JURISDICTIONAL INCENTIVES

Dustin E. Buehler[*]

TABLE OF CONTENTS

INTRODUCTION ... 107

I. PERSONAL JURISDICTION AND THE STREAM OF COMMERCE ... 111
- A. *Development of the Doctrine* ... 111
- B. *The* Asahi *Decision* ... 114
- C. *The* Nicastro *Decision* ... 116
- D. Nicastro*'s Implication* ... 119

II. ECONOMIC INCENTIVES, LITIGATION, AND PRODUCTS LIABILITY ... 120
- A. *Basic Litigation Model: Incentives to File Suit* ... 121
  - 1. Private Incentives ... 121
  - 2. Social Incentives ... 122
  - 3. Divergence Between Private and Social Incentives ... 125
- B. *Legal Rules and the Allocation of Risk* ... 127

III. THE ECONOMICS OF PERSONAL JURISDICTION ... 128
- A. *Realignment of Private Incentives* ... 128
- B. *Effect on the Divergence Between Private and Social Incentives* ... 132
- C. *Effect on the Allocation of Risk* ... 134

IV. A NEW APPROACH TO PERSONAL JURISDICTION: REALIGNING LITIGATION INCENTIVES ... 135
- A. *Building Blocks for an Evaluative Framework: Process-Based and Outcome-Based Metrics* ... 135
- B. *Adopting an Incentives-Based Approach* ... 137
  - 1. Protecting Due Process Rights ... 138
  - 2. Legislating Incentives-Based Jurisdictional Rules ... 141

---

* Assistant Professor, University of Arkansas School of Law; J.D., University of Washington School of Law; B.A., Willamette University. The author thanks Steve Calandrillo, Brian Gallini, Dan Klerman, Mohsen Manesh, Laurent Sacharoff, Mary Lynn Veden, and Anthony Wisen for their thoughts on prior drafts, and Jennifer Rovetti for her invaluable research assistance.

V. REVISITING THE STREAM OF COMMERCE THEORY....................... 145
A. *Clearing the Due Process Hurdle* 146
B. *Legislating Optimal Stream of Commerce Rules* 148
C. *An Alternative Proposal: Nationwide Personal Jurisdiction*.. 152

CONCLUSION 154

INTRODUCTION

A foreign manufacturer seeks to sell its products in the United States, but wants to avoid American products liability litigation.[1] It exploits personal jurisdiction rules to accomplish this goal. The manufacturer indirectly ships its products to the United States, using an independent distributor.[2] It instructs the distributor to sell its products anywhere buyers can be found, but remains ignorant of the actual destinations of those products.[3] When one of the products makes its way to a particular state through the "stream of commerce" and injures a consumer, the consumer files suit in that forum.[4] Although the manufacturer has litigation insurance,[5] it pretends to be shocked that it is being sued so far from home.[6] The court dismisses the suit, citing several hopelessly amorphous concepts, including "due process," "minimum contacts," and, perhaps most ironically, "fair play and substantial justice."[7]

In 2011, the Supreme Court decided *J. McIntyre Machinery, Ltd. v. Nicastro*,[8] a stream of commerce case with nearly identical facts.[9] The

---

1 *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2796, 2801 (2011) (Ginsburg, J., dissenting). In her dissent, Justice Ruth Bader Ginsburg quoted statements by a foreign manufacturer, saying: "'All we wish to do is sell our products in the [United] States—and get paid!'", *id.* at 2796 (alteration in original) (quoting correspondence from a McIntyre UK officer to McIntyre America), and "'American law—who needs it?!'", *id.* at 2801 (same).

2 *See* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995) ("[A] manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.").

3 *See Nicastro*, 131 S. Ct. at 2794-95 (Ginsburg, J., dissenting) (citing Weintraub, *supra* note 2, at 555) (discussing a similar hypothetical).

4 *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167 (1966) ("[C]onsiderations of litigational convenience, particularly with respect to the taking of evidence, tend in accident cases to point insistently to the community in which the accident occurred.").

5 *See* Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 870-71 (1999) (observing that manufacturers frequently insure against litigation, and citing a study that found that "between 1986 and 1996, products liability insurance cost manufacturers, on average, only sixteen cents for each $100 of product sales" (citing J. Robert Hunter, Consumer Federation of America, Product Liability Insurance: A Report of the Insurance Group of Consumer Federation of America 6 (1998) (unpublished manuscript) (on file with the University of Illinois Law Review)).

6 *Cf.* HOWARD KOCH, CASABLANCA: SCRIPT AND LEGEND 177-78 (1992) (Captain Renault: "I'm shocked, *shocked* to find gambling is going on in here!" Croupier: "Your winnings, sir." Captain Renault: "Oh. Thank you very much.").

7 *See, e.g.*, Guinness Imp. Co. v. Mark VII Distribs., Inc., 153 F.3d 607, 613-15 (8th Cir. 1998); Butler v. Ford Motor Co., 724 F. Supp. 2d 575, 587-89 (D.S.C. 2010); Staple Cotton Coop. Ass'n v. D.G. & G., Inc., 631 F. Supp. 2d 1168, 1171-74 (E.D. Mo. 2007).

8 131 S. Ct. 2780 (2011).

9 *See id.* at 2786 (Kennedy, J.) (plurality opinion); *id.* at 2795-97 (Ginsburg, J., dissenting).

Court issued a fractured opinion, holding that state courts lacked personal jurisdiction over the foreign manufacturer.[10] A plurality of four justices insisted that personal jurisdiction is based on a "defendant's actions, not his expectations," and exists "only where the defendant can be said to have targeted the forum."[11] Additionally, two justices concurred in the judgment, but refused to "refashion basic jurisdictional rules" "without a better understanding" of the "modern-day consequences" of those rules.[12] As a result, the decision offers the worst of both worlds: the wrong result, and no majority rule.

Nicastro demonstrates that the Court's approach to personal jurisdiction remains unclear, impractical, and unjust. Although scholars have been making this argument for decades,[13] proposals for changing personal jurisdiction rules frequently draw on the same values that have led the Court astray—namely, notions of due process[14] and sovereignty.[15] The Court's reliance on these concepts has transformed personal jurisdiction into a constitutional straightjacket, restricting available fora, and making it less likely that plaintiffs will find it worthwhile to file meritorious claims.

It is time to recognize personal jurisdiction rules for what they really are: procedural barriers that significantly alter litigant behavior. Disputes over personal jurisdiction occur more than a thousand times each year, twice as frequently as they did only two decades ago.[16] These disputes de-

---

10 *Id.* at 2791 (Kennedy, J.) (plurality opinion); *id.* at 2794 (Breyer, J., concurring).

11 *Id.* at 2785, 2788-89 (Kennedy, J.) (plurality opinion).

12 *Id.* at 2791, 2793, 2794 (Breyer, J., concurring).

13 *See, e.g.*, Friedrich K. Juenger, *A* Shoe *Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027-28 (1995); Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 753-54, 756 (2003); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600-02 (1993); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 105-06 (1991).

14 *See, e.g.*, Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1137-39 (1981). *But see* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 570-71 (2007) (arguing that "the [Supreme] Court has properly applied rational-basis review to choice of law under the Due Process Clause" and that "[a] careful examination of the parallel development of *both* substantive due process and personal jurisdiction doctrine across the eras of American law reveals that personal jurisdiction is merely an application of substantive due process principles").

15 *See, e.g.*, A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 619-20 (2006); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 738 (1987).

16 A Westlaw search of all state and federal cases between January 1, 2007 and January 1, 2012 in which "jurisdiction" and "minimum contacts" appeared in the same paragraph yielded 5,767 cases. For comparison with two decades ago, see Weintraub, *supra* note 2, at 531 n.5 (performing the same Westlaw search and finding 2,321 personal jurisdiction cases decided between January 1990 and February 1995). *See also* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shop-*

crease the chance that plaintiffs will be able to litigate in a convenient forum, and undoubtedly affect plaintiffs' cost-benefit analysis as they consider whether to proceed with their lawsuits.

This Article explores the ways in which jurisdictional rules alter litigation incentives by providing one of the first economic analyses of personal jurisdiction.[17] Specifically, this Article uses economic theory to determine whether jurisdictional rules provide proper incentives for private litigants to engage in socially optimal behavior. The Supreme Court's *Nicastro* decision provides a useful case study—although several notable scholars recently engaged in a spirited debate on the economics of products liability law,[18] they have ignored the crucial role personal jurisdiction rules play in shaping the private and social incentives of products liability litigation.[19]

This Article argues that our current personal jurisdiction rules misalign litigation incentives in a socially undesirable way. Unclear and restrictive jurisdictional rules increase the likelihood of procedural disputes, inflate litigation costs, and decrease the expected benefit from suit, making it less likely that plaintiffs will file lawsuits. This in turn increases the likelihood that injurers will escape liability and will be inadequately deterred from engaging in wrongful conduct.

To remedy this situation, this Article proposes a new "incentives-based" approach to personal jurisdiction. Under this approach, courts would abandon the traditional "minimum contacts" test from *International Shoe Co. v. Washington*[20] and would instead take a minimalist approach, restricting personal jurisdiction only when absolutely necessary to protect basic

---

ping and Outcome Determination Under International Shoe, 28 U.C. DAVIS L. REV. 769, 835 (1995) ("Litigation over personal jurisdiction abounds in the bread-and-butter of state court dockets.").

[17] Simultaneously with this Article, Professor Daniel Klerman authored an excellent economic analysis of the ways in which personal jurisdiction rules affect manufacturers' locational decisions, prices, and state judges' and legislators' incentives to craft efficient procedural and substantive rules. Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. (forthcoming Fall 2012), *available at* http://ssrn.com/abstract=1987223. The Author invites others to join the discussion on jurisdictional incentives, with the hope that the Supreme Court will take note of the collective findings and conclusions.

[18] *See* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1438 (2010) [hereinafter Polinsky & Shavell, *Uneasy Case*]; *see also* John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010); A. Mitchell Polinsky & Steven Shavell, *A Skeptical Attitude About Product Liability* Is *Justified: A Reply to Professors Goldberg and Zipursky*, 123 HARV. L. REV. 1949 (2010) [hereinafter Polinsky & Shavell, *Skeptical Attitude*].

[19] Other than this Author's analysis and Professor Klerman's forthcoming article, economic analysis of personal jurisdiction is virtually nonexistent, consisting of no more than a few fleeting references. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 904 (8th ed. 2011) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW] (mentioning personal jurisdiction briefly); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 304-05 (1985) (referencing *International Shoe*, but quickly moving on to choice-of-law issues).

[20] 326 U.S. 310 (1945).

procedural and substantive due process rights. Assertion of personal jurisdiction will satisfy due process as long as a rational basis supports the court's exercise of power, and as long as the parties receive reasonable notice[21] and an opportunity for a fair hearing.[22]

Legislatures would then take the lead in crafting and refining personal jurisdiction rules that properly align litigation incentives. In doing so, legislatures should place a premium on clarity, while avoiding overly restrictive rules. They also should balance the effect of personal jurisdiction rules against other substantive and procedural law incentives.

This Article proceeds in five parts. Part I briefly examines the development 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*. After teasing out the legal and economic rationales underlying the stream of commerce theory, it offers initial thoughts on the implications of the *Nicastro* decision. The Part concludes that economic analysis likely will play a significant role in the Court's refinement of the stream of commerce doctrine.

Part II establishes a framework for that economic analysis. It begins 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. The Part compares these private incentives with various social incentives of suit (i.e., deterrence of wrongful conduct, the price-signaling benefit of suit, victim compensation, as well as the social costs generated by the legal system). It also discusses the role legal rules play in allocating risk. This Part concludes that private and social litigation incentives generally are misaligned, leading to excessive or inadequate levels of litigation.

Part III provides an unprecedented descriptive analysis of the economic effect that personal jurisdiction rules have on litigation incentives. It argues that current jurisdictional rules exacerbate the divergence between private and social litigation incentives, often leading to a socially inadequate amount of litigation. Restrictive jurisdictional rules also shift risks and costs to risk-averse victims, away from risk-neutral injurers.

Based on these findings, Part IV outlines the proposal for an "incentives-based" approach to personal jurisdiction, which draws on both process-based and outcome-based theories. It argues that the Supreme Court should pare back and simplify its test for evaluating the constitutionality of personal jurisdiction, so that the test mirrors the minimal procedural and substantive due process protections that apply in other contexts. Legislatures would then be free to adopt socially optimal jurisdictional rules.

Finally, Part V applies this incentives-based approach to the various iterations of the stream of commerce theory considered by the Supreme

---

21 *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

22 *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Goldberg v. Kelly, 397 U.S. 254, 263-64, 266-67 (1970).

Court in *Nicastro*. It argues that all versions of the doctrine protect defendants' basic due process rights, but only an expansive application of the doctrine properly aligns private and social litigation incentives. It also proposes an alternative approach in the event that courts refuse to abandon the minimum contacts test: Congress should grant federal courts nationwide personal jurisdiction over foreign defendants in stream of commerce cases, based on the defendant's national contacts with the United States.

I. PERSONAL JURISDICTION AND THE STREAM OF COMMERCE

The stream of commerce doctrine arose during the aftermath of the last revolution in personal jurisdiction law—the adoption of the "minimum contacts" test.[23] In *Asahi Metal Industry Co. v. Superior Court*,[24] the Supreme Court unsuccessfully attempted to clarify the doctrine, producing a disjointed opinion with no majority rule.[25] After decades of confusion, the Court recently revisited the stream of commerce theory in *Nicastro*, but once again produced a badly fractured opinion.[26] With limited precedential value, the Court's *Nicastro* opinion creates significant uncertainty in jurisdictional law.[27]

A. *Development of the Doctrine*

In *International Shoe*, the Supreme Court held that a court has personal jurisdiction over a nonresident defendant if the defendant "ha[s] 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.'"[28] The minimum contacts test is based on a simple premise: with privilege comes responsibility.[29] When a corporation "conduct[s] activities within a state, it enjoys the benefits and protection of the laws of that state,"

---

23 *See infra* Part I.A.

24 480 U.S. 102 (1987).

25 *See infra* Part I.B.

26 *See infra* Part I.C.

27 *See infra* Part I.D. As courts and scholars have pointed out, the word "jurisdiction" has many meanings. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 6 n.7 (2011). In this Article, the word "jurisdiction," unless otherwise specified, refers to personal jurisdiction, not subject matter jurisdiction.

28 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Prior to *International Shoe*, personal jurisdiction theory had been rooted in principles of territoriality. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877); *see also* Spencer, *supra* note 15, at 641.

29 *See* Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 489 & n.43 (1998) (discussing *International Shoe*'s "social contract notion of jurisdiction").

"mak[ing] it reasonable . . . to require the corporation to defend [a] lawsuit" arising out of its conduct in the forum.[30]

In the decades following *International Shoe*, the Supreme Court further refined the minimum contacts test into a two-step analysis.[31] Courts first analyze whether sufficient contacts exist between the defendant and the forum state.[32] This requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum."[33] 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."[34]

If minimum contacts exist, courts analyze whether assertion of personal jurisdiction complies with "'traditional notions of fair play and substantial justice.'"[35] 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.'"[36] Not surprisingly, application of this multifactor balancing test has varied.[37]

---

30 *Int'l Shoe*, 326 U.S. at 317, 319. Scholars have noted that the demise of *Pennoyer*—and the adoption of the minimum contacts test—reflects the emergence of a national economy. *See, e.g.*, A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 32-33 (2d ed. 2008); Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1019 n.322 (2009).

31 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); *see also* Pamela J. Stephens, *The Single Contract as Minimum Contacts: Justice Brennan 'Has It His Way'*, 28 WM. & MARY L. REV. 89, 92-93 (1986).

32 *See World-Wide Volkswagen*, 444 U.S. at 291, 294.

33 Hanson v. Denckla, 357 U.S. 235, 253 (1958).

34 *World-Wide Volkswagen*, 444 U.S. at 297.

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

36 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (quoting *World-Wide Volkswagen*, 444 U.S. at 292). Not all factors are treated equally. *See World-Wide Volkswagen*, 444 U.S. at 292 (noting "that the burden on the defendant" is "always a primary concern"); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 23 (2006) ("Although cases will purport to consider all the fairness factors, the lower court decisions often turn on the defendant's burden of litigating in the United States. Courts are likely to find the exercise of jurisdiction reasonable, unless the defendant and its witnesses have to travel extremely long distances."); Spencer, *supra* note 15, 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.").

37 *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593 (1992).

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.[38] The first stream of commerce case was *Gray v. American Radiator & Standard Sanitary Corp.*,[39] in which the Illinois Supreme Court articulated an expansive theory of personal jurisdiction over upstream manufacturers.[40] The court reasoned that "[a]dvanced means of distribution . . . have largely effaced the economic significance of State lines," and innovations in "transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States."[41] 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.[42] 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.[43]

The Supreme Court appeared to agree with this reasoning in *World-Wide Volkswagen Corp. v. Woodson*,[44] 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."[45] That case did little to resolve disagreement

---

38 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, 472-74 (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.").

39 176 N.E.2d 761 (Ill. 1961); *see also* Mollie A. Murphy, Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach, 77 KY. L.J. 243, 256 (1989).

40 *Gray*, 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, 505-06 (2003). In *Gray*, an Ohio manufacturer sold safety valves to a Pennsylvania distributor, which installed the valves in water heaters. 176 N.E.2d at 764. After a water heater exploded in Illinois, the plaintiff sued the Ohio manufacturer in Illinois state court. *Id.* at 762. The manufacturer argued that the court lacked personal jurisdiction, noting that "it d[id] no business [in the state]; that it ha[d] no agent physically present in Illinois; and that it s[old] the completed valves . . . outside Illinois." *Id.* The Illinois Supreme Court held that the assertion of personal jurisdiction over the manufacturer did not violate due process. *Id.* at 767.

41 *Gray*, 176 N.E.2d at 766.

42 *Id.*

43 *Id.*

44 444 U.S. 286 (1980).

45 *Id.* at 297-98 (citing *Gray*, 176 N.E.2d at 766); *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]xplicit sanction is bestowed on *Gray*" by *World-Wide Volkswagen*); Erik T. Moe, Case Comment,

and confusion regarding the stream of commerce theory, however.[46] 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.[47] 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.[48]

B. *The* Asahi *Decision*

The Supreme Court attempted to resolve this confusion in *Asahi*,[49] but was unable to reach agreement on the stream of commerce theory.[50] Writing for four justices, Justice Sandra Day 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 minimum contacts.[51] Instead, "something more" is required—"for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed

---

Asahi Metal Industry Co. v. Superior Court*: The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203, 209-10 (1987) (same). *But see* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 94 n.78 ("[I]t is not completely clear that the citation [to *Gray*] constituted approval.").

46 Murphy, *supra* note 39, at 270.

47 *See, e.g.*, Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1084-86 (5th Cir. 1984); Nelson v. Park Indus., Inc., 717 F.2d 1120, 1126-27 (7th Cir. 1983); Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1358-59 (9th Cir. 1983).

48 *See, e.g.*, Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 300 (3d Cir. 1985) (holding that more than intermittent sales in a particular forum is required to assert personal jurisdiction over a manufacturer); Humble v. Toyota Motor Co., 727 F.2d 709, 710-11 (8th Cir. 1984) (drawing a distinction between a manufacturer's ability to foresee a product ending up in a particular forum and its ability to foresee being haled into court there).

49 After being injured in an accident, the plaintiff in *Asahi* sued a Taiwanese tire tube manufacturer in California state court, alleging that his motorcycle tire exploded due to a defective tire, tube, and sealant. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105-06 (1987) (O'Connor, J.). The tire tube manufacturer filed a cross-complaint, seeking indemnification from the Japanese company that had supplied the tire tube's valve assembly. *Id.* at 106. After the plaintiff settled his claims, the Japanese manufacturer moved to quash the service of summons, arguing that California did not have personal jurisdiction. *Id.* The Supreme Court held that, regardless of whether the Japanese manufacturer had sufficient contacts with California, assertion of jurisdiction would be unreasonable under the second prong of the minimum contacts analysis. *See id.* at 113-14.

50 *See id.* at 105, 110-13; *id.* at 116-17, 121 (Brennan, J., concurring); *id.* at 121-22 (Stevens, J., concurring). For a useful chart illustrating the divergent opinions in *Asahi*, see RICHARD H. FIELD ET AL., CIVIL PROCEDURE 605 (10th ed. 2010).

51 *Asahi*, 480 U.S. at 112 (O'Connor, J.).

to serve as the sales agent in the forum State."[52] This articulation of the doctrine is commonly referred to as "the 'stream-of-commerce-plus' test."[53]

Justice William Brennan wrote a concurring opinion on behalf of four justices, disagreeing with Justice O'Connor, and articulating an expansive jurisdictional theory.[54] 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."[55] 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.'"[56]

The Court's fractured *Asahi* decision provides little guidance on the continued viability of the stream of commerce theory.[57] The decades of silence from the Supreme Court on this issue[58] have left courts guessing regarding the proper application of personal jurisdiction rules to manufactur-

---

52 *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.

53 *See, e.g.*, Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); State *ex rel.* Edmondson v. Native Wholesale Supply, 237 P.3d 199, 207 (Okla. 2010); Kendrick D. Nguyen, Note, *Redefining the Threshold for Personal Jurisdiction: Contact and the Presumption of Fairness*, 83 B.U. L. REV. 253, 269-70 (2003).

54 *Asahi*, 480 U.S. at 116-17 (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.* at 116.

55 *Id.* at 117 (emphasis added).

56 *Id.* at 119 (quoting World-Wide Volkswagen Corp. 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 find its way into the forum State and 'purposeful availment' of the forum's market." *Id.* at 122 (quoting *id.* at 112 (O'Connor, J.)). Instead, Justice Stevens suggested that the stream of commerce analysis should be "affected by the volume, the value, and the hazardous character of the" manufacturer's products. *Id.*

57 *See, e.g.*, ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 130 (3d ed. 2009) (noting the confusion in the lower courts); SPENCER, *supra* note 30, at 98 ("[T]he disparate opinions [in *Asahi*] propounded quite distinct views of how personal jurisdiction should be analyzed in stream of commerce cases.").

58 The Court repeatedly denied certiorari in stream of commerce cases. *See, e.g.*, Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 470 (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.) (per curiam), *cert. denied*, 540 U.S. 948 (2003); Akro Corp. v. Luker, 45 F.3d 1541, 1549 (Fed. Cir.), *cert. denied*, 515 U.S. 1122 (1995).

ers, creating uncertainty for businesses and consumers alike.[59] Some courts apply Justice O'Connor's test.[60] Other courts use Justice Brennan's approach.[61] And many courts avoid *Asahi*'s jurisdictional thicket by noting that both tests frequently produce the same outcome.[62]

C. *The* Nicastro *Decision*

In June 2011—nearly twenty-five years after *Asahi*—the Supreme Court finally revisited the stream of commerce doctrine in *Nicastro*.[63] Instead of resolving the questions left unanswered by *Asahi*, however, the Court once again issued a decision with no majority opinion.[64]

In *Nicastro*, the 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.[65] The manufacturer did not have an office or property in New Jersey, did not advertise in the state, and did not send employees there.[66] The plaintiff nonetheless argued that New Jersey had personal jurisdiction over the manufacturer for three reasons.[67] First, an independent distributor in the United States agreed to sell the manufactur-

---

59 *See, e.g.*, IDES & MAY, *supra* note 57, at 130 (noting that, in the absence of Supreme Court guidance, "state and lower federal courts remain free to take any position they wish concerning the 'stream of commerce' theory"); Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 683 (2009) (noting that lower court confusion in stream of commerce cases "creates uncertainty for businesses and fails to give companies sufficient notice to structure their business to minimize risks").

60 *See, e.g.*, *Bridgeport Music*, 327 F.3d at 479-80; Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945-46 (4th Cir. 1994); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992); Boone v. Oy Partek Ab, 724 A.2d 1150, 1159-60 (Del. Super. Ct. 1997); CSR, Ltd. v. Taylor, 983 A.2d 492, 507 (Md. 2009); Vt. Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co., 914 A.2d 818, 826 (N.H. 2006).

61 *See, e.g.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992); Hill v. Showa Denko, K.K., 425 S.E.2d 609, 616 (W. Va. 1992); Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662, 674 (Wis. 2001).

62 *See, e.g.*, Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 244 (2d Cir. 1999); Pennzoil Prods. Co v. Colelli & Assocs., 149 F.3d 197, 207 (3d Cir. 1998); Wiles v. Morita Iron Works Co., 530 N.E.2d 1382, 1389 (Ill. 1988); Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So.2d 881, 889 (La. 1999).

63 J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (Kennedy, J.) (plurality opinion). On the same day, the Court also decided a case addressing general jurisdiction. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011).

64 *See Nicastro*, 131 S. Ct. at 2785-91 (plurality opinion); *id.* at 2791-94 (Breyer, J., concurring); *id.* at 2794-2804 (Ginsburg, J., dissenting).

65 *Id.* at 2786 (plurality opinion); *id.* at 2795 (Ginsburg, J., dissenting).

66 *Id.* at 2790 (plurality opinion).

67 *Id.* at 2786.

er's machines nationwide.[68] Second, the manufacturer advertised its machines at trade shows and conventions in various states.[69] Third, the machine that injured the plaintiff ended up in New Jersey.[70]

The New Jersey Supreme Court concluded that it had personal jurisdiction over the manufacturer.[71] 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."[72] 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."[73] Applying this rule to the case before it, the court 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.[74]

The U.S. Supreme Court reversed, holding that New Jersey did not have personal jurisdiction over the manufacturer.[75] The justices failed to coalesce around a particular rule, however.[76] Writing for a plurality of four justices, Justice Kennedy embraced Justice O'Connor's *Asahi* approach and rejected Justice Brennan's test.[77] 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,[78] and personal jurisdiction must be based on

---

68 *Id.* The independent company was based in Ohio, and served as the British manufacturer's exclusive U.S. distributor. Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592 (N.J. 2010), *rev'd*, 131 S. Ct. 2780 (2011).

69 *Nicastro*, 131 S. Ct. at 2786 (plurality opinion); *see also 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").

70 *Nicastro*, 131 S. Ct. at 2786 (plurality opinion).

71 *Nicastro*, 987 A.2d at 592.

72 *Id.*

73 *Id.*

74 *Id.*; *see also id.* at 593 ("[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.").

75 *Nicastro*, 131 S. Ct. at 2791 (plurality opinion); *id.* at 2794 (Breyer, J., concurring).

76 *See id.* at 2793 (Breyer, J., concurring) (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").

77 *See id.* at 2789-90 (plurality opinion).

78 *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." *See* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982). Commentators have repeatedly criticized the Court's sporadic tendency to ground personal jurisdiction in notions of federalism and state sovereignty. *See, e.g.*, Harold S. Lewis, Jr., *The Three Deaths of "State Sovereign-*

"the defendant's actions, not his expectations."[79] As a result, the stream of commerce doctrine applies "only where the defendant can be said to have targeted the forum."[80] The plurality concluded that although the facts of the case before the Court "may [have] reveal[ed] an intent to serve the U.S. market, . . . they did not show that [the British manufacturer] purposefully availed itself of the New Jersey market."[81]

Writing separately for two justices, Justice Stephen Breyer concurred in the judgment only, arguing that the case was "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."[82] 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."[83] 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."[84] 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.[85]

Justice Ruth Bader Ginsburg wrote a dissenting opinion on behalf of three justices, in which she defended the New Jersey Supreme Court's approach.[86] She noted that the British manufacturer actively sought to sell its product "anywhere in the United States,"[87] had products liability insurance coverage,[88] and arguably had structured its distribution system with the intention of avoiding liability.[89] Because the British manufacturer engaged an American distributor "to promote and sell its machines in the United States," Justice Ginsburg concluded that the manufacturer "availed itself of the market of all States in which its products were sold by its exclusive dis-

---

ty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction, 58 NOTRE DAME L. REV. 699, 699-700 (1983); Stein, *supra* note 15, at 724-25.

79 *Nicastro*, 131 S. Ct. at 2789 (plurality opinion).

80 *Id.* at 2788.

81 *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 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 also* FED. R. CIV. P. 4(k)(2).

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

83 *Id.* at 2791.

84 *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.* at 2791-92.

85 *Id.* at 2791, 2794.

86 *See id.* at 2804 (Ginsburg, J., dissenting).

87 *Id.* at 2796.

88 *Nicastro*, 131 S. Ct. at 2797.

89 *See supra* note 1.

tributor."[90] 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."[91] Justice Ginsburg also noted the irony that the European jurisdictional regulations applicable in the British manufacturer's home country authorize personal jurisdiction in "the place where the harmful event occurred."[92]

D. Nicastro*'s Implications*

What can one 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.[93]

Nonetheless, one 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.[94] 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 solely on "a single isolated sale" to an in-state customer through the stream of commerce.[95] A majority also agrees with

---

[90] *Nicastro*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

[91] *Id.* at 2801-02.

[92] *Id.* at 2803-04 (quoting Council Regulation 44/2001, art. 5, 2001 O.J. (L 12) 4).

[93] *See* Todd David Peterson, *The Timing of Minimum Contacts after* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 224 (2011) (noting that the *Nicastro* decision "arguably will create further confusion among the already befuddled lower courts"); Elisabeth A. Beal, Note, J. McIntyre Machinery, Ltd. v. Nicastro*: The Stream-of-Commerce Theory of Personal Jurisdiction in a Globalized Economy*, 66 U. MIAMI L. REV. 233, 247 (2011) (noting that the *Nicastro* "Court remained uncertain about the jurisdictional implications of corporations that target the United States market").

[94] *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))); *see generally* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 98-99 (2002) (noting the "mischief" the narrowest grounds approach can create); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980) ("In some circumstances—for example, when a narrowest ground that would apparently be subscribed to by a majority of the Court is readily ascertainable—the narrowest grounds approach may be an important means of promoting values of certainty and reliability.").

[95] *Nicastro*, 131 S. Ct. at 2791-92 (Breyer, J., concurring); *see also id.* at 2790 (plurality opinion) ("[A]fter 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.'"); *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.").

Justice Breyer's rejection of the New Jersey Supreme Court's expansive stream of commerce test in the context of this particular case.[96]

And yet it would be a mistake for lower courts and scholars to overreact to the *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.[97] For now, the law remains unsettled.

Ultimately, two things are likely in the aftermath of *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.[98] 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 Court's refinement of the stream of commerce doctrine in the years ahead.[99]

II. ECONOMIC INCENTIVES, LITIGATION, AND PRODUCTS LIABILITY

In order to analyze the consequences of jurisdictional rules, one first must understand the economic incentives underlying civil litigation. This Article begins 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.[100] It then briefly discusses the role that legal rules play in allocating risk.[101]

---

96 *See id.* at 2793 (Breyer, J., concurring) ("I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court. . . . [i]n 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 '[t]he stream-of-commerce doctrine of jurisdiction' were incorrect." (alteration in original) (citation omitted)).

97 *Id.* at 2791, 2793-94 (Breyer, J., concurring).

98 *See* Adam Steinman, *SCOTUS Decision in* J. McIntyre Machinery v. Nicastro, CIV. PROC. & FED. CTS. BLOG (June 27, 2011), http://lawprofessors.typepad.com/civpro/2011/06/scotus-decision-in-j-mcintyre-machinery-v-nicastro.html ("The biggest take-away from *Nicastro* may be that the Supreme Court does not plan to take another twenty-year hiatus from personal jurisdiction.").

99 *See Nicastro*, 131 S. Ct. at 2791, 2794 (Breyer, J., concurring).

100 *See infra* Part II.A.

101 *See infra* Part II.B.

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.[102] In addition to these private incentives, there are social incentives as well—from society's perspective, lawsuits can be desirable or undesirable.[103] There is a divergence between these private and social incentives, resulting in either excessive or inadequate levels of suit, depending on the circumstances.[104]

1. Private Incentives

Generally, a plaintiff will file suit when her expected benefit exceeds her litigation costs.[105] The "expected benefit" of suit is the amount a plaintiff will gain from the litigation process, multiplied by the probability that she will prevail.[106] A plaintiff's "litigation costs" include the direct costs she incurs in the litigation process, including filing fees, the expense of hiring legal counsel, and the time she invests in maintaining the lawsuit.[107]

This expected value analysis is commonly called a net present value model.[108] When a plaintiff's expected value exceeds her costs, the lawsuit is a positive expected value suit.[109] In contrast, if a plaintiff's litigation costs exceed her expected benefit, the lawsuit is a negative expected value suit.[110] For example, if a plaintiff has a 50-percent chance of recovering a $10,000 judgment (yielding an expected value of $5,000), the plaintiff would file

---

102 *See infra* Part II.A.1.

103 *See infra* Part II.A.2.

104 *See infra* Part II.A.3.

105 STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 390 (2004); *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) ("[S]uit is brought where it is privately profitable.").

106 Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 920 n.199 (2009). A plaintiff's expected benefit from suit is not necessarily limited to a monetary judgment or settlement—it also includes the utility plaintiff gains from nonmonetary aspects of the lawsuit (i.e., an award of injunctive relief, or defendant's disutility from mounting a defense). *See, e.g.*, Keith N. Hylton & Sungjoon Cho, *The Economics of Injunctive and Reverse Settlements*, 12 AM. L. & ECON. REV. 181, 184 (2010).

107 *See* SHAVELL, *supra* note 105, at 389-90.

108 Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1273 (2006).

109 Bone, *supra* note 106, at 920 n.199.

110 *Id.*; *see also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1054 n.186 (2001) (noting that when a potential plaintiff's legal costs exceed her losses, she will not bring suit).

suit if her litigation costs are $4,000, but would not file suit if her costs are $6,000.[111]

Two particular characteristics of these private incentives bear mentioning. First, a 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.[112] Second, a plaintiff will consider only her own expected benefit; when deciding whether to sue, she generally will not consider any indirect benefits to society from the lawsuit.[113]

2. 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.[114] When the legal system holds injurers liable for harm caused, those injurers internalize the full cost of their actions.[115] 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.[116] 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.[117]

---

[111] Expressed formally, a 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.

[112] 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 a "plaintiff might sue strategically").

[113] Shavell, *supra*, note 112, at 578, 595. This basic model also assumes that a plaintiff is a rational actor, and that she is risk neutral. For background on these concepts, see KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING 90 (1971); Edward L. Rubin, *Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 VAND. L. REV. 1705, 1714-15 (1998).

[114] *See, e.g.*, Kaplow & Shavell, *supra* note 110, at 1166; Shavell, *supra* note 112, at 578.

[115] As an illustration, suppose that an injurer exercising no care has a 10-percent 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, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 69 (1970) (explaining how the market can deter less desirable activities by making them more costly).

[116] *See* Klerman, *supra* note 17, at 22, 29.

[117] 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, *Uneasy Case*, *supra* note 18, at 1443-53; *see also* Jerry Hirsch, *U.S. Opens Probe of Toyota Highlander*, L.A. TIMES, Feb. 23, 2011, at B2 (noting that Toyota's share

Second, liability ensures that consumer purchases are socially optimal.[118] 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).[119] Consumers often lack accurate information about product risk, however, leading them to underestimate or overestimate a product's true cost.[120] 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.[121] Because these prices reflect product risk, consumers lacking accurate information nonetheless make optimal purchasing decisions.[122]

Third, liability serves a compensatory function.[123] Although many victims have at least partial insurance coverage for harms that might result from product-related accidents,[124] millions do not.[125] When uninsured or underinsured victims suffer product-related harms, products liability judgments can help make them whole.[126] Granted, the actual amount received by

---

of automobile sales in the United States fell from 17 percent in 2009 to 15.2 percent in 2010, following well-publicized recalls and fines to address reported cases of sudden acceleration, stalling, and loss of steering 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 accurately evaluate product risk. *See* Goldberg & Zipursky, *supra* note 18, at 1930-31; Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1449.

118 *See* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1459-61.

119 *See id.* at 1459-60. For example, if a product costs $20 to produce, and causes an average harm of $3, the true cost of the product is $23, and a purchase of the product is socially optimal only if the consumer's value from the product exceeds $23.

120 *See, e.g.*, Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 695-714 (1999) (summarizing scholarship on estimation of risk). Additionally, even if information is perfect, consumers with insurance may nonetheless engage in excessive purchasing of risky products because they will not bear the cost of harm. *See* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1461-62.

121 Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1460.

122 *Id.* For example, suppose that a product costs $20 to produce and causes an average harm of $3. Under a properly functioning products liability system, the manufacturer will pay for the $3 average harm, and will pass along that cost to consumers by raising the product price to $23. Because this price reflects the product's true cost, consumers make optimal purchasing decisions.

123 SHAVELL, *supra* note 105, at 267-68.

124 *See* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1462.

125 *Id.* at 1462-63; *see, e.g.*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2011, tbl. 17 (2011) *available at* http://www.bls.gov/ncs/ebs/benefits/2010/ownership/private/table12a.pdf (noting that over two-thirds of private industry employees do not have long-term disability insurance); Michelle Andrews, *Community Health Centers Draw Funds, Patients*, WASH. POST, Apr. 12, 2011, at E4 (noting that there are 50 million Americans without health insurance); *Too Many People Lack Adequate Life Insurance Coverage*, J.D. POWER & ASSOCS. (Feb. 24, 2012), http://www.jdpower.com/insurance/articles/Lack-of-Life-Insurance-Coverage ("Studies show that 40 percent of adult Americans have no life insurance whatsoever, and over 50 million people in this country lack adequate life insurance.").

126 *See* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1463.

the plaintiff is almost always less than the judgment or settlement amount, and may be inadequate to fully compensate losses.[127] Nonetheless, liability plays an important compensatory role in many cases.[128]

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.[129] In 2008, expenditures on legal services in the United States were $210 billion, approximately 1.47 percent of gross domestic product.[130] Many of these expenditures do not actually go to victims; instead, they are absorbed by the system.[131] Indeed, for every dollar received by victims, the tort system usually incurs more than a dollar in administrative costs.[132] Additionally, manufacturers pass along these litigation costs to consumers in the form of higher product prices, which prevents purchases that otherwise would be socially optimal.[133]

---

[127] Victim compensation often is reduced by insurance contract subrogation provisions, legal fees, and costs associated with delay. *See id.* at 1463-65; *see also* Goldberg & Zipursky, *supra* note 18, at 1935-36, 1938. Scholars disagree whether products liability is net beneficial in terms of its compensatory function. *Compare* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1469 (arguing that products liability's compensatory benefit "might well be small or could even be negative"), *with* Goldberg & Zipursky, *supra* note 18, at 1935-36 (arguing that products liability is necessary to compensate victims, in part because "the idea that insurance takes care of the important costs of injuries is vastly overblown").

[128] In addition to deterrence, price-signaling, and victim compensation, legal liability provides other social benefits as well. For example, lawsuits benefit society by providing an opportunity for the courts to interpret the law and set legal precedent. *See, e.g.*, Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 227 (1999); Shavell, *supra* note 112, at 595.

[129] *See, e.g.*, Shavell, *supra* note 112, at 581.

[130] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 437 tbl. 699, *available at* http://www.census.gov/prod/2011pubs/11statab/income.pdf. Additionally, corporate legal expenditures have risen steeply between 2000 and 2008. *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010).

[131] SHAVELL, *supra* note 105, at 280-81.

[132] *Id.* at 281; *see also* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 104 (2005) (noting that asbestos victims receive forty-two 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 forty-six cents of each judgment or settlement dollar); TOWERS WATSON, U.S. TORT COST TRENDS: 2010 UPDATE, at 8 (2010) (noting that, from 2000 to 2009, administrative expenses accounted for 24 percent of total tort costs).

[133] *See* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1460, 1470-72; *see also* Shawn J. Bayern, Comment, *Explaining the American Norm Against Litigation*, 93 CALIF. L. REV. 1697, 1712 n.72 (2005) ("Though manufacturers and service providers can spread litigation [c]osts among their customers, doing so will result in higher prices and may thus decrease demand.").

3. Divergence Between Private and Social Incentives

A fundamental divergence exists between these private and social incentives.[134] 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. A plaintiff only pays her own litigation costs; costs borne by the defendant and the state usually are of no concern to her, and are negative externalities of the plaintiff's decision to sue.[135] This often results in excessive levels of litigation, because there are situations in which a plaintiff's expected benefit from suit exceeds her own litigation costs, but does not exceed total litigation costs.[136]

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 plaintiffs' decisions to sue.[137] This divergence can lead to a socially excessive or socially inadequate amount of litigation, depending on the circumstances.[138] If private incentives to sue exceed the social benefit from suit, there likely will be an excessive number of

---

134 *See, e.g.*, SHAVELL, *supra* note 105, at 391-97; *see generally* Kaplow, *supra* note 112, at 382 ("[C]onclusions concerning the private/social cost divergence in incentives to sue can be highly misleading when viewed in isolation because of the general divergence between private and social benefits."); Shavell, *supra* note 112, at 577 (explaining that the divergence between private and social incentives permeates the litigation process for both plaintiffs and defendants); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 334 (1982) (noting that the divergence between private and social incentives results in either too little or too much litigation); Peter S. Menell, Note, *A Note on Private Versus Social Incentives to Sue in a Costly Legal System*, 12 J. LEGAL STUD. 41, 41 (1983) ("Litigation costs cause too many or too few suits by creating a divergence between the private and the social incentives to sue.").

135 *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). The magnitude of this divergence often is large. Because plaintiffs do not consider a 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 105, at 395.

136 *See* Shavell, *supra* note 135, at 99-100. For example, suppose there is a 5-percent chance that an accident causing $20,000 in harm will occur, and that the injurer can do nothing to lower this risk. Suppose also that injurers are strictly liable for any harm they cause, and that the victim and injurer each will incur $5,000 in litigation costs if the suit is filed. An injured victim will *always* file suit, because the $20,000 expected judgment exceeds the victim's $5,000 litigation costs. The suit is socially undesirable, however, because it generates $500 in expected litigation costs ($10,000 in total costs, multiplied by a 5-percent chance of suit), while yielding no deterrent benefit (the injurer can do nothing to reduce the risk).

137 Shavell, *supra* note 112, at 579; *see also* Shavell, *supra* note 135, at 99.

138 SHAVELL, *supra* note 105, at 391.

lawsuits.[139] However, the amount of litigation will be socially inadequate when the social benefits from suit exceed private incentives.[140]

Professor Steven Shavell summarizes factors that contribute to a socially excessive or socially inadequate amount of litigation.[141] Circumstances that increase the likelihood of socially *undesirable* 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."[142] In contrast, victims are less likely to file socially *desirable* suits when there are "high legal expenses of plaintiff[s], low expenses of defendants, a low level of loss, [or] a large reduction in net expected losses due to liability."[143]

It is difficult to empirically assess these effects in products liability cases.[144] Professors A. Mitchell Polinsky and Steven Shavell recently argued "that product liability will often, if not usually, be socially undesirable for widely sold products."[145] 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.[146] However, Professors John Goldberg and Benjamin Zipursky question many of these assumptions and conclusions,[147] arguing that "considerations of accountability, structural constitutionalism, egalitarianism, and rule-of-law values" justify products liability law.[148]

---

139 Shavell, *supra* note 112, 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 risk of harm. *See* Shavell, *supra* note 135, at 100. Thus, victims will file suit at socially excessive levels.

140 Shavell, *supra* note 112, at 578. Professor Shavell provides an example: Suppose there is a 10-percent 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 percent 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 percent to 1 percent, decreasing total social costs to $70 ($10 cost of care + 1-percent probability of risk x ($1,000 harm + $5,000 total litigation costs)). SHAVELL, *supra* note 105, at 392-93.

141 *See* Shavell, *supra* note 134, at 336.

142 *Id.*

143 *Id.*

144 *See* Mark A. Geistfeld, *Products Liability*, *in* 1 ENCYCLOPEDIA OF LAW AND ECONOMICS: TORT LAW AND ECONOMICS 287, 301-04 (Michael Faure ed., 2d ed. 2009).

145 Polinsky & Shavell, *Uneasy Case*, *supra* note 18, at 1474.

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

147 Goldberg & Zipursky, *supra* note 18, at 1927-42.

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

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 ex ante to minimize harm and litigation costs.[149] 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.[150] This goal is central to tort law rules, especially rules governing products liability.[151]

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.[152] Typically, individuals are risk averse, and firms are risk neutral.[153] 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

---

> 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 18.

149 *See generally* CALABRESI, *supra* note 115, at 135-40 (discussing the "least-cost avoider" concept); *id.* at 135 ("A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply. This is the same as saying that the system would allocate the costs to those acts or activities that 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.") (footnote omitted).

150 SHAVELL, *supra* note 105, at 189 ("The notion of the *least-cost avoider* applies in situations in which the risk of accidents will be eliminated if *either* injurers or victims take care. In such situation it is clearly wasteful for *both* injurers and victims to take care; rather, it is optimal for the type of parties who can prevent accidents at least cost—the least-cost avoiders—alone to take care.").

151 *See* RESTATEMENT (THIRD) TORTS: PRODS. LIAB. § 2 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").

152 *See* SHAVELL, *supra* note 105, 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, *Having the Cake and Eating It Too: Efficient Penalty Clauses in Common and Civil Contract Law*, 22 INT'L REV. L. & ECON. 381, 395 (2003).

153 SHAVELL, *supra* note 105, at 258-59.

activity.[154] The liability system can avoid these social costs by requiring risk-neutral injurers to compensate uninsured, risk-averse victims.[155]

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 who are either risk neutral or insured.

III. THE ECONOMICS OF PERSONAL JURISDICTION

With this conceptual framework in place, this Part proceeds to the next question: how do personal jurisdiction rules alter lawsuits and litigant behavior? It begins by describing the ways in which personal jurisdiction rules can realign private incentives.[156] Next, it examines the effect these rules have on the existing divergence between private and social litigation incentives.[157] Finally, it discusses the effect that personal jurisdiction rules have on the allocation of risk.[158]

A. *Realignment of Private Incentives*

Personal jurisdiction rules often significantly realign litigants' incentives. The existing rules increase the likelihood of jurisdictional disputes, increase litigation costs, and decrease plaintiffs' 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 existing rules encourage disputes over jurisdictional issues. First, personal jurisdiction rules are case-sensitive, and it

---

154 *See id.* at 266 (explaining the value of liability insurance in alleviating the burden of individual risk-bearing, which enables the pursuit of activities otherwise discouraged by an individual's assumption of risk).

155 *See id.* Policymakers also should consider the parties' preferences for or aversion to risk when setting the level of damages. *See, e.g.*, Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463, 465 (1996) ("If offenders are risk-averse, the deterrent effect of any given fine will exceed that fine's expected value; if offenders are risk-preferring, the deterrent effect will be less. To achieve optimal deterrence, then, the fine will have to be adjusted upward or downward, until its discounted disutility equals the social harm caused by the offense.").

156 *See infra* Part III.A.

157 *See infra* Part III.B.

158 *See infra* Part III.C.

is often unclear how they apply in practice.[159] This uncertainty increases the odds that the parties will interpret the rules differently and will litigate their differences in court.[160] Second, the defendant considers only its own benefits and costs when deciding whether to file a motion to dismiss.[161] As a result, a jurisdictional dispute occurs when a defendant's expected benefit (namely, the probability that the court will dismiss the case for lack of jurisdiction, multiplied by the defendant's net benefit from litigating in an alternative forum) exceeds its own costs of filing and litigating a motion to dismiss.[162] Notably, a defendant considers neither a plaintiff's costs of defending the motion, nor a plaintiff's net loss from litigating in an alternative forum.[163]

These jurisdictional disputes inflate litigation costs.[164] Parties and the courts allocate significant resources to motions to dismiss and other procedural disputes.[165] As a result, litigation over personal jurisdiction alters the

---

159 *See, e.g.*, Casad, *supra* note 37, at 1593 (discussing the difficulty in predicting how lower courts will balance the factors comprising the Supreme Court's "reasonableness and fairness" test for personal jurisdiction and arguing that this uncertainty incentivizes additional litigation and results in conflicting rulings throughout the lower courts); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 686 (1991) (noting that the minimum contacts test in *International Shoe* produces more uncertainty than the standard in *Pennoyer*).

160 *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 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.").

161 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 105, at 395 & n.9.

162 This concept can be expressed formally as follows: Assume c represents the 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 the defendant's benefit from litigating in the current forum (or loss, if x is negative), and x' is the defendant's benefit (or loss) from litigating in an alternative forum. The defendant will file a motion to dismiss on personal jurisdiction grounds if and only if $c < p(x' - x)$.

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

164 *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 (1998) (arguing for the need to streamline personal jurisdiction determinations to avoid "expensive and burdensome motion practice").

165 *See, e.g.*, Philip Y. Brown, *A Client's Guide to the Litigation Process*, *in* ADDRESSING A CLIENT'S LITIGATION ISSUES 31, 40 (Eddie Fournier, ed., 2008) ("Motions 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.").

private incentives of filing suit because the plaintiff incurs substantial costs, regardless of the court's decision on the defendant's motion.[166] 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."[167]

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.[168] However, these costs likely are not as significant as the cost of the procedural dispute itself.[169] The marginal costs associated with litigating in an inconvenient forum likely pale in comparison to the significant fixed costs of litigating in any forum,[170] and an increase in expected costs makes it more likely that the parties will settle their dispute, avoiding further expenses.[171] 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.[172] Nevertheless, any increase in a plaintiff's costs would still alter the private incentives of filing suit.[173]

In addition to these implications on litigation costs, personal jurisdiction rules also affect a plaintiff's expected benefit from the lawsuit. Plaintiffs have a tendency to file in a forum that they view as favorable to the

---

166 *See* Trippe S. Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client*, 6 TRANSACTIONS: TENN. J. BUS. L. 419, 431 (2005).

167 Emil Petrossian, Comment, *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 165, at 40 (noting that motions to dismiss are "a favorite weapon of the well-funded defendant for whom time is an ally").

168 *See, e.g.*, Walter W. Heiser, *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" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980))).

169 *See generally* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 21-31 (2010) (debating the weight of burdens imposed by litigating in a distant forum).

170 *Id.* at 23-24; *see also* Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 427 (2004) ("[T]he marginal cost of litigating in one forum compared to another tends to be de minimis, even in the case of foreign defendants. *Any* litigation is absurdly expensive, and the additional cost of plane tickets, local counsel, and hotel rooms is likely to be no more than a rounding error in the total legal bill.").

171 *See, e.g.*, SHAVELL, *supra* note 105, at 406; Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 418 (1973). In particular, uncertainty over jurisdiction almost certainly increases the likelihood that *risk-averse* parties will settle. It may also discourage litigation by individuals who experience disutility from disputes.

172 *See* Erbsen, *supra* note 169, at 26.

173 *See, e.g.*, Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 41-43 (1984) (arguing that litigation in an inconvenient forum imposes significant costs).

outcome of their case.[174] 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.[175] Although there appears to be a dearth of analysis on the effect of jurisdictional dismissals on win rates in subsequently filed lawsuits,[176] 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.[177] And in rare instances in which 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.[178] Thus, rules restricting personal jurisdiction likely decrease a 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 a plaintiff can prevail on the merits and obtain a $10,000 judgment in Forum A, for $2,000 in litigation costs. The plaintiff will file suit, because the expected benefit of $5,000 exceeds her litigation costs. However, let us further assume that the 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,[179] the plaintiff will spend $600 to litigate the jurisdictional dispute, and there

---

174 *See* Cameron & Johnson, *supra* note 16, at 777; *see also* Perdue, *supra* note 13, at 561 (noting that there are "three major practical reasons why litigants care about choice of forum: convenience, bias, and choice of law" (footnotes omitted)).

175 *See, e.g.*, Cameron & Johnson, *supra* note 16, at 820 (finding that in approximately 90 percent of the twenty Supreme Court personal jurisdiction cases between 1945 and 1995, "the party that prevailed on personal jurisdiction ultimately triumphed on the merits in either a judicial decision or a favorable settlement").

176 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.

177 *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, 593 (1998) ("[T]he [plaintiff's] overall win rate in federal civil cases is 57.97%, but in the subset of those cases that have been removed the win rate is only 36.77%. Apparently, the defendants' ability to choose the forum greatly augments their odds of success." (footnote omitted)); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511-12 (1995) ("In recent federal civil cases, 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.").

178 *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 (quoting Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977))); *see also* Cameron & Johnson, *supra* note 16, at 776 n.20 ("In the rare case in which an alternative forum is effectively unavailable, dismissal of the case on jurisdictional grounds is tantamount to a victory on the merits.").

179 This assumption is fairly accurate. *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 23-30 (1998) (analyzing published state supreme court and federal Court of Appeals opinions deciding substantive issues of personal jurisdiction spanning twenty-five years from 1970-1994, and concluding that products liability plaintiffs prevail on personal jurisdiction issues 59.45 percent of the time, with plaintiffs' success rate gradually declining after 1980).

is no other forum in which the plaintiff's expected benefits exceed her litigation costs. In this scenario, jurisdictional rules realign the private incentives of suit by reducing the plaintiff's expected benefit to $2,500 and increasing her litigation costs to $2,600. As a result, the plaintiff will not file suit.[180]

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 misalign 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 the injurers to reduce risk.[181]

Second, personal jurisdiction rules induce a socially excessive amount of jurisdictional disputes, regardless of their effect on the overall number of lawsuits. Because the defendant considers neither the plaintiff's litigation costs nor the net disadvantage to the plaintiff of litigating in an alternative forum, jurisdictional disputes occur even when significant social costs outweigh any marginal benefit to the defendant.[182] In theory, parties could

---

180 Expressed formally, the plaintiff will file suit in a particular forum if and only if $(c_J + c_M) < (p_J \text{ x } p_M \text{ x } h)$, where c_J is the plaintiff's cost of litigating the jurisdiction dispute, c_M represents other litigation costs incurred by the 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 the plaintiff will prevail on the merits, and h is the judgment amount that the plaintiff will receive if she prevails. When the plaintiff considers filing in multiple fora, she will file in the forum with the greatest positive difference between her expected benefit and expected costs.

181 Klerman, *supra* note 17, at 28 ("[T]he hardship of litigating out of state may deter plaintiffs from suing in the first place. This, of course, would reduce manufacturer's incentives to produce safe products."); *see also* SHAVELL, *supra* note 105, at 244 (arguing that raising damages above actual loss amounts will help create manufacturer incentives to reduce risk). 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.

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

avoid these costs through bargaining[183]—when the plaintiff's expected loss from litigating in an alternative forum exceeds the defendant's expected gain, the plaintiff can offer an amount that is mutually beneficial to both parties, in exchange for defendant's consent to personal jurisdiction.[184] In reality, however, transaction costs, imperfect information, and other factors often prevent bargaining.[185]

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.[186] If the defendant prevails, resources allocated to the case up to that point are for naught.[187] Because rulings on jurisdictional issues generally are not immediately ap-

---

183 Under the Coase theorem, if a mutually beneficial agreement exists and 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).

184 For example, suppose the plaintiff files a lawsuit against the defendant in Forum A, the defendant's net benefit from litigating in alternative Forum B would be $10,000, the plaintiff's net loss would be $15,000, and there is a 25-percent chance that the Forum A court would grant the defendant's motion to dismiss on personal jurisdiction grounds. The defendant's expected gain from jurisdictional litigation is $2,500; the plaintiff's expected loss is $3,750. If the plaintiff paid the defendant $3,000 in exchange for the 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 the plaintiff and defendant would each spend $2,000 litigating the jurisdictional dispute. These costs reduce the defendant's expected gain to $500, and increase the plaintiff's expected loss to $5,750, increasing the range of mutually beneficial outcomes.

185 *See* SHAVELL, *supra* note 105, at 87-92 (discussing "why bargaining may not occur when mutually beneficial agreements exist" and how "[e]ven if bargaining occurs and a mutually beneficial agreement exists, it may not be reached due to asymmetry of information"); *see also* Klerman, *supra* note 17, at 18 (arguing that, in reality, transaction costs are rarely low). For other criticisms of the Coase theorem, see, e.g., JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW 258-62 (1984) (discussing the flawed assumption of zero transaction costs underlying the Coase theorem and arguing that zero transaction costs may actually hamper bargaining); Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175, 176 (1981) (questioning the soundness of a Coase theorem analysis of nonmarket distributions and arguing in favor of a game theory analytical framework in its place); Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982) (arguing that ultimately, initial allocation does not matter to the efficient exchange of competitive liability rights); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) (discussing general deficiencies with the Coase theorem, such as the theorem's assumptions that consumers will behave in a certain way and that rules do not impact consumer choice).

186 *See* Fried, *supra* note 166, at 431 ("A successful personal jurisdiction defense increases the plaintiff's litigation costs—particularly if the plaintiff is forced to engage in discovery on the jurisdiction issue—and delays a decision on the merits."); Laura S. McAlister, Comment, *The Inefficiencies of Exclusion: The Importance of Including Insurance Companies in the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 129, 143 (2008) ("[T]he process of making [a personal jurisdiction] determination wastes time and does not promote judicial economy.").

187 *See, e.g.*, Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 412, 418-19 (1984) (reversing $1.1 million judgment on appeal because the state courts lacked personal jurisdiction over defendants).

pealable,[188] the magnitude of this loss can be staggering. As Judge Richard 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."[189]

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.[190] By restricting fora available to the plaintiff, jurisdictional rules disproportionately increase plaintiffs' costs and risks.[191] And yet in products liability actions, manufacturer defendants are more likely to be risk-neutral than victim plaintiffs.[192] Additionally, to the extent that manufacturers are risk averse, they likely have (or can easily obtain) insurance.[193]

By disproportionately increasing the plaintiff's costs and risks, jurisdictional rules also shift costs away from the party who 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 is almost certainly superior to consumer knowledge of

---

188 *See* 28 U.S.C. § 1291 (2006) (granting federal appellate court jurisdiction for "final decisions"); *see also* Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 583 (1995) ("[A]n appeal on the jurisdictional issue does not lie until there is a final judgment in the case.").

189 Hoagland v. Sandberg, Phoenix & Von Gontard, P.C., 385 F.3d 737, 739-40 (7th Cir. 2004); *see also* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.").

190 This has the effect of imposing increased costs and risks on plaintiffs and shifting them away from defendants. *See infra* notes 191-193 and accompanying text; *see also* SHAVELL, *supra* note 105, at 258-59 (noting that individuals tend to be risk averse and firms tend to be risk neutral).

191 *See* Erbsen, *supra* note 169, 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.").

192 *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887 (1998) ("[P]ublicly 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.").

193 *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 3 (2008) (noting that insurers absorb at least 75 percent of "direct tort costs").

such matters.[194] 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."[195]

In sum, existing 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 NEW APPROACH TO PERSONAL JURISDICTION: REALIGNING LITIGATION INCENTIVES

Drawing on this descriptive analysis of the effect of personal jurisdiction rules, this Article proposes a new "incentives-based" framework for evaluating the benefits and costs of personal jurisdiction rules. This approach draws from both process-based and outcome-based theories.[196] It ensures that courts operate within the limits of due process, while nonetheless freeing up legislatures to adopt and refine jurisdiction rules, so that those rules optimally align private and social litigation incentives.[197]

A. *Building Blocks for an Evaluative Framework: Process-Based and Outcome-Based Metrics*

There are two basic methods for evaluating procedural rules: a process-based approach and an outcome-based approach.[198] Professor Robert

---

194 *See generally* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 770-79 (1993) (discussing the costs and other difficulties consumers face in obtaining information about manufacturers and products).

195 Jennifer A. Schwartz, Comment, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CALIF. L. REV. 731, 741 (2008).

196 *See infra* Part IV.A.

197 *See infra* Part IV.B.

198 *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 666-67 (2d ed. 1988); Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 508-16 (2003) [hereinafter Bone, *Agreeing to Fair Process*];

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."[199]

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.'"[200] 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.[201]

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.[202] For 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.[203] 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.[204]

Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 201-02 (1992); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 2-4 (1974).

199 Bone, *supra* note 106, at 900.

200 Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008) (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)).

201 *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-253 (1985) (discussing the dignitary approach to due process, which emphasizes the human dignity effects of participation in the legal process); Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1888-91 (2009); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273-305 (2004). These values are not exclusive. For example, litigants also gain psychological benefits from direct participation. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975). *But see* Bone, *Agreeing to Fair Process*, *supra* note 198, at 506 ("Defining fairness in terms of feelings collapses fairness into utility.").

202 Bone, *Agreeing to Fair Process*, *supra* note 198, at 510; *see also* Redish & Katt, *supra* note 201, at 1889.

203 Bone, *supra* note 106, at 911. For an overview of the economic analysis of civil procedure, see generally ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 128-32 (2003); POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 19, 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.*

204 *See* Bone, *supra* note 106, 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

Each of these analytical tools has benefits and drawbacks. Process-based arguments reflect values vital to the legitimacy of our procedural system,[205] but they can be amorphous,[206] and often ignore the important role that accurate outcomes play in achieving legitimacy.[207] Outcome-based arguments ensure that procedural rules produce accurate results in an efficient manner,[208] but a purely outcome-based metric fails to consider the intrinsic value of due process rights, independent of outcome.[209]

B. *Adopting an Incentives-Based Approach*

In light of the advantages and disadvantages of the approaches described above, this Article borrows from both process-based and outcome-based theories and proposes a new "incentives-based" framework that facilitates socially optimal personal jurisdiction rules.

Under this approach, legislatures and courts play separate and distinct roles. First, the Supreme Court should "get out of the business of regulating personal jurisdiction"[210]—it is time for the Court to retire *International Shoe*'s overly sensitive minimum contacts test. Appellate courts should invalidate assertions of personal jurisdiction only when absolutely necessary to protect basic procedural and substantive due process rights.[211]

Second, state legislatures should get off the sidelines and take the lead in adopting (and refining) personal jurisdiction rules, with the primary goal of crafting rules that align private and social litigation incentives.[212] Under

---

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.

205 *See, e.g.*, Redish & Katt, *supra* note 201, at 1890.

206 *See* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1027 (2010) ("First, it is not clear what procedures a dignity-based participation right would guarantee. . . . Second, it is not clear what circumstances trigger dignity values strongly enough to call for individual participation in any form.").

207 *See* Bone, *Agreeing to Fair Process*, *supra* note 198, at 510 ("The reason we have a system of adjudication is to decide cases and produce good outcomes. The idea is not to provide people with a chance to participate or to give them another opportunity in their lives to exercise autonomous choice; there are plenty of other ways to do this."); *see also* Redish & Katt, *supra* note 201, at 1894-95 ("It would be unrealistic and unwise . . . to view the day-in-court ideal as an absolute.").

208 *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 106, at 911 n.170 ("[B]oth false-positive and false-negative errors dilute the deterrent effect of the substantive law, which increases social costs.").

209 Redish & Katt, *supra* note 201, at 1890.

210 Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 24 (1990).

211 *See infra* Part IV.B.1.

212 *See infra* Part IV.B.2.

an incentives-based approach, state legislatures actively drive the process; courts merely apply the brakes when necessary.[213]

1. Protecting Due Process Rights

For more than a century, personal jurisdiction analysis has been inextricably tethered to the Fourteenth Amendment's Due Process Clause.[214] The problem is that "[j]urisdictional due process developed independently of the interpretation of due process in other contexts" and currently protects "a wide variety of interests, most of which are unrelated to the concepts of individual liberty or property that are at the heart of the due process clause."[215] The result is a constitutionalized personal jurisdiction doctrine that is amorphous and inflexible, with an inherent defendant bias.[216]

Scholars repeatedly have argued that the constitutional status of *International Shoe*'s minimum contacts test is highly suspect.[217] Prior to the adoption of the Fourteenth Amendment's Due Process Clause, restrictions on the extraterritorial assertion of personal jurisdiction by state courts de-

---

213 In other words, like the parlance of San Francisco's cable car operators, legislatures serve as "gripmen," and courts serve as "brakemen." *Cf.* Gail Todd, *The Cable Car Museum, S.F.*, S.F. CHRON. (Feb. 18, 2010, 4:00 AM), http://articles.sfgate.com/2010-02-18/entertainment/17926857_1_cable-cars-washington-and-mason-streets-clay-street ("To move forward, the gripman squeezes the grip which grasps the moving cable under the slot in the street. To brake, the gripman releases the cable and the brakeman brakes.").

214 *See, e.g.*, Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (noting that restrictions on personal jurisdiction are "ultimately a function of the individual liberty interest preserved by the Due Process Clause"); Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("[P]roceedings in a court of justice to determine personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law").

215 Borchers, *supra* note 210, at 24.

216 *See, e.g.*, R. Lawrence Dessem, *Personal Jurisdiction After* Asahi*: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 65 n.136 (1987) (noting "the defendant bias inherent in the minimum contacts test"); Perdue, *supra* note 13, at 547 (same); Weintraub, *supra* note 2, at 531-32 ("[D]eference to the convenience of nonresident defendants has frustrated the reasonable interests of plaintiffs and their home states.").

217 Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) ("[T]he law of jurisdiction is spurious due process jurisprudence. It was constitutionalized without any serious analysis."); *see also* Borchers, *supra* note 210, at 56 ("[T]he [*International Shoe*] Court chose to perpetuate the still-unexplained myth that personal jurisdiction is an issue of constitutional law governed by the fourteenth amendment."); Redish, *supra* note 14, at 1113 ("[M]any of [*International Shoe*'s] premises are constitutionally, pragmatically, and conceptually inaccurate."); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 836-43 (1981) (analyzing the validity of and providing arguments for and against *International Shoe*'s use of the Due Process Clause).

veloped as common law rules.[218] None of the historic materials from the adoption of the Fourteenth Amendment suggest that the Due Process Clause was intended to operate as an independent limitation on the jurisdiction of state courts.[219] And a credible argument can be made that the Supreme Court's "full-blown constitutionalization" of *International Shoe*'s minimum contacts test resulted from its misinterpretation of prior case law.[220]

In light of this dubious history, this Article resists the urge to slip into talismanic incantations of "purposeful availment" and default to cases decided before the advent of the Internet. Instead, it asks a more basic and fundamental question: what should "jurisdictional due process" mean, both theoretically and in the context of modern-day litigation? This Article argues that the Supreme Court should pare back and simplify its test for evaluating the constitutionality of personal jurisdiction, so that the test mirrors the procedural and substantive due process protections that apply in other contexts. Under this approach, a court's assertion of personal jurisdiction will satisfy due process as long as a rational basis supports the court's exercise of power, and as long as the parties receive reasonable notice and an opportunity for a fair hearing.[221]

In other contexts, the Due Process Clause generally protects two types of rights: procedural due process and substantive due process.[222] "Procedural due process . . . refers to the procedures that the government must follow before it deprives a person of life, liberty, or property."[223] Its protections include the right to reasonable notice,[224] the right to an impartial decision maker,[225] and an opportunity to be heard.[226] In comparison, substantive due process prohibits the government from infringing on a narrow category of

---

218 *See, e.g.*, Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-76 (1989) (explaining that the federal common law rules on personal jurisdiction were originally derived from the Law of Nations and later expanded by the Full Faith and Credit Clause); *see also* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 570-99 (1981) (examining jurisdiction and conflict of laws in early cases and discussing the federal common law and Full Faith and Credit Clause).

219 *See* Whitten, *supra* note 217, at 804-05 (discussing historical sources).

220 Borchers, *supra* note 210, at 24 ("It is far from clear . . . that the Court meant *Pennoyer* [*v. Neff*] to create a constitutional law of personal jurisdiction.").

221 *See* Borchers, *supra* note 188, at 576-79 (outlining a "rationality-plus-fair-hearing test" that aligns personal jurisdiction analysis with procedural and substantive due process values).

222 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545-46 (3d ed. 2006); *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 417-19 (2010) (distinguishing between substantive and procedural due process rights).

223 CHEMERINSKY, *supra* note 222, at 545 (emphasis omitted); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (providing a three-factor balancing test for determining what process is due).

224 *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

225 *See, e.g.*, Turney v. Ohio, 273 U.S. 510, 532 (1927).

226 *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Goldberg v. Kelly, 397 U.S. 254, 263-64 (1970).

"'fundamental' liberty interests"—such as voting and free speech rights—"unless the infringement is narrowly tailored to serve a compelling state interest."[227]

Under these metrics (rather than the more stringent minimum contacts test), litigation almost always affords litigants their due process rights, even when a lawsuit occurs in a distant forum. First, as Professor Patrick Borchers has argued, "procedural due process values are colorably threatened only if the location of the forum prevents a fair hearing."[228] Assuming that the defendant receives reasonable notice of the lawsuit, the parties have access to an impartial decision maker, and the forum allows the litigants an opportunity to be heard, mere inconvenience of litigating in a distant forum should not constitute a violation of procedural due process.[229]

Second, substantive due process places minimal limitations on the extraterritorial jurisdiction of state courts because a court's assertion of personal jurisdiction does not infringe on fundamental rights.[230] As a result, substantive due process requirements are met as long as there is a "rational basis" for exercising jurisdiction over a non-resident defendant.[231] Professor Borchers points out that this deferential level of scrutiny will almost always be met.[232] For example, in stream of commerce cases, "[t]here is nothing 'irrational' about litigating a products liability case with all of the defendants in the forum in which the accident occurred."[233]

This "rationality-plus-fair-hearing test" would rarely strike down a court's assertion of personal jurisdiction[234]—and rightly so. Technological advances in recent decades have dramatically decreased the burdens defendants face when forced to litigate in distant fora. Many courtrooms facilitate electronic presentation of evidence, and allow remote testimony via videoconferencing.[235] Internet resources make it relatively easy to hire local

---

[227] Reno v. Flores, 507 U.S. 292, 301-02 (1993); *see generally* CHEMERINSKY, *supra* note 222, at 791-919 (providing an overview of substantive due process law); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283-97 (2007) (examining the historical and constitutional background of strict scrutiny). The concept of substantive due process has proven to be controversial. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").

[228] Borchers, *supra* note 188, at 579.

[229] *Id.* at 578-79.

[230] *Id.* at 577; *see also* Conison, *supra* note 217, at 1075 ("There is no identifiable, fundamental right threatened by exercises of jurisdiction."); Perdue, *supra* note 13, at 535 ("[T]he Court has never explained why being subject to jurisdiction is a taking of liberty."). *But see* Rhodes, *supra*, note 14, at 571 ("[I]f the defendant has not committed the requisite purposeful acts [under the minimum contacts test], the state cannot intrude upon that defendant's fundamental liberty interest.").

[231] *See* CHEMERINSKY, *supra* note 222, at 549.

[232] Borchers, *supra* note 210, at 90-91.

[233] *Id.* at 90.

[234] Borchers, *supra* note 188, at 579.

[235] *See* Fredric I. Lederer, *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

counsel almost anywhere in the world.[236] Moreover, any inconvenience and costs associated with the most distant fora are increasingly insignificant compared with discovery costs in even modest-sized cases.[237]

2. Legislating Incentives-Based Jurisdictional Rules

By retiring the overly sensitive minimum contacts test, the Supreme Court would encourage state legislatures to get off the sidelines and take the lead in adopting and refining socially optimal jurisdictional rules. As legislatures embrace their newly active role, their primary goal should be to craft personal jurisdiction rules that effectively align private and social litigation incentives.

For decades, constitutionalized personal jurisdiction rules have stunted legislative efforts to fine-tune procedural and substantive law incentives.[238] Rather than crafting carefully-tailored personal jurisdiction rules in the aftermath of *International Shoe*, several legislatures simply enacted long-arm statutes granting personal jurisdiction up to the limits of the Due Process Clause.[239] To make matters worse, when legislatures *have* bothered to enact specific, enumerated jurisdictional statutes, many courts have interpreted these provisions in a way that extends their scope to the full extent permitted by due process.[240] In either case, legislatures and courts in a majority of

---

advances in courtroom technology and noting that in many states "judges, counsel, and witnesses need not be in the same location" which creates a "real possibility of trials in which no physical commonality is present"); Michael D. Roth, Comment, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 191-95 (2000) (discussing current use of videoconferences in courts).

236 Several websites list attorneys affiliated with global networks. *See, e.g.*, HG.ORG, http://www.hg.org (last visited Sept. 23, 2012); INTERNATIONAL LAWYERS NETWORK, http://www.iltoday.com (last visited Sept. 23, 2012); LEX MUNDI, http://www.lexmundi.com (last visited Sept. 23, 2012).

237 *See* Erbsen, *supra* note 169, at 25 (describing the cost for U.S. citizens to litigate in a distant forum as "marginal"). Of course, the significance of discovery costs has been widely noted. *See, e.g.*, Scott Dodson, *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." (footnote omitted)).

238 *See* Borchers, *supra* note 188, at 584.

239 *See, e.g.*, ARK. CODE ANN. § 16-4-101 (2010); CAL. CIV. PROC. CODE § 410.10 (West 2004); ME. REV. STAT. tit. 14, § 704-A(1) (2010); NEB. REV. STAT. § 25-536(2) (2008); NEV. REV. STAT. § 14.065(1) (2011); R.I. GEN. LAWS § 9-5-33 (1997); TEX. R. CIV. P. 108 (West 2003); *see generally* VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C., LONG-ARM STATUTES: A FIFTY-STATE SURVEY (2003) (cataloging state long-arm statutes and pertinent case law), *available at* http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf.

240 *See, e.g.*, Sheppard v. Jacksonville Marine Supply, Inc., 877 F. Supp. 260, 265 (D.S.C. 1995) (interpreting South Carolina's long-arm statute); Balt. & Ohio R.R. Co. v. Mosele, 368 N.E.2d 88, 91-92 (Ill. 1977) (interpreting Illinois' long-arm statute); State *ex rel.* Deere & Co. v. Pinnell, 454 S.W.2d 889, 892 (Mo. 1970) (interpreting Missouri's long-arm statute); Dillon v. Numismatic Funding Corp., 231 S.E.2d 629, 630-31 (N.C. 1977) (interpreting North Carolina's long-arm statute); Hebron Brick Co.

states have cast aside the legislative rulemaking process in favor of *International Shoe*'s amorphous minimum contacts test.[241]

And yet there are several reasons why legislatures likely are better equipped than courts for incentives-based rulemaking. First, the legislative process offers much-needed flexibility.[242] After the enactment of a personal jurisdiction statute, legislatures can refine the law as facts, information, and technologies change. In contrast, *stare decisis* norms significantly curtail the ability of courts to adapt rules to changing times.[243] Second, the legislative process offers a superior "information environment" for crafting incentives-based rules.[244] Judicial rule makers inevitably have tunnel vision to some extent, because courts formulate rules within the context of specific cases.[245] In comparison, legislatures can address problems in the aggregate by holding hearings, relying on policy experts, and assembling extensive information on the societal effect of rules.[246] Third, if there is a risk that legislative rulemaking will fall prey to political posturing, a slow-moving process, or legislators who lack technical or legal expertise, legislatures can delegate rulemaking authority to agencies, court-appointed experts, or advisory committees.[247]

Thus, one of the most significant advantages of an incentives-based approach is that it empowers legislatures to craft procedural rules that optimally align private and social litigation incentives. Legislatures should

---

v. Robinson Brick & Tile Co., 234 N.W.2d 250, 255-56 (N.D. 1975) (interpreting North Dakota's long-arm statute).

241 *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496-97 (2004) (noting that nearly two-thirds of states extend jurisdiction to the constitutional limits).

242 DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 35 (1977).

243 *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 871-75 (2004).

244 *See id.* at 875-82.

245 *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 147-48 (1993) ("Courts are rarely experts in the area at hand. Moreover, the focus on the litigated case makes it hard for judges to understand the complex, often unpredictable effects of legal intervention."); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 24 n.130 (2009) ("Legislatures are less subject to the case-centered cognitive biases that affect courts because, in enacting statutes, they do not typically have before them only a single factual scenario."); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 538 (2005) ("[A]djudication necessarily entails a single-case perspective, which might blind the decision maker to the broader policy implications.").

246 *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 608, 616-17 (1992).

247 Granted, delegation of rulemaking authority to advisory committees is not without potential problems. *See, e.g.*, Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 843-55 (1991) (describing lobbying activity encountered by advisory committee members). However, these problems are often of lesser degree than they would be in the legislative process itself. *See* Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 239 (2012) ("Participation on these advisory commissions is not tantamount to giving an individual lobbyist access to legislative or executive branch officials.").

place a premium on clear rules, which will decrease the likelihood of costly procedural disputes.[248] Legislatures also should shy away from needlessly restrictive personal jurisdiction rules, which increase plaintiffs' litigation costs while decreasing their expected benefit, often causing a socially inadequate amount of litigation.[249] These rules ideally should shift the risk of liability and uncertain legal costs either to risk-neutral parties, or risk-averse parties with insurance.[250] Most importantly, legislatures should aim to enact jurisdictional rules that facilitate substantive law incentives.[251]

Because personal jurisdiction rules do not operate in a vacuum, legislatures should balance the effect of personal jurisdiction rules against existing substantive and procedural incentives.[252] In addition to considering substantive law incentives, legislatures also should consider the effect that other procedural rules have on litigant behavior, including rules governing subject matter jurisdiction,[253] choice of law,[254] class actions and other joinder devices,[255] fee shifting,[256] and contingency fees.[257] Additionally, in order

---

248 *See* Erbsen, *supra* note 169, at 3 ("A fair and efficient system for resolving civil disputes . . . requires clear and coherent rules governing personal jurisdiction."). *But see* Dodson, *supra* note 27, at 6 ("[S]imply repeating the mantra that jurisdictional rules should be simple and clear—as both courts and commentators often do—is unhelpful and potentially misleading without a full appreciation of the complexity of jurisdictional clarity.").

249 *See supra* Part III.B.

250 SHAVELL, *supra* note 105, at 259.

251 *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1982 n.92 (2007) ("[T]he value of adjudicative procedure must be primarily outcome-based . . . since adjudication is designed mainly to produce outcomes that conform to the substantive law.").

252 Although an analysis of the interaction between personal jurisdiction incentives and other substantive and procedural incentives is outside the scope of this Article, I invite others to weigh in on this topic. Legislatures should take a holistic approach to rulemaking by considering how the *procedural system as a whole* facilitates substantive law rules. Fortunately, rule makers can draw on an ample body of empirical studies and law-and-economics scholarship in order to analyze the various substantive and procedural rules that may come into play.

253 *See, e.g.*, Richard A. Posner, *Toward an Economic Theory of Federal Jurisdiction*, 6 HARV. J.L. & PUB. POL'Y 41 (1982) (making an economic argument for narrowing the jurisdiction of federal courts); Eric Kades, *The Law and Economics of Jurisdiction* (William & Mary Law Sch. Research Paper No. 09-11, 2009), *available at* http://ssrn.com/abstract=1431959 (analyzing the costs associated with post-trial challenges to a trial court's subject matter jurisdiction).

254 *See* LEA BRILMAYER, CONFLICT OF LAWS 169-218 (2d ed. 1995) (exploring the impact of state choice-of-law regimes); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 313-14 (1990) (noting that conflicts of law can encourage forum shopping); Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90 (Walter Olson ed., 1988); *see also* Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989) (arguing that a uniform choice-of-law rule would be optimal for products liability cases).

255 *See generally* Geoffrey P. Miller, *Class Actions*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 257-62 (Peter Newman ed., 1998) (discussing economic considerations in class action litigation); *see, e.g.*, David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) (criticizing regulatory and market alternatives to mandatory-litigation class action in mass tort cases); *id.* at 832 ("Understanding how individual prefer-

for carefully crafted personal jurisdiction rules to have their desired effect, legislative rule makers will need to take into account (and probably restrict) litigants' ability to contract around those rules, particularly in the context of standard form adhesion contracts.[258]

Of course, legislative rulemaking is not without risk. Professor Daniel Klerman argues that competition among states to attract business could lead those states to adopt inefficient jurisdictional rules that are overly favorable to defendants.[259] Alternatively, Professor Klerman suggests that if states take the lead in fashioning personal jurisdiction rules, they may adopt inefficient pro-plaintiff rules, in an attempt to transfer wealth from nonresident defendants.[260] In other words, incentives may exist for state legislatures to engage in a race to the bottom, one way or another.

Although these scenarios highlight potential disadvantages to a more active approach by legislatures, they are not insurmountable. First, nonresident corporate defendants presumably would pass along the cost of a state's procedural rules to in-state consumers through increased product prices.[261] If that is the case, suits against nonresident defendants would merely serve as a conduit for the transfer of in-state wealth.[262] Second, to the extent that states would engage in a race to the bottom, such a race reflects incentives inherent in our federal system, and perhaps justifies efforts by Congress to open the federal courthouse doors to victims of state bias.[263] Third, it is worth noting that several scholars have cast doubt on the race-to-the-bottom

---

ences change over time, particularly as individuals acquire knowledge, is central to the argument for mandatory mass tort class action."); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002) (advocating a conception of mass tort settlements based on put options of the kind seen in financial markets).

256 *See, e.g.*, Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317 (2005) (describing the effects of reverse-cost shifting on litigants' incentives); Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069 (1993) (examining the incentives created by alternative fee-shifting rules).

257 *See, e.g.*, Kong-Pin Chen & Jue-Shyan Wang, *Fee-Shifting Rules in Litigation with Contingency Fees*, 23 J.L. ECON. & ORG. 519 (2007) (analyzing the respective impact of British and American fee-shifting rules on litigant behavior).

258 *See* Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992) (arguing that choice-of-law forum clauses in standard consumer form contracts should be deemed invalid).

259 Klerman, *supra* note 17, at 20-22.

260 E-mail from Daniel Klerman to author (Apr. 25, 2012, 4:46 p.m. CDT) (on file with author); *see also* McConnell, *supra* note 255, at 92 ("Each state can profit at the expense of others by expanding its scope of liability, at least until the others catch up.").

261 Klerman, *supra* note 17, at 22. This assumes that it is both possible and cost effective for the corporate defendant to vary its prices on a state-by-state basis, which might not always be the case.

262 Specifically, whatever benefit the forum state and its residents receive from litigation against a nonresident corporate defendant would be subsidized by the higher prices that in-state consumers pay for the defendant's products.

263 *See, e.g.*, 28 U.S.C. § 1332 (2006) (vesting federal district courts with diversity jurisdiction); *id.* § 1441 (allowing removal of civil actions from state to federal court).

theory in other contexts, pointing out instances in which incentives for state competition exist but no race has occurred.[264]

Ultimately, an incentives-based approach is advantageous over our current court-driven process for defining the scope of personal jurisdiction rules. It protects defendants' procedural rights, but does not reflexively prioritize those rights over other interests. By focusing on outcomes, the approach favors personal jurisdiction rules that align litigation incentives and minimize social costs. Perhaps most importantly, an incentives-based approach provides flexibility—if existing incentives are not optimal, legislatures can make corrections to *both* procedural and substantive laws, rather than waiting for the Supreme Court to periodically revisit personal jurisdiction rules.

V. REVISITING THE STREAM OF COMMERCE THEORY

In light of this incentives-based approach, which iteration of the stream of commerce doctrine is best? To answer this question, this Part first discusses the ways in which personal jurisdiction rules should protect basic due process rights in stream of commerce cases.[265] It then compares various iterations of the stream of commerce rule, in order to determine which version best aligns private and social litigation incentives.[266] It concludes that legislatures should enact a hybrid approach that draws on Justice Brennan's "awareness" test from *Asahi*[267] and the New Jersey Supreme Court's "nationwide distribution" approach from *Nicastro*.[268] Finally, it proposes an alternative approach in the event that the Supreme Court refuses to abandon the minimum contacts test: Congress should grant federal courts nationwide

---

[264] For the seminal article on the race-to-the-bottom theory, see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974). In the years since Professor Cary's article, several scholars have questioned the veracity of that theory. *See, e.g.*, Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) (refuting the contention that states are competing with Delaware to attract incorporations of public companies); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 255-58 (1977) (arguing that other states' responses to Delaware law are not evidence of a "race to the bottom," but rather suggest that investors expect to benefit under a Delaware-style law).

[265] *See infra* Part V.A.

[266] *See infra* Part V.B.

[267] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116-17 (1987) (Brennan, J., concurring) (arguing that personal jurisdiction exists "[a]s long as a participant in [the manufacturing and distribution] process is aware that the final product is being marketed in the forum State").

[268] 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).

personal jurisdiction over foreign defendants in stream of commerce cases, based on the defendant's national contacts with the United States.[269]

A. *Clearing the Due Process Hurdle*

As described above, personal jurisdiction rules satisfy due process as long as a rational basis supports the court's exercise of power and as long as the parties receive reasonable notice and an opportunity for a fair hearing.[270] Under this approach, what protections must courts afford defendants in stream of commerce cases? And which iterations of the stream of commerce theory adequately protect due process rights?

This Article argues that due process places two primary limitations on the assertion of personal jurisdiction in stream of commerce cases. First, courts should refuse to exercise personal jurisdiction if it is cost prohibitive for the defendant to mount a defense in the plaintiff's chosen forum, forcing the defendant to default.[271] Courts should provide defendants an opportunity to present evidence showing that it is cost prohibitive to defend in the forum.[272] In the rare cases in which default is the only practical option for the defendant, the action should be dismissed and re-filed in an alternate forum that affords the defendant a realistic opportunity to present a defense. More commonly, however, the defendant's burden will not be of sufficient magnitude—the defendant will be able to find and hire local counsel in a remote forum with relative ease, and can use technological advances to defend in that forum at a reasonable cost.[273] In those cases, mere inconvenience is not a violation of due process rights.[274]

An example from Justice Breyer's concurring opinion in *Nicastro* illustrates how this limitation works in stream of commerce cases.[275] Justice Breyer worried that it would be unfair to subject a small manufacturer, such

---

269 *See infra* Part V.C.

270 *See supra* notes 221-233 and accompanying text; *see also* Borchers, *supra* note 188, at 576-79 (examining due process considerations in tests of personal jurisdiction).

271 *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950) (noting that the right to due process "has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest").

272 The defendant would have the burden to present specific evidence showing a financial inability to defend in the forum; a hypothetical inability to pay would not suffice. *Cf.* Faber v. Menard, Inc., 367 F.3d 1048, 1053-54 (8th Cir. 2004) (reciting similar rules while analyzing the unconscionability of fee-splitting arrangements).

273 *See supra* notes 234-236 and accompanying text.

274 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting) (noting that the defendant's burden "must be of constitutional dimension" and arguing that the burden "relates to the mobility of the defendant's defense" (i.e., "witnesses or evidence or the defendant himself [a]re immobile," or there is "a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense")).

275 *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011) (Breyer, J. concurring).

as an Appalachian potter, to jurisdiction in a distant state like Hawaii, merely because the potter uses a large distributor, and a single coffee mug finds its way to the forum.[276] Under the limitation discussed above, Justice Breyer's Appalachian potter would have an opportunity to show that it is cost prohibitive to mount a defense in Hawaii. If it is, the court should dismiss the suit. But if the evidence instead shows that the Appalachian potter intentionally used a distributor to target the national market, and can easily find local counsel and use technological advances to defend in the forum (despite the inconvenience of doing so), how exactly is that potter being denied due process?

Second, courts should strike down truly irrational assertions of personal jurisdiction. Although *International Shoe*'s minimum contacts approach is far too stringent,[277] substantive due process undoubtedly requires *some* connection in stream of commerce cases between "the defendant, the forum, and the litigation."[278] When a rational basis for jurisdiction does not exist (i.e., the underlying dispute has absolutely nothing to do with the plaintiff's chosen forum), courts should not assert personal jurisdiction over the defendant.[279]

The facts of *Asahi* illustrate this limitation. In that case, a plaintiff injured in California filed suit in that state, but then settled his claims.[280] The only remaining claim was a cross-claim for indemnification between a Taiwanese corporation and a Japanese corporation, based on a transaction that took place in Taiwan.[281] The Supreme Court properly concluded that the California state courts' assertion of personal jurisdiction violated due process because the only remaining claim lacked a rational connection to California.[282]

If the Supreme Court pared back the due process limitations on personal jurisdiction to these essential protections, all of the main iterations of the stream of commerce theory would undoubtedly be constitutional. Justice O'Connor's approach from *Asahi* provides ample due process—

---

276 *Id.* Justice Breyer raised this hypothetical during oral argument as well. *See* Transcript of Oral Argument at 22-23, *Nicastro*, 131 S. Ct. 2780 (No. 09-1343).

277 Under the minimum contacts approach, courts often dismiss for lack of personal jurisdiction even though a rational basis supports the assertion of jurisdiction over the defendant. *See, e.g.*, Convergence Techs. (USA), LLC v. Microloops Corp., 711 F. Supp. 2d 626, 637-38 (E.D. Va. 2010) (holding that personal jurisdiction did not exist under the stream of commerce theory, even if it were true that the defendant made "substantial sales in Virginia"); Tom's of Maine v. Acme-Hardesty Co., 565 F. Supp. 2d 171, 178 (D. Me. 2008) (holding that personal jurisdiction did not exist, even assuming that the defendant's product made its way to the forum state and caused damage there).

278 Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

279 This limitation prevents situations in which the plaintiff files suit in a particular forum to take advantage of that forum's substantive law, but the forum has no relation to the parties or the dispute.

280 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105-06 (1987) (O'Connor, J.).

281 *Id.* at 114.

282 *See id.* at 113-15.

jurisdiction exists only when defendants direct marketing, advertising, or sales toward the forum state.[283] Justice Brennan's test from *Asahi* also protects procedural and substantive due process rights because manufacturers have actual notice of potential fora and can structure their conduct accordingly.[284] And although the test used by the New Jersey Supreme Court in *Nicastro* potentially allows personal jurisdiction even when the defendant is not aware, but reasonably should know, of marketing or sales in a particular state,[285] it nonetheless requires proof that the defendant intentionally targeted the national market, using a distributor to sell its products to any and all customers within the United States.[286]

Thus, under an incentives-based approach, courts can allow expansive personal jurisdiction rules in stream of commerce cases, while protecting basic due process rights.

B. *Legislating Optimal Stream of Commerce Rules*

If due process allows expansive personal jurisdiction rules, how should legislatures respond? In other words, which iteration of the stream of commerce rule best aligns private and social litigation incentives, while efficiently allocating risks and costs?

To answer this question, this Article analyzes the three iterations of the stream of commerce doctrine considered by the Supreme Court in its *Nicastro* opinion: (1) Justice O'Connor's "stream-of-commerce-plus" test;[287] (2)

---

283 *Id.* at 112; *see also* Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993) (identifying Justice O'Connor's approach in *Asahi* as "the more stringent" stream of commerce test); Kristin R. Baker, Comment, *Product Liability Suits and the Stream of Commerce After* Asahi*:* World-Wide Volkswagen *Is Still the Answer*, 35 TULSA L.J. 705, 717 (2000) (same).

284 *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) (emphasizing that Justice Brennan's test in *Asahi* 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)).

285 *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592 (N.J. 2010) ("A manufacturer that 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 must expect that it will be subject to [that particular] [s]tate's jurisdiction."), *rev'd*, 131 S. Ct. 2780 (2011).

286 *See id.* ("The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold. . . . If a manufacturer does not want to subject itself to the jurisdiction of a [particular state's] court while targeting the United State market, then it must take some reasonable step to prevent the distribution of its products in th[at] [s]tate." (citations omitted)); *see also Nicastro*, 131 S. Ct. at 2799 (Ginsburg, J. 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 States the distributor can attract purchasers").

287 *Asahi*, 480 U.S. at 111-12 (O'Connor, J.) (concluding that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State" is insufficient for personal

Justice Brennan's "awareness" test;[288] and (3) the "nationwide distribution" test used by the New Jersey Supreme Court in the *Nicastro* case.[289] It also considers the European Union's expansive approach in these types of tort cases, which subjects manufacturers to personal jurisdiction "in the courts for the place where the harmful event occurred."[290] This Article concludes that legislatures should enact a hybrid rule, borrowing from both the "awareness" and "nationwide distribution" tests.

Although Justice O'Connor's "stream-of-commerce-plus" test from *Asahi* is widely used among state and federal courts,[291] that test has two notable disadvantages in terms of private and social incentives. First, it requires a more elaborate and fact-intensive inquiry than the other iterations of the stream of commerce rule—in addition to determining the defendant's awareness, courts must examine product design, defendant's advertising and customer relation efforts, and agreements with distributors.[292] This fact-intensive inquiry is uncertain in its application and costly to administer, increasing the frequency and cost of jurisdictional litigation.[293] Second,

---

jurisdiction; instead, "something more" is required, such as "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").

288 *Id.* at 117 (Brennan, J., concurring) ("The stream of commerce refers . . . to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.").

289 *Nicastro*, 987 A.2d at 592 (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").

290 Council Regulation 44/2001, art. 5, 2001 O.J. (L 12) 4.

291 *See, e.g.*, Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 479-80 (6th Cir. 2003) (per curiam); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945-46 (4th Cir. 1994); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992); Boone v. Oy Partek Ab, 724 A.2d 1150, 1159-60 (Del. Super. Ct. 1997); CSR, Ltd. v. Taylor, 983 A.2d 492, 506-09 (Md. 2009); Vt. Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co., 914 A.2d 818, 826 (N.H. 2006); Anderson v. Metro. Life Ins. Co., 694 A.2d 701, 703 (R.I. 1997).

292 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (O'Connor, J.).

293 *See* Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 581-82 (1991) ("[J]urisdictional inquiries [that] encompass every aspect of the relationship and the transaction between the parties . . . [would] lead to increased transaction costs that are inappropriate for issues which need be determined quickly and efficiently at the outset of the litigation."); *see also* Sheehan, *supra* note 164, at 440 (noting that Congress has the ability to "dictate the minimum protections for courts to make available under its full faith and credit authority," which would effectually "eliminate or . . . reduce substantially the uncertainty inherent in the personal jurisdiction determination, and . . . eliminate altogether the need to resolve these issues through expensive and burdensome motion practice"); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 328 (2010) ("The constitutional law of personal jurisdiction doctrine is notoriously confusing and imprecise. Thus, in close or difficult cases, raising and resolving personal jurisdiction challenges consumes an inordinate amount of parties' time and the courts' limited resources." (footnote omitted)).

courts applying 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.[294]

These effects are socially undesirable because they increase plaintiffs' costs, decrease a 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.[295] 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.[296] As a result, prices do not reflect the true cost of products (leading to overconsumption),[297] and inadequate incentives exist for manufacturers to take precautions and reduce risk.[298] Thus, a broader stream of commerce rule is necessary in order to expand jurisdiction and avoid a fact-intensive inquiry.

A comparison of Justice Brennan's "awareness" approach from *Asahi* and the "nationwide distribution" test used by the New Jersey Supreme Court in *Nicastro* 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.[299] This avoids over-deterrence of manufacturers that intentionally choose to distribute products to select states (rather than targeting a national market).[300] However, the New Jersey rule would reduce litigation expenses when it is obvious that a manufacturer targeted the national market, but it is difficult or time-consuming to

---

294 *See supra* notes 165-169 and accompanying text.

295 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. *See* Kaplow & Shavell, *supra* note 110, at 1054 n.186; *see also supra* Part III.A.

296 *See* SHAVELL, *supra* note 105, 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"); *see also* Goldberg & Zipursky, *supra* note 17, at 1930 ("[T]ort damages . . . generate full cost internalization and hence efficient deterrence.").

297 *See* Polinsky & Shavell, *Uneasy Case*, *supra* note 18, 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).

298 SHAVELL, *supra* note 105, at 244.

299 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

300 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.

prove the manufacturer's actual awareness that its products are being marketed in a particular state.[301] 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 their products.[302]

Additionally, these 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 risks to the manufacturer, the party who is more likely to be the least-cost avoider and either risk neutral or insured.[303] 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."[304]

In her dissenting opinion in *Nicastro*, Justice Ginsburg cited an even more expansive rule for stream of commerce cases used in the European Union.[305] European regulations authorize personal jurisdiction "in matters relating to tort . . . in the courts for the place where the harmful event occurred."[306] Although the adoption of this rule in American jurisdictions would ensure that plaintiffs have access to courts at the place of injury,[307] the rule is too broad to be socially optimal. It focuses neither on defendant's actual awareness that products are reaching a particular forum, nor the defendant's attempts to target a national market. As a result, the European rule

---

301 *See* Vt. Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co., 914 A.2d 818, 827 (N.H. 2006) ("Actual knowledge [under Justice Brennan's approach], especially when dealing with a commercial setting, may be difficult to determine.").

302 *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 ("[A] requirement of actual knowledge creates 'a potential jurisdictional loophole [for] a defendant who willfully or negligently ignores the destination of its products.'" (alteration in original) (quoting Moe, *supra* note 45, at 224)).

303 *See supra* notes 190-195 and accompanying text; SHAVELL, *supra* note 105, at 258-59 (noting that individuals typically are risk averse, and firms usually are risk neutral); Cupp, *supra* note 5, at 870-71 (noting that use of products liability insurance among manufacturers is common).

304 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); *see also* Luv N' Care, Ltd. v. Insta-Mix, 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).

305 *Nicastro*, 131 S. Ct. at 2803-04 (Ginsburg, J., dissenting).

306 Council Regulation 44/2001, art. 5, 2001 O.J. (L 12) 4; *see also* Weintraub, *supra* note 2, at 550-54 (discussing the European approach to personal jurisdiction); *see generally* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 127-32 (1992) (same).

307 *See* Weintraub, *supra* note 2, at 550 (noting that the *Asahi* Court adopts this approach).

likely would over-deter manufacturers, who would be unable to predict exactly where they would be sued.[308]

Ultimately, the best approach is likely a rule that combines the "awareness" and "nationwide distribution" tests. Each of these approaches will be socially optimal in some stream of commerce cases, but not in others—when a defendant targets the national market, the nationwide distribution test is likely superior; when a defendant's product is distributed in select states, the awareness test likely offers the best approach. Legislatures should craft personal jurisdiction rules in a way that ensures that each of these tests is used in appropriate circumstances.[309] Most importantly, legislatures should continue to refine personal jurisdiction rules so that those rules reflect changing economic circumstances and the most current information about litigation incentives.

C. *An Alternative Proposal: Nationwide Personal Jurisdiction*

Alas, this Author is a realist.[310] For more than six decades, the Supreme Court has stubbornly adhered to *International Shoe*'s minimum contacts test. Given the likelihood that the Court will continue to do so, a backup plan is necessary: Congress should grant federal courts nationwide personal jurisdiction over foreign defendants in stream of commerce cases, based on an aggregation of the defendant's national contacts with the United States.[311] On several occasions, the Supreme Court has left open the pos-

---

308 Faced with the prospect of defending lawsuits in unpredictable fora, manufacturers would either exercise a socially excessive level of care, or insure against the possibility of lawsuits in random jurisdictions. Neither option is socially optimal.

309 Legislatures also should adjust personal jurisdiction rules to account for different types of manufacturers. For example, the incentives of an upstream product manufacturer using an independent distributor might be different than the incentives of a component-part manufacturer.

310 *See* JAWAHARLAL NEHRU, JAWAHARLAL NEHRU'S SPEECHES 1949-1953, at 235 (1954) ("Theoretical approaches have their place . . . but a theory must be tempered with reality.").

311 Several scholars have analyzed 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, 816-24 (1988) ("[T]he question whether personal jurisdiction properly may be asserted over an alien defendant should be answered by a single inquiry into the kind and nature of contacts the defendant has had with the United States as a whole." (footnote omitted)); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 128-29 (1983) ("[A] federal court could, consistent with the Constitution, aggregate the defendant's contacts with the United States as a whole when deciding whether a sufficient nexus exists for jurisdiction." (internal quotation marks omitted)); Parrish, *supra* note 36, at 21-22 ("Although the Supreme Court has never directly addressed its constitutionality, courts will often permit a national contacts approach when dealing with foreign defendants." (footnote and internal quotation marks omitted)); Spencer, *supra* note 293, at 329 (noting the limitations on federal courts to exercise personal jurisdiction over foreign defendants, and proposing a change to the Federal Rules of Civil Procedure to "authorize[e] nationwide service of process in all civil cases in the federal district courts, which the Supreme Court has recognized as constitutionally permissible").

sibility that this national contacts approach might satisfy due process requirements for foreign defendants in exceptional cases.[312]

Currently, under Federal Rule of Civil Procedure 4(k), a federal district court has personal jurisdiction over a nonresident defendant if the long-arm statute of the state in which the court sits would allow the state's courts to exercise jurisdiction.[313] Rule 4(k) also authorizes federal district courts to exercise nationwide personal jurisdiction in federal question cases when "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."[314] The practical effect of the rule is that, in most cases, personal jurisdiction in federal district courts mirrors personal jurisdiction in state courts.[315] In rare federal question cases when a defendant does not have sufficient contacts with any particular state but nonetheless has sufficient contacts with the United States as a whole, any federal district court can exercise personal jurisdiction over that defendant,[316] and federal venue statutes determine which districts can hear the case.[317]

Congress could grant federal courts broad personal jurisdiction over foreign defendants in stream of commerce cases by removing some of the conditions on nationwide personal jurisdiction.[318] For example, it could expand nationwide personal jurisdiction beyond federal question cases to include state law cases that meet the requirements for diversity jurisdic-

---

312 *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (Kennedy, J.) (plurality opinion) ("[A] defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."); *see also* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) ("Under [the plaintiff's] theory, a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits."); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (plurality opinion) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.").

313 FED. R. CIV. P. 4(k)(1)(A) (authorizing federal district courts to exercise personal jurisdiction over a nonresident defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). The rule also allows federal district courts to exercise personal jurisdiction over a defendant joined under Rule 14 or 19 who is served within one hundred miles of the courthouse where the action was filed, or "when authorized by a federal statute." FED. R. CIV. P. 4(k)(1)(B)-(C).

314 FED. R. CIV. P. 4(k)(2)(A).

315 Spencer, *supra* note 293, at 327.

316 *See, e.g.*, Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403, 1412-18 (Fed. Cir. 2009); Mwani v. bin Laden, 417 F.3d 1, 10-14 (D.C. Cir. 2005); Adams v. Unione Mediterranea di Sicurta, 364 F.3d 646, 651-52 (5th Cir. 2004).

317 28 U.S.C. §§ 1391, 1404, 1406 (2006).

318 Alternatively, the Civil Rules Advisory Committee could accomplish this task by revising Rule 4, as long as its amendments did not conflict with existing federal statutes. *See* Patrick J. Borchers, J. McIntyre Machinery*,* Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1274-75 (2011).

tion.[319] Congress also could make the national contacts test a primary option for establishing personal jurisdiction over foreign defendants in federal court, rather than a secondary option that is available only if the defendant lacks contacts to specific states.[320] It could then use venue statutes to fine-tune litigation incentives.[321]

The main advantage of this national contacts approach is that there no longer would be an incentive for foreign manufacturers to use independent distributors and ignore product destinations in order to avoid personal jurisdiction in American courts.[322] A combination of nationwide personal jurisdiction and liberalized federal venue statutes would expand the fora available to plaintiffs in stream of commerce cases, decreasing the costs associated with filing suit and realigning private and social litigation incentives in a more optimal way.

Although a national contacts approach is better than the status quo, it is nonetheless inferior to a comprehensive incentives-based approach to personal jurisdiction rules. Most notably, application of the national contacts approach likely would be just as unclear and case-sensitive as existing personal jurisdiction rules, which increase jurisdictional disputes and litigation costs.[323] And this alternate approach does nothing to address the problems inherent in constitutionalized personal jurisdiction rules, which overprotect defendants' rights.[324]

CONCLUSION

Other concepts have animated personal jurisdiction rules in the past. But these concepts often obscure the reality that litigants face. All too often, personal jurisdiction rules close the courthouse door for victims seeking relief, and provide defendants with a convenient shield against liability. They increase costs in a legal system that is already too expensive. And they frequently reward parties who are sophisticated enough to play games

---

319 *See id.*; *see also* 28 U.S.C. § 2361 (2006) (authorizing nationwide service of process for interpleader actions).

320 *See, e.g.*, Degnan & Kane, *supra* note 311, at 817 ("[I]nternational constraints require only that there be substantial contacts with the country as a whole; if there are, we may demand a foreign national to submit to our courts.").

321 *See* Casad, *supra* note 37, at 1606 (arguing that if a defendant has sufficient national contacts, "the place of trial within the United States should be a matter of venue, not constitutional right").

322 *See* Weintraub, *supra* note 2, at 555 (arguing that if a manufacturer "that releases a product for sale" is not "subject to jurisdiction in any state where the product causes harm" regardless of how the product enters the state, "we turn the clock back to the days before modern long-arm statues when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it").

323 *See supra* notes 159-167 and accompanying text.

324 *See supra* notes 214-220 and accompanying text.

with procedural rules. For these litigants, jurisdictional rules are not *partly* about incentives; they are *entirely* about incentives.

Procedural rules must reflect this reality of modern-day litigation. They should take into account the consequences of an economy in which products are distributed across borders, across nations, and through increasingly complex distribution chains. In this world, restrictive jurisdictional rules often misalign substantive law incentives, leading to inadequate deterrence and other socially undesirable effects.

To the extent jurisdictional rules do not reflect this reality, they must be changed, and they must remain flexible. Adopting an incentives-based approach will go a long way toward ensuring that personal jurisdiction rules align individual actions with the greater social good.