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Civil Procedure: Personal Jurisdiction and Aliens

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Litigation in the United States is increasingly international. Of the five significant personal jurisdiction cases that the U.S. Supreme Court has decided since 2011, three have involved alien defendants.[2] In these cases and others, the Court has treated foreign and domestic defendants the same under the "minimum contacts" standard for personal jurisdiction: for all defendants, a court may rely only on the defendant's contacts with the specific state in which the court sits.[3]

This chapter urges reconsideration of this approach for alien defendants. The relevant forum for determining an alien's minimum contacts should be the United States as a whole rather than the particular state in which the court sits.

Others have advocated such a national-contacts approach to personal jurisdiction in other contexts, including in federal but not state courts, for federal but not state claims, and under the Fifth but not the Fourteenth Amendment.[4] The claim in this chapter that a critical distinction—overlooked in other formulations of a national-contacts approach—is between alien and domestic defendants. That claim is supported by the twin principles of fairness and interstate sovereignty that animate personal jurisdiction, is unaffected by foreign relations, is consistent with the Court's recent majority opinions, and offers an answer to the Court's inability to muster a majority opinion in *McIntyre*. Of course, Congress can authorize a national-contacts approach in federal court for federal claims, even under existing constitutional law, but the claim here is that the Constitution allows national-contacts personal jurisdiction over aliens in state court and for state claims too.

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1. Summarized and excerpted from William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018).

2. Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tire Ops, S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

3. This standard applies in federal court under Rule 4(k). FED. R. CIV. P. 4(k)(1)(A).

4. *See* Dodge & Dodson, *supra* note 1, at 1207 (citing authorities).

Personal jurisdiction under the Due Process Clauses is grounded in two different jurisprudential justifications: fairness to the defendant and "interstate federalism."[5] Both support a national-contacts approach for personal jurisdiction over aliens.

For fairness to a domestic defendant, the particular state forum matters. Domestic defendants are subject to general jurisdiction in the state where they are at home.[6] They choose to reside in that state, with its familiar laws and procedures, knowing that they can be sued there for any and all claims. Compared to litigating in their home states, domestic defendants face high burdens of litigating in other states, with the potential costs of travel and relatively unfamiliar laws, procedures, and jurors. Given those sensitivities, domestic defendants may even try to structure their business affairs to avoid certain states. Fairness is a key issue for personal jurisdiction over domestic defendants, but it is an issue of relative fairness *among domestic forums*, specifically, whether a domestic defendant may be sued in a state other than its home state.

For alien defendants, by contrast, the particular state forum is largely irrelevant. After *Daimler*, nonresident aliens are not (except in extraordinary cases) "at home" in any state and are not subject to general jurisdiction anywhere in the United States. Aliens have no U.S. home state with familiar procedures; all U.S. courts are foreign to them. Whatever interstate differences exist among U.S. courts is of little concern to alien defendants in light of the stark differences between litigation in the United States and litigation outside the United States—including broad discovery, the prevalence of juries, the possibility of punitive and other noneconomic damages, the requirement that each side bear its own litigation costs and fees regardless of who prevails, and the propensity of U.S. plaintiffs' attorneys to use contingency-fee agreements—dwarf the relatively more modest differences in litigation among the states.[7] The same argument applies to travel burdens; for

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5. *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–93 (1980) (focusing on interstate federalism), *with* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); *and with* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780–81 (2017) (stating that the right to be free from the coercive power of the state depends, in part, on the interstate-federalism limitations on that coercive power).

6. *See Daimler*, 134 S. Ct. at 761.

7. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981).

the most part, aliens are far more concerned about the travel costs and burdens of litigating in America generally than in a particular state. Finally, many aliens engaged in commercial enterprises treat the United States as a single market rather than a state-specific market.[8] Their concern is not to target specific states but rather to deal in as many states as possible, regardless which ones those are. Of course, aliens may care a great deal about avoiding suit anywhere in the United States. But once their contacts justify suit somewhere in the United States, they ought not care—at least for fairness reasons—exactly where.

Unusual burdens associated with one state but not another could exist. Perhaps one state has a locality acutely hostile to aliens, or to the particular defendant. Or perhaps the burden on an alien defendant's domestic witnesses would be greater in one state over another. The response to these burdens is they are not the concern of the minimum-contacts component of personal jurisdiction. These burdens are primarily the concern of the venue doctrine, which is available to address them.

From the perspective of the alien defendant, therefore, it is fairest to think of minimum contacts as contacts with the United States as a whole. And if the alien defendant has sufficient minimum contacts with the United States, then it must be fair to hale the defendant into the United States to be held accountable for harms related to those contacts. Otherwise, an alien defendant with minimum contacts with the nation who happens not to have minimum contacts with any one state could cause harm in all fifty states but nevertheless escape personal jurisdiction in all U.S. courts.

Interstate federalism is the other component of personal jurisdiction. The idea is that a domestic defendant's decision to submit to a particular state of domicile gives that state primary regulatory authority over that defendant. For another state to assert personal jurisdiction over a domestic defendant is an intrusion on this authority of the home state, an intrusion that would be violate interstate federalism unless justified by the kind of contacts with the second state that would give rise to specific jurisdiction.[9] Of course, more than one state might try to claim *specific* jurisdiction, but the Supreme Court has

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8. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 898 (2011) (Ginsburg, J., dissenting) (focusing on the defendant's "endeavors to reach and profit from the United States market as a whole").

9. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (focusing on the requirements for forcing a party to defend "away from its 'home'").

always assumed that multiple states might constitutionally assert specific jurisdiction over the same defendant for the same claim without regard to interstate federalism as among them.[10] To the contrary, interstate federalism only restrains a state's exercise of personal jurisdiction when it intrudes on the authority of the defendant's *home* state.

Unlike a domestic defendant, an alien defendant is not "at home" in any U.S. state, and thus any state's assertion of specific jurisdiction over the alien cannot intrude on any home state's authority. Thus, interstate federalism is no bar to a national-contacts approach to personal jurisdiction over alien defendants.

Of course, a national-contacts approach does enlarge the number of courts that could assert personal jurisdiction over an alien defendant; in essence, if the defendant establishes minimum contacts with the United States, then the minimum-contacts test is met for courts *all* states, including courts in a state which has *no* connection to the defendant. But, to repeat, such a scenario, at least with respect to alien defendants, both is constitutionally fair and poses no interstate-federalism problems. Venue statutes and doctrines of forum non conveniens are available to rectify such anomalies.

A national-contacts approach to personal jurisdiction over aliens does broaden personal jurisdiction in ways that implicate the interests of other countries. Other countries might refuse to recognize U.S. judgments, and a broad U.S. jurisdiction might interfere with the nation's ability to negotiate international agreements. Those are concerns, to be sure, but they are policy concerns, not constitutional concerns. Congress can always restrict the scope of personal jurisdiction by statute to accommodate foreign-relations concerns.

National Contacts in State Courts

This chapter argues for a rule dependent upon the alienage status of the defendant, not upon the source of law or the nature of the forum.

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10. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774–78 (1984) (allowing New Hampshire to assert personal jurisdiction over a claim involving harm suffered by a New York resident in other states); *cf. McIntyre*, 564 U.S. at 899 (Ginsburg, J., dissenting) ("New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State.").

Thus, a national-contacts test for personal jurisdiction over aliens applies to all claims, state or federal, and in all courts, state or federal.[11]

The constitutionality of a national-contacts approach to personal jurisdiction over aliens in state court under state law begins with an easy proposition: The Fifth Amendment demands only a national-contacts approach to federal-question cases in federal court.[12] Congress has passed nationwide-service statutes on that assumption,[13] and the Supreme Court has promulgated nationwide service rules.[14]

With respect to state-law cases in federal courts, Rule 4(k) generally incorporates the Fourteenth Amendment's limitations on state courts,[15] but only as matter of rule, not constitutional obligation. This is evidenced by Rule 4(k)'s so-called "bulge rule," which permits jurisdiction over joined parties who are served within 100 miles of the federal courthouse,[16] a rule that would be unconstitutional if federal courts were required to follow state lines when hearing state-law cases. Again, only the Fifth Amendment applies to federal courts directly.

The question then becomes why the answer should be different for state courts under the Fourteenth Amendment. Technically, the Fourteenth Amendment's Due Process Clause is a separate clause from its Fifth Amendment counterpart. But if the words "due process" dictate a national-contacts approach for personal jurisdiction under the Fifth Amendment, then the same words ought to do the same under the Fourteenth Amendment. As this chapter has already shown, the

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11. States would, of course, be free to require state-specific contacts for alien defendants in their long-arm statutes in the absence of preemption by federal law.

12. Although the Court has not expressly so held, it has strongly hinted as much. *See McIntyre*, 564 U.S. at 884 ("Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 111 (1987) ("A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable long-arm statute, might well serve the ends of the CEA and other federal statutes."); *cf.* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619-20 (1992) (applying a national-contacts approach to FSIA).

13. *See, e.g.*, Clayton Act, 15 U.S.C. § 22; Securities Act, 15 U.S.C. § 77v; Securities Exchange Act, 15 U.S.C. § 78aa; Antiterrorism Act, 18 U.S.C. § 2334(a).

14. *See* FED. R. CIV. P. 4(k)(2).

15. *See* FED. R. CIV. P. 4(k)(1)(A).

16. *See* FED. R. CIV. P. 4(k)(1)(B).

fairness concerns to an alien defendant and the interstate federalism concerns embodied in the Constitution dictate a national-contacts approach regardless of the constitutional source of those concerns.

If there is no good reason to distinguish between federal and state courts with respect to alien defendants, there is one very powerful reason not to do so: uniformity in personal-jurisdiction rules guards against vertical forum shopping and inequitable administration of the laws.[17] If federal courts applied a national-contacts approach to personal jurisdiction over aliens, while state courts applied a state-contacts approach, then plaintiffs might seek ways to abuse diversity jurisdiction by, for example, invoking diversity jurisdiction even in the plaintiff's home state.[18] Such plaintiffs would also have an unfair advantage over similarly situated alien plaintiffs, who would not be able to invoke federal diversity jurisdiction.[19] Thus, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."[20] Alternatively, plaintiffs might add relatively insignificant federal claims in an effort to secure a federal forum. It is for such reasons of vertical uniformity that portions of the federal court long-arm rule mirror state court personal jurisdiction.[21] Adopting a national-contacts approach only for federal courts would violate this principle of uniformity.

Controlling the Scope of National Contacts

A national-contacts approach to personal jurisdiction only rarely, if ever, should produce a forum that is unfair to an alien defendant. Nevertheless, it is possible that a particular forum within the United States could impose meaningful inconveniences or litigation burdens on an alien defendant. An alien defendant from Vancouver, for example, whose claim-related U.S. conduct is concentrated in Seattle, Washington, might face inconvenience and other burdens if sued by a Seattle plaintiff in, say, a rural South Carolina court.

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17. These goals are sometimes associated with the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

18. *See* 28 U.S.C. § 1332(a).

19. The Constitution's grant of alienage jurisdiction does not extend to cases between two aliens. *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

20. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941).

21. FED. R. CIV. P. 4(k)(1)(A).

The minimum-contacts component of personal jurisdiction, however, is not the only determinant of forum. Other doctrines can help isolate an appropriate forum under a national-contacts approach to personal jurisdiction over alien defendants, including doctrines of reasonableness, venue, and *forum non conveniens*.

The Supreme Court has made clear that even when minimum contacts exist, the Due Process Clauses prohibit the exercise of personal jurisdiction when it would be unreasonable.[22] In the case of the Vancouver defendant, defending in South Carolina might be unreasonably burdensome given the more reasonable forum in Seattle. Importantly, the minimum-contacts analysis would still be established by the defendant's national contacts, whether in a Seattle court or a South Carolina court, and thus would ensure that at least *one* U.S. court is available if those national contacts are sufficient. But reasonableness serves as a limited check for cases in which the plaintiff selects a court that would impose unusual burdens on alien defendants relative to the other factors in the reasonableness analysis.

A case in federal court is subject to rules of venue under federal law. In domestic-defendant cases, venue law is restrictive,[23] but in alien-defendant cases, venue is proper in any federal district court.[24] It is worth noting that venue's approach to aliens is consistent with a national-contacts approach to personal jurisdiction. However, venue *transfer* offers an important mechanism for moving the suit to the most convenient location. The venue-transfer statute allows transfer "[f]or the convenience of parties and witnesses" to any district where the case "might have been brought."[25] Because every federal court would have proper venue in an alien-defendant case based on nationwide personal jurisdiction, the venue statute allows such a case to be quickly transferred to the most convenient and appropriate U.S. forum. The rub is that any inconveniences imposed on alien defendants by a national-contacts approach to personal jurisdiction can be remedied in federal court by venue transfer. The Vancouver defendant, for example, should easily be able to transfer an action filed in South Carolina federal court to a Seattle federal court.

One nuance of national venue complicates matters: where the case begins affects which law applies to the case, no matter where it ends up

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22. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113, 115 (1987).

23. *See* 28 U.S.C. § 1391.

24. *See id.* § 1391(d).

25. *See* 28 U.S.C. § 1404(a).

if transferred for convenience reasons.[26] Plaintiffs thus might choose a particular forum because of the particular law that forum would apply.

Two responses to this complication lessen its concern. First, law shopping is an accepted and anticipated cost of the U.S. system of horizontal federalism.[27] For better or worse, plaintiffs are entitled to law-shop through horizontal forum shopping, and this shopping is available regardless of the alienage status of the defendant. Second, in alien-defendant cases, the opportunities for law-shopping-through-forum-shopping conduct are quite limited because the alien defendant's status as an outsider narrows the range of possibly applicable law. Choice-of-law regimes generally reject the application of the law of a jurisdiction with only minimal connections to the case and instead focus on the connections of the plaintiff, the claim, and the defendant. The alien defendant's absence from the United States will thus train focus on the connections of the plaintiff and the claim—and therefore on a narrower range of applicable laws. In short, it is highly unlikely that a national-contacts approach to personal jurisdiction over aliens will result in a case tried under the substantive law of a state that no party anticipated.

In state court, transfer to less burdensome forums is also possible. Aliens can remove all federal law cases from state court to federal court based on federal question jurisdiction and most state law cases based on alienage jurisdiction.[28] Once in federal court, the alien defendant can move to transfer to a more convenient state under the federal venue-transfer rules. When removal is unavailable or undesirable, the alien defendant may ask a state court to dismiss under the state's doctrine of *forum non conveniens* if the suit could be brought in another state or foreign court and the alternative forum would be more appropriate.

Reasonableness, venue transfer, and forum non conveniens thus all help control the breadth of a national-contacts approach to personal jurisdiction over aliens. They work in tandem with the national-contacts approach to isolate the most reasonable and convenient forum, while retaining the national-contacts approach's insistence that U.S. courts are available to hear a case involving sufficient national contacts.

If these legal doctrines are not enough to protect alien defendants, alien defendants can take matters into their own hands. Defendants can enter into contracts with forum-selection clauses that limit the range of

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26. *See* Ferens v. John Deere Co., 494 U.S. 516, 524–25 (1990).

27. *See id.*

28. *See* 28 U.S.C. § 1332(a).

possible courts in which the signatory can sue the defendant.[29] Arbitration clauses, which are used widely around the world, are one kind of forum-selection clause and are specifically enforceable in federal courts, even in a state-law case.[30] Further, an alien defendant who wishes to avoid the burden of litigating in U.S. court retains the option of defaulting and resisting enforcement of the U.S. judgment.[31] If the alien defendant does not have assets in the United States against which a U.S. judgment can be enforced, the plaintiff will have to seek enforcement of the default judgment in another country where enforcement may be infeasible for a U.S. plaintiff. As a practical matter, this practical reality may provide the greatest protection for Justice Breyer's small Egyptian shirtmaker or Kenyan coffee farmer.[32]

Conclusion

A national-contacts approach to personal jurisdiction over aliens is justified by fairness, federalism, and practicality. The approach resolves some of the Court's open personal-jurisdiction questions while maintaining consistency with existing precedent. The approach also maximizes the opportunities for Congress and the states to legislate or make rules to control the scope of personal jurisdiction over aliens if the constitutional scope is too broad.

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29. *See* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 49–51 (2014). If the forum-selection clause specifies a U.S. federal court, venue transfer pursuant to the forum-selection clause mandates that the transferee court apply its own choice-of-law rules instead of those of the transferor court, which curtails opportunities for plaintiffs to shop for favorable law. *See* Atl. Mar. Constr. Co. v. U.S. Dist. Ct., 134 S. Ct. 568, 579 (2013).

30. 9 U.S.C. § 205.

31. *See* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982).

32. *See* J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011) (Breyer, J., concurring).

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