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Online Communities as Territorial Units: Personal Jurisdiction over Cyberspace After *J. McIntyre Machinery, Ltd. v. Nicastro*

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**ONLINE COMMUNITIES AS TERRITORIAL UNITS: PERSONAL
JURISDICTION OVER CYBERSPACE AFTER *J. McINTYRE
MACHINERY, LTD. v. NICASTRO***

INTRODUCTION

The term “cyberspace” was coined by science fiction author William Gibson in his 1982 short story *Burning Chrome*¹ and was later popularized in his debut novel *Neuromancer*, published in 1984.² In Gibson’s vision, cyberspace was a three-dimensional realm that computer hackers entered by implanting electrodes into their foreheads.³ By navigating computer networks with their thoughts, hackers could break into servers, steal electronic data, and commit various other cybercrimes without lifting a finger.⁴

Even though Gibson’s original vision of cyberspace will likely remain a fiction for the foreseeable future, it is hard to overstate the internet’s impact on the lives of everyday people. In 2010, the average American spent thirty-two hours per month in cyberspace,⁵ and not all of that time was spent on frivolous entertainment. Commerce conducted through the internet, styled “e-commerce,” makes up a substantial portion of the American economy. According to the U.S. Census Bureau, a total of 3.371 trillion dollars’ worth of goods purchased through e-commerce were shipped in the United States in 2009, totaling 16.8% of the value of all goods shipped that year.⁶

But with every innovation comes a new set of legal challenges. The internet has been exploited in illegal enterprises ranging from piracy of music⁷

1. Scott Thill, *March 17, 1948: William Gibson, Father of Cyberspace*, WIRED.COM (Mar. 17, 2011, 7:00 AM), <http://www.wired.com/thisdayintech/2011/03/0317cyberspace-author-william-gibson-born>; see also William Gibson, *Burning Chrome*, OMNI, July 1982, at 72.

2. Thill, *supra* note 1; see also WILLIAM GIBSON, *NEUROMANCER* 51 (1984) (“Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation . . .”).

3. GIBSON, *supra* note 2, at 55.

4. *Id.* at 55–69.

5. *Average Time Spent Online per U.S. Visitor in 2010*, COMSCORE DATA MINE (Jan. 13, 2011), <http://www.comscoredatamine.com/2011/01/average-time-spent-online-per-u-s-visitor-in-2010>.

6. *E-Stats*, U.S. CENSUS BUREAU (May 26, 2011), <http://www.census.gov/econ/estats/2009/2009reportfinal.pdf>.

7. See generally Megan M. LaBelle, *The “Rootkit Debacle”: The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy*, 84 DENV. U. L. REV. 79 (2006) (providing a thorough, pre-2006 history of the recording industry’s war on file sharing).

to drug trafficking⁸ and distribution of child pornography.⁹ While these issues have received a great deal of attention from the popular press, some legal commentators have been more fascinated with the personal jurisdiction of state courts in cases involving internet communications.¹⁰ The most well-known case addressing this subject, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,¹¹ remains one of the most frequently cited federal district court cases in history.¹² Yet all of the judges, attorneys, and law professors who have discussed this problem have yet to reach any real consensus as to how it should be solved. Commentators attempting to shoehorn the internet into the framework of *International Shoe Co. v. Washington*¹³ have recommended tests ranging from multifactor targeting tests¹⁴ to causation tests that examine the strength of the causal connection between internet-based communications and the plaintiff's cause of action.¹⁵ Most recently, in the 2011 case *J. McIntyre Machinery, Ltd. v. Nicaastro*,¹⁶ Justice Breyer's concurrence expressed a willingness to change the prevailing doctrines to address the issues raised by internet commerce, but declined to do so because *J. McIntyre* "d[id] not present any of those issues."¹⁷

In spite of the volume of commentary that has been written on this subject, no one seems to have addressed perhaps the most difficult challenge to personal jurisdiction posed by modern technology: that of disputes arising between members of online communities. In the early 1990s, a typical website

8. See Adrian Chen, *Underground Website Lets You Buy Any Drug Imaginable*, WIRED.COM (June 1, 2011, 2:25 PM), <http://www.wired.com/threatlevel/2011/06/silkroad> (discussing the underground e-marketplace Silk Road, which lives on a secreted part of the internet accessible only through a network of proxy servers called Tor and is one of most notorious examples of internet-based drug trafficking).

9. See Joanna Glasner, *P2P Taken to Task for Child Porn*, WIRED.COM (Sept. 9, 2003), <http://www.wired.com/techbiz/media/news/2003/09/60368> (noting that the same peer-to-peer file sharing networks that have been used for illegal distribution of music have also been used for distribution of child pornography).

10. See, e.g., Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133 (2009).

11. 952 F. Supp. 1119 (W.D. Pa. 1997).

12. See Haynes, *supra* note 10, at 155 n.145 ("According to Westlaw, *Zippo* has been cited in over 600 court decisions and 648 law review articles in the twelve years since the decision."). As of this writing, Westlaw's KeyCite service lists a total of 4,782 citing references for *Zippo*.

13. 326 U.S. 310 (1945).

14. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1384-404 (2001); see also *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (combining *Zippo* with the *Calder* effects test).

15. Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1838-44 (2003).

16. 131 S. Ct. 2780 (2011).

17. *Id.* at 2791 (Breyer, J., concurring).

was little more than a two-way broadcast medium where website operators could distribute information to users, and users could submit limited amounts of information back to the website operators.¹⁸ Today, many websites are designed as digital spaces whose occupants are culturally connected, much like neighbors in a geographic community. When transactions are conducted or torts are committed in these digital spaces, it makes little sense to analyze the events as if they take place inside a forum state. Rather, they actually take place in cyberspace, a non-physical interactive realm that cannot be fixed at a given location.¹⁹ The Supreme Court has yet to make room for the unique attributes of cyberspace in the law of personal jurisdiction, and based on the *J. McIntyre* decision, it appears that the Court never will. This Comment will suggest that personal jurisdiction rules should be changed to accommodate the reality of cyberspace, and that it is up to Congress to do so by expanding the jurisdiction of the federal district courts to cover certain state-law claims arising from online communities.

Part I briefly reviews relevant highlights in the evolution of personal jurisdiction doctrine through the dawn of the World Wide Web. Part II discusses the nature of online communities and the challenge they pose. Part III analyzes the impact of the Supreme Court's decision in the 2011 *J. McIntyre* case and predicts that the judiciary will not modify Fourteenth Amendment law to accommodate online communities. Finally, Part IV proposes a cyberterritorial model of jurisdiction and identifies some possible challenges in implementing this model.

I. THE EVOLUTION OF PERSONAL JURISDICTION

One of the first steps toward the modern personal jurisdiction paradigm was made in 1927 when the Supreme Court decided *Hess v. Pawloski*.²⁰ Fifty years earlier, the Court had famously held in *Pennoyer v. Neff* that a state court could not establish personal jurisdiction over a non-resident, non-consenting defendant unless the defendant had been lawfully served inside the forum state's borders.²¹ In *Hess*, the Court heard a challenge to a Massachusetts statute providing that when a non-resident motorist is sued for an act of motor vehicle negligence committed on a Massachusetts public roadway, the plaintiff

18. At the genesis of the World Wide Web in 1992, interactivity was limited to hyperlinks. See WORLD WIDE WEB CONSORTIUM, <http://www.w3.org/History/19921103-hypertext/hypertext/WWW/MarkUp/Tags.html> (last visited June 27, 2012) (reproducing the Web's very first site); Matt Blum, *20 Years Ago Today: The First Website Is Published*, WIRED.COM (Aug. 6, 2011, 8:00 AM), <http://www.wired.com/geekdad/2011/08/world-wide-web-20-years>.

19. William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 198 (1995).

20. 274 U.S. 352 (1927).

21. 95 U.S. 714, 722 (1877).

may employ substitute service on the state registrar in lieu of personally serving the foreign defendant.²² Even though this statute fell outside the boundaries of *Pennoyer*, the Court upheld it in light of the “serious dangers to persons and property” posed by automobiles, and the state’s accompanying interest in promoting safe driving and helping its citizens obtain convenient relief for injuries inflicted by non-resident motorists.²³

The most famous personal jurisdiction case decided by the Supreme Court, and the case that defines the modern paradigm, is the 1945 case of *International Shoe Co. v. Washington*.²⁴ *International Shoe* replaced the formal jurisdictional categories of *Pennoyer* with the principle that a state may exercise jurisdiction whenever the defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²⁵

An important refinement of *International Shoe*’s minimum contacts test came in *Hanson v. Denckla*,²⁶ which held that jurisdiction requires “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”²⁷ In *Hanson*, the only contact between the defendant, a Delaware bank, and the forum state of Florida was that the bank had been named trustee of a trust whose beneficiary later moved to Florida.²⁸ The Court explained that “unilateral activity of those who claim some relationship with a nonresident defendant,” such as the beneficiary’s decision to move to Florida, “cannot satisfy” the minimum contacts test.²⁹

*Kulko v. Superior Court*³⁰ illustrates the flexibility of the minimum contacts test. The defendant, a divorced New York resident, was named as a party in his ex-wife’s action in a California court.³¹ The action sought to establish a divorce decree obtained in Haiti as a California judgment and to modify its terms as to visitation and child support.³² Before the action was filed, the defendant’s only contacts with California were that he consented to his daughter living there for the school year, that he purchased his daughter a plane ticket from New York to California, and that he had two brief military

22. *Hess*, 274 U.S. at 353–54.

23. *Id.* at 356–57.

24. 326 U.S. 310 (1945).

25. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

26. 357 U.S. 235 (1958).

27. *Id.* at 253.

28. *Id.* at 252.

29. *Id.* at 253.

30. 436 U.S. 84 (1978).

31. *Id.* at 87–88.

32. *Id.* at 88.

stopovers there many years prior.³³ On these facts, the Supreme Court's holding that California could not exercise jurisdiction over the defendant³⁴ may have been somewhat predictable. Nonetheless, the opinion is noteworthy for its rationale that jurisdiction "would impose an unreasonable burden on family relations, and one wholly unjustified by the 'quality and nature' of appellant's activities in or relating to the State of California."³⁵ *Kulko* demonstrates that the circumstances surrounding the litigation, including the relationship between the parties, can change the threshold at which the minimum contacts test will allow a state court to exercise jurisdiction.³⁶

The 1977 case of *Shaffer v. Heitner*³⁷ reinforced the importance of the values of fair play and substantial justice, and also emphasized that fundamental fairness is at the core of Fourteenth Amendment due process.³⁸ At issue in *Shaffer* was the Delaware court's exercise of quasi in rem jurisdiction over the defendants' shares of stock in Greyhound, a Delaware corporation.³⁹ In reversing the Delaware high court, Justice Thurgood Marshall wrote that the notion that "an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property" was a "fiction . . . support[ing] an ancient form without substantial modern justification" and that "[i]ts continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant."⁴⁰ Though he gave due consideration to the long history of quasi in rem jurisdiction,⁴¹ Justice Marshall had no qualms about overturning a jurisdictional rule that had existed for over a century. He wrote that traditional notions of fair play and substantial justice "can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."⁴² For these reasons, the Court held that a state's power over property within its borders is not absolute, and

33. *Id.* at 87, 90.

34. *Id.* at 101.

35. *Kulko*, 436 U.S. at 98 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

36. The Court also emphasized that the Due Process Clause can allow for flexible tests, but still imposes a meaningful limitation on state court jurisdiction. *Id.* at 101 ("We therefore believe that the state courts in the instant case failed to heed our admonition that the flexible standard of *International Shoe* does not herald the eventual demise of all restrictions on the personal jurisdiction of state courts." (internal quotation marks omitted)).

37. 433 U.S. 186 (1977).

38. *See id.* at 211.

39. *Id.* at 191–92.

40. *Id.* at 212.

41. *Id.* at 211–12 ("This history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process but it is not decisive." (internal citation omitted)).

42. *Shaffer*, 433 U.S. at 212.

that state courts' use of quasi in rem jurisdiction must satisfy the minimum contacts test.⁴³

One lesson that should be drawn from the history of personal jurisdiction doctrine is that the Court has, starting in the twentieth century, employed a culture-sensitive analysis. Whereas *Pennoyer* was decided based on "principle[s] of general, if not universal, law,"⁴⁴ later decisions acknowledged the realities of modern life and sought to replace rules that would unjustifiably deprive plaintiffs of a fair opportunity to obtain relief (such as in *Hess*), or that would unreasonably burden defendants' ability to own intangible property (such as in *Shaffer*), or maintain familial relationships across state lines (such as in *Kulko*). Since the Due Process Clause did not require the Court to turn a blind eye to the dangers of the automobile,⁴⁵ the interests of investors,⁴⁶ and the needs of families affected by divorce,⁴⁷ there should also be no obstacle to the Court giving full consideration to the cultural and commercial changes brought about by the advent of online communities.

Starting in the mid-90s, lower courts attempted to give that consideration to internet-based commerce. Best known among such cases is the district court case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, decided in 1997.⁴⁸ While *Zippo* has not received universal approval,⁴⁹ it remains one of the only cases that has attempted to create a new conceptual framework to address internet-related personal jurisdiction issues. At issue in *Zippo* was an internet domain name dispute between Zippo Manufacturing ("Manufacturing"), the maker of the well-known Zippo pocket lighters, and Zippo Dot Com ("Dot Com"), a company that sold access to internet newsgroups.⁵⁰ Manufacturing filed suit against Dot Com in the Western District of Pennsylvania, alleging that the court had jurisdiction based primarily on the fact that 3000 Pennsylvania residents subscribed to Dot Com's newsgroup service.⁵¹

The court proposed a sliding scale that would assign weight to contacts made via a website based on the website's level of interactivity.⁵² At the low end of the spectrum are "passive" websites that simply "make information

43. *Id.*

44. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

45. *See Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

46. *See Shaffer*, 433 U.S. at 212.

47. *See Kulko v. Superior Court*, 436 U.S. 84, 98 (1978).

48. 952 F. Supp. 1119 (W.D. Pa. 1997).

49. *See, e.g., Howard v. Mo. Bone & Joint Ctr., Inc.*, 869 N.E.2d 207, 212 (Ill. App. Ct. 2007) ("We disagree with the arbitrary 'sliding scale' approach adopted by *Zippo Manufacturing Co.* . . .").

50. *Zippo*, 952 F. Supp. at 1121.

51. *Id.*

52. *Id.* at 1124.

available to those who are interested in it.”⁵³ At the high end of the spectrum are “situations where a defendant clearly does business over the Internet” and “enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.”⁵⁴ In the middle are “interactive” sites where users “can exchange information with the host computer.”⁵⁵ At the high end, jurisdiction is proper; at the low end, jurisdiction is not proper; in the middle, “jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs” on the site.⁵⁶ Applying this sliding scale to the case at hand, the court determined that Dot Com was “doing business over the Internet,” and had therefore purposefully availed itself of the opportunity to do business in Pennsylvania, making itself subject to a Pennsylvania court’s jurisdiction.⁵⁷

Dot Com may have been a typical internet business from the mid-90s, but online commerce takes on many different forms today. The form that poses the greatest challenge to the law of personal jurisdiction is commerce conducted not between the users and the owner of a particular website, but between members of online communities.

II. WILLIAM GIBSON VINDICATED: ONLINE COMMUNITIES AND CYBERSPACE

Thirty years after its first use, Gibson’s term “cyberspace” has now been vindicated. The internet is a non-physical space, complex and organic, in which users from all over the world can interact and exchange information. One of the best illustrations of the nature of online communities is the popular website Reddit, which had more than thirty-four million unique users in December 2011.⁵⁸ Reddit’s design is roughly a cross between a social bookmarking website and an online discussion forum. Users submit links to other websites containing content that they think other users will find interesting, useful, or entertaining.⁵⁹ Other Reddit users can then weigh in by participating in a comment thread attached to the link or by using Reddit’s

53. *Id.*

54. *Id.*

55. *Zippo*, 952 F. Supp. at 1124.

56. *Id.*

57. *Id.* at 1125–26.

58. Erik Martin, *2 Billion & Beyond*, THE REDDIT BLOG (Jan. 5, 2012, 8:14 AM), <http://blog.reddit.com/2012/01/2-billion-beyond.html>.

59. See *Frequently Asked Questions*, REDDIT, <http://www.reddit.com/help/faq> (last visited Feb. 17, 2012). Users can also submit self-posts, which are comment threads that begin with a message written by the submitter instead of a link to another website. See *Help*, REDDIT, <http://www.reddit.com/help/submitting> (last visited Feb. 17, 2012).

trademark voting system, which consists of the submission of a binary “upvote” or “downvote.”⁶⁰

What makes Reddit different from older sites like Digg, Slashdot, and Delicious is the fact that Reddit is divided into more than 100,000 subsections called subreddits.⁶¹ Each subreddit is devoted to a certain subject, ranging from broad topics such as politics,⁶² humor,⁶³ and music,⁶⁴ to specific niche topics such as particular hobbies,⁶⁵ television shows,⁶⁶ and cities.⁶⁷ The more well-populated and well-developed subreddits constitute communities in a sense that should have significance in the context of personal jurisdiction. This is because larger subreddits have their own rules of conduct,⁶⁸ shared culture, and interactive proximity⁶⁹ between members of the community. Each of these three attributes ties in to the thinking that underlies personal jurisdiction caselaw.

First, the courts’ references to a state’s need to protect its citizens from out-of-state bad actors indicate a certain level of territoriality, or perhaps even shades of an in-group versus out-group mentality.⁷⁰ Online communities’ rules

60. See *Frequently Asked Questions*, *supra* note 59.

61. Fernando Alfonso III, *You Know What’s Cool? 100,000 Subreddits*, THE DAILY DOT (Dec. 27, 2011), <http://www.dailydot.com/news/reddit-100000-subreddit-milestone>.

62. See *Politics*, REDDIT, <http://www.reddit.com/r/politics> (last visited Feb. 17, 2012).

63. See *Funny*, REDDIT, <http://www.reddit.com/r/funny> (last visited Feb. 17, 2012).

64. See *Music*, REDDIT, <http://www.reddit.com/r/music> (last visited Feb. 17, 2012).

65. See *Crochet*, REDDIT, <http://www.reddit.com/r/crochet> (last visited Feb. 17, 2012).

66. See *Game of Thrones–The HBO Series & All Things GRRM*, REDDIT, <http://www.reddit.com/r/gameofthrones> (last visited Feb. 17, 2012).

67. See *StLouis*, REDDIT, <http://www.reddit.com/r/stlouis> (last visited Feb. 17, 2012).

68. For example, the TwoXChromosomes subreddit, which is dedicated to women’s issues, specifically bans “hatred, bigotry, . . . misogyny, misandry, transphobia, [and] homophobia.” *TwoXChromosomes*, REDDIT, <http://www.reddit.com/r/twoxchromosomes> (last visited Feb. 17, 2012). A more unusual example is the notorious ShitRedditSays subreddit, in which users document instances of racism, sexism, or otherwise offensive behavior by other users. The moderators of ShitRedditSays frequently ban commenters for arguing that the documented behavior is not offensive. *[META] SRS FAQ*, REDDIT, http://www.reddit.com/r/ShitRedditSays/comments/o0pdv/meta_srs_faq (last visited Mar. 28, 2012).

69. The phrase “interactive proximity” refers to the fact that any content posted to a subreddit is likely to be read by any user who frequents that subreddit. In fact, a user who subscribes to a subreddit need not deliberately navigate to that subreddit to see its content. Upon logging in, a user sees a customized front page with the top-rated posts from all of that user’s subscribed subreddits. Thus, users are exposed to high-rated content without having to seek it out. See *Frequently Asked Questions*, *supra* note 59.

70. See, e.g., *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 718 (1st Cir. 1996) (“As the district court noted, Massachusetts has a strong interest in protecting its citizens from out-of-state solicitations for goods or services that prove to be unsafe”); *Baldwin v. Fischer-Smith*, 315 S.W.3d 389, 398 (Mo. Ct. App. 2010) (comparing an out-of-state bad actor to a “tortfeasor who mails a thousand bombs to recipients in one state, and one to recipients in each of the other forty-nine states” (quoting C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of*

of conduct represent a similar attempt to shield the community from miscreants and to fence it off from the rest of the internet. Second, shared culture, such as common interests and political or personal beliefs, indicate that any given online community could potentially represent a discrete market to an enterprising business, a market of which a business could purposefully avail itself, as the Court wrote in *Hanson v. Denckla*.⁷¹ Third, because of the interactive proximity inherent in an online community, an advertisement or other public commercial activity that reaches one member of an online community is likely to reach a large portion of that community, just as an advertisement in a regional newspaper will reach a large portion of that region's citizens. In light of these three observations, an online community is not entirely out of place in the context of personal jurisdiction. It is often said that lawyers and judges are conservative by nature,⁷² and to a conservative mind, it might seem outlandish to compare a website to one of the fifty states. But as technology continues to spread and more daily activities move from the physical world into cyberspace, it will become more natural to think of an online community as simply another type of territory in which people spend their time.

On one hand, the similarities between online communities and traditional communities suggest that online communities should have a place in personal jurisdiction doctrine. On the other hand, the differences between the two dictate that cyberspace cannot be treated like traditional modes of communication that cross state lines. Cyberspace is unique, and it requires a unique approach.

The most fundamental difference—and perhaps the most obvious one—is that while a traditional community has a fixed location, cyberspace is both everywhere and nowhere all at once. When a user stores information, digital goods, or other data in the internet, that data can typically be accessed from any place in the world with an active internet connection. Cellular networks now offer data coverage to a large percentage of the continental United States, including most major metropolitan areas,⁷³ which means that many Americans can be connected to the internet literally every second of the day. At the same time, it would be a fallacy to say that the internet, or data stored in the internet,

Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects, 81 IND. L.J. 601, 659 (2006)) (“[I]f you pick a fight in Missouri, you can reasonably expect to settle it here.”); *LaMarca v. Pak-Mor Mfg. Co.*, 735 N.E.2d 883, 889 (N.Y. 2000) (“Considering that Pak-Mor’s long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York’s jurisdictional long-arm.”).

71. See *supra* notes 26–29 and accompanying text.

72. Thomas M. Steele, *The MacCrate Report: Its Impact on Education in Law Firm Management*, 23 PACE L. REV. 613, 613 (2003).

73. See, e.g., *AT&T Coverage Viewer*, AT&T, <http://www.wireless.att.com/coverageviewer/#?type=voice> (last visited Feb. 17, 2012).

is found in any one particular location. Most of the world's largest internet companies have multiple redundant data centers,⁷⁴ so for any individual piece of data, chances are good that it is not stored at any one single location at all. Moreover, even if each piece of data could be localized to a single server or a single storage device, the location of that device is typically both unknown and irrelevant to the user.

The fact that online activities are not fixed at a particular point in space frustrates attempts to analyze online interactions as if they take place in a forum state. When a Californian and a New Yorker communicate online, it makes little sense to say that the Californian reaches into New York, or vice-versa. Rather, the Californian and the New Yorker have both made a conscious decision to enter a place that is neither California nor New York. The two truly are interacting *in cyberspace*, and if personal jurisdiction rules are to keep up with the changing cultural landscape, the law will have to develop an understanding of what online communities are and develop rules to assign jurisdiction based on what happens in cyberspace.⁷⁵

Before 2009, one of the last ties that necessarily remained between an online transaction and the physical world was the exchange of traditional money—i.e., a government-backed currency. Today, online transactions can now take place without the use of a bank or any traditional currency. While electronic bank transfers and home banking services are nothing new,⁷⁶ the twenty-first century has seen the invention of the first electronic peer-to-peer currency system, called Bitcoin.⁷⁷ A unit of Bitcoin currency, eponymously

74. See, e.g., 4.5. *Data Redundancy*, RACKSPACE HOSTING, http://docs.rackspace.com/files/api/v1/cf-intro/content/Data_Redundancy-d1e258.html (last visited Feb. 17, 2012) (noting that web hosting giant Rackspace maintains at least three redundant copies of every file stored with its Cloud Files data storage service).

75. In 1999, one commentator actually mentioned what he called the “cyberspace model” of internet contacts, which would hold that internet contacts exist only in cyberspace and not in any particular state. Richard Philip Rollo, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 693 (1999). This is the central premise of the model I will propose. However, Rollo wrote that to adopt the cyberspace model “would be to deprive all courts of jurisdiction over the Internet.” *Id.* This is the case only if the minimum contacts analysis remains blind to litigants’ contacts with non-physical spaces, such as online communities. As will be discussed *infra*, there is no elegant way to translate a series of cyberspace contacts into a grant of jurisdiction to a particular court, but an inelegant solution is better than no solution at all. See *infra* Part V.

76. See Julie L. Williams & James F.E. Gillespie, Jr., *The Business of Banking: Looking to the Future—Part II*, 52 BUS. LAW. 1279, 1304, 1309 (1997).

77. The design of the Bitcoin system was announced in a paper published online under the pseudonym Satoshi Nakamoto. See Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN, <http://bitcoin.org/bitcoin.pdf> (last visited Feb. 17, 2012). The true identity of Bitcoin’s creator, or creators, has never been definitively proven. See Joshua Davis, *The Crypto-Currency*, NEW YORKER, Oct. 10, 2011, at 62.

called a bitcoin, is nothing more than a block of electronic data.⁷⁸ Each bitcoin is stored redundantly at multiple points throughout the network of computers and servers running the Bitcoin client software.⁷⁹ Every bitcoin has its own transaction history digitally encoded in the bitcoin itself, and the last transaction in this history is used to determine ownership of the bitcoin.⁸⁰ Among the purported benefits of the Bitcoin system is the fact that a Bitcoin transaction need not pass through any centralized clearinghouse.⁸¹ In fact, there is no central Bitcoin authority at all,⁸² and every computer running the Bitcoin software (called a “node”) has exactly the same level of authority as every other node.⁸³

It is undeniable that a bitcoin is “real money.” Hundreds of online merchants accept bitcoins for purchase of digital goods and services including web hosting, graphic design, and e-books, as well as physical goods ranging from beef jerky to firearms.⁸⁴ There are also dozens of online currency exchanges where bitcoins can be exchanged for government-issued currencies.⁸⁵ Now that an online transaction involving the exchange of money for digital goods or services need not even use a bank or a currency issued by any government, ties between cyberspace and physical space have been even further loosened and weakened. This further demonstrates that personal jurisdiction law misses an increasingly important aspect of life in the twenty-first century if it does not understand the unique qualities of online communities.⁸⁶

To round out the distinction between cyberspace and physical space, certain types of injuries—and, by extension, the associated causes of action—should be viewed as injuries sustained in cyberspace. Another important cyberspace phenomenon is that of digital goods. Prominent examples include

78. Nakamoto, *supra* note 77 (“We define an electronic coin as a chain of digital signatures.”).

79. *Id.* (explaining how transactions are broadcast to many nodes throughout the Bitcoin network).

80. *Id.*

81. *Id.*

82. *Frequently Asked Questions*, BITCOIN CENTRAL, <https://en.bitcoin-central.net/s/faq> (last updated Feb. 23, 2012).

83. Nakamoto, *supra* note 77 (“Proof-of-work is essentially one-CPU-one-vote.”).

84. *See Trade*, BITCOIN WIKI, <https://en.bitcoin.it/wiki/Trade> (last visited Feb. 17, 2012) (listing hundreds of online merchants accepting Bitcoin currency).

85. *See id.* (listing dozens of currency exchanges that trade in Bitcoin currency).

86. As of this writing, only one in-depth analysis of the legal status of Bitcoin has been published. *See* Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159 (2012). Grinberg argues that Bitcoin could be considered a security, making it subject to federal securities regulations. *Id.* at 194–204.

the exchange of virtual items in online games such as Second Life.⁸⁷ Many players buy and sell items such as virtual clothing or in-game currency from other players in exchange for traditional money.⁸⁸ Though the phrase “digital goods” is usually used to refer to this type of virtual object,⁸⁹ it could also be applied to items transacted in other contexts. For example, users of the Amazon Kindle e-reader can purchase books from Amazon.com’s Kindle Store, and then download and read those books on a wide variety of devices, including smartphones, laptops and the Kindle itself.⁹⁰ The Kindle Store customer has purchased a discrete “thing,” but it is a “thing” that cannot be localized to a particular object. At the same time, the purchased item can be accessed and used from almost any electronic device equipped with an internet connection. Is an e-book, then, any less of a digital good than a Second Life house? Digital goods are significant because they allow a wide variety of transactions in the nature of a sale to take place without either party delivering or receiving a physical chattel in any particular forum state.⁹¹ As such, when a transaction in digital goods goes awry, the injury is really suffered in cyberspace, not in any particular state.⁹²

A second class of online injuries includes injuries to a person’s reputation in an online community. eBay, for example, uses a feedback system that allows users to assign ratings to buyers and sellers.⁹³ The very purpose of this system is to allow users to avoid doing business with other users who have poor feedback ratings, so for a person who derives a substantial portion of his or her income from transactions conducted on eBay,⁹⁴ the threat of economic injury due to false statements made through the eBay feedback system is very real.

87. See *Shop: Frequently Asked Questions*, SECOND LIFE, <http://secondlife.com/shop/faq/> (last visited Feb. 17, 2012).

88. *Id.* Linden Lab, the creator of Second Life, runs its own digital goods marketplace. *Second Life Marketplace*, SECOND LIFE, <https://marketplace.secondlife.com> (last visited Feb. 17, 2012).

89. See, e.g., Bettina M. Chin, Note, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 BROOK. L. REV. 1303, 1312 (2007).

90. *Free Kindle Apps*, AMAZON.COM, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000493771> (last visited Feb. 17, 2012).

91. This fact also renders the *Calder* effects test inapplicable. See *infra* notes 105–06 and accompanying text.

92. In fact, thanks to Bitcoin, the would-be plaintiff no longer necessarily suffers a loss in his or her physical pocketbook or bank account. See *supra* notes 77–86 and accompanying text.

93. See *Feedback*, EBAY, <http://pages.ebay.com/services/forum/feedback.html> (last visited Feb. 17, 2012).

94. In 2009, eBay claimed that 1.3 million people relied on eBay as a primary or secondary source of income. Letter from Daniel Dougherty, Senior Dir. of Intellectual Prop., eBay, to Office of the General Counsel, U.S. Copyright Office (Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/ebay-inc-28.pdf>.

Admittedly, in no known case has a plaintiff successfully pursued a libel in which the alleged injury was an injury to the plaintiff's reputation in an online community—a “cyberlibel” claim, perhaps. But it does not take a wild imagination to foresee that such litigation could begin en masse any time. There are numerous online communities that are dedicated to facilitating transactions between users.⁹⁵ As technology continues to change the world's cultural landscape and becomes more tightly integrated into everyday life, the potential demand for online peer-to-peer transactions will only increase. In fact, some commentators, such as media theorist Douglas Rushkoff, see peer-to-peer value exchange as part of a movement that will bring about broad-based social and economic changes.⁹⁶ If Rushkoff's ideas take hold, it is quite possible that the majority of online transactions will eventually be transactions between website users rather than transactions between a user and a website operator, such as Amazon.com or another large e-commerce company. Moreover, it is likely that the courts have yet to see a deluge of cyberlibel claims arising out of eBay transactions merely because eBay has such an effective feedback system.⁹⁷ Increased demand for online exchanges of goods and services will further increase the number of online marketplaces, and chances are good that some smaller marketplaces will not have a feedback system as effective as eBay's. This will increase the likelihood that a malicious user will succeed in defaming a fellow user, thereby forcing that user to seek a remedy through the courts.⁹⁸

In summation, we now live in a world where people from different states can have an interaction in a non-physical space that is not inside any one U.S. state, in which they exchange real money without using any bank or government-backed currency, and in which one of the parties suffers an injury that does not happen in the physical world. If the law clings to old doctrines and old ways of thinking, then the law will turn a blind eye to the realities of

95. See, e.g., *About*, ETSY, http://www.etsy.com/about?ref=ft_about (last visited Feb. 17, 2012); *Who We Are*, EBAY, <http://www.ebayinc.com/who> (last visited Feb. 17, 2012). On a related note, acts of tortious interference with business relationships committed in one of these communities might fit into a category with acts of cyberlibel in that both types of torts cause injuries in cyberspace.

96. Douglas Rushkoff, Keynote Address at Web 2.0 Expo: Radical Abundance: How We Get Past “Free” and Learn to Exchange Value Again (Nov. 18, 2009), <http://futurismic.com/2009/11/23/rushkoff-on-radical-abundance-and-the-economics-of-web-cubed/>.

97. See Peter P. Swire, *Trustwrap: The Importance of Legal Rules to Electronic Commerce and Internet Privacy*, 54 HASTINGS L.J. 847, 856 (2003) (noting that eBay's feedback system proved to be a substantial success).

98. However, not all websites that are used to sell goods need necessarily be part of the cyberterritorial theory outlined below. Craigslist, for example, is divided into hundreds of regional subsections. See *Cities*, CRAIGSLIST, <http://www.craigslist.org/about/sites> (last visited Feb. 17, 2012). Thus, Craigslist is really an extension of geographic communities rather than a true online community.

the web. The values of fair play and substantial justice extolled in *International Shoe* cannot be served unless the law is grounded in a lucid understanding of online communities. Some analytical framework for understanding online interactions is needed.

Could this framework come from a readaptation of existing caselaw? Two doctrines that have been applied to internet-based contacts are the *Zippo* sliding scale test⁹⁹ and the *Calder* effects test.¹⁰⁰ Unsurprisingly, neither can be molded into a form that is applicable to online communities. The problems with *Zippo* are threefold. First, the sliding scale applies only to assertions of jurisdiction over a party operating a website, not over users of websites.¹⁰¹ Second, the language used in *Zippo* suggests that the sliding scale is fundamentally inapposite to interactions taking place in online communities. The court wrote that at the high end of the sliding scale are “situations where a defendant clearly does business *over* the Internet.”¹⁰² The court also framed the issue as a question of “the Constitutionally permissible reach of Pennsylvania’s Long Arm Statute . . . *through* cyberspace.”¹⁰³ The court’s choice of the prepositions “over” and “through” shows that the sliding scale test understands the internet as simply another point-to-point communication medium. Cyberspace is far more than a sophisticated successor to mail, telegraph, and telephone, and it needs a model of jurisdiction that reflects its true nature. Third, *Zippo* is readily distinguishable on its facts from any case arising from an online community. Specifically, the defendant chose to contract with Pennsylvania internet service providers (ISPs) to allow the ISPs’ customers to access the defendant’s services.¹⁰⁴ Contracts with these regional ISPs were physical-world contacts arising from the defendant’s desire to expand into a particular regional market. Dot Com’s contacts with the state of Pennsylvania were therefore the type of traditional regional business contacts anticipated in *International Shoe*, not true cyberspace contacts. Thus, *Zippo* did not address any of the issues raised by cases involving peer-to-peer cyberspace transactions or cyberlibel claims.

The *Calder* effects test, which has been applied often in libel cases,¹⁰⁵ is of little use in both peer-to-peer transaction cases and cyberlibel cases. *Calder* held that jurisdiction was appropriate where the defendant, first, committed

99. See *supra* notes 48–57 and accompanying text.

100. See *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

101. See, e.g., *Boschetto v. Hansing*, 539 F.3d 1011, 1018 (9th Cir. 2008) (distinguishing *Zippo* on this basis from a suit on a contract for sale between two eBay users).

102. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (emphasis added).

103. *Id.* at 1121 (emphasis added).

104. *Id.*

105. See, e.g., *Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060, 1068 (D. Haw. 2000) (allowing jurisdiction over a libel suit under *Calder*).

intentional actions expressly aimed at the forum state of California, and, second, “knew that the brunt of that injury would be felt” by the defendant in the forum state of California.¹⁰⁶ Once again, when two members of an online community contract for an exchange of digital goods or services, the parties’ physical location is completely irrelevant. Typically, the parties neither expressly aim an act at any particular state nor know in what state the effects of that act will be felt. The same is true in cyberlibel cases. A tortfeasor who defames a fellow eBay or Etsy user through the site’s reputation system targets not a forum state, but an online community. Thus, a case in either category would fail both parts of the *Calder* effects test.

Since neither of these two approaches is applicable to the problem of jurisdiction over online communities, a change in the law is needed. That is, either the Supreme Court will have to generate new Fourteenth Amendment due process doctrine, or Congress will have to expand the jurisdiction of the federal courts.

III. *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*

After the Supreme Court’s most recent decision involving personal jurisdiction, *J. McIntyre Machinery, Ltd. v. Nicastro*,¹⁰⁷ it is highly unlikely that this issue will be resolved by the courts. In reversing the New Jersey Supreme Court’s exercise of jurisdiction over a United Kingdom-based manufacturer of a metal-shearing machine,¹⁰⁸ Justice Kennedy’s lead opinion in *J. McIntyre* states that the Court’s 1987 decision in *Asahi Metal Industry Co. v. Superior Court*¹⁰⁹ “may be responsible in part for [the New Jersey Supreme Court’s] error” and attempts to “provide greater clarity” regarding the stream of commerce fact pattern.¹¹⁰ In reality, the Court’s decision does no such thing. Much like *Asahi*, *J. McIntyre* was a splintered decision that did not definitively settle the legal issues raised in the case.¹¹¹ Once again, there was no majority

106. *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

107. 131 S. Ct. 2780 (2011).

108. *Id.* at 2785.

109. 480 U.S. 102 (1987).

110. *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion). In this context, the phrase “stream of commerce” refers to situations in which the defendant does not personally sell its goods in the forum state but “delivers its products into the stream of commerce with the expectation that they will be purchased in the forum State,” such as by contracting with a third-party distributor who sells the products to consumers. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980). Jurisdiction is sometimes, but not always, proper in this type of situation. *See id.* However, the exact contours of this theory have been the source of much confusion since *World-Wide Volkswagen*. *See, e.g., J. McIntyre*, 131 S. Ct. at 2786; *Asahi*, 480 U.S. at 110–11.

111. In *Asahi*, the Court reversed a California court’s exercise of jurisdiction over a Japanese corporation that manufactured the tire valve assembly that was used to construct a motorcycle tire that exploded on a California interstate. 480 U.S. at 108. Though the reversal was unanimous, the

opinion in *J. McIntyre*. Justice Kennedy wrote the lead opinion, joined by Chief Justice Roberts and Justices Scalia and Thomas.¹¹² Justice Breyer wrote a concurrence on behalf of himself and Justice Alito.¹¹³ Justice Ginsburg dissented for the Court's three women.¹¹⁴ The plurality and the dissenters, among whom no one speaks with the full authority of the Court, espouse diametrically opposing views as to the source of personal jurisdiction doctrine.¹¹⁵ Even worse for clarity's sake, the signers of the concurring opinion do not articulate any theory of personal jurisdiction at all, preferring to wait for a case with better facts before making any bold pronouncements.¹¹⁶

The facts of *J. McIntyre* are a fairly typical instance of the stream of commerce pattern. J. McIntyre Machinery ("McIntyre UK") is a United Kingdom-based manufacturer of industrial machinery.¹¹⁷ One of McIntyre UK's products, a three-ton metal shearing machine, was sold in New Jersey and eventually severed four fingers on New Jersey resident Robert Nicasastro's right hand.¹¹⁸ Nicasastro then filed a product-liability suit against McIntyre UK in a New Jersey state court.¹¹⁹ McIntyre UK sold its products in the United States through a U.S.-based distributor, coincidentally named McIntyre Machinery America, Ltd. ("McIntyre America").¹²⁰ McIntyre UK made no secret of its intention to sell its products "to customers throughout the United

nine justices wrote three opinions advocating three separate grounds for reversal. Justice O'Connor, speaking for four justices, wrote that even where the stream of commerce carries the defendant's goods into the forum state, jurisdiction requires "an act of the defendant purposefully directed toward the forum State," such as labeling or packaging of the product for the consumer base in a particular jurisdiction. *Id.* at 112 (O'Connor, J., plurality opinion). Justice Brennan wrote on behalf of four justices that the stream of commerce fact pattern refers to the "regular and anticipated flow of products from manufacture to distribution to retail sale" and that the existence of a stream of commerce carrying the defendant's goods to the forum state always supports jurisdiction. *Id.* at 117 (Brennan, J., concurring). Finally, Justice Stevens, writing for himself and Justices White and Blackmun, who both also concurred in Justice Brennan's opinion, wrote that the Court's reversal should have been based on the fact that a California court exercising jurisdiction over an indemnity suit between a Japanese company and a Taiwanese company would be "unreasonable and unfair." *Id.* at 121–22 (Stevens, J., concurring).

112. *J. McIntyre*, 131 S. Ct. at 2785.

113. *Id.* at 2791.

114. *Id.* at 2794.

115. Compare *id.* at 2789 (Kennedy, J., plurality opinion) (noting that personal jurisdiction hinges on whether a sovereign has authority to render a judgment), with *id.* at 2798 (Ginsburg, J., dissenting) (stating that personal jurisdiction is a "function of the individual liberty interest preserved by the Due Process Clause").

116. *Id.* at 2791 (Breyer, J., concurring) ("So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.").

117. *J. McIntyre*, 131 S. Ct. at 2795.

118. *Id.*

119. *Id.* at 2786.

120. *Id.* at 2796.

States,” and never instructed McIntyre America to avoid selling McIntyre UK’s products in any particular region or state.¹²¹ In addition, McIntyre UK was an exhibitor at a number of nationally attended trade shows in Las Vegas, New Orleans, Orlando, San Antonio, and San Francisco.¹²² McIntyre UK also holds U.S. patents for some of its products.¹²³ Justice Ginsburg points out,¹²⁴ and the plurality does not dispute,¹²⁵ that McIntyre UK purposefully availed itself of a nationwide market in the United States. However, the machine that injured Nicastro was one of only four McIntyre UK products that had ever entered the state of New Jersey.¹²⁶ In addition, no McIntyre UK employee had ever set foot in New Jersey.¹²⁷

Justice Kennedy’s opinion holds that the New Jersey court’s assertion of jurisdiction over McIntyre UK was unconstitutional because of the defendant’s lack of contacts with the forum state of New Jersey.¹²⁸ The key features of Justice Kennedy’s reasoning are that it employs a “forum-by-forum, or sovereign-by-sovereign, analysis,” and that it recognizes “the United States [as] a distinct sovereign” from any one of the fifty states.¹²⁹ Consequently, the plurality has no difficulty accepting the premise whose perceived injustice drives the dissent¹³⁰—namely, that “a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”¹³¹ Justice Kennedy also quotes his own opinion in *U.S. Term Limits, Inc. v. Thornton*,¹³² in which he famously wrote that the framers “split the atom of sovereignty”¹³³ in creating a system with “two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”¹³⁴ For

121. *Id.* at 2797.

122. *J. McIntyre*, 131 S. Ct. at 2796.

123. *Id.* at 2795.

124. *Id.* at 2796–97 (stating that McIntyre UK’s goal in attending trade shows was to reach “anyone interested in the machine from anywhere in the United States” and to “sell [its] machines to customers throughout the United States” (internal quotation marks omitted)).

125. *Id.* at 2790 (“In this case, petitioner directed marketing and sales efforts at the United States.”).

126. *Id.* at 2786.

127. *J. McIntyre*, 131 S. Ct. at 2790.

128. *Id.* at 2790–91 (Kennedy, J., plurality opinion).

129. *Id.* at 2789.

130. *See id.* at 2801 (Ginsburg, J., dissenting) (“Courts . . . have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury.”).

131. *Id.* at 2789 (Kennedy, J., plurality opinion).

132. 514 U.S. 779 (1995).

133. *Id.* at 838 (Kennedy, J., concurring).

134. *J. McIntyre*, 131 S. Ct. at 2789 (Kennedy, J., plurality opinion) (quoting *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring)).

Justice Kennedy, the constitutional limits of New Jersey's jurisdictional power are a function of the borders of New Jersey and New Jersey alone, not the borders of the United States.¹³⁵ Stated differently, minimum contacts with one sovereign (the United States) do not necessarily suffice as minimum contacts with a different sovereign (New Jersey).¹³⁶ *McIntyre UK* may have had "an intent to serve the U.S. market," but it did not "purposefully avail[] itself of the New Jersey market" because its actions did not "manifest an intention to submit to the power of" New Jersey.¹³⁷ Therefore, the plurality found that New Jersey's exercise of jurisdiction was unconstitutional.¹³⁸

The dissenters' disagreement with the plurality is based on a different view of, first, the source of personal jurisdiction doctrine and, second, the significance of the defendant's commercial activities in the United States. Justice Ginsburg draws a distinction between state sovereignty and due process, and argues that the latter, not the former, per se, is the crux of the jurisdictional inquiry.¹³⁹ *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,¹⁴⁰ cited by the dissent, held that restrictions on state court jurisdiction "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."¹⁴¹ Also cited is *Shaffer*, which stated that "the mutually exclusive sovereignty of the States [is not] the central concern of the inquiry into personal jurisdiction."¹⁴² Thus, the Court need not be hung up on state sovereignty concerns in developing and applying the *International Shoe* doctrine, which "gave prime place to reason and fairness."¹⁴³ Even though Justice Ginsburg rejects the plurality's contention that personal jurisdiction is essentially an issue of state sovereignty, the dissent need not be read as rejecting the premise that due process requires a sovereign-by-sovereign analysis. Rather, the dissent seems to implicitly hold that it is improper to conduct the sovereign-by-sovereign analysis as if the fifty members of the United States were completely independent nation states, as opposed to constituent parts of one federal republic. Justice Ginsburg notes that *McIntyre UK* "dealt with the United States as a single market" and was "concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States."¹⁴⁴ *McIntyre*

135. See *J. McIntyre*, 131 S. Ct. at 2789 (Kennedy, J., plurality opinion).

136. *Id.*

137. *Id.* at 2788, 2790.

138. *Id.* at 2791.

139. *Id.* at 2798 (Ginsburg, J., dissenting).

140. 456 U.S. 694 (1982).

141. *J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10).

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

143. *Id.* at 2800 (Ginsburg, J., dissenting).

144. *Id.* at 2801.

UK's actions revealed its intention to avail itself of the entire United States market, and Justice Ginsburg saw McIntyre UK's amenability to suit in New Jersey, the situs of plaintiff Nicastro's injury, as a "reasonable cost of transacting business internationally."¹⁴⁵

Justice Breyer's concurrence disagrees with the plurality's reasoning but abstains from making any broad pronouncements or working any major change in personal jurisdiction doctrine.¹⁴⁶ For Justices Breyer and Alito, the case "requires no more than adhering to [the Court's] precedents."¹⁴⁷ Under *World-Wide Volkswagen* and *Asahi*, "a single isolated sale, even if accompanied by the kind of sales effort indicated here," is insufficient to support an exercise of jurisdiction over a foreign defendant.¹⁴⁸ At the same time, Justice Breyer objects to the "plurality's seemingly strict no-jurisdiction rule," but declines to state an alternate theory because "the incident at issue in this case does not implicate modern concerns."¹⁴⁹ He raises three hypothetical circumstances that illustrate the "modern concerns" that may justify a change in the law: first, a company that "targets the world by selling products from its Web site"; second, a company that "consigns the products through an intermediary (say, Amazon.com) who then receives and fulfill the orders"; and third, a company that purchases online advertising "that it knows will be viewed in a forum."¹⁵⁰ Justice Breyer writes that "[t]hose issues have serious commercial consequences but are totally absent in this case."¹⁵¹ Thus, the concurring Justices believe that existing precedents are inadequate to address the realities of conducting business through the internet but will wait to update those precedents until a better case comes along.

One of the few points agreed upon by a majority of the Court—the three dissenters and the two signers of the concurrence—is that the current state of personal jurisdiction doctrine, at least as articulated in Justice Kennedy's opinion, is deficient. However, an examination of each opinion reveals that it is unlikely that the Court will welcome the concept of cyberspace—i.e., online communities as territorial spaces unto themselves—into the personal jurisdiction analysis in the foreseeable future. The plurality's approach, based strictly on state sovereignty,¹⁵² is not amenable to extending the sovereign reach of a state into cyberspace. In fact, based on the plurality opinion's

145. *Id.*

146. *See J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring) ("So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.").

147. *Id.* at 2792.

148. *Id.* (Breyer, J., concurring).

149. *Id.* at 2792–93.

150. *Id.* at 2793.

151. *J. McIntyre*, 131 S. Ct. at 2793.

152. *See supra* notes 128–38 and accompanying text.

emphasis on traditional practice,¹⁵³ those four justices would probably say that traditional communities are the only communities that should be considered in the Fourteenth Amendment due process analysis. The dissenters favor granting state courts greater adjudicatory power over out-of-state defendants than the plurality does, but they would do so in this case only because the defendant deliberately availed itself of a nationwide market in the United States.¹⁵⁴ This rationale could not lead to a workable theory of jurisdiction over online communities because online interactions are not subject to any geographic limitations. A person who does business in an online community almost necessarily avails himself or herself of a global market, and would be subject to the jurisdiction of any American court.¹⁵⁵ This result would do great damage to the values of “fair play and substantial justice” and would create prohibitively high barriers to entry for e-commerce entrepreneurs.

Justices Breyer and Alito are the only two justices who seem open to creating new doctrine to account for the changes in technology that took place in the twenty-four years between *Asahi* and *J. McIntyre*.¹⁵⁶ With the seven other justices opposed to the idea, it seems highly unlikely that the Court will incorporate online communities into Fourteenth Amendment due process doctrine.

IV. IMPLEMENTING A STATUTORY SYSTEM OF JURISDICTION OVER CYBERTERRITORY

Justice Kennedy’s opinion in *J. McIntyre* obliquely refers to the fact that under Federal Rule of Civil Procedure 4(k), for state-law claims—which include garden-variety contract and defamation claims—the jurisdictional reach of the district courts is coextensive with that of state courts.¹⁵⁷ Consequently, as of today, if a non-U.S. defendant avoids jurisdiction in each of the fifty states, that defendant has also succeeded in avoiding the jurisdiction

153. See *J. McIntyre*, 131 S. Ct. at 2787 (Kennedy, J., plurality opinion) (“Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”).

154. See *supra* notes 143–45 and accompanying text.

155. Justice Breyer raises this concern in concurrence, and seems to prefer some sort of in-between rule whereby some, but not all, online communications would confer jurisdiction over an out-of-state defendant. See *supra* notes 149–51 and accompanying text.

156. See *id.*

157. See FED. R. CIV. P. 4(k)(1) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located”); *J. McIntyre*, 131 S. Ct. at 2790 (Kennedy, J., plurality opinion) (“It may be that . . . Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case”).

of the federal courts.¹⁵⁸ Of course, Congress could, through appropriate legislation, expand the jurisdiction of the district courts to the outer boundaries of the judicial power of the United States as circumscribed in Article III of the Constitution.¹⁵⁹ This is the path that Congress must take in order for plaintiffs to have reasonable access to the courts to resolve disputes originating in online communities.

This would not be the first jurisdictional issue that Congress has solved with legislation specific to one class of cases. The Federal Interpleader Act¹⁶⁰ was passed because of difficulties arising in situations where multiple adverse parties have mutually exclusive claims against the same property.¹⁶¹ For example, when residents of different states have claims against the same insurance policy, the insurer could face an administrative nightmare in distributing the insurance fund across multiple forums, and the claimants might be prejudiced by preferential settlements.¹⁶² To avoid these problems, Congress granted the district courts original jurisdiction over interpleader actions in situations like the one just described.¹⁶³

Included in the Act is a provision for nationwide service of process on any interpleader claimant by United States Marshals in the district where the claimant is present or domiciled.¹⁶⁴ In addition to providing an additional forum for relief, the interpleader procedure allows the district courts to grant a remedy that none of the state courts could provide.¹⁶⁵ The Supreme Court has not heard a due process challenge to the Interpleader Act, and the lower courts have applied it faithfully.¹⁶⁶ Two premises support the conclusion that the Act is constitutional. First, in federal court, service of process and personal jurisdiction in cases premised on a federal question are governed by Fifth Amendment due process rather than Fourteenth Amendment due process.¹⁶⁷ Second, just as Justice Kennedy suggests in *J. McIntyre*, the Fifth Amendment

158. Note that for a claim that arises under federal law, Rule 4(k)(2) allows a federal district court to assume jurisdiction over the dispute. FED. R. CIV. P. 4(k)(2). For state-law claims, however, the defendant will have completely evaded the jurisdiction of American courts in this situation.

159. See U.S. CONST. art. III, § 2, cl. 1–2.

160. 28 U.S.C. §§ 1335, 1397, 2361 (2006).

161. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533 n.15 (1967).

162. See *id.* at 533 & n.15.

163. 28 U.S.C. § 1335.

164. 28 U.S.C. § 2361.

165. *Equitable Life Assur. Soc’y of U.S. v. Miller*, 229 F. Supp. 1018, 1020 (D. Minn. 1964) (“[I]nterpleader . . . provides a party . . . with a remedy [that] would be unavailable to him in any State court.”).

166. Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 15–17 (1988).

167. *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992).

only requires that the defendant have minimum contacts with the United States itself, not with any particular state.¹⁶⁸

The problem of jurisdiction over cyberterritory lends itself to a solution similar to the Federal Interpleader Act. Congress could pass a statute giving district courts jurisdiction over disputes arising in online communities and providing for nationwide service of process by United States Marshals. The cases addressing Fifth Amendment due process suggest that a federal cyberterritorial jurisdiction statute would withstand constitutional scrutiny,¹⁶⁹ so it remains only to decide which district courts should be given jurisdiction over which cases.

As discussed previously, online communities represent commercial markets and interactive spaces that are, in some ways, quite similar to traditional communities in cities and states.¹⁷⁰ The most reasonable way to assign jurisdiction over online communities, then, is to copy the rule of *International Shoe* by determining jurisdiction based on a defendant's purposeful availment of the commercial opportunities presented by a particular online community. Such purposeful availment could be established by evidence that the defendant deliberately marketed and sold his or her goods or services in that online community, or by evidence that the defendant deliberately established a presence in that community for the purpose of selling goods or services to members of that community.

But even if cyberspace is territory in a sense that is relevant to personal jurisdiction, it is not the territory of a governmental entity with its own court system. How, then, should purposeful availment of an online community

168. *Id.*

169. Professor Lusardi suggests that the Interpleader Act may still be unconstitutional because "one might . . . argue that due process requires a reasonably convenient forum" in complex, multistate cases that may require defendants to appear in states with which they have had no contacts. Lusardi, *supra* note 166, at 16. However, Justice Kennedy's plurality opinion in *J. McIntyre*—of the three opinions, the one with the most restrictive view of personal jurisdiction—frames federal court jurisdiction as a matter of contacts with the sovereign, not as a matter of convenience. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (Kennedy, J., plurality opinion) ("For jurisdiction, a litigant may have the *requisite relationship with the United States Government* but not with the government of any individual State." (emphasis added)). Furthermore, courts have noted that the *International Shoe* doctrine is not applicable to a federal court lawfully authorized to effect nationwide service of process. See *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (discussing the nationwide service of process provision in the Securities Exchange Act of 1934). In such a situation, the federal court has nationwide jurisdiction, not extra-territorial jurisdiction as in cases governed by *International Shoe*. *Id.* In other words, the territorial substrate of a district court in the Eastern District of Missouri is actually the entire United States, not just the eastern half of Missouri. Thus, the role played by convenience in the *International Shoe* doctrine is irrelevant to the Interpleader Act's satisfaction of the Fifth Amendment.

170. See *supra* notes 70–74 and accompanying text.

translate into a grant of jurisdiction to a particular court? It would make little sense to give jurisdiction to the state in which the servers running a website associated with that community are located (assuming such a website even exists). Nor should jurisdiction be given to the state that is home to the business or individual that developed the website associated with the community. If cyberspace truly is a non-physical space, and if a person's location in cyberspace is a function of the person's online activities as opposed to the geographic location from which the person accesses the internet, then the jurisdictional question cannot be resolved by reference to the geographic location of the website operators or their property.¹⁷¹

Almost by definition, the problem of tying down an online community to a particular geographic location is intractable. Cyberspace is not located within, nor does it intersect with, any country or state. Nonetheless, the goals of fairness and convenience to litigants would be best served by a limited and controlled expansion of the federal courts' jurisdiction over disputes arising out of online communities. I propose that Congress mandate that the operators of an online community hub, defined as a website or other communication service, such as an Internet Relay Chat (IRC) channel or an online gaming platform, that is designed to facilitate interactions among its users, select one or more federal districts as the community's designated forum district(s) for jurisdictional purposes. The service's operators would be required to publish this selection in the terms and conditions that govern use of the service. Then the jurisdictional statute would provide that purposeful availment of an online community confers upon federal district courts in the website's designated forum districts jurisdiction over any dispute arising from interactions taking place within that online community. While there will be details to work out,¹⁷² this approach would strike a fair and manageable balance between defendants' need to be free from the jurisdiction of faraway states and plaintiffs' need for access to a convenient forum for relief.¹⁷³

171. Suppose that a dispute arises in a mining town that owes its existence to the corporation that owns the mining operation. Would it make sense to adjudicate that dispute in the state where the corporation is headquartered?

172. Congress may wish to consider requiring operators to select a minimum number of districts. Perhaps operators should be required to choose a number of districts so that any plaintiff in the continental United States will be within a certain distance of a designated forum district.

173. The cyberterritorial theory need not be the only theory applied to lawsuits between members of online communities. In some situations, there might exist a rationale independent of the cyberterritorial jurisdiction statute that could justify the exercise of state court jurisdiction under *International Shoe*. For example, if two members of an online community maintain a long-term contractual relationship, one party, the defendant-to-be, may learn the geographic location of the other party, the plaintiff-to-be. If the contractual relationship is one that has a substantial impact on a business enterprise based in the eventual plaintiff's home state, then the plaintiff might be able to sue in his or her home state under *Burger King Corp. v. Rudzewicz*. See 471 U.S. 462, 487 (1985) (allowing jurisdiction based on the parties' "substantial and continuing

The complexity of online communities creates two challenges in applying the cyberterritorial model to the facts of a particular case. On one hand, it may be difficult to tell in some cases whether a given communication took place within the borders of a given online community or not. Interactions within an online community are not always limited to a single electronic medium. Just as a collective of political activists might meet at coffee shops, parks, and private homes in addition to exchanging information via telephone, print newsletters, and flyers, members of an online community might communicate via discussion forums, comment threads on blog postings, social media sites, IRC channels, and dedicated community websites.¹⁷⁴ Each of these modes of communication may or may not be considered an “official” part of the community. In light of these complexities, it may be quite difficult for courts to decide whether a given communication did or did not take place in the online community in question.

On the other hand, it may be difficult to decide which one of several online communities was the one in which the cause of action arose. For any given subject, there could be countless separate and distinct online communities dedicated to that subject, and the chances are high that two individuals with a shared interest might have occasion to interact with each other in more than one such online community.¹⁷⁵ If the communications that led up to events creating a cause of action took place in multiple communities, more than one community might possibly be the cyberterritorial unit in which the cause of action arose.¹⁷⁶

relationship” and the defendant’s receipt of “fair notice from the contract documents and the course of dealing” that he might be haled into court in Florida).

174. For example, some subreddits have official IRC chat channels. *See, e.g., Sysadmin*, REDDIT, <http://www.reddit.com/t/sysadmin> (last visited May 23, 2012) (subreddit “dedicated to the profession of Computer System Administration”).

175. A quick Google search for “woodworking forum,” for example, yields a list of dozens of online communities dedicated to woodworking. *See* Search Results for Woodworking Forum, GOOGLE, <https://www.google.com/#output=search&q=woodworking+forum> (last visited May 23, 2012).

176. To complicate the matter even further, communities can be nested within other communities. While many subreddits have their own rules of conduct, Reddit as a whole has certain rules that apply globally across all subreddits. *See Reddiquette*, REDDIT, <http://www.reddit.com/help/reddiquette> (last visited May 23, 2012). Both sets of rules can be equally significant, as they can equally be the products of a community’s shared values. For example, one of Reddit’s best-known global rules is that posting another user’s personal information will result in an immediate and permanent ban because “witch hunts and vigilantism hurt innocent people too often.” *Id.* To avoid the potential complications of a community existing with another community, it may be best for the cyberterritorial jurisdiction statute to hold that purposeful avilment of a second-level community constitutes purposeful avilment of the overall community. In the case of Reddit, this would mean that a defendant’s purposeful avilment of the commercial market in a single subreddit would confer jurisdiction over that defendant to Reddit’s designated forum states.

Of these two problems, the latter is much easier to resolve. If multiple communities are sufficiently connected to the cause of action to warrant jurisdiction, then the defendant should be deemed amenable to suit in all of the communities' chosen forums. The former problem will undoubtedly prove more challenging. However, there is no reason to think that this problem would completely prevent the cyberterritorial model from succeeding. There will be difficult cases under the cyberterritorial model just as there are in cases involving only traditional geographic communities,¹⁷⁷ but the cyberterritorial model will prepare the courts for the potential influx of cyberspace litigation with a consistent framework to properly balance the interests of plaintiffs and defendants.

CONCLUSION

Since *Pennoyer v. Neff*, personal jurisdiction rules have become more nuanced to reflect the increasing complexities of modern life. E-commerce is the latest reality that the courts have attempted to accommodate in the *International Shoe* doctrine.¹⁷⁸ The next major cultural development that will require a change in the law is that of online communities. Litigation between members of online communities has been sparse up until now, but it is almost a foregone conclusion that peer-to-peer transactions in online communities will increase in number, giving rise to a greater number of potential cyberspace disputes. Virtually all of these lawsuits will raise legitimate questions about which courts have personal jurisdiction over which defendants.¹⁷⁹ It behooves Congress to implement a cyberterritorial model of jurisdiction now so as to avoid confusion and inefficiencies when the lower courts are faced with the task of resolving these issues. Implementing this jurisdictional system soon will give Congress and the courts an opportunity to experiment with different variations on the cyberterritorial theory¹⁸⁰ before online transactions produce a

177. See *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (“[In the *International Shoe* test,] few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.” (internal quotation marks omitted)).

178. See *supra* notes 48–57 and accompanying text.

179. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (“Whether a person or entity is subject to the jurisdiction of a state court . . . is a question that arises with great frequency in the routine course of litigation.”).

180. See *supra* notes 172–77 and accompanying text.

deluge of litigation. Hopefully, the judicial system will be able to sidestep the confusion that has resulted from decisions like *Asahi*¹⁸¹ and *J. McIntyre*¹⁸² and move directly to a clear and reasonable set of jurisdictional principles.

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181. *See supra* note 111.

182. *See supra* notes 128–55 and accompanying text.

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