "all States in which its products were sold by its exclusive distributor."[61] The purposeful availment requirement, the dissent explained, only prevents a defendant from being haled into court as a result of purely random or fortuitous events.[62] It does not protect a business whose own decision to target a national market gives rise to an affiliation with the forum.[63]

Finally, the dissent disapproved of the plurality's emphasis on purposeful availment over considerations of fairness and reasonableness.[64] The dissent discussed how it could be fair and reasonable to not subject J. McIntyre to jurisdiction in New Jersey where its products caused injury, after considering both J. McIntyre's interest in serving the United States and the heavy burden on Nicastro of pursuing his claim in England.[65] The dissent noted that several U.S. courts facing similar situations found that not allowing the exercise of personal jurisdiction would undermine principles of fundamental fairness and

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56. *Id.* at 2795 (Ginsburg, J., dissenting) (quoting Weintraub, *supra* note 14, at 555).

57. *Id.* at 2798–99.

58. *Id.*

59. *Id.* at 2798 (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982); Shaffer v. Heitner, 433 U.S.186, 204 & n.20 (1977)). The difference between limitations on state's authority arising out of the Due Process Clause, opposed to state sovereignty, can be viewed as a vertical versus horizontal relationship. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1297 (1989). The due process approach is vertical in that "the focus is on the relationship between the state and the individual." *Id.* The state sovereignty approach is horizontal in that it focuses on the relations between other, equal political states. *Id.* As such, the due process approach justifies the political rights protected by jurisdictional doctrine on concerns of fairness to individuals, while the sovereignty approach relies on fairness to other states. *See id.*

60. *Id.* at 2801.

61. *Id.*

62. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

63. *Id.*

64. *Id.* at 2800.

65. *Id.*

impermissibly insulate foreign businesses from accountability for injuries caused by their products in the United States.[66]

In sum, the dissent concluded that New Jersey was the most reasonable and fair forum in which to litigate this dispute, and that J. McIntyre purposefully availed itself of the United States and the New Jersey markets by engaging McIntyre America as a sales conduit in the United States.[67] Although the dissent did not expressly promote either Justice Brennan's or Justice O'Connor's stream-of-commerce test from *Asahi*, it indicated that J. McIntyre had sufficient minimum contacts with New Jersey to satisfy both standards.[68]

C. The Concurrence

The concurring opinion, authored by Justice Breyer and joined by Justice Alito, held that Nicastro failed to demonstrate that it was constitutionally permissible for New Jersey to exercise personal jurisdiction over J. McIntyre.[69] In reaching its decision, the concurrence focused on the same three primary facts upon which the New Jersey Supreme Court relied: (1) McIntyre America shipped the machine to Nicastro's employer in New Jersey; (2) J. McIntyre wanted McIntyre America to sell its machines to anyone in America willing to buy them; and (3) representatives from J. McIntyre attended trade shows in various U.S. cities, outside of New Jersey.[70] Drawing on both Justice Brennan's and Justice O'Connor's *Asahi* opinions, the concurrence found that these facts did not demonstrate a "'regular . . . flow' or 'regular course' of sales in New Jersey" and did not indicate "'something more,' such as special state-related design, advertising, advice, marketing, or anything else."[71] Therefore, under Supreme Court precedent, Nicastro could not demonstrate any specific effort by J. McIntyre to sell in New Jersey and thus had not established sufficient minimum contacts.[72]

The concurrence, however, expressly limited its holding to the facts at hand and refused to adopt any rules of broad applicability, primarily due to the limited factual record available.[73] Despite limiting his holding, however, Justice Breyer did provide some insight into the rules proposed by both the plurality and the dissent.[74]

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66. *Id.* at 2801–02; *see, e.g.*, Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 544 (6th Cir. 1993); A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362 (Ariz. 1995).

67. *Nicastro*, 131 S. Ct. at 2799–2802 (Ginsburg, J., dissenting).

68. *See id.*

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

70. *Id.*

71. *Id.* at 2792.

72. *Id.* Breyer stated that, under Supreme Court precedent, no single isolated sale, even if accompanied by certain sales efforts, could be considered sufficient minimum contacts. *Id.* Noticeably absent from his discussion, however, was *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957), where the Court did indicate that one sale could suffice. Rhodes, *supra* note 42, at 418.

73. *Nicastro*, 131 S. Ct. at 2792–93 (Breyer, J., concurring).

74. *See id.* at 2793–94.

Justice Breyer expressed serious concern with the commercial consequences of the plurality's "strict no-jurisdiction rule."[75] Justice Breyer, however, expressed equal concern with the approach taken by the New Jersey Supreme Court and urged by the dissent.[76] Such a rule, he stated, could not be reconciled with the constitutional demand for minimum contacts, purposeful availment, or fairness with respect to the defendant.[77] After considering the alternatives proposed, Justice Breyer refrained from making any dramatic changes in the law of personal jurisdiction.[78] Instead, he limited his holding to the facts presented, opting to wait until a case presented itself that would allow the Court to examine the contemporary commercial consequences of any new rule, and stated that in the interim the Court should continue strictly adhering to its precedents.[79]

D. The Marks Rule

Under the Marks Rule, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[80] Consequently, the precedential value of the *Nicastro* decision is most appropriately gleaned by determining what, if any, judicial reasoning was shared between the plurality and the concurrence. Furthermore, though not binding, several significant inferences can be drawn from the points where the plurality accepted the dissent's reasoning. Those inferences can be used both (1) to guide lower courts in applying the stream-of-commerce doctrine until a more suitable vehicle arises for refashioning jurisdictional rules[81] and (2) to forecast how Justice Breyer, and to some extent Justice Alito, would rule in a future stream-of-commerce case.

First, Justice Breyer refused to accept the plurality's submission to sovereignty analysis, under which the defendant must have "targeted the forum" to be subject to personal jurisdiction.[82] Breyer noted that the term "target" and the phrase "submit to the power of the sovereign" do not account for modern international business practices and lack any precise meaning in the international

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75. *Id.* at 2793. Justice Breyer explained that the plurality opinion's rule would have tremendous consequences in the international marketplace, particularly in the context of e-commerce where a business sells its products worldwide or markets its products through advertisement viewed in the forum. *Id.*

76. *Id.*

77. *Id.* Under Breyer's interpretation of the dissent's rule, every state would be able to assert jurisdiction in a products-liability suit against any manufacturer who sells its products to a national distributor, no matter how small the manufacturer, no matter how distant the forum, and no matter how few items end up in the particular forum at issue. *Id.*

78. *Id.* at 2794.

79. *Id.*

80. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

81. *See Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring).

82. *Id.*; *see also* Willemsen v. Invacare Corp., 282 P.3d 867, 874 (Or. 2012) (stating that Justice Breyer did not agree with the plurality's personal jurisdiction rule).

commercial market.[83] The dissent also rejected the plurality's reliance on sovereignty and targeting.[84] Therefore, five Justices would not proscribe assertions of jurisdiction in instances "where a defendant does not 'inten[d] to submit to the power of a sovereign' and 'cannot be said to have targeted the forum.'"[85]

Second, Justice Breyer did not accept or reject either of the competing stream-of-commerce tests from *Asahi*.[86] Instead, he referenced both of them.[87] Similarly, the dissent did not indicate whether Justice Brennan's or Justice O'Connor's test was the constitutionally proper analysis.[88] Therefore, although the plurality opinion would abolish Justice Brennan's test, five Justices recognized the ongoing validity of both Brennan's and O'Connor's stream-of-commerce tests.

Third, Justice Breyer upheld the principle from *World-Wide Volkswagen*—that a manufacturer or distributor "purposefully avails itself" of the forum by delivering goods into the stream of commerce "with the expectation that they will be purchased" by forum users.[89] The dissent also referenced the continued validity of *World-Wide Volkswagen*.[90] Therefore, five Justices support using the *World-Wide Volkswagen* analysis in stream-of-commerce cases.

Fourth, Justice Breyer's holding was premised on and limited to the minimal factual record presented in *Nicastro*.[91] Justice Breyer noted that Nicastro did not provide a list of New Jersey customers at J. McIntyre's trade shows; did not provide information about the size and scope of New Jersey's scrap-metal business; and did not otherwise show evidence of J. McIntyre's intent to serve, or expectation of serving, the New Jersey market.[92] Consequently, Justice Breyer concluded that under the limited factual record presented, Nicastro had not met his burden of establishing jurisdiction.[93] The implication of Justice Breyer's multiple references to the limited record presented in *Nicastro* is that exercising jurisdiction would be constitutional in a similar situation if a stronger factual record was

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83. *See Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) (questioning what targeting means "when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?").

84. *See id*. at 2798–99 (Ginsburg, J., dissenting).

85. *Id.* at 2793 (Breyer, J., concurring) (quoting *id.* at 2788 (plurality opinion)); *see* 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, 514–15 (2012).

86. *See Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring).

87. *Id.*

88. *See id*. at 2799–2802 (Ginsburg, J., dissenting).

89. *Id.* at 2792 (Breyer, J., concurring) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980)); Steinman, *supra* note 85, at 514.

90. *See Nicastro*, 131 S. Ct. at 2802 (Ginsburg, J. dissenting).

91. *Id.* at 2792–93 (Breyer, J., concurring).

92. *Id.* at 2792.

93. *Id.*

presented than that at issue in *Nicastro*.[94] In fact, several lower courts, after *Nicastro*, have properly relied on Justice Breyer's multiple references to the underdeveloped factual record in *Nicastro* when distinguishing products-liability actions.[95]

In sum, under the Marks Rule, lower courts applying *Nicastro* should not limit jurisdiction to those instances where a defendant intends to submit to the power of a sovereign and can be said to have targeted the forum.[96] Lower courts should instead rely on *World-Wide Volkswagen* and *Asahi* when determining whether an exercise of personal jurisdiction would be constitutional under the stream-of-commerce analysis, as discussed below.[97]

III. PROBLEMS AND IMPLICATIONS OF THE *NICASTRO* DECISION

Ultimately, the Supreme Court dismissed Nicastro's lawsuit against J. McIntyre for lack of jurisdiction, leaving Nicastro with the daunting task of traveling to England in search of recourse against J. McIntyre.[98] While Nicastro's situation is individually troubling, more problematic is the fact that the Supreme Court embraced what previously had been considered to be a logical impossibility.[99] Before *Nicastro*, it seemed untenable to many legal scholars that a manufacturer could purposefully target the U.S. market as a whole without targeting the individual states—leaving the manufacturer immunized from jurisdiction and liability in any state despite its efforts to exploit the national market.[100]

This Part discusses several troubling aspects of the *Nicastro* decision and their implications to demonstrate the need for a new stream-of-commerce rule,

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94. Steinman, *supra* note 85, at 510, 515 (citing *Nicastro*, 131 S. Ct. at 2792) (Breyer, J., concurring) ("Justice Breyer indicates that a different result could be justified if the record contained a 'list of potential New Jersey customers who might . . . have regularly attended [the] trade shows' that J. McIntyre officials attended; if the record had contained evidence of 'the size and scope of New Jersey's scrap-metal business'; or if the record revealed more than a single sale to a single New Jersey customer." (citations ommitted)).

95. *See, e.g.*, King v. Gen. Motors Corp., No. 5:11-CV-2269-AKK, 2012 WL 1340066, at *6–8 (N.D. Ala. Apr. 18, 2012) (distinguishing each of the three facts relied on by Justice Breyer); Russell v. SNFA, 965 N.E.2d 1, 10, *appeal allowed*, 968 N.E.2d 1073 (Ill. 2012) (stating that the two concurring Justices in *Nicastro* found that distribution by an American distributor could be sufficient, but it was insufficient in that particular case because the factual record showed only a single isolated sale); Willemsen v. Invacare Corp., 282 P.3d 867, 873 (Or. 2012) (quoting Justice Breyer's description of the limited factual record in *Nicastro*).

96. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) (quoting *id.* at 2788 (plurality opinion)); *see* Marks v. United States, 430 U.S. 188, 193 (1977); Steinman, *supra* note 85, at 514–15.

97. *See infra* Part IV.

98. *Nicastro*, 131 S. Ct. at 2791.

99. Brief of Law Professors as Amici Curiae in Support of Respondents at 6, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 5312677, at *3 [hereinafter Brief of Law Professors].

100. *Id.* at 6.

which is set forth in Part IV. Part III.A focuses on doctrinal problems in *Nicastro*'s plurality and concurring opinions. More specifically, Part III.A.1 demonstrates that, while purporting to adopt Justice O'Connor's stream-of–commerce plus test, the plurality opinion in *Nicastro* ignored several key aspects of her test that demonstrate how endeavors to serve the U.S. market as a whole can constitute purposeful availment. Part III.A.2 explores the plurality opinion's improper reintroduction of territorial sovereignty into the personal jurisdiction analysis. Part III.A.3 then turns to Justice Breyer's concurring opinion in *Nicastro*. It illustrates how Justice Breyer improperly blended the purposeful availment and fairness prongs of the personal jurisdiction analysis. It continues by showing how separating these two inquiries would diminish potential jurisdictional problems for small manufacturers—an issue Justice Breyer identified as affecting his *Nicastro* ruling.

Part III.B shifts to the practical implications of the *Nicastro* decision. In particular, Part III.B.1 discusses how later adoption of the plurality opinion from *Nicastro* would negatively affect U.S. manufacturers and consumers. This Part further contends that the plurality opinion would serve as a blueprint for foreign manufacturers seeking to exploit the U.S. market without subjecting themselves to suit in the United States. Finally, Part III.B.2 discusses the need for a clear jurisdictional rule in stream-of-commerce cases to prevent extensive, unnecessary satellite litigation over what should be a simple preliminary issue.

A. Doctrinal Problems in the Nicastro *Decision*

1. The Plurality Mischaracterized Justice O'Connor's Stream-of-Commerce Analysis

Through its application of the minimum contacts doctrine in *Nicastro*, the plurality (and the concurrence to the extent that it relied on the plurality's reasoning in finding insufficient minimum contacts) mischaracterized and incorrectly applied Justice O'Connor's stream-of-commerce plus test.[101] Since *International Shoe*, the Supreme Court has consistently found that a manufacturer establishes minimum contacts with a state when it seeks to serve the market in that state and its products cause injury in that state.[102] Specifically, Justice O'Connor and Justice Brennan established two separate stream-of-commerce tests in *Asahi*. Both, however, expressly embraced the principle that "if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly,

101. Justice O'Connor's test is referred to as the stream-of-commerce plus test because, whereas Justice Brennan's stream-of-commerce test is satisfied by awareness that the product is being marketed in the forum, Justice O'Connor's test requires some additional act by the defendant evidencing intent to serve the market, beyond mere sales and awareness. *See supra* notes 26–28 and accompanying text.

102. Brief of Law Professors, *supra* note 98, at 9; s*ee also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

the market for its product in other States," it is reasonable to subject that company to suit in those states where its defective merchandise has injured others.[103]

Therefore, assuming *arguendo* that the plurality opinion in *Nicastro* correctly found that the stream-of-commerce rule advocated by Justice Brennan in *Asahi* was inconsistent with due process,[104] the plurality's rule cannot be reconciled with Justice O'Connor's stream-of-commerce plus test. Even under Justice O'Connor's test, if the "conduct of the defendant . . . indicate[s] an intent or purpose to serve the market in the forum State," personal jurisdiction may be constitutionally exercised.[105]

In *Nicastro*, the plurality recognized that J. McIntyre hired McIntyre America to sell J. McIntyre's products; J. McIntyre officials attended trade shows in several states; and as many as four machines ended up in New Jersey.[106] Given these deliberate attempts to sell its products in the United States, it is difficult to see how J. McIntyre did not, at least indirectly, attempt to serve the New Jersey market within the meaning of the passage from *World-Wide Volkswagen* quoted above,[107] as expressly adopted by Justice O'Connor in *Asahi*.[108]

Furthermore, under Justice O'Connor's stream-of-commerce plus test, if the defendant indicates an intent to serve the forum state market by "designing the product for the market in the forum State" or by "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," such additional steps taken to facilitate sales make the exercise of jurisdiction proper.[109] Justice O'Connor implied that her test would be satisfied by facts similar to those in *Rockwell*, where a foreign manufacturer has reason to know and expect, as a result of a distribution system in effect, that its product will be marketed in any and all states.[110] It would also be satisfied, as was the case in *Hicks*, where a product was not brought directly into the forum state by a foreign manufacturer, but was marketed by one whom the manufacturer could foresee would cause the product to enter the forum state.[111]

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103. Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 110 (1987) (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98) (emphasis removed); Brief of Law Professors, *supra* note 99, at 10.

104. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011).

105. *Asahi*, 480 U.S. at 112.

106. *Nicastro*, 131 S. Ct. at 2790.

107. *See supra* note 103 and accompanying text.

108. *Asahi*, 480 U.S. at 110 (citing *World-Wide Volkswagen*, 444 U.S. at 297).

109. *Id.* at 112.

110. *See id.* at 113 (citing Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., 553 F. Supp. 328 (E.D. Pa. 1982)).

111. Hicks v. Kawasaki Heavy Indus., 452 F. Supp. 130, 134 (M.D. Pa. 1978). In *Hicks*, the plaintiff brought a products-liability action against a Japanese motorcycle manufacturer. *Id.* at 132. Kawasaki argued it was not subject to jurisdiction in the United States because its motorcycles available in the U.S. market were made in Japan pursuant to an order placed by Kawasaki Motors Corporation, U.S.A., who then sold the motorcycles in the United States. *Id.* The Court held that the manufacturer had minimum contact by means of indirect shipments of goods into the state. *Id.* at 134. Justice O'Connor cited *Hicks* as one

An analysis of Justice O'Connor's citations to *Rockwell* and *Hicks* reveals that indirect marketing and distribution agreements should not bar the assertion of jurisdiction over a foreign manufacturer attempting to exploit the U.S. market. Instead, under her approach, where a foreign manufacturer endeavors to serve the U.S. market generally, such actions constitute purposeful efforts to serve the individual states that comprise the United States.[112] Dozens of lower state and federal courts have recognized this principle and held that under Justice O'Connor's approach, it would be illogical to find that a distributor who targeted the entire U.S. market did not target the individual states that make up that market.[113]

The logic of Justice O'Connor's opinion in *Asahi* and her references to *Rockwell* and *Hicks* apply with even stronger force in *Nicastro*.[114] Here, not only did J. McIntyre know of the distribution system that would bring its products into the United States, but it hired McIntyre America as a distributor who agreed to serve as the sales agent—a distribution system remarkably similar to the one in *Hicks*.[115] Furthermore, J. McIntyre's product literature assured customers that the machine in question conformed to American safety standards, demonstrating that J. McIntyre designed the product specifically for the U.S. market.[116] Given these attempts to serve the entire U.S. market, J. McIntyre at least indirectly sought to serve the New Jersey market and established sufficient minimum contacts with New Jersey. Consequently, even though Justice Kennedy purports to adopt Justice O'Connor's stream-of-commerce plus test, his ultimate conclusion in *Nicastro* is in tension with the language used by Justice O'Connor in *Asahi* and the cases she provided to illustrate her analysis.[117]

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factual scenario that would satisfy her stream-of-commerce plus test. *Asahi*, 480 U.S. at 112–13.

112. Steinman, *supra* note 85, at 502.

113. *See, e.g.*, Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 543 (6th Cir. 1993) (holding that a "*deliberate decision* to market" in all 50 states through a national distributor satisfies the more restrictive O'Connor approach to purposeful availment under *Asahi*); Stokes v. L. Geismar, S.A., 815 F. Supp. 904, 907 (E.D. Va. 1993), *aff'd*, 16 F.3d 411 (4th Cir. 1994) (holding that where a foreign manufacturer, through its U.S. distributor, willingly sold its product to the United States, in the absence of any attempt on the part of either the manufacturer or the distributor to limit their marketing strategy to avoid Virginia or any other state, the manufacturer had purposefully availed itself of the Virginia market); A. Uberti & C. v. Leonardo, 892 P.2d 1354 (Ariz. 1995) (stating that it would "turn[] common sense on its head" to allow any defendant to escape jurisdiction simply by targeting a group of states instead of any particular state).

114. Brief of Law Professors, *supra* note 99, at 21.

115. *Compare* J. McIntyre Mach, Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011), *with Asahi*, 480 U.S. at 112, *and Hicks*, 452 F. Supp. at 133.

116. *See Asahi*, 480 U.S. at 112 ("[A]dditional conduct of the defendant [that] may indicate an intent or purpose to serve the market in the forum State, [includes], designing the product for the market in the forum State."); Brief for Respondents at 14, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 5125437, at *19.

117. *See supra* notes 103–13 and accompanying text.

2. The Plurality's Reliance on Territorial Sovereignty is Inconsistent with Supreme Court Precedent and Provides an Unworkable Political Justification for Assertions of Personal Jurisdiction

The *Nicastro* plurality's assertion, that "jurisdiction is in the first instance a question of authority" based on whether the defendant submitted to the power of a sovereign, lacks any basis in prior precedent.[118] While *Burger King*, *Bauxites*, and *Szukhent* mentioned submitting to a court's authority, in every instance the context involved jurisdiction predicated on consent, in the form of either express pre-suit consent or implied post-suit consent through litigation conduct.[119] None of the decisions held that the defendant's intention to submit to sovereign authority was an indispensible element of jurisdiction.[120]

In contrast, the Supreme Court previously stated that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[121] Any restriction on state sovereignty, therefore, "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause[, because it] is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."[122]

Lacking a basis in Supreme Court precedent, the plurality's reasoning cannot serve as the basis for the personal jurisdiction doctrine. Furthermore, a modern jurisdictional test cannot be premised on deliberate manifestations of submission to authority. Such a test would be too limited and "w[ould] leave out the vast majority of corporations and individuals" because most corporations and individuals will never consciously submit to the power of a state or have reason to do so.[123] The proper policy justification must seek to determine whether the

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118. *J. McIntyre*, 131 S. Ct. at 2789; *see* Rhodes, *supra* note 42, at 416–17.

119. Rhodes; *supra* note 42, at 416–17; *see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("[P]arties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("[A]n individual may submit to the jurisdiction of the court by appearance."); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964) ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.").

120. Rhodes, *supra* note 42, at 416–17; David E. Seidelson, *A Supreme Court Conclusion and Two Rationales That Defy Comprehension:* Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., 53 BROOK. L. REV. 563, 571 (1987) (explaining that the function of due process in the personal jurisdiction context is to protect an individual's liberty interest, not to restrict state power as a result of federalism concerns).

121. *Ins. Corp. of Ir.*, 456 U.S. at 702.

122. *Id.* at 702 n.10.

123. Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open By* Goodyear Dunlop Tires v. Brown *and* J. Mcintyre Machinery v. Niacastro, 63 S.C. L. REV. 617, 621 (2012) ("Corporations enter new states to earn profit and expand their business, just as individuals travel to, or interact with, new states because it is personally, socially, or professionally advantageous. People have

defendant's purposeful activities sought some benefit in the forum, "thereby distinguishing the necessary 'minimum contacts' from jurisdictionally insignificant 'random,' 'fortuitous,' or 'attenuated' contacts."[124] The concept of reciprocity and fair play provides such an analysis, as discussed in Part IV.D.

3. The Concurring Opinion Improperly Blended the Purposeful Availment and Fairness Prongs of the Minimum Contacts Analysis

In his *Nicastro* concurring opinion, Justice Breyer refused to accept the New Jersey Supreme Court's interpretation of the stream-of-commerce theory of personal jurisdiction, which would find sufficient minimum contacts if the producer knew or reasonably should have known that its products were being distributed and sold in any of the 50 states.[125] Justice Breyer's primary issue with New Jersey's rule was that such a rule could not be reconciled with "the constitutional demand for . . . defendant-focused fairness."[126] Justice Breyer argued that the New Jersey rule was improper because it would allow any state to assert jurisdiction against a manufacturer who sells its products through a national distributor.[127] Such a rule, he concluded, could be particularly harsh and unfair to a small business of limited means.[128]

While Justice Breyer characterized New Jersey's rule as abandoning any inquiry into fairness,[129] a complete reading of the New Jersey Supreme Court's opinion demonstrates that the rule cited by Justice Breyer was only intended to address the purposeful availment prong of the minimum contacts analysis. The New Jersey Supreme Court made a secondary inquiry into whether forcing J. McIntyre to defend a product's liability action in New Jersey would offend "traditional notions of fair play and substantial justice."[130] Had Justice Breyer followed the same approach as the New Jersey Supreme Court, his analysis would have (1) been more consistent with Supreme Court precedent, and (2) more precisely addressed his fairness concerns regarding small businesses.

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motives that need not (and generally do not) involve deliberate manifestations of assent to the states' coercive power.").

124. Rhodes, *supra* note 42, at 418–19.

125. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (Breyer, J., concurring) (citing Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 591 (2010)).

126. *Id.*

127. *Id.*

128. *See id.*; Transcript of Oral Argument at 30, J. Mcintyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf ("I'm worried about the woman's cooperative in India, I'm worried about the Chinese development, I'm worried about development everywhere. . . . I'd worry about a rule of law that subjects every small business in every developing company—in every developing country to have to be aware of the law in 50 States simply because they agreed to sell to an independent company who is going to sell to America . . . ." (quoting Justice Breyer)).

129. *Nicastro*, 131 S. Ct. at 2793.

130. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 593 (2010).

The Supreme Court has consistently promoted a bifurcated approach. Most notably, in *Asahi*, eight Justices held that the assertion of personal jurisdiction would be unreasonable and unfair, "even *apart* from the question of the placement of goods in the stream of commerce."[131] The holding in *Asahi* demonstrates that, while minimum contacts and fairness are interrelated, a finding of minimum contacts does not automatically "permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products . . . through a national distributor."[132] Instead, such contacts must still be examined to see if they comport with traditional notions of fair play and substantial justice.[133]

Had Justice Breyer followed the bifurcated approach, he could have more precisely addressed his concerns regarding the fairness of forcing a small business to litigate in a distant forum. In *Nicastro*, Justice Breyer posed a hypothetical that is useful in illustrating this point.[134] In the hypothetical, a small Appalachian potter sells a single coffee mug to a large distributor, the distributor then resells the mug to a consumer from Hawaii who is injured by the mug, resulting in a products-liability suit being brought in Hawaii against the Appalachian potter.[135] Under the bifurcated approach, this small Appalachian potter could have sufficient minimum contacts with Hawaii in an action arising out of an injury caused by their mug. But this would not be the end of the inquiry. The Appalachian potter's contacts must then be considered in light of the burden on the defendant; the interests of the forum state; the plaintiff's interest in obtaining relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering substantive social policies.[136] After weighing these considerations, a court could still dismiss for lack of jurisdiction. By relying on the fairness prong of the minimum contacts analysis, however, the analysis would follow a more logical path than that used by the Court in *Nicastro*, which found that a business who distributed its products across the United States did not purposefully avail itself of any U.S. state.

Turning to the circumstances at issue in *Nicastro*, had Justice Breyer used the bifurcated approach, he arguably could have dismissed for lack of personal

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131. Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 114 (1987) (emphasis added).

132. *Compare Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring), *with Asahi*, 480 U.S. at 115 (examining fairness independently of minimum contacts).

133. *See Asahi*, 480 U.S. at 113–14.

134. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring).

135. *Id.*

136. *See Asahi*, 480 U.S. at 113 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). These fairness concerns would be additionally heightened if the potter was from outside the United States. In that case, the procedural and substantive polices of other nations, as well as the federal interest in foreign relations, requires a careful inquiry into the reasonableness of the burdens placed on an alien defendant. *Id.* at 115.

jurisdiction.[137] But as discussed above, by relying on the fairness prong of the personal jurisdiction test to dismiss, Justice Breyer's analysis would have more precisely addressed his concerns regarding the undue burdens placed on small businesses as a result of being haled into an inconvenient forum.[138]

B. Implications of the Nicastro *Decision*

1. The Plurality Opinion, if Adopted, Would Have Adverse Consequences for U.S. Manufacturers and Consumers

If the plurality opinion in *Nicastro* was subsequently adopted by a majority of the Court, foreign manufacturers would have a blueprint for escaping U.S. jurisdiction while simultaneously exploiting the U.S. market. This would place U.S. manufactures at a severe competitive disadvantage to their foreign counterparts and force many U.S. consumers to suffer the burdens of litigating products-liability claims overseas.

The plurality in *Nicastro* held that even though J. McIntyre demonstrated "an intent to serve the *U.S. market*," it did not "purposefully avail[] itself of the *New Jersey market*."[139] The plurality explained that based on concepts of federalism, a defendant may have sufficient minimum contacts with the United States as a whole, but not any particular state.[140] The plurality claimed, however, that a foreign manufacturer having the requisite relationship with the United States, but not with any individual state, would be an "exceptional case" because "foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums."[141]

It seems more likely, however, that if a company like J. McIntyre can hire a manufacturer to distribute to all 50 states, maximizing its market in the United States without incurring the additional costs of being haled into court, it would have no incentive to limit its market by "concentrat[ing] on particular [s]tates."[142] This is particularly obvious if doing so would subject them to specific jurisdiction in those forums.[143]

A rule allowing a manufacturer to avoid jurisdiction simply by closing its eyes and making no effort to learn about or restrict its distributor's activities would

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137. Justice Breyer would have reached this same result by finding that despite J. McIntyre having sufficient minimum contacts with New Jersey, it would not have been fair to hale J. McIntyre into court. In such a matter, the case would be dismissed for lack of personal jurisdiction under the fairness/reasonableness prong of the minimum contacts analysis and not the purposeful availment prong as in *Nicastro*.

138. *See World-Wide Volkswagen*, 444 U.S. at 292 ("The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'"); Steinman, *supra* note 85, at 513–14 (stating that Justice Breyer's concerns could have been vindicated under the reasonableness prong of the personal jurisdiction analysis).

139. *Nicastro*, 131 S. Ct. at 2790 (emphasis added).

140. *Id.* at 2789.

141. *Id.* at 2789–90.

142. *Id.*

143. *Id.*

"drive American manufacturers out of business" and harm American consumers, "while allowing foreign businesses to produce, with absolute immunity, unreasonably dangerous and defective products."[144] This is because without personal jurisdiction in the plaintiff's home forum, the plaintiff would likely have to pursue litigation overseas.[145]

These sizable burdens would discourage plaintiffs from pursuing otherwise meritorious claims, saving foreign manufacturers the expense of litigation and compensating those harmed by their products. This is not only distressing for U.S. consumers, but because U.S. manufacturers would remain subject to suit in the United States, they would be placed at a severe competitive disadvantage when compared to their foreign counterparts.[146] This problem is further magnified if the foreign manufacturer uses a thinly capitalized distributor who is unable to satisfy the plaintiff's claims.[147] Given the result in *Nicastro*, there seems to be little reason for a foreign manufacturer not to use such a distributor. Doing so effectively eliminates avenues for a U.S. plaintiff to pursue his or her claim at home.

Furthermore, under the *Nicastro* plurality opinion, not only would a foreign manufacturer have no incentive to target specific states, but it would have a blueprint for escaping liability. After *Asahi* was decided, some warned that O'Connor's opinion would "serve as a primer for a nonresident defendant seeking to enjoy economic benefits of a forum state's market while retaining immunity from jurisdiction in the state."[148] Similarly, other legal scholars predicted that finished-product manufacturers (as opposed to the component-part manufacturer in

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144. A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362–63 (1995); *see also* Koppel, *supra* note 44, at 962 ("The no 'minimum contacts' portion of the [plurality] opinion threatens a return to the days when injured users of defective products had to hunt afar for a forum in which they could sue the manufacturers." (citing RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8 (6th ed. 2010))); Arthur R. Miller, Keynote Address, Mcintyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475 (2012) ("No longer [will] injured consumers and employees be free to bring cases where they received defective products . . . [but might] have to litigate in distant fora and possibly in other countries, or abandon their claims altogether.").

145. Brief of Amicus Curiae Public Citizen, Inc., in Support of Respondents at 31, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 5192282, at *19 [hereinafter Brief of Public Citizen, Inc.]. There is an argument that a manufacturer, like J. McIntyre, would be subject to jurisdiction in the state where the distributor is located. *See* Rhodes, *supra* note 42, at 431–32. However, this would require an expanded reading of the "relatedness" requirement of the personal jurisdiction doctrine. *Id.* The scope of the relatedness element has not been clearly defined by the Supreme Court and therefore it would, at a minimum, require additional litigation expenses for the injured party to bring a claim and would make the manufacturer's amenability to jurisdiction anywhere in the United States uncertain. *See id.*

146. *See* S. 1946, 112th Cong. §§ 2–3 (2011).

147. Brief of Public Citizen, Inc., *supra* note 145, at 20.

148. Seidelson, *supra* note 120, at 578–79 (demonstrating that a foreign manufacturer would simply follow the steps laid out in *Asahi* to completely avoid liability while still benefiting from the U.S. market).

Asahi) would attempt to avoid jurisdiction in the United States by "sell[ing] the product at the place of manufacture to an 'independent' distributor and claim[ing] that the resulting layers in the marketing process insulate the maker from suit in a forum where the product is finally sold to a user and causes injury."[149]

If the plurality opinion from *Nicastro* were to govern, then attorneys for a foreign manufacturer seeking to escape U.S. jurisdiction for injuries caused by its products would advise its client as follows. First, the company should design and manufacture the product for the widest possible use and should not modify the product for the unique characteristics of any particular state.[150] Second, they should hire a third-party distributor to sell products throughout the United States.[151] Third, the company can attend trade shows to increase sales, but it cannot make any direct sales.[152] If the client were to follow this advice, it would likely be able to enjoy all the economic benefits of accessing the U.S. market without any attendant liability, even if the client knew that its product would end up in each state in the intended market.[153]

This result would give unreasonable protection to foreign manufacturers while leaving U.S. consumers in peril. In 2007 alone, the United States imported more than $2 trillion worth of products using more than 825,000 importers and 300 ports of entry.[154] Although these imports represent only 44% of consumer products sold in the United States, they comprise over 75% of all product recalls by the

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149. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8 (6th ed. 2010).

150. *Cf.* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987); Seidelson, *supra* note 120, at 579. *But see* Steinman, *supra* note 85, at 495 (pointing out several facts the plurality opinion refused to consider that indicates that design for a specific market must play a less significant role in the current jurisdictional analysis than under Justice O'Connor's stream-of-commerce plus test).

151. *Cf.* Seidelson, *supra* note 120, at 579. Seidelson argued that if the O'Connor view from *Asahi* were to govern, then counsel for a manufacturer could likely avoid jurisdiction in the United States by, among other things, letting a distributor take care of the marketing and sales of a product sold across the United States. *Id.* While the Seidelson article was published pre-*Nicastro*, its logic applies with even stronger force post-*Nicastro* because it has been validated by the restrictive interpretation of the minimum contacts doctrine provided by the *Nicastro* plurality. Seidelson may have even been too cautious in his prediction, as he thought contracting with an entity to act as a sales agent might subject a manufacturer to U.S. jurisdiction, something the *Nicastro* plurality refused to find. *Compare id.* (predicting that a manufacturer who made a product for the widest possible use, and allows others to market and sell its products will be able to avoid jurisdiction in the United States), *with* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790–91 (2011) (finding that J. McIntyre did not purposefully avail itself of the New Jersey market despite hiring a distributor to sell its machines across the United States, its machines being sold in New Jersey, and its machines causing injury in New Jersey).

152. *See Nicastro*, 131 S. Ct. at 2790; *cf.* Seidelson, *supra* note 120, at 579.

153. *See* Miller, *supra* note 144, at 475.

154. INTERAGENCY WORKING GRP. ON IMPORT SAFETY, IMPORT SAFETY - ACTION PLAN UPDATE: A PROGRESS SUMMARY (2008), *available at* http://archive.hhs.gov/importsafety/report/actionupdate/actionplanupdate.pdf.

Consumer Product Safety Commission.[155] With approximately 34 million people injured or killed because of product defects, it is vital that the Supreme Court adopt a jurisdictional rule that will allow the U.S. tort system to redress the harms caused by foreign manufacturers.[156]

2. Nicastro *Will Increase Personal Jurisdiction Litigation, Amplify Litigation Costs, and Limit Consumers' Access to Judicial Remedies*

Since the 1987 *Asahi* opinion, the rules and standards for determining the proper range of permissible personal jurisdiction have been unclear.[157] Unfortunately, despite the need for a clear majority opinion to reconcile the several competing interpretations of *Asahi*, *World-Wide Volkswagen*, and our contemporary understanding of specific personal jurisdiction, the fractured *Nicastro* decision provides little guidance for lower courts. Instead, *Nicastro* further muddies the waters of stream-of-commerce jurisprudence and results in increased costs for courts and litigants.

Post-*Asahi*, but pre-*Nicastro*, lower courts primarily used two methods to analyze stream-of-commerce personal jurisdiction questions.[158] Following *Nicastro*, even less guidance exists for lower courts. While the four-Justice plurality clearly favors the stream-of-commerce plus test,[159] their interpretation does not appear to be entirely consistent with Justice O'Connor's *Asahi* opinion or its underpinnings, as derived from *World-Wide Volkswagen*.[160] While finding that minimum contacts were present, the Justices dissenting in *Nicastro* did not expressly articulate which standard they used to reach their decision.[161] Thus, even if their opinion had garnered five votes, it would have left lower courts with the same interpretive struggle resulting from the competing views of O'Connor and Brennan in *Asahi*. Finally, Justice Breyer's concurring opinion in *Nicastro*, by limiting his holding to the specific facts of this case, essentially left the lower

155. U.S. CONSUMER PROD. SAFETY COMM'N, IMPORT SAFETY STRATEGY 1 (2008), *available at* http://www.cpsc.gov/PageFiles/127661/importsafety.pdf.

156. Brief of the American Association for Justice as Amicus Curiae in Support of Respondents at 3, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 5275250, at *10 [hereinafter Brief of the American Association for Justice]; Claire Andre & Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, MARKULA CTR. FOR APPLIED ETHICS (1991), http://www.scu.edu/ethics/publications/iie/v4n1/pay.html.

157. *Nicastro*, 131 S. Ct. at 2785.

158. The most common approach courts used was to attempt to satisfy Justice O'Connor's more stringent stream-of-commerce plus test, noting that if this standard was met, Justice Brennan's test would be satisfied as well. Other courts specifically adopted O'Connor's test. Also, a small number of courts disregarded both and relied on *World-Wide Volkswagen*. *See supra* notes 29–32 and accompanying text.

159. *Nicastro*, 131 S. Ct. at 2789–90.

160. *See supra* Part III.A.1.

161. *Nicastro*, 131 S. Ct. at 2802–04 (Ginsburg, J., dissenting).

courts in limbo.[162] Lower courts were instructed to adhere to precedent, which has divided the Court since its inception.[163]

While it is impossible to tell exactly how the courts will incorporate the *Nicastro* decision into their jurisprudence, one consequence is almost guaranteed: more personal jurisdiction litigation.

Without a clear Supreme Court decision as a guide, personal jurisdiction challenges, particularly in the realm of products liability, will continue to generate "confusion, unpredictability, and extensive satellite litigation over what should be an uncomplicated preliminary issue."[164] Parties with the economic resources and legal capabilities will use *Nicastro* as a "procedural plaything[]," resulting in "[m]ore motions, more delays, more costs, [and] more appeals."[165] Statistics regarding the cost of such litigation are difficult to obtain because a substantial amount of cases dismissed for want of personal jurisdiction occur in unreported trial court decisions. However, one study counts 4,000 reported cases from 1983 to 1992.[166] This number is growing,[167] with *Nicastro* generating substantial litigation.[168]

Creating a clear procedural rule would reduce judicial costs by discouraging trial and appellate litigation on the issue.[169] Further, a clear personal jurisdiction doctrine would reduce the costs of dispute resolution generally by encouraging settlements.[170] This is because rational parties will settle when their

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162. *Id.* at 2794 (Breyer, J. concurring).

163. *Id.*

164. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 617 (2006); *see also* Robert H. Abrams & Paul R. Diamond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 83–84 (1984) ("Ultimately, [the] morass generates costly and wasteful threshold litigation over state court exercises of jurisdiction."); Geoffrey C. Hazard, Jr., *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 283 ("[T]he vagueness of the minimum-contacts general principle can make jurisdictional litigation uncertain at the trial level and frequent at the appellate level.").

165. *See* Miller, *supra* note 144, at 475–76 (citing JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 8 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (arguing that Supreme Court cases, including *Nicastro* and *Iqbal*, have resulted in increased costs and delays).

166. 2 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS, at v, vii (3d ed. 1998).

167. Weintraub, *supra* note 14, at 531 n.5. In 1995, Professor Russell Weintraub ran a simple all cases search on Westlaw using "'minimum contacts' /p 'jurisdiction'" and limiting the date to 1990–95. *Id.* His search returned 2,321 cases. The same search today (searching between January 1, 2007 and January 4, 2012) resulted in 3,366 cases.

168. An advanced search on Westlaw for the term "Nicastro" from June 27, 2011 (when *Nicastro* was decided) to March, 22 2012 produces 156 cases citing the *Nicastro* decision.

169. Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 582 (1995).

170. *Id.* at 584–85.

estimated case values are separated by less than the cost of litigation.[171] Conversely, unstable and unpredictable legal doctrine impedes "the convergence of the parties' estimates of the case value, thus inhibiting settlement."[172]

IV. A SOLUTION FOR THE JURISDICTIONAL ISSUES CREATED BY *NICASTRO*

It is not too late for courts to change course and mitigate the potential harm of *Nicastro*. This Part provides a potential solution—the reasonable-commercial-expectations test—to the problems and implications of *Nicastro*.

Parts IV.A–B explain the reasonable-commercial-expectations test, its basis in *World-Wide Volkswagen* and *Asahi*, and adaptions for evolving business practices. Part IV.C then illustrates how a reasonable-commercial-expectations test reconciles both stream-of-commerce tests provided in *Asahi*. Then, Part IV.C demonstrates how, by focusing on the underlying commercial expectations in the manufacturer distributor relationship, the test complies with the traditional constitutional requirements for asserting personal jurisdiction, while accounting for the increasingly complex world of international commerce. Part IV.D provides the policy justifications for a reasonable-commercial-expectations test—reciprocity and fair play. Part IV.E explains how a reasonable-commercial-expectations test is consistent with the operative aspects of *Nicastro* and thus permissible for lower courts to utilize until the Court reconsiders its stream-of-commerce analysis. And Part IV.E concludes by demonstrating that a majority of the Court would likely support a reasonable-commercial-expectations test if considered by the Court in the future.

A. The Reasonable-Commercial-Expectations Test

Exploring a judicial solution to the personal jurisdiction quagmire created by *Nicastro* is particularly important. Justice Breyer's concurrence in *Nicastro* expressly limited its holding to the facts at hand and delayed announcing a rule of broad applicability until the Court has an opportunity to undergo a full consideration of the modern-day consequences.[173] The concurrence's concern over modern-day economic consequences of their decision is well founded; for decades, Justices have expressed interest in the necessary evolution of the personal jurisdiction doctrine alongside the American and global economy.[174]

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171. *Id.*

172. *Id.* at 585 (citing Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 371 (1986)).

173. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J. concurring).

174. For example, in 1957 the Court abandoned the ideas of consent, doing business, and presence as a measure of contacts within a state, while noting the long trend toward "expanding the permissible scope of state jurisdiction over foreign corporations," due in part to the "fundamental transformation of our national economy over the years." McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957). Later, the Court again noted the

The test that best accommodates today's commercial practices, while adhering to the Supreme Court's personal jurisdiction precedent, is a test based upon the reasonable-expectations test derived primarily from *World-Wide Volkswagen*, but attuned to modern business practices.[175] This Note refers to this test as the reasonable-commercial-expectations test.

The reasonable-commercial-expectations test is based on the principle from *World-Wide Volkswagen*: A state may properly assert jurisdiction over a corporation that delivers products into the stream of commerce with the expectation that they will be purchased in the forum state.[176] In recognition of the increasingly international nature of the modern economy and the need for a jurisdictional rule to remain flexible enough to address evolving commercial practices,[177] the reasonable-commercial-expectations test builds on *World-Wide Volkswagen* by incorporating a rebuttable presumption that a marketing agreement with a nationwide U.S. distributor or retailer demonstrates a reasonable expectation of purchase in any state.[178] Under this presumption, if a manufacturer places its product into the stream of commerce through the use of a marketing or sales plan that targets the United States as a whole, then the manufacturer reasonably expected the product to be sold anywhere in the United States.[179] The

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need for the development of personal jurisdiction in *Hanson v. Denckla*, stating, "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase." 357 U.S. 235, 250–51 (1958). Then, once more, the Court referenced the need for personal jurisdiction law to keep pace with technological and industrial growth in 1980, stating that "[t]he historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980); *see also* Koppel, *supra* note 44, at 959 ("Since Justice Brennan commented 30 years ago, in his *World-Wide Volkswagen* dissent, that '[t]he model of society on which the *International Shoe* Court based its opinion is no longer accurate' in view of the rapid nationalization of commerce in the U.S., the rapid *globalization* of commerce and information continues to challenge the Court to adjust its personal jurisdiction jurisprudence to catch up with these realities, as it did 65 years ago in *International Shoe*." (citation omitted)).

175. *World-Wide Volkswagen*, 444 U.S at 297–98.

176. *Id.*

177. Brief of the American Association for Justice, *supra* note 156, at 5.

178. While described as a "modern modification," the alteration derives from *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In that case, the Supreme Court stated that the purposeful availment requirement was satisfied "where the contacts *proximately* result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* at 475 (emphasis added) (citation omitted). Therefore, "'[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Id.* at 473 (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98). The "modern modification" described, then, is most properly viewed as an incorporation of *Burger King* into the stream-of-commerce analysis.

179. Brief of the American Association for Justice, *supra* note 156, at 15–16.

manufacturer, therefore, should be presumed to have intended to avail itself of the market in each state.[180]

This presumption may be rebutted, as to a particular forum, by evidence indicating a clear intent to carve out certain geographical markets by restricting sales to a specific state or region or prohibiting sales in a certain state altogether.[181] The addition of this rebuttable presumption would alleviate the difficulties in dealing with the purposeful availment prong of the minimum contacts analysis in the commercial context, while leaving the other two traditional requirements intact—that the claim arise out of the defendant's contacts with the forum, and that the exercise of jurisdiction comport with notions of fair play and substantial justice.

The analysis under the reasonable-commercial-expectations test[182] would proceed with three independent analyses. First, under the "purposeful availment" prong of the analysis, a business that engaged in a sales or marketing scheme that targeted the United States as a whole would be presumed to have availed itself of the forum in question. The business could rebut this presumption by demonstrating that despite its nationwide plan, it had taken reasonable measures to avoid serving a certain forum or region.[183] If the business rebutted the presumption, an exercise of jurisdiction would then be unconstitutional for lack of purposeful availment. If the presumption was not rebutted, the analysis would continue.

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180. *Id.* at 16. "Under this test, jurisdiction is dependent on the reasonable market. If that market is fifty States, then jurisdiction can occur in any of the fifty States where the product comes to rest and causes injury. This is simply common sense. All must include each." *Id.* at 15; *see also* A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362 (Ariz. 1995) (stating that if a defendant could target the United States as a whole without targeting the individual states therein, this would turn "common sense on its head," and would defy "any sensible concept of due process").

181. Other scholars have found that such a presumption makes sense, particularly in light of the international nature of commerce and the ability for businesses to employ geographical restriction techniques. *See, e.g.*, Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 94–95 (2012); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 94 (arguing that in the e-commerce context, a business "not employing geographically restrictive techniques should anticipate being haled into court wherever their . . . conduct gives rise to a cause of action").

182. I refer to the term "reasonable-commercial-expectations test" to distinguish it from the reasonable expectations test established in *World-Wide Volkswagen*, while still acknowledging the roots of this analytical device, and to indicate that this test would be applicable only in the commercial context as traditional personal jurisdictional principles still adequately handle issues in that area.

183. Such reasonable measures would likely be evidenced by the business' contracts with its distributor or marketer. For example, if the business licensed its distributor to sell its products in the United States, but did not want to suffer the logistical burdens of traveling to Hawaii or Alaska, it could expressly prohibit sales by the distributor in those states. Similarly, if the business wanted to avoid demanding products-liability laws in State X, it could license sales in the United States with the exception of State X.

The court would then consider whether the plaintiff's cause of action arose out of the defendant's contacts with the forum.[184] This prong of the analysis ensures that foreign manufacturers would not be haled into the forum on claims unrelated to the sales and marketing of their products.[185] Where the claim is based on allegedly defective merchandise within the forum, as in a traditional products-liability suit, this prong would be satisfied and the analysis would continue.[186]

At this point, the court would conduct a final independent inquiry to determine whether an exercise of jurisdiction over the defendant would comport with "traditional notions of fair play and substantial justice" with regard to the defendant's contacts with the forum.[187] Under this prong of the analysis, if the exercise of jurisdiction would be unreasonable, jurisdiction would not be constitutionally permissible.[188] If the exercise of jurisdiction satisfies independent inquiry into each of these three prongs, a court could then properly exercise jurisdiction over the defendant under the reasonable-commercial-expectations test.

B. The Reasonable-Commercial-Expectations Test is Consistent with Both Brennan's and O'Connor's Asahi *Opinions*

As discussed above, *Nicastro* exacerbated the lack of clarity and consistency in the stream-of-commerce doctrine.[189] *Nicastro* was not only a splintered decision, but the plurality opinion's interpretation of Justice Brennan's and Justice O'Connor's stream-of-commerce tests from *Asahi* was inconsistent with Supreme Court precedent and lower court applications.[190] One of the primary benefits of the reasonable-commercial-expectations test is its clarification of the stream-of-commerce doctrine: The reasonable-commercial-expectations test reconciles Justice Brennan's and Justice O'Connor's stream-of-commerce tests from *Asahi*.

Although some courts and commentators have read Justice Brennan's and Justice O'Connor's *Asahi* opinions as endorsing drastically different standards, this characterization ignores the common foundation of both opinions found in *World-*

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184. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 (1985); Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

185. The "arise out of" prong essentially delineates between those claims proper for "specific jurisdiction" and "general jurisdiction." *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2855–56 (2011).

186. *See id.* at 2855 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

187. Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., 480 U.S. 102, 113–16 (1987).

188. *See, e.g.*, *id.* This independent inquiry is what was noticeably missing from the plurality's analysis in *Nicastro*. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring). However, this is an essential part of the analysis because it provides the Court with the flexibility needed to handle complex commercial arrangements without having to distort the purposeful availment prong into a "seemingly . . . no-jurisdiction rule." *See id.*

189. *See supra* Part III.B.2.

190. *See supra* Part III.A.1–2.

Wide Volkswagen.[191] As discussed earlier,[192] while Justices Brennan and O'Connor diverged on how to measure a manufacturer's intent to serve a given market, both expressly acknowledged that if the defendant's conduct "indicate[s] an intent or purpose to serve the market in the forum State," jurisdiction is constitutionally permissible.[193]

With this common foundation in mind, one can see that although Justice O'Connor required more than a mere placement of a product into the stream of commerce to exercise jurisdiction, her additional factors were, at their core, an attempt to discover the intent or reasonable expectations of the party.[194] Justice O'Connor's additional factors were examples of business expectations in serving a given market.[195] Similarly, Justice Brennan's test referring "not to unpredictable currents or eddies, but to the regular and anticipated flow of products," was focused on the reasonable expectations of a business in generating economic benefits from a given forum.[196] The reasonable-commercial-expectations test harmonizes Justice Brennan's and O'Connor's views by focusing on the reasonable expectations of the defendant as measured by an objective indication of intent to serve a given market that both Justices would agree on—the use of a nationwide distributor. As to the presumption that hiring a U.S. distributor constitutes a "reasonable commercial expectation" for the purposes of minimum contacts, there is little doubt that this would satisfy Brennan's stream-of-commerce test.[197] Further, it would also satisfy Justice O'Connor's test. While on its face this may seem contrary to Justice O'Connor's holding in *Asahi*, in that case Justice O'Connor specifically noted that Asahi "did not *create, control or employ* the distribution system that brought its valves" into the forum.[198] Justice O'Connor contrasted her finding in *Asahi* with *Rockwell* and *Hicks*, two cases in which the use of a U.S. distributor was sufficient to exercise jurisdiction over the foreign defendants.[199] The key difference in these cases was the control exercised by the manufacturer in relation to the purposeful availment requirement, as discussed below.[200] Therefore, both Brennan's and O'Connor's *Asahi* opinions are consistent with and harmonized by a reasonable-commercial-expectations test incorporating a

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191. *See Asahi*, 480 U.S. at 109–10 (plurality opinion) (citing *World-Wide Volkswagen*, 444 U.S. at 297); *id.* at 119 (Brennan, J., concurring) (citing same).

192. *See supra* Part III.A.1.

193. *Asahi*, 480 U.S. at 112 (plurality opinion); *id.* at 119 (Brennan, J., concurring).

194. *Id.* at 103–04, 112 (plurality opinion).

195. *See id.* at 112.

196. *See id.* at 117 (Brennan, J., concurring).

197. *See id.* at 120–21.

198. *Id.* at 112 (plurality opinion) (emphasis added).

199. *Id.* at 113 (citing Hicks v. Kawasaki Heavy Indus., 452 F. Supp. 130, 134 (M.D. Pa. 1978); Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., 553 F. Supp. 328, 331–34 (E.D. Pa. 1982)); *see supra* notes 109–12 and accompanying text.

200. *See, e.g.*, *Rockwell*, 553 F. Supp. at 331–34; *Hicks*, 452 F. Supp. at 134; *see infra* Part IV.C.

presumption that the use of a U.S. distributor demonstrates an intent to serve the market of all 50 states.

C. The Reasonable-Commercial-Expectations Test Complies with the Traditional Requirements for Personal Jurisdiction

Nicastro did not overrule any Supreme Court precedent regarding personal jurisdiction or the stream-of-commerce doctrine.[201] Therefore, to be constitutionally permissible, the reasonable-commercial-expectations test must satisfy the three traditional requirements for the legitimate assertion of personal jurisdiction: (1) purposeful availment, (2) relatedness, and (3) fair play and substantial justice.[202] The reasonable-commercial-expectations test satisfies all three prongs by focusing on the economic realities of the manufacturer–distributor relationship. It also retains an independent inquiry into fairness, allowing for the flexibility needed to accommodate evolving business practices.

Regarding the first prong, under the reasonable-commercial-expectations test, a business commits an "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State" by entering into a nationwide marketing or sales agreement with a U.S. distributor who makes a sale in the forum in question.[203] While some may argue that engaging in such an arrangement cannot satisfy the purposeful availment requirement with any particular state, this argument ignores the underlying commercial expectation of each party. This transaction relies upon the commercial expectation that the distributor will be able to resell the product and thus, in the end, "is just as much a purposeful act as shipping the product directly to customers in any of the states."[204]

The reason for ignoring the preliminary sale between the manufacturer and the distributor and focusing on the final sale to the customer is best illustrated by considering the different level of control in a retailer–customer relationship, as opposed to a manufacturer–distributor relationship. In the retailer–customer context, the retailer relinquishes all control over any goods sold, giving the customer the power to unilaterally take the goods to a distant state.[205]

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201. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2792–93 (2011); *see also* Part II.D.

202. *Nicastro*, 131 S. Ct. at 2787–88.

203. Hanson v. Denckla, 357 U.S. 235, 253 (1958). An agreement and subsequent sale satisfies purposeful availment because it is an "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.*; *see also* Brief of the American Association for Justice, *supra* note 156, at 20.

204. Brief of the American Association for Justice, *supra* note 156, at 20.

205. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 314 (1980); Cronan, *supra* note 11, at 1291 ("After the first retail sale, it is the consumer, not the defendant, who directs the movement of the product."); Seidelson, *supra* note 120, at 577 (1987) ("There are some rather obvious differences between the intervening conduct of the ultimate product user and the nonresident defendant's knowledge of the course of the distributive chain utilized by it.").

In contrast, a manufacturer–distributor relationship is the result of a premeditated business decision over which a manufacturer can typically exert a high level of control.[206] The manufacturer–distributor relationship "is premised on the deliberate and purposeful actions of the [parties] themselves in choosing to become part of a nationwide . . . network."[207] A manufacturer can inquire into its distribution network and make an informed decision as to whether or not the economic benefits outweigh the likely jurisdictional consequences.[208] Further, a manufacturer has the ability to contractually limit the distributor to sales in a limited number of states.[209] And, it can prohibit the distributor from selling in particular states if the manufacturer considers the burdens of litigation in that forum too great.[210] Finally, a manufacturer can negotiate a right of indemnification in exchange for making its products available to the distributive chain.[211]

In sum, the ability of a manufacturer to control the flow of its goods in this manner distinguishes contacts proximately caused "by the defendant himself that create a 'substantial connection' with the forum State," and those that are solely "a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'"[212] Consequently, in the manufacturer–distributor context, a manufacturer can be subject to a state court's jurisdiction if its contacts are in furtherance of a marketing or distribution agreement.[213]

This view does not create more unpredictability for several reasons. First, the argument is highly circular. "Defendants will anticipate being 'haled into court' wherever the law says they are subject to suit; thus, defining the law of jurisdiction with reference to the expectations of defendants makes no sense."[214]

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206. Cronan, *supra* note 11, at 1292.

207. *World-Wide Volkswagen*, 444 U.S. at 314.

208. Seidelson, *supra* note 120, at 577.

209. Spencer, *supra* note 181, at 91–94 (discussing, in the context of e-commerce, various geographical limiting techniques businesses can use to limit their business to specific forums).

210. Seidelson, *supra* note 120, at 577 (stating that a manufacturer has the ability to control the flow of its products, and contractually limit the movement of its products if the likely jurisdictional consequences become unacceptable).

211. *Id.* While indemnification would not limit jurisdiction, "it would certainly dilute the economic sting occasioned by such consequences." *Id.*

212. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (citations omitted). For example, under this rule—and consistent with *Burger King* and *World-Wide Volkswagen*—a manufacturer who contractually limited its distributor to Arizona would not be subject to jurisdiction if an Idaho resident purchased its product in Arizona or bought the product through a secondary vendor, like eBay, in Idaho and the product caused an injury there.

213. *See* Cronan, *supra* note 11, at 1292.

214. Spencer, *supra* note 164, at 646; *see also* Seidelson, *supra* note 120, at 577–78 (stating that "the course of the distributive chain volitionally utilized by the nonresident defendant is so significantly different" from that of the end product user that requiring additional purposeful conduct directed at the forum state, beyond the use of a distributive chain it knows will carry its products into the forum, "hardly seems to be a necessary or

Second, in contrast to the array of views and rules adopted regarding personal jurisdiction across the country, almost any clear rule would certainly enhance predictability, even if it increased amenability to suit.[215] Third, a reasonable-commercial-expectations rule would provide a strong incentive for manufacturers to specify contractually which markets they intended to serve.[216] The rule would diminish wasteful satellite litigation over personal jurisdiction and provide a much higher level of predictability for manufacturers.[217]

Under a reasonable-commercial-expectations test, nothing in the second prong of the minimum contacts analysis would change. The litigation would "arise out" of the forum, assuming the suit is filed in the state where the plaintiff was injured, because of the product's sales in the state.[218]

As to the third prong, under a reasonable-commercial-expectations test, there would be no significant change in the examination of traditional notions of fair play and substantial justice historically incorporated into the minimum contacts analysis.[219] As before, if it would truly be unreasonable to hale the defendant into court, the court could dismiss the case despite the defendant having minimum contacts—as in *Asahi*.[220]

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appropriate method of protecting" against unconstitutional assertions of personal jurisdiction).

215. Spencer, *supra* note 164, at 646.

> To illustrate the point, if the law in the federal courts tomorrow were changed to give those courts nationwide personal jurisdiction . . . , defendants would thenceforth be on notice that their conduct within the United States will submit them to personal jurisdiction in any of its federal district courts. So too would defendants be able to anticipate the fora in which they could be haled into court if the law of jurisdiction were altered to subject defendants to jurisdiction in those states where their conduct implicates legitimate state interests.

Id. (citations omitted).

216. In this context, the reasonable-commercial-expectations standard acts somewhat like a "penalty default" rule, which encourages a party to negotiate *ex ante* the terms of a contract by imposing a default rule the party would likely not prefer. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989). Such rules are appropriate in cases, like a manufacturer–distributor relationship, where "it is cheaper for the parties to negotiate a term ex ante than for the courts to estimate ex post." *Id.* at 93.

217. *See id.* ("Courts, which are publicly subsidized, should give parties incentives to negotiate ex ante by penalizing them for inefficient gaps.").

218. Brief of the American Association for Justice, *supra* note 156, at 17.

219. As explained above, however, this independent analysis would not be new, but would realign Justice Breyer's analysis with traditional minimum contacts analysis. *See supra* Part III.B.

220. Asahi Metal Industry Co. v. Super. Ct. of Cal., 480 U.S. 102, 114 (1987).

D. The Reasonable-Consumer-Expectations Test Provides a Workable Policy Justification for Asserting Personal Jurisdiction

Exertions of jurisdiction are acts of governmental coercion, necessitating a political justification.[221] Therefore, a jurisdictional test must have a substantial political justification to delineate the circumstances under which the assertion of governmental coercion is warranted.

The plurality opinion in *Nicastro* asserted that personal jurisdiction is rooted in the concept of territorial sovereignty and thus is only justified when a defendant intends to submit to the power of a sovereign.[222] But this assertion lacked foundation in Supreme Court precedent and relied on outdated business intent concepts.[223] The reasonable-commercial-expectations test addresses these shortcomings by focusing on a defendant's implicit decision to acquire forum benefits despite the costs of becoming amenable to forum jurisdiction—a concept referred to as reciprocity and fair play.[224]

Reciprocity and fair play refers to the idea that the benefits provided by a forum to a defendant legitimize jurisdiction over the defendant.[225] This concept was recognized in *Nicastro*[226]and has been relied on in several personal jurisdiction cases.[227] Furthermore, reciprocity and fair play provides a workable justification for personal jurisdiction because it requires a net benefit to the defendant as a precondition to the assertion of personal jurisdiction.[228] The reasonable-commercial-expectations test is consistent with the policies of reciprocity and fair play because it expressly limits a manufacturer's amenability to suit to those forums from which the manufacturer derives a benefit. Under a reasonable-commercial-expectations test, a manufacturer with a U.S. distributor can avoid being haled into any particular forum by contractually specifying certain states it does not wish to serve. A manufacturer weighing its options will consider whether the potential benefit from accessing any given forum is worth the potential cost of facing suit there. To the extent, then, that the enforcement of forum law is necessary to enable benefits in the forum, a manufacturer cannot have a principled

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221. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) ("Due process protects the defendant's right not to be coerced except by lawful judicial power.").

222. *See supra* Part III.A.2.

223. *See supra* Part III.A.2.

224. *See* Brilmayer & Smith, *supra* note 123, at 625–27, 630–33.

225. *Id.* at 625.

226. *Nicastro*, 131 S. Ct. at 2785 ("The exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))).

227. *See* Brilmayer & Smith, *supra* note 123, at 625–26 (citing Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 109 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

228. *Id.* at 626. The creation and enforcement of laws benefit those who conduct commercial business within a forum. *Id.* Therefore, to the extent that the enforcement of those laws is necessary to the provision of those benefits, those who benefit can have no objection to the enforcement of those laws. *Id.*

objection to the enforcement of forum law against it as the manufacturer derives a net benefit from the transaction.[229]

E. The Reasonable-Commercial-Expectations Test is Permissible Under Nicastro *and Should be Supported by a Majority of the Current Supreme Court*

Lower courts forced to apply the stream-of-commerce doctrine post-*Nicastro* can constitutionally apply the reasonable-commercial-expectations test because it is founded on Supreme Court precedent supported by a minimum of five Justices. As discussed, a reasonable-commercial-expectations test is rooted in principles established in *World-Wide Volkswagen* and draws support from Justice Ginsburg's stream-of-commerce plus test in *Asahi*.[230] Five Justices sustained the continuing validity of both *World-Wide Volkswagen* and *Asahi*.[231] Therefore, the basis of a reasonable-commercial-expectations test is intact post-*Nicastro*. In particular, Justice O'Connor's distinction in *Asahi* (between those entities that "create, control, or employ the distribution system" that brings their products into the market and those that have a mere awareness that their products may reach a market) remains as a legitimate basis for asserting liability over those who engage a U.S. distributor to sell their products.[232]

The only apparent conflict between *Nicastro* and a reasonable-commercial-expectations test is the function of the presumption in a case with minimal sales. Justice Breyer stated that a "single isolated sale, even if accompanied by the kind of sales effort[s]" in *Nicastro* was insufficient to validate an exercise of jurisdiction.[233] However, this conflict can be resolved. After discussing the problems attendant to jurisdiction based on a single scale, Breyer noted several deficiencies in the factual record.[234] Consequently, a case with a more developed factual record—showing state-related design, advertising, advice,

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229. *Id.*

230. *See supra* Part IV.A–B.

231. *See supra* Part II.D.4.

232. *See Asahi*, 480 U.S. at 112–13 (describing the difference between Asahi, which merely had an awareness that some of its valves would be sold in California, and the manufacturer in *Hicks v. Kawasaki Heavy Industries Tires*, 452 F. Supp. 130 (MD Pa. 1978), who created, controlled, or employed the distribution system that brought its product into the forum market); *see also* Russell v. SNFA, 965 N.E.2d 1, 11, *reh'g denied* (Jan. 18, 2012), *appeal allowed*, 968 N.E.2d 1073 (Ill. 2012); *supra* notes 86–88, 110–13 and accompanying text. *Russell* presents a unique opportunity to evaluate the changes made by *Nicastro* because it had the same defendant as in *Rockwell International Corp. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A.*, 553 F. Supp. 328, 329 (1982), and an almost indistinguishable factual record. *Russell*, 965 N.E.2d at 9. There, the court relied on *Asahi* and *Rockwell* to find that the defendant, who created bearings for use in an Italian helicopter to be sold in the United States, was subject to jurisdiction in Illinois where the helicopter crashed. *Id.* at 9–11.

233. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2792 (2011).

234. *Id.*

or anything else—could be distinguished.[235] Furthermore, it seems more reasonable for concerns over a single sale, or over a small business, to be handled under the reasonableness prong on the analysis—leaving the presumption intact.[236]

Additionally, if the Supreme Court revisits its *Nicastro* decision, a majority of the Justices would likely support a reasonable-commercial-expectations test. The decision would likely be close, however, with Justice Alito providing the swing vote.

Based on the plurality opinion in *Nicastro*, Justices Kennedy, Roberts, Scalia, and Thomas would likely oppose a reasonable-commercial-expectations test. There is limited common ground beyond the plurality opinion and a reasonable-commercial-expectations test, as both focus on activities by the defendant that invoked the benefits and protections of the forum's laws.[237] The plurality opinion, however, would characterize these activities differently from the reasonable-commercial-expectations test. While the plurality opinion views a defendant who has established a nationwide distribution system as only being able to "predict" that its goods will reach the forum state,[238] a reasonable-commercial-expectations test views such an action as a deliberate attempt, or manifestation of intent, to benefit from the laws of the forum.[239]

Justices Ginsburg, Sotomayor, and Kagan would almost certainly support a reasonable-commercial-expectations test. In *Nicastro*, these Justices stated that by hiring McIntyre America to promote and sell its machines in the United States, J. McIntyre had purposefully availed itself of "all States in which its products were sold."[240] Both the dissent and the reasonable-commercial-expectations test would not protect a business whose own decision to target the U.S. market gives rise to an affiliation with the forum.[241]

While Justice Breyer's stance is a closer call, his opinion indicates that he would also support a reasonable-commercial-expectations test. As noted above, Breyer embraced the passages of *World-Wide Volkswagen* and *Asahi* on which a reasonable-commercial-expectations test is built.[242] Breyer did find, however, that a rule where a manufacturer is liable "so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states'" was not

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235. *See* Steinman, *supra* note 85, at 510–12 (explaining that Justice Breyer saw a defendant who passively "permitted" sales to occur, as opposed to a defendant who "engaged" or "promoted" sales due to the limited factual record).

236. *See supra* Part II.A.4.

237. *Compare Nicastro*, 131 S. Ct. at 2788, *with supra* notes 177–84 and accompanying text.

238. *Nicastro*, 131 S. Ct. at 2788.

239. *See supra* notes 203–13 and accompanying text.

240. *Nicastro*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

241. *See id.*

242. *See supra* notes 86, 89 and accompanying text.

appropriate in "this case."[243] But he followed up this statement with his concerns regarding this rule for small businesses and international commerce.[244] A reasonable-commercial-expectations test addresses these concerns in two ways. First, Breyer's hesitancy in *Nicastro* regarding small businesses could be alleviated under the reasonableness prong of the test.[245] Second, the reasonable-commercial-expectations test does not focus on whether the defendant knows its products are distributed in the United States. Instead, the test focuses on the defendant's deliberate attempt to establish a distribution system in the United States, and the defendant's decision to seek the benefits of each individual state despite the risk of litigation.[246]

Because Justice Alito joined Justice Breyer in his concurrence, the same reasons Breyer would likely accept a reasonable-commercial-expectations test should apply to Alito; however, this is arguably to a lesser degree because Alito did not voice his concerns explicitly and asked few questions during oral argument.[247] Justice Alito has advocated a minimalist stance, making the smallest change, if any, in the law necessary for the resolution of the case.[248] As explained above, the reasonable-commercial-expectations test is more consistent with Supreme Court precedent than the plurality's view in *Nicastro*, and therefore would require the smallest departure from established precedent.[249]

Nevertheless, a more cynical observer may predict that Justice Alito would join the plurality if forced to reconsider the issue. As of June 28, 2012, Justice Alito had never joined Justice's Breyer, Ginsburg, Kagan (or Stevens), and Sotomayor (or Souter) in a 5–4 decision.[250] Procedure cases have not been categorically political in the Robert's Court, but "the expected political divide does

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243. *Nicastro* 131 S. Ct. at 2793 (Breyer, J., concurring) (quoting Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 591 (N.J. Ct. 2011)).

244. *Id.* at 2793–94.

245. *See supra* notes 134–38 and accompanying text.

246. *See supra* notes 203–04 and accompanying text.

247. *See* Transcript of Oral Argument, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2789 (2011) (No. 09-1343), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf.

248. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 322 (2012) (citing *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 343 (2006) (statement of J. Samuel A. Alito, Jr., Nominee to be Associate J. of the United States)).

249. *Compare supra* Part III.A.1–2, *with supra* Part IV.B–C.

250. Amanda Cox & Matthew Ericson, *Siding with the Liberal Wing*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/interactive/2012/06/28/us/supreme-court-liberal-wing-5-4-decisions.html. Kagan is paired with Stevens while Sotomayor is paired with Souter because Kagan and Sotomayor respectively replaced Stevens and Souter; all four Justices are considered to be part of the Court's liberal wing. *See id.; Supreme Court Nominations, Present–1789*, SENATE.GOV, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Apr. 6, 2013).

reveal itself in the most fundamental procedure cases, . . . [particularly cases] limiting certain plaintiffs' access to the courts."[251]

This cynical view, however, ignores two critical differences between the Court's recent procedure cases and the role of stream-of-commerce personal jurisdiction in international products-liability suits.[252] First, the political divide in many procedure cases can be explained as an "antipathy towards litigation."[253] As explained, however, what constitutes "target" or "submission to the power of the sovereign"—key language in the *Nicastro* plurality's test—lacks any precise meaning.[254] Unstable and unsettled legal doctrines, particularly regarding procedural rules, inhibit settlements and thus foster more litigation.[255] In contrast, the reasonable-commercial-expectations test provides workable rules based on decades-old Supreme Court precedent and encourages manufacturers to contractually address jurisdictional issues *ex ante*, thereby encouraging settlements and reducing litigation.[256] Second, the political divide in other cases can, to some degree, be seen as the conservative majority's attempt to protect big business by closing the courthouse door on plaintiffs.[257] If Justice Alito were to take the plurality's view from *Nicastro*, however, the only beneficiaries would be foreign businesses. U.S. plaintiffs would retain the ability to sue domestic businesses in the United States, thus placing domestic manufacturers at a significant competitive disadvantage.[258] As such, the normal themes which have pushed Justice Alito to side with the conservative wing of the Court in other procedure cases lean the other direction in the context of international products-liability actions. Thus, practical implications of the *Nicastro* decision indicate that the most likely result is that Justice Alito would support the reasonable-commercial-expectations test if considered in the future.

CONCLUSION

The *Nicastro* decision has once again divided the stream-of-commerce analysis, with three separate paths emerging in the wake of the decision.[259] Lower courts, forced to navigate the stream of commerce post-*Nicastro*, should utilize a reasonable-commercial-expectations test consistent with *World-Wide Volkswagen* and *Asahi*.[260] The reasonable-commercial-expectations test provides a workable

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251. Wasserman, *supra* note 248, at 330–31 (citing Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2779–80 (2010); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009)).

252. *Id.*

253. *Id.* at 331; *see, e.g.*, *Wal-Mart Stores, Inc.*, 131 S. Ct. 2541; *Rent-A-Center, West, Inc.*, 130 S. Ct. 2772; *Iqbal*, 129 S. Ct. 1937 (all cases limiting plaintiffs' access to the courts).

254. *See also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011).

255. Borchers, *supra* note 169, at 584–85.

256. *See* Part IV.A–D.

257. Wasserman, *supra* note 248, at 328.

258. *See supra* Part III.B.

259. *See generally supra* Part II (discussing the three conflicting opinions from *Nicastro*).

260. *See supra* Part IV.A–B.

rule for ensuring that foreign businesses that benefit from domestic law are held accountable when their products cause injuries in the United States. The incorporation of a rebuttable presumption of purposeful availment for businesses whose sales or marketing schemes target the United States as a whole eliminates the illogical conclusion that a business may target all states without, thereby, targeting each individual state.[261] The test provides more effective redress for U.S. consumers injured by products created abroad, and places domestic manufacturers on equal footing with their international counterparts.[262] Further, by requiring an independent inquiry into the traditional notions of fair play and substantial justice, the reasonable-commercial-expectations test remains consistent with Supreme Court precedent, while providing the flexibility necessary to handle difficult jurisdictional questions in the modern commercial context.[263]

261. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011); A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362–63 (Ariz. 1995).

262. *See supra* Part IV.C–D.

263. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring); Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113–15 (1987); *see supra* notes 219–20 and accompanying text.