Sterk on Personal Jurisdiction and Choice of Law

Stewart Sterk, who is a professor of law at Cardozo Law School, has posted Personal Jurisdiction and Choice of Law on SSRN.

> *A New Jersey resident, injured while working in his home state, seeks relief from the United Kingdom manufacturer of a shearing machine marketed at trade shows held at various American locations. What reason is there to prevent New Jersey from providing a forum for its injured resident? In J. McIntyre Machinery, Ltd. v. Nicastro, a plurality of the United States Supreme Court invoked both "individual liberty" and "sovereign authority" to justify its conclusion that New Jersey lacked personal jurisdiction over the British defendant. But the plurality's failure to identify the liberty and sovereignty interests at stake have left personal-jurisdiction jurisprudence even more conceptually muddled and practically confused than it was before the Court's most recent foray into the area.*
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> *When Pennoyer v. Neff controlled issues of personal jurisdiction, sovereignty's role was clear: a state could not exercise personal jurisdiction over a defendant unless the state had physical power over that defendant. Since the Court abandoned Pennoyer and replaced it with International Shoe's emphasis on "traditional notions of fair play and substantial justice," the Court has struggled to explain why state lines should be relevant at all in personal-jurisdiction cases. In World-Wide Volkswagen Corp. v. Woodson, the Court offered its best explanation to date, recognizing that "the sovereign power to try causes in their courts" was an essential attribute of state sovereignty, but emphasizing that "[t]he*

sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States." As abstract as it is, that explanation provides a touchstone for invocations of sovereignty in personal-jurisdiction cases: The inquiry must focus on the impact a forum state's exercise of jurisdiction will have on the sovereign interests of other states or countries, not on the connection between the defendant and the forum state. If the United Kingdom were prepared to require its corporations to submit to worldwide jurisdiction as the price for obtaining corporate status, there would be no sovereignty-based reason for the Supreme Court to limit New Jersey's power to assert jurisdiction over an entity incorporated in the United Kingdom.

Recognizing that personal jurisdiction's concern with sovereignty should focus on whether the forum state's assertion of jurisdiction impermissibly interferes with the interests of some other state also sheds light on the liberty interest emphasized in the J. McIntyre opinion. If limits on New Jersey's personal jurisdiction protect the United Kingdom's interest in regulating persons, entities, and activities within the United Kingdom's sphere of sovereign authority, the same limits also safeguard the liberty interests of persons and entities who act in accordance with the United Kingdom's regulatory scheme. That is, jurisdictional rules protect an entity against defending itself in a forum likely to ignore the legal norms and rules the entity might reasonably expect to govern its legal affairs.

These concerns about the sovereign interests of other jurisdictions and the expectations of parties who rely on particular rules of law dominate the discussion in a closely related doctrinal area: choice of law. Not surprisingly, choice of law is the "elephant in the room" in most personal-jurisdiction cases. The Supreme Court's explicit acknowledgment that choice of law plays a role in

jurisdictional determinations has been grudging at best. But the Court's holdings (and the doctrinal rules it has developed) have – with narrow exceptions – been consistent with the premise that choice of law is a critical factor in jurisdictional determinations. The cases in which the Court has held that the forum lacked personal jurisdiction have almost uniformly been cases in which application of forum law posed an unjustified threat to the regulatory scheme of another jurisdiction and a concomitant danger to defendants who assumed that their actions would be governed by that regulatory scheme. Goodyear Dunlop Tires Operations, S.A. v. Brown, decided concurrently with J. McIntyre, fits that pattern; J. McIntyre does not.

Part I explores the reasons for imposing limits on personal jurisdiction and argues that both the sovereignty and liberty bases for those limits are rooted in choice-of-law concerns: balancing the forum state's interest against the power of the defendant's home state to regulate local activity, and the right of local actors to rely on their home state's regulatory scheme. When application of forum law would not interfere with the power of the home state to regulate purely local activity and would not interfere with the reasonable reliance interests of the defendant, there is no persuasive reason to limit the forum's exercise of personal jurisdiction.

Part II explains how many of the principal features of existing personal-jurisdiction doctrine – including the decline of in rem jurisdiction, the narrow limits on general jurisdiction, and the "purposeful availment" standard for specific jurisdiction – are consistent with a primary focus on choice of law.

Part III then examines the implications of J. McIntyre for personal-jurisdiction jurisprudence. The plurality opinion – if it were ever to become law – would repudiate much of the jurisdictional learning of the past forty years and would

jeopardize the ability of states to protect their citizens against defective products purchased through e-commerce. The concurring opinion, however, holds out hope that J. McIntyre will prove to be a momentary aberration, and that the Court will ultimately expand the scope of personal jurisdiction to reflect the diminished incidence and significance of truly local markets.

The paper is forthcoming in the *Iowa Law Review*.