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The Meaning of McIntyre

Adam N. Steinman

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I. INTRODUCTION

On the final day of the last Term, the Supreme Court issued its much-anticipated decision in *J. McIntyre Machinery Ltd. v. Nicastro*.[1] The case ended two decades of high court abstinence from the topic of personal jurisdiction.[2] Even more frustrating than the length of that hiatus was the fact that, during that period, the Court's most up-to-date pronouncements on the topic were two inconclusive decisions that had failed to generate a majority opinion on important aspects of jurisdictional doctrine: *Asahi Metal Industry Co. v. Superior Court*[3] and *Burnham v. Superior Court*.[4]

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1. 131 S. Ct. 2780 (2011).

2. Also helping to end the personal-jurisdiction drought was a less divisive decision issued that same day. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (Ginsburg, J.) (unanimous opinion).

3. 480 U.S. 102 (1987).

4. 495 U.S. 604 (1990).

When certiorari was granted,[5] *McIntyre* seemed like a potential vehicle for resolving the post-*Asahi* uncertainty about how to assess whether jurisdiction is proper over a defendant whose products reach a state through the so-called "stream of commerce."[6] The plaintiff in *McIntyre* was Robert Nicastro, who suffered serious injuries to his hand while operating a metal-shearing machine at Curcio Scrap Metal, the New Jersey company where he worked. Mr. Nicastro filed a lawsuit in New Jersey state court against J. McIntyre Machinery, the British corporation that had manufactured the shearing machine. Curcio had purchased the machine from an Ohio-based company (McIntyre Machinery of America) that had agreed to sell J. McIntyre's machines in the United States. During the course of this distribution agreement—including the period when Curcio purchased the machine involved in the accident—J. McIntyre regularly sent its officials from the United Kingdom to industry trade shows throughout the United States (although never in New Jersey). The machine that injured Mr. Nicastro may have been the only J. McIntyre machine to have been purchased by a New Jersey customer.[7]

The New Jersey trial court dismissed the case for lack of jurisdiction, but the New Jersey Court of Appeals and the New Jersey Supreme Court concluded that jurisdiction was proper.[8] A majority of Justices on the U.S. Supreme Court reversed, holding that Mr. Nicastro had not met his burden of establishing personal jurisdiction over the British manufacturer in New Jersey. The Justices split four-to-two-to-three, however. Justice Kennedy wrote a plurality opinion rejecting jurisdiction on behalf of himself, Chief Justice Roberts, and Justices Scalia and Thomas.[9] Justice Ginsburg wrote a dissenting

5. *See McIntyre*, 131 S. Ct. 62 (2010), *cert. granted*, 131 S. Ct. 2780 (2011).

6. *See Asahi*, 480 U.S. at 105 ("This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes minimum contacts between the defendant and the forum State such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." (citations and internal quotation marks omitted)).

7. As described *infra* notes 127-135 and accompanying text, the Justices' descriptions of the relevant facts in *McIntyre* differ in some significant respects, and there is disagreement about what information should have been considered in assessing whether jurisdiction was proper. For each Justices' factual narrative, *see McIntyre*, 131 S. Ct. at 2786, 2790 (Kennedy, J., plurality); *id.* at 2791 (Breyer, J., concurring); *id.* at 2795-97 (Ginsburg, J., dissenting). For a more detailed account of the *McIntyre* record and the differences among the Justices about that record, *see* Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 481, 488-91 (2012).

8. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575 (N.J. 2010), *aff'd*, 945 A.2d 92, 104 (N.J. App. 2008).

9. *See McIntyre*, 131 S. Ct. at 2785 (Kennedy, J., plurality).

opinion (that would have upheld jurisdiction) on behalf of herself and Justices Sotomayor and Kagan.[10] Justices Breyer and Alito broke the impasse by providing two more votes against jurisdiction, but their concurring opinion (written by Justice Breyer) explicitly rejected significant aspects of Justice Kennedy's reasoning.[11]

For many, then, *McIntyre* was not worth the wait. Those hoping for "greater clarity"[12] or for answers to "decades-old questions"[13] woke up to yet another inconclusive decision on personal jurisdiction with no majority opinion. What—if anything—does a fractured decision like *McIntyre* mean for current jurisdictional doctrine? In one sense, to paraphrase Holmes, *McIntyre* means what courts *say* it means.[14] We are already beginning to develop a record on this front; federal and state courts have cited *McIntyre* frequently in the eight months since it was issued.[15] For judges, commentators, and practitioners alike, it is worth exploring how *McIntyre* is being used and interpreted by lower courts.

This descriptive task, however, cannot be the entire story. *McIntyre* is a Supreme Court decision, to which lower courts must look to ascertain "what the law is."[16] The lack of a majority opinion makes this a more complicated endeavor, of course. But that fact makes it especially important to look closely at what the *McIntyre* opinions say—and don't say. If lower courts are misreading *McIntyre*, it is crucial to identify those mistakes at an early stage, lest they find their way into opinions by federal courts of appeals or state supreme courts, and take root as binding precedent for some significant subset of our nation's judiciary.[17]

This Essay proceeds as follows: Part II summarizes how lower federal courts and state courts have been citing and interpreting *Mc-*

10. *See id.* at 2794 (Ginsburg, J., dissenting).

11. *See id.* at 2791 (Breyer, J., concurring); *id.* at 2794 ("[T]hough I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning."); *see also infra* note 126 and accompanying text.

12. *Id.* at 2786 (Kennedy, J.).

13. *Id.* at 2785.

14. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

15. According to West's Keycite service, there were 97 federal and state court opinions citing *McIntyre*. *See* Westlaw Keycite of *McIntyre*, 131 S. Ct. 2780 (performed on Mar. 9, 2012).

16. Marbury v. Madison, 5 U.S. 137, 177 (1803).

17. A federal district court opinion, by contrast, is not formally binding via stare decisis, even within its own district. *See, e.g.*, Chavez v. Board of Educ. of Tularosa, 614 F. Supp. 2d 1184, 1231 (D.N.M. 2008) ("[D]istrict court opinions are not, as a matter of law, binding authorities except on the parties. . ..").

Intyre. Part III critically examines two issues over which lower courts have split when reading *McIntyre*: (1) the role of "foreseeability" to the permissible scope of personal jurisdiction, and (2) whether *McIntyre* declared a winner in the disagreement between the Justice O'Connor and Justice Brennan four-Justice coalitions in *Asahi*.[18] Part IV confronts the broader question of how courts should make sense of Justice Breyer's *McIntyre* concurrence. Understood correctly, *McIntyre* does not mandate a more restrictive approach to jurisdiction.

II. How Lower Courts Are Interpreting *McIntyre*

This Part summarizes some of the ways that state courts and lower federal courts have been handling the *McIntyre* decision during its first eight months on the books. It organizes these courts' treatment of *McIntyre* into four categories. First are opinions that cite aspects of Justice Kennedy's plurality opinion, sometimes for generally-accepted propositions but other times for more controversial ideas that appear in the *McIntyre* plurality opinion alone.[19] Second are opinions that have distinguished *McIntyre* on factual grounds.[20] Third are opinions (to this point, only a single opinion) reading *McIntyre* as calling into question the relevance of the "reasonableness" or "fairness" inquiry that is said to constitute the second step in a two-part jurisdictional framework.[21] Fourth are opinions that have examined the relationship between the three *McIntyre* opinions, especially the extent to which Justices Breyer and Alito can be read as providing the necessary votes to generate a majority view on particular aspects of jurisdictional doctrine.[22]

A. Citations to Justice Kennedy's Plurality Opinion

It is perhaps not surprising that Justice Kennedy's opinion would be cited frequently by lower courts. The opinion appears first on the pages of the Supreme Court Reporter and garners a plurality of Jus-

18. *Compare Asahi*, 480 U.S. at 112 (O'Connor, J., joined by Chief Justice Rehnquist and Justices Powell and Scalia) (plurality opinion) ("[P]lacement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."), *with id.* at 119-20 (Brennan, J., joined by Justices White, Marshall, and Blackmun) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." (citations and quotation marks omitted)).

19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. *See infra* Part II.C.

22. *See infra* Part II.D.

tices. It has the look of a majority opinion, if not the votes. That makes it especially important, however, to examine closely how lower courts are using Justice Kennedy's opinion. Lower courts should not allow a non-majority opinion like Justice Kennedy's to trump established jurisdictional principles.

Many lower court opinions have cited Justice Kennedy's *McIntyre* plurality for propositions already established by earlier Supreme Court decisions. One federal appeals court opinion, for example, quoted the plurality for the basic distinction between specific jurisdiction and general jurisdiction.[23] Another quoted it for the proposition that personal jurisdiction and choice of law are distinct inquiries.[24] And many lower courts have cited Justice Kennedy's plurality opinion for the general notion that an out-of-state defendant must "purposefully avail[ ] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[25] Although often criticized,[26] this principle has been a consistent part of

23. Pangaea, Inc. v. Flying Burrito L.L.C., 647 F.3d 741, 746 (8th Cir. 2011) ("Specific jurisdiction may be established where the claim 'arises out of' or 'relates to' a defendant's contacts with the forum." (quoting *McIntyre,* 131 S. Ct. at 2787–88 (Kennedy, J.))); *see also id.* ("Specific jurisdiction, like general jurisdiction, may be justified when a defendant, through its contacts with the forum, purposefully avails itself of the privilege of conducting business in the forum, 'in a suit arising out of or related to the defendant's contacts with the forum.' " (quoting *McIntyre,* 131 S. Ct. at 2787–88 (Kennedy, J.))).

24. Adelson v. Hananel, 652 F.3d 75, 81 n.2 (1st Cir. 2011) ("Although . . . the district court concluded that the agreement was governed by Israeli law, this conclusion does not affect the outcome of our jurisdictional analysis because the issue before us is one of personal jurisdiction, not choice of law." (citing *McIntyre*, 131 S. Ct. at 2790 (Kennedy, J.))).

25. *See e.g.*, Carreras v. PMG Collins, L.L.C., 660 F.3d 549, 555 (1st Cir. 2011) ("The baseline rule is that a defendant is subject to jurisdiction only when it 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " (quoting *McIntyre*, 131 S. Ct. at 2787 (Kennedy, J.))); *accord* Ex parte City Boy's Tire and Brake, Inc., No. 1100205, 2011 WL 6848480, at * 8 (Ala. Dec. 30, 2011) ("As a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " (quoting *McIntyre*, 131 S. Ct. at 2785 (Kennedy, J.))); *see also* Starbucks Corp. v. S. Dakota Network L.L.C. ., No. 8:11CV237, 2011 WL 6399550, at * 2 (D. Neb. Dec. 20, 2011) (same); *see also* Englert v. Alibaba.com Hong Kong Ltd., 4:11CV1560 RWS, 2012 WL 162495, at * 2 (E.D. Mo. Jan. 19, 2012) ("Due process requires that a plaintiff show that a non-resident have 'minimum contacts' with the forum state and that the maintenance of the lawsuit does not offend 'traditional notions of fair play and substantial justice.' " (quoting *McIntyre*, 131 S. Ct. at 2787 (Kennedy, J.))).

26. *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1115 (1981) (arguing that constitutional limits on personal jurisdiction should not hinge on "prelitigation contacts between the defendant and the forum"); *see also, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. Davis L. Rev. 19, 53 (1990); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 617, 621-22 (2006).

the Court's contemporary jurisprudence,[27] even if its application in particular cases has not always been clear.[28]

Some lower court opinions have invoked more controversial language in Justice Kennedy's opinion—language that is in significant tension with earlier majority opinions by the Supreme Court.[29] Of particular concern is Justice Kennedy's emphasis on sovereignty,[30] submission,[31] and targeting[32] in conceptualizing jurisdiction over out-of-state defendants. With respect to sovereignty, Justice Kennedy wrote:

> [P]ersonal 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.[33]

Earlier Supreme Court decisions, however, rejected the notion that constitutional limits on personal jurisdiction derive from "an in-

27. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))); *id.* ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." (citations omitted)).

28. *Compare, e.g.*, *Asahi*, 480 U.S. at 112 (O'Connor, J.) ("[R]espondents have not demonstrated any action by Asahi to purposefully avail itself of the California market."), *with id.* at 116 (Brennan, J., concurring) ("I do not agree with . . . the conclusion that Asahi did not purposely avail itself of the California market." (citations omitted)).

29. The discussion below does not include lower court opinions that merely state as a descriptive matter the positions Justice Kennedy expresses in *McIntyre*. *See, e.g.*, Powell v. Profile Design L.L.C., No. 4:10-CV-2644, 2012 WL 149518, at * 3 (S.D. Tex. Jan. 18, 2012) ("In the plurality opinion, Justice Kennedy explained that a 'defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.' " (quoting *McIntyre*, 131 S. Ct. at 2788 (Kennedy, J.))); *see also* Prototype Productions, Inc. v. Reset, Inc., No. 2:11CV196, 2012 WL 32417, at *2 n.3 (E.D. Va. Jan. 5, 2012) (noting that "[t]he plurality held that the defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum" but recognizing that "no opinion commanded a majority" (citations, modifications, and internal citations omitted)). This Essay's concern is with lower court opinions that accept these aspects of Justice Kennedy's opinion as accurate statements of current law. *See infra* notes 36, 42, & 45 and accompanying text.

30. *See infra* note 33 and accompanying text.

31. *See infra* notes 37-38 and accompanying text.

32. *See infra* note 44 and accompanying text.

33. *McIntyre*, 131 S. Ct. at 2789 (Kennedy, J.) (emphasis added).

dependent restriction on the sovereign power of the court."[34] In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, the Court wrote: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[35] Nonetheless, some lower federal courts have parroted language from Justice Kennedy's plurality opinion endorsing sovereignty as the driving force behind our constitutional restrictions on state court jurisdiction.[36]

Justice Kennedy also wrote that "the principal inquiry" for purposes of personal jurisdiction is "whether the defendant's activities manifest an *intention to submit* to the power of a sovereign."[37] But this focus on "submission to a State's powers"[38] reflects an anachronistic view of jurisdiction that the Supreme Court rejected seven decades ago in *International Shoe Co. v. Washington*.[39] Prior to *International Shoe*, jurisdiction over defendants who were not present in the State was often legitimated by the idea that their "consent to service and suit" could be "implied" from their actions.[40] *International Shoe* put to rest this "legal fiction," recognizing instead that a defendant's "*acts* were of such a nature as to justify the fiction."[41] In developing the notion of "minimum contacts," *International Shoe* rejected a jurisdictional framework that was based on the defendant's implied consent or submission to the State's authority. By conceptual-

34. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982).

35. *Id.* at 702; *see also McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (noting that Justice Kennedy's emphasis on "sovereign authority" is inconsistent with earlier Supreme Court decisions (citing Shaffer v. Heitner, 433 U.S. 186, 204 & n.20 (1977))); Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 580 (2012) ("The Court rejected this notion in *Insurance Corp. of Ireland.*"); Steinman, *supra* note 7, at 496-97 n.108.

36. *See, e.g.*, *Pangaea*, 647 F.3d at 745 ("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." (quoting *McIntyre*, 131 S. Ct. at 2789 (Kennedy, J.))); *accord* Henderson v. Laser Spine Inst., No. 1:11-CV-0015(JAW), 2011 WL 4526067, at * 12 (D. Me. Sept. 28, 2011).

37. *McIntyre*, 131 S. Ct. at 2788 (Kennedy, J.) (emphasis added).

38. *Id.* at 2787.

39. 326 U.S. 310 (1945).

40. *Id.* at 318.

41. *Id.* at 318-19 (emphasis added); *see also McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[I]n *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."); *id.* at 2799 ("[T]he Court has explained [that] a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.").

izing jurisdiction as a function of the defendant's "submission," Justice Kennedy seemed to embrace a long-discarded framework.[42] Several lower federal courts have cited this language from Justice Kennedy's opinion without recognizing that tension.[43]

Finally, Justice Kennedy wrote that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum."[44] Justice Breyer's concurring opinion, however, squarely refused to adopt a targeting standard.[45] Nonetheless, some lower courts have embraced Justice Kennedy's idea that a manufacturer must target the forum state in order to be subject to jurisdiction there.[46]

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42. *See J. McIntyre*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting) ("[T]he plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court."); *id.* at 2799 n.5 ("The plurality's notion that jurisdiction over foreign corporations depends upon the defendant's 'submission,' seems scarcely different from the long-discredited fiction of implied consent." (citation omitted)); Steinman, *supra* note 7, at 497.

43. *See, e.g.*, S.E.C. v. Compania Internacional Financiera S.A., No. 11 Civ. 4904(DLC), 2011 WL 3251813, at *5 (S.D.N.Y. Jul. 29, 2011) (writing that "'the principal inquiry. . .is whether the defendant's activities manifest an intention to submit to the power of a sovereign'" (quoting same)); Yentin v. Michaels, Louis & Assocs., Inc., No. 11-0088, 2011 WL 4104675, at *1 n.1 (E.D. Pa. Sept. 15, 2011) ("As the Supreme Court recently observed, 'the principal inquiry' with respect to personal jurisdiction 'is whether the defendant's activities manifest an intention to submit to the power of a sovereign.'" (quoting same); *see also* Gerber v. Riordan, 649 F.3d 514, 523 (6th Cir. 2011) (Moore, J., dissenting) ("As the Supreme Court recently observed with respect to specific jurisdiction, 'The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign.'" (quoting *McIntyre*, 131 S. Ct. at 2788); Bluestone Innovations Texas, L.L.C. v. Formosa Epitaxy Inc., No. 2:10-cv-171-TJW-CE, 2011 WL 4591922, at *2 (E.D. Tex. Sept. 30, 2011) (noting "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" (emphasis added) (quoting *McIntyre*,131 S. Ct. at 2787); Harrelson v. Lee, 798 F. Supp. 2d 310, 315 (D. Mass. 2011) ("A finding of general jurisdiction is appropriate when "it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State." (quoting same)); Starbucks Corp. v. S. Dakota Network L.L.C. ., No. 8:11 CV237, 2011 WL 6399550, at *3 (D. Neb. Dec. 20, 2011) ("A person may *submit* to a state's authority in a number of ways" (emphasis added) (citing *McIntyre*,131 S. Ct. at 2787); Carolina Power & Light Co. v. 3M Co., Nos. 5:08-CV-460-FL, 5:08-CV-463-FL, 2011 WL 4591077, at *8 (E.D.N.C. Sept. 30, 2011) ("*[S]ubmission* through contact with and activity directed at a sovereign may justify specific jurisdiction in a suit arising out of or related to the defendant's contacts with the forum." (emphasis added) (quoting *McIntyre*, 131 S. Ct. at 2787-89.

44. *McIntyre*, 131 S. Ct. at 2788 (Kennedy, J.).

45. *Id.* at 2793 (Breyer, J., concurring) ("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. . . . I do not agree with the plurality's seemingly strict no-jurisdiction rule.").

46. *See* Dejana v. Marine Tech., Inc., No. 10-CV-4029(JS)(WDW), 2011 WL 4530012, at *5 (E.D.N.Y. Sept. 26, 2011) ("[T]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum." (quoting *McIntyre*, 131 S. Ct. at 2788 (Kennedy, J.)); Circuit Connect, Inc. v. Preferred Transport & Distribution, Inc., No. 10-cv-514-SM, 2011 WL 3678170, at *2 n.2 (D.N.H. Aug. 22, 2011) ("Mecca has

To be clear, it is not necessarily undesirable to think of jurisdiction in terms of sovereignty, submission, or even targeting. Indeed, those concepts are not inherently inconsistent with upholding jurisdiction over a foreign manufacturer like J. McIntyre. It might easily be said, for example, that a manufacturer who targets the U.S. market as a whole necessarily targets the states that comprise that U.S. market.[47] Likewise, to emphasize "the society or economy existing within the jurisdiction of a given sovereign" does not prevent the conclusion that a defendant's conduct is "directed at" the forum state when its conduct is directed at a territorial entity (such as the entire United States) that includes the forum state.[48] And one might say that a defendant "submits to the power of a sovereign"[49] when it purposefully seeks to access a geographic market that includes the territory of that sovereign.

One frustrating aspect of Justice Kennedy's opinion is that he failed to explain why his more general principles supported his conclusion that J. McIntyre's conduct did *not* constitute targeting or otherwise submitting to the sovereignty of the states within the United States, such as New Jersey.[50] His claim that "personal jurisdiction re-

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only shown that ACI, at sometime prior to loading the machine onto the truck for shipment by others, knew that the machine was headed for New Hampshire. Mecca has not shown that ACI otherwise 'targeted the forum.'" (quoting same)); Kimberly-Clark Worldwide, Inc. v. Fameccanica Data S.p.A No. 10-C-0917, 2011 WL 2634287, at *6 (E.D. Wis. July 5, 2011) ("The Supreme Court concluded that the 'defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum.'" (quoting same)); *see also* Carreras v. PMG Collins, L.L.C., 660 F.3d 549, 555 (1st Cir. 2011) ("Purposeful availment represents a rough quid pro quo: when a defendant deliberately *targets* its behavior toward the society or economy of a particular forum, the forum should have the power to subject the defendant to judgment regarding that behavior." (emphasis added) (citing *McIntyre*, 131 S. Ct. at 2787-88)).

47. *See McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting) ("McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States."); *id.* ("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 discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.").

48. *Id.* at 2789 (Kennedy, J.)..

49. *Id.* at 2788.

50. Similar in this regard is Justice Kennedy's statement that "[a]t no time did [J. McIntyre] engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws." *Id.* at 2791. One could reasonably conclude, however, that J. McIntyre intended to benefit from the protection of New Jersey law because (1) the larger market that J. McIntyre targeted included New Jersey; and (2) the New Jersey market exists because it is supported by an array of New Jersey laws, including New Jersey's tort laws, that give its citizens confidence to engage in economic activity knowing that they can seek compensation when other

quires a forum-by-forum, or sovereign-by-sovereign, analysis"[51] does not resolve this issue, nor does his observation that "the United States is a distinct sovereign."[52] Even a sovereign-by-sovereign analysis would seem to be easily satisfied when a defendant seeks to serve a market that unquestionably includes the territory of that sovereign.[53]

These problems aside, it should be emphasized that the lower courts that have cited these more questionable assertions by Justice Kennedy have not necessarily reached dubious outcomes as a result.[54] As a practical matter, concepts of sovereignty, submission, and targeting are only as bad (or as good) as those concepts are defined and applied.[55] Still, it is noteworthy that lower courts have been accepting such language from Justice Kennedy's plurality opinion without recognizing the concerns outlined above.

B. Distinguishing McIntyre *on Its Facts*

Several lower court opinions have sought to distinguish *McIntyre* on its facts. One state appellate court has written that, even after *McIntyre*, "the application of jurisdiction over a foreign defendant is a fact-specific enterprise, which must be determined on a case-by-case basis."[56] One federal district court wrote: "At best, [*McIntyre*] is

economic actors breach their duties. *See* Steinman, *supra* note 7, at 494. Justice Kennedy's opinion does not consider this possibility.

51. *Id.* at 2789.

52. *Id.*

53. The logical consequences of Justice Kennedy's position are potentially quite odd: "Suppose a defendant seeks to serve the New York City tri-state area, which includes portions of Connecticut, New Jersey, and New York. Would a court following Justice Kennedy's logic have to conclude that such a defendant has not targeted *any* of the three states? Or suppose a defendant seeks to serve an area bounded by particular latitudes and longitudes. If that area includes State X, would courts following Justice Kennedy's approach have to conclude that the defendant is not targeting State X because it has not explicitly defined its area of service with reference to that state?" Steinman, *supra* note 7, at 493-94.

54. Several of the decisions referenced above, although they endorse more questionable aspects of Justice Kennedy's opinion, reach sensible conclusions upholding jurisdiction over out-of-state defendants. *See, e.g.*, *Henderson v. Laser Spine Institute*, 2011 WL 4526067; S.E.C. v. Compania Internacional Financiera S.A., No. 11 Civ.4904(DLC), 2011 WL 3251813 (S.D.N.Y. Jul. 29, 2011).

55. *See supra* notes 47-49 and accompanying text.

56. State *ex rel.* Cooper v. NV Sumatra Tobacco Trading Co., No. M2010-01955-COA-R4-CV, 2011 WL 2571851, at *33 (Tenn. Ct. App. June 28, 2011); *see also McIntyre*, 131 S. Ct. at 2801 (noting that *McIntyre* did not "say that use of a national distribution system should, *ipso facto,* insulate a manufacturer from jurisdiction in the forum state"). The Tennessee Supreme Court recently granted permission to appeal in *Cooper*, paving the way for what could be a significant post-*McIntyre* state supreme court decision. *See Cooper*, 2011 WL 2571851 (noting "Application for Permission to Appeal Granted by Supreme Court" on January 11, 2012); *see also* Tennessee Supreme Court, Pending Case Report, *available at* http://www.tncourts.gov/sites/

applicable to cases presenting the same factual scenario that it does."[57]

In particular, many opinions have distinguished *McIntyre* by emphasizing (as Justice Breyer did) that the *McIntyre* record showed that only one of the British manufacturer's machines—the one involved in Mr. Nicastro's accident—had been purchased by a New Jersey customer.[58] Thus, courts have upheld jurisdiction in cases where there had been a higher volume of sales to in-forum purchasers,[59] or where the defendant's products were available for purchase in the forum.[60] One illustrative passage comes from the following federal district court opinion upholding jurisdiction over an Irish corporation, Moffett Engineering:

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default/files/docs/supremecourtpendingcasereportcurrentreport_10.pdf (Docket No. M2010-01955-SC-R11-CV).

57. Ainsworth v. Cargotec USA, Inc., No. 2:10-CV-236-KS-MTP, 2011 WL 4443626, at *7 (S.D. Miss. Sept. 23, 2011).

58. To this point, lower courts have not confronted the potential tension between (a) Justice Breyer's statement that Supreme Court decisions "strongly suggest[ ] that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place," *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring), and (b) the Court's decision in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957), which upheld jurisdiction in California even though the defendant had "never solicited or done any insurance business in California apart from the policy involved here." *Id.* at 222. One federal court of appeals has cited Justice Breyer's concurrence for the proposition that "[t]he Supreme Court has never found that a single isolated sale is *sufficient*" to justify jurisdiction, but added that the Court also has not "held that a single sale into a state is *insufficient* for due process purposes." Red Earth L.L.C. v. United States, 657 F.3d 138, 145 (2d Cir. 2011) (emphasis added) (characterizing the issue as "a close question of law"). For a discussion of how Justice Breyer's concurrence might be reconciled with *McGee*, see *infra* note 144.

59. *See* Brooks & Baker, LLC v. Flambeau, Inc., No. 2:10-cv-146-TJW-CE, 2011 WL 4591905, at *4 (E.D. Tex. Sept. 30, 2011) ("[T]he evidence shows that Flambeau made many more than just one isolated sale to Texas."); Soria v. Chrysler Canada, Inc., 958 N.E.2d 285, 297 (Ill. App. Ct. 2011) (noting that the foreign defendant's U.S. distributor had "ordered 28,383 total vehicles of various makes and models, including minivans, for its independently-owned dealerships *in Illinois*" (emphasis added)); *Cooper*, 2011 WL 2571851, at *33 ("Here, over 11.5 million of Sumatra's cigarettes were sold in Tennessee over a three-year period."); Russell v. SNFA, No. 1-09-3012, 2011 WL 6965795, at *8 (Ill. App. Dec. 16, 2011) (noting that "approximately 2,198" of the defendant's parts had been sold in Illinois between 2000 and 2007 and that "[t]hus, insufficient sales is not an issue in the case before us, as it was in *McIntyre*").

60. *See* Original Creations, Inc. v. Ready America, Inc., No. 11 C 3453, 2011 WL 4738268, at *5 (N.D. Ill. Oct. 5, 2011) ("In contrast [to the defendant in *McIntyre*], Life+Gear has sold its products to two distributors that market to Illinois residents. In other words, Life+Gear has taken advantage of the clearly defined distribution network offered by Meijer and West Marine, which includes at least 21 stores in Illinois."); Dram Techs. L.L.C. v. America. II Group, Inc., No. 2:10-CV-45-TJW, 2011 WL 4591902, at *3 (E.D. Tex. Sept. 30, 2011) (noting plaintiff's research confirming that products containing the memory chips were available for purchase in Texas stores and "are also available for sale on the internet and Plaintiff has found internet sites that ship these products directly to Texas").

> In *McIntyre,* the record only contained evidence that a single machine manufactured by the foreign defendant had been sold and shipped to the forum state. In the present case, it is undisputed that Cargotec has sold 203 Moffett forklifts to customers in Mississippi over the past decade, accounting for 1.55% of Moffett's United States sales during that time period and generating . . . roughly $5,350,000.00 in sales. That is a significant difference—one which . . . removes the present case from the scope of *McIntyre*'s applicability.[61]

In other opinions that explicitly distinguished *McIntyre* on its facts, courts have upheld jurisdiction over defendants who were aware that their products were being purchased by forum-state customers.[62] They have also upheld jurisdiction over defendants who had direct contacts with entities in the forum state.[63] In addition, lower courts have noted that *McIntyre* does not modify the prevailing approach to personal jurisdiction in cases arising from intentional torts.[64]

C. *The Continued Relevance of the Two-Prong Test*

According to one post-*McIntyre* opinion, *McIntyre* raises questions about the two-step jurisdictional framework that characterized the Supreme Court's case law during the 1980s.[65] Those two steps are as follows: *First*, the defendant must "purposefully establish[ ] 'mini-

61. *Ainsworth*, 2011 WL 4443626, at *7. On the other hand, one lower court has used to Justice Breyer's opinion to support the idea that a fairly small number of sales (even if there is more than a *single* sale) makes jurisdiction improper. Oticon, Inc. v. Sebotek Hearing Sys., L.L.C., No. 08-5489(FLW), 2011 WL 3702423, at *10 (D.N.J. Aug. 22, 2011) ("Under *Nicastro,* whether it is five or nine sales by Sebotek of SDT's allegedly infringing products, that is simply too small of a number from which to conclude that SDT purposefully availed itself of the New Jersey market.").

62. Merced v. Gemstar Group, Inc., No. 10-3054, 2011 WL 5865964, at *5 n.1 (E.D. Pa. Nov. 22, 2011) ("In the present case, an invoice by Margraf, S.P.A. noted that the ultimate destination for its shipment was Pennsylvania."); *Soria*, 958 N.E.2d at 297 ("Chrysler Canada is specifically *aware* of the final *destination* of *every product* (*i.e.,* vehicle) that it assembles." (emphasis in original)).

63. Adelson v. Hananel, 652 F.3d 75, 82 (1st Cir. 2011) ("Hananel directed regular administrative and financial conduct toward Massachusetts, and his contacts with the state were voluntary and the result of more than just a single event or transaction. . . . [G]iven that it was Hananel who sought this employment contract with a company whose key officers were all located in Massachusetts and whose financial accounts were all administered out of Massachusetts, the court properly concluded that Hananel had purposefully availed himself of Massachusetts law.").

64. *See* Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1228-29 (9th Cir. 2011) (stating that *McIntyre* was "consistent" with "the *Calder* 'effects' test" and that Justice Kennedy's opinion "distinguish[ed] intentional tort cases from cases governed by [the] 'general rule'" requiring "purposeful availment"); CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1077 (9th Cir. 2011) (same).

65. *See infra* notes 70-73 and accompanying text.

mum contacts' in the forum State."[66] *Second*, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[67] Factors relevant to this second prong—which would confirm "the reasonableness of jurisdiction"[68]—include "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'"[69]

One federal district court opinion stated that "[a]fter *McIntyre*, the relevance of fairness as part of the jurisdictional inquiry is unclear."[70] It noted:

> In *J. McIntyre Machinery*, the plurality did not use the traditional two-step analysis—looking first at minimum contacts and second at traditional notions of fair play and substantial justice. Instead, the plurality focused on whether the defendant purposefully availed itself of the privilege of conducting activities within the forum State.[71]

The opinion then cited Justice Kennedy's statement that "a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power."[72] The court apparently viewed Justice Breyer's concurrence as preserving the second prong of the jurisdictional inquiry, noting Justice Breyer's statement that "on the record present here, resolving this case requires no more than adhering to our precedents."[73]

Ultimately, this lower court opinion saw no need to resolve the issue, because it concluded that jurisdiction over the defendants in that case was consistent with both the minimum-contacts and fairness

66. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting *Int'l Shoe*, 326 U.S. at 316).

67. *Id.* at 474 (quoting *Int'l Shoe*, 326 U.S. at 316).

68. *Id.* at 478.

69. *Id.* at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

70. Kidston v. Resources Planning Corp., No. 2:11–cv–2036–PMD. 2011 WL 6115293, at *3 n.2 (D.S.C. Dec. 8, 2011).

71. *Id.*

72. *Id.* (quoting *McIntyre*, 131 S. Ct. at 2789 (Kennedy, J.)).

73. *Id.* (quoting *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring)).

inquiries.[74] Nonetheless, the opinion flags an important point. Several scholars have questioned the value of inquiring into fairness or reasonableness as a distinct, additional prerequisite for jurisdiction.[75] Such considerations might instead be addressed through forum non conveniens or some other non-jurisdictional inquiry,[76] or perhaps with a more flexible understanding of minimum contacts.[77]

Putting aside the normative merits of that argument, it would be wrong to read *McIntyre* as interring that second step in the jurisdictional framework. As a logical matter, there was no need for either Justice Kennedy or Justice Breyer to confront the reasonableness or fairness factors.[78] They had each concluded that J. McIntyre had not purposefully established minimum contacts with New Jersey, which is the first requirement of the traditional test.[79]

It is possible, moreover, that the reasonableness or fairness factors will play a significant role if the Supreme Court revisits jurisdic-

74. *Id.* at *4 (concluding that the plaintiff's "allegations are sufficient to make a prima facie showing that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice").

75. *See, e.g.*, Linda Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 595 (forthcoming 2012) [hereinafter Silberman, *Observations*]; *see also* Linda Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 758-59 (1995) [hereinafter Silberman, *"Two Cheers"*]; Howard B. Stravitz, *Sayonora to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 805-10 (1988); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L REV. 67, 102 (1987); *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 227-28 (2004) (noting that some of the Supreme Court's "second stage balancing factors . . . are difficult to conceptualize as due process requirements" (internal quotation marks and citations omitted)).

76. *See* Silberman, *"Two Cheers," supra* note 75 at 762 (arguing that "American jurisdictional theory" might "benefit . . . from a look at the experience of other countries" and noting that under English law, "notions of 'fairness' are introduced as a matter of judicial discretion, similar to considerations of forum non conveniens"); Stravitz, *supra* note 75, at 811 ("Forum non conveniens can deal more appropriately with the highly fact-specific determination of litigational convenience than can the fairness branch with its amorphous fluid balancing of interests."); Weinberg, *supra* note 75, at 102 ("Given the availability of *forum non conveniens*, and independent review of choice of law for fundamental fairness, defendants simply do not need all of the constitutional protection from plaintiff's choice of forum that the Supreme Court keeps lavishing on them.")

77. *See* Silberman, *"Two Cheers," supra* note 75 at 758-59 (arguing that the minimum contacts test, properly understood, "require[d] that the defendant's activities in the state be balanced against the state's regulatory and litigation interests—hence the requirement that the defendant have 'certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" and that, therefore, "the level of contacts required depended on the particular nature of the claim, the type of litigation, and possibly the parties" (quoting *Int'l Shoe*, 326 U.S. at 316) (ellipses in original)).

78. *See* Silberman, *Observations*, *supra* note 75.

79. *See McIntyre*, 131 S. Ct. at 2790 (Kennedy, J.); *id.* at 2793 (Breyer, J., concurring).

tional doctrine in the future. This is especially so in light of Justice Breyer's concurrence, which expressed concern for smaller manufacturers—both foreign and domestic:

> 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).[80]

He continued:

> It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.[81]

In either one of these situations, the second-step, reasonableness factors might vindicate Justice Breyer's concerns for smaller defendants without having to interpret the first-step, minimum-contacts analysis in a way that could foreclose jurisdiction over larger, more sophisticated manufacturers as well.[82] At the very least, these considerations suggest caution before concluding that *McIntyre* calls into question this part of the prevailing jurisdictional framework.

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80. *Id.* at 2793 (Breyer, J., concurring).

81. *Id.* at 2794; *see also* Transcript of Oral Argument at 52, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf (comment by Justice Breyer) ("I just read in the paper the other day there's some Ethiopian or some foreign country—it's a very poor country—and they're selling goats, and they're sending some to the United States for some kind of festival purpose or something. Now, he said, I have a site on the Internet.").

82. As Justice Ginsburg noted in her *McIntyre* dissent, "considerations of litigational convenience and the respective situations of the parties" could justify denying jurisdiction over a "defendant is a natural or legal person whose economic activities and legal involvements are largely home-based, *i.e.*, entities without designs to gain substantial revenue from sales in distant markets." *McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting). One might also treat such defendants differently under the first prong of the jurisdictional framework; arguably a defendant who lacks "designs to gain substantial revenue from sales in distant markets," *id.*, does not seek to serve those markets and, therefore, has not purposefully established minimum contacts with them. *See* Steinman, *supra* note 7, at 506 (discussing this possible understanding of Justice Ginsburg's dissent). That said, Justice Ginsburg's *McIntyre* dissent may reflect an approach to jurisdiction that does not draw a stark boundary between the two inquiries that crystallized during the 1980s. *Id.* at 507 ("Justice Ginsburg seemlessly presents fairly arguments that sound in both the first and the second prongs" (footnotes omitted)).

D. *The Relationship Between the Three* McIntyre *Opinions*

Because no opinion in *McIntyre* garners a majority of the Justices, any careful attempt to extract broader legal principles from *McIntyre* must consider how the three *McIntyre* opinions relate to one another. Several lower court decisions—state and federal—have concluded that Justice Kennedy's four-Justice plurality opinion cannot constitute the Supreme Court's holding in *McIntyre*.[83] One state court opinion, for example, wrote that Justice Kennedy's plurality "rejected a line of cases which it indicated have 'made foreseeability the touchstone of jurisdiction,'" but concluded that "[t]he plurality opinion alone cannot overrule this line of cases."[84] A federal district court opinion observed that "[t]he plurality opinion by Justice Kennedy . . . announced a standard for specific personal jurisdiction that is arguably stricter than the Supreme Court's previous standards," but made clear that "the plurality opinion by Justice Kennedy is not the precedential holding of the Supreme Court."[85]

On this point, these opinions and others recognize the impact of the so-called *Marks* rule.[86] In *Marks v. United States*,[87] the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[88] Several lower court opinions have stated that Justice Breyer's concurring opinion constitutes the *McIntyre* holding under *Marks*.[89]

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83. *See infra* notes 84-89 and accompanying text. The opinions discussed *supra* Part II.A have *not* stated that Justice Kennedy's opinion alone constitutes the Court's holding, although it is troubling that those opinions cite controversial aspects of Justice Kennedy's plurality without recognizing that they are in tension with earlier Supreme Court opinions. Every court to consider the issue explicitly has rejected the idea that Justice Kennedy's opinion alone is the *McIntyre* holding.

84. Esoterix Genetic Labs., L.L.C. v. McKey, No. 11 CVS 1379, 2011 WL 3667698, at *8 (N.C. Super. Ct. Aug. 22, 2011).

85. *Dram*, 2011 WL 4591902, at *2.

86. *Id.*; *Esoterix*, 2011 WL 3667698, at *8 (same); *see also infra* note 89.

87. 430 U.S. 188 (1977).

88. *Id.* at 193.

89. *See* UTC Fire & Security Americas Corp. v. NCS Power, Inc., No. 10 Civ. 6692(LTS)(THK), 2012 WL 423349, at *8 & n.6 (S.D.N.Y. Feb. 10, 2012) ("[B]ecause no opinion in *J. McIntyre* commanded five votes, Justice Breyer's concurrence controls." (citing *Marks*)); *Bluestone Innovations Texas*, 2011 WL 4591922, at *3 & n.3 (calling Justice Breyer's concurrence "[t]he controlling opinion"); Ainsworth v. Cargotex USA, Inc., 2011 WL 6291812, at *2 (S.D. Miss. Dec. 15, 2011) ("[I]n applying [*McIntyre*], the Court must consider Justice Breyer's concurring opinion as the holding of the Court, as he concurred in the judgment on the narrowest grounds.").

Lower courts seem to disagree, however, on what Justice Breyer's opinion stands for. One wrote that Justice Breyer does not commit to any particular jurisdictional standard and "would defer establishing a specific standard to a subsequent case."[90] Another wrote:

> Justice Breyer expressly declined to address the Supreme Court's split in *Asahi* as to whether mere foreseeability is a constitutionally sufficient basis for the exercise of personal jurisdiction under the stream-of-commerce theory. Instead, he considered *McIntyre*'s facts according to each side of the *Asahi* split and concluded that the record contained insufficient evidence to justify the exercise of personal jurisdiction under either analysis.[91]

Other decisions, by contrast, have read Justice Breyer (and Justice Kennedy as well) to endorse Justice O'Connor's approach in *Asahi*, thereby creating a majority holding on that principle. One federal district court opinion stated: "As this Court interprets *McIntyre*, the 'common denominator of the Court's reasoning' and 'a position approved by at least five Justices who support the judgment' is the 'stream-of-commerce plus' rubric enunciated in an opinion by Justice O'Connor in *Asahi*."[92] A similar sentiment was expressed by one state appellate court, which wrote that *McIntyre* "resolved" the question that had been "left open in *Asahi* . . . of whether placing products into the stream of commerce in a foreign country (or another state), aware that some may or will be swept into the forum state, is enough to subject a defendant to personal jurisdiction—or whether due pro-

90. *Esoterix*, 2011 WL 3667698, at *8.

91. *Ainsworth v. Cargotec USA, Inc.*, 2011 WL 6291812, at *2 (citations omitted); *see also id.*, 2011 WL 4443626, at *7 (Sept. 23, 2011) ("[R]ather than select one of the Supreme Court's past opinions as the controlling precedent to be applied in every case thereafter, Justice Breyer merely found that the plaintiff had failed to present evidence of purposeful availment under *any* of the Court's past opinions. He did not choose one of the *Asahi* plurality opinions as the controlling precedent." (emphasis in original)); *Oticon, Inc. v. Sebotek Hearing Sys.*, WL 3702423, at *9 ("Justice Breyer also emphasized that he was not ready to announce his own version of a stream-of-commerce test."); Sieg v. Sears Roebuck & Co., No. 3:10cv606, 2012 WL 610961, at *5 (M.D. Pa. Feb. 24, 2012) (noting "the failure of a Supreme Court majority [in *McIntyre*] to adopt clearly one of the two *Asahi* standards"); *see also Original Creations*, 2011 WL 4738268, at *4 ("I find that [*McIntyre*] do[es] not overturn the [Supreme] Court's earlier articulations of the stream of commerce theory.").

92. Smith v. Teledyne Continental Motors, Inc., No. 9:10cv2152, 9:10cv2546, 2012 WL 10836, at *2 (D.S.C. Jan.3, 2012); *see also id.* at *3 ("This view has come to be known as the 'stream-of-commerce plus' test. Although it did not win the support of a majority of the Court in *Asahi*, in the view of this Court, it has now done so in *McIntyre*."); Northern Ins. Co. v. Construction Navale Bordeaux, No. 11-60462-CV, 2011 WL 2682950, at *5 (S.D. Fla. July 11, 2011) (citing Justice Breyer's concurrence for the proposition that "'something more' than merely placing a product into the stream of commerce is required for personal jurisdiction").

cess requires that the defendant have engaged in additional conduct, directed at the forum."[93]

Lower courts have also framed their discussions of the *McIntyre* opinions in terms of foreseeability. Justice Kennedy aggressively critiques the relevance of foreseeability to determining the permissible scope of jurisdiction.[94] Lower courts have divided, however, over whether Justice Breyer's concurrence shares Justice Kennedy's view. One federal district court, for example, wrote that "Justice Breyer declined to adopt the plurality's holding that mere foreseeability that goods could wind up in a particular state could never form a constitutionally sufficient basis for the exercise of personal jurisdiction under the stream-of-commerce theory."[95] Another, however, "construes *McIntyre* as rejecting the foreseeability standard of personal jurisdiction," stating that this position "now commands the assent of six Justices of the Supreme Court."[96]

Finally, some lower courts have found in *McIntyre* a general principle that targeting the United States as a national market does not constitute targeting markets of the individual states that comprise the United States. According to one federal district court, "there is no doubt that *Nicastro* stands for the proposition that targeting the na-

93. Dow Chemical Canada v. Superior Court, 202 Cal. App. 4th 170, 172-73 (2011). An earlier decision in this case by the California appellate court was the subject of a U.S. Supreme Court petition for certiorari. After *McIntyre*, the Supreme Court vacated the earlier decision and remanded for further consideration in light of *McIntyre*, *see* Dow Chemical Canada ULC v. Fandino, 131 S. Ct. 2088 (2011), which led to the opinion quoted in the text.

94. *See infra* notes 101-102 and accompanying text.

95. UTC Fire & Security Americas Corp. v. NCS Power, Inc., 2012 WL 423349, at *8; *see also* Ainsworth v. Cargotec USA, Inc., 2011 WL 4443626, at *7 (S.D. Miss. Sept. 23, 2011) ("[Justice Breyer] did not reject the notion that mere foreseeability or awareness is a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce.").

96. Windsor v. Spinner Indus. Co., Ltd., No. JKB–10–114, 2011 WL 5005199, *4-5 (D. Md. Oct. 20, 2011); *see also id.* at *4 ("*McIntyre* clearly rejects foreseeability as the standard for personal jurisdiction"); *see also Oticon, Inc. v. Sebotek Hearing Sys.*, 2011 WL 3702423, at *9 ("Justice Breyer, in his concurrence, would not adopt as strict a rule as that enunciated by the plurality, but he too voiced his disagreement with the notion that mere foreseeability is the cornerstone of the stream-of-commerce jurisprudence."); *id.* at *12 ("Neither knowledge or expectation of sales to a particular forum state is enough to establish jurisdiction according to both the plurality opinion and the concurring opinion."). One district court, quoting Justice Breyer, characterized both Kennedy and Breyer as "rejecting rule that a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" Furminator, Inc. v. Wahba, No. 4:10CV01941 AGF, 2011 WL 3847390, at *5 (E.D. Mo. Aug. 29, 2011) (quoting *McIntyre*, 131 S. Ct. at 2793 (Breyer, J.) (emphasis by Justice Breyer)). For a discussion of this language from Justice Breyer's concurrence, *see infra* notes 116-118 and accompanying text.

tional market is *not* enough to impute jurisdiction to all the forum States."[97] Others, however, have continued to recognize that seeking to serve the U.S. market as a whole manifests an intention to serve the states that comprise it. As one Texas federal court explained in upholding jurisdiction: "[the defendant] has admitted that it inserted the accused products into the stream of commerce with the intention that the products reach a national market—that is, [the defendant] intended Texas consumers to purchase the products at issue in this lawsuit."[98]

The divisions described above concern some of the most crucial questions about what the *McIntyre* decision stands for. Correctly answering these questions requires understanding the relationship between the three *McIntyre* opinions. In particular, they hinge on Justice Breyer's concurring opinion (joined by Justice Alito), because that opinion ultimately provided the fifth (and sixth) votes rejecting jurisdiction in *McIntyre*. The next two Parts of this Essay explore these issues. As described below, *McIntyre* should not be read to mandate a more restrictive approach to personal jurisdiction.

III. *MCINTYRE*, FORESEEABILITY, AND *ASAHI*

Two issues over which lower courts have divided after *McIntyre* are (1) the role of "foreseeability" in assessing jurisdiction over an out-of-state defendant[99]; and (2) whether the disagreement between Justice O'Connor and Justice Brennan in *Asahi* has been resolved in favor of one or the other.[100] It is not clear that answering either of

97. *Oticon, Inc. v. Sebotek Hearing Sys.*, 2011 WL 3702423, at *9 (emphasis in original); *see also Dow Chemical Canada*, 202 Cal. App. 4th at 176-77 ([*McIntyre*] "considered whether the State of New Jersey could exercise jurisdiction over a foreign manufacturer solely because the manufacturer targeted the United States market for the sale of its product, which was purchased by a forum state consumer."). Related to this point, the district court in *Oticon* stated that *McIntyre* had therefore "overruled the line of cases exemplified by *Tobin, Barone,* and *Power Integrations*," 2011 WL 3702423, at *9, referring to several pre-*McIntyre* decisions, two of which Justice Ginsburg had cited approvingly in her *McIntyre* dissent. *See* 131 S. Ct. at 2805 (Ginsburg, J., dissenting) (citing Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613-15 (8th Cir. 1994); Tobin v. Astra Pharmaceutical Prods., Inc., 993 F.2d 528, 544 (6th Cir. 1993)); *see also* Power Integrations, Inc. v. BCD Semiconductor Corp., 547 F. Supp. 2d 365, 373 (D. Del. 2008).

98. Brooks & Baker v. Flambeau, 2011 WL 4591905, at *4; *see also* Soria, 958 N.E.2d at 297 (Ill. App. 2011) (noting that "Chrysler Canada indirectly shipped products into *the American market, including Illinois*, through Chrysler United States, its parent corporation" and that "Chrysler Canada continuously and intentionally serves or targets this market and is set up to manufacture vehicles for (and derives significant revenue from) *the United States market, including Chrysler dealerships throughout Illinois.*" (emphasis added)).

99. *See supra* notes 94-96 and accompanying text.

100. *See supra* notes 90-93 and accompanying text.

these questions in the abstract will provide much meaningful guidance on whether or not jurisdiction is proper in any given case going forward. But since the issue has attracted the attention of lower courts in the wake of *McIntyre*, it is worth taking a look at what the *McIntyre* opinions say about these issues.

With respect to foreseeability, Justice Kennedy's *McIntyre* plurality expended several paragraphs criticizing an approach to jurisdiction that would "discard[ ] the central concept of sovereign authority in favor of considerations of fairness and foreseeability."[101] He added that "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."[102]

Oddly, these parts of Justice Kennedy's opinion purported to challenge views exclusive to Justice Brennan's non-majority *Asahi* concurrence. Justice Kennedy wrote: "It was the premise of [Justice Brennan's] concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction."[103] In fact, it was the *World-Wide Volkswagen* majority that endorsed "foreseeability" as relevant to the constitutionality of jurisdiction,[104] writing that it was "critical to due process analysis" that "the defendant's conduct and connection with the forum State are such that he should *reasonably anticipate being haled into court there.*"[105] Additionally, it was the *World-Wide Volkswagen* majority that declared that a state may "assert[ ] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State."[106]

Admittedly, there is potentially a circular quality to *World-Wide Volkswagen*'s idea that jurisdiction must be "foreseeable" in the sense

101. *McIntyre*, 131 S. Ct. at 2788 (Kennedy, J.).

102. *Id.* at 2789.

103. *Id.* at 2788.

104. *World-Wide Volkswagen*, 444 U.S. 286, 297 ("This is not to say, of course, that foreseeability is wholly irrelevant.").

105. *Id.* (emphasis added). Indeed, that is precisely how Justice Brennan used the idea of foreseeability in his *Asahi* concurrence. Quoting *World-Wide Volkswagen* verbatim, Justice Brennan wrote:

> 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 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.

Asahi, 480 U.S. at 119 (Brennan, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

106. *World-Wide Volkswagen*, 444 U.S. at 298 (emphasis added) (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)).

that defendants "should reasonably anticipate being haled into court" in the forum state.[107] It is, after all, the jurisdictional principles *themselves* that would make jurisdiction foreseeable.[108] That said, it is inaccurate to say that the principle expressed in *World-Wide Volkswagen* and in Justice Brennan's *Asahi* concurrence would vest jurisdiction based on a defendant's "expectations" alone.[109] When a defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State,"[110] jurisdiction is based on an *action* ("deliver[ing] its products into the stream of commerce") that is *taken* with a particular expectation ("that they will be purchased by consumers in the forum State").

Whatever the merits of Justice Kennedy's arguments, one cannot plausibly read Justice Breyer's concurring opinion as adopting them. Most significantly, Justice Breyer quoted and applied the very language from *World-Wide Volkswagen* described above. He concluded that Mr. Nicastro had failed to show that J. McIntyre had *either* "'purposefully availed itself of the privilege of conducting activities' within New Jersey" *or* had "delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users."[111] That last clause—inquiring whether J. McIntyre had "delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users"—is straight from *World-Wide Volkswagen* and Justice Brennan's *Asahi* concurrence.[112]

Accordingly (and contrary to the views of some post-*McIntyre* lower courts[113]), it is wrong to read Justice Breyer as rejecting Justice

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107. *Id.* at 297.

108. *See, e.g.*, 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.").

109. *McIntyre*, 131 S. Ct. at 2789 (Kennedy, J.).

110. *World-Wide Volkswagen*, 444 U.S. at 298.

111. *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

112. Some of the lower court opinions described above have selectively quoted from Justice Breyer's concurrence to omit this part of his analysis. In *Dow Chemical Canada*, for example, the California Court of Appeals wrote:

> The concurrence [by Justice Breyer] noted no evidence of a "regular course" of sales in New Jersey, but it continued its assessment by pointing out: "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 jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey."

202 Cal. App. 4th at 178 (quoting *McIntyre*, 131 S. Ct. at 2792-93 (Breyer, J., concurring)).

113. *See supra* notes 92-93 and accompanying text.

Brennan's *Asahi* opinion in favor of Justice O'Connor's.[114] Likewise, Justice Breyer's opinion does not preclude consideration of foreseeability and a defendant's expectations. Again, his opinion considered whether the defendant had "delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users"[115]; he simply concluded that the *McIntyre* defendant had not done so.

Justice Breyer did reject one approach to determining the permissible scope of jurisdiction—one that he called "the absolute approach adopted by the New Jersey Supreme Court and urged by [Mr. Nicastro] and his *amici*."[116] Under this view, "a producer is subject to jurisdiction so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'"[117] Notably, Justice Breyer did *not* attribute this view to Justice Ginsburg and the *McIntyre* dissenters. And rightly so. Justice Ginsburg's dissent was not based on the "absolute approach" that Justice Breyer criticized. Rather Justice Ginsburg's approach was grounded in purposeful availment, pure and simple:

> 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 discrete collection of States. McIntyre UK thereby availed itself of the market of *all States* in which its products were sold by its exclusive distributor.[118]

Accordingly, just as it is too simplistic to characterize Justice Breyer as "rejecting the foreseeability standard of personal jurisdiction,"[119] it is too simplistic to characterize Justice Ginsburg as "embracing foreseeability as the standard of personal jurisdiction."[120] Relatedly, Justice Ginsburg's conclusion did not rest on a rejection of Justice O'Connor's *Asahi* logic in favor of Justice Brennan's. Justice Ginsburg's *McIntyre* dissent is entirely consistent with Justice O'Connor's requirement that a defendant must engage in conduct that "indicate[s] an intent or purpose to serve the market in the forum

114. On this issue, the opinions discussed *supra* notes 90-91 and accompanying text, have it right: Justice Breyer "did not choose one of the *Asahi* plurality opinions as the controlling precedent." Ainsworth v. Cargotec USA, Inc., 2011 WL 4443626, at *7 (S.D. Miss. Sept. 23, 2011).

115. *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring).

116. *Id.* at 2793.

117. *Id.* (quoting Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d at 592).

118. *Id.* at 2801 (Ginsburg, J., dissenting).

119. *Windsor*, 2011 WL 5005199, *4-5; *see also supra* note 96.

120. *Windsor*, 2011 WL 5005199, at *3.

State."[121] Justice Ginsburg merely recognized the geographic fact that the market of the United States includes the individual states that comprise it. Indeed, Justice O'Connor's *Asahi* opinion cited with approval two district court cases that had upheld jurisdiction on the theory that efforts to serve the U.S. market as a whole constitute purposeful efforts to serve the individual states that comprise the United States.[122] Although that scenario was not present in *Asahi*, Justice O'Connor's citation to those cases confirms that there is no fundamental conflict between her approach to minimum contacts and upholding jurisdiction in a case like *McIntyre*.

IV. UNDERSTANDING JUSTICE BREYER'S CONCURRENCE

At the end of the day, any attempt to extract broader legal principles from the fractured *McIntyre* decision will have to grapple with Justice Breyer's concurrence. Several lower courts have declared that Justice Breyer's opinion constitutes the *McIntyre* holding under the "narrowest grounds" rule of *Marks v. United States*.[123] Although the contours of the *Marks* rule are murky in some regards,[124] *Marks* certainly means that Justice Kennedy's four-Justice plurality cannot, standing alone, constitute the Supreme Court's holding in *McIntyre*. If any opinion qualifies under *Marks* as the one "concur[ring] . . . on

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

122. *See id.* at 112-13 (citing *Hicks v. Kawasaki Heavy Industries*, 452 F. Supp. 130 (M.D. Pa. 1978), and *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328 (E.D. Pa. 1982)); *Rockwell*, 553 F. Supp. at 330, 334 (noting that the defendant was "aware that the A-109 helicopter was targeted for the executive corporate transport market in the United States and Europe" and that "[g]iven the distribution system, [the defendant] had ample reason to know and expect that its bearing, as a unique part of a larger product, would be marketed in *any* or *all* states, including the Commonwealth of Pennsylvania"); *Hicks*, 452 F. Supp. at 134 (upholding jurisdiction in Pennsylvania over a Japanese motorcycle manufacturer's "indirect shipments of goods into the state" by its U.S. distributor, even though "the product was not directly placed in the state by [the Japanese manufacturer] but rather was marketed by one whom the [manufacturer] could foresee would cause the product to enter Pennsylvania"). For a more detailed discussion of *Rockwell* and *Hicks*, see Steinman, *supra* note 7, at 500-01.

123. 430 U.S. 188 (1977); *see supra* notes 86-89 and accompanying text.

124. *See, e.g.*, Nichols v. United States, 511 U.S. 738, 745 (1994) (stating that the *Marks* test "is more easily stated than applied to the various opinions supporting the result in *Baldasar* [*v. Illinois*, 446 U.S. 222 (1980)]"); *id.* at 745-46 (concluding that it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it," noting the view of some lower courts that "there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding"); *see also* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (citing and quoting *Nichols* and stating that the *Marks* test "is more easily stated than applied to the various opinion supporting the result in [*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)]" and that "[i]t does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it" (internal quotation marks omitted)).

the narrowest grounds,"[125] it would be Justice Breyer's. Put slightly differently, one would be hard-pressed to find in *McIntyre* a fifth vote for any new refinement of jurisdictional doctrine unless it appears in Justice Breyer's concurring opinion.

With respect to the overarching legal principles, Justice Breyer's concurring opinion shares more similarities with Justice Ginsburg's dissent than Justice Kennedy's plurality. For one thing, Justice Breyer affirmatively rejected significant aspects of Justice Kennedy's reasoning. He wrote: "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. . . . I do not agree with the plurality's seemingly strict no-jurisdiction rule."[126]

By contrast, Justice Breyer did not critique the legal standards employed by Justice Ginsburg. As discussed above, Justice Breyer criticized an "absolute approach" that he attributed to the New Jersey Supreme Court, not to Justice Ginsburg and the dissenters.[127] The key disagreement between Justice Breyer and Justice Ginsburg was not about the fundamental legal principles, but rather about what facts were properly considered in deciding the case.[128]

Justice Breyer's view of the factual record in *McIntyre* is crucial to making sense of his concurrence. He proceeded on the assumption that the *only* facts offered in support of jurisdiction were the following:

> (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.[129]

What is so telling about Justice Breyer's recounting of the factual record in *McIntyre* is that it excised J. McIntyre's overarching purpose of accessing the entire U.S. market for its products. Whereas Justice

125. *Marks*, 430 U.S. at 193.

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

127. *See supra* notes 116-118 and accompanying text.

128. *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring) ("There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. . . . I would take the facts precisely as the New Jersey Supreme Court stated them.").

129. *Id.* at 2791 (calling these the "three primary facts" on which the New Jersey Supreme Court "relied most heavily").

Ginsburg saw a defendant who "engaged" a U.S. distributor in order "to promote and sell its machines in the United States,"[130] and who took "purposeful step[s] to reach customers for its products anywhere in the United States,"[131] Justice Breyer saw a defendant who passively "permitted" and "wanted" such sales to occur.[132] With the record framed as Justice Breyer does, it is hard to see how a jurisdictional standard that hinges on a defendant's "purpose[ ]"[133] could ever be satisfied.

Justice Breyer's narrow view of the factual record also explains how he was able to reach the conclusion that J. McIntyre had not even "delivered its goods in the stream of commerce with the expectation that they will be purchased by New Jersey users."[134] In this regard, much can be learned from what Justice Breyer noted was *missing* from the factual record. Specifically, Justice Breyer indicated that a different result could be justified if the record contained "a list of potential New Jersey customers who might have regularly attended the trade shows" that J. McIntyre officials attended[135]; if the record had contained evidence of "the size and scope of New Jersey's scrap-metal business"[136]; or if the record revealed more than a single sale to a New Jersey customer.[137]

In recognizing that these facts could tip the scale in favor of jurisdiction, Justice Breyer's opinion can be reconciled with Justice Ginsburg's idea that minimum contacts are established when a defendant "seek[s] to exploit a multistate or global market" that includes the

130. *Id.* at 2801 (Ginsburg, J., dissenting).

131. *Id.* at 2797.

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

133. *Id.* at 2793 (noting the constitutional demand for "minimum contacts" and "purposeful availment").

134. *Id.* at 2792.

135. *Id.* ("He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows."); *cf. id.* at 2796 n.1 (Ginsburg, J., dissenting) (citing a 2011 member directory listing nearly 100 New Jersey business as belonging to the industry group that sponsored the trade shows).

136. *Id.* at 2792 (Breyer, J., concurring) (noting these as "other facts that Mr. Nicastro could have demonstrated in support of jurisdiction"); *cf. id.* at 2795 (Ginsburg, J., dissenting) (citing 2008 data on scrap metal recycling in New Jersey).

137. *See id.* at 2791 (Breyer, J., concurring) (noting that on his view of the record J. McIntyre's "American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio); *id.* at 2792 (relying on the premise that all three opinions in *Asahi* "strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place" (citing *Asahi,* 480 U.S. at 111, 112 (O'Connor, J.); *id.* at 117 (Brennan, J.); *id.,* at 122 (Stevens, J.))).

forum state.[138] Justice Breyer would just need a showing that potential New Jersey customers existed, thus creating an "expectation that [the defendant's products] will be purchased by New Jersey users."[139] If the record had contained "a list of potential New Jersey customers who might have regularly attended the trade shows" that J. McIntyre officials attended,[140] or evidence of "the size and scope of New Jersey's scrap-metal business,"[141] then that could create an expectation of purchases by New Jersey consumers. Either fact would confirm—even before any sales were made—that there was a potential market for J. McIntyre's products in New Jersey.

Even without such facts, the consummation of an actual sale to a New Jersey customer could create that expectation going forward.[142] At that point, J. McIntyre either would know or should know of the potential New Jersey market for its machines.[143] The purposeful act of delivering its product into the stream of commerce with that expectation would justify jurisdiction when the product is purchased and causes injury in New Jersey.[144] For Justice Breyer, however, no such

138. *J. McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

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

140. *Id.*; *see supra* note 135.

141. *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring); *see supra* note 136.

142. Although Justice Breyer notes that "the relevant facts found by the New Jersey Supreme Court show no regular flow or regular course of sales in New Jersey," *McIntyre*, 131 S. Ct. at 2792 (internal quotation marks omitted), he does not state that such a "regular flow" is required for jurisdiction to be proper. A "regular flow or regular course of sales in New Jersey" would have been *sufficient* for jurisdiction, *id.*, but Justice Breyer makes clear that Mr. Nicastro might also have *"otherwise* shown that the British Manufacturer . . . delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users." *Id.* (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

143. Accordingly, such additional facts would justify jurisdiction without adopting the "absolute approach" that Justice Breyer rejects. *Id.* at 2793. Under that approach, "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" *Id.* (quoting 987 A.2d at 592) Facts confirming the existence of actual or potential customers in the forum create an "expectation that [the defendant's products] will be purchased" by users in the forum, *id.* at 2792, rather than the mere speculation that a distribution system "*might* lead to those products being sold in any of the fifty states." *Id.* at 2793.

144. *See supra* notes 109-110 and accompanying text. Justice Breyer's concurrence, therefore, should not be read as endorsing a strict rule that jurisdiction is never proper when only a single sale is made to an in-forum purchaser. If an expectation of in-forum purchases is shown by *other* evidence, *see supra* text accompanying notes 139-141, then jurisdiction might be proper even if only a single sale is ultimately made. This understanding also reconciles Justice Breyer's concurrence with *McGee*. *See supra* note 58. The defendant in *McGee* had only a single customer in the forum (California), but it had a direct relationship with that customer and was unquestionably aware that it was providing life insurance to a California purchaser during the course of that relationship.

expectation is created when (1) there is only a single sale of the defendant's product to a customer in the forum state, and (2) there is no other evidence in the record suggesting potential customers in the forum state.

One can envision situations where *some* facts of the sort Justice Breyer identified would be necessary to create a true expectation of purchases by customers in the forum state. Consider, for example, scenarios where a defendant seeks to access the U.S. market as a whole but, as a practical matter, the market for the defendant's products exists only in some states (and not others). A manufacturer of grapefruit-harvesting equipment might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Alaska, North Dakota, or other states where grapefruit are not harvested. A manufacturer of cross-country skis might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Florida, Hawaii, or other states where cross-country skiing does not take place.

This is not to say that the machinery at issue in *McIntyre* presented such a scenario. But if we accept the premise that the burden is on the plaintiff to establish personal jurisdiction over the defendant,[145] one might need some evidence to confirm that a potential market exists in the particular state *within* the United States that seeks to exercise jurisdiction. Such an approach is not fundamentally inconsistent with the approach outlined by Justice Ginsburg in her dissent. It would simply require a slightly more robust factual record than Justice Breyer thought was present in *McIntyre*.

Accordingly, lower courts are wrong to read Justice Breyer's opinion as supporting the notion that a manufacturer who targets the U.S. market as a whole does not also target the individual states that comprise the U.S. market.[146] If one accepts Justice Breyer's antiseptically passive depiction of the factual record in *McIntyre*, it is hard to say that J. McIntyre was even "targeting" the general U.S. market.[147] In any event, as explained above, Justice Breyer's opinion is entirely consistent with allowing jurisdiction over defendants who seek to serve the U.S. market as a whole, provided the record suggests that

145. *See Insurance Corp. of Ireland*, 456 U.S. at 709 (noting the plaintiff's "burden of proof" with respect to personal jurisdiction); *But see* John Vail, *Six Questions in Light of* J. McIntyre, Ltd. v. Nicastro, 63 S.C. L. REV. 517 (2012) (arguing that the defendant should bear the burden of proving that a state court's assertion of jurisdiction is unconstitutional).

146. *See supra* note 97 and accompanying text.

147. *See supra* notes 129-133 and accompanying text.

potential customers for the defendant's product exist in the forum state.

V. CONCLUSION

The story of what *McIntyre* will mean for jurisdictional doctrine is only beginning to be written. Perhaps the Supreme Court itself will author a sequel in the not-too-distant future. Although it is possible that the lack of a majority opinion in *McIntyre* will prompt another twenty-year hibernation, the two concurring Justices—Breyer and Alito—indicate that they are open to "a change in present law" if presented with a case that provides "a better understanding of the relevant contemporary commercial circumstances," especially "a case (unlike [*McIntyre*]) in which the Solicitor General participates."[148] But until that next case reaches One First Street, lower courts must take care to avoid mistaking *McIntyre* for something it is not.

148. *McIntyre*, 131 S. Ct. at 2794 (Breyer, J., concurring).