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Economic Evolution, Jurisdictional Revolution

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Abstract: In June 2011, the Supreme Court issued its first personal jurisdiction decision in two decades. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court considered whether the placement of a product in the “stream of commerce” subjects a nonresident manufacturer to personal jurisdiction in states where the product is distributed. The Court issued a fractured opinion with no majority rule, with some justices expressing reluctance to “refashion basic jurisdictional rules” without additional information on “modern-day consequences.” This Article explores the consequences of these rules by providing the first law-and-economics analysis of personal jurisdiction. A descriptive analysis initially demonstrates that jurisdictional rules significantly misalign litigation incentives. Unclear and restrictive personal jurisdiction rules increase the likelihood of procedural disputes, inflate litigation costs, and decrease the expected benefit of suit, making it less likely that plaintiffs will file lawsuits. This in turn skewers substantive law incentives—because jurisdictional rules make litigation less likely, many injurers escape liability and are inadequately deterred from engaging in wrongful conduct. Drawing on this descriptive analysis, the Article proceeds to a normative analysis of the stream of commerce theory. It argues that a broad version of the stream of commerce doctrine best aligns procedural and substantive law incentives, while protecting fundamental due process rights. Ultimately, this Article concludes that it is time for a procedural revolution: the Supreme Court should allow expansive personal jurisdiction over nonresident manufacturers in products liability cases.

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INTRODUCTION

In Asahi Metal Co. v. Superior Court, the Supreme Court considered whether the placement of a product in the “stream of commerce” subjects a foreign manufacturer to personal jurisdiction in states where the product is distributed. The Court failed to produce a majority opinion. Justice Brennan argued that personal jurisdiction exists if the manufacturer “is aware that the final product is being marketed in the forum State.” Justice O’Connor disagreed, insisting that the minimum contacts test requires “something more” than mere awareness.

For more than two decades, the fractured Asahi opinion has confused lower courts, creating uncertainty for businesses and consumers alike. This period coincides with rampant globalization and the rise of the Internet, echoing the transformative decades preceding the last revolution in personal jurisdiction—the Supreme Court’s introduction of the “minimum contacts” test in International Shoe v. Washington.

In June 2011, the Supreme Court finally revisited the stream of commerce doctrine in J. McIntyre Machinery, Ltd. v. Nicastro, in
part to consider whether recent economic evolution requires more expansive personal jurisdiction rules in products liability cases. Unfortunately, the Court deadlocked once again, issuing a fractured opinion with no majority rule. Four justices endorsed Justice O’Connor’s test from *Asahi*. Three justices defended a broad rule, similar to Justice Brennan’s approach. And Justice Breyer refused to join either opinion, concluding that it was inappropriate to resolve the issue without additional information on the “contemporary commercial circumstances” and “modern-day consequences” of jurisdictional rules.

This Article attempts to fill that gap by providing the first law-and-economics analysis of personal jurisdiction and the stream of commerce doctrine. Law and economics uses empirical research and economic theory to determine whether existing rules provide proper incentive for private actors to engage in socially optimal behavior—an approach that is particularly useful for analyzing procedural rules. Although several notable scholars recently engaged in a spirited debate on the economics of products liability law, no one has analyzed the crucial role personal jurisdiction rules play in shaping the private and social incentives of products

same day, the Court also decided a case addressing general jurisdiction. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).


9. See *Nicastro*, 131 S. Ct. at 2790 (plurality opinion).

10. See id. at 2797 (Ginsburg, J., dissenting).

11. Id. at 2791, 2794 (Breyer, J., concurring in the judgment). Justice Alito joined Justice Breyer’s concurring opinion. Id. at 2791.


liability litigation.14

Part I of this Article briefly examines the development and evolution of the stream of commerce doctrine, from the aftermath of the Supreme Court’s landmark decision in *International Shoe*, to its recent decision in *Nicastro*. In addition to analyzing the fractured opinions in both *Asahi* and *Nicastro*, I tease out the legal and economic rationales underlying the stream of commerce theory. I then offer initial thoughts on the implications of the *Nicastro* decision. I conclude that economic analysis likely will play a significant role in the Court’s refinement of the stream of commerce doctrine in the years to come.

Part II establishes a framework for that economic analysis. I begin with a basic model of litigant behavior, which illustrates that private incentives to sue exist when a plaintiff’s expected benefit exceeds her litigation costs. I then compare these private incentives with various social incentives of suit—*i.e.*, deterrence of wrongful conduct, the price-signaling benefit of lawsuits, victim compensation, as well as the significant social costs generated by our legal system. I also discuss the relationship between legal rules and the optimal allocation of risk. This portion of the Article concludes that private and social litigation incentives generally are misaligned, leading to socially excessive or inadequate amounts of litigation, depending on the circumstances. I also note that it is difficult to assess whether litigation incentives are properly aligned in the specific context of products liability suits.

Part III provides an unprecedented descriptive analysis of the economic effects that personal jurisdiction rules have on litigation incentives. I argue that current jurisdictional rules exacerbate the divergence between private and social litigation incentives, often leading to a socially inadequate amount of litigation. Unclear and restrictive personal jurisdiction rules increase the frequency and cost of jurisdictional disputes, and decrease the expected benefit from suit, making it less likely that plaintiffs will file lawsuits.

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This in turn increases the likelihood that many injurers escape liability and are inadequately deterred from engaging in wrongful conduct. Additionally, restrictive jurisdictional rules tend to shift risks and costs to risk-averse victims, away from risk-neutral injurers.

Based on the conclusions from this descriptive analysis, Part IV provides a normative analysis of the various iterations of the stream of commerce doctrine. Initially, I propose a framework for evaluating the benefits and costs of personal jurisdiction rules, drawing on both process-based and outcome-based theories. I then apply this framework to the three iterations of the stream of commerce theory considered by the Supreme Court in *Nicastro*. I argue that all three versions of the doctrine protect defendants’ fundamental due process rights, but only a broad iteration of the doctrine properly aligns the private and social incentives of litigation.

I conclude that it is time for another procedural revolution: the Supreme Court should allow expansive personal jurisdiction over nonresident manufacturers in stream of commerce cases.

I. THE STREAM OF COMMERCE THEORY

The stream of commerce doctrine arose during the aftermath of the last revolution in personal jurisdiction law—the adoption of the “minimum contacts” test. In *Asahi Metal Co. v. Superior Court*, the Supreme Court unsuccessfully attempted to clarify the doctrine, producing a disjointed opinion with no majority rule. After decades of confusion, the Court recently revisited the stream of commerce theory in *J. McIntyre Machinery, Ltd. v. Nicastro*, but once again produced a badly fractured opinion. With limited precedential value, the Court’s *Nicastro* opinion creates significant uncertainty in jurisdictional law.

15. See infra Part I.A.
17. See infra Part I.B.
19. See infra Part I.C.
20. See infra Part I.D.
A. Development of the Doctrine

In *International Shoe Co. v. Washington*, the Supreme Court held that a court has personal jurisdiction over a nonresident defendant if 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.’” The “minimum contacts” test is based on a simple premise: with privilege comes responsibility. When a corporation conducts activities within a particular state, it “enjoys the benefits and protection of the laws of that state,” making it reasonable to require the corporation to defend a lawsuit there arising out of its conduct in the forum.

In the decades following *International Shoe*, the Supreme Court further refined the minimum contacts test into a two-step analysis. Courts first analyze whether sufficient contacts exist between the defendant and the forum state. This requires “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum.” When a corporation reaches out to the forum, it “has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.”

If minimum contacts exist, courts analyze whether assertion of personal jurisdiction complies with “traditional notions of fair play and substantial justice.” Courts use five factors to assess the reasonableness of jurisdiction: (1) “the burden on the defendant”; (2) “the interests of the forum State”; (3) “the plaintiff’s interest in obtaining relief”; (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and (5) “the shared interest of the several States in furthering fundamental substantive social policies.” Not surprisingly, application of this multi-factor balancing test has varied.

In particular, courts have had difficulty applying the minimum contacts test in “stream of commerce” cases—products liability cases in which the plaintiff has been injured by a product that traveled through a distribution chain before reaching its ultimate destination. The first stream of commerce case was *Gray v.*

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29. Id. at 292 (quoting *Int’l Shoe*, 326 U.S. at 316). The Supreme Court has suggested that after the plaintiff establishes defendant’s minimum contacts, the burden shifts and defendant must demonstrate that jurisdiction is unreasonable. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78, 487 (1985).

30. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). Not all factors are treated equally. See *World-Wide Volkswagen*, 444 U.S. at 292 (holding that the “burden on the defendant” is “always a primary concern”); *Spencer*, *supra* note 22, at 623 (“The burden on defendants is typically given the most weight, with the plaintiffs’ interests and state interests receiving a fair degree of consideration as well.”); *but see* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 *WAKE FOREST L. REV.* 1, 23 (2006) (“Courts are likely to find the exercise of jurisdiction reasonable, unless the defendant and its witnesses have to travel extremely long distances.”).


32. Although the stream of commerce theory usually arises in the context of products liability cases, courts occasionally apply the theory in other contexts. See, e.g., *Luv N’ Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469–72 (5th Cir. 2006) (copyright infringement); *Zazove v. Pelikan, Inc.*, 761 N.E.2d 256, 263–64 (Ill. App. Ct. 2001) (consumer fraud); *but see* Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo., 615 F.3d 364, 374 n.9 (5th Cir. 2010) (“It is true that this circuit has extended the stream of commerce analysis outside of the products liability context. But these cases are closely related to products liability cases as they all concern products introduced . . . by non-resident defendants who benefit from the product’s final sale in the forum.”).
American Radiator & Standard Sanitary Corp., in which the Illinois Supreme Court articulated an expansive theory of personal jurisdiction over upstream manufacturers. The court reasoned that “[a]dvanced means of distribution . . . have largely effaced the economic significance of State lines,” and innovations in transportation and communication had “removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.” Additionally, it noted that nonresident manufacturers enjoy benefits from states in which their products are sold, regardless of whether those products reach customers directly or indirectly. Thus, the court held that personal jurisdiction exists in stream of commerce cases as long as the manufacturer sells its product with the realization that it will be used in the forum state.

The Supreme Court appeared to agree with this reasoning in World-Wide Volkswagen v. Woodson, when it suggested in dicta that personal jurisdiction exists when corporations distribute “products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” That

34. See 176 N.E.2d at 766–67; see also Diane S. Kaplan, Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine, 55 BAYLOR L. REV. 503, 505 (2003). In Gray, an Ohio manufacturer sold safety valves to a Pennsylvania company, which installed the valves in water heaters distributed nationwide. Id. at 764. After a water heater exploded in Illinois, plaintiff sued the Ohio manufacturer in Illinois state court. Id. The Ohio company argued that the court lacked personal jurisdiction, noting that it manufactured and sold its safety valves outside Illinois, conducted no business in the state, and had no in-state agent for service of process. Id. The Illinois Supreme Court held that the assertion of personal jurisdiction over the manufacturer did not violate due process. Id. at 767.
35. Gray, 176 N.E.2d at 766.
36. Id. at 766–67.
37. Id.
39. Id. at 297–98 (citing Gray, 176 N.E.2d 761); see also Stewart Jay, “Minimum Contacts” As a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C. L. REV. 429, 443 (1981) (arguing that “[e]xplcit sanction is bestowed on Gray” by World-Wide Volkswagen); Erik T. Moe, Case
case did little to resolve disagreement and confusion regarding the stream of commerce theory, however. Some courts held that a manufacturer is subject to personal jurisdiction if it places a product in the stream of commerce with knowledge that it would reach certain states. Other courts held that awareness alone is not enough; instead, there must be additional activity on the part of the manufacturer to purposefully avail itself of the forum.

B. The Asahi Decision

The Supreme Court attempted to resolve this confusion in Asahi Metal Co. v. Superior Court, but was unable to reach agreement on the stream of commerce theory. Writing for four justices, Justice O’Connor articulated a narrow rule, concluding that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State” does not establish jurisdiction.
minimum contacts. Instead, “something more” is required—“for example, designing the product for the market in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”

This articulation of the doctrine is commonly referred to as the “stream of commerce plus” theory.

Justice Brennan wrote a concurring opinion on behalf of four justices, disagreeing with Justice O’Connor, and articulating an expansive jurisdictional theory. Noting that “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale,” Justice Brennan reasoned that “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”

A manufacturer with such knowledge “can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State.”

45. Asahi, 480 U.S. at 112 (opinion of O’Connor, J.).
46. Id. at 111–12. Applying this approach, Justice O’Connor concluded that the Japanese manufacturer’s contacts with California were insufficient because the company had no office, agents, employees, or property in the state, did not advertise there, had no control over the distribution system, and did not specifically design its product for consumers in California. Id. at 112–13.
48. Asahi, 480 U.S. at 116–21 (Brennan, J., concurring). Although Justice Brennan argued that the Japanese manufacturer had sufficient contacts with California, he nonetheless concluded that the assertion of personal jurisdiction would be unfair under the second prong of the minimum contacts test. See id.
49. Id. (emphasis added).
50. Id. at 119 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)). In addition to the opinions by Justice O’Connor and Justice Brennan, Justice Stevens concurred separately. Id. at 121–22 (Stevens, J., concurring). After emphasizing that it was unnecessary for the Court to reach the stream of commerce issue, Justice Stevens expressed his doubt “that an unwavering line can be drawn between ‘mere awareness’ that a component will
The Court’s fractured *Asahi* decision provides little guidance on the continued viability of the stream of commerce theory.\(^{51}\) Decades of silence from the Supreme Court on this issue\(^ {52}\) left courts guessing at the proper application of personal jurisdictional doctrine to manufacturers and distributors. Some courts apply Justice O’Connor’s test.\(^ {53}\) Other courts use Justice Brennan’s approach.\(^ {54}\) And many courts avoid *Asahi*’s jurisdictional thicket by noting that both tests frequently produce the same outcome.\(^ {55}\)

C. The Nicastro Decision

In June 2011—nearly twenty-five years after *Asahi*—the Supreme Court finally revisited the stream of commerce doctrine in *J. McIntyre Machinery, Ltd. v. Nicastro*.\(^ {56}\) Instead of resolving the questions left unanswered by *Asahi*, however, the Court once

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\(^{51}\) See e.g., IDES & MAY, supra note 5, at 130; SPENCER, supra note 6, at 98.

\(^{52}\) The Court repeatedly denied certiorari in stream of commerce cases. See, e.g., Luv N’ Care, Ltd. v. InstaMix, Inc., 438 F.3d 465 (5th Cir.), cert. denied, 548 U.S. 904 (2006); Bridgeport Music, Inc. v. Still N the Water Publ’g, 327 F.3d 472, 479 (6th Cir.), cert. denied, 540 U.S. 948 (2003); Akro Corp. v. Luker, 45 F.3d 1541 (Fed. Cir.), cert. denied, 515 U.S. 1122 (1995).


\(^{56}\) 131 S. Ct. 2780 (2011).
again issued a decision with no majority opinion.\textsuperscript{57} 

In \textit{Nicastro}, plaintiff filed a products liability suit against a British manufacturer in New Jersey state court, after he sustained injuries from one of the manufacturer’s shearing machines in the course of his employment at a New Jersey scrap-metal business.\textsuperscript{58} The manufacturer had no office or property in New Jersey, did not advertise in the state, and did not send employees there.\textsuperscript{59} Plaintiff nonetheless argued that New Jersey had personal jurisdiction over the manufacturer, for three reasons.\textsuperscript{60} First, an independent distributor in the United States agreed to sell the manufacturer’s machines nationwide.\textsuperscript{61} Second, the manufacturer advertised its machines at trade shows and conventions in various states.\textsuperscript{62} Third, the machine that injured plaintiff ended up in New Jersey.\textsuperscript{63}  

The New Jersey Supreme Court concluded that it had personal jurisdiction over the manufacturer.\textsuperscript{64} Invoking the stream of commerce doctrine, the court held that a manufacturer is subject to personal jurisdiction in New Jersey if it “knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.”\textsuperscript{65} It reasoned that “[a] manufacturer cannot shield itself merely by employing an independent distributor—a middleman—knowing the predictable route the product will take to market.”\textsuperscript{66} Applying this rule to the case before it, the court

\textsuperscript{57} See \textit{id.} at 2785–91 (plurality opinion); \textit{id.} at 2791–94 (Breyer, J., concurring in the judgment); \textit{id.} at 2794–2804 (Ginsburg, J., dissenting).

\textsuperscript{58} \textit{Id.} at 2786 (plurality opinion); \textit{id.} at 2795–96 (Ginsburg, dissenting).

\textsuperscript{59} \textit{Id.} at 2790 (plurality opinion).

\textsuperscript{60} \textit{Id.} at 2786.

\textsuperscript{61} \textit{Id.} The independent company was based in Ohio, and served as the British manufacturer’s exclusive United States distributor. \textit{Nicastro} v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592 (N.J. 2010).

\textsuperscript{62} \textit{Nicastro}, 131 S. Ct. at 2786 (plurality opinion); \textit{see also} \textit{Nicastro}, 987 A.2d at 592 (noting that the manufacturer’s president “was present at the Las Vegas trade convention where his exclusive distributor introduced plaintiff’s employer to the allegedly defective McIntyre Model 640 Shear”).

\textsuperscript{63} \textit{Nicastro}, 131 S. Ct. at 2786 (plurality opinion).

\textsuperscript{64} \textit{Nicastro}, 987 A.2d at 592.

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.}
concluded that jurisdiction was proper because the manufacturer had engaged in “calculated efforts to penetrate the overall American market,” and had failed to “take some reasonable step to prevent the distribution of its products” in New Jersey.67

The United States Supreme Court reversed, holding that New Jersey did not have personal jurisdiction over the manufacturer.68 The justices failed to coalesce around a particular rule, however.69 Writing for a plurality of four justices, Justice Kennedy embraced Justice O’Connor’s Asahi approach and rejected Justice Brennan’s test.70 According to the plurality, the Due Process Clause requires some act by which the defendant submits to the sovereign power of the state’s courts,71 and personal jurisdiction must be based on “the defendant’s actions, not his expectations.”72 As a result, the stream of commerce doctrine applies “only where the defendant can be said to have targeted the forum.”73 The plurality concluded that although the facts of the case before the Court “may reveal an intent to serve the U.S. market,” they do not show that the British manufacturer “purposefully availed itself of the New Jersey market.”74

67. Id.; see also id. at 593 (noting that the manufacturer “may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States”).
68. Nicastro, 131 S. Ct. at 2791 (plurality opinion); id. at 2794 (Breyer, J., concurring in the judgment).
69. See id. at 2793 (Breyer, J., concurring in the judgment) (refusing to join the reasoning of the plurality opinion); id. at 2804 (Ginsburg, J., dissenting) (noting that “the plurality opinion does not speak for the Court”).
70. See id. at 2789–90 (plurality opinion).
71. See id. at 2787. This reliance on principles of state sovereignty seems inconsistent with the Court’s previous suggestion that personal jurisdiction is “a function of the individual liberty interest preserved by the Due Process Clause,” which “makes no mention of federalism concerns.” Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982); see also Allan R. Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 TEX. L. REV. 689, 724–25 (1987).
72. Nicastro, 131 S. Ct. at 2789 (plurality opinion).
73. Id. at 2788.
74. Id. at 2790. The plurality did suggest in dicta that, in exceptional cases, “a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.” Id. at 2789. Thus, the plurality
Writing separately for two justices, Justice Breyer concurred in the judgment only, arguing that the case was an “unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.”75 Recognizing “that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents,” Justice Breyer nonetheless concluded “this case does not present any of those issues.”76 He reasoned that the plaintiff had failed to meet his burden under any of Asahi’s tests, which require more than a “single isolated sale.”77 Thus, Justice Breyer found it unnecessary and unwise to adopt a particular stream of commerce test without “a better understanding of the relevant contemporary commercial circumstances” and “modern-day consequences” of jurisdictional rules.78

Justice Ginsburg wrote a dissenting opinion on behalf of three justices, in which she defended the New Jersey Supreme Court’s approach.79 She noted that the British manufacturer actively sought to sell its product “anywhere in the United States,”80 had products liability insurance coverage,81 and arguably had structured its distribution system with the intention of avoiding appeared unwilling to foreclose the possibility that the Due Process Clause might permit federal courts to exercise personal jurisdiction over foreign defendants, based on an aggregation of national contacts. See id. at 2790; see FED. R. CIV. P. 4(k)(2). The Court previously has declined to address this issue. See Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987); Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113 n.4 (1987) (plurality opinion). For further analysis of a national contacts approach, see Ronan E. Degnan & Mary Kay Kane, The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants, 39 HASTINGS L.J. 799, 813–24 (1988); Graham C. Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 VA. L. REV. 85, 127–45 (1983); Parrish, supra note 30, at 21–22; A. Benjamin Spencer, Nationwide Personal Jurisdiction for Our Federal Courts, 87 DENV. U. L. REV. 325 (2010).

75. Nicastro, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).
76. Id. at 2791.
77. Id. at 2792. According to Justice Breyer, the record before the New Jersey Supreme Court included evidence of only one sale to the forum state—the machine sold and shipped to the plaintiff’s employer. Id.
78. Id. at 2791, 2793–94.
79. See id. at 2794–2804 (Ginsburg, J., dissenting).
80. Id. at 2796.
81. Id. at 2797.
liability. Because the British manufacturer engaged an American distributor “to promote and sell its machines in the United States,” Justice Ginsburg concluded it “availed itself of the market of all States in which its products were sold by its exclusive distributor.” She argued that in such circumstances, “it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer’s products caused injury.”

D. Nicastro’s Implications

What can we take from the *Nicastro* decision? At first glance, the decision seems frustratingly unhelpful. Because no particular interpretation of the stream of commerce theory received majority support, the Court’s fractured decision arguably does little to advance our understanding of personal jurisdiction law.

Nonetheless, we can glean a few hints by reading *Nicastro*’s tea leaves. The rationale of Justice Breyer’s concurring opinion is instructive because it articulates the “narrowest grounds” for the Court’s judgment. At the very least, a majority of the Court appears to agree with Justice Breyer that a state court cannot assert personal jurisdiction over an out-of-state manufacturer based

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82. See id. (quoting a letter allegedly explaining the manufacturer’s objective in establishing the exclusive distributorship, in which the manufacturer’s president stated, “All we wish to do is sell our products in the [United] States—and get paid!”); id. at 2801 (quoting an e-mail from one of the manufacturer’s officers to its distributor, which said “American law—who needs it?!”).
83. Id. at 2801.
84. Id. at 2801–02.
85. See id. at 2804 (Ginsburg, J., dissenting) (“While I dissent from the Court’s judgment, I take heart that the plurality opinion does not speak for the Court.”).
solely on a “single isolated sale” to an in-state customer through the stream of commerce.\textsuperscript{87} A majority also agrees with Justice Breyer’s rejection of the New Jersey Supreme Court’s expansive stream of commerce test in the context of this particular case.\textsuperscript{88}

And yet it would be a mistake for lower courts and scholars to overreact to the \textit{Nicastro} Court’s limited holding. Justice Breyer did not reject the plurality’s rule or the New Jersey Supreme Court’s approach out of hand; instead, he merely indicated his unwillingness to “work such a change to the law . . . without a better understanding of the relevant contemporary commercial circumstances” and “modern-day consequences” of personal jurisdiction rules.\textsuperscript{89} For now, the law remains unsettled.

Ultimately, two things are likely in the aftermath of \textit{Nicastro}. First, the stream of commerce doctrine will be very much in flux in the years ahead, now that the procedurally active Roberts Court has shown an interest in revisiting personal jurisdiction issues.\textsuperscript{90} Second, Justice Breyer’s request for additional information on the “contemporary commercial circumstances” and “modern-day consequences” of jurisdictional rules indicates that economic analysis may play a significant (and perhaps decisive) role in the

\textsuperscript{87} \textit{Nicastro}, 131 S. Ct. at 2791–92 (Breyer, J., concurring in the judgment); see also id. at 2790 (plurality opinion) (noting that “after discovery the trial court found that the defendant does not have a single contact with New Jersey short of the machine in question ending up in this state” (internal quotation marks omitted)); id. at 2795 (Ginsburg, J., dissenting) (“[S]ix Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities.”).

\textsuperscript{88} See id. at 2793 (Breyer, J., concurring in the judgment) (“I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court . . . [in the context of this case”]; see also id. at 2786 (plurality opinion) (“Both the New Jersey Supreme Court’s holding and its account of what it called ‘the stream-of-commerce doctrine of jurisdiction’ were incorrect . . . .” (internal citations and alternations omitted)).

\textsuperscript{89} Id. at 2791, 2793–94 (Breyer, J., concurring in the judgment).

Court’s refinement of the stream of commerce doctrine in the years ahead.\textsuperscript{91}

II. ECONOMIC INCENTIVES, LITIGATION, AND PRODUCTS LIABILITY

In order to analyze the consequences of jurisdictional rules, we first must understand the economic incentives underlying civil litigation. I begin by outlining a basic model of litigant behavior, which illustrates the private and social incentives of civil litigation in general, and products liability lawsuits in particular.\textsuperscript{92} I then briefly discuss the role that legal rules play in allocating risk.\textsuperscript{93}

A. Basic Litigation Model: Incentives to File Suit

Under a basic model of litigation behavior, private incentives to file suit exist whenever the plaintiff’s benefits exceed her costs.\textsuperscript{94} In addition to these private incentives, there are social incentives as well—from society’s perspective, suits can be desirable or undesirable.\textsuperscript{95} There is a divergence between these private and social incentives, leading to both excessive and inadequate levels of suit.\textsuperscript{96}

1. Private Incentives

Generally, a plaintiff will file suit when her expected benefit exceeds her litigation costs.\textsuperscript{97} The “expected benefit” of suit is the amount plaintiff will gain from the litigation process, multiplied by the probability that she will prevail.\textsuperscript{98} Plaintiff’s “litigation

\textsuperscript{91} Nicastro, 131 S. Ct. at 2791, 2793–94 (Breyer, J., concurring in the judgment).
\textsuperscript{92} See infra Part II.A.
\textsuperscript{93} See infra Part II.B.
\textsuperscript{94} See infra Part II.A.1.
\textsuperscript{95} See infra Part II.A.2.
\textsuperscript{96} See infra Part II.A.3.
\textsuperscript{97} Shavell, supra note 12, at 390; see also Keith N. Hylton, The Influence of Litigation Costs on Deterrence Under Strict Liability and Under Negligence, 10 Int’l Rev. L. & Econ. 161, 163 (1990).
\textsuperscript{98} Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873, 920 n.199 (2009). Plaintiff’s expected benefit
“costs” include the direct costs she incurs in the litigation process such as filing fees, the expense of hiring legal counsel, and the time she invests in maintaining the lawsuit.\textsuperscript{99}

This expected value analysis is commonly called a net present value model.\textsuperscript{100} When plaintiff’s expected value exceeds her costs, the lawsuit is a positive expected value suit.\textsuperscript{101} In contrast, if plaintiff’s litigation costs exceed her expected benefit, the lawsuit is a negative expected value suit.\textsuperscript{102} For example, if plaintiff has a 50 percent chance of recovering a $10,000 judgment (yielding an expected value of $5,000), plaintiff would file suit if her litigation costs are $4,000, but would not file suit if her costs are $6,000.\textsuperscript{103}

Two particular characteristics of these private incentives bear mentioning. First, plaintiff’s litigation costs do not include costs incurred by the defendant or by the court system, and thus the plaintiff will only consider the amount she expects to pay, not total litigation costs.\textsuperscript{104} Second, plaintiff will consider only her own

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99. SHAVELL, supra note 12, at 389–90.
101. Bone, supra note 98, at 920 n.199.
102. Id.; see also Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 HARV. L. REV. 961, 1054 n.186 (2001) (noting that when a victim’s legal costs exceed her losses, she will not bring suit).
103. Expressed formally, plaintiff will file her lawsuit if and only if \( B(p) > C \), where \( B \) represents the benefit from suit, \( p \) represents the probability of success, and \( C \) represents plaintiff’s litigation costs.
104. Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System, 26 J. LEGAL STUD. 575, 577–78 (1997); but see Louis Kaplow, Private Versus Social Costs in Bringing Suit, 15 J. LEGAL STUD. 371, 373 n.5 (1986) (noting that basic models illustrating private incentives to sue ignore “[i]ssues of uncertainty, risk aversion, endogeneity of litigation costs, and other complications,” along with the possibility that “plaintiff might sue strategically”).
expected benefit; when deciding whether to sue, she generally will not consider any indirect benefits to society from the lawsuit.\textsuperscript{105}

2. \textit{Social Incentives}

In addition to the private incentives of suit, there are several social incentives, reflecting society’s benefits and costs from litigation. First, the threat of legal liability often deters undesirable behavior by providing incentives toward safety.\textsuperscript{106} When the legal system holds injurers liable for harm caused, those injurers internalize the full cost of their actions.\textsuperscript{107} For example, products liability forces manufacturers to internalize the full cost of harm caused by unsafe products, providing an incentive for those manufacturers to take precautions that reduce product risk. As long as the cost of exercising care is less than the expected cost of liability, manufacturers will have an incentive to make safer products.\textsuperscript{108}

\footnotesize\textsuperscript{105} Shavell, \textit{supra}, note 104, at 578. This basic model also assumes that plaintiff is a rational actor, and that she is risk neutral. For background on these concepts, see Kenneth J. Arrow, \textit{Essays in the Theory of Risk-Bearing} 103–04 (1971); Edward L. Rubin, \textit{Putting Rational Actors in Their Place: Economics and Phenomenology}, 51 \textit{Vander. L. Rev.} 1705, 1713–17 (1998).

\footnotesize\textsuperscript{106} See, e.g., Kaplow & Shavell, \textit{supra} note 102, at 1166; Shavell, \textit{supra} note 104, at 578.

\footnotesize\textsuperscript{107} As an illustration, suppose that an injurer exercising no care has a 10% chance of causing harm of $1,000. Let us also assume the injurer can eliminate this risk by taking precautions costing $50. If there is no liability, the injurer has no incentive to take care (he will not be held liable for the harm caused, and will not take care costing $50). If liability exists, however, the injurer will take care because the cost of care ($50) is less than the expected liability ($100). For more on deterrence theory, see generally Guido Calabresi, \textit{The Costs of Accidents: A Legal and Economic Analysis} (1970).

\footnotesize\textsuperscript{108} The deterrent effect of products liability may be unnecessary for widely sold products, when market forces and government regulation provide adequate incentives for manufacturers to address well-publicized risks. See Polinsky & Shavell, \textit{Uneasy Case, supra} note 13, at 1443–53; see also Jerry Hirsch, \textit{U.S. Opens Probe of Toyota Highlander: Complaints of Stalling Prompt a Review Involving About 44,000 Hybrid SUVs}, \textit{L.A. Times}, Feb. 23, 2011, at B2 (noting that Toyota’s share of automobile sales in the United States fell from 17% in 2009 to 15.2% in 2010, following well-publicized recalls and fines to address reported cases of sudden acceleration in Toyota’s vehicles). That said, products liability law creates invaluable incentives-toward-safety for products that are not widely sold, when consumers and regulators lack sufficient information to
Second, liability ensures that consumer purchases are socially optimal. Generally, a purchase is socially optimal only if the consumer values the product more than its true cost (the product’s cost of production plus its expected harm). Consumers often lack accurate information about product risk, however, leading them to underestimate or overestimate a product’s true cost. When this is the case, products liability provides a price-signaling benefit: the imposition of liability forces manufacturers to internalize the full cost of their products, which they pass along to consumers through increased product prices. Because these prices reflect product risk, consumers lacking accurate information nonetheless make optimal purchasing decisions.

Third, liability serves a compensatory function. Although many victims have at least partial insurance coverage for harms that might result from product-related accidents, millions do not. When uninsured or underinsured victims suffer product-
related harms, products liability judgments can help make them whole.\textsuperscript{117} Granted, the actual amount received by the plaintiff is almost always less than the judgment or settlement amount, and may be inadequate to fully compensate losses.\textsuperscript{118} Nonetheless, liability plays an important compensatory role in many cases.\textsuperscript{119}

These benefits are not without costs, however. Lawsuits generate tremendous social costs, including the parties’ direct expenses, judicial resources devoted to adjudication, and lost productivity resulting from businesses diverting resources to litigation.\textsuperscript{120} In 2008, expenditures on legal services in the United States were $210 billion, approximately 1.45 percent of gross domestic product.\textsuperscript{121} Many of these expenditures do not actually go to victims; instead, they are absorbed by the system.\textsuperscript{122} Indeed,
for every dollar received by victims, the tort system usually incurs more than a dollar in administrative costs. Additionally, manufacturers pass along litigation costs to consumers in the form of higher product prices, which prevents purchases that otherwise would be socially optimal.

3. Divergence Between Private and Social Incentives

A fundamental divergence exists between these private and social incentives. There are several reasons for this divergence, which can lead to either excessive or inadequate levels of suit.

First, there is a divergence between private and social litigation costs. Plaintiff only pays her own litigation costs; costs borne by defendant and the state usually are of no concern to her, and are negative externalities of plaintiff’s decision to sue. This often results in excessive levels of litigation, because there are situations in which plaintiff’s expected benefit from suit exceeds her own litigation costs, but does not exceed total litigation costs.

123. Id. at 281; see also Stephen J. Carroll et al., Rand Inst. For Civil Justice, Asbestos Litigation 104 (2005) (noting that asbestos victims receive 42 cents of each judgment or settlement dollar); Peter W. Huber, Liability: The Legal Revolution and Its Consequences 151 (1988) (“Sixty cents of every dollar spent on malpractice liability insurance are absorbed by administrative and legal costs.”); Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003) (noting that tort victims receive 46 cents of each judgment or settlement dollar).

124. See Polinsky & Shavell, Uneasy Case, supra note 13, at 1470–72; see also Shawn J. Bayern, Comment, Explaining the American Norm Against Litigation, 93 Cal. L. Rev. 1697, 1712 n.72 (2005).


126. Shavell, supra note 104, at 577–78. The magnitude of this divergence often is large. Because plaintiffs do not consider defendant’s litigation costs and the court’s administrative costs, “victims may fail to take into account around half of total litigation costs.” Shavell, supra note 12, at 395.

127. See Steven Shavell, The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement, 19 Int’l Rev. L. & Econ. 99, 99 (1999). For example, suppose there is a 5% chance that an accident causing $20,000 in harm will occur, and that the injurer can do nothing to lower this risk. Suppose
Second, there is a divergence between the private and social benefits from suit. Plaintiffs generally are motivated by the prospect of obtaining compensation for their harm, and do not consider the deterrent effect of the suit, the precedential value of their case, or other social benefits—all of which are positive externalities of plaintiff’s decision to sue.\textsuperscript{128} This divergence can lead to a socially excessive or socially inadequate amount of litigation, depending on the circumstances.\textsuperscript{129} If private incentives to sue exceed the social benefit from suit, there likely will be an excessive number of lawsuits.\textsuperscript{130} However, the amount of litigation will be socially inadequate when the social benefits from suit exceed private incentives.\textsuperscript{131}

Professor Steven Shavell summarizes factors that contribute to a socially excessive or socially inadequate amount of litigation.\textsuperscript{132} Circumstances that increase the likelihood of socially undesirable

\textsuperscript{128} Shavell, supra note 104, at 579; see also Shavell, supra note 127, at 99.
\textsuperscript{129} Shavell, supra note 12, at 391.
\textsuperscript{130} Shavell, supra note 104, at 578. The previous example illustrates this—the victim’s private incentive to sue (namely, a net gain of $15,000 from the judgment, minus litigation costs) exceeds the social benefit of suit, which is nonexistent because there is nothing the injurer can do to reduce the risk. See supra note 127. Thus, victims will file suit at socially excessive levels.
\textsuperscript{131} Shavell, supra note 104, at 578. Professor Shavell provides an example: Suppose there is a 10% chance of an accident causing $1,000 in harm if an injurer does not exercise care, but the injurer could reduce the probability of harm to 1% by taking precautions costing $10. The victim’s cost to file suit is $3,000, and the injurer’s cost to defend is $2,000. Under this scenario, victims will not sue because the cost of suit ($3,000) exceeds the harm ($1,000). As a result, injurers have no incentive to take care, leading to a social cost of $100 (10% probability of an accident causing $1,000 in harm). As Professor Shavell points out, however, lawsuits are socially desirable in this example, because lawsuits would decrease the risk of harm from 10% to 1%, decreasing total social costs to $70 ($10 cost of care + 1% probability of risk x ($1,000 harm + $5,000 total litigation costs)). Shavell, supra note 12, at 392–93.
\textsuperscript{132} See Shavell, supra note 125, at 336.
suits include “low legal expenses of plaintiffs, high legal expenses of defendants, high levels of loss, or low liability-induced reduction in expected losses net of prevention costs.”

In contrast, victims are less likely to file socially desirable suits when there are “high legal expenses of plaintiff, low expenses of defendants, a low level of loss, [or] a large reduction in net expected losses due to liability.”

It is difficult to empirically assess these effects in products liability cases. Professors A. Mitchell Polinsky and Steven Shavell recently argued that “product liability will often, if not usually, be socially undesirable for widely sold products.” For these products, Professors Polinsky and Shavell argue that the safety benefit from liability is modest, price distortion costs likely outweigh any price-signaling benefit, and litigation costs equal or exceed compensation received by victims. However, Professors John Goldberg and Benjamin Zipursky question many of these assumptions and conclusions, arguing that “considerations of accountability, structural constitutionalism, egalitarianism, and rule-of-law values” justify products liability law.

133. Id.

134. Id.


136. Polinsky & Shavell, Uneasy Case, supra note 13, at 1474.

137. Id. Professors Polinsky and Shavell note that their conclusions do not necessarily apply to products that are not widely sold. See id. at 1476.


139. Id. at 1944. According to Professors Goldberg and Zipursky, Professors Polinsky and Shavell fail to account for several benefits of products liability:

It holds manufacturers accountable to persons victimized by their wrongful conduct. It empowers certain injury victims to invoke the law and the apparatus of government to vindicate important interests of theirs. It instantiates notions of equality before the law and articulates and reinforces norms of responsibility. And in doing all these things, it contributes in direct and indirect ways to deterrence and provides welfare-enhancing compensation.

Id. at 1948. For Professors Polinsky and Shavell’s reply to these arguments, see Polinsky & Shavell, Skeptical Attitude, supra note 13.
B. Legal Rules and the Allocation of Risk

Two additional concepts augment the basic model of litigation behavior described above. First, in addition to aligning private and social incentives, legal rules should aim to place risk on the least-cost avoider—the party who is in the best position \textit{ex ante} to minimize harm and litigation costs.\textsuperscript{140} For example, if accident losses (and subsequent litigation) can be prevented either by an injurer taking $100 of care, or a victim taking $200 of care, legal rules should place the onus on the injurer as the least-cost avoider.\textsuperscript{141} This goal is central to tort law rules, especially rules governing products liability.\textsuperscript{142}

Second, legal rules ideally should shift the risk of liability and uncertain legal costs to risk-neutral parties, or at least risk-averse parties with insurance.\textsuperscript{143} Typically, individuals are risk averse, and firms are risk neutral.\textsuperscript{144} It is not socially optimal when risk-averse individuals bear risk, because they exercise excessive care and do not engage in an optimal level of activity.\textsuperscript{145} The liability system can avoid these social costs by requiring risk-neutral injurers to compensate uninsured, risk-averse victims.\textsuperscript{146}

\textsuperscript{140} See, e.g., CALABRESI, supra note 107, at 135–40 (discussing the “least cost avoider” concept); Guido Calabresi & Jon T. Hirschoff, \textit{Toward a Test for Strict Liability in Torts}, 81 YALE L.J. 1055, 1060 n.19 (1972) (“The cheapest cost avoider has been . . . defined as the party ‘an arbitrary initial bearer of accident costs would (in the absence of transaction and information costs) find it most worthwhile to “bribe” in order to obtain that modification of behavior which would lessen accident costs most.’”).

\textsuperscript{141} SHAVELL, supra note 12, at 189.

\textsuperscript{142} See RESTATEMENT (THIRD) TORTS: PROD. LIAB. § 2, reporter’s notes, cmt. a (1998) (noting that products liability law holds designers and marketers liable “whenever the designer or marketer of a product is in a relatively better position than are users and consumers to minimize product-related risks”).

\textsuperscript{143} SHAVELL, supra note 12, at 259. Efficient risk bearing is related to the least-cost avoider concept, because the least-cost avoider frequently is the least risk-averse party to the transaction. See Aristides N. Hatzis, \textit{Having the Cake and Eating It Too: Efficient Penalty Clauses in Common and Civil Contract Law}, 22 INT’L REV. L. & ECON. 381, 395 (2002).

\textsuperscript{144} SHAVELL, supra note 12, at 258–59.

\textsuperscript{145} Id. at 266.

\textsuperscript{146} See id. Policy makers also should consider the parties’ preference for or aversion to risk when setting the level of damages. See, e.g., Richard Craswell,
In sum, a basic model of litigation behavior shows that private and social incentives are fundamentally misaligned. Plaintiffs generally consider only their own expected benefit and costs, and consider neither the social benefits of suit, nor the total social costs of litigation. This in turn leads to an amount of litigation that is either socially excessive or socially inadequate. Finally, legal rules should shift the risk of liability and legal costs to parties that are either risk neutral or insured.

III. THE ECONOMICS OF PERSONAL JURISDICTION

With a conceptual framework in place, I proceed to the next question: how do personal jurisdiction rules alter lawsuits and litigant behavior? I begin by describing the ways in which personal jurisdiction rules can realign private incentives. Next, I examine the effect these rules have on the existing divergence between private and social litigation incentives. Finally, I discuss the effect that personal jurisdiction rules have on the allocation of risk.

A. Realignment of Private Incentives

Personal jurisdiction rules often significantly realign litigants’ incentives. Existing rules increase the likelihood of jurisdictional disputes, increase litigation costs, and decrease plaintiff’s expected benefit from suit. As a result, some positive expected value suits become negative expected value suits, and potential plaintiffs who would have otherwise filed lawsuits do not do so.

There are two ways in which current rules encourage disputes over jurisdictional issues. First, personal jurisdiction rules are

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*Damage Multipliers in Market Relationships,* 25 J. LEGAL STUD. 463, 465 (1996) (noting that “[i]f offenders are risk-averse, the deterrent effect of any given fine will exceed that fine’s expected value; if offenders are risk-prefering, the deterrent effect will be less,” and concluding that “[t]o achieve optimal deterrence, . . . the fine will have to be adjusted upward or downward, until its discounted disutility equals the social harm caused by the offense”).

147. *See infra* Part III.A.
148. *See infra* Part III.B.
149. *See infra* Part III.C.
case-sensitive, and it is often unclear how they apply in practice.\footnote{150} This uncertainty increases the odds that the parties will interpret the rules differently and will litigate their differences in court.\footnote{151} Second, the defendant considers only its own benefits and costs when deciding whether to file a motion to dismiss.\footnote{152} As a result, a jurisdictional dispute occurs when defendant’s expected benefit (namely, the probability that the court will dismiss the case for lack of jurisdiction, multiplied by defendant’s net benefit from litigating in an alternative forum) exceeds its own costs of filing and litigating a motion to dismiss.\footnote{153} Notably, defendant considers neither plaintiff’s costs of defending the motion, nor plaintiff’s net loss from litigating in an alternative forum.\footnote{154}

These jurisdictional disputes inflate litigation costs.\footnote{155}


151. See Rachel M. Janutis, The Road Forward From Grable: Separation of Powers and the Limits of “Arising Under” Jurisdiction, 69 LA. L. REV. 99, 111 (2008) (arguing that jurisdictional rules that are uncertain and case sensitive “may increase the cost of litigation by increasing the likelihood of litigation over jurisdiction”); see also Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 739 (7th Cir. 2004) (“When it is uncertain whether a case is within the jurisdiction of a particular court, . . . the cost and complexity of litigation [is] increased by the necessity of conducting an inquiry that will dispel the uncertainty”).

152. Although there do not appear to be any studies of the allocation of costs for personal jurisdiction disputes, studies of litigation costs in tort cases indicate that each party pays approximately half of the total litigation costs. See, e.g., JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION xi fig.S.1 (1986); SHAVELL, supra note 12, at 395 & n.9.

153. This concept can be expressed formally as follows: Assume \( c \) represents defendant’s costs of litigating a motion to dismiss, \( p \) is the probability that the court will dismiss the case for lack of jurisdiction, \( x \) is defendant’s benefit from litigating in the current forum (or loss, if \( x \) is negative), and \( x' \) is defendant’s benefit (or loss) from litigating in an alternative forum. Defendant will file a motion to dismiss on personal jurisdiction grounds if and only if \( c < p(x' - x) \).

154. Note these incentives are a mirror image of plaintiff’s private incentive to file suit, in which plaintiff only considers her own litigation costs and expected benefit. See supra Part II.A.1.

155. See Jayne S. Ressler, Plausibly Pleading Personal Jurisdiction, 82 TEMP. L. REV. 627, 634 (2009); see also Katherine C. Sheehan, Predicting the Future: Personal Jurisdiction for the Twenty-First Century, 66 U. CIN. L. REV. 385, 440
and the courts allocate significant resources to motions to dismiss and other procedural disputes.\textsuperscript{156} As a result, litigation on personal jurisdiction alters the private incentives of filing suit because the plaintiff incurs substantial costs, regardless of the court’s decision on the defendant’s motion.\textsuperscript{157} Indeed, when a defendant has a significant financial advantage over the plaintiff, it frequently uses jurisdictional issues for strategic purposes, initiating a costly round of procedural litigation “to dry out the plaintiff’s resources.”\textsuperscript{158}

Even when personal jurisdiction rules are clear and perfectly applied, they force many plaintiffs to incur the additional costs of litigating in an inconvenient forum.\textsuperscript{159} However, these costs likely are not as significant as the cost of the procedural dispute itself.\textsuperscript{160} The marginal costs associated with litigating in an inconvenient forum likely pale in comparison to the significant fixed costs of litigating in any forum,\textsuperscript{161} and an increase in expected costs makes it more likely that the parties will settle their dispute, avoiding

\begin{itemize}
\item 156. See, e.g., Philip Y. Brown, \textit{A Client’s Guide to the Litigation Process, in Addressing a Client’s Litigation Issues: Leading Lawyers on Educating Clients, Managing Expectations, and Developing a Case Strategy} 40 (2008) (noting that “[m]otions to dismiss are expensive to draft and respond to, and they can cause substantial delays while the motion is briefed, heard by the court, and ruled upon”).
\item 158. Emil Petrossian, \textit{In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England}, 40 LOY. L.A. L. REV. 1257, 1309 (2007); see also Brown, supra note 156, at 40 (noting that motions to dismiss are “a favorite weapon of the well-funded defendant for whom time is an ally”).
\item 159. See, e.g., Walter W. Heiser, \textit{A “Minimum Interest” Approach to Personal Jurisdiction}, 35 WAKE FOREST L. REV. 915, 932 (2000) (noting that the Supreme Court has identified several burdens associated with “litigating in a distant or inconvenient forum,” including “travel to the forum, the hire of an attorney, participation in discovery, and payment of various costs and fees”).
\item 161. Id. at 23–24; see also Allan R. Stein, \textit{Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision}, 98 NW. U. L. REV. 411, 427 (2004) (suggesting that “the marginal cost of litigating in one forum compared to another tends to be de minimis”).
\end{itemize}
further expenses.\textsuperscript{162} Additionally, a forum that is less convenient for the plaintiff might be more convenient for the defendant, and thus a decrease in the defendant’s litigation costs might offset plaintiff’s additional expenses, at least from the vantage point of total social costs.\textsuperscript{163} Nevertheless, any increase in plaintiff’s costs would still alter the private incentives of filing suit.\textsuperscript{164}

In addition to these implications on litigation costs, personal jurisdiction rules also affect plaintiff’s expected benefit from the lawsuit. Plaintiffs have a tendency to file in a forum that they view as favorable to the outcome of their case.\textsuperscript{165} In theory, when a plaintiff is forced to file (or re-file) in a less-desirable forum, she is less likely to prevail on the merits, and less likely to obtain a favorable settlement.\textsuperscript{166} Although there appears to be a dearth of analysis on the effect of jurisdictional dismissals on win rates in subsequently filed lawsuits,\textsuperscript{167} empirical studies of win rates in analogous contexts suggest that when a plaintiff is forced to litigate in an alternative forum, her chances of prevailing on the merits decrease significantly.\textsuperscript{168} And in rare instances in which


\textsuperscript{163} See Erbsen, supra note 160, at 26.


\textsuperscript{166} See, e.g., Cameron & Johnson, supra note 165, at 820 (finding that in approximately 90% of the Supreme Court’s personal jurisdiction cases since International Shoe, “the party that prevailed on personal jurisdiction ultimately triumphed on the merits in either a judicial decision or a favorable settlement”).

\textsuperscript{167} Professors Cameron and Johnson admit that their study of twenty Supreme Court personal jurisdiction cases, while suggestive, “is in no way conclusive.” Id. at 780.

\textsuperscript{168} See, e.g., Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581, 581–82 (1998) (finding that “the win
there is no alternative forum, a dismissal of plaintiff’s case on personal jurisdiction grounds is the functional equivalent of a loss on the merits. 

Thus, rules restricting personal jurisdiction likely decrease plaintiff’s expected benefit.

Ultimately, the practical effect of all of this is less litigation. For example, suppose there is a 50 percent chance that plaintiff can prevail on the merits and obtain a $10,000 judgment in Forum A, for $2,000 in litigation costs. Plaintiff will file suit, because the expected benefit of $5,000 exceeds her litigation costs. However, let us further assume that defendant will file a motion to dismiss on jurisdictional grounds, there is a 50 percent chance that Forum A will conclude it lacks personal jurisdiction, plaintiff will spend $600 to litigate the jurisdictional dispute, and there is no other forum in which plaintiff’s expected benefits exceed her litigation costs. In this scenario, jurisdictional rules realign the private incentives of suit by reducing plaintiff’s expected benefit to $2,500 and increasing her litigation costs to $2,600. As a result, the plaintiff will not file suit.

rate in original diversity cases is 71%, but in removed diversity cases it is only 34%” and concluding that “forum really does affect outcome, with the removal process taking the defendant to a much more favorable forum”); Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 CORNELL L. REV. 1507, 1511–12 (1995) (observing in the context of federal-court venue transfers that “the plaintiff wins in 58% of the nontransferred cases that go to judgment for one side or the other, but wins in only 29% of such cases in which a transfer occurred.”).

169. See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419 n.13 (1984) (noting the possibility that there was no alternative forum in which the plaintiffs could sue all defendants, but refusing to consider plaintiffs’ “jurisdiction by necessity” theory); see also Cameron & Johnson, supra note 165, at 776 n.20.

170. This assumption is fairly accurate. See Michael E. Solimine, The Quiet Revolution in Personal Jurisdiction, 73 TUL. L. REV. 1, 26–30, 54 (1998) (finding that products liability plaintiffs prevail on personal jurisdiction issues 59.45% of the time, with plaintiffs’ success rate gradually declining after 1980).

171. Expressed formally, plaintiff will file suit in a particular forum if and only if \((c_J + c_M) < (p_J \times p_M \times h)\), where \(c_J\) is plaintiff’s cost of litigating the jurisdiction dispute, \(c_M\) represents other litigation costs incurred by plaintiff, \(p_J\) is the probability that the court will decide that it has personal jurisdiction over the defendant, \(p_M\) is the probability that plaintiff will prevail on the merits, and \(h\) is the judgment amount that plaintiff will receive if she prevails. When plaintiff considers filing in multiple fora, she will file in the forum with the greatest
B. Effect on the Divergence Between Private and Social Incentives

Personal jurisdiction rules often exacerbate the divergence between the private and social incentives of litigation. First, the private incentives provided by jurisdictional rules may skew the level of suit in a socially undesirably way. When substantive laws governing liability are crafted to induce an optimal amount of litigation, restrictions on personal jurisdiction throw this equilibrium out of balance by curbing the number of lawsuits, resulting in a socially inadequate level of suit. When this occurs, some injurers escape liability and do not internalize the full cost of their actions, and there are inadequate incentives for injurers to reduce risk.\(^{172}\)

Second, personal jurisdiction rules induce a socially excessive amount of jurisdictional disputes, regardless of their effect on the overall number of lawsuits. Because defendant considers neither plaintiff’s litigation costs nor the net disadvantage to plaintiff of litigating in an alternative forum, jurisdictional disputes occur even when significant social costs outweigh any marginal benefit to the defendant.\(^{173}\) In theory, parties could avoid these costs through bargaining\(^{174}\)—when the plaintiff’s expected loss from positive difference between her expected benefit and expected costs.

\(^{172}\) See Shavell, supra note 12, at 244; see also A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 887–96 (1998) (discussing the optimal level of damages when a defendant can escape liability). Of course, if lawmakers have not crafted optimal substantive law rules, those rules may induce excessive lawsuits. If that is the case, restrictions on jurisdiction may enhance social welfare by decreasing the volume of litigation to more optimal levels.

\(^{173}\) To illustrate why this is so, suppose plaintiff sues defendant in Forum A. Defendant has the option to file a motion contesting personal jurisdiction, which costs $2,000 and has a 25% chance of forcing plaintiff to re-file her case in Forum B. Defendant’s net benefit from litigating in Forum B would be $10,000, and plaintiff’s net loss from litigating in Forum B would be $15,000. Plaintiff would incur $2,000 in litigation costs if defendant files the motion. Defendant will file the motion, because the expected benefit of $2,500 (defendant’s $10,000 net benefit, times the 25% probability it will win the motion) exceeds defendant’s $2,000 in costs. Defendant will do so even though the motion produces a social loss of $5,250 (25% probability x ($15,000 loss for plaintiff – $10,000 gain for defendant) + $4,000 in litigation costs).

\(^{174}\) Under the Coase theorem, if a mutually beneficial agreement exists and
litigating in an alternative forum exceeds the defendant’s expected gain, plaintiff can offer an amount that is mutually beneficial to both parties, in exchange for defendant’s consent to personal jurisdiction. In reality, however, transaction costs, imperfect information, and other factors often prevent bargaining.

Finally, jurisdictional litigation results in a tremendous social loss, regardless of the outcome of the dispute. If the plaintiff prevails, thousands of dollars have been spent on a fight that changed nothing. If the defendant prevails, resources allocated to the case up to that point are for naught. Because rulings on jurisdictional issues generally are not immediately appealable, there are no obstacles to bargaining, then bargaining will lead to an efficient outcome regardless of the initial allocation of rights. See generally R. H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).

175. For example, suppose plaintiff files a lawsuit against defendant in Forum A, defendant’s net benefit from litigating in alternative Forum B would be $10,000, plaintiff’s net loss would be $15,000, and there is a 25% chance that the Forum A court would grant defendant’s motion to dismiss on personal jurisdiction grounds. Defendant’s expected gain from jurisdictional litigation is $2,500; plaintiff’s expected loss is $3,750. If plaintiff paid defendant $3,000 in exchange for defendant’s consent to personal jurisdiction in Forum A, both parties would be better off, and jurisdictional litigation would be unnecessary. Moreover, litigation costs make it even more likely that the parties will reach agreement. Suppose plaintiff and defendant would each spend $2,000 litigating the jurisdictional dispute. These costs reduce defendant’s expected gain to $500, and increase plaintiff’s expected loss to $5,750, increasing the range of mutually beneficial outcomes.


the magnitude of this loss can be staggering. As Judge Posner has observed, “the parties will often find themselves having to start their litigation over from the beginning, perhaps after it has gone all the way through to judgment.”

C. Effect on the Allocation of Risk

Personal jurisdiction rules also affect the allocation of risk. In the context of products liability litigation, rules that restrict personal jurisdiction have the tendency to shift the risk of liability and litigation costs from risk-neutral parties to risk-averse parties. By restricting fora available to the plaintiff, jurisdictional rules disproportionately increase plaintiffs’ costs and risks. And yet in products liability actions, manufacturer defendants are more likely to be risk-neutral than victim plaintiffs. Additionally, to the extent that manufacturers are risk averse, they likely have (or can easily obtain) insurance.

By disproportionately increasing plaintiff’s costs and risks, jurisdictional rules also shift costs away from the party that is most likely to be the least-cost avoider in products liability cases—the manufacturer. In light of increasingly elaborate manufacturing processes and the proliferation of complex distribution chains, a manufacturer’s knowledge of product risks and destinations almost certainly is superior to consumer knowledge of such matters.


180. Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 739 (7th Cir. 2004); see also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (Brennan, J., dissenting) (noting that “[p]arties . . . spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction”).

181. See Erbsen, supra note 160, at 26 (“Jurisdictional dismissals redistribute burdens rather than eliminate them: refusing to force a defendant to travel to the forum can force the plaintiff to travel from the forum.”).

182. See, e.g., Polinsky & Shavell, supra note 172, at 887 (noting that “publicly held firms should be treated as approximately risk neutral—implying that damages should equal harm—if their shareholders have well-diversified portfolios, which often, if not usually, will be the case”).


184. See generally Steven P. Croley & Jon D. Hanson, Rescuing the
As a result, the manufacturer is in a better position to internalize the cost of litigating in a distant forum—its superior knowledge of product risk and potential fora allows it to “purchase insurance, pass on litigation costs to customers, and curtail commercial activities in a forum when the risk and potential cost of litigation is too high.”185

In sum, our current personal jurisdiction rules realign private incentives by increasing the likelihood and cost of jurisdictional disputes, and by decreasing the plaintiff’s expected benefit from suit. As a result, plaintiffs file fewer lawsuits, often exacerbating existing divergences between the private and social incentives of litigation. This in turn increases the likelihood that injurers (such as manufacturers in products liability suits) will escape liability and be inadequately deterred. Restrictive personal jurisdiction rules also increase the social costs associated with procedural litigation, and have the tendency to shift risks and costs to risk-averse parties, and away from the least-cost avoider.

IV. A NORMATIVE ANALYSIS OF THE STREAM OF COMMERCE THEORY

Drawing on this descriptive analysis of the effect of personal jurisdiction rules, I proceed to a normative analysis of the stream of commerce doctrine. First, I propose a framework for evaluating the benefits and costs of personal jurisdiction rules, drawing on both process-based and outcome-based theories.186 I then apply this normative framework to various interpretations of the stream of commerce theory, ultimately concluding that the Supreme Court should adopt a broad version of the doctrine that allows expansive personal jurisdiction over nonresident manufacturers.187

186. See infra Part IV.A.
187. See infra Part IV.B.
A. An Evaluative Framework

There are two basic methods for evaluating procedural rules: a process-based approach or an outcome-based approach. 188 Professor Robert Bone summarizes the differences between the two: “A process-based approach evaluates a procedural rule by how it treats litigants independent of its consequences for outcome quality, while an outcome-based approach evaluates a rule by its effect on the quality of litigation outcomes.” 189

Process-based theories are rooted in the value society places on direct participation by individuals in the litigation process—the “historic tradition that everyone should have his own day in court.” 190 Several scholars argue that participation is essential to human dignity and autonomy, the finality of judgments, and the legitimacy of the judicial system and the democratic process. 191

Outcome-based theories aim to maximize the quality of judicial decisions, measured by the extent to which procedural rules facilitate the accurate application of substantive law. 192 For


189. Bone, supra note 98, at 900.


192. Bone, Agreeing to Fair Process, supra note 188, at 510; see also Redish & Katt, supra note 191, at 1889.
example, a utilitarian framework aggregates total social benefits and costs across all cases, and considers procedural rules socially optimal if they minimize the sum of expected error costs and expected process costs. In comparison, the goal of a “rights-based” outcome theory is to ensure that procedural rules allow individual litigants to vindicate their substantive rights, rather than evaluating rules based on aggregate social costs.

Each of these analytical tools has benefits and drawbacks. Process-based arguments reflect values vital to the legitimacy of our procedural system, but they can be amorphous and often ignore the important role that accurate outcomes play in achieving legitimacy. Outcome-based arguments ensure that procedural rules produce accurate results in an efficient manner, but a

193. Bone, supra note 98, at 911; see generally Bone, supra note 12, at 128–32; Posner, ÉCONOMIC ANALYSIS OF LAW, supra note 14, at 757–60. “Expected error costs” are costs associated with erroneous judicial decisions under the procedural rule, multiplied times the probability that they will occur. See Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 879 n.141 (2010). “Expected process costs” consist of the cost of administering the rule, including the parties’ costs of compliance, and costs incurred by the parties and the court when procedural disputes arise. See id.

194. See Bone, supra note 98, at 912–15. As Professor Bone notes, rights-based outcome theory “differs from its process-based counterpart by locating the violated right in the substantive law rather than a general right of access to court and by defining the violation in terms of the outcome rather than the way the process itself treats litigants.” Id. at 913.

195. See, e.g., Redish & Katt, supra note 191, at 1890.

196. See Robert G. Bone, Procedure, Participation, Rights, 90 B.U. L. REV. 1011, 1027 (2010) (noting that “it is not clear what procedures a dignity-based participation right would guarantee,” and it is also not clear “what circumstances trigger dignity values strongly enough to call for individual participation in any form”).

197. See Bone, Agreeing to Fair Process, supra note 188, at 510; see also Redish & Katt, supra note 191, at 1894–95 (admitting that “[i]t would be unrealistic and unwise . . . to view the day-in-court ideal as an absolute”).

198. See Jonathan T. Molot, Litigation Finance: A Market Solution to a Procedural Problem, 99 GEO. L.J. 65, 67 (2010) (“If litigation cannot be counted on to apply law accurately to the relevant facts, then it does not matter how carefully we craft substantive law rules.”); Bone, supra note 98, at 911 n.170 (noting that “both false-positive and false-negative errors dilute the deterrent effect of the substantive law, which increases social costs”).
purely outcome-based metric fails to consider the intrinsic value of fundamental due process rights, independent of outcome. 199

Recognizing the advantages and disadvantages of the various approaches described above, I propose that the Supreme Court use a two-step evaluative framework that borrows from both process-based and outcome-based theories. When evaluating the various iterations of the stream of commerce doctrine, the Court should first ask a threshold inquiry: which iterations of the rule protect defendant’s fundamental due process rights? By “fundamental due process rights,” I mean rights that are absolutely essential to the legitimacy of our procedural system (i.e., the right to reasonable notice and an opportunity to be heard). 200 Additionally, fundamental due process rights likely require some connection between “the defendant, the forum, and the litigation” 201 (i.e., one of the defendant’s products makes its way to the forum through the stream of commerce). 202

Second, the Court should compare all iterations of the rule that meet the threshold test, using an outcome-based inquiry: in the aggregate, which iteration of the stream of commerce doctrine optimally aligns private and social incentives, while promoting the most efficient allocation of risk? Because the stream of commerce doctrine is rooted in constitutional due process requirements (making it difficult to adjust the rule to account for changing circumstances), the Court should assume that substantive products liability law provides optimal incentives, and should choose an iteration of the procedural rule that best facilitates those incentives.

This proposed approach has several benefits. First, it protects

199. Redish & Katt, supra note 191, at 1890.
200. See generally Fuentes v. Shevin, 407 U.S. 67 (1972); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). For example, a particular iteration of the stream of commerce doctrine would be unacceptable under this threshold inquiry if it allows litigation in a forum so distant that it is cost prohibitive for the defendant to mount a defense, thus denying the defendant a meaningful opportunity to be heard.
202. By “some connection,” I mean a logical connection between the forum and the defendant. Ideally, this standard would be less stringent, more certain, and less costly to administer than the traditional minimum contacts “purposeful availment” inquiry.
defendants’ procedural rights, but does not reflexively prioritize those rights over other interests. Second, by focusing partly on outcomes, the approach favors rule iterations that align litigation incentives and minimize social costs. Third, it provides much needed flexibility—if substantive law incentives are not optimal, legislatures can make corrections to products liability law, rather than waiting for the Supreme Court to periodically revisit personal jurisdiction rules.

B. Evaluation of the Stream of Commerce Theory

In light of this approach, which interpretation of the stream of commerce doctrine is best? To answer this question, I apply the two-step inquiry described above to the three iterations of the doctrine considered by the Supreme Court in Nicastro: (1) Justice O’Connor’s “stream of commerce plus” test; (2) Justice Brennan’s awareness test; and (3) the “nationwide distribution”...
test used by the New Jersey Supreme Court in the *Nicastro* case.\(^\text{208}\)

1. **Process-Based Inquiry**

Under the first step, I identify the iterations of the stream of commerce theory that protect defendants’ fundamental due process rights. I conclude that all three iterations of the rule meet this threshold inquiry. Justice O’Connor’s “stream of commerce plus” inquiry unquestionably provides defendants ample due process—when minimum contacts exist under that approach, the defendant has purposefully directed marketing, advertising, or sales toward the forum state, and thus it is more than fair that defendant would be subject to suit there.\(^\text{209}\) It is my contention that the other two tests adequately protect fundamental due process rights as well.\(^\text{210}\)

Instead of slipping into talismanic incantations of “purposeful availment” and defaulting to case law precedents decided before the advent of the Internet, I start by asking a more basic question: what does jurisdictional “due process” mean in the context of modern-day litigation? It certainly would be a denial of due process if it were unduly burdensome or cost prohibitive for the defendant to mount a defense in the plaintiff’s chosen forum.\(^\text{211}\) It

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208. See *Nicastro* v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592 (N.J. 2010) (holding that a manufacturer is subject to personal jurisdiction if it “knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states”), *rev’d*, 131 S. Ct. 2780 (2011).


210. Needless to say, this proposition is controversial. See J. McIntyre Mach., Ltd. v. *Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (arguing that “Justice Brennan’s concurrence [in *Asahi*], advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power”); *id*. at 2793 (Breyer, J., concurring in the judgment) (concluding that the New Jersey Supreme Court’s application of the stream of commerce theory violates due process).

211. See, *e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting) (noting that defendant’s burden “must be of
also would be manifestly unfair to force a defendant to litigate in a
distant forum that has absolutely no connection to the defendant or
the transaction or occurrence underlying the dispute.\textsuperscript{212}

And yet technological advances have dramatically decreased
the “burden” most defendants face when forced to litigate in a
distant forum. In addition to advances in communication and
transportation, many courtrooms now can facilitate electronic
transmission and presentation of evidence, and an increasing
number allow remote testimony via videoconferencing.\textsuperscript{213} Internet
resources also make it relatively easy to hire local counsel almost
anywhere in the world.\textsuperscript{214} Additionally, whatever inconvenience
and costs a distant forum may impose on the defendant are almost
certainly insignificant compared with the escalating costs of
electronic discovery in even modest-sized cases.\textsuperscript{215} In other
words, this is not your father’s lawsuit (even though courts still
use your grandfather’s personal jurisdiction rules).

Viewed in this context, iterations of the stream of commerce

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{212} See, e.g., \textit{Asahi}, 480 U.S. at 114 (opinion of O’Connor, J.) (concluding
that California lacked personal jurisdiction over an indemnification claim
between a Taiwanese corporation and a Japanese corporation, based on a
transaction that took place in Taiwan).
\item \textsuperscript{213} See Frederic I. Lederer, \textit{The Road to the Virtual Courtroom? A
Consideration of Today’s—and Tomorrow’s—High-Technology Courtrooms,
50 S.C. L. REV. 799, 801–02 (1999) (discussing several advances in courtroom
technology, and concluding that in many cases “judges, counsel, and witnesses
need not be in the same location”); Michael D. Roth, Comment, \textit{Laissez-Faire
Videoconferencing: Remote Witness Testimony and Adversarial Truth, 48
in courts).
\item \textsuperscript{214} Several websites list attorneys affiliated with global networks. \textit{See, e.g.,
HG.ORG, http://www.hg.org (last visited August 15, 2011); INTERNATIONAL
LAWYERS NETWORK, http://www.iltroday.com (last visited August 15, 2011);
\item \textsuperscript{215} See Scott Dodson, \textit{New Pleading, New Discovery, 109 Mich. L. REV. 53, 64
(2010) (“Litigation costs have risen sharply in recent years, particularly with
the advent of electronic discovery.”).}
\end{itemize}
\end{footnotesize}
advanced by Justice Brennan and the New Jersey Supreme Court provide sufficient procedural safeguards. Justice Brennan stressed that “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.”216 Because his test subjects a defendant to personal jurisdiction only if the defendant “is aware that the final product is being marketed in the forum State,” manufacturers have actual notice of potential fora, and can structure their conduct accordingly.217 Moreover, the presence of minimum contacts does not end the inquiry; courts can exercise jurisdiction only if doing so also complies with the minimum due process requirements “inherent in the concept of ‘fair play and substantial justice.’”218

The New Jersey test has similar protections. Although that approach extends jurisdiction beyond circumstances in which the defendant is actually aware of marketing or sales in a particular state,219 it nonetheless requires proof that defendant intentionally targeted the national market, using a distributor to sell its products to any and all customers within the United States.220 In Nicastro,

216. Asahi, 480 U.S. at 117 (Brennan, J., concurring); see also J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring in the judgment) (emphasizing that Justice Brennan’s test applies “where a sale in a State is part of the regular and anticipated flow of commerce into the State, but not where that sale is only an eddy, i.e., an isolated occurrence” (internal quotation marks and alterations omitted)).

217. Asahi, 480 U.S. at 117 (Brennan, J., concurring).

218. Id. at 116 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477–78 (1985)); id. at 113 (opinion of O’Connor, J.) (noting that courts use five factors to assess the reasonableness of jurisdiction, including “the burden on the defendant,” “the interests of the forum State,” “the plaintiff’s interest in obtaining relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and “the shared interest of the several States in furthering fundamental substantive social policies”). Indeed, even though Justice Brennan thought minimum contacts existed based on Asahi’s purported awareness that its component parts were making their way to the forum, he ultimately concluded that jurisdiction would be fundamentally unfair. See id.


220. See id.; see also Nicastro, 131 S. Ct. at 2799 (Ginsburg, dissenting) (describing a scenario in which a foreign manufacturer hires a U.S. distributor to market the manufacturer’s product “anywhere and everywhere in the United
Justice Breyer suggests that it would be unfair to subject a small manufacturer to jurisdiction in distant states merely because it uses a large distributor.\footnote{Nicastro, 131 S. Ct. at 2793 (Breyer, concurring in the judgment) (citing the example of “a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant state (Hawaii)”).} But if a small manufacturer intentionally targets the national market, and can easily find local counsel and use technological advances to defend in the forum, how exactly is that manufacturer being denied due process?\footnote{One can envision Captain Renault exclaiming, “I’m shocked, shocked to find gambling is going on in here!” CASABLANCA (Warner Brothers 1943); HOWARD KOCH, CASABLANCA: SCRIPT AND LEGEND 176–77 (1992).}

To the extent that doubts remain, these tests can be clarified in a manner that ensures the protection of fundamental due process rights. For example, courts can allow the defendant an opportunity to present evidence showing that it would be unduly burdensome or cost prohibitive to mount a defense in the forum.\footnote{To the extent that Justice Breyer’s Appalachian potter would be unduly burdened by defending a lawsuit in Hawaii, this refinement of the New Jersey approach would conceivably address that concern.} Ultimately, however, what Justice Brennan said more than thirty years ago rings just as true today: “The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum.”\footnote{World-Wide Volkswagen, 444 U.S. at 301 (Brennan, J., dissenting).}

All three iterations of the stream of commerce theory discussed in \textit{Nicastro} adequately protect due process rights.

2. \textit{Outcome-Based Inquiry}

Under the second step, I compare the three iterations of the stream of commerce rule, using an outcome-based approach. The goal of this analysis is to identify an interpretation of the procedural rule that best facilitates the private and social incentives of substantive products liability law, while allocating risk and costs in an efficient manner.

Justice O’Connor’s approach has two notable disadvantages in terms of private and social incentives. First, the “stream of commerce plus” test involves a more elaborate and fact-intensive

States the distributor can attract purchasers”).
inquiry than the other iterations of the doctrine—in addition to determining the defendant’s awareness, courts must examine product design, advertising, customer relation efforts, and agreements with distributors.\footnote{225} This fact-intensive inquiry presumably is more uncertain in its application and more costly to administer than the other iterations of the rule, increasing the frequency and cost of jurisdictional litigation.\footnote{226} Second, courts that apply the more stringent “stream of commerce plus” test presumably are more likely to dismiss on jurisdictional grounds, forcing plaintiffs to re-file in alternative fora that are less convenient, with a lower chance of success on the merits.\footnote{227} These effects are socially undesirable because they increase plaintiffs’ costs, decrease plaintiff’s expected benefit, and lead to a fundamental misalignment between procedural incentives and the incentives provided by substantive products liability law. When procedural rules make litigation more costly and difficult, plaintiffs file fewer lawsuits.\footnote{228} This leads to under-enforcement of products liability law—some manufacturers that have caused harm nonetheless escape liability, and do not internalize the full cost of their actions.\footnote{229} As a result, prices do not reflect the true


\footnote{226. \textit{See} Linda J. Silberman, \textit{Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice-of-Law}, 22 \textit{Rutgers L.J.} 569, 581–82 (1991) (noting that “jurisdictional inquiries [that] encompass every aspect of the relationship and the transaction between the parties . . . would lead to high transaction costs that should not be imposed on questions which must be determined quickly and efficiently at the outset of the litigation”); \textit{see also} Sheehan, supra note 155, at 440; Spencer, \textit{supra} note 74, at 328.}

\footnote{227. \textit{See supra} notes 165–69, and accompanying text.}

\footnote{228. As legal costs increase in relation to the expected benefit of suit, it becomes increasingly likely that plaintiffs will not find it worthwhile to sue, even if they have been harmed and could recover on the merits. \textit{See} Kaplow & Shavell, \textit{supra} note 102, at 1054 n.186; \textit{see also} supra Part III.A.}

\footnote{229. \textit{See} Shavell, \textit{supra} note 12, at 244 (suggesting that “suit might not be brought because of litigation costs”; as a result, “injurers who ought to be liable might escape suit”); \textit{see also} Goldberg & Zipursky, \textit{supra} note 13, at 1930 (noting that “tort damages . . . generate full cost internalization and hence efficient deterrence”).}
cost of products (leading to overconsumption),\textsuperscript{230} and there are inadequate incentives for manufacturers to take precautions and reduce risk.\textsuperscript{231} Thus, the two broader iterations of the stream of commerce theory are preferable because they expand jurisdiction and avoid a fact-intensive inquiry.

A comparison of Justice Brennan’s approach and the test used by the New Jersey Supreme Court shows that each has marginal benefits and costs. Justice Brennan’s approach certainly offers defendants a greater degree of predictability, because it focuses on the manufacturer’s actual awareness that products are reaching a particular forum.\textsuperscript{232} This avoids over-deterrence of manufacturers that intentionally choose to market in select states (rather than the national market).\textsuperscript{233} However, the New Jersey approach likely would reduce litigation expenses when it is obvious that a manufacturer targeted the national market, but it is difficult or time-consuming to prove the manufacturer’s actual awareness that its products are being marketed in a particular state.\textsuperscript{234} And the New Jersey rule does not allow manufacturers to shield themselves from liability by using a national distributor and ignoring the specific destinations of its products.\textsuperscript{235}

\textsuperscript{230} See Polinsky & Shavell, Uneasy Case, supra note 13, at 1459–62 (discussing the price-signaling benefit of products liability, which forces manufacturers to internalize the cost of their products, which they then pass along to consumers through increased prices).

\textsuperscript{231} See Asahi Metal Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

\textsuperscript{233} For example, if a foreign manufacturer chose to limit its distribution to New York, New Jersey, and Pennsylvania, its expected litigation costs under Justice Brennan’s test would be tied to the cost of litigating in those states. In contrast, jurisdictional rules allowing suit in Alaska and Hawaii—despite the manufacturer’s express intention of limiting its distribution to the three previously-mentioned states—would increase expected litigation costs, leading to over-deterrence of the manufacturer, and over-inflated consumer prices.

\textsuperscript{234} See Vt. Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co., 914 A.2d 818, 827 (N.H. 2006) (“Actual knowledge [of Brennan approach], especially when dealing with a commercial setting, may be difficult to determine.”).

\textsuperscript{235} See J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794–95 (2011) (Ginsburg, J., dissenting); see also Vt. Wholesale, 914 A.2d at 827 (noting that “a requirement of actual knowledge creates ‘a potential jurisdictional loophole [for] a defendant who willfully or negligently ignores the destination of its
Additionally, the broader approaches efficiently allocate the risk of litigation, liability, and jurisdictional disputes. Both Justice Brennan’s approach and the New Jersey test shift costs and risk to the manufacturer, the party that is more likely to be the least-cost avoider and either risk-averse or insured. Under either of these broad approaches, manufacturers will be on notice of potential fora—states in which they know their products are being distributed, and potentially any state if they decide to market their product nationally. Thus, the manufacturer is in a position “to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State.”

This outcome-based analysis leads to two conclusions. First, the Supreme Court should reject Justice O’Connor’s approach out of hand because it causes a significant divergence between private and social incentives. Second, each of the two broader stream of commerce theories will be socially optimal in some cases, but not in others—when a defendant targets the national market, the New Jersey test is likely superior; when a defendant’s product is distributed in select states, Justice Brennan’s test likely offers the best approach.

CONCLUSION

An evolving economy requires innovative jurisdictional rules. Ironically, this is something the Illinois Supreme Court recognized fifty years ago in the decision that birthed the stream of commerce theory: “Unless they are applied in recognition of the changes

236. See supra notes 184–85, and accompanying text; SHAVELL, supra note 12, at 258–58 (noting that individuals typically are risk averse, and firms usually are risk neutral); Richard L. Cupp, Redesigning Successor Liability, 1999 U. ILL. L. REV. 845, 870–71 (1999) (noting that use of products liability insurance among manufacturers is common, and observing that “between 1986 and 1996, product liability insurance cost manufacturers, on average, only sixteen cents for each $100 of product sales”).

237. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); see also Luv N’ Care, Ltd. v. InstaMix, Inc., 438 F.3d 465, 472 n.13 (5th Cir. 2006) (noting that manufacturers can bargain with downstream distributors to ensure that products are not sent to certain states where litigation would be inconvenient or expensive).
brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted.”  

Personal jurisdiction rules should align litigation incentives in a socially optimal way. They should take account of the modern-day consequences of an economy in which products are distributed across borders, across nations, and through increasingly complex distribution chains. In this world, overly restrictive jurisdictional rules can skewer existing incentives provided by substantive law, resulting in inadequate deterrence and other undesirable effects.

It is time to end the decades-long uncertainty surrounding the stream of commerce doctrine. The Supreme Court should adopt a version of the doctrine that allows expansive personal jurisdiction over nonresident manufacturers. After all, a little revolution now and then is a good thing.  

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