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# Personal Jurisdiction Based on the Local Effects of Intentional Misconduct

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## PERSONAL JURISDICTION BASED ON THE LOCAL EFFECTS OF INTENTIONAL MISCONDUCT

ALLAN ERBSEN\*

### ABSTRACT

*Intentional misconduct frequently has extraterritorial consequences. Terrorist attacks, toxic pollution, civil rights violations, and other intentional torts can cause harm within a state despite originating outside the state. Those harms raise a vexing constitutional question: when do the local effects of intentional wrongdoing authorize personal jurisdiction over a defendant whose conduct occurred outside the forum? The answer has several significant implications. Granting or denying jurisdiction can support or undermine regulatory interests by allocating power between states, imposes burdens on the parties that can impede access to justice, and alters risk assessments that shape both socially desirable and socially destructive behavior.*

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*The jurisdictional dilemma posed by the in-state effects of out-of-state conduct is timeless and timely. It is timeless because it has arisen in thousands of cases and is an unavoidable feature of a federal system that allocates judicial power between fifty coequal states. It is timely because the Supreme Court's 2014 decision in *Walden v. Fiore* directly addressed effects jurisdiction for the first time since 1984.*

*This Article critiques *Walden* and proposes a new approach to the broader constitutional question by focusing on five conclusions. First, it illustrates how *Walden* relies on a distinction between a defendant's contacts with the forum state and a defendant's contacts with the forum's residents. Second, it critiques the forum/resident distinction as imprecise, misleading, and a revival of the formality that plagued nineteenth-century personal jurisdiction jurisprudence. It also offers a new account of Chief Justice Stone's reasoning in *International Shoe*, a case about enforcing taxes, by comparing *Shoe* to Stone's strikingly similar opinion in a case about imposing taxes. The comparison highlights *Shoe*'s hostility toward the sort of formality that animates *Walden*. Third, it contends that lower courts might salvage the Court's emphasis on forum contacts by focusing on the defendant's contacts with the forum's law, in effect merging constitutional limits on the state's legislative and judicial power. Fourth, it suggests that state regulatory interests are more important than commonly recognized when local effects are severe, such as an Ebola quarantine. Fifth, it proposes a new approach to analyzing jurisdiction by considering whether actors who commit intentional torts without a geographic focal point assume the risk of being sued wherever harm occurs.*

*These conclusions suggest that *Walden*'s reasoning would be misleading if read literally and acontextually. The opinion leaves more room for exercising jurisdiction in effects cases than its dismissive veneer implies.*

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## INTRODUCTION

This Article analyzes a constitutional question that implicates thousands of cases, myriad fields of substantive law, and a 2014 Supreme Court decision whose unanimity obscures deep confusion and disagreement. The problem seems simple: if a defendant's intentional conduct outside a state causes harm inside the state, may the state's courts provide a remedy? The illusion of simplicity crumbles when one considers the many contexts in which this "effects" scenario can arise. For example, suppose that: victims of the 9/11 terrorist attacks sue foreign organizations that funded the hijackers, a movie studio sues an out-of-state hacker who crippled its computer network, residents of a town sue an out-of-state polluter whose toxic emissions poisoned their water supply, or civil rights activists sue out-of-state police officers who wrongfully prevented their return home to participate in a protest. Each case raises the same vexing question: under what circumstances can the local effects of foreign conduct justify personal jurisdiction? The answer has several significant consequences. Granting or denying jurisdiction can support or undermine regulatory interests by allocating power between states, imposes burdens on the parties that can impede access to justice, and alters risk assessments that shape both socially desirable and socially destructive behavior.

Effects cases have befuddled courts for decades.<sup>1</sup> The Supreme Court first addressed the problem in *Calder v. Jones*<sup>2</sup> in 1984 and then revisited it in *Walden v. Fiore*<sup>3</sup> in 2014. More than three thousand judicial opinions have cited *Calder*.<sup>4</sup> In less than two years,

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1. See 1 ROBERT C. CASAD ET AL., JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS 113 n.123 (4th ed. 2014) (listing cases); 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, 617-19 (2006) (discussing "widespread divergence among the lower courts").

2. 465 U.S. 783, 787 (1984).

3. 134 S. Ct. 1115, 1119 (2014).

4. This figure is based on WestlawNext's "citing references" feature as of October 23, 2015. Citing References for *Calder v. Jones*, WESTLAWNEXT, <http://westlawnext.com> (search "465 U.S. 783"; click on "Citing References"; click on "Cases") (last visited Oct. 23, 2015).

more than 400 opinions have cited *Walden*.<sup>5</sup> Confusion persists because *Calder* and *Walden* rely on imprecise tests that are often a poor fit for the diverse scenarios in which local effects are relevant.<sup>6</sup> Both opinions also overlook normative questions about why states in a federal system may exercise authority over outsiders.<sup>7</sup> A more nuanced account of state power is essential for determining when defendants may resist jurisdiction.

State borders frame judicial power by creating an inside and outside. Insiders are subject to personal jurisdiction simply because they are insiders.<sup>8</sup> But exercising jurisdiction over outsiders requires applying intricate balancing tests.<sup>9</sup> These balancing tests often produce clear answers when conduct and its consequences are clustered either entirely within or completely outside the forum state. Outsiders who act in the forum state and cause injury in the forum are usually subject to jurisdiction.<sup>10</sup> However, outsiders who act outside the forum and cause injury outside the forum are usually immune from jurisdiction.<sup>11</sup>

Hard cases abound because the events underlying litigation frequently sprawl across borders. Disputes can involve a mix of insiders and outsiders, local and foreign conduct, and local and foreign effects. This geographic medley creates two types of problems when analyzing personal jurisdiction.

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5. Citing References for *Walden v. Fiore*, WESTLAWNEXT, <http://next.westlaw.com> (search "134 S. Ct. 1115;" click on "Citing References;" click on "Cases") (last visited Oct. 23, 2015).

6. See *infra* Part III.

7. See *infra* Part III.

8. "Insider" has both a geographic and normative connotation. I use the term descriptively rather than normatively to label actors subject to general jurisdiction under whatever criteria the Court chooses to use. See *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2853-54 (2011) ("[T]he 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."); cf. Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 543-44 (2012) (considering whether being at "home" is synonymous with being an "insider").

9. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 755-56 (2014) (contrasting "general" and "specific" jurisdiction).

10. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (upholding jurisdiction in Washington in suit to collect taxes linked to the activities of defendant's agents in Washington).

11. *Rush v. Savchuk*, 444 U.S. 320, 332-33 (1980) (rejecting jurisdiction in Minnesota over an Indiana resident who caused a car accident in Indiana).

First, courts often must identify the location of contacts that lack a clear physical dimension. Spatialization can be tricky, raising questions about the situs of ethereal communication (such as Internet activity), intangible property (such as a copyright), and informational harm (such as defamation).<sup>12</sup> Attempts to situate abstract phenomena within political borders can become misleading distractions when courts prioritize fictional locations over more salient indicia of state authority.<sup>13</sup> The risk of distraction does not obviate efforts to determine where conduct occurred and where harms were experienced, but courts should carefully consider why they ask such questions and how much weight to put on the answers.<sup>14</sup>

Second, after identifying geographic contacts, courts must decide why these contacts matter. Jurisdiction may be hazy if several variables seem relevant—such as the location of conduct, the site of effects, and where the defendant aimed its activities—yet some have an “inside” label while others have an “outside” label. Which variables are important, and are some more important than others? Identifying, analyzing, and weighing variables is intrinsically difficult. The Supreme Court has compounded that difficulty by formulating jurisprudence that is unprincipled, unstable, and unhelpful.<sup>15</sup>

This Article critiques current jurisprudence in an especially vexing category of cases and suggests factors that can guide lower courts. Part I frames the inquiry by identifying the key features of “effects” jurisdiction. Part II then analyzes *Calder* and *Walden* and identifies ambiguities in their reasoning that limit their usefulness.

Part III explores and suggests answers to several open questions, reaching five primary conclusions. First, it illustrates how *Walden* relies on a distinction between a defendant’s contacts with the forum state and a defendant’s contacts with the forum’s residents.

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12. Cf. Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007) (exploring space metaphors in the context of regulating the Internet).

13. See *infra* Part III.A.1.

14. See *Int’l Shoe*, 326 U.S. at 319 (“Whether due process is satisfied” does not rest on a “mechanical or quantitative” calculus, but “must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure”).

15. See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304 (2014) (“The one thing jurisdiction scholars agree on is the sad state of personal jurisdiction law.”).



Second, it critiques the forum/resident distinction as imprecise, misleading, and a revival of the formality that plagued nineteenth-century personal jurisdiction jurisprudence. It also offers a new account of Chief Justice Stone's reasoning in *International Shoe*,<sup>16</sup> a case about enforcing taxes, by comparing *Shoe* to Stone's strikingly similar opinion in a case about imposing taxes. The comparison highlights *Shoe*'s hostility toward the sort of formality that animates *Walden*. Third, it contends that lower courts might salvage the Court's emphasis on forum contacts by focusing on the defendant's contacts with the forum's law, in effect merging constitutional limits on the state's legislative and judicial power. Fourth, it suggests that state regulatory interests are more important than commonly recognized when local effects are severe, such as an Ebola quarantine. Fifth, it proposes a new approach to analyzing jurisdiction by considering whether actors who commit intentional torts without a geographic focal point assume the risk of being sued wherever harm occurs.

These conclusions suggest that *Walden*'s reasoning would be misleading if read literally and acontextually. The opinion leaves more room for exercising jurisdiction in effects cases than its dismissive veneer implies.

My analysis indicates that jurisdiction in effects cases will often be appropriate given the importance of state regulatory interests. That conclusion implicates a normative question animating scholarship about the proper function of personal jurisdiction doctrine.

Scholars have identified at least two conflicting approaches to justifying limits on state power to exercise personal jurisdiction over outsiders whose conduct causes harm in the forum. One focuses on horizontal federalism while the other focuses on what I call volitional localization. The horizontal federalism approach treats jurisdiction as a problem involving the allocation of regulatory authority between coequal states in a federal system. I have defended this approach in prior work.<sup>17</sup> The central question is whether the forum

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16. *Int'l Shoe*, 326 U.S. at 311.

17. See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010) [hereinafter Erbsen, *Impersonal Jurisdiction*]; Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. (forthcoming 2015) [hereinafter Erbsen, *Reorienting Personal Jurisdiction*]. Other scholars have also focused on the allocation of regulatory authority. See, e.g., Geoffrey P.

state has an interest sufficient to justify the assertion of power given the interests of other states, national interests, and the defendant's interest in avoiding an unlawful exercise of authority. In contrast, volitional localization approaches emphasize the geographic dimension of a defendant's choices. Relevant factors may include whether the defendant purposefully directed conduct toward the forum, anticipated contacts with the forum, had an opportunity to avoid the forum, or otherwise established a meaningful affiliation with the forum.<sup>18</sup>

The horizontal federalism and volitional localization approaches have distinct starting assumptions and priorities but can consider the same variables.<sup>19</sup> For example, weighing state interests from a horizontal federalism perspective could entail considering the defendant's choices, while the significance of a volitional act aimed at the forum might vary depending on the magnitude of state interests.<sup>20</sup>

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Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 24 (2014) ("horizontal federalism" principles can help identify "the tribunal that can resolve the controversy at the lowest social cost"); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 650-51 (2006) (stating that jurisdiction hinges on whether the forum state has a "legitimate" interest linked to its "police power"); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 734 (1987) ("A more coherent doctrine can be constructed if the courts would acknowledge expressly the sovereign allocation function of jurisdictional rules."); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 266 (2004) (proposing "a common law model rooted in interstate federalism"). A related perspective does not focus directly on the allocation of power within a federal system, but considers whether the connection between the suit and the forum is sufficient to ensure that jurisdiction is not arbitrary. See Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 504 (2015).

18. See, e.g., George Rutherglen, *Reconceiving Personal Jurisdiction: Sovereignty, Authority, and Individual Rights* 5 (Univ. of Va. Pub. Law & Legal Theory Research Paper Series, Paper No. 13, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2564300](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564300) [<http://perma.cc/Q43B-C3QJ>] (focusing on whether defendants "could not realistically have avoided the power of the forum state by limiting the geographical scope of their activities"); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 853 (1989) (focusing on "political consent," which "is an intangible or hypothetical consent inferred from the [defendant's] activities").

19. An alternative way of framing the schism juxtaposes "public ordering"/tort-based and "private ordering"/contract-based approaches to fairness. Stein, *supra* note 17, at 691. That perspective illuminates subtle dimensions of the Court's reasoning and helps situate personal jurisdiction doctrine within broader trends in due process jurisprudence. But I prefer to focus on horizontal federalism because it links personal jurisdiction doctrine to other power allocation rules that rely on provisions of the Constitution aside from the Due Process Clause.

20. For a discussion of how the two approaches overlap, see Erbsen, *Reorienting Personal*

Both approaches also consider whether litigation in the forum would impose undue burdens on the defendant. Burdens factor into the jurisdictional inquiry as a “fairness” or “reasonableness” factor,<sup>21</sup> but could—and I have contended should—be spun off into a distinct constitutional analysis of venue.<sup>22</sup>

This Article does not revisit the debate about why the Constitution limits personal jurisdiction. Instead, it sketches arguments that adherents of both the horizontal federalism and volitional localization approaches could potentially embrace and that might guide courts struggling to implement ambiguous precedent in effects cases. Further scholarship can explore in more detail how each argument would fare under particular normative theories of jurisdiction.

### I. A SIMPLE MODEL OF EFFECTS CASES

A single constitutional test nominally applies to all cases in which a state court attempts to exercise personal jurisdiction over outsiders. Jurisdiction is consistent with the Due Process Clause<sup>23</sup> only when the defendant has “minimum contacts” with the forum such that being compelled to appear is consistent with “fair play and substantial justice.”<sup>24</sup> This subjective test requires close attention to context, yet many fact patterns frequently recur. The Supreme Court has refined the “minimum contacts” inquiry by developing subsidiary doctrines to govern various types of recurring interactions between the defendant and the forum. For example, the Court has tailored doctrine to suits arising from contractual relation-

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*Jurisdiction*, *supra* note 17. Some approaches do not fit neatly into either the horizontal federalism or volitional localization categories because they blend concern about the defendant’s choices with concern about the proper allocation of power between states. *See, e.g.*, Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 248 (2014) (focusing on “policy considerations relevant to the design of welfare-enhancing jurisdictional rules”); *id.* at 294 (noting connections between “fairness” and “federalism”).

21. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (“The protection against inconvenient litigation is typically described in terms of ‘reasonableness’ or ‘fairness.’”).

22. *See* Erbsen, *Impersonal Jurisdiction*, *supra* note 17, at 18-32 (discussing potential constitutional limits on venue); *see also* Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153 (2014).

23. U.S. CONST. amend. XIV, § 1.

24. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

ships,<sup>25</sup> commercial activity within the forum,<sup>26</sup> commercial activity outside the forum,<sup>27</sup> and ownership of property.<sup>28</sup> Additional tailoring may occur as novel problems arise. For example, the Court seems especially skittish about “virtual contacts” over the Internet.<sup>29</sup>

This Article assumes that fragmenting personal jurisdiction doctrine into context-sensitive variations is appropriate. Scholars have debated the wisdom of drawing such lines and the particular lines that the Court has drawn.<sup>30</sup> But courts apparently think that compartmentalization is helpful when translating an abstract governing standard into context-sensitive outcomes.<sup>31</sup> I focus here on the practical implications of jurisprudence governing effects scenarios and therefore frame the problem in a way that parallels how courts approach cases.<sup>32</sup>

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25. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (focusing on whether the defendant “reach[ed] out beyond” the forum) (citation omitted).

26. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) (upholding jurisdiction based on “regular circulation of magazines in the forum State”).

27. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality opinion) (rejecting jurisdiction in product liability action against out-of-state manufacturer).

28. See *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (providing examples of how “the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation”).

29. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 n.9 (2014) (“We leave questions about virtual contacts for another day.”); cf. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) (noting that “technological progress” can alter the stakes in jurisdictional analysis by enhancing state interests and minimizing burdens on defendants).

30. Compare Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 230 (1967) (“[T]he [minimum contacts] test, however phrased, must be adapted to the needs of each of the environments in which it must operate.”), with *Floyd & Baradaran-Robison*, *supra* note 1, at 626-27 (contending that doctrinal fragmentation creates “difficulty in selecting which test to apply” and confusion about how to interpret the varying tests), and Howard M. Erichson, *Nationwide Personal Jurisdiction in all Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1158-59 (1989) (proposing that in federal courts “[p]ersonal jurisdiction ... should be applied consistently across different areas of law, so long as the sovereign power remains the same”).

31. For example, the table of contents of an exhaustive treatise on personal jurisdiction reveals dozens of categories into which courts have, to varying degrees, pigeonholed cases. See 1 CASAD ET AL., *supra* note 1, at iv-viii.

32. *Walden* and *Calder* both confined their analysis to intentional torts. See *Walden*, 134 S. Ct. at 1126 (framing holding in terms of the “proper focus” for due process analysis “in intentional-tort cases”); *Calder v. Jones*, 465 U.S. 783, 789 (1984) (distinguishing precedent involving “untargeted negligence”). The Court has never clearly instructed lower courts either to develop or refrain from developing context-specific personal jurisdiction rules that would implement broadly applicable constitutional standards. See Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 701-03 (2014).

This Part defines a particular recurring scenario—which I label the “effects problem”—in order to place subsequent discussion of case law in context. The label highlights the critical jurisdictional inquiry: under what circumstances do the local effects of foreign conduct justify personal jurisdiction?

State and federal courts routinely encounter “effects” cases that share at least six common features. The components of the problem are that: (1) an outsider defendant (2) acted outside the forum in a way that (3) caused harm inside the forum absent (4) a contractual relationship with the plaintiff or (5) commercial distribution of products, and (6) there is no shortcut around a fact-intensive jurisdictional inquiry.

First, the defendant is an outsider. If the defendant were an insider, “general” or “all purpose” jurisdiction would exist without regard to the local effects of the defendant’s conduct.<sup>33</sup> We can bracket precisely what distinguishes an insider from an outsider. For example, the bar for being an insider might be high: domicile for individuals and being “at home” for corporations.<sup>34</sup> Or the bar could be lower, such that extensive local business activity would be sufficient to make the actor an insider.<sup>35</sup> But by whatever definition we use, the defendant in effects cases is an outsider who is subject to jurisdiction, if at all, based only on contacts with the forum that are relevant to the suit.<sup>36</sup>

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33. See *supra* note 8 and accompanying text. If general jurisdiction were not available, the defendant’s insider connection to the forum may blur assessments of where her conduct occurred, her purpose, and the benefits that she received from her conduct. Courts might therefore skew their implementation of the effects inquiry when addressing an insider as opposed to an otherwise similarly situated outsider.

34. I define “insider” tautologically as a label for actors subject to general jurisdiction under whatever standard the Court applies. See *supra* note 8.

35. See Richard D. Freer, *Four Specific Problems with General Jurisdiction*, 15 NEV. L.J. (forthcoming 2015) (manuscript at 17), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2490034](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2490034) [<http://perma.cc/7DRZ-9SWK>].

36. The test for distinguishing relevant from irrelevant contacts is fuzzy. Contacts are relevant for establishing specific jurisdiction only when the plaintiff’s claim “arise[s] out of or relate[s] to” them. *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414 (1984). For a discussion of the many conflicting rules that courts use to implement this standard, see Ryne H. Ballou, Note, *Be More Specific: Vague Precedents and the Differing Standards by Which to Apply “Arises out of or Relates to” in the Test for Specific Personal Jurisdiction*, 35 U. ARK. LITTLE ROCK L. REV. 663, 668-79 (2013).

Second, the defendant acted outside the forum. Determining whether an act occurred inside or outside a particular place can be tricky. For example, if the defendant used a computer in Florida to hack into a server in Delaware in order to steal money from an account in a Massachusetts-based bank, there might be a question about where the theft occurred.<sup>37</sup> Likewise, cases involving intellectual property—such as patents, trademarks, and copyrights—raise challenging questions about the situs of infringement.<sup>38</sup> But for present purposes, we can assume that appropriate criteria are available for determining that conduct occurred outside the forum.

Third, the defendant's actions caused adverse effects inside the forum. These consequences can manifest in many forms—including physical, economic, and psychological—and in varying degrees of severity.

Fourth, the defendant did not have a contractual or other ongoing relationship with the plaintiff. Such a relationship could establish a relevant course of dealing that weighs in favor of jurisdiction independent of any local effects.<sup>39</sup> In contrast, we can assume that the defendant and the plaintiff, to the extent they directly interacted at all, did so only in connection with the tortious conduct underlying the suit.

Fifth, the defendant's contacts with the forum did not arise from the distribution of commercial products—at least not to any significant extent.<sup>40</sup> In theory, currents in the “stream of commerce” may

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37. *Cf. NetApp, Inc. v. Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 821, 825 (N.D. Cal. 2014) (applying *Calder* to exercise personal jurisdiction over Australian defendant who allegedly hacked into a server within the forum). Spatializing banking transactions can determine which jurisdictional test is applicable. For example, victims of a Hizballah rocket attack in Israel filed a suit in New York against a Lebanese bank that had funded the terrorists. *See Licci ex rel. Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. 2013). The bank had “no operations, branches, or employees in the United States,” but used an account in another New York bank as a conduit for wiring funds to Hizballah. *Id.* at 165-66. The Second Circuit deemed that account sufficient to establish conduct in New York that justified personal jurisdiction without resorting to the *Calder* effects test. *See id.* at 173.

38. *See Floyd & Baradaran-Robison*, *supra* note 1, at 654-55.

39. *See supra* note 25 and accompanying text.

40. Some tangential connection to product distribution is inevitable in many effects cases. For example, when jurisdiction is premised on the libelous content of a newspaper article, the fact that the newspaper generates profits from sales does not necessarily require considering precedents about commercial activity. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (distinguishing between the jurisdictional bases for subjecting a newspaper and its reporters to personal jurisdiction; local sales justified jurisdiction over the paper while the local effects of

ebb and flow in ways that connect distant actors to local fora through the migration of products.<sup>41</sup> These stream of commerce cases may hinge on a constellation of unique variables that do not exist in most other effects scenarios. Market participants may have specialized knowledge about the effects of their conduct, unique expectations about their jurisdictional footprint, a broad intent to profit from geographically diverse opportunities, and a relatively robust ability to bear litigation costs in distant fora. Doctrine governing distribution cases might therefore tolerate jurisdictional entanglements on a larger geographic scale than in non-distribution cases.<sup>42</sup>

Finally, there is no shortcut around analyzing personal jurisdiction. For example, the defendant did not consent to jurisdiction, did not waive its objections, and was not served while present in the forum.<sup>43</sup>

These elements combine to produce a textbook effects scenario: an entity that is not involved in commercial distribution and that lacks relevant prior contacts with the plaintiff and forum engages in activity outside the forum that causes harm within the forum.<sup>44</sup> The

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reporting justified jurisdiction over the employees).

41. The Court recently decided a case that “present[ed] an opportunity to provide greater clarity” about “stream of commerce” analysis. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) (plurality opinion). But clarity was elusive. *See id.* at 2794 (Breyer, J., concurring in the judgment) (“This case presents no such occasion” to fully revisit the stream of commerce metaphor).

42. *See Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961) (“Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted.”). For a discussion of how courts have implemented the stream of commerce test, see Kaitlyn Findley, Comment, *Paddling Past Nicastro in the Stream of Commerce Doctrine: Interpreting Justice Breyer’s Concurrence as Implicitly Inviting Lower Courts to Develop Alternative Jurisdictional Standards*, 63 EMORY L.J. 695, 730-46 (2014).

43. *See* 1 CASAD ET AL., *supra* note 1, at 132-47 (discussing jurisdiction based on presence, consent, and waiver).

44. Two American Law Institute restatements generally support jurisdiction in effects cases. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(j) (AM. LAW INST. 1987) (“[A] state’s exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if ... the person ... carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state.”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (AM. LAW. INST. 1971) (“A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere ... unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable.”).

effects scenario can arise in myriad contexts implicating important state regulatory interests, including cases about terrorism,<sup>45</sup> intellectual property,<sup>46</sup> pollution,<sup>47</sup> libel,<sup>48</sup> and civil liberties.<sup>49</sup>

## II. THE SUPREME COURT CONFRONTS EFFECTS JURISDICTION: *CALDER AND WALDEN*

Effects jurisdiction has been a vexing quagmire because the underlying issues are complex and the Supreme Court has provided minimal guidance. Only two Supreme Court decisions directly address the effects problem: *Calder v. Jones*<sup>50</sup> and *Walden v. Fiore*.<sup>51</sup> Both decisions were unanimous, but neither is a beacon of insight. Each articulates imprecise standards, relies on unstated assumptions, and is amenable to conflicting interpretations. This Part analyzes and critiques both opinions. Part III then explores open questions and identifies a path toward a more nuanced and coherent inquiry.

### A. *Calder*

#### 1. *The Long Arm of Tabloid Journalism*

*Calder* arose from a scurrilous article in the *National Enquirer*, a tabloid whose motto was “Enquiring Minds Want to Know.”<sup>52</sup> In 1979, the *Enquirer* decided that its readers wanted to know gossip about Shirley Jones, an actress who resided in California. The mag-

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45. See, e.g., *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 93-95 (2d Cir. 2008) (applying *Calder* to reject personal jurisdiction in New York over Saudi princes who allegedly funded al Qaeda).

46. See, e.g., *Pavlovich v. Superior Court*, 58 P.3d 2, 5-6, 7-13 (Cal. 2002) (applying *Calder* to reject personal jurisdiction in California over Texas resident who allegedly posted a California corporation’s trade secrets on the Internet).

47. See, e.g., *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at \*3 (E.D. Wash. Nov. 8, 2004) (applying *Calder* to allow personal jurisdiction in Washington over Canadian defendant that polluted a river flowing into Washington).

48. See *infra* Part II.A.

49. See *infra* Part II.B.

50. 465 U.S. 783 (1984).

51. 134 S. Ct. 1115 (2014).

52. HISTORY OF THE MASS MEDIA IN THE UNITED STATES 630 (Margaret A. Blanchard ed., 1998).



azine published an article stating that Jones was a “crying drunk” who “pour[ed] down vodka so fast” that she was “barely able to make it through the day” and could not fulfill her acting commitments.<sup>53</sup>

Jones sued the *Enquirer* and two of its reporters—the article’s author and editor—for libel in a California state court.<sup>54</sup> The case settled one month after the Supreme Court upheld personal jurisdiction.<sup>55</sup> Jones received damages and a “complete retraction.”<sup>56</sup>

Personal jurisdiction over the reporters was tenuous. Extensive sales in California subjected the *Enquirer* to jurisdiction,<sup>57</sup> which it did not contest.<sup>58</sup> However, the reporters did not distribute the magazine; they merely created the content. Jurisdiction over the reporters therefore could not rest on the *Enquirer*’s California circulation,<sup>59</sup> but could rest on how the content was related to California.<sup>60</sup> All the content creation occurred in Florida, where the reporters resided and worked.<sup>61</sup> Some of that creative activity included incorporating information from sources in California.<sup>62</sup> The author contacted California sources by telephone from Florida, but the editor did not.<sup>63</sup>

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53. John South, *Husband’s Bizarre Behavior Is Driving Shirley Jones to Drink*, NAT’L ENQUIRER (Oct. 9, 1979), <http://prawfsblawg.blogs.com/files/shirley-jones-enquirer.pdf> [perma.cc/QF79-LBYU]. The article also accused Jones’s husband of stealing money from a church and subjecting aspiring actresses to the “casting couch.” *Id.* He joined her libel suit but later voluntarily dismissed his claims. *See Calder*, 465 U.S. at 785 n.1.

54. *Jones v. Calder*, 187 Cal. Rptr. 825, 826-27 (Ct. App. 1982).

55. Aljean Harmetz, *National Enquirer Agrees to Settle with Shirley Jones in Libel Suit*, N.Y. TIMES (Apr. 27, 1984), <http://www.nytimes.com/1984/04/27/us/national-enquirer-agrees-to-settle-with-shirley-jones-in-libel-suit.html> [http://perma.cc/6L7T-VWK8].

56. *Id.*

57. In a different case decided on the same day as *Calder*, the Court held that “regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984).

58. *See Calder*, 465 U.S. at 785.

59. *See id.* at 790 (“Petitioners are correct that their contacts with California are not to be judged according to their employer’s activities there.”).

60. *See id.* (“[T]heir status as employees does not somehow insulate them from jurisdiction.”).

61. *See id.* at 785-86.

62. *See id.* at 785. The parties disputed whether the author had traveled to California while researching the article, but the Court did not rely on the alleged travel. *See id.* at 785 n.4.

63. *See Jones v. Calder*, 187 Cal. Rptr. 825, 827, 829 (Ct. App. 1983).

These facts produced a textbook effects scenario. Two Florida residents acting in Florida caused harm in California. They had no prior contact with the plaintiff and no other relevant contacts with the forum.<sup>64</sup> If jurisdiction existed, they would be forced to defend themselves thousands of miles from home. But if jurisdiction did not exist, the plaintiff would have had to travel that same distance in order to pursue her claims in an unfamiliar forum.

## 2. *A New Test*

The Supreme Court held that the reporters were subject to personal jurisdiction for a combination of four reasons. First, they “expressly aimed” and “intentionally directed” their conduct toward California because they “knew” that Jones resided and worked in California.<sup>65</sup> Second, their conduct was “calculated to cause injury.”<sup>66</sup> Third, Jones experienced the “effects” of their conduct in California.<sup>67</sup> Finally, California was the “focal point” of the reporters’ misconduct because the article relied on California-based sources, was published in California, and was about the activities in California of an actress based in California.<sup>68</sup> These four factors established that the reporters had “minimum contacts” with California such that they could “reasonably anticipate being haled into court there.”<sup>69</sup>

The outcome was fair. One party will inevitably be inconvenienced when plaintiffs and defendants reside in different states. Allocating the burden to the alleged wrongdoer rather than the alleged victim is often sensible if the burden on the defendant is manageable.<sup>70</sup> In *Calder*, litigating in California rather than Florida

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64. Both reporters had travelled to California for reasons that were unrelated to the article. See *Calder*, 465 U.S. at 785-86. The Court’s constitutional analysis did not refer to this travel. See *id.* at 788-91.

65. *Id.* at 789-90.

66. *Id.* at 791.

67. *Id.* at 789.

68. *Id.* at 788-89.

69. *Id.* at 788, 790 (citations omitted).

70. *Id.* at 790 (“An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.”); see also Roy L. Brooks, *The Essential Purpose and Analytical Structure of Personal Jurisdiction Law*, 27 IND. L. REV. 361, 364 (1993) (“The essential direction of [personal jurisdiction]

was unlikely to have been burdensome for the reporters, especially if the *Enquirer* indemnified them.<sup>71</sup> Rejecting personal jurisdiction would not have spared the reporters from travelling to California because if the case proceeded to trial they “most likely” would have been “required to appear as witnesses.”<sup>72</sup> Accordingly, once the *Enquirer* acquiesced to jurisdiction, the added burden on the reporters of being parties rather than witnesses was marginal.

Focusing on litigation burdens highlights an odd aspect of *Calder*: the parties’ five-year fight about personal jurisdiction may have been pointless. Jones wanted money and a retraction. The *Enquirer* could (and did) provide both.<sup>73</sup> Joining the reporters as parties in theory might have supplied extra pockets from which to collect damages if the amount of a judgment exceeded the *Enquirer*’s ability to pay, but that possibility was remote relative to the costs of litigating jurisdiction up to the Supreme Court. The Court was surely sophisticated enough to realize that the reporters were marginal characters in a larger drama, which might have alleviated any concerns about elevating them from witnesses to parties. *Calder*’s holding therefore may have been a sideshow to Jones’s suit against the *Enquirer*, which settled one month after the Court’s decision.<sup>74</sup>

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law is to determine who should travel.”). *But see* Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1305 (2012) (contending that the effects test allocates the burden of travel based on an unjustified assumption that the plaintiff’s claim has merit).

71. “[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *see also* Erbsen, *Impersonal Jurisdiction*, *supra* note 17, at 21-26 (noting several factors, including liability insurance, that mitigate defense costs in distant fora).

72. *Jones v. Calder*, 187 Cal. Rptr. 825, 832 (Ct. App. 1982). Exercising jurisdiction over reporters would be troubling if the fear of jurisdiction in distant fora chilled protected speech on topics related to those fora. *See* Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 259-60 (1987). *Calder* recognized that First Amendment concerns animated “substantive” libel law and declined to “double count[.]” “those concerns at the jurisdictional stage.” *Calder*, 465 U.S. at 790.

73. The Supreme Court noted the trial court’s observation that Jones’s “rights could be ‘fully satisfied’ in her suit against the publisher without requiring [the reporters] to appear as parties.” *Calder*, 465 U.S. at 786.

74. *See supra* notes 55-56 and accompanying text. On the other hand, *Calder* was the *Enquirer*’s editor-in-chief and worked closely with the tabloid’s owner. *See* Michael Pakenham, *The National Enquirer—A Shameless Insider’s Lurid Saga*, BALT. SUN (June 27, 2004), [http://articles.baltimoresun.com/2004-06-27/entertainment/0406280330\\_1\\_national-enquirer-pope-calder](http://articles.baltimoresun.com/2004-06-27/entertainment/0406280330_1_national-enquirer-pope-calder) [<http://perma.cc/6SCZ-GFMP>]. Perhaps Jones theorized that *Calder* was a key

### 3. Ambiguities in the New Test

Although the outcome in *Calder* seems appropriate in context, Supreme Court opinions address more than just the equities of a specific case. Their reasoning creates a template for courts to resolve thousands of related cases with materially different facts. *Calder*'s sparse reasoning created a veneer of clarity that masked several unresolved questions.

All four components of *Calder*'s test were innovations. The Court's prior personal jurisdiction cases refining the minimum contacts inquiry had not discussed "aiming," "directing," "calculating,"<sup>75</sup> or "focal points." Prior precedent had also declined to rely on an "effects test."<sup>76</sup>

*Calder*'s innovative language was imprecise in ways that have substantial practical implications. To understand why, consider two hypothetical variants of *Calder* that expose uncertainty about what the Court meant and how lower courts should apply the test.

First, suppose that the reporters did not know that Jones lived and worked in California. Instead, they knew that she was an actress but did not know the location of her current jobsite and residence. Would the article still have been "aimed" at California?

Probing the reporter's knowledge exposes a fiction at the heart of the aiming factor: the reporters aimed at a person, not a place. There is no evidence that they cared about Jones's nexus with California or sought a California target. They might sometimes have cared about California contacts—their many readers in California presumably clamored for stories about local celebrities—but a California nexus may not have motivated this particular story. Jones was an attractive target because she was famous, not necessarily

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decision maker in settlement negotiations and might be more willing to support a favorable settlement from the *Enquirer* if he was also personally liable for damages. If so, Jones's multi-year battle about jurisdiction over the employees would have been an effort to leverage conflicts of interest against a defendant who had already acquiesced to jurisdiction.

75. A prior opinion had referred to out-of-state advertising that might have been relevant to personal jurisdiction if it had been "reasonably calculated" to reach the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

76. *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978) (citation omitted).

because she lived in California. Indeed, many celebrities live elsewhere and yet remain fodder for tabloids.<sup>77</sup>

Although the Court stressed that the reporters “knowingly cause[d] the injury in California,” the relevance of their knowledge of Jones’s California residence was unclear.<sup>78</sup> The reporters would have known that Jones lived somewhere and worked somewhere even if they did not know where. Yet they presumably still would have libeled her. Writing the libelous story was the volitional act connecting them to the eventual effects in California. That act would have been equally voluntary, wrong, and harmful regardless of whether they knew about her residence and employment in California.

*Calder* is an unusual case because it involved an actress in the film and television industry, which is widely known to be heavily concentrated in California. The reporters might therefore have reasonably anticipated injury in California even if they did not know where Jones resided because they knew her “career was centered in California.”<sup>79</sup> However, one can imagine an analogous case in which the libel victim was a prominent painter rather than an actress. There is no language in *Calder* suggesting that the holding would have been different if the *Enquirer* had libeled a painter who resided in and worked in California even though the national painting community is not nearly as concentrated in the state as the film and television industry. The local roots of the plaintiff’s industry therefore do not seem to have animated *Calder*’s holding; what mattered was that she lived and worked in the forum. Accordingly, it is still interesting to consider how *Calder* should apply when the defendant

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77. For example, one of the *Enquirer*’s frequent targets was New York resident Jacqueline Kennedy Onassis. See KATHLEEN TRACY, THE EVERYTHING JACQUELINE KENNEDY ONASSIS BOOK: A PORTRAIT OF AN AMERICAN ICON 212 (2008) (“Whether the story was genuine and newsworthy, superficial, or basically fiction, Jackie was the new tabloid queen.”); cf. Galella v. Onassis, 487 F.2d 986, 998 (2d Cir. 1973) (affirming injunction protecting Onassis from an unusually persistent paparazzo).

78. *Calder*, 465 U.S. at 790. A subsequent sentence was less precise, observing that the defendants were “primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.” *Id.* This sentence is consistent with treating the defendants either as having aimed at the plaintiff and therefore being subject to jurisdiction in California because that is where she lived or as having aimed at the forum because that is where they knew she resided.

79. *Id.* at 788.

does not know where the victim resides and works but is aware that the victim must reside and work *somewhere*.

If the reporters' lack of knowledge about Jones's residence and place of employment would have immunized them from jurisdiction, then *Calder* would be far less sympathetic to plaintiffs than a natural reading would suggest. The opinion's statement that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California" would not actually protect victims of intentional misconduct.<sup>80</sup> Instead, it would sort victims into two categories. Victims of fastidious tortfeasors who learn their target's whereabouts would have a convenient remedy, while victims of ignorant tortfeasors who do not know where their targets reside and work would lack a convenient remedy. It is difficult to believe that *Calder* intended to sort victims this way, nor is there a compelling reason to think that the Constitution requires such sorting.<sup>81</sup>

*Calder's* aiming fiction was thus imprecise: did the reporters "aim" at California because they aimed at Jones and that is where she happened to be, or did they aim at California because that is where they knew she was? This seemingly minor distinction makes an enormous practical difference that I discuss in Part III, which considers circumstances under which targeting the forum might not be a prerequisite for jurisdiction.<sup>82</sup>

Second, suppose that Jones lived in Illinois and commuted to both California and New York for work and that the reporters knew this. Now there would be a question about whether California was the article's "focal point."

Imagining a victim with multi-state contacts exposes an ambiguity underlying the focal point factor. Intentional misconduct often will not have a single focal point because victims may live, work, and interact with multiple states. Yet it would be odd if jurisdiction hinged on whether the defendant injured a victim whose life was centralized in a single state rather than a victim whose relation-

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80. *Id.*

81. For a general discussion of the constitutional issues, see sources cited *supra* notes 17-18.

82. Lower courts have adopted various inconsistent tests for determining whether a defendant aimed at the forum. See *Tamburo v. Dworkin*, 601 F.3d 693, 704-06 (7th Cir. 2010) (discussing circuit split).

ships were more diffused. Identical conduct causing significant local effects that the defendant knew would occur locally should have the same jurisdictional consequences.<sup>83</sup>

Accordingly, *Calder* was unclear about whether intentional misconduct always has a focal point, only sometimes has a focal point, or may have multiple focal points. *Calder* was an easy case where the victim's relevant contacts were all with one state. But the opinion provides no guidance for what it means to "aim" at or "focus" on a victim with multi-state contacts.

The possibility that some intentional torts may not have a geographic focal point raises a larger question: why should the defendant's geographic focus matter at all? If a person intentionally commits a wrongful act that causes harm in a particular place, then the place where the harm occurs is important *ex post* even if it was not important *ex ante*. Yet *Calder* does not explain why the *ex ante* focus is more salient than the *ex post* effects. This ambiguity has practical implications that I discuss in Part III when considering the relative importance of state interests and the defendant's knowledge and purpose.

In sum, *Calder* developed an innovative test for a relatively simple case. But its imprecise factors provided limited guidance to lower courts, resulting in widespread confusion and inconsistency.<sup>84</sup> Thirty years later, the Court granted certiorari in *Walden* to clarify *Calder*.

## B. *Walden*

### 1. *Gambling on Effects Jurisdiction*

According to allegations in the Complaint that the Court assumed to be true,<sup>85</sup> the plaintiffs were professional gamblers who resided

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83. Distinguishing two defendants who commit the same act with the same equally foreseeable local consequences would require resting jurisdiction doctrine on a volitional localization theory rather than a horizontal federalism theory. For a discussion of why the latter is preferable, see *supra* note 17 and accompanying text.

84. See *supra* note 1.

85. See *Walden v. Fiore*, 134 S. Ct. 1115, 1119 n.2 (2014); *Fiore v. Walden*, 688 F.3d 558, 574 (9th Cir. 2012) ("The district court did not conduct an evidentiary hearing regarding personal jurisdiction."). The First Amended Complaint is printed in the Joint Appendix. See

in Nevada.<sup>86</sup> After a profitable gambling excursion, they were transporting approximately \$97,000 in cash to Nevada through Georgia.<sup>87</sup> Federal Drug Enforcement Administration (DEA) agents at Atlanta's airport seized the plaintiffs' cash, purportedly because some of it was in a bag on which a dog detected drug residue.<sup>88</sup> Upon arriving home, the plaintiffs promptly sought return of their money and provided documentation showing that the cash was related to legal gambling rather than illegal drug trafficking.<sup>89</sup>

Defendant Anthony Walden was a municipal police officer in Georgia serving on the DEA task force that seized plaintiffs' currency.<sup>90</sup> After the seizure, he helped prepare an affidavit substantiating probable cause.<sup>91</sup> The affidavit included false information suggesting a nexus with drug trafficking and omitted exculpatory information

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Joint Appendix at 13-36, *Walden*, 134 S. Ct. 1115 (No. 12-574) [hereinafter Complaint]. My description of the facts draws from the Complaint to augment the Court's short account. Like the Court, I assume that the plaintiffs' allegations are true. The record also includes a short declaration from Walden. See Joint Appendix, *supra*, at 39-43. All references in the footnotes to the Complaint, Joint Appendix, or to any briefs refer to Supreme Court filings in *Walden* unless otherwise noted.

86. See Complaint, *supra* note 85, ¶¶ 2, 8. The record is not clear about when the plaintiffs became residents of Nevada. The Supreme Court treated them as dual California/Nevada residents at the time of the disputed events. See *Walden*, 134 S. Ct. at 1119. The Ninth Circuit majority hedged, noting that plaintiffs were residents of Nevada at all relevant times while disclaiming reliance on this fact. See *Fiore*, 688 F.3d at 570, 580. Judge Ikuta's dissent in the Ninth Circuit speculated that Walden may not have known that the plaintiffs resided in Nevada because their drivers' licenses were issued by California. See *id.* at 593 (Ikuta, J., dissenting). Yet Walden's carefully worded declaration does not deny knowing that plaintiffs resided in Nevada. See Joint Appendix, *supra* note 85, at 39-43. The Complaint does not explicitly allege that Walden knew the plaintiffs resided in Nevada, but a court could infer from the Complaint that Walden may have known. See Complaint, *supra* note 85, ¶ 74 (alleging that Walden knew the currency originated in and was destined for Nevada); *id.* ¶ 79 (alleging that Walden was involved in an investigation that included searching databases with records about the plaintiffs); *id.* ¶¶ 70-72 (alleging that Walden received documentation sent by the plaintiffs from Nevada). The Supreme Court apparently did not consider the factual dispute to be material and therefore did not decide which party should bear the consequences of any uncertainty in the record about Walden's knowledge.

87. See Complaint, *supra* note 85, ¶¶ 11-13. The record is silent about why plaintiffs did not use wire transfers instead of bags stuffed with cash. They apparently wanted to hide their identities, see *id.* ¶¶ 10, 38, 70, which may have counseled against revealing details about their bank accounts.

88. See *id.* ¶¶ 55-58.

89. See *id.* ¶¶ 70-71.

90. See *Walden*, 134 S. Ct. at 1119.

91. See Complaint, *supra* note 85, ¶ 80.



showing a nexus with gambling.<sup>92</sup> These statements were intentionally false because Walden knew that the seizure was unlawful.<sup>93</sup> An Assistant United States Attorney eventually instructed the DEA to return the funds, which plaintiffs received “more than six months” after the seizure.<sup>94</sup>

Walden may have had an incentive to pursue an unjustified forfeiture. The Complaint is generally silent about his motive.<sup>95</sup> But the plaintiffs’ Supreme Court brief observed that because Walden was a member of a DEA state-federal task force, the local police department for which he worked would have received a share of the funds that he seized.<sup>96</sup> Commentators have suggested that revenue sharing entices officers to be excessively aggressive when they encounter a large cache of currency.<sup>97</sup>

Plaintiffs filed a *Bivens*<sup>98</sup> action against Walden in the District of Nevada alleging violation of their rights under the Fourth Amendment.<sup>99</sup> Walden apparently had no material contacts with Nevada

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92. See *id.* ¶¶ 81-83.

93. See *id.* ¶¶ 74, 80, 83-84.

94. *Id.* ¶ 95.

95. The Complaint alleged that either Walden or another agent admitted that the currency had no connection to drugs and defended the seizure because the plaintiffs used gambling “strategies” of which the agent “personally disapproved.” *Id.* ¶ 88. Neither the Supreme Court, nor the Ninth Circuit, nor the parties’ briefs highlighted this potentially important allegation. Presumably, the courts and parties were skittish about relying on allegations about what Walden *might* have said. This concern, coupled with uncertainty about whether Walden knew that plaintiffs resided in Nevada, see *supra* note 86, highlights the importance of jurisdictional discovery. Plaintiffs may have had a stronger argument in the Supreme Court if they could have shown that Walden knew they resided in Nevada and acted out of personal distaste for one of Nevada’s principal industries.

96. See Brief for the Respondents at 2, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574); *id.* at 48 (noting that requiring property owners to litigate in the forum where assets were seized rather than in their local forum might “embolden” officers to seize funds from travelers who would have difficulty suing).

97. See Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 786-90 (2009). The Department of Justice recently limited the ability of state law enforcement agencies to retain seized funds, but the limit does not apply to local officers working with federal agents on “a joint task force.” U.S. Dep’t of Justice, Office of the Attorney Gen., Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies (Jan. 16, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney\\_general\\_order\\_prohibiting\\_adoptions.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf) [<http://perma.cc/S72W-9XET>].

98. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

99. See *Fiore v. Walden*, 688 F.3d 558, 563 (9th Cir. 2012). The suit challenged actions by

other than through the conduct challenged in the suit.<sup>100</sup> But plaintiffs alleged that Walden's local contacts related to the suit were sufficient. These included that: (1) Walden knew that some of the currency originated in Nevada and that all of the currency was en route to Nevada;<sup>101</sup> (2) Walden received communication that the plaintiffs sent from Nevada;<sup>102</sup> and (3) injuries were experienced in Nevada.<sup>103</sup>

On these facts, *Walden* is an effects case as defined in Part I. The defendant was an outsider who acted outside the forum. He "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada."<sup>104</sup> Yet the effects of his conduct were experienced in the forum.<sup>105</sup>

Like *Calder*, *Walden* was a case in which the jurisdictional issue probably had little practical significance for the defendant.<sup>106</sup> The United States indemnified Walden, although the record is unclear about the extent or duration of indemnification.<sup>107</sup> Given that the

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multiple defendants in several locations, but Walden was the only defendant who was served. *See id.* at 572 n.8.

100. *See* Declaration of Anthony Walden, in Joint Appendix, *supra* note 85, at 41 (stating that he had never been present in Nevada or done business in Nevada but had once contacted a Nevada government agency in connection with another case).

101. *See* Complaint, *supra* note 85, ¶ 74 ("All defendants recognized at all times that the destination of the funds at the time of the seizure was Las Vegas, Nevada, and that a substantial amount of the currency had also originated at Las Vegas, Nevada."); *see also id.* ¶¶ 45-46 (Walden met the plaintiffs at the gate for their flight to Nevada); *id.* ¶ 61 (a plaintiff asked that sufficient funds be returned so that she could pay for a taxi in Nevada); *id.* ¶ 67 (Walden was involved in searching checked luggage destined for a flight to Nevada).

102. *See id.* ¶¶ 70-71.

103. *See id.* ¶ 111 (plaintiffs incurred attorney's fees in Nevada in an effort to reclaim their currency); *id.* ¶ 112 (plaintiffs suffered "lost use of the funds," although this is not explicitly alleged to have occurred in Nevada); *id.* ¶ 113 (plaintiffs suffered "emotional distress" upon landing in Nevada without sufficient funds to pay for transportation).

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

105. *See supra* note 103.

106. *See supra* text accompanying notes 73-74.

107. The Department of Justice represented Walden in the District Court and Ninth Circuit; he then obtained private counsel for the petition for rehearing en banc and in the Supreme Court. *See* Brief for the Respondents, *supra* note 96, at 6-7; Brief for Petitioner at 9, *Walden v. Fiore*, 134 S. Ct. 1115 (No. 12-574) (mentioning that new counsel appeared without explaining why or whether Walden paid any legal fees); Brief for the United States as Amicus Curiae Supporting Petitioner at 7 n.5, *Walden v. Fiore*, 134 S. Ct. 1115 (No. 12-574) (same); Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 18 LEWIS & CLARK L. REV. (forthcoming 2015) (manuscript at 7 n.30) (noting that the United States paid Walden's attorney's fees in the Supreme Court).

Department of Justice has lawyers in Nevada and that personal appearances by litigants are rarely necessary, the marginal cost for Walden (if indemnified) of litigating in Nevada rather than Georgia would have been minimal.<sup>108</sup> Nevertheless, other officers in Walden's position could face more severe burdens in distant courts. Several amici representing the interests of law enforcement agencies and officers therefore opposed jurisdiction in Nevada.<sup>109</sup>

The Supreme Court unanimously concluded that Nevada could not exercise jurisdiction over Walden.<sup>110</sup> The practical result is that if the plaintiffs wanted to vindicate their Fourth Amendment rights, they had to travel to Georgia, find local counsel, and litigate far from home. Walden could not be forced to travel to Nevada even if the federal government was managing and funding his defense. In essence, the Court held that the Constitution allocated the burden of distant litigation to the injured plaintiffs rather than to the defendant who allegedly caused their injuries.

## *2. The Holding Hinges on the Court's Distinction Between Contacts with the Forum and Contacts with Forum Residents*

The Court explained that Walden's "actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly

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The United States does not appear to have denied indemnifying Walden throughout the case and referred to him as a "federal agent[]" in a paragraph of its Supreme Court brief noting that federal agents are routinely indemnified. Brief for the United States, *supra*, at 6. *But cf. id.* at 19-20 (noting that indemnification is "discretionary" and that Walden was represented by private counsel, but not explicitly stating that indemnification had been revoked); *id.* at 21 (referring to Walden's "potential access to ... indemnification for any adverse judgment"). The Attorney General has discretion to determine when indemnification is appropriate and may pay for a private attorney to represent officers. *See* 28 C.F.R. § 50.15(a) (2015).

108. The District Court could have protected Walden by requiring that his deposition occur in Georgia. *See* FED. R. CIV. P. 26(c)(1)(B) (court may grant protective order specifying "place" for discovery); *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987) (noting presumption in favor of deposing non-resident defendants in their home states). In addition, personal appearances are often unnecessary at hearings. *See* *Talent Tree, Inc. v. Madlock*, No. 4:07-cv-03735, 2008 WL 8082752, at \*6 (S.D. Tex. Apr. 8, 2008) (exercising personal jurisdiction and noting that "given modern communications, many interactions with the Court, including hearings, can be conducted electronically or by telephone").

109. *See* Brief for Fed. Law Enforcement Officers Ass'n as Amicus Curiae Supporting Petitioner at 8-17, *Walden v. Fiore*, 134 S. Ct. 1115 (No. 12-574); Brief of Alabama et al. as Amici Curiae in Support of Petitioner at 11-17, *Walden v. Fiore*, 134 S. Ct. 1115 (No. 12-574).

110. *See* *Walden*, 134 S. Ct. at 1119.

directed his conduct at plaintiffs whom he knew had Nevada connections.”<sup>111</sup> This reasoning hinges on a distinction between the forum and its residents. Walden had contacts with people from Nevada, but in the Court’s view that was not equivalent to establishing contacts with “Nevada itself.”<sup>112</sup> Thus, “[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.”<sup>113</sup> Here, contacts with Nevada were not “meaningful” because Walden did not “create” them.<sup>114</sup> He created contacts with Georgia that plaintiffs tried to extend into Nevada when they “chose” to live there.<sup>115</sup>

The short opinion manages to invoke the forum/resident distinction twenty-seven times.<sup>116</sup> The opinion stressed the need for contacts “with the forum State” eight times; “with Nevada” seven times; “with the forum” three times; “with California” twice; and “with the State” and “with a particular State” once each.<sup>117</sup> Similarly, the opinion noted the insufficiency of contacts “with the plaintiff” twice; and “with persons who reside” in the forum, “with respondents,” and

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111. *Id.* at 1125.

112. *Id.*

113. *Id.*

114. *Id.* at 1125-26.

115. *Id.* at 1125. Earlier cases had relied on a less rigid version of the forum/resident distinction. One noted the importance of “the relationship among the defendant, the forum, and the litigation.” *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). Another came close to *Walden* by distinguishing “constitutionally cognizable contact with” the forum from contact with a person whose “unilateral activity” led to entanglement with the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298-99 (1980) (citation omitted). But in *Volkswagen*, the defendants never interacted with a forum resident and had no reason to believe that their conduct had any connection to the forum. *See id.* at 288 (noting that the case arose from the sale of a car in New York to a New York resident who later drove through the forum).

Another decision had noted that “contact with the forum state” was synonymous with “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). That formulation is not appropriate in effects cases involving intentional torts. For example, a terrorist whose intentionally targeted acts outside the forum kill people inside the forum is not seeking the “benefits and protections” of forum law and yet should be subject to jurisdiction under *Calder*. *See infra* Part III.B. The mismatch presumably explains why *Calder* never cites *Hanson* or the “purposeful availment” test. *Walden* likewise never mentions purposeful availment.

116. *See Walden*, 134 S. Ct. at 1119-26.

117. *Id.*

“with other persons affiliated with the State” once each.<sup>118</sup> Seven of these references appear on a single page.<sup>119</sup>

The Court apparently was preoccupied with confirming that defendants must have minimum contacts with the forum rather than with the forum’s residents. As I explain in Part III.A, however, the forum/resident distinction is a meaningless formality that obscures difficult questions about the scope of state power.

### 3. Reframing Calder

The holdings in *Walden* and *Calder* are consistent, yet *Walden* nevertheless provided a revisionist account of *Calder*’s reasoning. That account has already caused mischief in lower courts.

Jurisdiction would have been appropriate over *Walden* under two of the four *Calder* factors. His false affidavit was “calculated to cause injury,” and its “effects” were experienced in the forum.<sup>120</sup> The “aiming” factor is more ambiguous. The reporters in *Calder* and officer in *Walden* knew that the plaintiffs had a connection to the forum state. But the reporters’ knowledge was more robust. They knew that they were writing about an actress who lived and worked in California and whose reputation could be devastated by allegations of binge drinking while performing.<sup>121</sup> In contrast, *Walden* knew that he was dealing with gamblers who were moving between various gambling destinations, including Nevada.<sup>122</sup> He did not necessarily know that the plaintiffs resided in Nevada.<sup>123</sup> The “aiming” factor is sufficiently malleable to either justify or foreclose jurisdiction in *Walden*.<sup>124</sup> But clarifying the aiming inquiry was unnecessary in *Walden* because of the fourth *Calder* factor.

*Walden*’s rejection of jurisdiction is consistent with *Calder*’s endorsement of jurisdiction because Nevada was not the “focal point”

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118. *Id.* at 1122-24.

119. *See id.* at 1123.

120. *See supra* Part II.B.1.

121. *See Calder v. Jones*, 465 U.S. 785, 789-90 (1984).

122. The plaintiffs were returning from a trip to several casinos and informed *Walden* about their journey. *See* Complaint, *supra* note 85, ¶¶ 11, 50.

123. *See supra* note 86.

124. *See supra* Part II.A.2.

of the defendant's conduct.<sup>125</sup> He encountered the plaintiffs in Georgia, seized their money in Georgia, wrote an affidavit in Georgia, and interacted with the United States Attorney's office in Georgia.<sup>126</sup> Walden's gaze never left Georgia, so *Calder* did not support jurisdiction in Nevada.

More generally, the factual predicate for effects-based jurisdiction in *Walden* was much weaker than in *Calder*. The following table uses facts drawn from the two opinions to illustrate the relationship between the cases.<sup>127</sup> The table suggests that *Walden* was a poor vehicle for revisiting personal jurisdiction in effects cases. While the defendant caused harm in Nevada, his connection to Nevada was tenuous. An opinion rejecting jurisdiction in *Walden* therefore would likely be (and turned out to be) unhelpful for resolving harder cases. The opinion sends a signal about easier cases, but even that signal is muddled because of imprecision that I discuss in Part III.

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125. *Calder*, 465 U.S. at 789.

126. *See supra* Part II.B.1.

127. *See Walden v. Fiore*, 134 S. Ct. 1115, 1119-20 (2014); *Calder*, 465 U.S. at 785, 787-89.

Table 1

	<i>Calder</i>	<i>Walden</i>
Location of plaintiff(s) at the time of defendants' conduct	In the forum.	Outside the forum.
Severity of local injury	Long-term damage to a celebrity's reputation within the state in which she worked.	Temporary deprivation of funds that were eventually returned.
Nexus between defendants' false statements and plaintiffs' injury	Article directly harmed plaintiff's reputation each time someone read it.	Defendant was one of multiple agents who contributed to an affidavit that may have prolonged an investigation that delayed return of plaintiffs' currency.
Targeting of the forum	Defendants chose to write about a forum resident and contacted sources in the forum.	Defendant worked at a large airport where he routinely encountered travelers and did not alter his activities based on their origin or destination.
Tangible contacts with the forum	Defendants' article was published in the forum and one of the defendants called sources in the forum.	Defendant received data from the forum but did not send anything to the forum.
Knowledge about the forum's significance	Defendants knew that the conduct would affect a forum resident.	Defendant was aware that plaintiffs had some contact with the forum.
Focus of defendants' conduct	Article discussed activities in the forum by a forum resident as recounted by sources in the forum and was included in a newspaper distributed in the forum.	Defendant seized cash that he found outside the forum and then submitted an affidavit to an official outside the forum.

Effects jurisprudence would be clearer if the Court had denied Walden's petition for certiorari. However, the Ninth Circuit may have forced the Court's hand by upholding jurisdiction over eight dissenting votes in a case that raised substantial concerns for many states and law enforcement officers.<sup>128</sup>

Despite the fact that *Calder's* holding was easily distinguishable, the Court decided to recharacterize *Calder's* reasoning. According

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128. See *supra* note 109 and accompanying text; see also *Fiore v. Walden*, 688 F.3d 558, 562 (9th Cir. 2012) (O'Scannlain, J., dissenting from denial of rehearing en banc); *id.* at 568 (McKeown, J., dissenting from denial of rehearing en banc).

to *Walden*, “[t]he crux of *Calder*” rested on the metaphysics of libel law.<sup>129</sup> Libel arises from publication, publication occurred in California, and thus the “tort actually occurred *in California*.”<sup>130</sup> Publication of the story therefore connected the Florida defendants “to California” rather than only to the plaintiff.<sup>131</sup>

*Walden*’s reading of *Calder* was strained and revisionist. *Calder* did not discuss the nuances of libel law and did not consider where the tort occurred.<sup>132</sup> Tellingly, the paragraph in *Walden* purporting to explain what *Calder* meant never cites *Calder*.<sup>133</sup> *Walden* thus tried to transform the *Calder* test from a functional, practical assessment of the reporters’ conduct into a formal corollary to “the nature of the libel tort.”<sup>134</sup>

Fortunately, the Court in *Walden* hedged on its reimagining of *Calder*. Whether due to lack of votes or lack of resolve, the Court stated that *Calder* was only “largely” about libel law.<sup>135</sup> *Walden* also reiterated *Calder*’s “focal point” test.<sup>136</sup> This hedge leaves room for courts to continue citing *Calder* even outside the libel context. At least one court has done so, holding that “*Walden* and *Calder* do not limit ‘suit related conduct’ to the *elements* of a tort.”<sup>137</sup>

Unfortunately, several courts have not parsed *Walden* as carefully and have read *Walden* to foreclose nuanced analysis of *Calder* outside the libel context.<sup>138</sup> The extent to which *Walden* displaces

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129. *Walden*, 134 S. Ct. at 1123.

130. *See id.* at 1124 (emphasis in original).

131. *Id.*

132. *See Calder*, 465 U.S. at 788-91.

133. *See Walden*, 134 S. Ct. at 1123-24.

134. *Id.* at 1124.

135. *Id.*

136. *Id.* at 1123 (quoting *Calder*, 465 U.S. at 789).

137. *Havel v. Honda Motor Eur. Ltd.*, No. H-13-1291, 2014 WL 4967229, at \*10 (S.D. Tex. Sept. 30, 2014) (emphasizing that additional factors were relevant in *Calder* beside the elements of libel law); *cf. Leibman v. Prupes*, No. 2:14-cv-09003-CAS(VBKx), 2015 WL 898454, at \*9 (C.D. Cal. Mar. 2, 2015) (finding personal jurisdiction under *Calder* in a non-libel case and stating that “the Supreme Court decided *Walden* narrowly on the facts before it”).

138. *See Skyworks Sols., Inc. v. Kinetic Techs. HK Ltd.*, No. 13-10655-Gao, 2015 WL 461920, at \*4 (D. Mass. Feb. 4, 2015) (citing *Walden*’s “libel tort” language while noting that “the Supreme Court recently emphasized the importance of *Calder*’s particular facts to its outcome”); *Bank of Am. v. Corporex Cos.*, No. 3:13-CV-691-RJC, 2014 WL 3731778, at \*4 (W.D.N.C. July 28, 2014) (distinguishing *Calder* because *Walden* “recognized that the finding of personal jurisdiction turned, in large measure, on the unique nature of the libel tort”); *Conex Energy—Can., LLC v. Mann Eng’g, Ltd.*, No. CIV 13-4123-KES, 2014 WL 3732571, at



*Calder* as the source of standards for effects cases is therefore unsettled. That confusion is a problem because terrorism, computer hacking, and myriad other forms of intentional torts lack the idiosyncratic nuances of libel law. Part III considers how effects jurisdiction might still exist in those cases.

#### 4. *Maneuvering Room in Walden's Reasoning*

*Walden's* unanimity and brevity belie disagreement among the Justices. That disagreement runs deeper than merely hedging about the recharacterization of *Calder*.<sup>139</sup>

The best evidence of latent tension lies in what is missing from the opinion: *Walden* never mentions the Court's decision about personal jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*, decided three years earlier.<sup>140</sup> *Nicastro* is not a pure effects case because it involved distribution of commercial products.<sup>141</sup> However, *Nicastro* is relevant because it considered whether an injury in the forum justified personal jurisdiction over a defendant whose conduct had occurred outside the forum.<sup>142</sup> Both parties in *Walden* cited *Nicastro* extensively in their briefs.<sup>143</sup> Nevertheless, *Walden* ignored the Court's most recent relevant decision.

*Nicastro* is an unattractive precedent because the Court could not agree on answers to foundational questions about why the Constitution limits personal jurisdiction or how judges should balance competing state and private interests.<sup>144</sup> A four-Justice plurality

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\*7 (D.S.D. July 25, 2014) (distinguishing *Calder* because libel was not analogous to the torts of "conspiracy and interference with a business relationship" at issue); *Private Capital Grp., Inc. v. Dareus*, No. 2:13-CV-18 TS, 2014 WL 3394662, at \*5 (D. Utah July 10, 2014) (noting that *Walden's* references to the "libel tort" "clarif[ied] the applicability of the *Calder* test").

139. See *supra* notes 133-35 and accompanying text.

140. 131 S. Ct. 2780 (2011) (plurality opinion).

141. See *supra* notes 40-42 and accompanying text.

142. The defendant in *Nicastro* manufactured a product in England that harmed the plaintiff in New Jersey. See *Nicastro*, 131 S. Ct. at 2786 (plurality opinion).

143. See Brief for Petitioner, *supra* note 107, at 11, 13, 18-19, 26, 32, 34; Brief for the Respondents, *supra* note 96, at 23-25, 32, 38, 48.

144. For a discussion of the competing positions in *Nicastro*, see Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481 (2012).

disagreed with three dissenting Justices,<sup>145</sup> while two concurring Justices found neither alternative convincing.<sup>146</sup>

Evidently, the factions in *Nicastro* wanted to avoid revisiting contentious questions. *Walden* thus states that “[w]ell-established principles of personal jurisdiction are sufficient to decide this case.”<sup>147</sup>

The apparent price of unanimity in *Walden* was a need to avoid generalizing the holding beyond the oft-repeated forum/resident distinction.<sup>148</sup> Key paragraphs of analysis end with fact-bound assertions that particular contacts were not “meaningful,” “jurisdictionally relevant,” or a “proper basis for jurisdiction.”<sup>149</sup> These opaque statements resolved the case but provide little guidance to courts confronting effects jurisdiction in future cases with distinct facts. The issues that I identify in Part III may therefore provide a foundation for distinguishing *Walden* and minimizing its footprint.

### III. MAKING SENSE OF THE EFFECTS TEST FOR FUTURE CASES

*Walden*’s unanimity and dismissive rhetoric create an illusion of clarity. This Part dispels that illusion. Section A shows that *Walden* relies on an unsustainable distinction between a forum and its residents. To remedy this problem, Section A proposes a practical approach to reading and applying *Walden* that is consistent with the holding and provides a more sensible context for its reasoning. Section B then explores several questions that *Walden* and *Calder* leave open and suggests factors that can guide the effects inquiry in future cases.

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145. Compare *Nicastro*, 131 S. Ct. at 2785-91 (plurality opinion), with *id.* at 2794-804 (Ginsburg, J., dissenting).

146. See *id.* at 2791-94 (Breyer, J., concurring in the judgment).

147. *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014).

148. Cf. Donald R. Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals*, 26 AM. J. POL. SCI. 225, 226 (1982) (“[S]everal studies have provided compelling evidence that conflict over the outcome of the cases is sometimes hidden under the veneer of officially unanimous opinions.”); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995) (“Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it.”) (footnote omitted).

149. *Walden*, 134 S. Ct. at 1124-25.

*A. Reframing the Aiming Inquiry by Refining the Forum/Resident Distinction*

*Walden*'s holding is built on a single thin premise: a defendant's contacts "with the forum State itself" are distinct from its contacts "with persons who reside there."<sup>150</sup> Courts have already struggled to implement this distinction with dubious results.<sup>151</sup>

Distinguishing contacts with the forum from contacts with its residents is misguided for two reasons. First, the forum/resident distinction resuscitates the stilted formality that the Court previously tried to expel from personal jurisdiction jurisprudence. Second, the forum/resident distinction ignores the reality of how most intentional torts occur and obscures the need for a more subtle account of how state power and individual rights intersect when an outsider causes harm in the forum. The distinction is therefore misleading unless it is reframed to focus on more meaningful contacts, such as the nexus between the outsider's conduct and the state's laws. Section 1 identifies the distinction's imprecision and formality, Section 2 discusses how the distinction distracts from more relevant inquiries, and Section 3 considers how to reframe the distinction in a way that might provide more appropriate guidance.

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150. *Id.* at 1122; *see also supra* Part II.B.2.

151. *See, e.g.,* *Picot v. Weston*, 780 F.3d 1206, 1215 (9th Cir. 2015) (holding that the defendant's alleged intentional interference with a thirty-five million dollar contract executed in the forum by the local plaintiff who the defendant threatened "to destroy" was insufficient to warrant jurisdiction because the plaintiff's injury was "not tethered to California" and was "entirely personal to him and would follow him wherever he might choose to live or travel"); *Free Conferencing Corp. v. T-Mobile US, Inc.*, No. 2:14-cv-07113-ODW(SHX), 2014 WL 7404600, at \*11 (C.D. Cal. Dec. 30, 2014) (holding that "harm to non-parties" in the forum "is utterly irrelevant" to jurisdiction, even though the defendant's conduct directed at the local plaintiff had the anticipated effect of preventing local consumers from using the plaintiff's service); *Parlant Tech. v. Bd. of Educ.*, No. 2:12-cv-417-BCW, 2014 WL 4851881, at \*6-7 (D. Utah Sept. 29, 2014) (rejecting personal jurisdiction because even if the defendant intentionally infringed the trademark of a company that it knew to be based in the forum, it did not target "the State" despite voluntarily starting a "pilot-project" with the plaintiff that involved the trademark); *Bank of Am. v. Corporex Cos.*, No. 3:13-CV-691-RJC, 2014 WL 3731778, at \*1, \*4-5 (W.D.N.C. July 28, 2014) (holding that plaintiffs had no contact with "the state" despite fraudulently hiding assets from the local plaintiff to whom they allegedly owed thirty million dollars).

1. *The Forum/Resident Distinction Is Imprecise and Needlessly Formal*

The basic error in *Walden* is that the Court did not consider what a “State” is and thus had no sense of how “contacts” with “the forum State” occur. States are both physical and legal entities. They are places with territory and borders, as well as governments with institutions, officers, and laws.<sup>152</sup> As such, *Walden*’s requirement of “contacts” with a “State” could have two very different meanings: contact with the state’s territory or contact with a manifestation of the state government. Neither meaning is sensible and both rely on discredited formal approaches to jurisdiction.

a. *The Court Did Not Require Contacts with State Territory*

*Walden*’s holding could not have rested on a need for contacts with the forum state’s territory. Loose language in the opinion suggests the need for physical contact because the Court stressed that the libel in *Calder* occurred “in” California, where the article was published.<sup>153</sup> In contrast, the Court implied that because *Walden* was not a libel action, there was no similar territorial nexus between the defendant’s conduct and the forum.<sup>154</sup>

Conditioning personal jurisdiction on where a tort occurs is pointless because injury is an element of *every* intentional tort.<sup>155</sup> Effects cases by definition link personal jurisdiction to a local injury.<sup>156</sup> So in every effects case, including *Walden*, some portion of the alleged tort occurs within the forum’s territory, and thus there is a physical

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152. For a discussion of how government entities have a physical and legal dimension, see Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1171-72 (2011).

153. *Walden*, 134 S. Ct. at 1123.

154. *See id.* at 1123-24; *supra* Part II.B.3.

155. *See* *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994) (“[I]njury is an essential element of every tort.”).

156. *See supra* Part I. If the defendant caused an injury in the forum distinct from the injury underlying the plaintiff’s tort suit, specific jurisdiction in an effects case would not be available absent extremely unusual circumstances. *See* *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (holding that “specific jurisdiction” requires that “the suit ‘aris[es] out of or relate[s] to the defendant’s contacts with the forum’” (quoting *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (alterations in original))).

contact with the forum.<sup>157</sup> That contact might be insufficient for jurisdiction when viewed in the context of other factors, but it is still contact. Yet *Walden* held that the defendant had “no jurisdictionally relevant contacts with Nevada.”<sup>158</sup> The Court therefore could not have been defining “contacts” in the sense of the defendant’s action causing something to happen within the forum’s territory.<sup>159</sup>

Another possibility is that *Walden* was envisioning territorial contacts, but the contacts needed to be more direct than simply causing an effect within the forum. On this view, Officer Walden might have had contacts with Nevada if he had “sent” something there,<sup>160</sup> although he would not have needed to enter the forum himself.<sup>161</sup>

A need for direct interaction with territory could not have been the rationale for the Court’s “contacts” theory for three reasons. First, one of the defendants in *Calder* (the editor) never sent anything to California and was still subject to its jurisdiction.<sup>162</sup> *Walden* did not purport to overrule *Calder* and therefore could not have held that sending something into the forum’s territory is a prerequisite for jurisdiction. Second, *Walden* noted that “physical entry into the State,” including by “mail,” is merely “a relevant contact,” implying that it is not always required.<sup>163</sup> Third, there is no plausible argument that the unanimous Court in *Walden* would have altered its holding if the officer had sent a single one-line email to Nevada asking the plaintiffs for information. Yet the email would have been a “contact with the forum.”<sup>164</sup> Accordingly, the Court’s repeated reliance on Walden’s lack of sufficient contacts with Nevada must

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157. In *Walden*, the local injuries were a temporary deprivation of funds, payment of attorney’s fees, and emotional distress. See *supra* note 103. A more difficult problem would arise if a plaintiff injured entirely outside the forum seeks to base jurisdiction on injuries to third parties within the forum, such that there would be local effects but not necessarily a local tort.

158. *Walden*, 134 U.S. at 1124.

159. *Id.*

160. *Id.* (stressing that Walden “never ... sent anything or anyone to Nevada”); see also *id.* at 1122 (“[P]hysical entry into the State ... through an agent, goods, mail, or some other means—is certainly a relevant contact.”).

161. See *id.* (“[P]hysical presence in the forum is not a prerequisite to jurisdiction.”).

162. The editor made no calls to California and the Court did not deem him responsible for his employer’s decision to distribute the magazine in California. See *supra* notes 59, 63 and accompanying text.

163. See *Walden*, 134 U.S. at 1122.

164. *Id.* at 1125.

have focused on something other than the lack of direct interaction with Nevada's territory.

*b. The Court Might Have Required Contacts with States as Incorporeal Entities, but Such a Requirement Would Be Incoherent*

If *Walden* did not focus on contacts with the forum's territory, then it must have focused on contacts with the forum as a government entity. Yet legal entities have no corporeal existence aside from their territory, so there is nothing else to contact directly. States as entities exist through their institutions, agents, and laws. These manifestations of the state in turn define interests that the state seeks to protect, such as the well-being of its residents and markets.<sup>165</sup>

If *Walden* meant to require contact with a state as a legal entity, then the Court's distinction between contacts with a state and with its residents is incoherent. There was no way for *Walden* to have contacts with the entity "Nevada" other than by interacting with a manifestation of Nevada's existence, such as an institution or resident.<sup>166</sup> *Walden* had such an interaction when he deprived Nevada residents of Nevada-based property. Deeming *Walden* to have no contacts "with Nevada" despite his contacts with local residents and property ignores Nevada's incorporeal attributes.<sup>167</sup> Having ignored these incorporeal facets of Nevada's existence, the Court failed to explain what contact "with the State" could mean.

*Walden*'s contacts with manifestations of Nevada do not necessarily mean that jurisdiction was appropriate. Residents of different states routinely interact without subjecting themselves to jurisdiction in each other's domiciles. The difference between interactions

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165. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (upholding personal jurisdiction and noting that the forum had "a significant interest in redressing injuries that actually occur within the State"); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (upholding personal jurisdiction and noting that the forum had "a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims").

166. *Walden* might also have developed contacts with Nevada's laws. I discuss this possibility in Part III.A.3.

167. Of course, Nevada also has territory, but the prior Section explained why the Court could not have relied on the defendant's lack of contact with Nevada's territory.

that create jurisdiction and interactions that do not hinges on the nature and consequences of the activity. Courts should not evade this complex inquiry by searching for ethereal contacts with the state “itself.”<sup>168</sup>

*c. Whether the Forum/Resident Distinction Requires Contact with Territory or an Entity, It Needlessly Revives Archaic Formal Approaches to Jurisdiction that the Court Repudiated in International Shoe*

Interpreting *Walden* to require direct contacts between the defendant and the forum “itself” would revive archaic theories that the Court rejected seventy years ago. The modern history of personal jurisdiction doctrine, in a nutshell, has three phases. First, the Court in *Pennoyer v. Neff* held that a state could exercise jurisdiction only over defendants who were present “within its territory” at the time of service.<sup>169</sup> Second, courts relaxed the “presence” requirement by allowing jurisdiction based on “fictions” such as “constructive presence” in the forum at the time of wrongdoing.<sup>170</sup> The idea was that even an incorporeal defendant, such as a corporation, could be present based on activities it caused to occur within the forum. As Judge Learned Hand explained, “[w]hen we say ... that a corporation may be sued only where it is ‘present,’ we understand that the word is used, not literally, but as shorthand for something else.”<sup>171</sup> Third, the Court in *International Shoe Co. v. Washington*<sup>172</sup> “abandoned” the “presence” test in favor of focusing on the defendant’s “contacts” with the forum.<sup>173</sup> Jurisdiction became

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168. *Cf. Rush v. Savchuk*, 444 U.S. 320, 328 (1980) (declining to base personal jurisdiction on an “ingenious ... legal fiction”).

169. 95 U.S. 714, 722 (1878). *Pennoyer* included an exception for suits regarding “civil status” under state law. *Id.* at 734-35 (discussing marriage and divorce). Presence in the state is no longer necessary for jurisdiction, but may still be sufficient. *See Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion). For a discussion of how doctrine evolved before *Pennoyer*, see Weinstein, *supra* note 17, at 175-204.

170. Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2192 (1997).

171. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930).

172. 326 U.S. 310 (1945).

173. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957) (describing *International Shoe*) (citation omitted).

appropriate when the defendant had “sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.”<sup>174</sup>

*International Shoe*’s analysis was transformative.<sup>175</sup> Yet courts confronting unsettling new problems often overlook *Shoe*’s insights.<sup>176</sup> *International Shoe* considered a state’s effort to tax an out-of-state corporation’s local employees. The corporation disputed jurisdiction because it had carefully structured its operations to minimize its local presence: employees solicited orders in the state, but contracts were accepted and fulfilled outside the state.<sup>177</sup> These facts presented an opportunity for the Court to refine the presence inquiry.<sup>178</sup> Instead, the Court realized that the presence inquiry was misguided because deeming an incorporeal defendant “present” “beg[s] the question to be decided,”—whether its “activities” were “sufficient to satisfy the demands of due process.”<sup>179</sup>

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174. *Int’l Shoe*, 326 U.S. at 320. The Court’s reformulation loosely mirrors the Restatement of Judgments released three years earlier, which stated: “The fundamental requirement as to the jurisdiction of a State over a person is that there should be such a relation between the State and the person that it is reasonable for the State to exercise control over him through its courts.” RESTATEMENT (FIRST) OF JUDGMENTS § 14 cmt. a (AM. LAW INST. 1942).

175. One commentator analogized *International Shoe* to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), observing that both “served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow.” Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 586 (1958).

176. Fictions are difficult to resist, especially when courts confront new technologies that do not fit easily into existing doctrinal categories. Suits arising from Internet activity have been fertile sources of formalism and fictions in jurisdictional analysis. See Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1535-38 (2006) (discussing how “constructive presence” animates jurisdictional analysis in many Internet cases); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 431 (2004) (criticizing “jurisdictional fiction” in cases involving Internet activity). For another example of fictions seeping into modern personal jurisdiction, see *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 n.5 (2011) (Ginsburg, J., dissenting) (criticizing the plurality for reviving the “long discredited fiction of implied consent”).

177. See *Int’l Shoe*, 326 U.S. at 314.

178. See *id.* at 315 (noting that the defendant’s appellate argument relied on its lack of “presence” in the forum).

179. *Id.* at 316-17.



In essence, *International Shoe* held that the “presence” label masquerades as a factual conclusion about the defendant’s conduct but is really a policy conclusion about the state’s power. Chief Justice Stone’s analysis reflects his extensive exposure to and partial embrace of legal realism.<sup>180</sup> Power was the central issue, so the presence inquiry was a distraction. The answer to the question “was the defendant present in the state” had no significance independent from the legal context in which the question was asked. Once the legal context was clear, broader context-specific values eclipsed the notion of presence.

Chief Justice Stone had made the same point in an earlier case about due process constraints on a state’s taxing power. In *Curry v. McCannless*, the Court held that the potential “presence” of intangible property within a state could not determine whether the state could tax it.<sup>181</sup> *Curry* and *International Shoe* address two sides of the same coin: a state’s authority to impose a tax and its authority to provide a forum for enforcing a tax.<sup>182</sup>

A fascinating aspect of *International Shoe* is that it replicates *Curry*’s analysis without ever citing *Curry*. Neither courts nor commentators have analyzed similarities between the two cases.<sup>183</sup>

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180. See George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 354-58 (documenting Stone’s contacts with prominent legal realists dating back to his time as Dean of Columbia Law School); *id.* at 358 (characterizing *International Shoe* as a “synthesis” of past precedent and “selective sympathy” with legal realism); Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to International Shoe*, 10 GEO. MASON L. REV. 59, 82-86 (2001) (discussing how *Shoe*’s analysis parallels contemporary criticism of formal reasoning, especially in the “sociological jurisprudence” literature).

181. 307 U.S. 357, 366 (1939).

182. Just as *International Shoe* borrowed from a case about extraterritorial taxation, a case about extraterritorial taxation subsequently borrowed from *International Shoe*. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992) (incorporating *International Shoe*’s “minimum contacts” test). The Court still struggles to distinguish due process constraints on a state’s taxing authority from limits imposed by other provisions of the Constitution. See *Comptroller v. Wynne*, 135 S. Ct. 1787, 1799 (2015) (holding in a 5-4 decision that “the fact that a State has the jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause”).

183. Both cases involved efforts by states to collect taxes and are occasionally cited in tax scholarship but without a comparative analysis. See, e.g., Michael T. Fatale, *State Tax Jurisdiction and the Mythical “Physical Presence” Constitutional Standard*, 54 TAX LAW. 105, 107 n.11, 114 (2000).

Consider the following table comparing quotations from the two decisions:<sup>184</sup>

Table 2

<i>International Shoe</i>	<i>Curry</i>
Defendant's argument hinged on whether "its activities within the state were ... sufficient to manifest its 'presence' there."	Defendant's argument hinged on "the situs or location to be attributed to the intangibles."
"Since the corporate personality is a fiction ... its 'presence' without ... the state of its origin can be manifested only by activities carried on in its behalf."	Noted "the impossibility of attributing a single location to that which has no physical characteristics."
"[S]ome of the decisions ... have been supported by resort to the legal fiction that [the defendant] has given its consent to service and suit .... But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction."	"While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality."
Rejecting need to "symbolize" the defendant's activity with "terms" like "present" or "presence."	Rejecting need for a "fictitious situs."
State power depends on whether the defendant "exercises the privilege of conducting activities within a state, [such that] it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations."	State power depends on whether the defendant "extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws ... in such a way as to bring his person or property within the [state's] reach."
"[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical."	"We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons."

The close connection between *Curry* and *International Shoe* highlights how personal jurisdiction doctrine should not be perceived as an idiosyncratic field at the margins of constitutional law. *International Shoe* did not attempt to create a unique doctrine to address

184. *Int'l Shoe*, 326 U.S. at 315-19; *Curry*, 307 U.S. at 356-74.

the seemingly technical problem of adjudicative jurisdiction. Instead, the opinion cloaked personal jurisdiction in broader principles of constitutional law and legal reasoning. The Court recognized that adjudicative jurisdiction to enforce taxes, like prescriptive jurisdiction to impose taxes, is one of many interrelated problems that arise from the allocation of power between fifty coequal states. Analyzing these connections can lead to a more nuanced understanding of how personal jurisdiction doctrine should operate.<sup>185</sup>

*Curry* also illustrates that Chief Justice Stone's critique of substituting categorical fictions for nuanced analysis was not merely a reaction to *Pennoyer*. Instead, *International Shoe's* departure from the constructive presence test reflected a deep suspicion of analytical shortcuts, including the shortcut that animates *Walden*.<sup>186</sup>

Reading *Walden* to focus on direct contacts with the forum "itself" would revive the discredited constructive presence test. Instead of asking whether the defendant acted in a way that justified the assertion of state power, the Court would be looking for a shortcut—such as something sent to the forum, an idiosyncratic quirk of the governing tort law, or a basis for treating an ethereal "state" as a concrete entity.<sup>187</sup> *International Shoe* rejected such "mechanical" inquiries in favor of a more nuanced assessment of the "quality and nature of the [defendant's] activity."<sup>188</sup> *Walden* purported to rely on

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185. See *infra* Part III.A.3 (discussing potential connections between limits on adjudicative and prescriptive jurisdiction); see also Clyde Spillinger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1246 (2015) (noting the "common jurisprudential position" underlying Chief Justice Stone's decisions addressing personal jurisdiction and choice of law).

186. Justice Stone's opinion in *Curry* echoed an earlier opinion in which he observed that:

The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax.

*First Bank Stock Corp. v. Minnesota*, 301 U.S. 234, 240-41 (1937) (citation omitted). These three cases (*International Shoe*, *Curry*, and *First Bank*) are consistent with Stone's broader tendency to "push[] aside question-begging reifications." Herbert Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 784 (1946).

187. See *supra* Part II.B.3 (discussing *Walden's* attempt to distinguish *Calder*).

188. *Int'l Shoe*, 326 U.S. at 319.

“[w]ell-established principles of personal jurisdiction,” which counsels against reading *Walden* to resuscitate fictions that *International Shoe* interred.<sup>189</sup>

A judicial opinion that invokes the categorical forum/resident distinction twenty-seven times—as does *Walden*<sup>190</sup>—protests too much. The distinction was apparently a convenient way of resolving the case without revisiting *Nicastro*’s theoretical schism.<sup>191</sup> That shortcut did no damage in *Walden* because the case was relatively easy: Walden was a local police officer acting locally who had at most a tenuous connection to Nevada (especially when compared to the defendants’ contacts in *Calder*).<sup>192</sup> But courts confronting harder cases will need to look past stifling formal distinctions to the functional analysis in *International Shoe*.<sup>193</sup>

*2. Two Hypothetical Examples Illustrate How the  
Forum/Resident Distinction’s Emphasis on Motives  
Obscures the Importance of State Regulatory Interests in  
Justifying the Exercise of State Power*

The formality of the forum/resident distinction leads courts to focus on irrelevant questions at the expense of salient inquiries. For

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189. *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014).

190. See *supra* Part II.B.2.

191. See *supra* Part II.B.4. *Nicastro* itself relied on a *Pennoyer*-esque categorical approach to constitutional analysis that allowed the plurality to decouple the forum’s power from its interests. See Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove versus Nicastro*, 16 LEWIS & CLARK L. REV. 905, 916 (2012); Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 433-34 (2012); cf. Sawyer, *supra* note 180, at 65-66 (explaining how Justice Field employed contemporary tools of “formal jurisprudence” to construct the *Pennoyer* rule).

192. See *supra* Part II.B.3.

193. See *supra* Part III.A.1. My critique of formalism here is limited. I do not contend that the “very idea of decisionmaking by rule” is inappropriate. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (identifying common themes in critiques of formalism). Instead, I contend that *Walden* was preoccupied with the “specific linguistic formulation of a rule” despite that rule’s imprecision and disconnection from the values underlying the constitutional provision that the rule purports to enforce. *Id.* *Walden*’s formalism was flawed not because all formalism is necessarily flawed, but rather because it was poorly implemented and a poor fit for the problem the Court was trying to address. However, in fairness to the Court, *Walden* is not the first decision to struggle with translating *International Shoe*’s “open-ended” language into manageable rules. See, e.g., Rutherglen, *supra* note 180, at 358.

example, *Walden* and *Calder* both require assessing whether the defendant directed conduct toward the forum.<sup>194</sup> Yet geographic aiming is not a helpful concept in intentional tort cases.

Intentional torts generally target entities rather than places. For example, libelous articles target their subjects, letter bombs target their recipients, and computer viruses target the users of infected systems. Tortfeasors often know where their victims reside, but there is usually little reason to think that geographic knowledge motivates the tort. Injuries occur in a particular state not because the wrongdoer targeted the state but because victims have to be somewhere, and that is where they happened to be. Terrorism is an exception, as terrorists often have political goals that make the place of injury more important than the identity of specific victims.<sup>195</sup> Exceptions may also arise in commercial cases if actors seeking to profit from one market intentionally externalize the costs of their operations onto another.<sup>196</sup>

The potential difference in motives between terrorists and other tortfeasors highlights an oddity of *Walden*'s forum/resident distinction. Although the distinction implies that motives matter, there are good reasons to think that motives can be irrelevant. The following hypothetical scenario illustrates the problem.

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194. See *supra* Part II.

195. See, e.g., President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<http://perma.cc/YZ8Y-YP6Y>] (“[T]he terrorism we face is fueled by a common ideology—a belief by some extremists that ... violence against Western targets, including civilians, is justified in pursuit of a larger cause.”); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 3 (Oct. 23, 2001), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20011023.pdf> [<http://perma.cc/FTP3-GAE3>] (analogizing a recent “pattern of terrorist activity ... directed primarily against the United States Government, its military and diplomatic personnel and its citizens” to “war”).

196. For example, a defendant seeking to curry favor with the officials of a state in which it operates might structure its activities to shift pollution to a neighboring state in which it does no business, especially if it can operate near another state's border. These externalities might justify jurisdiction in the state that bears costs and is the target of the defendant's conduct. *But see* Klerman, *supra* note 20, at 272 (rejecting jurisdiction in this scenario due to the risk that the forum's courts would be biased against an outsider who does not confer any benefits on the forum). The added complexity associated with commercial activity explains why I exclude commercial distribution cases from my model of effects jurisdiction. See *supra* notes 40-42 and accompanying text.

Imagine two hypothetical suits in Nevada arising from successive attacks by two different hackers in Georgia. Both attacks targeted and crippled computer servers located at Acme Airlines' headquarters in Georgia. Each attack caused Acme to ground its flights nationwide, leading to chaos at its Las Vegas hub and a substantial loss of tourism revenue in Nevada. Each hacker fully anticipated these effects. After each attack, the hacker published a manifesto. The first hacker said: "I launched this attack to cripple Acme Airlines because I despise the Acme Corporation." The second hacker said: "I launched this attack to prevent people from travelling to Las Vegas, which is a hotbed of sin that I despise." According to *Walden*, jurisdiction would be appropriate in the second case because the hacker targeted "the forum State itself."<sup>197</sup> But a literal reading of *Walden* suggests that jurisdiction would not be proper in the first case. The first hacker targeted property in Georgia belonging to a Georgia-based entity that happened to be doing business in Nevada—the forum is merely where the victim "chose to be."<sup>198</sup>

There is no meaningful distinction between the two hypothetical hackers that would justify jurisdiction over only one. Both interacted with servers in Georgia, never set foot in Nevada, never sent anything to Nevada, and had no political affiliation with Nevada. But both knowingly committed a wrongful act, aimed that act at the defendant, knew that harm would occur where the defendant operated, and knew that the defendant operated in Nevada. Acme's interests in litigating in Nevada are the same in both cases, as are Nevada's interests in providing a forum based on events in the state.<sup>199</sup> The burden of litigating in Nevada would also be the same in both cases.

The Court has not articulated a plausible theory to justify making the hackers' distinct motives dispositive. One might contend that the hacker with an animus toward Las Vegas should "reasonably anticipate" jurisdiction in Nevada, while the hacker who merely

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197. *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

198. *Id.* at 1125.

199. In theory, Acme's and Nevada's interests might be slightly stronger in the case where Las Vegas was the hacker's target. The victim and forum may want to send a signal about their resolve to resist targeted attacks and local adjudication might be cathartic for victims. But the absence of such political signaling does not warrant precluding jurisdiction in the first hypothetical if the plaintiff and forum still have legitimate interests.

hated Acme should not.<sup>200</sup> But the anticipation test is circular. Jurisdiction is equally predictable in both cases. Deeming one prediction reasonable and the other unreasonable requires an independent theory of jurisdiction that the reasonable anticipation test does not supply.<sup>201</sup> Such a theory would need to explain why the forum state has different degrees of authority over two hackers who acted in the same way with the same knowledge and same consequences.

Distinguishing the hackers based on “implied consent” would also be unpersuasive. Implied consent suffers from the same flaws as constructive presence.<sup>202</sup> The existence of “consent” masquerades as a fact question but is really a policy question that requires an antecedent theory of what factors justify the assertion of state power. Once one develops that antecedent theory, the fiction of consent becomes superfluous.<sup>203</sup>

Unlike the hackers’ motives, changing other variables in the hypothetical scenario might raise relevant questions. For example, suppose that one defendant either did not know that Acme had a hub in Nevada, mistakenly believed it was attacking a different corporation, or damaged the servers accidentally while trying to repair them. Alternatively, imagine that in one case the disruption in Nevada was severe, while in another it was trivial. These sorts of variations might affect the jurisdictional inquiry depending on how one defines and weighs the relevant state and private interests. It is those interests that should shape the jurisdictional inquiry rather than the question of whether contacts were with the forum “itself.”

A hypothetical variant of *Walden* illustrates a similar point as the hacker hypothetical. Suppose that Walden falsified his affidavit because he wanted revenge against Nevada residents after his beloved Atlanta Braves baseball team lost to a team from Nevada.<sup>204</sup> That

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

201. *See id.* at 311 n.18 (Brennan, J., dissenting) (noting that the reasonable anticipation test is circular because the “defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is”); Spencer, *supra* note 17, at 646 (“[D]efendants will anticipate being ‘haled into court’ wherever the law says they are subject to suit; thus, defining the law of jurisdiction with reference to the expectations of defendants makes no sense.”).

202. *See supra* Part III.A.1.

203. *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304 (1989) (“[T]heories of tacit consent assume almost exactly what they set out to prove.”).

204. Nevada lacks a Major League Baseball team, but we can hypothesize the “Reno Rat

change in motive would be a thin reed on which to rest jurisdiction, yet would be potentially dispositive in *Walden*'s calculus because the contact with Nevada would cease to be the "fortuitous" result of "unilateral" actions by others.<sup>205</sup> Taken literally in the two hypothetical scenarios above, *Walden* would suggest that Nevada would have no power over a hacker whose intentional acts cause foreseeable bedlam in Nevada but would have power over a police officer causing relatively minor harm due to a petty sports rivalry. That would be a curious implementation of "due process." Jurisdiction should be available either in both scenarios because of the local effects of an intentional tort or in only the hacking scenario because of the relatively severe local effects. Yet *Walden*'s forum/resident distinction implies that geographically tinged motives have greater constitutional salience than the foreseeable consequences of intentional misconduct.

In sum, searching the record for contacts "with the forum" rather than "with residents" is a pointless and distracting exercise. The forum/resident distinction is imprecise, inappropriately formal, lacks a normative foundation, and obscures salient indicia of state authority. Analyzing personal jurisdiction is hard enough without an unnecessary layer of specious distinctions. Part III.B therefore considers alternative distinctions that should matter in the jurisdictional calculus.

### *3. Salvaging the Forum/Resident Distinction: Linking Jurisdiction and Limits on the Extraterritorial Application of State Law*

Lower courts can implement the unhelpful forum/resident distinction in two ways. One option would be for courts to treat *Walden* as merely a minor gloss on *International Shoe*. Given the maneuvering room in *Walden*,<sup>206</sup> courts can rely on *International Shoe*'s functional integration of state interests and individual liberty

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Pack."

205. *Walden v. Fiore*, 134 S. Ct. 1115, 1123, 1125-26 (2014).

206. *See supra* Part II.B.4.



to avoid the pitfalls of treating the forum/resident distinction literally and acontextually.<sup>207</sup> I explore this possibility in Part III.B.

Another approach would also be consistent with *Walden's* holding: courts adjudicating effects cases could blend inquiries into prescriptive jurisdiction (a state's power to apply its law) and adjudicative jurisdiction (a state's power to provide a forum).<sup>208</sup> The argument for this approach proceeds in four steps.

First, adjudicative and prescriptive jurisdiction are closely related historically and conceptually. Early personal jurisdiction doctrine arose from choice of law theories, was fodder for choice of law scholars, and was taught in choice of law courses.<sup>209</sup> That linkage makes sense. At a high level of abstraction, constitutional limits on adjudicative and prescriptive jurisdiction serve the same purpose: limiting the geographic reach of state power in a federal system while recognizing that state borders are an imperfect proxy for the legitimate reach of state institutions.<sup>210</sup> Chief Justice Stone illustrated the conceptual nexus with his overlapping analysis of prescriptive jurisdiction to impose taxes in *Curry* and adjudicative jurisdiction to enforce taxes in *International Shoe*.<sup>211</sup>

Second, constitutional limits on prescriptive and adjudicative jurisdiction arguably should be similar (if not identical) in effects

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207. See *supra* Part III.A.1.

208. For the finer points of the distinction, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987).

209. See Rutherglen, *supra* note 180, at 350-53. More recently, personal jurisdiction has been compartmentalized as a civil procedure topic, which may have subtly shaped how rules evolved. See Erbsen, *Impersonal Jurisdiction*, *supra* note 17, at 72-74 (discussing how the "exile of personal jurisdiction doctrine from the canonical understanding of constitutional law ... influences how judges and lawyers understand and shape" doctrine).

210. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 582-83 (2008). The Supreme Court has at various times recognized similarities and differences between constitutional limits on prescriptive and adjudicative jurisdiction. See *Shaffer v. Heitner*, 433 U.S. 186, 224-25 (1977) (Brennan, J., concurring in part and dissenting in part) ("I recognize that the jurisdictional and choice-of-law inquiries are not identical.... But I would not compartmentalize thinking in this area quite so rigidly as it seems to me the Court does today, for both inquiries 'are often closely related and to a substantial degree depend upon similar considerations.'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting))); *infra* note 240.

211. See *supra* Part III.A.1.c. Justice Black similarly blended analysis of prescriptive and adjudicative jurisdiction precedents in a subsequent case that cited *International Shoe*. See *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 647-48 (1950) (considering how the Due Process Clause applies "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state").

cases when defendants are outsiders. *International Shoe* explains that outsiders may subject themselves to state power when their “activity” undermines “the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”<sup>212</sup> That statement emphasizes two competing interests: the defendant’s interest in being immunized from jurisdiction that is unwarranted by the scope of its activity<sup>213</sup> and the state’s interest in acquiring jurisdiction based on activity relevant to its “laws.”<sup>214</sup> A sensible way to address these interests in effects cases would be to ask: would the Constitution permit the state to apply its law based on the local effects of the defendant’s intentionally tortious conduct?

If the state could apply its law to the defendant,<sup>215</sup> even if the state chooses not to,<sup>216</sup> the only additional issue would be whether the burden of compelling the defendant’s appearance would be

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212. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

213. See Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 708 (1983) (contending that the “fair and orderly” language focuses on the defendant’s interests rather than the state’s interests).

214. See Stein, *supra* note 17, at 698 n.48 (“Read in conjunction with the Court’s authorization of specific jurisdiction based on a limited or single contact ... the importance of the state’s regulatory concerns becomes apparent.”); Wechsler, *supra* note 186, at 784 (characterizing Chief Justice Stone’s jurisdiction decisions as “insistent that the issue was solely the question of power; that where local interest provided a basis for action, the prevention of inequity in the impact of legislation was not, as such, the business of the Court”). Chief Justice Stone’s reference to state interests in *International Shoe* was part of a larger project to reduce constitutional constraints on state authority. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 489 (1997).

215. An interesting problem would arise if state law would apply to only a subset of the claims against the defendant. Adjudication of all claims in the forum would be appropriate only under the doctrine of pendent personal jurisdiction, which the Supreme Court has never expressly endorsed. The basic idea is that if a long arm statute authorizes jurisdiction over one claim, it may implicitly authorize jurisdiction over all related claims. The same reasoning could apply if state interests rooted in prescriptive jurisdiction justify adjudicative jurisdiction over only some of the plaintiff’s claims. For a discussion of pendent personal jurisdiction, see Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 243-52 (2014); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619 (2001).

216. Whether the state *would* apply its law is a separate question. For example, a state might adopt a long-arm statute that asserts the maximum constitutional reach in order to protect local plaintiffs, while also adopting a deferential choice of law regime in order to promote interstate comity. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a), (c) (AM. LAW INST. 1971) (suggesting that the forum state should consider the interests of other states).

excessive.<sup>217</sup> Concerns about burdens could be addressed through a separate constitutional inquiry into the fairness of venue.<sup>218</sup> Personal jurisdiction would therefore be proper whenever the state could apply its law.

In contrast, when the local effects of conduct outside the forum do not create a constitutionally sufficient state interest in applying state law, then the state arguably should not be able to compel an outsider to appear.<sup>219</sup> A state might try to justify adjudicative jurisdiction even if foreign law must apply by asserting an interest in providing a convenient local forum for its residents. However, the seemingly benevolent act of providing a forum for the plaintiff is an exercise of coercive power over the defendant backed by the threat of an enforceable judgment if the defendant fails to appear. That power must be consistent with the Constitution. Assuming that the

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217. I assume that if state law applied, it would do so because of a state interest, rather than by default due to the absence of conflicting laws from other jurisdictions. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) (“There can be no injury in applying [the forum’s] law if it is not in conflict with that of any other jurisdiction connected to this suit.”). When state law applies by default, a separate analysis of adjudicative jurisdiction would be necessary.

218. See *supra* note 22 and accompanying text.

219. Robert Lefflar cautioned against assuming that the similar functions of doctrine limiting prescriptive and adjudicative jurisdiction necessitate identical implementation in all instances:

A conclusion that the requirements of fair play and substantial justice are satisfied for one of these jurisdictional purposes affords some basis for argument that they are satisfied for the others also; there is enough similarity among all of them that a decision as to one of them ought not to be ignored in passing on another. But the very nature of the requirements implies uniqueness. Fairness and justice of course are relative things, not absolutes. What is fairest and most just for one purpose may be less fair, less just, for another.

Robert A. Lefflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282, 292 (1960). I am skeptical about whether a sensible constitutional standard for prescriptive and adjudicative jurisdiction in effects cases would ever allow one and not the other, but further analysis would be necessary to confirm that hypothesis. For additional discussion of how the Constitution might impose similar limits on prescriptive and adjudicative jurisdiction, see Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Korn, *supra* note 170; Earl M. Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751 (1988); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569 (1991); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163 (2013); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67 (1988).

Constitution provides relatively mild limits on choice of law,<sup>220</sup> it is difficult to imagine facts that would justify interpreting the Constitution to mean that: (1) the local effects of intentional misconduct are insufficient to justify the extension of state law to extraterritorial behavior; but (2) are sufficient to justify summoning an outsider to appear in the forum and compelling other states to give “Full Faith and Credit” to the ensuing judgment.<sup>221</sup> If the Constitution were reinterpreted to sharply limit prescriptive jurisdiction, then states might have a stronger argument for providing a forum even when they could not apply their law.

Third, the Court in *Walden* might have harbored unstated concerns about whether the Constitution would have allowed Nevada to apply its law to a tortious deprivation of property in Georgia.<sup>222</sup> Current constitutional doctrine imposes minimal limits on prescriptive jurisdiction, such that applying Nevada’s tort law would not have been beyond the pale.<sup>223</sup> But even the modern lenient standard has boundaries. The Court has held that “if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.”<sup>224</sup> *Walden* concluded that the defendant had no “meaningful” contact with Nevada and that his conduct did not have “anything to do with Nevada.”<sup>225</sup> One must wonder how in those circumstances Nevada law could displace Georgia law.<sup>226</sup>

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220. See *infra* note 223 and accompanying text.

221. U.S. CONST. art. IV, § 1. I assume that local effects would be the sole basis for personal jurisdiction. If jurisdiction were instead based on the defendant’s insider status, presence, or consent, then adjudicative jurisdiction may exist even when prescriptive jurisdiction is not available. See *supra* notes 8, 43.

222. An extra complication in *Walden* is that the suit arose under federal law. There was no reason to think that Nevada would want to apply its own law or would even have any law to apply. However, in federal question cases Congress has decided that federal courts should essentially pretend that they are state courts for the purpose of analyzing personal jurisdiction. See FED. R. CIV. P. 4(k)(1)(A). That fiction could include assuming that the state was the source of the governing law or that the state was attempting to apply a local analogue to federal law.

223. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305, 313-19 (1981) (plurality opinion) (upholding application of Minnesota law to govern an insurance policy issued in Wisconsin to a Wisconsin resident who died after an accident in Wisconsin involving other Wisconsin residents).

224. *Id.* at 310-11.

225. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

226. The plurality’s holding in *Hague* might permit application of Nevada law because the

If Nevada could apply its law even after *Walden*, the Constitution would have a strange meaning. The local suffering of a local resident would give Nevada a constitutionally sufficient reason to apply its law to conduct that occurred entirely in Georgia, but the fact that the conduct occurred in Georgia would prevent Nevada from providing a judicial remedy. Worse, the Constitution would be more suspicious of Nevada helping a local citizen obtain convenient access to justice than of Nevada regulating conduct in Georgia. Those priorities seem backward.<sup>227</sup> One might try to justify this counterintuitive support for local law without a local remedy by stressing the defendant's interests in avoiding a burdensome forum. But Nevada was not a burdensome forum,<sup>228</sup> and in any event burdens can be addressed in a separate inquiry focused on venue rather than jurisdiction.<sup>229</sup>

*Walden's* rejection of adjudicative jurisdiction in Nevada might therefore suggest that Nevada would also have lacked prescriptive jurisdiction. Even if current choice of law precedent might justify applying Nevada's law,<sup>230</sup> that precedent is based on a thirty-four year old plurality decision that the Court has not cited in the past twelve years.<sup>231</sup> *Walden's* dismissive treatment of Nevada's contacts with the dispute casts doubt on whether the current Court would view state interests in the choice of law context as generously as past precedent.

Finally, in future cases where the local effects of the defendant's conduct outside the forum justifies application of the forum's law,

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plaintiffs resided in Nevada and used Nevada's government services. *See Hague*, 449 U.S. at 313-20 (plurality opinion). It is not clear that the Court would still endorse *Hague's* emphasis on the plaintiff's contacts with the forum. *See infra* note 231.

227. *See* Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.").

228. *See supra* note 108 and accompanying text. Officer Walden might have been concerned that a Nevada court would be biased in favor of local gamblers and against an out-of-state defendant. However, citing bias as a basis for rejecting jurisdiction over outsider defendants begs the question of why outsider plaintiffs must then risk bias by suing in the defendant's home state.

229. *See supra* note 22 and accompanying text.

230. *See supra* note 226.

231. The Court last cited *Hague* in a case that noted the "weakness" of a state's interest in applying its law. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 426 (2003).

one might say that the defendant has “contact with the forum State.”<sup>232</sup> Law is a manifestation of the state, and thus entanglement with state law might be what the Court meant in *Walden* when it distinguished contact with state residents from contact with the state itself. The existence of prescriptive jurisdiction would then signal that adjudicative jurisdiction is also appropriate (again, leaving room for consideration of whether the venue would be burdensome).

Reading *Walden* to focus on contacts with state law is consistent with *Nicastro*. The *Nicastro* plurality stated that in an “intentional tort” case, “the defendant might well fall within the State’s authority by reason of his attempt to obstruct its laws.”<sup>233</sup> Justice Ginsburg’s dissent likewise stressed the relevance of state interests and “choice-of-law considerations” to assessing personal jurisdiction.<sup>234</sup> However, the plurality avoided the question of how far prescriptive and adjudicative jurisdiction blur, noting that “[a] sovereign’s legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.”<sup>235</sup> Accordingly, *Nicastro* does not require reading *Walden*’s focus on “contacts with the forum State” as referencing the applicability of state law. Nevertheless, reading *Walden*’s reference to “the State” to mean “the State’s laws” may reflect the Justices’ underlying concerns. That reading is especially sensible if one assumes that the Court did not intend to revive the type of formal analysis that *International Shoe* rejected.<sup>236</sup>

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232. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

233. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion). Allan Stein has defended a similar argument in the context of jurisdiction over Internet activities, contending that “the appropriate jurisdictional inquiry is not whether a defendant has surrendered his or her liberty, but whether the state’s assertion of judicial authority sufficiently advances its regulatory interests to justify the attendant burden that such a proceeding would impose upon conduct outside of its territory.” Stein, *supra* note 176, at 413.

234. *Nicastro*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

235. *Id.* at 2790 (plurality opinion). An earlier decision had noted, without analysis, that a defendant’s lack of contacts with the forum would preclude jurisdiction “even if the forum State has a strong interest in applying its law to the controversy.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). The meaning of this statement is ambiguous. If the defendant truly had no contacts with the forum, then it is difficult to imagine why the forum’s interest in applying its law would be strong unless the court meant “interest” in the sense of “desire” rather than “entitlement.”

236. *See supra* Part III.A.1.

Whether linking the constitutional tests for prescriptive and adjudicative jurisdiction in effects cases would be wise in all circumstances depends on normative questions beyond the scope of this Article.<sup>237</sup> The link also assumes that the Court will preserve the current lenient constitutional limits on choice of law. If the Court were to substantially cabin states' prescriptive jurisdiction, then expanding their adjudicative jurisdiction might become more attractive.

Courts would also need to analyze precisely what the *Nicastro* plurality meant when it referred to actions that “obstruct [state] laws.” That novel phrase does not appear to have a foundation in precedent.<sup>238</sup> A natural reading, which this Section assumes, is that the plurality was referring to conduct within the state's prescriptive jurisdiction.<sup>239</sup> But an alternative possibility is that the plurality used state “law” in a more colloquial sense of state “interests.” This emphasis on interests rather than choice of law would be consistent with dicta in prior decisions that treated prescriptive and adjudicative jurisdiction as distinct issues (despite their conceptual overlap).<sup>240</sup> If *Nicastro* suggests that adjudicative jurisdiction in effects

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237. For a discussion of whether and how constitutional limits on prescriptive and adjudicative jurisdiction should overlap, see sources cited *supra* note 219.

238. Some nineteenth-century decisions invoked the concept of obstructed law in ways that Justice Kennedy presumably did not intend. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126 (1866) (“If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed.”); *Smith v. Turner*, 48 U.S. (7 How.) 283, 440 (1849) (“Our first step towards establishing an independent government was by the Declaration of Independence. By that act it was declared that the British king had endeavored to prevent the population of the colonies by obstructing the laws for the naturalization of foreigners.”); cf. Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 *LOY. L.A. L. REV.* 341, 359 n.82 (2012) (characterizing *Nicastro's* obstruction language as “ambiguous and extraneous”).

239. Cf. *SEC v. Straub*, 921 F. Supp. 2d 244, 255 (S.D.N.Y. 2013) (citing *Nicastro* and exercising personal jurisdiction because “the Defendants here allegedly engaged in conduct that was designed to violate United States securities regulations and was thus necessarily directed toward the United States”).

240. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (“The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry.”); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (“The issue is personal jurisdiction, not choice of law.”); cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481-82 (1985) (noting that although “choice-of-law analysis—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts

cases hinges on obstruction of state interests rather than the state's prescriptive jurisdiction, then *Walden's* forum/resident may require greater attention to state interests for the reasons discussed below in Part III.B.

For present purposes, it suffices to note that: (1) lower courts are stuck with *Walden's* command to identify contacts with the forum state rather than contacts with its residents; (2) that imprecise distinction has two equally unhelpful variations and if taken literally would revive *Pennoyer*-era formalism; but (3) the requirement of contacts with "the State" is salvageable in effects cases if courts consider the defendant's interaction with and obstruction of state law; and (4) reading *Walden* in this way would resonate with concerns expressed by seven Justices in *Nicastro*. Alternatively, the forum/resident distinction may require considering whether the defendant's conduct implicates the forum's interests, which is the subject of the next Section.

*B. Overlooked Factors that Should Guide the Effects Test: The Importance of State Regulatory Interests When Out-of-State Conduct Causes Local Effects*

The prior Section suggests that *Walden* adds little to *Calder*. Although *Walden* seemed to introduce a new emphasis on "contacts with the forum," that test turns out to be imprecise and incoherent (unless linked to prescriptive jurisdiction). A more challenging fact pattern than what the Court confronted in *Walden* would expose the opinion's hollowness and require additional analysis. Yet *Calder* also was unclear, so where does that leave lower courts?

This Section explores how courts should consider three critical factors in effects cases: the forum state's interests, the extent to which intentional misconduct that is not geographically targeted

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jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum," a contractual choice-of-law clause was a factor supporting personal jurisdiction). *But cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305, 317 n.23 (1981) (plurality opinion) (noting that adjudicative jurisdiction is "a factor not without significance in assessing the constitutionality of [the forum state's] choice of its own substantive law"); *Williams v. North Carolina*, 317 U.S. 287, 297-304 (1942) (pre-*International Shoe* decision blending analysis of Nevada's power to apply its marital relations law and its power to compel a nonresident spouse to appear in a divorce action).



can still warrant jurisdiction, and the relevance of reckless rather than willful targeting. Further scholarship can develop each argument in light of competing normative theories about why the Constitution limits adjudicative jurisdiction.<sup>241</sup>

*1. Nature and Extent of Local Injury: Reimagining Walden as a Case About Ebola*

The central feature of an effects case is the effect itself. Without the local effect, there would be little reason to think that jurisdiction exists. The case would involve an outsider acting outside the forum and causing injury outside the forum. The only possible nexus with the forum would be the plaintiff (if he resides or is domiciled there). But if the plaintiff's injuries have no local effects, it is difficult to see how the forum would have an interest in exercising jurisdiction that trumps the defendant's interests (as well as the interests of other potential fora).<sup>242</sup>

State regulatory interests are relevant under modern personal jurisdiction doctrine, as they should be.<sup>243</sup> State interests were also increasingly salient as the *Pennoyer* regime crumbled before *International Shoe* finally swept it aside.<sup>244</sup> Yet the role of state interests in the jurisdictional calculus is unclear. For example, the Supreme

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241. See *supra* notes 17-22 and accompanying text.

242. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (rejecting jurisdiction when the plaintiff's residence was the forum's sole relevant contact with the dispute). *But see* Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 963 (2000) ("The plaintiff's choice of forum based solely on the plaintiff's residence seems no less reasonable and fair than a plaintiff's choice of forum based on the defendant's residence.").

243. See Erbsen, *Impersonal Jurisdiction*, *supra* note 17, at 61-67. *But see* Harold S. Lewis, Jr., *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 771 (1982) (contending that "interests of government should not figure at all in decisions on personal jurisdiction").

244. See *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 628 (1935) (holding that "[t]he power of the states to impose terms upon nonresidents, as to activities within their borders" justified statute authorizing personal jurisdiction over foreign business with a local agent); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (holding that "public interest" in regulating "dangerous machines" justified state statute subjecting nonresident motorists to personal jurisdiction in suits arising from local accidents). *Pennoyer* had created an exception to the presence requirement for suits about marital status, see *supra* note 169, which the Court later justified as stemming from the forum's "large interest" in protecting a locally domiciled spouse, marital property, and marital offspring. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (upholding personal jurisdiction in a divorce action against a nonresident spouse).

Court emphasized state interests in cases when defendants tried to circumvent the forum's workers' compensation regime,<sup>245</sup> engaged in activity regulated by a state insurance commissioner,<sup>246</sup> and made libelous statements in a locally distributed publication.<sup>247</sup> Yet the Court gave state interests little or no weight in cases involving a local car accident<sup>248</sup> and a local industrial accident.<sup>249</sup> The Court's inconsistent treatment of state interests could in theory suggest a subtle pattern or trend, but more likely illustrates a lack of consensus and the doctrine's subjective indeterminacy.<sup>250</sup>

State interests will vary in effects cases depending on the nature and severity of the foreign conduct's local consequences. Potentially relevant factors include the extent to which local effects: (1) frustrate state regulatory objectives; (2) burden state institutions; (3) consume state resources; and (4) injure the state's economy. Even harms to private individuals can implicate public interests. For example, physical injury may require convalescence in a public hospital and payments from a state insurance fund, while economic injury may lead to local unemployment or a reduction in exports.<sup>251</sup>

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245. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945) (discussing the state's "taxing power").

246. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.").

247. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777-78 (1984) (stressing "the combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the 'single publication rule'"). The plaintiff in *Keeton* had only a single connection to New Hampshire: "the circulation there of copies of a magazine that she assists in producing." *Id.* at 772. She sued in New Hampshire because it was the only state where the statute of limitations had not expired. *Id.* at 773.

248. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980). The plaintiffs' brief stressed that victims were "hospitalized" in the forum for "over five months" due to "mutilating and disabling injuries" and were still "confined" there at the time of suit. Brief of Respondent at 3, 21, *Woodson*, 444 U.S. 286 (No. 78-1078). The Court never mentioned the extensive local medical treatment. Instead, the opinion described the accident and its consequences in one sentence. *See Woodson*, 444 U.S. at 288.

249. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality opinion) (holding that despite a "strong" interest in protecting local citizens, New Jersey was "without power" to exercise jurisdiction over the manufacturer of a product that caused an injury in New Jersey after the manufacturer actively marketed it to the entire United States).

250. The Court also lacks a clear theory of what constitutes a legitimate state interest. *See Lea Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 105-07.

251. *See Heiser, supra* note 242, at 960-68 (discussing how state and private interests overlap).

A striking feature of *Walden* is that it makes no effort to consider Nevada's interests. This omission creates the misleading impression that those interests were irrelevant. Ignoring state interests had no effect on the outcome in *Walden* because Nevada's interests were marginal: the plaintiffs' local injuries were small, temporary, and had no apparent ripple effects that might concern Nevada's regulators. Several states even filed amicus briefs denying that they would want to provide a forum in a similar case.<sup>252</sup> Accordingly, *Walden's* truncated inquiry may illustrate Justice Blackmun's concern that "easy cases make bad law."<sup>253</sup>

But what if the local injury had been severe such that Nevada's interests were stronger? Analyzing a hypothetical variation of *Walden* shows how little guidance the decision provides.

Suppose that when Walden encountered the plaintiffs in Atlanta, he was not working with the DEA searching for drugs. Instead, he was staffing a checkpoint screening for incoming travelers showing symptoms of Ebola. At the checkpoint, Walden intentionally and surreptitiously exposed the plaintiffs to an item that he knew to be contaminated with the Ebola virus. His motive was simply to be malicious and he picked the plaintiffs at random. His knowledge of the plaintiffs' connection to Nevada was the same as in the actual case: he knew that they were en route to Las Vegas. The plaintiffs then continued on their journey, eventually gambling in several Las Vegas casinos. They did not contract Ebola because, despite Walden's best efforts, the virus never moved from the infected item to the plaintiffs. But Nevada health officials learned of the plaintiffs' potential exposure and quarantined them along with several other people whom the plaintiffs encountered. The two-week quarantine generated a media frenzy. Images of workers in haz-mat suits scrubbing casino tables were ubiquitous on cable news channels. An ensuing wave of fear scared away tourists and wounded Nevada's economy.<sup>254</sup> Hotels, restaurants, and casinos furloughed employees,

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252. See Brief of Alabama et al., *supra* note 109, at 1-2.

253. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment).

254. This scenario unfortunately is not far-fetched, as even a small perceived risk of a serious disease can distort consumer behavior. See Susanna Kim, *How Fear of Ebola Could Impact the U.S. Economy*, ABC NEWS (Oct. 3, 2014, 8:31 AM), <http://abcnews.go.com/Business/fear-ebola-impact-us-%20economy/story?id=25915737> [<http://perma.cc/C2DR-YUBZ>].

tax revenues plummeted, and the state's emergency preparedness budget was decimated. Plaintiffs then sued Walden in Las Vegas for intentional infliction of emotional distress.

The Ebola hypothetical is identical to the actual *Walden* case in all jurisdictionally-relevant respects but one. In both the hypothetical and actual case, the defendant resided in Georgia, acted in Georgia, reported to supervisors in Georgia, knew that his actions were wrong, knew that he was interacting with people en route to Nevada, could easily anticipate that his actions would cause harm in Nevada, did not care about the Nevada connection, was connected to Nevada only because that is where plaintiffs unilaterally chose to go, and did not send anything to Nevada (because the virus never left the airport). Yet the harm in the hypothetical is many orders of magnitude more severe than in the actual case.

There is not one word in *Walden* that would directly help a court distinguish the Ebola hypothetical from the actual case. Yet it is difficult to imagine that the forum's extraordinary interest would be irrelevant. The defendant's obstruction of Nevada's laws would be a contact with the state justifying jurisdiction.<sup>255</sup> The states collectively would presumably support jurisdiction. One would not expect to see seventeen states join an amicus brief, as they did in *Walden*, opposing jurisdiction and asserting that Nevada's interests were "pure happenstance."<sup>256</sup> And the Supreme Court would be unlikely to hold unanimously that Nevada had not even a little bit of "contact" with a person who threatened to unleash a plague and caused havoc within the state.

*Walden's* silence about state interests highlights the importance of the maneuvering room that I identified in Part II.B.4. Courts confronting future cases involving significant local harms would need to focus on *Walden's* references to "meaningful" and "proper" connections with the state as the entry point for considering the forum's interests.<sup>257</sup> State interests may not be dispositive in the multi-factor calculus, but they are relevant.<sup>258</sup>

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255. See *supra* Part III.A.3 (discussing how intentional conduct causing injury in the forum may create meaningful contacts between the defendant and the state's laws).

256. Brief of Alabama et al., *supra* note 109, at 5.

257. *Walden v. Fiore*, 134 S. Ct. 1115, 1124-25 (2014).

258. The relevance of state interests would be even clearer if courts analyzed personal jurisdiction the way they analyze other due process problems. See *Mathews v. Eldridge*, 424

The fact that state interests are not dispositive means that future cases might still be difficult. For example, suppose in the hypothetical Ebola scenario that the plaintiffs traveled to California after landing in Las Vegas, that the defendant did not know the plaintiffs would have contacts with California, and that the quarantine occurred in Los Angeles instead of Las Vegas. The defendant's lack of knowledge might matter or might not.<sup>259</sup> Even in the relatively simple hypothetical in which injuries occurred in Nevada, the defendant might still argue that the state's interests are insufficient to warrant jurisdiction if he did not target the state. That defense would raise the questions I address in the next two Sections about whether targeting matters.

*2. Assumption of Jurisdictional Risk: The Defendant's Knowledge that Her Conduct Is Wrongful and Could Lead to Litigation*

Personal jurisdiction doctrine often relies on the concept of "reasonable anticipation." Jurisdiction may be appropriate when the defendant can "reasonably anticipate being haled into court,"<sup>260</sup> in contrast to when contacts with the forum are "random, fortuitous, or attenuated."<sup>261</sup> But what exactly must the defendant anticipate in effects cases that require evidence of conduct "aimed" at the forum?<sup>262</sup>

The reasonable anticipation test obscures three distinct dimensions of a defendant's knowledge: (1) knowledge that the defendant might be sued; (2) knowledge that the suit will occur in a specific

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U.S. 319, 335 (1976) ("[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used ... and finally, the Government's interest."). For discussion of the tension between treating personal jurisdiction as a substantive due process problem that fits poorly with substantive due process precedent and as a procedural due process problem that fits poorly with current personal jurisdiction precedent, see Weinstein, *supra* note 17, at 230-40.

259. See *infra* Part III.B.2-3; see also *Walden*, 134 S. Ct. at 1125 (expressing concern that allowing jurisdiction in Nevada would also allow jurisdiction in "California, Mississippi, or wherever else [the plaintiffs] might have traveled").

260. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

261. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985) (internal quotation marks and citations omitted).

262. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

forum; and (3) knowledge that the defendant's contacts with the forum will be sufficient to satisfy jurisdictional requirements. The Court explicitly focused only on the latter two dimensions—predicting contacts with the forum<sup>263</sup> and predicting the legal sufficiency of those contacts.<sup>264</sup> Anticipation of contacts with the forum might sometimes be relevant to jurisdiction, as noted in the next Section. But considering the defendant's expectations about legal sufficiency is circular because the law shapes expectations.<sup>265</sup> In any event, often lost in the shuffle is the critical inquiry into anticipation of suit, even if the specific forum is unpredictable.<sup>266</sup>

Two hypothetical scenarios illustrate why the distinction between predicting a suit and predicting the forum is important. First, imagine that a terrorist in Ohio attaches a bomb to an autonomous drone designed to fly a randomly generated flight pattern for twelve hours before exploding on impact with the ground. The bomber cannot predict the state in which the bomb will explode; any nearby state is a possibility (or no state, if the drone reaches Canada). Nor does he care where injuries occur; all he wants is carnage and he enjoys the uncertainty about where the drone will go. The bomb eventually maims a person in Michigan, leading to a suit in Michigan against the Ohio defendant. Second, imagine that an author in Ohio writes a book that he honestly believes is original but in fact subconsciously reproduces copyrighted work by an author in Michigan. The Michigan author sues the Ohio author in Michigan. In both scenarios, the defendants challenge personal jurisdiction because they could not predict that an injury would occur in Michigan.

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263. See, e.g., *id.* at 789-90 (noting in course of reasonable anticipation analysis that defendant knew that the target of its conduct resided in the forum); *Keeton*, 465 U.S. at 781 (linking reasonable anticipation finding to fact that defendant “deliberately exploited” the forum state’s market).

264. For example, in *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978), the Court held that a father could not “reasonably have anticipated” being sued for child support in California. But the mother and child were in California, so California was not a surprising forum. See *id.* Instead, the father claimed to have been surprised that his “single act” of “acquiesc[ing]” to the child’s living arrangements in California would make him amenable to suit in California. *Id.* The Court thus focused on anticipation in the sense of knowing what conduct triggers jurisdiction, rather than knowing where jurisdiction would be sought.

265. See *supra* note 201.

266. *Calder* observed that the defendant’s conduct was “calculated to cause injury.” *Calder*, 465 U.S. at 791. However, this observation was not directly linked to the reasonable anticipation inquiry.

Should both defendants win, at least with respect to the reasonable anticipation component of the inquiry?

The scenarios are materially distinct because the author likely could not predict that an injury would occur *anywhere*, while the bomber knew that an injury was likely to occur *somewhere*. There is no plausible constitutional value that would shield the bomber from Michigan courts simply because he did not know that Michigan would be the situs of the mayhem that he hoped to inflict.<sup>267</sup> The rationale for the reasonable anticipation test is that it enables defendants to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>268</sup> But intentional tortfeasors have an easy way to avoid jurisdictional ambiguity: they can refrain from committing intentional torts when they are unable to predict the results. In contrast, authors working in good faith who do not anticipate any litigation should not refrain from writing books, so perhaps the oblivious infringer deserves additional protection from distant fora.<sup>269</sup>

Accordingly, a meaningful application of the “reasonable anticipation” test should be able to distinguish between the bombing and copyright infringement hypotheticals. These scenarios suggest that a salient factor should be anticipation of litigation somewhere, rather than in a specific place. Jurisdiction might still be unavailable for other reasons—such as the burden of travel or lack of meaningful forum interests—but not for lack of reasonable anticipation.

The bombing hypothetical also suggests that courts adjudicating effects cases should consider whether the defendant assumed jurisdictional risk. In other words, knowing that her actions could cause injury *somewhere*, but not knowing where, did the defendant act anyway? If so, the defendant assumed the risk of being sued where the harm ultimately occurred. The same analysis could apply to the

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267. The Court’s concern about insulating defendants from personal jurisdiction based on the “unilateral activity’ of a third party” would not be an issue if the drone is treated as the defendant’s agent or instrumentality. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) (citation omitted). For a broader discussion of liability issues in cases involving autonomous artificial intelligence, such as a drone that can select its own flight path, see David C. Vladeck, *Machines Without Principals: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117 (2014).

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

269. See *supra* note 18.

defendant in the Ebola hypothetical from the previous Section: intentionally exposing travelers to a deadly virus assumes the risk of jurisdiction in the places to which they travel. The idea here is not that the defendant has fictionally consented to state authority, but rather that she lacks a compelling objection to being forced to bear the jurisdictional consequences of her behavior.

An assumption of risk theory would be partially consistent with two of the Court's stated concerns about jurisdictional rules. First, the Court believes that actors should be able to use predictions about jurisdiction to "structure their primary conduct."<sup>270</sup> Second, actors should have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."<sup>271</sup> These goals usually translate into a requirement that the actor "has 'purposefully directed' his activities at residents of the forum,"<sup>272</sup> although the semantics differ in effects cases.<sup>273</sup> But the link between predictability and purposeful direction makes less sense when activities are not directed toward any particular place or when there is a risk that costs will spill over beyond the borders of a targeted forum. At that point, the fair warning and predictability goals may tolerate forcing defendants to assume jurisdictional risk rather than foisting added litigation burdens on plaintiffs. If potential defendants do not like uncertainty, they can mitigate exposure by not engaging in wrongful conduct that they know will cause harm.

The assumption of risk argument is weaker if we assume that jurisdiction is often asserted in suits that lack merit. Efforts to mitigate the risk of jurisdictional exposure could then entail a reduction in socially productive behavior. Courts might also consider that allegations about a defendant's wrongful intent are difficult to

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270. *Woodson*, 444 U.S. at 297.

271. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) (alteration in original)).

272. *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

273. *Calder* never mentions any variant of the word "purpose." Notwithstanding this silence, *Walden* characterizes *Calder* as having "rejected" an argument that the defendant's contacts were not "sufficiently purposeful." *Walden v. Fiore*, 134 S. Ct. 1115, 1124 n.7 (2014). *Walden*'s only other reference to purpose was the descriptive statement that "we have upheld the assertion of jurisdiction over defendants who have purposefully 'reach[ed] out beyond' their State and into another." *Id.* at 1122 (citation omitted). Regardless of the semantics, both *Walden* and *Calder* required conduct in some way directed at the forum. *See supra* Parts II.A.2, II.B.2.



prove. For example, in the Ebola hypothetical,<sup>274</sup> the complaint might allege that the officer acted maliciously even though his conduct was an accident or never occurred at all. A rule allowing jurisdiction based on allegations about intent to cause injury could therefore impose substantial burdens that subsequent litigation on the merits reveals were unwarranted. Concerns about resting jurisdiction on allegations that turn out to be meritless are not limited to the effects context. But these concerns are often more salient in effects cases because jurisdiction tends to rest primarily on the central disputed merits question.<sup>275</sup>

The difficult choice for rulemakers is how to allocate risk given that all potential jurisdictional rules have error costs. Courts have two stark options (along with intermediate compromises): (1) assume that the plaintiff's allegations are true and thus make procedural decisions that could harm the defendant if the allegations turn out to be false; or (2) assume that the allegations might not be true and thus deprive the plaintiff of procedural opportunities that in hindsight may turn out to have been warranted. Under conditions of factual uncertainty, any rule will privilege one set of litigants at the expense of others. The relevant question is not whether error will occur, but how courts should skew it. The analysis in this Section suggests that an assumption of risk theory is appropriate, at least absent empirical evidence that the rule would impose unwarranted costs.<sup>276</sup>

The defendant's assumption of jurisdictional risk does not necessarily mean that jurisdiction is appropriate. Further questions would arise. For example, courts might consider how predictable litigation must be to justify jurisdiction in an unpredictable forum.

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274. See *supra* Part III.B.1.

275. See Robertson, *supra* note 70, at 1305. The consequences of basing effects jurisdiction on a false allegation of misconduct would be especially troubling if the suit challenges speech, such that the prospect of jurisdiction might have a chilling effect on speech directed outside the forum. See Rhodes & Robertson, *supra* note 215, at 255-56. The Court amplified this risk by declining to conduct a separate First Amendment inquiry at the jurisdictional stage of a libel action. See *supra* note 72.

276. Commentators have taken different approaches to allocating error costs. Compare Robertson, *supra* note 70, at 1355-57 (favoring eliminating the effects test in part due to the risk that jurisdiction will rest on false allegations), with Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1000 (2006) (seeking to balance the risk of jurisdictional errors and merits errors without categorically precluding effects cases).

The bombing and infringement hypotheticals are extremes, featuring near certainty on the one hand and good faith ignorance on the other; harder cases may arise in the middle. For example, suppose that the hypothetical bomber was instead an amateur weather enthusiast, and the bombs attached to the drone were instead scientific instruments. The drone was programmed to follow the wind, which was unpredictable, and then eventually return to its launch site. In his haste to launch the drone, the weather enthusiast attached the instruments with latches that he knew were weak. One of the instruments accidentally detached mid-flight and killed a person on whom it landed in Michigan. Jurisdiction would depend on whether deeming a reckless person with good intentions to have assumed the risk of distant litigation is “reasonable, in the context of our federal system of government.”<sup>277</sup>

Likewise, there may be normative reasons to cabin the assumption of risk theory when litigation in the forum would be burdensome.<sup>278</sup> These refinements to the theory are subjects for another article, although scholarship focused on horizontal federalism already calls into question the extent to which a defendant’s lack of purposeful aiming toward the forum is dispositive if other factors favor jurisdiction.<sup>279</sup> For now, it suffices to say that courts analyzing effects cases should consider whether the defendant could predict that the effect would occur and generate litigation somewhere, even if the specific forum was unpredictable.<sup>280</sup>

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277. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

278. In tort law, for example, assumption of risk should not necessarily deprive an actor of otherwise applicable legal protections. *See, e.g.*, Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 483-84 (2002) (discussing costs and benefits of the assumption of risk doctrine).

279. *See supra* note 17.

280. An interesting example of this principle in action—that oddly does not cite *Calder* or acknowledge the novelty of its reasoning—is *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003). In *Pugh*, representatives of seven “Americans” who died in the explosion of a French airplane flying between Congo and France sued Libyan agents who had conspired to place a bomb on the aircraft. *Id.* at 56. The court exercised personal jurisdiction because the defendants “should have reasonably postulated that passengers of many nationalities would be on board, from which they could also expect they might be haled into the courts of those nations whose citizens would die.” *Id.* at 59. In a sense, the bombers assumed the risk of being sued in the home fora of their victims, although the court had no occasion to consider whether jurisdiction would exist even if the presence of U.S. passengers came as a surprise. *See id.* (“Given the number of passengers on UTA Flight 772, and the international nature of the flight, it was also altogether foreseeable that some

Once again, *Walden* and *Calder* provide little guidance. *Walden* links jurisdiction to conduct that is “tethered” to the forum in a “meaningful way,”<sup>281</sup> while *Calder* requires conduct “expressly aimed” at the forum that is “calculated” to cause injury such that the forum is the “focal point.”<sup>282</sup> But in the assumption of risk scenario, conduct is often calculated to cause injury but has no focal point and no geographically-defined purpose. The scenario is different from anything that the Court has considered. Existing precedent is therefore not a straitjacket on lower courts, which must instead reason from the foundational principles in *International Shoe* to weigh the forum’s and the defendant’s competing interests.<sup>283</sup>

### 3. *Reckless Entanglement with the Forum*

Sections 1 and 2 suggest that the Due Process Clause may tolerate jurisdiction in effects cases based on the severity of the local injury and the defendant’s knowledge that her actions were wrongful. That conclusion seems inconsistent with precedent given the Court’s emphasis on the defendant’s purpose and intent. A logical response might be to insist that willful targeting of the forum is essential. This Section suggests otherwise.

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Americans would be aboard the plane.”). This principle is also evident in other judicial opinions. *See, e.g.*, *Indianapolis Colts, Inc. v. Metro. Balt. Football Club*, 34 F.3d 410, 411 (7th Cir. 1994) (Posner, J.) (noting in course of applying *Calder* to a trademark infringement suit that “[b]y choosing a name that might be found to be confusingly similar” the defendant “assumed the risk of injuring valuable property located in” the forum); *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 618-19 (E.D. Va. 2002) (holding in course of applying *Calder* that defendant who sent millions of spam emails through plaintiff’s servers “assumed the risk” of being “dragged into court where their actions caused the greatest injury”). *But see* *Ford Motor Co. v. Great Domains, Inc.*, 141 F. Supp. 2d 763, 776 (E.D. Mich. 2001) (deeming an assumption of risk inquiry in a trademark infringement case to be inconsistent with *Calder*’s “expressly aimed” test); *cf.* *Estate of Klieman v. Palestinian Auth.*, No. 04-1173 (PLF), 2015 WL 967624, at \*8 (D.D.C. Mar. 3, 2015) (citing *Walden* to reject personal jurisdiction over entities that allegedly aided terrorists who killed a forum resident in Israel; the court found insufficient evidence that the defendants “focused on the United States” and did not consider an assumption of risk theory).

281. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

282. *Calder v. Jones*, 465 U.S. 783, 789, 791 (1984).

283. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“The test is not merely ... whether the activity ... is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”).

Focusing on willful targeting obscures the many ways in which foreign conduct may entangle an outsider with the forum. Along a sliding scale, the outsider might purposefully target the forum, act with indifference to a known risk of entanglement with the forum, act based on a belief that consequences will not occur in the forum, or fall somewhere between these positions.

The prior Section considered a scenario in which the defendant did not target any forum and thus her conduct lacked any focal point. This Section considers the situation in which a defendant's conduct does have a focal point but still causes harm somewhere else.

We can again use two hypothetical scenarios to illustrate flaws in the targeting inquiry's narrow emphasis on a single dimension of a multidimensional problem. First, imagine that a person standing in Oregon along the border with California aims his rifle at a person whom he knows to be in California, shoots, and causes injury. The victim sues in California and the defendant has no California contacts other than the shooting. The existence of jurisdiction seems obvious. Indeed, this hypothetical is taken directly from an illustration of effects jurisdiction in section 37 of the *Restatement (Second) of Conflicts*.<sup>284</sup> *Calder* cited section 37 with apparent approval (although it did not mention the shooting scenario).<sup>285</sup>

Second, imagine the same facts, but the shooter aims at a person in Oregon, misses, and strikes a person in California whom the shooter knew to be present but hoped not to hit. Further suppose that the shooter is not an expert marksman and was aware that he might miss the intended target. The victim then sues the shooter in California.

If willful targeting of the forum is a prerequisite for personal jurisdiction, then there is jurisdiction in the first scenario but no jurisdiction in the second. Yet California's power should not depend on whether the local victim was intentionally harmed rather than

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284. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (AM. LAW INST.1971) (“[O]ne who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he had actually fired the bullet in the state.”).

285. See *Calder*, 465 U.S. at 789. A prior decision expressly declined to address the shooting hypothetical. See *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978).

recklessly harmed.<sup>286</sup> From the state's perspective, what matters is that a person was shot within its borders. Likewise, the shooter should not have a greater claim to jurisdictional immunity for the foreseeable consequences of bad aim than for the intended consequences of good aim.<sup>287</sup>

One of the many vices of *Pennoyer v. Neff*,<sup>288</sup> which also involved a wrongdoer in Oregon and a victim in California, is that the decision's narrow focus on territorial borders precluded jurisdiction in effects cases such as the two shooting hypotheticals.<sup>289</sup> Replacing rigid emphasis on territory with rigid emphasis on willful targeting would recreate *Pennoyer's* limits on state authority to provide a remedy for intentional misconduct that causes local injuries.

The Court has never confronted a scenario analogous to the bad-aim hypothetical and therefore has not considered whether a geographically-precise "purpose" is an essential prerequisite for jurisdiction in all effects cases.<sup>290</sup> Accordingly, courts adjudicating effects cases should consider the possibility that jurisdiction is appropriate when intentional conduct produces foreseeable local effects indepen-

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286. *Cf.* *BioE LLC v. Mediatech, Inc.*, No. 10-2085 (MJD/FLN), 2011 WL 31727, at \*5 (D. Minn. Jan. 5, 2011) (exercising personal jurisdiction in part based on the local effects of the defendant's "reckless misrepresentations" directed at a victim in the forum). *Calder's* focus on intentional torts is ambiguous when the relevant substantive law does not distinguish between willful and reckless misconduct. *See* Steven M. Reiss, *Applying the Effects Theory of Personal Jurisdiction in Patent Infringement Actions*, 23 *AIPLA Q.J.* 99, 103-04 (1995) (exploring the concept of an "intentional infringer").

287. If the shooting hypothetical arose in the context of assessing prescriptive rather than adjudicative jurisdiction, the state in which the bullet landed would probably be able to apply its criminal law. *See* *Simpson v. State*, 17 S.E. 984, 985 (Ga. 1893) (holding that Georgia's criminal law applied to a defendant who, while standing in South Carolina, shot at and missed a person in Georgia); *State v. Hall*, 19 S.E. 602, 604 (N.C. 1894) (holding that Tennessee's criminal law should apply to the defendant, who had fired a shot in North Carolina that killed a person in Tennessee).

288. 95 U.S. 714 (1878).

289. *See* Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 *MICH. L. REV.* 1195, 1196-97 (1984) (arguing that *Pennoyer's* "undiscerning reliance on dogmatic considerations" precluded jurisdiction over "meritorious causes where neither the defendant nor sufficient property could be found within the state").

290. *Cf.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (plurality opinion) ("As a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State' .... There may be exceptions, say, for instance, in cases involving an intentional tort.") (citation omitted).

dent of the defendant's purpose, especially when state interests are strong and the defendant knew that her conduct was wrongful.<sup>291</sup>

### CONCLUSION

When a person in one state intentionally commits a tortious act that has devastating consequences in another state, the victims should be able to sue in a convenient local forum because jurisdiction would not violate due process (at least absent unusual circumstances, and assuming that the venue would not be unduly burdensome). Yet imprecise and undertheorized language in two Supreme Court opinions suggests otherwise. This Article has shown that *Walden* leaves more questions open than the opinion's unanimity might imply, such that courts still have substantial authority to exercise personal jurisdiction in effects cases. In particular, the Article: (1) highlights ambiguities in *Calder* and *Walden*; (2) identifies flaws in the Court's imprecise requirement of "contacts with the forum" and suggests that courts should read that language as permitting jurisdiction based on contact with state law; and (3) demonstrates that several factors may be more important than the Court has so far acknowledged, including the magnitude of state interests, the defendant's assumption of jurisdictional risk, and the predictable consequences of reckless action.

*Walden* was decided thirty years after *Calder*, which was decided thirty-nine years after *International Shoe*. Lower courts may have to wait a long time for additional authoritative guidance. In the interim, the factors discussed in this Article could help in the thousands of effects cases that will arise over the coming years.

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291. See *supra* Part III.B.1-2.

