The text of the NCVIA does not clearly evince a congressional intent to preempt state defective-design claims. Rather than be bound by a presumption against preemption, the Court interpreted the NCVIA by drawing inferences about its structure that were based on its own hostility toward state tort law. Where it should have looked for the existence of clear *congressional* intent, the Court instead viewed the statute through its own lens of distrust for tort law. As a result, it substituted its policy judgment for congressional choice and disregarded the checks of federalism, eliminating state control over a field traditionally occupied by the states and perpetuating precisely the evils that the presumption against preemption was designed to avert.

B. Personal Jurisdiction

Stream-of-Commerce Doctrine. — The Due Process Clause of the Fourteenth Amendment limits a state's ability to exercise personal jurisdiction over a nonresident defendant by requiring that the defendant have sufficient "minimum contacts" with the forum state.[1] At its inception, the concept of minimum contacts performed "two related, but distinguishable, functions[:] [i]t protected the defendant against the burdens of litigating in a distant . . . forum," an interest "typically described in terms of 'reasonableness' or 'fairness'";[2] and it "ensure[d] that the States . . . d[id] not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system," an interest typically described in terms of "federalism" or "sovereignty."[3] As the American economy grew and transformed in the latter half of the twentieth century, the Supreme Court recognized that the scope of personal jurisdiction had to expand,[4] and it placed more emphasis on the reasonableness rationale at the expense of sovereignty.[5] This trend came to a head in *Asahi Metal Industry Co. v. Superior Court*,[6] in which the Court considered whether the act of placing a good into the stream of commerce was sufficient to trigger personal jurisdiction over the manufacturer in a state where an injury relating to that product occurred.[7] Although the Court was unanimous in its judgment, it produced two competing opinions, one by Justice O'Connor for four Justices and the other by Justice Brennan for four Justices. Justice O'Connor would have held that the manufacturer must engage in something more to target the forum state than merely placing the

---

1 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
2 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).
3 *Id.* at 292–94.
4 *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).
5 *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).
6 480 U.S. 102 (1987).
7 *See id.* at 108.

product into the stream of commerce.[8] Justice Brennan would have held that such placement was enough, so long as the manufacturer was aware that its products would be marketed in the forum state.[9]

Last Term, in *J. McIntyre Machinery, Ltd. v. Nicastro*,[10] the Court had another chance to clarify the contours of the stream-of-commerce doctrine. Although the Court again could not fashion a majority, the plurality opinion endorsed Justice O'Connor's "stream-of-commerce plus" theory and did so by elevating principles of sovereignty over principles of fairness and reasonableness.[11] Despite the lack of a majority, the Court's decision signals the return of sovereignty as an important due process rationale and has significant implications for the development of personal jurisdiction jurisprudence in the next iteration of technological advancement — the internet.

On October 11, 2001, Robert Nicastro, an employee at Curcio Scrap Metal in New Jersey, was injured while operating a McIntyre Model 640 Shear, "a recycling machine used to cut metal."[12] The Model 640 Shear was manufactured by J. McIntyre Machinery, Ltd. (McIntyre UK), a British corporation, and then sold through McIntyre UK's exclusive U.S. distributor, McIntyre Machinery America, Ltd. (McIntyre America),[13] an Ohio corporation, to Curcio Scrap Metal in 1995.[14] Nicastro brought suit against McIntyre UK in New Jersey state court, alleging the Model 640 Shear was a dangerous product defectively designed.[15] McIntyre UK moved to dismiss the suit for lack of personal jurisdiction.[16] The trial court granted the motion, concluding that neither the traditional minimum contacts test nor the *Asahi* stream-of-commerce theory supported the exercise of jurisdiction.[17]

The Appellate Division of the New Jersey Superior Court reversed.[18] The court held that, although "traditional minimum contacts principles" would not support jurisdiction,[19] New Jersey's exercise of jurisdiction was justified "under the 'stream-of-commerce plus' ratio-

---

[8] *See id.* at 112 (opinion of O'Connor, J.).

[9] *See id.* at 117 (opinion of Brennan, J.).

[10] 131 S. Ct. 2780 (2011).

[11] *See id.* at 2788–90 (plurality opinion).

[12] Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010).

[13] *Id.* McIntyre UK and McIntyre America "were distinct corporate entities, independently operated and controlled, without any common ownership." *Id.* at 579.

[14] *Id.* at 578.

[15] *Id.* at 577–78. Nicastro also included McIntyre America in the suit, but that company filed for bankruptcy in 2001 and did not participate in the litigation. *Id.* at 577, 578 n.2.

[16] *Id.* at 578.

[17] Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 99 (N.J. Super. Ct. App. Div. 2008).

[18] *Id.* at 95.

[19] *Id.* at 104.

nale espoused by Justice O'Connor in *Asahi*."[20] Specifically, the court found not only that McIntyre UK was aware that "its machine might end up in New Jersey," but also that it "engaged in additional conduct indicating an intent or purpose to serve the New Jersey market."[21]

The New Jersey Supreme Court affirmed.[22] Writing for the majority, Justice Albin[23] held that New Jersey could exercise personal jurisdiction over a nonresident manufacturer so long as the manufacturer "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states."[24] Justice Albin relied heavily on the New Jersey Supreme Court's previous decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*,[25] which had adopted a permissive stream-of-commerce theory.[26] In evaluating the validity of *Charles Gendler* in light of the intervening U.S. Supreme Court decision in *Asahi*, Justice Albin determined that Justice Brennan's approach was most consistent with the Due Process Clause in light of the present realities of international trade.[27]

The Supreme Court reversed,[28] but it splintered in its reasoning. Writing for a four-Justice plurality, Justice Kennedy[29] endorsed Justice O'Connor's "stream-of-commerce plus" rationale, stating that it, and not Justice Brennan's conception, was true to the underlying due process requirement of purposeful availment.[30] Finding that the New Jersey Supreme Court's application of the stream-of-commerce doctrine was inconsistent with this general rule, Justice Kennedy held that New Jersey could not exercise jurisdiction over McIntyre UK.[31]

Justice Kennedy began his analysis by reaffirming the familiar minimum contacts rule, but he observed that "freeform notions" of fairness do not satisfy the due process test.[32] Instead, "it is the defendant's purposeful availment [of the forum's market] that makes jurisdiction consistent with 'traditional notions of fair play and substantial jus-

---

[20] *Id.* at 95. The court noted the competing view of Justice Brennan in *Asahi* but found it unnecessary to determine which view would control, since satisfying Justice O'Connor's more restrictive approach would always satisfy Justice Brennan's less restrictive one. *Id.* at 104.

[21] *Id.* at 104.

[22] Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010).

[23] Justice Albin was joined by Chief Justice Rabner and Justices Long, LaVecchia, and Wallace.

[24] *Nicastro*, 987 A.2d at 592.

[25] 508 A.2d 1127 (N.J. 1986).

[26] *See id.* at 1135–38.

[27] *See Nicastro*, 987 A.2d at 589–91.

[28] *Nicastro*, 131 S. Ct. at 2791 (plurality opinion).

[29] Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia and Thomas.

[30] *See Nicastro*, 131 S. Ct. at 2788–90 (plurality opinion).

[31] *Id.* at 2791.

[32] *Id.* at 2787.

tice.'"[33] Turning to the Court's earlier decision in *Asahi*, Justice Kennedy noted that the stream-of-commerce "metaphor" does not displace the general rule of purposeful availment; rather, "[i]t merely observes that a [nonresident] defendant may . . . be subject to jurisdiction" when it "'seek[s] to serve' a given State's market."[34] Thus, the "principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."[35] Justice Kennedy found that Justice Brennan's "stream-of-commerce alone" rationale "discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability,"[36] and he thus rejected the rationale as "inconsistent with the premises of lawful judicial power."[37] In contrast, Justice O'Connor's "stream-of-commerce plus" theory required some sort of targeting and was therefore consistent with Justice Kennedy's interpretation of purposeful availment.[38]

Justice Kennedy supported "[t]he conclusion that jurisdiction is in the first instance a question of authority rather than fairness"[39] by noting that the principal opinion in *Burnham v. Superior Court*[40] — in which the Court held that service of process within a state, without more, can satisfy due process[41] — "conducted no independent inquiry into the desirability or fairness" of that rule.[42] He also observed that fairness considerations had not excused a lack of purposeful availment in previous cases.[43] He further asserted that "two principles [were] implicit in" this analysis: first, that the question of personal jurisdiction "requires a forum-by-forum, or sovereign-by-sovereign, analysis"; and second, that "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."[44]

Finally coming to the facts of the case, Justice Kennedy first noted that only McIntyre UK's "purposeful contacts with New Jersey, not with the United States," were relevant.[45] Importantly, McIntyre UK did not have an office in New Jersey, own any land there, pay taxes

---

[33] *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[34] *Id.* at 2788 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 2789.

[38] *See id.* at 2790.

[39] *Id.* at 2789.

[40] 495 U.S. 604 (1990).

[41] *Id.* at 628 (opinion of Scalia, J.).

[42] *Nicastro*, 131 S. Ct. at 2789 (plurality opinion) (quoting *Burnham*, 495 U.S. at 621) (internal quotation marks omitted).

[43] *See id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).

[44] *Id.*

[45] *Id.* at 2790.

there, advertise there, or send any employees there.[46] On these facts, Justice Kennedy found that McIntyre UK may have had an intent to serve the United States market as a whole, but it did not purposefully avail itself of the New Jersey market in particular.[47]

Justice Breyer, joined by Justice Alito, concurred in the judgment.[48] He criticized the plurality for "announc[ing] a rule of broad applicability without full consideration of the modern-day consequences,"[49] specifically noting the potential jurisdictional problems that may arise in the internet context.[50] Instead, Justice Breyer argued that this case could be resolved by a straightforward application of the Court's precedents.[51] He found that neither Justice Brennan's nor Justice O'Connor's stream-of-commerce test would support jurisdiction since, at a minimum, McIntyre UK did not even have a regular flow of sales in New Jersey.[52] While declining to join the plurality's reasoning, Justice Breyer also criticized the New Jersey Supreme Court's rule as "rest[ing] jurisdiction . . . upon no more than the occurrence of a product-based accident in the forum State."[53] He further asserted that he could not "reconcile so automatic a rule with the constitutional demands for 'minimum contacts' and 'purposefu[l] avail[ment].'"[54]

Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented.[55] Arguing that the Model 640 Shear arrived in New Jersey not as a result of "random[]" and "fortuitous[]" events, but rather as a result of the distribution system McIntyre UK deliberately created, she maintained that personal jurisdiction in New Jersey was proper.[56] She criticized the plurality for deemphasizing fairness in favor of sovereignty[57] and for relying on "submission" notions reminiscent of the "long-discredited fiction of implied consent."[58] Instead, the "modern approach to jurisdiction," she argued, "gave prime place to reason and fairness."[59] Justice Ginsburg asserted that it was reasonable to conclude that by engaging McIntyre America to sell in the U.S. market, "McIntyre UK thereby availed itself of the market of all States in

---

[46] *Id.*
[47] *Id.*
[48] *Id.* at 2791 (Breyer, J., concurring in the judgment).
[49] *Id.*
[50] *Id.* at 2793.
[51] *Id.* at 2791.
[52] *See id.* at 2792.
[53] *Id.* at 2793.
[54] *Id.* (alterations in original) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980)).
[55] *Id.* at 2794 (Ginsburg, J., dissenting).
[56] *Id.* at 2797.
[57] *See id.* at 2798.
[58] *Id.* at 2799 n.5.
[59] *Id.* at 2800.

which its products were sold by its exclusive distributor."[60] She then distinguished the decisions in *World-Wide Volkswagen* and *Asahi*, rejecting McIntyre UK's contention that those decisions required reversal of the New Jersey Supreme Court.[61] Justice Ginsburg ended her analysis with two observations: first, that the Court's holding in *Nicastro* would place U.S. plaintiffs at a disadvantage compared to plaintiffs in other parts of the world; and second, that reasonableness may justify treating multinational defendants who actively seek to serve multiple jurisdictions differently from local defendants who do not have such ambitions.[62]

Although the Court again could not produce a majority opinion to clarify the contours of the stream-of-commerce doctrine, *Nicastro* signals a renewed emphasis on sovereignty, as opposed to fairness or reasonableness, as the core component of personal jurisdiction. By placing increased focus on whether the defendant's activities "manifest an intention to submit to the power of a sovereign,"[63] the Court's approach has significant implications for the development of the law of personal jurisdiction in the internet context.

Under the territorial approach of *Pennoyer v. Neff*,[64] personal jurisdiction was predicated on state power and its controlling rationale was sovereignty.[65] In *International Shoe Co. v. Washington*,[66] the Court seemed to discard *Pennoyer*'s emphasis on sovereignty.[67] In announcing the minimum contacts test, the Court placed significant emphasis on "traditional notions of fair play and substantial justice,"[68] indicating a break with the conceptual underpinnings of *Pennoyer*'s rule in favor of reasonableness and fairness considerations.[69]

Although in succeeding cases the Court attempted to "tie[] together the flexible standard of *International Shoe* and the state sovereignty prong of *Pennoyer*,"[70] by the early 1980s it was clear that reasonable-

---

[60] *Id.* at 2801.

[61] *See id.* at 2802–03.

[62] *Id.* at 2803–04.

[63] *Id.* at 2788 (plurality opinion).

[64] 95 U.S. 714 (1877).

[65] *See id.* at 722; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 (1987).

[66] 326 U.S. 310 (1945).

[67] *See* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 463 (1st Cir. 1990).

[68] *Int'l Shoe Co.*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted).

[69] *See* Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 107 (1991) ("*International Shoe* represented a repudiation of the established personal jurisdiction rule and, seemingly, the theory underlying that rule.").

[70] *Donatelli*, 893 F.2d at 463; *see, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293–94 (1980); Hanson v. Denckla, 357 U.S. 235, 250–51 (1958).

ness was the touchstone of personal jurisdiction doctrine. First, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[71] the Court asserted that the Due Process Clause "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[72] Later, in *Asahi*, although the Court splintered on how the stream-of-commerce theory would establish minimum contacts, eight Justices agreed that the exercise of jurisdiction would be unreasonable.[73] Indeed, Justice Brennan, who would have found that minimum contacts existed, characterized the case as one in which the unreasonableness of jurisdiction would trump purposeful availment.[74]

The Court's decision in *Nicastro*, specifically the reasoning embodied in the plurality opinion, signals a shift in this trend. The doctrinal mechanism through which the increased emphasis on sovereignty operates is *Hanson v. Denckla*'s[75] purposeful availment requirement.[76] In *Hanson*'s initial conception, purposeful availment operated to protect state sovereignty.[77] However, as reasonableness became the touchstone of jurisdiction in the 1980s, purposeful availment was reinterpreted to guard against a defendant's being haled into a forum "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."[78] Yet the *Nicastro* plurality's appeal to *Hanson*'s purposeful availment requirement took on a strikingly different rationale. Instead of characterizing the test as a way to determine reasonableness, the plurality asserted that purposeful availment occurs when a defendant "submit[s] to a State's authority."[79] In doing so, the plurality elevated purposeful availment — as well as the values that it was initially created to protect — to a "general rule" that would trump any appeal to "[f]reeform notions of fundamental fairness."[80] Indeed, the plurality used purpose-

---

[71] 456 U.S. 694 (1982).

[72] *Id.* at 702; *see also id.* at 703 n.10.

[73] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–16 (1987).

[74] *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment).

[75] 357 U.S. 235 (1958).

[76] *Id.* at 253.

[77] *See id.* at 251 ("[Due process] restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

[78] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980)). Indeed, *Burger King* subordinated the purposeful availment requirement to a way of defining whether a defendant could "reasonably anticipate being haled into court there." *Id.* at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (internal quotation mark omitted).

[79] *Nicastro*, 131 S. Ct. at 2787. The plurality's appeal to a party's submission to state authority is reminiscent of the theory of implied consent or presence that dominated the Supreme Court's personal jurisdiction jurisprudence in the period between *Pennoyer* and *International Shoe*. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356–57 (1927); Phila. & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917).

[80] *Nicastro*, 131 S. Ct. at 2787.

ful availment to approve of Justice O'Connor's *Asahi* opinion and reject Justice Brennan's.[81] However, the *Nicastro* plurality went further than Justice O'Connor did; by reformulating the purposeful availment requirement's underlying rationale to emphasize sovereignty, the plurality changed the way that courts will apply the test. This shift has significant implications for the future of personal jurisdiction doctrine as courts confront new changes in communication and technology.

For over half a century, the Supreme Court has recognized that the scope of personal jurisdiction must adapt as society develops new ways of doing business,[82] such as transacting business through the mail,[83] over wires,[84] and in complicated manufacturing and distribution arrangements.[85] The advent of the internet at the end of the twentieth century and its explosion into nearly all facets of daily life have exacerbated the difficulties courts face in fashioning jurisdictional rules to adapt to these changes.[86] Some courts have followed traditional jurisdictional analyses,[87] while others have attempted to design new tests altogether.[88] As one commentator has aptly described the challenge, because "the Internet increases both the number and breadth of one's contacts with other places . . . the Internet raises the specter of subjecting far more persons to suit in far more places."[89]

Justice Breyer recognized the changing nature of commerce in the internet context in his *Nicastro* concurrence, rhetorically asking whether personal jurisdiction would exist over a company that "targets the world by selling products from its Web site" or over a company that does not sell directly but rather sells through an intermediary like Amazon.com.[90] The lower courts have already weighed in on these questions. In the former situation, courts often employ the test first formulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[91] to

---

[81] *See id.* at 2788–90.

[82] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 250–51 (1958).

[83] *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

[84] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

[85] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 106–07 (1987).

[86] *See* Arthur R. Miller, *The Emerging Law of the Internet*, 38 GA. L. REV. 991, 995–99 (2004) (discussing the difficult issues surrounding personal jurisdiction in the internet context).

[87] Many courts employ a traditional minimum contacts test. *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1015–16 (9th Cir. 2008). Other courts, especially in the context of intentional torts, follow the effects test first articulated by the Supreme Court in *Calder v. Jones*, 465 U.S. 783, 789 (1984). *See, e.g.*, Tamburo v. Dworkin, 601 F.3d 693, 702–03 (7th Cir. 2010); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714–15 (4th Cir. 2002).

[88] *See* C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 602–05 (2006).

[89] Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1823 (2003).

[90] *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).

[91] 952 F. Supp. 1119 (W.D. Pa. 1997).

determine whether the website operator purposefully availed himself of the laws of the forum state. Under *Zippo*, commercial websites that do direct business with buyers are generally subject to jurisdiction in forums related to those sales.[92] Courts have been quite liberal in finding purposeful availment,[93] in many cases finding that one interactive website, plus a few sales to a state, is sufficient to establish personal jurisdiction.[94] Justice Breyer's latter scenario, in which a defendant sells through an intermediary website, is a more recent phenomenon, but lower courts have been equally permissive in finding purposeful availment. For example, courts have exercised jurisdiction over defendants who conduct their business through eBay or Amazon.com and "h[o]ld themselves out as shipping to the entire United States and most of the world,"[95] even if the defendants have made very few shipments to the state exercising personal jurisdiction and derive very little revenue from those sales.[96]

The *Nicastro* plurality's emphasis on a strict interpretation of purposeful availment based on sovereignty values rather than reasonableness values will likely serve to restrict the situations in which personal jurisdiction can be exercised over defendants engaged in internet commerce. First, by characterizing "sovereign authority," not "fairness and foreseeability," as personal jurisdiction's "central concept,"[97] the plurality's reasoning instructs lower courts to place more emphasis on consummated transactions themselves rather than on general notions of what the defendant could or should have expected by placing his products on the internet.[98] Second, by mandating a "sovereign-by-sovereign" approach to the question of personal jurisdiction,[99] the plurality opinion indicated that geographical borders will become more relevant in the internet context, and thus courts will be more hesitant to look to broader internet conduct to justify jurisdiction.[100] Instead,

---

[92] *See id.* at 1124 (applying a "sliding scale" model in which the likelihood of personal jurisdiction is proportional to the interactivity of the defendant's website).

[93] *See* Note, *supra* note 89, at 1828 ("If knowingly sending a letter or making a phone call to a state can constitute purposeful availment, then [this test] may become literally meaningless as a barrier to exercising jurisdiction over a defendant who keeps a website.").

[94] *See* Yasmin R. Tavakoli & David R. Yohannan, *Personal Jurisdiction in Cyberspace: Where Does It Begin, and Where Does It End?*, 23 INTELL. PROP. & TECH. L.J. 3, 6 (2011).

[95] Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 822 (E.D. Mich. 2006).

[96] *See, e.g.*, Aero Toy Store, LLC v. Grieves, 631 S.E.2d 734, 736, 740–41 (Ga. Ct. App. 2006); Crummey v. Morgan, 965 So. 2d 497, 500 (La. Ct. App. 2007); Malcolm v. Esposito, No. 215392, 2003 WL 23272406, at *1, *4 (Va. Cir. Ct. Dec. 12, 2003).

[97] *Nicastro*, 131 S. Ct. at 2788 (plurality opinion).

[98] *See, e.g.*, Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (finding jurisdiction proper partially because defendant "consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally").

[99] *Nicastro*, 131 S. Ct. at 2789 (plurality opinion).

[100] *See, e.g.*, 3M Co. v. Mohan, No. 09-1413, 2010 WL 786519, at *1–3 (D. Minn. Mar. 5, 2010) (basing jurisdiction in part on defendant's roughly 2100 transactions on eBay and Amazon.com).

courts will be forced to determine whether the website operator or seller targeted a particular forum.[101] Some courts have already recognized this more limited scope,[102] and *Nicastro* ensures that others will too. This approach could potentially stand in opposition to the *Zippo* approach: although under *Zippo* there may be personal jurisdiction over an internet company if people in the forum are simply purchasing the product on an interactive website, under the *Nicastro* plurality's reasoning there may not be jurisdiction unless the company is specifically marketing to the particular forum. This factual scenario has the potential to implicate a situation that the plurality thought was rare: when a defendant has purposefully availed himself of the United States market as a whole, but not that of any particular state.

These effects are likely to occur despite the Court's fragmentation. For one thing, *Nicastro* is the Supreme Court's first foray into personal jurisdiction in two decades, and courts and commentators have been asking for Supreme Court guidance for years.[103] Whatever treatment lower courts decide to attach to the plurality's opinion, it is certain that all courts will consider it, and many will likely adopt its reasoning, especially those that have endorsed Justice O'Connor's *Asahi* approach or those that analyze stream-of-commerce questions under both *Asahi* opinions.[104] Furthermore, neither of the Supreme Court's last two cases regarding personal jurisdiction, *Burnham* and *Asahi*, garnered a majority, yet each stands as the authoritative opinion for the subset of personal jurisdiction doctrine it addresses. As the Court's most recent pronouncement on the stream-of-commerce doctrine, *Nicastro* will likely have significant influence.

Nicastro's implications for internet jurisdiction will have both advantages and disadvantages. On one hand, restricting personal jurisdiction in the internet context will serve the values of predictability and consistency.[105] A significant goal in fashioning jurisdictional rules has been to ensure that defendants may structure their primary behavior so as to predict where they will be amenable to suit.[106] On the

---

[101] *See* Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380–84 (2001) (advocating a targeting approach).

[102] *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1019 (9th Cir. 2008); Sayeedi v. Walser, 835 N.Y.S.2d 840, 846 (N.Y. Civ. Ct. 2007).

[103] *See, e.g.*, Floyd & Baradaran-Robison, *supra* note 88, at 666.

[104] Only three circuits have adopted Justice Brennan's approach, whereas five circuits have adopted Justice O'Connor's, and an additional five analyze cases under both frameworks. *See* Matthew R. Huppert, Note, *Commercial Purpose as Constitutional Purpose: Reevaluating* Asahi *Through the Lens of International Patent Litigation*, 111 COLUM. L. REV. 624, 642 (2011).

[105] *Cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in the judgment).

[106] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Although predictability and consistency could arguably be best served through the adoption of a clear rule — no matter what exactly that rule is — the unpredictability of contacts inherent in the internet con-

other hand, increased focus on sovereignty and geographical boundaries might not be compatible with the nature of the internet. Indeed, one of the internet's most fundamental characteristics is its boundlessness and global scope. As companies and individuals seek access to new markets and expand their businesses, the internet provides a cheap and easy way to do so. Along with the privilege of serving these markets, however, the concomitant obligation to submit to those markets' laws seems to be firmly grounded in Supreme Court precedent.[107] Taking an overly geographical view may upset this careful quid pro quo by enabling companies to take advantage of the benefits but shirk the obligations.

III. FEDERAL STATUTES AND REGULATIONS

A. 42 U.S.C. § 1983

1. Postconviction Access to DNA Evidence. — Forty-eight states and the District of Columbia have enacted statutes that grant some convicted prisoners access to DNA testing,[1] creating a liberty interest in proving innocence.[2] In its 2009 opinion in *District Attorney's Office v. Osborne*,[3] the Supreme Court rejected substantive due process as a basis for challenging a state's refusal to test DNA evidence, but it declined to decide by what mechanism a prisoner could bring a procedural due process claim to vindicate the state-created liberty interest.[4] Last Term, in *Skinner v. Switzer*,[5] the Supreme Court held that prisoners challenging denial of DNA testing provided by state statute were not required to seek writs of habeas corpus[6] but could instead use 42

---

text, *see* Note, *supra* note 89, at 1823, indicates that a clear rule which restricts the scope of personal jurisdiction is best tailored toward satisfying these values.

107 *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

1 *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Oct. 2, 2011). Neither Massachusetts nor Oklahoma has such a statute, *id.*, but both provide procedures for accessing newly discovered evidence, *see* Brief for the Respondent at 29 n.11, Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6) (reporting that all states, with the possible exception of South Dakota, "provide at least one . . . mechanism by which a prisoner may seek relief based on evidence of innocence such as a favorable DNA test result"). *See generally DNA Laws Database*, NAT'L CONFERENCE OF STATE LEGISLATURES, tbl.3 (2010), http://www.ncsl.org/portals/1/Documents/cj/Table3PostConvictionTesting.pdf.

2 *See Osborne*, 129 S. Ct. at 2319.

3 129 S. Ct. 2308.

4 *Id.* at 2321–22. A procedural due process violation occurs if the procedure provided to the prisoner "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *See id.* at 2320 (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992) (internal quotation marks omitted)).

5 131 S. Ct. 1289 (2011).

6 *See* 28 U.S.C. § 2254 (2006).