A POTENTIAL REBIRTH OF THE PRIMARY ROLE OF TERRITORIAL LIMITATIONS ON STATE COURT JURISDICTION: *MALLORY V. NORFOLK SOUTHERN RAILWAY CO.*

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Civil procedure, the rules for litigating a legal claim, scarcely qualifies as a stimulating topic to anyone. Its dryness is repellant to most non-lawyers, while attorneys sardonically remember it as a substitute for Ambien. (First-year law students spend an entire semester on it, hoping to reduce their time in purgatory). But, despite its insipid nature, civ pro can often tee up important issues.

Mallory v. Norfolk Southern Railway Co, a civ pro case argued before the U.S. Supreme Court on November 8th, is one such case.[1] It concerns a classic of the civ pro genre: personal jurisdiction, the issue of whether a state's courts can exercise authority over a non-resident defendant. The case has much to offer both lay and lawyerly audiences: issues of state sovereignty, business autonomy, and the distinctions between natural and corporate citizens. What's more, the case may clarify, if not challenge, the Court's willingness to adhere to the Constitution's original meaning even when that creates tensions with longstanding judicial doctrines.

Robert Mallory—a Virginia citizen—sued Norfolk Southern—a railroad incorporated in Virginia—in Pennsylvania for work-related injuries that arose in Ohio and Virginia. He argues that a Pennsylvania law gives that state's courts personal jurisdiction over Norfolk Southern because the company registered to do business there. A Pennsylvania statute provides that by registering to do business, Norfolk Southern consented to be sued in the state's courts regardless of who the plaintiff is and where the case arose.

Norfolk Southern contends that Mallory cannot bring his lawsuit in Pennsylvania and that Pennsylvania's statute violates its due process rights by forcing the company to appear in the courts of a state where it is neither headquartered, nor incorporated to answer for conduct that occurred in another state. Note, this is not the sexy kind of "due process," the substantive variety—you know, the one that involves bedroom practices, *i.e.*, premarital intercourse, contraception, abortion, and so on—that courts have used to imply constitutional sanction for certain bedroom practices. No; this is the comparatively straightforward question of the processes a court must afford Norfolk Southern for the court to render a valid judgment enforceable against the railway.

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1. No. 21-1168 (U.S. argued Nov. 8, 2022).

And yet, the due process question apparently is not so simple because the question of what process Norfolk Southern is due is entangled with the question of the Pennsylvania legislature's authority to enact the registration statute. In fact, the question of state power—sovereignty—may logically precede the question of the company's due process rights. As Harvard Law Professor Stephen Sachs explains, "Jurisdictional questions at the Founding were fundamentally questions of powers, not rights, and nothing has happened since to change that."[2]

The power implicitly at issue here is the state's power to exclude a non-resident from its territory. Pennsylvania's ability to pair registration and consent—that is, to condition Norfolk Southern's ability to do business in the state on its consent to general jurisdiction, hinges on whether Pennsylvania has the power to exclude Norfolk Southern from the state if it does not consent. Whether Pennsylvania in fact has that power is disputed.

"As a sovereign," each individual state "has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress."[3] These lines, which were penned by the late Justice Antonin Scalia, may strike modern ears a bit harshly. The liberal-libertarian sensibility quails at the notion of a state's power to exclude anyone from its territory or to impose any restraint on someone else's freedom unless some injury is involved. Borders are passé, and the word "sovereign" recalls bewigged men with scepters and stockings. These have little purchase in a twenty-first-century commercial democracy.

But modern sensibilities, whether commercial or humanitarian, are not the test of constitutionality, and Scalia's summation of sovereignty draws from a reservoir of historical consensus. Consider the granddaddy of all personal jurisdiction cases, *Pennoyer v. Neff*.[4] The Supreme Court made it clear that a state may exercise jurisdiction only over people and property within its territorial confines. As Justice Stephen Field wrote:

> Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also the regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several

2. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1712 (2020).

3. Arizona v. United States, 567 U.S. 387, 417 (2012) (Scalia, J., concurring).

4. 95 U.S. 714 (1877).

> States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals.[5]

If each state is a separate "sovereign," it would seem that each one could exclude whomever it wants or impose whatever requirements it prefers as conditions of entry. For example, under the law of nations, the "sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state."[6] Thus, "the authority to exclude was universally accepted as inherent in sovereignty, whatever prudential limitations there might be on its exercise."[7] In fact, exclusionary power was such a "core" feature of sovereignty that Scalia likened it to "the States' other inherent sovereign power, immunity from suit," and thus, "elimination of the States' sovereign power to exclude requires that 'Congress unequivocally express its intent to abrogate.'"[8]

These views did not carry the day in *Arizona v. U.S.*, the immigration-restriction case in which the lines were written.[9] Nevertheless, they represent a compelling originalist thesis that the power to exclude was a defining attribute of state sovereignty. And Petitioner Mallory supports the constitutionality of the Pennsylvania statute by maintaining that some portion of the states' sovereign power to exclude not just individuals, but corporations, survived both the Constitution's ratification in 1788 and the Fourteenth Amendment's adoption in 1868.

When asked by Justice Samuel Alito whether "a statute that simply bars foreign corporations from operating in the state" would violate the Constitution, Mallory's counsel responded "No, not based on the original public meaning of Article I, Section 8 [the Commerce Clause]," though he acknowledged that this

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5. *Id.* at 722–23 (internal citations omitted).

6. *Arizona*, 567 U.S. at 417 (Scalia, J., concurring) (quoting 2 THE LAW OF NATIONS § 94, at 309 (B. Kapossy & R. Whatmore)).
eds., 2008)).

7. *See id.*

8. *Id.* at 423 (citing Seminole Tribe of Fla. v. Fla, 517 U.S. 44, 55 (1996)).

9. The majority in *Arizona v. U.S.* did not hold that the Constitution itself deprived the states of the sovereign power to exclude illegal aliens; instead, the Court took an expansive view of "field preemption" and determined that Congress's adoption of a comprehensive scheme governing the registration and removal of aliens displaced the states' ability to regulate in the same area.

might run afoul of the Court's more recent dormant Commerce Clause precedents, a question not currently before the Court.[10]

The prevalence of consent-by-registration statutes before and after 1868 is evidence that the states believed they had retained some ability to restrict or exclude out-of-state corporations from their territories.[11] Mallory cites laws as early as 1827 that required businesses to submit themselves to the jurisdiction of courts in the state where they were not chartered but where they wished to conduct business. In the 19th Century, Mallory identifies 20 states with statutes that exacted jurisdictional consent from corporations broad enough to cover any and all lawsuits regardless of where they arose—what we now call "general jurisdiction." Mallory cites another five contemporaneous state laws that made non-resident corporations amenable to jurisdiction whenever the claim was brought by a resident of the state. Finally, he notes that in the nineteenth century, every state had some form of statute rendering a non-resident corporation subject to jurisdiction for its conduct within the state's borders. We now take this type of jurisdiction for granted under the heading of "specific personal jurisdiction," but this concept was not established at the time. Instead, the default rule of the era was that, absent consent, corporations could be sued only in their state of incorporation. Thus, even these more modest statutes limited to in-state occurrences created jurisdiction where it was otherwise absent.

When considered in the broader context of corporate regulation in the nineteenth century, consent-by-registration statutes appear less remarkable than they do by present standards. For instance, from the time of the Fourteenth Amendment's ratification in the twentieth century, it was common for states to legislate restrictions on corporate lifespan, capitalization, and business purposes.[12] In the early twentieth century, competition among the states for corporate registrations led the legislatures to gradually abandon these laws, but their legality was not questioned at the time.[13]

Mallory's originalist case for the constitutionality of Pennsylvania's statute is by no means air-tight; he acknowledges the lack of contemporaneous

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10. Transcript of Oral Argument at 33:9-17, Mallory v. Norfolk Southern Railway Co. (2022) (No. 21-1168) [hereinafter Oral Arg. Tr.]. Although the Privileges and Immunities Clause grants citizens the right of free movement among the several states, like the illegal aliens in *Arizona v. U.S.*, corporations are not citizens for purposes of the Clause, and thus they derive no right of movement from it. *See, e.g.*, Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460–61 (2019) (the "Privileges and Immunities Clause has been interpreted not to protect corporations[.]" citing W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 656 (1981)).

11. So, too, does the fact that, before the Fourteenth Amendment became law, the Supreme Court had not held that "corporations" like the railway were "persons" for Fourteenth Amendment purposes. The Court would not even imply recognition of the corporations as persons until its 1886 decision in *Santa Clara County v. Southern Pacific Railroad* in which the Justices assumed without explanation that that the Fourteenth Amendment's Equal Protection Clause was applicable to corporations. 118 U.S. 394 (1886).

12. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 550–57 (1933) (Brandeis, J. dissenting)

13. *Id.* at 557–64.

case law establishing the constitutional bona fides of laws that required corporations to consent to jurisdiction over cases in which neither the plaintiff nor the conduct was tied to the forum. Still, Mallory plausibly contends that each consent-by-registration statute created jurisdiction over a non-resident corporation that would not have existed but for the statute, meaning that the state legislatures saw no due process issue with requiring consent to be sued as a prerequisite to accessing the state's markets. The conclusion Mallory draws from the co-existence of these statutes and the Fourteenth Amendment is that "sovereigns have this [exclusionary] prerogative, and it hasn't changed since 1868."[14]

History seems to provide firm ground for the practice of states conditioning access to their markets on corporations' consent to be sued in the courts of that state.[15] So, Norfolk Southern's response is to distinguish its case from what it sees as the true historical practice. According to Norfolk Southern, throughout the nineteenth century, states limited their assertion of jurisdiction over a non-resident corporation to cases stemming from the corporation's conduct within the state. Norfolk Southern and its amici, which include several states, offer several state court decisions applying this limitation.

What conclusions should be drawn from some state legislatures and certain state courts limiting their jurisdiction to in-state occurrences? There are reasons to doubt that this history reflects an inherently constitutional limitation, rather than a prudential one, or that the limitation, if constitutional, is grounded in the Due Process Clause.

First, interpreting historical practice as Norfolk Southern does seems retroactively to apply notions of specific jurisdiction based on minimum contacts that were not formally articulated until the 1940s with the Supreme Court's opinion in *International Shoe Co. v. Washington*, a decision which made it difficult to sue corporations outside the state in which they were headquartered or incorporated.[16] Some originalists have described "*International Shoe'*s adoption of the minimum-contacts and fairness standard as the test for compliance with the Due Process of Law Clauses [as] a paradigm case of living constitutionalism."[17]

Notably, it was not until 1971 that any court relied on the Due Process Clause to find a consent-by-registration statute to be unconstitutional despite

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14. Oral Arg. Tr., *supra* note 10, at 36:16–17.

15. The state registration statutes Mallory cites employ the terms "doing business," "transacting business," or "maintain[ing] [an] office or place of business" to describe the intrastate activity that renders a corporation subject to the state's jurisdiction. These terms are facially broad enough to cover the providing of either goods or services or both within the state's territory. *See* Op. Br. Appendix B, Mallory v. Norfolk Southern Railway Co. (2022) (No. 21-1168). During oral argument, counsel for Mallory clarified that Pennsylvania's statute concerns intrastate conduct, *i.e.*, goods and services provided in Pennsylvania rather than those which happen to traverse its territory. Oral Arg. Tr., *supra* note 10, at 32:7–13; 123:24–124:3.

16. 326 U.S. 310 (1945).

17. Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and A Few Answers*, 73 ALA. L. REV. 483, 485 (2022).

their prevalence before and after *Pennoyer v. Neff* made explicit the connection between due process and personal jurisdiction in 1886.[18] This tends to confirm Professor Sachs's contention that jurisdictional questions are issues of power, not rights, and belies the notion that the Fourteenth Amendment's Due Process Clause was understood at the time of ratification as a clear negation of the state's sovereign prerogative to exclude non-citizens. Moreover, it confirms that the due process right that Norfolk Southern asserts—to be free from suits in foreign courts except where it specifically waives its right or the dispute occurred there—is of a decidedly more recent vintage.

Second, accepting Norfolk Southern's limitations on jurisdiction would constitutionalize a curious imbalance in the due process rights held by natural persons and those belonging to artificial ones like corporations. In the 1996 decision, *Burnham v. Superior Court*, the Supreme Court upheld so-called "tag jurisdiction" over individuals as deeply rooted in American tradition and therefore constitutional.[19] Tag jurisdiction allows state courts to exercise lawful authority over a person who is served with process inside the state regardless of where the person resides, or where the dispute at issue arose, or how impractical it may be for that person to litigate before the court in question. And it bears noting that Norfolk Southern is every bit as "present" in the state as the individual traversing the state's highways or stuck on a layover in Philadelphia. Norfolk Southern operates "2,278 miles of track . . . eleven rail yards and three locomotive repair shops" within Pennsylvania.[20]

Yet the vulnerability the Constitution permits in the case of natural persons is precisely what Norfolk Southern hopes to avoid, here. This asymmetry in due process rights between individuals and corporations has caught the Court's attention before. Justice Neil Gorsuch recently observed that "[n]early 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why."[21] So, it was no surprise when during oral argument Justice Gorsuch cut through counsels' abstruse statutory comparisons by stating "one thing that can't be a problem is treating corporations on par with individuals." To which Mallory's counsel responded:

> The language of the Fourteenth Amendment speaks to persons, and it doesn't create a higher grade of person [] -- or a person that's entitled to better constitutional rights because they were birthed by filing a piece of paper in Virginia as opposed to, you know, being birthed by a mother at a hospital.[22]

There is a wealth of *policy* reasons for treating corporate and natural persons differently. Corporations generally conduct interstate commerce more

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18. Oral Arg. Tr. *supra* note 10, at 7:12–14; Op Br. 36, Mallory v. Norfolk Southern Railway Co. (2022) (No. 21-1168). (citing Ratliff v. Cooper Laby's, Inc., 444 F.2d 745, 748 (4th Cir. 1971)).

19. 495 U.S. 604 (1990).

20. Op. Br. 6, Mallory v. Norfolk Southern Railway Co. (2022) (No. 21-1168).

21. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

22 Oral Arg. Tr., *supra* note 10, at 23:5–12.

often and in a greater variety of locales than any single individual. Thus, the burdens of lawsuits in distant courts will fall more frequently, and perhaps more heavily, on corporations than on natural persons. But as a matter of original meaning, Norfolk Southern offers no textual arguments or legislative records supporting the conclusion that the Fourteenth Amendment's drafters enshrined two distinct sets of due process rights in the Constitution, one for natural persons and a more accommodating one for entities that were then still heavily restricted creatures of state law. Unlimited lifespans and global reach are considerable advantages to corporate enterprise; it is not unreasonable to think that these might have some corresponding disadvantages, including perhaps greater geographic vulnerability to suit.

It is far from certain that originalism and state sovereignty will be the defining features when an opinion is written in this case. Several justices seemed inclined to follow the prevailing *International Shoe* framework in this case despite its dubious applicability where a corporation's consent, not its contacts with the state, is the basis for jurisdiction. Justices Sonia Sotomayor and Ketanji Brown Jackson, were not among that group, but they showed interest in lines of argument distinct from those discussed here.[23]

The justices, regardless of which facet of the argument preoccupied them, are surely sensitive to the fact that a ruling on the extent of state sovereignty in this case may have implications for the so-called Dormant Commerce Clause, another longstanding doctrine that has been critiqued from an originalist point of view including by sitting members of the Court.[24] While the Commerce Clause is not among the questions presented by the current posture of Mallory's case, both parties now belatedly recognize its relevance to the question of Pennsylvania's power to exclude, and Mallory's counsel candidly stated that should he prevail on due process grounds, "Mallory reserves the right to argue below that there is no dormant Commerce Clause and [the Court's] precedent to the contrary should be reversed."[25]

Already this Term the Court heard arguments on a major dormant Commerce Clause case centering on California's efforts to regulate out-of-state practices in the pork industry.[26] The nettles in that case may warn the Court off pronouncements that could strengthen states' rights to regulate non-resident corporations. Several amici supporting Norfolk Southern argue that ruling for

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23. Justice Jackson's questions focused primarily on establishing the constitutionality of consent-by-registration statutes by analogy to the decisions of criminal defendants to waive trial and appeal rights as a condition of their plea deals. *See, e.g.*, Oral Arg. Tr.. *supra* note 10, at 58–62. Justice Sotomayor, for her part, reiterated her standing disagreement with the court's personal jurisdiction jurisprudence as it relates to corporate entities, and she indicated her skepticism that Norfolk Southern could avoid suit in the state where it does more business than any other. Oral Arg. Tr., *supra* note 10, at 71–72.

24. Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 578 (2015) (Thomas, J. dissenting) ("I continue to adhere to my view that the negative Commerce Clause has no basis in the text of the Constitution[.]").

25 Oral Arg. Tr., *supra* note 10, at 31.

26. Nat'l Pork Producers Couns. v. Ross, Docket No. 21-468 (argued Oct. 11, 2022).

Mallory will have this effect and consequently diminish the states' status as co-equal sovereigns, echoing the words of *Pennoyer*.[27]

These concerns are not unfounded, but there is reason to doubt that they are as severe or as unavoidable as Norfolk Southern and its amici contend. Concerning extra-territorial application of state law, it must be noted that statutes rendering a non-resident corporation subject to jurisdiction do not regulate or restrict the types of conduct in which the corporation is permitted to engage. Norfolk Southern consented to jurisdiction of Pennsylvania's courts, not to the indiscriminate application of that state's laws to all claims the state's courts might hear against the railroad. And no state inflexibly applies its own substantive law to decide a controversy without regard to where that controversy arose. Traditional choice-of-law principles, which are followed in many states, require the presiding court to apply to law of the state where the harm took place (*lex loci delicti*) or the place where the parties' agreement was made (*lex loci contractus*).

Even more modern approaches to choice-of-law principles retain a certain solicitude for the law of the place where the relevant events occurred. Pennsylvania, for example, follows the "interests" methodology, which requires its courts to consider, among other things, "the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered."[28] So, practically speaking, there is little chance that a Pennsylvania court applying Pennsylvania choice-of-law principles would end up applying Pennsylvania's substantive law in a case like Mallory's, where the relevant facts and events occurred elsewhere. In fact, were a Pennsylvania court to apply Pennsylvania's substantive law to Mallory's case, and if that law conflicted with the law of state where the claims arose, the decision would be vulnerable to a due process challenge.[29]

This is an additional safeguard to the common law doctrine of *forum non conveniens*, which permits a court to dismiss a case that should be filed in a forum more closely connected with the case, and the statutory right of removal, which enables defendants to transfer a case filed in state court to federal court provided that the case satisfies the prerequisites for federal subject matter jurisdiction.[30]

Concerning the dormant Commerce Clause, for all the originalist criticism of this jurisprudence, reconciliation between a robust view of state sovereignty and a narrower but still exclusive federal power to regulate interstate commerce may not be impossible. At least one amicus in the pork case explains how the

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27. Brief of Virginia, et al. as Amici Curiae Supporting Respondent at 16–17, Mallory v. Northfolk S. Ry. Co., No. 21-1168, *petition for cert. filed*, (U.S. Feb. 18, 2022).

28. Marks v. Redner's Warehouse Mkts., 136 A.3d 984, 987–88 (Pa. Super. Ct. 2016).

29. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814–23 (1985) (Kansas state court violated the Due Process Clause when it applied its own substantive law to claims that arose in Texas and Oklahoma, disregarding the conflict between its own law and the laws of those states).

30. *See* 28 U.S.C. §§ 1441, 1446.

Constitution's history and structure vests the federal government alone with power over interstate commerce, but that the notion of "commerce" has been interpreted too broadly, thus expanding that exclusive power beyond its intended boundaries.[31] Conceivably then, the Constitution may permit a state to require a corporation's consent to suit without allowing the state to dictate the particulars of the corporation's business in other jurisdictions. In any event, the overlapping questions of state sovereignty offer the possibility for an interesting dialogue between the two cases.

Last term the Court brought originalism to the fore in several high-profile opinions. In *Dobbs v. Jackson Women's Health*, the Court revived the right of state regulation over abortion during all phases of pregnancy.[32] In *New York State Rifle & Pistol Association v. Bruen*, the Court struck down novel state restrictions on firearms possession that lacked historical precedents.[33] The record in *Mallory* may not be as robust or conclusive as in either or those cases. But there is good reason to think that in a sovereignty-rights dichotomy, here, the sovereign power is on firmer footing.

31. Br. N.C. Chamber Legal Inst. et al. as Amici Curiae Supporting Petitioners at 18-26, Nat'l Pork Producers Couns. v. Ross, Docket No. 21-468 (argued Oct. 11, 2022).

32. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

33. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2127 (2022).