4-4-2022

A Post Minimum Contacts World

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Date : April 4, 2022

Patrick J. Borchers, Ford Motor Co. v. Montana Eighth Judicial District Court *and "Corporate Tag Jurisdiction" in the Pennoyer Era*, 72 **Case W. Res. L. Rev.** 45 (2021).

Personal jurisdiction is one of those legal headscratchers. Courts and commentators assume that personal jurisdiction doctrine—which delimits where a defendant can face suit—is rooted in the due process clause, imposing a constitutional limit on the reach of state authority. This means courts usually find personal jurisdiction (1) where a defendant resides, (2) where it has sufficient "minimum contacts" that closely "relate to" the litigation, or (3) where it is physically served with process. But the Supreme Court has limited this last option—"tag jurisdiction"—to individuals, not corporations. In a great new article, Patrick Borchers offers a contrary view, decoupling personal jurisdiction from due process and concluding that states can constitutionally adopt long arm statutes permitting tag jurisdiction over corporations.

The Supreme Court has struggled to articulate a workable test for personal jurisdiction. So when *Ford v. Montana*, a products liability case, yielded a unanimous ruling last year, it generated attention. The majority found Ford's significant contacts relating to its car business—such as selling and servicing its cars in the forum state—sufficed for personal jurisdiction, even though the individual vehicles involved in the accidents were originally purchased elsewhere. As Anya Bernstein and I have explained, *Ford* clarifies that, for personal jurisdiction purposes, a defendant's contacts with the forum state need not give rise to the particular cause of action; it is enough for the defendant's state contacts to relate to the lawsuit's "underlying controversy."

With this crucial issue resolved, *Ford* will have a significant immediate effect on personal jurisdiction doctrine. But Borchers offers a fascinating longer view of the issues *Ford* raises. His lively article stems from Justice Gorsuch's concurring opinion, which was joined by Justice Thomas. The concurrence agrees with the outcome but questions the majority's minimum contacts analysis. Instead, Gorsuch invites an analysis of personal jurisdiction from a textualist and originalist lens.

Borchers accepts this invitation and challenges conventional personal jurisdiction scholarship and doctrine by reaching three conclusions. First, "[t]he current constitutional rule that corporations are subject to general jurisdiction only in the states in which they have their headquarters or are incorporated is utterly ahistorical and disastrous in practice." Second, after detaching personal jurisdiction from due process, he argues that the Court can jettison the beleaguered minimum contacts test. Borchers builds on these conclusions to make his boldest claim—states have the constitutional authority to enact long arm statutes permitting corporate tag jurisdiction.

In reaching this conclusion, Borchers untethers personal jurisdiction from procedural due process. The "conventional view of *Pennoyer*—establishing the due process clause itself as a limitation on state-court jurisdiction—might be a 'giant misunderstanding.'" The minimum contacts test—the Court's proposed means of measuring whether due process allows a state to exercise personal jurisdiction—is the product of a misreading of Pennoyer v. Neff, the path-breaking case from which the Supreme Court spent decades stumbling to articulate a new vision for personal jurisdiction. Borchers analyzes *Pennoyer*'s text and historical context to weave an argument that "Due Process—as originally understood—quite likely did not itself supply jurisdictional rules, but rather was a mechanism for enforcing rules that come from elsewhere."

This is where the article breaks new ground

Borchers identifies state long arm statutes as “that elsewhere” underlying personal jurisdiction requirements. Had I come across such a conclusion in isolation, the skeptic in me would have bristled. But Borchers leads his readers towards this point by methodically and convincingly unpacking this history of personal jurisdiction. He spells out how separating the doctrine from due process allows the judiciary to forego “the ever-morphing minimum-contacts/fair-play test [that] too often put[s corporations] beyond the grasp of plaintiffs harmed in their home states by multinational enterprises exploiting the forum-state’s market.” He examines the world of personal jurisdiction post-*Pennoyer* but pre-minimum contacts, analyzing key New York and North Carolina decisions approving state long arm statutes permitting tag jurisdiction over corporations. These decisions, combined with his close reading of *Pennoyer*, prove his claim that due process need not limit a state’s reach over an out of state defendant personal jurisdiction.

The payout for working through this line of reasoning is significant. Should the Court recognize that due process is a means for challenging—not a source of—personal jurisdiction requirements, state long arm statutes can extend further than the limited reach of the minimum contacts test. Such statutes must identify a forum that does not “put the defendant at a practical disadvantage in defending the case.” This means states can adopt long arm statutes allowing corporate tag jurisdiction, negating “the advantages corporations gained in prior decades by being able to do some business while evading jurisdiction in the forum state.”

There is a lot here, too much for me to do all of Borchers’ article justice in this review. He walks the reader through each claim, interweaving existing scholarly debates with his own assiduous readings of legal authority. Even as one uninclined towards textualist or originalist arguments, the article left me with a tremendous amount to consider about a post minimum contacts world.

Cite as: Christine Bartholomew, *A Post Minimum Contacts World*, JOTWELL (April 4, 2022) (reviewing Patrick J. Borchers, Ford Motor Co. v. Montana Eighth Judicial District Court *and “Corporate Tag Jurisdiction” in the Pennoyer Era*, 72 **Case W. Res. L. Rev.** 45 (2021)), https://courtslaw.jotwell.com/a-post-minimum-contacts-world/.