NOTES

Rethinking Conspiracy Jurisdiction in Light of Stream of Commerce and Effects-Based Jurisdictional Principles

For decades, some courts have been willing to exercise personal jurisdiction over nonresident defendants based solely on the forum contacts of their coconspirators. This practice, termed "conspiracy jurisdiction," has proven controversial among courts and commentators alike. On one hand, the actions of one member of a conspiracy are ordinarily attributable to other members of the conspiracy, and jurisdiction-conferring acts should arguably be no exception. On the other hand, attributing forum contacts from one actor to another based solely on their joint membership in a civil conspiracy seems to stretch due process protections to the breaking point. This Note provides new reasons to question conspiracy jurisdiction and offers a new path forward for analyzing personal jurisdiction in multidefendant conspiracy cases. In particular, it shows that due process concerns cannot be alleviated by further restricting when it is appropriate to attribute the forum contacts of one conspirator to another. Even the most restrictive versions of conspiracy jurisdiction are problematic because they make constitutional limits on personal jurisdiction vary by jurisdiction based on substantive state law. Rather than attempting to determine when attribution of forum contacts among conspirators is appropriate and when it is not, courts should instead draw on the Supreme Court's recent personal jurisdiction decisions in the stream of commerce and extraterritorial intentional tort contexts to rethink what constitutes a forum "contact" in multidefendant conspiracy cases. Specifically, courts should require that nonresident conspirators intentionally target a forum through their own actions to be subject to jurisdiction there.

INTRODUCTION

For decades, some courts have been willing to exercise personal jurisdiction over nonresident defendants based solely on the forum contacts of their coconspirators. The results have been startling at times. For instance, the Supreme Court of Tennessee recently held that

Tennessee courts might properly exercise jurisdiction over a New York-based, Delaware-incorporated securities ratings agency on claims of fraud and misrepresentation based solely on the Tennessee contacts of its alleged coconspirators.[1] Tellingly, the court conceded that the agency's own contacts with Tennessee were insufficient to support specific jurisdiction.[2] Particularly in today's increasingly interconnected global marketplace, in which commonplace professional connections and business relationships frequently give rise to claims of civil conspiracy,[3] such an expansive theory of personal jurisdiction threatens to undermine the predictability and fairness concerns animating the Supreme Court's personal jurisdiction jurisprudence.[4] This has led some defendants to challenge conspiracy jurisdiction as unconstitutional.[5]

Today, state courts of last resort disagree about whether establishing jurisdiction over all members of a civil conspiracy by attributing the forum contacts of one member to the entire group violates the Due Process Clause of the Fourteenth Amendment.[6] Because the Supreme Court has never addressed conspiracy jurisdiction, courts and commentators have tended to treat the theory in a class of its own and have focused primarily on determining when attribution of contacts among conspirators is appropriate.[7] But as this

1. First Cmty. Bank, N.A. v. First Tenn. Bank, N.A., 489 S.W.3d 369, 390–400, 407–08 (Tenn. 2015).

2. *Id.* at 390–94.

3. *See The Law of Personal Jurisdiction: A Game Changer for Foreign Banks Involved in Litigation in the U.S.*, HOGAN LOVELLS (Mar. 7, 2017), http://www.hoganlovells.com/en/publications/the-law-of-personal-jurisdiction [https://perma.cc/MWG8-6MN8] [hereinafter *The Law of Personal Jurisdiction*] (interview with Marc Gottridge) (noting that "we are seeing this conspiracy theory being rolled out by plaintiffs' lawyers in a lot of our cases for banks" in which "the plaintiffs say that while the defendants are all sitting in Europe or Asia, they conspired with a U.S. bank or a trader in New York," and thus, "since the alleged conspirators should all be treated as agents of one another, they are all subject to jurisdiction here").

4. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

5. Petition for Writ of Certiorari, Fitch Ratings, Inc. v. First Cmty. Bank, N.A., No. 15-1511 (U.S. Mar. 14, 2016), 2016 WL 1056619, at *10–13. This Note only addresses personal jurisdiction in the context of civil conspiracy cases; it does not deal with jurisdictional issues arising in the criminal context.

6. *Id.* at *14–15.

7. *See* Ann Althouse, *The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234–35, 251–59 (1983) ("If the act supports jurisdiction over the actor, an analysis of the attribution process must follow."); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 21 (1986) ("The courts then must find or fashion a test for separating cases where attribution is appropriate from those where it is not."); Stuart M.

Note demonstrates, due process concerns cannot be entirely alleviated by further restricting the circumstances under which it is appropriate to attribute forum contacts among conspirators. Even the most restrictive versions of conspiracy jurisdiction are problematic because they make constitutional limits on personal jurisdiction vary by jurisdiction based on substantive state law.[8] Further, by treating conspiracy cases as fundamentally unique for purposes of personal jurisdiction, courts and commentators have overlooked important similarities between personal jurisdiction in conspiracy cases and personal jurisdiction in other contexts that the Supreme Court has addressed. Specifically, the Supreme Court's recent personal jurisdiction decisions in stream of commerce and extraterritorial intentional tort cases provide the appropriate framework for analyzing personal jurisdiction in conspiracy cases. Rather than relying on attribution of contacts to establish personal jurisdiction in conspiracy cases, courts should ask whether nonresident conspirators have purposefully targeted the forum state through their conspiratorial conduct.

This Note proceeds in three parts. Part I surveys the historical origins and purposes of conspiracy jurisdiction and how modern courts apply the doctrine. Part II explains the legal and policy arguments for and against conspiracy jurisdiction and highlights practical problems with the way many courts apply the doctrine. Finally, Part III reconsiders conspiracy jurisdiction in light of the Supreme Court's recent personal jurisdiction cases in the stream of commerce and extraterritorial intentional tort contexts. Because conspiracy cases share important similarities with stream of commerce and intentional tort cases, this Note argues that jurisdiction in multidefendant conspiracy cases is best analyzed under those precedents.

I. THE HISTORY AND PURPOSE OF CONSPIRACY JURISDICTION

Under the conspiracy theory of personal jurisdiction, courts exercise jurisdiction over a nonresident defendant based on the forum contacts of one or more coconspirators. Its proponents reason that because the acts of each member of a conspiracy are attributable to every other member of the conspiracy for purposes of liability, the jurisdiction-conferring acts of one conspirator may be attributed to other conspirators, thereby subjecting them to the jurisdiction of the

Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of in Personam Jurisdiction*, 84 COLUM. L. REV. 506, 506–07 (1984) (reviewing the basic premises of the theory).

8. *See infra* Section II.A.3.

court.[9] This Part places conspiracy jurisdiction in its historical and jurisprudential context. Section A briefly explains the Supreme Court's modern personal jurisdiction jurisprudence and its relationship to conspiracy jurisdiction. Section B then examines the historical development of conspiracy jurisdiction and details current judicial applications of the doctrine.

A. The Supreme Court's Personal Jurisdiction Jurisprudence

A state court[10] may exercise personal jurisdiction over a defendant only if jurisdiction is both authorized by state law (such as the state's long-arm statute[11]) and permitted by the Due Process Clause of the Fourteenth Amendment.[12] Because most state long-arm statutes authorize personal jurisdiction to the full extent permitted under the U.S. Constitution,[13] the analysis typically centers on the second prong, which requires that courts establish either general or specific jurisdiction over a defendant.[14]

Conspiracy jurisdiction is an application of specific jurisdiction: courts attribute the purposefully established, conspiracy-related forum contacts of one conspirator to a second conspirator who lacks such contacts. On the basis of those attributed contacts, the court then exercises specific jurisdiction over the second conspirator for claims arising out of the conspiracy.[15] Thus, general jurisdiction is not relevant to conspiracy jurisdiction analysis. The fact that one member of a conspiracy is subject to general jurisdiction in a forum cannot subject

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9. *See, e.g.*, Istituto Bancario Italiano SpA v. Hunter Eng'g Co., 449 A.2d 210, 222 (Del. 1982).

10. Ordinarily the personal jurisdiction analysis will be the same for federal courts, as the Federal Rules of Civil Procedure authorize federal courts to assert personal jurisdiction over a defendant who would be subject to personal jurisdiction in state court in the state where the district court is located. *See* FED. R. CIV. P. 4(k)(1)(A).

11. Long-arm statutes tell state courts which nonresident defendants the state has authorized the courts to exercise personal jurisdiction over. *See* THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE 436–37 (3d ed. 2012).

12. 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1069 (4th ed. Supp. 2017).

13. *Id.* Notwithstanding the broad sweep of most long-arm statutes, many states place jurisdictional limitations in substantive statutes that allow for civil prosecution. *See, e.g.*, John C. Brinkerhoff Jr., Note, *Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope*, 34 YALE J. ON REG. 353, 355–56 (2017) (noting jurisdictional limitations in state antitrust statutes).

14. A defendant subject to general jurisdiction in a forum may be sued in that forum for any and all claims against it, even if the claims have no connection to the forum. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). For general jurisdiction to exist, the defendant's "affiliations with the State" must be "so continuous and systematic as to render [it] essentially at home in the forum State." Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (internal quotation marks omitted). General jurisdiction is not at issue in conspiracy jurisdiction cases.

15. *See infra* Section I.B.

other members of the conspiracy to specific jurisdiction in that forum for claims arising out of the conspiracy.[16] Since conspiracy jurisdiction is an application of specific jurisdiction, it is helpful to briefly examine the development of the Supreme Court's specific jurisdiction jurisprudence in greater detail.[17]

The Supreme Court's modern specific jurisdiction jurisprudence has its roots in the famous case *International Shoe Co. v. Washington*.[18] In its own courts, the state of Washington sought to recover unpaid contributions to the state unemployment fund from International Shoe, a Delaware corporation with its principal place of business in St. Louis, Missouri.[19] International Shoe objected that the Washington courts' exercise of personal jurisdiction over it violated its due process rights because it was not "present" in the state.[20] While International Shoe had no office in Washington and did not contract for the sale of any merchandise there, it did employ salesmen in Washington who exhibited samples of shoes and solicited orders from prospective buyers.[21] The salesmen would transmit orders to International Shoe's St. Louis office for acceptance or rejection, and the shoes would then ship to customers in Washington.[22]

The Supreme Court held that International Shoe was properly subject to jurisdiction in Washington.[23] According to the Court, due process allows for personal jurisdiction over nonresident defendants provided they have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[24] In particular, the Court emphasized that jurisdiction is appropriate where the cause of action arises out of or is connected to the defendant's activities within the state, but not where the defendant's contacts with the state are unconnected with the lawsuit.[25]

16. It is an open question, however, whether contacts that render a subsidiary corporation subject to general jurisdiction in a state may be attributed to the subsidiary's parent, so that the court may exercise general jurisdiction over the parent also. *See Daimler*, 571 U.S. at 134–35 (explicitly refusing to pass judgment on this question).

17. For a thorough review of the Court's major personal jurisdiction decisions since *International Shoe Co. v. Washington*, see 4 WRIGHT ET AL., *supra* note 12, § 1067.1.

18. 326 U.S. 310 (1945).

19. *Id.* at 311–13.

20. *Id.* at 315.

21. *Id.* at 313–14.

22. *Id.* at 314.

23. *Id.* at 321.

24. *Id.* at 316.

25. *Id.* at 317, 319–20.

International Shoe's focus on "minimum contacts" and "fair play and substantial justice" has become the touchstone of modern personal jurisdiction analysis. Subsequent case law has developed a two-part test for determining whether due process permits the exercise of personal jurisdiction: (1) the defendant must establish minimum contacts with the forum state and (2) the assertion of jurisdiction must be reasonable, comporting with traditional notions of fair play and substantial justice.[26]

With regard to the first prong, the Court has emphasized that the defendant must "purposefully avail[ ]" itself of the forum state[27] and that the lawsuit must "arise out of or relate to" such purposefully established contacts.[28] This requirement protects individuals' liberty interest under the Due Process Clause in not being subject to the binding judgments of a forum with which they have no meaningful contacts.[29] It also allows individuals to plan their primary conduct with some knowledge of where they can be subjected to suit based on that conduct.[30]

With regard to the second prong, the Court has identified several factors relevant to determining whether the assertion of jurisdiction is fair and reasonable even where the minimum contacts requirement is met: the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.[31] Jurisdiction may be found unreasonable based on consideration of these factors even where a defendant has purposefully established minimum contacts with the forum, though such a defendant must make a compelling case to avoid jurisdiction on reasonableness grounds.[32] Additionally, "[t]hese considerations sometimes serve to establish the reasonableness of

26. 4 WRIGHT ET AL., *supra* note 12, § 1067.2.

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

28. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) ("[Due process] is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." (citations omitted)).

29. *Id.* at 471–72.

30. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

31. *Id.* at 292; *see also Burger King*, 471 U.S. at 476–77.

32. *Burger King*, 471 U.S. at 477.

jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[33]

Because conspiracy jurisdiction is an application of specific jurisdiction, the same constitutional standards apply to assertions of jurisdiction based on a defendant's participation in a conspiracy as to any other assertion of specific jurisdiction. This has led numerous courts and commentators to question the constitutionality of conspiracy jurisdiction.[34] Though the Supreme Court has never had occasion to address conspiracy jurisdiction, lower courts have been developing the doctrine for several decades, as the next Section explains.

B. Historical Development and Current Forms of Conspiracy Jurisdiction

Although one of the first cases to base personal jurisdiction on the existence of a civil conspiracy was decided in the mid-1940s,[35] the doctrine did not gain significant traction in the courts until the 1970s.[36] The early cases upheld jurisdiction over nonresident conspirators based on the in-state acts of their coconspirators, but the courts generally did so on the theory that the in-state coconspirators acted as agents of the nonresident defendants.[37] Thus, jurisdiction was proper not merely

33. *Id.*

34. *See infra* Section II.A.

35. Giusti v. Pyrotechnic Indus., 156 F.2d 351, 354–55 (9th Cir. 1946). In *Giusti*, an individual businessman who bought and sold fireworks in California sued several fireworks manufacturers around the country for conspiring to fix fireworks prices and agreeing to refuse to sell him fireworks in violation of the antitrust laws. *Id.* at 352. At meetings in San Francisco, several California fireworks manufacturers allegedly agreed to refuse to sell fireworks to the plaintiff and contacted other fireworks manufacturers around the country urging them to do the same. *Id.* at 352–53. One of the conspirators, a Delaware corporation that had not attended the meetings and had not done any business in California, argued that jurisdiction was improper because California's long-arm statute only authorized jurisdiction over foreign corporations that had transacted business in the state. *Id.* at 353. But the court held that jurisdiction was proper because the Delaware corporation's coconspirators *had* transacted business in California. *Id.* at 354. The court concluded that the California coconspirators "were agents of [the Delaware defendant] in the conspiracy's attempt to destroy [the plaintiff's] business." *Id.*

36. Althouse, *supra* note 7, at 236–41.

37. For example, though subsequent courts viewed Judge Friendly's opinion in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), as a major development in conspiracy jurisdiction, Althouse, *supra* note 7, at 237–39, *Leasco* merely suggested that a nonresident defendant might be subject to jurisdiction in a forum if another person commits illegal acts there under his direction, supervision, and control. 468 F.2d at 1343–44. Judge Friendly expressly noted that "the mere presence of one conspirator [in a forum] does not confer personal jurisdiction over another alleged conspirator." *Id.* at 1343. Likewise in *Giusti*, *see supra* note 35, it is unclear whether the court's conclusion that the California manufacturers were agents of the Delaware corporation was based merely on the fact that they were all coconspirators or also on the fact that the Delaware corporation was an association of fireworks manufacturers composed of the other defendants in the lawsuit, including the California manufacturers. *See* 156 F.2d at 352–54 (discussing the existence of a conspiracy between both the defendants and their association).

because the defendants' coconspirators established minimum contacts with the forum but also because the nonresident defendants exercised sufficient direction and control over their in-state coconspirators to give rise to a principal-agent relationship.[38] From this relatively modest agency-based theory of jurisdiction grew the expansive forms of conspiracy jurisdiction recognized by numerous courts today.

Though conspiracy jurisdiction is of relatively recent vintage, it is continuing to gain recognition in state and federal courts.[39] Some version of conspiracy jurisdiction is recognized in at least eight states[40] and in numerous federal courts,[41] and plaintiffs seeking to sue foreign banks in U.S. courts continue to frequently deploy conspiracy jurisdiction arguments.[42] Courts take a variety of approaches to conspiracy jurisdiction. Some have rejected the theory entirely, holding that conspiracy jurisdiction violates the due process rights of defendants under the Fourteenth Amendment.[43] Others have accepted the theory but have adopted different standards for determining when attribution of forum contacts among conspirators is appropriate.[44] The

38. *See, e.g.*, *Leasco*, 468 F.2d at 1343 (noting that jurisdiction over a lawyer based on his partner's forum conduct might be appropriate if "the relationship was the closer one between a senior partner . . . and a younger partner to whom he has delegated the duty of carrying out an assignment over which the senior retains general supervision . . . [and] the junior was in frequent communication with the senior").

39. *See* Jack Figura, *No Consensus on Conspiracy Theory of Personal Jurisdiction*, LAW360 (Jan. 31, 2018, 11:51 AM), https://www.law360.com/articles/1007340/no-consensus-on-conspiracy-theory-of-personal-jurisdiction [https://perma.cc/8BAR-97PG] (detailing recent applications of conspiracy jurisdiction in state and federal courts).

40. *See Ex parte* United Ins. Cos., 936 So. 2d 1049, 1055 (Ala. 2006); Gibbs v. PrimeLending, 381 S.W.3d 829, 834 (Ark. 2011); Istituto Bancario Italiano SpA v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982); Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., 752 So. 2d 582, 585–86 (Fla. 2000); Mackey v. Compass Mktg., Inc., 892 A.2d 479, 486 (Md. 2006); Hunt v. Nev. State Bank, 172 N.W.2d 292, 310–13 (Minn. 1969); Hammond v. Butler, Means, Evins & Brown, 388 S.E.2d 796, 798–99 (S.C. 1990); First Cmty. Bank, N.A. v. First Tenn. Bank, N.A., 489 S.W.3d 369, 394–96 (Tenn. 2015).

41. *See, e.g.*, Globe Metallurgical, Inc. v. Rima Indus. S.A., 177 F. Supp. 3d 317, 330 (D.D.C. 2016); Cawley v. Bloch, 544 F. Supp. 133, 135 (D. Md. 1982).

42. *See The Law of Personal Jurisdiction*, *supra* note 3 ("[W]e are seeing this conspiracy theory being rolled out by plaintiffs' lawyers in a lot of our cases for banks.").

43. *See, e.g.*, *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 307 F. Supp. 2d 145, 158 (D. Me. 2004) (rejecting conspiracy theory of jurisdiction); Ashby v. State, 779 N.W.2d 343, 360–61 (Neb. 2010) (declining to attribute the forum contacts of some defendants to their alleged coconspirator for purposes of establishing personal jurisdiction over the coconspirator); Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995) (holding that the forum contacts of one conspirator "cannot be imputed" to other alleged coconspirators for purposes of establishing personal jurisdiction (quoting Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 437–38 (Tex. 1982))).

44. *See, e.g.*, *Execu-Tech*, 752 So. 2d at 585–86 (requiring allegations of a conspiracy and effects in the forum state resulting from the conspiracy); Gemini Enters., Inc. v. WFMY Television Corp., 470 F. Supp. 559, 564 (M.D.N.C. 1979) (requiring in-state acts by a conspiracy that the nonresident conspirator knew or should have known would occur); *Istituto*, 449 A.2d at 225 (adopting stringent multielement test for conspiracy jurisdiction).

result is that it is considerably easier to obtain jurisdiction over alleged coconspirators in some jurisdictions than in others.

The cases that have recognized conspiracy jurisdiction can be roughly divided into three groups. The first group recognizes a sweeping version of conspiracy jurisdiction under which attribution of jurisdictional contacts is appropriate if a plaintiff alleges (1) the existence of a conspiracy among the defendants and (2) some act in furtherance of the conspiracy or effect resulting from the conspiracy within the forum state.[45] These cases do not require a factual showing of a conspiracy or agency relationship between defendants at the pleading stage.[46] Rather, specific allegations of in-forum acts by an alleged conspirator or in-forum effects resulting from the alleged conspiracy are sufficient to survive a motion to dismiss for lack of personal jurisdiction.[47]

The second group of cases adopts a more restrictive approach. These cases require that nonresident conspirators have knowledge of or be able to foresee the in-state acts or effects of a conspiracy for attribution of contacts to be appropriate.[48] For example, in *Gemini Enterprises, Inc. v. WFMY Television Corp.*, a federal district court in North Carolina exercised jurisdiction over a nonresident trade association of television broadcasters on the grounds that the association could foresee that its coconspirator, a North Carolina television station, would act in furtherance of the conspiracy in North Carolina.[49] The trade association had set certain advertising and programming standards through its Television Code, to which the North Carolina station subscribed.[50] Acting in accordance with the Code, the station prohibited one plaintiff from appearing on its

45. *See, e.g.*, Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1393 (7th Cir. 1983) (requiring allegations of an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state); Mandelkorn v. Patrick, 359 F. Supp. 692, 694–97 (D.D.C. 1973) (same); Maricopa Cty. v. Am. Petrofina, Inc., 322 F. Supp. 467, 468–69 (N.D. Cal. 1971) (requiring allegations of a conspiracy and effects in the forum state resulting from the conspiracy); *Execu-Tech*, 752 So. 2d at 585–86 (same); *Hammond*, 388 S.E.2d at 797–99 (same).

46. *See, e.g.*, *Mandelkorn*, 359 F. Supp. at 696.

47. *See, e.g.*, *id.* at 696–97; *Execu-Tech*, 752 So. 2d at 585–86. The *Mandelkorn* court noted, however, that the situation might be different if the allegations of the complaint were controverted by the defendant. 359 F. Supp. at 696–97.

48. *See, e.g.*, *Gemini*, 470 F. Supp. at 564 (jurisdiction over nonresident coconspirator was appropriate "where substantial acts in furtherance of the conspiracy were performed in the forum state and the co-conspirator knew or should have known that acts would be performed in the forum state"); Santa Fe Techs., Inc. v. Argus Networks, Inc., 42 P.3d 1221, 1234 (N.M. Ct. App. 2001) (attribution of contacts to nonresident coconspirators is appropriate "when the plaintiff can demonstrate that the non-resident co-conspirators had sufficient knowledge of and participation in the acts that occurred in the forum state and the resultant effect of those acts was foreseeable").

49. 470 F. Supp. at 562–65.

50. *Id.* at 562.

programing and refused to sell advertising time to another plaintiff, allegedly in violation of federal law.[51] Because the station had agreed to follow the trade association's Code, and because the trade association "expected [the station] to perform acts in North Carolina in accordance with the Code," the court held that jurisdiction over the trade association was proper.[52]

The third group of cases adopts the most restrictive version of conspiracy jurisdiction and requires that some multielement test be satisfied before attributing jurisdictional contacts among conspirators.[53] The various tests generally require that some combination of the following elements be satisfied: (1) the defendant must be part of a conspiracy, (2) the conspiracy must act or cause substantial effects in the forum state, (3) the defendant must have known or had reason to know the conspiracy would produce such acts or effects, and (4) the acts in or effects on the forum state must be a direct and foreseeable result of the conspiratorial conduct.[54] One popular contemporary version of such a test was first articulated in *Cawley v. Bloch*,[55] and has since been adopted by the courts of last resort in Arkansas, Maryland, and Tennessee.[56]

Despite conspiracy jurisdiction's continued growth,[57] the doctrine remains controversial. As the next Part explains, some courts have rejected conspiracy jurisdiction as unconstitutional,[58] and scholars have criticized the theory on both due process and pragmatic grounds.[59]

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51. *Id.* at 562–63.

52. *Id.* at 565.

53. *See, e.g.*, Cawley v. Bloch, 544 F. Supp. 133, 135 (D. Md. 1982); Gibbs v. PrimeLending, 381 S.W.3d 829, 832, 834 (Ark. 2011); Istituto Bancario Italiano SpA v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982); Mackey v. Compass Mktg., Inc., 892 A.2d 479, 486 (Md. 2006); Chenault v. Walker, 36 S.W.3d 45, 53–54 (Tenn. 2001).

54. *See, e.g.*, *Istituto*, 449 A.2d at 225.

55. 544 F. Supp. at 135. The *Cawley* court's test for exercising conspiracy jurisdiction is:

> [W]hen (1) two or more individuals conspire to do something (2) that they could reasonably expect to lead to consequences in a particular forum, if (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.

Id.

56. *See Gibbs*, 381 S.W.3d at 832; *Mackey*, 892 A.2d at 486; *Chenault*, 36 S.W.3d at 53–54.

57. *See* Figura, *supra* note 39 (detailing recent applications of conspiracy jurisdiction in state and federal courts).

58. *See, e.g.*, Ashby v. State, 779 N.W.2d 343, 360–61 (Neb. 2010); Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995).

59. *See* Althouse, *supra* note 7, at 260 (concluding that conspiracy theory jurisdiction "must not . . . serve as [a] devic[e] to avoid genuine due process analysis"); Riback, *supra* note 7, at 536

II. DEBATING CONSPIRACY JURISDICTION: NORMATIVE ARGUMENTS

The arguments for and against conspiracy jurisdiction can be divided into two categories. The first and most critical set of arguments concerns whether conspiracy jurisdiction—at least in some forms—is unconstitutional. The basic argument is that at least some applications of conspiracy jurisdiction violate the Due Process Clause of the Fourteenth Amendment. However, assuming some form of conspiracy jurisdiction is constitutional, a second set of arguments addresses whether the theory reflects sound policy, and thus whether states should enact long-arm statutes authorizing jurisdiction under the theory. This Part analyzes each set of arguments in turn.

A. Conspiracy Jurisdiction and Due Process

Critics of conspiracy jurisdiction claim that the exercise of jurisdiction over nonresident defendants based on the attributed contacts of their coconspirators often violates due process.[60] The Supreme Court has emphasized that *International Shoe*'s requirements of minimum contacts and reasonableness must be met as to each defendant over whom a state court exercises jurisdiction.[61] Conspiracy jurisdiction shifts the focus away from a nonresident defendant's *contacts* with the forum state and instead asks about the defendant's *relationship* with another actor who has established jurisdiction-conferring contacts with the state. The focus is not on whether the defendant himself has minimum contacts with the state but on whether another actor's forum contacts may properly be attributed to the defendant. Thus, to alleviate the due process concerns associated with attributing jurisdictional contacts among conspirators, some proponents of conspiracy jurisdiction have placed strict limits on when attribution is appropriate. At least two limitations on attribution could potentially render conspiracy jurisdiction constitutional: (1) requiring that the exercise of conspiracy jurisdiction be "reasonable" under

(concluding that "the conspiracy theory [of jurisdiction] often causes confusion and may lead to unconstitutional results").

60. Riback, *supra* note 7, at 517–18 (explaining that the due process inquiry must be individualized, and that "[b]ecause the purpose of jurisdiction law is to safeguard the defendant's planning interest, it follows that the activities of third parties not controlled by the defendant will not confer jurisdiction on the forum").

61. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783 (2017) ("But as we have explained, '[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.' " (omission and alteration in original) (quoting Rush v. Savchuk, 444 U.S. 320, 332 (1980))); Calder v. Jones, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

World-Wide Volkswagen Corp. v. Woodson[62] or (2) requiring knowledge or foreseeability of in-state acts or effects by the conspiracy before attributing jurisdictional contacts. As explained below, however, neither approach ultimately succeeds.

1. Cabining Conspiracy Jurisdiction: *World-Wide Volkswagen*'s Reasonableness Factors

One way to evaluate the constitutionality of conspiracy jurisdiction is to consider whether attributing jurisdictional contacts among conspirators is reasonable in a particular case. As noted above,[63] every assertion of personal jurisdiction must both satisfy the minimum contacts analysis and be "reasonable," such that it comports with traditional notions of fair play and substantial justice. Even conceding that the minimum contacts requirement can be met by attributing contacts among conspirators, specific applications of conspiracy jurisdiction might still be constitutionally suspect if they were unreasonable. In *World-Wide Volkswagen*, the Court identified several factors relevant to determining the reasonableness of exercising jurisdiction: the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.[64]

It is easy to imagine many of these factors being present in cases where jurisdiction is sought based on a conspiracy. Where the conspiracy has caused harm in the forum state, that state will have an interest in adjudicating the dispute. Where the plaintiffs who have suffered the harm reside in the forum state, they will have an interest in obtaining relief there. Further, and perhaps most persuasively, promoting efficiency within the interstate judicial system may weigh in favor of jurisdiction, as using a single forum to adjudicate claims against multiple defendants whose liability stems from the same underlying conduct conserves judicial resources and avoids duplicative proceedings.

In fact, it is difficult to imagine a conspiracy case in which the above factors would not be present. Determining whether attribution of contacts is fair and reasonable based solely on the presence of the *World-Wide Volkswagen* factors will almost always yield a pro-

62. 444 U.S. 286 (1980).

63. *See supra* Section I.A.

64. 444 U.S. at 292; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77 (1985).

jurisdiction result, assuming the plaintiffs have a viable claim. The Supreme Court, however, has made clear that tests which always yield pro-jurisdiction results and do not impose meaningful limits on courts' extraterritorial assertions of jurisdiction are constitutionally problematic.[65] Thus, *World-Wide Volkswagen*'s fairness factors, standing alone, are likely inadequate to distinguish cases in which attribution of contacts among conspirators is constitutional from those in which it is not.

2. Cabining Conspiracy Jurisdiction: Knowledge and Foreseeability

Another possible way to tame conspiracy jurisdiction and alleviate due process concerns is to limit when it is appropriate to attribute forum contacts among conspirators. For example, Professor Althouse argues that attribution of contacts among conspirators is appropriate only when evidence shows the nonresident conspirator knew or should have known that participating in the conspiracy entailed a "risk of consequences in the forum state substantial enough to require him to defend a lawsuit in that state."[66] On Professor Althouse's view, then, it would be unconstitutional to assert jurisdiction over a nonresident defendant who could not foresee that the conspiracy he joined would commit acts within the forum state.[67] As noted above, a number of courts exercise jurisdiction over nonresident conspirators without any evidence that the in-state acts of other conspirators or in-state effects of the conspiracy were foreseeable to the nonresident conspirators when they joined the conspiracy.[68] Such applications of conspiracy jurisdiction would clearly violate due process under Professor Althouse's view.

On the other hand, some courts find no constitutional problem with attributing jurisdictional contacts among conspirators even where the conspiracy's in-state acts or effects were not foreseeable to the other

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65. *See* Daimler AG v. Bauman, 571 U.S. 117, 134–36 (2014) (rejecting the Ninth Circuit's test for attributing contacts from an in-state subsidiary to a foreign corporation because the test "will always yield a pro-jurisdiction answer").

66. Althouse, *supra* note 7, at 255 (footnote omitted). According to Professor Althouse:

> The touchstone of this analysis is the non-acting defendant's responsibility for the forum contact which arises from the relationship between him and the direct actor. That responsibility may flow from actual control of the actor and benefit from the act, or it may flow from involvement in planning and encouraging the co-conspirator to perform the act. On the other hand, responsibility may not exist when one of the co-conspirators has at some remote time and place performed an act in furtherance of the conspiracy that the out-of-state defendant would not have anticipated.

Id. (footnote omitted).

67. *See id.*

68. *See supra* Section I.B.

conspirators.[69] If there is no constitutional problem with imposing *liability* on a defendant based on his coconspirator's unforeseen acts in furtherance of the conspiracy, such courts reason, why would it be problematic merely to subject a defendant to *jurisdiction* based on those same acts?[70] As Judge Posner puts it, "If through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction."[71]

The strongest response to this argument is that rules of conspiracy liability and rules of personal jurisdiction are designed to serve fundamentally different purposes.[72] Assigning liability for the acts of one member of a civil conspiracy to all members of the conspiracy reflects society's judgment about the culpability of knowingly joining an illegal conspiracy and provides plaintiffs with a greater opportunity for recovery by expanding the available pool of resources.[73] By contrast, due process limitations on personal jurisdiction are designed to protect potential defendants' liberty and planning interests in not being subject to the binding judgments of a forum with which they have no meaningful contacts.[74] There is no corresponding constitutionally protected liberty interest to be free from substantive liability based on the unforeseen acts of one's coconspirators. The rules of personal jurisdiction are designed to allow potential defendants to plan their activities with some knowledge of *where* they may be sued based on those activities,[75] whereas the rules of conspiracy liability simply tell potential defendants *whether* they may be sued for another's activities.[76] Thus, any version of conspiracy jurisdiction that authorizes

69. *See, e.g.*, Stauffacher v. Bennett, 969 F.2d 455, 459 (7th Cir. 1992).

70. *See id.* ("[F]or most purposes the acts of one conspirator within the scope of the conspiracy are attributed to the others. . . . [W]e have difficulty understanding why personal jurisdiction should be an exception."); Chenault v. Walker, 36 S.W.3d 45, 53–54 (Tenn. 2001) ("If due process does not prevent [a] co-conspirator from being held civilly or criminally responsible based on the principle of imputed conduct, it is difficult to see why it should prevent the exercise of jurisdiction based on that same principle.").

71. *Stauffacher*, 969 F.2d at 459.

72. *See* Riback, *supra* note 7, at 530.

73. *Id.*

74. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

75. *World-Wide Volkswagen*, 444 U.S. at 297 ("The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

76. Importantly, just because a defendant cannot be sued for conspiracy in a particular forum does not mean the defendant cannot be sued at all: the plaintiff is always free to seek recovery wherever the defendant is "at home" and thus subject to general jurisdiction. *See* Daimler AG v. Bauman, 571 U.S. 117, 127 (2014).

jurisdiction over a nonresident defendant who could not have known that the conspiracy he joined would commit acts or cause effects within the forum state is constitutionally suspect under the minimum contacts prong of modern personal jurisdiction doctrine. And as the next Section explains, even versions of conspiracy jurisdiction that condition contact attribution on knowledge or foreseeability cannot entirely alleviate due process concerns.

3. Divergent Due Process Protections Across Jurisdictions

The above concerns are all serious reasons to doubt the constitutionality of conspiracy jurisdiction, especially those versions of the theory that do not require knowledge or foreseeability as a condition of attribution. But there is another, previously unexplored reason to doubt the theory's constitutionality that poses problems for even the most restrictive versions of the theory: conspiracy jurisdiction makes constitutional limits on personal jurisdiction vary from jurisdiction to jurisdiction based on substantive state law.

Even among jurisdictions that use a rigorous test like the one articulated in *Cawley*,[77] the ease of establishing jurisdiction over nonresident conspirators can vary significantly from jurisdiction to jurisdiction. This is so for at least two reasons: jurisdictions have different substantive definitions of what constitutes a conspiracy, and jurisdictions require different levels of proof from plaintiffs to survive a motion to dismiss for lack of personal jurisdiction. Thus, even assuming that the Due Process Clause sometimes permits attribution of one conspirator's forum contacts to other members of the conspiracy, whether a conspiracy exists at all will depend on the substantive law of conspiracy that applies. And further, whether a plaintiff can successfully persuade a court to exercise jurisdiction over a nonresident conspirator will depend on the showing required in that jurisdiction for plaintiffs to survive a motion to dismiss for lack of personal jurisdiction.

For example, in *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, the Tennessee Supreme Court relied on Tennessee's definition of the tort of conspiracy in determining what the plaintiff would have to show to satisfy the first prong under the *Cawley* test.[78] Further, it relied on interpretations of Tennessee rules of procedure in

77. *See supra* note 55 and accompanying text.

78. 489 S.W.3d 369, 395–96 (Tenn. 2015) ("[A conspiracy is] an agreement between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means. Each conspirator must have the intent to accomplish this common purpose, *and each must know of the other's intent*." (emphasis added) (citations omitted) (internal quotation marks omitted)).

determining the burden plaintiffs bear at the motion to dismiss stage to establish jurisdiction.[79] But other jurisdictions have different definitions of a conspiracy[80] and require different levels of proof to survive a motion to dismiss.[81] Thus, the application of even the same version of conspiracy jurisdiction can vary by jurisdiction based on the substantive law of conspiracy that applies and the forum's procedural requirements for establishing personal jurisdiction. And it seems clear that the limits of a court's power to reach beyond the state and subject nonresidents to personal jurisdiction—limits that are circumscribed by the Due Process Clause—should not depend on substantive or procedural laws unique to that state.

One might object, however, that personal jurisdiction is not the only context in which constitutional protections vary by jurisdiction based on substantive state law. Under procedural due process doctrine, for example, whether a person has a constitutionally protected property interest is determined by looking to positive law.[82] Thus, the same government action (for example, firing a public employee) might trigger the due process protections of notice and a hearing in State A but not in State B, simply because State A's laws grant public employees a property right in continued employment while State B's do not.[83] If it is acceptable for constitutional protections to vary by state in the context of procedural due process protections for property interests, why not also in personal jurisdiction law?

Divergent due process protections are justifiable in the context of constitutional protections for property interests in a way they are not for personal jurisdiction. Because property rights "are not created by

79. *Id.* at 402 ("Once challenged, the Plaintiff had the burden of making a prima facie showing that jurisdiction existed through the production of affidavits and other written evidence." (citing Chenault v. Walker, 36 S.W.3d 45, 56 (Tenn. 2001))).

80. *See, e.g.*, Luck v. Primus Auto. Fin. Servs., Inc., 763 So. 2d 243, 247 (Ala. 2000) ("In order to succeed on a civil-conspiracy claim, a plaintiff must prove a concerted action by two or more people that achieved an unlawful purpose or a lawful end by unlawful means.").

81. *See, e.g.*, Santa Fe Techs., Inc. v. Argus Networks, Inc., 42 P.3d 1221, 1228 (N.M. Ct. App. 2001) ("When the district court bases its [personal jurisdiction] ruling on the pleadings and affidavits, the standard of review resembles that of summary judgment; the appellate court reviews the pleadings and affidavits or sworn testimony in the light most favorable to the party asserting jurisdiction.").

82. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). Other constitutional protections of property rights, such as the Takings Clause, raise the same issue, and the foregoing analysis applies equally to them.

83. *Compare* Perry v. Sindermann, 408 U.S. 593, 599–603 (1972) (holding that a Texas college's de facto tenure policy created a constitutionally protected property interest in continued employment), *with Roth*, 408 U.S. at 578 (holding that a Wisconsin law did not create a property interest in continued employment for a nontenured professor at a state university).

the Constitution" but instead "stem from an independent source such as state law," different states are free to define property differently.[84] So long as states are the entities responsible for defining the law of property, and so long as the Constitution protects property rights, some variation across jurisdictions in what is protected is inevitable. But the same is not true of personal jurisdiction. Constitutional limitations on personal jurisdiction protect defendants from being sued in a forum they have no connection to. Such limitations need not be—and historically have not been—inescapably bound to state law (conspiracy or otherwise). Personal jurisdiction cases are routinely resolved without reference to state law. And given the anomalous results that would flow from tying the existence of personal jurisdiction to state conspiracy laws, the fact that it is unnecessary to do so also renders it unwise.

Consider, for instance, two hypothetical states A and B. State A has a broadly drawn civil conspiracy statute that sweeps up many types of agreements, while State B has a more narrowly drawn statute that covers fewer types of agreements.[85] Defendant *D* is a resident of State C and has no contacts with State A or B. *D* does, however, participate in an illegal arrangement with person *E*, who has established identical contacts with State A and State B relating to the arrangement. *D*'s participation in the arrangement qualifies him as a coconspirator of *E* under the law of State A, but not of State B. Assume also that *D* could foresee with equal certainty that the arrangement would have adverse effects in both State A and State B. Under any version of conspiracy jurisdiction (no matter how stringent), a court in State A would have jurisdiction over *D*, but a court in State B would not—even though *D*'s relationship to State A is identical to his relationship to State B with respect to the illegal arrangement. This hypothetical thus illustrates a previously unexplored constitutional problem with conspiracy jurisdiction: there is no reason the existence of personal jurisdiction over *D* should depend solely on which state's substantive law of conspiracy applies. The Due Process Clause should not provide *D* with varying levels of protection based solely on where he is sued.

84. *Roth*, 408 U.S. at 577.

85. Significant differences in states' civil conspiracy laws are not merely hypothetical. For example, it is more difficult to establish a civil conspiracy in Tennessee than in other states because Tennessee requires that each conspirator be aware of every other conspirator's unlawful intent. *Compare* First Cmty. Bank, N.A. v. First Tenn. Bank, N.A., 489 S.W.3d 369, 395–96 (Tenn. 2015) ("[A conspiracy is] an agreement between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means. Each conspirator must have the intent to accomplish this common purpose, *and each must know of the other's intent*." (emphasis added) (citations omitted) (internal quotation marks omitted)), *with Luck*, 763 So. 2d at 247 (explaining that under Alabama's civil conspiracy law, "a plaintiff must prove a concerted action by two or more people that achieved an unlawful purpose or a lawful end by unlawful means").

One might object that the Constitution routinely provides litigants with varying levels of protection based on where they are sued: some jurisdictions interpret the Constitution to be more protective than others, and litigants sued in those jurisdictions will enjoy greater constitutional protections than those sued in less protective jurisdictions. But divergent due process protections in the personal jurisdiction context are different in kind from divergent protections caused by nonuniform interpretations of the Constitution. Nonuniform interpretations of federal law can be brought into uniformity by the Supreme Court, but divergent due process protections created by conspiracy jurisdiction cannot, because conspiracy jurisdiction makes due process protections depend on substantive state law. Thus, to ensure uniform application of constitutional limits on personal jurisdiction, it is imperative that personal jurisdiction standards not be tethered to state conspiracy laws. Whether a conspiracy exists under state law, and whether a defendant is a member of the conspiracy, is simply irrelevant to whether the defendant may constitutionally be subjected to jurisdiction in a given forum.

B. Conspiracy Jurisdiction and Sound Policy

Even assuming the application of conspiracy jurisdiction does not always produce unconstitutional results, the question remains whether the theory reflects sound policy and should thus be authorized by state long-arm statutes. The primary arguments in favor of conspiracy jurisdiction are that it promotes judicial efficiency and fairness. Where the liability of two or more parties rests on the same factual allegations, it promotes efficiency to bring all parties before the same court to avoid duplicative proceedings in multiple courts. Assuming that multiple parties are liable to the same plaintiff on causes of action arising out of the same facts, the plaintiff's choice of forum as to where to sue them is arguably entitled to some deference. Further, permitting a defendant who participated in an illegal conspiracy that harmed a plaintiff to avoid jurisdiction where the plaintiff was harmed simply because his coconspirator carried out the acts creating contacts with the forum seems inequitable.

On the other hand, there are good reasons for abandoning conspiracy jurisdiction even in the absence of due process concerns. First, the inquiry into the existence of a conspiracy is superfluous to the jurisdictional analysis and distracts from the real constitutional inquiry of whether each defendant purposefully availed itself of the forum

state.[86] Second, even if it were sound in theory, conspiracy jurisdiction proves fatally difficult to apply in practice because the jurisdictional facts are frequently inextricably bound up with the merits of the case.[87]

1. Simplifying the Jurisdictional Inquiry

Even critics of conspiracy jurisdiction generally concede there will be cases in which its operation will not run afoul of due process.[88] However, the fact that conspiracy jurisdiction may sometimes—even often—be constitutional is not by itself a good reason to adopt it. The Supreme Court has repeatedly emphasized that jurisdiction over a nonresident requires that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State."[89] Since the purposeful availment standard is the central inquiry under the Supreme Court's personal jurisdiction case law, focusing on the existence of an alleged conspiracy only adds unnecessary confusion to the jurisdictional analysis.[90] If a defendant purposefully participates in a conspiracy knowing that the conspiracy will produce consequences in a particular forum sufficient to give rise to suit in that forum, then presumably the defendant will have purposefully availed himself of the forum.[91] In other words, participation in a conspiracy may itself constitute purposeful availment of the forum state, eliminating the need to attribute the contacts of coconspirators.[92]

However, in such cases, the fact that the defendant is a member of a conspiracy is only relevant to the jurisdictional analysis to the extent that it evidences the defendant's intent to purposefully avail himself of the forum state. The case can be analyzed without relying upon the presence of a conspiracy to provide any special justification for asserting jurisdiction.[93] Thus, focusing on whether a conspiracy existed and whether the defendant was a member of the conspiracy distracts from the real question of whether the defendant, through his own actions, purposefully availed himself of the forum state. Given the

86. *See* Riback, *supra* note 7, at 525–26.

87. Althouse, *supra* note 7, at 247–51.

88. *See* Riback, *supra* note 7, at 521 ("[I]n many cases satisfaction of the conspiracy theory will also comply with due process . . . .").

89. Hanson v. Denckla, 357 U.S. 235, 253 (1958); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Kulko v. Superior Court, 436 U.S. 84, 94 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

90. *See* Riback, *supra* note 7, at 510–11, 513–16.

91. *See id.* at 524–26.

92. *See id.*

93. *See id.*

potential for confusion, some argue the theory serves no useful purpose, even where it does not produce unconstitutional results.[94]

2. Merging Jurisdiction and Merits

A second policy argument against conspiracy jurisdiction is that even if the theory were constitutional, the theory proves difficult or impossible to apply in practice. In particular, determining whether a defendant is subject to jurisdiction under the theory essentially requires courts to conduct a trial on the merits at the outset of the case. Establishing jurisdiction under the conspiracy theory requires at a minimum that a conspiracy exist, that the defendant be a member of the conspiracy, and that at least one other member of the conspiracy commit jurisdiction-conferring acts in furtherance of the conspiracy.[95] To resolve the jurisdictional issue for purposes of a motion to dismiss, the trial court must find facts sufficient to support each of the above elements at the outset of the case.[96] Such fact-finding proves extensive—in most jurisdictions, proof of a conspiracy requires at least (1) agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means, (2) specific intent to accomplish the common purpose, and (3) actual injury caused by acts committed pursuant to the conspiracy.[97] Findings on such facts at the jurisdictional stage would essentially resolve the merits of the case, upending the normal sequence of litigation and imposing significant costs on both litigants and the court.

There are no easy answers to the "problem of [the] inextricability of the merits."[98] To postpone determination of the jurisdictional issue until the case is resolved on the merits—in addition to potentially exceeding the court's authority to subject a defendant to process—would render the issue moot.[99] Further, allowing the lawsuit to proceed before resolving the jurisdictional question would often induce defendants to settle before it was clear whether the plaintiff would succeed on the merits, and consequently, whether the defendant was properly subject

94. *Id.* at 536.

95. *See supra* Section I.B.

96. Stauffacher v. Bennett, 969 F.2d 455, 459 (7th Cir. 1992) ("[T]o resolve the jurisdictional issue in advance would require the district court to conduct an evidentiary hearing as extensive as, and in fact duplicative of, the trial on the merits—either that or permit a nonresident to be dragged into court on mere allegations.").

97. *See, e.g.*, Faulkner v. Ark. Children's Hosp., 69 S.W.3d 393, 406 (Ark. 2002).

98. Althouse, *supra* note 7, at 258.

99. *Stauffacher*, 969 F.2d at 459 ("If the plaintiff won on the merits, the jurisdictional issue would be automatically resolved in his favor, while if he lost the defendant would waive the defense of personal jurisdiction and take the judgment for its preclusive value in subsequent suits.").

to jurisdiction in the first place. But the alternative of resolving the jurisdictional question at the outset would require extensive fact-finding that could usually only be achieved by subjecting the defendant to burdensome discovery, one of the very harms the law of personal jurisdiction is designed to prevent.

Some commentators have attempted to fashion a middle road between the two approaches. Professor Althouse has proposed a method of analysis similar to that used by courts when faced with a motion for a preliminary injunction.[100] Motions for a preliminary injunction call on courts to act at the very beginning of a case to prevent irreparable harm to the plaintiff.[101] Courts decide whether to grant a preliminary injunction by balancing the plaintiff's likelihood of success on the merits with other equitable factors.[102] A similar model could be employed when courts are faced with a motion to dismiss for lack of personal jurisdiction in a conspiracy case:

> [A] court presented with a motion to dismiss for lack of personal jurisdiction faces a need to justify compelling the defendant to undergo the rigors of discovery, pretrial practice and trial. It should also approach this motion in the framework of likelihood of success. The likelihood that [the] plaintiff will ultimately meet his burden of proving the existence of jurisdiction by a preponderance of the evidence should be balanced against the equities presented—such as the burden of litigation to be placed on the defendant, the prospect of forcing the plaintiff to split his litigation, the problem of forum shopping, and the need to include the additional defendants in order to obtain full relief.[103]

Ultimately, any solution to the problem of conspiracy jurisdiction's inextricable connection to the merits of the case must strike some balance between defendants' due process rights and plaintiffs' interest in obtaining relief in a forum of their choice. Professor Althouse's solution appears to strike a reasonable balance, but like all balancing tests it can be difficult to administer in a predictable fashion. Part III instead proposes a method of analysis that minimizes the problem of merging jurisdictional questions with the merits of the case by shifting the focus of the jurisdictional inquiry away from determining whether a conspiracy existed and toward determining whether an alleged conspirator has targeted the forum state by his own conduct.

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100. Althouse, *supra* note 7, at 258.

101. *Id.*

102. *Id.*

103. *Id.* (footnotes omitted).

III. RETHINKING CONSPIRACY JURISDICTION IN LIGHT OF RECENT SUPREME COURT OPINIONS

Attributing jurisdictional contacts among coconspirators presents constitutional and practical difficulties. Fundamentally, conspiracy jurisdiction runs into the basic objection that personal jurisdiction must be assessed on a defendant-by-defendant basis, with the central focus remaining on the "relationship among the defendant, the forum, and the litigation"[104] rather than the relationship between the defendant and a third party. Thus, this Part proposes another path forward. Rather than relying on attributed contacts to support personal jurisdiction in conspiracy cases, courts should rethink what counts as a forum "contact" in multidefendant conspiracy cases by focusing on the relationship between the defendant's extraterritorial conduct and the forum state.

Most scholarship on conspiracy jurisdiction dates from the 1980s.[105] However, in recent years the Supreme Court has decided a number of important personal jurisdiction cases.[106] These decisions—particularly those addressing personal jurisdiction in the stream of commerce and intentional tort contexts—share important similarities with conspiracy cases and provide the appropriate framework for analyzing personal jurisdiction in conspiracy cases.

A. Stream of Commerce Doctrine and Conspiracy Jurisdiction

When a consumer is injured by a product in a state where the manufacturer's only contact is the fact that its product was sold into the state (via the "stream of commerce"), the issue arises whether the injured consumer may sue the manufacturer in that state.[107] Stream of commerce doctrine grapples with this issue. Supreme Court cases addressing stream of commerce theory can prove useful in analyzing conspiracy jurisdiction due to similarities between stream of commerce and conspiracy cases. In particular, a nonresident conspirator whose conspiracy produces harmful effects in a state can be analogized to a manufacturer whose products cause injury in a state even though the manufacturer itself did not place the goods in the state—or perhaps

104. Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984)).

105. *See* Althouse, *supra* note 7; Brilmayer & Paisley, *supra* note 7; Riback, *supra* note 7.

106. *See Walden*, 134 S. Ct. 1115; Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

107. *See, e.g.*, *Nicastro*, 564 U.S. at 877; *see also* 4 WRIGHT ET AL., *supra* note 12, § 1067.4 (explaining Supreme Court decisions developing stream of commerce theory).

even know they were entering the state.[108] In both cases, the extraterritorial actions of nonresident defendants (participating in a conspiracy or making a defective product) can cause harmful effects in a forum with which the nonresident defendant has little real connection.

1. The Evolution of Stream of Commerce Doctrine

In *World-Wide Volkswagen Corp. v. Woodson*, the Court stated that jurisdiction is appropriate under the Due Process Clause where a defendant "delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State."[109] After *World-Wide Volkswagen*, however, much confusion ensued regarding whether a defendant's mere "expectation" that his goods would flow from the stream of commerce into a given state authorized jurisdiction in that state, or whether something else beyond "expectation" was required.[110]

This confusion was furthered by the Court's fractured opinions in *Asahi Metal Industry Co. v. Superior Court*.[111] In *Asahi*, Justice O'Connor wrote for a four-Justice plurality that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[112] She further noted that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[113] Instead, some further act targeting the forum state is needed.[114] However, Justice Brennan, also writing for four Justices, concluded that jurisdiction under the stream of commerce theory is appropriate as long as the defendant "is aware that the final product is being marketed in the forum State."[115]

After more than two decades of silence on the subject, the Court returned to the stream of commerce doctrine in *J. McIntyre Machinery, Ltd. v. Nicastro*.[116] The Court considered whether J. McIntyre, an

108. At least one other author has suggested such an analogy. *See* Althouse, *supra* note 7, at 253 n.115 ("A person setting a conspiracy in motion might also be analogized to a manufacturer defending a negligence action who has delivered products into the stream of commerce.").

109. 444 U.S. 286, 298 (1980) (emphasis added).

110. *See* 4 WRIGHT ET AL., *supra* note 12, § 1067.4.

111. 480 U.S. 102 (1987).

112. *Id.* at 112.

113. *Id.*

114. *See id.*

115. *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

116. 564 U.S. 873 (2011).

English company, was subject to jurisdiction in the state courts of New Jersey for claims arising out of an injury caused by one of its products there.[117] J. McIntyre never marketed or shipped goods to New Jersey, and the only goods it sold to buyers in the United States were to a U.S. distributor, who was not under the company's control.[118] The New Jersey Supreme Court nevertheless concluded that jurisdiction was proper because the injury occurred in New Jersey, because the defendant knew or should have known its products were distributed through a nationwide distribution system that might result in those products being sold in any of the fifty states, and because the defendant failed to take reasonable steps to prevent the distribution of its products in New Jersey.[119] The Supreme Court reversed and held that the New Jersey courts' exercise of jurisdiction over J. McIntyre was improper.[120] While six Justices agreed as to the result, they differed in their reasoning.[121]

Justice Kennedy's plurality opinion for four Justices attempted to bring some clarity to stream of commerce doctrine and is of particular relevance to conspiracy jurisdiction. Following Justice O'Connor's approach in *Asahi*, the plurality concluded that jurisdiction based on a defendant's placement of goods into the stream of commerce is proper "only where the defendant can be said to have targeted the forum; . . . it is not enough that the defendant might have predicted that its goods will reach the forum State."[122] The key inquiry, according to the plurality, is not whether the defendant could foresee that its products would enter the forum state when it placed them into the stream of commerce, but "whether the defendant's activities manifest an intention to submit to the power of a sovereign."[123] This idea of submission to a state's authority is apparently just another way of saying that the defendant purposely availed itself "of the privilege of conducting activities within the forum State."[124]

2. Applying Stream of Commerce Principles to Conspiracy Cases

Applying the principles from Justice Kennedy's opinion in *Nicastro* and Justice O'Connor's opinion in *Asahi* to conspiracy

117. *Id.* at 878–79.
118. *Id.* at 878.
119. *Id.* at 879.
120. *Id.* at 887.
121. *See id.* at 876, 887.
122. *Id.* at 882.
123. *Id.*
124. *Id.* (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

jurisdiction would significantly limit the ability of courts to subject nonresident conspirators to jurisdiction based on their coconspirator's contacts. Under this approach, even knowledge or foreseeability that a conspiracy will produce harmful effects in a given state would be insufficient to subject a nonresident conspirator to jurisdiction. Rather, a nonresident conspirator would need to purposefully target the forum state by his own actions.

In the stream of commerce context, intentional targeting occurs by conduct manifesting the defendant's intent to serve the market in the forum state.[125] Such conduct may include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[126] By analogy, intentional targeting by a nonresident conspirator could consist of encouraging coconspirators to take action in the forum state or planning, directing, or coordinating the activity of other coconspirators designed to produce effects in the forum state. Such purposeful targeting would justify jurisdiction over the nonresident conspirator without needing to rely upon attribution of contacts from coconspirators who actually carried out the activities producing effects in the forum.

Under this account, jurisdiction over a conspirator who has not purposefully targeted the forum will be inappropriate even if the conspiracy as a whole produces harmful effects in the forum. In this scenario, the nonresident conspirator is in a similar position to the manufacturer who sells defective products to a distributor, who in turn sells them to consumers in a forum the manufacturer has not targeted where they then cause harm. In both cases, the nonforum actors engage in conduct that will subject them to liability (conspiracy liability in one case and products liability in the other) but not to jurisdiction in that forum. In both cases, the question is not *if* the nonresident conspirator or manufacturer can be sued, but *where*. And the principles from the plurality opinion in *Nicastro* counsel that a nonresident conspirator can only be sued in those fora he intentionally targets during his participation in the conspiracy.

B. Extraterritorial Intentional Torts and Conspiracy Jurisdiction

The usual principles of personal jurisdiction often apply somewhat differently to cases where a defendant has committed an

125. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

126. *Id.*

intentional tort outside the forum that produced harmful effects within the forum.[127] Even when the Court has maintained that the same basic principles governing specific jurisdiction in other cases also apply to intentional tort cases,[128] its analysis has looked somewhat different—and rightly so. In particular, the Court treats as "contacts" with the forum state any actions (even extraterritorial ones) purposely aimed at the forum state that produce harmful effects within the forum.[129] And as this Section explains, the Court's effects-based understanding of forum contacts in extraterritorial intentional tort cases provides a useful paradigm for evaluating personal jurisdiction in conspiracy cases.

1. Personal Jurisdiction and Extraterritorial Intentional Torts

The seminal personal jurisdiction case involving an intentional tort committed outside the forum state is *Calder v. Jones*.[130] In *Calder*, the Court considered whether California courts had jurisdiction over a reporter and an editor from Florida for a libel suit arising out of an article they had written about the California plaintiff.[131] The defendants wrote and edited the article entirely from Florida, though they did rely on phone calls to California sources in producing the article.[132] After the article was completed, the defendants' employer published and circulated the article in California, where the plaintiff later sued.[133]

The Court concluded jurisdiction over the defendants was proper in California based on the "effects" their conduct in Florida had caused in California.[134] While the defendants argued that jurisdiction was improper because they had no control over where their employer chose to publish and circulate the article, the Court nevertheless upheld jurisdiction because the defendants, in writing and editing the article, had "expressly aimed" their "intentional, and allegedly tortious" conduct at California.[135] The defendants' express aiming was

127. *Nicastro*, 564 U.S. at 877–78 ("There may be exceptions [to the general rule that a defendant must purposefully avail itself of the privilege of conducting activities in the forum State] . . . in cases involving an intentional tort.").

128. Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014) ("These same [personal jurisdiction] principles apply when intentional torts are involved.").

129. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 788–90 (1984).

130. 465 U.S. 783.

131. *Id.* at 784–85.

132. *Id.* at 785, 788.

133. *Id.* at 784–85.

134. *Id.* at 789.

135. *Id.*

manifested by their knowledge that the article would harm the plaintiff and that such harm would occur mainly in California, where the plaintiff lived and worked and where the magazine had its largest circulation.[136] The Court concluded the defendants were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."[137]

The Court recently revisited effects-based jurisdiction in *Walden v. Fiore*.[138] In *Walden*, a law enforcement officer at a Georgia airport seized a large sum of cash (believed to be drug related) from the plaintiffs, who were professional gamblers on their way from Puerto Rico to Nevada.[139] The officer knew at the time he seized the cash that the plaintiffs were traveling to Las Vegas, Nevada.[140] At some point after seizing the cash, the officer helped draft an allegedly false and misleading affidavit purporting to show probable cause for forfeiture of the funds and forwarded that affidavit to a U.S. Attorney's Office in Georgia.[141] The plaintiffs claimed the seizure violated their Fourth Amendment rights and brought a *Bivens* action to recover damages in federal court in Nevada.[142] But the Supreme Court held that jurisdiction over the officer was lacking in Nevada.[143] Several parts of the Court's reasoning are relevant to analyzing jurisdiction in conspiracy cases.

The central reason the Court refused to uphold jurisdiction in Nevada was because the defendant's tortious conduct (submitting a false affidavit that delayed the return of the seized cash) targeted only the *plaintiffs*, not the *forum state*.[144] The plaintiffs claimed that they had been injured in Nevada because they lacked access to their seized funds while in Nevada.[145] But the Court noted that the continued deprivation of the plaintiffs' funds was not an effect that was tethered to *Nevada* in any meaningful way.[146] The only reason the plaintiffs lacked access to their funds in Nevada was because that is where they chose to be after their funds were seized.[147] Thus, the harmful effects of

136. *Id.* at 789–90.
137. *Id.* at 790.
138. 134 S. Ct. 1115 (2014).
139. *Id.* at 1119.
140. *See id.*
141. *Id.* at 1119–20.
142. *Id.* at 1120.
143. *Id.* at 1121.
144. *Id.* at 1123–25.
145. *Id.* at 1125.
146. *Id.*
147. *Id.*

the defendant's conduct could just as easily have occurred in any of the other forty-nine states if that is where the plaintiffs had chosen to travel.[148] And the mere fact that the defendant knew that the plaintiffs were travelling to Nevada and had Nevada connections was not sufficient to confer jurisdiction over him in Nevada.[149]

Walden appears to foreclose an expansive reading of *Calder*. The distinction between the extraterritorial submission of a false affidavit in *Walden* and the extraterritorial submission of a libelous article in *Calder* appears to be that the false affidavit was aimed only at the plaintiffs (not Nevada), while the libelous article was aimed not only at the plaintiff but also at California. Read together, these cases suggest that extraterritorial conduct must target the forum state itself to support jurisdiction over the defendant; it is not enough that the conduct target a plaintiff known to reside in the forum state or that the conduct produce foreseeable effects in the forum state. In practice, this means that whether extraterritorial conduct counts as targeting the forum state depends on the nature of the harm inflicted on the plaintiff. If the harm is of a type that can be suffered anywhere based solely on the unilateral decision of the plaintiff to travel to another state (as in *Walden*), then the fact that the harm foreseeably occurred in a particular forum will not be enough to support jurisdiction there. On the other hand, if the harm is of a type that will be experienced uniquely in a particular state (as with the reputation-based effects of libel in *Calder*), then intentionally causing that harm in a particular forum will support jurisdiction there.

The *Walden* Court made this point clear in its treatment of *Calder*: "The crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[150] Put differently, "because publication to third persons is a necessary element of libel, the defendants' intentional tort actually occurred *in* California."[151] Thus, the nature of the harm inflicted in the forum state and how the alleged wrong is legally defined may prove relevant to determining whether extraterritorial conduct targeted a particular forum.

148. *See id.*
149. *Id.* at 1124–25.
150. *Id.* at 1123–24.
151. *Id.* at 1124 (citation omitted).

2. Applying Effects-Based Jurisdictional Principles to Conspiracy Cases

Applying either the effects-based jurisdictional principles of *Calder* and *Walden* or the stream of commerce principles discussed above[152] to conspiracy cases leads to a similar analysis. The defendants in conspiracy cases are frequently in similar positions to the defendants in *Calder* and *Walden*: nonresident defendants commit extraterritorial acts (in furtherance of a conspiracy) that contribute to harmful effects in the forum state. Moreover, as *Nicastro* does in the stream of commerce context, *Walden* and *Calder* make clear in the intentional tort context that mere foreseeability or knowledge that extraterritorial conduct will produce harmful effects in the forum state is insufficient to constitute the "express aiming" or "purposeful targeting" necessary to support jurisdiction. Additionally, extraterritorial conduct that targets a plaintiff known to reside in the forum state is insufficient to support jurisdiction where the injury inflicted on the plaintiff is not tethered to the state in any unique way.

What type of extraterritorial conduct by coconspirators might constitute intentional targeting of the forum state? *Calder* provides some guidance. There, the defendants intentionally targeted California by writing a story about the plaintiff's activities in California, relying on phone calls to California sources and causing unique reputational injury in California, where the plaintiff lived and worked.[153] While the type of conduct constituting intentional targeting in the conspiracy context is necessarily fact dependent, it could include conspirators from outside the forum state illegally agreeing not to sell products to a plaintiff's business in the forum state.[154] It might also include conspirators from outside the forum state agreeing to fix the prices of their products at artificially high levels, so that whenever any conspirator's products are sold in the forum state consumers will pay an artificially inflated price.[155] While there will no doubt be close cases under this standard, relying on effects-based jurisdictional principles removes the need for attribution of jurisdictional contacts among conspirators and avoids the many constitutional and practical difficulties such attribution poses.

Relying on stream of commerce and effects-based jurisdictional principles to analyze personal jurisdiction in conspiracy cases is superior to conspiracy jurisdiction in several respects. The Supreme

152. *See supra* Section III.A.

153. Calder v. Jones, 465 U.S. 783, 788–89 (1984).

154. Giusti v. Pyrotechnic Indus., 156 F.2d 351, 352–54 (9th Cir. 1946).

155. Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., 752 So. 2d 582, 585–86 (Fla. 2000).

Court's stream of commerce and extraterritorial intentional tort cases provide an objective standard that will apply uniformly to defendants in all jurisdictions, without tethering constitutional protections to individual state laws. Further, abandoning conspiracy jurisdiction will simplify the jurisdictional inquiry, allowing courts to focus on the relationship between the individual defendant, the forum, and the litigation, rather than getting bogged down in determining whether a defendant was a member of a conspiracy and if so whether attribution of contacts among conspirators is appropriate. Finally, employing stream of commerce and effects-based jurisdictional principles instead of conspiracy jurisdiction will prevent courts from having to decide the merits of a case at the outset to determine whether jurisdiction exists, thereby conserving both the litigants' and the court's resources.

CONCLUSION

Courts have long wrestled with the scope of their power to subject nonresident defendants to jurisdiction, and conspiracy jurisdiction represents one recent manifestation of this struggle. Many courts have tended to treat conspiracy jurisdiction in isolation from the Supreme Court's broader body of personal jurisdiction precedent by attempting to determine the circumstances under which it is appropriate to attribute forum contacts among conspirators. But given the considerable constitutional and practical difficulties with attributing contacts among conspirators, a better approach is to apply jurisdictional principles from the Supreme Court's stream of commerce and extraterritorial intentional tort decisions to conspiracy cases. Requiring that nonresident conspirators intentionally target a forum through their own conspiratorial conduct to be subject to jurisdiction there will vindicate the planning and liberty interests personal jurisdiction law is designed to promote, avoid the problem of making constitutional limits on personal jurisdiction depend on substantive state law, and prevent the many practical difficulties that attribution of jurisdictional contacts poses.

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