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Elliot Barela

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DROWNING IN THE STREAM OF COMMERCE: A CRITIQUE OF *SPROUL v. ROB & CHARLIES, INC.*

Elliot Barela*

INTRODUCTION

Can New Mexico assert jurisdiction over a foreign manufacturer? This question deserves significant concern in New Mexico. China, Mexico, and Canada are the largest foreign importers of consumer goods in New Mexico.[1] In 2014, over two billion dollars in foreign goods entered the state.[2] Moreover, retailers like Wal-Mart sell substantial amounts of consumer goods in New Mexico, most of which are produced overseas.[3] These facts demonstrate that goods manufactured overseas are widespread in New Mexico. Probability dictates that some of those products will cause an injury in the state; however, the manufacturer may escape liability unless New Mexico can assert jurisdiction.

Jurisdiction is "[a] government's general power to exercise authority over all persons and things within its territory."[4] Generally, jurisdiction is divided into two categories––subject matter jurisdiction and personal jurisdiction.[5] Subject matter jurisdiction concerns the court's power to decide a particular issue.[6] Personal jurisdiction addresses a court's power to bind the parties to its decisions.[7] This note focuses on personal jurisdiction and New Mexico's power over foreign manufacturers.

To assert personal jurisdiction over a foreign manufacturer, New Mexico must comply with the Due Process Clause of the 14th Amend-

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* University of New Mexico J.D. Candidate 2016.

1. *Foreign Trade: State Imports for New Mexico*, U.S. CENSUS BUREAU, http://www.census.gov/foreign-trade/statistics/state/data/imports/nm.html (last visited Nov. 13, 2014).

2. *Id.*

3. Jiang Jingjing, *Wal-Mart's China Inventory to hit US$18b this year*, CHINA DAILY (Nov. 29, 2004, 3:21 PM), http://www.chinadaily.com.cn/english/doc/2004-11/29/content_395728.htm ("[M]ore than 70 per cent of the commodities sold in Wal-Mart are made in China.").

4. BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

5. Ted Occhialino, Civil Procedure I 1 (2014) (unpublished textbook) (on file at the University of New Mexico School of Law).

6. For federal courts, the U.S. Constitution governs subject matter jurisdiction. *Id.* For state courts, subject matter jurisdiction is most commonly determined based on a state's constitution. *Id*.

7. *Id*. at 18.

ment.[8] Moreover, New Mexican courts must adhere to the U.S. Supreme Court's interpretation of due process.[9] However, the U.S. Supreme Court has been unable to provide a clear rule regarding personal jurisdiction. For example, in *J. McIntyre Machinery, Ltd. v. Nicastro*,[10] a foreign manufacturer engaged a third party distributor to sell its goods in U.S.[11] The distributor indiscriminately sold the manufacturer's products throughout the country.[12] The manufacturer's product caused a severe injury in New Jersey, but the Court held that the state could not assert jurisdiction over the manufacturer.[13] Unfortunately, the decision provided more confusion than guidance. The Court's fractured opinion only complicated the framework for lower courts and left many questions unanswered.

The New Mexico Court of Appeals attempted to resolve those questions in *Sproul v. Rob and Charlies, Inc.*,[14] but instead reached a split decision just like the U.S. Supreme Court. Unlike *J. McIntyre*, *Sproul* held that a foreign manufacturer who targets the national market was subject to New Mexico's jurisdiction.[15] Although this approach intuitively makes sense, this Note argues that *Sproul* reached the wrong result under the due process jurisprudence.

Part I of this Note provides basic information on personal jurisdiction, summarizes the U.S. Supreme Court opinions guiding *Sproul*'s decision, and then summarizes the *Sproul* decision. Part II provides information on the precedential value of split decisions. It also argues that *J. McIntyre* and *Asahi Metal Industry Co. v. Superior Court of California*[16] promulgate precedential holdings that must be adhered to by lower courts. Part III argues that *Sproul* was incorrectly decided and violates due process. Next, the Note provides a constitutionally acceptable alternative to *Sproul*. In doing so, the author argues that New Mexico law already provides a method to consumers from defective products without violating the U.S. Constitution.

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8. Sproul v. Rob & Charlies, Inc., 2013-NMCA-072, ¶¶ 8–9, 304 P.3d 18 (plurality opinion).

9. Martin v. Hunter, 14 U.S. 304, 305–06 (1816) (establishing that the U.S. Supreme Court has appellate jurisdiction over state court decisions interpreting federal law).

10. 131 S. Ct. 2780 (2011).

11. *Id.* at 2786.

12. *Id.*

13. *Id.* at 2782.

14. 2013-NMCA-072, 304 P.3d 18.

15. *Id.* ¶ 32.

16. 480 U.S. 102 (1987).

I. BACKGROUND

This section provides basic information on personal jurisdiction. Next, it summarizes the various opinions that *Sproul* considered in reaching its holding. Specifically, the opinions that are summarized are *World-Wide Volkswagen v. Woodson*,[17] *Asahi Metal Industry Co. v. Superior Court*, and *J. McIntyre Machinery v. Nicastro*. The final portion of the background summarizes *Sproul*.

A. The Basics of Jurisdiction

"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."[18] In order to satisfy due process, the defendant must have sufficient minimum contacts in the forum so "traditional notions of fair play and substantial justice" are not violated.[19] Sufficient minimum contacts do not include a defendant's casual presence or an isolated event.[20]

The minimum contacts necessary to satisfy due process may differ depending on the category of personal jurisdiction asserted.[21] Personal jurisdiction is either general or specific.[22] When a forum asserts general jurisdiction, the defendant is bound by a court's decision, even if the dispute arose from the defendant's out-of-state activity.[23] To assert general jurisdiction the defendant's minimum contacts must be "continuous and systematic" such that the defendant is essentially "at home" in the forum.[24] In contrast, specific jurisdiction is limited to "'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'"[25]

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17. 444 U.S. 286 (1980).

18. *Id.* at 291.

19. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

20. *Id.* at 317.

21. Sproul v. Rob & Charlies, Inc., 2013-NMCA-072, ¶ 9, 304 P.3d 18 (plurality opinion). ("[T]he minimum contacts required for the state to assert personal jurisdiction over a defendant depends on whether the jurisdiction asserted is general (all-purpose) or specific (case-linked).").

22. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

23. *Id.*

24. *Id.*

25. *Id.*

Furthermore, the defendant's minimum contacts must relate to the forum and the dispute at issue.[26]

1. *World-Wide Volkswagen v. Woodson*

World-Wide Volkswagen was decided by a five to four majority.[27] The case arose when the plaintiffs purchased an Audi in New York and drove through Oklahoma in order to reach Arizona.[28] While passing through Oklahoma, the plaintiff's vehicle was struck from behind, causing a fire and injuring the plaintiffs.[29] The plaintiffs filed suit in Oklahoma and sought damages from the Audi dealership and the dealership's distributor.[30] The dealer sold vehicles exclusively in New York, while the distributor's operations were limited to New York, New Jersey and Connecticut.[31] The issue before the U.S. Supreme Court concerned Oklahoma's power to assert jurisdiction over the dealer and distributor.[32]

The Court held that personal jurisdiction hinges on the defendant's minimum contacts.[33] The importance of minimum contacts served two fundamental and related interests––fairness to the defendant and preserving "coequal sovereigns in a federal system."[34] The Court stressed that federalism played an important role in personal jurisdiction and implicitly limits a states power to reach beyond its borders.[35] The Court further held that, "[t]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment."[36] As such, the Court held that a forum specific analysis of minimum preserves state sovereignty.[37]

The Court also that held minimum contacts "protect[ ] the defendant against the burdens of litigating in a distant or inconvenient forum."[38] Minimum contacts established that that the forums assertion of jurisdiction did not offend traditional notions of fair play and substantial

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26. *Id.*
27. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291 (1980).
28. *Id.* at 288.
29. *Id.*
30. *Id.* at 288–89.
31. *Id.* at 289.
32. *Id.*
33. *Id.* at 286.
34. *Id.* at 291–92.
35. *Id.* at 293.
36. *Id.* at 294.
37. *Id.* at 293 ("[The] framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.").
38. *Id.* at 292.

justice.[39] The Court held that jurisdiction is fair if the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[40] Based on that point the Court held that foreseeability alone could not establish personal jurisdiction.[41] Additionally, the unilateral activity of an unrelated third party could not establish a defendant's minimum contacts in the forum.[42]

According to those principles, the Court held Oklahoma could not assert jurisdiction over the nonresident car dealer or distributor.[43] The defendants never made a sale or performed services in Oklahoma.[44] Nor did the evidence show that the defendants advertised or intended to serve the Oklahoma market through third parties.[45] Conversely, the plaintiff's unilateral act in bringing the Audi to Oklahoma was not a minimum contact by the defendants.[46] The Court rejected the argument that the defendants could foresee the product's use in other states[47] and reasoned, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process."[48]

Notwithstanding the Court's previous holdings, it conceded that in some instances, a state may assert jurisdiction over an out of state defendant.[49] In doing so, the Court introduced the stream-of-commerce theory as a means to assert jurisdiction over a non-present defendant whose interstate distribution channels are substantial enough to establish minimum contacts.[50] The Court stated, "[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."[51] Nonetheless, in *World-Wide Volkswagen* the Court held that the defendant's actions were not directed toward the state.[52] Instead,

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39. *Id.* The Court enumerated five fairness factors to consider when asserting jurisdiction over a nonresident defendant. *Id.*
40. *Id.* at 297.
41. *Id.* at 295.
42. *Id.* at 298.
43. *Id.*
44. *Id.*
45. *Id.* at 295.
46. *Id.* at 298.
47. *Id.* at 296.
48. *Id.*
49. *Id.* at 297–98.
50. *Id.* at 297.
51. *Id.* at 297–98.
52. *Id.*

the plaintiff's unilateral actions brought the defendant's product into state.[53]

The Court also enumerated several factors related to fairness and justice encompassed in due process.[54] These include (1) the burden on the defendant; (2) the forum's interest in the dispute; (3) the plaintiff's interest; (4) the interstate judicial interest; and (5) the shared interstate interest in furthering substantive social policies.[55] Yet, the Court did not address these factors since it was determined that the defendants lacked minimum contacts with the forum.[56]

Justice Marshall and Justice Blackmun dissented.[57] They believed that the defendants intended to become part of a nationwide marketing and distribution network[58] and that the defendant's products would likely reach Oklahoma given the transitory nature of automobiles coupled with the nation's system of interstates.[59] Likewise, the defendants intentionally participated in nationwide service centers, which encouraged and facilitated travel and thereby established contacts wherever a service center is located.[60] That system also promoted the defendant's sales and contributed to the defendant's overall revenue.[61] Accordingly, the dissent argued that Oklahoma properly asserted jurisdiction and asserting jurisdiction properly reflected the practical realities of interstate commerce.[62]

Justice Brennan wrote a separate dissent.[63] Justice Brennan argued that the Constitution did not require a forum with the most numerous contacts, but simply a forum where the suit can be brought.[64] For instance, Oklahoma had sufficient contacts because the accident occurred in that state, the plaintiffs were hospitalized there, and all the essential evidence was held in Oklahoma.[65]

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53. *Id.* at 298.
54. *Id.* at 292.
55. *Id.*
56. *Id.* at 299 ("Because we find that petitioners have no 'contacts, ties, or relations' with the State of Oklahoma . . . the judgment of the Supreme Court of Oklahoma is *Reversed*.") (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
57. *Id.* at 313–17 (Marshall, J., dissenting).
58. *Id.* at 314.
59. *Id.*
60. *Id.* at 315.
61. *Id*.
62. *Id*. at 317.
63. *Id*. at 299–312 (Brennan, J., dissenting).
64. *Id*. at 301.
65. *Id*. at 305.

Justice Brennan also proposed a different stream-of-commerce theory than the majority.[66] Unlike the majority, foreseeability was the touchstone of Justice Brennan's stream-of-commerce theory.[67] Justice Brennan analogized to *Ohio v. Wyandotte Chemicals Corp.*[68] where a nonresident corporation polluted Lake Erie.[69] The corporation dumped pollutants into a stream just outside of Ohio's territorial limits and the stream carried the pollutants to Lake Erie.[70] Although the corporation never entered Ohio, jurisdiction met due process because the river naturally carried the pollutants down stream.[71] According to Justice Brennan, this case was just like *Wyandotte Chemicals Corp.*[72] The defendant's introduced its product into stream-of-commerce, which carried its product to an equally predictable destination.[73] As such, Oklahoma could assert jurisdiction over the defendants without offending due process.[74]

2. *Asahi Metal Industry Co. Ltd. v. Superior Court*

In *Asahi*, a defective tire caused a motorcycle accident in California.[75] The accident resulted in severe injuries to the motorist and death to the passenger.[76] The motorist then sued Cheng Shin, a Taiwanese company that manufactured the tire.[77] Cheng Shin subsequently filed an indemnification suit against Asahi Metal Industry Co., a Japanese company.[78] Asahi manufactured valve assemblies and sold them to Cheng Shin[79] but all sales between Asahi and Cheng Shin took place in Taiwan.[80] The product arrived in California because Cheng Shin would incorporate Asahi's valves into its tires and sell them in throughout the state.[81] Asahi knew that its product was incorporated into Cheng Shin's tires and sold in

66. *Id*. at 306.
67. *Id.*; Sproul v. Rob & Charlies, Inc., 2013-NMCA-072, ¶ 49, 304 P.3d 18 (plurality opinion).
68. 401 U.S. 493 (1971).
69. *World-Wide Volkswagen*, 444 U.S. 286, 306 (1980) (Brennan, J., dissenting).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 312–13.
75. Asahi Metal Industry Co. Ltd. v. Superior Court, 480 U.S. 102, 105 (1986) (plurality opinion).
76. *Id.*
77. *Id.* at 105–06.
78. *Id.*
79. *Id.*
80. *Id*. (noting that Cheng Shin sold its tires in multiple foreign markets, including the United States).
81. *Id.* (noting that California comprised 20% of Cheng Shin's total U.S. sales).

the U.S.[82] Nonetheless, Asahi argued that it never intended its products to enter the U.S. market, much less California.[83]

Justice O'Conner authored the plurality opinion and was joined by three other Justices.[84] The plurality held that California could not assert jurisdiction over Asahi and that due process required more than placing a product into the stream-of-commerce.[85] Rather, the defendant must, "indicate an intent or purpose to serve the market in the forum State."[86] The plurality held that this rule included, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[87] The plurality then determined that, "[the defendant] ha[d] no office, agents, employees, or property in California. It d[id] not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California."[88] Moreover, Asahi's product was not specifically designed for the Californian market; instead, it was generically manufactured for a world market.[89] As a result, the Court held that California's jurisdiction was improper since Asahi did not intend that its products would enter the State.[90]

Justice Brennan concurred, but disagreed with the plurality's stream-of-commerce theory.[91] According to the concurrence, "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."[92] Furthermore, "as long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise," and forum's assertion of jurisdiction complied with due process.[93] Based on these principals, Justice Brennan held that Cheng Shin did not unilaterally bring

82. *Id.* at 107.
83. *Id.*
84. *Id.*
85. *Id.* at 113.
86. *Id.* at 112.
87. *Id.*
88. *Id.*
89. *See id.* at 113.
90. *Id.*
91. *Id.* at 116–21 (Brennan, J., concurring in part and concurring in the judgement) (Justice Brennan's concurring opinion was joined by three other Justices).
92. *Id.* at 117.
93. *Id.*

Asahi's products into the Californian market.[94] Instead, Asahi knowingly introduced its product into the stream-of-commerce and profited from sales in California.[95]

Justice Stevens wrote a separate concurrence.[96] He concluded that plurality's opinion was unnecessary because "'fair play and substantial justice' . . . defeated the reasonableness of jurisdiction."[97] Nonetheless, Justice Stevens thought that the plurality's purposeful availment standard was indistinguishable from "'mere awareness.'"[98] Conversely, purposeful availment should be defined by, "the volume, the value, and the hazardous character of the components" that entered the forum.[99] The concurrence thought 100,000 units of the defendant's product arriving in California likely evidenced purposeful availment.[100]

Despite *Asahi*'s splintered views regarding the stream-of-commerce, the Court delivered a unanimous opinion concerning traditional notions of fair play and substantial justice.[101] *Asahi* held that a foreign defendant was burdened by litigating in a foreign legal system and intercontinental travel.[102] Furthermore, the defendant's burden superseded the plaintiff's interest in pursuing the suit in California.[103] Cheng Shin's interest centered on indemnification and that liability arose from a contract formed overseas; therefore, it was more convenient for both companies to litigate the dispute in Taiwan or Japan.[104]

The Court also held that Asahi's burden outweighed the state's interest in the dispute.[105] The Court believed that California's interest related solely to adjudicating the dispute between two foreign companies.[106] As a result, the Court rejected the state's argument that its interest stemmed from promulgating safety standards.[107] The Court further held that California's safety interest could be accomplished without asserting

94. *Id.* at 119–20.
95. *Id.* at 121.
96. *Id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment) (Justice Stevens's concurring opinion was joined by two other Justices).
97. *Id.* (quoting Burger King Corp. v. Rudewicz, 471 U.S. 462, 476–78 (1985).
98. *Id.* at 122.
99. *Id.*
100. *Id.*
101. *Asahi*, 480 U.S. 102, 104 (1986) (plurality opinion).
102. *Id.* at 114.
103. *Id.*
104. *Id*. at 114–15.
105. *Id.* at 114.
106. *Id.*
107. *Id.* at 114–15 ("The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards.").

jurisdiction over Asahi.[108] According to the Court, companies like Cheng Shin would pressure its suppliers to manufacturer safe products, or bear the burden of product liability California.[109]

Lastly, the Court addressed the interest of the "'several states'" in furthering the advancement of substantive social policies.[110] However, unlike a domestic company, a foreign defendant invoked the interests of various nations.[111] Moreover, the Court held that foreign policy, which was a federal interest, was implicitly implicated; therefore, the Court strongly cautioned against asserting jurisdiction over a foreign defendant.[112] On these grounds the Court stated, "[the] [f]ederal interest . . . will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State."[113] The Court noted that jurisdiction crossing national borders required heightened precaution and a presumption of unfairness.[114] Thus, the Court determined that California's jurisdiction was unfair to Asahi and violated due process.[115]

3. *J. McIntyre Machinery, Ltd. v. Nicastro*

In *J. McIntyre*, the plaintiff injured his hand while using a machine manufactured by the defendant.[116] The plaintiff subsequently filed a product-liability suit in New Jersey.[117] The defendant was a foreign manufacturer and lacked direct contacts in New Jersey.[118] However, the defendant utilized an unrelated U.S. distributor to sell its machines throughout the country.[119] It also attended U.S. trade shows and four of its machines were located in New Jersey.[120] Based on these facts, the plaintiff

108. *Id.* at 115.

109. *Id.* ("[S]imilar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.").

110. *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 480 U.S. 286 (1980)).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

argued that the defendant targeted the national market, including New Jersey.[121] The state supreme court agreed, but offered additional justifications for jurisdiction.[122] These included the defendant's U.S. patents, control over its U.S. distributor, and goods on consignment with the U.S. distributor.[123] Furthermore, the defendant did not affirmatively exclude New Jersey from national sale efforts.[124]

Justice Kennedy, joined by three other Justices, wrote for the plurality.[125] According to the plurality, "the defendant's purposeful availment . . . makes jurisdiction consistent with 'traditional notions of fair play and substantial justice.'"[126] Moreover, the defendant must intend to serve the forum by, "[minimum] contact[s] and acti[ons] directed at [the] sovereign."[127] Moreover, the main question under due process is, "whether the defendant's activities manifest an intention to submit to the power of a sovereign."[128] Based on these principals, the plurality rejected any stream-of-commerce theory founded on the defendant's mere expectations.[129]

The plurality also established two principals that it considered fundamental to personal jurisdiction.[130] The first principal was that, "personal jurisdiction require[d] a forum-by-forum, or sovereign-by-sovereign, analysis."[131] That principal prevented a state's assertion of jurisdiction if the defendant never intended to serve the forum.[132] The second principal contends that the United States is a separate sovereign from the states.[133] Additionally, each state is a distinct sovereign from its sister states and if a defendant lacks minimum contacts in one state but maintains minimum contacts in another, assertion of jurisdiction would "upset the federal balance" between the states.[134]

Based on the defendant's unintentional actions in the forum, the plurality held that New Jersey's assertion of jurisdiction violated due pro-

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 2785.
126. *Id.* at 2787.
127. *Id*. at 2788.
128. *Id*.
129. *Id*.
130. *Id*. at 2789.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.

cess.[135] The defendant did not have offices, employees, or property in the state.[136] The defendant also did not advertise or pay taxes in New Jersey.[137] The defendant's only contacts were four machines and the plaintiff's injury.[138] Furthermore, the plurality determined that the defendant's actions outside New Jersey evidenced its intent to enter the U.S. market. However, New Jersey was a separate forum and the defendant's actions were not specifically directed at the state.[139]

Justice Breyer, joined by Justice Alito, concurred in the result but for different reasons. Justice Breyer held that a single sale could not amount to minimum contacts.[140] According to the concurrence, even the most liberal interpretation of the stream-of-commerce theory precluded New Jersey's assertion of jurisdiction.[141] Therefore, the defendant was not subject to the state's jurisdiction because it failed to establish minimum contacts in New Jersey.[142]

The concurrence rejected the plurality's strict jurisdictional rules, but also the New Jersey Supreme Court's broad stream-of-commerce interpretation.[143] The plurality's rule was too rigid and failed take into account future circumstances.[144] Conversely, New Jersey's rule was too extensive and was unsupported by the Court's precedent.[145] Justice Breyer stated, "to adopt [New Jersey's approach] would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between 'the defendant, the *forum,* and the litigation,' it is fair, in light of the defendant's contacts *with that forum,* to subject the defendant to suit there."[146] The concurrence believed that such an approach would return to the outdated principle of a defendant's liability to a " suit 'travel[ing] with [his] chattel.'"[147]

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135. *Id.* at 2791.
136. *Id*. at 2790.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 2792 (Breyer, J., concurring in the judgment).
141. *Id.*
142. *Id.*
143. *Id.* at 2793.
144. *Id.* The concurrence believed that online retailers, like Amazon, may unjustifiably escape a state's jurisdiction and the plurality's rule was inflexible to facilitate such an approach. *Id.*
145. *Id.*
146. *Id.* at 2793 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).
147. *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980)).

In addition, Justice Breyer believed that the New Jersey Supreme Court's rule was unfair.[148] Justice Breyer stated, "I cannot reconcile so automatic a rule with the constitutional demand for 'minimum contacts' and 'purposefu[l] avail[ment],' each of which rest upon a particular notion of defendant-focused fairness."[149] The concurrence also thought that New Jersey's expansive rule would magnify this unfairness for foreign defendants.[150]

Justice Ginsburg, joined by two other justices, dissented.[151] The dissent argued that six Justices created a loophole by permitting manufactures to escape liability through utilizing unrelated distributors.[152] The dissent held that jurisdiction is appropriate where a defendant targets the national market and its product causes injury in any of the 50 states.[153] Moreover, the dissent argued that the majority departed from due process by focusing on federalism.[154] The dissent stated that the defendant "'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States."[155] Therefore, New Jersey should be able to assert jurisdiction over the defendant.[156]

4. *Sproul v. Rob & Charlies, Inc.*

In *Sproul*, the plaintiff purchased a mountain bike from a Santa Fe bike shop, Rob and Charlies, Inc. ("R&C").[157] Fifteen years later, a serious accident occurred at a BMX course in Santa Fe, New Mexico.[158] While going over a bump, the front wheel separated from the bike frame, causing the plaintiff to be thrown from the bike, which resulted in severe injuries.[159] The plaintiff filed a products liability suit against R&C and various defendants involved in manufacturing and delivering the bike to R&C.[160] R&C then filed an indemnification claim against Joy Co., the

148. *See id.* at 2793–94.
149. *Id.* at 2793 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).
150. *Id.*
151. *Id.* at 2794–2804 (Ginsburg, J., dissenting).
152. *Id.* at 2795.
153. *Id.* at 2800.
154. *Id.* at 2798 (citing Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703, n.10 (1982)).
155. *Id.* at 2801.
156. *Id.* at 2804.
157. Sproul v. Rob & Charlies, Inc., 2013-NMCA-072, ¶ 2, 304 P.3d 18 (plurality opinion).
158. *Id.*
159. *Id.*
160. *Id.*

manufacturer of the bike's quick release mechanism.[161] R&C asserted that Joy Co. was partly liable for Sproul's Injuries as an upstream manufacturer of the defective part.[162] Joy Co. responded with a motion to dismiss for lack of personal jurisdiction.[163]

Joy Co. designed and manufactured bicycle component parts.[164] Joy Co. manufactured its product in the Republic of China and was incorporated under Chinese law.[165] Its principal places of business are in China and Taiwan, but its products enter the U.S. market through a system of U.S. distributors.[166] Joy Co. was aware of this distribution network and encouraged its products to be sold worldwide, including in the U.S. market; however, it avoided selling its products in Central and South America.[167] Joy Co. also had an employee residing in California, and that employee provided customer service to all U.S. customers.[168] Although the employee serviced the entire U.S. market, the extent of said employee's service in New Mexico was undeterminable in the opinion.[169]

The quick release mechanism incorporated into the plaintiff's bike entered the U.S. through J & B Importers ("J&B").[170] J&B is headquartered in Miami, Florida, and established multiple distribution centers to serve the entire U.S. market.[171] J&B's Denver office sold the bike at issue to R&C.[172] Joy Co.'s products were also sold to K-Mart retail centers in New Mexico, but it was unspecified if J&B supplied K-Mart.[173]

R&C argued that Joy Co. was subject to New Mexico's jurisdiction because the manufacturer maintained sufficient minimum contacts within the state.[174] Joy Co. argued that it lacked minimum contacts in New Mexico and never intended its products to reach New Mexico.[175] Relying on

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161. *Id.* ¶ 3. A quick release mechanism uses a single quick release lever operation on the hub to enable the wheel to be easily installed and removed. *See generally* Sheldon Brown & John Allen, *Bike Quick-Releases*, HARRIS CYCLERY (Apr. 22, 2015, 7:57 PM), http://sheldonbrown.com/skewers.html.

162. *Sproul*, 2013-NMCA-072, ¶ 4.

163. *Id.*

164. *Id.* ¶ 28.

165. *Id.*

166. *Id.*

167. *Id.* ¶ 30.

168. *Id.* ¶ 28.

169. *Id.*

170. *Id.*

171. *Id.* ¶ 28; *About Us*, J&B, http://www.jbi.bike/web/about-us.php (last visited Aug. 30, 2014).

172. *Sproul*, 2013-NMCA-072, ¶ 28.

173. *Id.* ¶ 29.

174. *Id.* ¶ 4.

175. *Id.*

the plurality opinion in *Asahi*, the district court found that New Mexico could not assert jurisdiction over Joy Co.[176] In addition, the district court found that New Mexico's jurisdiction would offend traditional notions of fair play and substantial justice.[177]

Still, the district court certified R&C's interlocutory appeal, which the New Mexico Court of Appeals granted.[178] The court unanimously agreed that New Mexico did not have sufficient contacts to assert general jurisdiction over Joy Co.[179] Yet, the court sharply divided on specific jurisdiction and the precedential value of *Asahi* and *J. McIntyre*.[180] Specifically, the main point of contention was the competing stream-of-commerce theories.[181] The plurality and concurring opinions held that New Mexico could assert specific jurisdiction while the dissent disagreed.[182] Honorable Judge Vanzi authored the plurality opinion, while Honorable Judge Vigil authored the concurring opinion, and Honorable Judge Kennedy authored the dissent.

The plurality held that New Mexico could assert jurisdiction under the stream-of-commerce theory.[183] Specifically, the plurality adopted *World-Wide Volkswagen*'s stream-of-commerce theory.[184] In addition, it rejected *Asahi* and *J. McIntyre* because the U.S. Supreme Court was unable to reach a consensus on purposeful availment, minimum contacts, or the stream-of-commerce theory. Instead, it held that *World-Wide Volkswagen* controlled because the decision was the most recent majority holding from the U.S. Supreme Court.[185] However, the plurality preferred Justice Brennan's stream-of-commerce theory, despite the fact that it was

176. *Id.* ¶ 38.

177. *Id.* ¶ 1.

178. *Id.*

179. *Id.* ¶ 11; *id.* ¶ 47 (Vigil, J., specially concurring); *id.* ¶ 54 (Kennedy, J., concurring in part and dissenting in part). The court determined that it could not assert general jurisdiction because the defendant's connections with New Mexico did not meet the minimum threshold. *Id.* ¶13 (plurality opinion). The court also noted that Joy Co. was not incorporated, did not conduct substantial business operations, or manufacture its products in New Mexico. *Id.*

180. *Id.* ¶ 47 (Vigil, J., specially concurring); *id.* ¶ 54 (Kennedy, J., concurring in part dissenting in part).

181. *Id.* ¶ 47 (Vigil, J., specially concurring); *id.* ¶ 54 (Kennedy, J., concurring in part dissenting in part).; *id.* ¶ 54 (Kennedy, J., concurring in part dissenting in part).

182. *Id.* ¶¶ 45, 47 *Id.* ¶ 47 (Vigil, J., specially concurring); *id.* ¶ 54 (Kennedy, J., concurring in part dissenting in part); *id.* ¶ 54 (Kennedy, J., concurring in part dissenting in part).

183. *Id.* ¶¶ 19, 34 (plurality opinion).

184. *Id.* ¶ 44.

185. *Id.*

a solo-dissent in *World-Wide Volkswagen*.[186] The plurality also held that New Mexico courts appear to adhere to the *World-Wide Volkswagen* stream-of-commerce theory.[187] It cited several New Mexico Court of Appeals decisions to support that proposition.[188] In addition, the plurality cited the New Mexico Supreme Court's sole decision that "deal[t] with the notion of minimum contacts."[189]

Based on the foregoing, the plurality held that Joy Co. targeted the U.S. market, and in doing so purposefully availed itself to New Mexico's jurisdiction.[190] Moreover, Joy Co.'s minimum contacts evidenced intent to sell goods to New Mexican consumers.[191] In support, the plurality held that Joy Co. profited through selling goods to distributors that served the New Mexican market.[192] Joy Co. also employed a Californian employee to provide customer service throughout the United States, including New Mexico.[193] Lastly, Joy Co.'s products met U.S. safety standards and were intentionally sold in the U.S.; yet, it intentionally prevented its products from entering markets in Latin American.[194] For the plurality, those facts determined that the defendant "manufactured the allegedly defective product and placed it into the stream of commerce."[195] As such, the plurality stated, "[w]e believe that such directed efforts to the United States market reflect a purposeful intent to reach a consumer [in New Mexico]."[196]

The plurality then addressed traditional notions of fair play and substantial justice.[197] Joy Co. argued it was unduly burdened to defend itself in a foreign legal system, but the plurality was un-persuaded.[198] According

186. *Id.* ¶ 26 ("Reaffirming a preference for Justice Brennan's stream of commerce approach from World-Wide Volkswagen, we now turn to the facts in this case.").

187. *Id.* ¶ 21.

188. *Id.* ¶¶ 21–23 (citing Visarraga v. Gates Rubber Co, 1986-NMCA-021, ¶ 22, 104 N.M. 143) (relying on *World-Wide Volkswagen* to determine New Mexico's assertion of jurisdiction complied with due process); Roberts v. Piper Aircraft Corp., 1983-NMCA-110, ¶ 14, 100 N.M. 363 (citing *World-Wide Volkswagen* for the proposition that the defendant should reasonably anticipate being subject to New Mexico's jurisdiction)).

189. *Id.* ¶ 24 (citing Blount v. T.D. Publishing Corp., 1966-NMSC-262, 77 N.M. 384).

190. *Id.* ¶ 27.

191. *Id.* ¶ 31.

192. *Id.* ¶ 28.

193. *Id.*

194. *Id.* ¶ 30.

195. *Id.* ¶ 31.

196. *Id.* ¶ 31.

197. *Id.* ¶¶ 35–37.

198. *Id.* ¶ 36.

to the plurality, "Joy Co. is not a small farmer or cottage industry potter in a faraway country or state [which concerned Justice Breyer in *J. McIntyre*]."[199] Nor was Joy Co. like the defendant in *Asahi* whose "component parts were incorporated into another product abroad and then sold throughout the United States."[200] Instead, Joy Co. was a large company with revenues approaching forty-six million dollars and had direct business in the United States[201] The plurality further held that Joy Co.'s actions in the United States exposed it to litigation in the United States.[202] Accordingly, litigation in the United States, including New Mexico, was a minimal burden to Joy Co.[203]

In addition, the plurality believed that the plaintiff's and New Mexico's interest outweighed Joy Co.'s. New Mexico had an interest in disputes that arose from defective products causing injuries to New Mexican consumers.[204] R&C's interest was "manifest." As such, the plurality held that New Mexico could assert jurisdiction without violating traditional notions of fair play and substantial justice.[205]

The plurality concluded with an explanation as to why it had declined to apply *Asahi* and *J. McIntyre*.[206] The plurality determined that the competing opinions in *Asahi* and *J. McIntyre* failed to garner a majority of the Court.[207] However, the plurality believed the overall majority in *Asahi* supported the Justice Brennan stream-of-commerce theory.[208] Thus, Joy Co.'s arguments that relied on those split decisions were dismissed outright.[209]

The concurrence agreed that New Mexico could assert jurisdiction, but disagreed with the plurality's rejection of *Asahi* and *J. McIntyre*.[210] The concurrence determined that the stream-of-commerce consists of two viewpoints, the "Justice Brennan view" and the "Justice O'Connor

199. *Id.*
200. *Id.*
201. *Id.* (evidencing Joy Co.'s U.S. business practices by holding U.S. patents, selling directly to U.S. manufacturers, and attending trade shows in Nevada).
202. *Id.*
203. *Id.*
204. *Id.* ¶ 37.
205. *Id.*
206. *Id.* ¶ 44.
207. *Id.*
208. *Id.* ¶ 41. Nonetheless Judge Vanzi concluded "the dueling *Asahi* opinions have done little more than provide a muddled rubric for deciding stream of commerce cases involving nonresident corporations." *Id.*
209. *Id.* ¶ 32.
210. *Id.* ¶ 47 (Vigil, J. specially concurring).

view."[211] However, the concurrence believed that either view supported New Mexico's jurisdiction over Joy Co. The "Justice Brennan view," was evidently supported in the plurality opinion, and the concurrence saw no need to elaborate further.[212] Moreover, the "Justice O'Conner view" supported New Mexico's jurisdiction because Joy Co. established channels for advice and marketed its product through a distributor.[213] Joy Co. intended to benefit from New Mexico's economy and by doing so, complied with the *J. McIntyre* plurality.[214]

The dissent criticized the plurality as proffering to rely on a majority in *World-Wide Volkswagen*, but instead adopted Justice Brennan's solo-dissent.[215] Rejecting that view,[216] the dissent embraced the stream-of-commerce theory established by the plurality in *Asahi*.[217] The dissent believed that Joy Co.'s product merely made incidental contact with New Mexico and was not reflective of Joy Co.'s intention to reach the state.[218] Instead, specific jurisdiction required "(1) the defendant [to] purposely direct its activities toward the forum state or purposely avail itself of the privileges of conducting activities there, and (2) [for] the controversy to arise[ ] out of or is relate[ ] to the defendant's contacts with the forum state."[219] The dissent also noted that the dispute centered on indemnification, not product liability.[220] Therefore, Joy Co.'s contacts in the state were incidental with respect to the indemnification claim.[221]

The dissent then addressed *J. McIntyre* and argued that six Justices agreed on key issues directly at point in *Sproul*.[222] These include, "[a] specific effort to sell in the forum state, purposeful availment of the privilege of doing business in the forum state and the expectation that one's goods will be purchased in the forum state."[223] As such, the dissent believed that jurisdiction could not rest solely on the stream-of-commerce and foreseeability.[224] Moreover, the dissent criticized the plurality for conflating con-

211. *Id.* ¶ 48.
212. *Id.* ¶ 52.
213. *Id.*
214. *Id.* ¶ 53.
215. *Id.* ¶ 55 (Kennedy, J., concurring in part and dissenting in part).
216. *Id.* ¶ 54.
217. *Id.* ¶ 56.
218. *Id.* ¶ 56.
219. *Id.* (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).
220. *Id.*
221. *Id.*
222. *Id.* ¶ 57.
223. *Id.*
224. *Id.* ¶ 61.

tacts in New Mexico with the United States.[225] It also argued that Joy Co. had never made direct sales in New Mexico and its contacts in New Mexico were from third parties.[226] Any approach that assessed purposeful availment through defendant's intention to serve a national market was a sound for alarm.[227]

II. ARGUMENT

This section discusses the precedential value of fractured decisions from the U.S. Supreme Court and argues that *Asahi* and *J. McIntyre* constitute precedential holdings that lower courts must adhere to.

A. Precedential Authority in Fractured Decisions

Split U.S. Supreme Court decisions may still provide precedential value. In *Marks v. United States*,[228] the Court was tasked with defining the limits of obscenity and free speech based on its previous split decisions.[229] The Court held that the plurality opinion in "*Memoirs v. Massachusetts*"[230] commanded a majority of the Court and therefore carried precedential value. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[231] In *Memoirs*, a three Justice plurality held that obscene material was protected unless it was " 'utterly without redeeming social value.'"[232] Justice Black and Justice Douglas concurred but believed that the right to free speech was absolute and the government could never censor obscenity.[233] The final vote came from Justice Stewart who held that free speech does not include hardcore pornography.[234] The Court determined that the plurality represented the narrowest grounds in *Memoirs* because Justice Black and Justice Douglas' broad rule implicitly accepted the plurality's rule.[235]

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225. *Id.* ¶ 58.
226. *Id.* ¶ 59.
227. *Id.* ¶ 60.
228. 430 U.S. 188 (1977).
229. *Id.* at 188–89.
230. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Com. of Mass., 383 U.S. 413 (1966).
231. *Marks*, 430 U.S. at 193.
232. *Memoirs*, 430 U.S. at 419.
233. *Id.* at 433.
234. *Id.* at 421.
235. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991).

The narrowest grounds doctrine assumes that those supporting the whole implicitly support the pieces of the whole.[236] For example, suppose nine people are asked what their favorite color is. A four-person plurality likes red and blue, a two-person concurrence likes blue and orange, and a three-person dissent likes yellow and green. A five person majority likes blue. Although this example is highly simplified, it serves to illustrate the underlying logic of the narrowest grounds doctrine.

B. Narrowest Grounds of Asahi and J. McIntyre

1. *Asahi*

Three separate opinions were authored in *Asahi*. Justice O'Conner's plurality held, "minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. . . . The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[237] In contrast, Justice Brennan's concurrence stated, "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware [the forum may properly assert its jurisdiction.]"[238] Lastly, Justice Stevens' concurrence held, "purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components."[239] Each opinion is summarized as follows:

TABLE 1.

Rule	Judicial Support	Author of Opinion
Stream of Commerce Plus Intention to Serve the Forum = Due Process	Four Justices (Chief Justice Rehnquist, Justice O'Conner, Justice Powell, Justice Scalia)	Justice O'Conner
Stream of Commerce = Due Process	Three Justices (Justice Brennan, Justice White, Justice Marshall, Justice Blackmun)	Justice Brennan
Volume, Value and Hazardous nature of the goods = Due Process	Three Justices (Justice Stevens, Justice White, Justice Blackmun.)	Justice Stevens

236. Ken Kurma, *A Legitimacy Model for Interpretation of Plurality Decisions*, 77 CORNELL. L. REV. 1593, 1596–97 (1992).

237. Asahi Metal Industry Co. Ltd. v. Superior Court, 480 U.S. 102, 112 (1986) (plurality opinion) (emphasis in original) (citation omitted).

238. *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

239. *Id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

Under the narrowest grounds doctrine, Justice O'Conner's *Asahi* plurality does not garner a majority. In fact, both concurrences explicitly reject her approach. However, a majority of Justices did not join Justice Brennan either. Justice O'Conner's plurality required an intentional act to serve the forum, while Justice Brennan's did not. Moreover, Justice Steven's concurrence required a showing of the type and quantity of goods entering the forum; mere expectation under Justice Brennan's approach does not meet that standard. Unfortunately, the narrowest grounds doctrine does not shed light on which stream-of-commerce test controls.

A split in the lowers courts illustrates the lack of a majority consensus in *Asahi*. The Federal Circuit Courts are divided along three views on applicable stream-of-commerce test. The First, Fourth, Sixth, Ninth and Eleventh Circuits follow Justice O'Conner's stream-of-commerce plus test.[240] The Fifth, Seventh and Eighth Circuits adhere to Justice Brennan's stream-of-commerce test.[241] The Second, Third, and Tenth circuits follow both approaches. State courts are just as divided as the Federal Circuits.[242] Importantly though, *Asahi* was unanimous on the issue of traditional notions of fair play and substantial justice, which established binding precedent to that concept.[243] Other than that, the opinion did not promulgate a precedential holding.

2. *J. McIntyre*

Like *Asahi*, *J. McIntyre* produced a fractured decision without a clear majority. Justice Kennedy's plurality adhered to Justice O'Conner's rationale in *Asahi*.[244] Justice Breyer's concurring opinion did not require the defendant to target the forum, but did require a forum specific analysis.[245] Justice Ginsburg's dissent held that jurisdiction is proper if a defen-

240. Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 479–80 (6th Cir. 2003); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945–46 (4th Cir. 1994); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992); Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1990).

241. Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613–15 (8th Cir. 1994); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992).

242. Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 703–04, 704 n.132 (2009).

243. *Asahi*, 480 U.S. at 113–16 (plurality opinion).

244. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2790–91 (2011) (plurality opinion).

245. *Id.* at 2793 (Breyer, J., concurring in the judgment).

dant targets the national market.[246] A break down of the various opinions is as follows:

TABLE 2.

Rule	Judicial Support	Author of Opinion
Stream of Commerce Plus Intention to Serve the Forum = Due Process	Four Justices (Chief Justice Roberts, Justice Kennedy, Justice Scalia, Justice Thomas)	Justice Kennedy
Stream of Commerce but Forum Specific Analysis of the Defendant's Minimum Contacts is Required = Due Process	Two Justices (Justice Breyer, Justice Alito)	Justice Breyer
Stream of Commerce Based on Intention to Serve the National Market = Due Process	Three Justices (Justice Sotomayor, Justice Ginsburg, Justice Kagan)	Justice Ginsburg

The plurality's test was affirmatively rejected by both the concurrence and the dissent. Both Justice Breyer and Justice Ginsburg held that that the defendant was not required to target the forum in order for the forum to have jurisdiction. However, there is an implicit consensus between the concurring opinion and the plurality. The plurality requires a forum-by-forum (or sovereign-by-sovereign) analysis, while the concurring opinion required a focus "upon the relationship between 'the defendant, the forum, and the litigation, and the "defendant's contacts with that forum, to subject the defendant to suit there."[247] The underlying consent affirmatively establishes that six Justices require a focus on the defendant's in state activities, *not* his actions in the national market. Additionally, both the concurrence and plurality rejected the New Jersey Supreme Court's national market approach and, instead, require a forum specific analysis. Therefore, the controlling rule from *J. McIntyre* is that "targeting the national market is *not* enough to impute jurisdiction to all the forum States."[248] Other than this limited principle, *J. McIntyre* does not command anything more.

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

247. *Id.* at 2793 (Breyer, J., concurring in the judgment).

248. Oticon, Inc. v. Sebotek Hearing Sys., LLC, 865 F. Supp. 2d 501, 513 (D.N.J. 2011).

III. ANALYSIS AND IMPLICATIONS

This section provides a critical analysis of *Sproul* and argues that it selectively interpreted *World-Wide Volkswagen*, *Asahi*, and *J. McIntyre*––thereby departing from U.S. Supreme Court precedent. This section then applies the narrowest grounds approach to the facts of *Sproul* and argues that Joy Co. lacked minimum contacts for New Mexico to exert jurisdiction over it. This section primarily focuses on the plurality in *Sproul*. While the concurrence authored a separate opinion to support jurisdiction on other grounds, it agreed with the plurality's rationale in New Mexico's ability to assert jurisdiction. As such, *Sproul* evidences that New Mexico adopted a national market approach that disregards state lines. However, *Sproul*'s liberal holding does not meet the burdens of due process and New Mexico's law on personal jurisdiction violates the U.S. Constitution.

A. Sproul's *Interpretation of* World-Wide Volkswagen*,* Asahi *and* J. McIntyre

The *Sproul* plurality adopted the stream-of-commerce theory from *World-Wide Volkswagen* because it represented a majority opinion of the U.S. Supreme Court. However, that proposition was contradicted when the plurality, "[r]eaffirm[ed] [its] preference for Justice Brennan's stream of commerce approach from *World-Wide Volkswagen*."[249] As a result, a major justification establishing the credibility of the plurality's argument was lost.

Furthermore, the *World-Wide Volkswagen* court explicitly held that minimum contacts serve two related functions, one of which is limiting the reach of state courts to preserve "coequal sovereigns in a federal system."[250] *World-Wide Volkswagen* also stressed the importance of "state lines for jurisdictional purposes."[251] Conversely, the *Sproul* plurality focused on Joy Co.'s efforts to serve the national market and rendered state lines irrelevant. In addition, *World-Wide Volkswagen*'s stream-of-commerce theory is inconsistent with *Sproul*'s national market approach. Instead, the steam-of-commerce theory was primarily a method of distinguishing between purposeful availment and unilateral activity. The structure of the *World-Wide Volkswagen* opinion supports this argument; immediately following the Court's introduction of the stream-of-commerce theory, it determined that the theory was inapplicable due the

249. Sproul v. Rob & Charlies, Inc., 2013-NMCA-072, ¶ 26, 304 P.3d 18 (plurality opinion).

250. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980).

251. *Id.* at 293.

plaintiff's unilaterally activity.[252] Moreover, it is illogical that *World-Wide Volkswagen* would stand for the proposition that targeting the national market establishes purposeful availment. This is because Part II of the opinion is substantially related to the interplay between federalism and minimum contacts. In contrast, the national market approach is fundamentally at odds with federalism and state sovereignty, which was the fundamental concept *World-Wide Volkswagen* highlighted throughout the opinion.

Sproul's holding is further weakened by the plurality's selective interpretation of *J. McIntyre*. In *J. McIntyre*, the plurality condensed Justice Breyer's concurrence into a selective precept. According to the *Sproul* plurality, Justice Breyer simply advocated, "that the case could be decided based on precedent . . . without 'making broad pronouncements that refashion basic jurisdictional rules.'"[253] Yet, it failed to mention that "broad pronouncements" referred to Justice Breyer's overt rejection of the New Jersey Supreme Court's national market approach. This selective interpretation of Justice Breyer's concurrence also allowed the *Sproul* plurality to conclude that, "[only] a plurality of the Court [in *J. McIntyre*] rejected the 'national stream of commerce' theory as a basis for personal jurisdiction."[254] In truth, a majority of the court rejected a "'national stream of commerce' theory" as demonstrated above.

Sproul also ignored *Asahi*'s unanimous holding pertaining to traditional notions of fair play and substantial justice. *Asahi* commanded "careful inquiry" when exercising jurisdiction over a foreign defendant, but *Sproul* made no such inquiry. For example, *Asahi* held that a foreign defendant is inherently burdened by international travel and litigation in a foreign legal system.[255] Conversely, *Sproul* concluded that Joy Co.'s substantial revenue eased the company's burden of international travel. *Asahi* never held that the defendant's financial strength removed the burden of foreign litigation. Moreover, Asahi Metal Company was a large manufacturer and likely had substantial revenues just like Joy Co. Both companies were entirely based over seas and both were burdened by international travel. Nevertheless, the plurality determined that *Sproul* had

252. *Id.* at 297–98.

253. *Sproul*, 2013-NMCA-072, ¶ 42.

254. *Id.* ¶ 38.

255. Asahi Metal Industry Co. Ltd. v. Superior Court, 480 U.S. 102, 114 (1986) ("Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system.").

participated in the U.S. legal system and New Mexico's laws were not substantially different. Therefore, litigation in New Mexico did not present a substantial burden. However, product-liability and indemnification law differs immensely from state to state.[256]

Sproul also contradicts Justice Breyer's concurrence in *J. McIntyre*. Both Joy Co. and the defendant in *J. McIntyre* held contracts with U.S. distributors and held U.S. patents. Nonetheless, these facts failed to sway Justice Breyer and Justice Alito that New Jersey's jurisdiction was fair. In contrast, the plurality determined that these facts made Joy Co. a seasoned legal expert on New Mexico law.

There were additional issues with *Sproul*'s fairness and justice analysis as well. First, the *Sproul* plurality misinterpreted New Mexico's interest in the suit. *Sproul* and *Asahi* both arose from indemnification claims.[257] This is important because it directly affects the state's interest. In *Asahi*, the state's interest did not include product safety or consumer protection; rather, it centered on indemnification and the relationship between two manufacturers.[258] *Sproul* directly conflicts with that principle by holding, "New Mexico has a clear interest in resolving claims arising from injuries occurring here as the result of defective products."[259] Instead, New Mexico's concern pertained to protecting the financial wellbeing of New Mexican retailers. This is arguably less important than consumer protection and preventing bodily injury.

Sproul also failed to mention the procedural and substantive interests of other nations whose interests were affected when New Mexico asserted jurisdiction over Joy Co. *Asahi* required "great care" when exercising personal jurisdiction in the international context because it inevitably implicates U.S. foreign policy.[260] Yet, *Sproul* failed to mention why foreign policy was unaffected by New Mexico's assertion of jurisdiction over a Chinese manufacturer. This analysis may seem trivial but legal scholars and *Asahi* argue otherwise. For example, asserting jurisdiction may offend foreign sovereigns, provoke diplomatic protests, trigger com-

256. PRODUCTS LIABILITY, 50 STATE STATUTORY SURVEYS: CIVIL LAW: TORTS, *available at* 0020 Surveys 29 (WestlawNext) ("This survey covers federal and state statutes relating to products liability actions generally, and to specific types of products liability claims, e.g., manufacture and sale of firearms, food donations, and donations of bodily organs, tissue, and blood, among others.").

257. *Asahi*, 480 U.S. at 114 ("The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards.").

258. *Id.*

259. *Sproul*, 2013-NMCA-072, ¶ 37.

260. *Asahi*, 480 U.S. at 114.

mercial or judicial retaliation, threaten friendly relations in unrelated fields, and contradict Congress' Constitutional power in foreign affairs.[261]

B. Application of Narrowest Grounds of J. McIntyre to Sproul

A forum specific analysis of minimum contacts was an implicit consensus underlying the plurality and concurrence in *J. McIntyre*. In that decision, a majority of the court rejected the New Jersey Supreme Court's national market approach. For instance, the New Jersey Supreme Court stated, "a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of . . . New Jersey."[262] This same logic, almost exactly, is advocated in *Sproul* where the court held "[s]ufficient facts exist in this case to determine that Joy Co. purposefully directed its activities toward the United States market and, as a result, toward the New Mexico market as well."[263] Therefore, the question becomes whether New Mexico could assert jurisdiction over Joy Co. without focusing on its actions in the national market. This requires a forum specific analysis of Joy Co.'s minimum contacts in New Mexico––an analysis that falls short under close inspection.

Sproul determined that Joy Co.'s minimum contacts were: (1) complying with U.S. safety standards, (2) utilizing an out-of state distributer to serve New Mexico, (3) component parts incorporated into bicycles sold by R & C and K-Mart, and (4) a Californian employee.[264] First, compliance with national safety standards indicates Joy Co.'s intent to serve the national market, not New Mexico. Additionally, there was no evidence that Joy Co. specifically designed its products for New Mexican consumers. Second, Joy Co.'s distributor was an out-of-state company and served the national market, not just New Mexico. Likewise, it was uncontended that Joy Co. directed or influenced its distributor to serve New Mexican customers. Thus, the distributer was not a contact in New Mexico. Third, it was unspecified how many Joy Co. parts were in the state or the estimated revenue Joy Co. derived from sales in New Mexico. Fourth, *Sproul* never clarified if Joy Co.'s employee ever made contact with the state.

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261. *See generally* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952).

262. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 589 (N.J. 2010), *rev'd sub nom.* J. McIntyre Machinery, LTD. v. Nicastro, 131 S. Ct. 2780 (2011).

263. *Sproul*, 2013-NMCA-072, ¶ 34.

264. *Id.* ¶¶ 27–29.

Rather, the dissent noted that no evidence showed that Joy Co.'s employee directly served New Mexico. Notwithstanding the preceding flaws in Joy Co.'s contacts with New Mexico, there could be sufficient minimum contacts to establish jurisdiction. This is highly dependent on the number of Joy Co. products in the state and the frequency that the employee served New Mexican costumers. Since this information was not provided in *Sproul* we are left to speculate.

C. Personal Jurisdiction After Sproul

Ironically, *Sproul* created the same problem for New Mexico trial courts as the U.S. Supreme Court has created for federal district courts because *Sproul* splintered just like *Asahi* and *J. McIntyre*. Moreover, instead of clarifying personal jurisdiction and the stream-of-commerce, *Sproul* muddied the waters. While we wait for clarification, this author suggests that New Mexico follow the majority's stream-of-commerce theory in *World-Wide Volkswagen* as modified by *J. McIntyre*. Moreover, evidentiary hearings should be used when the defendant objects to New Mexico's assertion of jurisdiction. This is best exemplified by another court's approach, which notably dealt with the same defendant in *Sproul*, Joy Co.

Windsor v. Spinner Industry Co., Ltd.,[265] closely parallels the events and competing arguments raised in *Sproul*. The plaintiff was injured while riding his bike and alleged that Joy Co.'s quick release mechanism was to blame.[266] The plaintiff argued that Joy Co. purposely availed itself of the state's jurisdiction because it indiscriminately targeted the national market, which included Maryland.[267] Joy Co. moved to dismiss for lack of personal jurisdiction.[268]

Unlike *Sproul*, the Maryland court used the narrowest grounds doctrine to find that *J. McIntyre* rejected the national market approach.[269] The court stated, "[*J. McIntyre*] embraces the continuing significance of individual state sovereignty and, on that basis, hold[s] that specific jurisdiction must arise from a defendant's [minimum contacts] with the forum state."[270] However, instead of dismissing the suit, the court determined that an evidentiary hearing should be utilized.[271] This gave the plaintiff a chance to determine if Joy Co. had minimum contacts. This author

265. 825 F. Supp. 2d 632 (2011).
266. *Id.* at 634.
267. *Id.* at 634–35.
268. *Id.*
269. *Id.* at 638.
270. *Id.*
271. *Id.* at 640.

strongly encourages that New Mexico courts adopt the same approach as *Windsor* in assessing the question of minimum contacts. Furthermore, the use of an evidentiary hearing will keep the plaintiffs in court and give the parties a chance to litigate the claim, as well as provide a method to reach the most complete and accurate result regarding due process.

D. Alternatives to the National Market Approach

It is critical that courts and practitioners remain cognizant that personal jurisdiction is a constitutional matter and the U.S. Supreme Court requires forum-specific contacts. As such, New Mexico Courts must protect consumers without violating the Constitution. However, simply following New Mexico's law on products-liability and indemnification accomplishes this goal.

New Mexico adheres to the doctrine of strict products liability.[272] This doctrine holds that a seller of a defective product is liable despite a lack of negligence or wrongdoing on their part.[273] Yet, when a downstream party in the manufacturing process is strictly liable, the non-negligent party may seek indemnification from an upstream party.[274] Moreover, New Mexico's indemnification law allows the down stream party to transfer product liability onto the party closest to the "wrong doer."[275]

As such, liability can be imputed to an upstream party in the manufacturing process, thereby eliminating the need for a retailer to seek indemnification from a manufacturer. The state retailer may become a defendant, but indemnity solves this dilemma. Furthermore, the law is focused on the defendant's relation to the wrongdoer, meaning liability will fall on the defendant closest to the manufacture within the distribution chain. From the retailer's perspective, the distributor is likely the best target if the foreign manufacturer lacks minimum contacts. A distributor serving in-state retailers inherently maintains sales contracts, deliveries, order confirmations, etc. Not only does this approach provide effective relief for in-state retailers, it also prevents unsafe products from entering the state. If the distributor bears the burden of liability, it will demand that its suppliers manufacturer safe products. In addition, the manufacturer may be insulated from liability within New Mexico, but not

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272. Tuijillo v. Berry, 1987-NMCA-072, ¶5, 106 N.M. 86.

273. *Id.*

274. *Id.* ¶ 13 ("We hold only that where the manufacturer and retailer are held strictly liable in tort and the latter's liability resulted solely from its passive role as the retailer of the product furnished it by the manufacturer, indemnity may lie in favor of the retailer against the manufacturer.").

275. *Id.* ¶ 7.

in other forums. The distributor will likely seek indemnification in a forum where the two companies executed a service agreement. *Sproul* serves as a helpful example to illustrate this argument.

R&C was subject to strict liability as a down stream party. The immediate upstream party was J&B Distributors. However, J&B was also the closest party to the manufacturer in New Mexico. The distributor likely shipped products, order confirmations, and order catalogs to New Mexico retailers and thereby satisfied minimum contacts in New Mexico. Therefore, R&C should have sought indemnification from J&B instead of Joy Co. This approach would ensure that R&C was compensated for unknowingly selling Joy Co.'s defective product. In addition to compensating the plaintiff, holding J&B liable would prevent Joy Co.'s defective products from entering the state. If J&B disregarded this risk, it would be gambling every time it sold a defective Joy Co. product in New Mexico.

This approach also provides a catalyst in ultimately holding Joy Co. liable for the injuries its products cause in New Mexico. J&B is head quartered in Miami, Florida and likely entered into a service contract with Joy Co. in Florida. In *Burger King Corp. v. Rudzewicz*,[276] the nonresident defendant had executed a contract that was subject to the laws in the plaintiff's forum state.[277] Nonetheless, the Court determined that minimum contacts and due process was satisfied.[278] Thus, J&B could seek indemnification from Joy Co. in Florida and the liability would ultimately fall on Joy Co.

E. Counter Arguments and Responses to Counter Arguments

1. The New Mexico Supreme Court Commanded the Result in *Sproul*

It can be argued that a 1966 New Mexico Supreme Court decision supports *Sproul*'s holding. In *Blount v. T D Pub. Corp.*,[279] the court held that the publisher was subject to New Mexico's jurisdiction because its periodicals were sold through a national distribution network.[280] Moreover, minimum contacts were satisfied because the publisher benefited from a distribution channel that facilitated sales in New Mexico.[281] Like the defendant in *Blount*, Joy Co. sold its products to a national distributor and indirectly profited from New Mexico consumers.

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276. 471 U.S. 462, 466 (1985).
277. *Id.* at 478.
278. *Id.*
279. 1966-NMSC-262, 77 N.M. 384.
280. *Id.* ¶ 10.
281. *Id.* ¶ 15.

That *Blount* still reflects the view of the New Mexico Supreme Court is nothing more than a guess. First, it was decided before *World-Wide Volkswagen*, *Asahi*, and *J. McIntyre*. Accordingly, the New Mexico Supreme Court has never decided which stream-of-commerce approach reflects the view of U.S. Supreme Court. Furthermore, the two U.S. Supreme Court decisions referenced by the New Mexico Supreme Court in *Blount* were majority decisions that were unrelated to product-liability and did not involve foreign defendants. Thus, *Blount*'s facts are incongruent with *Sproul*. Moreover, *Blount* arose from a libel claim against the publisher defendant. The U.S. Supreme Court decided an almost identical issue in *Calder v. Jones*.[282] It is true that *Calder* relaxed the burdens of minimum contacts required to meet due process;[283] however, *Calder* only applies to intentional torts.[284] Therefore, *Blount*'s precedential value may only extend a far as jurisdictional issues surrounding intentional torts.

Second, the Justices deciding *Blount* were no longer on the bench when *Sproul* was decided half a century later. The New Mexico Supreme Court, just like any appellate court, is made up of individuals who likely have different perspectives. Third, and most importantly, the New Mexico Long-Arm Statute is coextensive with the requirements of due process. As a result, federal law determines personal jurisdiction in New Mexico. Arguing that the New Mexico Supreme Court's 1966 decision is still consistent with current federal law is a risky guess.

2. *J. McIntyre* lacks Precedential Value

Another counter argument is that *J. McIntyre* is entirely open for multiple interpretations. For example, *Eastman Chemical Co. v. AlphaPet Inc.*[285] held that the narrowest grounds of *J. McIntyre* leaves the stream-of-commerce debate unresolved. *Eastman Chemical Co.* held that it the precedential value of *J. McIntyre* was unworkable.[286] Other courts have reached the same result.[287] Still, other jurisdictions have interpreted *J.*

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282. 465 U.S. 783 (1983).

283. *Id.* at 787.

284. Holland America Line Inc. v. Wartsila North America, Inc., 485 F.3d 450, 460 (9th Cir. 2007) ("It is well established that the Calder test applies only to intentional torts, not to breach of contract or negligence claims.").

285. No. 09-971-LPS-CJB, 2011 WL 6004079, at *18, (D. Del. Nov. 4, 2011).

286. *Id.*

287. *See, e.g.*, AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358, 1363 (Fed. Cir. 2012) (applying the narrowest grounds doctrine and holding, "we must proceed on the premise that *McIntyre* did not change the Supreme Court's jurisdictional framework"); Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174 (5th Cir. 2013) (applying the narrowest grounds doctrine and holding, "Justice Breyer's concurrence was explicitly based on Supreme Court precedent and on *McIntyre's* specific facts").

McIntyre as adopting the stream-of-commerce "plus" test after applying the narrowest grounds doctrine.[288] As such, this conflicts with the author's argument that *J. McIntyre* commanded a majority.

Despite various interpretations, no jurisdiction has held that purposeful availment is supported by the defendant's intention to target the national market. In addition, in Supreme Court jurisprudence the national market approach has only received support in Justice Ginsburg's dissent in *J. McIntyre*. If a majority of Justices agreed with the national market approach, Justice Ginsburg's opinion would have been the majority. However, six Justices affirmatively rejected the national market approach in *J. McIntyre*. Accordingly, even if the narrowest grounds approach is incompatible with *J. McIntyre*, we can be sure that the U.S. Supreme Court has clearly foreclosed on any notion that the national market can be used as a basis for a state to assert jurisdiction. Since *Sproul*'s holding was rooted in the national market approach, the New Mexico legal community should advocate for a reevaluation by the courts.

CONCLUSION

This Note explored if *Sproul* was correctly decided under *World-Wide-Volkswagen*, *Asahi*, and *J. McIntyre* and, if not, argued for a practical solution that complies with due process but protects New Mexico consumers from defective products. This Note determined that *Asahi* and *J. McIntyre* did not amend the stream-of-commerce theory adopted in *World-Wide Volkswagen*. Nonetheless, it is evident that the U.S. Supreme Court rejected any approach that departs from federalism and a forum specific analysis, as the Supreme Court has overtly rejected a national market approach in establishing personal jurisdiction. *Sproul* disregarded the defendant's minimum contacts in New Mexico and, as a result, likely violated due process. Instead of adopting the approach in taken in *Sproul*, this Note argued that New Mexican courts should utilize other judicial tools to ensure that a plaintiff is compensated when a defective product causes injury.

The author notes that while *Sproul* "represents the most sensible approach to personal jurisdiction in the context of global commerce, it nevertheless . . . is clearly foreclosed by the precedents of the Supreme

288. Smith v. Teledyne Continental Motors, Inc., 840 F. Supp. 2d 927, 931 (D.S.C. 2012) ("[A] 'common denominator of the Court's reasoning' and 'a position approved by at least five Justices who support the judgment' is the 'stream-of-commerce plus' [approach].").

Court."[289] *Sproul* confronted a tough issue and received little guidance from the U.S. Supreme Court. This Note took a critical approach to *Sproul*, especially the plurality opinion. The author believes that the plurality was justified on its beliefs and logic, but was wrong on the law. Simply put, the U.S. Supreme Court's approach does not make sense given the global context and vast distribution chains. However, until the U.S. Supreme Court resolves the steam-of-commerce debate, lower courts must find creative ways to ensure that foreign manufacturers are held accountable without violating the Constitution.

289. Windsor v. Spinner Industry Co., Ltd., 825 F.Supp.2d 632, 640 (D. Md. 2011).