

Charleston School of Law

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April, 2012

Goodyear Dunlop Tires Operations, S.A. v. Brown (and J. McIntyre Machinery, Ltd. v. Nicastro)

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TOP 20 FOOD AND DRUG CASES, 2011 & CASES TO WATCH, 2012

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978-1-935065-48-7/02.75

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CHAPTER 1

GOODYEAR DUNLOP TIRES
OPERATIONS, S.A. v. BROWN
(AND J. McINTYRE MACHINERY,
LTD. v. NICASTRO)

WILLIAM M. JANSSEN

Among the most ardently avoided memories for most lawyers is their recollection from the first week of civil procedure class. Typically, that week brings with it a law student's first exposure to the delight of education by Socratic Method¹ (an experience, alone, of recoiling distinction). But, in civil procedure class, this wracking event is made all the more unpleasant by the students' encounter with *Pennoyer v. Neff*.²

Decided just 13 years after the death of Abraham Lincoln and the close of the American Civil War, Associate Justice Stephen Field's *Pennoyer* decision for a nearly unanimous court confronts a byzantine tangle of intrigue, with debt across state lines, involving a debtor of whereabouts unknown (seemingly), pursued by an especially disreputable creditor with a wicked strategic cleverness and a dark past, the distinction between judgments *in rem* and those *in personam*, the service of process code legislated for Oregon (by then admitted to statehood not even 20 years), and the curious origins of the path that the Fourteenth

¹ See BLACK'S LAW DICTIONARY at 1518 (9th ed. 2009) ("A technique of philosophical discussion—and of law-school instruction—by which the questioner (a law professor) questions one or more followers (the law students), building on each answer with another question, esp. an analogy incorporating the answer. • This method takes its name from the Greek philosopher Socrates, who lived in Athens from about 469–399 B.C. His method is a traditional one in law schools, primarily because it forces law students to think through issues rationally and deductively—a skill required in the practice of law. Most law professors who employ this method call on students randomly, an approach designed to teach students to think quickly, without stage fright.")

² 95 U.S. 714 (1878). Feel that? If you are a lawyer and reading this footnote, it is almost certain that you've already had a chill sink down your spine, and the hairs on your neck are now the envy of the finest corps of cadets on the West Point green.

Amendment's Due Process Clause would cleave through the United States' personal jurisdiction jurisprudence.³ To enhance how memorable this experience would later be for those trembling future lawyers (who, this day, will prove that M&Ms really *can* melt in one's hands before they ever make it to the mouth), the *Pennoyer* decision candidly acknowledges that no one on the Supreme Court really knows what the words "due process" fully mean (not an especially comforting—or orienting—revelation for new law students who fret, if the United States Supreme Court is lost, what possible chance do I have?).⁴ It also is not particularly helpful that the Supreme Court, in reaching this announcement, plows exhaustingly through 22 pages of verbosity that is written in 19th century prose that feels hopelessly inaccessible to the legal newbies who, by now, are sitting at their desks convulsed in numbing horror that they might be Socrates' next victim.⁵ *Pennoyer* is, truly, a law professor's dream.

But *Pennoyer* is, also, the true "fountainhead" of constitutional personal jurisdiction theory, and therefore essential reading for all new lawyers.⁶ In *Pennoyer*, the Supreme Court confirmed that whatever the elusive "due process" phrase might otherwise mean, it at least acts as a governor which not only limits when a court's civil judgments are entitled to full faith and credit in sister states, but also whether those judgments are valid and enforceable at home.⁷ This now venerable constraint—constitutional personal jurisdiction—today safeguards a "defendant's right not to be coerced except by lawful judicial power."⁸ For lawyers-in-training, it also marks the outset of a challenging early toil, as they labor to learn

³ In a different setting, the sordid adventure underlying *Pennoyer v. Neff* ought to have made fascinating reading for law students. It seems that Marcus Neff, a young and illiterate homesteader in Oregon, engaged a local attorney known as J. H. Mitchell to pursue land grant paperwork on his behalf. Mr. Mitchell was not all he seemed, but instead a former schoolteacher from Pennsylvania named John Hipple who had fled a marriage to one of his students, traveling to California (in the company of a different woman). Fleeing her as well, once she became ill and too expensive to care for, Mr. Mitchell/Hipple ventured on to Oregon, remarried there (without ever divorcing his Pennsylvania wife), practiced law, became a U.S. Senator, had a five-year tryst with his new wife's younger sister, was convicted of land fraud, and died while his appeal was pending (from, evidently, complications from a tooth extraction). The whole tale is spun with wonderful skill in Wendy Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 480-91 (1987).

⁴ See, e.g., *Pennoyer*, 95 U.S. at 733 ("Whatever difficulty may be experienced in giving to those terms ["due process"] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden ...").

⁵ See, e.g., *Pennoyer*, 95 U.S. at 733 (holding that, for civil lawsuit, due process means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.").

⁶ Whether Professor Freer and Dean Purdue first coined this "fountainhead" characterization of *Pennoyer* or not, I do not know, but their characterization is very apt. RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 22 (5th ed. 2008).

⁷ See *Pennoyer*, 95 U.S. at 732-36. See also *id.* at 732 ("if the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, it is difficult to see how the judgment can legitimately have any force within the State.").

⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, ___ U.S. ___, 131 S. Ct. 2780, 2785 (2011).

how the law in this area has evolved from *Pennoyer* over the years, to accommodate the transformative pace, innovation, and technological structure of the national economy,⁹ the emerging prevalence of the corporate actor in that new economy,¹⁰ the increasing potential for distant impacts from local market conduct¹¹ and the penchant for commercial actors to engage in significant, sustained business relationships implicating multiple state interests,¹² the widespread participation in a national (and international) flow of commerce,¹³ and the advent of the exponentially expansive and sophisticated cyberspace market.¹⁴

Pennoyer is about judicial power, the constraints on the extraterritorial reach of that power, and how those constraints have morphed to meet contemporary conditions. In June 2011, the United States Supreme Court added its most recent chapters to this stately story with the release of two new personal jurisdiction cases—*Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastrò*.

I. Why It Made the List

The study of constitutional personal jurisdiction is much like watching a PBS documentary on the life of polar bears—long periods of hibernation interrupted by breathtaking adventures. The Supreme Court’s contributions to this area have been marked by fits and starts. For example, during the decade of the 1980s, the Supreme Court was especially prolific in this area of its jurisprudence, releasing in quick succession a parade of landmark personal jurisdiction decisions that reshaped our understanding of this legal doctrine: *World-Wide Volkswagen Corp. v. Woodson* in 1980¹⁵; *Insurance Corporation of Ireland v. Compagnie de Bauxites de Guinee* in 1982¹⁶; *Keeton v. Hustler Magazine, Inc.*,¹⁷ *Calder v. Jones*,¹⁸ and *Helicopteros Nacionales de Colombia, S.A. v. Hall*¹⁹ in 1984; *Burger King Corp. v. Rudzewicz*²⁰ and *Phillips Petroleum Co. v. Shutts*²¹ in 1985; *Asahi Metal Industry Co. v. Superior Court of*

⁹ See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

¹⁰ See *International Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945).

¹¹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

¹² See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

¹³ See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987).

¹⁴ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

¹⁵ 444 U.S. 286 (1980).

¹⁶ 456 U.S. 694 (1982).

¹⁷ 465 U.S. 770 (1984).

¹⁸ 465 U.S. 783 (1984).

¹⁹ 466 U.S. 408 (1984).

²⁰ 471 U.S. 462 (1985).

²¹ 472 U.S. 797 (1985).

*California*²² and *Omni Capital International, Ltd. v. Rudolf Wolff & Co, Ltd.*²³ in 1987; and, in early 1990, *Burnham v. Superior Court of California*.²⁴ By any measure, that 10-year period marked one of the most vibrant in the Court's history of work in personal jurisdiction.

The 21 years that followed were far different. Between the *Burnham* opinion's release in early 1990 and June 2011, the Supreme Court's personal jurisdiction jurisprudence returned to its somnolence.²⁵ Lower federal courts and the courts of the states were largely left to fend for themselves in the commercially evolutionary era that marked this period. As the Internet quickly shrunk the planet and brought every marketplace into the family room computer,²⁶ creating unimaginably vast new portals for commerce and information exchange that strained existing personal jurisdiction concepts, those lower courts struggled alone. As to personal jurisdiction, the Supreme Court had decamped.

This changed on the morning of June 27, 2011. On that day, the Court returned from its personal jurisdiction slumber with its two opinions in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastrò*. The first was unanimous with nary a concurrence; the second was a fractured 4-2-3 decision. Both opinions addressed the issue of constitutional personal jurisdiction in the context of the new global economy (although neither squarely, nor for very long, confronted the related question of Internet contacts as a jurisdictional element).²⁷ Both cases involved American plaintiffs bringing suit domestically for personal injuries they claimed were caused by a foreign defendant's manufactured product (in *Goodyear*, three tire manufacturers from Turkey, France, and Luxembourg; in *J. McIntyre Machinery*, a British manufacturer of metal sheering equipment). In neither case were the foreign defendants presently physically within the forum where the case lay pending. In both cases, the foreign defendants prevailed, successfully resisting the exercise of the forum's jurisdiction.

²² 480 U.S. 102 (1987).

²³ 484 U.S. 97 (1987).

²⁴ 495 U.S. 604 (1990).

²⁵ In 1991, the Court approved the use of forum selection clauses as constitutionally adequate consent to personal jurisdiction, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), and in 1992, it unanimously found that a mail order office supply company had purposefully availed itself of the privilege of doing business in North Dakota, *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08 (1992), and that Argentina had likewise availed itself of a United States forum by issuing certain negotiable debt instruments, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619-20 (1992).

²⁶ See Santa Clara Valley Historical Ass'n, *Internet Timeline* (available at http://www.siliconvalleyhistorical.org/home/internet_timeline).

²⁷ The irony in this evasion is extraordinary. To a lower judiciary awash in uncertainty as to the proper application of the Due Process Clause to Internet activity, the Court offered no special insights on the matter, although it plainly feels comfortable using this electronic resource for its own purposes. See, e.g., *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2796 n.1 (Ginsburg, J., dissenting) (citing trade industry statistics from the Internet site of the Scrap Recycling Industries, Inc. Member Directory); *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007) (inviting readers to view a police surveillance videotape available through the Court's website).

Although neither decision involved a drug or device product, the twin opinions in *Goodyear* and *J. McIntyre Machinery* qualify easily for the list of the most important drug and device cases of 2011. First, the pharmaceutical and medical device industries are among the most international of the world's commercial sectors.²⁸ If Justice Breyer, in his concurring opinion in *J. McIntyre Machinery*, was right to be concerned about the changing impact of personal jurisdiction theory in the 21st century global marketplaces confronting “an Appalachian potter” crafting cups and saucers, and an “Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer,”²⁹ how exponentially more pronounced must that changing impact be within the established international marketplace and supply channels for pharmaceuticals and medical devices. Second, constitutionally adequate personal jurisdiction over non-resident defendants is an unquestionable predicate to the exercise of judicial power in the United States.³⁰ The issue is not some occasional, incidental litigation technicality, but a critical, omnipresent threshold hurdle for American litigation. Third, these decisions mark the Supreme Court's long-delayed and long-awaited return to this area of jurisprudence. Making sense of, and correctly applying, this absent oracle's new directives assumes national importance for every domestic litigation (which, obviously, included drug and device cases). Therefore, because these cases influence the manner in which personal jurisdiction will now be assessed in every courtroom in America, against both domestic defendants and foreign ones, their reverberating effect throughout the drug and device litigation environment merits careful attention.

II. Facts of Case

Goodyear Dunlop Tires Operations, S.A. v. Brown

As a team of under-14-aged soccer players was heading to a Paris airport for their return flight back home to North Carolina after a youth tournament in France, the bus in which they were riding overturned into a ditch in Paris, injuring several of the passengers and

²⁸ The international outsourcing of key components of the innovation / early-study steps in pharmaceutical development has continued to grow. See Duke Univ., *Global Value Chains: Shifts in the Configuration of the Industry from 1995 Until Present*, THE GLOBAL PHARMACEUTICAL INDUSTRY (available at <http://www.duke.edu/web/soc142/team2/shifts.html#outsourcing>). In terms of marketing prospects, some predict a global pharmaceutical marketplace reaching \$1.1 trillion by 2014, with double-digit growth throughout the so-called “pharmerging” countries marketplace—led by an anticipated growth in the Chinese pharmaceutical market of 20 percent per year. See, e.g., IMAP, PHARMAECUTICALS & BIOTECH INDUSTRY GLOBAL REPORT – 2011, at 4 (available at http://www.imap.com/imap/media/resources/IMAP_PharmaReport_8_272B8752E0FB3.pdf).

²⁹ *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2793-94 (Breyer, J., concurring).

³⁰ *World-Wide Volkswagen*, 444 U.S. at 291 (“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.”) (citation omitted).

killing two 13-year-old boys.³¹ The families of the two boys brought a lawsuit claiming that one of the bus tires failed when its plies separated, and contending that the failed tire was defectively designed, manufactured, and distributed.³²

The tire that failed was a Goodyear brand Regional RHS tire manufactured by Goodyear Lastikleri T.A., a wholly owned Goodyear subsidiary that maintained its manufacturing plant in the nation of Turkey (“Goodyear Turkey”).³³ Among the defendants the families named in their lawsuit were the Goodyear parent company (the Goodyear Tire and Rubber Company),³⁴ the failed tire’s manufacturer (Goodyear Turkey), and two other European Goodyear subsidiaries—Goodyear Luxembourg Tires SA (“Goodyear Luxembourg”) and Goodyear Dunlop Tires France SA (“Goodyear France”).³⁵ The parent, Goodyear USA, did not contest the exercise of personal jurisdiction by the North Carolina State court, but the three subsidiaries did.³⁶

The three subsidiaries manufactured tires for principally European and Asian markets, and their tires were of different sizes and constructions to accommodate markets where permitted load weights, road conditions, and speed limits differ from U.S. markets.³⁷ None of these three subsidiaries from Turkey, Luxembourg, or France had a place of business, employees or bank accounts in North Carolina.³⁸ None designed, manufactured, or advertised products in North Carolina, and none solicited business in, sold products in, or shipped products to North Carolina.³⁹ Nevertheless, thousands of tires made by these subsidiaries still made their way into North Carolina during an exemplar four-year period, 2004 to 2007, typically in response to custom orders placed for specialized heavy vehicles like cement mixers, waste haulers, and trailers for boats and horses.⁴⁰ During that four-year period, Goodyear Turkey shipped “at least 5,906 tires” into North Carolina; Goodyear France shipped “at least 33,923” tires into North Carolina; and Goodyear Luxembourg shipped “at least 6,402” tires into North Carolina.⁴¹ These shipments and sales were made “indirectly”—not by or

³¹ See *Julian Brown, 13, Becomes Second ODP Player To Die From French Bus Crash*, SOCCERTIMES.COM (Apr. 26, 2004) (available at <http://www.soccertimes.com/youth/2004/apr26.htm>). According to this contemporary media report, the bus driver was jailed in France after the crash for exceeding the speed limit by 20 miles per hour on rain-soaked roads; the bus’s “governor”—which would have restricted the vehicle’s speed—had reportedly been disabled. See *id.*

³² See *Brown v. Meter*, 681 S.E.2d 382, 384 (N.C. Ct. App. 2009).

³³ See *id.* at 385-86.

³⁴ The parent company is an Ohio corporation. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, ___, 131 S. Ct. 2846, 2850 (2011).

³⁵ See *Brown*, 681 S.E.2d at 384.

³⁶ See *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2850.

³⁷ See *id.* at 2852.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *Brown*, 681 S.E.2d at 385. The numbers may be higher, since the parent Goodyear company had not determined how many other tires from these three subsidiaries made it to North Carolina attached to cars imported for U.S. sale. See *id.*

through the original foreign subsidiaries, by rather through the Goodyear parent or other Goodyear subsidiaries.⁴² The type of tire that failed on that tragic day outside the Paris airport—Goodyear brand Regional RHS tire manufactured by Goodyear Turkey—had, however, never been distributed in North Carolina.⁴³

The three foreign subsidiaries' challenge to personal jurisdiction did not persuade the Onslow County trial judge. He reasoned that tire shipments into North Carolina "generate[d] substantial revenue" for both the Goodyear parent and its three subsidiaries, that the subsidiaries' contacts with the state were therefore "continuous and systematic," that the subsidiaries were owned by U.S. companies which themselves did substantial business in North Carolina, that the pending lawsuit was "closely related to the contacts with the [subsidiaries], in that [they] are causing substantial quantities of tires they manufactured to be sold in North Carolina, and plaintiffs seek to exercise jurisdiction related to a defect in a tire [those companies had] designed, manufactured, distributed, or sold," that North Carolina had a substantial interest in providing its citizens a forum for redress, and that the foreign defendants would not be substantially inconvenienced by litigating in state, while the families of the deceased boys would certainly be.⁴⁴

On appeal, the North Carolina Court of Appeals affirmed. Although parting company with the trial judge on his finding of a "relatedness" between the North Carolina contacts to the underlying lawsuit,⁴⁵ and thereby acknowledging that personal jurisdiction would require a "higher threshold" showing of "continuous and systematic contacts,"⁴⁶ the court determined that the operative inquiry must be whether the three subsidiaries had "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina."⁴⁷ The court noted that inspection of the failed tire led plaintiffs' engineering expert to conclude that the tire was "designed, manufactured and marketed for sale worldwide, including sale in the United States and North Carolina," because it was imprinted with a serial number and other markings required by the U.S. Department of Transportation regulations for domestic distribution and also contained load and pressure rating listings and other English-language

⁴² See *Brown*, 681 S.E.2d at 385-86 & 386 n.4. The North Carolina appeals court would ultimately credit this factual finding: "the record appears to be devoid of evidence that [the three foreign subsidiaries] took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina. On the contrary, the available evidence tends to show that other entities were responsible for the shipment of tires manufactured by [the three subsidiaries] to the United States and, as a part of that process, the tires arrived in North Carolina. As a result, our analysis of the trial court's findings is informed by our understanding that [the three subsidiaries], as separate corporate entities, were not directly responsible for the presence in North Carolina of tires that they had manufactured."

⁴³ See *id.*

⁴⁴ See *Brown*, 681 S.E.2d at 386-87.

⁴⁵ Cf. *Brown*, 681 S.E.2d at 388 ("The present dispute is not related to, nor did it arise from, Defendants' contacts with North Carolina.").

⁴⁶ See *id.* at 388.

⁴⁷ *Id.*

markings to facilitate U.S. sales.⁴⁸ Thus, the court adduced that, “at an absolute minimum, [Goodyear Turkey] contemplated that the tire might be sold in this country,” that other tires manufactured by the subsidiaries “were shipped to the United States for sale,” and that the subsidiaries made “no attempt to keep these tires from reaching the North Carolina market.”⁴⁹ Combined with the sizable volumes of tires injected into North Carolina during the 2004-2007 period, the factual record persuaded the appeals court that a “continuous and systematic” chain of distribution, and not “a sporadic or episodic one,” had been established.⁵⁰ The court agreed there was “no question” that the subsidiaries would be burdened by litigating in North Carolina, but reasoned that their burden was “alleviated to some extent” by their U.S. corporate affiliations and, in any event, the burden confronting the deceased boys’ families to have to litigate in Europe was “greater.”⁵¹

After the North Carolina Supreme Court refused to hear a further appeal,⁵² the three subsidiaries sought, and were granted, certiorari to the United States Supreme Court.⁵³

J. McIntyre Machinery, Ltd. v. Nicastro

Robert Nicastro worked for 30 years with a Saddle Brook, New Jersey scrap metal company.⁵⁴ In October 2001, he was operating a three-ton metal sheering machine at work when his right hand was caught accidentally by the machine’s blades, severing four of his fingers.⁵⁵ In the product liability claim that followed, Mr. Nicastro contended that the sheering machine was defective in design because it had no safety guard and because it lacked adequate warnings and instructions.⁵⁶ He named two parties as defendants—the machine’s designer and manufacturer (J. McIntyre Machinery, Ltd.) and its exclusive U.S. distributor (McIntyre Machinery America, Ltd).⁵⁷ The claim against the exclusive distributor moved aside quickly; that company had filed for bankruptcy the same year as Mr. Nicastro’s injury and did not participate in the lawsuit.⁵⁸ Consequently, the only practical defendant in the lawsuit was the designer/manufacturer of the sheering machine, J. McIntyre Machinery, Ltd.

⁴⁸ See *id.* at 392-93.

⁴⁹ See *id.* at 393.

⁵⁰ See *id.* at 394.

⁵¹ See *id.* at 394.

⁵² *Brown v. Meter*, 695 S.E.2d 756 (N.C. 2010).

⁵³ ___ U.S. ___, 131 S. Ct. 2846 (2010) (No. 10-76).

⁵⁴ See *Nicastro v. McIntyre Mach. America, Ltd.*, 987 A.2d 575, 577 (N.J. 2010) [hereinafter *Nicastro III*]. As found by the New Jersey courts, these facts were undisputed. See *id.* at 582 n.7 (“The facts in this case are basically undisputed. It is the legal consequences that flow from the facts that are at issue.”).

⁵⁵ See *id.* See also *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2795 (Ginsburg, J., concurring). The New Jersey appeals court clarifies the imposing size of this machine. See *Nicastro v. McIntyre Mach. America, Ltd.*, 945 A.2d 92, 96 (N.J. Super. Ct., App. Div. 2008) [hereinafter *Nicastro I*] (“The machine is about eight feet long and six feet high and weighs more than three tons.”).

⁵⁶ See *Nicastro II*, 987 A.2d at 577-78.

⁵⁷ See *id.* at 577.

⁵⁸ See *id.* at 578 n.2.

J. McIntyre Machinery, Ltd. was incorporated in England and maintained its principal place of business in Nottingham, England; it was there that the machine that injured Mr. Nicastro was built.⁵⁹ The company designed and manufactured equipment for the metal recycling industry.⁶⁰ It owned no property in New Jersey, maintained no office, bank account, or employees there, had no New Jersey registered agent. Nor had it obtained from the state a license to do business there.⁶¹ The company itself neither marketed its products to nor shipped its products into New Jersey.⁶² Representatives from the company did, however, attend the annual national trade show conventions of the Institute of Scrap Recycling Industries from 1990 through 2005 that were held in various U.S. cities (but none in New Jersey).⁶³ Representatives also attended other industry-related exhibitions, conferences, and meetings in the United States.⁶⁴ The company held patents on its technology in both Europe and the United States, and cautioned owners and users through its instruction manual to be mindful of applicable health and safety regulations, including those adopted by the American National Standards Institute.⁶⁵ The company also maintained a website from the United Kingdom where it advertised its product line, and one of its sales brochures claimed that the model machine that Mr. Nicastro alleged caused his injury was “use[d] throughout the [w]orld.”⁶⁶

American customers interested in purchasing J. McIntyre Machinery products would do so through the exclusive U.S. distributor the company had appointed. Until 2001, that distributor was McIntyre Machinery America, Ltd., an Ohio corporation with its principal place of business in Ohio.⁶⁷ Although that distributor and the English manufacturer shared a common name, they were not subsidiary/parent, but rather were independent corporate entities with no shared ownership or management.⁶⁸ Evidence in the record insisted that the manufacturer “had no knowledge of the business dealings” between the distributor and its customers,⁶⁹ beyond the obvious recognition that, as a distributor, the Ohio company was

⁵⁹ See *id.* at 577-58. The company has a long history; it was incorporated in 1872. *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

⁶⁰ See *id.* See also *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

⁶¹ See *Nicastro I*, 945 A.2d at 96.

⁶² See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2786.

⁶³ See *id.* at 2795-96 (Ginsburg, J., dissenting) (listing convention locations as Las Vegas, New Orleans, Orlando, San Antonio, and San Francisco).

⁶⁴ See *Nicastro I*, 945 A.2d at 96.

⁶⁵ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

⁶⁶ *Id.*

⁶⁷ See *Nicastro I*, 945 A.2d at 95. Following the Ohio company’s bankruptcy, a Pennsylvania company and, later, a Texas company assumed the role of exclusive distributor for J. McIntyre Machinery products in the United States. See *id.* at 98.

⁶⁸ See *id.* The record in the litigation did not unearth any written contract between the companies. See *id.* Although independent of one another, the record confirmed the manufacturer’s concern with the distributor’s backlog of unsold inventory, its push to have that inventory sold, and its influence over “commissions” that the distributor was earning. See *id.* at 96-97.

⁶⁹ See *id.* at 99.

not the intended end-user of the products sold by the manufacturer but, instead, served as a conduit to the ultimate consumers.⁷⁰ Although separate and independent, the distributor, however, “structured [its] advertising and sales efforts in accordance with [the manufacturer’s] direction and guidance whenever possible.”⁷¹

Mr. Nicastro’s employer came to learn of the J. McIntyre Machinery products during a visit to the company’s exhibitor booth at a trade convention in the mid-1990s in Las Vegas, Nevada, and placed an order with the Ohio distributor for one of the metal sheering machines; the purchase price was \$24,900 made payable to the Ohio distributor.⁷² The Ohio distributor, in turn, shipped the machine to the Saddle Brook, New Jersey facility of the purchaser—Mr. Nicastro’s employer.⁷³ About six years later, Mr. Nicastro was injured.

The trial court granted J. McIntyre Machinery’s motion to dismiss for lack of personal jurisdiction, ruling that the English manufacturer “does not have a single contact with New Jersey short of the machine in question ending up in this state.”⁷⁴ The Appellate Division of the New Jersey Superior Court reversed, reasoning that the manufacturer had, notwithstanding the trial court’s conclusion, engaged in constitutionally adequate minimum contacts with New Jersey:

When defendant [J. McIntyre Machinery] sold and shipped machines to [its Ohio distributor], defendant did not do so with the purpose of availing itself of the Ohio market. When defendant’s senior management personnel attended trade conventions in Las Vegas and other United States cities to display its machines and seek buyers for them (through [the Ohio distributor]), its purpose was not to sell machines for use in Las Vegas or those other cities. Defendant was engaged in purposeful conduct to avail itself of the entire United States market, namely to effect sales, through its exclusive distributor, to end users in all fifty states, including New Jersey.⁷⁵

⁷⁰ See *id.* at 104.

⁷¹ See *Nicastro II*, 987 A.2d at 579.

⁷² See *Nicastro I*, 945 A.2d at 96.

⁷³ See *Nicastro II*, 987 A.2d at 578.

⁷⁴ See *Nicastro I*, 945 A.2d at 99. Later, the New Jersey Supreme Court would essentially agree with this characterization by the trial judge. See *Nicastro II*, 987 A.2d at 582 (“We do not find that J. McIntyre [Machinery] had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff’s claim that J. McIntyre [Machinery] may be sued in this State must sink or swim with the stream of commerce theory of jurisdiction.”).

⁷⁵ *Nicastro I*, 945 A.2d at 104-05.

Granting a subsequent petition for discretionary review, and mindful of the “unreasonable” prospect of requiring Mr. Nicaastro to have to sue in England,⁷⁶ the New Jersey Supreme Court affirmed the Appellate Division by relying on largely similar reasoning:

The increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade and has proven the wisdom of [an approach to stream of commerce jurisdiction theory that will “support[] the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state.”]. Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey.⁷⁷

The manufacturer subsequently sought, and was granted, certiorari to the United States Supreme Court.⁷⁸

⁷⁶ See *Nicaastro II*, 987 A.2d at 593-94 (“It would be unreasonable to expect that plaintiff’s only form of relief is to be found in the courts of the United Kingdom, which may not have the same protections provided by this State’s product-liability law.”). In vigorously defending the decision by the Appellate Division to reverse the trial ruling, Mr. Nicaastro’s counsel faulted J. McIntyre Machinery for selling “its products throughout the United States, and yet claim[ing] immunity from suit anywhere, due to the strategy of using ... [a] financially-irresponsible distributor with a nearly identical name,” and then cautioned the State supreme court that “[t]o permit [J. McIntyre Machinery] to avoid personal jurisdiction in this products-liability matter will create a road-map for foreign manufacturers on how to dump their unsafe products in the United States” and escape liability in the State where their products cause personal injuries. He pressed the Court that public policy ought not “allow such a ‘flanking maneuver’ that will ‘leav[e] a catastrophically-injured citizen without legal recourse.’ ” *Id.* at 581.

⁷⁷ *Nicaastro II*, 987 A.2d at 577. See also *id.* at 592-93 (“J. McIntyre [Machinery] ... targeted the United States market for the sale of its recycling products. It did so by engaging ... an Ohio-based company ... as its exclusive United States distributor for an approximately seven-year period ending in 2001. [It] knew or reasonably should have known that the distribution system extended to the entire United States ... [t]he joint appearances by [the English manufacturer and Ohio distributor at national trade shows] were calculated efforts to penetrate the overall American market. ... [Mr. Nicaastro’s] employer, a New Jersey businessman, is just one example of a person who traveled thousands of miles to a convention where, by dint of a sales effort, he purchased one of J. McIntyre [Machinery]’s machines. [The manufacturer] may not have had access to [the Ohio distributor’s] customer list, but [it] knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. [It] may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States.”).

⁷⁸ ___ U.S. ___, 131 S. Ct. 62 (2010) (No. 09-1343).

III. Court Rulings

In both *Goodyear* and *J. McIntyre Machinery*, the Supreme Court ruled that the States' exercise of personal jurisdiction over the non-resident, foreign defendants was unconstitutionally violative of the Due Process Clause. A brief reminder of the core elements of constitutional personal jurisdiction⁷⁹ will best contextualize these holdings and their significance.

The United States Constitution's two Due Process Clauses "set[] the outer boundaries of a ... tribunal's authority to proceed against a defendant."⁸⁰ The Due Process Clause of the Fifth Amendment binds the federal courts; that of the Fourteenth Amendment binds the State courts.⁸¹

⁷⁹ "Constitutional" personal jurisdiction is, of course, distinct from "statutory" personal jurisdiction. The first predicate for any exercise of personal jurisdiction is comportment with the forum's own grant of judicial authority. Legislatively, most American jurisdictions have enacted "long-arm statutes" that represent their respective judgments about the preferred scope and breadth of their States' judicial authority. Ordinarily, those statutes are grounded in the States' inherent police powers over activities occurring within their territories. See generally 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 (2002). Sometimes, those statutes are very detailed and context-specific. See, e.g., ALASKA STAT. § 09.05.015(a)(1)-(a)(12) (listing 12 different categories of circumstances and 23 separate sub-variants of those categories supporting exercise by Alaska courts of personal jurisdiction). Sometimes, those statutes simply announce the States' intention to exercise jurisdiction as far as the United States Constitution will tolerate. See, e.g., CAL. CIV. PROC. CODE § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). And sometimes, those statutes may do both. See, e.g., PA. CONS. STAT. § 5322(a)(1)-(a)(10) (listing 10 categories and 11 more sub-parts of categories for the assertion of personal jurisdiction by Pennsylvania courts); *id.* § 5322(b) (providing that, in addition to the enumerated listing, Pennsylvania courts also have personal jurisdiction "to the fullest extent allowed under the Constitution of the United States" and such jurisdiction "may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."). Only if this first predicate—"statutory" personal jurisdiction—is satisfied, does the second inquiry—"constitutional" personal jurisdiction—trigger. Thus, a forum may exercise personal jurisdiction that comports with its legislative grant of judicial authority, but only if doing so also meets the due process requirements imposed by the United States Constitution. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1986) ("As has been long settled, and as we affirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.").

⁸⁰ *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2853.

⁸¹ U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ..."); *id.* amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law ..."). The Supreme Court has never applied these two constitutional guarantees differently in the context of personal jurisdiction, and the Court's general discussion of the two Clauses in tandem implies that the Court sees them as affording identical protections though from separate sovereigns. See, e.g., *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'"); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression ...'). See also *Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) (" 'Due process of law,' within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government."). See generally RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 60 (5th ed. 2008) ("Another unanswered question concerning Fifth Amendment limits on personal jurisdiction is whether that Amendment requires the same type of 'purposeful availment' that is required under the Fourteenth Amendment.").

“The canonical opinion in this area remains *International Shoe*,” wrote Justice Ginsburg for the unanimous Court in *Goodyear*.⁸² In the landmark *International Shoe* opinion in 1945, the Court departed from *Pennoyer*’s rigid command that physical presence within the forum’s territory (or consent) was an irreducible prerequisite for personal jurisdiction.⁸³ Instead, the Court wrote that “due process requires only” that the defendant “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁸⁴ Today, two types of such personal jurisdiction are now recognized as passing due process scrutiny. Whether the lawsuit is related to the defendant’s in-state contacts or not, a court enjoys “general” personal jurisdiction over that defendant so long as that defendant’s contacts with the forum are “continuous and systematic.”⁸⁵ Alternatively, if that intensity of forum contacts is missing, a court may still possess “specific” personal jurisdiction over the defendant if, by its contacts, it “purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of [that State’s] laws,”⁸⁶ but—importantly—only if those activities themselves give rise to or relate to the lawsuit’s claims.⁸⁷

Thus, the Due Process Clauses remain potent governors on the exercise of local judicial power over non-residents. Litigation in the forum may be only marginally (or not at all) inconvenient for the non-resident defendant, the forum may have powerful policy interests in adjudicating the dispute, and the forum may indisputably represent the most convenient venue for the claim’s resolution—and, still, absent constitutionally proper “general” or “specific” personal jurisdiction (or consent), the guarantee of due process of law may nevertheless divest the forum of its authority to exercise judicial power over the dispute.⁸⁸

***Goodyear Dunlop Tires Operations, S.A. v. Brown:* “General” Personal Jurisdiction**

The Court in *Goodyear* took the opportunity to refine its “general” personal jurisdiction jurisprudence. Prior to *Goodyear*, the Court had explored the contours of this concept only three times—in 1984 in *Helicopteros Nacionales de Colombia, S.A.*,⁸⁹ in 1952 in *Perkins v.*

⁸² *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2853.

⁸³ See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁸⁴ *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁸⁵ See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 & 414 n.9 (1984).

⁸⁶ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁸⁷ See *Helicopteros*, 466 U.S. at 414 & 414 n.8. See also *International Shoe*, 326 U.S. at 319 (“[T]o the extent that a corporation exercises the privilege of conducting activities with a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”).

⁸⁸ See *World-Wide Volkswagen Corp.*, 444 U.S. at 294.

⁸⁹ 466 U.S. 408 (1984).

Benguet Consolidated Mining Co.,⁹⁰ and in 1923 in *Rosenberg Brothers & Co. v. Curtis Brown Co.*⁹¹ The Court in *Goodyear* continued the path those earlier three decisions had staked.

Writing for a unanimous Court, Justice Ginsburg distilled “general” personal jurisdiction into a simple inquiry—such “all-purpose” jurisdiction will exist when a defendant’s “affiliations with the State are so ‘continuous and systematic’ as to render [that defendant] essentially at home in the forum State.”⁹² The “paradigm forum” for this “all-purpose” / “essentially-at-home” status will, for individuals, be his or her place of domicile; for corporations, “an equivalent place, one in which the corporation is fairly regarded as at home.”⁹³ In erecting this prohibitive threshold for “general” personal jurisdiction, Justice Ginsburg recounted the sweeping consequence that follows once this type of jurisdiction is found to exist: it will permit the forum to hear “any and all claims” against that defendant,⁹⁴ and lawsuits “on causes of action arising from dealings entirely distinct from” the defendant’s forum-related activities.⁹⁵

Measured by this “all-purpose” / “essentially-at-home” inquiry, “general” personal jurisdiction over *Goodyear Turkey*, *Goodyear Luxembourg*, and *Goodyear France* obviously failed. These three foreign defendants may well have designed and manufactured tires that, by the tens of thousands, made their way into the forum, but those connections “fall far short of the ‘continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.”⁹⁶ These three foreign defendants were, concluded Justice Ginsburg, “in no sense at home in North Carolina.”⁹⁷

***J. McIntyre Machinery, Ltd. v. Nicastro:* “Specific” Personal Jurisdiction**

A divided Court decided the *J. McIntyre Machinery* case. All agreed that the English manufacturer was not subject to “general” personal jurisdiction, as it manifestly lacked a “continuous

⁹⁰ 342 U.S. 437 (1952).

⁹¹ 260 U.S. 516 (1923).

⁹² *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2851.

⁹³ *Id.* at 2853.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2853-54 (quoting *International Shoe*, 326 U.S. at 318). Although Justice Ginsburg did not set out definitively where a corporation is “fairly regarded as at home,” she did cite with approval earlier scholars’ conclusions that “identif[ied] domicile, place of incorporation, and principal place of business as ‘paradig[m]’ bases for the exercise of general jurisdiction.” *Id.* at 2853-54 (quoting Lea Brilmayer, Jennifer Haverkamp, Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

⁹⁶ *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2857.

⁹⁷ *Id.*

and systematic” connection to New Jersey and was, unquestionably, not “at home” there.⁹⁸ But the question of “specific” personal jurisdiction fractured the Court, just as a similar question had badly divided the Court in another case nearly a quarter-century earlier.⁹⁹

A plurality of four Justices (led by Justice Kennedy) ruled the English manufacturer had not “purposefully availed” itself of the privilege of conducting commercial activities in New Jersey. The plurality accepted that the factual record might well “reveal an intent to serve the U.S. market,”¹⁰⁰ but that assessment, reasoned Justice Kennedy, side-stepped the proper “specific” jurisdiction inquiry. “Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is [the English manufacturer’s] purposeful contacts with New Jersey, not with the United States, that alone are relevant.”¹⁰¹ Refocused in this manner, the plurality found its legal conclusion easily. J. McIntyre Machinery had no purposeful contacts of any type with New Jersey, and the equipment that injured Mr. Nicastro had been sent into the state by an independent actor. “At no time,” concluded Justice Kennedy, did the English manufacturer “engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws.”¹⁰²

A two-Justice concurrence, led by Justice Breyer, agreed with the plurality’s judgment but on different terms. For the concurring Justices, existing Supreme Court precedent offered all the principles needed to readily decide this case in the English manufacturer’s favor. “None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient,”¹⁰³ and nothing in the record showed any “specific effort by the British Manufacturer to sell in New Jersey.”¹⁰⁴ Thus, “resolving this case requires no more than adhering to our precedents,” and, Justice Breyer reserved, “I would not go further.”¹⁰⁵

In dissent, Justice Ginsburg, joined by Justices Sotomayer and Kagan, would have permitted the New Jersey courts to exercise “specific” jurisdiction over the manufacturer, since that

⁹⁸ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2790 (plurality opinion) (“The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the ‘defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.’”); *id.* at 2792 (Breyer, J., concurring) (“the relevant facts found by the New Jersey Supreme Court show no ‘regular . . . flow’ or ‘regular course’ of sales in New Jersey”); *id.* at 2797 (Ginsburg, J., dissenting) (“all agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly ‘at home’ in New Jersey”).

⁹⁹ *Cf. Asahi Metal Indus. Co. v. Superior Ct. of Calif.*, 480 U.S. 102 (1987) (4-4-1 split on purposeful availment issue).

¹⁰⁰ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2790 (plurality opinion).

¹⁰¹ See *id.* at 2790 (plurality opinion).

¹⁰² See *id.* at 2791 (plurality opinion).

¹⁰³ *Id.* at 2792 (Breyer, J., concurring, joined by Justice Alito).

¹⁰⁴ *Id.* at 2792.

¹⁰⁵ *Id.*

company “dealt with the United States as a single market.”¹⁰⁶ Accepting that “purposeful availment” was the correct measure for this brand of jurisdiction, Justice Ginsburg argued that it was readily satisfied: through its exclusive distributor, J. McIntyre Machinery had “ ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States.”¹⁰⁷ By purposefully cultivating a U.S. market, indiscriminately as among the various States, the manufacturer had, in the dissent’s view, certainly qualified for “specific” jurisdiction in the American forum where a successful sale had given rise to a personal injury claim.¹⁰⁸

IV. Rationale for Decision

Goodyear Dunlop Tires Operations, S.A. v. Brown: “General” Personal Jurisdiction

Goodyear had to be a “general” personal jurisdiction case, if *any* theory of personal jurisdiction would permit the North Carolina courts to proceed there. The unanimous Court swiftly discounted the possibility of “specific” personal jurisdiction—“[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.”¹⁰⁹ Consequently, only the “all-purpose” / “essentially-at-home” brand of personal jurisdiction remained a possibility, and the Court ruled that it, too, was absent.

The Court first identified a threshold error the North Carolina courts had committed in analyzing “general” personal jurisdiction. Throughout their analyses, those courts had interwoven stream-of-commerce and related “specific” jurisdiction concepts with their “general” jurisdiction inquiry. This “[c]onfusing or blending [of the] general and specific jurisdiction inquiries,” the Supreme Court ruled, was a mistake.¹¹⁰ Those “specific” jurisdiction barometers (like stream-of-commerce assessments) “may bolster an affiliation germane to *specific* jurisdiction,” wrote the Court, “[b]ut ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.”¹¹¹

¹⁰⁶ *Id.* at 2801 (Ginsburg, J., dissenting).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2794-802.

¹⁰⁹ *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2851. *See also id.* at 2855 (agreeing with the North Carolina appeals court that the State’s “specific” jurisdiction long-arm provision could not apply because “both the act alleged to have caused injury (the fabrication of the allegedly defective tire) and its impact (the accident) occurred outside the forum.”).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2855-56 (italics in original).

Next, the Court reconfirmed that the “textbook case of general jurisdiction” remains the Court’s 1952 opinion in *Perkins v. Benguet Consolidated Mining Co.*—the only occasion in which the Supreme Court found “general” personal jurisdiction to have existed.¹¹² As most law school 1Ls can readily recount, *Perkins* involved a Philippine mining corporation that fled the oncoming Japanese occupation of its homeland and relocated its wartime commercial activities to Ohio.¹¹³ There, the company’s president operated his office, maintained company files, continued company correspondence, paid salaries, held bank accounts, convened directors meetings, and otherwise supervised the business’s affairs.¹¹⁴ When the company was later sued on a stockholder’s claim that neither arose out of nor related to its Ohio business operations, the Court verified that the requisite “continuous and systematic” activities occurred in Ohio to warrant the exercise of personal jurisdiction over those unrelated claims.¹¹⁵ Intriguingly, Justice Ginsburg closed her discussion of *Perkins* by citing to then-Associate Justice Rehnquist’s characterization of the precedent in 1984; Justice Rehnquist had explained that “Ohio’s exercise of general jurisdiction was permissible in *Perkins* because ‘Ohio was the corporation’s principal, if temporary, place of business.’ ”¹¹⁶ Evidently, it was important to Justice Ginsburg (and, by extension, to the full Court which joined her opinion without qualification) to show that the “continuous and systematic” contacts requirement for “general” jurisdiction required not just a healthy volume of in-forum contacts, but so much so that the forum had become, if even temporarily, the defendant’s “principal” business location.¹¹⁷

Justice Ginsburg then turned to the Court’s later decision in *Helicopteros* where “general” jurisdiction was refused. In that case, the next-of-kin of passengers killed when a helicopter crashed in Peru brought suit in Texas against the helicopter’s Colombian owner and operator.¹¹⁸ Although the Colombia defendant had no operations or assets in Texas, it did engage

¹¹² *Id.* at 2856 (quoting *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

¹¹³ *Id.* (discussing *Perkins*, 342 U.S. at 447-48).

¹¹⁴ *See Perkins*, 342 U.S. at 447-48.

¹¹⁵ *See id.* at 448 (“While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons. . . . [W]e conclude that, under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding.”).

¹¹⁶ *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2856 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 n.11 (1985)).

¹¹⁷ This aligns to an important degree with Justice Brandeis’ pre-*International Shoe* opinion in the 1923 case of *Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923). There, in a very short, three-paragraph opinion, Justice Brandeis held for another unanimous Court that a small Tulsa retailer had not exposed itself to personal jurisdiction in New York simply by regularly purchasing a large volume of its inventory from New York. The sole issue before the Court, he explained, was “whether, at the time of the service of process, defendant was doing business within the state of New York in such manner and to such extent as to warrant the inference that it was present there.” *Id.* at 517. The trial judge was “clearly correct” in holding “no.” *Id.* “Visits [into a State by a foreign corporation’s officers to purchase goods] . . . , even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state.” *Id.* at 518.

¹¹⁸ *Helicopteros*, 466 U.S. at 409-10.

in contract negotiations there, accept Texas checks, purchase equipment there, and send personnel to be trained there.¹¹⁹ Contrasting the *Helicopteros* facts with those in *Perkins*, the Court ruled that “mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions [in other words, “general” jurisdiction].”¹²⁰

The Court’s application of law-to-facts occurred in a simple, three-sentence paragraph. Justice Ginsburg wrote:

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the “the continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.¹²¹

Thus, quite easily, the unanimous Court found that Goodyear Turkey, Goodyear Luxembourg, and Goodyear France were not “essentially at home” in North Carolina, and thus not amenable to the North Carolina courts’ “all-purpose” jurisdiction. In a closing footnote to her legal application discussion, Justice Ginsburg brushed past the contention that the North Carolina courts were obliged to provide a forum for their citizens’ right of redress for injuries. Quoting earlier jurisdiction scholarship, Justice Ginsburg explained: “[G]eneral jurisdiction to adjudicate has in [United States] practice never been based on the plaintiff’s relationship to the forum. There is nothing in [our] law comparable to ... article 14 of the Civil Code of France (1804) under which the French nationality of the plaintiff is a sufficient ground for jurisdiction.”¹²² And, with that, the families of the two deceased North Carolina boys were relegated to litigating their claims against the three foreign subsidiaries in Europe, or not at all.

¹¹⁹ *Id.* at 410-12.

¹²⁰ *Id.* at 418.

¹²¹ *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2857 (citations omitted).

¹²² *Id.* at 2857 n. 5 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1137 (1966)).

***J. McIntyre Machinery, Ltd. v. Nicastro:*
“Specific” Personal Jurisdiction**

As certainly as *Goodyear* was a “general” rather than a “specific” personal jurisdiction case, *J. McIntyre Machinery* was a “specific” rather than a “general” personal jurisdiction case. Instead of “continuous and systematic” contacts with New Jersey, all agreed that the English manufacturer’s actual contacts with the state were—essentially—none at all. The plurality ruled that the record did “not show that J. McIntyre purposefully availed itself of the New Jersey market.”¹²³ The dissenting Justices wrote that the English manufacturer was “hardly ‘at home’ in New Jersey” and “surely is not subject to general (all-purpose) jurisdiction in New Jersey courts.”¹²⁴ At the trial level, the New Jersey trial judge had written that the manufacturer “does not have a single contact with New Jersey short of the machine in question ending up in this state,”¹²⁵ and the New Jersey Supreme Court concurred it could not find that the manufacturer “had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction.”¹²⁶

The operative reasoning in *J. McIntyre Machinery* is complicated by the fractured nature of the deciding Court. The Supreme Court has instructed that, in such cases when the Court releases a judgment where “no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.’”¹²⁷ In *J. McIntyre Machinery*, the plurality of four Justices (Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas) preferred to simply examine actual, intentional forum-specific contacts and, if none exist, reject the exercise of “specific” personal jurisdiction.¹²⁸ The two concurring Justices (Justices Breyer and Alito) disliked the plurality’s “seemingly strict no-jurisdiction rule,” and instead found no cause to do more than simply apply settled Supreme Court precedent to decide the dispute.¹²⁹ The dissenting three Justices (Justices Ginsburg, Sotomayor, and Kagan) would have found that jurisdiction existed by applying a broader purposeful-availment analysis.¹³⁰ Because six Justices voted to reject personal jurisdiction, and because the concurrence qualifies as the “narrowest grounds” taken by those so voting, it is to that concurrence that we first turn.

In his concurrence, Justice Breyer rejected the factual record that had persuaded the New Jersey state courts. He noted the New Jersey Supreme Court’s reliance on three facts as

¹²³ See *J. McIntyre Mach.*, __ U.S. at __, 131 S. Ct. at 2790 (plurality opinion).

¹²⁴ See *id.* at 2797 (Ginsburg, J., dissenting).

¹²⁵ *Id.* at 2790 (plurality opinion) (quoting trial opinion).

¹²⁶ *Id.* at 2790 (plurality opinion) (quoting *Nicastro II*, 987 A.2d at 582).

¹²⁷ *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

¹²⁸ See *J. McIntyre Mach.*, __ U.S. at __, 131 S. Ct. at 2785-91 (plurality opinion).

¹²⁹ See *id.* at 2791-94 (concurring opinion).

¹³⁰ See *id.* at 2794-2806 (dissenting opinion).

supporting “specific” personal jurisdiction: that the manufacturer’s exclusive American distributor had shipped one machine into New Jersey; that the manufacturer wanted the distributor to sell anywhere in America it could; and that representatives of the manufacturer had attended trade shows in other U.S. cities.¹³¹ None of those facts, to Justice Breyer’s eye, however, “provide contacts between [the manufacturer] and the State of New Jersey constitutionally sufficient to support New Jersey’s assertion of jurisdiction in this case.”¹³² He reasoned that nothing showed a regular flow of sales by the manufacturer into the State, nor any “‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else.”¹³³ Because “[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient,” Justice Breyer concluded that “resolving this case requires no more than adhering to our precedent.”¹³⁴

What troubled Justice Breyer about the plurality’s analysis, he explained, was the inflexibility he perceived in their focus on the defendant’s submission to a sovereign’s authority. “[W]hat do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?”¹³⁵ These concerns persuaded Justice Breyer to step back from joining the plurality.

But he was equally uninterested in the competing view, where an awareness that an existing distribution system might carry products to each of the 50 States would be sufficient for jurisdiction. The sweeping consequence of such a view, its incompatibility with prior precedent, and its flawed embrace of a “jurisdiction-by-chattel” approach all concerned Justice Breyer.¹³⁶ “I cannot reconcile so automatic a rule with the constitutional demand for ‘minimum contacts’ and ‘purposefu[l] avail[ment],’ each of which rests upon a particular notion of defendant-focused fairness.”¹³⁷ He worried about “an Appalachian potter” who sold his cups and saucers to an exclusive distributor who then re-sold a mug to a customer in Hawaii,¹³⁸ and about “a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer” who, by consequence of selling to an international distributor, find themselves amenable “to products-liability tort suits in virtually every State in the Unit-

¹³¹ See *id.* at 2791 (concurring opinion).

¹³² *Id.*

¹³³ *Id.* For instance, he cited the lack of any showing that New Jersey customers attended those trade shows. *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 2793.

¹³⁶ *Id.* Indeed, Justice Breyer noted that the jurisdiction-by-chattel approach had already been considered, and rejected, by the Court in *World-Wide Volkswagen, Id.* (noting that “this Court has rejected the notion that a defendant’s amenability to suit ‘travel[s] with the chattel.’”) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 296).

¹³⁷ *Id.*

¹³⁸ *Id.*

ed States.”¹³⁹ These concerns persuaded Justice Breyer that such a view was just as unwise as the plurality’s approach.

Ultimately, because the facts posed of J. McIntyre Machinery’s contacts with New Jersey presented no occasion to tackle these thorny permutations, because the United States Solicitor General had not weighed in on the litigation, and because existing Supreme Court precedent convinced him that jurisdiction would be improper, Justice Breyer declared the he “would not go further.”¹⁴⁰

“Further” is certainly where both the plurality and the dissent would have preferred to go, albeit in separate directions.

The plurality, led by Justice Kennedy, had hoped that this case would “present[] an opportunity to provide greater clarity” to the stream-of-commerce concept of jurisdiction left muddled by the divided *Asahi Metal Industry* decision more than two decades earlier.¹⁴¹ Although the divided nature of the *J. McIntyre Machinery* Court disappointed that expectation, the plurality set out its view nonetheless. Justice Kennedy began by emphasizing that “[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”¹⁴² That “authority” to render a judgment comes from a defendant’s purposeful availment of that sovereign’s benefits and protections.¹⁴³ And, “[i]n products-liability cases like this one, it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’”¹⁴⁴ This purposeful availment, explained Justice Kennedy, was “a more limited form of submission to a State’s authority” premised on amenability to lawsuits that bear a proper relatedness to the underlying contacts.¹⁴⁵ “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.’”¹⁴⁶

Understood with this foundation in mind, Justice Kennedy wrote that the stream-of-commerce concept, “like other metaphors, has its deficiencies as well as its utility.”¹⁴⁷ On the one hand, it was a convenient shorthand to describe the distributive chain in the movement

¹³⁹ *Id.* at 2794. The question of size and international platform seemed likely to influence this assessment, in Justice Breyer’s view. *See id.* (“it may be that a larger firm can readily ‘alleviate the risk of burdensome litigation by procuring insurance, passing the costs on to customers, or, if the risks are too great, severing its connection with the State.’ But manufacturers come in many shapes and sizes.”) (citation omitted).

¹⁴⁰ *Id.* at 2792-93.

¹⁴¹ *See J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2786 (plurality opinion).

¹⁴² *Id.* at 2787.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (internal citation omitted).

¹⁴⁵ *Id.* (internal citation omitted).

¹⁴⁶ *Id.* at 2788 (internal citation omitted).

¹⁴⁷ *Id.*

of goods, but it “does not amend the general rule of personal jurisdiction” which inquires “whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”¹⁴⁸ This intention, the plurality opinion noted, will be present only over a defendant who, through its transmission of goods, “can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”¹⁴⁹

The plurality then turned to the divided *Asahi Metal Industry* Court from 1987. The concurring opinion written there by Justice Brennan, which had “advocat[ed] a rule based on general notions of fairness and foreseeability,” was, in Justice Kennedy’s view, “inconsistent with the premises of lawful judicial power” and ought to have been rejected.¹⁵⁰ Instead, two different principles ought to guide “specific” jurisdiction theory. First, such jurisdiction “requires a forum-by-forum, or sovereign-by-sovereign, analysis,” namely, “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.”¹⁵¹ Second, as a corollary to the first principle, the United States and its constituent States are separate sovereigns.¹⁵² Consequently, a defendant may have qualifying contacts with the federal sovereign yet lack qualifying contacts with any particular State.¹⁵³

Applying these two principles to the case presented by *J. McIntyre Machinery*, the plurality concluded that jurisdiction could not be sustained. Although acknowledging that the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2789.

¹⁵¹ *Id.* The plurality emphasized that this focus on a defendant’s submission to a sovereign was not a retrenchment back to a reliance on territoriality-based personal jurisdiction that the Court had moved from in 1982. In 1982, Justice White had explained that constitutional personal jurisdiction “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.” *Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Justice Kennedy explained why his sovereignty formulation was consistent with, not contrary to, this earlier holding: “[D]ue process protects the individual’s right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.” *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2789 (plurality opinion).

¹⁵² *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2789 (plurality opinion). This, Justice Kennedy observed, “is consistent with the premises and unique genius of our Constitution.” *Id.*

¹⁵³ *Id.* This very scenario had prompted the promulgation of Federal Rule of Civil Procedure 4(k)(2) which, in a federal claim context, authorizes “national” jurisdiction over disputes arising under federal law that lack a qualifying jurisdictional connection with any individual State but possess it with the federal government. FED. R. CIV. P. 4(k)(2). See generally *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987) (prompting promulgation of Rule 4(k)(2), after ruling that no then-available authority existed “authorizing service on an alien in a federal-question case when the alien is not amendable to service under the applicable state long-arm statute”). Rule 4(k)(2) has no analogue for claims arising under State law, rather than federal law, though Justice Kennedy mused that Congress could possibly enact such a companion to Rule 4(k)(2) to authorize “national” jurisdiction for the States, provided such an enactment were otherwise permitted under its authority. See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2790 (plurality opinion).

English manufacturer had “directed marketing and sales efforts at the United States,” it had not “engaged in conduct purposefully directed at New Jersey.”¹⁵⁴ Necessarily, therefore, the company had not submitted to the authority of that State and, for that reason, “specific” personal jurisdiction was absent.

The dissent, led by Justice Ginsburg, would also have tinkered with “specific” jurisdiction theory, but by widening it. She acknowledged that the Court had never previously confronted “the now-prevalent pattern presented here—a foreign-country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer’s products.”¹⁵⁵ She reasoned that what J. McIntyre Machinery had done for its products was “illustrative of marketing arrangements for sales in the United States common in today’s commercial world.”¹⁵⁶ And that innovative market exploitation structure merited a broader application of the “purposeful availment” inquiry. “Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach.”¹⁵⁷ Mindful of these objectives, as well as the expanse of the market it is unquestionably seeking to penetrate, Justice Ginsburg asked: “On what sensible view of the allocation of adjudicatory authority could the place of Nicastro’s injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?”¹⁵⁸

Significantly, the dissenters did not propose to abandon or revise the “purposeful availment” benchmark for “specific” personal jurisdiction; to the contrary, they embraced it.¹⁵⁹ They merely applied it to reach a different conclusion. By appointing an exclusive distributor to exploit the entire U.S. market for its machines, they reasoned, the English manufacturer had “purposefully availed itself” of the entire American market, “not a market in a single State or a discrete collection of States” and, in so doing, “thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.”¹⁶⁰ As to the plurality’s reliance on a “sovereign submission” construction of purposeful availment, the dissenters rejected that notion as “draw[ing] no support from controlling decisions of this Court,” and as “repeatedly” dismissed as “unnecessary and unhelpful.”¹⁶¹ Citing a battery of lower court decisions, the dissenters claimed that the weight of judicial authority supported this application of purposeful availment theory.¹⁶² Moreover, the dissenters noted that the plurality’s

¹⁵⁴ *Id.*

¹⁵⁵ *See J. McIntyre Mach.*, __ U.S. at __, 131 S. Ct. at 2802 (dissenting opinion).

¹⁵⁶ *Id.* at 2799.

¹⁵⁷ *Id.* at 2794.

¹⁵⁸ *Id.* at 2797.

¹⁵⁹ *Id.* at 2801.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2799.

¹⁶² *Id.* at 2801-02 & 2802 n.14.

analysis now places American plaintiffs “at a disadvantage in comparison to similarly situated complainants elsewhere in the world,” who often enjoy personal jurisdiction over an injury-causing defendant in the place of injury.¹⁶³

Finally, the dissenters emphasized the “prime place [given] to reason and fairness” under modern personal jurisdiction theory.¹⁶⁴ They would hold it not undue, unreasonable, or unfair to obligate the English manufacturer “to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere” throughout the United States.¹⁶⁵ Comparably, the dissenters would hold that any burden borne by the manufacturer was eclipsed by “the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using [the manufacturer’s] product at his workplace in Saddle Brook.”¹⁶⁶

V. Impact of Decision

The Supreme Court’s recent reawakening from its more than 20-year personal jurisdiction slumber has injected both clarity and new uncertainties into this area of threshold jurisprudence. Because these twin decisions in *Goodyear* and *J. McIntyre Machinery* will now influence the federal due process analysis of personal jurisdiction inquiries conducted in every forum of the United States, they merit careful study and consideration. In few litigation sectors is this more true than in the decidedly interstate and international drug and device environment. Although a cataloguing of the full impacts of these two opinions will have to await the reception and application they receive from the lower judiciary, 10 observations already merit special mention.

1. **No More Blurring of General and Specific Jurisdiction Theory.** Due, in large measure, to the Supreme Court’s frustrating pattern of episodic emergences followed by persistent absences from our personal jurisdiction jurisprudence, the boundary lines between “general” and “specific” jurisdiction have never been especially clear. This led the North Carolina courts (and, for that matter, many others) to intermix aspects and considerations of the two types of jurisdiction, creating a bit of a resulting muddle. Isolated, occasional forum activities have long qualified for “specific” jurisdiction contacts-counting (provided they possessed the requisite relatedness to the underlying cause of action), but might such contacts also play a role in “general” jurisdiction assessments? And, if so, in what manner? The

¹⁶³ *Id.* at 2803-04.

¹⁶⁴ *Id.* at 2800.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2801.

unanimous Court in *Goodyear* admonished against this “[c]onfusing or blending” of the two inquiries.¹⁶⁷ For the Court, these two brands of jurisdiction were analytically and pragmatically distinct.¹⁶⁸ Earlier notions of personal jurisdiction portrayed it as a sort of “continuum,” bounded on one side by few but highly related forum contacts (supporting “specific” jurisdiction), on the other side by many yet unrelated forum contacts (supporting “general” jurisdiction), and in the middle a type of continuum center where more-than-few-but-less-than-many contacts could still support a kind of hybrid, middle-ground flavor of jurisdiction. After *Goodyear*, this “continuum” notion feels far less surefooted.¹⁶⁹

2. **“All-Purpose” General Jurisdiction.** The Court in *Goodyear* added two highly consequential new terms to our shorthand nomenclature for “general” personal jurisdiction. Both may prove to be so uncannily descriptive that the terms, themselves, could largely drive the “general” jurisdictional analysis. The first, “all-purpose” jurisdiction, is a very apt description of “general” jurisdiction’s practical consequence—when “general” jurisdiction exists, the defendant who is subject to it is obligated to defend in the forum against everything, no matter how utterly unrelated a claim might be to the defendant’s forum activities.¹⁷⁰ Consider, by way of example, the consequence of finding Goodyear Turkey amenable to “general” jurisdiction in North Carolina—such a finding would permit a cement company from Norway (complaining about a delivery of bad tires), a sandwich shop from Istanbul (complaining about an unpaid delicatessen order), and the Turkish electric company (complaining about a delinquent utilities bill) to all sue Goodyear Turkey in a state court in Charlotte. By using the “all-purpose” jurisdiction moniker, the Court has likely ensured that the ramifications of a “general” jurisdiction finding are never far from a trial judge’s view.

3. **“Essentially-At-Home” General Jurisdiction.** The second new shorthand term from *Goodyear*, “essentially-at-home,” is equally descriptive and can likewise be expected to drive the “general” jurisdiction analysis. The quantum of contacts necessary to support “general” jurisdiction is captured handily by this moniker—the

¹⁶⁷ *Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2851.

¹⁶⁸ *See id.* at 2855-56 (noting that “ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.”) (emphasis in original).

¹⁶⁹ Some early applications of *Goodyear* seem to confirm this sense. *See* *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075 (9th Cir. 2011) (“CollegeSource confuses the general and specific jurisdiction inquiries. A nonresident defendant’s discrete, isolated contacts with the forum support jurisdiction on a cause of action arising directly out of its forum contacts, but this is specific rather than general jurisdiction. However, discrete forum contacts such as AcademyOne’s alleged acts of misappropriation do not support jurisdiction on causes of action unrelated to those contacts.”) (citations omitted).

¹⁷⁰ *See Goodyear Dunlop Tires*, ___ U.S. at ___, 131 S. Ct. at 2853-54 (confirming that “general” jurisdiction permits the forum to hear “any and all claims” against that defendant, and lawsuits “on causes of action arising from dealings entirely distinct from” the defendant’s forum-related activities”).

defendant must have such a concentration of activities, affiliations, and contacts with the forum that it is “essentially at home” there.¹⁷¹ The phrase offers a nice caboose to Justice Ginsburg’s telling characterization of the *Perkins* case as the “textbook” example of the concept in application—a case where the defendant did not simply have a lot of contacts with the forum state of Ohio, it had actually relocated there.¹⁷² The conclusion that “general” jurisdiction is now reserved only for that forum where the defendant is actually at home or where the defendant has relocated to from its home seems to be embraced by many early lower court decisions applying *Goodyear*.¹⁷³

4. **“Doing-Business” General Jurisdiction.** Although the “all-purpose” and “essentially-at-home” terms certainly seem to undermine it, the *Goodyear* decision did not unambiguously foreclose the possibility that something less than a defendant’s one, primary home could qualify for “general” jurisdiction. Cryptically, Justice Ginsburg wrote that a corporation is amenable to “general” jurisdiction where it is “fairly regarded as at home,” but then stopped short of confirming that such “at-home” status is *only* present at its place of incorporation and principal place of business.¹⁷⁴ Could there be a quantum of contacts, short of principal place of business and place of incorporation, which qualifies as a defendant’s “essential” home? The difference may lie in what the Court means by “at-home”—is it the “at-home” of being nestled in your very own bed, or the “at-home” feeling of lodging at an

¹⁷¹ See *id.* at 2851.

¹⁷² *Id.* at 2856 (quoting *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

¹⁷³ See, e.g., *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1074 (9th Cir. 2011) (“CollegeSource has not satisfied the ‘exacting’ standard necessary to establish general jurisdiction. AcademyOne has no offices or staff in California; is not registered to do business in the state; has no registered agent for service of process; and pays no state taxes. AcademyOne has not closed its Pennsylvania offices and removed its corporate operations to California.”) (citations omitted); *Viasystems, Inc. v. EBM-Papst St. Georgen Gmbh & Co.*, 646 F.3d 589, 597 (8th Cir. 2011) (“the Supreme Court’s decision in *Goodyear* make[s] clear that even if a foreign corporation ‘pours its products’ into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area,’ this connection alone is ‘so limited’ that it ‘is an inadequate basis for the exercise of general jurisdiction.’”) (citations omitted); *Eastman Chem. Co. v. AlphaPet, Inc.*, 2011 WL 6004079, at *14 n.16 (D. Del. Nov. 4, 2011) (“[t]he U.S. Supreme Court recently clarified that general jurisdiction over foreign corporations is proper if and only if ‘their affiliations with the State are so ‘continuous and systematic’ as to render them *essentially at home in the forum State*.’ The *Goodyear* Court reaffirmed that the quintessential paradigm for general jurisdiction arises from the principal place of business for the corporation.”) (citations omitted; emphasis in original). Although most courts seem to have given the “essentially-at-home” phrase near-dispositive billing, not all have. Cf. *Cepia, LLC v. Alibaba Group Holding Ltd.*, 2011 WL 5374747, at *7 (E.D. Mo. Nov. 8, 2011) (“maintain[ing] significant business relationships with over 1,200 persons or entities in Missouri on an ongoing basis” is evidence that “amply supports a finding of general personal jurisdiction”).

¹⁷⁴ *Id.* at 2853–54. Justice Ginsburg then makes the omission all the more mysterious by citing, with a “See” signal, a law review article by Professors Lea Brilmayer, Jennifer Haverkamp and Buck Logan, to which she appends a partially quoting parenthetical: “identifying domicile, place of incorporation, and principal place of business as ‘paradig[m]’ bases for the exercise of general jurisdiction.” *Id.* (citing Lea Brilmayer, Jennifer Haverkamp and Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)). Whether Justice Ginsburg, and the unanimous Court she led, considers this scholarship listing of “paradigm” circumstances to be exhaustive as well is a question she (perhaps) leaves unanswered.

especially comfortable hotel? Sometimes squarely, sometimes indirectly, several lower courts have embraced this ambiguity and left the “doing business” door still ajar.¹⁷⁵

5. **“Purposeful Availment” Still Reigns in Specific Jurisdiction.** For law students, the badly fractured 4-4-1 opinion in the 1987 *Asahi Metal Industry* case has long served as a useful teaching tool on the competing jurisprudential views on “specific” personal jurisdiction, as well as the imprecise art of giving meaning to plurality court decisions. It is undeniable, though, that such divided decisions do more to muddy a doctrine than to clarify it. The Court’s 4-2-3 opinion in *J. McIntyre Machinery* is likely destined for a similar fate. But the case is certainly not bereft of all value. It seems now well-settled that the full Court continues to embrace the “purposeful availment” principle as the benchmark for “specific” personal jurisdiction.¹⁷⁶ This longstanding principle contemplates an exchange of sorts—in return for enjoying the fruits of conducting activities within a particular forum, actors may well find themselves subject to the obligation of defending in that same forum claims arising from or related to those forum activities.¹⁷⁷ In other words, an intentional choice to conduct activities in a given forum carries with it a corresponding expectation that litigation there concerning those same forum activities will not

¹⁷⁵ See, e.g., *Cepia, LLC v. Alibaba Group Holding Ltd.*, 2011 WL 5374747, at *7 (E.D. Mo. Nov. 8, 2011) (“maintain[ing] significant business relationships with over 1,200 persons or entities in Missouri on an ongoing basis” is evidence that “amply supports a finding of general personal jurisdiction”); *Irving v. Revera, Inc.*, 2011 WL 5329726, at *3 (D. Vt. Nov. 4, 2011) (finding general jurisdiction over Canadian company who, indirectly and through layers of subsidiaries, owned Vermont health care institutions, explaining that the defendant “has continuously and systematically conducted business aimed at Vermont’s market” by owning “several health care facilities in Vermont, from which it has earned substantial revenue,” by “manag[ing] the operations of these centers, with ultimate authority over their budgets and capital improvements,” and by “publicly project[ing] its behind-the-scenes authority ... [through] a coordinated website that clearly displays the [defendant’s] brand name and links to [defendant’s] webpages”). See also *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075 (9th Cir. 2011) (“Marketing to forum residents, at least where such marketing does not result in substantial and continuous commerce with the forum, does not support general jurisdiction.”) (emphasis added); *id.* at 1074 & 1076 (for “general” jurisdiction, contacts must “approximate physical presence” in the forum) (emphasis added); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1225-26 (9th Cir. 2011) (“Evidence that a nonresident defendant advertises in a forum is significant for general jurisdiction when the defendant markets its own product by targeting forum residents, but has less significance for general jurisdiction when other entities use the defendant’s publication to promote their own businesses.”) (emphasis added; citations omitted).

¹⁷⁶ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2785 (plurality opinion) (“As a general rule, the exercise of judicial power is not lawful unless the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws’”) (citation omitted); *id.* at 2793 (concurring opinion) (acknowledging “the constitutional demand for ‘minimum contacts’ and ‘purposeful[ly] avail[ment]’”); *id.* at 2801 (dissenting opinion) (reasoning that the manufacturer, “by engaging [its exclusive U.S. distributor] to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide”).

¹⁷⁷ See *International Shoe*, 326 U.S. at 319 (“[T]o the extent that a corporation exercises the privilege of conducting activities with a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”).

offend due process.¹⁷⁸ The full Court has reaffirmed the continuing vitality of this benchmark.¹⁷⁹

6. **Stream-of-Commerce “Specific” Jurisdiction.** What is far less certain is what the 4-2-3 *J. McIntyre Machinery* opinion has done to, or with, the stream-of-commerce concept. In fairness, the confusion that the stream-of-commerce wrought pre-dated the fractured *Asahi Metal Industry* case. Indeed, on two occasions—once in 1980 and again in 1985—the Court, in dicta, pronounced that delivering “its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State” may subject a defendant to “specific” personal jurisdiction.¹⁸⁰ The plurality in *J. McIntyre Machinery* would prefer to demote this language from a statement of fixed jurisdictional principle to a possibility of jurisdiction tolerance (hinging on the presence of other affiliating criteria).¹⁸¹ The concurrence seems inclined to accept this demotion as well, although far more equivocally.¹⁸² For its part, the dissent largely distanced itself from the whole stream-of-commerce business altogether, brushing off *Asahi Metal Industry*’s “dueling opinions” as “hardly necessary” in the context of that case, and readily distinguishable from the actions of the English manufacturer in the *J. McIntyre Machinery* dispute.¹⁸³ In the end, it did not appear as though any of the nine Justices were

¹⁷⁸ See *World-Wide Volkswagen*, 444 U.S. at 298 (“When a corporation ‘purposefully avails itself of the privilege of conducting activities within the forum State,’ it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, 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.”) (citation omitted).

¹⁷⁹ And the post-*J. McIntyre Machinery* lower judiciary have followed suit. See, e.g., *Robert Bosch LLC v. ADM 21 Co.*, 2011 WL 2619335, at *4 (D. Nev. July 1, 2011) (commenting that “[n]umerous courts have found defendants to have purposefully availed themselves by attending trade shows within a forum state.”).

¹⁸⁰ See *World-Wide Volkswagen*, 444 U.S. at 297-98 (“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.”); *Burger King Corp.*, 471 U.S. at 473 (“[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State’ and those products subsequently injure forum consumers.”).

¹⁸¹ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2788 (plurality opinion) (“The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the ‘stream of commerce.’ The stream of commerce, like other metaphors, has its deficiencies as well as its utility. . . . But the 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—itsself an unexceptional proposition—as where manufacturers or distributors ‘seek to serve’ a given State’s market.”).

¹⁸² See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2793 (concurring opinion) (“I am not persuaded by the absolute approach [that] . . . a producer is subject to jurisdiction for a products-liability action so long as it ‘knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.’ In the context of this case, I cannot agree.”) (citation omitted; emphasis in original).

¹⁸³ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2803 (dissenting opinion).

particularly enthusiastic about latching “specific” personal jurisdiction theory to a stream-of-commerce concept. What that means for the concept in the lower judiciary (and especially in those courts which have developed a now-mature body of stream-of-commerce case law) is still unclear.¹⁸⁴

7. **Targeting the Whole Nation “Specific” Jurisdiction.** Equally uncertain is what is to be done jurisdictionally about a nonresident defendant who “targets” (the new vernacular) the entirety of the United States, but does so indiscriminately, aiming not at particular States or geographic regions but instead at the generic American consumers (wherever they might be found and induced to make a purchase). The plurality in *J. McIntyre Machinery* proposes a ready answer—absent an intent to “purposefully avail” itself of a particular sub-national sovereign’s territory, there can be no “specific” jurisdiction.¹⁸⁵ The sharpness of so absolute an approach warded off the two concurring Justices, who were concerned about what such a “targeting” test would mean in the equally indiscriminate global cyberspace marketplace.¹⁸⁶ The dissent was not left at all uncertain; they would rule that an intentional targeting of the entire American marketplace can constitute a targeting of each of the nation’s constituent territories.¹⁸⁷ Here, again, the lower courts are left largely unguided in assessing how to approach an indiscriminately targeting defendant.¹⁸⁸

¹⁸⁴ Some courts have read the divided 4-2-3 ruling in *J. McIntyre Machinery* as the judicial “punt” that offers little of instructive value on stream-of-commerce theory. See *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, ___ F. Supp. 2d ___, 2011 WL 3702423, at *9 (D.N.J. Aug. 22, 2011) (“Read as a whole, *Nicastro* does not clearly or conclusively define the breadth and scope of the stream of commerce theory, as there was not a majority consensus on a singular test.”). Others have decided that the opinion leaves undisturbed existing local stream-of-commerce law. See *Original Creations, Inc. v. Ready America, Inc.*, 2011 WL 4738268, at *4 (N.D. Ill. Oct. 5, 2011) (announcing that the Supreme Court’s June 2011 opinions “do not overturn the Court’s earlier articulations of the stream of commerce theory”); *id.* at *5 (“the *Nicastro* Court does not discard the stream of commerce theory”).

¹⁸⁵ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2789-91 (plurality opinion).

¹⁸⁶ See *id.* at 2793 (plurality opinion) (“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?”) (citation omitted).

¹⁸⁷ See *id.* at 2801 (dissenting opinion).

¹⁸⁸ Adding an appendix of cases to their opinion, the dissenting Justices contended that the lower judiciary have often ruled that, when “a manufacturer sell[s] its products across the USA,” fairness would be undermined were “the foreign manufacturer [insulated] from accountability in court at the place within the United States where the manufacturer’s products caused injury.” *Id.* at 2801-02 (dissenting opinion); *id.* at 2804-06 (appendix of cases). Not all lower courts agree, however, or see in the 4-2-3 decision a lack of guidance. See *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, ___ F. Supp. 2d ___, 2011 WL 3702423, at *9 (D.N.J. Aug. 22, 2011) (“there is no doubt that *Nicastro* stands for the proposition that targeting the national market is *not* enough to impute jurisdiction to all the forum States”) (emphasis in original). See also *A.W.L.I. Group, Inc. v. Amber Freight Shipping Lines*, ___ F. Supp. 2d ___, 2011 WL 6130149, at *5-*6 (E.D.N.Y. Dec. 9, 2011) (in trademark infringement case, New York’s long-arm statute does not permit jurisdiction based on a nonresident defendant’s website boast that it “currently handles all points of USA”, because it was “an advertisement targeted at customers equally nationwide and thus does not confer any personal jurisdiction” in New York, having not “specifically target[ed] New York in any fashion”).

- 8. Volumes Matter in “Specific” Jurisdiction.** Some courts have placed special emphasis on the reliance Justice Breyer’s concurrence gave to raw numerical or comparative volumes of product commerce. In deciding to vote with the plurality on the judgment reversing the New Jersey Supreme Court, Justice Breyer noted that the English manufacturer’s actual exploitation of the State of New Jersey bore a much greater resemblance to the “single isolated sale” that had not supported personal jurisdiction in prior cases, than to the “‘regular . . . flow’ or ‘regular course’ of sales” that had.¹⁸⁹ Some courts have adopted this volume-of-commerce element as an outcome-critical aspect of their “specific” jurisdiction inquiries.¹⁹⁰
- 9. Intentional Torts May Merit a Different “Specific” Jurisdiction Approach.** During its personal jurisdiction case law flurry of the 1980s, the Supreme Court twice ruled that a defendant’s intentional tort aimed into a forum could support the exercise of “specific” personal jurisdiction there.¹⁹¹ The plurality in *J. McIntyre Machinery* steered clear of these precedents, noting the spectre that intentional torts may merit a separate jurisdictional analysis.¹⁹² Lower courts in several early post-*J. McIntyre Machinery* decisions have followed precisely this view, finding “specific” personal jurisdiction in intentional torts where the tortfeasor is aware of the victim’s location.¹⁹³
- 10. Hedging the Post-Goodyear/McIntyre Uncertainties.** The Supreme Court’s twin opinions in *Goodyear* and *J. McIntyre Machinery* succeed in both clarifying and clouding personal jurisdiction precepts. As with much of its earlier personal jurisdiction case law, these two new opinions verify the critical importance of factual nuances and the factual record in resolving these threshold questions of judicial

¹⁸⁹ See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2789-91 (plurality opinion).

¹⁹⁰ Compare *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, ___ F. Supp. 2d ___, 2011 WL 3702423, at *10 (D.N.J. Aug. 22, 2011) (relying on *J. McIntyre Machinery* to hold that 5 or 9 sales is “simply too small a number from which to conclude that [defendant] purposefully availed itself of the New Jersey market.”) with *State v. NV Sumatra Tobacco Trading Co.*, 2011 WL 2571851, at *32-34 (Tenn. Ct. App. June 28, 2011) (ruling that obligation under settlement agreement to pay per-cigarette fee to state justified “specific” jurisdiction over foreign defendant where 11.5 million of its products were sold in Tennessee, albeit through the use of a national distribution channel).

¹⁹¹ See *Caldor v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1985).

¹⁹² See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2787 (plurality opinion) (“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.”); *id.* at 2785 (noting that the purposeful availment principle may have exceptions, “say, for instance, in cases involving an intentional tort”).

¹⁹³ See *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076-80 (9th Cir. 2011) (misappropriation claim); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1231 (9th Cir. 2011) (“where, as here, a website with national viewership and scope appeals to, and profits from, an audience in a particular state, the site’s operators can be said to have ‘expressly aimed’ at that State.”) (citations omitted).

power. The opinions also reveal the danger of an underdeveloped factual record,¹⁹⁴ and the uncertainty of receiving from the trial court a period of pre-ruling jurisdictional discovery is well known.¹⁹⁵ But commercial actors (and prospective litigants) in the pharmaceutical and medical device communities can mitigate this uncertainty to a large degree by ensuring that their business dealings are always accompanied by enforceable forum selection clauses.¹⁹⁶

VI. Conclusion

For the first time in more than 20 years, the United States Supreme Court has spoken on the rigors of constitutional personal jurisdiction. Those two opinions, *Goodyear Dunlop Tires Operations, S.A. v. Brown* (discussing “general” personal jurisdiction) and *J. McIntyre Machinery, Ltd. v. Nicastro* (discussing “specific” personal jurisdiction), will guide all lower courts in both the federal and State judiciaries as they assess their exercise of judicial power. Both decisions are certain to become mainstays on this threshold litigation issue. The ramifications from both decisions will be felt for many years to come.

¹⁹⁴ In fact, the dispositive two votes represented by the concurring Justices in *J. McIntyre Machinery* candidly acknowledged the possibility that additional facts might well exist to support the plaintiff’s proposed exercise of personal jurisdiction. See *J. McIntyre Mach.*, ___ U.S. at ___, 131 S. Ct. at 2792 (concurring opinion). But those facts were not in the record and, though conceding their potential relevance, the concurring Justices refused to consider them in ruling. See *id.* (“But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them.”).

¹⁹⁵ See generally STEVEN BAICKER-McKee, WILLIAM M. JANSSEN, JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK 443-46 (2012) (“Whether, and under what constraints, to permit jurisdictional discovery are matters typically reserved for the trial judge’s discretion,” and discussing various factual and record permutations for granting or denying such discovery).

¹⁹⁶ See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (ruling that contractual forum selection clauses—even those that were not actually or realistically subject to negotiation—are enforceable if proper notice is given and if they comport with fundamental fairness).