The Inextricable Merits Problem in Personal Jurisdiction

Cassandra Burke Robertson[*]

In 1984, Hollywood star Shirley Jones convinced the Supreme Court to adopt an effects-based test for personal jurisdiction when she brought suit in California against a Florida defendant for defaming her reputation. After adopting the test in Calder v. Jones, *the Court never returned to the issue, and in fact avoided personal jurisdiction questions entirely for more than two decades. This past spring, however, the Supreme Court not only revisited the personal jurisdiction doctrine, but also signaled an intention to return to personal jurisdiction issues in the near future, with two justices calling specifically for development of the doctrine in cases involving modern "commerce and communication." When the Court chooses to hear such a case, it will likely be to resolve an emerging issue that has divided lower courts — the proper scope of the* Calder *effects test.*

This Article advocates limiting the effects test. It argues that many of the conflicting cases in this area can be reconciled only by acknowledging courts' implicit assumptions about the underlying merits of the case. The Article then demonstrates that once these assumptions are made explicit, the merits of the cases are so inextricably intertwined with the jurisdictional issues that courts cannot resolve the jurisdictional question without fully trying the cases on the merits — an action that would require the defendant to forfeit the very constitutional interests that the personal jurisdiction doctrine was developed to protect. Finally, the Article examines how the development of the Internet destroyed previous assumptions about the litigation resources of likely defendants. It

[*] Copyright © 2012 Cassandra Burke Robertson. Associate Professor, Case Western Reserve University School of Law. For inspiration and helpful comments, I thank Kevin Clermont, Juscelino Colares, Tiffani Darden, Lonny Hoffman, Sharona Hoffman, Jacqueline D. Lipton, Lawrence E. Mitchell, Andrew S. Pollis, David Post, William M. Richman, Patrick Woolley, and the participants at the following faculty workshops and conferences where earlier drafts of the Article were presented: the University of Toledo Law School Faculty Workshop and the 2011 Southeastern Association of Law Schools Annual Conference Roundtable on Civil Procedure. Effy Folberg provided outstanding research assistance.

concludes that narrowing the effects-test doctrine would minimize the cost of forum selection for both plaintiff and defendant, would promote online commercial development, and would better protect a robust speech environment.

TABLE OF CONTENTS

INTRODUCTION ... 1303
I. THE DUE PROCESS PROTECTIONS OF PERSONAL JURISDICTION 1306
A. *Protected Interests* ... 1307
B. *Minimum Contacts, Reasonableness, and the Effects Test*. 1309
II. THE HIDDEN MERITS PROBLEM ... 1310
A. *The Paradigm Cases* ... 1311
B. *Difficult Cases: The Merits at Equipoise* ... 1320
III. REFRAMING THE JURISDICTIONAL STANDARD OF PROOF ... 1326
A. *The Burden of Proof for Jurisdictional Facts* ... 1327
1. Doctrinal Neglect and Confusion ... 1327
2. The Prima Facie Standard for Inextricable Merits Cases ... 1332
B. *What Contacts Count?* ... 1338
C. *The Reframed Standard* ... 1342
IV. CONSEQUENCES OF THE REFRAMED STANDARD ... 1344
A. *Closing the Courthouse Door to Plaintiffs* ... 1344
B. *Protecting Defendants' Due Process Rights* ... 1346
1. Minimizing Forum-Selection Costs ... 1346
2. Protection of Speech and Commerce ... 1348
3. Better Integration of Online Activity ... 1350
C. *Weighing the Balance* ... 1354
CONCLUSION ... 1356

INTRODUCTION

Shortly after the Supreme Court released two personal jurisdiction opinions during the 2010 term,[1] it denied two petitions for certiorari that it had been holding for resolution of those cases.[2] Both of the denied petitions raised a similar question: should a defendant who allegedly commits an intentional tort be subject to personal jurisdiction in the forum where the aggrieved plaintiff lives and works, and where the effect of the harm was therefore felt, even if the defendant has no other connection with the forum state?[3] Such jurisdiction is described as "effects-test personal jurisdiction" because it is based on the in-state effects of the defendant's out-of-state conduct.[4] Although the Supreme Court adopted the effects test in the 1984 case *Calder v. Jones*,[5] it has not revisited the issue. In the meantime, many lower courts have adopted a very narrow construction of the effects test that precludes jurisdiction without evidence of other forum-state contacts, while others have interpreted

[1] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2846 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2780-84 (2011).

[2] Clemens v. McNamee, 615 F.3d 374 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 3091 (2011); Kauffman Racing Equip., L.L.C. v. Roberts, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, *cert. denied*, 131 S. Ct. 3089 (2011).

[3] The petition for certiorari in *Kauffman Racing* phrased the question as "[w]hether the Due Process Clause permits a State to exercise personal jurisdiction over a nonresident defendant based solely on a claim that the defendant committed an intentional tort on the Internet knowing that the plaintiff resided in the forum State." Petition for a Writ of Certiorari, Roberts v. Kauffman Racing Equip., L.L.C., 131 S. Ct. 3089, 3090 (2011) (No. 10-617), 2010 WL 4494141, at *i. The cert petition in *Clemens* asked, "Does the Due Process Clause require that a defamatory statement refer to a state and be drawn from sources in the state to permit the state to exercise specific personal jurisdiction over a nonresident defamation defendant?" Petition for a Writ of Certiorari, Clemens v. McNamee, 131 S. Ct. 3091 (2011) (No. 10-966), 2011 WL 291140, at *ii.

[4] *See* Larry Dougherty, *Does a Cartel Aim Expressly? Trusting Calder Personal Jurisdiction When Antitrust Goes Global*, 60 FLA. L. REV. 915, 927 & n.2 (2008). Because effects-test jurisdiction requires that the defendant intentionally target a particular forum, there can typically only be effects-test jurisdiction in one forum — even though there may be personal jurisdiction in multiple fora. *See, e.g.*, Remick v. Manfredy, 238 F.3d 248, 258 (3d Cir. 2001) ("[W]e held that the Calder 'effects test' requires the plaintiff to show that: (1) The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.") (emphasis removed).

[5] *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

the test more broadly.[6] The court opinions underlying the denied petitions for certiorari took very different positions.

Although the Supreme Court denied both petitions, the contours of effects-test jurisdiction remain far from settled — neither of the Court's recent personal jurisdiction opinions addressed the question, and the courts in the two underlying cases came to different conclusions.[7] But while the Supreme Court left the issue unresolved, the plurality's emphasis in *J. McIntyre Machinery, Ltd. v. Nicastro* on the need for specific forum-state targeting may lend some support to the courts that have adopted a more narrow reading of *Calder*, and it may suggest that the Court will be willing to reconsider effects-test jurisdiction in the near future.[8]

When the Court does decide to take up the issue, it will have no problem finding a suitable case in which to do so; the number of effects-test cases has more than tripled in the last decade, surpassing the number of "stream of commerce" jurisdictional cases.[9] The growth of effects-test cases corresponds to the rise of modern communications technology. Increasingly, we are seeing disputes that cross state or national boundaries, even when the individuals involved remain at home.[10] In addition, although the stakes at issue in any particular case may be fairly limited, the cases in the aggregate raise important issues of free speech, commercial development, and protection of intellectual property rights.[11]

---

[6] *See infra* Part II; *see also* Sabados v. Planned Parenthood of Greater Ind., 882 N.E.2d 121, 127 n.4 (Ill. App. Ct. 2007) ("*Calder* is limited by its facts and has been consistently criticized.").

[7] *See Clemens*, 615 F.3d at 376 (denying jurisdiction); *Kauffman Racing*, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 1 (upholding jurisdiction).

[8] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788-90 (2011) (plurality opinion) (stating that personal jurisdiction in a commerce case is appropriate "only where the defendant can be said to have targeted the forum" and concluding that "[r]espondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey").

[9] According to a Westlaw search of cases, there were approximately 94 stream-of-commerce cases between 1997 and 2000, as compared to 77 effects-test cases. A decade later, between 2007 and 2010, the number of stream-of-commerce cases had grown to 167 — but the number of effects-test cases had grown to 294. For both time periods, I searched ("stream of commerce" w/p "personal jurisdiction") and (Calder w/p "personal jurisdiction") in the allcases database. Some amount of the increase was likely due to improved case coverage in Westlaw, but the relative growth of effect-test cases in comparison to stream-of-commerce cases demonstrates the doctrine's increasing relevance.

[10] *See infra* Part IV.B.3.

[11] *See infra* Part IV.B.2.

The time is therefore ripe to revisit the question of effects-test jurisdiction and, in particular, to explore the reasons why many courts have been so eager to limit its application in the decades since it was first adopted. This Article contends that much of the doctrinal inconsistency arises from courts' unexamined views of the underlying merits of each case. In effects-test cases, the merits are inextricably intertwined with jurisdictional issues and therefore influence — often unconsciously — the courts' decisions on personal jurisdiction.[12] Essentially, when a court accepts the plaintiff's allegations of wrongfulness and harm as true, the court will find jurisdiction.[13] When a court is unwilling to accept the plaintiff's allegations of tortious conduct as true, the court is less likely to find jurisdiction appropriate. The burden of proof is thus a critical inquiry in effects-test cases.

Although other scholars have noted the "inextricable merits" problem in personal jurisdiction generally,[14] this Article is the first to examine how the inextricable merits problem interacts specifically with the effects test. Effects-test cases are different from most other personal-jurisdiction cases. Unlike other cases where the merits may overlap with the jurisdictional question, the two issues do not merely overlap in effects-test cases — instead, they are nearly identical inquiries.[15] Ultimately, the Article concludes that effects-test cases can be harmonized only by explicitly acknowledging the influential role played by merits-based assumptions in the past. Going forward, courts

[12] *See infra* Part II.

[13] *See infra* Part II.

[14] *See* ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 4-2 (3d ed. 1998) ("When a long-arm statute describes the basis for jurisdiction in terms of 'commission of a tortious act' or 'entering a contract,' the fact on which the defendant's susceptibility to jurisdiction depends also may be the ultimate substantive issue . . . . The question of whether the defendant can be forced to appear and litigate the issue becomes circular: a court cannot decide whether a tort has been committed without jurisdiction, but it cannot determine whether jurisdiction exists without deciding whether there was a tort."); Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234, 247 (1983) (analyzing the "inextricable merits" problem in conspiracy-based jurisdiction); Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 978 (2006) (arguing that when jurisdictional facts are intertwined with substantive merits questions, the court should require no more than a prima facie showing of jurisdiction).

[15] Because there are no other contacts to analyze in effects-test cases, the circularity problem identified by Casad & Richman is not mitigated by supporting jurisdictional evidence. *See* CASAD & RICHMAN, *supra* note 14, at § 2-5.

should require a higher burden of jurisdictional proof in effects-test cases, even at the risk of limiting court access for some plaintiffs.

The Article proceeds as follows: Part I provides a brief background on the fundamental principles of personal jurisdiction essential to understanding the effects test. Part II then explores the unstated influence that merits judgments have on effects-test cases by contrasting two paradigm cases, demonstrating how the courts' language choices can reveal hidden assumptions about the cases' underlying merits and can predict the ultimate jurisdictional outcome. Part III delves deeper into the standard of jurisdictional proof for personal jurisdiction, arguing that courts err when they merely accept the plaintiffs' jurisdictional allegations as true rather than requiring proof of jurisdiction. This Part also opposes the lower standard of proof advocated by some courts and scholars for resolving jurisdictional facts that are closely entwined with the merits of a case. Lastly, Part III examines what contacts "count" for effects-test jurisdiction, concluding that only wrongful or tortious conduct should give rise to effects-test jurisdiction in the absence of any other forum-state contact.

This Article concludes that applying the proper burden of proof to personal jurisdiction leaves only two choices in most effects-test cases: delay the personal jurisdiction determination until trial, thus denying the defendant the constitutional due process that the personal jurisdiction doctrine was meant to protect, or close the forum to the plaintiff and require that suit be filed elsewhere — most likely in the defendant's home forum. Part IV explores the consequences of these two options more fully. Ultimately, it concludes that although there are significant costs on both sides of the equation, the risks of a broader effects test outweigh the costs of a narrower test. It therefore recommends that courts abandon the effects test whenever they cannot determine before trial whether the defendant has in fact engaged in wrongful conduct. In these cases, the court should not rely merely on the plaintiff's allegations of in-state effects; instead, the court should look for traditional indicia of purposeful availment of the forum state's benefits and protections. In the absence of such indicia, the court should not exercise personal jurisdiction over the defendant.

I. THE DUE PROCESS PROTECTIONS OF PERSONAL JURISDICTION

In order to understand the issues arising from the burden of proof in effects-test cases, it is necessary to examine some of the basic assumptions of the personal jurisdiction doctrine. Because other scholars have done an excellent job in tracing the history and

theoretical implications of the doctrine,[16] this Part introduces some of the fundamental principles underlying the subsequent jurisdictional argument set out in Parts II–IV of this Article.

A. Protected Interests

The due process analysis in the determination of personal jurisdiction protects the defendant's due process right in "not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful 'contacts, ties, or relations.' "[17] In order to ensure the requisite connection between the defendant and the plaintiff's chosen forum, the Supreme Court has distinguished between two types of adjudicatory authority: general jurisdiction and specific jurisdiction.[18] General jurisdiction applies when the defendant's connections with a forum are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Thus, for example, the "paradigm forum" for general jurisdiction is the defendant's home forum.[19] Specific jurisdiction, on the other hand, applies when the defendant has fewer contacts with the forum, but the defendant's in-forum actions "may be sufficient to render [defendants] answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections."[20]

---

[16] *See, e.g.*, Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189-90 (1998); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597 (1991); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 (1987); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004).

[17] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[18] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2849 (2011).

[19] *Id.* at 2853.

[20] *Id.*

A plaintiff who wants to sue will thus easily be able to obtain personal jurisdiction over the defendant in the defendant's home forum, regardless of whether that forum has any connection to the dispute. However, a plaintiff who wants to sue elsewhere, such as in the plaintiff's home forum, will have to establish a connection among the defendant, the dispute, and the forum.[21] The "minimum contacts" jurisprudence that developed to analyze this tripartite connection has been described as plagued by ambiguity and incoherence.[22] While the Supreme Court's recent jurisprudence has refined the doctrine, it has not eliminated the ambiguity inherent in the analysis.[23]

The essential question in an analysis of personal jurisdiction "is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[24] In a specific-jurisdiction analysis, the court must determine whether "the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[25] Traditionally, courts have interpreted this to mean that the plaintiff must first prove that the defendant intentionally engaged in acts connected with the target forum, or "minimum contacts"; once the plaintiff does so, the burden shifts to the defendant to show some reason why jurisdiction would nevertheless be unreasonable in the forum.[26]

---

[21] Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Of course this analysis considers only the due process protection afforded by personal jurisdiction; there must also be a statutory basis as well. *See* CFA Inst. v. Inst. of Chartered Fin. Analysts of India, 551 F.3d 285, 292 (4th Cir. 2009) (noting that "the forum state's long-arm statute must authorize the exercise of such personal jurisdiction").

[22] McMunigal, *supra* note 16, at 189 ("Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court's personal jurisdiction doctrine.").

[23] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion). *But see* Allan Ides, *A Critical Appraisal of the Supreme Court's Decision in* J. Mcintyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. (forthcoming 2012) (manuscript at 12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938472 (criticizing the *Nicastro* plurality's "targeting" approach and noting that the Court did not explain what it means by "activity directed at a sovereign").

[24] *Nicastro*, 131 S. Ct. at 2789.

[25] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[26] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (holding that once the plaintiff establishes the existence of minimum contacts, the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable").

B. Minimum Contacts, Reasonableness, and the Effects Test

The contacts supporting jurisdiction cannot be merely fortuitously associated with the forum seeking to exercise jurisdiction.[27] Instead, the "principal inquiry . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign."[28] The defendant generally manifests this intent by "purposefully avai[ling] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[29] Thus, relevant "minimum contacts" may include in-forum trips, sales, contracts, or other voluntary connections with the forum.[30]

A more difficult question arises when the defendant does not have any of the traditional contacts demonstrating purposeful availment, but has allegedly committed a tort or engaged in other conduct that that has an effect within the forum. The Restatement (Second) of Conflict of Laws suggests that jurisdiction is appropriate in these cases:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any claim arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.[31]

In 1984, the Supreme Court adopted the Restatement's approach, known as the "effects test."[32] Thus, in effects-test cases, the minimum contacts analysis looks at whether the defendant "purposefully directed" conduct at the target forum, rather than whether it "purposefully availed" itself of the forum's benefits and protections.[33]

---

[27] *Nicastro*, 131 S. Ct. at 2801 (Breyer, J., concurring in the judgment).

[28] *Id.* at 2783 (plurality opinion).

[29] *Id.* at 2787 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[30] *See, e.g.*, *Burger King*, 471 U.S. at 462 (concluding that franchise and contract activities could give rise to jurisdiction); Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (basing jurisdiction on in-state commercial activity).

[31] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1988 revision).

[32] Calder v. Jones, 465 U.S. 783, 789 (1984).

[33] *See Burger King*, 471 U.S. at 472 (stating that jurisdiction is appropriate "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities."); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) ("In tort cases, we typically inquire whether a defendant "purposefully direct[s] his activities" at the forum state, applying an "effects" test that focuses on the forum in which the defendant's actions were felt . . . . By contrast, in contract cases,

Regardless of whether a court finds contacts by "direction" or "availment," jurisdiction must still be reasonable. The Supreme Court has identified five reasonableness factors that courts must weigh to determine whether the situational context would render jurisdiction so unfair as to deprive the defendant of due process even when minimum contacts are otherwise satisfied.[34] These factors are: "the burden on the defendant, the interests of the forum State, [] the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies."[35]

II. THE HIDDEN MERITS PROBLEM

While courts have struggled to apply personal jurisdiction principles generally, they have had particular difficulty with effects-test cases.[36] As a result, decisions applying the effects test are often conflicting and contradictory, and efforts to smooth the inconsistent doctrine have been largely ineffective.[37]

---

we typically inquire whether a defendant "purposefully avails itself of the privilege of conducting activities" . . . focusing on activities such as delivering goods or executing a contract.").

Combining the concepts of "purposeful direction" and "purposeful availment" can lead to awkward constructions implying that tortious activity is itself a privilege. *See, e.g.*, Jones v. Dirty World Entm't Recordings, LLC, 766 F. Supp. 2d 828, 832-33 (E.D. Ky. 2011) ("Therefore, the court holds that the record sufficiently shows that Dirty World, LLC purposefully availed itself of the privilege of causing a tortious consequence in Kentucky by virtue of its web site activities.").

[34] Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113 (1987).

[35] *Id.*

[36] 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, 618 (2006) ("Particularly where the *Calder* test has been applied, courts have evidenced considerable confusion as to the meaning of its express aiming or intentional targeting requirement . . . . These ambiguities have led to widespread divergence among the lower courts."); A. Benjamin Spencer, *Terminating* Calder*: "Effects" Based Jurisdiction in the Ninth Circuit After* Schwarzenegger v. Fred Martin Motor Co., 26 WHITTIER L. REV. 197, 202-03 (2004) ("Although *Calder* contained some clear statements permitting jurisdiction in states where intentional torts have effects, the circuit courts were not too enthusiastic about embracing this view of the case.").

[37] A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 101 (2006) (noting that especially in cases involving Internet-based contacts, a number of courts have "ignor[ed] the targeting of the harmful conduct at issue" in a way that "conflicts

Although the legal doctrine in this area may be inconsistent, I conclude that effects-test cases actually possess a hidden unifying principle: courts' implicit assessment of the merits underlying plaintiffs' cases. When a court is willing to assume that the plaintiff's allegations are true and that the defendant has engaged in wrongful conduct, it is willing to apply the effects test broadly and generally finds the defendant to be subject to personal jurisdiction. When a court is unwilling to make such assumptions, it generally finds a way to distinguish contrary precedent and apply a more narrow jurisdictional analysis that avoids finding personal jurisdiction.

This assumption is not part of the underlying personal jurisdiction doctrine. At the jurisdictional stage, the court should not predict the ultimate merits of the plaintiff's causes of action.[38] Nor should it weigh the social value of the defendant's allegedly wrongful activity.[39] Nonetheless, it appears that assumptions as to implicit merit and value strongly influence the outcomes of these cases.[40]

A. The Paradigm Cases

Two cases illustrate opposite poles of the effects test: *Calder*, in which the Supreme Court first adopted the effects test and found jurisdiction, and *Young v. New Haven Advocate*, in which the Court of Appeals for the Fourth Circuit distinguished *Calder* and denied jurisdiction.[41] In terms of doctrinally relevant facts, the cases are very similar: they both involve defamation suits arising from published news articles.[42] The doctrinally irrelevant facts, however, are substantially different: the plaintiff in *Calder* was highly sympathetic, while the plaintiff in *New Haven Advocate* was much less so. In addition, the defendants' speech in *Calder* involved sensationalist

with the standard established in *Calder*").

[38] Clermont, *supra* note 14, at 1020.

[39] Calder v. Jones, 465 U.S. 783, 790 (1984) (noting that weighing the defendants' First Amendment rights at the jurisdictional stage would result in "double-counting" those interests).

[40] An evaluation of the merits acts as a "shadow rule" of jurisdiction in effects-test cases. *See* Robin Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. (forthcoming 2012) (manuscript at 44) (on file with author) ("The term 'shadow rules' is just shorthand for categorizing the interpretive differences among courts . . . . It is the element of discretion which overlays the spirit of the [federal rules of civil procedure] and the operation of specific ones making it difficult to disambiguate ordinary interpretative differences from variances stemming from shadow rules.").

[41] *Calder*, 465 U.S. at 783, 789; Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002).

[42] *Calder*, 465 U.S. at 783; *Young*, 315 F.3d at 258.

gossip, while the defendants' speech in *New Haven Advocate* involved significant governmental policy choices.[43] The *New Haven* court explicitly based its holding on a distinction between Internet-mediated publication and physical publication; however, observers have found that distinction unconvincing.[44] When examined in light of the court's language and rhetoric about the parties and conduct at issue, the decision makes more sense. Unlike the Supreme Court in *Calder*, the Fourth Circuit was unwilling to assume that the defendants' conduct was wrongful, and it was therefore willing to stretch in order to find a doctrinal distinction.[45]

The *Calder* lawsuit arose when Shirley Jones, an actress famous for playing wholesome characters,[46] sued the less-than-reputable *National Enquirer*[47] for publishing an article that portrayed her as a poorly functioning alcoholic. The article claimed that Shirley's husband drove her to drink on set, stating that "[s]he start[ed] blurring her lines, and by 3 o'clock in the afternoon she[] [was] a crying drunk and they ha[d] to stop shooting."[48] Jones sued for libel in her home state of California. In addition to suing the *Enquirer* itself, she also named both the writer and editor of the article as individual defendants.[49]

The *Enquirer* did not contest personal jurisdiction in California, nor could it reasonably do so — it admittedly sold numerous copies of the publication there, which sufficed as a minimum contact with the forum.[50] The writer and editor, however, did contest personal jurisdiction.[51] They both worked in Florida, and both asserted that their only travel to California had been unrelated to their work on the

[43] *Calder*, 465 U.S. at 784; *Young*, 315 F.3d at 259.

[44] Spencer, *supra* note 37, at 101-02.

[45] *See Young*, 315 F.3d at 262-63.

[46] *See, e.g.*, Susan King, *The Other Side of Mrs. Partridge*, L.A. TIMES, May 15, 2009 (noting that "Shirley Jones does wholesome as well as anybody in the business (with the possible exception of Doris Day)"). Jones is perhaps best known for her role as "the loving mom" in the Partridge Family sitcom. *Id.*

[47] At the time this case arose, the paper was known primarily as "a disreputable scandal sheet and all-around guilty pleasure, filled with an enthusiastic combination of the lurid, the tawdry and the wholly preposterous." Paul Farhi, *Going Respectable?*, AM. JOURNALISM REV., June–July 2010, at ¶ 4. In recent years, however, the publication has the first to break major news stories, such as Tiger Woods's infidelity and John Edwards's affair with a campaign staffer. *Id.*

[48] *See* John South, *Husband's Bizarre Behavior Is Driving Shirley Jones to Drink*, NAT'L ENQUIRER, Oct. 9, 1979, *available at* 1982 U.S. Briefs 1401, at *8-9.

[49] Calder v. Jones, 465 U.S. 783, 785-86 (1984).

[50] *Id.* at 788-90.

[51] *Id.*

story.[52] The Court agreed that the publication's circulation in California could not be imputed to its employees, so the *Enquirer*'s California sales were not counted as minimum contacts in the case against the individual defendants.[53] Beyond the pair's unrelated trips to California, the writer's phone calls to California in researching the story, and the story itself, the Court concluded that there were "no other relevant contacts with California."[54]

In spite of the paucity of the individual defendants' contacts, the Court nonetheless concluded that both of them were subject to personal jurisdiction in California.[55] The Court found that the purposeful availment requirement had been satisfied because the editor and writer had "expressly aimed" and "targeted" their actions at the forum state.[56] Although the defendants had attempted to avoid jurisdiction by analogizing their work on the magazine to the position of "a welder employed in Florida who works on a boiler which subsequently explodes in California," the Court disagreed that the situations were comparable.[57] It distinguished between the welder's "mere untargeted negligence" and the writer and editor's "intentional, and allegedly tortious, actions" that were "expressly aimed" at the forum state.[58]

Interestingly, even though there was not yet a judicial determination of the falsity at this stage in the litigation, the Court refused to give weight to First Amendment concerns. Although the defendants had asked the Court to weigh speech protection in its determination, the Court flatly "reject[ed] the suggestion that First Amendment concerns enter into the jurisdictional analysis."[59] It concluded that such concerns would "needlessly complicate an already imprecise inquiry."[60] In addition, the Court implied that the relevant First Amendment rights were already amply protected by substantive

[52] *Id.* at 785 n.4. Although there was some dispute about whether the author had traveled to California to conduct research for the story, he maintained that he relied only "on phone calls to sources in California for the information contained in the article." *Id.* at 786. The Supreme Court found it "unnecessary to consider the contention." *Id.*

[53] *Id.* at 789.

[54] *Id.* at 786.

[55] *Id.* at 791.

[56] *Id.* at 789.

[57] *Id.* (citing Buckeye Boiler Co. v. Superior Court, 458 P.2d 57 (Cal. 1969) and Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)).

[58] *Id.* at 789.

[59] *Id.* at 790.

[60] *Id.*

defamation law, noting that "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits."[61] It concluded that weighing speech protection at the jurisdictional stage "would be a form of double counting."[62]

In *Young v. New Haven Advocate*, the Fourth Circuit was also faced with a defamation claim, but one with a far less sympathetic plaintiff and with more important speech at issue. The case arose when a Virginia prison warden, Stanley Young, sued three Connecticut newspapers and related defendants for libel. The State of Connecticut had run low on prison space and had begun contracting with the State of Virginia to house Connecticut prisoners.[63] Connecticut newspapers ran stories questioning the wisdom of this policy; these stories included quotes from state politicians that were sharply critical of Young and his collection of Civil War prints and Confederate memorabilia in particular. One article stated that "[t]he Civil War scenes in Young's office — under printed titles that say 'Our Heroes' — set an ominous, racist tone for the current group of 399 Connecticut inmates, who are predominantly black and Hispanic."[64] Another article quoted a state senator: "If you'd been in that office . . . you'd have thought the South won the Civil War. The paraphernalia should not be on display outside the warden's home."[65] A third article quoted a state representative: "It's a part of a mindset that is not understood in Connecticut and is easily misinterpreted. If you're a Connecticut person, especially African-American, you don't see the difference between a Confederate flag and a white sheet."[66]

Warden Young objected to these statements and others critical of his work, arguing that the statements "were meant and intended to convey, and did convey, to the community at large, the impression that Warden Stanley Young is a racist and a member of the Ku Klux Klan," and that they implied he was "unsuited, unfit, and without ability or capacity to hold the position of Warden of a prison."[67] Young did not specifically deny maintaining a collection of Confederate

---

[61] *Id.*

[62] *Id.*

[63] Complaint at Count III, ¶ 4, Young v. New Haven Advocate, 184 F. Supp. 2d 498 (W.D. Va. 2000) (No. 2:00CV00086).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

memorabilia. Nonetheless, he asserted that he had "always enjoyed a good reputation for uprightness of character, fairness to others, truthfulness and competence in his ability to administer prisons as well as his standing in his profession in the correctional community," and that this good reputation was harmed by the allegedly defamatory statements.[68]

Both the trial court and the appellate court focused on the Internet-based nature of the contacts in their jurisdictional analyses. The newspapers argued that they did nothing to target a Virginian readership; although the articles were posted on the papers' websites, all on-line advertising was local, and the stories were targeted at a Connecticut audience.[69] Young, on the other hand, argued that placing the articles on the website made them accessible to Virginian friends and colleagues, thus harming his reputation where he lived and worked.[70]

The Fourth Circuit was persuaded by the newspapers' arguments and distinguished the case from *Calder* on the basis of the Internet contacts. It held that "application of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state."[71] Because the newspapers were not attempting to reach a Virginian readership, the court concluded that there was no such express targeting.[72]

As Professor Spencer points out, this result is inconsistent with the Supreme Court's test in *Calder*.[73] The question in *Calder* was not whether the publication itself targeted a California readership — there was no question that it did and, therefore, no question that there was jurisdiction over the National Enquirer.[74] But the Court in *Calder* had also accepted the defendant writer's and editor's contentions that they had no control over where the paper was sold or read, and that the newspaper's circulation could not be imputed to them as contacts.[75] Thus, the *Calder* decision rested on the idea that the mere writing and

[68] *Id.*

[69] Young v. New Haven Advocate, 315 F.3d 256, 259-60 (4th Cir. 2002).

[70] *Id.* at 262-63.

[71] *Id.*

[72] *Id.* at 264 ("The facts in this case establish that the newspapers' websites, as well as the articles in question, were aimed at a Connecticut audience. The newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers.").

[73] Spencer, *supra* note 37, at 101.

[74] Calder v. Jones, 465 U.S. 783, 790 (1984).

[75] *Id.* ("Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there.").

editing of a defamatory article was itself sufficient to support jurisdiction in the forum where the plaintiff lived, worked, and suffered reputational harm.[76] The circulation of the publication in California was not entirely irrelevant because the California readership caused some of the harm to Jones's reputation. Nonetheless, for purposes of jurisdiction, the Court did not require that the editor or writer have any control over circulation or intent to circulate in the relevant forum — writing and editing the defamatory publication was enough to prove that they "targeted" the forum, even when its ultimate circulation was out of their control.[77]

The court in *New Haven Advocate* essentially applied the commercial activity analysis from the minimum contacts test in place of the *Calder* effects test. If the newspapers had indeed sought to target a Virginia readership, there would be jurisdiction because the defendants were "seek[ing] to serve" the market.[78] Jurisdiction under such circumstances is so well settled that the *National Enquirer* itself did not contest jurisdiction; it clearly served the California market.[79] The effects test is needed only when there is no intent to serve a state's market. Even accepting the defendants' contention that putting the article on the Internet should not be viewed as intent to distribute the publication to a Virginia audience, no such intent is needed under *Calder*. Intent to defame is sufficient to find jurisdiction under the effects test; intent to distribute to an in-state readership is unnecessary.[80]

---

[76] *Id.* at 789-90 ("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.").

[77] *Id.* at 789 (noting the defendants' argument that they "have no direct economic stake in their employer's sales in a distant State," and are not "able to control their employer's marketing activity," but rejecting these arguments because "their intentional, and allegedly tortious, actions were expressly aimed at California").

[78] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (plurality opinion) ("[A] defendant may in an appropriate case be subject to jurisdiction without entering the forum — itself an unexceptional proposition — as where manufacturers or distributors 'seek to serve' a given State's market.").

[79] This is a point that is frequently misunderstood by courts attempting to distinguish *Calder*. *See, e.g.*, Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd., 34 F.3d 410, 412 (7th Cir. 1994) ("The defendant had also 'entered' the state in some fashion, as by the sale (in *Calder*) of the magazine containing the defamatory material."). Of course the writer and editor were the only defendants in *Calder* to contest personal jurisdiction, and the Supreme Court explicitly chose not to impute the magazine sales to the individual defendants. *Calder*, 465 U.S. at 783.

[80] Spencer, *supra* note 37, at 101-02 ("Any person who targets wrongdoing at a

Other scholars have convincingly argued why the Internet-based nature of the publication should not have influenced the outcome of *New Haven Advocate*;[81] the publication medium cannot be dispositive when it is the defamatory statement itself, as opposed to its in-state circulation, that gives rise to jurisdiction.[82] But why, then, was the Fourth Circuit willing to accede to the defendants' unconvincing distinction between Internet-based publication and paper-based publication?[83] And why, in other cases, have many other courts attempted to impose a narrower reading of the *Calder* effects test?[84]

The two courts' underlying views of the merits may better explain the different outcomes in *Calder* and *New Haven Advocate*. At least for purposes of determining personal jurisdiction, the Supreme Court in *Calder* appeared to accept the truth of the plaintiff's allegations as pleaded, both as to the falsity of the defendants' statements and the defendants' wrongful intent in making them, and as to the harm that the plaintiff suffered as a result of those statements.[85] The Court's language telegraphs its assumption that the defendants did in fact

victim found residing within a particular state can anticipate having to answer for that wrongdoing in the courts of that state. That is the essential holding and logic of Calder . . . . Courts should not evaluate whether a wrongdoer has targeted the victim's fellow state residents or the State itself because Calder accords such considerations little relevance . . . . What should be and is relevant under Calder is that the victim was the target of the wrongdoing and whether that victim is a resident of the forum State.").

81 *Id.* (summarizing critiques).

82 *Id.* at 103 ("[C]ourts are evaluating who the defendant's target "audience" is rather than who the victim of the allegedly intentionally tortious conduct is. But as the Calder Court made clear, it is the targeting of wrongdoing, not of the medium of its transmission, that matters.").

83 In fact, one of the newspaper defendants also distributed several paper copies to eight subscribers in the State of Virginia. In order to maintain the Internet/paper distinction, however, the Fourth Circuit avoided consideration of this physical circulation by concluding that the plaintiff had not relied on those contacts. Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002) ("[W]e can put aside the few Virginia contacts that are not Internet based because Warden Young does not rely on them.").

84 *See* Griffis v. Luban, 646 N.W.2d 527, 533 (Minn. 2002) ("Courts have come to varying conclusions about how broadly the 'effects test' approved in *Calder* can be applied to find jurisdiction. The Seventh Circuit Court of Appeals has construed *Calder* very broadly . . . . However, the other federal courts of appeals that have considered the issue have rejected this expansive view that *Calder* supports specific jurisdiction in a forum state merely because the harmful effects of an intentional tort committed in another jurisdiction are primarily felt in the forum.").

85 Although the court would be correct to defer to the plaintiff's factual allegations in ruling on a 12(b)(6) motion to dismiss for failure to state a claim, this standard is inappropriate for jurisdictional rulings. *See infra* Part III.A.1.

engage in defamation. This assumption may well be factually correct; after all, shortly after the jurisdictional ruling, the plaintiff accepted a confidential monetary settlement in exchange for dropping her $20 million claim.[86] But, true or not, at this stage of the litigation, the wrongfulness of the conduct was still an assumption — the case had not yet been litigated on the merits. At trial, the plaintiff would bear the burden of proving that the defendants' statements were in fact false; if the plaintiff could not show falsity, then the defendants' conduct in writing the story would not have been wrongful, regardless of how unflattering the story might have been.[87]

The Court explicitly recognized that the allegations were not yet proven, referring in several instances to the defendants "alleged" wrongdoing.[88] In spite of this acknowledgment, however, the Court used language strongly critical of the individual defendants. The Court wrote that "Petitioner South wrote and Petitioner Calder edited an article that they knew would have a potentially devastating impact on respondent," that "they knew that the brunt of the injury would be felt by respondent in the State in which she lives and works," and that they were "primary participants in an alleged wrongdoing intentionally directed at a California resident."[89] The Court implied that the defendants' mental state encompassed both knowledge and specific intent; not only did the defendants "kn[o]w that the brunt of

---

[86] *See* Brief for Appellants at 12, Calder v. Jones, No. 82-1401 (June 17, 1983), 1982 U.S. Briefs 1401 (noting that Jones sought $10 million in compensatory damages as well as $10 million in punitive damages); Aljean Harmetz, *National Enquirer Agrees to Settle With Shirley Jones in Libel Suit*, N.Y. TIMES, Apr. 27, 1984, at A17.

[87] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) ("We believe that the common law's rule on falsity — that the defendant must bear the burden of proving truth — must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."). Interestingly, Shirley Jones's husband, Marty Ingels, dropped his defamation claim while her claim was still pending, before the case was heard by the Supreme Court. *See* Transcript of Oral Argument at 2, Calder v. Jones, 82-1401 (Nov. 8, 1983), 1983 U.S. Trans. LEXIS 38. The article had also made unflattering statements about Ingels, claiming that he owes money that he "never" pays back and he "has one of the most notorious casting couches in all of Hollywood." South, *supra* note 48.

[88] *Calder*, 465 U.S. at 783, 788, 790 (referring to "[t]he allegedly libelous story," the defendants' "allegedly tortious" actions, and the defendants' "participation in an alleged wrongdoing").

[89] *Id.* at 789-90.

the injury" would be felt in California, but their conduct was "calculated to cause injury" in California.[90]

In contrast to the critical language the Court used to describe the defendants' actions, the language it used to describe the plaintiff's claim expressed much more sympathy. The Court stated that the article "impugned [her] professionalism," by alleging that she drank at work.[91] The Court concluded that her "emotional distress" and "injury to her professional reputation" should be actionable in California.[92]

The Fourth Circuit in *New Haven Advocate* made no such assumption of the defendants' wrongdoing; in general, the court was much more circumspect in demonstrating its allegiance to either side's version of the facts. Nevertheless, the court's articulation of the facts of the case suggests that the court was, at best, skeptical of the plaintiff's likelihood of success. Where the Supreme Court in *Calder* accused the defendants of "impugn[ing] the [plaintiff's] professionalism," the Fourth Circuit more gently described the defendants' conduct in *New Haven Advocate* as "discuss[ing] the allegedly harsh conditions at the Virginia prison," "express[ing] concern" about the display of Confederate memorabilia, and "questioning the practice" of sending Connecticut prisoners to Virginia.[93] The much gentler rhetoric suggests that the court did not believe that the defendants had published libelous falsehoods or intentionally sought to harm Young's reputation.

Furthermore, although *Calder* flatly prohibited consideration of First Amendment principles at the jurisdictional stage, the Fourth Circuit's language in *New Haven Advocate* emphasized the importance of the speech at issue. The court noted that Connecticut's decision to transfer inmates to Virginia was a policy that "provoked considerable public debate" both among the public and state legislators, and that the policy was controversial enough that Connecticut citizens engaged in "demonstrations against it at the state capitol in Hartford."[94] In concluding that "Connecticut, not Virginia, was the focal point of the articles," the court emphasized the importance of the speech at issue: "The articles reported on and encouraged a public debate in Connecticut about whether the transfer policy was sound or practical for that state and its citizens."[95] Thus, although the court did not

[90] *Id.* at 789, 791.
[91] *Id.* at 788 n.9.
[92] *Id.* at 789.
[93] *Id.* at 788; Young v. New Haven Advocate, 315 F. 3d 256, 259 (4th Cir. 2002).
[94] *Young*, 315 F.3d at 259.
[95] *Id.* at 263-64.

explicitly take First Amendment issues into account at the jurisdictional stage, it nonetheless characterized the facts of the case in a way that emphasized the importance of the speech at issue. Because the court did not accept the plaintiff's characterization of the defendants' speech as wrongful or tortious, it did not find that the speech was calculated to cause injury, much less to cause injury in Virginia.

B. Difficult Cases: The Merits at Equipoise

The differing outcomes in *Calder* and *New Haven Advocate*, while inconsistent, may result in a type of rough justice.[96] While the courts' assumptions of the merits of those cases may have unwittingly influenced the jurisdictional outcome, those assumptions were probably correct. An actress who loses work because of false accusations of alcohol abuse likely has a strong defamation claim; a prison official who keeps Confederate memorabilia in his office and then complains that publications criticizing this practice "imply that he 'is a racist who advocates racism' " likely has a much weaker claim.[97] In a number of the cases distinguishing *Calder*, the plaintiffs' claims were similarly weak.[98]

In many cases, however, the strength of the plaintiff's claim is much less clear at the pretrial stage. Neither the plaintiff nor the defendant may be more sympathetic than the other, and the merits of the claim may be murky even after pretrial evidentiary development. In these cases, the courts' opinions have been even more contradictory and

[96] Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 67 n.117 (1998) ("If a plaintiff comes to court with what appears to be a meritorious claim, the trial judge may be inclined to deny a motion to dismiss for lack of personal jurisdiction, rather than force the plaintiff to endure the delay inherent in bringing suit in another forum. Likewise, if the plaintiff's suit appears to lack merit, the trial judge may be inclined to take advantage of an opportunity to quickly dismiss the case on jurisdictional grounds.").

[97] *Young*, 315 F.3d at 259; *see* Meiring de Villiers, *Substantial Truth in Defamation Law*, 32 AM. J. TRIAL ADVOC. 91, 98 (2008) ("The truth or falsity of an alleged defamatory statement and the degree of fault exhibited by the defendant clearly play a prominent role in a defamation action.").

[98] *See, e.g.*, Marten v. Godwin, 499 F.3d 290, 293 (3d Cir. 2007) (holding that a Pennsylvania court lacked personal jurisdiction over a defamation and retaliation claim brought by a student accused of plagiarism and expelled from an online degree program); Griffis v. Luban, 646 N.W.2d 527, 536 (Minn. 2002) (holding that Alabama lacked jurisdiction over a defamation claim that arose when the out-of-state defendant wrote on an Internet forum that the Alabama plaintiff lacked academic credentials and got her archeology degree from a "box of Cracker Jacks," noting that there was no record evidence of actual harm to the plaintiff's reputation).

unpredictable than in more one-sided cases, but each decision still largely depends on whether the court is willing to accept as true the plaintiff's allegations about the underlying claim.

Online consumer criticism provides fertile ground for cases whose merits are less than clear.[99] The Supreme Court recently denied a petition for certiorari in one such case — *Kauffman Racing Equipment, L.L.C. v. Roberts*.[100] The case arose when Kauffman Racing Equipment, an Ohio business, sold an engine block to Scott Roberts, a resident of Virginia.[101] Roberts believed the product to be defective.[102] Kauffman Racing agreed to refund his money if the company could verify that the product was defective. However, after inspection, the company concluded that any defect arose from modifications that Roberts made to the block after receiving it.[103]

Roberts criticized both the product and the seller on automotive websites, including eBay Motors, where the seller engaged in online sales.[104] Roberts's comments called the block "junk," called the owner of Kauffman Racing "less than honorable," and wrote that he was trying to get his message out "to help other potential victims."[105]

Unsurprisingly, Kauffman Racing saw the issue differently. The company asserted that Roberts's statements were false and defamatory, and that Roberts was wrongfully attempting to cause the company to lose business.[106] Kauffman Racing sued Roberts in Ohio state court both for defamation and for intentional interference with contracts and business relationships.[107]

The Ohio courts found the case to be a difficult one. The lower courts split on the question of personal jurisdiction, with the trial court dismissing the case and the intermediate court reinstating it.[108] The Ohio Supreme Court affirmed in a split decision, but the majority and dissenting justices struggled with the relationship between

[99] *See, e.g.*, BroadVoice, Inc. v. TP Innovations LLC, 733 F. Supp. 2d 219 (D. Mass. 2010) (ruling on a motion to dismiss); Kauffman Racing Equip., L.L.C. v. Roberts, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 1, *cert. denied*, 131 S. Ct. 3089 (2011) (same).

[100] 131 S. Ct. 3089 (2011).

[101] *Kauffman Racing*, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 1.

[102] *Id.*

[103] *Id.* at 787-88.

[104] *Id.* at 788.

[105] *Id.*

[106] *Id.* at 789.

[107] *Id.*

[108] *Id.*

jurisdiction and merits.[109] As in *Calder*, the majority accepted the plaintiff's factual allegations, which led to a finding of jurisdiction: "When viewed in a light most favorable to [Kauffman Racing], the evidence shows that Roberts intentionally and tortiously sought to harm [Kauffman Racing's] reputation and negatively affect its contracts and business relationships."[110] The dissenting justices were less willing to view the evidence in the light most favorable to the plaintiff.[111] While the dissent did not explicitly take issue with the jurisdictional burden of proof, they nonetheless refused to infer wrongfulness:

> While it is evident from Roberts's Internet posts that he sought to discourage others from purchasing KRE's products, any individual who posts a negative review of a product or service in a public forum arguably seeks the same objective. Subjecting all individuals to suit in Ohio who post Internet reviews — no matter how scathing — of purchases made from Ohio companies does not comport with the due process notions of "fair play and substantial justice."[112]

The burden of proof on the wrongfulness of the defendant's conduct therefore appears to be the determinative issue in the case and highlights a more general trend. When the court views the evidence in the light most favorable to the plaintiff, it must assume that the defendant was indeed making false statements in an effort to harm the plaintiff, and under *Calder* jurisdiction is therefore appropriate based on the defendant's intent to harm a known resident of Ohio.[113] On the other hand, when the court is unwilling to assume harmful intent, there is no "expressly aimed" tort on which to base personal jurisdiction.[114] And at least at the pretrial stage, there is little evidence by which to predict whether the defendant's conduct was wrongful. Without knowing whether the product was actually defective, it is difficult to guess whether the defendant wrongfully trying to harm the reputation of an innocent seller or reasonably trying to warn consumers of an unscrupulous one.

[109] *Id.* at 797-99.
[110] *Id.* at 796.
[111] *Id.* at 799 (O'Donnell, J., dissenting).
[112] *Id.*
[113] *See id.* at 796 (majority opinion); *supra* Part II.A.
[114] *Kauffman Racing*, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 55. (quoting Calder v. Jones, 465 U.S. 783, 789-90 (1984)).

Outside the defamation context, intertwined problems of merits and jurisdiction can also make it difficult to determine jurisdiction in close cases. One recent case, *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*,[115] involved an intellectual property dispute. Plaintiffs Karen Dudnikov and Michael Meadors made a living selling printed fabric on eBay.[116] One set of prints resembled artwork by the artist Erté. However, as the court noted, "While Erté's images depict elegant women walking aquiline dogs, plaintiffs' prints portray Betty Boop next to her aptly named canine companion, Pudgy."[117] Chalk & Vermilion Fine Arts, the American agent for the British copyright holder of the original Erté images, and the copyright holder itself, all believed that the fabric infringed on their copyrights.[118] Dudnikov and Meadors disagreed. Chalk and Vermilion first filed a notice of claimed infringement with eBay, which Dudnikov and Meadors contested. SevenArts, the British copyright holder, then sent an email to Dudnikov announcing an intent to file suit for copyright infringement.[119] Dudnikov and Meadors preempted the threatened suit by filing, *pro se*, an action in their home state of Colorado seeking a declaratory judgment that their fabric did not infringe the Erté copyright.[120] Both SevenArts and Chalk & Vermilion contested personal jurisdiction. The district court dismissed the case, but the Court of Appeals for the Tenth Circuit reversed and reinstated the case.[121]

Dudnikov and Meadors relied on the *Calder* effects test to argue in favor of jurisdiction, claiming that defendants' efforts to shut down their auction, although initiated in the defendants' home jurisdiction and communicated to eBay in California, were targeted to interfere with their business in Colorado.[122] The defendants, on the other hand, argued that their actions were not wrongful and that they were merely "vindicating their putative intellectual property rights."[123]

The dispute created a difficult question for the court. It had no doubt that the defendant intended to have an impact in the state of

[115] 514 F.3d 1063 (10th Cir. 2008).
[116] *Id.* at 1067.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 1067-68.
[122] *Id.*
[123] *Id.* at 1072.

Colorado.[124] It likened the defendant's conduct to "a bank shot in basketball" in which "[a] player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket."[125] Here, the court concluded, because Chalk & Vermilion sent the notice of claimed infringement to California with the intent of cancelling the auction in Colorado, their " 'express aim' thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket."[126]

The more difficult determination, however, was the import of the defendants' conduct: was it wrongful, and did it even need to be wrongful to support jurisdiction? Or could the *Calder* effects test support jurisdiction based on nonwrongful conduct directed at the forum? The court avoided what it characterized as a "thicket" by accepting the plaintiff's allegation of wrongfulness as true.[127] By "crediting the complaint as true," as the court believed it "must" at the jurisdictional stage, the court was able to adopt "an inference that defendants tortiously interfered with plaintiffs' business" sufficient to support effects-test jurisdiction.[128]

The merits of the parties' contentions in *Kauffman Racing* and *Dudnikov* are fairly balanced, and in both cases the courts could find effects-test jurisdiction only by assuming the truth of plaintiffs' allegations of wrongfulness and harm. In similar cases, however, courts have come to the opposite conclusion by refusing to take such allegations as true.

One such case, *BroadVoice, Inc. v. TP Innovations LLC*,[129] presents a number of close parallels to *Kauffman Racing*; like the earlier action, it is a defamation case involving online consumer criticism. Michael Bednar, doing business as TP Innovations LLC, used BroadVoice for business telephone service.[130] After he became dissatisfied with the service, he purchased the domain name "www.bewareofbroadvoice.com" and posted various criticisms of the company.[131] He accused the company of violating numerous laws, referred to it as "The Internet Telephone

[124] *Id.* at 1075.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 1073.
[128] *Id.*
[129] 733 F. Supp. 2d 219 (D. Mass. 2010).
[130] *Id.* at 222.
[131] *Id.*

Service From Hell," and "encouraged BroadVoice 'victims' to file complaints" with various state and federal agencies.[132] His website provided links to assist other customers in contacting those agencies.[133] The company and two of its officers filed suit for defamation, intentional infliction of emotional distress, and business disparagement in the company's home state of Massachusetts.[134] Interestingly, when the court cited the standard of review, it concluded that it "must take the jurisdictional facts affirmatively alleged by the plaintiff as true and construe all 'disputed facts in the light most hospitable to [the] plaintiff.' "[135] Nevertheless, it avoided making a finding of jurisdiction by concluding that (1) the plaintiffs did not formally allege "that Bednar intended that 'the brunt of the harm' be felt in Massachusetts," and (2) that the website was not targeted at a Massachusetts readership more than any other forum.[136]

Neither distinction was fully convincing. The plaintiffs had identified *Calder* as a "directly analogous" case, and *Calder* acknowledges that the brunt of the harm will be felt where a defamation plaintiff "lives and works."[137] Furthermore, as noted above, *Calder* did not require the individual defendants to target a particular readership; it was the harm from the intentional tort that was targeted at the forum, not the communication itself.[138] If the defendant had particularly targeted a Massachusetts readership, there likely would have been personal jurisdiction based on traditional principles of purposeful availment and seeking to serve the state market — there would have been no need to rely on the effects test.[139] Therefore, even though the court claimed to take the plaintiff's allegations as true, it did not assume for jurisdictional purposes that the defendant intentionally engaged in wrongful conduct harmful to the plaintiff, but instead looked for traditional indicia of purposeful availment.

Another case, *Radio Systems Corp. v. Accession, Inc.*,[140] decided by the Court of Appeals for the Federal Circuit, presents parallels to *Dudnikov*. It also was an intellectual property case in which the plaintiff sought a declaratory judgment, although this case arose out of

[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 223.
[136] *Id.*
[137] Calder v. Jones, 465 U.S. 783, 784 (1984).
[138] *See supra* Part I.A.
[139] *See supra* notes 78-80.
[140] 638 F.3d 785, 789 (Fed. Cir. 2011).

competing patent claims.[141] The defendant, Accession, believed that a patent application filed by Radio Systems infringed on an earlier Accession patent.[142] Accession contacted the Patent and Trademark Office ("PTO") in order to bring its earlier patent to the office's attention in connection with Radio Systems' patent application.[143] The PTO then withdrew the "notice of allowance" it had previously issued, thus leaving room for the patent to be challenged.[144] Radio Systems sued Accession in Tennessee, seeking a declaration of noninfringement and of invalidity of Accession's earlier patent.[145] Unlike the Tenth Circuit in *Dudnikov*, the Federal Circuit was unwilling to assume that Accession was wrongfully interfering with Radio Systems' business.[146] Instead, the court concluded that Accession's contacts with the PTO were directed at Virginia, where the PTO office was located, rather than Tennessee, where Radio Systems was headquartered.[147] In reaching that conclusion, the court characterized Accession's efforts as "enforcement activities";[148] unlike the *Dudnikov* court, it did not characterize the conduct as necessarily tortious or wrongful.

These different outcomes in substantially similar cases suggest that a clearer standard of proof is needed for effects-test cases. At the outer limits, the hidden influence of the merits on jurisdictional decisions may not have a significant influence on how cases are ultimately resolved; it merely allows weaker cases to be dismissed earlier. In cases where the merits are at equipoise, however, this influence results in significant unpredictability and doctrinal confusion. When courts rely on assumptions about the merits of the claim in order to determine jurisdiction, they reach unpredictable and conflicting jurisdictional determinations in cases where the claims appear evenly balanced.

III. REFRAMING THE JURISDICTIONAL STANDARD OF PROOF

Part II described the confusion and inconsistency in effects-test cases and argued that there is a hidden factor influencing how the decisions come out: when courts accept the plaintiff's allegations of

[141] *Id.*
[142] *Id.* at 788.
[143] *Id.*
[144] *Id.*
[145] Radio Sys. Corp. v. Accession, Inc., No. 3:09-CV-481, 2010 WL 2103443, at *2 (E.D. Tenn. May 21, 2010).
[146] *Radio Sys. Corp.*, 638 F.3d at 792.
[147] *See id.*
[148] *See id.*

wrongfulness and harm as true, the court will find jurisdiction. The burden of proof is therefore a critical inquiry in effects-test cases.

This Part examines the jurisdictional burden of proof in greater depth. First, it focuses on the quantum of proof necessary for effects-test personal jurisdiction, analyzing what standard (or standards) of proof courts are currently applying, the costs and benefits of possible standards, and the assumptions a court may appropriately make at this stage. Second, it examines what types of contacts should "count" for effects-test jurisdiction. Specifically, it questions whether the defendant's actions must be wrongful and tortious, or whether it is enough that the defendant's actions merely have an intentional effect on the forum.

A. The Burden of Proof for Jurisdictional Facts

Despite the importance of the burden of proof, court opinions in this area are especially confused and fragmented. There are several reasons for this doctrinal incoherence. First, and perhaps most importantly, this is an issue that has received little attention from litigants, courts, or scholars.[149] As a result, few litigants raise the issue and few court decisions explicitly examine it — even the Supreme Court in *Calder* failed to explicitly identify the jurisdictional standard of proof, though it relied implicitly on the defendants' "alleged" actions.[150] Second, perhaps because of the doctrinal neglect this issue has received, many courts have confused the standard for ruling on motions to dismiss for lack of personal jurisdiction with the standard for ruling on motions to dismiss for failure to state a claim.[151] Third, while proposals to allow a lower standard of proof for jurisdictional facts inextricably intertwined with the merits may work well in run-of-the-mill personal jurisdiction cases, those lower standards are problematic in effects-test cases.[152]

1. Doctrinal Neglect and Confusion

The problems of doctrinal neglect and confusion work symbiotically. The burden-of-proof issue is rarely raised by the

[149] Professor Kevin Clermont is one of the few scholars to systematically examine the standard of proof for both personal jurisdiction and subject matter jurisdiction. *See, e.g.*, Clermont, *supra* note 14, at 1008 (discussing the standard of proof for personal and subject matter jurisdiction).

[150] *See* Calder v. Jones, 465 U.S. 783, 790 (1984).

[151] *See infra* text accompanying notes 153-60.

[152] *See infra* text accompanying notes 187-93.

litigants, and so it is rarely explicitly decided by courts. Because of its underlying influence in effects-test cases, however, courts have to handle the issue at least implicitly. When they do so, they often import standards that they apply to other pretrial motions. Thus, for example, courts may say that they "must 'view allegations in the pleadings and the documentary evidence in a light most favorable' to the plaintiff and resolv[e] all reasonable competing inferences in favor of the plaintiff."[153]

It is not uncommon for courts to apply a plaintiff-deferential standard at the jurisdictional stage; courts have applied such a standard both to subject-matter jurisdiction challenges and to personal jurisdiction challenges, though not without disagreement.[154] However, the standard is more commonly and more appropriately applied to a motion to dismiss for failure to state a claim, which derives from the common law demurrer.[155] At that stage, the idea is the moving party should only be able to avoid a jury trial if, even taking all inferences against it, there is still no valid claim and, therefore, nothing for the

[153] *See* Kauffman Racing Equip., L.L.C. v. Roberts, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, *cert. denied*, 131 S. Ct. 3089 (2011).

[154] For subject-matter jurisdiction, compare *Saudi Basic Industries Corp. v. Exxonmobil Corp.*, 194 F. Supp. 2d 378, 400 (D.N.J. 2002) ("[I]n a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), no presumption of truthfulness attaches to the allegations in the complaint."), with *Old Republic Insurance Co. v. Sidley & Austin*, 702 F. Supp. 207, 208 (N.D. Ill. 1988) (stating that, in deciding a motion under 12(b)(1), "any inference drawn must be favorable to the plaintiff, and the allegations contained in the complaint are to be accepted as true" (citation omitted)). For personal jurisdiction, compare *QRG, Ltd. v. Nartron Corp.*, No. 06-500, 2006 WL 2583626, at *1 (W.D. Pa. 2006) ("For purposes of a Rule 12(b)(2) motion, the court applies the same standard for truthfulness and inferences as in a Rule 12(b)(6) motion, that is, accepting as true plaintiff's version of the facts and drawing all inferences in the plaintiff's favor."), with *Kopff v. Battaglia*, 425 F. Supp. 2d 76, 81 (D.D.C. 2006) (distinguishing the 12(b)(6) context in which a court defers to the plaintiff's well-pleaded allegations and holding that "[w]hen considering challenges to personal jurisdiction, the Court need not treat all of plaintiffs allegations as true and may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts" (internal citation omitted)), and *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 36 n.6 (D.D.C. 2007) ("Plaintiffs rightfully carry a heavier burden in answering a jurisdictional challenge under Rule 12(b)(2) than a 12(b)(6) challenge to the sufficiency of pled claim.").

[155] *See* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1876 (2008) (noting that for a demurrer at common law: "A court simply accepted the facts pled by the plaintiff and any inference in support of the plaintiff's claim . . . however improbable any such inferences might be. The court then decided whether a claim existed under these facts.").

jury to decide.[156] Without close analysis of the reasons underlying the different standards and without guidance from the litigants, a court may very well import the Rule 12(b)(6) (failure to state a claim) standard into jurisdictional determinations under Rule 12(b)(1) (subject matter jurisdiction) and Rule 12(b)(2) (personal jurisdiction).[157] The conflation of the standards is not surprising: both questions are raised by pretrial motions under Rule 12(b), and both seek dismissal of the claim.

When close analysis of the underlying bases for dismissal are undertaken, it is clear that the standards should be different. A motion to dismiss for failure to state a claim is deferential to the plaintiff in order to protect the plaintiff's Seventh Amendment right to a jury trial. In contrast, personal jurisdiction protects the defendant's due process rights under the Fourteenth Amendment. Subject matter jurisdiction ensures that courts will not exceed the powers given to them by Article III and therefore protects federalism interests.[158]

In deciding a motion to dismiss for lack of jurisdiction, the court is not adopting a strict standard in order to ensure that the jury-trial right is protected; instead, it is trying to determine whether it has the power to hear the claim (in the case of subject matter jurisdiction) or power over the parties (in the case of personal jurisdiction). Because different constitutional rights are at issue in each decision, the consequences of each type of dismissal are also quite different.[159] In the Rule 12(b)(6) analysis, the only constitutional standard to be protected is the plaintiff's Seventh Amendment right to a jury trial — the defendant has no constitutional right to an earlier dismissal.[160] As a

[156] *See id.* at 1890 ("[A] complaint may be dismissed without a violation of the Seventh Amendment, but the court must accept as true the facts and corresponding inferences pled by the complainant, however probable or not."); *see also* FED. R. CIV. P. 12(b)(6).

[157] *See* sources cited *supra* note 154 and accompanying text.

[158] *See* Thomas, *supra* note 155, at 1876-78 (describing relationship between jury trial right and Rule 12(b)(6) motions).

[159] *See* Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 597 (2007) ("The dismissal for failure to state a claim will be deemed a judgment on the merits, with prejudice and not subject to refiling and having res judicata effect on future actions involving the same or related claims or parties. The dismissal for lack of subject matter jurisdiction leaves the plaintiff free to refile her federal and state claims in another forum."). Similarly, the dismissal for lack of personal jurisdiction leaves the plaintiff free to file in a more appropriate jurisdiction. FED. R. CIV. P. 41(b) (specifying that dismissal for lack of jurisdiction does not operate as an adjudication on the merits).

[160] And, in fact, some scholars have argued that not only is there no constitutional right to pretrial dismissal, but current dismissal practices for 12(b)(6) motions and

result, even an erroneous decision to deny a Rule 12(b)(6) dismissal would not infringe any constitutional right, though the corresponding error in granting such a motion would deny the plaintiff's right to a jury trial. Thus, the court accepts the plaintiff's allegations as true to ensure that it does not usurp the jury's fact-finding role. Conversely, if the court errs in allowing a case to proceed where it lacks jurisdiction, it is exercising a power that it lacks under the Constitution and infringing on the defendant's right to due process.[161] If the court automatically accepts the plaintiff's allegations as true, it will be assuming the existence of facts giving rise to jurisdiction — and it will thereby assume the existence of jurisdiction even in cases where it lacks the power to act.

Recognizing the importance of the jurisdictional determination, the Supreme Court long ago held that the party seeking to invoke the court's jurisdiction (usually the plaintiff) has the burden of proof to demonstrate jurisdiction generally and must do so by a preponderance of the evidence.[162] The Court provided that when the defendant challenges those facts, the plaintiff "must support them by competent proof," and that regardless of whether the defendant contests those facts, "the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."[163]

---

summary judgment are affirmatively unconstitutional. *See* Thomas, *supra* note 155, at 1876; *see also* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 141-42 (2007).

[161] *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578, 583-84 (1999); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 9-12 (2001) (characterizing "subject matter jurisdiction [as] a nonwaivable delimitation of federal power, personal jurisdiction a waivable guarantee of individual liberty," both of which are "essential and constitutional aspect of federal judicial power").

[162] *See* McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936); *see also* Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 411 (2008) (arguing, in the class action context, that shifting the burden to the party arguing against jurisdiction "is the civil procedural equivalent of saying that criminal defendants are now guilty until proven innocent.").

[163] *See McNutt*, 298 U.S. at 189 (addressing subject matter jurisdiction). In the personal jurisdiction context, this has expanded to mean that the plaintiff has the burden to show minimum contacts/purposeful availment. After the plaintiff does so, the burden then shifts to the defendant to show why the exercise of jurisdiction would be unreasonable. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.").

Thus, although a number of courts have resolved competing versions of the facts in favor of the plaintiff,[164] such decisions are in error; the Supreme Court has required a higher level of proof for jurisdictional allegations and does not generally allow the plaintiff's allegations to be merely taken as true.[165] Lower standards should be accepted only when the defendant does not contest the jurisdictional allegations[166] or in a preliminary response to the motion to dismiss that will be supplanted after discovery.[167] While some authorities have suggested that the court has flexibility to apply the lower pretrial standard without revisiting it later,[168] the stronger view is that the plaintiff must reach the higher standard at some point before judgment; otherwise, the court may render judgment without ever having established the facts necessary to support jurisdiction.[169]

---

[164] *See, e.g.*, Mercantile Capital, LP v. Fed. Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002) ("[I]f the parties present conflicting evidence, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing will be sufficient to survive the motion to dismiss notwithstanding the contrary presentation by the moving party."); *see also* CASAD & RICHMAN, *supra* note 14 ("Most courts refuse to engage in an evidentiary inquiry on the jurisdiction issue, and if the plaintiff has pleaded in good faith a prima facie case of tort, the case will not be dismissed.").

[165] *See McNutt*, 298 U.S. at 189.

[166] *See, e.g.*, Welsh v. Gibbs, 631 F.2d 436, 439 (6th Cir. 1980) (applying a lower standard when "the written materials presented no disputed questions of fact on jurisdiction and no issues of credibility").

[167] *See, e.g.*, Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990) ("Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith . . . . After discovery, the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant . . . . If the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence.").

[168] *See, e.g.*, O'Bryan v. McDonald, 952 P.2d 636, 638 (Wyo. 1998) ("The court may determine the matter on the basis of pleadings and other materials called to its attention; it may require discovery; or it may conduct an evidentiary hearing . . . . The procedural path the district court chooses to follow determines the plaintiff's burden of proof and the standard to be applied on appeal.").

[169] *See, e.g.*, 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1351 (3d ed. 2011) ("Deferring the ruling will enable the parties to employ discovery on the jurisdictional issue and might lead to a more accurate judgment on the subject than one made solely on the basis of affidavits."); *see also* Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 713 (7th Cir. 2002) ("If personal jurisdiction is challenged under Rule 12(b)(2), the court must decide whether any material facts are in dispute. If so, it must hold an evidentiary hearing to resolve them, at which point the party asserting personal jurisdiction must prove what it alleged."); *see also* Clermont, *supra* note 14, at 992 n.79 (noting that "lowering the standard for early determinations is

2. The Prima Facie Standard for Inextricable Merits Cases

As described above, the existence of jurisdictional facts must be established; the court cannot merely assume that the plaintiff's jurisdictional allegations are correct. The question then arises: when, and by what standard, should jurisdiction be proved? Most jurisdictional facts can be established pretrial, either because they are undisputed, or because the court can hold an evidentiary hearing to determine jurisdiction.[170] The standard for jurisdictional proof becomes much more complex when jurisdictional facts are inextricably intertwined with the merits.[171]

The Supreme Court has expressed concern that the trial judge not prematurely evaluate the merits at the jurisdictional stage. In cases where issues of jurisdiction and merits overlap, the Court has therefore allowed the plaintiff to go to trial on a very modest showing of jurisdiction.[172] Thus, courts have held that "where the jurisdictional

---

nonsensical, because the lowered standard would force defendants who eventually prevail on the merits to defend in a forum where by law they supposedly need not defend," and concluding that "[m]ost likely, such judicial statements in favor of an early lowered standard are merely loose and confused talk to which the court has no intention of giving tangible effect," as "apparently no actual case exists in which the court upheld jurisdiction by a lowered standard on pretrial motion and then properly found no jurisdiction at trial under the higher standard, as opposed to cases that straightforwardly postponed the jurisdictional issue until determination at trial.").

Of course, even the preponderance standard leaves some room for error. *See* William P. Marshall, *The "Facts" of Federal Subject Matter Jurisdiction*, 35 DEPAUL L. REV. 23, 50 (1985) ("A margin of error is implicit in fact-finding and cannot be eliminated even when the underlying issue is jurisdiction.").

[170] Clermont, *supra* note 14, at 985 ("The judge determines the issue on documentary proof and affidavits and, if necessary, after an evidentiary hearing.").

[171] *Id.* at 976-77 (concluding that the plaintiff "should not have to prove her cause of action in order to establish jurisdiction," and noting that such a requirement would lead to problematic consequences including costly proceedings, res judicata problems, and the possibility of the judge usurping the jury's role).

[172] *Id.* at 1008 ("But as usual, the court in deciding jurisdiction must avoid trying the merits. The standard therefore must be lowered to prima facie proof for issues that overlap the merits.") (citing Smithers v. Smith, 204 U.S. 632, 645 (1907) (holding that a judge's discretion to dismiss a case apparently without jurisdiction should be subject to certain limits, "lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial")).

It is possible that the Supreme Court is overly cautious in not allowing pretrial jurisdictional evidence that overlaps with the merits. As Professor Clermont argued in a later article, a judge-made pretrial determination would not bind a subsequent jury and would not have a res judicata effect. Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 338 (2011) ("Although there is no constitutional jury right on

issue cannot be decided without the ruling constituting at the same time a ruling on the merits," the "necessary choice . . . is to permit the cause to proceed to trial," as long as the plaintiff can make a prima facie showing of jurisdiction.[173] Many courts will apply the prima facie standard pretrial, to be superseded by proof by a preponderance of the evidence at trial.[174] Of course, the effect of this changed standard allows a court to determine that it lacks jurisdiction even after fully trying the case on the merits.[175]

Various alternatives to a post-trial decision on jurisdiction have been offered. One prominent civil procedure scholar has suggested that the reasonableness factors should take on a greater role and that prelitigation contacts with the forum need not be considered at all.[176] Another scholar has suggested that the prima facie standard should apply at all stages of the litigation, not just pretrial.[177] Each of these solutions is problematic in effects-test cases.

First, ignoring prelitigation contact with the forum entirely would not solve the predictability problem. A defendant could be sued in potentially any forum; to resist jurisdiction, the defendant would have to prove why it is an unreasonable choice, developing evidence of cost, inconvenience, and lack of state interest.[178] That proceeding alone

jurisdictional issues, courts and commentators equivocate on whether a jury must first determine any common issue. But they are wrong to equivocate. *Beacon Theatres–Dairy Queen* applies only to issues common to joined legal and equitable claims, not to issues common to jurisdiction and the merits."). Thus, it is theoretically possible that a judge could determine jurisdiction by a preponderance of the evidence pretrial and then allow the jury to make a merits determination at trial. *Id.* ("[T]he judge can decide jurisdiction at the outset, and the jury can decide anew the common issue at the regular trial."). However, because such a procedure would essentially require two trials presenting the same evidence, it would be highly inefficient and unlikely to appeal to judges facing overcrowded dockets.

173 Wade v. Rogala, 270 F.2d 280, 285 (3rd Cir. 1959).

174 *See, e.g.*, Forsythe v. Overmyer, 576 F.2d 779, 781 (9th Cir. 1978) ("Whatever degree of proof is required initially, a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence.").

175 *See* Clermont, *supra* note 14, at 993-94.

176 *See* Redish, *supra* note 16, at 1115 (proposing a new test that "would eliminate two factors of central importance to the 'minimum contacts' test — concern for prelitigation contacts between the defendant and the forum and for the defendant's awareness of possible suit in that forum — except to the extent such factors relate to the actual burdens of litigation.").

177 Clermont, *supra* note 14, at 1004-05 (noting that "[a]t each step of the legal analysis on jurisdiction, the plaintiff should be able to survive by making some sort of plausible showing that might not measure up to more-likely-than-not," and summarizing the benefits of such a rule).

178 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 476-77 (1985).

would be burdensome and would likely require significant discovery only to reach the jurisdictional decision.[179] Other scholars have noted that the purpose of personal jurisdiction is to protect two different interests: while one is the potential burden on the defendant, another is "a concern for a defendant's liberty through self-regulation of its conduct."[180] A policy of ignoring prelitigation contacts would serve at most the burden interest, but could not offer the opportunity for self-regulation.

Second, waiting until trial to resolve the question of personal jurisdiction in cases where the merits of the claim are inextricably intertwined with the jurisdictional question makes the defendant's due process right to challenge jurisdiction largely illusory.[181] This is not problematic if the defendant loses on the merits because such a decision necessarily means that the court possessed personal jurisdiction over the defendant.[182] In contrast, if the defendant wins on the merits, either in the trial court, or through a successful appeal, then the court may be forced to conclude that there was no personal jurisdiction over the defendant.[183] Thus, such a "win" for the defendant is really a loss because the favorable decision would not be binding; the plaintiff would be free to sue again in a location where personal jurisdiction was proper.[184] Presumably, a defendant who wins on the merits could also waive any former jurisdictional objection in order to avoid dismissal of the case and protect the merits ruling from relitigation in another forum.[185] But even a defendant who could

[179] S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 539 (2010) (analyzing the burdens of jurisdictional discovery and noting the higher burden where jurisdiction determination "involves early disclosure of numerous facts that are intimately associated with liability on the merits").

[180] Michael P. Allen, *In Rem Jurisdiction from Pennoyer to Shaffer to the Anticybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243, 274 (2002).

[181] *See* Althouse, *supra* note 14, at 257 ("Complete merger of the jurisdictional issue with the trial on the merits imposes this burden on the defendant regardless of whether there is jurisdiction, and therefore is unacceptable under a modern analysis.").

[182] *See supra* Part II.B.

[183] Clermont, *supra* note 14, at 981; *see also* Nelson v. Miller, 143 N.E.2d 673, 681 (Ill. 1957) ("Thus the defendant who successfully litigated the issue of liability for jurisdictional purposes in our courts might be subjected to a second trial of the issue on the merits in the courts of another State.").

[184] Clermont, *supra* note 14, at 981-82.

[185] *Id.* at 994 (concluding that defendants who win at trial "would risk . . . a jurisdictional dismissal after the successful defense on the merits, unless the defendants can then consent to jurisdiction and thereby sidestep the payback for their success").

secure a favorable judgment would still have forfeited the "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations,' " which is the primary constitutional interest that the personal jurisdiction doctrine was developed to protect.[186]

Third, accepting a lower prima facie standard for jurisdiction also infringes on defendants' right not to appear in a forum that lacks personal jurisdiction over them. While the Court has characterized the personal jurisdiction doctrine as the right to be free from a binding judgment rather than the right to be free from prejudgment proceedings,[187] it has also provided an opt-out mechanism for the defendant who wishes to avoid all such prejudgment proceedings. The defendant who contests jurisdiction "is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."[188] On collateral attack, the reviewing court would engage in a jurisdictional inquiry to determine whether the original forum possessed personal jurisdiction over the defendant. If it did, then the reviewing court would be obligated to give the default judgment full faith and credit.[189] If it did not, then the court would refuse to enforce the judgment against the defendant.[190]

If the jurisdictional standard is lowered, and if this lowered standard also applies to collateral attacks on a default judgment, then the defendant would not dare to default in the first forum in effects-test cases.[191] Cases where the merits appear balanced before trial, like

[186] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)); *see also* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 604 (2007) ("[A] fundamental liberty interest is at stake when the state seeks to employ its binding adjudicative power against a person who has not established a purposeful relationship with it.").

[187] Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) ("Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order.").

[188] Ins. Co. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 706 (1982).

[189] Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

[190] *Id.*

[191] *See* Patrick Woolley, *The Jurisdictional Nature of Adequate Representation in Class*

Dudnikov and *Kauffman Racing*, show that it is often easy for the plaintiff to establish a prima facie case for jurisdiction; only evidentiary development and merits-based adjudication could establish whether Roberts' speech was truthful criticism or wrongful defamation (in *Kauffman Racing*) and whether Chalk & Vermilion's interference in the plaintiffs' online auction was a legitimate protection of their intellectual property or a tortious interference with business relations (in *Dudnikov*).

Professor Clermont, who advocates the prima facie standard for jurisdictional facts that overlap the merits, agrees that the standard is inappropriate for fundamental questions like the identity of the defendant:

> [T]hink of mistaken identity for a defendant who defaulted because he had no connection whatsoever with a totally misled plaintiff. Upon enforcement of the default judgment at the defendant's home, the system would intuitively let him maintain that the in-state actor had not been him, even if the plaintiff could make a plausible showing of same name and likeness. Foreclosing collateral attack would be unfair. Indeed, that result would create a worldwide service provision. No defendant could risk defaulting, because too much would be at stake under conditions too uncertain.[192]

In Clermont's scheme, the prima facie standard works because there is a hierarchy of jurisdictional facts; fundamental questions like the defendant's identity may be subject to a higher standard, while other questions with greater overlap with the merits can be demonstrated by a lesser showing.[193]

The problem with effects-test cases, however, is that they lack the same hierarchy of jurisdictional facts. It is not that the jurisdictional and merits questions share a few common issues; instead, it is that there is nearly a complete identity of issue in the two analyses. The question is whether the defendant committed an intentional act directed at causing harm in the plaintiff's home state.[194] That is the only question supporting jurisdiction, and its affirmative answer will also support liability. As a result, Professor Clermont's sense that it

Litigation, 79 GEO. WASH. L. REV. 410, 423 (2011) ("Indeed, a rational litigant will waive the objection if it would be in his or her interest to litigate in the courts of a sovereign lacking an appropriate connection with him or her.").

[192] *See* Clermont, *supra* note 14, at 997.

[193] *Id.*

[194] *See* sources cited *supra* notes 86-87.

would be unfair to prevent the defendant from contesting a case of mistaken identity should apply equally to allow a defendant to contest the facts underlying the imposition of effects-test jurisdiction.

Strict application of the preponderance-of-the-evidence standard would ensure that defendants retain the right to challenge jurisdiction in a collateral attack.[195] Such an approach may go further, however, and actually encourage defendants to do so, rendering the forum state's long-arm statute ineffective in effects-test cases. Because jurisdiction and merits overlap completely in these cases, any post-default collateral attack that challenges jurisdiction necessarily also challenges the merits of the claim. And if a defendant can always contest the merits on collateral attack, then there is little incentive to appear for trial in the contested jurisdiction — defendants may well prefer to default and then to contest the merits of the claim in their home jurisdiction. This incentive is unavoidable in effects-test cases.[196] When jurisdiction and merits are so thoroughly intertwined, a lesser standard of jurisdictional proof precludes the defendant from collaterally challenging a default, while a preponderance standard encourages the defendant to default and make a collateral challenge later. However, this all-or-nothing scenario applies only in pure effects-test cases; when there are traditional indicia of purposeful contacts, such as sales, advertising, or contractual relations, then the jurisdictional question can be resolved separately from the merits, and a later collateral attack on jurisdiction would not automatically allow the defendant to litigate the underlying merits.

[195] *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1094 n.39 (1999) ("A default judgment attacked for lack of jurisdiction . . . [can be collaterally attacked] because the party did not have a full and fair opportunity to litigate the question without forfeiting the very protection that personal jurisdiction doctrines are designed to afford. To hold otherwise would be to require a defendant to litigate jurisdictional issues in the forum he claims has no jurisdiction over him.").

[196] The right to launch a collateral attack is constitutionally protected. *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 76 (2010) ("[S]ometimes external judicial systems must intervene: for example, the federal judiciary when the defendant appeals to the Supreme Court, or other states' judiciaries when the plaintiff seeks to enforce a judgment rendered without personal jurisdiction and the defendant mounts a collateral attack. But no matter which institution reins in the offending state, it does so because of a right that the Constitution empowers the individual defendant to assert."); Sherry, *supra* note 193, at 1094 n.39.

B. What Contacts Count?

The prior subpart argued that courts should not automatically accept the plaintiff's jurisdictional allegations as true, but should instead apply the traditional preponderance-of-the-evidence standard to determine whether there is personal jurisdiction. It also argued that, at least in effects-test cases, the court should not accept a lower standard of proof for the issues of wrongfulness and harm — issues that largely determine both the jurisdictional question and the ultimate liability question. The question then becomes how to resolve closely balanced effects-test cases like *Kauffman Racing* or *Dudnikov* without making assumptions as to wrongfulness and harm.

In many of the more difficult cases, the actions giving rise to the suit are not challenged — only the wrongfulness of those actions is disputed. In *Kauffman Racing*, Roberts did not deny criticizing the company online; he denied only that his comments were defamatory.[197] Likewise, in *Dudnikov*, Chalk & Vermilion did not deny attempting to stop the eBay merchants from selling their fabric; they denied only that their interference with those sales was tortious.[198]

But can nonwrongful conduct give rise to effects-test jurisdiction? Assuming, for example, that Chalk & Vermilion's action was not wrongful — that it legitimately sought to stop the sale of an infringing product located in Colorado — would its action nevertheless be sufficient to subject it to suit in Colorado? Likewise, if Roberts's comments were nondefamatory attempts to warn customers away from an unscrupulous seller, would he still be subject to jurisdiction in Ohio?

Currently only the Court of Appeals for the Ninth Circuit has answered in the affirmative and allowed effects-test-based personal jurisdiction even in cases where the defendant's conduct — though targeted to have an effect in-state — was not itself wrongful.[199] In *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, French civil rights groups objected to Nazi artifacts and Holocaust-denial materials being sold on Yahoo!'s online auction site, which could be accessed and viewed in France. The groups sent a cease-and-desist

[197] *See supra* notes 99-114.

[198] *See supra* notes 115-26.

[199] Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1208 (9th Cir. 2006) ("[W]e do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts."); *id.* at 1208 ("We do not see how we could do so, for if an allegedly wrongful act were the basis for jurisdiction, a holding on the merits that the act was not wrongful would deprive the court of jurisdiction.").

letter to Yahoo!'s headquarters in California, asserting that Yahoo!'s conduct violated French law. When they failed to get a satisfactory response, they sued for an injunction in France (and served process on Yahoo! in California). The plaintiffs obtained orders from a French court ordering Yahoo! to "take all necessary measures to . . . render impossible any access [from French territory] via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes."[200] Yahoo! then the sued French groups in California, seeking a declaratory judgment that the French orders were not enforceable in the United States. The French groups objected to personal jurisdiction in California.

In an en banc opinion, the Ninth Circuit held that California could properly exercise personal jurisdiction over the French groups.[201] Of the three potential contacts it identified — sending the cease-and-desist letter, serving process in California, and securing the orders from a French court — it held that the first two actions could not give rise to jurisdiction for reasons of public policy.[202] With regard to the letter, the court reasoned that:

> If the price of sending a cease and desist letter is that the sender thereby subjects itself to jurisdiction in the forum of the alleged rights infringer, the rights holder will be strongly encouraged to file suit in its home forum without attempting first to resolve the dispute informally by means of a letter.[203]

Likewise, the court worried that holding service of process sufficient to create jurisdiction "would be providing a forum-choice tool by which any United States resident sued in a foreign country and served in the United States could bring suit in the United States, regardless of any other basis for jurisdiction."[204]

However, the Ninth Circuit was willing to base jurisdiction on the third contact — the plaintiffs' action in securing the French court orders — because the orders required Yahoo! to take action in California. The court conceded that "[i]t is of course true that the effect desired by the French court would be felt in France," but

---

[200] *Id.* at 1202.

[201] In spite of the majority support for the personal jurisdiction holding, the court dismissed Yahoo!'s action; while the court was fractured, a majority of the judges all supported dismissal, though on various grounds. *Id.* at 1201.

[202] *Id.* at 1208-09.

[203] *Id.* at 1208.

[204] *Id.* at 1209.

concluded that "the fact that significant acts were to be performed in California" provided a sufficient basis for effects-test jurisdiction.[205] Thus, even though the groups' actions in France were neither wrongful nor tortious (French law supported their claims), those actions were designed to have an effect in California by requiring Yahoo to make changes to its computer servers in California.[206] The Ninth Circuit found the issue of personal jurisdiction to be "a close question," but concluded that California could legitimately exercise personal jurisdiction.[207]

To date no court has followed the Ninth Circuit by allowing nonwrongful actions to support effects-test jurisdiction. At least two other circuits, however, have explicitly avoided deciding that question by taking the plaintiff's allegations of wrongfulness as true for purposes of jurisdiction.[208]

Under current Supreme Court doctrine, the Ninth Circuit probably erred in several ways by extending the effects test to nonwrongful conduct. First, recent dicta implies that only cases involving intentional torts may be exempt from the need to prove purposeful availment "of the privilege of conducting activities within the forum State."[209] Second, in a case predating the acceptance of the effects test in *Calder*, the Supreme Court stated that the effects test is meant to reach wrongful or tortious conduct; it is not intended to apply to every case in which the defendant "caused an 'effect' in" the forum state.[210]

---

[205] *Id.*

[206] *Id.* ("The servers that support yahoo.com are located in California, and compliance with the French court's orders necessarily would require Yahoo! to make some changes to those servers.").

[207] *Id.* at 1211.

[208] *See, e.g.*, Tamburo v. Dworkin, 601 F.3d 693, 704 (7th Cir. 2010) ("The circuits are divided over whether *Calder*'s 'express aiming' inquiry includes all jurisdictionally relevant intentional acts of the defendant or only those acts that are intentional and alleged to be tortious or otherwise wrongful . . . . We need not take sides in this debate. Tamburo alleges that the individual defendants intentionally published defamatory statements on their websites or in blast emails."); Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1073 (10th Cir. 2008) ("As it happens, we are able to avoid entering this thicket. Even if Calder can be properly read as requiring some form of 'wrongful' intentional conduct, we agree with plaintiffs that their complaint complies.").

[209] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion) ("There may be exceptions [to purposeful availment], say, for instance, in cases involving an intentional tort.").

[210] Kulko v. Superior Court of Cal., 436 U.S. 84, 96 (1978); *see also* Michelle Feldman, *Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basis for Personal Jurisdiction Under New York's Libel Terrorism Protection Act*, 31 CARDOZO L. REV. 2457, 2482 (2010) (referencing *Kulko* and concluding that "if the purpose of the

Although the Supreme Court itself has never revisited the effects test, most subsequent lower-court cases have assumed the test applied only to wrongful conduct.[211]

Furthermore, it is not clear that courts have the power to exert personal jurisdiction based on extraterritorial conduct that was not even allegedly tortious. As Professor Spencer has noted, "The basis for a state's authority to adjudicate is derivative of the police power that it enjoys domestically."[212] While the state's police power is very broad, it is not unlimited.[213] The state's interest in adjudicating a dispute is weaker than its interest in having its own law apply to the case.[214] These principles cut against the idea that extraterritorial conduct with nonwrongful effects in the forum should give rise to personal jurisdiction.[215]

The case against personal jurisdiction based on extraterritorial regulation is especially strong when the conduct at issue may be constitutionally protected. As Professor Allan Erbsen has noted, "[A]ny assertion in the form 'State X lacks power to regulate activity Y' can be restated as 'actors engaging in activity Y have a right not be regulated by state X.' "[216] State X may have the power to regulate out-

personal jurisdiction analysis is to determine whether the exercise of such jurisdiction would violate the defendant's due process rights, then there is good reason to require wrongfulness").

[211] *See, e.g.*, *Yahoo!*, 433 F.3d at 1231 (Ferguson, J., concurring) (objecting to the Yahoo majority's decision to include nonwrongful conduct in the jurisdiction calculus of an effects-test case, and noting that "every 'purposeful direction' case that the majority cites in its opinion involved tortious or otherwise wrongful acts by the defendants"); IMO Indus. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir.1998) (requiring commission of an intentional tort).

[212] A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 650 (2006); *see also* Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality opinion) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts.").

[213] Spencer, *supra* note 14, at 651 n.158 (citing Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.")).

[214] *Id.*; *see also* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 40 (1986) ("[T]o the extent that different standards should be used for jurisdictional than for substantive purposes, these standards should be more restrictive, not more lenient.").

[215] Spencer, *supra* note 14, at 650 (concluding that "those not alleged to have acted, in some way, to violate the tranquility and order provided by a state domestically cannot be said to fall within that state's sphere of authority").

[216] Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 564 (2008).

of-state speech that defames a state resident. If, however, the speech is not defamatory, then residents speaking in State Y may have a right not to be regulated by State X.

Thus, the stronger view is that the effects test, as currently formulated, requires wrongful or tortious conduct. It should be noted, however, that the wrongfulness requirement applies only to effects-based jurisdiction; it does not apply to conduct in which the defendant "purposefully avails" itself of forum-state benefits and laws.[217] The Supreme Court distinguished between the two types of jurisdiction in *Burger King*, contrasting the two different state interests that give rise to jurisdiction: the first interest is "redressing injuries" to in-state residents; the second is an "account[ing] . . . for the consequences" in the forum state that arise from parties' attempts to " 'purposefully derive benefit' from their interstate activities."[218] Thus, cases demonstrating purposeful availment through in-state presence, commerce, or contracts rarely require analysis of effects and do not require wrongful conduct.[219] Cases that lack such purposeful availment and rely only on in-state harm, however, should be limited to cases of wrongful or tortious conduct.

C. *The Reframed Standard*

When the standard of proof for personal jurisdiction is reframed as explained above, it becomes much more difficult for a court to make a finding of effects-test personal jurisdiction. A court can no longer assume for jurisdictional purposes that the plaintiff's allegations of wrongfulness and harm are true; instead, those allegations must be proven by a preponderance of the evidence.[220] Nor can a court base jurisdiction on the uncontested, but nonwrongful, actions that have an effect in the target forum.[221] As a result, courts cannot find effects-test jurisdiction without engaging in a rigorous evidence-based analysis;

[217] *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) (basing jurisdiction on in-state magazine sales); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957) (basing jurisdiction on solicitation of a life insurance policy); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1231 (9th Cir. 2006) (Ferguson, J., concurring).

[218] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-74 (1985).

[219] *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1133 (2009) ("Even in the minimum contacts realm, effects-based analysis is sometimes limited to suits based on tortious conduct, and is not the framework that applies to suits in contract.").

[220] *See supra* Part III.A.

[221] *See supra* Part III.B.

because that same analysis would be the focus of liability as well, a court would have to delay the jurisdictional determination until trial.[222]

In a few cases, it may be possible to resolve the jurisdictional question early without usurping the jury's role. Such cases may present undisputed or conclusively proven factual allegations, such that summary judgment would be appropriate.[223] In these cases, the judge could make a pretrial determination of wrongfulness and harm without infringing on the right to a jury trial.[224] These cases are likely to be few and far between, however, as cases that are strongly one-sided usually settle rather than proceed to adjudication.[225]

In the more common case where wrongfulness is hotly disputed, the revised standard offers two difficult options: delay the personal jurisdiction determination until trial, thus denying the defendant the protection that the doctrine was meant to protect,[226] or close the forum to the plaintiff and require that suit be filed elsewhere. The next Part considers these options more fully.

---

[222] As noted above, the court may theoretically have the option of trying the case twice: once to the judge at the jurisdictional stage, and another time to the jury on the merits. However, the Supreme Court has never suggested such a procedure in cases where the merits are intertwined with jurisdiction and the practical inefficiencies of trying a case twice make it unlikely that such a procedure would gain judicial support. *See supra* note 172; *see also* Stefania A. Di Trolio, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1276 n.212, 1282 (2003) ("[T]he function of the "intertwined with the merits" exception is to ensure that issues of fact normally decided by the jury are not summarily decided by the court. Thus, the purpose of the exception is to make certain that the plaintiff's right to a jury trial is not infringed upon. In order for the exception to serve its purpose, it must be applied both consistently and correctly." (citations omitted)).

[223] *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[224] *Id.* One example where wrongfulness cannot reasonably be contested is solicitation of violent criminal conduct — in a number of recent cases, for example, vengeful individuals have posted Craigslist ads posing as women who seek sexual contact. *See* Stephanie Reitz, *Police Say Feud Led to Fake Sex Ad*, CHARLESTON DAILY MAIL, Apr. 23, 2010, at 6A. If the victim filed a civil lawsuit in her home state, the issue of wrongfulness and harm could presumably be determined as a matter of law.

[225] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-5 (1984) (studying the selection effect of cases settled versus litigated); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 12 (1998) ("Rational litigants will settle the strongest and weakest cases, leaving only the difficult and uncertain cases to go to trial.").

[226] *See supra* Part III.A.2 (explaining that if the defendant must wait until after trial for a jurisdictional determination, the protections of the personal jurisdiction doctrine will be largely illusory).

IV. CONSEQUENCES OF THE REFRAMED STANDARD

As described above, the effects test has been plagued by doctrinal inconsistency and confusion, resulting in conflicting opinions and unpredictable outcomes. When these doctrinal inconsistencies are reconciled, a troubling paradox emerges: defendants should be subject to trial in the target forum only when they have intentionally engaged in wrongful conduct that targets the plaintiff's chosen forum, but the determination of whether the defendants' conduct was wrongful cannot generally occur prior to trial.

There is no easy or perfect resolution to this paradox. Professor Clermont has characterized the competing errors as "Type I" — an error that contravenes the "policy against failing to limit the burden on the defendant" — and "Type II" — an error that fails "to provide a forum to the plaintiff."[227] Although no personal jurisdiction doctrine can eliminate both types of errors, the goal is to limit the sum of both types.[228] The *Calder* effects test leans heavily toward avoiding Type II errors — it provides a forum for plaintiffs at the expense of burdening defendants.

This Part examines the impact of a weakened effects test. Under the reframed standard, if jurisdiction depends on the in-state effects of out-of-forum conduct and the court cannot determine whether that conduct was wrongful without sending the case to trial, then the court would have to dismiss the case for lack of jurisdiction and require that suit be filed elsewhere. This more limited version of the effects test would tilt the balance of errors away from providing a forum for plaintiffs and toward a greater protection of defendants' due process interests.

A. Closing the Courthouse Door to Plaintiffs

The strongest criticism of a more limited effects test is that it closes the courthouse door to plaintiffs, denying them a convenient forum in which to vindicate their rights.[229] Our legal system has a strong tradition of protecting the individual's ability to seek redress for harm. This principle is founded on the equitable notion of *ubi jus, ibi*

[227] Clermont, *supra* note 14, at 1000.

[228] *Id.* ("The aim is to minimize the sum of the costs, but the trick is to specify properly the sources and magnitudes of all the various costs.").

[229] *See* Spencer, *supra* note 36, at 222 (noting that a stronger effects test aids the "protection of unwitting victims from the burden of having to travel to the wrongdoers' home states to vindicate harms committed against them, an interest the *Calder* Court explicitly intended to promote").

remedium — where there is a right, there is a remedy.[230] Although this principle is not unlimited,[231] it is nevertheless a cherished value that some scholars have argued rises to the level of constitutional due process.[232]

Limiting the reach of the effects test does not automatically block plaintiffs from accessing justice, though it does limit the number of available forums. Plaintiffs will generally still have the right to sue in the defendants' home forum, where there would be general jurisdiction to resolve all disputes involving the defendant regardless of whether the forum has any connection to the particular lawsuit.[233]

Thus, the access-to-justice problem is primarily practical rather than legal. Even though there is a forum with the legal power to hear the dispute, the plaintiff may not have the practical means to access the available forum.[234] The problem is especially acute when the only potential forum is located outside the United States.[235]

---

[230] Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636 (2004).

[231] *See* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1482 n.188) (citing Kiyemba v. Obama, 555 F.3d 1022, 1027 (D.C. Cir. 2009) ("Not every violation of a right yields a remedy, even when the right is constitutional. Application of the doctrine of sovereign immunity to defeat a remedy is one common example. Another example . . . is application of the political question doctrine.") (citations omitted)).

[232] Thomas, *supra* note 230, at 1636. In addition, the constitutions of 40 states expressly protect the right to a remedy. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310-11 (2003) (noting that there are two major variants of the state-level protections). The majority provision provides in essence: "That all courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of the law." *Id.*

[233] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853-54 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

[234] The cost of litigating in an unfamiliar or distant forum is one that can affect both plaintiff and defendant. *See, e.g.*, Redish, *supra* note 16, at 1133 ("The most immediate means by which the extension of a state's jurisdiction could cause injustice to a litigant is through the imposition of significant burdens and expense, resulting from the need to travel to the forum in question and to transport evidence and witnesses long distances."). Indeed, the relative costs and inconveniences may be balanced under the "reasonableness" prong of jurisdiction. *See id.* at 1137 ("Inconvenience would presumably have to be measured comparatively.").

[235] *See, e.g.*, Chang v. Virgin Mobile USA, LLC, No. 3:07-CV-1767-D, 2009 WL 111570 (N.D. Tex. Jan. 16, 2009) (holding that Texas district court lacked personal jurisdiction over Australian defendant); *see also* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 538-49 (2005) (analyzing court access in cases

If plaintiffs cannot afford to sue outside their home jurisdiction, they may simply forgo their rights. Obviously, this situation is problematic for the harmed plaintiffs who lack access to a remedy. When harmed individuals forgo litigation in large numbers, regulatory interests may also suffer harm from underenforcement.[236] One scholar found such an effect in the patent arena, noting that spurious patents may go unchallenged when potential plaintiffs — parties who have been accused of infringing potentially invalid patents — are unable to obtain personal jurisdiction over the patent holders in a convenient forum.[237]

B. Protecting Defendants' Due Process Rights

Weighing against the desire to provide a remedial forum is the need to protect litigants' due process rights. A narrower effects test would protect due process rights by giving potential defendants fair warning as to where they are subject to suit, ensuring that speech rights and intellectual property are adequately protected, and integrating modern electronic commerce and communications in a way that maintains the doctrine's consistency.

1. Minimizing Forum-Selection Costs

One of the goals of the personal jurisdiction doctrine is to allow potential defendants to predict where they will be subject to jurisdiction, so that they may alter their behavior accordingly.[238] The

---

involving allegations of transnational defamation).

It is also possible that the alternative forum would have less favorable substantive law; however, the Supreme Court has excluded this consideration from forum choice determination. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (holding that a *forum non conveniens* dismissal was appropriate even though plaintiffs "may not be able to rely on a strict liability theory," and "their potential damages award may be smaller," as long as "there is no danger that they will be deprived of any remedy or treated unfairly").

[236] *See* Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO. MASON L. REV. 43, 62 (2010).

[237] *Id.* (alleging that home-forum unavailability "causes alleged [patent] infringers to forego declaratory relief and allows many bad patents to go unchallenged").

[238] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows 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." (citation omitted)); Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach*

effects test, as currently applied, does not do a good job of this. Much of the lack of predictability comes from doctrinal inconsistency; as noted above, the judgments of courts in different circuits will come out differently even in cases where the facts are nevertheless substantially similar.[239] This inconsistency substantially increases the costs of litigation, both to the litigants and to the court system.[240]

Predictability would continue to be a problem even if courts were willing and able to accede to the principle that allows plaintiffs to sue in the location where they suffered harm. Under the purposeful availment standard, defendants can consciously choose where they will visit, enter into contracts, or market their goods; thus, in economic terms, the defendant may well be the least-cost avoider.[241] Under the theory of *Calder*, defendants could also choose not to commit intentional torts directed at plaintiffs in identifiable locations in order to avoid inconvenient litigation.[242] Again, however, this theory assumes that the defendants actually committed such a tort. What is not predictable is where defendants will be *accused* of committing a tort — especially if, in fact, the defendant actually committed no wrongful conduct at all. Because potential defendants cannot predict such an accusation, they could not "structure their primary conduct"[243] to avoid jurisdiction in inconvenient or

to Minimum Contacts, 57 BAYLOR L. REV. 135, 137 (2005) ("Predictability insures both that nonresidents will be able to structure their transactions to avoid the sovereign jurisdictional prerogative of a foreign state and that litigants will have some guidance as to when a jurisdictional challenge may be appropriate.").

[239] *See supra* Part II.B.

[240] Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. (forthcoming 2012) (manuscript at 33), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880975 ("[J]urisdictional litigation results in a tremendous social loss, regardless of the outcome of the dispute. If the plaintiff prevails, thousands of dollars have been spent on a fight that changed nothing. If the defendant prevails, resources allocated to the case up to that point are for naught.").

[241] *See id.* at 35 (noting that in a products liability case, "the manufacturer is in a better position to internalize the cost of litigating in a distant forum" because the defendant has more information about the risks of the product and the forums in which it is sold).

[242] This view of the effects test is not limited to the United States. The High Court of Australia expressed a similar view in *Dow Jones & Co. v Gutnick* (2002) 210 CLR 575 (Austl.) ("At least in the case of the publication of materials potentially damaging to the reputation and honour of an individual, it does not seem unreasonable, in principle, to oblige a publisher to consider the law of the jurisdiction of that person's habitual residence."). Such an obligation is likely to chill not just defamatory speech, however, but also protected speech that is highly critical of others. *See infra* Part IV.B.2.

[243] *World-Wide Volkswagen*, 444 U.S. at 297.

burdensome locations unless they cease to engage even in protected and desirable conduct, a consequence discussed below.

2. Protection of Speech and Commerce

By their nature, effects-test cases often involve potentially wrongful speech. When there are other types of contacts — physical presence, contractual relationships, or in-state marketing or sales — plaintiffs generally will not need to rely on effects-test jurisdiction.[244] By the time these more traditional contacts have been ruled out, the only potential contacts left to support jurisdiction are out-of-state speech acts that may have an effect in state. Thus, for example, common causes of action may include "cases claiming trademark or copyright infringement, consumer or business fraud, and defamation."[245]

Although *Calder* suggested that First Amendment concerns do not belong in a personal jurisdiction analysis for fear of "double counting" the speech interest,[246] others have disagreed.[247] In this area, the Court seems to be undervaluing the speech issue — and, in particular, underestimating the impact of jurisdictional standards on maintaining a robust speech environment.[248] There is little doubt that jurisdictional standards can influence primary conduct. In fact, due process in

[244] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (concluding that franchise and contact activities could give rise to jurisdiction); Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (basing jurisdiction on in-state commercial activity).

[245] *See* Jeffrey Hunter Moon, *New Wine, Old Wineskins: Emerging Issues in Internet-Based Personal Jurisdiction*, 42 CATH. LAW. 67, 67 (2002) (noting that these are the most common Internet-based personal jurisdiction issues).

[246] Calder v. Jones 465 U.S. 783, 790 (1984) ("Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce those concerns at the jurisdictional stage would be a form of double counting." (citation omitted)); Internet Solutions Corp. v. Marshall 39 So. 3d 1201, 1215 (Fla. 2010) (noting, but rejecting, the defendant's argument that the court should consider First Amendment principles in construing Florida's long-arm statute).

[247] Kauffman Racing Equip., L.L.C. v. Roberts, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 81 (O'Donnell, J., dissenting) (noting that *Calder* forbade consideration of First Amendment protections at the jurisdictional stage, but concluding that the exercise of effects-test jurisdiction in an online defamation case "unnecessarily chill[s] the exercise of free speech").

[248] Not only does the Court discount the influence that jurisdiction may have in shaping primary conduct, it also discounts its expressive value. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 101, 146 (forthcoming 2011) (noting that jurisdiction "performs an expressive role in affirming that certain limitations are important or fundamental").

personal jurisdiction is premised on the idea that defendants order their affairs according to where they are willing and able to be subjected to the courts' process; the Supreme Court has noted that the doctrine "allows 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."[249]

Given the Court's expressed desire to allow potential defendants to structure their primary conduct with personal jurisdiction in mind, it seems likely that speech would be included in the conduct that that is influenced by jurisdiction. Other scholars have also pointed out that broad-based personal jurisdiction for tort claims can affect speech choices:

> Unlike most intentional torts, we do want to encourage people to engage in the underlying speech activity that gave rise to the tort, and the threat of distant litigation can inhibit that activity, as much or more than imposition of substantive liability. If I think I might be sued far from home, I am going to watch my tongue whether or not I think I will win the lawsuit.[250]

If individuals can be haled into court based on a mere allegation that their speech is wrongful or defamatory, their speech will be chilled at least to some extent. It seems plausible that speech by individuals is more likely to be chilled than speech by corporations; on average, individuals are likely to have fewer resources and find it more burdensome to litigate in a foreign forum.[251] Likewise, individuals may be especially deterred from criticizing businesses that have significant legal and financial resources to deploy in retaliation. Recent defamation suits over online consumer reviews evidence just such an attempt to crack down on allegedly wrongful speech.[252] But if such

[249] *Burger King*, 471 U.S. at 472.

[250] Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 422 (2004).

[251] *See* Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 165-66 (2009) (noting that a result of this disparity, "in some states, the long-arm statute only applies to corporate defendants or to associations and partnerships" and not to individuals).

[252] *See, e.g.*, BroadVoice, Inc. v. TP Innovations LLC, 733 F. Supp. 2d 219 (D. Mass. 2010) (involving a dissatisfied customer who created a website to post complaints and derogatory remarks about an internet telephone service); *Kauffman Racing*, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, *cert. denied*, 131 S. Ct. 3089 (2011) (involving a dissatisfied customer who posted numerous criticisms on various websites devoted to automobile racing).

speech is chilled, the public forum will suffer as consumer information will become more limited, and public opinion will become a less effective weapon in policing fraudulent or deceptive commercial behavior.[253]

The same incentives that encourage or discourage speech can apply to commercial activity and the protection of intellectual property. Companies that believe their intellectual property is being infringed can make infringement claims to regulatory bodies or online marketplaces without fear that they will thereby subject themselves to an inconvenient or unexpected forum. Of course, the flip side of this protection is that the entities they accuse of infringement will have to defend before these same bodies — they will not have the option of bringing their accusers into their own jurisdiction to resolve the claims. As noted above, this may lead to overdeterrence if companies wrongfully assert infringement against innocent parties.[254]

3. Better Integration of Online Activity

Limiting the reach of the effects test also reduces some of the uncertainty surrounding online commerce and communication. The Internet facilitates exactly the kind of conduct that the effects test seeks to reach — it makes it easy for individuals to engage in conduct in one forum that gives rise to effects in another forum.[255] When the

[253] Frank and unfiltered consumer reviews allow customers to have more information about their business dealings and thereby reduce information asymmetry problems. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS 57 (2004) (explaining the value of collective wisdom and noting that "[c]ollective decisions are most likely to be good ones when they're made by people with diverse opinions reaching independent concludiosn, relying primarily on private information"); Behrang Rezabakhsh, Daniel Bornemann, Ursula Hansen & Ulf Schrader, *Consumer Power: A Comparison of the Old Economy and the Internet Economy*, 29 J. CONSUMER POL. 3, 3 (2006) (analyzing consumer power and concluding that "the Internet enables consumers (a) to overcome most information asymmetries . . . (b) to easily band together against companies and impose sanctions via exit and voice, and (c) to take on a more active role in the value chain and influence products and prices according to individual preferences").

[254] *See* sources cited *supra* notes 236-37 and accompanying text; *see also* Buehler, *supra* note 240, at 24 ("If private incentives to sue exceed the social benefit from suit, there likely will be an excessive number of lawsuits. However, the amount of litigation will be socially inadequate when the social benefits from suit exceed the private incentives.").

[255] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7-8 (2004) ("[T]he digital revolution makes it easier for content to cross cultural and geographical borders. Not only can speakers reach more people in the country in which they live, they can also

Internet first became a powerful force, courts were unsure of how to deal with Internet contacts, and early decisions adopted Internet-specific tests rather than integrating them into a traditional personal jurisdiction analysis.[256]

Some legal scholars, including two Supreme Court justices, have suggested that the personal jurisdiction doctrine requires special consideration of Internet issues. In the Court's most recent decision, Justices Breyer and Alito refused to join the plurality opinion, in part because the case "does not implicate modern concerns" and would not provide a vehicle for answering questions relevant to cyberspace in particular:

> [W]hat do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?[257]

Others, however, have taken an "unexceptionalist" position regarding cyberspace, arguing that special regulatory or jurisdictional rules are not needed, and that activities on the Internet should be integrated into the current legal structure.[258]

---

interact with and form new communities of interest with people around the globe."); Jacqueline D. Lipton, Cyberlaw 2.0, *8 (2011) (unpublished manuscript), *available at* http://works.bepress.com/jacqueline_lipton/12/ ("[A]ll online conduct involves information exchange.").

[256] *See, e.g.*, Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (basing the jurisdictional determination on an analysis of whether the website was passive, interactive, or commerce-based).

[257] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring).

[258] *See* DAVID G. POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE 166-71, 183-86 (2009) (adopting the term "cyberspace unexceptionalist"); *see also* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1202 (1998) ("Cyberspace transactions do not inherently warrant any more deference by national regulators, and are not significantly less resistant to the tools of conflict of laws, than other transnational transactions."); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167, 1191 (1998) ("[T]he personal jurisdiction cases to date suggest the courts are well on their way to working out a more-or-less coherent approach to the allocation of judicial authority over cyberspace controversies. As courts become more familiar with the technology, we can expect more sophisticated refinements. This suggests that the new technology of cyberspace does not, in general, confound our basic jurisdictional instincts."); Veronica M. Sanchez, Comment, *Taking a Byte Out of Minimum Contacts: A Reasonable Exercise of*

Most courts now take a middle view: they recognize that there cannot be separate legal standards for online and offline activity, but acknowledge that jurisdiction standards must accommodate modern technological development.[259] As others have pointed out, it is becoming "increasingly difficult to separate Internet activities from activities unrelated to the Internet," and "the problems the Internet presents for personal jurisdiction doctrine [therefore] become the problems of personal jurisdiction doctrine generally."[260] Nonetheless, our personal jurisdiction standards will have to accommodate the realities of the networked world, just as the doctrine once had to integrate the issues arising from automobiles and modern travel.[261]

Integrating online communication into a coherent personal jurisdiction doctrine requires acknowledging the ways in which the Internet has changed modern personal and commercial realities, as well as how those changes may influence jurisdictional questions. One major impact is the democratization of mass communications. In the past, we might have assumed that a libel defendant was likely to be a corporate entity that was capable of defending its legal interests in numerous jurisdictions;[262] however, party status can no longer be assumed. As recent defamation cases demonstrate, we cannot predict

Personal Jurisdiction in Cyberspace Trademark Disputes, 46 UCLA L. REV. 1671, 1717 (1999) ("In making personal jurisdiction determinations in Internet cases, courts should not focus on the medium itself but should scrutinize the contacts at issue.").

[259] *See, e.g.*, ALS Scan, Inc. v. Digital Serv. Consultants, Inc, 293 F.3d 707, 714 (4th Cir. 2002) ("Until the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology, we must develop, under existing principles, the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually 'entered' the State via the Internet for jurisdictional purposes.").

[260] Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1844 (2003).

[261] Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."); Hess v. Pawloski, 274 U.S. 352, 356 (1927) (broadening jurisdictional concepts to account for modern transportation); *see also* Michael P. Allen, *In Rem Jurisdiction from Pennoyer to Shaffer to the Anticybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243, 287 (2002) ("The doctrine needs to develop if it is going to be able to address changes in society and technology that are certain to come.").

[262] ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country — and indeed the world — has yet seen. The plaintiffs in these actions correctly describe the 'democratizing' effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them.").

whether either the plaintiff or the defendant will be a corporate entity, a small business, or an individual.[263] Thus, whatever rules we apply must not presuppose that the party will have substantial litigation resources.

The personal jurisdiction doctrine must also account for the number of places online communications can affect. Many scholars and commentators have noted the potentially worldwide impact of online activity.[264] It may seem counterintuitive that, at the same time the Internet expands access to the world, principles of personal jurisdiction would contract in response and narrow the number of places in which an individual would be called to defend. Nevertheless, such a contraction makes sense.[265] In the past, it may have been a reasonably safe assumption that defendants who were able to act nationally or internationally had the ability to defend themselves on a similarly large scale.[266] The democratizing effect of the Internet means that this is no longer a safe assumption; while it has empowered individuals to act on a large scale, it has not given them the resources to defend on a similarly large scale.[267] As a result, a narrower personal jurisdiction doctrine may be needed to counteract a jurisdictional sphere that the Internet would otherwise broaden too much.[268]

---

263 *See* Balkin, *supra* note 255, at 8 ("The Internet gives people abilities that were previously enjoyed only by large commercial enterprises; it offers them access to an infrastructure for sending information worldwide.").

264 *See, e.g.*, Martin H. Redish, O*f New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 582 (1998) (explaining the growth of the Internet and its enabling of worldwide communication).

265 *See* Lipton, *supra* note 253, at 39 ("[T]he proportion of Internet cases raising jurisdictional issues is likely to be higher than the equivalent proportion of non-Internet cases. Thus, Internet law creates greater risks of jurisdictional inquiries detracting from inquiries about developments of substantive rights."). *But see* Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 UC DAVIS L. REV. 1481, 1543 (2006) (expressing concern that limitations on personal jurisdiction in the Internet era could create a "wholesale elimination of extraterritorial state authority and a cloak of immunity over all remote communications").

266 *See, e.g.*, *Hess*, 274 U.S. at 356 (expanding the doctrine of personal jurisdiction to allow states to exercise jurisdiction over non-resident motorists).

267 *See* POST, *supra* note 256, at 163 ("The international legal system is premised, at bottom, on the existence and mutual recognition of the physical boundaries that separate sovereign and independent lawmaking communities — nation-states — from one another . . . . But on the inter-network, information moves in ways that seem to pay scant regard to these boundaries, and mapping them onto network activity is a profoundly difficult challenge.").

268 *Id.* at 167 ("A place where just about everybody can have significant effects on

C. Weighing the Balance

Regardless of how it is done, reconciling the effects-test doctrine will result in significant costs to litigants. Limiting the reach of the doctrine removes a convenient litigation forum from plaintiffs who have suffered harm. While other forums remain, not all plaintiffs will have the resources necessary to access them. As a result, some plaintiffs will be left without a remedy. If too many plaintiffs are unable to enforce their legal rights, then we are likely to see problems with underenforcement of legal obligations such as those we may be seeing now in the patent context.[269]

Conversely, the costs are even larger when defendants can be haled into a forum based on the in-forum effects of out-of-forum conduct that has not yet been proven wrongful. In this situation, defendants would not be able to predict where they may reasonably face lawsuits. The unpredictable risk of litigating in a distant forum may also chill consumer speech and reduce commercial activity. These effects are magnified as the Internet takes on an increasingly greater role in commerce and communications.

While there are costs on both sides of the equation, the costs of court access can be minimized in ways that do not implicate the personal jurisdiction doctrine. Expanding civil access-to-justice programs could offset a general concern about the cost of court access.[270] Offering non-jurisdictional litigation incentives could mitigate more specific regulation concerns regarding the underenforcement of substantive rights.[271] For example, Congress passed legislation awarding statutory damages and attorneys' fees in cases brought against violators of the Fair Debt Collection Practices Act, thereby creating incentives for attorneys to take these cases when

just about everyone else, everywhere, simultaneously, is a place where the 'significant effects principle' cannot sensibly resolve jurisdictional questions.").

[269] *See* sources cited *supra* note 236 and accompanying text.

[270] Mark C. Brown, Comment, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 894 (2011) ("Calls to expand the right to appointed legal counsel stem from the many legal needs left systemically unmet and the current legal aid system's inability to satisfy indigent litigants' demands for legal assistance . . . . Adverse outcomes are significantly more likely for unrepresented litigants.").

[271] Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782-83 (2011) (analyzing "devices designed to increase the rate of private litigation: attorneys' fee shifts for prevailing plaintiffs, and damage enhancements such as multipliers or punitive damages"; concluding that while some "suit-boosters" may increase the number of suits filed, they do not fully meet regulatory goals).

plaintiffs otherwise could not afford the cost of litigation.[272] Alternatively, the expansion of third-party litigation funding may increase court access without changing jurisdictional doctrine.[273]

Although there are significant costs on both sides of the equation, the risks of a broader effects test outweigh the costs of a narrower test. Furthermore, access-to-justice issues can be addressed outside of jurisdictional doctrine, while the potential harm to defendants' liberty interests can be protected only by limiting jurisdictional exposure. The risk that some plaintiffs would be deterred from filing suit is offset by greater jurisdictional predictability, a more robust speech environment, and greater integration of electronic commerce and communication.

Nor would a narrower effects test significantly disrupt current legal practice. While some cases would be decided differently, the effects-test doctrine has been so beset by conflicts that it is possible to find many other cases where the courts were already applying a narrower standard than *Calder* seemed to permit.[274] Under the proposed standards, cases such as *Dudnikov* and *Kauffman Racing* could not go forward in the plaintiff's chosen forum; if the plaintiffs wanted to pursue those cases, they would have to file suit where the defendant was subject to jurisdiction — most likely in the defendant's home forum. This resolution largely eviscerates the *Calder* effects test: even the *Calder* case itself, which adopted the effects test, might have come out differently if the Supreme Court had not assumed for jurisdictional purposes that the defendants' conduct was wrongful, and Shirley Jones would likely have had to sue in Florida, where the defendant writer and editor lived and worked.

On the other hand, under the reframed standard, cases that have been criticized as conflicting with *Calder* would form the basis for a new standard. For example, cases like *New Haven Advocate*, *Broadvoice*, and *Accession* would correctly deny jurisdiction.[275] In these cases, the court cannot determine before trial whether the defendants in fact engaged in wrongful conduct targeted at the forum. As a result, the effects test could not be employed as a basis for jurisdiction. The

[272] 15 U.S.C. § 1692(k) (2006).

[273] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1338 (2011) ("Third-party financing of litigation will increase access to justice and encourage private enforcement of the law . . . . Most important, however, litigation funding will reduce systemic inequalities in our legal system . . . in a way that will increase the equality of arms in any given litigation and make it more likely that more kinds of litigants will be able to play for rules.").

[274] *See supra* Part II.

[275] *See supra* Part II.

courts may still examine the facts to see if there is evidence of other types of purposeful availment — business travel, contracts with forum residents, in-forum sales, or targeted advertising — demonstrating efforts toward purposeful availment of the benefits and protections of a forum. Otherwise, jurisdiction should be denied.

CONCLUSION

Ever since the Supreme Court adopted the effects test for personal jurisdiction in *Calder v. Jones*, the test has been applied in a haphazard manner. Even when cases possess strikingly similar fact patterns, courts have reached inconsistent conclusions on the threshold issue of jurisdiction. The cases become possible to reconcile only when the courts' implicit assumptions about the underlying merits of the cases are made explicit. When a court is willing to accept the plaintiff's allegations as true, it is likely to find that jurisdiction is appropriate based on the defendant's "express aiming" of tortious conduct directed at the forum. When a court is unwilling to accept the plaintiff's allegations of tortious conduct as true, it is less likely to find jurisdiction appropriate; because there is no finding of tortious conduct, there can be no finding of express aiming.

Once hidden assumptions about the merits are made explicit, the standard of proof for personal jurisdiction becomes much more salient, and it correspondingly becomes much more difficult for a court to make a finding of effects-test personal jurisdiction. The court can no longer assume for jurisdictional purposes that the plaintiff's allegations of wrongfulness and harm are true; instead, those allegations must be proven by a preponderance of the evidence. Nor can the court base jurisdiction on the uncontested, but nonwrongful, actions that have an effect in the target forum. The court is therefore left with two difficult options: waiting until trial to resolve the issue of personal jurisdiction, or narrowing the effects test to require plaintiffs to sue elsewhere.

Although neither option is without cost, the better option is to adopt a more limited version of the effects test. It is true that limiting the reach of the doctrine removes a convenient litigation forum from plaintiffs who have suffered harm, and some plaintiffs will not have the resources necessary to access alternative forums. However, although these costs are not insignificant, they can be ameliorated with access-to-justice initiatives outside the jurisdictional arena. The costs of a broader effects test cannot be reduced in the same manner. If the jurisdictional question is not resolved until trial, the broader standard will cause defendants to forfeit the very interests that the

personal jurisdiction doctrine is meant to protect. The broader standard would also increase the cost of forum selection for both parties, inhibit legitimate speech, and potentially disrupt the growth of online commercial activity.

Many courts have already adopted narrow interpretations of the effects test, perhaps in an unconscious recognition of these costs. When the Supreme Court next hears an effects-test case, it should endorse a more limited construction of the test that recognizes the inextricability of the merits from the jurisdictional decision. Such a test would require the district court to abandon the effects test whenever it cannot make a pretrial determination that the defendant has in fact engaged in wrongful conduct. In these cases, the court should instead perform a traditional examination of purposeful availment of the forum state's benefits and protections. In the absence of such indicia, the court should not exercise personal jurisdiction over the defendant.