In Search of a Parsimonious Model of Personal Jurisdiction

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William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 **Mich. L. Rev.** (forthcoming 2018), available at SSRN.

Parsimony is a vital concept in empirical scholarship. It holds that a simple model that explains things is preferable to a more complex model that explains just as much. The ideal model achieves a desired level of explanation with as few predictors and as little complexity as possible. For example, a regression model with three independent variables that explains a given amount of variance is preferable to a regression model with nine independent variables that does not explain more (or not sufficiently more). The key insight is that complexity is not always desirable or always undesirable; it must be justified by the amount of extra explanatory power that it purchases.

The concept of parsimony can help us make sense of the morass that is personal jurisdiction doctrine and scholarship. The Supreme Court continues to provide a fluctuating cast of more or fewer rules and caveats. Personal jurisdiction doctrine is, to a significant degree, the discursive practice of strengthening or adjusting a few core rules (e.g., *Shaffer v. Heitner*) or expanding, preserving, and creating caveat categories (e.g., *Burnham v. Superior Court*). Legal scholars debate whether we should account for new phenomena (e.g., Internet commerce) by adjusting existing categories or creating entirely new caveats and tests. The notion of parsimony offers tools to puzzle through such choices. It reminds us that we cannot simply insist that the creation of new doctrinal categories would be a better fit for new realities. Similarly, we cannot reject innovations simply because they would add complexity. Instead, the cost of doctrinal complexity must be justified by the benefit of a sufficiently better normative fit.

William Dodge and Scott Dodson's forthcoming *Personal Jurisdiction and Aliens* does just that. It argues for a broadened national-contacts test for alien defendants. Under this test, the alienage status of a defendant breaks the shackles of a state-by-state contacts analysis. Instead, courts would consider the defendant's contacts with the whole nation for state and federal causes of action in state and federal courts. This doctrinal innovation would add complexity by explicitly bifurcating (to some extent) the personal jurisdiction analysis based on the domestic or alienage status of the defendant. Is this added complexity justified?

Dodge and Dodson begin their answer to that question by relativizing the charge of added complexity. A national-contacts caveat for aliens would not add significant complexity to current doctrine because, though facially neutral, it already treats alien defendants differently from local defendants in important ways. The reasonableness prong of the minimum contacts analysis and the modern articulation of general jurisdiction make it increasingly difficult to establish personal jurisdiction over foreign defendants. Courts in practice rarely use the reasonableness prong of modern minimum contacts to protect domestic defendants. Instead, this prong is mostly reserved to dismiss suits against foreign defendants. Similarly, while general-jurisdiction doctrine does not mention foreign defendants, they are typically not treated as "at home" in any U.S. jurisdiction. General jurisdiction serves as a fallback option for domestic defendants—at least one state will be able to hear a suit involving a domestic defendant. But because foreign defendants are not "at home" in any U.S. jurisdiction, they can do business with many or all U.S. states but still be immune from general jurisdiction in all of them. Unitary personal jurisdiction doctrine thus hides complexity in application—the doctrine already minds differences between domestic and foreign defendants with the net effect that foreign defendants can more easily escape the reach of U.S. courts than domestic defendants.

Beyond explaining that their proposal would not add much complexity, Dodge and Dodson justify any added complexity by arguing that a national-contacts test for alien defendants is a good doctrinal and normative fit. One key notion that

animates much of the argument here is that "once [alien defendants'] contacts justify suit somewhere in the United States, they ought not care exactly where." Foreign defendants typically do not want to be sued in U.S. courts. But if unavoidable, they care far less about whether to incur that burden in Nebraska or South Dakota. If foreign defendants think of the market, the forum, and the burdens as national, then courts do not impose unfairness by using a national test that sums contacts across states. This also avoids the incentives potential foreign defendants have to structure their substantial U.S. business dealings in a diffuse manner spread across numerous states to become immune to suit in all of these states.

Dodge and Dodson contend that a national-contacts test for alien defendants respects the sovereignty interests of each state and the accompanying limitations on the sovereignty of all other states. Treating alien defendants differently from domestic defendants does not upset the implied federal balance among the states. Alien defendants frequently do not have a special relationship with a state that could be impinged upon by the assertion of personal jurisdiction in sister-state courts. Dodge and Dodson further argue that treating alien defendants differently is consistent with recent Supreme Court thinking and would provide a stronger foundation for building broad and stable coalitions on the Court.

They conclude by arguing that existing protections temper the abuse of a national-contacts analysis for alien defendants. Foreign defendants utilize specific-jurisdiction's reasonableness factors to challenge the exercise of personal jurisdiction based on the unique burdens foreign litigants sometimes face; these factors continue as a safeguard under a national-contacts test. Similarly, federal venue and transfer statutes, as well as *forum non conveniens* (among other practical tools), can mitigate excessive litigation burdens on alien defendants.

The power of *Personal Jurisdiction and Aliens* does not derive from complete originality—others have considered ways to incorporate alien defendants into general jurisdiction doctrine, in federal courts, for federal claims, etc. Instead, Dodge and Dodson's article shines in two ways.

First, it is timely. Many of the Supreme Court's recent personal-jurisdiction cases have involved foreign defendants, and alien defendants likely will continue to attract significant judicial attention, generating thorny and consequential doctrinal puzzles and confusions. Second, the article is elegant and thorough. Balancing complexity and fit is a delicate exercise. Dodge and Dodson illustrate how to do it well, even though some readers might strike a different balance or would prefer to purchase complexity elsewhere in the personal-jurisdiction landscape.

This article provides a helpful model for a new wave of scholarship just over the horizon that will grapple with the reach and effects of cases like J. McIntyre Machinery v. Nicastro and Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County and propose new and hopefully parsimonious accounts of personal jurisdiction in a changing world.

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