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# Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicastro

John Vail

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# SIX QUESTIONS IN LIGHT OF *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*

John Vail*

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The junkyards of North Jersey, where Mr. Nicastro was injured, are my home turf. As someone who believes, deeply, that the lesson of the law is experience, the result in *J. McIntyre Machinery, Ltd. v. Nicastro*[1] is viscerally upsetting, and the plurality opinion is intellectually perplexing. I will check my emotions at the door and will describe some of my confusion, in the hope that my colleagues in the academy can provide some guidance. I applaud the South Carolina Law Review for providing an opportunity for the practicing bar and the legal academy to address, jointly, an issue that affects the day-to-day resolution of disputes. Such occasions are too few.

I am not wholly new to this world of jurisdictional standards. I spent many years participating in State Department meetings dealing with the failed Hague Convention on Jurisdiction and Judgments, learning much from Advisers Arthur von Mehren, Ron Brand, and Harold Maier. That experience equipped me, I thought, to address the issues raised in *J. McIntyre*.[2]

I make no secret that I think the case was wrongly decided. Although I would have reached a different result than Justice Breyer, I agree with him that a straightforward application of existing principles could have, and should have, readily decided the case.[3] The case never was, factually, a good vehicle for the Supreme Court to resolve the issues it had left open in *Asahi Metal Industry Co. v. Superior Court*.[4] I suspect that a broad and provocative opinion from the

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1. 131 S. Ct. 2780 (2011).
2. *Id.*
3. *See id.* at 2791 (Breyer, J., concurring).
4. 480 U.S. 102 (1987).



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Supreme Court of New Jersey[5] had more to do with the grant of certiorari than the facts of the case itself. But I will not dwell on the inscrutable process by which the Supreme Court shapes its docket. I will focus instead on several broad questions that the academy might ponder in advance of the Court's next attempt to sort out its inscrutable jurisprudence of specific jurisdiction.

## I. WHOSE JOB IS IT, ANYWAY?

The plurality opinion in *J. McIntyre* did not ask whether New Jersey's exercise of sovereign power was limited by the federal Constitution; it said that New Jersey, as a sovereign, did not have that authority in the first place: "[J]urisdiction is, *in the first instance, a question of authority*. . . ."[6] My question is: Where does the Supreme Court get the authority to define what sovereign powers a state possesses?

"[T]he States are independent sovereigns in our federal system."[7] Justice Kennedy, author of the plurality opinion in *J. McIntyre*,[8] last year said the following regarding this topic:

> I had thought it a basic principle that the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government. The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the people), not the other way around as the Court's analysis suggests. And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.[9]

He was talking about the Tenth Amendment,[10] and the statement is more nuanced than the quotation from *Medtronic* that began the last paragraph.[11] But, neither Justice Kennedy nor anyone else I know of has asserted that any state ceded some of its sovereign jurisdictional power to the federal government. The plurality opinion in *J. McIntyre* certainly does not describe what power was surrendered to the national government, or even that the residual power of the state was limited by the due process clause; it states that no power exists.[12]

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5. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
6. *J. McIntyre*, 131 S. Ct. at 2789 (emphasis added).
7. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
8. *See J. McIntyre*, 131 S. Ct. at 2783.
9. United States v. Comstock, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring).
10. U.S. CONST. amend. X.
11. *See supra* text accompanying note 7.
12. *See J. McIntyre*, 131 S. Ct. at 2791.

## II. WHY NO PRESUMPTION OF CONSTITUTIONALITY?

My second question is related to my first: In jurisdictional analysis, why is a state's decision that it possesses sovereign power to hale a foreign defendant into court given no presumption of constitutionality, and why is it the burden of the proponent of the state action to justify it?

In standard constitutional analysis, it has long been the rule that when "deal[ing] with a subject clearly within the scope of the police power," a state's exercise of power is afforded a "presumption of constitutionality," meaning that "if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts."[13] A challenger "must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."[14]

In certain contexts dealing with fundamental rights, that is not so.[15] The Supreme Court has never identified a foreigner's right not to be hauled into a court of a state of the United States as fundamental in this sense.[16] Is such an identification implicit in the jurisprudence? The Court has hardly had a strong tradition of recognizing fundamental rights by implication,[17] so that does not seem likely. And, the Court has recognized the strong state interest in providing a forum,[18] which would militate against inversion of the normal presumption of constitutionality.[19]

If a state's exercise of jurisdiction is not within its police power to start out with, not affording its assertion of that power a presumption of constitutionality makes sense. If the state starts with that power, the presumption seems in order. Affording deference in *J. McIntyre*, which dealt with a state long-arm statute saying simply that the power extended as far as due process would allow,[20] might not have made much difference. But, consider a case brought under the

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13. Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935) (quoting Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934)) (internal quotation marks omitted).

14. *Id.* (quoting *Borden's Farm Prods.*, 293 U.S. at 209) (internal quotation marks omitted).

15. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)) (internal quotation marks omitted)).

16. *See J. McIntyre*, 131 S. Ct. at 2786–87 (describing the foreign defendant's due process right without mentioning that right to be a fundamental one).

17. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–35 (1972) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

18. *See* Carey v. Brown, 447 U.S. 455, 480–81 (1980) ("[T]he State has a legitimate interest in . . . providing a forum where no other is reasonably available . . . .").

19. *See* Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) ("What this Court has called 'strict scrutiny'—with its strong presumption against constitutionality—is normally out of place where . . . important competing constitutional interests are implicated.").

20. N.J. Ct. R. 4:4-4(a)(6).

South Carolina long-arm statute, in which the legislature attempts to give content to due process principles:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> . . . .
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State.[21]

There, a presumption of constitutionality might matter.

## III. DOES TERRITORY GIVE POWER, OR DOES FAIRNESS RESTRAIN IT?

Waxing and waning is more attractive in lunar behavior than in Supreme Court jurisprudence. The Court has waxed, then waned, and now appears to be waxing again with regard to whether the power to exercise extraterritorial adjudicative jurisdiction is directly related to control over things within a territory, or is simply limited by concerns of fairness.

As late as 1958, in *Hanson v. Denckla*,[22] the Court noted that due process limitations "are a consequence of territorial limitations on the power of the respective States,"[23] apparently reviving an idea from *Pennoyer v. Neff*[24] that the Court seemingly had rejected in *International Shoe Co. v. Washington*.[25] Subsequently, however, the Court powerfully rejected this idea.

Justice White wrote for eight members of the Court when, in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,[26] the Court emphatically rejected sovereignty and attendant territoriality as part of the jurisdictional inquiry:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It

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21. S.C. CODE ANN. § 36-2-803(A)(4) (2003 & Supp. 2011).
22. 357 U.S. 235 (1958).
23. *Id.* at 251.
24. 95 U.S. 714, 720 (1878)
25. 326 U.S. 310, 316 (1945).
26. 456 U.S. 694 (1982).

> represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.[27]

In the footnotes, Justice White emphasized this rejection of the role of sovereignty in personal jurisdiction:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[28]

Five years later, in *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*,[29] the case that gave rise to Federal Rule of Civil Procedure 4(k)(2),[30] the Court unanimously endorsed the holding quoted above.[31] The "restriction on state sovereign power described in *World-Wide Volkswagen Corp.*," noted in *Insurance Corporation of Ireland,* is a concern about interstate relations and federalism.[32] That concern does not even arise when dealing with an international defendant. The fractured opinions in *Burnham v. Superior Court*,[33] however, indicated that the issue would not die.

Channeling the undead, the plurality in *J. McIntyre* reiterates the territorial limitations endorsed in *Hanson v. Denckla*,[34] noting "that jurisdiction is in the first instance a question of authority rather than fairness."[35] There is an academic debate about whether territoriality is a legitimate piece of the due

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27. *Id.* at 702.
28. *Id.* at 702–03 n.10.
29. 484 U.S. 97 (1987).
30. Mark B. Kravitz, *National Contacts and the Internet: The Application of FRCP 4(k)(2) to Cyberspace*, 7 U. BALT. INTELL. PROP. L.J. 55, 56 (1998) (explaining the history of Rule 4(k)(2)).
31. *Omni Capital*, 484 U.S. at 104 (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702).
32. *Ins. Corp. of Ir.*, 456 U.S. at 702 n.10. The Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), noted that the due process clause "acts to ensure that the states . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."
33. 495 U.S. 604 (1990).
34. 357 U.S. 235, 251 (1958); *see supra* text accompanying notes 22–23.
35. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011).

process analysis with regard to jurisdiction or whether it is legitimate only as a proxy for fairness.[36] I am largely in the second camp. But, I have found suggestions that territoriality also is a proxy for a different concern, a concern more closely linked to due process: the finality of judgments.

*Magnolia Petroleum Co. v. Hunt*[37] alludes to the common law doctrines of finality and merger as reasons underlying the full faith and credit regime governing interstate relations:

> [It is] the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other.[38]

*Magnolia* echoes a theme present in very early cases on international comity. In 1820, in *Le Roy v. Crowninshield*,[39] a circuit-riding Justice Story decided that, because a statute of limitations affects remedy only, an action on a contract is governed by the statute of the state in which the action is brought, and not by that in which the contract was made.[40] He made this point:

> [T]he bar of rei judicatae is admitted to be conclusive in all foreign courts upon the ground of public utility, because there should be some means to put a final issue to controversies, otherwise litigation would be perpetual.[41]

The appellee in *Owings v. Nicholson*,[42] in 1815, noted, "the courts of one country are not in any degree bound by the judgments of the courts of another," which "is the result of their independence and sovereignty,"[43] and argued

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36. *See id.* at 2799 & n.4 (Ginsburg, J., dissenting) (citing Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304–06 (1989); Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 2, 30–32 (2001); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 536–44 (1991); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 884–85 (1989)).

37. 320 U.S. 430 (1943). *Magnolia* is somewhat problematic for its holding regarding full faith and credit to be accorded in the workers' compensation context, but the quoted reasoning is not questioned. *See* Thomas v. Washington Gas Light Co., 448 U.S. 261, 277 (1980).

38. *Magnolia*, 320 U.S. at 439.

39. 15 F. Cas. 362 (C.C.D. Mass. 1820) (No. 8,269).

40. *Id.* at 364–65.

41. *Id.* at 367 (citing LORD HENRY HOME OF KAMES, PRINCIPLES OF EQUITY 517 (Alex Lawrie & Co. 1825) (1760)).

42. 4 H. & J. 66 (Md. 1815). The reporter reported the arguments of the parties, and the result of the case, but not the decision itself, which was lost.

43. *Id.* at 96.

successfully that reciprocity was a key concern in deciding whether comity should be afforded: "In France a judgment rendered in this country would not be received as conclusive, and in Martinique it would not. And are we to take theirs as conclusive upon notions of comity, which are not reciprocal?"[44]

These concerns of merger, bar, and finality are legitimately concerns of due process, concerns about the integrity of the judicial system as a whole. They do not support territoriality as a concern of due process. However, they do support the non-enforceability of judgments rendered without jurisdiction.[45] They also support the holding of *Insurance Corporation of Ireland*[46] that a court always has jurisdiction to determine its own jurisdiction and that when a party hinders the court from making that determination, the party impermissibly hinders the overall goal of achieving finality;[47] parties must assist the court.[48] The Court in those decisions showed greater respect for reciprocal enforcement than was shown in the *J. McIntyre* plurality opinion.

## IV. WHAT DOES *J. MCINTYRE* MEAN FOR RECIPROCAL ENFORCEMENT?

If the plurality opinion in *J. McIntyre* is right, and due process precludes enforcement of foreign judgments rendered without jurisdiction, a foreign tort judgment based on place of harm jurisdiction, when a party can show no purposeful availment of the foreign jurisdiction, is not enforceable in the United

44. *Id.* at 96–97.

45. *See* Griffin v. Griffin, 327 U.S. 220, 228–29 (1946) ("A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction." (citing Baker v. Baker, Eccles & Co., 242 U.S. 394, 401 (1917); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 23 (1907); Nat'l Exch. Bank v. Wiley, 195 U.S. 257, 270 (1904))). The court also noted that "due process requires that no other jurisdiction shall give effect, *even as a matter of comity*, to a judgment elsewhere acquired without due process." *Id.* at 229 (emphasis added) (citing RESTATEMENT OF JUDGMENTS § 11 cmt. c (1942)).

Also, note that the Court has solidly maintained that choice of law, as opposed to jurisdiction, raises no federal question. *See* United States v. Pink, 315 U.S. 203, 245 (1942) (Stone, C.J., dissenting) ("This Court has repeatedly decided that the extent to which a state court will follow the rules of law of a recognized foreign country in preference to its own is wholly a matter of comity, and that, in the absence of relevant treaty obligations, the application in the courts of a state of its own rules of law rather than those of a foreign country raises no federal question." (citations omitted)). Choice of law does not raise the concerns of finality that jurisdiction does.

46. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982) (deeming jurisdictional, facts established because of non-compliance with discovery); *see id.* at 702 n.9 ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.").

47. *See id.* at 709 (explaining the court's power to determine personal jurisdiction and issue sanctions).

48. *See id.* at 704–05 (explaining how courts can determine personal jurisdiction and the consequences of failure to provide the court with necessary facts).

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States.[49] Place of harm jurisdiction arguably is the norm of the industrialized world.[50]

Consider the differing real world plights of two different humans. An Irish farmer—the kind described by Seamus Heaney, rooted in place, never having traveled far from his home[51]—is injured when a Boeing plane crashes into his field. Under European jurisdictional rules, he could sue Boeing in Ireland, the place where the harm occurred.[52] Now consider one of Faulkner's Mississippi mud farmers—another gentleman whose rich experiences were confined to a small geographic area[53]—injured at his homeplace by a derelict Airbus jet. Under *J. McIntyre*, he is welcome to venture to Toulouse to file his action. *J. McIntyre* does not leave Heaney's Irish farmer untouched: his Irish judgment, absent a showing of Boeing's purposeful availment of Ireland, is not enforceable in any U.S. jurisdiction.

If finality is a concern of constitutional jurisdictional jurisprudence, *J. McIntyre* is a giant step backward.

## V. SYMMETRY OR ASYMMETRY?

The plurality in *J. McIntyre* raises the question of whether Congress, acting on behalf of the national sovereign, could authorize the exercise of jurisdiction over a company like J. McIntyre that marketed and sold products to the United States as a whole, but not to any particular state.[54] Assume, for example, that there existed a national products liability statute. Federal court jurisdiction presumably—and I use that term with some irony, given Part I above[55]—would lie, with service of process being made under Federal Rule of Civil Procedure 4(k)(2).[56] The 4(k)(2) regime has not been constitutionally tested, but under the

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49. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S.Ct. 2780, 2787 (2011) (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (purposeful availment is required for jurisdiction).

50. *See, e.g.*, Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 5 [hereinafter EU Council Regulation] (noting that member states of the European Union may be sued "in the courts for the place where the harmful events occurred"); Brief for Respondents at 40 *J. McIntyre*, 131 S. Ct. 2780 (No. 09-1343) (citing EU Council Regulation, *supra*); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2) cmt. i (1987).

51. *See* Seamus Heaney, *Digging*, WEED'S ANTHOLOGY OF FAVOURITE POEMS, http://www.wussu.com/poems/shdigg.htm (last visited Feb. 2, 2012) (emphasizing his grandfather's attachment to place by describing him as the person who "cut more turf in a day [t]han any other man on Toner's bog").

52. *See* EU Council Regulation, *supra* note 50, at 5.

53. *See* WILLIAM FAULKNER, THE REIVERS (1962).

54. *J. McIntyre*, 131 S. Ct. at 2790. ("In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts.").

55. *See supra* text accompanying notes 6–12.

56. FED. R. CIV. P. 4(k)(2).

Rules Enabling Act,[57] both the Court and Congress had the opportunity to entertain that question and, again, presumably found that it passed muster.

In that situation, in which state the case was heard would become a venue question. If the facts of *J. McIntyre* had arisen in Alaska, presumably there would be no constitutional barrier to requiring J. McIntyre to defend a federal claim in Anchorage. And, under the existing facts, there would be no barrier to requiring J. McIntyre to respond in federal court in Newark, while the constitution would bar haling J. McIntyre into state court in Newark.[58] As a matter of what we normally think of as due process, that is bizarre.

Generally, the content of the Fifth and Fourteenth Amendment Due Process Clauses has been considered identical: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."[59] In a separate opinion in 2010, in one of the gun rights cases, Justice Stevens suggested that the substantive rights protected by the two due process clauses could differ.[60] The Court heartily rejected the notion: "As we have explained, the Court, for the past half-century, has moved away from the two-track approach. If we were now to accept Justice Stevens' theory across the board, decades of decisions would be undermined."[61] I have found no instance suggesting that the Court would endorse different concepts of fair procedure under the two clauses.

If jurisdictional facts might, under due process analysis, justify place of harm specific jurisdiction authorized by Congress, but not the same jurisdiction authorized by the state that was the place of harm, some idea of territoriality must be imported into due process analysis, rendering the Fifth and Fourteenth Amendment analyses asymmetrical.[62] But, territoriality was not a concern of English due process, from which our due process clauses came.[63] Rather, it was imported from international sovereignty theories of French and Dutch continental scholars.[64] The concerns of international and interstate relations that territoriality addresses seem less awkwardly addressed by constitutional

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57. 28 U.S.C. § 2072 (2006).

58. *See J. McIntyre*, 131 S. Ct. 2780.

59. Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (equating Fifth and Fourteenth Amendment due process); Dusenbery v. United States, 534 U.S. 161, 167 (2002) (noting equivalence of clauses); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974) (determining that it is unnecessary to decide whether Fifth or Fourteenth Amendment applies to Puerto Rico, as they are equivalent).

60. McDonald v. City of Chi., 130 S. Ct. 3020, 3093 (2010) (Stevens, J., dissenting).

61. *Id.* at 3048 (plurality opinion).

62. *See generally* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1120–21 (1981) (discussing the historical link between interstate sovereignty, federalism, and due process).

63. *Id.* at 1122.

64. *Id.* at 1116. *See also* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. L. REV. 241, 258 (1965) (citing Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 399 (1919)).

provisions other than the Due Process Clauses, such as the Commerce Clause and federal powers over foreign relations. The Due Process Clauses should retain their symmetry.

## VI. WHITHER THE WEB?

E-commerce is the 800 pound gorilla clouding jurisdictional analysis, a concern to which Justice Breyer alluded in *J. McIntyre*.[65] Professor Miller has suggested, "Although the Internet and the other new communications technologies do present some strikingly new factual patterns and do change the way personal jurisdiction is acquired over some defendants at the margins, little substantive doctrine should be affected by this new technology—at least not in the near term."[66] For now, existing concepts seem to suffice.

Nonetheless, the Hague Convention negotiations bogged down within the U.S. delegation when a consensus could not be reached on how to handle e-commerce.[67] At one agency-sponsored meeting related to the Hague effort, I asked a representative of a large international manufacturer, who had traveled from Europe, why she had come. She noted that her company planned, eventually, to sell its expensive product via websites, FOB the place of manufacture, in part with the idea that such sales would not subject the company to jurisdiction in the U.S.

The *J. McIntyre* plurality does not address the consequence of a manufacturer's capacity to control where its product is sold or delivered. J. McIntyre clearly could have ordered its distributor not to sell or ship products to New Jersey. That would seem to negate purposeful availment, and it raises a question about what consequence should attach to the failure to exercise that negative power. But, what about the nod and wink of the European manufacturer fixing the point of sale as the foreign jurisdiction? Should that matter if the company is openly soliciting sales *to* the United States, or to particular states?

I expect we will find out before too long.

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65. *See* J. McIntyre Mach., Ltd. V. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring) ("I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues.")

66. 4A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1073.1 (3d ed. 2002).

67. *See* Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 490 (2006) (quoting Wendy Purdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 455 (2004)).