

**IF IT WASN'T ON PURPOSE, CAN A COURT TAKE  
IT PERSONALLY?: UNTANGLING *ASAHI*'S MESS  
THAT *J. MCINTYRE* DID NOT**

Comment\*

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I. SKETCHING THE INCOHERENCE OF PERSONAL JURISDICTION ANALYSIS

A coffee connoisseur in West Texas searches Google for a pound of Sulawesi wet-processed Toraja beans at a city roast. Because of the keywords associated with the connoisseur’s search, Google AdWords

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displays an ad for an artisan-crafted espresso machine from a retiree in Florida. Feeling tired of his current Chemex brew pot, the connoisseur clicks the ad and finds himself on Amazon.com (the retiree-artisan had provided a short run of his machines to a consortium of local artisans that sell through Amazon.com). The connoisseur views the specs, Googles some forum-user reviews, and pulls the trigger.

When the machine arrives, the connoisseur excitedly begins pulling his first shot of espresso. Unfortunately, a weld on the boiler snaps, causing an explosion of steam that sears the connoisseur's face. Although the connoisseur's burns recover superficially, the connoisseur permanently loses his sense of taste.

Bitter, the connoisseur contacts an attorney. In their first meeting, the connoisseur demands that the attorney sue the retiree-artisan because the connoisseur wants the retiree-artisan held responsible. The attorney immediately dreads this request. The attorney knows that obtaining personal jurisdiction<sup>1</sup> over the retiree-artisan will require showing the existence of the retiree-artisan's "minimum contacts" with Texas to ensure that "traditional notions of fair play and substantial justice" are not offended.<sup>2</sup> Could the retiree-artisan have targeted a specific forum through something as geographically ubiquitous as Amazon.com and a keyword-based online advertisement?<sup>3</sup>

The attorney also knows that twenty-first century commercial practices are not alone in complicating personal jurisdiction analysis. Twenty-five years ago, the Court issued two fractured plurality opinions in *Asahi Metal Industry Co. v. Superior Court of California*.<sup>4</sup> *Asahi's* two plurality opinions advocated two markedly different standards to determine when courts may exercise jurisdiction over nonresident defendants whose ties to the forum arise through the "stream of commerce."<sup>5</sup> Despite the fractured

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1. For ease of reading, this Comment will employ the generic term "personal jurisdiction" to stand in for the more nuanced term "specific personal jurisdiction."

2. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

3. *Cf. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring) ("But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) . . . ?"); *About Amazon*, AMAZON, <http://www.amazon.com/Careers-Homepage/b/?ie=UTF8&node=239364011> (last visited Oct. 8, 2012) (describing how Amazon.com allows manufacturers of varying sizes to reach customers throughout the globe); GOOGLE ADS, <http://www.google.com/ads/adwords2> (last visited Oct. 2, 2012) ("[C]reate your ads and choose keywords, which are words or phrases related to your business.>").

4. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987) (plurality opinion).

5. *Compare id.* at 112 ("[P]lacement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."), *with id.* at 117 (Brennan, J., concurring) (holding that placement of a good into the stream of commerce that results in a sale in a forum state indirectly benefits the foreign defendant of the privileges of doing business in that state, and thus, exercising jurisdiction over the foreign defendant does not necessarily violate the Due Process Clause).

pluralities *Asahi* generated, the Court did not weigh in on personal jurisdiction again until June 27, 2011, in *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>6</sup> During this twenty-five year interim, lower courts grappled with which plurality opinion defined the proper constitutional standard.<sup>7</sup> Moreover, lower courts not only have grappled with the *Asahi*-split but have also fashioned personal jurisdiction analyses to deal with contacts created via the Internet—without any guidance from the Court.<sup>8</sup>

Although the attorney is quickly developing a headache, she then remembers that with complete diversity she can file in federal court.<sup>9</sup> This allows the attorney to escape Texas's more stringent minimum contacts analysis compared to that of the Court of Appeals for the Fifth Circuit's precedent, which adheres to Justice Brennan's *Asahi* plurality's less stringent minimum contacts analysis.<sup>10</sup> The attorney also knows that because *J. McIntyre* lacks a majority opinion, Justice Kennedy's federalism-laden purposeful availment test does not constitute mandatory authority on any court in the Fifth Circuit.<sup>11</sup> But then the attorney soon discovers that a split of authority has already developed on the impact *J. McIntyre* has in the Fifth Circuit, despite its lack of a majority opinion.<sup>12</sup>

What is this attorney to do? Better yet, what are lower courts to make of this continued state of unrest in the Court's personal jurisdiction jurisprudence?<sup>13</sup> These are the questions this Comment will address.

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6. See *J. McIntyre*, 131 S. Ct. at 2785 (plurality opinion).

7. See, e.g., *id.* at 2789 (“Since *Asahi* was decided, the courts have sought to reconcile the competing opinions [of Justice O’Connor and Justice Brennan.]”); see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.4 nn.18.1–18.2 (3d ed. 2002 & Supp. 2011) (citing lower court cases that utilize both standards and lower court cases where courts adopt one standard over the other).

8. See 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 108.44 (3d ed. 1999 & Supp. 2010).

9. See 28 U.S.C. § 1332 (2012).

10. Compare, e.g., *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 576-77 (Tex. 2007) (employing Justice O’Connor’s stream-of-commerce-plus rationale), with, e.g., *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419-20 (5th Cir. 1993) (citing *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989)) (noting that the Fifth Circuit employs the circuit’s pre-*Asahi* precedent). See Angela M. Laughlin, *This Ain’t the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 715 (2009) (noting that the Fifth Circuit adopted Justice Brennan’s “mere foreseeability” standard based on applying the circuit’s pre-*Asahi* precedent).

11. E.g., *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that where no majority opinion exists, the holding of the case is the narrowest rationale relied on by the concurring Justice(s)); see *J. McIntyre*, 131 S. Ct. at 2789-90 (plurality opinion) (holding that federalism concerns and traditional understandings of sovereignty undergird personal jurisdiction pursuant to the Due Process Clause).

12. See *infra* note 156.

13. Cf. Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 387 (2012) (analyzing all three opinions and chastising the Court for its inability to put forth a cogent personal jurisdiction framework). Professor Ides summarized *J. McIntyre* as “the clerks let their Justices down, the Justices let their colleagues down, and the Court let us all down.” *Id.* at 386.

Suggesting a means to untangle *Asahi*'s mess requires first elucidating the confusion caused by *Asahi*. This Comment does so by tracing the evolution of personal jurisdiction analysis prior to *Asahi* in Part II. Part III examines the *Asahi*-split itself to determine what issue actually split the Court. In Part IV, this Comment analyzes *J. McIntyre* in light of Part II's traced evolution of personal jurisdiction analysis and concludes that *J. McIntyre* frustratingly missed the mark by the narrowest of margins. Ultimately, this Comment proposes that purposeful availment accords with the Court's prior personal jurisdiction jurisprudence and, thus, represents the appropriate standard.<sup>14</sup> This conclusion is derived not from a preference in policies but from the thread of horizontal federalism concerns present in the Court's personal jurisdiction jurisprudence from *Pennoyer* up until *Asahi*, which purposeful availment respects.<sup>15</sup> Having suggested which standard should prevail, Part V addresses how horizontal federalism can anchor personal jurisdiction analysis in the twenty-first century, recommending legislative solutions that protect plaintiffs and practical litigation strategies to adapt to twenty-first century commercial practices.

## II. HISTORY

Instead of sorting out *Asahi*'s doctrinal uncertainty by analyzing the arguments on either side of the split, this Comment suggests a different tack: trace the development of the Court's personal jurisdiction jurisprudence over time. This Part, then, seeks to discover consistent threads of analysis that persist over time. It also seeks to diagnose how the Court's personal jurisdiction jurisprudence became so fractured in the hope of explaining why the fracture has yet to be resolved.

### *A. The Pennoyer Era: Co-Equal Sovereignty and Territoriality*

Although most first-year civil procedure courses begin their treatment of personal jurisdiction with *Pennoyer v. Neff*, American courts dealt with personal jurisdiction well before Justice Field penned *Pennoyer*.<sup>16</sup> In fact, prior to *Pennoyer*, state courts developed their own personal jurisdiction analysis outside of the Court's purview.<sup>17</sup> These early state court decisions

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14. See *infra* Part V.

15. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 503 (2008) (defining "horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions").

16. *Pennoyer v. Neff*, 95 U.S. 714 (1877); see Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 948-49 (1999).

17. See Korn, *supra* note 16, at 948-49 (detailing the history of personal jurisdiction prior to, and immediately after, the ratification of the Fourteenth Amendment). Of course the Court did entertain personal jurisdiction issues when they arose between states under Article IV, Section 1, the Full Faith and Credit Clause. See *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174-76 (1850).

limited the exercise of personal jurisdiction to when the defendant was territorially present in the forum—a limitation the state courts viewed as an inherent feature of the interstate-federal system.<sup>18</sup>

*Pennoyer* represents a sea change in American personal jurisdiction jurisprudence.<sup>19</sup> Yes, *Pennoyer* simply continued the states' approach of focusing on the territorial presence of the defendant as the prerequisite for the forum's exercise of personal jurisdiction over that defendant.<sup>20</sup> But rather than continuing to allow personal jurisdiction to be a function of state-by-state common law development, the Court announced that the Due Process Clause of the Fourteenth Amendment checked states' exercise of personal jurisdiction.<sup>21</sup>

Under *Pennoyer*, federalism acted through the Due Process Clause to protect the interest of nonresident defendants—individuals—by greatly limiting the ability of states to exercise jurisdiction over them.<sup>22</sup> These limits were justified because the states are co-equal territorial sovereigns.<sup>23</sup> Accordingly, if a state exercised jurisdiction over persons or property not located within the state's territorial limits, that exercise of jurisdiction usurped the sovereignty of the state where the person or property was

18. See James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 7-14 (1992) (detailing the development of territorially restrained personal jurisdiction).

19. See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 499-502 (1987).

20. *Pennoyer*, 95 U.S. at 733. *Pennoyer* also held the exercise of jurisdiction to be proper with the defendant's "voluntary appearance." *Id.* (emphasis added). Emphasis was added because *Pennoyer* framed federalism-based personal jurisdiction analysis as something that could be waived. See *id.* This distinction, however, was either not apparent to or disregarded by the Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) ("[I]f the federalism concept operated as an independent restriction of the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement . . ."); *infra* Part II.D.

21. See *Pennoyer*, 95 U.S. at 733-34; Perdue, *supra* note 19, at 499-502 ("Field then goes on to invoke the due process clause as a mechanism to which the federal courts may turn to ensure that states do not exceed the inherent limitations of their power."); see also Korn, *supra* note 16, at 977-83 (refuting the territorial rationale of personal jurisdiction as the result of Justice Story misapplying Ulrich Huber's influential works on conflicts of laws). Many other scholars note this same flawed rationale that led Justice Field to circumscribe personal jurisdiction to states' territorial limits. See, e.g., Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 822-28 (1981). Regardless of this critique's historical veracity, territoriality remains the central focus of personal jurisdiction today. See *infra* Part V.A.

22. *Pennoyer*, 95 U.S. at 723, 733.

23. See *id.* at 722-23. Justice Field developed this premise by identifying two inherent principles of law that drove his analysis:

One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . the other principle . . . is that no State can exercise direct jurisdiction and authority over persons or property without its territory . . .

"Any exertion of authority of this sort beyond this limit . . . is a mere nullity and incapable of binding such persons or property in any other tribunals."

*Id.* (quoting Story, *Confl. Laws*, c.2 § 539).

located.<sup>24</sup> To prevent this usurpation, *Pennoyer* employed the Due Process Clause's protection of individuals to limit a court's ability to exercise power over individuals to only those who were either within the state's territorial boundaries (i.e., sovereignty) or to whom the defendant consented to jurisdiction (i.e., waiver).<sup>25</sup>

If an individual did not meet either of those conditions, then a judgment rendered in that case would be a "judgment *coram non judice*."<sup>26</sup> Such a judgment would constitute a denial of due process, which the Fourteenth Amendment bars.<sup>27</sup> Thus, *Pennoyer* justified its territorial restriction on states' exercise of personal jurisdiction through the necessity of balancing the sovereignty of the individual states within the Constitution's federal system.<sup>28</sup> To enforce this balance, the Court vested individuals with the right to check states' attempted usurpations of sovereignty.<sup>29</sup>

*B. From International Shoe to Hanson v. Denckla: The Shift to Minimum Contacts*

*Pennoyer*'s co-equal sovereignty justification for limiting courts' exercise of personal jurisdiction to their territorial boundaries, in the abstract, makes sense and comports with other federalism-based concerns (e.g., the Dormant Commerce Clause).<sup>30</sup> But shifting commercial practices, made possible through increased efficiencies in transportation and communication, strained courts' ability to comply with the strictures of *Pennoyer*.<sup>31</sup> Accordingly, in *International Shoe*, the Court recognized that

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24. *Id.* at 723 ("[A]ny influence exerted . . . to enforce an ex-territorial jurisdiction by [a State's] tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.").

25. *See id.* at 723, 733.

26. *Id.* at 724 (quoting *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134)).

27. *See id.* at 733-34; Perdue, *supra* note 19, at 499-502.

28. *See Pennoyer*, 95 U.S. at 723; *see also* Perdue, *supra* note 19, at 499-502 ("The basic premise of the opinion is that there are limitations on state power that are simply inherent in the nature of government.").

29. *See Pennoyer*, 95 U.S. at 733.

30. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949)); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1081 (2009).

31. *See Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) ("[O]ver [the] long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents . . . attributable to the fundamental transformation of our national economy over the years . . . [and] this increasing nationalization of commerce . . .").

it was necessary to engage in legal fiction to allow states to justifiably reach beyond their territorial boundaries.<sup>32</sup>

The Court determined that instead of requiring strict territorial presence, courts could appropriately exercise personal jurisdiction on a showing of the defendant's "minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>33</sup> To reconcile *Pennoyer's* co-equal sovereignty rationale with commercial realities, the Court limited states' extraterritorial reach by focusing its minimum contacts analysis on the defendant's activities within the forum.<sup>34</sup> The Court's legal fiction proceeded, then, as such:

[T]o the extent that a [nonresident defendant] exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the [nonresident defendant] to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.<sup>35</sup>

While the "minimum contacts" test obviates the strict territory requirement of *Pennoyer*, territoriality did not disappear from the calculus altogether.<sup>36</sup> The Court still focused the analysis in terms of the forum state's relationship with the nonresident defendant—a relationship defined based on actions taken with respect to a state's territorial boundaries.<sup>37</sup>

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32. See *Shaffer v. Heitner*, 433 U.S. 186, 202-03 (1977); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

33. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

34. See *id.* at 319.

35. *Id.*

36. See *id.* ("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.")

37. See *id.* ("The clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which *the state* has no contacts, ties, or relations." (emphasis added)) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)); see also *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("[A] defendant may not be called upon to [defend a lawsuit in a foreign tribunal] unless he has had the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him.") (quoting *Int'l Shoe Co.*, 326 U.S. at 319). Notably, when citing to *Pennoyer*, the Court utilized a "Cf." citation. *Int'l Shoe Co.*, 326 U.S. at 319 (1945). "Cf." is defined as "authority [that] supports a proposition different from the main proposition but sufficiently analogous to lend support." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). This bears mentioning because contrary to Professor Borchers's analysis, the *International Shoe* Court did invoke the concept of territoriality in justifying its minimum contacts test, just not *Pennoyer's* strict territoriality presence requirement. *Contra* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the *Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1264 (2011).

Thus, in defining minimum contacts, *International Shoe* still obliquely referenced territoriality.<sup>38</sup>

But *International Shoe*'s minimum contacts analysis lacked sufficient specificity.<sup>39</sup> Most importantly, the Court did not sketch the outer limits of states' extraterritorial reach now that it had opened the door for states to reach outside their territorial limits.<sup>40</sup> Instead, the Court waited over a decade before supplying the necessary limits to *International Shoe*'s broad holding in *Hanson v. Denckla*.<sup>41</sup>

In *Hanson*, the Court noted that while commercial practices had paved the way for flexible jurisdictional rules in *International Shoe* and *McGee*, the exercise of personal jurisdiction still significantly impacts the interstate-federal system.<sup>42</sup> The Court refused to overlook these interstate-federalism concerns.<sup>43</sup> As such, the Court heavily emphasized these considerations when evaluating *International Shoe*'s and *McGee*'s departure from *Pennoyer*'s strict territorial limits:

[Restrictions on states' ability to exercise personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* 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.*<sup>44</sup>

With that in mind, the Court enunciated a new test for minimum contacts: the purposeful availment test.<sup>45</sup> Under the purposeful availment

38. See *Int'l Shoe Co.*, 326 U.S. at 317-18.

39. See Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? *It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 59-61 (2004) ("It was not only what the Court in *International Shoe* left unsaid, but what it said explicitly as well, that created confusion for lower court judges and lawyers.").

40. See Laughlin, *supra* note 10, at 691-92.

41. See Condlin, *supra* note 39, at 60-61. Although not the first case of the Court's 1957-1958 term to take up minimum contacts, *Hanson* still provides the Court's first meaningful analysis of minimum contacts. See *id.* at 62 n.53 ("*McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)) is a four page unanimous opinion . . . *Hanson* is a twenty-one page majority opinion and another eight pages of Justices Black and Douglas dissents.").

42. See *Hanson*, 357 U.S. at 251.

43. See *id.* ("But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.").

44. *Id.* (emphasis added).

45. See *id.* at 253 ("[I]t is essential in each case that there be 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."). Interestingly, the *Pennoyer* Court justified its presence-in-the-territory approach to jurisdiction based on Justice Story's misinterpretation of Ulrich Huber's work. See Korn, *supra* note 16, at 977-83. But *Hanson*'s requirement that the defendant create a sufficient jurisdictional hook with the forum through the defendant's own activities comes quite close to what Ulrich Huber conceived. Compare *Hanson*, 357 U.S. at 253 ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities

test, a court must inquire whether a nonresident defendant purposefully directed its activities towards the forum state and, thus, necessarily enjoyed the forum state's "benefits and protection."<sup>46</sup> The Court reasoned that when a nonresident defendant utilizes a forum state to derive a benefit for itself, the nonresident defendant correspondingly incurs an obligation between itself and the forum state to account for the consequences of that utilization.<sup>47</sup> It is on the basis of this defendant-created obligation that a state may then reach beyond its territorial boundary and hale a nonresident defendant before its tribunals.<sup>48</sup> The Court made it clear that only the nonresident defendant's actions matter because "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."<sup>49</sup> Further, to satisfy the purposeful availment test, the nonresident defendant's contacts must relate to the cause of action.<sup>50</sup>

*Hanson's* refinement of *International Shoe's* minimum contacts test placed a concrete limit on states' ability to exercise personal jurisdiction.<sup>51</sup> The contacts that count in minimum contacts analysis are only defendant-initiated contacts that relate to the cause of action.<sup>52</sup> States' territorial boundaries, however, remained the focus of the analysis.<sup>53</sup> Thus, the Court in *International Shoe* and *Hanson* simply swapped *Pennoyer's* territorial presence requirement for a territorial acts requirement.<sup>54</sup> What the Court lacked, however, was sufficient justification of why territoriality remained the divining rod in personal jurisdiction analysis.<sup>55</sup>

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within the forum State, thus invoking the benefits and protections of its laws."), with Korn, *supra* note 16, at 982 ("[T]he repeated statements elsewhere in Huber's writing indicat[e] his agreement with the territorial nexuses . . . i.e., defendant's long-term association through residence, domicile, nationality, or activity of nonresidents causing injury in the state—[are] the most widely accepted bases for judicial jurisdiction." (emphasis added)).

46. *E.g.*, *Hanson*, 357 U.S. at 253 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

47. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985) (citing *Hanson*, 357 U.S. at 253).

48. *See, e.g., id.*

49. *Hanson*, 357 U.S. at 253.

50. *See id.* at 251.

51. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (citing *Hanson*, 357 U.S. at 251, 254) ("[T]he Due Process Clause, acting as an instrument of interstate federalism may sometimes act to divest the State of its power to render a valid judgment.").

52. *See Hanson*, 357 U.S. at 251, 253.

53. *See id.* at 253 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . ." (emphasis added)); Conklin, *supra* note 39, at 64.

54. *Compare Hanson*, 357 U.S. at 253 (citing *Int'l Shoe Co.*, 326 U.S. at 319) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . ." (emphasis added)), with *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (quoting Story, *Confl. Laws*, c.2 § 539) ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory." (emphasis added)).

55. *See infra* Part II.C.

C. World-Wide Volkswagen: Reviving the Role of Federalism

In *World-Wide Volkswagen Corp. v. Woodson*, the Court finally provided a rationale for why territoriality remains the divining rod of personal jurisdiction analysis.<sup>56</sup> The rationale supplied is one that was notably absent in *International Shoe* but was hinted at throughout *Hanson*'s strong territoriality emphasis: federalism, the same justification the Court supplied over one hundred years prior to *World-Wide Volkswagen* in *Pennoyer*.<sup>57</sup>

But *World-Wide Volkswagen* articulates a reduced role for federalism in personal jurisdiction analysis compared to *Pennoyer*.<sup>58</sup> The Court made this clear at the opinion's outset:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, *do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system*.<sup>59</sup>

Thus, in federalism's stead, the primary justification for the minimum contacts test becomes guarding a defendant's liberty interest.<sup>60</sup> The Court described how a territorially confined minimum contacts analysis protects this interest by providing "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."<sup>61</sup>

Although federalism no longer remains the primary justification of personal jurisdiction analysis, federalism still supplies the previously absent rationale of why the requirement of purposefully directed acts towards a forum proceeds on a state-by-state basis rather than on a regional or even

56. See *World-Wide Volkswagen*, 444 U.S. at 293.

57. Compare *World-Wide Volkswagen*, 444 U.S. at 292-93 (employing federalism concerns in personal jurisdiction analysis), with *supra* notes 22-25 and accompanying text (noting that *Pennoyer* does the same).

58. Compare *World-Wide Volkswagen*, 444 U.S. at 292-93 (employing federalism concerns as a secondary justification for limiting states' exercise of personal jurisdiction), with *supra* notes 22-25 and accompanying text (noting that *Pennoyer* justified its personal jurisdiction analysis primarily through federalism concerns).

59. *World-Wide Volkswagen*, 444 U.S. at 291-92 (emphasis added); accord Weinstein, *supra* note 18, at 32 n.116 (tying this quote to the development of personal jurisdiction cases espousing the same federalism concerns pre-dating *Pennoyer*).

60. See *World-Wide Volkswagen*, 444 U.S. at 297; Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 628-29 (2007) (arguing that minimum contacts ultimately protects a defendant's substantive liberty interest).

61. *World-Wide Volkswagen*, 444 U.S. at 297; accord Rhodes, *supra* note 60, at 628-29 (suggesting this language evidences a liberty interest under the due process analysis).

nationwide basis.<sup>62</sup> The Court initially observed that it has “never accepted the proposition that state lines are irrelevant . . . nor could [it], and remain faithful to the principles of interstate federalism embodied in the Constitution.”<sup>63</sup> The Court then invoked a rationale borrowed from the Dormant Commerce Clause analysis, replacing interstate commerce issues with the ability to define and adjudicate substantive state law.<sup>64</sup>

Without employing the academic term, the Court simply articulated a horizontal federalism rationale—one quite similar to that articulated in *Pennoyer*.<sup>65</sup> Viewed from a horizontal federalism perspective, the requirement of territorially confined minimum contacts justifies the minimum contacts test as preventing a “denial of due process . . . not [from] some particular unfairness in the proceedings, but in the fact that the proceedings are illegitimate as beyond the state’s authority.”<sup>66</sup> Such a theoretical framework for personal jurisdiction analysis is perfectly consonant with how the Constitution handles other horizontal federalism concerns.<sup>67</sup> Thus, *World-Wide Volkswagen* ties the protection personal jurisdiction affords litigants to the protections individuals receive from other horizontal federalism limits to interstate frictions such as “taxing out-of-state citizens arriving at local ports, . . . taxes that fall disproportionately on visitors from out-of-state, . . . and regulations . . . tailored to benefit local manufacturers at the expense of importers.”<sup>68</sup>

#### D. Bauxites and Burger King: *The Seeds of Doctrinal Confusion Sown*

Throughout reshaping the analytical framework of personal jurisdiction, the Court managed to adhere to territorial-based, and implicitly federalism-focused, concerns.<sup>69</sup> But two years after *World-Wide Volkswagen*, the Court confronted a strange interplay between discovery

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62. See *World-Wide Volkswagen*, 444 U.S. at 293 (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949)); Florey, *supra* note 30, at 1081.

63. *World-Wide Volkswagen*, 444 U.S. at 293.

64. See *id.* (citing *H.P. Hood & Sons, Inc.*, 336 U.S. at 538).

65. See Erbsen, *supra* note 15, at 503 (defining “horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions”); *supra* notes 22-25 and accompanying text.

66. Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 411 (1985); accord *World-Wide Volkswagen*, 444 U.S. at 294 (holding that even if fairness factors highly suggest a state’s exercise of jurisdiction works no inconvenience that “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”).

67. See Erbsen, *supra* note 15, at 547-48 (“A critical component of horizontal federalism is the Constitution’s creation of individual rights tied to the multistate character of the Union and its empowerment of private citizens to enforce those rights in federal or state courts.”) (noting “the liberty interest under the Due Process Clause in avoiding personal jurisdiction in a state where the person lacks sufficient contacts”).

68. *Id.* at 521-28.

69. See *supra* Part II.B-C.

sanctions and personal jurisdiction.<sup>70</sup> In sorting out the interplay, the Court sowed the seeds of doctrinal confusion.<sup>71</sup>

The facts and the procedural posture of the case can perhaps elucidate why the Court injected doctrinal confusion into the Court's personal jurisdiction jurisprudence. *Compagnie des Bauxites* (CBG), a company incorporated in Delaware and jointly owned by a Pennsylvania corporation and the Republic of Guinea, purchased interruption insurance that was covered in part by twenty-one foreign insurers.<sup>72</sup> After experiencing mechanical breakdowns leading to an interruption, CBG filed a claim that its insurers denied.<sup>73</sup> CBG filed suit in the Western District of Pennsylvania, and the excess insurers challenged personal jurisdiction.<sup>74</sup> Throughout the jurisdictional discovery process, the excess insurers refused requests for production, leading to numerous hearings and subsequent extensions.<sup>75</sup> The district court finally instructed the excess insurers that failure to comply with the court's next extension would result in an adverse inference pursuant to Federal Rule of Civil Procedure 37(b)(2)(A).<sup>76</sup> The excess insurers did not comply, and the court deemed that the undisclosed documents would have established the propriety of exercising personal jurisdiction over the excess insurers.<sup>77</sup>

After the Third Circuit affirmed the trial court's ruling, the Court granted certiorari to resolve a circuit split on the propriety of applying Rule 37 during jurisdictional discovery.<sup>78</sup> To do so, the Court began its analysis by describing the contours of the limited subject matter jurisdiction of Article III courts.<sup>79</sup> The Court emphasized that subject matter jurisdiction cannot be waived and that the limited jurisdiction of Article III courts serves vertical federalism purposes by operating as a check on federal

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70. *See* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695-96, 701-02 (1982).

71. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1046-48 (1983) (noting the unnecessary and counterintuitive ambiguity created by *Bauxites*); Weisburd, *supra* note 66, at 413 (same).

72. *Bauxites*, 456 U.S. at 696.

73. *Id.* at 697.

74. *Id.* at 698.

75. *See id.* at 698-99.

76. *See id.* at 699.

77. *See id.*

78. *See id.* at 700 (citing *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134, 1139-40 (5th Cir. 1980); *English v. 21st Phoenix Corp.*, 590 F.2d 723, 728-29 (8th Cir. 1979); *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10, 11 (4th Cir. 1971)).

79. *See id.* at 700-02.

power over the states.<sup>80</sup> The Court noted all of this to make the following observation: “None of this is true with respect to personal jurisdiction.”<sup>81</sup>

Of all the differences between personal jurisdiction and subject matter jurisdiction, the Court concerned itself chiefly with the fact that personal jurisdiction can be waived.<sup>82</sup> The Court focused on this trait because it reasoned that to uphold the lower courts’ holding that Rule 37 could deem jurisdictional facts, personal jurisdiction could not lie at the core of judicial power (i.e., be something that cannot be waived).<sup>83</sup> Based on the differences between personal jurisdiction and subject matter jurisdiction, the Court concluded that personal jurisdiction did not define judicial power and, thus, could be waived.<sup>84</sup> The Court then noted that “[t]he expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights.”<sup>85</sup> Thus, because a defendant submits to a court’s jurisdiction to resolve the defendant’s special appearance, the Court held that failure to comply with a court’s power to resolve that dispute could appropriately lead to deeming the jurisdictional facts as a sanction, thereby waiving the defendant’s special appearance.<sup>86</sup>

Prior to reaching its ultimate holding, though, the Court facially obviated the role federalism concerns play in personal jurisdiction analysis.<sup>87</sup> It did so ostensibly to buttress its ultimate holding.<sup>88</sup> The Court stated first that personal jurisdiction “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”<sup>89</sup> Next, in its infamous footnote ten, the Court noted the following:

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80. *See id.*; *see also* Erbsen, *supra* note 15, at 506-07 (describing the differences between vertical and horizontal federalism; concluding that vertical federalism issues are easily resolved under the Constitution).

81. *Bauxites*, 456 U.S. at 702. It is worth noting both the strangeness and the lack of utility of this analysis: Federal courts’ limited subject matter jurisdiction is a check on the federal government to prevent it from encroaching on the states; personal jurisdiction is a check on the states to prevent them from intruding upon one another. *See* Weisburd, *supra* note 66, at 412-16; *accord* Erbsen, *supra* note 15, at 506-07. Thus, the Court essentially compared an apple to an orange solely to prove that an apple is different from an orange. *See* Weisburd, *supra* note 66, at 412-16; *accord* Erbsen, *supra* note 15, at 506-07.

82. *See Bauxites*, 456 U.S. at 702-05. But the Court’s concern is misplaced because *Pennoyer*, a case that defined personal jurisdiction as bearing on courts’ sovereign power, stated explicitly that personal jurisdiction could be waived. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (finding jurisdiction proper if the defendant is “brought within [a court’s] jurisdiction by service of process within the State, or *his voluntary appearance*” (emphasis added)).

83. *See Bauxites*, 456 U.S. at 702 n.10.

84. *See id.*

85. *Id.* at 705.

86. *See id.* at 706-07, 709 (“By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court’s determination on the issue of jurisdiction.”).

87. *See id.* at 702 n.10.

88. *See id.* at 709-10 (Powell, J., concurring) (“In my view the Court’s broadly theoretical decision misapprehends the issues actually presented for decision.”).

89. *Id.* at 702.

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States . . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.<sup>90</sup>

Many read this statement as stripping away the territorial-based federalism principles inherent in the Court's personal jurisdiction jurisprudence over the previous 110 years.<sup>91</sup> But the statement should not be read that way because the Court did not eliminate federalism concerns from personal jurisdiction analysis.<sup>92</sup> All the *Bauxites* Court made clear is that federalism does not operate as a stand-alone basis for personal jurisdiction and simply that federalism operates as "a function of the individual liberty interest."<sup>93</sup> This is an incredibly unremarkable distinction.<sup>94</sup> Unfortunately, the Court made this unremarkable distinction in an incredibly obtuse manner.<sup>95</sup>

More vexing, though, is why the Court felt the need to make the distinction: Neither *Hanson* nor *World-Wide Volkswagen*—the Court's most developed explication of minimum contacts—claimed that federalism could operate as a stand-alone basis for personal jurisdiction.<sup>96</sup> All that both cases recognized regarding federalism considerations is that they serve due process by preventing "not . . . some particular unfairness in the proceedings, but in the fact that the proceedings are illegitimate as beyond the state's authority,"<sup>97</sup> an authority the forum lacks because the nonresident defendant has not created a sufficient relationship with the forum to warrant

90. *Id.* at 702 n.10.

91. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2798 (2011) (Ginsburg, J., dissenting); *Bauxites*, 456 U.S. at 709-10 (1982) (Powell, J., concurring); Weisburd, *supra* note 66, at 413 (critiquing the commentators who adopt this view).

92. *See* *Bauxites*, 456 U.S. at 702 n.10; *supra* notes 88-91 and accompanying text; *infra* notes 93-99 and accompanying text.

93. *Bauxites*, 456 U.S. at 702 n.10; *accord* Drobak, *supra* note 71, at 1047.

94. *See supra* notes 59-66 and accompanying text.

95. *See* Weisburd, *supra* note 66, at 412-13.

96. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 ("The concept of minimum contacts . . . perform[s] two related, but distinguishable functions . . . protect[ing] the defendant against the burdens of litigating in a distant . . . forum. And it acts to ensure that the States . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("[The restrictions on the exercise of personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

97. Weisburd, *supra* note 66, at 411; *accord* Erbsen, *supra* note 15, at 548-49 (establishing that "a critical component of horizontal federalism is the Constitution's creation of individual rights tied to the multistate character of the Union and its empowerment of private citizens to enforce those rights in federal or state courts" and noting "the liberty interest under the Due Process Clause in avoiding personal jurisdiction in a state where the person lacks sufficient contacts").

the forum's exercise of jurisdiction over the nonresident defendant.<sup>98</sup> Further evidence that the Court did not toss out federalism concerns altogether is that *World-Wide Volkswagen's* minimum contacts analysis remained intact.<sup>99</sup> Thus, *Bauxites* did not obviate federalism and territoriality concerns from personal jurisdiction analysis.<sup>100</sup> It simply clarified only that "personal jurisdiction, unlike subject matter jurisdiction, is not independent of individual liberty concerns" and, as such, is subject to waiver.<sup>101</sup>

Aside from *Bauxites's* own internal logic, *Burger King v. Rudzewicz* also evidences that *Bauxites's* footnote ten did not do away with federalism concerns in personal jurisdiction analysis—but not enough to rectify the doctrinal confusion caused by *Bauxites*.<sup>102</sup> Justice Brennan authored the *Burger King* opinion, which is odd in and of itself.<sup>103</sup> In doing so, Justice Brennan apparently set aside his previous disagreements with *Hanson* and *World-Wide Volkswagen*, relying heavily on both opinions in explicating the purposeful availment test.<sup>104</sup>

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98. See *World-Wide Volkswagen*, 444 U.S. at 291-92; *Hanson*, 357 U.S. at 252-53; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945).

99. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) ("[O]ur holding today does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum State.").

100. See Weisburd, *supra* note 66, at 412-14.

101. Weisburd, *supra* note 66, at 413-14; *accord* Drobak, *supra* note 71, at 1046-48; Erbsen, *supra* note 15, at 548-49. Professor Weisburd notes that the *Bauxites* Court likely failed to clearly articulate its point because it sought to define what personal jurisdiction is not, whereas cases like *Hanson* and *World-Wide Volkswagen* concerned defining how personal jurisdiction works in practice. Weisburd, *supra* note 66, at 412.

102. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 nn.13-14 (1985); *accord* *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) ("Limitations on sovereignty, and not the convenience of defendants, lie at the core of cases such as *Burger King* . . . and *World-Wide Volkswagen* . . . and their many predecessors."); *infra* notes 109-10, 149-51 and accompanying text.

103. See *Burger King*, 471 U.S. at 474-75. This is surprising given that he disagreed with both *Hanson's* territorial and *World-Wide Volkswagen's* federalism-based minimum contacts analysis. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 305-13 (1980) (Brennan, J., dissenting); *Hanson v. Denckla*, 357 U.S. 235, 258-62 (1958) (Black, J., dissenting) (Justice Brennan joined Justice Black's dissent); see also Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 569-70 (2012) ("[I]t is difficult to believe that one is reading a Brennan opinion.").

104. See *Burger King*, 471 U.S. at 474-75; Freer, *supra* note 103, at 569-70. Professor Freer opines that Justice Brennan stomached his previous qualms about this approach in order to further obscure the distinction between minimum contacts analysis and fairness considerations to inject his "sliding-scale" approach, which Justice Brennan had first articulated in his dissent in *World-Wide Volkswagen*. Freer, *supra* note 103, at 570. As Professor Freer notes, however, if this is the case, Justice Brennan miscalculated the efficacy of this tack because the sliding-scale analysis has largely been rejected. *Id.* at 571 (noting that neither plurality opinions in *Asahi*—even Justice Brennan's own—employed the sliding-scale approach).

At the outset of the analysis, Justice Brennan cited *Bauxites* solely for the proposition that personal jurisdiction is an individual right.<sup>105</sup> After this clarification, Justice Brennan affirmed the role of federalism in personal jurisdiction analysis in two steps.<sup>106</sup> First, Justice Brennan followed his brief overview of personal jurisdiction analysis with “[n]otwithstanding [fairness and convenience rationales], the constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum state.”<sup>107</sup> Then Justice Brennan immediately both cited and quoted *Hanson* and *World-Wide Volkswagen* in describing a territoriality-focused and federalism-tinged purposeful availment test.<sup>108</sup>

Remarkably, then, *Burger King* continues a vestige of *Pennoyer* through its explication of the purposeful availment test.<sup>109</sup> Yet, while the application of territorial-based federalism concerns threads consistently from *Pennoyer* to *Burger King*, Justice Brennan did obfuscate federalism’s role in *Burger King* by referencing it only implicitly through citations to *World-Wide Volkswagen*.<sup>110</sup> Because of Justice Brennan’s obfuscation, *Burger King* fails to fully clarify *Bauxites*, further sowing the seeds of doctrinal uncertainty that would lead to *Asahi*.<sup>111</sup>

### III. *ASAHI*: PADDLING UPSTREAM THROUGH DOCTRINAL CONFUSION

Having traced the evolution of the Court’s personal jurisdiction jurisprudence up to *Asahi* in Part II, Part III seeks to determine why the Court split so badly in *Asahi*. An effective understanding of the split, though, requires an analysis of what the stream of commerce is and how the Court had reconciled its prior precedents with the stream of commerce prior to *Asahi*.

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105. *Burger King*, 471 U.S. at 471-72 n.13 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982)) (“Although *this protection operates to restrict state power*, it ‘must be seen as ultimately a function of the individual liberty interest preserved by the Due Process clause’ rather than as a function ‘of federalism concerns.’” (emphasis added)); *cf.* Erbsen, *supra* note 15, at 548-49 (describing personal jurisdiction objections as an individual right that checks against the “adverse effects of the friction-inducing behavior [inherent in horizontal federalism]”).

106. *See Burger King*, 471 U.S. at 474.

107. *Id.* (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

108. *See id.* at 474-75 (quoting *World-Wide Volkswagen*, 444 U.S. at 295; *Hanson*, 357 U.S. at 253).

109. *Compare Burger King*, 471 U.S. at 474-75 (continuing a territorially confined minimum contacts analysis carried forward from *World-Wide Volkswagen*), with *Pennoyer v. Neff*, 95 U.S. 714, 723, 733 (1877) (requiring the defendant’s presence within the territorial boundaries of the forum state; justifying this requirement as balancing the co-equal sovereignty of states with the federal system), and *supra* Part II.C (describing *World-Wide Volkswagen*’s horizontal federalism rationale for territorially confined minimum contacts analysis).

110. *See Burger King*, 471 U.S. at 474-75 (citing *World-Wide Volkswagen*, 444 U.S. at 295) (never utilizing the term “federalism”).

111. *See supra* notes 87-110 and accompanying text.

A. *What Is the Stream of Commerce?*

In *Gray v. American Radiator*, the Illinois Supreme Court found a nonresident component-part manufacturer subject to its courts' jurisdiction in a products liability suit even though the component-part manufacturer's only contact with Illinois was that its component-part entered Illinois through the "course of commerce" as part of a boiler that injured an Illinois resident.<sup>112</sup> *Gray* came just three years after the Court defined minimum contacts as the defendant's purposefully directed activities towards the forum.<sup>113</sup> Nevertheless, the Illinois Supreme Court justified the exercise of jurisdiction because the component-part manufacturer had derived an indirect benefit from the State of Illinois through the boiler's purchase by Illinois residents.<sup>114</sup> With *Gray*, the stream of commerce doctrine was born.<sup>115</sup> Under this doctrine, a state can exercise jurisdiction over a nonresident defendant who does not do business in a state but whose product ends up in the state as a result of interstate commercial activity.<sup>116</sup>

Although *Gray* spawned the doctrine—*Gray* is an outlier.<sup>117</sup> It remains relevant only because the *World-Wide Volkswagen* Court cited *Gray* as analogous to, but not on point with, its proposition that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers in the forum State.*"<sup>118</sup> Such action, the Court held, could satisfy the purposeful availment requirement—but mere placement could not.<sup>119</sup> Critical to note is that the Court tied the stream of commerce doctrine to *Hanson's* purposeful availment test—not to *Gray*.<sup>120</sup> Thus, the Court's "with the expectation" language implies a requirement of some kind of purposefully directed activity towards the forum state before personal jurisdiction may be appropriately exercised.<sup>121</sup>

112. *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 764, 766 (Ill. 1961).

113. *See Hanson v. Denckla*, 357 U.S. 235, 253 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

114. *See Gray*, 176 N.E.2d at 764, 766.

115. *See Condlin*, *supra* note 39, at 76.

116. *See id.*

117. *See id.* at 110 n.392 (noting that *Asahi* and *Gray* share many factual similarities but do not share the same outcome).

118. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (emphasis added). The *World-Wide Volkswagen* Court cited to *Gray* using a *Cf.* citation. *Id.*; *see also* THE BLUEBOOK, *supra* note 37, R. 1.2(a), at 55 (defining *Cf.* as "authority [that] supports a proposition different from the main proposition but sufficiently analogous to lend support").

119. *See World-Wide Volkswagen*, 444 U.S. at 297-98.

120. *See id.*; *see also* Condlin, *supra* note 39, at 74-75 (noting that *World-Wide Volkswagen* refined the purposeful availment nexus for the stream of commerce doctrine).

121. *See World-Wide Volkswagen*, 444 U.S. at 298-99. The Court prefaced its "with the expectation" rationale by describing some of the efforts the New York based Audi dealership could have done to create sufficient contacts with Oklahoma in the case. *Id.* The Court stated that "if the

What constitutes placement “with the expectation” was not clearly defined by the Court.<sup>122</sup> But *World-Wide Volkswagen* explicitly rejected that the mere foreseeability that a product could end up in a state can provide a basis for personal jurisdiction.<sup>123</sup> The Court’s lack of precision in defining “with the expectation,” however, would soon prove irksome.<sup>124</sup>

### B. *Split Stream Sadness*

Seven years after the Court ensconced federalism concerns into the stream of commerce in *World-Wide Volkswagen*, and five years after injecting confusion via *Bauxites*, the Court completely muddied the waters in *Asahi*.<sup>125</sup> The vehicle that wrought complete doctrinal uncertainty actually resulted in eight Justices agreeing on this outcome:<sup>126</sup> when a Japanese valve manufacturer sold its tire valves to a Taiwanese tire maker, and the Taiwanese tire maker’s tire ended up in California and caused an accident, a California court could not exercise personal jurisdiction over the Japanese valve manufacturer for the purposes of an indemnification clause dispute between the Japanese valve manufacturer and the Taiwanese tire maker when the plaintiff had settled the original claim.<sup>127</sup> Eight Justices agreed that on these facts, it was wholly unreasonable for a California court to adjudicate the indemnification clause dispute.<sup>128</sup> What the Justices disagreed on, however, was whether the Japanese valve manufacturer’s activities were purposefully directed toward California and whether such contact was even necessary.<sup>129</sup>

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sale . . . ar[ose] from the efforts of the manufacturer or distributor to serve directly or indirectly[] the market for its product in [Oklahoma] it is not unreasonable to subject it to suit . . .” *Id.* at 297. Further, and although not a model example of clarity, the Court did provide examples of the many things Audi did not do to purposefully avail itself of Oklahoma’s benefits and protections accompanying its placement of cars into the stream of commerce. *See id.* at 295.

122. *See supra* note 121.

123. *See World-Wide Volkswagen*, 444 U.S. at 297 (“[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State.”).

124. *See infra* Part III.B.

125. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788-89 (2011) (plurality opinion) (describing the doctrinal difficulties that arose from trying to reconcile *Asahi*’s two competing plurality opinions).

126. *Compare Asahi Indus. Metal Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 116 (1987) (plurality opinion) (reversing the California Supreme Court’s decision finding personal jurisdiction to be proper), *with id.* at 121 (Brennan, J., concurring) (same).

127. *Id.* at 106-07, 116 (plurality opinion); *id.* at 121 (Brennan, J., concurring).

128. *See id.* at 116 (Brennan, J., concurring) (joining Part II-B of the plurality opinion).

129. *Compare id.* at 112 (plurality opinion) (“[P]lacement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed to the forum State.”), *with id.* at 117 (Brennan, J., concurring) (“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 . . . [t]hese benefits accrue regardless of whether that participant . . . engages in additional conduct directed toward that State.”).

Justice O'Connor's plurality started by trying to better define *World-Wide Volkswagen's* stream of commerce rationale.<sup>130</sup> In doing so, Justice O'Connor first emphasized that *Burger King* "reaffirmed the oft-quoted reasoning of *Hanson v. Denckla*" and then went on to emphasize how much of *Hanson's* territoriality rationale had been incorporated into *World-Wide Volkswagen's* articulation of the stream of commerce.<sup>131</sup> With that in mind, Justice O'Connor reasoned that "placement of a product into the stream of commerce, without more," could not constitute purposeful availment, "'the constitutional touchstone' of . . . personal jurisdiction."<sup>132</sup> Based on the strictures of the purposeful availment test, Justice O'Connor then provided a non-exhaustive list of what that something more—that purposefully directed activity—could look like.<sup>133</sup> The list included "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."<sup>134</sup>

Although Justice O'Connor utilized more than four pages developing how purposeful availment should function in a stream of commerce case, the opinion did not analyze the purposeful availment issue in relation to the facts of the case.<sup>135</sup> Instead, Justice O'Connor assumed sufficient minimum contacts existed so that she could analyze the case on the same fairness factors Justice Brennan's plurality would.<sup>136</sup>

Justice Brennan, also writing for three other Justices, would not assent to Justice O'Connor's purposeful availment reasoning.<sup>137</sup> In fact, Justice Brennan proposed removing the requirement of any kind of purposefully directed activity from the equation.<sup>138</sup> Justice Brennan justified this reasoning because "[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 . . . [t]hese benefits accrue regardless of whether that participant . . . engages in additional conduct directed toward that State."<sup>139</sup> Thus, because the nonresident defendant derived a benefit from the forum

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130. *See id.* at 108-09 (plurality opinion).

131. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

132. *Id.* at 109, 112 (alterations omitted) (quoting *Burger King*, 471 U.S. at 474).

133. *See id.* at 112.

134. *Id.*; accord *supra* note 121.

135. *See Asahi*, 480 U.S. at 116 (plurality opinion). Admittedly, Part III of the opinion does state, "Because the facts of this case do not establish minimum contacts . . ." *Id.* But aside from a formulaic recitation of *International Shoe*, no actual analysis occurred regarding purposeful availment. *See id.* at 116.

136. *See id.* at 112.

137. *Id.* at 116 (Brennan, J., concurring).

138. *See id.* at 116-17.

139. *Id.* at 117.

state through the stream of commerce, the forum state can properly exercise personal jurisdiction—regardless of whether the nonresident defendant purposefully directed its activities there.<sup>140</sup> Notably, Justice Brennan spent an entire page justifying this position—yet cited no authority in the process.<sup>141</sup>

Justice Brennan then proceeded to parse out some of *World-Wide Volkswagen*'s looser language regarding the stream of commerce.<sup>142</sup> Afterwards, Justice Brennan quoted from his dissent in *World-Wide Volkswagen* to conclude that “[t]he Court in *World-Wide Volkswagen* thus took great care to distinguish ‘between a case involving goods which reach a distant State through a chain of distribution and . . . goods which reach the same State because a consumer . . . took them there.’”<sup>143</sup> Absent from Justice Brennan’s analysis of *World-Wide Volkswagen*, however, is that *World-Wide Volkswagen* supplied a horizontal federalism rationale behind *Hanson*’s territorial emphasis.<sup>144</sup> Also lost in Justice Brennan’s gloss on *World-Wide Volkswagen* is that *Gray* was cited not as direct authority but rather through a *Cf.* cite as something merely analogous—not on point with—*World-Wide Volkswagen*’s “with expectation” language.<sup>145</sup> Thus, Justice Brennan’s plurality opinion rests on a paragraph of reasoning lacking any supporting authority and a gloss on *World-Wide Volkswagen* anchored ultimately to his own dissenting opinion from the case.

Neither *Asahi* plurality, however, addressed federalism.<sup>146</sup> Although Justice O’Connor did frame purposeful availment utilizing *Hanson* and *World-Wide Volkswagen*’s territoriality and federalism-based framework, neither entered into her discussion.<sup>147</sup> The omission of territoriality, and the federalism rationale behind it, is puzzling but consistent with the thrust of the plurality’s overall holding that *Asahi*’s facts presented a rare instance in which, even if minimum contacts did exist, fairness considerations counseled against exercising jurisdiction.<sup>148</sup> Viewed from this perspective, the omission of federalism reads like an oversight.

Justice Brennan’s omission of federalism reads less like an oversight and more like part of a broader scheme. Consider first the rapidity with which Justice Brennan vacillated between disparaging a territorially

140. *See id.* at 117-21.

141. *Id.* at 117 (citing no authority).

142. *Id.* at 119-20 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)); *see supra* notes 121-24 and accompanying text.

143. *Asahi*, 480 U.S. at 120 (second omission in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 306-07).

144. *See id.*

145. *Compare id.* (“The Court concluded its illustration by referring to *Gray* . . . a well-known stream-of-commerce case”), with *supra* note 118 and accompanying text (noting the *Cf.* distinction).

146. *See Asahi*, 480 U.S. at 102 (plurality opinion) (never referencing federalism).

147. *See id.* at 108-10; *see also* Condlin, *supra* note 39, at 121 (noting the incorporation of federalism concerns in O’Connor’s plurality opinion).

148. *See* Condlin, *supra* note 39, at 111-12.

confined purposeful availment test in his dissent in *World-Wide Volkswagen* alongside his endorsement of the same test in *Burger King*.<sup>149</sup> Next, factor in that Justice Brennan glossed over the horizontal federalism rationale detailed in *World-Wide Volkswagen* in his incredibly detailed *Burger King* opinion.<sup>150</sup> Taken together, then, Professor Freer posits that Justice Brennan merely “stated fealty to [purposeful availment] and then tried to undo it.”<sup>151</sup> Professor Freer’s postulation gains credence considering that in *Asahi* Justice Brennan articulated an analysis under which the mere foreseeability that a product reaches a forum—by itself—is sufficient to acquire jurisdiction over a nonresident defendant: a rationale that completely extricates the need for any purposefully availing activity from minimum contacts analysis.<sup>152</sup>

Having parsed the *Asahi* opinions, it appears that the issue that split the Justices was not what degree of activity constitutes purposeful availment. Instead, *Asahi* split the Justices on the validity of a territorially confined purposeful availment test,<sup>153</sup> a test whose rationale is supplied through horizontal federalism concerns.<sup>154</sup> Justice O’Connor’s plurality adhered to *World-Wide Volkswagen*’s stream of commerce rationale, which incorporated horizontal federalism concerns via the requirement of purposefully directed activities.<sup>155</sup> Justice Brennan’s plurality, and the circuits that endorse it,<sup>156</sup> however, obviated purposeful availment from

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149. See Freer, *supra* note 103, at 569-70. Compare *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985) (explicating purposeful availment as the constitutional touchstone of personal jurisdiction analysis), with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 306-07 (1980) (Brennan, J., dissenting) (advocating that no purposeful activity be required).

150. See *supra* note 110 and accompanying text.

151. Freer, *supra* note 103, at 570.

152. See *Asahi*, 480 U.S. at 117 (Brennan, J., concurring).

153. See *supra* notes 137-43 and accompanying text.

154. See *supra* Part II.C.

155. See Laughlin, *supra* note 10, at 703-14, 727 for an excellent discussion of the *Asahi* circuit split and table charting the stances of all thirteen circuit courts of appeal and all fifty states on the split.

156. See *Asahi*, 480 U.S. at 108-10 (plurality opinion); see also Condlin, *supra* note 39, at 121 (noting the incorporation of federalism concerns in O’Connor’s plurality opinion). A pertinent example of a circuit that endorses Justice Brennan’s *Asahi* plurality is the Fifth Circuit. See *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419-20 (5th Cir. 1993) (citing *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989)); Laughlin, *supra* note 10, at 715 (noting that the Fifth Circuit adopts Justice Brennan’s mere foreseeability standard based on applying the circuit’s pre-*Asahi* precedent). The Fifth Circuit bases its endorsement of Justice Brennan’s *Asahi* plurality on its interpretation of *World-Wide Volkswagen*. See *Ruston*, 9 F.3d at 419-420 (citing *Irving*, 864 F.2d at 386). Yet, the Fifth Circuit’s interpretation of *World-Wide Volkswagen* ignores that *World-Wide Volkswagen* encoded purposeful availment into the stream of commerce to arrive at its position. Cf. *Luv N’ Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 474-76 (2006) (DeMoss, J., concurring); Alison G. Myhra, *Civil Procedure*, 39 TEX. TECH L. REV. 689, 711 (2007) (“Judge DeMoss argued that to permit an exercise of personal jurisdiction simply because the defendant placed a product into the stream of commerce, the product reached the forum state, and it was foreseeable that the product would reach the forum state defies principles of federalism.”). What effect *J. McIntyre* will have on the Fifth Circuit’s personal jurisdiction analysis has already caused a district court split in the Fifth Circuit. Compare *Powell v. Profile Design, LLC*, 825 F. Supp. 2d 842, 845-49 (S.D. Tex. 2011) (employing *J. McIntyre*;

personal jurisdiction analysis, which required completely discounting over one hundred years of the Court's jurisprudence.<sup>157</sup>

#### IV. *J. MCINTYRE*: LESS THAN THE SUM OF ITS PARTS

*J. McIntyre* began when Robert Nicastro's boss purchased a scrap-metal baler from J. McIntyre Machinery Ltd.'s United States distributor during a Las Vegas trade show in 1995.<sup>158</sup> Six years later, Nicastro severed four of his fingers while using the machine in New Jersey.<sup>159</sup> Nicastro's boss had first learned of J. McIntyre's products at that very same trade show the year before.<sup>160</sup> Although J. McIntyre attended these conventions, J. McIntyre's distributor, based out of Ohio, exclusively sold J. McIntyre's products in the United States.<sup>161</sup>

The drawn out jurisdiction dispute began when Nicastro filed suit in a New Jersey court, which dismissed the case because J. McIntyre lacked sufficient minimum contacts with the State of New Jersey.<sup>162</sup> A New Jersey intermediate appellate court overruled the trial court, but only to allow the parties to engage in jurisdictional discovery.<sup>163</sup> After the parties completed this discovery on remand, the trial court again granted J. McIntyre's motion to dismiss for lack of personal jurisdiction.<sup>164</sup> This time, however, the intermediate appellate court reversed the trial court, finding that minimum contacts existed under Justice O'Connor's stream-of-commerce-plus test.<sup>165</sup> The New Jersey Supreme Court affirmed the intermediate appellate court, but for wholly different reasons.<sup>166</sup> It relied on its own case law, which

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finding personal jurisdiction improper), *with* *Ainsworth v. Cargotec USA, Inc.*, No. 2:10-CV-236-KS-MTP, 2011 WL 4443626, at \*6-7 (S.D. Miss. Sept. 23, 2011) (rejecting the idea *J. McIntyre* displaces the Fifth Circuit's precedent). Because of this split, a district court has certified the question of *J. McIntyre*'s effect on the Fifth Circuit for an interlocutory appeal. *See* *Ainsworth v. Cargotec USA, Inc.*, No. 2:10-CV-236-KS-MTP, 2011 WL 6291812, at \*3-5 (S.D. Miss. Dec. 15, 2011). Despite one district court seeking explicit guidance from the Fifth Circuit, the Fifth Circuit has still yet to address *J. McIntyre*'s effect on existing Fifth Circuit precedent, and many district courts continue to employ existing Fifth Circuit precedent. *See, e.g., In re Chinese Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2012 WL 3815669, at \*20-23 (E.D. La. Sept. 4, 2012); *Frito-Lay N. Am., Inc. v. Medallion Foods, Inc.*, No. 4:12-CV-74, 2012 WL 1108427, at \*5 (E.D. Tex. Mar. 20, 2012).

157. *See supra* Part II; notes 137-43 and accompanying text.

158. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2795 (2011) (Ginsburg, J., dissenting).

159. *Id.*

160. *Id.*

161. *Id.* at 2796.

162. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578 (N.J. 2010), *rev'd sub nom. J. McIntyre*, 131 S. Ct. 2780.

163. *Id.*

164. *Id.* at 579.

165. *Id.* at 579-80.

166. *Id.* at 594.

predates *Asahi* yet articulates a Justice Brennan-esque rationale that excludes purposeful availment from the analysis altogether.<sup>167</sup>

Twenty-five years after *Asahi*, the Court granted certiorari, apparently viewing *J. McIntyre* as the proper vehicle to finally resolve the *Asahi* split.<sup>168</sup> The Court's plurality opinion, authored by Justice Kennedy, blamed *Asahi* for the holding below and the general state of confusion in personal jurisdiction analysis.<sup>169</sup> After laying the blame, the plurality opinion sought to resolve *Asahi*'s confusion by emphasizing a familiar refrain—purposeful availment.<sup>170</sup> But Justice Kennedy invoked purposeful availment only after framing the Due Process Clause as protecting individuals from having to submit to illegitimate sovereign power.<sup>171</sup>

The plurality first acknowledged that “due process protects the individual’s right to be subject only to lawful power.”<sup>172</sup> Having acknowledged that personal jurisdiction protects an individual liberty interest, the plurality next defined the requirements for states to lawfully exercise jurisdiction over nonresidents.<sup>173</sup> It noted that, 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.’”<sup>174</sup> Having noted the purpose of purposeful availment, the plurality articulated what it viewed as the first principle of personal jurisdiction analysis: “whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.”<sup>175</sup> Then the plurality invoked horizontal federalism concerns as its second principle of personal jurisdiction analysis: Due to the “unique genius of our Constitution . . . if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance . . . [because] each

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167. *Id.* at 582-92 (citing *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127 (N.J. 1986)).

168. *See Ides*, *supra* note 13, at 345 (“[T]he Supreme Court stepped in and granted certiorari . . . ostensibly to ameliorate that confusion.”).

169. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) (plurality opinion).

170. *Id.* at 2790; *see supra* notes 138-41 and accompanying text.

171. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (“[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether . . . the sovereign has the power to subject the defendant to judgment concerning [the defendant’s] conduct.”).

172. *Id.*

173. *Id.*

174. *Id.* at 2783 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

175. *Id.* at 2789. Worth noting is that the plurality acknowledges *Bauxites* much the same way that Part II.D did. *Compare id.* (citing *Bauxites* while discussing the individual’s liberty interest in being free from submitting to illegitimate sovereign authority), *with supra* Part II.D (analyzing *Bauxites* in relation to the Court’s personal jurisdiction jurisprudence and concluding *Bauxites* merely frames the relationship of territorially confined sovereignty as integral to the protected liberty interest).

State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>176</sup>

With those principles in mind, Justice Kennedy explained that purposeful availing serves the dual purpose of indicating a defendant’s willingness to submit to state’s sovereign authority and, thus, invoking the sovereignty of the state to exercise its jurisdiction.<sup>177</sup> Based on this sovereignty rationale, the plurality rejected Justice Brennan’s *Asahi* plurality, which required no purposefully availing activities as a predicate for the exercise of jurisdiction, as “inconsistent with the premises of lawful judicial power.”<sup>178</sup> The plurality then marched through its application of law to fact in three short paragraphs and found no purposefully availing activities.<sup>179</sup>

In *J. McIntyre*, then, the plurality described personal jurisdiction from a horizontal federalism viewpoint consistent with the analysis of the Court’s prior personal jurisdiction jurisprudence developed in Part II.<sup>180</sup> But the plurality did not develop its rationale very coherently.<sup>181</sup> Because of this, the plurality failed to link itself to the clear thrust of the Court’s personal jurisdiction precedent developed in Part II.<sup>182</sup> As a result, Justices Breyer and Alito did not perceive an invocation of the only clear doctrinal thread of the Court’s personal jurisdiction precedent—horizontal federalism.<sup>183</sup> Instead, they perceived a “refashion[ing of] basic jurisdictional rules.”<sup>184</sup> It is this aspect of the plurality opinion that is disappointing because it appears that had the plurality better explicated its rationale, perhaps Justices Breyer and Alito would have seen that the plurality does not depart from the

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176. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion); accord Erbsen, *supra* note 15, at 503 (defining “horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions”).

177. *J. McIntyre*, 131 S. Ct. at 2788 (plurality opinion) (“The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”).

178. *Id.* at 2789.

179. *Id.* at 2790-91.

180. *See id.* at 2789 (“[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.”); Erbsen, *supra* note 15, at 503 (defining “horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions.”). The plurality opinion describes all of the facets of horizontal federalism, and yet despite the availability of scholarship describing horizontal federalism, the plurality opinion fails to employ the term. Compare *J. McIntyre*, 131 S. Ct. at 2788-90 (plurality opinion) (describing the limits of state courts’ exercise of personal jurisdiction as allowing individuals to object to having to submit to a court that lacks authority to compel their appearance based on the limits on state sovereignty), with Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 54-60 (2010) (same; labeling the limit on state authority as horizontal federalism).

181. *Cf. Ides*, *supra* note 13, at 386 (“[T]he clerks let their Justices down, the Justices let their colleagues down, and the Court let us all down.”).

182. *See J. McIntyre*, 131 S. Ct. at 2793 (2011) (Breyer, J., concurring) (“[T]his is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.”).

183. *See id.* at 2792-93.

184. *Id.* at 2793.

Court's prior precedent at all.<sup>185</sup> Thus, in place of a 6-3 majority opinion, *J. McIntyre* provided a plurality that convolutedly utilized the Court's prior precedent,<sup>186</sup> a concurring opinion that got lost in the plurality's convolution and did not join the plurality to separately decide the case by utilizing the Court's prior precedent,<sup>187</sup> and a dissent that misinterprets *Bauxites*.<sup>188</sup>

## V. SHOULD PURPOSEFUL AVAILMENT WIN THE DAY?

### A. Choosing a Side

For a quarter of a century now, personal jurisdiction analysis has remained unsettled.<sup>189</sup> The inability of five Justices of the Supreme Court to agree on one rationale has led to a state of affairs in which a defendant sued in a Texas, Louisiana, or Mississippi court will be bound by different *Asahi* pluralities depending upon whether the plaintiff filed in state or federal court.<sup>190</sup> This absurdity exists in other circuits as well.<sup>191</sup>

That the nation's courts cannot agree on a defining rationale for personal jurisdiction analysis perhaps evidences the difficulty in fitting a nineteenth century doctrine into a twenty-first century economy.<sup>192</sup> But personal jurisdiction analysis is fraught with much deeper analytical uncertainties than that.<sup>193</sup> Even still, Part II of this Comment identified that prior to *Asahi*'s abstraction of the issue altogether, horizontal federalism served as the basis for a territorially defined analysis—a consistent theme that spanned *Pennoyer* to *Burger King* in some form or fashion.

By taking the time to trace the evolution of personal jurisdiction over the previous two centuries, the picture is now less murky, and distinct bases

185. See *supra* Part II; cf. *Ides*, *supra* note 13, at 386 (“[T]he clerks let their Justices down, the Justices let their colleagues down, and the Court let us all down.”).

186. See *supra* notes 180-82 and accompanying text.

187. See *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring) (“[R]esolving this case requires no more than adhering to our precedents.”).

188. Compare *id.* at 2798 (Ginsburg, J., dissenting) (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982)) (asserting that *Bauxites* forecloses the plurality's sovereignty analysis), with *supra* Part II.D (undermining interpretations of *Bauxites* similar to Justice Ginsburg's). Cf. *Ides*, *supra* note 13, at 345 (“[E]ach of the opinions, to varying degrees, demonstrated a disappointing level of judicial competence well below that which we can rightfully expect from Supreme Court Justices.”).

189. See *supra* notes 4-7 and accompanying text.

190. See Laughlin, *supra* note 10, at 727 (noting that the state courts of the Fifth Circuit adopt Justice O'Connor's rationale, while federal courts within the Fifth Circuit adhere to Justice Brennan's mere foreseeability test).

191. See *id.*

192. See *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring) (“But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) . . . ?”).

193. See Erbsen, *supra* note 180, at 9-54 (dissecting and analyzing rationales for personal jurisdiction in a variety of circumstances; demonstrating the limitations of each rationale).

for the doctrinal confusion are apparent.<sup>194</sup> The doctrinal confusion surrounding *Asahi* may stem from misapplications of *Bauxites*'s language.<sup>195</sup> Yet, read in light of the Court's personal jurisdiction jurisprudence—especially the cases immediately before and after *Bauxites*—*Bauxites* is unremarkable.<sup>196</sup> So perhaps the combination of *Bauxites*'s language and Justice Brennan's attempted dismantling of purposeful availment better explains the phenomenon.<sup>197</sup>

Whatever the case may be, for over one hundred years the Court consistently incorporated horizontal federalism principles into personal jurisdiction analysis.<sup>198</sup> In *Pennoyer*, the Court expressly invoked federalism concerns to justify its limitation of state courts' exercise of jurisdiction.<sup>199</sup> *Hanson* invoked a strong territorial rationale to define the requirements of sufficient minimum contacts and, in doing so, alluded to federalism concerns in the process.<sup>200</sup> Then, *World-Wide Volkswagen* clarified that the role federalism serves in personal jurisdiction analysis is to provide a rationale as to why state lines still matter.<sup>201</sup> Thus, purposeful availment—as articulated by *Hanson*, rationalized in *World-Wide Volkswagen*, and carried forward through Justice O'Connor's *Asahi* plurality and Justice Kennedy's *J. McIntyre* plurality—recognizes federalism's role.<sup>202</sup>

Purposeful availment recognizes federalism's role by limiting a state's ability to reach outside its territorial boundary to instances when a nonresident defendant creates a sufficient relationship with that state.<sup>203</sup> Under this view, a state's exercise of jurisdiction is initially limited to its territorial boundaries.<sup>204</sup> Only on the basis of individual action that creates a sufficient relationship with the state is the state then permitted to reach outside its territorial boundary and exercise jurisdiction over the nonresident defendant.<sup>205</sup>

While Part II established that horizontal federalism concerns connect the Court's jurisprudence from *Pennoyer* to *J. McIntyre*, Part II also noted that personal jurisdiction analysis ultimately functions to protect individual

194. See *supra* Part II.

195. See, e.g., *J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting).

196. See *supra* Part II.C-D.

197. See *supra* notes 104, 149-52 and accompanying text.

198. See *supra* Part II.

199. See *supra* Part II.A.

200. See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“[Limits on states’ exercise of jurisdiction] are a consequence of territorial limitations on the power of the respective States.”); see also Erbsen, *supra* note 180, at 54 (“[W]hat really matters is that a forum cannot reach beyond *its own* borders absent sufficient grounds for doing so.”); *supra* Part II.B.

201. See *supra* Part II.C-D.

202. See *supra* Parts II-IV.

203. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294, 297 (1980).

204. See, e.g., *Hanson*, 357 U.S. at 251-52.

205. See, e.g., *id.*

liberty.<sup>206</sup> Rather than obviate federalism from personal jurisdiction analysis, this protection of individual liberty reinforces the validity of the horizontal federalism rationale present in the Court's jurisprudence since *Pennoyer*.<sup>207</sup>

To understand this effect, however, the interest protected must be defined clearly. The interest protected is not a defense against suit, and as Professor Erbsen notes, the liberty interest protected is not one that "protect[s] defendants from being sued within a particular state."<sup>208</sup> Instead, the liberty interest protected "is that the defendant has a right to avoid being haled into a state *by that state*."<sup>209</sup> This is a subtle, yet meaningful, difference, and horizontal federalism concerns provide the following meaning:

[T]he Constitution endows all fifty states with a certain power and thus creates a scenario where each state might exercise its power in a manner that burdens other states or citizens of other states, which in turn requires a rule . . . [that] would posit that if a state's action implicates sufficiently important interests and is sufficiently objectionable (for any number of context-sensitive reasons) then the action is unconstitutional.<sup>210</sup>

In the context of personal jurisdiction, horizontal federalism prevents states, through their courts, from compelling an individual's appearance simply because a plaintiff chose to file suit there.<sup>211</sup> The interest implicated in personal jurisdiction analysis is having to submit to the authority of a state with which one has no relationship with other than a relationship created by the actions of others.<sup>212</sup> Preventing states' unfettered exercise of jurisdiction out of deference to the co-equal sovereignty each state shares with one another, then, protects individuals by "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."<sup>213</sup> This liberty interest certainly pales in comparison to other notable interests the

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206. See Part IIC-D.

207. See Erbsen, *supra* note 180, at 54-60 (describing how the horizontal federalism rationale is strengthened by conceiving of personal jurisdiction as protection of individual liberty interests).

208. See *id.* at 56-57.

209. *Id.* at 58.

210. *Id.* at 62.

211. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

212. See *Hanson v. Denckla*, 357 U.S. 235, 253, 254 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

213. *World-Wide Volkswagen*, 444 U.S. at 297; accord Rhodes, *supra* note 60, at 628-29 (suggesting this language evidences a liberty interest under the due process analysis). As Professor Erbsen astutely notes, "[this liberty interest] seems less robust than the majestic title of 'liberty' suggests." Erbsen, *supra* note 180, at 58.

Fourteenth Amendment protects.<sup>214</sup> But it also remains consonant with other constitutionally enshrined horizontal federalism checks that allow individuals to assert challenges to horizontal federalism frictions.<sup>215</sup>

The validity of the horizontal federalism rationale is confirmed elsewhere in the personal jurisdiction analysis. Under Federal Rule of Civil Procedure 4(k)(1)(C), Congress can authorize nationwide jurisdiction by statute.<sup>216</sup> Thus, a court created by the federal government, exercising power pursuant to a statute enacted by the federal government, may exercise jurisdiction based on contacts that occur within its border (i.e., the fifty states and territories).<sup>217</sup>

This provides useful insight into why a purposeful availment test, buttressed by horizontal federalism concerns, reflects a cogent liberty interest for the Due Process Clause of the Fourteenth Amendment to protect. First, it demonstrates that under the Constitution, personal jurisdiction analysis always requires that the defendant have engaged in some activity within the borders of the sovereign entity that hauls the defendant into its court.<sup>218</sup> Second, it “suggests that what really matters is that a forum cannot reach beyond its *own* borders absent sufficient grounds for doing so.”<sup>219</sup> Purposeful availment—as articulated by *Hanson*, rationalized in *World-Wide Volkswagen*, and carried forward through Justice O’Connor’s *Asahi* plurality and Justice Kennedy’s *J. McIntyre* plurality—defines those sufficient grounds for a state to reach beyond its borders.<sup>220</sup> Accordingly, purposeful availment should win the day.<sup>221</sup>

Acknowledging horizontal federalism concerns, then, does not entail paying deference to those concerns simply because Justice Field did so in

214. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545-604 (3d ed. 2006).

215. See Erbsen, *supra* note 15, at 548-49.

216. See FED. R. CIV. P. 4(k) advisory committee’s note to 1993 amendment (“The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.”); Erbsen, *supra* note 180, at 49 n.201 (listing the various statutes authorizing nationwide jurisdiction); cf. *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 105-07 (1987) (discussing Federal Rule of Civil Procedure 4(e)’s allowance of nationwide service process if authorized by Congressional statute).

217. See FED. R. CIV. P. 4(k) advisory committee’s note to 1993 amendment (“The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.”); *Omni Capital Int’l, Ltd.*, 484 U.S. at 102 n.5 (noting that the Court has yet to confront this issue); *Med. Mut. of Ohio v. DeSoto*, 245 F.3d 561, 567-68 (6th Cir. 2001) (approving nationwide contacts analysis in federal question case); *Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (same); *Fed. Fountain, Inc. v. KR Entm’t*, 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) (same); *Bush v. Buchman, Buchman & O’Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994); see also Erbsen, *supra* note 180, at 51-52 (noting that all but one circuit holds that nationwide contacts are sufficient, on some level, to support the exercise of jurisdiction in federal question cases).

218. See Erbsen, *supra* note 180, at 54.

219. *Id.*

220. See Parts II-IV.

221. See Erbsen, *supra* note 180, at 54-63; *supra* Parts II.C, III.

1878. Rather, acknowledging horizontal federalism entails recognizing—as we do in several other areas of the law—the limitations inherent in, and the problems created by, our federal system of government.<sup>222</sup> True, defining state “sovereignty” is not easy from an analytical standpoint.<sup>223</sup> But that does not displace the reality that issues of horizontal federalism, and the friction they create, are very much real.<sup>224</sup> Neither does it negate that encoding horizontal federalism into an individual liberty interest supplies a cogent, workable rationale for personal jurisdiction.<sup>225</sup> Nor does it overshadow the practical benefits that can ensue from unifying personal jurisdiction analysis because, by doing so, attorneys, courts, and legislatures can fashion solutions to minimize the burden on plaintiffs that purposeful availment can bring about.

### B. Making Purposeful Availment Work

Does adopting purposeful availment solve all of personal jurisdiction analysis’s problems? No.<sup>226</sup> But, it can be readily adapted to both familiar and new concerns regarding plaintiff-centric fairness.

#### 1. Dealing with Problems the Court Has Already Confronted

Purposeful availment can present undue obstacles to plaintiffs pursuing legitimate litigation because the cost of litigating outside their home state makes little economic sense compared to the amount of damages they seek to recover.<sup>227</sup> But acknowledging horizontal federalism does not require states to reward companies who operate through complex distribution schemes to defeat jurisdiction.<sup>228</sup>

For example, Texas adopts Justice O’Connor’s stream-of-commerce-plus rationale.<sup>229</sup> This rationale can operate to prevent plaintiffs from litigating against nonresident defendants in Texas courts.<sup>230</sup> But the Texas Legislature has included a failsafe for plaintiffs in products liability

222. See Erbsen, *supra* note 15, at 511-29; *infra* note 252 and accompanying text.

223. See H. Jefferson Powell & Benjamin J. Priestler, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645, 646 (2000) (“The problem with this principle of respect for state sovereignty is that its meaning is not self-evident . . . [S]tates plainly are not ‘sovereigns’ as that term is used in international law . . .”).

224. See Erbsen, *supra* note 15, at 511-29 (categorizing the various frictions that result between states).

225. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); Erbsen, *supra* note 180, at 63-64.

226. See Erbsen, *supra* note 180, at 95-96.

227. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2802-04 (2011) (Ginsburg, J., dissenting) (lamenting this issue).

228. See TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(7)(B), (c) (West 2011).

229. See, e.g., *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 576-77 (Tex. 2007).

230. See, e.g., *id.* (denying jurisdiction).

actions—the actions most typically associated with difficult stream of commerce issues.<sup>231</sup>

Although Texas law generally exempts non-manufacturing sellers of products from products liability actions, it also carves out several exceptions to this general rule.<sup>232</sup> One such exception reinstates non-manufacturing sellers' liability when "the manufacturer of the product is . . . not subject to the jurisdiction of the court."<sup>233</sup> This exception allows for a plaintiff simply to sue the seller, collect a judgment, and leave the seller to worry about seeking indemnification from the manufacturer elsewhere.<sup>234</sup> To further reduce the plaintiff's costs and burden in recovering a judgment, § 82.003(c) provides a presumption that the manufacturer is not subject to the court's jurisdiction if the manufacturer does not file an answer.<sup>235</sup>

The adoption of statutes mirroring § 82.003(a)(7)(B) would circumvent much of the consternation the purposeful availment requirement could foist on would-be plaintiffs. In most instances, the seller will have undertaken some activity connected with the plaintiff's forum state in order to complete the transaction at issue. That activity, generally, would likely evidence purposeful availment and allow the plaintiff to acquire jurisdiction over the seller to litigate the claim. If the seller genuinely believes that it could acquire personal jurisdiction over the manufacturer in the instant action, a provision modeled after § 82.003(c) would allow the seller to demonstrate that to the court.<sup>236</sup> But the burden and the cost of doing so would be born by the seller only—not the plaintiff.<sup>237</sup> As such, readily available legislative solutions exist that can alleviate the plaintiff-centric fairness concerns brought on by acknowledging a purposeful availment standard influenced by horizontal federalism concerns.

## 2. *Fitting Minimum Contacts to the Internet*

Prior to the advent of geolocating services, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* provided practitioners and courts its widely adopted sliding-scale approach to determine whether personal jurisdiction could be based on a defendant's online activity.<sup>238</sup> The scale ranged from websites

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231. See § 82.003(a)(7)(B), (c); *supra* Parts III-IV.

232. See § 82.003(a)(1)-(7).

233. § 82.003(a)(7)(B).

234. See *id.*

235. See § 82.003(c).

236. See *id.*

237. See *id.* (requiring the seller to prove to the court that jurisdiction exists over the manufacturer and relieving the plaintiff of this burden).

238. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-25 (W.D. Pa. 1997); see Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal*

through which the defendant contracted with forum residents (active websites) to websites that merely provided information (passive websites).<sup>239</sup> In the middle, the court coined a term of art that was subjected to much disparate treatment due to the term's ambiguity: interactive websites.<sup>240</sup> *Zippo* interactivity, however, merely sought to serve as a proxy for purposefully directed activity that related to the plaintiff's cause of action.<sup>241</sup> Rather than striving to add substance to a muddled term of art, the focus should shift away from *Zippo*.<sup>242</sup> Geolocation services and corresponding technological innovations can more easily provide discrete indications of the amount and type of interaction between a website and forum residents.<sup>243</sup> Thus, jurisdictional litigation should shift its emphasis away from *Zippo* and towards innovations in the discovery process that leverage geolocation technology.

Practitioners, then, should stop trying to establish abstract "interactivity" to establish personal jurisdiction. Instead, practitioners should leverage common litigation tools that can more easily ferret out the facts necessary to establish jurisdiction's propriety. Although keyword-driven to correspond with search results or website content, most online advertising services also include the ability to geographically target potential customers.<sup>244</sup> Thus, a simple set of requests for admissions can quickly establish whether what Justice O'Connor described as the "something more" necessary to exercise personal jurisdiction exists.<sup>245</sup>

Critical to develop, however, are precise definitions of online marketing tools such as geographic targeting. Based on freely available information from online advertising services, website hosting services, etc., litigators can easily craft definitions for ambiguous terms that are likely to take center stage in jurisdictional disputes.<sup>246</sup> The following definitions illustrate the point that based on readily discernible information—like the

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*Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 78-80 (2011); MOORE, *supra* note 8, ¶ 108.44[1].

239. *Zippo*, 952 F. Supp. at 1124 (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)).

240. *See id.*; 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1073.1 (3d ed. 2002 & Supp. 2011).

241. *See Zippo*, 952 F. Supp. at 1123 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

242. *See King*, *supra* note 238, at 78-80.

243. *See id.* at 66-70.

244. *See, e.g.*, GOOGLE ADS, *supra* note 3 ("[C]reate your ads and choose keywords, which are words or phrases related to your business"); *Benefits*, GOOGLE ADS, <http://www.google.com/ads/adwords2/#tab0=1> (last visited Oct. 3, 2012) (noting the ability to layer in geographic targeting to keyword based advertising).

245. *See King*, *supra* note 238, at 78-80 (discussing geolocation technologies' ramifications on jurisdictional analysis and discussion of proposed methodologies to handle this shift).

246. *See id.* at 66-70, 78-80 (discussing geolocation technologies' ramifications on jurisdictional analysis and discussion of proposed methodologies to handle this shift).

website's source code—practitioners can easily tailor definitions to the circumstances of their case.

1. **Geographic targeting** includes, but is not limited to, the following methods to approximate geographic location for the purposes of targeting advertisements: utilizing country-based domains (e.g., .fr for France), search terms that contain geographic locations (e.g., “New York restaurants”), physical locations based on Internet Protocol addresses, and location information shared from social networks or email accounts that provide information through user identifying information stored via text strings within the user's internet browser that identify the user (commonly known as cookies).
2. **Internet Protocol address** means the unique string of numbers assigned to a device attached to a TCP/IP network that is transmitted when the device relays information via the TCP/IP network.
3. **User** means a single Internet Protocol address associated with an individual computer or mobile device.
4. **Online** refers to being connected to the Internet.
5. **Internet** means the system of interconnected computer networks colloquially referred to as “the Internet.”

With the appropriate definitions set forth, propounding requests for admissions such as these could establish the plus factor of advertising in the forum state:<sup>247</sup>

1. [Defendant] utilized online advertisements to market [allegedly defective product]?  
ADMIT or DENY:
2. [Defendant] included geographic targeting as a feature of its online advertisements?  
ADMIT or DENY:
3. [Defendant] specifically targeted [forum state] with its online advertising utilizing a geographically targeting feature as referenced in paragraph 2?  
ADMIT or DENY:

A further plus factor could be established simply by viewing the defendant's website to determine whether the website has a “Contact Us” feature or live chat support. If either of these are present on the website, then use the following simple requests for admission:

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247. See *Asahi Indus. Metal Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality opinion) (listing “advertising in the forum State” as evidence of purposefully directed activities towards a forum state).

4. [Defendant's] website provides a [live chat support] feature for users to ask questions to or seek advice from [Defendant]?

ADMIT or DENY:

5. Based on location data derived from Internet Protocol addresses, residents of [forum state] have utilized the service referenced in paragraph 4?

ADMIT or DENY:

Answers to these requests could provide sufficient evidence that the defendant established channels of communication with residents of the forum state.<sup>248</sup> Thus, follow-up requests for producing the relevant records would serve a plaintiff very well in overcoming something akin to a Federal Rule of Civil Procedure 12(b)(2) motion.<sup>249</sup>

Of course a possibility exists that those requests, and other similarly conceived requests, will not turn up evidence of purposefully directed activity. Further, perhaps a plaintiff's home state has not adopted legislation similar to Texas Civil Practice & Remedies Code Annotated § 82.003(a)(7)(B), (c). Those circumstances would force that plaintiff to litigate its claim elsewhere, which is likely to be more inconvenient than the plaintiff's hometown.<sup>250</sup> Perhaps the attorney from Part I might find herself in this exact plight (assuming, instead, that the attorney does not practice in Texas).<sup>251</sup> A situation like this is regrettable. But situations in which the plaintiff's preferred choice of forum is not sacrosanct are not uncommon.<sup>252</sup> Although the old adage that plaintiffs are masters of their own claims provides a general rule, the rule is just that—general. As distasteful as depriving plaintiffs of their preferred forum might be, procedural devices that divest plaintiffs of their preference do so because those devices weigh plaintiff-centric fairness against other systemic concerns.<sup>253</sup> Sometimes, the balance of the systemic concerns outweighs those of plaintiff-centric fairness.

Personal jurisdiction is just one of the many examples when the systemic concerns outweigh plaintiff-centric concerns.<sup>254</sup> Indeed, a personal jurisdiction analysis that is rooted in the horizontal federalism concerns that are inherent under our nation's structure reminds us that

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248. *See id.* (listing “establishing channels for providing regular advice to customers in the forum” as evidence of purposefully directed activities towards a forum state).

249. FED. R. CIV. P. 12(b)(2) (providing a basis to move for dismissal for lack of personal jurisdiction); *see, e.g.*, *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009) (describing plaintiff's burden to survive 12(b)(2) motion).

250. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2798, 2803 (2011) (Ginsburg, J., dissenting).

251. *See supra* Part I; notes 229-37 and accompanying text.

252. *See, e.g.*, 28 U.S.C. §§ 1404, 1406 (2012); FED. R. CIV. P. 19(b); *BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950, 953-55 (5th Cir. 1977) (discussing abstention doctrines).

253. *See supra* note 252.

254. *See supra* Part V.A.

The concept of minimum contacts . . . perform[s] two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.<sup>255</sup>

Because:

[Restrictions on states' ability to exercise personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. 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 'minimum contacts' with that State that are a prerequisite to its exercise of power over him.<sup>256</sup>

Accordingly, a personal jurisdiction analysis rooted in horizontal federalism concerns simply reflects a procedural device that accounts for the systemic concerns inherent in our federal system of government. And thus, "by continuing to require contacts with the forum state, the doctrine continues the analogy of states to nations, albeit in a much weaker way than in the early cases. . . . [Nevertheless,] the doctrine reminds us that we are a nation of states."<sup>257</sup>

## VI. CONCLUSION

That *J. McIntyre* failed to generate a majority opinion should merit the ire of commentators, practitioners, and lower courts.<sup>258</sup> That failing should also beg the fairly obvious question this Comment posed at its outset: What should be done about the continued state of unrest in personal jurisdiction analysis? At the most basic level, the answer is obvious: unify it. But the process of unifying the twenty-five year fracture in personal jurisdiction analysis is not that easy. If it were, *J. McIntyre* would not have produced three inadequate-for-the-task-at-hand opinions.<sup>259</sup>

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255. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980).

256. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

257. Drobak, *supra* note 71, at 1047.

258. *Ides*, *supra* note 13, at 386 ("[T]he clerks let their Justices down, the Justices let their colleagues down, and the Court let us all down.").

259. *Id.* at 345 ("[E]ach of the opinions, to varying degrees, demonstrated a disappointing level of judicial competence well below that which we can rightfully expect from Supreme Court Justices."). As this Comment goes to publication, though, the Court has granted certiorari to another personal jurisdiction case that will focus squarely on what constitutes purposeful availment. *Fiore v. Walden*, 688 F.3d 558 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3334 (U.S. Mar. 4, 2013) (No. 12-574). Perhaps, then, clarity—rather than continued confusion—is on the horizon.

Spotting the issue en route to answering the question is simple: Why does the dispute exist? This Comment sought to address the issue not by analyzing the dispute itself but instead by attempting to identify the dispute's origin.<sup>260</sup> Because Part II identified what allowed the confusion to take root, Part III could identify the precise issue that split the *Asahi* Court: the validity of federalism's influence in personal jurisdiction analysis.

Although Part II teased out where the uncertainty stems from, Part II accomplished more than just that. Part II, through its analysis of the Court's precedent from *Pennoyer* to *Asahi*, also identified a constant: horizontal federalism concerns embodied in the various tests the Court articulated over time.<sup>261</sup> And Part V demonstrated that horizontal federalism concerns remain relevant in personal jurisdiction analysis even in the twenty-first century.

Although *J. McIntyre* failed to similarly analyze the Court's prior precedent in support of its holding, Part IV established that the plurality still invoked horizontal federalism concerns.<sup>262</sup> Hopefully, however, rather than inspire continued ire towards the lax case development and analysis *J. McIntyre* provided, this Comment has suggested a solution that can mend the fracture. That hope is sated whether the reader finds the solution in this Comment's suggested answer to its own question or in the methodology it employed in reaching its answer. Thus, although this Comment certainly intended to provide a workable solution, simply sparking a more coherent analysis of the "how" or "why" of the problem—rather than promoting continued discussion of the problem itself—will suffice.

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260. See *supra* Parts II-III.

261. See *supra* Parts II, V.

262. See *supra* notes 180-81 and accompanying text.