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# Bridging the Stream of Commerce: Recommendations for Living in the Post-Nicastro Era

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# Bridging the Stream of Commerce: Recommendations for Living in the Post-Nicastro Era

Amanda Iler\*

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I. INTRODUCTION

In 2008, sixty-year-old Karlene Willemson, an Oregon resident, died after a fire broke out in her home.<sup>1</sup> Willemson had multiple sclerosis and was confined to a wheelchair.<sup>2</sup> In bed and unable to move, Willemson was powerless to save herself from the smoke and flames.<sup>3</sup>

A year after her death, Willemson’s family filed a products liability suit in Oregon against several corporations, including Invacare Corporation, a motorized wheelchair manufacturer based in Ohio, and China Terminal and Electric Corporation (CTE), a Taiwanese corporation that supplies battery chargers to Invacare.<sup>4</sup> Willemson’s family alleged that a defective battery charger manufactured by CTE started the fire<sup>5</sup> and that, based on medical evidence, Willemson “was alive and conscious at the time of the fire and that she suffered significant pre-death burns, physical injury and psychological terror.”<sup>6</sup> CTE moved to dismiss the lawsuit, claiming that the Oregon court lacked personal jurisdiction.<sup>7</sup> The trial court denied the motion, and the Oregon Supreme Court denied CTE’s petition for a writ of mandamus to compel the trial court to vacate its ruling.<sup>8</sup>

With no luck in the state courts, CTE filed a petition for certiorari with the United States Supreme Court.<sup>9</sup> CTE’s petition came at a somewhat pivotal time for the Court, as it was considering an important personal jurisdiction case that would be applicable to CTE and other foreign corporations,<sup>10</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>11</sup> The Court ultimately vacated the Oregon Supreme Court’s decision and remanded the case for “further consideration in light of *Nicastro*.”<sup>12</sup>

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1. Stuart Tomlinson, *Family Files Lawsuit in Portland Woman’s Death*, THE OREGONIAN (Feb. 4, 2009), <http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/1233714309218400.xml&coll=7> (on file with the *McGeorge Law Review*).

2. *Id.*

3. *Id.*

4. *Willemson v. Invacare Corp.*, 282 P.3d 867, 867–69 (Or. 2012).

5. *Id.* at 869.

6. Tomlinson, *supra* note 1.

7. *Willemson*, 282 P.3d at 869.

8. *Id.*

9. *Id.*

10. *Id.* at 869–70.

11. 131 S. Ct. 2780 (2011).

12. *Willemson*, 282 P.3d at 869–870.

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But *Nicastro* was an ambiguous decision by a plurality of the Court giving the Oregon court little guidance.<sup>13</sup> The plurality opinion limits state courts' power over foreign defendants based upon a stream-of-commerce theory.<sup>14</sup> The stream-of-commerce "refers to the movement of goods from manufacturers through distributors to consumers . . . ."<sup>15</sup> This movement of goods from a manufacturer to consumers in various states can, theoretically, establish personal jurisdiction over the manufacturer where injury occurs in a state because of a product defect.<sup>16</sup> Unfortunately, in *Nicastro*, a divided Court issued no clear guidance or test for how to determine liability based on the stream of commerce; as a result, lower courts are left to their own devices when they have foreign defendants whose only link to the state in which the court sits is the indirect import and sale of products.<sup>17</sup>

While the Oregon Supreme Court applied *Nicastro* on its narrowest grounds (which is found in Justice Breyer's concurring opinion) and held that the Oregon courts did have personal jurisdiction over CTE based upon the volume of sales within the forum,<sup>18</sup> this approach is not universal.<sup>19</sup> This Comment demonstrates the considerable confusion in the wake of *Nicastro* and argues that the Supreme Court should articulate a clear stream-of-commerce test: specifically, that minimum contacts can be satisfied with a showing of sufficient volume of goods entering the forum through the stream. Sufficient volume should be further defined as a "regular course of sales"<sup>20</sup> in the forum. Because this test would still leave open the possibility that some foreign corporations could escape liability because of lack of personal jurisdiction, this Comment further argues that a statutory solution that creates an alternative means of holding such foreign companies liable is necessary.

Part II of this Comment provides an overview of *Nicastro* and its application in the lower courts. Part III proposes a judicial solution for the stream-of-commerce theory. Part IV discusses pending legislation that could provide a statutory solution for corporations that would otherwise not be subject to jurisdiction in any court in the United States. Part V concludes that judicial clarification of the stream-of-commerce theory, as well as a statutory fallback, is

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13. See generally *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780 (2011).

14. *Id.* at 2785.

15. *Id.* at 2788.

16. Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 241 (1987).

17. See *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) ("The plurality seems to state strict rules that limit jurisdiction where a defendant does not 'inten[d] to submit to the power of a sovereign' and cannot 'be said to have targeted the forum.' But what do those standards mean when a company targets the world by selling products from its Web site?") (alterations in original).

18. *Willemsen*, 282 P.3d. at 873–875; see also *Nicastro*, 131 S. Ct. at 2791–94.

19. See, e.g., *Graham v. Hamilton*, No. 3 Civ. 609, 2012 WL 893748 at \*2–3 (W.D. La. Mar. 15, 2012) (stating that *Nicastro* is limited in its applicability and that, in the case in question, the court will continue to follow Fifth Circuit precedents).

20. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring) (internal quotations omitted).

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required to ensure that no corporation sending products to the United States is judgment-proof in United States courts.

II. LOWER COURTS AND *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*:  
A DIVIDED RESPONSE

This Part discusses the U.S. Supreme Court’s decision in *J. McIntyre Machinery, Ltd. v. Nicastro* and its analysis and application in the lower courts.<sup>21</sup> Section A provides the backdrop to and an overview of *Nicastro*, looking individually at Justice Kennedy’s plurality opinion, Justice Breyer’s concurring opinion, and Justice Ginsburg’s dissenting opinion. Part B examines how lower courts have applied *Nicastro* in various cases.

A. *Stream of Commerce and Personal Jurisdiction: Unclear Directives from the Supreme Court*

When the Supreme Court granted certiorari in *J. McIntyre Machinery v. Nicastro*, legal scholars believed that the Court would finally clarify a test for the stream-of-commerce theory of personal jurisdiction.<sup>22</sup> The stream-of-commerce confusion began in 1987 with *Asahi Metal Industry Co. v. Superior Court of California*.<sup>23</sup> In *Asahi*, Justices O’Connor and Brennan, in dicta, articulated different standards for the stream of commerce.<sup>24</sup> Justice O’Connor, writing for the plurality, believed personal jurisdiction turned on whether the defendant’s actions were purposefully directed at the state.<sup>25</sup> She wanted something more than mere awareness that the corporation’s products may end up in the forum—for example, solicitation of business, hands-on involvement with the distribution network, or doing direct business within the state.<sup>26</sup> Simply placing an item in the stream of commerce, by itself, is not enough.<sup>27</sup>

In a concurring opinion, Justice Brennan argued that foreseeability was the driving factor, specifically that “[a]s long as a participant in this process is aware

21. See discussion *infra* Part II.A–B.

22. See, e.g., Kendall Gray, *J. McIntyre Machinery v. Nicastro: Declarifying Asahi*, The Appellate Record (June 28, 2011), <http://www.appellaterecord.com/2011/06/articles/new-opinions/j-mcintyre-machinery-v-nicastro-declarifying-asahi/> (on file with the *McGeorge Law Review*) (“. . . Professors and law nerds everywhere had the vapors because the Supreme Court of the United States had a chance to clear it all up in *J. McIntyre Machinery Ltd. v. Nicastro*.”).

23. 480 U.S. 102 (1987).

24. *Id.* at 114 (holding that jurisdiction over *Asahi*, a foreign corporation, would be unreasonable, “even apart from the question of the placement of goods in the stream of commerce”).

25. *Id.* at 112 (“[A] defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”).

26. *Id.*

27. *Id.*

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that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”<sup>28</sup> In his view, the defendant corporation benefitted directly from the sale of goods in the forum and indirectly from the laws that facilitated that sale, and those benefits make jurisdiction in these cases consistent with the Due Process Clause of the Fourteenth Amendment.<sup>29</sup> Justice Brennan drew a line, based upon past precedents, between a situation where a customer transports a product into a forum and one where a product regularly reaches a forum through a distribution chain.<sup>30</sup> The latter, he argued, creates sufficient contacts, while the former does not.<sup>31</sup>

Finally, Justice Stevens, in a second concurring opinion, also addressed the stream of commerce.<sup>32</sup> Taking issue with the “unwavering line” drawn by Justice O’Connor, Justice Stevens argued that the court should consider the volume, value, and hazard of goods entering the forum state through the stream of commerce in determining whether “this conduct rises to the level of purposeful availment” making assertion of personal jurisdiction constitutional.<sup>33</sup>

Without a majority supporting either standard, it fell to lower courts to attempt to make some sense out of the differing opinions of the Justices in *Asahi*.<sup>34</sup> The conflicting opinions in the case resulted in split circuits, confused opinions, and a variety of holdings with cases involving the stream of commerce.<sup>35</sup>

Then came *Nicastro*, a 2011 products liability case with an American plaintiff and a foreign corporate defendant.<sup>36</sup> The plaintiff, Robert Nicastro, was operating a metal-shearing machine manufactured by the defendant, a British corporation, when he seriously injured his hand.<sup>37</sup> It appeared from the record that J. McIntyre had little contact with the forum state of New Jersey.<sup>38</sup> J. McIntyre’s

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

29. *Id.*

30. *Id.* at 118–20 (comparing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), where the plaintiff unilaterally transported the product into the forum with *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 76 (1961), where jurisdiction was proper because the defendant sold component parts to a manufacturer who “incorporated them into a final product that was sold in Illinois.”).

31. *Id.* at 117 (“As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit cannot come as a surprise.”).

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

33. *Id.* at 122.

34. Gray, *supra* note 22.

35. See Levi McAllister, Comment, *Paddling the Stream of Commerce: The Supreme Court’s Need to Cautiously Re-Examine One Aspect of Personal Jurisdiction, and the Judicial and Financial Consequences Resulting from Current Approaches* 3 HIGH CT. Q. REV. 53, 57–58 (2007) (describing circuit splits, including the First Circuit adoption of the O’Connor stream-of-commerce approach and the Eighth Circuit adoption of the Brennan approach).

36. *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

37. *Id.*

38. *Id.* The record, although under-developed, included some contacts, including a US distributor, attendance by J. McIntyre officials at annual conventions, and one to four (the record is unclear) machines sold

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sales were primarily to a US distributor, not to individual buyers.<sup>39</sup> Justice Kennedy, writing for the plurality, stated, “The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there.”<sup>40</sup> It looked as though the Court was finally going to clear up the confusion that resulted from the dueling O’Connor and Brennan stream-of-commerce opinions in *Asahi*.<sup>41</sup>

It was not to be. The Court once again divided over when personal jurisdiction is proper under the stream-of-commerce theory.<sup>42</sup> In the plurality opinion, Justice Kennedy emphasized state sovereignty, explaining “it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’”<sup>43</sup> Justice Kennedy described a number of ways in which a defendant could “submit to a State’s authority . . .”<sup>44</sup> and stated that the principle inquiry is “whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”<sup>45</sup> While Justice Kennedy discussed both the O’Connor plurality and Brennan concurrence from *Asahi*, he drew a stricter line than Justice O’Connor.<sup>46</sup> Justice O’Connor looked for placement in the stream of commerce plus an additional act “purposefully directed toward the forum state.”<sup>47</sup> Justice Kennedy’s call for “activities that manifest intention to submit to the power of a sovereign” seems to harken back to the pre-*International Shoe* days,<sup>48</sup> where the now debunked implied-consent theory of personal jurisdiction was utilized by “[c]ourts and legislatures . . . to bring intuitively reasonable assertions of in personam

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in the forum. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* Some commentators speculate that Justice Stevens’ retirement was key to the Court once again taking up personal jurisdiction. See Rodger D. Citron, *The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in J. McIntyre Machinery, Ltd. v. Nicastro?*, 63 S.C. L. REV 643, 644 (2012) (discussing the fact that Justice Stevens could have created a majority in *Asahi* by casting his vote with either Justice O’Connor or Justice Brennan; however, Justice Stevens denied both sides his vote and wrote his own concurring opinion). “After he retired in 2010 and was replaced by Justice Elena Kagan, the Court apparently saw an opportunity to resolve the conflict between the competing approaches set out by Justices O’Connor and Brennan and granted certiorari in *McIntyre*. Although Stevens had departed, the Court nevertheless was unable to establish the legal standard for stream of commerce jurisdiction.” *Id.*

42. See *Nicastro*, 131 S. Ct. at 2785 (stating that four justices supported the plurality opinion, two supported the concurring opinion, and three supported the dissenting opinion).

43. *Id.* at 2787.

44. *Id.* at 2787–88.

45. *Id.* at 2788.

46. *Id.*

47. *Asahi Metal Industry Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987).

48. See *Dayton*, *supra* note 16, at 247 (“Before 1945, in deference to due process, the U.S. Supreme Court had consistently held that a court could not assert nonconsensual personal jurisdiction over a person or thing that was not physically present within its jurisdiction.”).

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jurisdiction within its parameters.”<sup>49</sup> While Justice O’Connor looked for something more than just placement in the stream, Justice Kennedy appears to require stringent analysis of whether a person or corporation intended governance by the laws of the state in question.<sup>50</sup>

Joined by Justice Alito, Justice Breyer concurred in the judgment, but not in the reasoning.<sup>51</sup> He rejected both the “plurality’s seemingly strict no-jurisdiction rule” and a mere awareness standard, articulated by Justice Brennan in *Asahi* and adopted by the New Jersey Supreme Court.<sup>52</sup> Justice Breyer stated that “the relevant facts found by the New Jersey Supreme Court show no ‘regular . . . flow’ or ‘regular course’ of sales in New Jersey; and there is no ‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else.”<sup>53</sup> He observed that the plurality made the correct decision based on the record, which included only: (1) the sale of a single machine in New Jersey, (2) J. McIntyre’s intent to sell its machines to anyone in the United States through its distributor, and (3) attendance at trade shows in several cities outside of New Jersey.<sup>54</sup> Furthermore, because the case did not implicate modern concerns, such as Internet sales, and because the record regarding J. McIntyre’s contacts with New Jersey was sparse, Justice Breyer declined any opportunity to make changes to jurisdictional rules.<sup>55</sup>

Justice Ginsburg, who was joined by Justices Sotomayor and Kagan in dissent, argued that J. McIntyre intended to target the United States as a single market, and that “by engaging McIntyre America [its US distributor] to promote and sell its machines in the United States,” it purposefully availed itself to any forum where products were sold by its distributor.<sup>56</sup>

This is the legal landscape now facing lower courts. They must analyze these conflicting opinions to determine when, if at all, a stream-of-commerce theory is proper in subjecting a foreign corporation to personal jurisdiction. Rather than

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49. *Id.* at 248. “State courts and legislatures in the post-*Pennoyer*, pre-*International Shoe* era used the consent theory as a means of circumventing the limitations of the territorial approach related to physical presence.” *Id.* at 247 n.27.

50. See *supra* notes 46–49 and accompanying text.

51. *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring) (“I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.”).

52. *Id.* at 2793. The New Jersey Supreme Court premised jurisdiction on whether the defendant “knows or 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,” which is similar to Justice Brennan’s opinion in *Asahi*, where he states that if a defendant is aware that a product is being marketed in the forum, “the possibility of a lawsuit there cannot come as a surprise.” *Id.*; *Asahi v. Super. Ct.*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

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

54. *Id.* at 2791.

55. *Id.* at 2792–93.

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



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clarifying *Asahi*, as many had hoped, *Nicastro* continues the trend of confusion and inconsistent rulings.<sup>57</sup>

### B. Handling *Nicastro*: How Lower Courts Are Managing

Since the Supreme Court's ruling in *Nicastro* in mid-2011, nearly 200 different opinions from various courts have cited to it.<sup>58</sup> Thus far, lower courts are applying *Nicastro* inconsistently.<sup>59</sup> This Section discusses the various approaches in greater detail.<sup>60</sup>

#### 1. Limiting *Nicastro* to Its Facts

A number of courts, including the Oregon Supreme Court in *Willemsen*, relied on Justice Breyer's concurrence as the narrowest grounds of agreement between a majority of the justices.<sup>61</sup> Some courts have taken this further and held that Justice Breyer's concurrence is limited to the same or similar sets of facts.<sup>62</sup> For example, in *Ainsworth v. Cargotec USA, Inc.*,<sup>63</sup> plaintiffs brought suit on behalf of a relative, a citizen of Mississippi, who was struck and killed by a forklift manufactured by Moffett Engineering, an Irish corporation that sold its products through a US distributor.<sup>64</sup> The court distinguished *Nicastro* on its facts—evidence showed the distributor had sold 203 Moffett machines in Mississippi totaling 1.55% of Moffett's US sales at the time, while *Nicastro* dealt with one, single machine being sold in New Jersey—and declined to depart from the Fifth Circuit precedent of “mere foreseeability.”<sup>65</sup>

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57. Gray, *supra* note 22.

58. *J. McIntyre Machinery, Ltd. v. Nicastro Citing References*, WESTLAWNEXT, [https://1.next.westlaw.com/RelatedInformation/I61c0ed8aa0c511e0a5bbc8ef87b8b429/CitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=\(sc.UserEnteredCitation\)&docSource=7702fa75a3d6416282b79abd5b9f515b](https://1.next.westlaw.com/RelatedInformation/I61c0ed8aa0c511e0a5bbc8ef87b8b429/CitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.UserEnteredCitation)&docSource=7702fa75a3d6416282b79abd5b9f515b) (last visited Nov. 11, 2012) (on file with the *McGeorge Law Review*).

59. See discussion *infra* Parts II.B.1–3 (describing the various lower court approaches to the stream-of-commerce theory following the *Nicastro* decision).

60. In an attempt to streamline the various opinions that have emerged since *Nicastro* was decided, I have selected four opinions that demonstrate the inconsistent ways lower courts are interpreting *Nicastro*.

61. See, e.g., *Willemsen v. Invacare Corp.*, 282 P.3d 867, 873 (Or. 2012) (stating that Justice Breyer's opinion is the narrowest grounds on which a majority concurred and, therefore, would guide its resolution of the present case).

62. See, e.g., *Ainsworth v. Cargotec USA, Inc.*, 2 Civ. 236 (S.D. Ms. Dec. 15, 2011) (“In the present matter, this Court concluded that Justice Breyer's *McIntyre* opinion was only applicable to cases presenting the same factual scenario as that case.”).

63. *Id.*

64. *Id.* at \*1.

65. *Id.* at \*2.

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Prior to *Nicastro*, Fifth Circuit precedent called for following Justice Brennan's foreseeability approach discussed in *Asahi*.<sup>66</sup> Under this approach, a defendant need not have purposefully directed any activities at the forum state; rather, a defendant corporation simply must be able to foresee being haled into court because "it purposefully availed itself of the benefits of the forum state."<sup>67</sup> Simply put, if a corporation knows its products are entering a state and the corporation benefits from sales of those products within that state, this would likely be enough to satisfy the foreseeability standard.

A Louisiana district court considered whether *Nicastro* had changed existing Fifth Circuit precedent in *Graham v. Hamilton*.<sup>68</sup> In *Graham*, the plaintiffs sued GM Canada following the malfunction of a vehicle that the corporation manufactured.<sup>69</sup> A woman and her two children died after a wreck involving the vehicle in Louisiana, the forum state.<sup>70</sup> GM Canada argued that personal jurisdiction was not proper because "[it] did not target Louisiana," essentially a purposeful availment, not foreseeability, argument.<sup>71</sup> In considering *Nicastro*, the court stated that, while Justice Breyer's concurrence is binding, he declined to adopt a new rule.<sup>72</sup> "As Justice Breyer declined to choose between the *Asahi* plurality opinions, [*Nicastro*] is rather limited in its applicability. It does not provide the Court with grounds to depart from the Fifth Circuit precedent."<sup>73</sup> The court, in applying that precedent, held personal jurisdiction to be proper.<sup>74</sup>

*3. Adhering to the Kennedy Approach*

Although Justice Kennedy's opinion in *Nicastro* did not command a majority of the justices,<sup>75</sup> some lower courts have adhered to his suggested analysis.<sup>76</sup> In *Keranos, LLC v. Analog Devices, Inc.*,<sup>77</sup> a patent infringement suit, the district

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66. *Graham v. Hamilton*, 2012 WL 893748, at \*3 (W.D. La. Mar. 15, 2012) ("In the Fifth Circuit, a defendant has minimum contacts with the forum state when a defendant 'knowingly benefits from the availability of a particular state's market for its products . . . .").

67. *Id.*

68. *Id.*

69. *Id.* at \*1.

70. *Id.*

71. *Id.* at \*2.

72. *Id.* at \*3.

73. *Id.* (quoting *Ainsworth v. Cargotec USA, Inc.*, Civ. 236, at \*19 (S.D. Ms. Dec. 15, 2011)).

74. *Id.* at \*5.

75. *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780 (2011).

76. *See, e.g., Keranos, LLC v. Analog Devices, Inc.*, 2011 WL 4027427 (E.D. Tex. Sept. 12, 2011) at \*10 (quoting from Justice Kennedy's plurality opinion in the proper test for determining whether the defendant in question is subject to personal jurisdiction).

77. *Id.* at \*1.

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court in Texas held that the plaintiff was entitled to jurisdictional discovery to determine whether jurisdiction would be proper “[i]n light of the new minimum contacts analysis announced in [*Nicastro*]. . . .”<sup>78</sup> In discussing the legal standard established by *Nicastro*, the court articulated the test as Justice Kennedy’s analysis in his plurality opinion: specifically, “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.”<sup>79</sup> The court did not mention Justice Breyer’s concurring opinion.<sup>80</sup>

#### 4. A Fourth Approach: Examining the Volume of Goods Entering the Forum

Some courts read Justice Breyer’s concurring opinion as inviting analysis on the volume of sales that have taken place within the forum state to determine whether personal jurisdiction would be proper.<sup>81</sup> The Oregon Supreme Court took that approach in the *Willemsen* case, which is described in the introduction to this Comment.<sup>82</sup> The court found that Invacare, the company that sold the wheelchair in question, sold more than 1,100 wheelchairs equipped with the batteries that CTE, the foreign defendant, made in Oregon over a two-year period.<sup>83</sup> Based on this number, the court determined that a “‘regular . . . flow’ or ‘regular course’ of sales in Oregon” existed and that “[t]he sale of the CTE battery charger in Oregon that led to the death of plaintiffs’ mother was not an isolated or fortuitous occurrence.”<sup>84</sup> Because of that, the court held that the trial court could properly exercise jurisdiction over CTE.<sup>85</sup> Of the four approaches discussed, it is this case-by-case analysis of the volume of goods that have entered the forum that is closest to what *Nicastro* stands for and the analysis this Comment endorses.

### III. KEEPING THE FLOW: A JUDICIAL RECOMMENDATION FOR THE STREAM OF COMMERCE

This Part will discuss in greater detail why a stream-of-commerce theory of personal jurisdiction is necessary. It will also address some of the larger issues *Nicastro* presents, including inconsistencies with existing law and what the likely

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78. *Id.* at \*10.

79. *Id.* (quoting *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2789 (2011)).

80. *Id.*

81. *See, e.g., Willemsen v. Invacare Corp.*, 282 P.3d 867, 874 (Or. 2012) (scrutinizing the number of batteries defendant corporation sold in the forum state).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 877.

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outcome would be should courts continue to adopt the rigid analysis proposed by Justice Kennedy. Finally, this Part argues that the U.S. Supreme Court should articulate a clear test for when personal jurisdiction is proper under the stream-of-commerce theory, and that the test should be a case-by-case analysis of the volume of goods entering or that have entered the forum state.

*A. Necessity of the Stream*

The *Willemsen* case is a prime example of why it is necessary to develop and maintain a viable test for determining personal jurisdiction under the stream-of-commerce theory.<sup>86</sup> CTE, which manufactured the allegedly defective battery, is a Taiwanese corporation that elected to do business in the United States via an Ohio-based company.<sup>87</sup> The record does not contain any evidence that CTE elected to sell its batteries in Oregon, or to advertise in Oregon, or to engage in any kind of conduct within Oregon whatsoever.<sup>88</sup> Rather, CTE merely passed an allegedly defective battery through a distribution chain—perhaps with the belief that this hands-off approach would insulate the corporation from liability, at least in this case.<sup>89</sup>

Without the stream of commerce, CTE would have likely been correct in arguing that jurisdiction was not proper. Based on the record, it had no contacts with Oregon,<sup>90</sup> which means the minimum contacts prong of a personal jurisdiction analysis would not be satisfied,<sup>91</sup> which makes the likelihood of subjecting CTE to the jurisdiction of Oregon courts improbable.<sup>92</sup> This means that CTE, because it elected to distribute its products through a US company, rather than directly, would essentially be judgment-proof. If CTE was not subject to the power of US courts, the plaintiff's only option would be to sue in Taiwan, where CTE is based. Due to distance and cost, this is overly burdensome on an injured plaintiff. Ultimately, the corporation likely would not be held accountable for its role in Mrs. Willemsen's death and her family would not be compensated for their loss.

While it may be easy to dismiss the CTE example as an unrealistic hypothetical because the courts have endorsed the stream-of-commerce theory of

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86. See *supra* notes 81–85 and accompanying text.

87. *Willemsen*, 282 P.3d at 869–70.

88. *Id.*

89. *Id.* at 869 (“CTE reasoned that due process would permit an Oregon court to exercise personal jurisdiction over it only if CTE had purposefully availed itself of the privilege of doing business here. In CTE’s view, the fact that it sold its battery chargers to Invacare in Ohio, which sold them together with its wheelchairs in Oregon, was not sufficient to meet that standard.”).

90. *Id.* at 869–70.

91. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (articulating the basic test for personal jurisdiction: whether the defendant has sufficient contacts with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

92. *Id.*

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personal jurisdiction, articulating a clear test is becoming increasingly important as economies become more global.<sup>93</sup> For example, in 2011, the United States imported \$128.8 billion dollars in goods from Japan.<sup>94</sup> Vehicles, machinery, and electrical devices were the top three import categories, totaling roughly \$100 billion dollars.<sup>95</sup> Imagine if Japanese corporations sent all of these goods into various states in the United States through distributors or sent pieces of these goods to be further assembled and sold by US manufacturers, with no instructions on how or where to sell them. Further, imagine that one of these products or a component part that came from a Japanese corporation was defective and injured an American consumer. Would the consumer be able to hale the foreign corporation into court?<sup>96</sup> Personal jurisdiction in this hypothetical becomes a much tougher question without looking to the stream-of-commerce theory.<sup>97</sup>

As the global economy continues to grow,<sup>98</sup> personal jurisdiction jurisprudence must expand to ensure consumers have recourse for injuries and damage from defective products. That includes articulating a clear, consistent test for establishing minimum contacts through the stream-of-commerce for the purposes of personal jurisdiction.<sup>99</sup>

93. See *infra* notes 94–97 and accompanying text (discussing the global economy).

94. *Japan*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/japan-korea-apec/japan> (last visited Dec. 30, 2012) (on file with the *McGeorge Law Review*).

95. *Id.*

96. FED. R. CIV. P. 4(k)(2) could be an option for establishing jurisdiction over a foreign defendant, but does present some issues. First, in order to utilize this rule, the claim must arise under federal law and second, as the advisory notes state, “There also may be a further Fifth Amendment constraint in that a plaintiff’s forum selection might be so inconvenient to a defendant that it would be a denial of ‘fair play and substantial justice’ required by the due process clause . . .” *Id.*

97. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (holding that sufficient minimum contacts did not exist between a Delaware trust company and the state of Florida in order for a Florida court to exercise jurisdiction). “The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail. The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State.” *Id.*

98. See Annie Lowrey, *I.M.F. Lowers Its Forecast for Global Growth*, N.Y. TIMES (Oct. 8, 2012), [http://www.nytimes.com/2012/10/09/business/global/imf-lowers-its-global-growth-forecast.html?\\_r=0](http://www.nytimes.com/2012/10/09/business/global/imf-lowers-its-global-growth-forecast.html?_r=0) (on file with the *McGeorge Law Review*) (projecting global growth to increase by 3.6 percent in 2013).

99. See Melissa A. Murphy-Petros, “*Stream of Commerce Plus*” or *Minus*? *Advancing the Law of Personal Jurisdiction in Product Liability Cases*, WILSON ELSER, [http://www.wilsonelser.com/files/repository/PL\\_PersonalJurisdiction\\_eNewsApril08.pdf](http://www.wilsonelser.com/files/repository/PL_PersonalJurisdiction_eNewsApril08.pdf) (last visited Dec. 30, 2012) (on file with the *McGeorge Law Review*).

[F]or example, the Illinois Appellate Court found that personal jurisdiction over Tokai Corporation in Illinois was constitutionally permissible solely because it designed a product in Japan and its U.S. subsidiary in California—a separate corporation in whose operations Tokai plays no role—bought the design in Japan, had the product manufactured in Mexico by a Mexican corporation, and then distributed the product into the national stream of commerce in the United States, from which it ultimately came to Illinois. These essential facts are not unique to any particular jurisdiction, and with no current national uniform interpretation and application of the stream of commerce theory, some federal and state courts would decline personal jurisdiction based on them; others would not.

*Id.*

## B. *Nicastro*: Where the Court Went Wrong

This Section critically examines the plurality, concurring, and dissenting opinions in *Nicastro*. It discusses the strengths and weaknesses of each, particularly in light of existing precedent and the goals this Comment sets out to accomplish.

### 1. *Justice Kennedy's Plurality Opinion*

#### a. *The Law: It's Not What He Says It Is*

In his *Nicastro* plurality opinion, Justice Kennedy either distorts or fails to mention a handful of well-known personal jurisdiction precedents,<sup>100</sup> including: the introduction of the stream-of-commerce theory in *Gray v. American Radiator Standard Sanitary Corp.*;<sup>101</sup> the Court's approval of the stream-of-commerce theory in *World-Wide Volkswagon v. Woodson*;<sup>102</sup> and the applicability of the "effects test" articulated in *Calder v. Jones*.<sup>103</sup>

The Illinois Supreme Court introduced the stream-of-commerce doctrine in 1961 in a well-known case taught in most Civil Procedure courses, *Gray v. American Radiator & Standard Sanitary Corp.*<sup>104</sup> The plaintiff was injured when her hot water heater exploded because of a defective safety valve manufactured by an out-of-state company.<sup>105</sup> The court upheld jurisdiction based upon the benefits that the company received from the laws of the state in transacting business, despite the fact that there was no information on the volume of sales in Illinois<sup>106</sup> or whether the defendant had any direct business in Illinois.<sup>107</sup>

In 1980, stream-of-commerce jurisprudence continued to develop in *World-Wide Volkswagon Corp. v. Woodson*, when the Court seemingly approved the use of the theory as articulated in *Gray*.<sup>108</sup> While the Court found that the use of the stream-of-commerce theory to establish personal jurisdiction was not proper

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100. *Nicastro*, 131 S. Ct. at 2785–91.

101. *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 762 (Ill. 1961).

102. *World-Wide Volkswagon v. Woodson*, 444 U.S. 286, 297–298 (1980).

103. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

104. 176 N.E.2d 761 (Ill. Sup. Ct. 1961).

105. *Id.* at 762.

106. *Id.* at 764.

107. *Id.* at 766 (“As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines.”).

108. *See generally* 444 U.S. 286 (1980) (considering whether personal jurisdiction over a New York car dealer involved in a products liability suit was proper in Oklahoma, the state where the plaintiffs were traveling when the car accident in which they were injured occurred).

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based upon the set of facts presented,<sup>109</sup> it did not discount the precedent set by the Illinois Supreme Court in *Gray*.<sup>110</sup> The Court stated:

[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.<sup>111</sup>

In his *Nicastro* plurality analysis, which attempts to clarify the stream-of-commerce doctrine, Justice Kennedy makes no mention of the *Gray* case, despite the fact that the Supreme Court endorsed its holding, and he only discusses a few brief points from the *World-Wide Volkswagen* opinion.<sup>112</sup> Although the Court in *World-Wide Volkswagen* says jurisdiction may be proper when a corporation has an “expectation” that consumers in the forum state will purchase its goods,<sup>113</sup> Justice Kennedy seemingly distorts this point. He writes that the proper inquiry is whether “the defendant’s activities manifest an intention to submit to the power of a sovereign” and that the defendant must target the forum.<sup>114</sup> This portrayal of personal jurisdiction case law is inaccurate.<sup>115</sup> By calling for an “intention to submit” to the sovereign, it seemingly makes the defendant’s consent to personal jurisdiction a touchstone, when existing precedent makes clear it is not.<sup>116</sup>

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109. *Id.* at 298 (stating that, while it is foreseeable that some purchasers of automobiles may take them to Oklahoma, as the plaintiffs did, that unilateral activity is not enough to subject a foreign defendant to the jurisdiction of the state).

110. *Id.* at 297–98.

111. *Id.* The stream of commerce, however, ends with the consumer and jurisdiction cannot be established by the consumer’s unilateral action in taking a product from one state to another. *Id.* at 298.

112. *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2788 (2011). Both *Gray* and *World-Wide Volkswagen* were foundational stream-of-commerce precedents and should have factored into consideration of that doctrine. *Citron*, *supra* note 41, at 650.

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

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

115. *See, e.g., Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that a Florida defendant could be subjected to a California court’s jurisdiction because the “effects” of their conduct were felt by the plaintiff in the forum state).

116. *Nicastro*, 131 S. Ct. at 2788; *Dayton*, *supra* note 16, at 255.

The *Shaffer to Burger King* line of cases illustrates that, although the Supreme Court has never expressly defined purposeful availment, in recent years it has typically used that term to describe a pattern of behavior by a defendant that can objectively be expected to result in contacts between the defendant and the state in question. The Court’s decisions indicate that the defendant must undertake affirmative acts that ultimately bring him in contact with the state, but they also make clear that

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A defendant may also be subject to personal jurisdiction in a distant forum based upon an “effects” test articulated in *Calder v. Jones*,<sup>117</sup> additional precedent that demonstrates that it is not always necessary for an actor to have an intention to submit to the power of the forum state or to target the forum state outright.<sup>118</sup> In *Calder*, the Court held jurisdiction was proper based on the effects of the Florida residents’ conduct in California.<sup>119</sup> Based on the facts in that case,<sup>120</sup> defendants did not meet the high standard set by Justice Kennedy in *Nicastro*. While the defendants focused their efforts and activities on a California resident, nothing about their conduct suggested they were targeting the state or intending to “submit to the power of a sovereign.”<sup>121</sup> Justice Kennedy appears to improperly characterize *Calder* by limiting that holding to intentional torts.<sup>122</sup> This is a point of law that remains unsettled.<sup>123</sup>

Furthermore, in citing *Asahi Metal Industry Co. v. Superior Court*<sup>124</sup> Justice Kennedy neglects to mention Justice Stevens’ concurring opinion, which essentially states that satisfying minimum contacts through the stream of commerce is dependent upon “the volume, the value, and the hazardous character of the components.”<sup>125</sup> Rather, he treats the O’Connor and Brennan opinions as

‘purpose’ does not equal ‘subjective intent,’ that ‘purpose’ has very little to do with ‘control,’ and that ‘purposeful’ contacts need not be direct ones.

*Id.*

117. 465 U.S. 783, 789 (1984).

118. *Id.*

119. *Id.*

120. *Id.* at 784–85 (explaining that the key facts, in considering whether personal jurisdiction was proper in California in a libel case involving a California plaintiff and Florida defendants, were that the magazine in question was largely circulated in California, the defendants relied on California sources, and a California resident received tortious injury).

121. *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2788 (2011); *Calder*, 465 U.S. at 785–88 (stating that the defendants’ only contacts with California included calling sources located in the state and “knowingly” causing the injury to the plaintiff).

122. *Nicastro*, 131 S. Ct. at 2787 (referring, seemingly, to *Calder* in stating that a defendant must purposefully avail himself or herself “of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, though in some cases, as with an intentional tort, the defendant might well fall within the State’s authority by reason of his attempt to obstruct its laws.”).

123. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (citing *Calder* as supporting the proposition that a defendant can be subject to personal jurisdiction for conduct purposefully directed towards residents of the forum state, as well as the proposition that a higher showing of factors that support the fairness of asserting of personal jurisdiction in the forum could mean a lesser showing of minimum contacts is required); *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998) (“We have observed that under this test [*Calder*] a court may exercise personal jurisdiction over a nonresident defendant who commits an intentional tort by certain acts outside the forum which have a particular type of effect upon the plaintiff within the forum.”). *But see Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (applying the *Calder* effects test to a copyright infringement claim); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1398 (9th Cir. 1986) (citing *Calder* as standing for the proposition that “[a] defendant who enters into an obligation which she knows will have effect in the forum state purposefully avails herself of the privilege of acting in the forum state”).

124. 480 U.S. 102 (1987).

125. *See Nicastro*, 131 S. Ct. at 2788–89 (discussing opinions by Justices O’Connor and Brennan in



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having equal weight and equal support, despite the fact that neither garnered a majority.<sup>126</sup> Based upon the divergence in the opinions authored by Justices O'Connor<sup>127</sup> and Brennan,<sup>128</sup> Justice Stevens' opinion appears to be the narrowest basis where there is agreement between a majority of the justices and, hence, it should be treated as the rule that emerges from the split court. In not citing Justice Stevens' opinion in *Asahi*, Justice Kennedy ignores a point of law in line with past Court precedent, as Justice Stevens' opinion overlaps with Justice Brennan's, thereby creating a majority.<sup>129</sup>

*b. What the Kennedy Opinion Would Do to Personal Jurisdiction*

Recalling Karlene Willemssen's tragic story,<sup>130</sup> one can see what could happen if the standard for personal jurisdiction involved proving a defendant corporation's intent to "submit to the power of a sovereign."<sup>131</sup> An international corporation could take a completely hands-off approach, conducting no activities specifically aimed at any state, and just sell, sell, sell through an independent subsidiary or distributor.<sup>132</sup> CTE, the foreign corporation that made the allegedly defective battery that injured Willemssen, appeared to have no contacts whatsoever with Oregon, save the sale of its batteries in the state by the wheelchair company.<sup>133</sup> Under Justice Kennedy's analysis, CTE would likely not be held accountable for its actions and would continue to reap the benefits of US sales because there is no evidence the company intended to submit to Oregon's power or that the company treated Oregon as a sales-target.<sup>134</sup> While state legislatures make policy decisions regarding products liability and the safety of its citizens that state courts should apply when possible, Justice Kennedy's

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*Asahi*, with no mention of any opinion by Justice Stevens); *Asahi v. Super. Ct.*, 480 U.S. 102, 122 (1987).

126. *Nicastro*, 131 S. Ct. at 2788–89.

127. *Asahi*, 480 U.S. at 112 (stating that simply placing a product into the stream of commerce is not enough; rather, the necessary action for the "finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*").

128. *Id.* at 122 (stating that awareness that a product will reach the forum state when placed into the stream of commerce satisfies the minimum contacts portion of personal jurisdiction analysis).

129. See McAllister, *supra* note 35, at 56 ("Although not expressly noted, Stevens effectively presents an approach that is consistent with the Court's prior decisions which state that a totality of the circumstances in each case, and not a bright line rule, should be the proper benchmark for determining whether minimum contacts exist to support personal jurisdiction.").

130. See discussion *supra* Part I (describing a fire allegedly caused by a defective battery manufactured by a foreign corporation).

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

132. See *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992) ("The possibility of being haled into an Illinois court creates a particularly effective deterrent to the manufacture of unsafe fireworks where purchasers of Austin's fireworks might otherwise be immune from Illinois tort law liability on the basis of workers' compensation statutes, as happened in the present case.").

133. *Willemssen v. Invacare Corp.*, 282 P.3d 867, 869–71 (Or. 2012).

134. *Id.* at 871 (stating that CTE did not maintain offices in Oregon or directly sell to, advertise to or solicit business from consumers in Oregon); *Nicastro*, 131 S. Ct. at 2788.

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opinion, picking and choosing between personal jurisdiction precedents,<sup>135</sup> appears to make a real policy choice too: protecting national and international corporations over injured citizens.<sup>136</sup>

## 2. *Justice Breyer: Ambiguous, but in the Right Direction*

The Oregon Supreme Court wanted to uphold jurisdiction in *Willemsen* by picking up on the theme first articulated by Justice Stevens in *Asahi* and echoed by Justice Breyer in *Nicastro*: the volume of sales and products that have entered the forum matter in the minimum contacts analysis.<sup>137</sup> However, Justice Breyer's opinion contains a number of ambiguities. It is impossible to know what would have satisfied his minimum contacts standard, as he simply views the record as too sparse to support jurisdiction.<sup>138</sup>

Justice Breyer also acknowledges jurisdictional concerns surrounding a growing global economy.<sup>139</sup> In addressing Justice Kennedy's rigid standards of "intend[ing] to submit to the power of the sovereign" and targeting the forum, Justice Breyer writes, "But what do those standards mean when a company targets the world by selling products from its Web site?"<sup>140</sup> That is one of the concerns this Comment addresses; however, Justice Breyer leaves the question

135. *See supra* Part III.B.1.a (discussing which personal jurisdiction precedents Justice Kennedy relied on and which he did not).

136. *See J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) ("The New Jersey Supreme Court also cited 'significant policy reasons' to justify its holding, including the State's 'strong interest in protecting its citizens from defective products.' That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency."); *Willemsen*, 282 P.3d at 875 ("If [Kennedy's] opinion were controlling, it might be difficult for plaintiff to show that, on this record, CTE's contacts with Oregon were sufficient to establish jurisdiction over it.")

137. *Willemsen*, 282 P.3d at 877 ("CTE has provided no valid reason to say that the sale of 1,102 CTE battery chargers in Oregon over a two-year period does not constitute a 'regular course of sales' in this state."); *see also Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring) (emphasizing that the facts show no "regular . . . flow" or "regular course" of sale in New Jersey); *Asahi Metal Industry, Ltd. v. Super. Ct.*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part and concurring in judgment)

Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world.

*Id.*

138. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring) (explaining that *Nicastro* did not introduce any evidence to show a specific effort by the corporation to sell in New Jersey, or to show the corporation purposefully availed itself of New Jersey laws, or to show that the corporation "delivered its goods in the stream of commerce 'with the expectation they would be purchased' by New Jersey users").

139. *Id.* at 2793.

140. *Id.*

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open, stating that those types of things (targeting consumers from a Web site) are not at issue in the present case—another ambiguity.<sup>141</sup>

Furthermore, Justice Breyer also makes clear that he does not agree with a strict foreseeability rule, which the New Jersey Supreme Court endorsed.<sup>142</sup> Citing concerns about fairness to small manufacturers and the like, Justice Breyer does not make clear what type of rule would be workable—choosing, rather, to say what would not work.<sup>143</sup>

What is clear is that Justice Breyer will not endorse a bright-line, absolute rule for personal jurisdiction analysis in cases similar to *Nicastro*.<sup>144</sup> To satisfy Justice Breyer and establish a majority approach to stream-of-commerce cases, the Court must resolve the ambiguous concerns that have thus far been unanswered—like the possibility of subjecting a small-town manufacturer to jurisdiction in a distant forum simply because that manufacturer sold its goods to a nationwide distributor.<sup>145</sup>

### *3. Justice Ginsberg’s Dissent: Worthy of Consideration*

Writing for the dissent, Justice Ginsberg articulates a number of points worthy of consideration when discussing the stream of commerce.<sup>146</sup> As is likely done by many foreign corporations, Justice Ginsberg points out that McIntyre UK engaged a US subsidiary, McIntyre America “as the conduit for sales of McIntyre UK’s machines to buyers ‘throughout the United States.’”<sup>147</sup> In Justice Ginsberg’s view, keeping an eye to the way sales and marketing are typically done in today’s global economy, by working through McIntyre America to “promote and sell” its products in the United States as a whole, McIntyre UK “purposefully availed itself” of the United States market nationwide, not a market in a single State or discrete collection of States.<sup>148</sup> Justice Ginsberg recognized that, as international corporations grow and target countries as a whole, personal jurisdiction jurisprudence must adapt to ensure that these

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141. *Id.*

142. *Id.*

143. *Id.* at 2793–94.

144. *Id.* (“Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain.”).

145. *Id.* at 2793 (“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).”).

146. *Id.* at 2796 (Ginsburg, J., dissenting) (discussing McIntyre’s connections with the United States as a whole as grounds for subjecting the corporation to personal jurisdiction in New Jersey).

147. *Id.* at 2797. Neither Justice Kennedy nor Justice Breyer mention this point; however, the relationship between McIntyre UK and McIntyre America is one that should have been more fully investigated and added to the record in support of jurisdiction.

148. *Id.* at 2801.

corporations will not be able to escape liability simply because they place a buffer between themselves and the forum.<sup>149</sup> Injured plaintiffs should not be left with overseas courts as their only option.

*C. A Cast for the Fracture: How the Supreme Court Should Rule on the Next Stream-of-Commerce Case*

Given the inconsistent and confused rulings emerging from the lower courts based on *Nicastro*,<sup>150</sup> as well as the implications surrounding international corporations, today's modern economy, and the stream-of-commerce doctrine,<sup>151</sup> the Court should articulate a clear, meaningful stream-of-commerce test as soon as possible. That test should be a continuation of points argued in Justice Stevens' opinion in *Asahi* and Justice Breyer's opinion in *Nicastro*: where a sufficient volume of goods enters the forum state through the stream of commerce, establishing a regular course of sales, the defendant corporation "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>152</sup> This is consistent with the majority rules that emerge from both *Nicastro* and *Asahi*.<sup>153</sup>

In applying this test, each set of facts should undergo a case-by-case analysis—in order to avoid situations like—as described by Justice Stevens in his *Nicastro* concurrence—the Appalachian potter who sells his goods only to a large distributor.<sup>154</sup> If it would be inherently unfair to subject a small-time manufacturer, like the potter, to jurisdiction in a distant forum, that unfairness should be a critical part of the analysis, which, under existing personal jurisdiction precedent, involves a balancing of fairness factors articulated in *Burger King v. Rudzewicz*.<sup>155</sup> The Appalachian potter hypothetical aside, it is

149. *See id.* ("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. As a McIntyre UK officer wrote in an e-mail to McIntyre America: 'American law—who needs it?!'").

150. *See supra* Part II.B (describing the various stream-of-commerce approaches the lower courts have taken since *Nicastro*).

151. *See supra* Part III.A (discussing the growth of the international economy).

152. *See Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring) (emphasizing that the facts "show no 'regular . . . flow' or 'regular course' of sales in New Jersey"); *Asahi Metal Industry, Ltd. v. Super. Ct.*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part and concurring in judgment) (discussing that the volume, value, and hazard of goods entering the forum should be considered in a constitutional analysis of whether personal jurisdiction is proper); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (stating that the exercise of personal jurisdiction is not lawful unless a defendant has purposefully availed itself to the laws of the forum state).

153. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring); *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in judgment).

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

155. *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 477 (1985) (listing fairness factors to 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

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important to remember that corporations seek to maximize gain and benefit from one of the largest economies in the world: the United States.<sup>156</sup> These considerations should also weigh into a fairness analysis.

Counsel must also build a complete record when arguing the appropriateness of jurisdiction in a particular forum.<sup>157</sup> While the *Nicastro* Court focused heavily on the fact that there was only one sale of the machine in question in New Jersey,<sup>158</sup> McIntyre probably sold more machines than that in the forum—a point that could have been supported with a more adequate record.<sup>159</sup> In order to meet the standard this Comment advocates, a well-built record, particularly one that establishes the volume of goods entering the forum, is imperative.

Utilizing a volume test to establish personal jurisdiction from the stream of commerce is also in alignment with existing precedent.<sup>160</sup> If a certain volume of goods enters a forum, it is not a fortuitous coincidence that would make subjecting a defendant corporation to jurisdiction unfair; rather, volume should put a potential defendant on notice. Willful blindness in selling through a nationwide distributor and asking no question about where the goods are sent should not operate to displace this. When a defendant is benefitting from the products entering a forum—both from sales of the product and from the laws of the forum—the defendant should not be surprised to be subjected to a lawsuit in that forum. Essentially, as the Oregon Supreme Court correctly determined in the *Willemssen* case, these things add up to “sufficient minimum contacts” for the exercise of specific jurisdiction over a defendant corporation.<sup>161</sup>

Furthermore, as Justice Breyer correctly pointed out in his concurring opinion in *Nicastro*, the cornerstone of the personal jurisdiction inquiry is a focus on the “defendant, the *forum*, and the litigation”—whether “it is fair, in light of

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resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies”) (internal quotations omitted).

156. *See Nicastro*, 131 S. Ct. at 2796 (Ginsburg, J., dissenting) (discussing that McIntyre UK earned more in the U.S. than it did anywhere else in the world).

157. *See id.* at 2792 (Breyer, J., concurring) (discussing evidence that the plaintiff could have submitted to prove jurisdiction, but did not).

158. *Id.* at 2790–91; *see also id.* at 2792 (Breyer, J., concurring) (“None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court’s previous holdings suggest the contrary.”).

159. *Id.* at 2792 (Breyer, J., concurring) (stating that *Nicastro* could have introduced additional facts in support of jurisdiction, such as a list of potential New Jersey customers).

160. *Id.* at 2793 (stating that the “constitutional demand” in determining whether jurisdiction is proper is “minimum contacts” and “purposeful[ ] avail[ment],” both of which “rest upon a particular notion of defendant-focused fairness”).

161. *Willemssen v. Invacare*, 282 P.3d 867, 874–75 (Or. 2012).

To be sure, nationwide distribution of a foreign manufacturer’s products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state. In this case, however, the record shows that, over a two-year period, Invacare sold 1,102 motorized wheelchairs with CTE battery chargers in Oregon. . . . The sale of the CTE battery charger in Oregon that led to the death of the plaintiff’s mother was not an isolated or fortuitous occurrence.

*Id.* at 874.

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the defendant's contacts *with that forum*, to subject the defendant to suit there."<sup>162</sup> A volume-based, stream-of-commerce test keeps the focus on the defendant, the forum, and the litigation—requiring a relationship between all three—while still allowing for personal jurisdiction jurisprudence to evolve with the global economy. As consumers become increasingly dependent on online shopping and products are shipped to them from all over the world, a rigid standard, such as that suggested by Justice Kennedy in his *Nicastro* plurality opinion, will not work.<sup>163</sup>

#### IV. A LEGISLATIVE BACK-UP: CONGRESS AND PERSONAL JURISDICTION OVER FOREIGN CORPORATIONS

This Part will argue the need for a statutory solution as a stopgap for instances where foreign corporations are not subject to jurisdiction in any court under a minimum contacts analysis.<sup>164</sup> This Part also discusses legislation proposed in 2011 that provided a potential solution to this problem and why it did not pass then and likely would not pass now. Finally, this Part proposes a new statutory solution—an international long-arm statute, where a corporation's contacts are analyzed under Fifth Amendment Due Process, rather than the Fourteenth Amendment.

##### A. *The Necessity of a Statutory Solution*

A Japanese corporation designs a product and sells the design to its US subsidiary in California.<sup>165</sup> The subsidiary, an independent corporation not controlled by the Japanese corporation in question, then manufactures the product in Mexico.<sup>166</sup> A Mexican corporation oversees the manufacturing and places the product in the stream of commerce, where an Illinois consumer purchases it.<sup>167</sup> The product has a design defect that injures the consumer and the consumer wants to bring a lawsuit against the company who oversaw the design—the Japanese corporation.<sup>168</sup> Is there a United States court that has

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

163. *Id.* at 2788; *see also id.* at 2793 (Breyer, J., concurring) (“[W]hat if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.”).

164. *See supra* Part III.A (describing a hypothetical situation where a foreign defendant would not be subject to personal jurisdiction in any US state).

165. *Saia v. Scripto-Tokai Corp.*, 851 N.E.2d 693, 695 (Ill. App. 2006).

166. *Id.*

167. *Id.*

168. *Id.* Reasons for suing the Japanese corporation rather than the Mexican corporation can vary, although it is a decision that likely comes down to money. For example, in *Nicastro*, the plaintiff could only recover from McIntyre UK because McIntyre America filed for bankruptcy and was no longer operating. *Nicastro*, 131 S. Ct. at 2796 n. 2 (Ginsburg, J., dissenting).

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personal jurisdiction over the Japanese corporation? It is questionable on these facts.<sup>169</sup>

In the above hypothetical, which was an actual case decided by an Illinois court in 2006, the appellate court determined the corporation did have enough contacts with the forum to support jurisdiction.<sup>170</sup> But in making this determination, the court stated:

“If Scripto [the U.S. subsidiary] succeeds in persuading the trial court that it has no responsibility for the negligent design, [the Plaintiff] may not have any domestic forum for litigating her negligence claim. Illinois has an interest in providing its citizens effective redress for negligent design of products distributed here, and Illinois cannot protect this interest unless it exercises jurisdiction over foreign designers that use subsidiaries to distribute the products they design.”<sup>171</sup>

This excerpt effectively describes why a statutory solution is necessary. Much like a catchall provision, an international long-arm statute will ensure that foreign corporations are subject to jurisdiction in the United States. Its use should be limited to those instances where, under the stream-of-commerce test, a foreign corporation remains outside the jurisdiction of any US state. The statute should be drafted as such. This Comment advocates that, in analyzing personal jurisdiction for a foreign corporation, courts start with the stream-of-commerce theory and utilize the proposed statute as a stopgap. This will create greater accountability when businesses seek to sell, as well as greater redress for consumers injured by defective products.<sup>172</sup> Such a statute is constitutional because, under 5th Amendment due process, the inquiry is whether sufficient contacts exist with the United States a whole, not with any individual state.<sup>173</sup>

#### *B. Dead on Arrival: Foreign Manufacturers Legal Accountability Act of 2011*

The Foreign Manufacturers Legal Accountability Act (“the Act”) of 2011 sought to address the issues mentioned in the previous Section.<sup>174</sup> As proposed,

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169. Murphy-Petros, *supra* note 99 (stating that “some federal and state courts would decline personal jurisdiction” based on the facts stated in this paragraph).

170. *Saia v. Scripto-Tokai Corp.*, 851 N.E.2d at 701.

171. *Id.*

172. See Andrew F. Popper, *The Two-Trillion Dollar Carve-Out: Foreign Manufacturers of Defective Goods and the Death of H.R. 4678 in the 111th Congress*, 26 TOXICS L. REP. 105, 107 (2011) (describing various claims against foreign manufacturers and stating “[t]hat foreign entities and individuals profit from the sale of goods—on occasion, dangerous or even deadly defective goods—and are somehow outside [the US justice] system is offensive, dangerous, and unfair.”).

173. Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code*, 16 AM. BANKR. INST. L. REV. 37, 39 (2008).

174. Foreign Manufacturers Legal Accountability Act of 2011, S.1946, 112th Cong. § 2 (2011) (findings

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the Act required registration of agents of foreign manufacturers authorized to accept service of process in the United States; in particular, it required the agent to be located “in a State with a substantial connection to the importation, distribution, or sale of the covered product.”<sup>175</sup> In registering an agent, the foreign manufacturer also consented to the personal jurisdiction of the state or federal courts where the agent is located.<sup>176</sup> The Act only required foreign manufacturers who exceeded a minimum volume to appoint an authorized agent.<sup>177</sup>

While the Act would have been a large step towards ensuring that foreign corporations are not judgment-proof because of personal jurisdiction issues, it did not come to fruition, nor does it appear likely to in the future.<sup>178</sup> Senate Bill 1946 and House Bill 3646, both comprising the Act, were reintroductions of earlier, similar legislation that did not pass.<sup>179</sup> More likely than not, the same issues that doomed the 2010 Act also led to the failure of the 2011 Act—“vocal and well-funded opposition from foreign manufacturers and their U.S. representatives” coupled with politicians whose ideologies favor big business.<sup>180</sup>

This solution will likely remain unviable so long as staunch partisanship and great ideological divide remains in Congress. While the Act is far from perfect—making no guarantees that an injured plaintiff will be able to litigate in a convenient forum<sup>181</sup>—at the very least, it does bring foreign corporations within the reach of the US legal system. It also does so in a way consistent with existing legal precedent. One point made by Justice Kennedy in his *Nicastro* plurality opinion is that “explicit consent” by a defendant will support jurisdiction.<sup>182</sup> Agreement to appoint an agent who is authorized to receive service of process, as stated in the Act, is viewed as consenting to the jurisdiction of the courts within the state where the agent is located.<sup>183</sup> Furthermore, Justice Kennedy suggests that

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include that “[f]oreign manufacturers and producers often seek to avoid judicial consideration of their actions by asserting that United States courts lack personal jurisdiction over them” and “[f]oreign manufacturers and producers can avoid the expenses necessary to make their products safe if they know they will not be held liable for violations of United States product safety laws”).

175. *Id.* § 5.

176. *See id.* (clarifying, also, that consent to jurisdiction only applies to regulatory proceedings or civil actions relating to the manufactured product).

177. *Id.*

178. *S. 1946 (112<sup>th</sup>): Foreign Manufacturers Legal Accountability Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1946#related> (last visited Jan. 6, 2013) (on file with the *McGeorge Law Review*) (stating both the Senate and House bills that comprised the Act died when the 112<sup>th</sup> Congress adjourned).

179. *Id.*

180. Popper, *supra* note 172, at 105.

181. Foreign Manufacturers Legal Accountability Act of 2011, S.1946, 112<sup>th</sup> Cong. § 5 (2011) (on file with the *McGeorge Law Review*) (stating that jurisdiction is proper in the state where the registered agent is located, not necessarily the state where the injury occurs).

182. *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2787 (2011).

183. *Id.*; Foreign Manufacturers Legal Accountability Act of 2011, S.1946, 112<sup>th</sup> Cong. § 5 (2011).



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a Congressional solution could be the way to go for instances where a foreign defendant targets the United States as a whole.<sup>184</sup>

Finally, in looking at the fundamental fairness of subjecting a foreign manufacturer to jurisdiction within the United States, one only has to consider whether that manufacturer is reaping substantial benefits from US consumers, US laws, and a distribution network that includes the United States. What seems unfair is to subject US manufacturers to this country's laws and regulations, while allowing foreign manufacturers to devise ways to remain outside of the system.<sup>185</sup>

Because the Foreign Manufacturers Legal Accountability Act continues to fail—despite being a clear, straightforward solution—other legislative options should be considered.

#### *C. An International Long-Arm Statute and Fifth Amendment Due Process*

In exercising personal jurisdiction, both state and federal courts look to the long-arm statute in the state where they sit to determine the scope of jurisdiction.<sup>186</sup> Some long-arm statutes allow the exercise of jurisdiction as far as Fourteenth Amendment Due Process will allow, which requires an analysis of minimum contacts between the forum and defendant.<sup>187</sup> This minimum contacts analysis is the core of the issue this Comment discusses.<sup>188</sup> What if a foreign corporation has established no meaningful contacts with any particular state? What if the contacts are with the United States as a whole?

Another statutory possibility exists for situations where a foreign defendant's contacts are with the United States as whole, rather than a particular state. When Congress authorizes nationwide service of process, as it has done in bankruptcy proceedings, courts look to Fifth Amendment due process analysis: do sufficient minimum contacts exist with the United States as a whole?<sup>189</sup> Congress should enact an international long-arm statute based on diversity jurisdiction (a US plaintiff and foreign defendant), narrowly tailored to situations where a corporation is not subject to jurisdiction in any state and premised on Fifth Amendment due process. The long-arm should explicitly state situations where it

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184. *Nicastro*, 131 S. Ct. at 2790 (“It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power.”).

185. Popper, *supra* note 172, at 107.

186. Gardina, *supra* note 173, at 37.

187. *See id.* (citing *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995)). “In order to obtain personal jurisdiction in diversity action, jurisdiction must be legitimate under laws of forum state and under due process clause of Fourteenth Amendment.” *Id.*

188. *See supra* Part IV.A (describing instances where a foreign corporation may have no or little minimum contacts with any forum, making the exercise of personal jurisdiction difficult).

189. Gardina, *supra* note 173, at 39.

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is applicable,<sup>190</sup> in which federal courts would have jurisdiction over the case (should jurisdiction be appropriate), and the applicable law (to prevent choice of law issues). This solution is likely more appealing than that proposed in the Foreign Manufacturers Legal Accountability Act because it does not require appointment of an agent or consent upfront;<sup>191</sup> rather, it calls for minimum contacts analysis, which is more in line with existing personal jurisdiction precedent. Furthermore, in considering concerns about damage to businesses, this statute should actually be viewed as pro-business: it equalizes the playing field for US companies, who are much more likely to be haled into court in the United States, and foreign corporations who, depending on how they structure their subsidiaries and the like, seemingly enjoy an unfair advantage.

In *Nicastro*, there was no denying that McIntyre UK targeted the United States as a whole by selling its products to a US distributor.<sup>192</sup> The record, as it stood, showed no sales by McIntyre UK directly to US consumers nor was there any evidence that its US distributor was under its control.<sup>193</sup> Analyzing minimum contacts for purposes of satisfying the Fourteenth Amendment appears next to impossible, but if the same analysis is done under the Fifth Amendment Due Process Clause, haling McIntyre UK into a US court appears more likely as there seems to be no other reason for selling to a US distributor other than to gain business from the US as a whole.<sup>194</sup> In short, sufficient minimum contacts do seem to exist when considering the United States as a whole.<sup>195</sup> An international long-arm, in still adhering to minimum contacts analysis and fundamental fairness, is a reasonable solution to a problem that could otherwise leave consumers with no recourse.<sup>196</sup>

## V. CONCLUSION

As the modern, global economy grows and more products enter the United States from a foreign manufacturer through a distribution chain,<sup>197</sup> ensuring that these corporations are subject to the personal jurisdiction of a United States court is crucial. The Supreme Court should articulate a clear test for determining

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190. Applicable situations include products liability claims where a foreign defendant is not subject to jurisdiction in any United States court because of lack of minimum contacts. Unlike FED. R. CIV. P. 4(k)(2), the claim would not have to be under federal law.

191. Foreign Manufacturers Legal Accountability Act of 2011, S.1946, 112th Cong. § 5 (2011).

192. *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

193. *Id.*

194. *Id.*

195. *Id.*

196. Popper, *supra* note 172, at 105 (“Because of the complex post-*Asahi* minimum contacts puzzle, many of those producers are not subject to tort liability in state courts regardless of the fact that their products are dangerous and likely to be sold in the United States.”).

197. *Id.* at 105 (“Gross sales of foreign manufactured goods in the U.S. exceed two trillion dollars annually.”).

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whether personal jurisdiction is proper based on the stream-of-commerce theory as soon as possible. Based on existing personal jurisdiction precedent, the test should be a volume-based inquiry, examining both the number of products sold and the dollar amount of sales within the forum—an analysis some lower courts are already applying.<sup>198</sup> Furthermore, Congressional action is also necessary to prevent foreign corporations with no contacts in any particular forum state from being judgment-proof to products liability actions. This stopgap should be an international long-arm statute requiring analysis under the Due Process Clause of the Fifth Amendment: do sufficient, minimum contacts exist with the United States as a whole?<sup>199</sup> Foreign corporations should not be able to escape liability simply by placing a buffer, such as a US distributor that they do not control, in between themselves and the US legal system.

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198. *See* *Willemsen v. Invacare*, 282 P.3d 867, 874–75 (2012) (determining jurisdiction was proper based on the number of products that had entered the forum, as well as the dollar amount sold in the forum).

199. *See supra* Part IV.C (suggesting an international long-arm statute where the minimum contacts analysis would consider contacts with the United States as a whole, rather than individual states).