"NOT OF ANY PARTICULAR STATE": *J. MCINTYRE MACHINERY, LTD. V. NICASTRO* AND NONSPECIFIC PURPOSEFUL AVAILMENT

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The Supreme Court recently revisited the doctrine of specific personal jurisdiction for the first time in decades in J. McIntyre Machinery, Ltd. v. Nicastro*, which resulted in a fractured opinion, a flurry of critical scholarship, and uncertainty on the lower courts. This Note argues that the principal significance of* Nicastro *lies in the sensitivity of the Breyer concurrence to the problems modernity poses for jurisdictional doctrine and its concomitant willingness to reevaluate the doctrine. Lower courts and litigants should see the case as an invitation to address such "modern concerns" in jurisdictional analysis within the bounds implied by Justice Breyer. This Note proposes that the jurisdictional problem of an interconnected globalized economy is the same as that posed by the Internet—the novel and increasingly pervasive fact of nonspecific purposeful availment of transjurisdictional contacts—and that such contemporary circumstances necessarily erode the utility of minimum contacts analysis as a consistent and fair limitation on personal jurisdiction, such that a more robust implementation of fairness balancing must become the engine of the doctrine.*

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Introduction

Robert Nicastro was at work feeding copper and aluminum into a three-ton metal-shearing machine in Saddle Brook, New Jersey, when its two-foot blades sheared four fingers off his right hand.[1] He alleged that the manufacturer, J. McIntyre Machinery (J. McIntyre), was liable for his injury because the machine was not reasonably fit, suitable, or safe for its intended purpose.[2] Neither court nor jury ever had the opportunity to consider the merit of this allegation, however, because the United States Supreme Court ruled that no court in New Jersey[3]—and thus perhaps no court in the United States[4]—had the authority to do so.

The Supreme Court ruled on the basis of the doctrine of personal jurisdiction, which defines the authority of a court to subject a particular party to judgment, and courts have traditionally understood the contours of that authority in territorial terms.[5] Parties who do not reside in a jurisdiction generally must have made certain "minimum contacts" with its territory in order to be subject to the power of its courts.[6] The problem for Nicastro was that J. McIntyre was a British company[7] that conducted its American business exclusively through an intermediary distributor in Ohio—J. McIntyre Machinery America.[8] Nicastro's employer had purchased the machine that injured Nicastro from this distributor, which was defunct by the time of the injury.[9] Clearly and by its own admission, the British company sought to avail itself of the entire American market, but its operations

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[1] Joint Appendix, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 4642529, at 57a–60a.

[2] *Id.* at 7a.

[3] *Nicastro*, 131 S. Ct. at 2791.

[4] The Court faced only the question of the appropriateness of asserting jurisdiction in New Jersey, but the Court's reasoning creates doubt as to whether any American forum could hear Nicastro's claims. *See infra* note 121 and accompanying text.

[5] *See, e.g.*, Black's Law Dictionary 930 (9th ed. 2009) (defining personal jurisdiction as "[a] court's power to bring a person into its adjudicative process"); 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1064 (3d ed. 2002) ("[C]ommon law judges and legal writers regarded a court's actual physical power over the defendant as a necessary prerequisite to the validity of a judgment. This background and the early development of the notion of transitory actions apparently led to the emergence of the territorial concept of personal jurisdiction.").

[6] *See generally infra* notes 34–46 and accompanying text (discussing the development of "minimum contacts" doctrine).

[7] *Nicastro*, 131 S. Ct. at 2790 (plurality opinion).

[8] *Id.* at 2796 (Ginsburg, J., dissenting).

[9] *Id.* at 2796 n.2.

did not *specifically* target New Jersey.[10] Writing for the plurality, Justice Kennedy ruled that "[b]ecause the United States is a distinct sovereign, a defendant [who targets the American market] may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State,"[11] implying a class of "stateless" defendants who target the American market but are apparently immune to adjudication in American courts.[12]

Nicastro thus presents the jurisdictional problem of a defendant whose activities target the United States generally but not any state in particular. This problem is posed by an increasingly prevalent class of cases,[13] including those in which the Internet plays a predominant role. Justice Breyer's concurrence in *Nicastro* discusses the jurisdictional complexities posed by this growing class of cases but declines to address the problem directly, distinguishing *Nicastro* as a case not implicating such "modern concerns."[14]

This Note argues that the complex commercial arrangements characteristic of the increasingly interconnected global economy, such as those present in *Nicastro*, pose the same problem for jurisdictional analysis as the Internet cases do: It is now possible, and increasingly common, for commercial parties to *purposefully* avail themselves of *every* jurisdiction without *specifically* availing themselves of *any* juris-

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[10] J. McIntyre sought to sell its products wherever it could in the United States, *see* Joint Appendix, *supra* note 1, at 134a ("All we wish to do is sell our products in the States—and get paid!"), but it did not single out New Jersey in any particular way.

[11] *Nicastro*, 131 S. Ct. at 2789 (plurality opinion).

[12] Because the absence of personal jurisdiction in state courts generally means the absence of personal jurisdiction in federal courts, this statement has occasioned some bafflement. *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 347 n.226 (2013) ("It is not clear what that passage means. In diversity of citizenship cases, at least the courts of appeal agree that federal courts must follow the jurisdictional principles of the forum state."). Justice Kennedy may have been implying a legislative extension of jurisdiction based on non-state-specific national contacts, which he addressed more directly later in the opinion: "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." *Nicastro*, 131 S. Ct. at 2790 (plurality opinion). If such a law were passed and its constitutionality upheld, then a federal district court in New Jersey would have authority to hear claims arising under New Jersey law, while the same claims, under the plurality's reasoning, would violate the Due Process Clause if adjudicated in a New Jersey state court. Justice Ginsburg's dissent called this implication "curious." *See id.* at 2800 n.12 ("I see no basis in the Due Process Clause for such a curious limitation."). In any event, no such legislative extension exists, and the hypotheticals offer little comfort to Robert Nicastro or anyone similarly situated.

[13] *See infra* note 15 (citing analysis of and statistics on the rise of globalized commerce).

[14] *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring).

diction.[15] This Note designates such activity, which lacks specificity but exhibits purposefulness, as nonspecific purposeful availment.[16]

Courts generally have not distinguished between specific and nonspecific purposeful availment,[17] and any such distinction may have been impossibly abstract in the past; but the Internet and the increasingly interconnected commercial environment now make the distinction forcefully relevant to jurisdictional analysis. Purposefully availing oneself of contacts as broadly as possible without specific jurisdictional targeting is the intention and result of most every use of the Internet.[18] Likewise, businesses are clearly motivated to make commercial contacts with as many locations as possible—whether by

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[15] The globalization of supply chain management has extended commerce across borders and made many more effectively global companies. *See, e.g.*, Peter Bisson et al., *The Global Grid*, McKinsey & Co. (June 2010), http://www.mckinsey.com/insights/innovation/the_global_grid (discussing globalization's creation of "vast, complex networks" that move "[m]oney, goods, data, and people" across borders "in huge volumes"). According to recent estimates by the U.S. Census Bureau, commerce conducted over the Internet—which in principle reaches across borders—already represents approximately half of all U.S. manufacturing shipments, nearly a fifth of all U.S. merchant wholesaler sales, and nearly five percent of all U.S. retail sales. U.S. Census Bureau, E-Stats 1–2 (2013), *available at* http://www.census.gov/econ/estats/2011reportfinal.pdf. The transjurisdictional nature of such commerce has concerned politicians seeking to ensure taxation of these sales. *See* Jonathan Weisman, *Internet Sales Tax Bill Gains Ground in Senate*, N.Y. Times, Apr. 23, 2013, at B3 (describing an attempt to pass federal legislation designed to help states collect sales taxes from online retailers).

[16] By "nonspecific purposeful availment," I refer to contacts that are made purposefully across jurisdictional borders but do not specifically single out a target jurisdiction. Courts and scholars have recognized such conduct, but none to my knowledge has adopted this terminology. This designation recognizes that, in the modern era, conduct may *purposefully* result in contact with a geographic location (along with other locations collectively) without *specifically* targeting that location for contact.

[17] Some courts have noted that the broad language of "purposeful availment" conflates distinct concepts of purposeful availment as used in contract and purposeful direction as used in tort. *See, e.g.*, Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1071 (10th Cir. 2008) ("In the tort context, we often ask whether the nonresident defendant 'purposefully directed' its activities at the forum state; in contract cases . . . we sometimes ask whether the defendant 'purposefully availed' itself of the privilege of conducting activities or consummating a transaction in the forum state."); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) ("We often use the phrase 'purposeful availment,' in shorthand fashion, to include both purposeful availment and purposeful direction, but [they are] two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis . . . is most often used in suits sounding in tort.") (citations omitted).

[18] Even performing a simple Google search or checking one's e-mail account is likely to result in the transmission of data to, and reception of data from, servers in other jurisdictions. *Cf. Data Center Locations*, Google, http://www.google.com/about/datacenters/inside/locations/index.html (last visited Apr. 21, 2014) (presenting far-flung locations of Google's servers). Users generally do not deliberately target specific jurisdictions when using the Internet, but because the Internet is effectively predicated upon interstate transmissions of information, users purposefully engage in transjurisdictional contacts.

Internet sales or, as in *Nicastro*, by distribution arrangements that maximize their access to larger markets—while minimizing their direct contacts and liability exposure across jurisdictions.[19] As such nonspecific purposeful availment is implicated in increasingly many cases, its treatment in the courts may result either in strategic insulation from jurisdiction (if nonspecificity is taken to preclude jurisdiction) or a seemingly more expansive jurisdictional regime (if purposeful availment is taken to suffice for jurisdiction irrespective of specificity).

Nicastro has occasioned a large body of commentary,[20] and scholarship on the jurisdictional problem posed by the Internet is well into its second decade.[21] But commentators have not closely examined the thematic overlap between cases involving interconnected global commerce, such as *Nicastro*, and cases involving the Internet. This Note proposes that the two classes of cases in fact represent dual faces of the same problem, and argues that the fundamental difficulty for both of them is the nonspecific purposeful availment that the modern world makes possible. The "new reality"[22] implicit in *Nicastro* necessarily erodes the utility of minimum contacts analysis as a limiting principle for the exercise of personal jurisdiction because courts must decide whether to place nonspecific purposeful availment above or below the minimum contacts threshold. This necessity is the source of the tension between the intolerable extremes represented in the case.[23] Placing nonspecific purposeful availment below the threshold leads to an underinclusive doctrine that unduly shields potential defendants from liability. On the other hand, placing such contact above the threshold would seem to lead to an overinclusive doctrine that allows mere Internet use to satisfy the minimum contacts requirement in any jurisdiction. Moreover, this Note argues that the existing but infrequently used fairness-balancing framework presents an effective tool to compensate for the diminished utility of minimum contacts analysis in these cases and should have a more prominent role in jurisdictional analysis.

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[19] *See supra* note 15 (describing the massive expansion of such business practices).

[20] *See infra* note 97 (collecting scholarship on *Nicastro*).

[21] *See infra* note 62 (collecting scholarship on Internet jurisdiction).

[22] The Supreme Court of New Jersey used the phrase "new reality" to refer to the globalized economy, Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011), and Justice Breyer used the phrase "modern concerns" to refer to Internet commerce and globalization, *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring). This Note uses both phrases and the term "modernity" interchangeably.

[23] *See infra* Part II (discussing *Nicastro* and the intolerable extremes of a "no jurisdiction" regime and an "absolute jurisdiction" regime).

Part I discusses the development of the doctrine of personal jurisdiction as a continual adaptation to an increasingly mobile and technological society and the emergence of nonspecific purposeful availment as an outcome of these social developments. Part II analyzes *Nicastro*'s place in this terrain and how the various opinions in the case respond to the distinction between specific and nonspecific purposeful availment. Part III argues that courts can address the "modern concerns"[24] presented by Justice Breyer's concurrence in *Nicastro* by finding that nonspecific purposeful availment meets the minimum contacts threshold while limiting the scope of personal jurisdiction through fairness balancing.

I
The Jurisdictional Challenges of Mobility and Technology

The tension evident in *Nicastro* did not arise suddenly. Rather, it developed in tandem with social, technological, and economic trends over many decades. This Part traces this development from the nineteenth century through the digital age and demonstrates that increasing transjurisdictional mobility has always challenged the viability of existing jurisdictional doctrine. The "new reality" present in *Nicastro* is only the most recent iteration of discord between unprecedented transjurisdictional mobility and existing jurisdictional doctrine.

A. The Adaptation of Doctrine to Mobility and Economic Globalization

The history of personal jurisdiction is the story of increasing mobility and advancing technology.[25] In a medieval world where people are tied to land over which a sovereign has uncontested authority, jurisdiction may be easily presumed and as a doctrine therefore may be easy enough to ignore.[26] By the nineteenth century, however, this image had already grown archaic when the U.S. Supreme

[24] *See infra* notes 106–08 and accompanying text (discussing such "modern concerns").

[25] For a synopsis of this history emphasizing the role of an increasingly mobile population, see Samuel Issacharoff, Civil Procedure 92–123 (3d ed. 2012).

[26] People living within a territory are subject to the jurisdiction of the territory's courts. In the absence of regular movements between territories, the common law did not need to develop nuanced doctrines of territorial jurisdiction. For a broader discussion of the common law antecedents to personal jurisdiction, see Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 253 ("[U]ntil after 1800 it would have been impossible, even if it had been thought appropriate, to disentangle the question of territorial limitations on jurisdiction from those arising out of charter, prerogative, personal privilege, [etc.] . . . . The intricacies of English jurisdictional law of that time . . . seem certainly not reducible to territorial dimension.").

Court in *Pennoyer v. Neff*[27] drew upon territorial reasoning to settle a dispute over an allegedly unpaid debt between two sometime-residents of Oregon.[28] The Court constitutionalized a doctrine of personal jurisdiction through the Due Process Clause,[29] holding that it prohibited a state court from exercising jurisdiction over a nonresident defendant unless the defendant gave consent or received service of process while present in the state.[30] This stretching of the logic of territoriality had become necessary to accommodate people whose lives were not conveniently circumscribed by territorial boundaries. The phenomenon of mobility—the fact that many citizens no longer had single-state lives—created the problem *Pennoyer* attempted to solve.

The underlying problem of transjurisdictional mobility did not lie dormant in the aftermath of *Pennoyer*. On the contrary, the rise of private automobile ownership, interstate highways, and a more interconnected national economy compounded it, requiring jurisdictional doctrine to adapt accordingly. Fifty years after *Pennoyer*, the Supreme Court faced the increasing prevalence of interstate automobile tort suits in *Hess v. Pawloski* and endorsed the fictionalization of *Pennoyer*'s requirements of in-state service and consent for asserting jurisdiction over nonresidents.[31] A state law appointed a government official as an in-state agent for service of process and made consent a condition of driving on the state's roads.[32] Even though most out-of-state drivers were surely unaware of this state law, the Court held that

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27 95 U.S. 714 (1877).

28 The essential facts of this famous case are well known, rooted in a dispute between Marcus Neff—who left Iowa seeking his fortune in Oregon and later spent many years in California—and J.H. Mitchell—who adopted this name when he fled Pennsylvania after being forced to marry a teenager he had seduced (he would later be a U.S. Senator and convicted of fraud, in that order). For a thorough and amusing discussion of the factual background of the case, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987).

29 As commentators have noted, the Fourteenth Amendment was not yet ratified when the default judgment against Neff was entered. For this reason, the Court has called *Pennoyer*'s discussion of due process dicta, but this interpretation of the Fourteenth Amendment nevertheless constitutionalized the exercise of personal jurisdiction by state courts. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 37–38 (1990) ("Commentators, and more recently the Court, have charitably referred to the due process discussion [in *Pennoyer*] as 'dictum' because of this obvious problem of timing." (citation omitted)).

30 *Pennoyer*, 95 U.S. at 733. *Pennoyer*'s holding therefore made domicile, in-state service, and consent the touchstones of personal jurisdiction.

31 Hess v. Pawloski, 274 U.S. 352 (1927).

32 *Id.* at 354.

this purely formal in-state service and consent satisfied constitutional requirements.[33]

Nearly two decades later, in *International Shoe Co. v. Washington*, the Court upheld a state court's exercise of jurisdiction over an out-of-state business that had employed itinerant door-to-door salesmen in the plaintiff's state.[34] In doing so, the Court seemingly abandoned the territorial framework of *Pennoyer* in favor of a standard that required "certain minimum contacts with [the territory of the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[35] Where the *Pennoyer* touchstones of domicile, in-state service of process, and consent are not satisfied, *International Shoe*'s requirements of both minimum contacts and fairness have provided the framework for personal jurisdiction.[36] While "fair play and substantial justice" constitute a constitutional requirement independent from the necessity of minimum contacts, courts rarely conduct in-depth analysis of the fairness prong and instead often assume that the existence of sufficient contacts naturally makes the assertion of jurisdiction fair.[37]

The Supreme Court subsequently developed and refined the framework for personal jurisdiction established in *International Shoe*. The Court explained in *Hanson v. Denckla* that the requirement of "certain minimum contacts" requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities" in the forum state.[38] In *World-Wide Volkswagen Corp. v. Woodson*,

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[33] *Id.* at 356–57. The statute notably also required *actual* notice by mail to wherever the defendant happened to be to supplement the fictitious in-state notice. *Id.* at 354. This requirement may have been rooted in an intuitive sense of fairness rather than any formal constitutional demand from *Pennoyer*, and thus may have presaged a shift to fairness balancing in jurisdictional doctrine.

[34] 326 U.S. 310 (1945).

[35] *Id.* at 316 (internal quotation omitted).

[36] *International Shoe* remains good law in the aftermath of *J. McIntyre Machinery, Ltd. v. Nicastro*. *See* 131 S. Ct. 2780, 2783 (2011) (plurality opinion) (quoting language from *International Shoe*); *id.* at 2794 (Ginsburg, J., dissenting) (referring to "pathmarking precedent" of *International Shoe*); *id.* at 2793 (Breyer, J., concurring) (discussing both minimum contacts and fairness, citing *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

[37] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) ("This is one of those rare cases in which minimum requirements inherent in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." (internal quotation omitted)); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional.").

[38] 357 U.S. 235, 253 (1958).

the Court elaborated that "purposeful availment" with a forum occurs when the defendant's contact with a forum "arises from the [defendant's] efforts,"[39] making it reasonable for the defendant to anticipate being subject to suit in that forum.[40] The Court also explained that determining the reasonableness and fairness of asserting jurisdiction requires examining the burden on the defendant as "a primary concern,"[41] but that this burden "will in an appropriate case be considered in light of other relevant factors."[42] These factors include the forum state's interest in the dispute, the plaintiff's interest in obtaining relief, the "interstate judicial system's interest in obtaining the most efficient resolution of controversies,"[43] and "the shared interest of the several States in furthering fundamental substantive social policies."[44]

Increasing transjurisdictional mobility presented a still more complex challenge to the doctrine of personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court*,[45] when the Supreme Court faced the complicated jurisdictional problem posed by a transoceanic tort suit representative of the increasingly interconnected global economy. Despite the Court being unanimous in its holding and nearly unanimous in a rationale sufficient to reach it, the decision produced a fractured set of opinions that diverged on the issue of what constitutes sufficient "minimum contacts" to uphold the exercise of personal jurisdiction over a defendant.[46] The division in *Asahi* demonstrates the difficulty of applying minimum contacts analysis to complex commercial arrangements that are ubiquitous in the modern economy.

Asahi began with a serious motorcycle accident in California that the plaintiff alleged was caused by a blown tire.[47] By the time the case reached the Supreme Court, the plaintiff and several defendants had already settled, and the only remaining dispute was over the distribution of liability between the Taiwanese manufacturer of the tire's tube

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39 444 U.S. 286, 297 (1980).

40 *Id.*

41 *Id.* at 292.

42 *Id.*

43 *Id.*

44 *Id.*

45 480 U.S. 102 (1987).

46 Justice O'Connor wrote for the majority and was joined in her Part I by a unanimous Court, and in her Part II.B by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun, Powell, and Stevens. Her Parts II.A and III, however, constitute a plurality opinion only joined by Chief Justice Rehnquist and Justices Powell and Scalia. Justice Brennan authored a separate concurrence joined by Justices White, Marshall, and Blackmun, while Justice Stevens authored a concurrence joined by Justices White and Blackmun.

47 480 U.S. at 105–06.

and the Japanese manufacturer of the tube's valve.[48] The Supreme Court unanimously held that California state courts could not exercise personal jurisdiction over the Japanese subpart manufacturer under the circumstances.[49] Eight of the justices agreed that *International Shoe*'s requirement that the exercise of personal jurisdiction comport with "fair play and substantial justice" compelled dismissal.[50] In considering the issue of fairness, the Court conducted a balancing test consisting of four factors, echoing concerns mentioned in *World-Wide Volkswagen*: (1) "the burden on the defendant," (2) "the interests of the forum State," (3) "the plaintiff's interest in obtaining relief," and (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies."[51] The Court found that the burden on the Japanese defendant was "severe," since it had to travel between Japan and California and submit itself to "a foreign nation's judicial system."[52] The interests of the plaintiff and the forum, by contrast, were "slight," since all that remained in the case was an indemnity action by a Taiwanese corporation against a Japanese corporation over a transaction that occurred in Taiwan.[53] The interest of the judicial system was best served by 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."[54] Thus, applying the four-factor test to *Asahi*'s facts, eight justices held that fairness balancing "clearly reveal[ed] the unreasonableness of the assertion of jurisdiction."[55]

Although the Court's holding regarding fairness balancing provided sufficient ground for the disposition of the case, the Court nevertheless reached, and disagreed on, the question of whether the Japanese manufacturer had sufficient minimum contacts with California to sustain the state's assertion of personal jurisdiction. The Court's unnecessary conflict over minimum contacts demonstrates the difficulty presented by the phenomenon of nonspecific purposeful availment. The company did not have any offices or employees in California and did not directly solicit sales there, but it did operate on an international scale and sold valves to tire manufacturers knowing

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[48] *Id.* at 106.

[49] *Id.* at 108.

[50] *Id.* at 116. The sole holdout was Justice Scalia.

[51] *Id.* at 113 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)) (internal quotation marks omitted).

[52] *Id.* at 114.

[53] *Id.*

[54] *Id.* at 115.

[55] *Id.* at 114.

that some would inevitably reach the California market.[56] It did not *specifically* target California, but it availed itself of an international market that surely *included* California. Justice Brennan's concurrence focused on the foreseeability of one's conduct affecting the forum state, making minimum contacts satisfied wherever, as here, a defendant places a product into the "stream of commerce" while "aware that the final product is being marketed in the forum State."[57] Justice O'Connor's plurality denied that foreseeability alone could satisfy minimum contacts and instead required the presence of additional circumstances or conduct that "indicate an intent or purpose to serve the market in the forum State," pointing to state-specific design or targeted advertising as examples of sufficiently specific targeting.[58] Justice Brennan's test for personal jurisdiction became known as the "stream of commerce" or "foreseeability" theory, while Justice O'Connor's test became known as the "stream of commerce plus" or "foreseeability plus" theory.[59]

Asahi created a split among lower courts, with different circuit courts following different *Asahi* opinions regarding the appropriate standard for the minimum contacts prong of jurisdictional analysis.[60] This conflict over minimum contacts makes it easy to overlook the important fact that *Asahi* itself did not require such an analysis: Fairness balancing sufficed to reach the outcome of the case,[61] and the Court nearly unanimously agreed on its application. The analysis of minimum contacts, though, was and remains the source of doctrinal conflict.

B. The Challenge of the Internet

The Internet represents the next frontier in the continuing adaptation of jurisdictional doctrine to increasing mobility and advancing technology. Commentators have written extensively on the jurisdictional problems posed by cases in which the defendant's contact with a

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[56] *Id.* at 107–08.

[57] *Id.* at 117 (Brennan, J., concurring).

[58] *Id.* at 112 (plurality opinion).

[59] For a discussion of "stream of commerce" analysis generally and a thorough accounting of the circuit split, see 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, 700–09 (2009). Laughlin includes an appendix charting how every state and circuit stands in the controversy. *Id.* at 727.

[60] *Id.* at 703–07.

[61] The Court analyzed contacts and the fairness factors as two distinct prongs, but both must be satisfied to justify an exercise of personal jurisdiction. Justice Brennan's concurrence would have held that the minimum contacts prong was satisfied while Justice O'Connor's concurrence would have held that it was not, but eight justices agreed that fairness balancing precluded jurisdiction regardless. *Asahi*, 480 U.S. at 105.

jurisdiction occurred through the use of the Internet.[62] Like the "stream of commerce" cases exemplified by *Asahi*,[63] the Internet cases involve the problem of nonspecific purposeful availment: The Internet allows contacts to be made with indifference to jurisdictional borders and thus allows users to purposefully but nonspecifically avail themselves of geographically diverse contacts, which makes traditional minimum contacts analysis problematic. The conceptual difficulty of the Internet cases is not a fundamentally new problem, but rather an extension of the issues posed by the increasingly complex and globalized modern economy. Commercial arrangements like those present in *Asahi* allow a company to introduce goods into a "stream of commerce" that inevitably enters various jurisdictions while, at the same time, they mitigate the need for the company to specifically target those jurisdictions in order to receive commercial benefits from them. Likewise, the Internet allows a user to contact multiple jurisdictions with the click of a mouse and completely obviates the necessity of geographical targeting.

Zippo Manufacturing Co. v. Zippo Dot Com, Inc.[64] remains the leading case on personal jurisdiction and the Internet. The plaintiff, a Pennsylvania company, brought suit in Pennsylvania against a California corporation over a trademark dispute.[65] The defendant corporation had no physical presence in Pennsylvania, but it operated a website that was readily accessible from the state and counted approximately 3000 Pennsylvanians as customers.[66] Although the case did not fit neatly within the traditional framework for personal jurisdiction analysis, the court recognized that changes brought about by "modern commercial life"[67] had already obviated the need for physical entry into a state in order to justify an exercise of jurisdiction and

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[62] Many scholars have opined on the jurisdictional problems posed by the Internet and have suggested various solutions. *See, e.g.*, Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380 (2001) (proposing a three-prong standard for determining whether a particular website "targets" a forum); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 134 (2009) (advocating a state-level solution by means of jurisdiction-limiting "short-arm statutes"); Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. BALT. INTELL. PROP. L.J. 75, 78–80 (2003) (proposing a hybrid test that permits jurisdiction where websites have a heightened effect within a forum); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 75 (2006) (advocating the use of established jurisdiction analysis rather than a specialized one in Internet cases).

[63] *See supra* text accompanying notes 45–61 (discussing *Asahi*).

[64] 952 F. Supp. 1119 (W.D. Pa. 1997).

[65] *Id.* at 1121.

[66] *Id.*

[67] *Id.* at 1123 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

noted that "[t]he Internet makes it possible to conduct business throughout the world entirely from a desktop."[68]

It was likely apparent to the *Zippo* court that the defendant in some important sense was *in* Pennsylvania—the company was profiting from thousands of Pennsylvanians—even if the company had never sent a single representative to the state or otherwise singled it out for business. Increasing transjurisdictional mobility had been subverting the territorial bases for jurisdiction for more than a century, but technology was now making physical mobility itself redundant, allowing users to engage in complex and pervasive transjurisdictional contacts without leaving their desks. But it cannot be that every transjurisdictional contact made over the Internet justifies an exercise of personal jurisdiction, because such a rule could expose any user to suit in any forum. The *Zippo* court responded to this difficulty by conceiving of a "sliding scale" of Internet contacts.[69] On the scale, defendants who clearly engage in commercial activity over the Internet satisfy the minimum contacts threshold, while defendants with "passive" websites that merely make information available do not meet it.[70] Interactive websites falling in the "middle ground" between the two extremes may or may not meet the minimum contacts threshold depending on the "level of interactivity and commercial nature of the exchange of information."[71]

Zippo's sliding scale has intuitive appeal and gained widespread acceptance in American courts,[72] but it is an awkward fit as a standard for minimum contacts analysis. It is calibrated to the degree of interactivity experienced by the *user* and does not directly measure the quality or quantity of the *defendant's* contact with the relevant forum.

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[68] *Id.*

[69] *Id.* at 1124 (internal citations omitted).

[70] *Id.*

[71] *Id.*

[72] *See* Geist, *supra* note 62, at 1367–71 (discussing the "widespread approval" of *Zippo* in its aftermath). Many circuit courts have adopted or approvingly cited the *Zippo* scale. *See, e.g.*, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452–54 (3d Cir. 2003) (citing *Zippo* for the sliding scale of interactivity); Revell v. Lidov, 317 F.3d 467, 470 (5th Cir. 2002) (drawing upon the *Zippo* scale to determine whether sufficient minimum contacts existed for personal jurisdiction); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713–14 (4th Cir. 2002) (same); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002) (using the *Zippo* scale to determine presence of purposeful availment); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296–97 (10th Cir. 1999) (finding a foreign bank's website to be "passive" on the *Zippo* scale); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418–19 (9th Cir. 1997) (citing *Zippo*'s test for interactivity of websites). Of course, not all courts are in agreement. *See, e.g.*, Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) ("[I]t is not clear why a website's level of interactivity should be determinative on the issue of personal jurisdiction. . . . [R]igid adherence to the *Zippo* test is likely to lead to erroneous results.").

Moreover, the "middle ground" in *Zippo*'s sliding scale, consisting of "interactive Web sites where a user can exchange information with the host computer,"[73] arguably describes *all* websites.[74] Moreover, the relative degrees of interactivity that fall within the scale are subject to shifting technological norms, such that an unusually high level of interactivity a few years ago may be ordinary or even less interactive than usual today.[75]

The *Zippo* sliding scale of interactivity also fails to provide predictability. Courts applying the sliding scale have reached opposite jurisdictional outcomes in cases involving the same website and, thus, precisely the same level of interactivity. For example, the eBay online auction site has generated a significant volume of transjurisdictional litigation, with courts both affirming and denying exercises of jurisdiction in cases involving nearly identical facts.[76] Degree of interactivity is clearly not determinative of the outcome in these cases.

While courts do not uniformly apply the interactivity prong of the *Zippo* scale, *Zippo*'s other dimension—the degree of commercialization—may be a stronger predictor of jurisdictional outcomes. At least one of the eBay cases cited above emphasized the nature of the defendant as a repeat commercial player in upholding the exercise of personal jurisdiction.[77] As with the level of interactivity, however,

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[73] *Zippo*, 952 F. Supp. at 1124.

[74] Even at their most basic, websites are collections of documents that users navigate interactively by clicking on hyperlinks, and interactivity was central to their conceptualization from the start. *See* Scott Laningham, *developerWorks Interviews: Tim Berners-Lee*, IBM DEVELOPERWORKS (Aug. 22, 2006), http://www.ibm.com/developerworks/podcast/dwi/cm-int082206txt.html (interviewing inventor of the World Wide Web, who describes the original intention for the Web to be an "interactive space").

[75] For a discussion of the technological development and shifting norms of user interactivity in web design, see Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY (Sept. 30, 2005), http://oreilly.com/lpt/a/6228. *See also* Geist, *supra* note 62, at 1379–80 ("[I]n 1997, an active website might have featured little more than an email link and some basic correspondence functionality. Today, sites with that level of interactivity would likely be viewed as passive, since the entire spectrum of passive versus active has shifted upward with improved technology.").

[76] *Compare* Boschetto v. Hansing, 539 F.3d 1011, 1014 (9th Cir. 2008) (finding jurisdiction in California improper after the sale over eBay of a 1964 Ford Galaxie by a Wisconsin seller), *and* Hinners v. Robey, 336 S.W.3d 891, 893 (Ky. 2011) (finding jurisdiction in Kentucky improper after sale over eBay of a 2002 Cadillac Escalade by a Missouri seller), *with* Erwin v. Piscitello, 627 F. Supp. 2d 855, 856 (E.D. Tenn. 2007) (finding jurisdiction in Tennessee proper after the sale over eBay of a 1962 Chevrolet Impala by a Texas seller). *See also* Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 816–17 (E.D. Mich. 2006) (finding jurisdiction in Michigan proper after the sale over eBay of two paintings by New York sellers).

[77] *See Dedvukaj*, 447 F. Supp. 2d at 822–23 (finding personal jurisdiction based on defendants' "regular and systemic" use of the eBay website such that the website and the defendants' company were "entwine[d]"); *see also* Dudnikov v. Chalk & Vermilion Fine

measuring the degree of commercialization does not distinguish the degree of *contact* with the forum, since the nature of the contact remains precisely the same in any eBay sale regardless of the identity of the participants. The degree of commercialization of the contact does not necessarily implicate the *amount* of contact with the forum, since even a repeat seller might have contacted the particular forum only once.[78] Thus, despite the supposed utility of the *Zippo* scale as a measure of minimum contacts, its incorporation of the degree of commercialization prevents it from meaningfully testing the quality or quantity of the defendant's contact with the relevant forum.

Instead, the commercialization prong serves as a proxy for analyzing the fairness of asserting jurisdiction over a particular party. The commercial nature of the individuals involved in the transaction implicates the expectations and respective burdens on the parties: Larger and more commercially sophisticated parties can be expected to anticipate and prepare for litigation resulting from their commercial activities, while smaller and less commercial parties are less likely to have retained counsel, liability insurance, or knowledge of the law across jurisdictions. They are also less able to selectively forgo contacts with particular jurisdictions, and defending suit in a distant forum is comparatively more burdensome for them. Such a weighing of respective burdens is an explicit feature of fairness balancing.[79] Thus, by considering the degree of commercialization in the *Zippo* scale, courts may be conducting a surreptitious form of fairness balancing under the guise of minimum contacts analysis. This practice demonstrates that fairness balancing tends to assume a heightened role to compensate for the diminished utility of contacts analysis, but it also obfuscates the doctrine by failing to make the balancing explicit. As this Note argues, courts could directly address fairness concerns by applying the balancing approach employed in *Asahi*.[80] Moreover, employing fairness balancing in Internet cases would have

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Arts, Inc., 514 F.3d 1063, 1067 (10th Cir. 2008) (noting that litigation involved eBay "power sellers").

78 The *Zippo* test has also been criticized for failing to limit the number of jurisdictions in which a particular defendant may be subject to suit, since "[r]egardless of the level of interactivity or commercialism that a court chooses as its threshold, once a website crosses it, purposeful availment would be established with every state in the country." Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1834 (2003).

79 *See supra* note 51 and accompanying text (discussing the fairness balancing test in *Asahi*, which includes the respective burdens and interests of the parties).

80 *See infra* Part III.B (advocating increased use of fairness balancing as a limiting principle for exercise of personal jurisdiction).

the added benefit of unifying jurisdictional doctrine and removing the doctrinal carve-out for Internet cases represented by *Zippo*.

II
Nicastro and Justice Breyer's Invitation

Thus was the doctrinal muddle of personal jurisdiction when the Supreme Court reentered the fray in *Nicastro*.[81] The two decades between *Asahi* and *Nicastro*[82] witnessed the rapid development of the Internet and its compounding of the challenges discussed above. In affirming New Jersey's jurisdiction over J. McIntyre,[83] the Supreme Court of New Jersey had issued a sweeping opinion noting that "[t]oday, all the world is a market"[84] and declaring the need to ensure that jurisdictional law "reflect this new reality" of the "contemporary international economy, [in which] trade knows few boundaries."[85] *Nicastro* thus invited the Court to reshape personal jurisdiction doctrine in light of the modern economy and technological advances, much as it had done in *Pennoyer* and *International Shoe*. Nevertheless, the Supreme Court missed the opportunity to clarify the law.

Justice Breyer's concurring opinion, however, revealed sensitivity to the implications of modernity for jurisdictional doctrine, and his willingness to revisit the question if given a better understanding of the issues constitutes the central message and doctrinal import of the case. The concurrence should be seen as an invitation to lower courts and to litigants to consider these issues, but with a warning to avoid both extremes of the *Nicastro* plurality's underinclusive approach and the New Jersey Supreme Court's overinclusive approach. This Part will analyze the Supreme Court's decision in *Nicastro*, with a particular focus on Justice Breyer's concurring opinion.

The *Nicastro* Court reached a bare majority to reverse the Supreme Court of New Jersey,[86] but its splintered decision failed to settle the doctrine. The old *Asahi* circuit split—between those circuits

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[81] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

[82] The Supreme Court decided two personal jurisdiction cases in 2011—*Nicastro* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). Prior to 2011, the two most recent personal jurisdiction cases decided by the Supreme Court were *Burnham v. Superior Court*, 495 U.S. 604 (1990), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Of those four decisions, only *Goodyear Dunlop*—which concerned the related but separate doctrine of general jurisdiction—produced a majority opinion.

[83] Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 594 (N.J. 2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

[84] *Id.* at 577.

[85] *Id.*

[86] *Nicastro*, 131 S. Ct. at 2785, 2791.

that apply Justice Brennan's "stream of commerce" minimum contacts test and those that apply Justice O'Connor's narrower "stream of commerce plus" test—was not resolved.[87]

Nicastro comprises three opinions, none of which garnered a majority of the Court: Justice Kennedy's plurality,[88] Justice Breyer's concurrence,[89] and Justice Ginsburg's dissent.[90] The plurality and dissent were divided over competing views of the theoretical basis for personal jurisdiction. The Kennedy plurality emphasized sovereignty and consent as the bases for an assertion of jurisdiction,[91] harking back to the territorialism of *Pennoyer*. The plurality found that J. McIntyre had never submitted itself to New Jersey's judicial authority because it did not specifically target the state for contacts, thus making jurisdiction improper.[92] The Ginsburg dissent, by contrast, emphasized due process and fairness as the touchstones of jurisdictional analysis.[93] Under this view, New Jersey's courts could assert jurisdiction because J. McIntyre sought to avail itself of the entire American market and could foresee that sales into New Jersey would occur.[94] The Breyer concurrence largely avoided the theoretical disagreement, finding that the resolution of the case did not require resolving any doctrinal controversy.[95] Justice Breyer thus concurred narrowly with the Kennedy plurality's conclusion, holding that Robert Nicastro failed to meet the burden of showing the constitutional propriety of asserting jurisdiction in New Jersey.[96]

Nicastro generated a flurry of academic commentary, much of it harshly critical of the outcome,[97] but did nothing to abate the doc-

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87 *See supra* notes 57–60 and accompanying text (discussing circuit split).

88 *Nicastro*, 131 S. Ct. at 2785 (plurality opinion) (Kennedy, J., joined by Roberts, C.J., and Scalia and Thomas, JJ.).

89 *Id.* at 2791 (Breyer, J., concurring, joined by Alito, J.).

90 *Id.* at 2794 (Ginsburg, J., dissenting, joined by Sotomayor and Kagan, JJ.).

91 *See id.* at 2788 (plurality opinion) ("The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign.").

92 *Id.* at 2790–91.

93 *See id.* at 2798 (Ginsburg, J., dissenting) ("[T]he constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."); *id.* at 2800 ("The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness.").

94 *Id.* at 2801, 2804.

95 *See id.* at 2792 (Breyer, J., concurring) ("[O]n the record present here, resolving this case requires no more than adhering to our precedents.").

96 *Id.* at 2794 ("[T]hough I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.").

97 A substantial collection of scholarship on *Nicastro*, most of it quite critical, comes from a symposium of the *South Carolina Law Review* on the Supreme Court's two personal jurisdiction cases of 2011. Symposium, *Personal Jurisdiction for the Twenty-First*

trinal confusion among lower courts. Given the splintered result of *Nicastro*, lower courts have looked to Justice Breyer's concurrence for guidance; the opinion thus merits closer examination. Most courts have declined to view the rejection of jurisdiction in *Nicastro* as an endorsement of Justice O'Connor's narrower "stream of commerce plus" minimum contacts test,[98] since in a splintered decision the holding is represented only by the narrowest agreement among opinions supporting the outcome,[99] and Justice Breyer's concurrence did not favor any particular test for determining minimum contacts.[100] As the Federal Circuit declared, "[t]he narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the same after [*Nicastro*]."[101]

Century: The Implications of McIntyre *and* Goodyear Dunlop Tires, 63 S.C. L. REV. 465 (2011), *available at* http://sclawreview.org/2011-symposium-issue/. *See, e.g.*, Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 476 (2011) ("The [*Nicastro*] plurality opinion is an open invitation to defense interests to exploit this stop sign for all it is worth. Next, we will be barring the courthouse door to all but a chosen few."); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2011) ("Personal jurisdiction . . . seems to inspire foolish remarks and poor opinions, and *Nicastro* may set a new low in that regard."); John Vail, *Six Questions in Light of* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 517, 517 (2011) ("[T]he result in [*Nicastro*] is viscerally upsetting, and the plurality opinion is intellectually perplexing."). *See also* Patrick J. Borchers, J. McIntyre Machinery*,* Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245–46 (2011) ("The Supreme Court performed miserably. Its opinion in [*Nicastro*] . . . is a disaster. . . . [T]he plurality opinion attempted to roll back the clock by a century or more . . . ."); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 389 (2012) ("[*Nicastro*'s] controlling opinions . . . remained mired in the past instead of acknowledging that prior jurisdictional doctrine should be interpreted to accommodate underlying federalism policies in a globally interconnected world."); Taylor Simpson-Wood, *In the Aftermath of* Goodyear Dunlop*: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 124 n.74 (2012) ("[T]he [*Nicastro*] plurality opinion shows that [the Court] failed to grasp the modern economic reality of global commerce . . . . Justice Kennedy [and the other Justices in the plurality] waxed nostalgic as they turned back the hands of time in order to once again protect corporate interests.").

98 Hatton v. Chrysler Can., Inc., 937 F. Supp. 2d 1356, 1365–66 (M.D. Fla. 2013) (citing Simmons v. Big # 1 Motor Sports, Inc., 908 F. Supp. 2d 1224 (N.D. Ala. 2012)); Ainsworth v. Cargotec USA, Inc., No. 2:10-CV-236-KS-MTP, 2011 WL 6291812, at *2 (S.D. Miss. Dec. 15, 2011); Askue v. Aurora Corp. of Am., No. 1:10-cv-0948-JEC, 2012 WL 843939, at *6–7 (N.D. Ga. Mar. 12, 2010).

99 *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("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 . . . ." (internal quotation omitted)).

100 Justice Breyer approvingly cited both the O'Connor and the Brennan *Asahi* opinions in his *Nicastro* concurrence and did not specify which precedent should control the outcome of the case. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring).

101 AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358, 1363 (Fed. Cir. 2012). This is not a perfect consensus, however. One district court found that *Nicastro* "clearly rejects

The decisional linchpin of the Breyer opinion lies in his finding that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient"[102] contact to justify an exercise of personal jurisdiction.[103] Justice Breyer left room for "other facts that Mr. Nicastro could have demonstrated

foreseeability as the standard for personal jurisdiction," but it also conceded that, "[b]eyond this," the case "merely affirms the status quo." Windsor v. Spinner Indus. Co., 825 F. Supp. 2d 632, 638 (D. Md. 2011). The Eighth Circuit, in affirming a finding of insufficient contacts to justify jurisdiction, noted "the conclusion in [Justice Breyer's *Nicastro*] concurrence that a single contact, in certain contexts, is an insufficient basis for personal jurisdiction, provides relevant guidance," Pangaea, Inc. v. Flying Burrito LLC, 647 F.3d 741, 749 n.5 (8th Cir. 2011), though it did not specify the contours of that guidance, which may simply be an inference to err against finding jurisdiction in close cases. A similar inference may have affected a district court's dismissal for lack of personal jurisdiction based on "the restrictive approach to personal jurisdiction posited by the plurality opinion in [*Nicastro*]," Weinberg v. Grand Circle Travel, LLC, 891 F. Supp. 2d 228, 243 (D. Mass. 2012), despite remarking that the outcome "seem[ed] unfair" and citing to scholarship critical of *Nicastro*. *Id.* at 252. Even when courts agree that *Nicastro* did not decisively alter jurisdictional doctrine, the preexisting *Asahi* split continues to produce inconsistent outcomes. Within days of each other, federal district courts in Kentucky and Mississippi reached opposing jurisdictional outcomes in separate lawsuits against the same Irish forklift manufacturer, which employed an American distribution arrangement similar to that of J. McIntyre in *Nicastro*; both courts cited to *Nicastro* for support. *Compare* Ainsworth v. Cargotec USA, Inc., No. 2:10-CV-236-KS-MTP, 2011 WL 4443626, at *6–7 (S.D. Miss. Sept. 23, 2011) (discussing *Nicastro* and following Fifth Circuit precedent in holding jurisdiction constitutionally proper), *aff'd sub nom.* Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174 (5th Cir. 2013), *with* Lindsey v. Cargotec USA, Inc., No. 4:09CV-00071-JHM, 2011 WL 4587583, at *4–6, *12 (W.D. Ky. Sept. 30, 2011) (discussing *Nicastro* and following Sixth Circuit precedent in holding jurisdiction constitutionally improper). For a discussion of these cases, see Zach Vosseler, Case Note, *A Throwback to Less Enlightened Practices:* J. McIntyre Machinery, Ltd. v. Nicastro, 160 U. PA. L. REV. PENNUMBRA 366, 384–87 (2012), http://www.pennlawreview.com/online/160-U-Pa-L-Rev-PENNumbra-366.pdf.

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

103 Scholars have questioned this dubious proposition. *E.g.*, Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 581–82 (2012) (claiming that Justice Breyer "overlooked" *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), and citing other cases in which the Court has upheld jurisdiction "based upon a single contact"); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 508 (2012) (asserting that there is "significant tension" between this proposition and the Court's decision in *McGee*); Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 749 n.24 (2012) ("Not only did [Justice Breyer] forget *McGee* . . . but he ignored *International Shoe*'s general admonition to evaluate the nature and quality of even single acts.").

in support of jurisdiction"[104] but concluded based on the facts in the record that the burden had not been met in the case.[105]

Justice Breyer's opinion acknowledged the current doctrinal shortcomings in light of the "modern concerns"[106] presented by a growing class of cases, and it also repeatedly emphasized the significance of fairness,[107] especially in light of the "many recent changes in commerce and communication, many of which are not anticipated by our precedents."[108] This language reflects a sensitivity to the novel problems posed by modernity—particularly the increasing prevalence of nonspecific purposeful availment made possible by technological and commercial advances—and to the inadequacies of traditional minimum contacts analysis in solving these problems.

Justice Breyer harshly criticized both "the plurality's seemingly strict no-jurisdiction rule"[109] and the permissive "absolute approach"[110] of the New Jersey Supreme Court[111] as unsuitable for the modern world. He expressed skepticism about the fairness of the plurality's requirements of forum-targeting and submission to a sovereign. In a world where companies may "target[ ] the world" through online sales and act through distant intermediaries, Breyer reasoned that companies can foreseeably reach a forum though they may not specifically target it.[112] On the other hand, Justice Breyer also doubted the wisdom of the "absolute approach" of the New Jersey Supreme Court, which would make reasonable foreseeability that a product in a nationwide distribution system might end up in every state sufficient

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104 *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring). Justice Breyer repeatedly emphasized the limitations of the factual record, writing that "[b]ased on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden," *id.* at 2791, that "the factual record leaves many open questions," *id.* at 2793, and that he "would adhere strictly to . . . the limited facts found by the New Jersey Supreme Court," *id.* at 2794. For an argument that with "a slightly more robust factual record" the Breyer opinion might have gone the other way, see Steinman, *supra* note 103, at 508–12.

105 *See Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring) ("[O]n the record present here, resolving this case requires no more than adhering to our precedents.").

106 *Id.*

107 *See, e.g.*, *id.* ("[T]he constitutional demand[s] for minimum contacts and purposeful availment . . . rest upon a particular notion of defendant-focused fairness. . . . What might appear fair in the case of a large manufacturer . . . might seem unfair in the case of a small [one]." (internal quotation marks and brackets omitted)).

108 *Id.* at 2791.

109 *Id.* at 2793.

110 *Id.*

111 The Breyer concurrence does not ascribe opposing jurisdictional rules to the plurality and the dissent, but rather to the plurality and the New Jersey Supreme Court, respondent, and his amici. *Id.* at 2793. This may support Adam Steinman's suggestion that the Breyer concurrence is more akin to the dissent in its reasoning despite siding with the plurality in the outcome of the case. Steinman, *supra* note 103, at 509.

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

to confer jurisdiction in any state.[113] He noted the excessive burden such a rule would place on a hypothetical Appalachian potter who sells pottery to a distributor who resells a single piece to a buyer in Hawaii, or on "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors."[114] In discussing these problems that the modern economy poses, Justice Breyer acknowledged that he "kn[ew] too little about the range of these or in-between possibilities"[115] and consequently would not "work such a change to the law . . . without a better understanding of the relevant contemporary commercial circumstances."[116]

Despite the lower courts' uncertainty regarding *Nicastro*'s significance and the scholarly criticism of the case's outcome, it is this very tentativeness in Justice Breyer's concurrence—this sensitivity to "modern concerns" and perception of their significance to jurisdictional doctrine—that underlines the case's importance. Justice Breyer's invitation to address these "modern concerns" has so far gone unanswered.

III
The Twentieth-Century Seeds of a Twenty-First-Century Jurisdictional Doctrine

A. Purposeful Availment and Modernity

We have seen the jurisdictional problem posed by the globalization of modern commerce, as well as that posed by the rise of the Internet. And though the two phenomena have elicited different doctrinal responses from courts, this Note argues that they are in essence two faces of the same problem, which is itself the logical endpoint of the commercial and technological trend toward increasing transjurisdictional mobility that courts have had to grapple with since the days of *Pennoyer*. The fundamental and irreproachable intuition of *Pennoyer* from which all of our jurisdictional doctrine has grown is that there is some class of defendants for whom it would simply be *unfair*, for whom it would be "contrary to the first principles of justice,"[117] to be subject to a particular court's exercise of jurisdiction—namely, those defendants who do not reside in and cannot be found within that court's jurisdictional borders. This perhaps only became an

113 *Id.*
114 *Id.* at 2793–94.
115 *Id.* at 2793.
116 *Id.* at 2794.
117 Pennoyer v. Neff, 95 U.S. 714, 732 (1877).

insight worth having when people began to move across jurisdictional borders with some frequency. As that frequency increased, *Pennoyer*'s intuition became more difficult to navigate and the rule it suggested became more difficult to apply. The difficulties were exacerbated by the development of commercial structures that allowed parties to be *in* the territory in one sense (by means of itinerant salesmen, for instance) but not more generally, forcing courts to respond by departing from rigid adherence to *Pennoyer*'s touchstones of presence and consent and turning instead to *International Shoe*'s framework of minimum contacts and fairness. But technology and globalization have continued to compound the ways that parties can be *in* a particular place in some sense but not in another. Modern communication and commercial networks allow people and organizations to purposefully avail themselves of contact—whether educational, recreational, or commercial—with others all over the world without *specifically* availing themselves of anywhere in particular. The possibility of such contacts is both a defining motivation for and a principal result of the Internet and economic globalization. Indeed, such contacts are the essence of what the Internet and globalization *are*.

Justice Breyer did not see *Nicastro* as a case implicating "modern concerns"[118] of the sort that are clearly evident in Internet cases. But despite the gruesome injury and industrial machinery evocative of nineteenth-century tort cases, *Nicastro* presented the problem of nonspecific purposeful availment at the heart of these "modern concerns." J. McIntyre sought to avail itself of the broadest possible market for its products. As a representative of the company wrote to its distributor in an e-mail, "[a]ll we wish to do is sell our products in the States—and get paid!"[119] J. McIntyre clearly wanted to benefit from the entire American market, but it did not care to target any particular state more than any other. What the company sought to do—and what today it is newly possible to do—was to *purposefully* avail itself of the opportunity of doing business in *every* state without *specifically* availing itself of *any* state in particular. The ability to purposefully but nonspecifically avail oneself of a forum would have been difficult even to imagine in *Pennoyer*'s day, but technology and globalization have made it increasingly common in recent years.

Nicastro also demonstrates the legal advantages of conducting business through nonspecific purposeful availment, which will make

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[118] *See Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring) ("Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.").

[119] Joint Appendix, *supra* note 1, at 134a.

such commercial arrangements increasingly prevalent. By selling its products through its distributor in Ohio, J. McIntyre may avoid the jurisdiction of any other state's courts. Moreover, it is not clear whether Robert Nicastro could have brought suit even in Ohio, since his claim arose in New Jersey.[120] By so structuring its operations, a party may reap the commercial benefit of doing business in every state while being subject to liability in few or none of them.[121]

While Justice Breyer's concurrence in *Nicastro* acknowledged the need for jurisdictional doctrine to address squarely the problems posed by "modern concerns," he did not suggest a potential solution. This Note proposes a jurisdictional framework that would navigate between the intolerable extremes Justice Breyer identified. First, courts should follow something akin to the absolute approach of the New Jersey Supreme Court with regard to minimum contacts analysis. This would mitigate the unfairness of an underinclusive personal jurisdiction doctrine. Second, to prevent the unreasonable exercise of jurisdiction, courts should apply the fairness-balancing prong of *International Shoe* and its progeny as a limiting principle.[122] This approach maintains the established framework of *International Shoe* and its two prongs of minimum contacts and fair play and substantial justice, but it shifts the primary limiting principle of the doctrine from minimum contacts analysis to fairness balancing as applied in *Asahi*.[123]

The remainder of this Part analyzes the nature of the "modern concerns" that preoccupy the Breyer concurrence in order to contribute to a "full consideration of the modern-day consequences"[124] of the doctrine of personal jurisdiction. It then argues that the appropriate doctrinal solution to the problems implicated by the "modern concerns" is to give a more prominent role to the fairness balancing

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120 *See* Freer, *supra* note 103, at 585 (questioning whether jurisdiction would have been proper in Ohio); *see also* Joint Appendix, *supra* note 1, at 167a–169a, 196a–199a (transcript of arguments before New Jersey Supreme Court on viability of Ohio as a forum for the case).

121 *See* Arthur R. Miller, University Professorship Lecture: Are They Closing the Courthouse Doors? 12–13 (Mar. 19, 2012), http://www.law.nyu.edu/sites/default/files/ECM_PRO_072088.pdf ("[The *Nicastro* plurality's] view . . . means that a corporate defendant . . . can structure its distribution system and have its products or services initially reach only one state while avoiding the jurisdiction [of] almost any other state to which they are then shipped by the distributor.").

122 *See* Freer, *supra* note 103, at 584 ("The answer to these hypotheticals is not to strain to find that there is no contact. . . . Rather, the answer is to find that there is relevant contact, and to assess whether jurisdiction would be fair.").

123 *See supra* notes 50–55 and accompanying text (discussing application of fairness balancing in *Asahi*).

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

prong of the *International Shoe* framework. Finally, it applies fairness balancing to problematic cases involving such "modern concerns" to demonstrate the advantages of this approach.

B. The Limiting Power of Fair Play and Substantial Justice

There are two principled ways for jurisdictional doctrine to respond to the new reality that troubled Justice Breyer: Require purposeful and *specific* availment in order to satisfy minimum contacts or allow purposeful but *nonspecific* availment to suffice. There is no coherent third option, since nonspecific purposeful availment must either meet or not meet the minimum contacts threshold. Courts therefore have no choice but to determine whether to set the minimum contacts bar above or below this line. Until very recently there was little need to examine the question, since purposeful availment required specificity of target; but that is manifestly no longer the case, as parties may avail themselves purposefully but nonspecifically across many jurisdictions, either through the Internet or complex distribution arrangements (or more likely both). Requiring specific availment thus necessarily results in Justice Kennedy's "no-jurisdiction" regime and incentivizes strategic insulation from liability. Victims such as Robert Nicastro may lose access to any realistic forum in which to pursue their claims. Allowing purposeful but nonspecific availment to satisfy the minimum contacts requirement necessarily erodes the utility of minimum contacts analysis as a robust limitation on the exercise of personal jurisdiction. Such erosion will only escalate as technology continues to make transjurisdictional contacts ever more integrated into our daily lives. These two extremes are necessary consequences of technological and economic reality.

Justice Breyer identifies the "no-jurisdiction rule" of the Kennedy plurality and the "absolute approach" of the New Jersey Supreme Court as changes to the present law, and he recognizes that both may produce undesirable results.[125] But these jurisdictional extremes do not truly represent doctrinal changes—rather, it is the *facts* that have changed. As demonstrated above, these opposing positions represent the only principled ways for minimum contacts analysis to proceed in circumstances involving nonspecific purposeful availment. In either approach, the utility of minimum contacts analysis as a bright-line limitation on personal jurisdiction is eroded, resulting in a doctrine that is either overinclusive or underinclusive.

But the loss of minimum contacts as a robust limiting principle does not necessitate unbounded jurisdiction. Courts considering juris-

[125] *Id.* at 2794.

dictional issues involving the Internet already compensate for the diminished utility of a bright-line minimum contacts test by applying a sliding scale that weighs the degree of commercialization as a proxy for the fairness of imposing jurisdiction.[126] More broadly, as others have noted in criticism of *Nicastro*,[127] conformity with "traditional notions of fair play and substantial justice" remains the second prong of the established test for personal jurisdiction.[128] This standard may have been conceived as a release valve for exceptional cases in which minimum contacts were present while other factors swayed a court against exercising jurisdiction,[129] but the "new reality" of a deeply interconnected world makes fairness balancing a more equitable and effective limitation against the overbroad assertion of jurisdiction than minimum contacts analysis. By allowing nonspecific purposeful availment to satisfy the minimum contacts requirement while using fairness balancing to foreclose jurisdiction in unreasonable circumstances, courts can avoid both undesirable extremes identified by Justice Breyer's *Nicastro* concurrence and employ a better calibrated and fairer doctrine of personal jurisdiction.

Courts may be reluctant to rely on a multifactor standard rather than a bright-line rule, but, as the Internet cases demonstrate, the bright line is simply no longer tenable. While either the "no-jurisdiction" rule or the "absolute approach" may provide greater predictability, the injustice of each extreme is too steep a price to pay. The *Asahi* fairness balancing framework, while potentially leading to less predictability relative to a bright-line rule, still provides a robust and nuanced tool for navigating between the jurisdictional Scylla and Charybdis that so discomfited Justice Breyer in *Nicastro*. Moreover, the appropriate jurisdictional outcome in some cases might actually be more easily obtained by applying fairness balancing than by applying a supposedly bright-line rule of minimum contacts. *Asahi* itself provides such an example, as the Supreme Court almost unanimously agreed that the exercise of jurisdiction would be unreasonable and

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126 *See supra* Part I.B (arguing that fairness balancing better predicts jurisdictional outcomes than degree of contact does in the context of the *Zippo* sliding scale).

127 *Supra* note 122 and accompanying text.

128 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

129 This is evidenced by Justice Black's criticism of the fairness prong as an unnecessary limitation to personal jurisdiction in his *International Shoe* concurrence, *see id.* at 324–25 (Black, J., concurring) ("[The] Constitution leaves to each State . . . a power . . . to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. . . . I think it a judicial deprivation to condition its exercise upon this Court's notion of 'fair play.'"), and the generally infrequent use of fairness balancing when minimum contacts are met, *see supra* note 37 and accompanying text (discussing infrequent use of fairness balancing).

unfair but could not reach a majority on whether sufficient minimum contacts were present.[130] Finally, regardless of the potential uncertainty of applying fairness balancing, the fact remains that courts have not found a better alternative to avoid either underinclusiveness or overinclusiveness in the exercise of jurisdiction in cases involving nonspecific purposeful availment. The increasing prevalence of such cases creates a problem that requires a solution. Absent a wholesale overhaul of jurisdictional doctrine, avoiding both extremes identified by Justice Breyer's *Nicastro* concurrence will require using fairness balancing as a limiting principle.

The four factors to be considered in fairness balancing—the burden on the defendant, the interest of the plaintiff, the interest of the forum state, and "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"[131]—provide a workable solution to the problem of nonspecific purposeful availment. While this approach does not offer a bright-line rule, it can succeed at avoiding the intolerable extremes, and it relies only on the type of judgment that judges apply every day.[132]

To illustrate, take, for example, eBay cases of the kind discussed in Part I.B above.[133] A one-time seller of some personal possession puts the item on eBay rather than advertising it in a local newspaper because the online venue will reach more potential buyers. She does not *specifically* target buyers in any particular place, but she will happily sell to the highest bidder, wherever he happens to be. Consequently, by placing her item on eBay, the seller engages in nonspecific purposeful availment of the jurisdiction in which the eventual winning bidder resides.

If the sale results in the buyer suing her in his home state, the court should find that such nonspecific purposeful availment meets the minimum contacts threshold and proceed to analyze the appropriateness of asserting jurisdiction under the fairness balancing factors. The plaintiff-buyer's interest in resolving the dispute at home rather than traveling to the defendant-seller's state and the defendant-seller's burden in defending against suit in the plaintiff-buyer's state seem to be in equipoise. The forum state has an interest in the vindication of its citizens' rights, but it also has a countervailing interest in protecting its citizens from being haled into foreign jurisdictions if the

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130 *See supra* note 61 and accompanying text (describing the nearly unanimous application of fairness balancing in *Asahi*).

131 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1979).

132 *See supra* Part I.B (discussing eBay cases with opposite jurisdictional outcomes in which fairness balancing seems to predict outcomes better than degree of contact does).

133 *Supra* notes 76–77 and accompanying text.

roles were reversed. It likely has no particularized interest in this case, since it is a private dispute over a personal transaction. And finally, nothing suggests that the interest of the interstate judicial system requires the resolution of the dispute in one state rather than the other. Since the plaintiff must meet the burden of showing the propriety of jurisdiction, the equipoise of the factors leads to a finding of no jurisdiction over the seller in the buyer's state.

A modification of the facts could alter the balance of the fairness considerations. If, for example, the seller is a repeat player running a business over eBay in order to reach a wider market, it would be reasonable to expect the seller to anticipate the risk of litigation and either insure against it or refuse to sell to bidders in particular states. The plaintiff-buyer, however, maintains his interest in resolving the dispute in his home state. The interests of the forum state and the interstate judicial system would remain neutral on the issue. Balancing the factors in light of the reduced burden on the defendant-seller, a court should hold jurisdiction in the plaintiff-buyer's home state to be proper.

Fairness balancing would function similarly under the facts of *Nicastro* itself. Robert Nicastro's interest in seeking a remedy in New Jersey—his home state and the state of his injury—is substantial, and he may not have the resources to pursue a claim anywhere else. For J. McIntyre, defending the suit in the United States rather than its home country of England creates a meaningful burden, but, as a manufacturer of industrial equipment, the company can anticipate and insure against such litigation. Moreover, since the company targets the entire American market for sale,[134] it can expect to be sued in any of the states. Thus the balance of the two parties' interests favors Nicastro. New Jersey maintains an interest in providing an accessible venue for the vindication of rights and in ensuring the safety and quality of products sold to its citizens. Finally, since denial of jurisdiction in New Jersey could potentially leave Nicastro without any American forum for his claim,[135] the interest of the interstate judicial system in obtaining efficient resolution of controversies favors upholding New Jersey's exercise of jurisdiction over J. McIntyre.[136] In sum, applying fairness balancing would uphold New Jersey's exercise of jurisdiction

134 *Supra* note 119 and accompanying text.

135 *See supra* note 121 and accompanying text (discussing the availability, or nonavailability, of an American forum for Nicastro's claim).

136 The ability to consider the availability of some American forum under the balancing test guards against the possibility of the "stateless" defendants implied in the *Nicastro* plurality, *see supra* note 12 and accompanying text, who purposefully avail themselves of the American market while sheltering themselves from American courts.

over J. McIntyre while still assuaging Justice Breyer's concern about protecting small-scale and part-time sellers from an over-inclusive doctrine of personal jurisdiction.[137]

The fairness balancing analysis presented above assumes an affirmative answer to the threshold question of minimum contacts, so it would be irrelevant in practice if courts interpret Justice Breyer's concurrence with the outcome of *Nicastro* as a precedential holding that conduct like that of J. McIntyre could never constitute sufficient minimum contacts to uphold the exercise of personal jurisdiction.[138] However, lower courts should not feel bound by *Nicastro* in subsequent cases involving similar facts. Justice Breyer based his conclusion on the insufficiency of the factual record in the case and Nicastro's failure to meet his burden.[139] A more robust factual record may have altered the outcome,[140] given that Justice Breyer explicitly declined to announce a new jurisdictional rule.[141] Moreover, *Nicastro* does not bind courts considering other types of cases that implicate the "modern concerns" identified by Justice Breyer's concurrence. Courts facing such cases should recognize that the question of personal jurisdiction can be adjudicated more fairly and without a fatal loss of predictability by allowing nonspecific purposeful availment to satisfy minimum contacts while applying *Asahi*-style fairness balancing to limit overbroad jurisdiction. In addition to avoiding the intolerable extremes identified by Justice Breyer, this approach obviates the need for a *Zippo*-style carve-out for Internet cases, resulting in a more unified doctrine.[142]

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137 *See supra* note 114 and accompanying text (noting Justice Breyer's wariness of placing an excessive jurisdictional burden on small-scale and part-time sellers).

138 *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring) ("In my view, these facts do not provide contacts between the British firm and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case.").

139 *Supra* notes 104–05 and accompanying text.

140 *See* Steinman, *supra* note 103, at 509–12 (noting that Justice Breyer focused on the deficiency of the factual record in rejecting assertion of personal jurisdiction).

141 *Supra* notes 98–101 and accompanying text.

142 *See supra* Part I.B (discussing Internet cases and the *Zippo* framework). The balancing of respective burdens to determine the fairness of asserting jurisdiction may make the jurisdictional question resemble a question of venue, despite the theoretical distinction between a doctrine that pertains to the power of a particular court to adjudicate and one that concerns the convenience of a particular court for adjudication. *See* Denver & Rio Grande W. R.R. Co. v. Bhd. of R.R. Trainmen, 387 U.S. 556, 569 (1967) ("[V]enue, relating to the convenience of the litigants, is quite different from jurisdiction, relating to the power of a court to adjudicate . . . .") (Black, J., dissenting). Insofar as purposeful availment is theoretically sufficient to establish the power of a court to adjudicate, however, there is no clear reason that an equally purposeful though nonspecific availment should be otherwise. A shift toward a jurisdictional analysis that resembles determinations of convenient venue therefore grows naturally from the emergence of nonspecific

Conclusion

It is a common observation that the world seems to be getting smaller. This perception is a consequence of certain features of our lives that define the contemporary era: greater physical mobility, electronic communications, vastly increased contacts across great distances, and economic and cultural interconnectedness. This reality presents challenges for the doctrine of personal jurisdiction, central among which is the ease with which purposeful availment can be realized without any geographic or jurisdictional specificity. Until courts squarely address the question of whether such nonspecific purposeful availment satisfies minimum contacts, the result will be the dissatisfying and often unpredictable outcomes found in *Nicastro* and in cases that involve the Internet or globalized commerce. In order to avoid the intolerable extremes of immunization from jurisdiction on the one hand and universal jurisdiction on the other, courts confronted with this class of cases should find that nonspecific purposeful availment does satisfy minimum contacts while applying an *Asahi*-style fairness balancing test to limit the exercise of jurisdiction.

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purposeful availment and demands no reformulation of the theoretical basis of jurisdiction. Calls for such a shift are not new, *see* Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 Or. L. Rev. 103, 112–13 (1971) ("[We should] put the question in the less lofty but more expedient terms of a procedural venue fair to both parties . . . . Jurisdiction must become venue." (internal quotation marks omitted)), but new circumstances have made the doctrine especially ripe for such a change. Moreover, when litigants are able and willing to litigate in distant fora, the question of jurisdiction already acts in a similar way—the question for such litigants is not whether but where litigation will proceed—so the only practical change occurs in cases with a litigant like Robert Nicastro who otherwise never gets his day in court.