

**PAPER SYMPOSIUM
MAKING SENSE OF PERSONAL JURISDICTION
AFTER *GOODYEAR* AND *NICASTRO***

INTRODUCTION: DUE PROCESS, BORDERS, AND THE
QUALITIES OF SOVEREIGNTY—SOME THOUGHTS ON *J.
MCINTYRE MACHINERY V. NICASTRO*

by
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The Supreme Court's announcement that it would hear two personal jurisdiction cases last Term raised the hope that it would clarify an area of doctrine that has been unclear for 20 years. The Court's decision on general jurisdiction satisfied those expectations at least in part. The Court's specific personal jurisdiction decision, by contrast, only made things worse. This essay provides a critical analysis of the Nicaastro decision on specific personal jurisdiction. Part Two surveys some of the history of personal jurisdiction doctrine, with an emphasis on the tension between rules and standards. Part Three grapples with Nicaastro and its possible meanings and concludes that Nicaastro undermines much of the understanding (such as it was) that shaped the last thirty-plus years of personal jurisdiction doctrine. Part Four suggests an approach to personal jurisdiction based in state interests and relative burdens—one that takes federalism seriously yet at the same time would uphold more assertions of jurisdiction. Part Five turns to a different topic: the rhetoric of Justice Kennedy's and Justice Breyer's opinions. Justice Kennedy repeatedly insisted that personal jurisdiction is about "submission" to sovereign (judicial) authority, and I consider some of the ramifications of this claim, particularly in relationship to Justice Kennedy's opinions in other cases. For his part, Justice Breyer provided

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examples of people over whom he thought personal jurisdiction would be inappropriate. These examples rest on a set of assumptions about national and regional characteristics, as well as a conception about jurisdiction that assumes a sharp distinction between periphery and metropole. His approach, in other words, rests on a different, more cosmopolitan, but perhaps also more disturbing, idea of sovereignty.

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I. INTRODUCTION

For 20 years, the Supreme Court allowed the law of personal jurisdiction to fester as lower courts and commentators struggled to make sense of cases such as *Asahi Metal Industry Co. v. Superior Court*,¹ *Burnham v. Superior Court*,² and *Helicopteros Nacionales de Colombia, S.A. v. Hall*.³ *Asahi* and *Burnham*, which addressed specific personal jurisdiction, displayed a fractured court, with no opinion able to achieve a coherent majority on important questions about the meaning and application of the minimum-contacts test. Although the Court managed to produce a majority opinion in *Helicopteros* on the issue of general personal jurisdiction, its analysis was sketchy and unhelpful. Thus, the Court's

¹ 480 U.S. 102 (1987).

² 495 U.S. 604 (1990).

³ 466 U.S. 408 (1984). For lower court struggles to apply personal jurisdiction doctrine, see, for example, Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 835–36 & nn.305–09 (1995); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 210 (2011); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 540–45 (1995).

announcement that it would hear two personal jurisdiction cases in the 2010 Term—one on general jurisdiction and one on specific jurisdiction—raised the possibility that it would impose some order on this often vexing area of doctrine.

When the Court handed down its decisions, however, the response was understandably mixed. In one of the cases—*Goodyear Dunlop Tires Operations, S.A. v. Brown*⁴—the Court produced a unanimous opinion that improves on *Helicopteros*, even as it (perhaps inevitably) raises serious questions of its own. For example, is a corporation that has significant operations in multiple states really only subject to general personal jurisdiction where it is “at home”?⁵ The answer to that question appears to be yes, but then how many “homes” can a corporation have?⁶ Fully developed answers to these questions will require courts and commentators to delve more deeply into the underlying theory of general jurisdiction than the Supreme Court was required to do in *Goodyear*.⁷ In addition to the more obvious implications, a restrictive

⁴ 131 S. Ct. 2846 (2011).

⁵ See *id.* at 2853–54. Writing for the Court, Justice Ginsburg used the term “at home” to identify the place or places for a corporation that are most closely analogous to domicile for an individual: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Id.*

⁶ Justice Ginsburg’s parenthetical quotation of Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988), suggests that a corporation is only “at home” at its “place of incorporation[] and principal place of business.” See *Goodyear Dunlop*, 131 S. Ct. at 2854. Such an approach would conform general jurisdiction over corporations to their citizenship for purposes of diversity. See 28 U.S.C. § 1332(c)(1) (2006) (“[A] corporation shall be deemed to be a citizen . . . of the State where it has its principal place of business . . .”). But it is not clear why that conformity would be desirable, especially when the resulting limitation on general jurisdiction would be severe. Consider Boeing Corporation. The company is incorporated in Delaware. See THE BOEING CO., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION (May 5, 2006), available at http://www.boeing.com/corp_gov/certificate_incorporation.pdf. Its corporate headquarters are in Illinois. See *About Us: Boeing in Brief*, BOEING, <http://www.boeing.com/companyoffices/aboutus/brief.html>. It has extensive U.S. manufacturing operations in Washington, including “the world’s largest building by volume.” *Everett Tour*, BOEING, <http://www.boeing.com/commercial/tours/index.html>. If general jurisdiction is limited to state(s) of incorporation and a single principal place of business, then Boeing is subject to general jurisdiction either in Illinois or in Washington, but not in both. Note, however, that Justice Ginsburg’s somewhat ambiguous conclusion in *Goodyear*, that the “petitioners are in no sense at home in North Carolina,” provides a small hook for a contrary argument. *Goodyear Dunlop*, 131 S. Ct. at 2857.

⁷ For helpful analysis of *Goodyear*, see James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969 (2012). See generally Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 KAN. L. REV. 549 (2012); Peterson, *supra* note 3, at 211–18; Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 422–30 (2012).

definition of “home” could have severe consequences for litigation against foreign corporations under the Alien Tort Statute.⁸

Alas, in the other case—*J. McIntyre Machinery, Ltd. v. Nicastro*⁹—the Court failed to achieve a majority view on the structure and purpose of specific personal jurisdiction doctrine. But that failure may turn out to be the best thing about *Nicastro*. Although six justices were willing to restrict the power of state courts to exercise jurisdiction over the out-of-state manufacturers of dangerous products that injure residents of the forum state, a different majority of five was unwilling to embrace the problematic implications of Justice Kennedy’s plurality opinion. And, because the *Nicastro* opinions collectively undermine more personal jurisdiction doctrine than they create, the door is open for rethinking the scope of and reasons for constitutional limitations on personal jurisdiction.

Part Two of this Article traces some of the history of personal jurisdiction doctrine through the lens of one of the “perennial themes” in personal jurisdiction law: the tension between rules and standards.¹⁰ Part Three describes *Nicastro* and assesses its impact on this history and tension. In so doing, these two parts also serve as a kind of introduction to this symposium. The next two parts are more prescriptive or critical in tone. Part Four sketches factors for an approach to personal jurisdiction that, while not necessarily new, nonetheless improves on the current landscape’s disarray. The final part takes an entirely different course; it briefly but critically explores the theories of sovereignty and citizenship that emerge from Justice Kennedy’s plurality opinion and Justice Breyer’s concurrence.

⁸ See 28 U.S.C. § 1350. Courts have often used theories of general jurisdiction to support their adjudication of ATS claims against foreign corporations. See, e.g., *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (holding a federal district court in California had general personal jurisdiction over a foreign corporation because of the contacts of its subsidiary). Not only does *Goodyear* raise the bar for such efforts in general, but the specific issue in *Goodyear*—whether there is personal jurisdiction in North Carolina over the foreign subsidiaries of a U.S. corporation—indicates that corporate structure will become more significant than it was in a case like *Bauman*. Whether the analysis of *Goodyear* maps well onto the more typical ATS situation—in which plaintiffs use domestic subsidiaries to support general jurisdiction over a foreign parent—remains to be seen. Cf. Rhodes, *supra* note 7, at 430 (“All-purpose adjudicative authority over a foreign corporation by American courts should be reserved for rare cases, thereby preventing adjudicative regulation of controversies that have little or no relationship to American interests.”).

⁹ 131 S. Ct. 2780 (2011).

¹⁰ Lea Brilmayer, *Introduction: Three Perennial Themes in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 561, 565–66 (1991). My historical analysis in Part Two is doctrinal; I make no effort to situate the cases in a broader historical context. Part Four and especially Part Five make some effort to broaden the focus.

II. RULES, STANDARDS, AND THE *INTERNATIONAL SHOE* TEST

Contemporary personal jurisdiction doctrine derives from the Supreme Court's statement in *International Shoe v. Washington* that

due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."¹¹

For years afterward, the Court imposed few restrictions on personal jurisdiction, with the result that, according to at least some commentators, "the exercise of jurisdiction by a state court . . . [was] presumptively valid."¹² But the ease of establishing personal jurisdiction "ultimately provoked a judicial reaction" in favor of stricter standards.¹³ By 1980, the Court had turned *International Shoe's* statement into a two-part analysis for the constitutionality of state court assertions of personal jurisdiction: (1) an assessment of the amount and quality of the defendant's contacts with the forum, and (2) an assessment of whether the exercise of jurisdiction would be fair and reasonable.¹⁴ The Court also agreed on a set of factors that would guide the second part of the analysis.¹⁵

Throughout this process, the Court framed the personal jurisdiction analysis as a quintessential due process inquiry: At the end of the day, it

¹¹ 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹² Cameron & Johnson, *supra* note 3, at 839; *see also id.* at 823–24 (surveying Supreme Court personal jurisdiction cases from 1945 to 1995 and stating there was a "steady expansion of state court jurisdiction" from 1958 to 1977); Rhodes, *supra* note 7, at 400 (asserting that "[o]ver the next dozen years [after *International Shoe*], the Court interpreted constitutional jurisdiction limits as establishing minimal restraints on the reach of state courts").

¹³ Cameron & Johnson, *supra* note 3, at 839.

¹⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–94 (1980). For confirmation of the two-part analysis, *see Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105, 108–113 (1987) (plurality opinion), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985). Disputes exist about exactly when the two-part test became doctrine, and some lower courts and commentators speak of a three-part test that separates the minimum contacts component of the analysis into two inquiries (purposeful availment, and a cause of action arising out of the conduct that constitutes purposeful availment). *See* Linda J. Silberman, "Two Cheers" for *International Shoe* (and None for *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755, 759–60 (1995) [hereinafter Silberman, "Two Cheers" for *International Shoe*]; Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 579 (1991); Weintraub, *supra* note 3, at 540; *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.2 (2002); 4A WRIGHT & MILLER, *supra*, at § 1069.

¹⁵ *See World-Wide Volkswagen*, 444 U.S. at 292 (setting out the factors); *see also Asahi*, 480 U.S. at 113–16 (applying the factors); *Burger King*, 471 U.S. at 476–77 (confirming the factors).

turns on the particular facts and circumstances of individual cases. Thus, in *International Shoe*, Chief Justice Stone explained: “Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”¹⁶ Nearly 40 years later, Justice Marshall was more candid in *Kulko v. Superior Court*:

Like any standard that requires a determination of “reasonableness,” the “minimum contacts” test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite “affiliating circumstances” are present. We recognize that this determination is one in which few answers will be written “in black and white. The greys are dominant and even among them the shades are innumerable.”¹⁷

However one frames the issue, the point is that *International Shoe*’s description of personal jurisdiction doctrine is much more a flexible standard than a strict rule.¹⁸

Still, as it slogged its way through case after case of post-*International Shoe* individualized inquiry, the Court tried to control or minimize the extent to which personal jurisdiction turns on “innumerable” gradations. The best example of this effort is Justice Scalia’s opinion in *Burnham v. Superior Court*, in which he declared, writing for himself and three other justices, that “jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”¹⁹ There was no need, he went on—but now writing only for himself and two other justices—to consider whether the defendant had minimum contacts or whether the exercise of jurisdiction was fair or reasonable; the traditional rule that a court has jurisdiction over a person served in the forum sufficed to decide the case.²⁰

In other cases, the Court was not as ambitious, but it nonetheless attempted to formulate rules or guidelines that would work within and

¹⁶ *Int’l Shoe*, 326 U.S. at 319.

¹⁷ 436 U.S. 84, 92 (1978) (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 (1958); *Estin v. Estin*, 334 U.S. 541, 545 (1948)); see also *Burger King*, 471 U.S. at 485–86 (quoting *Kulko*, 436 U.S. at 92); *Hanson*, 357 U.S. at 251 (referring to “the flexible standard of *International Shoe*”).

¹⁸ For useful discussions of rules and standards in American jurisprudence, see FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–123 (1992).

¹⁹ 495 U.S. 604, 619 (1990) (plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and White).

²⁰ *Id.* at 622–27 (joined by Chief Justice Rehnquist and Justice Kennedy).

structure the application of the minimum contacts test. For example, in *Hanson v. Denckla*, the Court insisted that the move to “the flexible standard of *International Shoe*” did not presage “the eventual demise of all restrictions on the personal jurisdiction of state courts.”²¹ To the contrary, the minimum contacts test required some baseline content because it implemented the “territorial limitations on the power of the respective States.”²² That baseline, according to the Court, was the existence of “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”²³

The dispute in *Hanson* was about jurisdiction over an out-of-state trustee in litigation over an estate,²⁴ and its application to cases involving different causes of action was not obvious—despite the majority’s categorical language. When the Court embarked on a series of personal jurisdiction decisions in the late 1970s, *Hanson* was an important precedent, but its controlling authority remained unclear.

The Court relied on *Hanson*’s purposeful availment language in *Kulko*, but it did not invoke *Hanson*’s reliance on the territorial limits of state power, and it also conducted a more general reasonableness inquiry.²⁵ *Kulko* also could be distinguished as another family-centered dispute, this time over child custody and support.²⁶ Even if one accepts that distinction, the Court had also cited the purposeful availment test a year earlier in *Shaffer v. Heitner*.²⁷ Yet *Shaffer* also described the *International Shoe* test as turning on reasonableness and fairness, and one could interpret the Court’s discussion of contacts or availment as merely assisting that more general inquiry.²⁸ After *Shaffer* and *Kulko*, therefore, “purposeful availment” was clearly a useful term, and it was also clear that conduct by the defendant that amounted to purposeful availment would be enough to establish minimum contacts. It was not clear, however, exactly what role purposeful availment played in the personal jurisdiction analysis or whether it established the minimum level of conduct that

²¹ *Hanson*, 357 U.S. at 251.

²² *Id.*

²³ *Id.* at 253.

²⁴ *Id.* at 238.

²⁵ *Kulko v. Superior Court*, 436 U.S. 84, 93–94, 96–98 (1978).

²⁶ I am not suggesting that *Hanson* and *Kulko* are less important because of their underlying subject matter. But one could attempt to distinguish both cases by contending that they apply only within particular substantive contexts. Indeed, the *Kulko* majority noted that the facts of that case did not involve “a commercial act.” *Kulko*, 436 U.S. at 101.

²⁷ 433 U.S. 186, 216 (1977).

²⁸ *Id.* at 204 (noting that under *International Shoe*, “[m]echanical or quantitative evaluations of the defendant’s activities in the forum could not resolve the question of reasonableness”); *id.* at 207 (referring to the “test of ‘fair play and substantial justice’ [that] governs assertions of jurisdiction *in personam*”).

would suffice. Nor was it clear exactly what types of conduct would fit within the confines of purposeful availment.

Two years later, the Court attempted to impose clarity but also created a rules–standards tension that continues to structure the debate over specific personal jurisdiction doctrine. Justice White’s majority opinion in *World-Wide Volkswagen v. Woodson* accepted the importance of the general inquiry into reasonableness, and he set out five factors to guide that part of the inquiry, with the burden on the defendant being the chief factor.²⁹ But he also insisted that personal jurisdiction analysis required a specific inquiry into the defendant’s contacts with the forum.³⁰ For this part of the analysis, he indicated that purposeful availment was indeed the minimum that would suffice for personal jurisdiction, that the term would not be interpreted expansively, and that the reason for adhering to this standard was—as *Hanson* had said—the need to enforce constitutional limits on the powers of the states.³¹

Yet *World-Wide Volkswagen* did not merely rely on *Hanson*’s reasoning. It also expanded on it. For example, on the importance of territorial limits on state power, Justice White began with an assertion of original intent:

[T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.³²

As a result, he continued, “the reasonableness of asserting jurisdiction over the defendant must be assessed ‘in the context of our federal system of government,’” because “the Due Process Clause ensures not only fairness, but also the ‘orderly administration of the laws.’”³³ Only then did Justice White quote the language of *Hanson* about “territorial limitations,” and that language served primarily to set up a powerful assertion that due process imposes real limits on the ability of states to exercise personal jurisdiction over absent defendants:

²⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (“Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff’s power to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” (citations omitted)).

³⁰ *Id.* at 297.

³¹ *Id.* at 293–98.

³² *Id.* at 293.

³³ *Id.* at 293–94 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317, 319 (1945)).

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.³⁴

This passage is a classic rule statement. Regardless of what result might be desirable on the equities, the rule will dictate a result that must be followed.

Justice White engaged in similarly extensive analysis of the plaintiffs' claim that purposeful availment exists when a defendant puts its product into the stream of commerce, because such conduct makes it foreseeable that the product could end up in the forum state.³⁵ In rejecting that claim, he admitted that foreseeability is a relevant consideration. "But the foreseeability that is critical to due process analysis," he declared, "is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."³⁶ The reason for this limited conception of foreseeability was, again, the virtues of a rule, which include "giv[ing] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."³⁷

Justice White went on to affirm that *Hanson's* purposeful availment standard creates reasonable anticipation and also serves the goal of predictability.³⁸ He closed this part of his analysis by reframing and limiting the stream-of-commerce metaphor: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."³⁹

In short, with *World-Wide Volkswagen*, the Court adopted a flexible but also clearly bounded test for personal jurisdiction: Purposeful contacts, reasonable anticipation, and federalism-based limits on state sovereignty all serve to structure the inquiry, with fairness and reasonableness

³⁴ *Id.* at 294. The *Hanson* Court made a similar but less emphatic categorical statement. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him.").

³⁵ *World-Wide Volkswagen*, 444 U.S. at 295–98.

³⁶ *Id.* at 297.

³⁷ *Id.*

³⁸ *Id.* at 297–98.

³⁹ *Id.*

concerns playing a subsidiary role.⁴⁰ But the stability that the *World-Wide Volkswagen* majority tried to create was tenuous. Justice Brennan's dissent in that case advanced a powerful alternative vision of personal jurisdiction that rejected *International Shoe* as "outdated" and sought to ground the doctrine in "fairness and reasonableness," such that "the rights of defendants" were only one factor in the analysis, not the focus of the analysis.⁴¹

The Court's next personal jurisdiction decision—also written by Justice White—repudiated *World-Wide Volkswagen*'s reliance on state sovereignty. In *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, the Court declared: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."⁴² Justice Powell's concurring opinion objected to the rejection of the sovereignty rationale and complained that "the Court may be understood as finding that 'minimum contacts' no longer are a constitutional requirement for the exercise by a state

⁴⁰ On the same day, the Court decided *Rush v. Savchuk*, 444 U.S. 320 (1980), in which the majority denied personal jurisdiction without the extended analysis of *World-Wide Volkswagen*. The Court did observe, however, that the defendant had not "engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable." *Id.* at 329 (citing *Kulko v. Superior Court*, 436 U.S. 84, 93–94 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

⁴¹ *World-Wide Volkswagen*, 444 U.S. at 300, 308–09 (Brennan, J., dissenting).

⁴² 456 U.S. 694, 702 (1982). In a footnote, Justice White explained, "The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . 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." *Id.* at 703 n.10. Justice White overstated the due-process limitation on personal jurisdiction in *World-Wide Volkswagen* by making it appear inconsistent with consent. See *World-Wide Volkswagen*, 444 U.S. at 291 ("[A] state court may exercise personal jurisdiction over a nonresident defendant *only* so long as there exist 'minimum contacts' between the defendant and the forum State." (emphasis added)). But surely one can correct that statement without jettisoning the sovereignty rationale, unless—as Justice White suggested—that rationale is necessarily inconsistent with jurisdiction based on consent, which I very much doubt. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 296–99 (2004) (discussing waiver and arguing it is fully consistent with federalism); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(g) (1987) (declaring that, as a matter of international law, "a state's exercise of jurisdiction . . . is reasonable if, at the time jurisdiction is asserted . . . the person, whether natural or juridical, has consented to the exercise of jurisdiction"); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 65 n.261 (2010) (arguing, among other things, that this passage in *Insurance Corp.* "relies on an unnuanced view of waiver that does not account for the possibility that some limits on personal jurisdiction might be waivable but that others might not").

court of personal jurisdiction over an unconsenting defendant. Whenever the Court's notions of fairness are not offended, jurisdiction apparently may be upheld."⁴³ Although overblown in that case, Justice Powell's concerns highlight the tension between *Insurance Corp.* and *World-Wide Volkswagen*—and it was a tension that derived not just from the absence or presence of sovereignty, but also from the difference between (objective) rules and (ad hoc or individualized) standards.⁴⁴

Justice Brennan's subsequent majority opinion in *Burger King v. Rudzewicz* capitalized on the uncertain doctrinal landscape by attempting to qualify *World-Wide Volkswagen's* analysis. He cited that case for the importance of predictability and its version of the stream of commerce test, and he also referred to purposeful availment as a "requirement."⁴⁵ Yet his articulation of purposeful availment was less rigorous than that of Justice White in *World-Wide Volkswagen*. Not only did Justice Brennan avoid any references to sovereignty, but he also asserted that the function of purposeful availment was simply to "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'"⁴⁶

Justice Brennan also tried to modify the overall minimum contacts test to increase the circumstances in which state courts would be able to exercise personal jurisdiction. His tool for that effort was the second, fairness-based part of the test:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." . . . *These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.* On the other hand, where 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

⁴³ *Ins. Corp. of Ir.*, 456 U.S. at 713–14 (Powell, J., concurring in the judgment) (footnote omitted).

⁴⁴ Soon thereafter, in *Calder v. Jones*, 465 U.S. 783 (1984), a unanimous Court further threatened the rule of *World-Wide Volkswagen*. The Court rejected the defendants' reliance on that case in the course of crafting the plaintiff-centered "effects test" as an alternative to purposeful availment in intentional tort cases. *Id.* at 789–90. The Court cited *World-Wide Volkswagen* for the proposition that the defendant must reasonably anticipate being haled into the courts of the forum state, *id.* at 790, but it did not refer to purposeful availment or state sovereignty.

⁴⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–75 (1985).

⁴⁶ *Id.* at 475 (citations omitted).

usually may be accommodated through means short of finding jurisdiction unconstitutional.⁴⁷

To the extent this test contemplates a reduction, in some cases, of the level of contacts required for jurisdiction, it weakens the force of the purposeful availment idea and of the rule-like qualities that supposedly go along with it.

For all that, Justice Brennan's version of the reasonableness test in *Burger King* and other cases did not function as an open-ended balancing test. He rarely concluded that a state court's exercise of personal jurisdiction violated due process, because his focus on reasonableness functioned primarily to prevent arbitrary assertions of jurisdiction at the margin, not to weigh its desirability in every case.⁴⁸ Nor has the reasonableness inquiry resulted in many denials of personal jurisdiction.⁴⁹

The objection to Justice Brennan's approach in *Burger King* and other cases, therefore, cannot be simply that he advocated an uncertain and shifting test. Indeed, from a defendant's point of view, application of the test was all too predictable. The objection, instead, has two parts. The first part asserts that the reasonableness test pays insufficient attention to purposes and too much attention to results, even if the results are foreseeable. The second part contends that no matter how predictable the test may be in a given case, it always contains within itself the core of a standard, the ability to be unpredictable, to make exceptions, and to reject the defendant's often quite reasonable perspective in favor of a conception of fairness that incorporates an equally reasonable but quite different interest in providing a remedy in the plaintiff's chosen forum.

In any event, *Burger King's* reorientation of specific personal jurisdiction doctrine would not last as a majority view. Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court* made no reference to Justice Brennan's assertion in *Burger King* that insufficient contacts are adequate if the reasonableness analysis strongly favors the plaintiff's choice of forum. Instead, she quickly invoked the purposeful availment test and relied heavily on *World-Wide Volkswagen*—although,

⁴⁷ *Id.* at 476–77 (emphasis added) (citations omitted). There is some tension in this passage, for it simultaneously states that a plaintiff must establish minimum contacts before the reasonableness inquiry kicks in and that the reasonableness inquiry may reduce the level of contacts required for jurisdiction. In other words, “minimum contacts” appears to change its definition over the course of the quotation. Perhaps Justice Brennan was trying to get as close as possible to his *World-Wide Volkswagen* dissent while still maintaining plausible consistency with the majority opinion in that case.

⁴⁸ Compare Justice Marshall's application of reasonableness and fairness as arguments against jurisdiction in *Kulko v. Superior Court*, 436 U.S. 84, 96–98 (1978), to Justice Brennan's more permissive conception in dissent, *id.* at 102. Justice Brennan did join the portion of Justice O'Connor's *Asahi* opinion that concluded the exercise of personal jurisdiction in that case would be unreasonable. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105, 113–16 (1987).

⁴⁹ See 4A WRIGHT & MILLER, *supra* note 14, § 1069 n.22 (collecting cases); Silberman, “Two Cheers” for International Shoe, *supra* note 14, at 760–61.

presumably following *Insurance Corp. of Ireland*, she did not refer to the sovereignty rationale.⁵⁰ But she also went beyond *World-Wide Volkswagen* when she tried to settle diverging lower court applications of the purposeful availment standard by shifting its emphasis:

The “substantial connection” between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.⁵¹

This analysis is particularly important for tort cases in which a product enters the forum state through the actions of one or more intermediaries, and it threatens to prevent personal jurisdiction even when the defendant knew that its product would end up in the forum.

Justice Brennan’s concurrence in part took strong issue with Justice O’Connor’s formulation. Specifically, he accused her of being unfaithful to *World-Wide Volkswagen* and contended that she misunderstood the stream of commerce idea:

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State’s laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.⁵²

Notably, even as she tried to heighten the purposeful availment standard, Justice O’Connor’s *Asahi* opinion remained within the two-part analysis that *World-Wide Volkswagen* and *Burger King* had followed—and the second part of the analysis was crucial to the result. While her

⁵⁰ *Asahi*, 480 U.S. at 109.

⁵¹ *Id.* at 112 (plurality opinion) (citations omitted).

⁵² *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

discussion of minimum contacts was only a four vote plurality opinion, her conclusion that the exercise of personal jurisdiction over Asahi would be unreasonable under the *World-Wide/Burger King* framework was an eight vote majority opinion.⁵³ Only Justice Scalia did not join that part of her opinion (and, in the wake of *Nicastro*, it is worth noting that Justice Kennedy was not yet on the Court).⁵⁴

The Court's final personal jurisdiction decision before *Goodyear* and *Nicastro* was *Burnham v. Superior Court*.⁵⁵ I already referred to Justice Scalia's plurality opinion in that case, in which he attempted to create an exception to the minimum contacts test for cases in which the plaintiff is able to serve the defendant in the forum state, and was dismissive of any kind of fairness or reasonableness inquiry.⁵⁶ The idea that the rejection of such an inquiry might generalize beyond presence cases seemed speculative, in part because Justice Brennan's concurring opinion—in which he insisted on the applicability of the two-part minimum contacts test—garnered as many votes as Justice Scalia's opinion.⁵⁷ Just as important in retrospect, however, is the fact that Justice Kennedy joined all of Justice Scalia's opinion.

In sum, before *Nicastro*, and with the exception of Justice Scalia's plurality opinion in *Burnham*, which dealt with presence in the forum, it seemed settled that personal jurisdiction questions turned on the two-part analysis derived from *International Shoe*. *World-Wide Volkswagen's* endorsement of purposeful availment was the closest thing the Court had to a controlling precedent on the question of how to apply the *International Shoe* test, but *Burger King* and *Asahi* had thrown the precise definition of that term into doubt. The Court had also rejected the federalism/state sovereignty rationale advanced by *World Wide Volkswagen* as justification for the minimum contacts test, in favor of the claim that the focus of the personal jurisdiction inquiry is on the due process liberty interests of the defendant who contests personal jurisdiction.⁵⁸ The cases

⁵³ *Id.* at 105 (majority opinion). Justice O'Connor also added an additional factor: "the Federal Government's interest in its foreign relations policies." *Id.* at 115.

⁵⁴ *Id.* at 105.

⁵⁵ 495 U.S. 604 (1990).

⁵⁶ *Id.* at 608–27; see also *supra* notes 19–20 and accompanying text. One can certainly argue over the appropriateness of calling Justice Scalia's analysis in *Burnham* an "exception," in light of *International Shoe's* caveat that the minimum contacts/fair play and substantial justice test applies "if [the defendant] be not present within the territory of the forum." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Doctrinally, the question depends upon the interpretation of *Shaffer's* statement that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

⁵⁷ *Burnham*, 495 U.S. at 628–39 (Brennan, J., concurring in the judgment). Justice Brennan was also able to hold all four votes for his entire opinion, which Justice Scalia was unable to do.

⁵⁸ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

also indicate, as I mentioned above, a general acceptance that the application of this analysis partakes more of a standard than a rule.

Beneath the general acceptance of the two-part analysis and the standard-like nature of the overall inquiry, however, the Court was fighting over the meaning of *International Shoe*. Questions of interpretation and implementation turned into jurisprudential battles over the relative virtues of rules and standards. The justices who favored greater structure and predictability tended to focus on “minimum contacts,” while the justices who wanted personal jurisdiction to be an adaptable standard emphasized “fair play and substantial justice.” Rules, in turn, equated with discernible limits on jurisdiction, even when there would be little burden on the defendant, while standards indicated a more accommodating view of state power over out-of-state actors who caused harm in the forum.

III. ASSESSING *NICASTRO*

A. *Going to Extremes: The Nicastro Opinions*

The most straightforward observation one can make about *Nicastro* is that it compounds the uncertainty that *Asahi* and *Burnham* fostered. J. McIntyre Machinery, Ltd., a British company, manufactures metal-shearing machines.⁵⁹ It sought to sell its machines in the United States, and in addition to regularly attending U.S. trade shows, it also contracted with an Ohio-based distributor that ordered machines from J. McIntyre, marketed them in the United States, and shipped them to purchasers.⁶⁰ Robert Nicastro is a New Jersey resident who worked for Curcio Scrap Metal, a New Jersey company that purchased one of J. McIntyre’s machines from the U.S. distributor.⁶¹ In 2001, while Nicastro was using the machine, which did not have a safety guard, his right hand “accidentally got caught in the machine’s blades, severing four of his fingers.”⁶² Nicastro sued J. McIntyre in New Jersey state court.⁶³ J. McIntyre sought dismissal, contending that it was not subject to personal jurisdiction in New Jersey.⁶⁴ Nearly seven years after Nicastro filed suit, and without any hearing on the substantive merits of the case, the United States Supreme Court agreed that New Jersey courts cannot exercise

⁵⁹ J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011).

⁶⁰ *Id.* at 2786.

⁶¹ *Id.*

⁶² Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010). Worth noting as well is that the U.S. distributor went out of business shortly after Nicastro’s injury, leaving J. McIntyre as the only available defendant for a products liability claim. *See id.* at 578 n.2.

⁶³ *Id.* at 577–78.

⁶⁴ *Id.*

personal jurisdiction over J. McIntyre with respect to Nicastro's injuries.⁶⁵ Six justices joined in this result, but there was no majority opinion.⁶⁶

1. Justice Kennedy's Opinion

Justice Kennedy wrote for himself, Chief Justice Roberts, and Justices Scalia and Thomas.⁶⁷ He began by stating that "[t]he Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."⁶⁸ This requirement, he went on, applies as much "to the power of a sovereign to resolve disputes through judicial process" as it does "to the power of a sovereign to prescribe rules of conduct for those within its sphere."⁶⁹ Even more, he asserted: "As a general rule, neither statute nor judicial decree may bind strangers to the State."⁷⁰ What Justice Kennedy meant by the equation of prescriptive and adjudicative jurisdiction—and in particular what he meant to say about the ability of states to legislate extraterritorially—is unclear.⁷¹

The point for purposes of this case was that lack of jurisdiction equates with lack of power, such that a judgment rendered in the absence of jurisdiction is void. Justice Kennedy immediately went on to link this idea of "lawful authority" to personal jurisdiction doctrine in words that plainly implicate the rules-standards tension:

A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"⁷²

That is to say, the *International Shoe* inquiry explicitly includes consideration of "fair play and substantial justice," but for Justice Kennedy those are not simply traditional ideas; their content is also

⁶⁵ *Nicastro*, 131 S. Ct. at 2791.

⁶⁶ *Id.* at 2785.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2786. *See also id.* at 2785 (stating that due process requires "lawful judicial power").

⁶⁹ *Id.* at 2786–87.

⁷⁰ *Id.* at 2787.

⁷¹ *See infra* note 139 and accompanying text. Later in the opinion, Justice Kennedy hedged. *See Nicastro*, 131 S. Ct. at 2790 ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.")

⁷² *Nicastro*, 131 S. Ct. at 2787 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Justice Kennedy noted that intentional torts may be an exception to this rule. *Id.*

confined by tradition and subservient to—or perhaps incorporated into—the purposeful availment requirement.

From there, Justice Kennedy raised the rhetorical ante. Not only is purposeful availment a necessary prerequisite, in most cases, for the exercise of lawful authority, but the relationship between the defendant and the forum is one of submission: “A person may submit to a State’s authority in a number of ways,” including consent, presence, and citizenship or domicile.⁷³ Purposeful availment by people outside the forum is also a form, albeit “a more limited form[,] of submission to a State’s authority.”⁷⁴

The insistence that personal jurisdiction requires the defendant’s submission to the court’s authority—a phrasing that suggests a formal and knowing decision—set up Justice Kennedy’s discussion of the stream of commerce idea, which the New Jersey Supreme Court had emphasized in its opinion upholding jurisdiction.⁷⁵ For the plurality, the idea that personal jurisdiction could arise from something as casual as putting goods in the stream of commerce was simply inconsistent with the idea of submission to sovereign authority. Thus, Justice Kennedy insisted that Justice O’Connor’s opinion in *Asahi* was the correct approach,⁷⁶ and he declared that Justice Brennan’s opinion in that case, “advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power.”⁷⁷

Having said this much, Justice Kennedy suggested a new structure for personal jurisdiction doctrine. First, “jurisdiction is in the first instance a question of authority rather than fairness.”⁷⁸ Perhaps in the last

⁷³ *Nicastro*, 131 S. Ct. at 2787.

⁷⁴ *Id.* Justice Kennedy used the word “submit” or “submission” six times in the two paragraphs from which I have quoted, and those words also appear elsewhere in his opinion. *Id.* at 2787–88. The Court or individual justices sometimes describe a party as submitting to the jurisdiction of another court. *See, e.g.*, *Medellín v. Texas*, 128 S. Ct. 1346, 1376 (2008) (Breyer, J., dissenting); *Tenn. Students Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004). But the use of “submit” or “submission” in connection with personal jurisdiction is rare. *See, e.g.*, *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3 (1983) (using “submit” as part of a description of traditional practices, where submission was an alternative to personal service); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704–05 (1982); *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Stevens, J., concurring in the judgment) (using “submit” as part of a negative assessment of the statute at issue). The word “submit” or “submission” appears only once in each of these cases, however. Justice Kennedy’s insistent repetition is therefore particularly noteworthy. For more discussion of this point, see *infra* notes 152–62 and accompanying text. *See also* Rhodes, *supra* note 7, at 415–17.

⁷⁵ *See Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 583–92 (N.J. 2010).

⁷⁶ *Nicastro*, 131 S. Ct. at 2788–90.

⁷⁷ *Id.* at 2789.

⁷⁸ *Id.* Justice Kennedy relied on Justice Scalia’s *Burnham* opinion, which he referred to as the “principal opinion” in the case. That label is misleading, however, because Justice Brennan’s opinion attracted the same number of votes (four). Indeed, relevant portions of Justice Scalia’s opinion received only three votes.

instance as well, for he also indicated that no degree of fairness can make up for a lack of contacts.⁷⁹ Second, the proper analysis is not so much case-by-case as it is “forum-by-forum, or sovereign-by-sovereign,” and it asks “whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”⁸⁰

Justice Kennedy then suggested scenarios that confirm his intention to create a relatively restrictive rule for personal jurisdiction. First, he insisted that “[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State,” and he insisted that this conclusion displayed “the premises and unique genius of our Constitution.”⁸¹ Others might not use the word “genius” to describe such a result.⁸² Justice Kennedy also contended that his approach was necessary to protect “the owner of a small Florida farm” who sold crops to a distributor who then sent them across the country.⁸³ The new approach would lower the cost of litigation, apparently because it would allow a low-cost dismissal of suits against defendants of this kind in other states, or deter the filing of such suits altogether.⁸⁴

This last example is critical because it strongly suggests that, under Justice Kennedy’s approach, there is no fairness inquiry at all. He clearly asserted that “authority to subject a defendant to judgment depends on purposeful availment” and that considerations of fairness are not “controlling.”⁸⁵ Even more, he relied heavily on Justice Scalia’s opinion in *Burnham* and never suggested that ideas of fair play and substantial

⁷⁹ *See id.* (“That such considerations have not been controlling is instructive.”).

⁸⁰ *Id.* Justice Kennedy explained that although personal jurisdiction is a due process doctrine concerned with individual liberty, the liberty interest that is protected is the “right to be subject only to lawful power,” and “whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.” *Id.* In the next paragraph, he came closer to *World-Wide Volkswagen’s* analysis: “[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.” *Id.*

⁸¹ *Id.* He went on to make clear that the Constitution does not actually require such a result in all circumstances. Congress might be able to fix the problem by allowing a federal forum. *See id.* at 2790.

⁸² Justice Ginsburg charitably referred to this line of reasoning as “curious.” *Id.* at 2800 n.12 (Ginsburg, J., dissenting). That criticism seems mild, especially if Justice Kennedy meant to include the facts of *Nicastro* in that category. But he probably did not mean to go so far. His statement that “target[ing] or concentrat[ing] on particular States” would be sufficient to establish specific personal jurisdiction in those states, presumably would allow jurisdiction over J. McIntyre in Ohio, at least. *Id.* at 2789–90 (plurality opinion).

⁸³ *Id.* at 2790.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2789–90.

justice have any meaningful and separate role in the personal jurisdiction analysis.⁸⁶ Certainly, if they did, those ideas might apply to the “owner of a small Florida farm,” for whom the burden of litigating across the country might be significant. Justice Kennedy’s insistence that this example explained the need for a strict approach to conduct and availment, therefore, also strongly suggests that his approach allows little if any inquiry into fairness or reasonableness.⁸⁷

Turning to the application of this standard, Justice Kennedy made short work of Nicastro’s arguments for jurisdiction. It may be, he stated, that J. McIntyre has sufficient contacts with the United States, and it may even be the case that New Jersey law should apply to the controversy, but there was no evidence that J. McIntyre had purposefully availed itself of New Jersey.⁸⁸

2. Justice Breyer’s Opinion

Justice Breyer, joined by Justice Alito, filed a relatively brief opinion concurring in the judgment.⁸⁹ He positioned his approach to the case as simple adherence to established precedents. Under his understanding of prior cases, personal jurisdiction over J. McIntyre was inappropriate because the sale of the machine to Nicastro’s employer was “a single isolated sale” to New Jersey and was not accompanied by “something more,” such as special state-related design, advertising, advice, marketing, or anything else.⁹⁰

Justice Breyer specifically rejected “the plurality’s seemingly strict no-jurisdiction rule,” but the only reason that he gave was the potential difficulties associated with applying that approach to “modern concerns,” such as products sold through a web site, consigned to an intermediary such as Amazon.com, or marketed through pop-up advertisements.⁹¹ He reserved his strongest criticisms for Nicastro’s assertion that jurisdiction is appropriate if a manufacturer “knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.”⁹² The reasons he rejected Nicastro’s position were, first, that it “would abandon

⁸⁶ Note, however, that “fair play and substantial justice” was not specifically at issue in *Nicastro*, because J. McIntyre challenged jurisdiction “exclusively under the first prong” of the International Shoe framework. Brief of Law Professors as *Amici Curiae* in Support of Respondents at 5, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), available at http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/09-1343_RespondentAmCuLawProfessors.pdf.

⁸⁷ See Peterson, *supra* note 3, at 234 (making the same point). Of course, a robust purposeful availment test for contacts likely would obviate many, if not most, defendant-centered fairness concerns.

⁸⁸ *Nicastro*, 131 S. Ct. at 2790–91.

⁸⁹ *Id.* at 2791–94 (Breyer, J., concurring in the judgment).

⁹⁰ *Id.* at 2792.

⁹¹ *Id.* at 2792–93.

⁹² *Id.* at 2793 (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010)).

the heretofore accepted inquiry of whether . . . it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there" and, second, that it was irreconcilable with "the constitutional demand for 'minimum contacts' and 'purposefu[l] avail[ment],' each of which rest upon a particular notion of defendant-focused fairness."⁹³

Justice Breyer's primary concern, in short, was that a ruling in favor of Nicastro would also operate as a strict rule that had no room for a fairness inquiry. He preferred to maintain some flexibility in the Court's approach to personal jurisdiction, although he stopped short of defining exactly how fairness would work. By contrast, he had nothing to say about fairness concerns with respect to the plurality's rule, apparently because it was already so defendant-friendly, if also inflexible.

As had Justice Kennedy, Justice Breyer provided examples of his fairness-based concerns. Domestically, he was concerned about "an Appalachian potter" who sells a product to a distributor, who resells it nationwide.⁹⁴ Internationally, he worried about "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors."⁹⁵ I will have more to say about Justice Breyer's choice of examples in Part Five. For now, my goal is simply to highlight his insistence that in all of these cases, "basic fairness" required something more flexible than "an absolute rule."⁹⁶

3. *Justice Ginsburg's Opinion*

Justice Ginsburg began her dissent, which was joined by Justices Sotomayor and Kagan, by providing a far more detailed factual narrative than the one provided by Justice Kennedy in his plurality opinion.⁹⁷ She documented that J. McIntyre developed its products for an international market and that it had targeted and derived substantial revenue from its sales in the United States.⁹⁸ Further, it was clear from the record that J. McIntyre was willing to sell its products to customers in any state, including New Jersey.⁹⁹ Based on the "purposeful step[s]" established by these facts, she concluded that Nicastro had brought his suit "in a forum entirely appropriate for the adjudication of his claim."¹⁰⁰ The fact that specific marketing efforts came from an independent U.S. distributor rather than from the U.K. manufacturer, she asserted, should make no

⁹³ *Id.* (alterations in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 297 (1980)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 2794.

⁹⁶ *Id.* at 2793–94.

⁹⁷ *Id.* at 2794–97 (Ginsburg, J., dissenting).

⁹⁸ *Id.* at 2795–96.

⁹⁹ *Id.* at 2794–96.

¹⁰⁰ *Id.* at 2797.

difference to the personal jurisdiction analysis, and it certainly should not insulate the manufacturer from the jurisdiction of state courts.¹⁰¹

Having recast the facts, Justice Ginsburg turned to the underlying law. She characterized the basic inquiry for specific jurisdiction as “turn[ing] on an ‘affiliatio[n] between the forum and the underlying controversy.’”¹⁰² Later in the opinion, she declared that “[t]he modern approach to jurisdiction over corporations and other legal entities . . . gave prime place to reason and fairness.”¹⁰³ Although purposeful availment is a “requirement,” she adopted Justice Brennan’s interpretation of that term from *Burger King* rather than Justice O’Connor’s from *Asahi*: “[Th[e] purposeful availment requirement, this Court has explained, simply ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.”¹⁰⁴ Near the end of her opinion, she stressed that “considerations of litigational convenience and the respective situations of the parties” ought to “determine when it is appropriate to subject a defendant to trial in the plaintiff’s community.”¹⁰⁵ Significantly, despite her reference to purposeful availment and “[t]he relationship among the defendant, the forum, and the litigation,”¹⁰⁶ Justice Ginsburg never used the phrase “minimum contacts.”¹⁰⁷ The entire thrust of her dissent was that the facts established the reasonableness of asserting jurisdiction. Minimum contacts as a separate inquiry—and for that matter, any sense that personal jurisdiction doctrine requires a two-part analysis—was entirely absent.¹⁰⁸

¹⁰¹ *Id.* at 2794–95.

¹⁰² *Id.* at 2797–98 (second alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)). Justice Ginsburg said little in *Nicastro* about what constitutes an “affiliation,” but her *Goodyear* majority opinion explained that an affiliation is an “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.” *Goodyear Dunlop*, 131 S. Ct. at 2851.

¹⁰³ *Nicastro*, 131 S. Ct. at 2800.

¹⁰⁴ *Id.* at 2801 (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (internal quotation marks omitted).

¹⁰⁵ *Id.* at 2804.

¹⁰⁶ *Id.* at 2798 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

¹⁰⁷ Note, though, that in her *Goodyear* opinion, Justice Ginsburg did refer to minimum contacts. *Goodyear Dunlop*, 131 S. Ct. at 2853 (“[A] State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has ‘certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” (second alteration in original) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

¹⁰⁸ One could argue that, having provided a factual narrative that made clear the defendant’s contact with the United States was sufficient, Justice Ginsburg believed it was unnecessary to be more explicit in her analysis. But that argument is inconsistent with Justice Ginsburg’s insistence that personal jurisdiction doctrine gives “prime place to reason and fairness.” *Nicastro*, 131 S. Ct. at 2800. More convincing is the argument that her analysis applies only to, as she indicated, “corporations and other legal entities,” *id.*, so that a different analysis might apply to natural persons.

Justice Ginsburg dismissed federalism-based concerns about the “fair and reasonable allocation of adjudicatory authority among States of the United States,” and went on to deny that state sovereignty has anything to do with “the constitutional limits on a state court’s adjudicatory authority.”¹⁰⁹ Finally, referring to Justice Kennedy’s repeated stress on submission, she stressed that after *International Shoe*, “legal fictions, notably ‘presence’ and ‘implied consent,’ should be discarded,” and she derided “the plurality’s notion that consent is the animating concept” as having “no support from . . . decisions of this Court.”¹¹⁰ Invoking European jurisprudence, she also suggested that the Court’s refusal to permit jurisdiction at the place of injury “puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world.”¹¹¹

B. What Did Nicaastro Hold?

Nicaastro produced a clear result: six justices voted to reject personal jurisdiction over J. McIntyre. But finding a majority holding is more difficult. Four justices tried to heighten the standard for personal jurisdiction, but five justices rejected that attempt. Yet those five justices were not able to agree on an alternative approach.

The plurality’s proposed rule draws from Justice O’Connor’s opinion in *Asahi*, but it strips away the reasonableness inquiry and adds a strong sovereignty argument.¹¹² It departs, therefore, from the two-part analysis that emerged from *World-Wide Volkswagen*. More important than its lack of conformity to that test, however, is the plurality’s effort to reinstall sovereignty at the center of personal jurisdiction doctrine. Justice Kennedy’s notion of sovereignty is also quite different from that of Justice White in *World-Wide Volkswagen*. Where Justice White was concerned with federalism-based limits on state power, Justice Kennedy was as much or more concerned with the relationship between the court and the defendant. Because this relationship is formal—the submission to authority—Justice Kennedy insisted on the importance of establishing the forms and predicates for the exercise of that authority.

In addition, Justice White’s reliance on sovereignty arose from constitutional structure and the concrete facts of federalism. Justice

¹⁰⁹ *Id.* at 2798.

¹¹⁰ *Id.* at 2798–99; *see also id.* at 2799 n.5.

¹¹¹ *Id.* at 2803 (noting the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for personal jurisdiction in tort cases in the courts of the place where the harmful event or place of injury occurred).

¹¹² Lower courts undoubtedly will be tempted to conclude that, all evidence to the contrary, Justice Kennedy did not mean to displace the reasonableness inquiry, and they will find support for that position in (1) Justice Kennedy’s quotation of *International Shoe*’s “minimum contacts” consistent with “traditional notions of fair play and substantial justice” language, *see id.* at 2787 (plurality opinion), and (2) the fact that the specific issue before the Court was contacts, not reasonableness, *see supra* note 86.

Kennedy's use of sovereignty, by contrast, arises from traditional ideas of judicial power that may be consistent, but are not necessarily interwoven with the structure of the Constitution or the federal system more generally. Particularly on the facts of *Nicastro*, Justice Kennedy's approach therefore lays itself open to the charge that it serves no particular material or constitutional interests and instead represents formalism for its own sake or, at best, for the sake of tradition.

Justice Ginsburg's dissent, by contrast, comes very close to the fairness-based approach to jurisdiction that Justice Brennan outlined in his *World-Wide Volkswagen* dissent. She insisted that the personal jurisdiction inquiry is entirely about reasonableness, and she made no separate, free-standing inquiry into contacts. Her opinion, therefore, is also inconsistent with the two-part personal jurisdiction analysis. She certainly made a detailed examination of the facts—and along the way she invoked purposeful availment and the relationship among the defendant, the forum, and the litigation—but she did so specifically to determine the reasonableness of jurisdiction. I interpret Justice Ginsburg's approach as creating a low threshold for the plaintiff to demonstrate that jurisdiction is appropriate, with the burden then shifting to the defendant to rebut that presumption by demonstrating that jurisdiction would be inappropriate and unreasonable.¹¹³ It comes close, therefore, to the presumption of jurisdiction that Justice Breyer was unwilling to accept. Thus, although her emphasis on “reason and fairness” suggests an unclear standard, its actual operation is closer to that of a rule, as was also the case with Justice Brennan's preferred version of the reasonableness approach.

For his part, Justice Breyer also embraced the importance of a fairness based inquiry, yet he also appears to have done so within the context of the two-part analysis into both contacts and fairness. He certainly disavowed any effort to depart from established personal jurisdiction law. To the contrary, he declared, “I would adhere strictly to our precedents,”¹¹⁴ and his reference to “a particular notion of defendant-centered fairness”¹¹⁵ indicates that he rejected the fairness analysis that Justice Brennan articulated in his *World-Wide Volkswagen* dissent, and that Justice Ginsburg largely adopted in her *Nicastro* dissent. The unstated corollary to these statements is that, more than Justices Kennedy and Ginsburg, he would adhere to the case-by-case model of decisionmaking. Interestingly, neither he nor Justice Ginsburg, for all

¹¹³ In contrast to Justice Breyer, *see Nicastro*, 131 S.Ct. at 2791–94 (Breyer, J., concurring in the judgment), Justice Ginsburg did not put any emphasis on assigning the burden of proof, and my presentation of her position may be an over-interpretation. Yet there is at least a bit of support for my assessment in the introduction to her opinion, where she questions whether J. McIntyre had “succeeded in escaping personal jurisdiction.” *Id.* at 2794 (Ginsburg, J., dissenting).

¹¹⁴ *Id.* at 2794 (Breyer, J., concurring in the judgment). I doubt that it is really possible to “adhere strictly” to the Supreme Court's personal jurisdiction precedents.

¹¹⁵ *Id.* at 2793.

their emphasis on fairness or reasonableness, made any use of the fairness factors spelled out in *World-Wide Volkswagen*, confirmed in *Burger King*, and applied in *Asahi*. Indeed, their opinions suggest two distinct conceptions of fairness, neither of which clearly lines up with the multi-factor *World-Wide Volkswagen* test.

What, then, did *Nicastro* hold? In one sense, nothing at all, for the Court agreed on very little. Yet that conclusion is too easy. *Nicastro* produced a majority result that easily generalizes: non-U.S. manufacturers who entrust their product to a distributor with the goal of serving the entire U.S. market will not be subject to personal jurisdiction in every state in which their products are sold. There is no doubt that foreign defendants will make vigorous use of that result wherever possible and that domestic manufacturers will urge courts to apply the same reasoning to them.

Nicastro also indicates that seven justices do not feel bound by the reasoning of personal jurisdiction precedents that are twenty or more years old; nor do they feel bound to follow the general approach to personal jurisdiction that was worked out in those cases. The proof of this assertion is the willingness of these justices to depart from *World-Wide Volkswagen*'s two-part test. One might even conclude that the two-part analysis has been overruled.¹¹⁶

C. Rules and Standards, or Polarization and Disarray?

My goal so far has been to think about personal jurisdiction doctrine in terms of the familiar tension between rules and standards. In Part Two, I tried to show that, beginning at least with *Hanson v. Denckla*, the Supreme Court has divided over the extent to which rules or rule-like doctrines can fit within the *International Shoe* test of "minimum contacts . . . such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹¹⁷ Before *Nicastro*, a majority of the Court favored accommodation of the tension between rules and standards through a two-part analysis: minimum contacts, with some emphasis on rules, and fair play and substantial justice (or reasonableness), with more emphasis on standards.

The problem with this accommodation is that the rhetoric of predictability that accompanied the search for minimum contacts rules and the rhetoric of balancing that accompanied the fair play and substantial justice standard has little to do with the actual operation of these parts of the doctrine. The fairness or reasonableness inquiry advanced by Justice Brennan and now by Justice Ginsburg operates more as a justification for jurisdiction than a check on it. As a result, although

¹¹⁶ Although, again, lower courts understandably will try to avoid that conclusion. See *supra* note 112.

¹¹⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

it looks on the surface like a standard, it does not vary much from case to case and ends up operating more like a rule. The purposeful availment inquiry into contacts, by contrast, requires an assessment of the facts of each case, which creates uncertainty. Even more, this inquiry has not worked well as a clear rule and has therefore created even more uncertainty. And, the repeated failures of the purposeful availment test have led groups of justices to search for variations that will achieve the rule-like qualities that they value, but the resulting instability of doctrine has undermined their goal. At the end of the day, the overall test remains a case-by-case inquiry—a standard—but that is as much because of uncertainty over the doctrine as because of the factors at play in the underlying analysis.

Perhaps, then, *Nicastro's* rejection of the rules–standards accommodation is cause for qualified celebration. The two principal opinions reject a two-part analysis that has been crumbling for years and perhaps deserves demolition.¹¹⁸ But shouldn't those who demolish the doctrine also propose something more coherent in place of the old test? This is where *Nicastro* fails. The justices may have torn down the two-part test, but they left behind only the incomplete foundations of incompatible structures. For Justice Kennedy, tradition and sovereignty require rules (even if necessarily somewhat flexible rules) that fairness cannot trump. For Justice Ginsburg, reasonableness is the entire test, and it ignores federalism and does little to limit state court assertions of personal jurisdiction.

Nor is there any obvious way to combine these two approaches, to have rules *and* standards instead of rules *or* standards, for compromise is inconsistent with the positions that Justice Kennedy and Ginsburg have marked out. Certainly, one can conclude that Justice Breyer's opinion presents a middle path, but it is a middle path that requires the justices at either end of the spectrum to abandon the basic conceptions—submission to state sovereignty, on the one hand, and an overriding focus on reasonableness as a justification for jurisdiction, on the other—that drive their approaches. Even more, although Justice Breyer's approach to the case may be defensible on pragmatic grounds, as a kind of muddling through within the existing doctrinal structure, it does nothing to solve the problems of personal jurisdiction doctrine that were created by the very cases that he embraces. Although he reached a result and made assertions about fairness and connections with the forum, those claims were not grounded in any specific theory of the interests that personal jurisdiction serves.

Tension may be inherent in personal jurisdiction doctrine. But doctrinal tensions ought to grow out of the effort to accommodate or

¹¹⁸ As Allan Erbsen has observed, “commentators by near ‘consensus’ routinely deride [pre-*Nicastro*] doctrine as ‘unacceptably confused and irrational,’ ‘convoluted and arcane,’ ‘in chaos,’ ‘half-baked,’ ‘precarious,’ and ‘plagued’ by ‘ambiguity and incoherence.’” Erbsen, *supra* note 42, at 5 (footnotes omitted).

balance interests that are actually present in specific cases. Current doctrine fails to meet this standard, and *Nicastro*—especially Justice Kennedy’s opinion—compounds the failure.

IV. PERSONAL JURISDICTION AS A FUNCTION OF LEGITIMATE STATE INTERESTS AND REAL BURDENS

Various majorities and pluralities of the Court have advanced ever more complicated variations on the theme of purposeful availment. Their search for clarity and for meaningful limits on state power is sensible. Equally sensible is the notion at the heart of the contemporary reasonableness approach: that personal jurisdiction should reflect “the fundamental transformation of our national economy over the years,”¹¹⁹ including the “marketing arrangements . . . [that are] common in today’s commercial world.”¹²⁰ But the specific results of the search for clarity and limits do not add up to a sensible doctrine, and the concerns of the reasonableness approach do not exhaust the concerns of due process in general.

When a plaintiff sues a defendant in a particular forum, many considerations will play a role in the choice of that forum. They range from such things as a simple desire to sue either in the plaintiff’s home jurisdiction or where the harm took place, to obtain the benefit of favorable law, all the way to the desire to burden or prejudice the defendant. Defendants understandably seek to frustrate the plaintiff’s choice and to substitute a more favorable forum. Venue doctrines, including removal, transfer, and forum non conveniens, provide some help, and other “procedural devices” are also available to defendants.¹²¹ Often, however, these doctrines and devices will fail, and the defendant will be stuck with the plaintiff’s choice of forum.

Should the Constitution police this process and, in particular, should courts use personal jurisdiction doctrine to protect defendants from forum shopping and inconvenience? Unless one is simply convinced that the Constitution requires a particularly strict approach to jurisdiction—something along the lines of *Pennoyer v. Neff*’s focus on territory, property, and domicile¹²²—it is difficult to see why courts should do very much to limit personal jurisdiction. Even if a defendant is subject to personal jurisdiction in an undesirable forum, other legal doctrines exist to ensure that the resulting legal proceedings are fair. Even if a court has

¹¹⁹ *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

¹²⁰ *Nicastro*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting).

¹²¹ *Burnham v. Superior Court*, 495 U.S. 604, 639 & n.13 (1990) (Brennan, J., concurring in the judgment). For a good example of defendants’ use of these doctrines to whittle away at the plaintiff’s choice of forum, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

¹²² *Pennoyer v. Neff*, 95 U.S. 714, 723–24, 727 (1878).

power over an unwilling party, in other words, its power is bounded, not plenary.

But the conclusion that personal jurisdiction doctrine does not need to do very much is only a first step. That conclusion says little about the relatively small set of circumstances in which personal jurisdiction ought to limit the power of courts. A more complete answer requires, first, identification of the constitutional doctrines that personal jurisdiction implicates and, second, application of those doctrines to explain when and why courts must refuse to exercise jurisdiction over a particular defendant.

According to the Supreme Court, contemporary personal jurisdiction doctrine is exclusively a matter of due process.¹²³ Outside the context of personal jurisdiction, the Court has developed two tests for due process issues. For substantive due process, the test is reasonableness—that is, a rational relationship to a legitimate state interest—unless a fundamental right is involved (and the Court has never indicated that personal jurisdiction implicates a fundamental right). For procedural due process the basic test is fundamental fairness.¹²⁴ Under these standard tests, a court should be able to exercise jurisdiction over a defendant if (1) there is a legitimate or rational basis—such as a forum state interest—for suing the defendant in the chosen forum,¹²⁵ and (2)

¹²³ The minimum contacts test for state court assertions of personal jurisdiction (and federal court assertions in most civil cases as well) derives from Fourteenth Amendment due process. *See* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982); *see also Nicaastro*, 131 S. Ct. at 2786 (plurality opinion) (framing the issue as arising under the Due Process Clause). By contrast, the more relaxed test for federal court assertions of personal jurisdiction in federal question cases in which Congress has provided for nationwide service of process—which is not the topic of this Article—derives from Fifth Amendment due process. *See* 4 WRIGHT & MILLER, *supra* note 14, § 1068.1. It is worth noting the obvious role that federalism has in separating these two different categories of personal jurisdiction.

¹²⁴ *See* Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 577–79 (1995) (outlining generally accepted tests for ordinary procedural and substantive due process interests); Weinstein, *supra* note 42, at 232–40 (assessing personal jurisdiction doctrine under procedural and substantive due process analyses); *see also* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 113 (1999) (“Due process has both procedural and substantive dimensions . . . and it is not easy to locate the law of personal jurisdiction exclusively in either.”); Cameron & Johnson, *supra* note 3, at 841 (suggesting that rational basis review is appropriate for legislative decisions to allow state courts to exercise personal jurisdiction in particular classes of cases); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 948 (1995) (arguing personal jurisdiction is only an issue when there is “procedural unfairness,” such as “unfair surprise or meaningful procedural inconvenience”).

¹²⁵ For essentially the same point, *see* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 738 (1987) (“[J]urisdiction should be evaluated by reference to the state’s legitimate sphere of authority vis-à-vis other states . . .”); *id.* at 747 (“[J]urisdictionally significant contacts . . .

the course of proceedings—including the burden on the defendant of litigating in that forum—will be fundamentally fair.¹²⁶

The first question requires a deferential assessment of the connection(s) among “the defendant, the forum, and the litigation”¹²⁷ that is similar to the “modest restrictions” that due process (and full faith and credit) place on a forum’s decision to apply its own law.¹²⁸ The second question is a more open-ended but also deferential inquiry into the likelihood that the proceedings will be fundamentally fair to the defendant. At the core of this inquiry is the inconvenience, if any, caused by crossing a border (or several borders), but because fundamental fairness turns on the specifics of each case,¹²⁹ there is no reason for the inquiry to be narrow even if the ultimate assessment is deferential.¹³⁰ It could include, for example, some inquiry into whether the defendant had any reason to anticipate litigation in that forum. And, because the interests of the opposing parties are linked—both because they each have interests in the underlying transaction and because any choice of forum will impact all parties—the fairness analysis can also include an assessment of the plaintiff’s interests.¹³¹

Due process protection of liberty interests requires nothing further, and under these tests the exercise of personal jurisdiction would be appropriate in all or nearly all of the cases in which the Supreme Court has held that it was inappropriate. This divergence of result between standard due process analysis and the actual outcomes of Supreme Court personal jurisdiction cases leads to three possible conclusions: (1) personal jurisdiction doctrine requires radical change that would remove most obstacles to state court jurisdiction over out-of-state defendants; (2) due process has additional content in personal jurisdiction cases that

are those that demonstrate a forum state interest in regulating the conduct at issue in the underlying cause of action.”).

¹²⁶ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

¹²⁷ See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

¹²⁸ *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818–19 (1985). The choice of law test is that, “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion). As the *Phillips* Court noted, “The dissenting Justices [in *Allstate*] were in substantial agreement with this principle.” *Phillips Petrol. Co.*, 472 U.S. at 818–19. For more discussion of this issue, see *infra* note 143.

¹²⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

¹³⁰ *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

¹³¹ See *Mathews*, 424 U.S. at 335 (holding that an assessment of due process relating to government action requires consideration of the government interest and the individual interest); see also *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (modifying the *Mathews* test in the context of prejudgment seizure to focus on the competing interests of private litigants).

generates further restrictions on personal jurisdiction; or (3) some other constitutional principle is also at work. Although I sympathize with the first option, I suspect that the third is most likely to be correct. Something else in the Constitution, other than due process, provides a basis for further restrictions on personal jurisdiction. The most obvious principle is federalism.¹³²

Many commentators and justices—including Justice Ginsburg in *Nicastro*—have rejected or minimized the role that federalism plays in personal jurisdiction, in favor of a due process approach.¹³³ But due process and federalism are not entirely separate. Fourteenth Amendment due process exists to address unfairness imposed by a state,¹³⁴ and it is both a source of individual rights and a limit on the powers of state sovereigns that exist within a larger federal structure.¹³⁵ Under current doctrine, moreover, personal jurisdiction is not a constitutional issue when the defendant is a resident of the forum, no matter how inconvenient the specific in-state venue may be. Personal jurisdiction is a due process issue only when a person is required to litigate in the courts of a state with which he or she claims to have no meaningful connection.¹³⁶

In other words, personal jurisdiction as a doctrine of Fourteenth Amendment due process depends on the existence of state borders within a federal system. And, as Allan Stein has explained, by protecting individual rights in relation to the power of a specific state, due process also “protects the sovereign interests of other states.”¹³⁷ The question is

¹³² And, of course, a fourth conclusion is possible—that doctrine has little to do with the results in these cases because they turn on other, extraneous factors. Cf. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (arguing the Rehnquist Court’s jurisprudence can be explained by reference to an underlying hostility toward litigation as a mechanism for administering justice).

¹³³ See, e.g., Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1112–37 (1981) (arguing due process doctrine has no place for federalism in the context of personal jurisdiction, that due process concerns only individual state relations, and that federalism is relevant, if anywhere, to choice of law).

¹³⁴ Cf. *The Civil Rights Cases*, 109 U.S. 3 (1883) (elaborating the state action doctrine for the Fourteenth Amendment).

¹³⁵ In Hohfeldian terms, due process operates both as a personal immunity from certain forms of government conduct and a corresponding disability on the power of state governments. See Allen Thomas O’Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141, 159 (2009).

¹³⁶ Allan Erbsen argues along similar lines to establish the importance of state borders, and therefore of federalism, for personal jurisdiction law, but I am less willing than he is to dismiss individual due process interests. See Erbsen, *supra* note 42, at 38–60. My analysis comes closer to that of James Weinstein, who argues for a mix of due process and “federal common law designed to vindicate constitutional structure.” Weinstein, *supra* note 42, at 265.

¹³⁷ Stein, *supra* note 125, at 711; see also Weinstein, *supra* note 42, at 219–22 (agreeing that due process serves this function but also arguing that due process is

whether the consequences of crossing state borders are sufficiently important to require additional federalism safeguards. The Supreme Court's continued search for restrictions that go beyond those of minimal due process indicates a collective judgment that more is necessary. Although one could certainly determine that this conclusion is mistaken, it gains at least some support from full faith and credit—from the idea that, once a court gains personal jurisdiction and renders a judgment against a defendant, every other court in the nation is bound to give effect to that judgment. That is to say, the effects of a judgment rendered under a minimal due process standard do not just impact the rights of the particular defendant. They also impact the interests of the forum state, the interests of other states, relations among states, and constitutional structure.¹³⁸

Deciding that federalism is relevant to personal jurisdiction and that it supports restrictions that go beyond the minimum of due process does not mean, however, that one must go as far as Justice Kennedy's *Nicastro* plurality (or even as far as Justice O'Connor's *Asahi* plurality). Federalism requires respect for state powers, interests, and borders, but it does not fetishize those things; nor does it mandate obeisance to ideas about the territorial nature of state power that are inconsistent with the realities of contemporary commercial life and regulatory practices.¹³⁹ Personal jurisdiction doctrine must recognize these facts even as it imposes some restraints on state courts. Moreover, the *Nicastro* plurality's attempt to force rigid federalism ideas into a due process analysis is particularly misguided, because the rule it sought to create would harm plaintiffs without any concern for the substance of their cases or the relative burdens of litigation—which hardly seems consistent with the core due process idea of fundamental fairness.

Justice White's majority opinion in *World-Wide Volkswagen* provides a source of federalism constraints that are much more modest. First, Justice White's federalism analysis centered on the idea that each state's sovereignty is limited by that of the other states.¹⁴⁰ Second, as James Weinstein has noted, two of the fairness factors that Justice White

inadequate by itself as a basis for personal jurisdiction doctrine because it cannot incorporate all of the federalism aspects of the doctrine).

¹³⁸ For a lengthy exploration of the connections between full faith and credit and the development of personal jurisdiction doctrine, see generally Weinstein, *supra* note 42.

¹³⁹ For example, despite Justice Kennedy's apparent suggestion to the contrary, the states have authority to regulate extraterritorially, either legislatively or through judicial decisions, particularly when they attempt to reach conduct outside the state that has effects within the state. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. k (1987) ("Subject to constitutional limitations, a State may exercise jurisdiction on the basis of territoriality, including effects within the territory, and, in some respects at least, on the basis of citizenship, residence, or domicile in the State.").

¹⁴⁰ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–94 (1980).

articulated have much more to do with federalism than with due process: “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”¹⁴¹ Taken together, but also held separate from the rest of *World-Wide Volkswagen*, these ideas suggest the need to go beyond due process even as they fall short of requiring “purposeful availment.” They buttress the idea that, to go forward with the litigation at all, a state must have a legitimate interest in providing a forum.¹⁴² Even more, they support an additional requirement that a court decline jurisdiction when its basis for jurisdiction is minimal and another state has a significantly stronger interest.

In brief, personal jurisdiction doctrine should reflect basic due process doctrine supplemented by federalism values. An appropriate standard is something like the following: a state court may presumptively exercise jurisdiction over non-consenting defendants who know or ought to know that their voluntary acts or omissions, and/or the effects of those acts or omissions, implicate the legitimate regulatory interests of the forum state, unless the defendant demonstrates that (1) the forum state’s interests in the litigation are minimal and significantly outweighed by those of another state or (2) the burdens on the defendant would make litigation in that forum significantly unfair in relation to another available forum and the potential burdens on the plaintiff.¹⁴³

¹⁴¹ *Id.* at 292; *see also* Weinstein, *supra* note 42, at 227–29. Weinstein also noted that the *Asahi* Court’s reference to “the Federal government’s interest in its foreign relations policies” implicates constitutional structure—in this instance vertical federalism rather than horizontal federalism. *See id.* at 229–30 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987)).

¹⁴² The forum state’s interest is already one of the fairness factors. *See* Weinstein, *supra* note 42, at 227–29.

¹⁴³ I chose the word “significant” to invoke something more than the relaxed scrutiny of rational basis review but also something well short of intermediate scrutiny. My use of “significant” also aligns my proposal with the language of the due process test for evaluating a forum’s application of its own law to a controversy, which also turns on “significant” interests arising out of contacts. *See supra* note 128; *see also* Stein, *supra* note 125, at 740–42 (arguing for convergence between personal jurisdiction and choice-of-law analysis in terms that are fairly similar to my proposal). Whether there is much meaningful force to the choice-of-law test is quite another question. My goal for personal jurisdiction is a modest yet more than minimal standard of review, and I would not object to a similar development of the choice-of-law standard. Note that *Asahi*’s reference to vertical federalism, *see supra* note 141, suggests the basis for a similar rule where another country has a significantly stronger interest. Yet I would hesitate before concluding that the issues surrounding national borders are no different from those surrounding state borders. Perhaps, for example, personal jurisdiction should be appropriate so long as the forum state has a significant interest, without regard to whether another country has a significantly stronger interest. At the very least, I would argue for a more detailed examination of the relevant benefits and burdens on plaintiff and defendant in a case such as *Nicastro*. *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (articulating a ten part test for forum-non-conveniens analysis, which in the federal system is a decision that involves national borders).

My goal with this standard is to articulate relatively modest constitutional constraints that step back from the purposeful availment requirement without sliding all the way to the nearly toothless reasonableness test endorsed by Justices Brennan and Ginsburg. I also hope that application of this standard would clarify and simplify personal jurisdiction analysis. But the proposal is not perfect. It could be applied, for example, in ways that further undermine the predictability of personal jurisdiction decisions. To avoid such a result, courts would have to focus on the presumption that personal jurisdiction is appropriate in a forum that has legitimate interests in the litigation and on the defendant's burden of proving that these modest constitutional constraints require displacing that presumption.

Whatever the flaws in this approach, it manages to avoid the extremes of the *Nicastro* opinions, and it would uphold New Jersey's assertion of personal jurisdiction in that case. New Jersey has an obvious interest in adjudicating the effects in New Jersey of J. McIntyre's allegedly defective product, and no other state appears to have a significantly greater interest.¹⁴⁴ There is no apparent burden to J. McIntyre in having to litigate in New Jersey, as opposed to some other state. By contrast, forcing *Nicastro* to go to Ohio or the United Kingdom will almost certainly impose disproportionate burdens on him.

As for other recent Supreme Court specific personal jurisdiction cases, I think the results in *Burger King* and *Burnham* would be the same, although the analysis would be more straightforward than Justice Brennan's in those cases (although, admittedly, not as straightforward as Justice Scalia's).

By contrast, *Asahi* might come out differently. Had the plaintiff in that case named *Asahi Metal Industries* in the complaint, it would be difficult to articulate a convincing argument that California had no legitimate interest in adjudicating whether *Asahi's* allegedly defective product injured the plaintiff. The actual case arose in the context of an indemnification claim, however, and California's interest in that issue was not as strong (although it arguably still had a general interest in safety standards), and one easily could conclude that Japan and Taiwan had stronger interests.¹⁴⁵ Importantly, however, Justice O'Connor's purposeful availment analysis swept more broadly than the indemnification context and would also foreclose jurisdiction if the plaintiff had named *Asahi* in the complaint. The test I am proposing, by contrast, would allow personal jurisdiction in that situation, but my analysis of *Asahi* also suggests the qualification that the forum's interests in the litigation should be articulated with some level of specificity and

¹⁴⁴ The United Kingdom also has an obvious interest, but that interest does not clearly outweigh New Jersey's interest, and my sense is that the burden that J. McIntyre faces in making such a showing should be higher when the result would force the litigation outside the United States. *See supra* note 143.

¹⁴⁵ *See Asahi*, 480 U.S. at 115.

with reference to the actual claims of the party or parties invoking the forum's jurisdiction.¹⁴⁶

World-Wide Volkswagen, as ever, is the hard case. Note that in the wake of *Goodyear*, personal jurisdiction over all of the defendants in that case probably would have to be specific.¹⁴⁷ But one can certainly argue that the effects in Oklahoma of Audi's actions gave that state a legitimate interest in adjudicating the claim against Audi, that the interest was not significantly outweighed by those of another state, and that the burdens of litigation in Oklahoma were not significantly unfair in relation to the available forums and the potential burdens on the plaintiff.

Given the nature of the claims in the case, however—"defective design and placement of the Audi's gas tank and fuel system"¹⁴⁸—the state's interest in adjudicating the claims against the importer Volkswagen USA, the regional distributor World-Wide Volkswagen, and the upstate New York dealer Seaway would steadily decrease, and the burden on each defendant would steadily increase. I conclude that personal jurisdiction is appropriate for the importer precisely because of its role in bringing Audis to the United States. For the distributor and dealer, however, there was no indication that their acts or omissions, or the effects of those acts of omissions, supported more than a minimal interest, if that, on the part of Oklahoma courts in exercising jurisdiction over them with respect to a product defect claim. These two parties also faced more of a litigation burden than did the other two defendants,¹⁴⁹ and there was little harm to the plaintiff because the product defect claim could proceed without World-Wide or Seaway (although their absence made the case removable).¹⁵⁰ Had there been additional claims, for example about negligent repair work, the result could well be different because the effects of Seaway's conduct would have been felt in Oklahoma, and there would be at least an arguable, although hardly

¹⁴⁶ With respect to the reasonableness inquiry in that case, the Court focused on distance and forced adjudication in a foreign legal system (in addition to the relative interests of California, Japan, and Taiwan). *See id.* at 114–15. It is not at all clear that litigation in California would be fundamentally unfair without more information about how the case would proceed in California versus another forum. As for the concern about adjudication in a foreign forum, *Asahi* was presumably already at risk of litigating in Taiwan instead of Japan, so it is unclear how the substitution of California as a forum heightens that inconvenience.

¹⁴⁷ *See supra* notes 5–6 and accompanying text.

¹⁴⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

¹⁴⁹ But note that there is at least some reason to believe that Audi and Volkswagen of America would have continued to represent Seaway and World-Wide in the litigation. *See* Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122, 1139 (1993).

¹⁵⁰ *See id.* at 1128–30, 1143 (noting the decision to sue Seaway and World-Wide was based on a desire to defeat diversity jurisdiction in federal court, that defendants sought unsuccessfully to remove the case before the rulings on personal jurisdiction, and that the remaining defendants successfully removed the case after the Supreme Court's decision).

conclusive, basis for determining that Seaway knew or should have known that its negligent conduct would have out-of-state effects.¹⁵¹ In other words, and as Justice White certainly understood in that case, a knowledge-and-interest-based standard is more open to jurisdiction than a purposeful-avilment-based standard.

Finally, and more generally, an interest-and-fairness-based test is also consistent with *International Shoe*, which requires only that a defendant have “minimum contacts” with the forum—not ideal, extensive, or even intentional contacts—such that the assertion of jurisdiction is consistent with “traditional notions of fair play and substantial justice.” A legitimate interest based in acts or effects satisfies the literal terms of “minimum contacts.” The phrase “traditional notions of fair play and substantial justice” can support several interpretations, one of which—perhaps the best—is as roughly equivalent to “fundamental fairness.” One might even argue that this notion of a rough equivalence comes close to what Justice Breyer was trying to articulate in portions of his *Nicastro* concurrence.

V. SOVEREIGN COURTS, SUBMISSIVE CITIZENS, AND THE METROPOLE

A. *Justice Kennedy’s Rhetoric of Sovereignty, Submission, and Rights*

Justice Kennedy’s plurality opinion in *Nicastro* repeatedly refers to the defendant’s appearance in court, or its decision to engage in conduct that constitutes purposeful avilment, as “submission to a State’s authority,” where this act of submission establishes “that the sovereign has the power to subject the defendant to judgment.”¹⁵² This insistent and unusual repetition functions doctrinally to demonstrate the importance of purposeful avilment, but it also communicates larger ideas about judicial power and citizenship.

By characterizing the defendant’s relationship to a court as submission to a sovereign, Justice Kennedy asserts, first, the formality of judicial power as something not invoked lightly or accidentally and, second, its majesty as a manifestation of sovereignty. Judicial authority, once properly invoked, is something that overrides the parties and is

¹⁵¹ Deciding such a case might require evaluation of the relative burdens, which would be difficult, and which also was an issue the Supreme Court did not address. Note that Allan Stein’s interest-based analysis of *World-Wide Volkswagen* suggests that “Oklahoma had an important interest in regulating the quality of automobiles used within the state, and its assertion of jurisdiction over the defendants would have directly advanced that interest.” Stein, *supra* note 125, at 755. He explains that, “on balance, Oklahoma should have some say over tortious conduct in New York that caused serious and foreseeable injury in Oklahoma.” *Id.* I have no quarrel with that conclusion, but it is worth noting that it fits much better with my hypothetical negligent repair claim than with the product defect claim that was actually at issue in *World-Wide Volkswagen*.

¹⁵² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787–2789 (2011); *see also supra* note 74.

superior to them; it is not something to which one relates with any kind of equality. Nor is it a surprise that a stress on sovereignty and on the formality and majesty of judicial power would be important themes in Justice Kennedy's opinion. Among other things, he wrote the majority opinion in *Alden v. Maine*, which declares that the states possess "the dignity and essential attributes" of sovereignty, such that their "immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."¹⁵³ He also wrote for the majority in *City of Boerne v. Flores*, which took a dim view of congressional efforts to assert reasonable interpretations of the Constitution.¹⁵⁴ And, he was one of the authors of the joint opinion in *Planned Parenthood of Southeast Pennsylvania v. Casey*, which advanced an aggressive and exalted view of the Supreme Court's role in American political life.¹⁵⁵

In *Nicastro*, Justice Kennedy's rhetoric is, if anything, more forceful than in other cases, perhaps because he is reinforcing the scope and nature of judicial power even as he constrains it in that case. Put somewhat differently, however, *Nicastro* stands for the proposition that, although judicial power may only be invoked and exercised consistent with certain formalities that make it "lawful judicial power,"¹⁵⁶ one must submit to a court's sovereign authority and become its subject once those formalities are satisfied.

This version of the court-litigant relationship also suggests an interesting function for legal rights. The defendant who has submitted to judicial authority—whether voluntarily or not—can only relate to the court from a position of weakness that is in tension with the ability to demand one's rights. On the one hand, of course, one of the chief functions of rights is precisely to protect an individual from the otherwise arbitrary power of the sovereign. Perhaps, then, this position of weakness is neither new nor a matter of concern so long as the court accepts legitimate claims of right and is bound by general notions of fundamental fairness. On the other hand, by the very nature of his or her submission, the defendant has no legitimate expectation that any particular rights will be granted; the sovereign court's decision to recognize a litigant's rights is simply an act of discretion, which suggests a very different function for legal rights. Rather than being claims or obligations that the court must recognize, they become factors that the sovereign considers when making its discretionary decisions. The person who is subject to a court's jurisdiction, in short, is simultaneously a rights-bearing individual who participates fully and equally in political life in a regime of popular sovereignty (at least somewhere), and a submissive

¹⁵³ *Alden v. Maine*, 527 U.S. 706, 713–14 (1999).

¹⁵⁴ *City of Boerne v. Flores*, 521 U.S. 507, 516, 519, 529 (1997).

¹⁵⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865–69 (1992) (plurality opinion).

¹⁵⁶ *Nicastro*, 131 S. Ct. at 2785.

subject on which the authoritarian (judicial) sovereign exercises its power.¹⁵⁷

This rhetoric of sovereignty and submission—and my interpretation of it—intersects unevenly with Justice Kennedy’s other discussions of consent and political authority. Consider the following passage from *United States v. Drayton*, a case in which police officers boarded a bus and asked passengers to consent to searches of their bags, without also informing them that they had the right to refuse:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.¹⁵⁸

In *Drayton*, consent came easy because, according to the Court, there was nothing to fear from police authority. Even more, consent or waiver of rights was the preferred option, in contrast to exercising them. One might even conclude that waiver was almost a responsibility, a marker of

¹⁵⁷ Not surprisingly, therefore, I disagree with the claim that Justice Kennedy’s emphasis on submission to sovereign authority reflects the political theory of the Lockean social contract. See Rhodes, *supra* note 7, at 415–17. Locke did state that persons temporarily within the territory of a state have submitted to the sovereign power of that state, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT ¶ 119, at 348 (Peter Laslett ed., Student ed. 1988) (1690), and one could relate that statement to the idea of purposeful availment. But the idea of sovereign power over people within the territory of a state, even when those people are not citizens of that state, is not central to the social contract, except as a contrast to the way power operates among members of the commonwealth. The stranger, for Locke, is not a party to the social contract and has few political rights, precisely because he or she is not part of the commonwealth. See *id.* ¶ 122, at 349. The relationship between the stranger and the commonwealth, in short, is more authoritarian and more linked to the relations between people in the state of nature than it is to the social contract relationship that reflects but also constitutes liberal individualism. See *id.* ¶¶ 8–10, at 272–73 (asserting that the power of a “Prince or State” to “punish an Alien, for any crime he commits in their Country” derives from natural law). Nor is this idea original to Locke or necessarily linked to his version of the social contract. See HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 137 (Martine Julia van Ittersum ed. 2006) (circa 1606, first published 1886); see also RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 82 (1999) (describing Grotius’s and Locke’s identical views as “one of the most striking examples of intellectual convergence”); *id.* at 89 (asserting Grotius’s description of sovereign power over strangers indicates he was a “good humanist”). To be sure, the fact that this marginalization of the stranger helps to define liberal citizenship is a familiar and important point; it is also consistent with my analysis of the ways in which Justices Kennedy and Breyer framed their discussions.

¹⁵⁸ *United States v. Drayton*, 536 U.S. 194, 197–98, 207 (2002).

full, law-abiding citizenship.¹⁵⁹ Finally, although the language of *Drayton* seems to describe liberal individuals freely consenting to official authority, the result, again, is clearly submission.¹⁶⁰

Together, *Drayton* and *Nicastro* reinforce the idea of a steeply hierarchical relationship between the sovereign state in its police or judicial forms and the submissive citizen. The two cases are not entirely consistent, however. In *Drayton* an individual easily waived his constitutional rights in the shadow of police authority, while in *Nicastro* a corporation's efforts to sell its products in the United States could not defeat its objections to jurisdiction in one of the states to which its products were distributed. This apparent tension in the meanings and operations of consent suggests another way to interpret Justice Kennedy's rhetoric. Instead of the articulation of a political theory, his deployment of ideas such as "consent" and "sovereignty" may be entirely strategic, with the result that consistency must come not from doctrinal statements but rather, if at all, from the underlying goals and interests that he is trying to balance and achieve.¹⁶¹ One might conclude, of course, that this is exactly how a sovereign operates, but one would also have to admit that this conclusion runs contrary to popular notions of what the Constitution and the rule of law are supposed to accomplish.

B. Justice Breyer and the Metropole

In his concurring opinion, Justice Breyer expressed concern for people who might unfairly be subjected to personal jurisdiction in state courts if the Court abandoned the purposeful availment test. He gave four examples: "an Appalachian potter[] who sells [a] product" to a distributor, as well as "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors."¹⁶²

This is an extraordinary list. When choosing locations and assigning particular activities to the residents of those locations, Justice Breyer's

¹⁵⁹ For additional discussion of *Drayton* along these lines, see John T. Parry, *Rights and Discretion in Criminal Procedure's "War on Terror,"* 6 OHIO ST. J. CRIM. L. 323, 327–33 (2008).

¹⁶⁰ Perhaps this is an example of a social contract at work, see *supra* note 157, but the result of the contract is more discipline than liberty.

¹⁶¹ This interpretation—that Justice Kennedy's use of sovereignty is strategic—could also explain the apparent tension between Justice Kennedy's opinion in *Nicastro* and his majority opinion in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which has been celebrated as proof that "[s]overeignty is no longer absolute, territorial, and sacred." David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 61. For the argument that "the supposed fragmentation of territorial sovereignty in *Boumediene* is itself strategic," see John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2028–29 (2010).

¹⁶² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793–94 (2011) (Breyer, J., concurring in the judgment).

opinion advances a set of assumptions about national or regional characteristics. What kinds of citizens are in what countries or states? There are potters in poor, rural Appalachia, shirt makers in Egypt (presumably using cotton), manufacturing cooperatives in Brazil (socialism meets capitalism in a developing South American melting pot?), etc.

But even as the opinion valorizes these borders and differences, it also subverts them. The various examples are embedded in an international economic and class structure of core and periphery. The people in the examples are farmers, workers, or artisans who make a commodity or product on a relatively small scale. They consign that product to someone else, a distributor, who takes the product to another location, where it is sold to consumers. They do not, in Justice Breyer's telling, have any control over the fruits of their labor; nor, presumably, do they receive the full exchange value of their product.¹⁶³ The product, that is, works its way from worker to distributor to purchaser, from the periphery to the center or metropole. The inclusion of the Appalachian potter confirms that borders are only part of this story. The United States is at the center; it is the imperial power toward which producers in other countries direct their activities, but the same structure repeats itself within the United States. Even within the center, there is core and periphery; only portions of it qualify as the metropole. (And perhaps the unstated corollary is that the metropole is not confined to parts of the United States, so that borders again become complex in a global economic system.)

Importantly, moreover, Justice Breyer is arguing that these producers in far-off places (whether culturally or geographically) need and deserve protection. If one's activities are defined as peripheral, one loses agency in relation to the center. One cannot be held responsible for the intended consequences of one's actions, because one cannot really know what might happen at the center; one cannot control it and, therefore, one simply does not have relevant intentions at all. Accordingly, it becomes the task of someone else—some well-intentioned and enlightened portion of the residents of the metropole—to act on behalf of the producers, to shelter and protect them. Even more, this protection—which in Justice Breyer's *Nicastro* concurrence takes the form of fairness analysis under the rubric of due process—also requires altruism on behalf of the center, the willingness to bear certain costs in order to create a stable distribution of benefits and burdens.

In the aggregate, the distribution of benefits and burdens clearly favors the metropole. The surplus value of consumer products flows to the center, even as the benefits of a global distribution network raise the

¹⁶³ It is tempting to suggest that Justice Breyer is asking readers to draw the conclusion that the people in his examples are alienated from their labor. See Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 66, 70–81 (Robert C. Tucker ed., 2d ed. 1978).

producers' standard of living. But even in the center, there are workers and consumers, and Justice Breyer ultimately cast his vote in favor of J. McIntyre, a British manufacturing company that sells its products in many countries, and against Nicastro, a New Jersey scrap metal worker, who may end up with no remedy for the severe injuries to his hand. Adjusting and managing the global system thus requires self-sacrifice and altruism from those at the center, but even in the center the costs are not evenly distributed, such that one might conclude the metropole is not a geographic entity at all but is instead a cosmopolitan network of various elites who assign costs but do not bear them.

As I hope is obvious, my goal is not to criticize a fairness or reasonableness analysis, let alone to argue that in fact the people in Justice Breyer's examples must be subject to personal jurisdiction in specific cases.¹⁶⁴ My insistence is, instead, that when courts analyze jurisdiction with respect to such defendants, they should not approach them with a well-intentioned understanding of differences that also undermines their agency relative to the center. Put more bluntly, the approach I am criticizing is simply another assertion of sovereignty. And, in its blend of the cosmopolitan and the metropole, it is perhaps even more pernicious.

VI. CONCLUSION

At a time when commentators are discussing the fragmentation of citizenship and subjecting the idea of nation, sovereign, and territoriality to nuanced and critical analysis,¹⁶⁵ Justices Kennedy and Breyer have advanced theories of personal jurisdiction that harken back, in very different ways, to older understandings of these relationships. If due process is about tradition, as Justice Scalia has argued,¹⁶⁶ then the implicit Breyer–Kennedy debate is one that must continue, whatever the normative implication may be. But if due process is a doctrine of adjustment, a standard that adapts to actual facts and circumstances, then Justice Ginsburg's general approach is the better option. Although her

¹⁶⁴ For distinctions between the people in Justice Breyer's examples and companies such as J. McIntyre, see Rhodes, *supra* note 7, at 420–21. It is worth noting that, no matter what rule one adopts, it is unlikely that these producers will be shielded from liability or some kind of consequences at the end of the day. If distributors or retailers end up bearing the cost of litigation, and if there is a problem with the commodity or product—and perhaps even if there is not—they likely will find a way to shift at least a good portion of those costs to the producers.

¹⁶⁵ See, e.g., PHENG CHEAH, *SPECTRAL NATIONALITY: PASSAGES OF FREEDOM FROM KANT TO POSTCOLONIAL LITERATURES OF LIBERATION* (2003); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009); SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006); PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008).

¹⁶⁶ See *supra* text accompanying note 19.

Nicastro analysis leans too heavily on a particular approach to reasonableness, it nonetheless makes room (or easily could be altered to make room) for an assessment of the interests that personal jurisdiction implicates, and it avoids the traps that Justices Breyer and Kennedy have laid for themselves. If, at the end of the day, the diverging opinions of the justices in *Nicastro* clear the ground for an honest debate about personal jurisdiction doctrine, free of preconceived notions that are untested or have not stood the test of time, then there is reason to hope.