

PERSONAL JURISDICTION FOR ALLEGED INTENTIONAL OR
NEGLIGENT EFFECTS, MATCHED TO FORUM REGULATORY
INTEREST

by
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This Article discusses how the Walden Court may have mischaracterized the effects test of Calder, and it explores how Calder's effects test should be applied. This Article argues that personal jurisdiction should be based primarily on forum regulatory interest, and it uses this link to apply effects test analysis in defamation situations, then in other contexts unexplored by the Walden opinion. Dram-shop liability and products-liability cases are explored as situations where personal jurisdiction should be upheld, similarly to Calder, on the basis of a plaintiff's good-faith allegation that a defendant intentionally acted to create foreseeable forum effects. To the extent courts are uncomfortable applying such effects analysis, and instead insist on additional defendant forum conduct, this Article suggests such action may be in response to the reality that a plaintiff's jurisdictional allegations almost always involve factually contested matters that, unlike a defendant's presence, cannot be determined apart from the merits of the case. This Article urges courts, however, to resist importing defendant presence-based considerations into modern personal jurisdiction analysis. Instead, courts should allow a plaintiff's good-faith allegations of defendant-initiated effects to support jurisdiction. Such an approach is the best way to fully implement the minimum contacts approach required by International Shoe.

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INTRODUCTION

*Walden v. Fiore*¹ being a unanimous opinion, one assumes there is little that could be said against the result—no jurisdiction in Nevada over a Georgia police officer on facts as characterized by the Court. *Walden*'s factual assumption was that all of the defendant's relevant conduct occurred entirely in Georgia, and, more importantly, that there was no defendant intention to cause effects anywhere else. If a defendant aims nothing at the plaintiff's forum, the plaintiff cannot create jurisdiction just because that is where she chooses to feel her pain. The facts as thus characterized by the *Walden* Court are the precedential limits of the case, and little new has been added to personal jurisdiction jurisprudence. As Justice Thomas summed up, “[w]ell-established principles of personal jurisdiction are sufficient to decide this case.”² Difficult issues, involving, for example, alleged intentional cyber-attacks and “phishing” schemes, could wait for another day.³

Accepting the *Walden* opinion as thus characterized by the Court, it does not stand for much. I explore here only one potential miscue in the *Walden* opinion about how to read *Calder*,⁴ and then briefly discuss a few difficult situations that lower courts inevitably must address when the Court provides as little guidance as it has about how to apply the effects test outside easy situations. One of those situations, products-liability effects cases, otherwise known as stream-of-commerce cases, deserves far more treatment than here will be given, but hopefully the emphasis here placed on regulatory interest can trigger some productive responses that would provide more clarity in this confused area. Along the way I also discuss an important question about personal jurisdiction more generally that the Court so far has not directly addressed—how, if at all, should personal jurisdiction doctrine protect defendants from the possibility of assertions that do not match with what the defendant actually did? My preliminary position is that we must trust the courts with proper regulatory authority over a defendant's alleged conduct to deal with this problem, because there is no other satisfying way to proceed without under-

¹ 134 S. Ct. 1115 (2014).

² *Id.* at 1126.

³ *Id.* at 1125 n.9.

⁴ *Calder v. Jones*, 465 U.S. 783 (1984).

mining the gains achieved by *International Shoe*.⁵ The goal of all these comments is to stimulate further discussion, and I appreciate the opportunity Professor Parry has provided in this symposium to write freely.

I. THE STARTING ASSUMPTION OF FORUM REGULATORY INTEREST AS WHAT UNDERLIES EFFECTS-BASED PERSONAL JURISDICTION

My starting point and guiding principle for personal jurisdiction analysis continues to be that personal jurisdiction should presumptively match with constitutional ability to apply forum law. I of course recognize that the Court several times has rejected efforts to link the two concepts,⁶ but I continue to believe that this is a mistake.⁷ As applied to personal jurisdiction under the effects test, linking ability to apply forum law with ability to hear the case seems especially straightforward. Plaintiff convenience can never justify personal jurisdiction under a due process right designed to protect defendants from an overreaching sovereign. Effects jurisdiction thus cannot be based on the convenience a plaintiff would obtain by being allowed to sue where effects were felt. When the only thing the defendant has done in the forum is produce harmful effects, it is also pretty clear that any arguments about defendant presence, related contacts, convenience, fairness, or availment are out the window. When all that the defendant has done is produce effects, why should she have to answer where those effects were manifested? The short and correct answer is because the forum where those effects were aimed has a right to regulate that conduct by its law.

“Availment” especially, in a person-on-the-street sense of the term, is necessarily problematic under the most pure forms of effects-test jurisdiction. Post-*Calder*, the Court for a while properly transitioned its terminology from “purposefully avail” to “purposefully direct,”⁸ in recognition of the effects-type jurisdiction it had approved in *Calder* and *Keeton* explicitly, and by dicta for products-liability situations in *World-Wide Volkswagen*.⁹ When one fires a bullet into a neighboring state, as under the famous Second Restatement hypo discussed in *Kulko*,¹⁰ it is hardly accurate to describe this action as an availment of the benefits and protections of forum law that should give rise to reciprocal obligations associated with the

⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁶ *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 214–16 (1977); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).

⁷ *See, e.g., Stanley E. Cox, The Missing 'Why' of General Jurisdiction*, 76 U. Pitt. L. Rev. 153, 193–95 (2014).

⁸ *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985).

⁹ *Calder*, 465 U.S. at 789; *Keeton*, 465 U.S. at 781; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

¹⁰ *See Kulko v. Superior Court*, 436 U.S. 84, 96 (1978) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1971)). The gun-firing hypo is now in Comment *e* of the 1988 Revision of the Second Restatement.

forum benefits. All the defendant wants to happen in the forum is to have deleterious effects felt there when the bullet kills or maims. Forum law certainly provides no benefits to the defendant associated with this action. It only outlaws what the defendant has done.

To its credit, the *Walden* Court returned to the *Shaffer* formulation of “relationship among the defendant, the forum, and the litigation”¹¹ as the proper due process personal jurisdiction inquiry, noting that this was the approach used in *Keeton* and *Calder*.¹² That formulation is appropriate for all personal jurisdiction inquiries,¹³ but it works especially well for intentional-effects jurisdiction, such as the gun-firing hypo. When the only defendant action associated with the forum is an intended deleterious effect, that effect is what gives rise to the forum litigation and also is what entitles the forum to regulate the defendant’s conduct. As the Second Restatement correctly analyzed the situation in its original comment, “one who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he had actually fired the bullet in the state.”¹⁴ Whether he actually fired the bullet in or outside the state, the state’s regulatory interest over the defendant is equally (excuse the pun) triggered when his bullet hits his intended forum target.

II. WHERE ARE EFFECTS AIMED FOR *CALDER* INTENTIONAL TORT SITUATIONS?

A. *The Walden Court’s Questionable Emphases re: Calder*

The main surprise in the *Walden* opinion was how it described *Calder*, especially by seeming to assume, and if so incorrectly doing so, that a necessary condition for the effects jurisdiction approved in *Calder* was that the offending *National Enquirer* article had to have been published in high quantity in California. Under the *Walden* description of *Calder*, where Shirley Jones lived seemed not important to the *Calder* effects analysis at all, and where she worked only secondarily so. As the *Walden* Court summed up its *Calder* analysis:

[T]he reputational injury caused by the defendants’ story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. . . . [T]he “effects” caused by the defendants’ article—*i.e.*, the injury to the plaintiff’s reputation in the estimation of the California public—connected the defendants’ conduct to *California*, not just to a plaintiff who lived there. That connection, com-

¹¹ *Shaffer*, 433 U.S. at 204.

¹² *Walden v. Fiore*, 134 S. Ct. 1115, 1121, 1123, 1126 (2014).

¹³ This includes even general jurisdiction inquiries, as I have recently argued. See Cox, *supra* note 7, at 200–01.

¹⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1971).

bined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.¹⁵

This emphasis on California publication is problematic to the extent it shifts attention away from the kind of aiming that *Calder* actually seemed to endorse. Here are the key *Calder* passages, with emphasis added regarding the plaintiff's residence and work as being key to the jurisdictional analysis:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

....

Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the *State in which she lives and works* and in which the National Enquirer has its largest circulation.¹⁶

Given *Calder's* litany of where the plaintiff lived, worked, and where the greatest amount of circulation occurred, I had always considered it an open question how many of those things must occur in the same state before jurisdiction would be appropriate, or which if any of those three things could be determinative for jurisdiction. When I taught this case to my students, I asked them to consider variations on the facts to try to get at what *Calder* aiming might mean for situations where all three things did not occur in the same forum. One variation had Jones live somewhere else (say in a small-population state like Montana, Idaho, or Wyoming), but still work as an actress in California. It seemed to us that jurisdiction on such changed facts would still be appropriate in California, but we thought it might also be appropriate in Jones's home state. This argument was based partly on the "emotional distress" and resident harm language quoted from *Calder* above, but it was also based on the gloss to *Calder* that the Court provided in the companion *Keeton* case, where the Court wrote:

Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the fo-

¹⁵ *Walden*, 134 S. Ct. at 1124.

¹⁶ *Calder*, 465 U.S. at 788-90 (emphasis added) (footnote omitted). The Court also cited in support the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37.

cus of the activities of the defendant out of which the suit arises.
See *Calder*¹⁷

It certainly did not seem to us that plaintiff's residence, even standing alone, was automatically irrelevant to the defamatory aiming upon which the *Calder* Court based jurisdiction.

In another variation of the facts, I switched Jones's acting career to New York and her residence to the East Coast, with all the underlying fictions of the libelous story having nothing to do with Hollywood, but instead only with Broadway. Under that variation, we almost always agreed that the fact of most circulation of the libelous story in California was not particularly relevant to the targeting jurisdiction approved by *Calder*. Notwithstanding the possible contrary implications of lower court cases such as *Brother Records*,¹⁸ we thought it important that *Calder* was argued and decided separately from *Keeton*, and that the *Calder* court justified jurisdiction over the writer and editor based on targeted aiming instead of based on distribution by the publisher to readers for profit. For commercial publishers, *Keeton* authorized jurisdiction wherever they distributed a libelous item for sale; for authors and editors who did not directly publish, we understood *Calder* to require a more personalized targeting related to who was being libeled and what the libel was about. California being the most populous state and therefore having the greatest number of readers seemed to us to give it no higher claim over any other state based just on the general public reading a libelous story. To use the *Walden* language, it seemed to us that the "various facts that gave the article a California focus"¹⁹ were the heart of what justified *Calder's* effects jurisdiction. We of course noted the *Calder* Court's emphasis that California was also the state of largest circulation, but upon further examination, that fact seemed to us the least relevant of the factors listed by the Court in support of jurisdiction.

In another variation on the *Calder* facts, I had the authors and editors write an article that strongly argued Shirley Jones should not be selected for a Broadway role for which she was one of the leading candi-

¹⁷ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984).

¹⁸ *Brother Records, Inc. v. HarperCollins Publishers*, 682 A.2d 714, 717–18 (N.H. 1996) (holding that author and editor of allegedly libelous book about The Beach Boys could be sued in New Hampshire based on book being published there, which they desired and by which they profited). *Brother Records* primarily relied upon *Keeton* rather than *Calder* for its results, even though the factual match-up to author and editor arguably is closer with *Calder* than to the publisher situation in *Keeton*. It is possible to distinguish the *Brother Records* facts from *Calder* by emphasizing a direct royalty profit to the *Brother Records* defendants based on the volume of New Hampshire (forum) sales, a fact which presumably was not involved in *Calder*. Nevertheless, the overall approach and tone of the *Brother Records* opinion does not seem consistent with *Calder*. The case draws no meaningful distinction between publisher and author, and accordingly seems to approve nationwide jurisdiction over authors wherever their works are published.

¹⁹ *Walden*, 134 S. Ct. at 1124.

dates, based on alleged libels about things she had supposedly done while working in Hollywood. The sources and facts thus remained California based, but the article's purpose was to harm Jones in New York. Should jurisdiction be appropriate in New York? I sometimes also moved Jones to New York if that seemed necessary to generate good discussion. I am not certain what the answer to my own hypothetical should be, but I remain convinced that the best way to approach such problems is to analogize to gun firing, and to focus on the potential regulatory authority of the jurisdiction where the bullet was aimed.

In a defamation case involving widespread dissemination of a libel, such as through a mass-produced magazine article, it would be rare if at least some first-generation publication did not occur in the forum. But the focus of a targeting inquiry, at least as I understand *Calder* to have engaged in it, is not on how much (or perhaps even whether) forum publication occurred, but instead upon whether the forum was the place where devastating effects were intended by the defamer as a result of publication. It is not immediately obvious why direct publication needs to occur in the forum at all. So long as those whom the defamer intended to be affected by the publication learn of it as the defamer intended, and so long as they then act in response to the defamation as the defamer expected them to, the defamer's intention has been accomplished, and the targeted effects have been realized. That seemed the essence of the targeted effects test *Calder* approved.

B. Should the Reality that Courts Decide Jurisdictional Questions on the Basis of Plaintiff Allegations (Versus Established Facts) Affect the Minimum Contacts Jurisdictional Equation?

Since I approach personal jurisdiction questions, as previously stated, from the assumption that forum regulatory interest is the real underlying rationale for jurisdiction, it is hard for me to imagine why a court might insist instead on actual, or even greatest, dissemination of an article in the forum as condition for allowing jurisdiction based on the kind of targeted effects approved in *Calder*. The effects test underlying *Calder* is more limited than causing harm to reputation among the general public. It is based on a different and more particularized regulatory interest than protecting the general public from false information. The issue of such potential disconnect between court limits on jurisdiction and the underlying regulatory purpose for jurisdiction will recur in other situations examined in this essay, but it can be introduced briefly now in relation to *Calder*'s effects test for writers who target harm through articles published by others.

What the Court could be doing, if it were to refuse to allow a state with the strongest regulatory interest to assert jurisdiction, is to protect the defendant against potentially invalid plaintiff suits. Such policy does not make good jurisprudential sense to me, and the Court certainly does not say this is what it wants to do, but this is the best explanation I can

come up with for refusing to allow a forum to hold a defendant responsible for his allegedly realized intentions when that forum has the strongest apparent regulatory interest in regulating the defendant's wrongful conduct.

The problem the Court may indirectly be trying to address is one that is fundamental to most personal jurisdiction situations. It is the problem of not knowing if the defendant has really done anything wrong until you have the trial, but nevertheless having to decide if the defendant has done something wrong for purposes of determining whether you get to even have a trial. The problem as applied to effects-test situations is that maybe the effects the plaintiff alleges were non-existent. Maybe there were no deleterious intentions. How do we deal with the reality that we don't really know for most libel cases whether a libel "gun" was even fired, when we are trying to decide if a case should be heard in the forum where the plaintiff claims that targeted libel effects were aimed and realized?

The gun-firing hypothetical works well when making the case for jurisdiction in a forum where a plaintiff claims that literal physical effects were intended and resulted. It is hard to argue against the reality of a physical bullet in a body in the forum. If the defendant conceded that he or she is the one who fired the shot, argument over! But in most tort situations it is not so clear at the front end that the defendant has done anything presumptively wrong. The plaintiff *claims* that the defendant libeled her. But maybe all the statements were true. The plaintiff *claims* the story was intended to cause her potential employer not to hire her for the role, but maybe the story was issued for some other purpose, such as informing the public about plaintiff's antics as a matter of entertainment. In most contested litigation, most issues are . . . contested.

For personal jurisdiction arguments, when courts don't know whose version of the facts is correct, their procedural law almost always requires that they accept as true the plaintiff's version of the jurisdictional events, so long as there is some support for that version that a fact finder could believe to be true.²⁰ The balance is thus weighted in plaintiff's favor towards finding jurisdiction valid. In all states except Washington,²¹ we also do not seriously penalize the plaintiff if she was wrong about the things she alleged happened to establish jurisdiction, so long as the allegations were made in good faith. This means the costs to the defendant of having

²⁰ See, e.g., *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782–83 (7th Cir. 2003) (describing prima facie approach where no hearing is held, and describing other circuits' approaches as similar).

²¹ See WASH. REV. CODE § 4.28.185 (2012) (authorizing court to award reasonable attorney fees, as well as other costs, to a defendant who has been subjected to long-arm jurisdiction and who prevails in the action). For a leading Washington precedent applying the provision, see *Scott Fetzer Co. v. Weeks*, 859 P.2d 1210 (Wash. 1993). There, the trial court initially awarded \$116,788 and the Washington Supreme Court eventually approved an award of \$22,454.28 for defendant costs fighting personal jurisdiction on plaintiff's claim that was worth, if true, around \$19,000. *Id.* at 1212.

to appear and defeat the plaintiff's jurisdictional claims, so long as there was some good-faith basis for them, is never fully recovered. When the facts upon which jurisdiction constitutionally can be based are disputed, as they almost always are,²² a defendant who really did not do what the plaintiff alleged is never able to recover the costs of having to defend in a place that she never should have had to defend in to start with. This could cause some defendants not to bother fighting jurisdiction and instead to settle, especially if the plaintiff's claims are not large.

Insisting that the plaintiff sue somewhere else, where the defendant has a more tangible or greater number of contacts, could be an unacknowledged way around this dilemma. As previously stated, the Court has never explicitly endorsed such a rationale. Nor should it indirectly do so. Insisting on a greater quantity or a more physical type of contacts, which are less related to what the litigation is really about, is bad policy for several related reasons.

To start with, shifting jurisdiction elsewhere means only that plaintiffs may have to sue elsewhere, not that they will not sue. If the underlying plaintiff allegations are not valid, the defendant, so long as suit happens somewhere, will still be put to the expense of defending in a forum where she should not have had to defend at all. For high damage suits with another U.S. forum made available, litigation likely will still occur. The defendant only achieves victory if the only alternative forums made available are ones that the plaintiff finds too inconvenient to sue in and therefore drops the suit. And this normally happens only in lower-damage suits in the United States, because of the costs at the margin. Detering potentially non-meritorious plaintiff libel suits at the margin may be thought a worthy goal by some, but it is unclear to me why fundamental personal jurisdiction rules about how to count contacts should be pressed into service of that goal. A more effectively tailored tool to the problem of plaintiffs getting to bring cases that they shouldn't have been able to bring to start with might be to change the procedural rules at the front end so plaintiffs are required to prove alleged contacts in more de-

²² Even in the purest case of specific jurisdiction, where *all* activity allegedly giving rise to the cause of action occurred in the forum, the defendant seldom agrees that she committed any act giving rise to liability. Consider, for example, versions of the classic fact pattern of *Hess v. Pawloski*, 274 U.S. 352 (1927). A defendant drives her car into the forum, is involved in a traffic accident, and is sued thereafter by a forum resident claiming injuries as a result of defendant's negligence. The defendant merely driving her car into a jurisdiction does not create personal jurisdiction. That fiction of implied consent relied upon in *Hess* was rejected by *International Shoe*. 326 U.S. 310, 318 (1945) (describing *Hess* as a case where a single contact of the right "nature and quality," rather than fictive consent, justified personal jurisdiction); see also *Burnham v. Superior Court*, 495 U.S. 604, 618 (1990) ("*International Shoe* cast those fictions aside."). After *International Shoe*, on *Hess*-type facts, specific jurisdiction only comes into being because the plaintiff *alleges* that the defendant drove *negligently*. The defendant who was unwilling to settle almost certainly denies this allegation when the plaintiff sues. At that point in the litigation we do not know who is correct as to what happened.

tail, or to allow defendants to recover costs for fighting personal jurisdiction when they win jurisdictional battles. Such solutions more directly weed out the weakest or factually false personal jurisdiction cases.²³

The more fundamental problem of pushing litigation off to a less-interested forum is that it runs counter to the quite sensible notion behind the minimum contacts revolution of *International Shoe* that we should try to allow jurisdiction where there is regulatory interest rather than limit it to places where a defendant is more “present.” The *Shaffer* test of relationship among defendant, forum, and litigation, as the *Walden* Court recognized, is the appropriate way to evaluate whether jurisdiction satisfies due process. Under that test, one does not start with a presumption that a defendant should be sued only where some generic-type contacts are greatest, but instead asks what the litigation is about, what are the forum’s interests in it, and how the defendant’s actions are connected to it. Under the *Calder* effects test, jurisdiction is justified because the defendant allegedly aimed harm directly at a forum plaintiff in connection with her forum work, giving the forum a very high interest in regulating this conduct. To push the litigation off to another forum where the defendant is not alleged to have aimed the conduct as pointedly means the case is not being heard where the alleged conduct most mattered.

Pushing litigation off to other forums is not just bad for injured plaintiffs, but also for overall substantive results, and likely even for defendants generally. The harm to defendants may not be obvious, since the harm occurs to defendants not before the court. In the case before the court, a defendant who does not want to be sued where effects were allegedly targeted is arguing that she instead should be sued somewhere else. But if the litigating defendant wins this argument, she is supporting a precedent that allows jurisdiction in a less targeted forum, and this may come back to harm future defendants in other litigation. The more forums that plaintiffs have available, the more likely it is that one of those forums will be plaintiff-friendly. Only if less targeted forums are always fewer in number and always more defendant-friendly than specifically targeted forums will defendants as a whole likely be better off.

²³ They do so, of course, at a cost of slowing down the litigation to wage more detailed factual war at the front end, in the case of changing the rules for presuming facts about personal jurisdiction. In the case of both changes, they produce other problems associated with satellite litigation. My own preference is to strike procedural balances in favor of plaintiffs, because ultimately I see the development of substantive law for the truly meritorious plaintiff suits as an important part of societal justice that should be given the benefit of the doubt procedurally. But judges or commentators who take the opposite view, that a world without the possibility of much plaintiff litigation is basically a good thing, might nevertheless agree with me that to force all plaintiffs to sue somewhere other than where the most meritorious of them really was targeted strikes of overkill. Focusing on procedural reforms that more directly address any perceived problem of pro-plaintiff bias under existing rules would more directly address the perceived problem of too easy plaintiff access without cutting off those who have meritorious claims.

Consider, for example, another aspect of the *Calder* facts. If jurisdiction were to be approved in California because that was where the underlying facts behind the allegedly libelous story were sourced, this would establish jurisdiction in factual-background states, even though these are not automatically states where meaningful plaintiff harm was aimed. The libel suit against an editor or writer, as in *Calder*, is not about collecting information, but about what the defendant did with the information collected, allegedly incorrectly reporting it and targeting that misinformation to a forum that would cause the plaintiff harm. While the defendant may have directly acted in the sourcing states, it is hard to see why such states have any strong regulatory interest based solely on the defendant collecting information there. Defendants interested in curtailing plaintiff opportunities for forum shopping should prefer a jurisdictional rule that limits plaintiff forum shopping only to those forums that have strong interest in regulating the harms alleged.

When jurisdiction is limited to forums with true regulatory interest, this increases the likelihood for substantive justice by placing jurisdiction in a forum that will likely apply its own law.²⁴ When forums purport to apply another jurisdiction's laws, there is no guarantee they will get the content correct, and there is no way to appeal results to the forum whose law is supposedly being applied and interpreted. Additionally, forum procedural rules, and who the fact finders are, significantly affect actual results. It is important to realize that law appliers provide the real meaning of any law that is applied. Count me among those who believe that real law is more than word content!

There remains, despite these points, the fundamental reality that plaintiffs can begin litigation based on good faith allegations about jurisdiction that may not be true in fact. If the plaintiff's allegations end up not being true, the defendant should not have been sued where the plaintiff started the litigation. I think this is just a jurisdictional reality we have to accept in the post-*International Shoe* world. While it may come as a shock to some to realize that it is not actual defendant contacts that support jurisdiction, but rather allegations about those contacts, I see no other way to make specific jurisdiction work.

The alternative is to reject specific jurisdiction and return to some version of the territorial *Pennoyer* approach, under which it did not matter what the litigation was about or whether the forum had any regulatory interest in the underlying suit. All that mattered was consent or non-litigation-related forum power over the defendant.²⁵ The heart of the

²⁴ If more than one forum has legitimate regulatory interest, more than one forum's law is potentially applicable. The tendency among all choice-of-law approaches, however, is for the forum, if it has a right to do so under its choice-of-law approach, to apply its own law.

²⁵ While some might claim that Justice Kennedy's plurality opinion in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), represents a retreat towards such an approach, I do not think that is necessarily so. Since I will have more to say about

specific jurisdiction approach instead consists of placing jurisdiction where the cause of action allegedly arose. Since the defendant will almost always contest whether she actually did anything wrong, it will always be true that the defendant's contacts, when she wins, literally did not give rise to anything.²⁶ The end result, however, becomes a victory on the merits in the defendant's favor, with *res judicata* effect, even though technically the "facts" that supported jurisdiction were later found on the merits *not* to exist.

One might ask how a defendant's due process rights were not violated by subjecting her to a court's power if that court did not have "God's truth" minimum contacts sufficient to support jurisdiction, but instead only good-faith allegations about such contacts. The answer is that constitutional rights, even those like personal jurisdiction rights that go to the heart of a defendant's liberty interest, do not require anything approaching certainty as to the underlying basis for assertion of governmental power to resolve a controversy.²⁷ For example, in connection with criminal prosecutions, which involve literal loss of liberty, defendant arrests are based on mere probable cause, which hardly requires anything like certainty that the defendant committed a crime. If a jury or judge later acquits, or the prosecutor voluntarily dismisses, this does not mean probable cause to arrest did not exist, only that the significantly higher burden of proof required for conviction could not be met. In civil suits, we similarly leave it to the forum court system to sort out the reality of the facts once the plaintiff has passed some threshold of jurisdictional "truth." The threshold must be meaningful, but need not approach certainty. Contested litigation means true facts, including the true facts underlying jurisdiction, are not known until the litigation is over.

C. *Can There Be Calder-Targeting of an Unknown Forum?*

One of the issues the *Walden* Court found unnecessary to address was how courts should deal with situations where effects are clearly intended, but the location of the effects is not so clearly known. In *Walden*, the Court was able to avoid this problem because the Court viewed the facts as involving no effects being aimed anywhere.²⁸ It was not just that the police officer acted only in Georgia. He was viewed as acting in Georgia without credible allegation of any intention to cause harm anywhere else. *Walden* was therefore not an effects situation that could take advantage of *Calder's* effects test. In a true effects situation, however, the issue of how

negligent-effects jurisdiction in connection with product-liability cases a little later in this Article, that discussion can wait. At any rate, to the extent Justice Kennedy was advocating the need for affirmative submission to sovereign authority, any such requirement was rejected by the other five *Nicastro* Justices, and is not controlling law.

²⁶ See also *supra* note 22 and accompanying text.

²⁷ See *supra* note 23 and accompanying text.

²⁸ *Walden v. Fiore*, 134 S. Ct. 1115, 1124 (2014).

pointedly the defendant must aim conduct at a known forum is a real issue.

The type of hypothetical the *Walden* plaintiffs unsuccessfully tried to align themselves with involved credit card or internet fraud. Imagine, as plaintiff's counsel and Justice Breyer discussed in oral argument,²⁹ that someone improperly has obtained an out-of-state resident's credit card or debit card and starts tapping the plaintiff's credit line or funds. Stealing someone's funds to make purchases would appear sufficiently targeted at the defrauded plaintiff to support jurisdiction in the plaintiff's home state. As with firing a gun at someone in the forum, when someone reaches into a plaintiff's pocket, albeit only electronically, to take money from a person, the thief should be counted as present as if he were physically in the plaintiff's forum doing the robbing. The money disappears with exactly the same intended forum effect.

Perhaps, however, this first analysis has too quickly analogized to physical robbery. Where are a person's funds that have been electronically stolen? The defendant may argue that the funds only meaningfully come into existence at the point of fraudulent sale or purchase. The defendant may argue he brought the funds into being by allegedly fraudulently tapping them, and should only be subject to jurisdiction where he acted. These approaches miss the point of the harm that was intended. The more accurate analysis is that the funds became available to a defendant when the defendant pretended to be the plaintiff and stole the plaintiff's ability to access his own funds. By improperly acting as if he were the plaintiff, the defendant caused the plaintiff's funds to appear wherever the defendant wanted them, for whatever purchase the defendant wanted to make. The actual location of either the funds or the purchase is not what is most important. What is more important is that the defendant acted as if he were the plaintiff but against the plaintiff's interests. The situation seems to fit within *Calder* targeting, since the defendant targeted the plaintiff by pretending to be the plaintiff, and so has targeted the plaintiff's forum. Physical location of transactions is not so important as is the identity theft that led to financial harm.

In these *Walden*-related discussions about the credit card robbing defendant, the assumption was that the defendant knew the plaintiff's home forum at the time he was cyber-thieving. But that is not the reality for many cyber-thieving situations. Nor do I think such knowledge is necessary to support targeted *Calder* effects jurisdiction. A defendant can target a forum, even though he cannot name in advance the forum he is targeting. It is the intention to do harm, with the intention that the harm will occur wherever plaintiffs are, that supports jurisdiction. For instance, if a defendant puts a bomb on an airplane with a timer set to explode when the plane reaches a certain altitude, or after a certain number of minutes into the flight, is there any doubt courts would find jurisdiction

²⁹ See Transcript of Oral Argument at 37–38, *Walden*, 134 S. Ct. 1115 (No. 12-574).

appropriate over the defendant where the bomb went off and not just where the defendant placed it on the aircraft? Where the defendant intended his actions to have consequences was wherever the bomb went off. That he did not know for sure where that would be should not prevent jurisdiction in the place he targeted.

Viewing jurisdiction as needing to match with regulatory interest reinforces this conclusion. The forum's regulatory interest in bringing a bomber to justice is not based just on the fact that actual harm occurred in the forum. It is more properly based on the reality that the defendant intended just such harm as actually occurred. The harm was not merely hypothetically foreseeable; it was exactly what the defendant planned. There was no break in the causal chain that would prevent the forum from regulating the defendant's actions. Preventing the harm and holding a defendant accountable for it is a legitimate forum regulatory purpose. The ability to accomplish that purpose should match with personal jurisdictional power over the defendant who aimed harmful activity at the forum.

III. NEGLIGENT EFFECTS AND PERSONAL JURISDICTION

A questionable argument that sometimes has been made in connection with the effects test is that it should be limited only to intentional torts. Negligent actions, however, that have foreseeable effects were properly recognized by the Second Restatement as giving rise to jurisdictional exposure, and Supreme Court case law has not undercut that logic.³⁰ To deny jurisdiction for negligent effects solely because there is no direct defendant-forum contact over reads the foreseeability limitations imposed by *World-Wide Volkswagen*, and underplays the significance of the forum's interest in regulating defendants' purposeful acts that proximally cause harmful forum effects. I briefly sketch two types of example situations here, dram-shop liability and products liability, to illustrate the nature of the problem and why approaching it from a focus on regulatory interest is the most sensible way to decide if personal jurisdiction is appropriate.

³⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. d, e (1988); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1971). The examples used in both the original (comment *a*) and revised version (comment *d*) of exploding dynamite near a border or, in the revised version, of a factory emitting noxious fumes near a border (comment *e*) seem as solid now as when adopted. As to the dangerousness, however, of the activity being the tipping criterion in support of jurisdiction, an argument the Restatement also proffers, this seems questionable. Pointedly, the Restatement gives no examples of not-so-dangerous activities that would not support jurisdiction when effects were more than merely foreseeable. One supposes that all harms for which law gives a remedy and for which plaintiffs are demanding redress are serious. It is always only harmful effects that are offered to support jurisdiction.

A. *Liquor, Guns, and Cross-Border Harmful Effects*

Dram-shop-liability situations raise a classic personal jurisdiction effects problem, but modern courts have resisted analyzing it that way.³¹ The cases involve a forum-state plaintiff, or other plaintiff injured in the forum state, suing an out-of-state tavern or casino for having served a drunk forum customer who thereafter would be expected on return to the forum state to pose risks to herself and others (like plaintiff) en route. The cases usually raise a choice of law issue as well as a personal jurisdiction problem, with the forum state recognizing dram-shop liability, while the state where liquor was served imposing no, or much lesser, liability. The difference in substantive law means that, for the forum state, alleged lack of proximate cause has already been dealt with under that state's substantive law. The tavern owner cannot claim under forum law that the unilateral acts of the customer choosing to drink and then choosing to drive drunk absolves the liquor server of liability. That is the essence of dram-shop liability.

Logically, dram-shop personal jurisdiction analysis should similarly focus on the tavern's act of serving inebriated forum customers, and should justify personal jurisdiction based on the foreseeable effects of that action being manifested in the forum state. This is an especially logical approach for liquor-serving establishments close to the forum's borders—cases that provide the bulk of decisions in this area. A tavern at the state line knows that many of the drunks it serves and releases will be hazards on its neighbor state's roads. The liquor server is like the exploder of dynamite or the factory emitting noxious fumes that the Second Restatement views as classic examples supporting effects jurisdiction.³² This approach, however, although used in some of the older dram-shop cases, is not directly pursued in the modern case law, with modern courts sometimes explicitly stating that they believe such foreseeability of harm in a directly neighboring state is foreclosed by *World-Wide Volkswagen*.³³

The cases are over reading *World-Wide Volkswagen*'s foreseeability requirements. In *World-Wide*, the forum accident was not within the customer base area of the automobile dealer, but rather far across the country.³⁴ *World-Wide* did not label *all* foreseeable consequences off-limits for

³¹ Several of the points made in this Subsection borrow from a draft of a revised chapter of the personal jurisdiction treatise of which I am a co-author. ROBERT C. CASAD, WILLIAM M. RICHMAN & STANLEY E. COX, *JURISDICTION IN CIVIL ACTIONS* (4th ed. 2014). The revised chapter of the second volume from which I am borrowing for this Subsection has been submitted for publication in 2015.

³² See *supra* note 30.

³³ See, e.g., *Meyers v. Kallestead*, 476 N.W.2d 65 (Iowa 1991); *West Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676 (Minn. 1983) (explicitly overruling prior Minnesota dram-shop cases that relied for personal jurisdiction on tavern owner's awareness that border plaintiffs would be customers, believing this was required after *World-Wide*).

³⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

establishing personal jurisdiction, but instead only held that “*mere likelihood*,”³⁵ created by the plaintiff’s or a third party’s unilateral actions, is not enough to justify jurisdiction. What distinguishes such mere likelihood from foreseeability sufficient to support jurisdiction is if “the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”³⁶ The due process protections are designed to “allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”³⁷

Applying these principles to dram-shop situations, it should be sufficient to support jurisdiction for cross-border injuries if a liquor server sets up shop intending to serve a cross-border clientele.³⁸ When a tavern owner sets up shop intending to serve customers from across the border, then serves them when intoxicated, she has structured her conduct so as to create the kind of connection with the border state that supports holding her accountable for predictable cross-border dram-shop consequences. Many of the cases get to this result of forum jurisdiction by emphasizing the defendant’s marketing to forum residents,³⁹ but that is several steps removed from the regulatory basis for jurisdiction. In dram-shop litigation, the forum state is not holding the defendant accountable for advertising into the forum, even if the advertising was to entice residents to come and get drunk. The regulatory interest instead arises from the tavern actually serving a person liquor that she should not have been served, knowing the inebriated person will likely pose harm in the forum. Advertising may confirm that the defendant has structured her conduct so as to impact the forum, but advertising should not be required to establish jurisdiction.

³⁵ *Id.* at 297.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See, e.g.,* Young v. Gilbert, 296 A.2d 87 (N.J. Super. Ct. Law Div. 1972) (finding New York bowling alley and cocktail lounge subject to personal jurisdiction for accident involving a twenty-year old intoxicated New Jersey driver, where the establishment was located six miles from border and did not advertise in New Jersey, but did predictably receive customers from New Jersey who could not purchase liquor there because of the state’s higher drinking age).

³⁹ Wimmer v. Koenigseder, 470 N.E.2d 326 (Ill. App. Ct. 1984) (finding Wisconsin tavern owners who regularly advertised in Illinois newspaper to make Illinois residents aware of their facilities and of Wisconsin’s lower legal drinking age, and who did a significant portion if not a majority of their business with Illinois residents, amenable to suit), *rev’d on other grounds*, 484 N.E.2d 1088 (Ill. 1985); Lawson v. Darrington, 416 N.W.2d 841 (Minn. Ct. App. 1987) (finding Iowa bar that actively solicited Minnesota customers to come to Iowa to drink could reasonably anticipate being haled into Minnesota courts for injuries incurred by Minnesota residents on return trip, with no proof required that Minnesotans came as direct result of solicitation); Hart v. McCollum, 376 A.2d 644 (Pa. Super. Ct. 1977) (finding personal jurisdiction proper over New Jersey lounge for accident in Pennsylvania, based on New Jersey establishment’s substantial advertising to Pennsylvania, inducing Pennsylvania drivers to come to the New Jersey lounge).

Focusing on the regulatory interest in improper liquor serving, and the proximal out-of-state consequences, resolves the split among the lower courts as to how specifically a forum resident has to be targeted by the defendant's advertising and responsive to it.⁴⁰ The answer is that the courts on both sides of the debate are focusing on the wrong thing. It should not matter whether the customer who became drunk was targeted by forum advertising. The conduct being regulated is serving the forum customer. The defendant does not choose to serve only those forum customers to whom she directed advertisements. Proof of advertising may decrease a defendant's ability to argue that she did not intend to serve forum customers as a significant part of her business. Even a "local" watering hole, however, that engages in no out-of-state advertising, if set up close to a state boundary and dependent upon out-of-state business for its financial survival, cannot credibly claim that it did not intend to serve out-of-state customers who would foreseeably cause out-of-state harm after being served drunk.

When viewing the dram-shop cases from the outside, this reality of foreseeability of forum effects as the underlying basis for jurisdiction was correctly recognized in a 2010 Missouri appellate case, *Noble v. Shawnee Gun Shop, Inc.*,⁴¹ that dealt with a different kind of dangerous customer. Analogizing to the dram-shop cases, the *Noble* court found personal jurisdiction appropriate over a Kansas gun shop that allegedly negligently sold ammunition to a Missouri resident who used the ammo to kill Missouri residents in a Missouri shooting rampage. The *Noble* court used the kind of reasonable foreseeability analysis approved under *World-Wide Volkswagen* to analyze both long-arm and constitutional requirements.⁴² A

⁴⁰ Compare *Williams v. Lakeview Co.*, 13 P.3d 280 (Ariz. 2000) (en banc) (holding that although Nevada casino advertised and solicited Arizona customers, because plaintiffs did not come to casino as a result of these actions, there was no causal connection between defendant's Arizona contacts and the dram-shop cause of action) *with id.* at 286 (Zlaket, C.J., dissenting) (arguing that forum advertising was sufficiently related to cause of action to support jurisdiction, and also arguing independently for jurisdiction based on clearly foreseeable effects).

⁴¹ *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364 (Mo. Ct. App. 2010) (relying on dram-shop cases for finding personal jurisdiction over Kansas gun shop that solicited Missouri business, when Missouri resident bought ammunition there and used it in Missouri shooting spree against Missouri plaintiff-victims).

⁴² For example, as to the Missouri long-arm jurisdiction the court stated: "It appears to this court that the courts in these dram shop cases and others found that the fact that these businesses were located near the border and, in some cases, advertised to residents on both sides of the border, meant that the businesses knew or should have known (although the courts did not analyze their decisions using this wording) that their customers were likely to cross the border after patronizing the businesses. Therefore, it would be foreseeable that a sale originating from their businesses could have consequences in the neighboring state. We find that this standard is appropriate for determining whether the alleged cross-border-negligence of a defendant falls under Missouri's long-arm statute." *Noble*, 316 S.W.3d at 372. As to due process, the court more succinctly summarized, "We do not find that it is unreasonable for [defendant] to foresee that any allegedly negligent sales might have

similar example of a court correctly using *World-Wide's* foreseeability analysis, but to cut off gun-sale personal jurisdiction exposure, is the recent *Williams v. Romarm* decision.⁴³ The key to both decisions was the extent to which the defendant sold to a known out-of-state clientele who could be expected to cause forum harm with the products purchased. Focusing on the forum regulatory purpose of holding those accountable who sell items that they reasonably know will be brought into the forum to cause harm aligns a gun case like *Noble* with the dram-shop cases, but also with products-liability cases, which are the focus of the next Subsection.

B. Products-Liability Cases as Merely Another Version of Negligent-Effects Cases

The Second Restatement, in its 1988 revision, correctly identified products-liability personal jurisdiction cases as the poster child for uncertainty about how to apply the effects test in negligent-harm situations.⁴⁴ Given much focus post-*World-Wide*, then post-*Asahi*⁴⁵ and more recently post-*Nicastro*,⁴⁶ on stream-of-commerce situations as a potentially separate category of personal jurisdiction analysis, one modest purpose of this Article is to remind readers that stream-of-commerce situations are merely a version of negligent-effects jurisdiction, and do not require special products-liability personal jurisdiction rules.⁴⁷ One correct point the *Nicastro* plurality emphasized was that New Jersey personal jurisdiction jurisprudence had gotten far off the rails when it thought stream of commerce could be used as some separate version of personal jurisdiction analysis

consequences in Missouri and, therefore, that [defendant] should reasonably anticipate being haled into Missouri's courts." *Id.* at 374. *See also id.* at 370 n.5 (noting that analysis under long-arm statute and due process would be similar where both are premised on similar foreseeability considerations).

⁴³ *Williams v. Romarm, S.A.*, 756 F.3d 777 (D.C. Cir. 2014) (finding Romanian manufacturer's sale of assault weapons to distributor in United States for sale throughout the country insufficient to support personal jurisdiction in D.C. for suit based on drive-by shooting, because no such weapons could legally be sold in D.C., and finding foreseeability that product would end up in D.C. insufficient to establish personal jurisdiction).

⁴⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, cmt. b (1971) states: "The cases, although numerous, involve many different factual situations. They do not provide a basis for the statement of firm rules. All that can be done at the present time is to enumerate the principal factors that should be considered in arriving at a decision."

⁴⁵ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

⁴⁶ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

⁴⁷ Alternatively, one could correctly and as easily emphasize that effects jurisdiction is also no special category of personal jurisdiction. The relationship among defendant, forum, and litigation is the proper lens for all jurisdictional analysis, and properly includes the concern for forum-regulatory interest involved in all personal jurisdiction situations.

that could operate by different rules from other personal jurisdiction inquiries.⁴⁸

In this brief symposium offering I have no intention of exploring the voluminous lower-court-case fact variations involving personal jurisdiction for foreign-made products that cause forum injury, nor could I meaningfully describe and comment in this short Subsection on the almost equally vast secondary literature in this area. My goal is not to resolve the difficult conflicts in the cases, but only to offer a few comments that might move us forward in that direction. The starting place is to identify the confusion generated by *Asahi* that still persists after *Nicastro*.

I respectfully suggest that the Justices' continued argument, as to whether relative fairness (Brennan/Ginsburg) or tangible forum marketing (O'Connor/Kennedy) should be the primary criteria for proper products-liability personal jurisdiction, is misfocused. The swing vote opinions (Stevens/Breyer) also somewhat misfocus on how many defendant products have entered the forum rather than first focusing on what should underlie the reason for products-liability personal jurisdiction: regulatory authority. When a product causes injury to a forum resident, the arising litigation is not about whether the defendant shipped other products into the forum that caused no harm. What matters preliminarily is why this particular litigation-producing product ended up in the forum, and whether it would be appropriate to hold the defendant accountable in the forum for the consequences of this particular allegedly harmful product being there.

Applying the test of relationship among defendant, forum, and litigation means that regulatory focus is the essence of the forum's interest in the litigation. The defendant's connection to the forum in relation to the litigation is what makes it presumptively legitimate to assert jurisdiction over the defendant to regulate that defendant's conduct. If the primary focus is first placed on what the defendant did unrelated to this particular litigation at issue,⁴⁹ we are slipping back towards a version of personal jurisdiction that counts contacts in the service of finding presence (*Pennoyer*) rather than looking to contacts that triggered the litigation, as required by *International Shoe*. As *International Shoe's* citation to *Hess* indicated,⁵⁰ and *McGee* later confirmed,⁵¹ even a single defendant contact that gives rise to litigation can sometimes be sufficient to support jurisdiction.

⁴⁸ *Nicastro*, 131 S. Ct. at 2790–91.

⁴⁹ As to whether this can be a *secondary* focus of personal jurisdiction analysis, the short answer is yes, but more about that later.

⁵⁰ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (citing *Hess* in support of the proposition that a single contact of the right "nature and quality," rather than fictive consent, justified personal jurisdiction).

⁵¹ See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (finding that sale of single life insurance policy supports specific jurisdiction).

One problem in stream-of-commerce situations of course is that the defendant did not deal directly with the plaintiff, but depended on others to get the defendant's product to where it allegedly caused plaintiff harm. But before addressing that reality, which places such cases in the effects wing of personal jurisdiction analysis, it might be profitable briefly to consider situations where small-scale defendants have dealt more directly in single transactions with plaintiffs. Insights gained from those situations might help us keep proper focus on what is similarly at stake in stream-of-commerce products situations.

1. *Should We Protect Appalachian Potters?*

Justice Breyer's concerns about Appalachian potters⁵² play out all the time in contract situations involving internet purchases. E-Bay auction cases are plentiful, and involve small-time sellers interacting with distant purchasers. The majority position is that personal jurisdiction is not appropriate over small e-Bay sellers, even though the seller ships directly to the plaintiff who claims damages for not receiving what was promised.⁵³ While I tend to favor the minority position, it is worth emphasizing that the concerns over small-scale sellers subjected to distant jurisdiction are fully at play in these non-stream-of-commerce cases. Justice Breyer does not need to argue that a national distribution chain should not be equated with a small seller who uses the chain, or that a one-off sale to a particular forum is not where most of a small seller's product goes into the stream. The more straightforward defense is that the small seller is simply too small to be exposed to jurisdiction except at her home forum. The e-Bay majority position in small-seller cases does not explicitly espouse that principle, but it is the theme that best explains them.

The reason I find such pro-defendant results suspect is that they provide knock-out protection for small sellers, even when they cause somewhat big harm, say to small buyers. Small-defendant and small-plaintiff cases, however, are admittedly truly hard cases. When dollar values are not huge, the grant or denial of jurisdiction effectively determines the

⁵² Justice Breyer writes: "A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach." *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring).

⁵³ See, e.g., *Hinners v. Robey*, 336 S.W.3d 891, 902 (Ky. 2011) (siding with majority position, although acknowledging some contrary authority); *Malone v. Berry*, 881 N.E.2d 283, 287-88 (Ohio Ct. App. 2007) (collecting only cases in favor of the majority position).

reality of who wins the case on the merits, since litigation costs in the other side's forum often match or exceed damage claims. Such situations are not unique to internet situations, but cover any long distance plaintiff–defendant interaction.⁵⁴ If the Court wants to provide automatic constitutional protection to small defendants in such situations, it should explicitly acknowledge that this is what it is doing.

The consequences of preventing jurisdiction over small defendants in the forum where they allegedly directed harm, however, should also be recognized. Small Appalachian potters who distribute even a single piece of pottery into the forum have triggered strong forum regulatory interest if that piece of pottery explodes when it shouldn't have and a shard puts out someone's eye. Whom should the plaintiff be able to sue for this injury? I say whom rather than where, because when you are considering the forum's regulatory interest, there is never any guarantee that some other forum would: 1) be required to take jurisdiction; and 2) have the same substantive policies as the injury forum. As to the first point, I elsewhere have argued that general jurisdiction is never required to be exercised by the defendant's home forum.⁵⁵ Specific jurisdiction may be available only in the injury forum, but at any rate that forum is at least the most obvious candidate for where the cause of action arose.⁵⁶

⁵⁴ One of my favorite cases as a departure point for such explorations is *Chung v. NANA Dev. Corp.*, 783 F.2d 1124 (4th Cir. 1986), in which a Virginia plaintiff bought 500 pounds, some \$17,500 worth, of frozen reindeer antlers from an Alaska defendant, 380 pounds of which arrived in Virginia thawed and unusable, with the defendant failing to have insured as allegedly promised, and the defendant having collected \$12,000 of which it refused to refund any amount. The majority denied jurisdiction, recognizing that, "While in this instance, due process may appear to protect a breaching defendant from suit in an injured plaintiff's state, in others it will safeguard defendants from baseless litigation in remote and unrelated forums." *Id.* at 1129. The dissent would have found jurisdiction based on the explicit promise to ship and insure, but also recognized that "the burden on [defendant] of defending in Virginia[] does tend to undermine the assertion of jurisdiction." *Id.* at 1132 (Ervin, J., dissenting). Tweaking the facts so that the dollar values involved are smaller, or the defective nature of the shipped product is less clear, and having (contrary to the real facts) no physical plaintiff interaction in Alaska, can produce hard conundrums about how one deals with situations where it is not clear who is right and the practical problems of suing or being sued in the other party's forum are large. Reindeer antlers are also stick-in-the-mind facts that assist as a teaching tool!

⁵⁵ See Cox, *supra* note 7, at 203–06.

⁵⁶ Defendants can agree to waive defenses in another forum, and often do so in connection with statute-of-limitations defenses as condition for forum non conveniens dismissals. The discussion in text assumes a scenario where there is no more convenient forum under forum non conveniens rationale, which should be the case when the forum is the place of injury. As to alternative forums where the cause of action arose, I concede that the place of manufacture in a products-liability suit may be such a forum. If the constitutionally required jurisdictional rule for small manufacturing defendants is to be no specific jurisdiction except in the place of manufacture, the Court should state that rule with clarity, acknowledging that regulatory policies of the state where the injury occurred are being set aside to protect small defendants by such a rule.

As to the second point, a substantive result of implementing the forum's regulatory policies is guaranteed only by placing jurisdiction in the injury forum. On my hypothetical eye-injury case, imagine the plaintiff was also negligent in her use of the pottery. If the forum applies pure comparative negligence principles, while other jurisdictions would require greater than fifty percent fault, the injury forum's policies give way if suit proceeds elsewhere.⁵⁷ Similar results could occur as to punitive damages issues, limits on recovery, or other important tort policies. When the manufacturer is outside of the United States, strict liability may not even be possible in any alternative forum.

Products-liability personal jurisdiction cases almost always involve embedded substantive-law conflicts, and it would be prudent to recognize that this is what is involved in the personal jurisdiction battles. My emphasis is that substantive considerations should not be considered collateral consequences of minimum contacts requirements, but should be recognized as what they are—the essence of what makes specific jurisdiction either presumptively constitutional or not. So how, if at all, should the fairness concerns about Appalachian potters enter into the equation?

I think that what the Breyer and Stevens opinions are attempting to do, albeit indirectly, is not inconsistent with regulatory interest being at least the legitimate starting place for personal jurisdiction analysis. These opinions are not automatically cutting off all jurisdiction for small products producers, but only some of it. They are, in other words, indirectly using fairness considerations to cut off jurisdiction that would otherwise be appropriate were these fairness factors not also taken into account. It would be more helpful if the opinions explicitly labeled what they are doing when letting fairness considerations outweigh otherwise proper regulatory interest, but that is the effect.⁵⁸

⁵⁷ The law actually applied by whatever forum hears the case is determined by its choice-of-law approach, which of course does not always require forum law to be applied. The bias in favor of applying forum law, however, especially under modern approaches, is significant enough that I hope readers will forgive the exaggerated equivalence of forum jurisdiction with forum law being used in the textual discussion.

⁵⁸ This may explain why, in *Asahi*, Justices White and Blackmun felt comfortable joining both the Brennan and Stevens opinions. The Brennan opinion ultimately held, after establishing that defendant placement of a product in the stream of commerce, without more, did constitute purposeful availment, that the *Asahi* indemnification facts nevertheless constituted "one of those rare cases in which 'minimum requirements inherent in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Asahi*, 480 U.S. at 116 (Brennan, J., concurring) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985) (some internal quotation marks omitted)). The Stevens opinion, brief as it was, appeared to require more than mere placement in the stream before jurisdiction would be found to be appropriate availment, Justice Stevens specifically suggesting that the "constitutional determination . . . is affected by the volume, the value, and the hazardous character of the components." *Id.* at 122 (Stevens, J., concurring). The two opinions may actually be saying nearly the same thing if Justice Stevens' emphasis, especially on volume and value of components, were interpreted to relate

If fairness considerations were more explicitly dealt with as separate second-stage conditions that also sometimes have to be satisfied, even after regulatory interest is found to exist at the first stage,⁵⁹ this would have at least two salutary effects. First, it would reinforce, although the point should not be in doubt, that a majority of the Court both in *Asahi* and in *Nicastro* specifically rejected an approach to products cases that automatically denies jurisdiction unless the defendant's product is manufactured or distributed with the forum specifically in mind. Placing into the stream a product that sweeps into the forum can sometimes be sufficient to expose a product-making defendant to liability, according to both Court majorities.

The second benefit of focusing on fairness considerations as a distinct and separate consideration is that it would become clear that this is, indeed, a distinct and separate consideration. Accordingly, the relationship of fairness-satisfying contacts to the litigation should not matter when doing a second-stage fairness evaluation. If paucity of contacts for a small defendant can defeat the forum's regulatory interest when the defendant's product allegedly causes injury there, the presence of sufficient contacts *of any sort* should allay concerns that it would simply be unfair to have a particular small-scale defendant answer in a distant forum for what she allegedly has done.⁶⁰ The distribution of other products by the defendant to the forum, or non-product defendant contacts, should count to satisfy fairness considerations as much as distributing more of the same product into the forum. If the issue is whether the defendant is simply too small-scale an entity to be subjected to distant jurisdiction, contacts of all types speak to such fairness considerations.⁶¹

to how many contacts additional to the one that gave rise to the litigation he wanted to see before he would find it fair to hold a distant components manufacturer like *Asahi* subject to jurisdiction.

⁵⁹ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (indicating two-stage test, with fairness test proceeding only after first stage constitutional-directedness requirements are satisfied).

⁶⁰ Cf. *Russell v. SNFA*, 987 N.E.2d 778 (Ill. 2013) (finding French manufacturer of specialty bearings for aerospace industry subject to personal jurisdiction in Illinois when a helicopter incorporating one of its bearings crashed there, with court placing emphasis on fact that company's exclusive U.S. distributor had a business relationship with an Illinois aerospace company for a different specialty bearing product line), *cert. denied*, 134 S. Ct. 295 (2013). Whether the *Russell* court got the minimum-contacts balance right is open to debate. I cite the case only as a recent example of contacts that did not give rise to the litigation being used by a court in its fairness balancing. I further emphasize that these fairness considerations cannot substitute for proper regulatory interest that must first be found to exist.

⁶¹ Such fairness considerations cannot substitute for regulatory interest, of course. The perplexing *Burger King* dicta, potentially to the contrary, to my knowledge has never been used to establish jurisdiction where there was no strong regulatory interest first established at stage one of personal jurisdiction analysis. Cf. *Burger King*, 471 U.S. at 477 (“These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”).

My preference is to find jurisdiction based solely on regulatory authority, and, to repeat, this is because I see no other way that a forum's legitimate regulatory interest can be satisfied except to match jurisdiction with that regulatory interest. But if the Court is going to continue to balance other equities as part of its personal jurisdiction analysis, it would be helpful if this was done transparently and separately from the analysis of contacts that actually produced the litigation.

2. *Effects Jurisdiction Based on Intended Customer Use*

Returning to the regulatory interests that are involved in products suits,⁶² line drawing that shuts off jurisdiction always at the point of sale would be a mistake. Even when the only contact with the forum is that the defendant's product allegedly caused injury there, that should sometimes be enough to support jurisdiction. The injury forum's regulatory interest may not always be sufficient to support personal jurisdiction over a defendant who made an allegedly defective product, but surely it sometimes would be. Assume a product, for example, that is designed to be used outside the place of manufacture, sold to the plaintiff, in the normal course of business, somewhere that the product was not intended to be used. Snow skis sold in Texas might fit the bill. When the consumer uses such products as the manufacturer intended, this can happen only outside the sales forum. Instead of it being merely foreseeable that the product could cause injury somewhere other than where the consumer bought it, the product would only be capable of causing injury wherever the consumer took it for its intended use. To label this the unilateral action of a third party so as to defeat jurisdiction smacks of formalism.

One could get to the result of jurisdiction in the injury forum by stretching Justice O'Connor's requirement, of manufacture with the forum in mind, to include situations where a manufacturer knows its products can be used only under certain geographical conditions (such as snow mountains for skis), which the forum possesses. But this is not accurate to that opinion's intent of the stronger requirement of forum specialization, nor is this the similar kind of stretching, which some lower courts have engaged in, that claims a product is marketed to a particular state because it complies with generic U.S. safety or design standards.⁶³ It would be more honest to reject the need for particularized forum design and instead recognize that for negligent effects occurring as a result of intended customer use, the state's regulatory interest is legitimately triggered by the intended use. The customer is not taking the product somewhere the manufacturer did not expect it to be taken, but is using the product exactly as the manufacturer intended. The manufacturer has no market for the product without such intended forum use. When the product fails to do what it was supposed to do where it was supposed to

⁶² See *supra* notes 48–52 and accompanying text.

⁶³ Cf. *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18, 28 (N.M. Ct. App. 2012).

perform properly, that is a negligent effect for which the manufacturer presumptively should have to answer.

The other unsatisfying way around the reality that negligent effects are the primary basis for jurisdiction over the defendant is to misidentify other manufacturer conduct as the ostensible basis for jurisdiction. The Court may have engaged in this misfocused analysis in its famous *World-Wide* dicta approving stream-of-commerce jurisdiction when it stated:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.⁶⁴

If the dicta means that the sale by a manufacturer in State *A* of a product can subject the manufacturer to jurisdiction in State *B* because the manufacturer intends to serve that market by having its products used there, that would be exactly my point. But if, as the language is more usually interpreted, jurisdiction exists in State *B* only when sale or servicing of the same product occurs in State *B*, that is more problematic.

Jurisdiction exists in State *B* under either scenario only when injury occurs there. Servicing or selling other products into the forum does not give rise to the plaintiff's cause of action. Such contacts are never what the suit is about. They are also almost always present for large manufacturers such as Audi or Volkswagen. Can one imagine a U.S. state in which the defendant's cars are not sold, advertised, or serviced? To require such conduct provides no meaningful protection to defendants who sell or distribute nationally. It would be more honest to admit that injury alone, as a result of the product being used as the manufacturer intended, at least presumptively provides the basis for jurisdiction.⁶⁵

For suit against component-part manufacturers, there is even less room to argue that any other defendant conduct can justify jurisdiction. Component manufacturers do not usually directly distribute their components nationwide. Therefore, there is all the more need to recognize that the forum's regulatory interest presumptively supporting jurisdiction is based on effects occurring from intended use of the component. One could imagine a version of substantive tort law that simply refuses to recognize claims by injured persons against component manufacturers. The plaintiff's claim could be viewed as existing only against the maker, seller, or distributor of the finished product into which the component was incorporated. When the forum instead says, no, we wish to extend substantive tort liability to the component manufacturer, this means the forum's

⁶⁴ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

⁶⁵ Any requirement of additional, unrelated defendant-forum conduct would go only to fairness considerations to the extent that the Court insists on continuing to impose those.

substantive tort law has already concluded that there does not need to be a direct connection between a component manufacturer and the consumer who purchased the product. If personal jurisdiction's reach can never match with this substantive law judgment, that substantive law policy is negated.

To push jurisdiction back to the forum where the component was incorporated into a finished product might make sense if the suit was between the two manufacturers, especially say for breach of contract.⁶⁶ But as to any injured consumer, this places the case where the cause of action did not arise. If liability attaches based on intended use of the product, isn't that where the case at least presumptively should be heard? That this is not currently understood to be the law does not mean that it should not be the law.

If the Court wants to trump the presumption that the place of intended use is the appropriate place for jurisdiction, I suggest, again, that they do this by explicitly developing relative convenience fairness considerations as a separate and distinct aspect of personal jurisdiction independent of the "relation among defendant, forum, and litigation" that supposedly is the basis for jurisdiction in the post-*International Shoe* world. These independent requirements would need to have some bite and the basis for them would need to be explained more clearly than the Court has so far done in *Asahi* and *Burger King*, including, to repeat, why they should form a major part of personal jurisdiction requirements in the post-*International Shoe* world. If the Court alternatively is worried that plaintiffs have too great an edge over defendants in forum-shopping battles when jurisdiction is authorized where intended use produced only *alleged* harms, I suggest that they explain with some clarity why due process requires greater defendant protection at the cost of shutting off valid plaintiff suits. As for me, having wrestled with these issues for many years, I see no better solution than to place jurisdiction where effects are not merely foreseeable, but are alleged to occur exactly where the defendant intended its product to be used.

CONCLUSION

The Court's embrace of the *Calder* effects test was an important recognition that post-*International Shoe* minimum contacts analysis necessarily relates to substantive law and not defendant presence. The kind of effects that count for minimum contacts purposes are forum effects that cause harm to the plaintiff and therefore constitute part of the plaintiff's claim. One problem with effects-based personal jurisdiction, however, in contrast to jurisdiction based on a defendant's presence, is that effects are almost always contested. One does not know until after a trial on the

⁶⁶ Cf. *Asahi*, 480 U.S. at 105–06 (finding no personal jurisdiction in suit between two foreign manufacturers about indemnification because inter alia the *Asahi* forum was not the place of component incorporation).

merits whether the effects a plaintiff has alleged actually occurred. One must use the effects a plaintiff alleges, however, to support the personal jurisdiction that allows the trial to occur. Perhaps because of this uncertainty as to whether the defendant actually had minimum contacts with the forum, courts, including the U.S. Supreme Court, sometimes seem reluctant to fully implement the effects test that *Calder* championed. This is a mistake. If courts insist that effects are not sufficient to support personal jurisdiction, this would constitute a return to territorially based jurisdiction, which is exactly what *International Shoe* rejected. Courts should instead openly embrace effects-based jurisdiction as the only principled way to operate in the post-*International Shoe* world.

My thanks again to Professor Parry for organizing this timely symposium and inviting me to contribute.