PURPOSEFUL UN-AVAILMENT: WHY A JUSTICE BRENNAN APPROACH TO PERSONAL JURISDICTION WOULD SAVE INDIANA FROM THE PROBLEMS OF *NICASTRO*

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"The Law of Five. With five votes, you can do anything around here."[1]

INTRODUCTION

On June 27, 2011, the United States Supreme Court issued an opinion that legal scholars had hoped would clear up the murky waters surrounding the establishment of personal jurisdiction of foreign corporations through the "stream of commerce"[2] theory—unfortunately, it failed in every way.

That opinion was *J. McIntyre Machinery, Ltd. v. Nicastro*[3] ("*Nicastro*"), which attempted to increase the purposeful availment necessary to subject a foreign corporation to personal jurisdiction in the United States, even after a corporation has released its products into the stream of commerce.

More specifically, *Nicastro* held that the stream of commerce metaphor cannot supersede the Due Process Clause, and a state may only have jurisdiction over a defendant when there have been other actions that show an intention to target that state, aside from the sale of the products within the state.[4] The opinion was a letdown for those hoping that the Supreme Court would clear up the twenty-year-old stream of commerce problem facing the nation's courts. *Nicastro* split the court 4-2-3, and its non-binding opinion of the Court established a severely strict interpretation of past precedent, which was condemned by a majority of the Justices (even though two Justices concurred in the overall judgment).

Before *Nicastro*, when stream of commerce jurisdiction challenges arose in state and lower federal courts, the guiding precedent was *Asahi Metal Industry Co. v. Superior Court of California*.[5] *Asahi* proffered an even split between Justices O'Connor and Brennan in how the stream of commerce theory should be applied. Justice O'Connor's opinion held that for jurisdiction to be valid under

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1. Nat Hentoff, *The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45 (quoting Justice Brennan's "rule of five").

2. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298-99 (1980) (holding that a "[s]tate does not exceed its powers under the Due Process Clause [by exercising] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that [its products] will be purchased in [that] [s]tate").

3. 131 S. Ct. 2780 (2011).

4. *Id*. at 2785.

5. 480 U.S. 102 (1987).

the Due Process Clause, not only must it be foreseeable that a product will reach a certain forum, but the defendant must also have taken some other tangible actions to target that specific forum.[6] Justice Brennan believed that Justice O'Connor went too far in her analysis; he believed that merely introducing a product into the stream of commerce would, in fact, establish minimum contacts, but other "notions of fair play and substantial justice" could make holding a defendant subject to the jurisdiction of certain forums offensive to the Due Process Clause.[7] Because neither approach attracted five votes, lower courts were free to choose between the two concurring opinions. In what seems to be a legal oddity, Indiana's state courts have not explicitly ruled on which approach stream of commerce jurisdiction should apply following the *Asahi* decision.

The purpose of this Note is twofold. First, the Note investigates the dangers the plurality in *Nicastro* advocated. Second, the Note proposes that Indiana use its unique position without precedent in the area of stream of commerce personal jurisdiction to lead the way in adopting the consistent approach espoused by Justice Brennan. Part I discusses the personal jurisdiction precedent of the Supreme Court before *Asahi*, with an emphasis on what Justice Brennan wrote, if applicable, for each case. Part II discusses *Asahi*, the famous split between Justice O'Connor and Justice Brennan, and the problems this split has caused various courts in the United States before *Nicastro*. Part III briefly recaps the *Nicastro* opinion and discusses the problems left over by the opinion. Part IV then discusses the history of personal jurisdiction in Indiana. Finally, Part V proposes specific solutions for Indiana to take in order to establish a consistent and constitutional approach to personal jurisdiction in the state.

I. *PENNOYER* TO *BURGER KING*: THE CONSTITUTIONALIZATION OF PERSONAL JURISDICTION

A. Pennoyer v. Neff[8]

Historically, personal jurisdiction analysis has assumed that a state has legal control over matters within its jurisdictional limits and, therefore, that a state has both legislative jurisdiction to establish laws and judicial jurisdiction to adjudicate disputes involving those laws within its territory.[9] Before 1878, interstate jurisdictional cases were decided from two sides: the plaintiff argued that the Full Faith and Credit Clause[10] and the Full Faith and Credit Act[11]

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6. *Id*. at 112-13.

7. *Id*. at 118-20 (Brennan, J., concurring).

8. 95 U.S. 714 (5 Otto) (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

9. Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 685 (2009).

10. U.S. CONST. art. IV, § 1.

11. Act of May 26, 1790, ch. 11, 1 Stat. 122, *amended by* Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. § 1738 (2006)).

demanded that his judgment be enforced in the defendant's state, and the defendant argued that the Full Faith and Credit Clause, through the Full Faith and Credit Act, contained an exception for judgments delivered "in violation of the prevailing international law standards of jurisdiction."[12] *D'Arcy v. Ketchum*[13] established that a collateral attack on a sister state's judgment for lack of personal jurisdiction did not offend the Full Faith and Credit Clause or the Full Faith and Credit Act.[14] Further, the Court held that courts could enforce rules of personal jurisdiction in accordance with only principles of international law as the Court understood them, and no constitutional directive was needed.[15] However, in 1868 the Due Process Clause was incorporated into the Constitution when the states ratified the Fourteenth Amendment.[16] Therefore, when faced with the Court's first jurisdictional challenge after the ratification of the Due Process Clause, the Court invoked the Clause to convert its previous interstate principles into a "general applicability that would govern" all jurisdictional challenges.[17]

Pennoyer held that it was unconstitutional under the Due Process Clause for a state to assume jurisdiction over an individual who was not served in that state or had not consented to jurisdiction in that state.[18] The Court succinctly stated its views on *in personam* jurisdiction when it wrote,

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to deter mine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[19]

In rem jurisdiction was proper against non-residents only when the defendant was both served with process, and the property was brought under the control of the state and was the subject of the case itself.[20]

While later overturned in part,[21] *Pennoyer* was the first case to restrict jurisdiction of a state court through the Due Process Clause, which is still the basis courts use in personal jurisdictional analyses.[22] However, at the time, the

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12. 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, 30 (1990) [hereinafter Borchers, *Death*].

13. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850).

14. *Id.* at 175-76.

15. Borchers, *Death*, *supra* note 12, at 28-29.

16. U.S. CONST. amend. XIV, § 1.

17. Borchers, *Death*, *supra* note 12, at 36-37.

18. Pennoyer v. Neff, 95 U.S.(5 Otto) 714, 733 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

19. *Id*.

20. *Id.* at 733-34.

21. *See Shaffer*, 433 U.S. at 212.

22. Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the*

question remained: what role was due process to play in personal jurisdiction?[23] An expansive view of *Pennoyer* allowed courts to deem "unconstitutional any state court assertion of personal jurisdiction beyond [its] territorial principles and allow a defendant to [make any jurisdictional] attack [on] the judgment."[24] A limited view of *Pennoyer* is that the Court intended for the Due Process Clause to provide at least one opportunity to challenge a state's exercise of personal jurisdiction in all cases, but it did not intend to have the Due Process Clause dictate what those jurisdictional statutes contained.[25] Nearly forty years after *Pennoyer*, the Court firmly adopted the expansive view in *Riverside & Dan River Cotton Mills, Inc. v. Menefee*.[26] The Court settled on the notion that a due process challenge can be made at any time, and the limited reading of *Pennoyer* simply delays the inevitable.[27] By adopting the expansive view, the Court rejected the notion that the states are free to determine their own jurisdictional statutes, even if they provide an avenue to challenge that jurisdiction.[28] When *Riverside* was decided, the Court had finally endorsed the constitutional due process requirements of each jurisdictional challenge that was vaguely present in *Pennoyer*, leading the way for modern-day personal jurisdiction rules to form.

B. International Shoe Co. v. Washington[29]

By 1945, the notion of the Due Process Clause controlling a state's exercise of personal jurisdiction was well settled.[30] In between *Riverside* and *International Shoe*, the Court's personal jurisdiction "doctrine limited the reach of state courts to defendants who were either served with process within [the] state['s] borders, who had consented either expressly or implicitly to jurisdiction, or to those deemed to be 'present' within the state by virtue of 'doing business' there."[31] However, the rise of interstate corporate transactions, which often did not fit into one of the previously defined categories, caused the Court "to revise the doctrine substantially[,]" while still using the Due Process Clause as the guideline for jurisdictional legality.[32]

International Shoe established a test that would find jurisdiction over a non-resident corporation that had sufficient minimum contacts within the forum state

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Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1246 (2011) [hereinafter Borchers, *Incoherence*].

23. Borchers, *Death*, *supra* note 12, at 38-39.

24. *Id.* at 39.

25. *Id.* at 40.

26. 237 U.S. 189, 195-96 (1915).

27. Borchers, *Death*, *supra* note 12, at 50-51.

28. *Id.*

29. 326 U.S. 310 (1945).

30. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 621 (2006).

31. *Id.* (footnotes omitted).

32. *Id.* at 621-22.

and adequate notice.[33] Contacts would qualify as "minimum" depending on the nature, quality, and relationship to the underlying cause of the suit.[34] "[S]ystematic and continuous" substantial contacts could warrant the exercise of personal jurisdiction even if the contacts and the claim were not related.[35] A single and isolated contact could only warrant the exercise of jurisdiction if it was related to the underlying cause of the action.[36] The Court's new test eliminated "the requirement of in-state service or presence" within the state—although either would still suffice for jurisdiction—for a test focused on "minimum contacts" that would serve as a proxy of presence.[37] The Court maintained that the Due Process Clause restrained jurisdiction of the state courts, but it reiterated that due process only required that a defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[38]

International Shoe was a progressive decision that allowed for states to enforce their unemployment statutes and other workplace-related statutes against out-of-state corporations.[39] Further, the decision vastly expanded a state's power "to exercise jurisdiction over an out-of-state defendant, and also enhanced governmental power to deal with societal needs, enforce innovations across state lines, and . . . nationalize New Deal reforms."[40] Although it established a new "minimum contacts" test, the question then became: what were the outer limits of "minimum contacts," and what characteristics of the contacts were necessary to ensure all defendants were receiving their required due process of law?

C. The Brennan Years: 1956-1989

On October 16, 1956, Justice William J. Brennan was sworn in as the ninetieth justice to serve on the United States Supreme Court.[41] Entering the Court after *International Shoe* had been decided, Justice Brennan would begin to issue a series of opinions that remained remarkably loyal to the original tenets of *International Shoe*. Reliably, Justice Brennan would show respect to the original meaning of the term "minimum contacts," while consistently analyzing jurisdiction on a case-by-case basis to assure that a state's assertion of jurisdiction did "not offend 'traditional notions of fair play and substantial justice.'"[42]

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33. *Int'l Shoe Co.*, 326 U.S. at 320.

34. *Id.* at 316-18 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

35. *Id.* at 318, 320.

36. *Id.* at 317-19.

37. Spencer, *supra* note 30, at 621-22.

38. *Id*. at 634.

39. Laughlin, *supra* note 9, at 691.

40. *Id*.

41. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 95 (2010).

42. Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

In *McGee v. International Life Insurance Co.*,[43] the Court noted two constructive reasons for extending personal jurisdiction over out-of-state defendants.[44] The first reason was necessity: allowing for states to exercise jurisdiction over non-residents was necessary to accommodate the increased commercial flow between states.[45] The second reason was that the burden of travelling to defend oneself in a lawsuit had lessened due to increased progress in communications and travel.[46] The Court unanimously held that a California long-arm statute was not unconstitutional due to an insurance company's substantial and continuous contacts with the plaintiff.[47] This case did not stray from the central tenets of *International Shoe*, but it is important because it was Justice Brennan's first jurisdictional decision as a member of the Supreme Court.

The next important case in the Supreme Court's jurisdictional precedent was *Hanson v. Denckla*.[48] In *Hanson*, the Court held that the unilateral activity of a single person who has some relation to a non-resident defendant does not fulfill the minimum contacts test to hold the defendant to personal jurisdiction in the forum state.[49] *Hanson* was the first case to hold that there must be not only minimum contacts with the forum state, but also "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."[50] The Court cited *International Shoe* after that passage, but the term "purposeful availment" is not present in *International Shoe*, and this term would slowly bubble its way throughout the proceeding personal jurisdiction opinions, and eventually play a large, but inappropriate, role in *Nicastro*.

Justice Brennan did not write his own dissent in *Hanson*, but he signed onto Justice Black's dissent, which represents Justice Brennan's first official declaration of his position on personal jurisdiction. Justice Black wrote,

> It seems to me that where a transaction has as much relationship to a State as [Plaintiff's] appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice."[51]

This stance continued to grow until it fully manifested itself in Justice Brennan's concurrence in *Asahi*. This statement is indicative of how Justice Brennan would

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43. 355 U.S. 220 (1957).
44. *Id.* at 222-23.
45. *Id.*
46. *Id.* at 223.
47. *Id.* at 224.
48. 357 U.S. 235 (1958).
49. *Id.* at 253-54, 256.
50. *Id.* at 253.
51. *Id.* at 258-59 (Black, J., dissenting) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

treat personal jurisdiction questions in the future: were there minimum contacts, and would exercising jurisdiction offend traditional notions of fair play and substantial justice?

The next major personal jurisdiction case did not come through the Supreme Court until 1977, when *Shaffer v. Heitner* was decided.[52] *Shaffer* rid the landscape of *in rem* and *quasi in rem* jurisdiction and held that all assertions of state court jurisdiction must be evaluated according to the minimum contacts standard set by *International Shoe*.[53] However, it also held that mere ownership of property (in this case, shares of stock) in a state is not a sufficient contact to subject the property owner to a lawsuit in that state unless that property is the basis of the suit.[54]

Justice Brennan concurred in part and dissented in part in *Shaffer*.[55] He agreed with the portions of the majority's opinion that applied the minimum contacts test to all jurisdictional questions.[56] However, Justice Brennan dissented as to how that test was applied to the case at bar.[57] This was Justice Brennan's first authored dissent in a jurisdictional case, and the recurring refrains of individual fairness and forum state interests continued in his writings on the subject until his retirement. Justice Brennan wrote in *Shaffer*:

> [T]he chartering State has an unusually powerful interest in insuring the availability of a convenient forum for litigating claims involving a possible multiplicity of defendant fiduciaries and for vindicating the State's substantive policies regarding the management of its domestic corporations.
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> In this instance, Delaware can point to at least three interrelated public policies that are furthered by its assertion of jurisdiction.
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> . . . .
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> At the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy.[58]

The majority in *Shaffer* was not far off from the approach taken by Justice Brennan. The plaintiff in the case argued, and Justice Brennan agreed, that forum states have a strong interest in supervising the management of a forum corporation, but the majority stated that because Delaware had not enacted a statute designed to protect that supposed interest, that the interest could not be as great as the plaintiff claimed it to be.[59] When the majority wrote that if the forum

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52. 433 U.S. 186 (1977).
53. *Id.* at 216-17.
54. *Id.*
55. *Id.* at 219 (Brennan, J., concurring in part and dissenting in part).
56. *Id.* at 219-20.
57. *Id.*
58. *Id.* at 222-23, 225.
59. Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts*

state "perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as [the plaintiff] suggests, we would expect it to have enacted a statute more clearly designed to protect that interest[,]" it seemed to be inviting a legislative response.[60] Therefore, after the decision was handed down, the Delaware legislature adopted a statute that provided that all "officers and directors of [corporations] incorporated in Delaware impliedly consent to jurisdiction.[61] The Delaware Supreme Court went on to declare this statute constitutional."[62] This legislative response shows that even traditionally conservative members of the Court are open to states expressly codifying the outer edges of their long-arm statutes to make known which interests each individual state holds dear. This is important to point out because it is an example of a state taking action that allows states to take control of their own personal jurisdiction rules in the wake of the Supreme Court's fractured personal jurisdiction jurisprudence, which is what I suggest Indiana do, either legislatively or judicially.

The next case in the long line of jurisdictional cases was truly a game changer, and it set in motion the chain of cases that would lead to the disaster of *Nicastro*. *World-Wide Volkswagen Corp. v. Woodson*[63] was a landmark case due to the fact that it was the first to address the possibility of establishing personal jurisdiction through "the stream of commerce."[64] This case established what has become the Supreme Court's primary policy concern when conducting a jurisdictional analysis: to protect defendants against burdens of litigating in a distant or inconvenient forum and to insure that states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[65] The Court then established relevant factors to consider when determining jurisdiction over a non-resident defendant: (1) burden on the defendant against "the forum [s]tate's interest in adjudicating the dispute"; (2) "the plaintiff's interest in obtaining convenient and effective relief"; (3) the "efficient resolution of controversies" in the interstate judicial system; and (4) "the shared interest of the several [s]tates in furthering fundamental substantive, social policies."[66] However, even when the burden on the defendant is minimal and the forum state has a high interest in adjudicating the dispute, it is still a violation of due process to hold jurisdiction over a defendant who has not purposefully availed himself to the forum state.[67]

Apply the Supreme Court Standard for Personal Jurisdiction, 18 HASTINGS CONST. L.Q. 441, 445, 453-55 & 455 n.81 (1991).

60. *Shaffer*, 433 U.S. at 214-15.

61. Borchers, *Incoherence*, *supra* note 22, at 1273 & n.217 (citing DEL. CODE ANN. tit. 10, § 3114 (2011)).

62. *See* Armstrong v. Pomerance, 423 A.2d 174, 176-79 (Del. 1980).

63. 444 U.S. 286 (1980).

64. *Id.* at 298.

65. *Id.* at 292.

66. *Id.*

67. *Id.* at 294.

Once again, Justice Brennan dissented.[68] Justice Brennan stated, "The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends 'traditional notions of fair play and substantial justice.'"[69] Justice Brennan continued, "[t]he existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness. . . . Another consideration is the actual burden a defendant must bear in defending the suit in the forum."[70]

Justice Brennan dismissed the idea that "travel" would not be unconstitutionally inconvenient on its face.[71] Instead, he stated that if evidence or witnesses "were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home . . . would [place a] special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests."[72]

Justice Brennan also took a much more practical sense of foreseeability when compared with the majority opinion. Justice Brennan believed that a company that sells automobiles could have reasonably foreseen that its product would be moved from state to state. "When an action in fact causes injury in another State, the actor should be prepared to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed."[73] Justice Brennan was not concerned with the "best contacts."[74] Instead, he was simply concerned with whether the minimum contacts espoused in *International Shoe* were present, and Justice Brennan realized that the Court was drastically moving away from this.

The next major personal jurisdiction case to come through the Supreme Court, *Burger King Corp. v. Rudzewicz*,[75] was the only time in Justice Brennan's long line of personal jurisdiction cases in which he wrote the majority opinion; however, he still held true to his consistent concerns of fairness, foreseeability, and forum state interests. In this case, the defendant was in a business relationship with Burger King as an individual franchisee in Michigan, while Burger King's headquarters were located in Miami, Florida.[76] When the franchisee breached the franchise agreement, Burger King sued to enforce the contract pursuant to Florida's long-arm statute, which provides that franchisees are subject to jurisdiction in the state for "actions arising out of its franchise

68. *Id.* at 299 (Brennan, J., dissenting).
69. *Id.* at 300 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
70. *Id.* at 300-01.
71. *Id.* at 301.
72. *Id.*
73. *Id.* at 311.
74. *Id.* at 301, 311.
75. 471 U.S. 462 (1985).
76. *Id.* at 464, 466.

agreements."[77] Due to the defendant's "substantial and continuing relationship with Burger King's Miami headquarters," Justice Brennan held that there was no violation of the franchisee's due process rights because he "should [have] reasonably anticipate[d] being haled into court" there.[78] Justice Brennan did note that there was some inconvenience for this man to defend himself against Burger King in Florida, but, staying true to his dissent in *Volkswagen*, Justice Brennan stated that the inconvenience here was not substantial enough to rise to the level of a "*constitutional* magnitude" because the burden mostly involved simple travel.[79] Justice Brennan did say, though, that not all interstate transactions should cause reasonable anticipation of being sued in the other state.[80] For instance, Justice Brennan wrote that "[t]he 'quality and nature' of an interstate transaction may sometimes be so 'random,' 'fortuitous,' or 'attenuated' that it cannot fairly be said that the potential defendant 'should reasonably anticipate being haled into court' in another jurisdiction."[81]

At this point, Justice Brennan had consistently remained true to the original tenets of *International Shoe* in the Court's personal jurisdiction opinions. He had voted in favor of both a single individual against a major corporation in *World-Wide Volkswagen* and in favor of a major corporation against a single individual in *Burger King*. He applied the standard of "traditional notions of fair play and substantial justice," no matter the parties, when voting on a jurisdictional case. Further, he seemed to be gaining favor with his fellow Justices when assigned to write the majority opinion in *Burger King*. However, a case was on its way to the Court that would radically split its members and cause a jumbled mess of personal jurisdiction jurisprudence throughout the country.

II. *ASAHI* AND ITS PROGENY

Before *Nicastro*,[82] *Asahi Metal Industry Co. v. Superior Court of California*[83] was the preeminent stream of commerce opinion relied on by the lower courts for personal jurisdiction questions. In *Asahi*, the petitioner was a Japanese manufacturer of tire valve assemblies, which it sold to several different tire manufacturers, including a Taiwanese corporation, Cheng Shin Rubber Industrial Co.[84] The valve assemblies were manufactured in Japan and delivered to Taiwan, and the finished tires were shipped to California, where the accident at the root of the case occurred.[85] The Justices were unanimous as to the question of whether

77. *Id.* at 467-69.

78. *Id.* at 486-87.

79. *Id.* at 483-84.

80. *Id.* at 486.

81. *Id.* (footnote omitted) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

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

83. 480 U.S. 102, 106 (1987).

84. *Id.* at 105-06.

85. *Id.* at 106.

California should have jurisdiction over a Japanese corporation's indemnification of a Taiwanese corporation (all American parties had either dropped or settled out of the suit), but the Court split radically as to how the stream of commerce theory should be interpreted.

Justice O'Connor wrote the opinion of the court, but the significant portion of the opinion dealing with the application of the stream of commerce theory only attracted four total votes, resulting in a now-famous split of the Court.[86] Joined by three other members of the Court, Justice Brennan authored a concurrence discussing his beliefs on the stream of commerce theory.[87] Justice Stevens did not side with either Justice O'Connor or Justice Brennan, and this caused the case to be split with a 4-4-1 vote, leaving multiple options for lower courts to follow.[88]

In Justice O'Connor's portion of the opinion, she concluded that resale of component products, even absent other factors indicating an intention to serve the forum market, would not establish minimum contacts.[89] Justice Brennan wrote that resale of component products was sufficient for jurisdiction, even without other indications of intent to serve the forum market.[90] Justice Brennan once again showed his consistency in applying the minimum contacts test and in balancing those contacts with fairness and foreseeability. According to Justice Brennan, "This is one of those rare cases in which minimum requirements inherent in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."[91] Justice Brennan believed that Justice O'Connor misapplied the stream of commerce theory in *World-Wide Volkswagen*.[92] Justice Brennan wrote, "The Court in *World-Wide Volkswagen* thus took great care to distinguish 'between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there.'"[93] Therefore, Justice Brennan believed the lower court correctly took note of this distinction and correctly found jurisdiction over Asahi.

The legal world had hoped *Asahi* would clear up the test for personal jurisdiction "at a time when lower courts and parties were having an extremely difficult time trying to 'apply' the Court's maddeningly unstable constitutional

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86. *Id.* at 105.

87. *Id.* at 116 (Brennan, J., dissenting).

88. *Id.* at 121 (Stevens, J., concurring).

89. *Id.* at 112 (unanimous opinion) (listing such other indicators of intent as forum-state advertising, "establishing channels for providing regular advice to customers in the forum [s]tate, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum [s]tate").

90. *Id.* at 116 (Brennan, J., dissenting).

91. *Id.* (alterations in original) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)) (internal quotation marks omitted).

92. *Id.* at 119-20.

93. *Id.* at 120 (alteration in original) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306-07 (1980) (Brennan, J., dissenting)).

'test' for personal jurisdiction."[94] Instead, *Asahi* simply increased the confusion regarding which factors are most important in a due process personal jurisdiction analysis. The "federalism" and "sovereignty" factors in the jurisdictional calculus have been particularly vexing.[95] In the twenty-nine-year period prior to *Asahi*, the Court accepted, then rejected, then accepted, then rejected, and then accepted it again when it decided *Asahi*.[96]

Predictably, after *Asahi* failed to resolve the dispute between the competing factions on how the minimum contacts test should be applied when a product finds its way to a distant forum state, the circuit courts split drastically in choosing whether to follow Justice O'Connor's opinion or that of Justice Brennan.[97] The First, Fourth, Sixth, Ninth, and Eleventh Circuits employed Justice O'Connor's "foreseeability plus" test.[98] The Fifth, Seventh, and Eighth Circuits employed Justice Brennan's "mere foreseeability" test.[99] The Second and Federal Circuits expressly used both tests when deciding whether minimum contacts exist to justify jurisdiction.[100] State courts are also drastically divided.[101]

"[T]he minimum contacts test's criteria are confused, its purposes perplexing, and its results often unpredictable."[102] However, Justice Brennan remained remarkably consistent in his analyses when compared with the attempts of his brethren on the Court. The *Asahi* problem simmered for two decades, and when the Supreme Court granted certiorari in *Nicastro*,[103] it seemed as if the "purpose was to resolve the [infamous] *Asahi* split."[104]

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94. Borchers, *Death*, *supra* note 12, at 77.

95. *Id.*

96. *Id.* at 78 (These cases, in order of decision, are *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980); *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113-15 (1987).).

97. Laughlin, *supra* note 9, at 703.

98. *See, e.g.*, Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 479-80 (6th Cir. 2003) (following Justice O'Connor's "stream of commerce 'plus' theory"); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945-46 (4th Cir. 1994); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992); Madara v. Hall, 916 F.2d, 1510, 1519 (11th Cir. 1990).

99. *See, e.g.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613-15 (8th Cir. 1994) (following Justice Brennan's stream of commerce test); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (same).

100. *See, e.g.*, Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 244 (2d Cir. 1999); Akro Corp. v. Luker, 45 F.3d 1541, 1545, 1549 (Fed. Cir. 1995) (following *International Shoe*'s purposeful availment test for patent infringement cases).

101. Laughlin, *supra* note 9, at 703-04 & 704 n.132.

102. Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998).

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

104. Borchers, *Incoherence*, *supra* note 22, at 1249 (italics added).

III. *NICASTRO*: A RECAP AND CRITIQUE

Nicastro arose "from a products-liability suit filed in [a] New Jersey state court."[105] Plaintiff Robert Nicastro severed four fingers from his hand while using a metal shearing machine that J. McIntyre Machinery, Ltd. had manufactured.[106] The machine was manufactured in England, but the accident occurred in New Jersey.[107] The opinion of the Court stated the issue in *Nicastro* as such: "Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction."[108] A plurality of the Court (Chief Justice Roberts and Justices Kennedy, Thomas, and Scalia) held that the exercise of personal jurisdiction in this case was inappropriate.[109]

Justice Kennedy, writing the opinion of the Court, attributed this lack of clarity presented in the case at issue to the "decades-old questions left open in *Asahi*."[110] However, one commenter wrote, "This was uncharitable, even to the splintered *Asahi Metal Industry Co. v. Superior Court of California* Court. What the plurality described is the issue in essentially every close jurisdictional case, not just the stream-of-commerce cases such as *Asahi*."[111]

In regards to this case, the plurality pointed to the three facts given by Nicastro's counsel that would tend to support New Jersey's assertion of jurisdiction over J. McIntyre Machinery.[112]

> First, . . . J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's control. Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey. Third, no more than four machines (the record suggests only one), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.[113]

Thus, the Court minimized J. McIntyre's connection to New Jersey but still announced that the New Jersey Supreme Court erred in finding jurisdiction, and it attributed this error to *Asahi* stating, "[T]his case presents an opportunity to

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105. *Nicastro*, 131 S. Ct. at 2786.
106. *Id.*
107. *Id.*
108. *Id.* at 2785.
109. *Id.* at 2785, 2791.
110. *Id.* at 2785.
111. Borchers, *Incoherence*, *supra* note 22, at 1253.
112. *Nicastro*, 131 S. Ct. at 2786.
113. *Id.* (citation omitted).

provide greater clarity."[114]

The plurality then stated that "[f]reeform notions of fundamental fairness divorced from traditional practice" based on *International Shoe*'s "traditional notions of fair play and substantial justice" language, "cannot transform a judgment rendered in the absence of authority into law."[115] The plurality wrote:

> As a general rule, the sovereign's exercise of power requires 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."
>
> . . . .
>
> In other words, submission 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.'[116]

The plurality then attributed these lower court errors to the deficiencies in the relationship between jurisdiction and the "stream of commerce" theory espoused in *Asahi*.[117] For instance:

> This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market.[118]

The plurality stated that the principal inquiry in stream of commerce cases such as this was "whether the defendant's activities manifest an intention to submit to the power of a sovereign."[119]

Reviewing the O'Connor-Brennan *Asahi* split, the plurality sided with Justice O'Connor.[120] However, the plurality also gave a more restricted view of a state's lawful exercise of personal jurisdiction by stating that the defendant must have actually "targeted the forum[,]" and it was not enough for the defendant to "have predicted that its goods will reach the forum [s]tate."[121] The plurality expressly rejected Brennan's analysis when it stated, "Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is

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114. *Id.*

115. *Id.* at 2787.

116. *Id.* at 2787-88 (citation omitted).

117. *Id.* at 2788.

118. *Id.* (citation omitted) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 298 (1980)).

119. *Id.*

120. *Id.*

121. *Id.*

inconsistent with the premises of lawful judicial power."[122]

The plurality then dove headlong into a stubborn analysis of why a "sovereign–by-sovereign"[123] analysis is necessary. In essence, the plurality wanted to reiterate that each personal jurisdiction case must analyze each sovereign involved and the interactions between them, as opposed to an objective constitutional analysis to each case. In a roundabout way, the plurality seems to sidestep precedent in order to strong arm its sovereignty analysis into the opinion by disregarding a plaintiff's interest in having a convenient forum for her claim for a defendant's individual liberty.[124] Next, the plurality off-handedly seemed to endorse a national contacts test, at least in cases in which the relevant contacts were with the federal government: "assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts."[125] The plurality also revived the discredited interstate federalism dicta from *World-Wide Volkswagen* when it stated, "[I]f 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."[126] Further discrediting Justice Brennan's opinion in *Asahi*, the plurality completely ignored Justice Brennan's endorsement of the reasonableness check on jurisdiction. Ironically, Justice Brennan's opinion likely would have voided jurisdiction in all of the unnatural hypotheticals posited by the plurality and concurrence.

Gearing down, the plurality noted that while J. McIntyre targeted the United States as a whole, it did not specifically target New Jersey, which caused them to posit whether Congress would be able to enact a federal long-arm statute that would authorize jurisdiction.[127] And finally, the Court dismissed the notion that a New Jersey plaintiff, injured in New Jersey, would need access to a convenient forum.[128] That need, was a minor obstacle that must give way to the liberty interests of the English manufacturer.[129] In essence, the liberty interests of foreign corporations in being sued in the correct forum substantially outweigh the need for injured citizens to have a convenient forum to litigate disputes.

Justice Brennan would not appreciate the approach taken by the plurality. The plurality attempted to make state sovereignty the key analysis when determining whether or not personal jurisdiction is appropriate. However, Justice Brennan's dissent in *World-Wide Volkswagen* proclaims that state sovereignty and the forum state's interest in adjudicating the dispute are equal factors when determining whether jurisdiction is appropriate.[130] Further, the plurality in this

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122. *Id.* at 2789.
123. *Id.*
124. *Id.*
125. *Id.* at 2790.
126. *Id.* at 2789.
127. *Id.* at 2790.
128. *Id.* at 2790-91.
129. *Id.* at 2791.
130. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J.,

case seems to disregard whether or not burden on the defendant is an important issue in jurisdictional analyses due to the overarching needs of sister states to not step on any other state's fingers. However, Justice Brennan believes that not only should burden on the defendant be a factor to be considered, it is the actual burden on each defendant that must be taken into account.[131] And of course, Justice Brennan believed that *International Shoe* allowed for the significance of the contacts between the defendant and the forum state to be lessened should other considerations make jurisdiction seem unfair and unreasonable.[132] Essentially, jurisdiction issues should be evaluated on a case-by-case basis that takes each jurisdictional element into account, and the *Nicastro* plurality expressly avoided taking any steps towards explaining anything besides state sovereignty. Justice Brennan would believe that the plurality's approach in *Nicastro* did not stay true to the original tenets of *International Shoe*, and his approach could easily have come to the same conclusion, without continuing to further muddle the existing unclear jurisprudence regarding personal jurisdiction.

A. Nicastro *Concurrence and Dissent*

This strict-sovereignty approach taken by the plurality was roundly denounced by both the concurrence, which was written by Justice Breyer and joined by Justice Alito,[133] and the dissent, which was written by Justice Ginsburg and joined by Justices Sotomayor and Kagan.[134]

Justice Breyer "noted that the New Jersey Supreme Court's broad conception of personal jurisdiction rested in part on its view of the realities of global commerce[,]" but Justice Breyer felt that this case was not the proper "vehicle to examine those issues" because it did not present the current realties of global commerce.[135] In fact, this case presented no unique issues of material fact to the Court.[136] Because it presented no new issues facing the current global economy, Justice Breyer felt that the Court's current precedent controlled.[137] Because only one machine was sold to a New Jersey customer, jurisdiction would not be appropriate under either the Justice O'Connor or Justice Brennan test from *Asahi*.[138] The main concern of Justice Breyer's concurrence was how strict the plurality's sovereignty-based approach would play out in a case that provided a current economic problem.[139] For instance, how would the plurality's test treat

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dissenting).

131. *Id.* at 300-01.

132. *Id.* at 301-02.

133. *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

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

135. *See* Borchers, *Incoherence*, *supra* note 22, at 1257.

136. *Id.*

137. *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

138. *Id.* at 2791-92.

139. *Id.* at 2792.

a huge online retailer like Amazon?[140] Justice Breyer used a list of attenuated hypotheticals to disagree with the New Jersey Supreme Court.[141] Similar to the plurality, Justice Breyer completely ignored the reasonableness test that united the entire *Asahi* Court, which would have given him the answer to his own hypotheticals.

Justice Brennan would have a little bit more respect for the concurrence in *Nicastro* than the plurality's opinion in the case. Justice Breyer's main reason for denying jurisdiction was the fact that only one machine ended up in New Jersey.[142] However, Justice Brennan would have declared this machine reaching New Jersey as a sufficient minimum contact and then moved along to the next step in his jurisdictional analysis, mainly determining whether or not jurisdiction would have offend the traditional notions of fair play and substantial justice tenets of *International Shoe*. Justice Breyer ignored these steps and instead focused on exaggerated hypotheticals, which could have easily been answered by examining a Justice Brennan approach to the situation.

The dissent argued that the plurality was allowing J. McIntyre to hide behind its distributor to avoid jurisdiction in the United States, except perhaps in states where it sold large quantities of its product.[143] The dissent pointed out some case-specific facts that would have established sufficient contacts.[144] For instance, New Jersey processes more scrap metal than any other U.S. state, so New Jersey was inevitably a target market for a manufacturer of scrap metal processing machines.[145] As to the plurality's sovereignty-based analysis, Justice Ginsburg noted that because a foreign defendant was involved, no argument could be made that New Jersey's exercise of jurisdiction would "tread on the domain, or diminish the sovereignty, of any sister State."[146] Also, the Court had previously rejected the notion that state sovereignty concerns could dictate the result of a jurisdictional challenge, and that the last time the Court had tried to use state sovereignty as the foundation for the minimum contacts test, the Court rejected that view merely two years later.[147]

B. Binding Authority Left by the Nicastro *Decision*

Nicastro did not attract a majority of five justices.[148] Plurality opinions still

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140. *Id.* at 2793.

141. *See id.* (speculating about "a small manufacturer (say an Appalachian producer) 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)").

142. *Id.* at 2791 (plurality opinion).

143. *Id.* at 2795 (Ginsburg, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.* at 2798.

147. *See id.* (citing *Insurance Corp.*'s disagreement with the need for a state sovereignty based test for minimum contacts set out in *World-Wide Volkswagen Corp.*).

148. *Id.* at 2780 (plurality opinion).

can provide binding authority on lower courts even though no single approach garners the five votes needed for a majority.[149] *Marks v. United States* established that when a decision of the Court lacks a majority opinion, the Court's holding is the "position taken by those [Justices] who concurred in the judgments on the narrowest grounds."[150] The *Marks* rule does not apply unless "the narrowest opinion . . . represent[s] a common denominator of the Court's reasoning [and] embod[ies] a position implicitly approved by at least five Justices who support the judgment."[151]

When comparing the plurality and the concurrence in *Nicastro*, it becomes difficult to identify the narrowest grounds of agreement of the concurring opinions. Some courts have attempted to find the narrowest grounds in *Nicastro*, but some of these interpretations still leave room for alternative interpretations of the case. In *Smith v. Teledyne Continental Motors, Inc.*, the court decided that *Nicastro* was the controlling case for jurisdiction matters; therefore, the court needed to ascertain the narrowest grounds of *Nicastro* in order to identify the precedent to follow.[152] First, the district court correctly described the plurality's reasoning when it stated, "[F]our Justices expressed their strong view that the propriety of exercising personal jurisdiction should be based on concepts of national or state sovereignty rather than on foreseeability, convenience or the interests of the judicial system."[153] The district court pivoted though, when it stated, "However, when this mode of analysis was applied to the facts (which reflected minimal activity by the defendant), the rationale was similar to Justice O'Connor's 'stream-of-commerce plus' test. The plurality emphatically rejected the pure 'foreseeability' test, advocated by a dissenting opinion in which three Justices joined."[154] Further, because the *Nicastro* concurrence believes Justice O'Connor's opinion in *Asahi* should have controlled in the case, the district court determined that six Justices agreed that the O'Connor *Asahi* analysis is now binding law.[155] Other courts are taking this path as well.[156]

However, other district courts believe that *Nicastro* provides no clear position on which approach to a stream of commerce theory the courts should follow.[157] The district court of Delaware noted that Justice Breyer's *Nicastro* concurrence listed factors such as "how large the manufacturer is, the distance of the forum, and the number of items that end up in the forum" state as important

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

150. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

151. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991).

152. Smith v. Teledyne Continental Motors, Inc., 840 F. Supp. 2d 927, 929-30 (D.S.C. 2012).

153. *Id.* at 931 (citing *Nicastro*, 131 S. Ct. at 2789-90).

154. *Id.* (citation omitted).

155. *Id.* at 929-31.

156. *See* Oticon, Inc. v. Sebotek Hearing Sys., LLC, 865 F. Supp. 2d 501, 511-12 (D.N.J. 2011).

157. Eastman Chem. Co. v. Alphabet Inc., No. 09-971-LPS-CJB, 2011 WL 6004079, at *18, (D. Del. Nov. 4, 2011).

considerations in jurisdictional analysis.[158] Therefore, the court held that the personal jurisdiction question is still an open one, and that neither the Justice Brennan nor Justice O'Connor approach is binding law.[159]

Even though these two cases were only at the district court level, they are important in showing how easily courts can disagree on what constitutes the narrowest grounds of the *Nicastro* opinion. Putting aside questions of whether Justice Brennan's or Justice O'Connor's approach is correct, the almost instantaneous fracture of district courts attempting to interpret *Nicastro* points to the inherent problems in the opinion. Possibly, the narrowest holding of *Nicastro* is that personal jurisdiction was not appropriate in regards to the specific facts of the case. Therefore, when a state like Indiana has a chance to rule on a stream of commerce issue, it should not feel bound by any portion of the *Nicastro* opinion because determining the narrowest possible ground of the plurality and concurring Justices is not as simple as it looks.

C. Inherent Problems with the Nicastro *Plurality's Reasoning*

Nicastro was supposed to answer the jurisdictional question left by *Asahi*; instead, the split opinion carries the potential to leave the already precarious personal jurisdiction jurisprudence of the United States splintered in its wake. *Nicastro* raises four main problems. First, it recategorizes the horizontal federalism concerns of personal jurisdiction questions from matters of state sovereignty to matters of individual liberty, and this misguided concern led the plurality to write the opinion in such a way that could end up having an adverse impact on the federal courts.[160] Second, the way in which the plurality formulated its opinion provides a blueprint for future foreign companies to shield themselves from litigation in the United States.[161] Third, the plurality and the concurrence ignored a key aspect of Justice Brennan's binding aspect of jurisdictional analysis, which would have allowed them to reach the same conclusion without taking such a strict stance.[162] Last, and most simply, the Court failed to give meaningful guidance to the courts already confused by *Asahi*.[163]

It came as a surprise when the *Nicastro* opinion's first line discussing the Due Process Clause's role in personal jurisdiction had to do with protecting an individual's liberty.[164] The plurality's due process analysis is succinctly recapped

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158. *Id.*

159. *Id.*

160. Allan Erbsen, *Personal Jurisdiction,* McIntyre v. Nicastro*, and Horizontal Federalism*, PRAWFSBLAWG (Aug. 17, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/08/personal-jurisdiction-mcintyre-v-nicastro-and-horizontal-federalism.html.

161. Howard Wasserman, *Clarifying Personal Jurisdiction . . . Or Not*, PRAWFSBLAWG (June 28, 2011, 4:05 PM), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/clarifying-personal-jurisdiction-or-not.html.

162. *Id.*

163. *Id.*

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

by stating,

> The plurality essentially contended that: (1) limits on personal jurisdiction exist to protect "individual liberty" rather than as "a matter of state sovereignty"; (2) liberty is important because of the Due Process Clause; (3) the Due Process Clause "protects the individual's right to be subject only to lawful power"; and (4) power is lawful only if it is within the "sovereign" "authority" of the forum state.[165]

Further, in regards to the scope of a State's adjudicative jurisdiction, the plurality completed the following "chain of reasoning": "limits on jurisdiction implicate liberty, liberty implicates due process, due process requires focusing on state authority, and state authority is a function of the forum state's position among other coequal actors in a federal system."[166] Therefore, the plurality would have us believe that the scope of a state's adjudicatory power and horizontal federalism are forever intertwined.[167]

Horizontal federalism may be a prism through which to fix the current personal jurisdiction crises, but there are three main problems with the plurality's usage of horizontal federalism that do not allow it to achieve that goal. First, the plurality was not clear on "how the theory that it [espoused] led to the test that it announced."[168] Consistent with past precedent, the plurality concluded "that purposeful targeting of the forum is . . . a necessary prerequisite for jurisdiction," but the plurality did not consider why

> a doctrine ostensibly focused on state authority in a federal system should prioritize the defendant's subjective intent over . . . the forum state's interest in providing a remedy, objective facts about the defendant's profit from activities in the forum, and the defendant's ability to bear the cost of litigating in the forum.[169]

Therefore, the plurality departs from reasoning "of why jurisdictional limits exist without reconsidering prior accounts of how jurisdictional limits operate."[170]

Also, the plurality fails to take into account the implications its horizontal federalism reasoning would have on areas of law other than personal jurisdiction, mainly, choice of law.[171] For instance, the plurality first stated,

> The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This 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

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165. Erbsen, *supra* note 160 (citation omitted).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

> prescribe rules of conduct for those within its sphere. As a general rule, neither statute nor judicial decree may bind strangers to the State.[172]

The plurality is saying here that personal jurisdiction and choice of law inquiries are similar; "states may not exercise 'lawful power' over [non-residents]."[173] However, the plurality later observed 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."[174] So, different factors may be present for jurisdictional and choice of law analyses; therefore, someone may "be a stranger for jurisdictional purposes but not for choice of law purposes."[175] The plurality never addressed "which aspect[s] of asserting jurisdiction over a person, as compared to applying a [certain state's] statute to" a person differ.[176] Instead of answering the question, the plurality simply repeated tests espoused in past jurisdictional cases "without explaining why those tests did not also apply in the choice of law context."[177] The failure to compare the two is an error of great issue, for certainly in this case, "modern choice of law doctrine . . . would allow [for an] application of New Jersey law to the plaintiff's claim, . . . even though the defendant did not 'purposefully direct' its conduct to New Jersey."[178] Erbsen concludes quite powerfully, "[A]pparently the lawful exercise of sovereign authority over a reluctant defendant does not always require the sort of purposefully targeted conduct that the plurality extols in its blunt rhetoric about due process."[179]

The final problem with the Court's horizontal federalism analysis is best captured by a hypothetical. The plurality mentioned that it may be possible for J. McIntyre Machinery, Ltd. to be subject to federal jurisdiction pursuant to an act of Congress, should one be enacted.[180] However, it is not inconceivable that a federal court and a state court would lease space in the same facility.[181] "[T]wo plaintiffs could sue the British manufacturer on identical claims; one would file in state court, and one in federal court.[182] Assuming these court rooms were on the same floor, the British manufacturer would have no defense to personal jurisdiction in the federal case, but mere feet away, "the manufacturer could bristle at the outrage of being sued in a New Jersey court in violation of its right

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172. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786-87 (2011) (citations omitted).

173. Erbsen, *supra* note 160.

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

175. Erbsen, *supra* note 160.

176. *Id.*

177. *Id.*

178. *Id.* (explaining that because the accident occurred in New Jersey and the injury was to an employee of a business in New Jersey that choice of law would allow for New Jersey law to be applied here).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

to liberty and due process."[183] Theoretically, the defendant may be justified in his outrage, but simply removing the case to a courtroom twenty feet away "takes some of the sting out of the defendant's invocation of liberty interests."[184]

Esoteric concerns like horizontal federalism are certainly important, but *Nicastro* has simpler and more powerful problems embedded within its pages. First, the plurality has inadvertently given future manufacturers a blueprint for avoiding jurisdiction in the United States. Nicastro was a British company that sought to sell its machines throughout the entire United States by selling them through a distributor in Ohio who would target any and all states.[185] According to six members of the Court, this was insufficient to establish jurisdiction in New Jersey, but it might have created minimum contacts with the United States as a whole, subject to an act of Congress.[186] Therefore, as long as this hypothetical act of Congress remains hypothetical, there is nothing to stop foreign corporations from following J. McIntyre's blueprint to avoid jurisdiction in any court in the United States. In fact, some in the media have noted the Supreme Court's decisions from the October 2010 term for their astounding capacity to not only rule in favor of businesses such as J. McIntyre, but also for its capacity to make patently clear to other companies like them how to avoid lawsuits.[187]

Further, both "[t]he plurality and the concurrence completely ignored the second part of the personal jurisdiction analysis."[188] After determining whether a defendant has minimum contacts with the forum State, the factors laid out in *World-Wide Volkswagen* (which is still binding law) are to be examined to determine if exerting jurisdiction over the defendant would "offend 'traditional notions of fair play and substantial justice.'"[189] The total disregard for this aspect of the jurisdictional analysis is made even more absurd when both the plurality and the concurrence list hypothetical cases that, at best, seem to be begging the question about proper jurisdiction in the first place. The plurality is concerned about a small Florida grower of fruit, who sells to a distributor, who then sells the fruit to Alaska.[190] The concurrence is concerned with an "Appalachian potter," who in turn sells to a distributor, who sells the pottery to Hawaii.[191] What the plurality and concurrence were trying to convey by conveniently having these minor products travel extremely long distances actually hurts their argument. Just as Justice Brennan did in *Asahi*, the plurality and the concurrence could have come to the same ultimate conclusion (that jurisdiction was not appropriate) using

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183. *Id.*

184. *Id.*

185. Wasserman, *supra* note 161.

186. *Id.*

187. Dahlia Lithwick, *Operation Instructions*, SLATE (July 1, 2011, 5:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/07/operating_instructions.html.

188. Wasserman, *supra* note 161.

189. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

190. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011).

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

the factors to determine whether it would offend traditional notions of fair play and substantial justice.[192] Surely, if one box of oranges reached Alaska, or one set of dishes made its way to Hawaii, the concepts of fair play and substantial justice would provide plenty of protection for the small business owners contemplated by the plurality's and concurrence's reference to poor small business owners.

Finally, the *Nicastro* opinion stands out for more than just its faulty reasoning. In fact, the opinion's opening paragraph draws attention to *Nicastro*'s ultimate irony. The plurality states in its opening paragraph, "The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court of California.*"[193] Again, the Court as a whole did nothing to clear up the questions that had been open for decades. In fact, this may end up becoming *Nicastro*'s biggest albatross. For what are courts to do when faced with novel issues of jurisdictional challenges when the Justices on the Supreme Court of the United States cannot even agree?

IV. PERSONAL JURISDICTION IN INDIANA

Surprisingly, Indiana state courts have never ruled on the jurisdictional issues raised in a stream of commerce case. When a stream of commerce issue inevitably arises in this State, Indiana will have an opportunity to lead the way on reform this country badly needs. However, to understand why Indiana would be a good state to lead this reform, a brief explain the history of personal jurisdiction in the State may be beneficial.

Indiana Trial Rule 4.4(A) ("T.R. 4.4") sets out Indiana's long-arm statute:

> Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent:
>
> (1) doing any business in this state;
> (2) causing personal injury or property damage by an act or omission done within this state;
> (3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;
> (4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;
> (5) owning, using, or possessing any real property or an interest in real

192. Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 116 (1987) (Brennan, J. concurring).

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

> property within this state;
> (6) contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made;
> (7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state; or
> (8) abusing, harassing, or disturbing the peace of, or violating a protective or restraining order for the protection of, any person within the state by an act or omission done in this state, or outside this state if the act or omission is part of a continuing course of conduct having an effect in this state.
>
> In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.[194]

When the rule was written, the drafters intended for "an 'enumerated acts' rule."[195] This type of long-arm statute identifies "specific acts" that would support personal jurisdiction in Indiana if committed by a person[196] Conveniently, Indiana has deemed a corporation a person for jurisdictional purposes.[197] "The first seven acts were . . . part of the original long-arm statute."[198] In 1997, the Indiana Supreme Court added the "breach of peace" element, and in 2003 it "added the 'any constitutional basis'" element.[199]

Even though it was "adopted as an 'enumerated acts' statute, the framers of the Indiana rule provided [numerous] important clues regarding the intended scope of T.R. 4.4."[200] In regards to T.R. 4.4, the Civil Code Study Commission comments stated:

> The adoption of [T.R. 4.4] will expand the in personam jurisdiction of the courts of this state to the limits permitted under the Due Process Clause of the Fourteenth Amendment. . . . [I]t must appear that the defendant over whom jurisdiction is asserted has had such "minimum contacts" with the state as to render it consistent with "traditional notions of fair play and substantial justice."[201]

From the mid-1980's to 2003, the procedure to determine if Indiana should

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194. IND. R. TRIAL P. 4.4(A).

195. 21 STEPHEN E. ARTHUR & JEROME L. WITHERED, INDIANA PRACTICE SERIES: CIVIL TRIAL PRACTICE § 5.2 (2d ed.2013).

196. *Id.*

197. *See id.* (citing Woodmar Coin Ctr., Inc. v. Owen, 447 N.E.2d 618 (Ind. Ct. App. 1983)).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).

assert personal jurisdiction over a defendant was a two-step analysis.[202] First, the court must find that the defendant committed one of the eight enumerated acts listed in the rule.[203] Then the court would conduct an "*International Shoe* analysis [to] determine [if] the defendant had established sufficient 'minimum contacts' with Indiana so that the court's assertion of jurisdiction would not 'offend traditional notions of fair play and substantial justice.'"[204]

Even though a two-step process was created to determine jurisdiction in Indiana courts, the courts themselves began to interpret T.R. 4.4(A) as one that should be defined less by the enumerated acts, and more by the outer limits provided by the Due Process Clause.[205] The Indiana Court of Appeals quickly determined that "T.R. 4.4(A)(1) extends the personal jurisdiction of Indiana courts over nonresident defendants 'doing any business in this state' to the limits permitted by the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment."[206] In fact, the District Court for the Southern District of Indiana, in *Oddi v. Mariner-Denver, Inc.*, had already taken this approach in 1978, stating that the way in which the two-step process was constructed automatically collapses the analysis into a search for due process limits.[207] Even the Seventh Circuit Court of Appeals concluded the same when it stated, "These twin inquiries collapse into one. . . . Indiana's long-arm statute extends personal jurisdiction to the limit allowed under the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment. Accordingly, we shall focus on whether assertion of jurisdiction in this case violates due process."[208] However, in 2000, the Indiana Supreme Court rejected the argument that the two-step analysis collapses into a one-step analysis and mandated that all courts "follow the two-part jurisdictional inquiry."[209] In 2003, the Court then "added the 'any constitutional basis'" language to T.R. 4.4(A), although the court did not delete the eight enumerated acts.[210] And in 2006, after numerous interpretations from the federal courts serving Indiana,[211] the Indiana Supreme Court finally determined that the 2003 "any constitutional basis" amendment was intended to eliminate the need for a two-step due process analysis.[212] The enumerated acts remain in place, but they are only intended to serve as a "checklist" of activities and circumstances that would most likely support

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202. *Id.*

203. *Id.*

204. *See id.* (citing *Int'l Shoe Co.*, 326 U.S. at 316).

205. *Id.*

206. *Id.* (citing Griese-Traylor Corp. v. Lemmons, 424 N.E.2d 173 (Ind. Ct. App. 1981)).

207. *Id.* (citing Oddi v. Mariner-Denver, Inc., 461 F. Supp. 306 (S.D. Ind. 1978)).

208. *Id.* (citing Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir. 1990)).

209. *Id.* (citing Anthem Ins. Cos. v. Tenet Healthcare Corp., 730 N.E.2d 1227 (Ind. 2000)).

210. *Id.*

211. *Id.* (citing Peterson v. Farrakhan, No. 2:03-CV-319 PS, 2006 WL 1722362 (N.D. Ind. June 22, 2006), Emp. Benefit Managers., Inc. v. Medex Transition Admin. Co., No. 1:04-cv-443-TS, 2006 WL 897438 (N.D. Ind. Mar. 31, 2006), U.S. Sch. of Golf, Inc. v. Biltmore Golf, Inc., No. 1:05 CV 0373 DFH TAB, 2005 WL 3022005 (S.D. Ind. Nov. 10, 2005)).

212. *Id.* (citing LinkAmerica Corp. v. Albert, 857 N.E.2d 961 (Ind. 2006)).

Indiana's jurisdiction over a non-resident defendant.[213]

Only one time has a stream of commerce case been decided after *Asahi* using the Indiana long-arm statute.[214] Looking back on the case, it is remarkably similar to the fact pattern that played out in *Nicastro*. The decision in *Roberts v. Owens-Corning Fiberglass Corp.* was a denial of a motion to dismiss for lack of personal and subject matter jurisdiction.[215] The named defendant successfully impleaded Bell Asbestos Mines Ltd. ("Bell") because its asbestos was the cause of the Roberts' injury.[216] "Bell argue[d] that it did not purposefully direct its activities toward [Indiana]" because "[i]t did not register to do business in Indiana" and has no "agents, employees, offices, bank accounts, or property in [Indiana]."[217] Bell claimed that the only way its product could end up in Indiana was through "the autonomous actions of a third party[,]" and, thus, it could not be held to have directed its activities towards a forum state because its products were not specially tailored towards any specific forum state.[218] The court discredited these arguments because the portion of *World-Wide Volkswagen* that *Asahi* relied upon related to a consumer's unilateral act of bringing a product into the forum state.[219] The court wrote that the situation is substantially different in which "a corporation transfers its product to a manufacturer or distributor with the expectation that either of them would deliver the product into the stream of commerce."[220] Bell further argued that once its asbestos was sold "f.o.b. Thetford Mines, Quebec, . . . the purchaser assumed control of the product . . . and independently decided where it would go from there."[221] However, "nothing in [*Asahi* or] *World-Wide Volkswagen* 'suggests that . . . a foreign manufacturer or seller rids itself of title by a sale F.O.B. a foreign port is enough to insulate that manufacturer or seller from jurisdiction.'"[222] The district court roundly discredited all of Bell's jurisdictional claims when it stated,

> Personal jurisdiction does not depend on a mechanical or formalistic test, such as where title passes, but on a practical and realistic approach to determining the purpose of a defendant's conduct. The appearance of Bell's asbestos in this state was not random or fortuitous, but was the result of a conscious effort by Bell to exploit a chain of distribution so entrenched that it embraced all of the major trading areas of the United States, including Indiana.[223]

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213. *LinkAmerica Corp.*, 857 N.E.2d at 967.
214. Roberts v. Owens-Corning Fiberglass Corp., 101 F. Supp. 2d 1076 (S.D. Ind. 1999).
215. *Id.* at 1078, 1089.
216. *Id.* at 1078-79.
217. *Id.* at 1080.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 1082-83.
222. *Id.* at 1083 (quoting Renner v. Lanard Toys Ltd., 33 F.3d 277, 282 (3d Cir. 1994)).
223. *Id.* (citation omitted).

Roberts is a case where the court decided that a foreign corporation does not offend the Due Process Clause by using a third party distributor to serve the United States. Further, the *Roberts* court analyzed the Due Process Clause under T.R. 4.4. While the rule itself is nothing special, it gives more guidance to Indiana when it comes time for its state courts to finally determine the issue for themselves.

V. SUGGESTIONS FOR INDIANA COURTS

Indiana state courts have never ruled on a stream of commerce case, either before or after *Asahi*. This places Indiana in the unique position of having *World-Wide Volkswagen*, *Asahi*, and *Nicastro* as guideposts at its disposal should the issue ever arise in the state courts. However, even with these cases to draw from, there still remains no binding approach to take on the issue. Because of this, Indiana should feel safe in interpreting its own view on what the outer edges of the Due Process Clause are when establishing personal jurisdiction through the stream of commerce. Quite simply, Indiana should adopt Justice Brennan's "mere foreseeability" position, which he embraced in *Asahi* and all of his previous writings. Further, Indiana should add an act to its enumerated statute that allows for jurisdiction over distributors having a substantial foreseeability that their products will end up in Indiana. These two steps would firmly entrench Indiana in a Justice Brennan approach to personal jurisdiction and provide protection for its citizens and local businesses, all while remaining constitutional.

There are numerous arguments in support of why this would not only be the best application over all, but the Justice Brennan philosophy would be the best for Indiana specifically. First, concerns for regional unity support a Justice Brennan analysis for personal jurisdiction in Indiana. Second, the particular concerns the plurality and concurrence have for the small Florida citrus grower and the small Appalachian potter are fully accounted for in a Justice Brennan analysis because the analysis does not simply stop at mere foreseeability; it continues into a fairness analysis that courts today seem to ignore. Finally, adopting the Justice Brennan standard allows for Indiana to protect its citizenry while continuing to allow for truly inappropriate jurisdictional claims to be dismissed through a traditional fairness test that determines if jurisdiction would "offend traditional notions of fair play and substantial justice."

The Seventh Circuit and the one case interpreting T.R. 4.4 through the stream of commerce lens both follow a Justice Brennan analysis.[224] The Seventh Circuit has held that "[u]nder the stream of commerce theory [the plaintiff's] case is resolved on his behalf by noting that [the defendant] sold fireworks to [a third party] with the knowledge that its fireworks would reach Illinois consumers in the stream of commerce."[225] While the plurality in *Nicastro* discredits Justice Brennan's approach in *Asahi*, it did not gain a majority. Further, even though

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224. *See* Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992); Roberts v. Owens-Corning Fiberglass Corp., 101 F. Supp. 2d 1076 (S.D. Ind. 1999).

225. *Dehmlow*, 963 F.2d at 947.

some plurality opinions hold within them some binding authority, it is disputable at worst whether or not any rationale was adopted by the *Nicastro* court. Immediately after the opinion was released, courts have split on what portion of *Nicastro* is binding.[226] *Roberts* draws a distinct comparison to the facts of *Nicastro*; a foreign manufacturer freely allowed a third party to purchase its product and place it into the stream of commerce for the entire United States, and asserting personal jurisdiction over the foreign corporation would not violate the Due Process Clause.[227] These opinions provide Indiana with enormous guidance on how the stream of commerce issue has been handled within the state and region up to this point, and courts may feel secure in taking a Justice Brennan approach towards the issue because of these opinions.

Indiana simply should interpret the Due Process with a Justice Brennan analysis and add another enumerated act onto its long-arm statute. By adding an enumerated act that provides for jurisdiction over a person or corporation that places its goods into the stream of commerce with a "substantial foreseeability" that it will reach *any* state (including Indiana), the act will give even further guidance to Indiana trial and appellate courts. The fact that the enumerated acts in the long-arm statute currently are only guidelines actually makes Indiana's case stronger. By adding a "substantially foreseeable" enumerated act, the statute tells those who read it that Indiana finds a *Nicastro* situation comfortably within the limits of the constitution. Also, taking a Justice Brennan position by adding an enumerated act would show that Indiana is willing to protect its individual citizens and local businesses over the liberty interests of large foreign corporations by providing individuals with a convenient forum for suits that arise within Indiana. If a foreign corporation knows that Indiana is a leading state in the industry that a corporation serves, Indiana should serve as a "substantially foreseeable" forum. Taking the Justice Brennan approach, along with adding an enumerated act to T.R. 4.4(A), will put all foreign corporations on notice of their responsible for any injury they cause within the state.

Adopting the Justice Brennan approach to the stream of commerce question would not open up the floodgates to lawsuits in which there is one random and attenuated contact by a large corporation to a state. The mere foreseeability approach only establishes that a minimum contact was made. Indiana courts would still be able to take the facts of each case into account to determine if holding the defendant to personal jurisdiction would offend traditional notions of fair play and substantial justice. While different judges may have varying interpretations of what is fair or not, the Justice Brennan approach provides the most stability. By sticking with this approach, the disaster that *Nicastro* brought us would cease. No longer would the interpretations of what, when, and how the Due Process Clause is violated change each time a case works its way up the

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226. *Compare* Smith v. Teledyne Cont'l Motors, Inc., 840 F. Supp. 2d 927, 931 (D.S.C. 2012) (claiming that six Justices had agreed on Justice O'Connor's "foreseeability plus" test), *with* Eastman Chem. Co. v. Alphabet Inc., No. 09-971-LPS-CJB, 2011 WL 6004079, at *18 (D. Del. Nov. 4, 2011) (claiming that the narrowest grounds of the *Nicastro* ruling are unclear).

227. *Roberts*, 101 F. Supp. 2d at 1083.

judicial system. Instead, the Justice Brennan approach would keep the door open to holding jurisdiction over corporations that cause a substantial amount of actual harm within the state. The *Nicastro* Court goes too far in this regard. By taking the *Nicastro* plurality's approach, numerous lawsuits would never even be able to get off of the ground. The Justice Brennan approach at least allows for plaintiffs to argue that their defendants should be held to jurisdiction in a specific forum. Providing this opportunity to Indiana citizens should be more important than worrying about the liberty interests of foreign corporations, and the Justice Brennan approach allows for this to be a reality.

Nicastro was a tragic decision in many ways. The drastic steps it took to curtail jurisdiction over foreign corporations who use independent domestic distributors were unnecessary and will provide American citizens no recourse against those that injure them. And, most apparently, no portion of the opinion garnered a majority, leaving American courts continuing to struggle in their attempts to interpret the Due Process Clause limitations on jurisdiction. Indiana is in a prime position to establish a clear and concise approach to personal jurisdiction. By adopting a Justice Brennan approach, it will allow for more case-by-case analyses of jurisdiction, as opposed to drafting overreaching and incorrect platitudes about the Due Process Clause that shut off access to the courts.