

# The Timing of Minimum Contacts After *Goodyear* and *McIntyre*

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## ABSTRACT

*The Supreme Court has never articulated a reason why the “minimum contacts” test, which determines whether a defendant’s contacts with a forum are sufficient to subject it to in personam jurisdiction there, is required by the Due Process Clause, or why the Due Process Clause should impose any limitation on the exercise of personal jurisdiction at all. Because the Court has not provided a reason, several issues remain unclear, including what the relevant time period is during which a defendant’s contacts with the forum state may subject it to personal jurisdiction within that state. As I discussed in a previous article, the Supreme Court has never directly addressed the issue of the timing of minimum contacts in any of its personal jurisdiction decisions, which has resulted in confusion among the lower courts about how to apply the minimum contacts test.*

*The Supreme Court recently had the opportunity to clarify its personal jurisdiction jurisprudence, especially with regard to the stream of commerce theory of jurisdiction and the timing issue, in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicaastro*. These new cases raise many important questions with respect to the issues addressed in my previous article. This article analyzes *Goodyear* and *McIntyre* in an attempt to resolve some of those issues. First, it analyzes whether *Goodyear* and *McIntyre* modify existing Supreme Court personal jurisdiction precedent in a significant way, and whether the Court’s holdings make sense in the context of existing precedent. It also addresses the more fundamental issue of whether the Supreme Court clarified the rationale for imposing a contacts requirement under the Due Process Clause. Finally, this Article examines the more specific issue of whether the Court’s opinions shed any further light on the issues relating to the timing of minimum contacts in either general or specific jurisdiction cases.*

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## INTRODUCTION

One year ago, *The George Washington Law Review* published an article in which I addressed issues relating to the timing of minimum contacts in personal jurisdiction cases.<sup>1</sup> The issues arose out of a growing number of cases in which courts have struggled to identify the relevant time period during which a defendant's contacts with the forum state satisfy the due process requirement that "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain *minimum contacts* with it such

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<sup>1</sup> Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010).

that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>2</sup> This contacts requirement is independent of the defendant's ability to defend the case effectively in the forum state. Thus, most commentators recognize the contact requirement as an element of substantive due process, although the Supreme Court has never discussed what principle of due process requires any contact between the defendant and the forum state.<sup>3</sup>

The most the Court has done to clarify the contacts issue is to create two categories of jurisdiction based upon different types of contacts between the defendant and the forum state. If these contacts are "continuous and systematic," then the defendant may be subject to personal jurisdiction in the forum state regardless of where the claim arose ("general jurisdiction").<sup>4</sup> If the contacts are merely "isolated and sporadic," then the defendant may be subject to personal jurisdiction in the forum state only if the claim arose out of the defendant's purposeful contact with the forum state ("specific jurisdiction").<sup>5</sup> In either case, it may be necessary for a court to define the time parameters during which a defendant's contacts count for the purposes of this due process analysis. For example, the relevant time could extend up to the time at which the claim arose, the case was filed, or the court decides the issue of personal jurisdiction.<sup>6</sup> In addition, a court may limit how far into the past it will look for such contacts.<sup>7</sup>

The purpose of the previous article was threefold. First, the article canvassed the existing caselaw to determine if there was any judicial consensus on the relevant time periods for counting minimum contacts in both general jurisdiction and specific jurisdiction cases. Second, the article attempted, to the extent possible under existing Supreme Court precedent, to identify the proper contact time parameters for each type of jurisdiction. Finally, the article sought to use the timing cases as a lens through which to evaluate the effectiveness of the existing Supreme Court caselaw in providing coherent principles of personal jurisdiction law to guide the decisions of the lower courts.

The previous article found very little consensus among the courts grappling with the timing issue. The reason for the courts' struggles was not hard to identify. Because the Supreme Court has never ex-

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<sup>2</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (second emphasis added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>3</sup> See Peterson, *supra* note 1, at 114.

<sup>4</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-48 (1952).

<sup>5</sup> *Hanson v. Denckla*, 357 U.S. 235, 251, 254 (1958).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 147.

plained why the Due Process Clause<sup>8</sup> requires any particular contact between the defendant and the forum state, the lower courts struggle to apply the contacts requirement to novel issues like the timing question.<sup>9</sup> Without an explanation of what principle connects the amorphous due process requirement to the particularized requirement for contact between the defendant and the forum state, the lower courts have nothing to guide their deliberations. They inevitably flounder in their efforts to work out coherent principles for the timing of minimum contacts. Although the article identified a number of potential principles for evaluating the timing of minimum contacts,<sup>10</sup> the overarching conclusion of the article was that the failure of the Court to enunciate a foundational due process principle for the contacts requirement makes it extraordinarily difficult to resolve issues like the timing of minimum contacts.<sup>11</sup> The article concluded that the Court should take a personal jurisdiction case for the first time since 1990 and use the opportunity to establish a clear rationale for the substantive due process component of personal jurisdiction.<sup>12</sup>

Fortuitously, the Court decided to hear two personal jurisdiction cases during the October 2010 term, and it issued its decisions on the final day of the term.<sup>13</sup> The issue that prompted the Court to examine personal jurisdiction for the first time in twenty-one years<sup>14</sup> concerned the application of the so-called “stream-of-commerce theory,” which would allow for personal jurisdiction over a manufacturer that sells its product to a distributor or another manufacturer, which then sells the final product in the forum state.<sup>15</sup> A deeply divided Court had previously considered this theory in *Asahi Metal Industry Co. v. Superior Court*,<sup>16</sup> with four Justices (in an opinion written by Justice Brennan) opining that the benefits received by the upstream manufacturer were sufficient to establish minimum contacts;<sup>17</sup> another four Justices (in an opinion by Justice O’Connor) opining that it was necessary to demonstrate additional factors showing the defendant’s intentional affiliation

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<sup>8</sup> U.S. CONST. amend. XIV, § 1.

<sup>9</sup> See Peterson, *supra* note 1, at 105–22.

<sup>10</sup> See *id.* at 142–59.

<sup>11</sup> *Id.* at 159.

<sup>12</sup> See *id.* at 160.

<sup>13</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

<sup>14</sup> See *Burnham v. Superior Court*, 495 U.S. 604 (1990).

<sup>15</sup> BLACK’S LAW DICTIONARY 1557 (9th ed. 2009).

<sup>16</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). For a more detailed discussion of the decisions in the case, see *infra* notes 35–52 and accompanying text.

<sup>17</sup> *Asahi*, 483 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment).

with the forum state;<sup>18</sup> and Justice Stevens concluding that, under the specific facts of that case, the defendant's contacts were sufficient.<sup>19</sup> Not surprisingly, the lower courts responded to *Asahi* with a wide array of confusing, and confused, opinions. Some appeared to follow Justice Brennan's opinion allowing jurisdiction based solely on the stream-of-commerce theory.<sup>20</sup> Other courts appeared to follow Justice O'Connor's opinion,<sup>21</sup> and at least one court utilized Justice Stevens's opinion in resolving the issue of stream-of-commerce jurisdiction.<sup>22</sup> Thus, the lack of a theory as to why minimum contacts are required by the Due Process Clause has led to the splintering of the Court, which, in turn, has led to the splintering of lower court decisions and confusion for those who are trying to interpret and apply the law.

The unsettled nature of the lower court precedents prompted the Court to hear its first personal jurisdiction cases in twenty-one years. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>23</sup> Justice Ginsburg, writing for a unanimous Court, reversed the decision of a North Carolina intermediate appellate court that had applied the stream-of-commerce theory to establish general jurisdiction.<sup>24</sup> On the same day, in *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>25</sup> a divided Court reversed a New Jersey Supreme Court decision that upheld specific jurisdiction based upon a stream-of-commerce theory.<sup>26</sup> Justice Kennedy, writing for a four-Justice plurality, broadly rejected the use of the stream-of-commerce theory without a showing of some specific action on the part of the defendant to connect itself with the forum state.<sup>27</sup> Justice Breyer, writing for himself and Justice Alito, took a more restrained view and opined that it was not necessary to address the issue whether the stream-of-commerce theory might *ever* provide a valid basis for

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<sup>18</sup> *Id.* at 112 (plurality opinion).

<sup>19</sup> *Id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

<sup>20</sup> See *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385–86 (5th Cir. 1989).

<sup>21</sup> See *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 479–80 (6th Cir. 2003); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945–46 (4th Cir. 1994); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–83 (1st Cir. 1992); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375–76 (8th Cir. 1990).

<sup>22</sup> See *Abuan v. Gen. Elec. Co.*, 735 F. Supp. 1479, 1485–86 (D. Guam 1990), *aff'd on other grounds*, 3 F.3d 329 (9th Cir. 1993).

<sup>23</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

<sup>24</sup> *Id.* at 2851.

<sup>25</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

<sup>26</sup> *Id.* at 2785 (plurality opinion).

<sup>27</sup> See *id.* at 2789.

jurisdiction; under the facts of this case, the contacts were too limited and attenuated to support jurisdiction under any existing precedent.<sup>28</sup> Justice Ginsburg, writing for Justices Sotomayor and Kagan in dissent, argued that, even without direct contacts with the forum state, the upstream manufacturer's efforts to market in any state were sufficient to subject it to personal jurisdiction.<sup>29</sup>

These new cases raise many important questions with respect to the issues addressed in my previous article. Part I, assesses whether *Goodyear* and *McIntyre* modify existing Supreme Court personal jurisdiction precedent in a significant way, and whether the Court's holdings make sense in the context of existing precedent. This Part also addresses the more fundamental issue of whether the Supreme Court clarified the rationale for imposing a contacts requirement under the Due Process Clause. Part II examines the more specific issue of whether the Court's opinions shed any further light on the issues relating to the timing of minimum contacts in either general or specific jurisdiction cases.

## I. UNDERSTANDING THE *GOODYEAR* AND *MCINTYRE* DECISIONS

The lower courts have long needed clarification from the Supreme Court about how to apply the stream-of-commerce theory to the minimum contacts component of the personal jurisdiction analysis. This Part begins by examining previous Supreme Court precedent as historical context before analyzing each of the new cases in turn.

### A. *Historical Context of the Stream-of-Commerce Theory*

To understand *Goodyear* and *McIntyre*, it is necessary to recount briefly the history of the stream-of-commerce theory that both decisions address. The stream-of-commerce theory was first enunciated by the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*<sup>30</sup> In that case, the Illinois court upheld jurisdiction over Titan Valve, an Ohio corporation that shipped its valves to American Radiator, a Pennsylvania corporation that incorporated the valves into a water heater that it eventually sold in Illinois.<sup>31</sup> The Illinois court ruled that Titan's shipment of the valve to American Radiator satisfied the minimum contacts test because, even though Titan did not ship its product directly to Illinois, the valves were incorporated

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<sup>28</sup> See *id.* at 2791 (Breyer, J., concurring in the judgment).

<sup>29</sup> See *id.* at 2801 (Ginsburg, J., dissenting).

<sup>30</sup> *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

<sup>31</sup> *Id.* at 764, 767.

into products that were sold to ultimate consumers in Illinois.<sup>32</sup> Thus, Titan Valve benefitted from the protection of Illinois law, which governed the eventual sale of the product.<sup>33</sup> After *American Radiator*, a number of lower courts relied on the stream-of-commerce theory in specific jurisdiction cases in order to find personal jurisdiction over upstream manufacturers whose products were either incorporated into other products that were then sold in the forum state or that were sold into the forum state by independent distributors.<sup>34</sup>

The United States Supreme Court did not address the stream-of-commerce theory until 1987 when it decided *Asahi Metal Industry Co. v. Superior Court*.<sup>35</sup> In *Asahi*, the Court unanimously held that the California courts could not exercise jurisdiction over Asahi, a Japanese corporation that sold its tire valves to a Taiwanese corporation, Cheng Shin.<sup>36</sup> Cheng Shin incorporated the valves into tires it sold to Honda in Japan for use on its motorcycles, many of which were later sold in California.<sup>37</sup> The original plaintiff, an American citizen, settled his lawsuit against Honda and Cheng Shin, but Cheng Shin had filed a third-party complaint against Asahi claiming that the accident was caused by a defect in Asahi's valve.<sup>38</sup> Asahi maintained that it was not subject to personal jurisdiction.<sup>39</sup> Eight members of the Court concluded that Cheng Shin's third-party claim against Asahi failed the second prong of the Supreme Court's test for specific jurisdiction: the fairness or procedural due process factors first set forth in *Kulko v. Superior Court*.<sup>40</sup> Although all Justices agreed that the fairness factors required dismissal of the action, they were sharply split on the issue of

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<sup>32</sup> *Id.* at 766.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1125, 1126 n.6, 1127 (7th Cir. 1983); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 201-02 (5th Cir. 1980); *Poyner v. Erma Werke GmbH*, 618 F.2d 1186, 1192 (6th Cir. 1980).

<sup>35</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

<sup>36</sup> *Id.* at 106, 108.

<sup>37</sup> *Id.* at 106.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 114-16; see *Kulko v. Superior Court*, 436 U.S. 84, 92-93 (1978). The *Kulko* case stated that in addition to assessing the adequacy of the defendant's contacts with the forum state, a court must also evaluate whether the suit is procedurally fair by weighing the burden on the defendant against the need of the plaintiff to sue in the forum state, the forum state's interest in the case, the efficiency of the interstate system of justice, and any impact on substantive law that might result from the exercise of personal jurisdiction in the case. See *id.* at 91-96. In *Asahi*, the Court determined that the significant burden on Asahi, a foreign corporation, outweighed Chen Shin's minimal need to bring suit in California, and that once the original plaintiff's claim had been settled, California had no further interest in the resolution of Chen Shin's indemnity action against Asahi. *Asahi*, 480 U.S. at 114-15. *Asahi* remains the only Supreme Court case in which

whether the defendant possessed the requisite minimum contacts with the forum state.

Justice O'Connor, who wrote the opinion for the Court, could garner only three additional Justices in support of her conclusion that the benefits received by an upstream manufacturer from the sale of a product in the forum state were insufficient to satisfy the minimum contacts part of the specific jurisdiction test.<sup>41</sup> Justice O'Connor wrote that the defendant's contacts must be more "purposefully directed at the forum State" than the mere act of placing a "product into the stream of commerce."<sup>42</sup> In addition to the benefit from the sale of the final product in the forum state, she wrote, the Due Process Clause required "an act purposefully directed toward the forum state,"<sup>43</sup> such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sale's agent in the forum State."<sup>44</sup> Justice O'Connor maintained, however, that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state."<sup>45</sup>

Justice Brennan, writing for himself and three other members of the Court, concluded that Asahi had sufficient minimum contacts in order to establish personal jurisdiction.<sup>46</sup> According to Justice Brennan, as long as the defendant was aware that its products were sold in the forum state, the Due Process Clause was satisfied if a defendant placed its product into the "regular and anticipated flow of products from manufacturer to distribution to retail sale."<sup>47</sup>

Justice Stevens, although disclaiming any need to consider minimum contacts given the Court's ruling on the fairness aspect of the specific jurisdiction analysis,<sup>48</sup> nevertheless went on to conclude that

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these fairness factors were determinative in the denial of personal jurisdiction over the defendant.

<sup>41</sup> *Asahi*, 480 U.S. at 112 (plurality opinion).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 121 (Brennan, J., concurring in part and concurring in the judgment).

<sup>47</sup> *Id.* at 117.

<sup>48</sup> *Id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment).

the minimum contacts part of the test had been satisfied in the case.<sup>49</sup> Justice Stevens accepted the use of the stream-of-commerce theory as long as the defendant's products ultimately sold in the forum state were of sufficient value, volume, and hazardous character.<sup>50</sup> In this case, notwithstanding the absence of hard data on the number of Asahi valves sold in the state of California, Justice Stevens concluded that his additional factors satisfied the minimum contacts part of the personal jurisdiction test.<sup>51</sup> Thus, five Justices, at least based on the facts of *Asahi*—and albeit in dictum—agreed that there were sufficient minimum contacts based on the stream-of-commerce theory and the facts considered necessary by Justice Stevens.<sup>52</sup>

Because of the conflicting opinions, the lower courts found it difficult to apply *Asahi* in cases where personal jurisdiction depended upon a stream-of-commerce theory to establish minimum contacts. Some courts have followed Justice Brennan's opinion by allowing jurisdiction based solely upon the regular and anticipated flow of products from manufacturer to distributor to retail sale.<sup>53</sup> Other courts have decided to follow Justice O'Connor's opinion by requiring additional evidence of a defendant's intent to serve the forum state's market.<sup>54</sup> At least one court has utilized the factors noted in Justice Stevens's opinion to resolve the minimum contacts issue in a stream-of-commerce case.<sup>55</sup> Needless to say, the lower courts have long needed clarification from the Supreme Court concerning how to apply the stream-of-commerce theory to the minimum contacts component of the personal jurisdiction analysis. As we shall see, after a long wait of twenty-one years, the Supreme Court has not provided much clarification on this issue.

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<sup>49</sup> *Id.* at 122.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385–86 (5th Cir. 1989).

<sup>54</sup> See *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 479–80 (6th Cir. 2003); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945–46 (4th Cir. 1994); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–83 (1st Cir. 1992); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375–76 (8th Cir. 1990).

<sup>55</sup> See *Abuan v. Gen. Elec. Co.*, 735 F. Supp. 1479, 1485–86 (D. Guam 1990), *aff'd on other grounds*, 3 F.3d 329 (9th Cir. 1993).

*B. The Stream-of-Commerce Theory in General  
Jurisdiction Cases: Goodyear Dunlop Tires  
Operations, S.A. v. Brown*

In *Goodyear*, the Court addressed the issue of whether the stream-of-commerce theory could be used to establish the continuous and systematic contacts that are necessary to provide a basis for general jurisdiction over a defendant when the claim arises outside of the forum state.<sup>56</sup> *Goodyear* arose from a lawsuit brought in North Carolina by the parents of two thirteen-year-old boys who were killed in a bus accident in France.<sup>57</sup> The lawsuit alleged that the accident resulted from a defective tire manufactured in Turkey at the plant of a foreign subsidiary of the Goodyear Tire and Rubber Company (“Goodyear USA”).<sup>58</sup> The lawsuit named as defendants Goodyear USA and three of its subsidiaries organized and separately incorporated in Turkey, France, and Luxembourg.<sup>59</sup> Goodyear USA, which operates manufacturing plants in North Carolina, did not contest personal jurisdiction, but the foreign corporate defendants moved to dismiss on the ground that the North Carolina court had no personal jurisdiction over them.<sup>60</sup> The Supreme Court described the foreign defendants’ contacts with the forum state as follows:

[P]etitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners’ tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.<sup>61</sup>

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<sup>56</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2852.

Because the claim arose outside of the United States, the North Carolina courts relied on a general jurisdiction theory on the ground that the foreign defendants' contacts with the state of North Carolina were sufficiently continuous and systematic to establish general jurisdiction.<sup>62</sup> Also, because the foreign defendants had no physical presence in North Carolina, the North Carolina courts relied solely on the sales in North Carolina of tires manufactured by the foreign defendants in order to establish these contacts.<sup>63</sup> Lastly, because the foreign defendants did not themselves sell any of their tires in North Carolina, the North Carolina courts relied on a stream-of-commerce theory to connect the foreign defendants with the state.<sup>64</sup>

The Court, in an opinion by Justice Ginsburg, unanimously rejected the North Carolina court's application of the stream-of-commerce theory in a general jurisdiction context. The Court explained that the North Carolina court's analysis

elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction. But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.<sup>65</sup>

If *Goodyear* is limited to the facts in which it arose and one views it as establishing only the proposition that indirect contacts with the forum state through the stream of commerce cannot provide the kind of continuous and systematic contacts required for general jurisdiction, then this case is of little doctrinal significance. Even after *Asahi*, virtually all of the cases dealing with the stream-of-commerce theory were specific jurisdiction cases, and scholarly debate about the stream-of-commerce theory focused entirely on its use in specific jurisdiction cases.<sup>66</sup> Given the questionable applicability of the stream-of-commerce theory even in specific jurisdiction cases, the North Carolina court clearly seemed to overreach by applying a theory based on

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2854.

<sup>65</sup> *Id.* at 2855 (citation omitted).

<sup>66</sup> See, e.g., Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 Mo. L. REV. 753, 808–810 (2003) (discussing the applicability of a stream-of-commerce test to achieve specific jurisdiction); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995) (arguing that courts should find specific jurisdiction against a manufacturer who “releases a product for sale” in the place where “the product causes harm”).

indirect contacts in the context of general jurisdiction, where the due process test requires contacts that are so much more significant.

The problem with Justice Ginsburg's opinion in *Goodyear* is that it could be read much more broadly than the facts of this particular case might suggest. At one end of the spectrum, in *Perkins v. Benguet Consolidated Mining Co.*,<sup>67</sup> the Court upheld jurisdiction over a corporation that had its temporary corporate headquarters in the forum state.<sup>68</sup> The inherently continuous and systematic nature of even a temporary corporate headquarters made it easy for the Court to uphold jurisdiction over a claim that did not arise in the forum state. At the other end of the spectrum, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>69</sup> the Court decided that a collection of separate contacts with the forum state, which included the purchase of helicopters, the training of pilots, the visit of defendant's chief executive officer to negotiate a contract, and the receipt of checks for its services drawn on a Texas bank were insufficient to constitute the continuous and systematic contact required for general jurisdiction.<sup>70</sup>

Prior to *Goodyear*, the Supreme Court had given no indication of where to draw the line between these two easy cases at either end of the general jurisdiction spectrum.<sup>71</sup> In particular, the Court has never resolved whether extensive sales in the forum state, even if sales made directly by the defendant into the forum state (as opposed to some physical presence like a corporate headquarters), would be sufficient to establish general jurisdiction.<sup>72</sup> Nevertheless, a number of lower courts have relied upon extensive sales directly into the forum state as a basis for the assertion of general jurisdiction, although the cases are remarkably inconsistent on the amount of sales necessary for such jurisdiction.<sup>73</sup> The general assumption, however, has always been that,

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<sup>67</sup> *Perkins v. Benguet Consol. Mining Co.*, 324 U.S. 437 (1952).

<sup>68</sup> *Id.* at 447–49.

<sup>69</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984).

<sup>70</sup> *Id.* at 416–19.

<sup>71</sup> See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 612 (1988) (stating that, in *Helicopteros*, “the Court gave no guidance as to how courts are to determine the scope of general jurisdiction in the future”).

<sup>72</sup> Indeed, *Helicopteros* never suggested that some physical presence would be required or that, as a categorical matter, a large volume of sales made directly to the forum state would be insufficient to establish general jurisdiction. See *Helicopteros*, 466 U.S. at 416–18.

<sup>73</sup> Compare *Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state), *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465, 467 (6th Cir. 1989) (holding defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan), and *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436–38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens, which amounted to

even if a court is more likely to find general jurisdiction based on physical presence in the forum state, there is some amount of sales directly made to the forum state that would be sufficient to establish general jurisdiction.<sup>74</sup> General Motors, most scholars have assumed, is subject to general jurisdiction in every state, regardless of whether it owns physical property in each state.<sup>75</sup>

Certain parts of Justice Ginsburg's opinion in *Goodyear*, however, may throw this generally accepted conclusion into some doubt. Already, some observers are suggesting that *Goodyear* may be interpreted to bar general jurisdiction based on even a large amount of sales made to the forum state.<sup>76</sup> This concern may simply be a product of loose language on the part of Justice Ginsburg or it may accurately identify Justice Ginsburg's specific intention to narrow the lower courts' scope of general jurisdiction. Because the Court has not enunciated a clear due process rationale for the minimum contacts requirement, the lower courts tend to obsess over the specific language of the Court's personal jurisdiction opinions as though reading tea leaves to divine whatever meaning they can to resolve unsettled issues, including the timing of minimum contacts.<sup>77</sup> Let us take a look at the parts of the opinion that could be so construed.

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0.083% of its total loan portfolio, plus other contacts, was sufficient to give rise to general jurisdiction in Pennsylvania when specific jurisdiction was not argued), *with Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198–1200 (4th Cir. 1993) (rejecting general jurisdiction where 2% of total sales were in forum and rejecting specific jurisdiction because product liability suit did not “arise out of the defendant’s activities in the forum”), *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (rejecting general jurisdiction where about 13% of total revenues occurred in the forum and specific jurisdiction was not argued), *and Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp.*, 916 F. Supp. 1049, 1052–54 (W.D. Wash. 1994), *aff’d*, 78 F.3d 602 (Fed. Cir. 1996) (rejecting general jurisdiction where 3% of total sales occurred in forum and rejecting specific jurisdiction over patent infringement claim, where the defendant sent letters into the forum threatening litigation for infringement, in part because the letters had no substantive bearing on the infringement issue).

<sup>74</sup> See, e.g., Twitchell, *supra* note 71, at 633–34.

<sup>75</sup> See, e.g., *id.* at 670–71; see also Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 312–14 & n.16 (2001); Debra Windson, *How Specific Can We Make General Jurisdiction: The Search for a Refined Set of Standards*, 44 BAYLOR L. REV. 593, 609–12 (1992).

<sup>76</sup> See, e.g., Howard Wasserman, *Clarifying Personal Jurisdiction . . . or Not*, PRAWFSBLAWG (June 28, 2011, 4:05 PM), <http://prawfsblawg.blogspot.com/2011/06/clarifying-personal-jurisdiction-or-not.html> (“Importantly, the Court seems to have rejected or at least narrowed general ‘doing business’ jurisdiction in which an entity is subject to general jurisdiction in any state in which it does continuous, systematic, and substantial business. . . . The opinion signals to lower courts that simply doing a lot [of] continuous business in a state is not sufficient for general jurisdiction.”)

<sup>77</sup> See Peterson, *supra* note 1, at 150–52.

First, in describing the concept of general jurisdiction, Justice Ginsburg states, "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as home."<sup>78</sup> One could read this description as an exceptionally narrow definition of general jurisdiction that limits jurisdiction to the corporation's "home," which might be defined as its state of incorporation or principal place of business. That interpretation, however, seems too narrow, and it ignores Justice Ginsburg's use of the term "paradigm," meaning "an outstandingly clear or typical example or archetype."<sup>79</sup> A corporation's "home," in the form of its state of incorporation or its principal place of business, may be the clearest and easiest example of a state where general jurisdiction would be permissible, but it reads too much into Justice Ginsburg's statement to suggest that such a state is the only place in which general jurisdiction may be asserted.

There are other reasons to suggest that, while not limiting general jurisdiction to a corporation's "home," Justice Ginsburg may be suggesting that no amount of sales in the forum state by itself would be sufficient to establish general jurisdiction. For example, later in the opinion, in discussing the application of the stream-of-commerce theory, the Court cautions that

[a] corporation's "continuous activity of some sorts within a state," *International Shoe* instructed, "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that is not consented to suit in the forum."<sup>80</sup>

After discussing the facts of *Perkins* and *Helicopteros*, Justice Ginsburg concludes:

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant

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<sup>78</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011) (citing *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)) (noting that Professor Brilmayer identified "domicile, place of incorporation, and principal place of business as 'paradig[m]' bases for the exercise for exercise of general jurisdiction" (alteration in original)).

<sup>79</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 898 (11th ed. 2003).

<sup>80</sup> *Goodyear*, 131 S. Ct. at 2856 (second alteration in original) (citation omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the state fall far short of the “the [sic] continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.<sup>81</sup>

Here, Justice Ginsburg’s reiteration of the home metaphor could be read as further evidence that a defendant’s contacts with the forum state must be the equivalent of domicile in order to maintain general jurisdiction. Yet the strongest support for the conclusion that Justice Ginsburg may indeed have intended to limit general jurisdiction to those forums where the defendant could be “at home” may be found in *Goodyear*’s companion case on the application of the stream-of-commerce theory in a specific jurisdiction context. In *McIntyre*, discussing the possible bases of jurisdiction over the defendant, Justice Ginsburg stated: “First, all agree, McIntyre UK surely is not subject to general (all purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly ‘at home’ in New Jersey.”<sup>82</sup> Justice Ginsburg’s utilization of this description of general jurisdiction (with a citation to *Goodyear*) as the basis for dismissing general jurisdiction over the defendant in *McIntyre*, may be the strongest evidence that Justice Ginsburg intended to restrict the applicability of general jurisdiction to a defendant’s state of incorporation or principal place of business, where that corporation could reasonably be said to be “at home.” If that is true, it would mark a substantial change in the law of general jurisdiction as implemented by the lower courts, which, as noted above, have recognized continuous large volumes of sales in the forum state as a potential basis for general jurisdiction.<sup>83</sup> Certainly, it would not be surprising if some lower courts were to read *Goodyear* in that manner.

Despite this language, a more appropriate interpretation of *Goodyear* would be that some substantial volume of sales made directly into the forum state will continue to be sufficient to establish general jurisdiction but that it is impermissible to establish general jurisdiction based on the kinds of indirect and sporadic contacts with

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<sup>81</sup> *Id.* at 2857 (citation omitted) (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1983)).

<sup>82</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2797 (2011) (Ginsburg, J. dissenting) (citing *Goodyear*, 131 S. Ct. at 2850–51, 2854–57).

<sup>83</sup> See *supra* notes 73–75 and accompanying text.

the forum state that typify a stream-of-commerce fact pattern. Justice Ginsburg seemed to suggest this point when she concluded:

We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.<sup>84</sup>

Thus, Justice Ginsburg suggests that, under the specific facts of *Goodyear*, the plaintiff's theory of personal jurisdiction reaches far beyond existing precedent, but she does not explicitly suggest that she intends to go further than this case requires and reverse the multitude of lower court cases that rest general jurisdiction on direct sales to the forum state. That result would be vastly more far reaching than what the decision in *Goodyear* requires and would work a major change in lower court caselaw without consideration of the very different facts of those cases.

Unfortunately, much of the reason for the potential confusion that may arise when lower courts attempt to determine the meaning of *Goodyear* in subsequent general jurisdiction cases stems from the fact that, once again, the Court failed to identify any principle that might link the concept of due process to the requirement for any contacts between the defendant and the forum state. In the absence of such a grounding principle of minimum contacts, the lower courts will be forced to parse the conflicting metaphors and references in Justice Ginsburg's opinion, which, as one can see from the above description, do not lead in any clear direction. *Goodyear* was a fairly easy case to resolve; the limited contacts with North Carolina of Goodyear's foreign subsidiaries would not have satisfied almost anyone's reading of the requirements of general jurisdiction. If the lower courts read *Goodyear* as restricting the current understanding in any significant way, *Goodyear* may be a classic example of an easy case making bad law. A better reading of the case would be to focus on the particular facts of *Goodyear* and limit its meaning to the conclusion that the stream-of-commerce theory may not be utilized to establish general jurisdiction. Such a reading would prevent further confusion concerning the requirements for general jurisdiction. Unfortunately, no reading of the case can lead to any conclusion other than that the Supreme

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<sup>84</sup> *Goodyear*, 131 S. Ct. at 2856.

Court has once again squandered an opportunity to define the purpose of a contacts-requirement and to clarify the still-murky contours of general jurisdiction.

C. *The Stream-of-Commerce Theory in Specific Jurisdiction Cases:*  
J. McIntyre Machinery, Ltd. v. Nicastro

Unlike *Goodyear*, *McIntyre* appeared to raise the issue left unresolved by the Court in *Asahi* nearly twenty-five years ago. After describing the Court's opinions, this Section discusses *McIntyre*'s significance for the future of the stream-of-commerce theory in specific jurisdiction cases and the attempts in *McIntyre* to justify the minimum contacts requirement.

1. *The Background and Opinions in McIntyre*

The dispute in *McIntyre* arose when a New Jersey resident severed four of his fingers while using a three-ton metal-shearing machine manufactured by defendant J. McIntyre Machinery, Ltd. ("McIntyre"), a company located in the United Kingdom.<sup>85</sup> The plaintiff's employer had decided to purchase the scrap metal-shearing machine after attending a trade show in Las Vegas where McIntyre was an exhibitor.<sup>86</sup> The plaintiff's employer, however, did not purchase the machine directly from McIntyre, which did not sell any of its machines directly to United States customers. Instead, the employer purchased the machine from McIntyre's sole U.S. distributor based in Ohio,<sup>87</sup> which would have been the obvious target for the plaintiff's lawsuit had it not gone bankrupt by the time the plaintiff filed his complaint.<sup>88</sup> Although the American distributor and English manufacturer were similarly named,<sup>89</sup> there was no dispute in the case that "the two companies were separate and independent entities with 'no commonality of ownership or management.'"<sup>90</sup>

Because the plaintiff lacked any evidence that McIntyre itself sold its machine, or any other of its products, directly to any buyer in New Jersey, it relied on a stream-of-commerce theory to establish the required minimum contacts between the defendant and the forum

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<sup>85</sup> *McIntyre*, 131 S. Ct. at 2795–96.

<sup>86</sup> *Id.* at 2795.

<sup>87</sup> *Id.* at 2796.

<sup>88</sup> *See id.* at 2796 n.2.

<sup>89</sup> The American company operated under the name McIntyre Machinery America, Ltd. *Id.* at 2796.

<sup>90</sup> *Id.*

state.<sup>91</sup> The New Jersey Supreme Court accepted this theory as an adequate basis for the exercise of personal jurisdiction

because the injury occurred in New Jersey; because petitioner knew or reasonably should have known “that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states”; and because petitioner failed to “take some reasonable step to prevent the distribution of its products in this State.”<sup>92</sup>

The New Jersey court, however, did the plaintiff no favors by the manner in which it justified the assertion of personal jurisdiction over the defendant. Justice Kennedy’s plurality opinion found it

notable that the New Jersey Supreme Court appears to agree [that McIntyre did not purposefully avail itself of the New Jersey market], for it could “not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case.”<sup>93</sup>

The New Jersey court’s concession that McIntyre had insufficient minimum contacts with the forum is certainly odd given that the entire purpose of the stream-of-commerce theory, as articulated by Justice Brennan in *Asahi*, was to establish the existence of minimum contacts through the known benefit derived from the sale of a manufacturer’s product to the ultimate consumer in the forum state.<sup>94</sup> The New Jersey court inexplicably concluded that the stream-of-commerce theory somehow substituted for minimum contacts as opposed to establishing those contacts—which was the intent behind Justice Brennan’s opinion in *Asahi*.

At this point, it is worth noting a number of facts that distinguish *McIntyre* from the facts of the Supreme Court’s earlier encounter with the stream-of-commerce theory in *Asahi*. First, unlike *Asahi*, *McIntyre* involved an injured plaintiff who was a resident of the forum state, who remained a party in the case, and whose sole source of available relief was the foreign manufacturer defendant.<sup>95</sup> This crucial difference explains why the Court did not address the convenience

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<sup>91</sup> See *id.* at 2786 (plurality opinion).

<sup>92</sup> *Id.* (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 591, 592 (N.J. 2010)).

<sup>93</sup> *Id.* at 2790 (quoting *Nicastro*, 987 A.2d at 582).

<sup>94</sup> See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part and concurring in the judgment).

<sup>95</sup> *McIntyre*, 131 S. Ct. at 2796 n.2, 2803–04 (Ginsburg, J., dissenting).

and fairness factors that were dispositive in *Asahi* where the American plaintiff was no longer involved in the case and the dispute concerned indemnification between two foreign corporations.<sup>96</sup> In addition, unlike *Asahi*, which involved a defendant that sold a minor component part to another manufacturer that sold its own part to a third manufacturer that in turn sold its product into the forum state, *McIntyre* involved a foreign manufacturer of a finished product that sold its finished product to an American distributor pursuant to a contractual arrangement that could have specified exactly where McIntyre wished the product to be sold within the United States.<sup>97</sup> Thus, McIntyre could have avoided sales to particular states if it wished, an opportunity unlikely to have been available to the manufacturer of a motorcycle tire valve such as *Asahi*.<sup>98</sup> The distribution arrangement in *McIntyre* thus arguably makes a stronger case for specific jurisdiction because of McIntyre's greater power to control where its product was sold and used. The significance of these important differences will be discussed in more detail after the discussion of the opinions in the case.

The distinctions were insufficient, however, to persuade Justice Kennedy's plurality that the defendant had established minimum contacts with New Jersey.<sup>99</sup> Justice Kennedy states that where "the question concerns the authority of a New Jersey state court to exercise jurisdiction, . . . it is [the defendant's] purposeful contacts with New Jersey, not with the United States, that alone are relevant."<sup>100</sup> Because the Court did not recognize the defendant's knowing receipt of the benefit of a sale to the ultimate consumer in the forum state as a purposeful contact with the state, it concluded that the defendant "has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey."<sup>101</sup> The plurality analyzed the potentially relevant contacts as follows:

The distributor agreed to sell J. McIntyre machines in the United States; J. McIntyre officials attended trade shows in several states but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employ-

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<sup>96</sup> See *Asahi*, 480 U.S. at 106.

<sup>97</sup> See *McIntyre*, 131 S. Ct. at 2794, 2803.

<sup>98</sup> See *id.* at 2803.

<sup>99</sup> See *id.* at 2790-91 (plurality opinion).

<sup>100</sup> *Id.* at 2790.

<sup>101</sup> *Id.*

ees to, the State. Indeed, after discovery the trial court found that “defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.” These facts may reveal an intent to serve the U.S. market but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.<sup>102</sup>

Justice Breyer’s opinion concurring in the judgment (joined by Justice Alito) agrees that the facts of the case were insufficient to demonstrate the required minimum contacts but argues that defendant’s contacts were so limited that, under any of the opinions written in *Asahi*, such contacts were insufficient to establish personal jurisdiction.<sup>103</sup> Therefore, Justice Breyer concludes, it is “unwise to announce a rule of broad applicability without full consideration of the modern-day consequences” and the “many recent changes in commerce and communication, many of which are not anticipated by our precedents.”<sup>104</sup> Justice Breyer argues that these facts did not satisfy Justice O’Connor’s opinion in *Asahi* which required “something more than simply placing a product into the stream of commerce, even if the defendant is awar[e] that the stream may or will sweep the product into the forum State.”<sup>105</sup> It did not satisfy Justice Brennan’s opinion in *Asahi*, which, according to Justice Breyer, required that “jurisdiction . . . lie where a sale in a State is part of the regular and anticipated flow of commerce into the State, but not where that sale is only an edd[y], i.e., an isolated occurrence.”<sup>106</sup> Finally, Justice Breyer argues that the facts in *McIntyre* would not have satisfied Justice Stevens’s concurrence “indicating that the volume, the value, and the hazardous character of a good may affect the jurisdictional inquiry and emphasizing *Asahi*’s regular course of dealing.”<sup>107</sup> Instead, Justice Breyer finds that

the relevant facts found by the New Jersey Supreme Court show no regular . . . flow or regular course of sales in New Jersey; and there is no something more, such as special state-related design, advertising, advice, marketing, or anything else. Mr. Nicastro, who here bears the burden of proving

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<sup>102</sup> *Id.* (citation omitted).

<sup>103</sup> *See id.* at 2792 (Breyer, J., concurring in the judgment).

<sup>104</sup> *Id.* at 2791.

<sup>105</sup> *Id.* at 2792 (alteration in original) (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111–12 (1987) (plurality opinion)) (internal quotation marks omitted).

<sup>106</sup> *Id.* (alteration in original) (internal quotation marks omitted) (citing *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment)).

<sup>107</sup> *Id.* (internal quotation marks omitted) (citing *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment)).

jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. And he has not otherwise shown that the British Manufacturer purposefully avail[ed] itself of the privilege of conducting activities within New Jersey, or that it delivered its goods in the stream of commerce with the expectation that they will be purchased by New Jersey users.<sup>108</sup>

After concluding that the contacts were insufficient under the *Asahi* tests, Justice Breyer states that it is “unwise to announce a rule of broad applicability without full consideration of the modern-day consequences,” including the “many recent changes in commerce and communication, many of which are not anticipated by our precedents.”<sup>109</sup> He rejects the seemingly rigid rules imposed by Justice Kennedy’s plurality opinion:

[W]hat do those standards mean 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? Those issues have serious commercial consequences but are totally absent in this case.<sup>110</sup>

Justice Ginsburg’s dissent, joined by Justices Sotomayor and Kagan, disagrees that McIntyre had insufficient contacts with New Jersey to establish personal jurisdiction and argued that the majority opinion “‘turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.’”<sup>111</sup> Unlike the two other opinions in the case, Justice Ginsburg distinguishes *McIntyre* from any of the Court’s prior caselaw.<sup>112</sup> In particular, Justice Ginsburg distinguishes *Asahi* on the ground that

*Asahi* . . . did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it

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<sup>108</sup> *Id.* (alteration in original) (internal quotation marks omitted).

<sup>109</sup> *Id.* at 2791.

<sup>110</sup> *Id.* at 2793.

<sup>111</sup> *Id.* at 2795 (Ginsburg, J., dissenting) (quoting Weintraub, *supra* note 66, at 555).

<sup>112</sup> *Id.* at 2802–03.

appeared at no trade shows in the United States, and, of course, it had no Web site advertising its products to the world. Moreover, Asahi was a component-part manufacturer with little control over the final destination of its products once they were delivered into the stream of commerce. It was important to the Court in *Asahi* that those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law. To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.<sup>113</sup>

Justice Ginsburg argues that the defendant had established sufficient minimum contacts with the forum state because of the realities of “marketing arrangements for sales in the United States common in today’s commercial world.”<sup>114</sup> She states that McIntyre, like any foreign manufacturer, contracted with an American distributor to distribute the manufacturer’s products in every state in which a sale could be made, and that the manufacturer likely has liability insurance to cover accidents wherever they occur.<sup>115</sup> In this case, Justice Ginsburg argues, McIntyre viewed the United States as a single market, and it was indifferent where in the United States its machines were sold.<sup>116</sup> As a result, “[i]f McIntyre UK is answerable in the United States at all, is it not perfectly appropriate to permit the exercise of that jurisdiction . . . at the place of injury?”<sup>117</sup> Justice Ginsburg concludes:

In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, purposefully availed itself of the United States market nationwide, not a market in a single State or a discreet collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. . . . How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?<sup>118</sup>

Thus, the Court arrived at three opinions, which will again impair the lower courts’ ability to decide specific jurisdiction cases in a princi-

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<sup>113</sup> *Id.* at 2803 (alteration in original) (internal quotation marks and citations omitted).

<sup>114</sup> *Id.* at 2799.

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 2801.

<sup>117</sup> *Id.* (internal quotation marks omitted).

<sup>118</sup> *Id.* (internal quotation marks omitted).

pled and consistent manner. The next two Subsections wrestle with the decisions in *McIntyre* and how they will affect future cases in the lower courts.

2. *McIntyre's Significance for the Future Application of the Stream-of-Commerce Theory in Specific Jurisdiction Cases*

When the Supreme Court decided to hear the *McIntyre* case, many in the civil procedure community hoped that the case would resolve decades of disagreement over the application of the *Asahi* case and the application of the stream-of-commerce theory to specific jurisdiction cases. In particular, procedure scholars hoped that the Court would resolve whether a component manufacturer's passive, but knowing, receipt of a benefit from the forum state (by virtue of the laws governing the sale to the ultimate consumer of a product incorporating the manufacturer's component) would be sufficient to satisfy the minimum contacts required by Justice Brennan in *Asahi*.<sup>119</sup> Alternatively, it was possible that the Court might resolve to follow Justice O'Connor's approach in *Asahi*, which required, in addition to sale of the product to the ultimate consumer in the forum state, "an act purposefully directed toward the forum state."<sup>120</sup>

Unfortunately, *McIntyre* not only fails to resolve the debate about the meaning of *Asahi* and the viability of a stream-of-commerce argument, it arguably will create further confusion among the already befuddled lower courts. At least Justice Kennedy's plurality opinion seems clearly to align itself with Justice O'Connor's plurality opinion in *Asahi*. Justice Kennedy directly attacks the Brennan concurrence in *Asahi*,<sup>121</sup> and he agrees with Justice O'Connor's conclusion that "the authority to subject a defendant to judgment depends on purposeful availment" and that such purposeful availment must involve actions intentionally directed to the specific forum state.<sup>122</sup>

Justice Breyer's opinion, on the other hand, eschews any discussion of the general applicability of the stream-of-commerce theory in specific jurisdiction cases. Instead, Justice Breyer focuses on the specific facts of the case and concludes, "I think it unwise to announce a rule of broad applicability without full consideration of the modern-

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<sup>119</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part and concurring in the judgment).

<sup>120</sup> *Id.* at 112 (plurality opinion).

<sup>121</sup> *McIntyre*, 131 S. Ct. at 2789 (plurality opinion).

<sup>122</sup> *See id.* at 2790.

day consequences.”<sup>123</sup> Justice Breyer notes that the “plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘intend to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’”<sup>124</sup> Justice Breyer finds that the specific facts of the case fail even Justice Brennan’s test in *Asahi* because the plaintiff did not show that defendant “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”<sup>125</sup>

Both opinions, however, ignore important facts that distinguish *McIntyre* from *Asahi*. Indeed, both fail to see that *McIntyre* is not a true example of a stream-of-commerce case. Unlike *Asahi*, which involved an upstream component manufacturer whose product was sold to another manufacturer, incorporated into another product, and then in turn sold to a third manufacturer sending the finished good into the forum state, *McIntyre* involved the foreign manufacturer of a completed product who simply hired an American distributor to sell the product in the United States.<sup>126</sup> *McIntyre* was not an upstream component manufacturer contributing one part of a final product without a say about where that product was eventually sold.<sup>127</sup> *McIntyre* had the right to specify in its contract with the American distributor exactly where and under what circumstances the products would be sold.<sup>128</sup> In effect, as the dissent makes clear, *McIntyre* said to its American distributor, “Sell as many machines as possible, and sell them in whatever states you can.”<sup>129</sup>

It is simply not correct to say that *McIntyre* wished to serve the American market but not any particular state market.<sup>130</sup> Given the facts of the case, it seems more accurate to say that *McIntyre* sought to serve every single state market and urged its distributor to sell its machines in every state it could. If *McIntyre* had wished to avoid any particular state, it could have specified quite clearly in its agreement with the American distributor that its machines should be sold only in certain states and not in others. This crucial difference between the

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<sup>123</sup> *Id.* at 2791 (Breyer, J., concurring in the judgment).

<sup>124</sup> *Id.* at 2793 (quoting *id.* at 2788 (plurality opinion)).

<sup>125</sup> *Id.* at 2792 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

<sup>126</sup> *See id.* at 2797, 2803 (Ginsburg, J., dissenting).

<sup>127</sup> *See id.* at 2797.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 2794.

<sup>130</sup> *See id.* at 2790 (plurality opinion) (stating that the facts show *McIntyre*’s intent to serve the U.S. market but not the New Jersey market).

*Asahi* case, in which an upstream manufacturer had little direct control over where its product was sold, and *McIntyre*, in which McIntyre had plenary control over where its American distributor sold its products, makes this case a poor vehicle for analyzing the stream-of-commerce theory, and it raises serious questions about the dubious assertions by the plurality and concurring opinions.

For example, the plurality opinion argued that McIntyre's conduct was not "purposefully directed at New Jersey."<sup>131</sup> In support of this conclusion, the plurality states that the facts show only that the distributor agree to sell McIntyre's machines in the United States; that McIntyre's officials attended trade shows in certain states but not New Jersey; and that a certain number of machines ended up in New Jersey but that McIntyre had no office in New Jersey, and did not pay taxes, own property, advertise, or send employees there.<sup>132</sup> The Supreme Court's personal jurisdiction cases, however, have never required any of those facts in the context of a specific jurisdiction case as long as a defendant manufacturer has delivered its product to the forum state in which it causes injury to the plaintiff.<sup>133</sup> The only difference between these cases and *McIntyre* is that McIntyre did not send the machine directly to New Jersey but rather instructed its distributor to sell the machines to any customer who would buy one, anywhere in the United States,<sup>134</sup> including New Jersey, and it did not seek to exclude a single state from the sale of its machines under the marketing agreement.

Justice Breyer's opinion suffers from a similar misunderstanding of Supreme Court precedent. For example, Justice Breyer, citing *World-Wide Volkswagen Corp. v. Woodson*,<sup>135</sup> argues that

[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary. The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction.<sup>136</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *infra* notes 137-40 and accompanying text.

<sup>134</sup> See *McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

<sup>135</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>136</sup> *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment) (citing *World-Wide Volkswagen*, 444 U.S. 286).

To the contrary, however, the Supreme Court has expressly allowed personal jurisdiction in a case involving a single sale to the forum state. In *McGee v. International Life Insurance Co.*,<sup>137</sup> a California citizen purchased a life insurance policy from an Arizona insurance company.<sup>138</sup> After the Arizona corporation was purchased by a Texas insurance company, the new company mailed a reinsurance certificate to the California insured, who sent his premiums from California to the Texas company.<sup>139</sup> The beneficiaries under the policy sued the Texas insurance company in California state court and, even though there was no evidence that the Texas insurance company had sold even a single additional policy in California, the Supreme Court upheld specific jurisdiction in the case.<sup>140</sup>

Moreover, the conclusion that even one sale directly into the forum state can give rise to specific jurisdiction makes perfect sense, given the differences between specific and general jurisdiction. To the extent that the Supreme Court has enunciated any theory on why a manufacturer should be subject to a suit arising out of its sale of a product in the forum state, it is based on the idea that the manufacturer has derived a significant benefit from the state's provision of a legal framework in which the sale to the ultimate consumer may be made.<sup>141</sup> If a manufacturer sells a million products into the forum state, it is potentially subject to a million lawsuits if all of them prove to be defective. On the other hand, if a manufacturer sells only one item in the forum state, it is potentially subject to only one lawsuit. In each case, the burden imposed on the manufacturer through the state's exercise of personal jurisdiction is directly proportional to the benefit received from the sales in the forum state, whatever the number of those sales might be. That is true for any product, regardless of the price, but the connection to the forum state is even more significant when the item sold is as expensive as McIntyre's \$24,000 metal-shearing machine.

The only difference between *McGee* and *McIntyre* is that the life insurance company received its payments directly from the plaintiff in California (although it did not originally enter into the agreement with the plaintiff in California),<sup>142</sup> while McIntyre sold its machine to

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<sup>137</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>138</sup> *Id.* at 221.

<sup>139</sup> *Id.* at 222.

<sup>140</sup> *Id.* at 222-24.

<sup>141</sup> See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

<sup>142</sup> *McGee*, 355 U.S. at 221-22.

the plaintiff in New Jersey through an independent American distributor.<sup>143</sup> Because McIntyre, as argued above,<sup>144</sup> should be held responsible for selling the machine in New Jersey because of its control over the distribution process and its instruction to the distributor to sell to any state, that distinction is of no significance. Neither McIntyre nor International Life Insurance initiated the contact with the forum state, but both had the power either to prevent the contact in the first instance (in the case of McIntyre) or end the contact (in the case of International Life). In neither case, however, should the number of sales in the forum state be relevant for the purposes of specific jurisdiction.

The second problem with Justice Breyer's analysis is that the facts of *World-Wide Volkswagen* are entirely distinguishable from those in the *McIntyre* case. The problem in *World-Wide Volkswagen* was not that it involved a single sale, but rather that the lawsuit was filed outside of the state where the product was sold to the ultimate consumer.<sup>145</sup> The defendant derived a significant benefit from the state where the sale took place, but it did not derive any benefit in the state to which the plaintiff took the car after the sale.<sup>146</sup> In *McIntyre*, the defendant's product was sold to the ultimate consumer in the forum state, a state from which defendant derived a benefit.<sup>147</sup>

In sum, not only does *McIntyre* not resolve any of the ambiguities left by *Asahi*, it adds a host of new problems for lower courts and jurisdiction scholars trying to understand the proper scope of specific jurisdiction. The absence of a majority opinion makes it impossible to give dispositive weight to any views expressed by any of the Justices, and the failure of the majority in concurring opinions to identify the significant differences between a true stream-of-commerce case like *Asahi* and the very different factual setting of *McIntyre*, in which the defendant maintained significant control over where its product was ultimately sold, simply further confuses the law of specific jurisdiction.

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<sup>143</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

<sup>144</sup> See *supra* notes 130–31 and accompanying text.

<sup>145</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288–89 (1980) (noting that the case was brought in Oklahoma and there was no evidence that the defendant did any business or shipped any products there).

<sup>146</sup> See *id.* at 288–89, 297–98.

<sup>147</sup> See *McIntyre*, 131 S. Ct. at 2786.

### 3. *McIntyre and the Theoretical Foundation for a Minimum Contacts Requirement*

Notwithstanding the problems noted above, *McIntyre* could have made a significant contribution to the understanding of personal jurisdiction law if even one of the opinions persuasively explained the reason why the Due Process Clause requires any kind of contact between the defendant and the forum state. As noted in my previous article, ever since *Pennoyer v. Neff*<sup>148</sup> the Supreme Court has stated that the Due Process Clause requires some form of contact between the defendant and the forum state, separate and apart from any additional requirement that the forum state be sufficiently convenient to permit the defendant to be able to effectively litigate the case.<sup>149</sup> No matter how convenient the forum is for the defendant, a forum state may not exercise personal jurisdiction unless the defendant has sufficient contacts with the forum state.<sup>150</sup> Yet the Court has never articulated any coherent rationale to explain why the Due Process Clause should require any form of contact between the forum state and the defendant in order to permit personal jurisdiction.<sup>151</sup> Even if *McIntyre* misapplied the doctrine in the context of the facts of the particular case, if it had offered an explanation for why due process should require any particular contacts with the forum state, it would mark a dramatic advancement in personal jurisdiction law.

Unfortunately, none of the opinions in *McIntyre* offers any help in understanding the connection between the Due Process Clause and the minimum contacts requirement. It is perhaps unsurprising that Justice Breyer's opinion concurring in the judgment does not take on that issue since the thrust of his argument is that the Court should not make any grand pronouncements on personal jurisdiction law in the context of this case, but should instead decide it narrowly on the facts under existing Supreme Court precedents.<sup>152</sup> Justice Kennedy's plurality opinion, on the other hand, purports to resolve the stream-of-commerce question left open by *Asahi*, but ultimately it does not pro-

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<sup>148</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>149</sup> See Peterson, *supra* note 1, at 107.

<sup>150</sup> See *id.* at 107–08.

<sup>151</sup> This statement excepts the abortive attempt of Justice White to explain the contacts requirement in *World-Wide Volkswagen* as a matter of interstate federalism. *World-Wide Volkswagen*, 444 U.S. at 293. The explanation was almost immediately retracted in the Supreme Court's next personal jurisdiction case. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982); see Peterson, *supra* note 1, at 111–12.

<sup>152</sup> See *McIntyre*, 131 S. Ct. at 2791 (Breyer, J. concurring in the judgment).

vide any more guidance on this question than does Justice Breyer's opinion.<sup>153</sup>

It is useful to walk through Justice Kennedy's opinion and examine the statements that might hint at the basis for a minimum contracts requirement under the Due Process Clause. First, Justice Kennedy states that a person "may submit" to a state's authority in a number of ways, including express consent, presence in the forum state at the time the defendant is served with process, or domicile in the state—"or, by analogy, incorporation or principal place of business for corporations."<sup>154</sup> Justice Kennedy argues that "[e]ach of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State."<sup>155</sup> However, Justice Kennedy does not explain either why such an intention to "submit" to the jurisdiction of a state's courts is required by the Due Process Clause or why these acts are appropriate signs of submission. For example, it is far from intuitively obvious why traveling briefly through a state, during which time one is served with process, demonstrates the intent to "submit" to the jurisdiction of the state's courts over a claim that may have arisen in a different state.<sup>156</sup>

Justice Kennedy further states that there "is also a more limited form of submission to a State's authority for disputes that 'arise out of or are connected with the activities within the state.'"<sup>157</sup> Justice Kennedy writes that the "principal inquiry" for such a case "is whether the defendant's activities manifest an intention to submit to the power of a sovereign."<sup>158</sup> Justice Kennedy then speaks to the competing opinions in *Asahi*:

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of the law judicial power. This Court's precedents make it clear that "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."<sup>159</sup>

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<sup>153</sup> *Id.* at 2790–91.

<sup>154</sup> *Id.* at 2787 (plurality opinion).

<sup>155</sup> *Id.*

<sup>156</sup> See *Burnham v. Superior Court*, 495 U.S. 604, 608, 628 (1990).

<sup>157</sup> *McIntyre*, 131 S. Ct. 'at 2787 (quoting *Int'l Shoe Co. v. Washington*, 325 U.S. 310, 319 (1945)).

<sup>158</sup> *Id.* at 2788.

<sup>159</sup> *Id.* at 2789. This statement somewhat misrepresents Justice Brennan's opinion in *Asahi*,

The problem with Justice Kennedy's formulation, however, is that he never explains why a defendant's contacts with a forum state are necessary in order for a court to have the authority to render a binding judgment over the defendant.

Justice Kennedy comes close to articulating why there is a minimum contacts requirement but he stops before he actually gets there:

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.<sup>160</sup>

Although Justice Kennedy's statement explains the need for a "lawful" judgment in order to bind a defendant, it does not even begin to explain why a defendant's contacts with the forum state are necessary to make that judgment lawful. Two possibilities may be inferred (albeit with much conjecture and hypothesis) as a potential basis for Justice Kennedy's explanation of the contacts requirement. First, the continual use of the words "submit" and "submission" echoes the Court's use of implied consent in *Hess v. Pawloski*,<sup>161</sup> a reference not lost on the dissent in *McIntyre*, which correctly notes that the idea "that consent is the animating concept" in jurisdiction cases "draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious

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which focuses on the defendant's actions in addition to "general notions of fairness and foreseeability." See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part and concurring in the judgment). The difference between Justice Brennan's and Justice O'Connor's opinions is that Justice Brennan's opinion concludes that the *action* of placing one's product in the stream of commerce with the knowledge that it will be sold in the forum state is sufficient to support the minimum contacts requirement under the Due Process Clause.

<sup>160</sup> *McIntyre*, 131 S. Ct. at 2789 (citation omitted) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxite de Guinee*, 456 U.S. 694, 702 (1982)).

<sup>161</sup> *Hess v. Pawloski*, 274 U.S. 352 (1927).

consent, the Court has repeatedly said, is unnecessary and unhelpful.”<sup>162</sup>

A second possibility is slightly more promising. Because the United States is “a distinct sovereign,” a defendant could be subject to the jurisdiction of the United States but not of any particular state.<sup>163</sup> Justice Kennedy cites one of his own decisions from a context unrelated to personal jurisdiction: “Ours is a ‘legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.’”<sup>164</sup> Justice Kennedy concludes that “a litigant may have the requisite relationship with the United States Government” to support jurisdiction, but lack that relationship with “any individual State.”<sup>165</sup> This statement hints at a political theory basis for the contacts requirement that echoes the suggestions of Professors Lea Brilmayer<sup>166</sup> and Roger Trangsrud.<sup>167</sup> This passage, however, amounts to only the slightest and most vague of hints, and its persuasiveness is vitiated when Justice Kennedy states that “if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>168</sup> This statement, which suggests that an inappropriate exercise of personal jurisdiction would offend the rights of another state—rather than the individual rights of the defendant—is not only at odds with the Supreme Court’s precedent,<sup>169</sup> it is also contrary to the fundamental notion that the Due Process Clause guarantees individual rights rather than protecting states’ sovereignty from interference by other states.<sup>170</sup>

Two additional comments in Justice Kennedy’s plurality opinion reveal the absence of any true theory underlying the contacts require-

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<sup>162</sup> *McIntyre*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting).

<sup>163</sup> *Id.* at 2789 (plurality opinion).

<sup>164</sup> *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

<sup>165</sup> *Id.*

<sup>166</sup> See generally Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) (arguing for a “rights-based approach to choice of law” that limits states’ power).

<sup>167</sup> See generally Roger Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989) (contending that the Supreme Court should articulate a theory of personal jurisdiction based on “political consent”).

<sup>168</sup> *McIntyre*, 131 S. Ct. at 2789.

<sup>169</sup> See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982).

<sup>170</sup> See U.S. CONST. amend. XIV, § 1.

ment or even an understanding of the role that the contacts requirement plays in personal jurisdiction cases. First, Justice Kennedy's opinion appears to ignore the incongruously lesser due process limitations on application of a state's law to a defendant as compared with the due process limitations on a state's jurisdiction. He then later appears to acknowledge the difference but does not explain or justify it. The opinion states that the Due Process Clause protects against the imposition of burdens on persons except in accordance with valid laws of the land and that "[t]his is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere."<sup>171</sup> The opinion does not acknowledge, however, that the Due Process Clause imposes only "modest" restrictions on a state's decision to apply its own law to a defendant.<sup>172</sup> In the leading case of *Allstate Insurance Co. v. Hague*,<sup>173</sup> the Court rejected a due process attack on a state court's decision to apply its own law, even though the "connection between the forum and the controversy [was] much too tenuous to support an assertion of judicial jurisdiction."<sup>174</sup> Indeed, it is a perfect illustration of the incoherence of the Court's minimum contacts doctrine that the plaintiff probably could have brought suit against McIntyre in Ohio, home to the American distributor, where the courts would have been free to apply—and probably would have applied—New Jersey law to govern McIntyre's liability because the accident occurred in New Jersey. Later in his opinion, Justice Kennedy acknowledges that "[a] sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."<sup>175</sup> But he does not offer any explanation as to why that result makes sense under the Due Process Clause.

The second anomalous aspect of Justice Kennedy's opinion is that he illustrates the potential problems of an insufficiently rigorous minimum contacts requirement with a hypothetical that presents a dramatic illustration of procedural unfairness that could be rectified by the imposition of procedural fairness rules without requiring minimum contacts. Justice Kennedy describes the potential problem as one in which owners of a small farm in Florida could be sued through-

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<sup>171</sup> *McIntyre*, 131 S. Ct. at 2786–87.

<sup>172</sup> See *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

<sup>173</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

<sup>174</sup> James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 241–42 (2004).

<sup>175</sup> *McIntyre*, 131 S. Ct. at 2790.

out the country, despite never leaving Florida if they happen to “sell crops to a large nearby distributor . . . who might then distribute them to grocers across the country. If foreseeability were the controlling criterion the farmer could be sued in Alaska or any number of other State’s courts without ever leaving town.”<sup>176</sup>

Of course, it seems dramatically unfair to require a small Florida farmer to travel all the way to Alaska to litigate some small claim. That is not due to the lack of contacts between the farmer and Alaska, however, but rather the expense and distance that would make litigating the case so difficult as to prevent the farmer from having a fair day in court. The Court could—and should—simply dispose of such a case using the fairness factors that comprise the second part of the due process test for personal jurisdiction.

Justice Kennedy’s rigorous minimum contacts rule should be able to justify denying jurisdiction in the following hypothetical: A small jewelry maker living in Manhattan sells her jewelry to a Manhattan distributor, who sells it to a consumer in Jersey City, who then is injured by the negligently designed jewelry. The Manhattan jewelry maker could be sued in Jersey City without ever having left town.<sup>177</sup> Does that hypothetical fill one with indignation at the injustice imposed on the Manhattan jewelry maker? Is there any reason why the Due Process Clause should prohibit New Jersey from taking jurisdiction over the injured party’s claim simply because the jewelry maker did not sell the product directly to the buyer in New Jersey? Justice Kennedy has not provided an answer.

Interestingly, Justice Breyer succumbs to precisely the same error in his opinion concurring in the judgment, in which he posits the following hypothetical:

What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii).<sup>178</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> Jersey City is approximately a twenty-eight minute drive (9.6 miles) from Manhattan. Driving Directions from Manhattan to Jersey City, NJ, GOOGLE MAPS, <http://maps.google.com> (follow “Get Directions” hyperlink; then search “A” for “Manhattan” and search “B” for “Jersey City, NJ”; then follow “Get Directions” hyperlink) (last visited Sept. 14, 2011).

<sup>178</sup> *McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).

Once again, this illustration of procedural unfairness can be adequately remedied by enforcing the fairness factors that compose the second part of the due process test for personal jurisdiction. It does not demonstrate the need for any kind of minimum contacts requirement.

Thus, the opinions rejecting jurisdiction in *McIntyre* provide no explanation that might remedy the absence of a clear due process justification for any minimum contacts requirement in previous personal jurisdiction cases. After waiting twenty-one years for the Supreme Court to provide some theoretical foundation for the requirement that the defendant have contact with the forum state for personal jurisdiction purposes, but not for choice-of-law purposes, the Supreme Court has once again let us down. The only hope provided by *McIntyre* is that the unsatisfying split among the Justices that resulted in no majority opinion may lead the Court to address this issue once again in a more compelling factual setting. One can only hope that the Court would use that opportunity to consider more thoughtfully why the Due Process Clause requires any contacts requirement at all.

## II. APPLYING *GOODYEAR* AND *MCINTYRE* TO THE TIMING OF MINIMUM CONTACTS

Notwithstanding the disappointing failure of the Court to explore the due process rationale for the minimum contacts requirement in personal jurisdiction cases, it is worth looking through the issues presented by the cases involving the timing of minimum contacts to determine if either of the new Supreme Court cases might provide guidance beyond the previous caselaw. We will first look at the issues presented in the context of general jurisdiction cases and then to the issues in specific jurisdiction cases.

### A. *The Timing of Minimum Contacts and General Jurisdiction Cases*

The significance of these new personal jurisdiction cases for the timing of minimum contacts in the general jurisdiction context will largely be determined by the meaning lower courts give to *Goodyear*. If courts take seriously the references to general jurisdiction as applying in a corporation's "home"<sup>179</sup> and limit general jurisdiction to states in which a corporation is incorporated or has its principal place of business, then timing may no longer be an issue with respect to gen-

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<sup>179</sup> See *supra* notes 78–84 and accompanying text.

eral jurisdiction. Courts would no longer seek to aggregate separate contacts that might occur over a long period of time in order to establish general jurisdiction. Instead, courts would look only to factors like state of incorporation and principal place of business, which are not likely to change. Therefore, it would be unnecessary to determine whether general jurisdiction must be assessed at the time the claim arises, when the case is filed, or when a court resolves a motion to dismiss on personal jurisdiction grounds.<sup>180</sup> Even if the general jurisdiction analysis were to include states where the defendant has some physical presence, timing would likely not be an issue because that physical presence would probably extend over all of the possible time periods during which courts have measured minimum contacts for the purposes of general jurisdiction.

In the unlikely event that these relatively fixed parameters were to change in a particular case, nothing in either *Goodyear* or *McIntyre* provides a reason to alter the guidelines discussed in my previous article.<sup>181</sup> The relevant time period for identifying factors—such as state of incorporation, principal place of business, or even physical presence within the forum state—would not be the time the claim arose, because the claim in a suit seeking general jurisdiction has, by definition, no connection to the forum state.<sup>182</sup> Similarly, since the Supreme Court has held that the Due Process Clause does not protect a defendant from the burden of litigating in a forum with which it does not have the relevant contacts, but rather from having a judgment entered against it by a court that lacks jurisdiction,<sup>183</sup> the relevant time period for determining these contacts would remain the date on which the court decided the motion to dismiss for lack of personal jurisdiction.<sup>184</sup>

On the other hand, given the large number of cases in the lower courts that have found jurisdiction based on sales in the forum state and contacts other than physical presence in the forum state,<sup>185</sup> it seems unlikely that lower courts will abandon this basis for general jurisdiction absent a much clearer mandate from the Supreme Court. If that proves to be the case, then timing will continue to be a very significant issue, particularly when it comes to the question of how far back in time a plaintiff can probe to identify contacts relevant to gen-

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<sup>180</sup> See Peterson, *supra* note 1, at 122–32.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.* at 142–43.

<sup>183</sup> See *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526–27 (1988).

<sup>184</sup> See Peterson, *supra* note 1, at 143–45.

<sup>185</sup> See *supra* note 78.

eral jurisdiction.<sup>186</sup> As a practical matter, this issue is most likely to arise in the discovery context in which the plaintiff seeks information from the defendant concerning the defendant's connection with the forum state.<sup>187</sup> Therefore, this issue is likely, in the first instance, to remain subject to the discretion of the trial courts. Ultimately, when it comes time for a court to ascertain which contacts are relevant to the assessment of general jurisdiction, the lower courts are no better off now than they were before *Goodyear*. In fact, because of the confusion that is likely to arise from the Court's frequent use of the "home" metaphor, lower courts are now unfortunately likely to be even more fractured than before these decisions.

*B. Timing of Minimum Contacts in Specific Jurisdiction Cases  
After Goodyear and McIntyre*

Although neither *Goodyear* nor *McIntyre* directly discusses the due process rationale for having a contacts requirement, certain insights may be gleaned from these cases that are relevant to the specific jurisdiction issues discussed in my previous article.

*1. Fair Warning That a Defendant May Be Subject to Personal Jurisdiction in the Forum State*

As noted in my previous article,<sup>188</sup> lower courts have picked up on a phrase originating in Justice Stevens's concurring opinion in *Shaffer v. Heitner*,<sup>189</sup> in which he, after discussing the procedural due process requirement for proper notice of a lawsuit, stated that "the requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign."<sup>190</sup> This assertion, although it had no previous support in caselaw, was repeated in *World-Wide Volkswagen*. There, the Court, while refusing to attach jurisdictional significance to the fact the defendant could foresee that the car it sold might wind up in the forum state, picked up on Justice Stevens's notion of the foreseeability of personal jurisdiction:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will

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<sup>186</sup> See Peterson, *supra* note 1, at 147–49.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 150–55.

<sup>189</sup> *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>190</sup> *Id.* at 218 (Stevens, J., concurring in the judgment).

find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.<sup>191</sup>

Unfortunately, because of the absence of any coherent policies underlying the minimum contacts doctrine in Supreme Court caselaw, a number of lower courts have seized upon the fair warning language as the basis for making decisions about the timing of minimum contacts.<sup>192</sup> In my previous article, I discussed at length the problem with the so-called "fair warning requirement" as a principle to guide personal jurisdiction analysis.<sup>193</sup> The concept is dictum in the Supreme Court cases in which it is discussed, has no historical foundation in any of the Court's prior caselaw, conflates notice of a lawsuit with notice that one may be subject to personal jurisdiction, assumes without any evidence that defendants plan their behavior on where they will be subject to personal jurisdiction, and, most importantly, is entirely circular.<sup>194</sup> At most, the fair warning concept is a reason for having some clear doctrine of personal jurisdiction, but it does not support a particular variant of personal jurisdiction law. In particular, it does not support a minimum contacts requirement. A rule that defendants are subject to jurisdiction in every state would be far more predictable and certain than the Supreme Court's current chaotic caselaw on minimum contacts. As an amicus brief filed in *McIntyre* by a number of distinguished civil procedure professors noted, "It is, after all, the jurisdictional principles *themselves* that would make jurisdiction foreseeable or would otherwise provide fair warning of what activity will subject a defendant to jurisdiction."<sup>195</sup> If there is any silver lining in the *McIntyre* decision, it is that the opinions do not make any refer-

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<sup>191</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted).

<sup>192</sup> See, e.g., *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987).

<sup>193</sup> See Peterson, *supra* note 1, at 150–55.

<sup>194</sup> *Id.* at 152–53.

<sup>195</sup> Brief of Law Professors as Amici Curiae Supporting Respondents at 27, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343) (citing Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. REV. 1112, 1134 (1981) ("[A] potential defendant can only have such an expectation because the law so provides.")).

ence to the fair warning concept. One can only hope that the Court has recognized the entirely circular nature of this argument and has decided not to refer to it in the context of personal jurisdiction cases.

## 2. *The Significance of Related Contacts*

One of the other great sources of confusion and disagreement among the lower courts that have considered the timing of minimum contacts is the unresolved issue of whether “related contacts” are related to the claim, but have no causal connection to the claim because the claim does not arise out of those contacts. These contacts count when assessing whether defendants have established sufficient minimum contacts with the forum state. As noted in my previous article, the issue of whether contacts arising after the claim accrue in specific jurisdiction cases depends entirely upon the relevance of related but not causally connected contacts.<sup>196</sup> Thus, even if the Court does not fully address reasons why the Due Process Clause should include any minimum contacts requirement, it could at least clarify the extent to which courts may count unrelated but not causally connected contacts in specific jurisdiction cases.

A stream-of-commerce case provides a perfect opportunity to discuss this issue, particularly if the Justices concur with Justice O'Connor's views in *Asahi*.<sup>197</sup> In *McIntyre*, Justice Kennedy's opinion touches tangentially on this point. For example, in discussing the concept of specific jurisdiction, Justice Kennedy states that “submission through contact with an activity directed at a sovereign may justify specific jurisdiction ‘in a suit arising out of or *related to* defendant's contacts with the forum.’”<sup>198</sup> The fact that Justice Kennedy used the language of *Helicopteros*, a general jurisdiction case, in *McIntyre*, a specific jurisdiction case, may suggest that at least he and the Justices who joined his plurality opinion are prepared to recognize related but not causally connected contacts with a forum state. This comment, by itself, however, is a slender reed upon which to base that proposition.

In identifying contacts that were absent in this case, but perhaps inferentially supporting the exercise of specific jurisdiction, Justice Kennedy's opinion may provide further insight into this issue. Justice

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<sup>196</sup> See Peterson, *supra* note 1, at 155–58.

<sup>197</sup> See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–13 (1987) (plurality opinion) (listing “[a]dditional conduct of the defendant” that “may indicate an intent or purpose to serve the market in the forum State”).

<sup>198</sup> *McIntyre*, 131 S. Ct. at 2788 (plurality opinion) (emphasis added) (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Kennedy notes that McIntyre “had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State.”<sup>199</sup> Justice Kennedy does not clarify, however, whether these contacts would have been sufficient to establish specific jurisdiction, even if they were unrelated to the particular claim.<sup>200</sup>

Justice Kennedy also notes that McIntyre “officials attended trade shows in several states but not in New Jersey.”<sup>201</sup> Would it have been sufficient to establish specific jurisdiction if McIntyre had attended a trade show in Atlantic City that included prospective purchasers from throughout the United States but not the officials of plaintiff’s company who ultimately bought the machine at a trade show in Las Vegas? That Justice Kennedy mentions this fact suggests that it might have made a difference to him, but it is difficult to see why. If a trade show that is intended to market to prospective purchasers throughout the United States happens to take place in the forum state but otherwise has no connection to the plaintiff’s claim, it is difficult to see why that type of contact should provide the essential connection with the forum state that is missing in *McIntyre*. Justice Kennedy’s opinion fails to clarify the relevance of unrelated contacts to a specific jurisdiction inquiry.

Justice Breyer’s opinion is similarly opaque on the issue. He believes that the *McIntyre* case would not satisfy the *Asahi* opinions of Justice O’Connor, Justice Brennan, or Justice Stevens.<sup>202</sup> He argues that

the relevant facts found by the New Jersey Supreme Court show no . . . “regular course” of sales in New Jersey; and there is no “something more,” such as special state-related design, advertising, advice, marketing, or anything else. . . . [Mr. Nicastro] has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. . . .

There may well have been other facts Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. . . . But the plaintiff bears the burden of establishing jurisdiction, and here I

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<sup>199</sup> *Id.* at 2790.

<sup>200</sup> *See id.*

<sup>201</sup> *Id.* at 2790.

<sup>202</sup> *See id.* at 2792 (Breyer, J., concurring in the judgment).

would take the facts precisely as the New Jersey Supreme Court stated them.<sup>203</sup>

Justice Breyer thus continues the Court's tendency to list potential contacts without clearly stating exactly how they must be related to the claim in order to satisfy the minimum contacts requirement.

Both the plurality and the concurring opinions are remarkably unilluminating on the issue of what kinds of contacts might have satisfied the minimum contacts requirement in general. In particular, the opinions tell us little about the extent to which the Court might be willing to recognize related but not causally connected contacts in a specific jurisdiction case.

### CONCLUSION

After 21 years without hearing a personal jurisdiction case, the Supreme Court had the opportunity this past term to use the *Good-year* and *McIntyre* cases to answer questions about the minimum contacts requirement that have remained unaddressed for 144 years. The Court could have begun to explore the fundamental question of why the Due Process Clause requires any contact between the defendant and the forum state for personal jurisdiction to be constitutionally permissible. At the very least, the Court could have begun to identify the kinds of contacts, including related but not causally connected contacts that might be relevant to the minimum contacts test. Failing that, the Court could have resolved the twenty-five-year-old uncertainty over whether the stream-of-commerce theory is sufficient to establish the required minimum contacts.

Unfortunately, the Supreme Court did not accomplish even the least of these goals. Indeed, the cases may serve to increase the confusion of the lower courts about the requirements for establishing both general and specific jurisdiction. It is certain that the lower courts will continue to struggle with issues like the timing of minimum contacts because of the Supreme Court's failure to answer these questions. The best we can hope for is that the splintered decision in *McIntyre* may lead the Court to identify a case with more compelling facts in which to address the stream-of-commerce issue, and that the Court seizes that opportunity to address the more fundamental issues about the meaning of the minimum contacts requirement. Until the Court

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<sup>203</sup> *Id.*

takes up that task, lower courts will continue to be perplexed by personal jurisdiction and continue to render inconsistent decisions as they struggle to make sense of this vexing doctrine.