

## TEACHING AND LEARNING PERSONAL JURISDICTION AFTER THE STEALTH REVOLUTION

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In *The Stealth Revolution in Personal Jurisdiction*,<sup>1</sup> Professor Michael Hoffheimer uses *Bristol-Myers Squibb Co. v. Superior Court (BMS)*,<sup>2</sup> the U.S. Supreme Court's latest personal jurisdiction decision, as a vehicle to critically examine the Court's recent narrowing of both general and specific personal jurisdiction. Since 2011, the Court has decided six cases in which it has found that a lower court's exercise of personal jurisdiction violated the Constitution.<sup>3</sup> As Professor Hoffheimer notes, commentators agree that these cases have dramatically changed the law of personal jurisdiction<sup>4</sup> and have made it more difficult, and sometimes impossible, for plaintiffs to identify a forum.<sup>5</sup>

Nevertheless, as Professor Hoffheimer explains, "members of the Court repeatedly deny that they are altering existing law. On the contrary, they insist that the Court's holdings are controlled by long-settled legal principles."<sup>6</sup> Professor Hoffheimer's thesis is "that the Court is engaged in a stealth revolution, a process of radically changing existing law while claiming to follow controlling precedent."<sup>7</sup> After thoroughly discussing the lower court and Supreme Court opinions in *BMS*,<sup>8</sup> Professor Hoffheimer elaborates upon the many costs associated with the stealth revolution.<sup>9</sup> For example, the Court's failure to fully explain its personal jurisdiction decisions has created much new uncertainty in the law of personal jurisdiction.<sup>10</sup> Moreover, because the Court repeatedly insists

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1. Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018).

2. 137 S. Ct. 1773 (2017).

3. See *id.* at 1784; *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017); *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011).

4. Hoffheimer, *supra* note 1, at 503–04, 541 & n.234.

5. *Id.* at 501–02.

6. *Id.* at 504.

7. *Id.* at 499.

8. See *id.* at 505–24.

9. See *id.* at 546–51.

10. *Id.* at 546–47. Specifically, Professor Hoffheimer contends that this failure creates uncertainties about:

- (1) the reasons why general jurisdiction must constrict over time;
- (2) the reasons why general and specific jurisdiction must be conceptually exclusive and why there can be no hybridization;
- (3) the reasons supporting a tight relatedness requirement for specific jurisdiction;
- (4) the status of the two-part

that it is simply applying settled precedent, its opinions not only fail to “provide []sufficient guidance to lower courts about how to apply the holdings to future cases with different facts,”<sup>11</sup> but also suggest that lower courts either do not understand the law of personal jurisdiction or have gone rogue in refusing to apply clear precedent.<sup>12</sup> This, in turn, contributes to the erosion of public confidence in the judiciary.<sup>13</sup> Professor Hoffheimer concludes his article “with a call for greater transparency, in effect, to restore confidence in the Court’s current jurisprudence.”<sup>14</sup>

Professors Patrick Borchers and Michael Vitiello have both written excellent Responses to *The Stealth Revolution in Personal Jurisdiction*.<sup>15</sup> For example, Professor Borchers contends that the reason the Court has not fully explained the constitutional rationale for “its radical contraction of personal jurisdiction” is that “the Court doesn’t have a clear rationale for why it closely regulates state court jurisdiction (and by extension federal court personal jurisdiction).”<sup>16</sup> He concisely examines cases from *Pennoyer v. Neff*<sup>17</sup> through *BMS* to illustrate the “wild vacillations” in the Court’s constitutional justification for its personal jurisdiction decisions.<sup>18</sup> And he persuasively argues that these vacillations “in rationale bespeak a lack of clarity as to the constitutional underpinnings.”<sup>19</sup> Professor Vitiello raises some additional issues that he hopes Professor Hoffheimer will address in the future, such as Justice Alito’s reliance on sovereignty to find jurisdiction lacking in *BMS* and the policy reasons for the more liberal justices’ willingness (aside from Justice Sotomayor) to join Justice Alito’s majority opinion in *BMS*.<sup>20</sup>

I add my voice to Professors Borchers and Vitiello in this Response simply to point out one additional cost of the stealth revolution: the substantially increased difficulty of teaching and learning the law of personal jurisdiction which, in turn, erodes law students’ confidence in the Supreme Court as an institution. Of course, for various reasons,

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methodological framework for specific jurisdiction; and (5) the reasons for avoiding constructions of specific jurisdiction that could replace older forms of general jurisdiction.

*Id.*

11. *Id.* at 547.

12. *See id.* at 542–46, 549.

13. *Id.* at 499.

14. Michael Vitiello, *Reflections on Hoffheimer’s The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 31, 35 (2018); *see Hoffheimer, supra* note 1, at 552

15. *See generally* Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 21 (2018); Vitiello, *supra* note 14.

16. Borchers, *supra* note 15, at 22.

17. 95 U.S. 714 (1878).

18. *Id.* at 22–26.

19. *Id.* at 25.

20. *See* Vitiello, *supra* note 14, at 35–40.

teaching and learning the law of personal jurisdiction has always been challenging. To grasp personal jurisdiction, students must “master[] . . . an evolving test in a series of Supreme Court cases where no one case is explicitly overruled.”<sup>21</sup> The complexity of this task is compounded by a multitude of factors, including: the fact that students lack any prior context for understanding personal jurisdiction; many students read the Supreme Court’s personal jurisdiction cases without having first taken constitutional law; and the time devoted to teaching civil procedure, and therefore personal jurisdiction, has shrunk at many law schools.<sup>22</sup> Today, as the Court drastically alters existing personal jurisdiction law while claiming to do no such thing, the difficulty level associated with teaching and learning personal jurisdiction has ratcheted up. As Professor Borchers notes, it is virtually impossible to believe that a topic which almost all first-year law students study, and which truly matters to practicing lawyers, “has become *more* irrational and confused” since 2011 when the Supreme Court began deciding personal jurisdiction cases again—after two decades of silence.<sup>23</sup>

If, as Professors Hoffheimer and Borchers write, the lower courts are confused by the Court’s personal jurisdiction decisions and the Court itself is confused about the constitutional rationale for those decisions,<sup>24</sup> imagine what first-year law students must think as they read and attempt to synthesize these cases. Consider, for example, the impression a case like *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>25</sup> one of the Court’s recent personal jurisdiction decisions, makes on students. Professor Borchers succinctly summarizes *J. McIntyre* this way:

[T]he Court could not produce a majority opinion. The four-Justice plurality invoked a sovereignty rationale to deny a forum to a plaintiff injured in his home state by an industrial machine purchased there by his employer in the ordinary course of business. The three dissenting Justices emphasized the unfairness to the plaintiff and the lack of unfairness to the defendant in litigating in the forum. Two Justices concurred in the plurality’s denial of jurisdiction, saying little more than they were constrained by earlier precedents.<sup>26</sup>

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21. Cynthia Ho et al., *An Active-Learning Approach to Teaching Tough Topics: Personal Jurisdiction as an Example*, 65 J. LEGAL EDUC. 772, 773 (2016).

22. *Id.*

23. Borchers, *supra* note 15, at 21 (emphasis added).

24. *See id.*; Hoffheimer, *supra* note 1, at 504–05.

25. 564 U.S. 873 (2011).

26. Borchers, *supra* note 15, at 25.

Professor Borchers concludes: “Small wonder why lower courts are left rubbing their eyes before attempting to traverse a moonscape.”<sup>27</sup> Small wonder that law students are left rubbing their eyes too.

Given the confused nature of the Court’s personal jurisdiction decisions, how much, really, do first-year law students learn about the law of personal jurisdiction? They can probably parrot phrases like “minimum contacts,” “purposeful availment,” “stream of commerce,” and maybe even “fair play and substantial justice,” but what do they actually learn about this topic “of great practical import”?<sup>28</sup> In terms of the law itself, probably not much. But in terms of the Supreme Court as an institution, probably quite a bit. The disarray in personal jurisdiction law itself speaks volumes to students. Although they may miss much of the nuance in personal jurisdiction, they get the big picture. They understand that the Court has greatly reduced the fora available to plaintiffs, and they see that the Court has failed to explain why it is doing so. Moreover, students recognize that the Court’s recent decisions benefit defendants and harm plaintiffs. And regardless of whether they think a conservative Supreme Court with a pro-defendant bias is a good thing or a bad thing, they realize that the Court does not clarify why a plaintiff can’t sue in a forum that is obviously convenient for that plaintiff and just as obviously does not burden the defendant.

When students read the plurality and concurring opinions in *J. McIntyre*, they quickly comprehend “[o]ne of the most stunning things” about these opinions: their utter lack of concern with fairness to the plaintiff, who was injured at work while using a metal-shearing machine purchased by his employer but could not sue the manufacturer of the machine—a British corporation—in his home state.<sup>29</sup> But Justice Kennedy’s plurality opinion, in particular, expresses great concern about the unfairness of hailing the British manufacturer into a court in the plaintiff’s home state<sup>30</sup> “[e]ven though the corporation was clearly exploiting the U.S. market.”<sup>31</sup>

So even if first-year law students don’t leave civil procedure with a strong understanding of the *law* of personal jurisdiction, they do leave civil procedure with a much less glowing view of the Court than they typically began law school with. They sense that the Court, at least in its personal jurisdiction decisions, is being unfair and not quite honest. As is often true, it can be very disenchanting to meet your heroes. By the time civil procedure is over, many law students have a dim and suspicious view of individual justices and the Court as an institution.

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27. *Id.*

28. *Id.* at 21.

29. *See J. McIntyre*, 564 U.S. at 878 (plurality opinion).

30. *See id.* at 886.

31. Borchers, *supra* note 15, at 28.

Undoubtedly the Court hasn't given much thought to the impact its personal jurisdiction decisions have on first-year law students. After all, the Court doesn't seem to have given much thought to the "quandary" its decisions have created for lower courts judges and practitioners "over what ought to be an elementary threshold issue in which the rules are relatively clear."<sup>32</sup> But perhaps the Court should stop and think. To state the obvious, law students are the lawyers, judges, law professors, legislators, and, sometimes, presidents of tomorrow. As noted above, Professor Hoffheimer argues that one cost of the stealth revolution is the "narrative" it fosters "of lower court lawlessness that both devalues the work of the lower courts and erodes public confidence in the judiciary."<sup>33</sup> To the extent that the stealth revolution erodes law students' confidence in the Court, this erosion may have a ripple effect throughout the legal profession.

In an era when the federal courts are under attack by the Executive branch<sup>34</sup> and Chief Justice Roberts' finds it necessary to publicly "defend[] the independence and integrity of the federal judiciary,"<sup>35</sup> the Court can ill afford to continue to contribute to its own de-legitimization. Interestingly, when Chief Justice Roberts spoke out to defend the federal judiciary, he said: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."<sup>36</sup> But this is not what law students learn when they study the Court's personal jurisdiction decisions. They do not see a group of judges doing their *best* to do equal right to plaintiffs and defendants. They see a Court with a pro-defendant bias and are left to reach their own conclusions about why this is so.

Restoration of confidence in the federal courts in general, and the Supreme Court in particular, is of critical importance to a healthy democracy. The Supreme Court must start somewhere in repairing its damaged reputation. Professor Hoffheimer calls on the Court to be transparent and explain why, in terms of both constitutional principles and policy, the constriction of specific and general personal jurisdiction is warranted.<sup>37</sup> Moreover, Professor Hoffheimer urges the Court to

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32. *Id.* at 21.

33. Hoffheimer, *supra* note 1, at 499.

34. See e.g., *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> [<https://perma.cc/48WG-N3VW>].

35. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), [www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html](http://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html) [<https://perma.cc/3KAF-9BSW>].

36. *Id.*

37. Hoffheimer, *supra* note 1, at 552.

clearly tie its transformation of personal jurisdiction to the Due Process Clause or acknowledge that some other constitutional provision is driving the revolution.<sup>38</sup> If the Justices heed Professor Hoffheimer's advice, they will take one small step toward restoring confidence in the Court—at least, perhaps, law students' and professors' confidence. Unfortunately, this isn't likely to happen: "The Supreme Court will not roll out of its proverbial bed tomorrow and decide that more than seven decades of minimum contacts jurisprudence should be discarded."<sup>39</sup>

Recognizing that the Court is unlikely to jettison its current approach, such as it is, to personal jurisdiction, Professor Hoffheimer suggests in the alternative that "the Court should slow the revolution" until at least five justices can agree on and explain the constitutional justification for personal jurisdiction.<sup>40</sup> Professor Borchers echoes this suggestion when he writes that "[p]erhaps the Supreme Court will tiptoe away and let lower courts begin to repair the damage that the high court has wrought on jurisdictional law."<sup>41</sup> Maybe silence from the Court on personal jurisdiction is the best we can hope for—and one way the Justices can begin to restore confidence not only in the Court's personal jurisdiction jurisprudence but in the Court itself.

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38. *Id.*

39. Borchers, *supra* note 15, at 29.

40. Hoffheimer, *supra* note 1, at 552.

41. Borchers, *supra* note 15, at 30.