

Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson

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My greatest fear when I agree to be a commentator is that I will have nothing to say about the paper. As I read the paper by Professors Cameron and Johnson, I increasingly had a sinking feeling that I would have absolutely nothing to say. Their paper makes two major points. First, the paper describes the factual background of the landmark decision on personal jurisdiction: *International Shoe Co. v. Washington*.¹ I have nothing to add to their fascinating account of the case.

Second, Professors Cameron and Johnson describe the ultimate outcomes of Supreme Court cases dealing with personal jurisdiction. They show that the party that wins the personal jurisdiction issue before the Supreme Court usually prevails on the merits. I have relatively little to say about this and certainly agree that procedural issues, such as personal jurisdiction, have a strong relationship to the substantive outcome of cases.

At the conclusion of their paper, Professors Cameron and Johnson offer two suggested improvements in the law of personal jurisdiction: that there should be greater certainty in the content and application of the minimum contacts rule and that there should be more judicial deference to state rules concerning personal jurisdiction. Although I do not disagree with the descriptive parts of Professors Cameron and Johnson's paper, I do challenge their recommendations. Nothing in their analysis of *International Shoe* or the disposition of the Supreme Court cases supports these recommendations. Moreover, the desirability of these reforms is very questionable.

In responding to Professors Cameron and Johnson, I make three points. First, the relationship between jurisdiction and

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¹ 326 U.S. 310 (1945).

outcome is much more complicated than their paper makes it seem. Second, the need for greater certainty in jurisdictional rules is unsupported and very suspect. Third, deference to state law will not solve any of the problems in the law of personal jurisdiction identified by Professors Cameron and Johnson.

These three points should not obscure my overall agreement with Professors Cameron and Johnson and my admiration for their paper. Both their description of *International Shoe* and their study of the disposition of Supreme Court decisions are important contributions to the law of personal jurisdiction.

I. THE RELATIONSHIP BETWEEN JURISDICTION AND OUTCOME

Professors Cameron and Johnson carefully researched the ultimate outcome of the Supreme Court's cases concerning personal jurisdiction. They show that in over ninety percent of the cases decided by the Supreme Court concerning personal jurisdiction, the party that prevailed on the issue of personal jurisdiction ultimately succeeded on the merits.

Although Professors Cameron and Johnson provide a fascinating and original account of how these cases were resolved, I question how much their study can be used to support the conclusion that there is a relationship between jurisdiction and outcome. I do not deny such a relationship; rather, I question how much their study, however fascinating it is, proves that decisions about jurisdiction determine outcomes on the merits.

First, their study simply presents a correlation; it does not show that the decision on jurisdiction was important in deciding the outcome on the merits. For example, the result in these cases might have been exactly the same even if the Court had decided the jurisdictional issue the opposite way. There is no way to know from the study whether the outcome was determined by the decision about jurisdiction or whether it would have been the same no matter what the ruling on jurisdiction.

Second, generalizing from these cases is highly questionable. The fact that the parties litigated the personal jurisdiction issue all the way to the Supreme Court is a strong indication that these are cases where the parties perceived that a great deal depended on the outcome of the jurisdictional issue. In other words, these are probably the cases where personal jurisdiction

matters the most. Therefore, any broader generalization from these cases about the relationship between jurisdiction and disposition must be suspect.

Third, it is possible that the Supreme Court's ruling in favor of a party, albeit just on the jurisdictional issue, may have been a reason for the ultimate outcome of the cases. According to the study by Professors Cameron and Johnson, many of the cases ultimately were settled or not pursued. Once a party has litigated all the way to the Supreme Court, the resources for litigation may be exhausted. The party that pursued the case all the way to the Supreme Court and then lost on jurisdiction might be demoralized and lack the desire to pursue the matter further.

In fact, the party losing on the jurisdictional issue might well exaggerate its importance to the ultimate outcome of the case. Having taken the resources and time to litigate all the way to the Supreme Court, the parties might overestimate the importance of the jurisdictional issue. Having lost the jurisdictional issue, a party might decide that the best course is to settle the matter.

Indeed, even the lower courts might have been influenced by the Supreme Court's decision in favor of one of the parties. Even though the Supreme Court was deciding only the question of personal jurisdiction, a lower court might be influenced by a Supreme Court decision for one side.

Again, none of this is to deny the importance of personal jurisdiction or to deny that the choice of forum matters in determining the result of a case. It is, however, to question how much can be generalized from the study by Professors Cameron and Johnson.

II. IS GREATER CERTAINTY IN JURISDICTIONAL RULES DESIRABLE?

Professors Cameron and Johnson conclude that the minimum contacts test is inherently vague and that there is a need for

more certainty in the law of personal jurisdiction.² I question, however, both the basis for their conclusion and its wisdom.

First, the study by Professors Cameron and Johnson does not support their conclusion that there should be more certainty in the test for personal jurisdiction. Professors Cameron and Johnson show that in seventeen of nineteen cases decided by the Supreme Court concerning personal jurisdiction, the party that won on the jurisdictional issue prevailed on the merits. But this does not indicate ambiguity in the law or support a need for more certainty. If the result had been the opposite, and in seventeen of nineteen cases the party that won on jurisdiction lost on the merits, there would be no more or less of an indication for a need for certainty in the law of personal jurisdiction.

Second, recent Supreme Court cases have added certainty to the law of personal jurisdiction. In *Schaffer v. Heitner*, the Supreme Court essentially eliminated quasi-in-rem jurisdiction as an independent basis for personal jurisdiction.³ In *World-Wide Volkswagen Corp. v. Woodson*⁴ and in *Asahi Metal Industry Co. v. Superior Court*,⁵ the Court clarified the test for personal jurisdiction in products liability cases. In *Burnham v. Superior Court*,⁶ the Court upheld transitory jurisdiction as a basis for a court's territorial authority. Obviously, these and other cases have not ended all uncertainty in the law of personal jurisdiction. But they have clarified the law in important respects.

Third, and most importantly, uncertainty in the law of personal jurisdiction is inevitable and desirable. Ultimately, the minimum contacts test is about fairness; when is it unfair to hale an out-of-state defendant to another state? No bright-line test for this can ever be created. Due process limits personal jurisdiction because, at some point, it is simply unfair and unjust to force a person to come to a foreign state as a party or witness. But it never will be possible to define that point with precision.

² Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 772-75 (1995).

³ 433 U.S. 186 (1977).

⁴ 444 U.S. 286 (1980).

⁵ 480 U.S. 102 (1987).

⁶ 495 U.S. 604 (1990).

For example, one way of establishing personal jurisdiction is by demonstrating that there is "general jurisdiction"; that is, that the person had systematic and continuous contacts with the state. But there can never be a formula or a clear rule for what degree of involvement in a state is enough to justify a conclusion of systematic and continuous contacts. Courts look at factors such as whether the individual personally availed herself of the state, whether the individual benefitted from the state, and whether litigation in the state was foreseeable. But none of these factors ever can be quantified. Fairness is inherently contextual and fact specific. Professors Cameron and Johnson never explain how minimum contacts can be made more specific without compromising the essential inquiry into whether it is fair to hale a person into another state.

Indeed, history shows that bright-line rules in the area of personal jurisdiction are generally worse than the more flexible minimum contacts test. Under *Pennoyer v. Neff*,⁷ a rigid test of presence in the state was used for determining personal jurisdiction. The test proved unworkable in practice, and courts developed many fictions for finding presence to establish personal jurisdiction when physical presence did not exist.⁸ "Minimum contacts" certainly is more ambiguous than the presence test, but it is far preferable in reflecting the underlying policy behind the due process limit on personal jurisdiction: it is fair to force a person to come to a distant jurisdiction only if the individual has minimum contacts with that state.

Finally, the costs of uncertainty are unproven. Undoubtedly, a vague standard means that there will be litigation over its meaning and application. But how much litigation is engendered compared to what would exist under alternative formulations? Professors Cameron and Johnson offer no answer. The costs of uncertainty compared to alternative standards is never shown. It is not sufficient to count the number of cases where personal jurisdiction is contested. The question is how much a greater degree of certainty would reduce such litigation. Professors Cameron and Johnson neither offer such information nor provide a way in which it might be obtained.

⁷ 95 U.S. 714 (1878).

⁸ See, e.g., FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 59-70 (4th ed. 1992).

I am not arguing that the law of personal jurisdiction is perfect or that it cannot be improved. There are ways in which it can be made clearer as the Court explains the factors to be assessed and the weight to be given to them. However, ultimately, personal jurisdiction must be about fairness, and fairness never can be reduced to a formula. Minimum contacts, although inherently vague, is a desirable test because it properly focuses courts on what should be at the core of personal jurisdiction analysis: does the person have sufficient connections to the state as to make it fair to hale her into the state?

III. DEFERENCE TO STATE LAW IS NOT THE ANSWER

Professors Cameron and Johnson state that “[o]ne modest way of limiting the uncertainty in jurisdictional doctrine would be for the courts to take a more deferential stance toward legislative judgments.”⁹ I question, however, whether this would solve the problem that they identify or whether it would even be desirable.

First, reliance on state laws is not likely to solve the problem of uncertainty. The one problem that Professors Cameron and Johnson identify in the law of personal jurisdiction is its lack of certainty. But never do Professors Cameron and Johnson show that greater deference to state laws would enhance certainty. In fact, state laws are frequently very vague. California law, for instance, provides that courts may exercise jurisdiction in any manner consistent with the Constitution. The law states: “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United states.”¹⁰ Obviously, relying on California state law would not add any clarity since it simply echoes the constitutional standard.

Second, the choice to have more reliance on state law improperly avoids the basic question: when is it unfair to hale a person into a state? The issue in personal jurisdiction cases is whether a state can constitutionally exercise territorial jurisdiction. The decision to defer to state law is an arbitrary choice to favor the party invoking jurisdiction under a state long-arm

⁹ Cameron & Johnson, *supra* note 2, at 839.

¹⁰ CAL. CIV. PROC. CODE § 410.10 (West 1973).

statute over the party seeking to avoid being haled into the jurisdiction. This does not address or resolve the question of whether it is fair to allow jurisdiction in a particular instance.

Phrased slightly differently, states have an incentive to maximize their territorial jurisdiction to provide a convenient forum for their citizens. The issue is when is it unconstitutional for states to exercise such jurisdiction. A rule of more deference to state long-arm statutes does not address the basic normative question of what should be the proper scope of personal jurisdiction.

Finally, I disagree with Professors Cameron and Johnson's observation that personal jurisdiction only concerns property rights.¹¹ There is also a basic liberty interest in being free from being haled into a distant forum. Forcing a person to travel to a state, against her will, is an interference with liberty. At the same time, access to the courts — for both plaintiffs and defendants — is a right. Personal jurisdiction has an obvious relationship to this liberty interest.

Professors Cameron and Johnson suggest that balancing of interests is more for the legislature than the judiciary. If, however, constitutional rights are at stake, I strongly disagree. The judicial role is to uphold the Constitution, including, inevitably, weighing fundamental rights against other interests. This is no less true in the area of personal jurisdiction than in any other realm of constitutional law. Unless Professors Cameron and Johnson contend that due process imposes no limit on personal jurisdiction, the judiciary must be involved here as with all areas of due process and constitutional rights.

CONCLUSION

I applaud Professors Cameron and Johnson's fascinating attempt to measure the impact of personal jurisdiction decisions. Their account of the background of *International Shoe* is also important and interesting. My concerns arise when they shift from this descriptive realm to a normative one and offer suggestions for reform in the law. Their proposals are not supported by their research and, in fact, would be undesirable.

¹¹ Cameron & Johnson, *supra* note 2, at 840-41.

The minimum contacts test has survived for fifty years because it is a desirable test that properly focuses courts' attention in personal jurisdiction cases. Although the law always can be improved, this is an area where major changes are unnecessary.