2015

Good-Bye Significant Contacts: General Personal Jurisdiction after Daimler AG v. Bauman

Judy Cornett

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I. INTRODUCTION

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[1] and *Daimler AG v. Bauman*,[2] the Supreme Court by unanimous decisions clarified the law of general personal jurisdiction, the power of a state to require defendants to answer all lawsuits, whether or not the claims are related to the defendants' presence or activity in the state.[3] *Goodyear* held that the Due Process Clause prevented North Carolina from exerting personal jurisdiction over foreign tire manufacturers allegedly responsible for a defective tire that led to the deaths of two North Carolina residents in France.[4] *Daimler* held that the Due Process Clause prevented California from exerting personal jurisdiction over a German corporation for allegedly participating in atrocities during the "Dirty War" in Argentina that led to the deaths and injuries of non-California residents in Argentina.[5] Specific or litigation-related personal jurisdiction was not available in either case because none of the defendants' tortious conduct occurred in North Carolina or California.

Justice Ginsburg, writing for the Court in both cases, emphasized the historical roots of the Court's approach to general jurisdiction. Rejecting arguments for broad general jurisdiction as "exorbitant"[6] and "grasping,"[7] she contrasted specific or conduct-linked jurisdiction, which has evolved to become

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[1] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

[2] Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

[3] *Id.* at 754 (defining general jurisdiction).

[4] *See Goodyear*, 131 S. Ct. at 2857. *See generally* Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations S.A. v. Brown, 60 KAN. L. REV. 549 (2012) (discussing the history of the case and identifying questions raised by the opinion).

[5] *Daimler*, 134 S. Ct. at 750–51. The plaintiffs commenced the action in federal court in California. Under federal rules, the federal court's personal jurisdiction is governed by the personal jurisdiction available in state court in California. FED. R. CIV. P. 4(k)(1)(A).

[6] *Daimler*, 134 S. Ct. at 751. It is not clear whether she meant to employ the term "exorbitant" in the technical way that it applies in European practice to transient jurisdiction based on quasi in rem jurisdiction. *See generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8, at 198–200 (6th ed. 2010) (discussing exclusion of exorbitant jurisdiction from EU regulations).

[7] *Daimler*, 134 S. Ct. at 761.

"the centerpiece of modern jurisdiction theory,"[8] and general jurisdiction, which remains strictly limited to its traditional forms.[9] *Goodyear* announced that general jurisdiction exists only where the corporate affiliations are "so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State."[10] *Daimler* further signals that, except for truly exceptional circumstances, a corporation is "at home" only in its states of incorporation and principal place of business.[11]

Despite the Court's assurance that its decisions are guided by tradition, *Daimler* departs from settled law under which corporations have been subject to jurisdiction for all claims in states where they maintained a sufficient permanent presence or engaged in a comparable substantial level of business.[12]

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[8] *Goodyear*, 131 S. Ct. at 2854 (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988)), *quoted in Daimler*, 134 S. Ct. at 755.

[9] "[W]e have declined to stretch general jurisdiction beyond limits traditionally recognized." *Daimler*, 134 S. Ct. at 757–58.

[10] *Goodyear*, 131 S. Ct. at 2851, *quoted in Daimler*, 134 S. Ct. at 758 n.11. In *Daimler*, she added the significant clarification that this requires affiliations "comparable to a domestic enterprise in that State." *Id.*

[11] *Daimler*, 134 S. Ct. at 760. Without expressly approving an exception, the Court observed, "[w]e do not foreclose the possibility that in an exceptional case a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n.19 (citation omitted). Nevertheless, the Court cited *Perkins v. Benguet Consolidated Mining Co.* as a case to illustrate the possibility of an exception. *Id.* at 756–57 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)). Elsewhere, the Court insisted on characterizing the corporation's contacts in *Perkins* as establishing a de facto principal place of business. *Id.* at 756 (citing *Perkins*, 342 U.S. at 448).

[12] *See infra* Part III.C. Encouraged by the Supreme Court and supported by many lower court decisions, legal treatises repeated the doctrine that corporations were subject to general jurisdiction where they engaged in substantial, systematic, and continuous activity. *See* 36 AM. JUR. 2D *Foreign Corporations* § 417 (2011); 16D C.J.S. *Constitutional Law* § 1753 (2005); 2 MADDEN & OWEN ON PRODS. LIAB. § 29:7 (3d ed. 2000); *see also* Burnham v. Super. Ct., 495 U.S. 604, 610 n.1 (1990) (Scalia, J.) (plurality opinion) ("We have said that '[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.'" (quoting Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984))). While *Goodyear* announced a significant change, leading treatises assumed the law remained well-settled even after that decision. *See* 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1067.5 (Supp. 2014) ("If the *Goodyear* opinion stands for anything, aside from the limited proposition that stream of commerce theory is an inappropriate base for general jurisdiction, it simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction."); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.41 (3d ed. 2014) ("Like the test for minimum contacts, the test for substantiality [for general jurisdiction] appears to be flexible. It generally requires an analysis of the strength and duration of the contacts and the nature of the litigation . . . .").

The law was so well settled that large corporations in leading cases did not even challenge general jurisdiction over them.[13]

In previous decisions, the Court placed limits on contacts-based general jurisdiction but never disapproved of it.[14] Most recently, *Goodyear* clarified that limited sales in a state would not support general jurisdiction over manufacturers for claims unrelated to those sales.[15] The Court's opinion adopted a more restrictive approach by declaring that for a state to exercise general jurisdiction, a corporation's affiliations with a state must be "so 'continuous and systematic' as to render [it] essentially at home in the forum State."[16] While acknowledging that such jurisdiction exists at a corporation's place of incorporation and principal place of business, the opinion did not restrict general jurisdiction to those "paradigm" places.

Daimler is a game changer. In advancing the policy goal of giving corporations the power to limit states where they must answer legal claims, the Court shrinks the places of general jurisdiction against many large corporations

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[13] *See* Bauman v. Daimlercrysler Corp. (*Bauman I*), 644 F.3d 909, 914 (9th Cir. 2011) (discussing Daimler AG's failure to challenge the finding that its subsidiary Mercedes-Benz USA, LLC was subject to general jurisdiction in California).

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), New York residents were injured in Oklahoma by an Audi they bought in New York. While the East Coast distributor and retailer successfully challenged specific jurisdiction, the manufacturer did not challenge personal jurisdiction in the Oklahoma trial court, and the U.S. importer raised the defense at trial but waived the defense on appeal in the state courts. *Id.* at 288 n.3. A leading civil procedure textbook implies that the manufacturer did not raise the defense because general jurisdiction was recognized under the law at that time. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 109 (8th ed. 2012) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise there has been the source of injury to others . . . .")).

In *Goodyear*, the parent corporation did not challenge general jurisdiction in North Carolina because it operated a major manufacturing facility, engaged in a high volume of retail sales, and had appointed an agent to receive service of process in North Carolina. The first question Justice Ginsburg raised at oral argument was the grounds for jurisdiction over the parent. *See* Transcript of Oral Argument at 4, *Goodyear*, 131 S. Ct. 2846 (No. 10-76). Justice Kagan also inquired about general jurisdiction based on service on an appointed agent. *Id.* The Court failed to address the issue in either *Goodyear* or *Daimler*, despite being aware of a split among the Circuits. *See id.* at 5, 15.

[14] *See generally Perkins*, 342 U.S. 437; *Helicopteros*, 466 U.S. 408; *Burnham*, 495 U.S. 604.

[15] *Goodyear*, 131 S. Ct. at 2851.

[16] *Id.*

to one or two states.[17] The news media understandably greeted *Daimler* as restricting the existing law of personal jurisdiction.[18]

The Court's conclusion that California's exercise of general jurisdiction in *Daimler* violates due process may be correct given the unusual facts of the case.[19] But the reasoning offered by Justice Ginsburg for the majority is troubling, and Justice Sotomayor concurred in an opinion that sharply criticized Justice Ginsberg's analysis.[20] In failing to acknowledge the Court's departure from established law, Justice Ginsburg's opinion failed to mention, let alone respectfully consider, decades of work by lower courts that, in repeatedly addressing more common fact patterns, have acquired familiarity with the practical problems and real life consequences presented by jurisdictional tests.[21] With few exceptions, Justice Ginsburg cited almost none of the voluminous scholarship on general jurisdiction.[22] And while her opinions restricting general jurisdiction evidence concern for the burdens facing corporations, these opinions express no similar concern for the hardships they will impose on

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[17] *Daimler*, 134 S. Ct. at 760. The argument that general jurisdiction should be restricted to place of incorporation and place of "continuous and systematic supervision of corporate activities" was first proposed by the U.S. Chamber of Commerce. Brief for the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioners at 3–4, *Goodyear*, 131 S. Ct. 2846 (No. 10-76) [hereinafter Brief for the U.S. Chamber of Commerce I].

[18] *E.g.*, Jess Bravin & Brent Kendall, *Supreme Court Bars Rights Suit Against Daimler in California*, WALL ST. J. (Jan. 14, 2014, 11:14 AM), http://www.wsj.com/news/articles/SB10001424052702303819704579320511383971756, *archived at* http://perma.cc/Q6JC-DKTP ("The Supreme Court on Tuesday made it *harder* to sue foreign corporations in U.S. courts . . . .") (emphasis added); Adam Liptak, *Justices Raise Bar for Suing Foreign Companies*, N.Y. TIMES (Jan. 14, 2014), http://nyti.ms/19snplm, *archived at* http://perma.cc/AXK9-F4SC ("The Supreme Court on Tuesday made it *harder* to sue foreign companies in American courts . . . .") (emphasis added). Legal commentators agree. *See* Tanya J. Monestier, *Where Is Home Depot 'at Home'?* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 236 (2014) (declaring *Daimler* "marks a radical departure from decades of case law"); Charles W. "Rocky" Rhodes and Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 211 (2014) (stating that *Daimler* "tilted the balance of power toward the defense side of the spectrum . . . . mak[ing] litigation more difficult for plaintiffs . . . .").

[19] The authors have mixed attitudes about the specific result. For one, the analysis of due process law and its application by the Ninth Circuit is most persuasive. For the other, Justice Sotomayor's concurrence provides a reasonable analysis and application of due process standards but does not provide a complete explanation for why the Ninth Circuit determination should be reviewed de novo.

[20] *See Daimler*, 134 S. Ct. at 763 (Sotomayor, J., concurring).

[21] *See* sources cited *infra* note 55 (collecting and discussing the work of lower courts); *see also Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (citing state and federal decisions exercising contacts-based general jurisdiction).

[22] *See infra* notes 253–54 and accompanying text (discussing influence of scholarship by von Mehren and Trautman).

injured individuals.[23] In a rush to protect defendants from the perceived evils of forum shopping, the Court gives corporations unprecedented power to predetermine what states or countries they can be sued in—and what law will apply to them.

This Article examines the new law of general personal jurisdiction. Part II briefly describes the scope of general jurisdiction before *Daimler* with the aim of showing how far the Court departs from past practices. Part III discusses the holding of *Daimler*. Part IV examines new issues raised by the decision that will become the focus of future litigation. Part V considers constitutional consequences of the Court's recent decisions.

This Article argues that the Court has moved too far, too fast towards limiting the traditional power of states to require nonresident corporations to answer lawsuits in their courts. While the latest decision may achieve a level of certainty and predictability for which some commentators have longed,[24] it has done so at the cost of restricting access to courts and through an exercise of tenuous constitutional authority that trespasses on the power of states and precludes more appropriate regulation by Congress.

II. A REALIST HISTORY OF GENERAL JURISDICTION

Justice Ginsburg's opinions treat the history of general jurisdiction as a logical process culminating in the formal doctrines the Court now applies.[25] This history omits inconsistent trends[26] and neglects the actual scope of judicial power exercised by state courts in the past.[27]

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[23] "[I]t should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions." *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring); *accord* Kate Bonacorsi, Note, *Not at Home with 'At-Home' Jurisdiction*, 37 FORDHAM INT'L L.J. 1821, 1852 (2014) (After *Daimler*, "U.S. plaintiffs are worse off now than ever before.").

[24] *Daimler*, 134 S. Ct. at 760.

[25] *See infra* Part III.B.4.

[26] The Court did not address how its departure from subsisting practices of jurisdiction over corporations deviates from its approval of such practices in cases of transient jurisdiction over individuals. *See* Burnham v. Super. Ct., 495 U.S. 604 (1990). Additionally, it did not consider the transformation of divorce law where the court held that the domicile of a single spouse establishes valid personal jurisdiction over the other. *See* Williams v. North Carolina, 317 U.S. 287, 298–99 (1942). Moreover, nor did it consider how the Court's previous cases focused on the real in-state effects of corporate conduct rather than the legal forms of corporate activity. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319–20 (1945) (disregarding the fact that corporations structured relations to avoid entering contracts or acquiring legal titles to property in states).

[27] For more complete historical discussions of general jurisdiction, see Hoffheimer, *supra* note 4, at 553–69; Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 63 S.C. L. REV. 697, 713–15 (2012); Charles W. ("Rocky") Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 390–412, 422–24 (2012); S. Wilson Quick, Comment, *Staying Afloat in*

This part shows that courts long exercised broad personal jurisdiction without regard to the nature of claims.[28] It explains that the courts' traditional focus on the forms by which litigation commenced prevented them from developing a coherent doctrine of general jurisdiction. And it argues that doctrines developed by the Court to support the expansion of specific jurisdiction were never aimed at restricting general jurisdiction over corporations to a small number of places.

A. *General In Rem Jurisdiction*

Before 1977, U.S. courts routinely exercised general jurisdiction under the guise of quasi in rem jurisdiction.[29] Corporations with assets in a state were subject to general jurisdiction to the extent of those assets. A corporation with a sufficiently large level of activity in the state would in practice be subject to general jurisdiction for all claims in all amounts.

Under this form of jurisdiction, New York courts in the 1930s exercised jurisdiction in a case with remarkable parallels to the claims in *Daimler*. By attaching assets owned by the German national railroad located in New York, a German Jewish employee obtained in rem jurisdiction, forcing the German corporation to answer his lawsuit in New York after the railroad followed Nazi laws and fired the Jewish employee in Germany.[30]

General in rem jurisdiction was common in the United States,[31] and it was known to some foreign legal systems.[32] It did not provoke constitutional controversy until courts began to exercise in rem jurisdiction over choses in action, intangible property, and chattels that were brought into the forum state by persons other than the owner or real party in interest.[33]

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the Stream of Commerce: Goodyear, McIntyre, *and the Ship of Personal Jurisdiction*, 37 N.C. J. INT'L L. & COM. REG. 547, 553–62 (2011).

[28] Before the 1900s, common law courts focused solely on the forum state's relationship to the defendant and its property without regard to the nature of the claims. Twitchell, *supra* note 8, at 614–15. All jurisdiction was general jurisdiction. *Id.*

[29] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (holding that general jurisdiction in rem (or quasi in rem jurisdiction) must satisfy the due process standards the Court applied to in personam jurisdiction and that "all" forms of jurisdiction must meet such standards).

[30] Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 475 (1938) (no parallel citation is provided because the summary of the procedural posture with reference to jurisdiction by attachment is omitted in the regional reporter, 14 N.E. 2d 798 (N.Y. 1938)).

[31] The proceedings in Ohio resulting in the leading Supreme Court decision recognizing general jurisdiction in personam were preceded by an in rem action in California where jurisdiction was not in issue. Perkins v. Benguet Consol. Mining Co., 132 P.2d 70, 78 (Cal. Dist. Ct. App. 1942). Under the reasoning in *Pennoyer v. Neff*, assets in Oregon provided a sufficient basis for the exercise of state power. Pennoyer v. Neff, 95 U.S. 714, 723 (1878).

[32] *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8, at 199 (6th ed. 2010) (discussing history of general in rem jurisdiction in Germany).

[33] *Cf.* Harris v. Balk, 198 U.S. 215, 224 (1905) (holding that the presence of the debtor in the state supported in rem jurisdiction over the creditor's right to payment).

The availability of in rem proceedings obviated the need for plaintiffs to bring actions in personam that tested the outer limits of general jurisdiction. The prevalence of in rem jurisdiction explains why the Court did not develop a separate, comprehensive theory of general jurisdiction. And the corresponding absence of such a theory most emphatically does not reveal any judicial skepticism about general jurisdiction over corporations that were active in the forum states. While jurisdiction existed at the place of incorporation and principal place of business, those sites were not the only available places, and they were not the places at which most litigation occurred.[34] They become "paradigm" only in Justice Ginsburg's effort to compare general jurisdiction over corporations to general jurisdiction based on domicile.

After in rem actions became subordinated to due process limits governing actions in personam, courts began to address substantive limits on general jurisdiction irrespective of the form of litigation. The Court held in *Shaffer v. Heitner* that quasi in rem jurisdiction violated due process in the absence of minimum contacts.[35] Justice Marshall declared broadly that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[36] But no one at that time thought general jurisdiction was limited to a corporation's base of operations, and Justice Marshall would have been astonished to learn that his words would one day have the effect of eliminating state power over large corporations active in states where they were routinely required to answer lawsuits in 1977.

B. *Service on In-State Agents*

As businesses expanded during the 1800s, states authorized service on appropriate agents acting for the business in the state[37] and also enacted laws requiring nonresident corporations to appoint agents to receive service of process in the state in order to be qualified to do business in the state.[38] *Pennoyer v. Neff* expressly approved of such service[39] and further authorized states to

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[34] This would be easy to demonstrate by a survey of appellate decisions in any jurisdiction. But it is probably sufficient to note that Justice Ginsburg's history never claims that most general jurisdiction was based on her paradigm theories and instead simply avoids the reality of how jurisdiction was obtained in the vast number of cases, jurisdiction that the Court now declares to be unconstitutional because it does not correspond to the paradigms.

[35] Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

[36] *Id. Shaffer* involved claims against nonresident individuals for claims unrelated to the forum state. *Id.* at 186. Accordingly, the appropriate substantive standard was minimum contacts. *Id.* at 213.

[37] *See, e.g.*, Barrow S.S. Co. v. Kane, 170 U.S. 100, 112 (1898); Tauza v. Susquehanna Coal Co., 115 N.E. 915, 918 (N.Y. 1917) (Cardozo, J.).

[38] Every state requires foreign corporations doing business in the state to appoint an agent for service of process in the state. Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 856 (2004).

[39] *Pennoyer*, 95 U.S. at 735 ("Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts

appoint agents on behalf of nonresidents doing business in a state when the nonresidents failed to appoint agents.[40]

Service on agents, especially those expressly authorized to receive service, satisfied the due process requirements of *Pennoyer* for two reasons: an in-state agent established the principal's physical presence in the state's territory, and the appointment signaled the principal's consent to jurisdiction. Opinions relying on the presence theory upheld general jurisdiction resulting from service on agents appointed to receive service of process,[41] and courts similarly approved service on any appropriate agent so long as the corporation was doing business in the state.[42]

Leading cases from *International Shoe Co. v. Washington* to *Daimler* resulted from challenges to personal jurisdiction where defendant corporations had *not* appointed agents to accept service in the forum state.[43] The Court and scholars alike usually omit the important contextualizing language that precedes the substantive rule: "[N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam, if he be not present within the territory of the forum*, he have certain minimum contacts" with the forum.[44]

While minimum contacts was thus offered as a conclusory label for the level of activity sufficient to support jurisdiction, *International Shoe* contrasted claims related to the activity in the state, where few contacts were sufficient, and others, where more substantial activity was required. This distinction

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enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way . . . ."); *id.* ("[A] man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed . . . ." (quoting Vallee v. Dumergue, 4 Exch. 290, 154 Eng. Rep. 1221 (1849)) (internal quotation marks omitted)).

[40] *Pennoyer*, 95 U.S. at 735.

[41] *See* Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1077 (N.Y. 1916). The older process under which a defendant was arrested in the state by a capias established the fact of jurisdiction by a direct exercise of sovereign authority. This was no longer the case when the equity procedure was adopted under which a summons required a future appearance. Such process could be delivered outside the state and, even if delivered in state, required only a future performance. The delivery of such process neither guaranteed that it was an expression of sovereign power nor assured its legality.

[42] *See, e.g.*, *Barrow*, 170 U.S. at 112; *Tauza*, 115 N.E. at 918.

[43] In *International Shoe*, service was attempted by serving a sales solicitor of the defendant in the forum state, but the defendant had not authorized the solicitor to receive process and vigorously disputed whether the solicitors were agents in any sense; process was also mailed to the defendant's corporate headquarters in St. Louis. Int'l Shoe Co. v. Washington, 326 U.S. 310, 312 (1945).

[44] *Id.* at 316 (emphasis added).

provides the foundation for the subsequent bifurcation of cases into specific and general jurisdiction and for the different due process standards for each. But at the time, courts understood the "substantial" level of activity very differently. They contrasted substantial activity not to minimum contacts but rather to an occasional or transient level of activity that failed to establish the corporation's presence in the state. As Judge Cardozo wrote, "[I]f [the business] is here, not occasionally or casually, but with a fair measure of permanence and continuity, then . . . it is within the [general] jurisdiction of our courts."[45]

Service on agents of businesses that were present in this sense supported very broad general jurisdiction. Moreover, in other decisions the Supreme Court approved of service on agents expressly appointed to receive process under a consent theory, holding that service on an agent actually appointed to receive service established valid consent to general jurisdiction.[46] And in 1927, the Court upheld specific jurisdiction resulting from service on an agent constructively appointed for claims arising from the defendant's in-state conduct.[47]

International Shoe replaced tests based on constructive presence and doing business with a functional analysis of the nonresident's activity in the forum state.[48] But the opinion did not repudiate older holdings; nor did it address jurisdiction based on consent.[49]

C. *Contacts-Based Jurisdiction Before* Daimler

Ironically, appellate decisions squarely addressing contacts-based general jurisdiction over corporations that qualify to do business in-state and that do in fact conduct substantial business there are uncommon simply because general jurisdiction was so well established in such situations that corporate defendants have not challenged jurisdiction.[50]

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[45] *Tauza*, 115 N.E. at 917.

[46] *See* Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917) (Holmes, J.); St. Clair v. Cox, 106 U.S. 350, 356 (1882). In later decisions, the Court narrowly construed state registration statutes so as to avoid reaching the question of whether consent per se validates general jurisdiction. *See generally* Rhodes, *supra* note 27, at 438–40 (discussing cases). But courts will be forced to address the validity of registration statutes as plaintiffs, seeking to avoid the effects of *Daimler*, will increasingly be forced to rely on such statutes to establish corporate consent to general jurisdiction. *See* Rhodes & Robertson, *supra* note 18, at 258–63.

[47] Hess v. Pawloski, 274 U.S. 352, 356 (1927) (upholding jurisdiction where the state authorized service on a state official for claims arising from a nonresident motorist driving on state roads).

[48] Rhodes, *supra* note 38, at 856–57.

[49] The effect of *Daimler* on personal jurisdiction resulting from service is discussed *infra* Part IV.A.

[50] *See, e.g.*, FED. R. CIV. P. 11(b)(2) (requiring that defense be supported by existing law or good faith argument for modifying or reversing existing law or making new law). Jones Day, a prominent law firm with many corporate clients, summarized its understanding

Before *Daimler*, courts accepted the theory that sufficiently significant and continuous contacts could support general jurisdiction. The Court expressly approved of some contacts-based jurisdiction as early as *Pennoyer*.[51] In *International Shoe* and *Perkins v. Benguet Mining Co.*, the Supreme Court

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of the law in 2004: "General jurisdiction exists when a defendant has engaged in activities that are sufficiently 'substantial, continuous, and systematic' to allow a court to exercise jurisdiction over any cause of action, even unrelated to the defendant's specific activities in the state." *Ninth Circuit to Re-Examine Personal Jurisdiction over Internet Sellers*, JONES DAY (May 2004), http://www.jonesday.com/ninth-circuit-to-re-examine-personal-jurisdiction-over-internet-sellers-05-14-2004/, *archived at* http:// perma.cc/R9GQ-LYF3 (citing Perkins v. Benguet Consol. Mining Co. 342 U.S. 437, 445 (1952)).

One online commentator asked rhetorically whether the *Daimler* decision constitutes a "windfall" for defendants. Garrett Nemeroff, Daimler AG v. Bauman *& The "Too Big for General Jurisdiction" Phenomenon*, INTER-AMERICAN LAW REVIEW (Feb. 13, 2014), http://inter-american-law-review.law.miami.edu/daimler-ag-v-bauman-too-big-general-jurisdiction-phenomenon/, *archived at* http://perma.cc/Y68T-2HJ8. Defense firms welcomed the decision. *See* Colin T. Kemp et al., Daimler AG v. Bauman*: Court Again Rejects a "Sprawling View of General Jurisdiction,"* PILLSBURY LAW (Jan. 22, 2014), http://www.pillsburylaw.com/publications/daimler-ag-v-bauman-court-again-rejects-a-sprawling-jurisdiction, *archived at* http://perma.cc/LU5B-XQLG; Vivek Krishnamurthy, Daimler AG v. Bauman*: In Latest ATS Decision, the Supreme Court Limits Jurisdiction of U.S. Courts over Multinational Corporations*, FOLEY HOAG, LLP (Jan. 18, 2014), http://www.csrandthelaw.com/2014/01/daimler-ag-v-bauman-for-corporations-home-is-now-where-the-lawsuits-must-now-be/, *archived at* http://perma.cc/D37Q-KHWF; Stephen R. Stegich & David P. Yates, Daimler AG v. Bauman*: U.S. Supreme Court Again Applies Strict Test for "General" Jurisdiction over Foreign Corporate Defendants*, CONDON & FORSYTHE, LLP (Feb. 26, 2014), http://www.condonlaw.com/2014/02/daimler-ag-v-bauman-u-s-supreme-court-applies-strict-test-general-jurisdiction-foreign-corporate-defend ants/, *archived at* http://perma.cc/P26B-Q2A6; *Supreme Court Reins in the Jurisdictional Reach of U.S. Courts over Foreign and Out-of-State Corporations*, HOGAN LOVELLS (Jan. 16, 2014), http:// ehoganlovells.com/cv/ 07a26b5bb21d5b13a712ac868a8f60da58e4ee7e, *archived at* http://perma.cc/HS8S-SU4T; *U.S. Supreme Court Sharply Limits General Jurisdiction over Corporate Defendants*, CLEARY GOTTLIEB (Jan. 16, 2014), http://www.cgsh.com/us-supreme-court-sharply-limits-general-jurisdiction-over-corporate-defendants/, *archived at* http://perma.cc/HT57-V6GW.

Commentators have predicted that *Daimler* gives large corporations "a ground to contest jurisdiction outside of their home states" in cases where they previously conceded the existence of jurisdiction. Rhodes & Robertson, *supra* note 18, at 228. The developing case law bears out this prediction. In a number of cases, large corporations have moved for dismissal where before *Daimler* they probably would have conceded jurisdiction. *See* Bristol-Myers Squibb Co. v. Super. Ct., 228 Cal. App. 4th 605, 175 Cal. Rptr. 3d 412 (Cal. Ct. App.), *review granted* (Cal. 2014); Evans v. Johnson & Johnson, No. H–14–2800, 2014 WL 7342404, at *3 (S.D. Tex. Dec. 23, 2014); Shrum v. Big Lots Stores, Inc., No. 3:14–cv–03135–CSB–DGB, 2014 WL 6888446, at *7 (C.D. Ill. Dec. 8, 2014).

[51] One of the puzzles in *Daimler* is the statement by Justice Ginsburg that *Pennoyer* "held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum." Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014) (citing Pennoyer v. Neff, 95 U.S. 714, 720 (1878)). This inaccurate oversimplification is surprising from a former Civil Procedure scholar. *See Pennoyer*, 95 U.S. at 735 (authorizing extraterritorial jurisdiction over associations and partnerships doing business in state).

approved of general jurisdiction over corporations that maintained offices in a state.[52] Over the years the Court's opinions repeatedly endorsed the idea of contacts-based general jurisdiction.[53] The Court similarly held that soliciting business in a state provided a sufficient nexus with the state so that the imposition of taxes did not violate due process.[54] Lower courts uniformly found general jurisdiction based on sufficient contacts, though the rule was so well established they more often applied it in deciding complex cases involving more attenuated contacts.[55]

Helicopteros Nacionales de Colombia and *Goodyear* announced some restrictions. *Helicopteros* held that even significant and regular purchases did not establish sufficient contacts for general jurisdiction.[56] *Goodyear* held that due process prohibits general jurisdiction over a foreign manufacturer based on the sale of its products in the forum state, or at least when the sales are limited

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[52] Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (citing with approval Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917) (Cardozo, J.) (upholding jurisdiction without regard to the nature of claims over a nonresident defendant with a local office in state)); *see infra* note 191 and accompanying text (discussing Justice Ginsburg's suggestion in *Daimler* that *Tauza* and similar cases cited with approval in the past have been overruled). In prior cases, the Court has expressed approval of general jurisdiction based on contacts short of those required to establish a principal place of business. *E.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (observing that general jurisdiction is proper based on "sufficient contacts"); *id.* at 417 (explaining that in a prior case finding insufficient contacts, the defendant did not establish a place of business in the forum or regularly carry on business there).

[53] *See generally Perkins*, 342 U.S. 437; *Helicopteros*, 466 U.S. 408; Burnham v. Super. Ct., 495 U.S. 604 (1990) (Scalia, J.).

[54] Quill Corp. v. North Dakota, 504 U.S. 298, 305–08, 313–14 (1992) (holding that imposition of tax on mail order business would violate the "substantial nexus" test of the Commerce Clause but not exceed Due Process Clause limits on state authority) (citing *Int'l Shoe*, 326 U.S. 310; Shaffer v. Heitner, 433 U.S. 186 (1977); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)). At oral argument Justice Sotomayor also discussed authority attributing a subsidiary's contacts to a parent for tax purposes does not violate due process. Transcript of Oral Argument at 5–6, 19–20, *Daimler*, 134 S. Ct. 746 (No. 11-965) (referring to Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983) (holding that state treatment of parent and foreign subsidiaries as unitary businesses for tax purposes did not violate due process)).

[55] *E.g.*, Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1078 (9th Cir. 2003), *dismissed as moot on other grounds*, 398 F.3d 1125 (9th Cir. 2005) (finding general jurisdiction based on Internet activity); Lakin v. Prudential Sec., Inc., 348 F.3d 704, 709 (8th Cir. 2003) (finding that the state could constitutionally exercise general jurisdiction over a nonresident bank that maintained about $10 million in home-equity loans and lines of credit to Missouri residents even though the loans constituted only one percent of the bank's loan portfolio); Revell v. Lidov, 317 F.3d 467, 470–71 (5th Cir. 2002) (finding that Internet business contacts with forum could be continuous and systematic and support general jurisdiction); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (holding that Internet activity could be a functional equivalent of physical store but finding insufficient contacts).

[56] *See Helicopteros*, 466 U.S. at 411.

in comparison to its products sold elsewhere and when the products enter the state through intermediaries.[57]

Justice Ginsburg's opinion for the Court in *Goodyear* articulated a new standard: a state may exercise general personal jurisdiction over foreign corporations "when [the corporations'] affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state."[58] And Justice Ginsburg's evaluation of the sales in that case indicated that the Court might adopt a comparative approach under which contacts outside the state might reduce the likelihood that a corporation's in-state activity would constitute a home in the state.[59]

Goodyear closed the door on the most expansive applications of general jurisdiction. But like *Helicopteros*, it stated unmistakably that corporations with substantial local presence or contacts were subject to general jurisdiction.[60] Treatises printed as black letter law that corporations were subject to general jurisdiction wherever they engaged in a sufficiently high level of business

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[57] *See* Hoffheimer, *supra* note 4, at 575–76, 578–79 (discussing the problem of the Court's conflicting characterizations of the facts).

[58] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[59] *See id.* at 2852, 2857.

[60] *Id.* at 2851. Courts and commentators reached different conclusions about whether the place where a corporation was "at home" after *Goodyear* included places where it engaged in substantial activity outside its place of incorporation or principal place of business. The Ninth Circuit in *Daimler* concluded that the defendant was "at home" in California based on its subsidiary's high level of commercial activity there. *See infra* notes 74–76 and accompanying text. *See generally* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1266–67 (2011) (reading *Goodyear* implicitly to endorse contacts-based jurisdiction); John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. U. L. REV. 1707, 1722 (2013) (reading *Goodyear* clearly to require more than sales or purchases in the forum state in order to create general jurisdiction); Hoffheimer, *supra* note 4, at 583, 592, 599 (observing that opinion did not define the meaning of "at home" and left room to argue that test was satisfied by continuous and systematic business activity); Peddie, *supra* note 27, at 698 (arguing the Court failed to define "essentially at home") (Peddie was counsel for plaintiff in *Goodyear*); Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 533 (2012) (emphasizing uncertainty of meaning of corporation's home state); *see also* sources cited *infra* note 62 (citing treatises approving contacts-based general jurisdiction after *Goodyear*). *But see* Lindsey D. Blanchard, Goodyear *and* Hertz*: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865, 886 (2013); Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 677 (2012) (Feder was attorney for defendant in *Goodyear*); James R. Pielemeier, Goodyear Dunlop*: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 981, 990–91 (2012) (arguing *Goodyear* would or should be interpreted to restrict general jurisdiction to place of incorporation or principal place of business). For the first argument restricting jurisdiction over corporations to the place of incorporation and place of "systematic supervision of corporate activities," see Brief of the U.S. Chamber of Commerce I, *supra* note 17, at 3–4.

activity.[61] Given the state of the law, Professor Yeazell's widely used textbook added a note after *Goodyear* observing that it was a "wise choice" for Goodyear USA to avoid challenging North Carolina's general jurisdiction "given the extent of their contacts with North Carolina . . . ."[62]

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[61] *See* 36 AM. JUR. 2D *Foreign Corporations* § 417 (2011); 16D C.J.S. *Constitutional Law* § 1753 (2005); 2 MADDEN & OWEN ON PROD. LIAB. § 29:7 (3d ed. 2000).

[62] YEAZELL, *supra* note 13, at 138; *see* Borchers, *supra* note 60, at 1267 (noting probable contacts-based jurisdiction over parent corporation in *Goodyear*). *See generally* MARY KAY KANE, CIVIL PROCEDURE IN A NUTSHELL 60–61 (7th ed. 2013) (observing that general jurisdiction depends on variety of fairness factors without mentioning place of incorporation or principal place of business). *But see* JOSEPH W. GLANNON, CIVIL PROCEDURE EXAMPLES AND EXPLANATIONS 6 (7th ed. 2013) (observing that general jurisdiction outside a corporation's place of incorporation and principal place of business is unclear after *Goodyear*); MICHAEL H. HOFFHEIMER, CONFLICT OF LAWS EXAMPLES & EXPLANATIONS 57 (2d ed. 2013) (observing that general jurisdiction over nonresident corporation engaged in unrelated systematic commercial activity was uncertain after *Goodyear* and would depend on whether the Court subsequently restricted contacts-based jurisdiction to its principal place of business); WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 70, 112 (4th ed. 2013) (discussing uncertain status of contacts-based general jurisdiction); Hoffheimer, *supra* note 4, at 599 (arguing that general jurisdiction over Goodyear USA in North Carolina was uncertain after *Goodyear*).

The United States suggested that contacts-based general jurisdiction over Daimler AG's subsidiary was "debatable" after *Goodyear*. Brief for the United States as Amicus Curiae Supporting Petitioner at 16 n.5, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965) [hereinafter Brief for the United States].

III. THE HOLDING IN *DAIMLER*

A. *Case History*

1. *District Court*

In 2004[63] twenty-two citizens of Argentina and one citizen of Chile sued Daimler AG[64] in California.[65] They claimed Daimler AG had collaborated with the military dictatorship in Argentina in killing, torturing, detaining, and kidnapping the plaintiffs and their family members during the period of systematic human rights violations from 1976 to 1983 known as the "Dirty War."[66]

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[63] Plaintiffs commenced the action in 2004. Bauman v. Daimlerchrysler Corp. (*Bauman II*), 579 F.3d 1088, 1092 (9th Cir. 2009), *vacated*, 603 F.3d 1141 (9th Cir. 2010).

[64] Daimler AG resulted from the reorganization of DaimlerChrysler AG, itself the result of earlier mergers of Chrysler Corporation and Daimler-Benz AG. *See* Bauman v. DaimlerChrysler AG (*Bauman III*), No. C-04-00194 RMW, 2005 WL 3157472, at *1 (N.D. Cal. Nov. 22, 2005). The reorganization of the parent corporation did not affect any court's analysis of jurisdiction over it, and we refer to it consistently as Daimler AG. Daimler AG was a German stock company with headquarters in Stuttgart, Germany. *Id.* But plaintiffs contended that Daimler AG also operated an operational facility in Auburn Hills, Michigan that constituted a headquarters in the U.S. *Id.*

Daimler AG did not qualify to do business in California. *Id.* Plaintiffs attempted to serve Daimler AG at its German headquarters under the Hague Convention, but the German courts held that such service interfered with German sovereignty and did not authorize service. *Id.* The plaintiffs also attempted service on the defendant at the Michigan facility, where employees refused to accept process. *Id.* at *2. They subsequently mailed service to various addresses. *Id.*

Daimler AG initially challenged both sufficiency of service and personal jurisdiction but withdrew its challenge to service. *Id.* Daimler AG's subsidiary, Mercedes-Benz US, LLC, was a Delaware corporation responsible for importing and distributing Daimler AG's cars into the U.S. *Id.* The subsidiary was not named as a party. Personal jurisdiction over it became relevant only to the extent its jurisdictional contacts were attributable to Daimler AG. *Id.* at *6.

[65] Although the court had federal question subject matter jurisdiction, the plaintiffs argued that personal jurisdiction was the same as that of California state court. *See* FED. R. CIV. P. 4(k). California's statutes authorize personal jurisdiction to the extent permitted by the Due Process Clause. *Daimler*, 134 S. Ct. at 753 (citing CAL. CIV. PROC. CODE § 410.10 (West 2004)).

[66] *Bauman III*, 2005 WL 3157472, at *1. The Ninth Circuit discussed the plaintiffs' theories more fully, explaining that Daimler AG allegedly provided names of persons with the intention that they would be killed, tortured, or removed from its workplace, thus facilitating the end of a strike and increasing its productivity. *Bauman I*, 644 F.3d 909, 911–12 (9th Cir. 2011), *rev'd sub nom. Daimler*, 134 S. Ct. at 746.

The plaintiffs claimed Daimler AG was liable for the torts committed by its Argentinian subsidiary Mercedes-Benz Argentina. *Id.* They claimed that Daimler AG was subject to personal jurisdiction in California through the contacts of a separate subsidiary, Mercedes-Benz USA (MBUSA), a Delaware corporation. *Id.* at 913–14. MBUSA had regional and other offices in California. *Id.* at 914. Daimler AG sold its majority interest in

The trial court applied the Ninth Circuit's two-part test for general jurisdiction under which (1) a defendant must have systematic and continuous contacts with California and (2) the assertion of general jurisdiction is reasonable.[67] In a preliminary decision, the trial court concluded that Daimler AG did not itself have systematic and continuous contacts in California[68] and also, though a "close question," that its subsidiary's activities should not be attributed to Daimler AG for jurisdictional purposes.[69] In 2007, after limited discovery on whether an agency relationship existed between Daimler AG and its subsidiary and whether plaintiffs had alternative forums in Germany or Argentina,[70] the court dismissed for lack of personal jurisdiction due to lack of both contacts and reasonableness.[71]

2. *Ninth Circuit*

In 2009 the Ninth Circuit initially affirmed, finding that Daimler AG lacked continuous and systematic contacts in California without reaching the issue of reasonableness.[72] In 2011 it reconsidered and reversed, holding that Daimler

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the Chrysler car group in 2007. *Id.* at 913 n.7. None of the reorganizations affected the jurisdictional analysis because: (1) contacts for general jurisdiction were determined at the time the action was commenced, *Id.* at 913–14 n.7 (citing Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 422 (9th Cir. 1977)); and (2) the reorganizations did not affect the relationship between Daimler AG and MBUSA for purposes of attributing contacts of the subsidiary to the parent. *Id.* at 913 n.7.

The plaintiffs stated claims under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2014), the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350, and other federal, California state, and international laws. Bauman v. DaimlerChrysler AG (*Bauman IV*), No. C-04-00194 RMW, 2007 WL 486389, at *1 (N.D. Cal. Feb. 12, 2007). They brought the case before the Supreme Court clarified that the Alien Tort Claims Act applied to U.S. territory. *See generally* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[67] *Bauman III*, 2005 WL 3157472, at *3 (citing Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc., 1 F.3d 848, 851 (9th Cir. 1993); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984)).

[68] *Bauman III*, 2005 WL 3157472, at *9.

[69] *Id.* at *12.

[70] *Id.* at *18–19.

[71] *Bauman IV*, 2007 WL 486389, at *2 ("DCAG's contacts with California are not 'systematic and continuous' . . . . However, the court does not need to reach this conclusion, as DCAG has demonstrated that both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims, [making the exercise of general jurisdiction unreasonable]").

[72] *Bauman II*, 579 F.3d 1088, 1097 (9th Cir. 2009), *vacated*, 603 F.3d 1141 (9th Cir. 2010). The court refused to attribute MBUSA's contacts to Daimler AG because of insufficient evidence of control by the parent. *Id.* at 1096–97.

Judge Reinhardt dissented: "The result is to shield foreign corporations from actions in American courts—although they have structured their affairs so as to reap vast profits from American markets—and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice." *Id.* at 1098 (Reinhardt, J., dissenting).

AG had both continuous and systematic contacts in California[73] and that the exercise of personal jurisdiction would be reasonable.[74] While considering Daimler AG's direct contacts with the United States, the court rested its decision on the contacts of its subsidiary (MBUSA) with California.[75] The Ninth Circuit's final opinion did not cite Justice Ginsburg's recent opinion in *Goodyear*.[76]

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[73] *Bauman I*, 644 F.3d 909, 931 (9th Cir. 2011) (unanimous opinion by Judge Reinhardt, who had dissented from the court's initial decision).

[74] *Id.* Having found sufficient contacts, the court held that the defendant bore the burden of showing unreasonableness. *Id.* at 924. It found that Daimler AG's level of commercial activity in California made it reasonable to anticipate litigation there, that the burden of litigating in California was not too weighty, that litigation would not be more burdensome than in Germany, that Argentina was not an adequate forum, that it was not clear whether Germany was an adequate forum, and that the availability of alternative forums did not prevent reasonable jurisdiction. *Id.* at 925–29.

[75] *Id.* at 912 ("DCAG was subject to personal jurisdiction in California through the contacts of its subsidiary . . . ."). MBUSA operated three offices in California. *Id.* at 914. No party contested the sufficiency of its contacts for general jurisdiction. *Id.* at 914, 920 n.11.

Daimler AG's direct contacts in the U.S. as a whole included a "dual operational headquarters" in Michigan and Germany. *Id.* at 912–13. Daimlerchrysler sales were 1% of the nation's gross domestic product. *Id.* at 913. The U.S. sales constituted 19% of Mercedes-Benz sales worldwide, and California sales accounted for 2.4% of Daimler AG sales worldwide. *Id.* at 922. Nearly 50% of Daimler AG revenue came from the U.S. *Id.* at 926. The corporation employed 125,000 employees in North America and "paid $8.2 billion in wages in the United States in 2003." *Id.* at 926–27 n.16.

Neither the trial court nor the Ninth Circuit considered whether nationwide jurisdiction was authorized by Federal Rule of Civil Procedure 4(k)(2). *Id.* at 918 n.9.

[76] The decision was final, the panel unanimously voting to deny rehearing, and a majority of the Circuit Judges failing to vote for rehearing en banc. Bauman v. Daimlerchrysler Corp. (*Bauman V*), 676 F.3d 774 (9th Cir. 2011).

Judge O'Scannlain wrote a dissenting opinion, joined by seven members of the court. *Id.* at 774. The dissent characterized the decision as holding that jurisdiction was proper "based simply on having a separate U.S.-based subsidiary . . . ." *Id.* at 775. It cited and quoted Justice Ginsburg's recent opinion. *Id.* (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)). The dissent argued that *Goodyear* held that foreign subsidiaries of a U.S. parent are not amenable to general jurisdiction in the state where the parent is subject to general jurisdiction. *Id.* at 776 n.1. The dissent reasoned that this prevented any "affiliate" of a corporation from being subject to jurisdiction based on the activity of a legally distinct corporate entity. *Id.* The dissent also argued more narrowly that the majority opinion expanded jurisdiction beyond precedents and applied a test for attributing contacts that was rejected by other Circuits. *Id.* at 774–75.

Justice Breyer observed that after *Goodyear*, the case was "crying out for an en banc [review]." Transcript of Oral Argument, *supra* note 54, at 30. And the Court's opinion reveals evidence of the Court's displeasure with the Ninth Circuit's failure to apply the standard from its recent decision in *Goodyear*. Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014). Suggesting that the Ninth Circuit's decisionmaking was erratic, Justice Ginsburg emphasized the posture under which the Circuit first affirmed the dismissal for lack of jurisdiction, then changed its mind, "replac[ing its opinion] with one authored by Judge Reinhardt, which elaborated on reasoning he initially expressed in dissent." *Id.* at 753. She emphasized that Daimler AG petitioned for rehearing en banc, "urging that the exercise of

B. *Justice Ginsburg's Opinion for the Court*

The conflicting decisions by the district court and Ninth Circuit signal the complexity of the issues. Although *Goodyear* clearly established that limited sales were insufficient for general jurisdiction, it hardly addressed the situation where a corporation's massive sales were coupled with the operation of a subsidiary corporation that was subject to general jurisdiction (either by the level of subsidiary's activity or by its consent).

Given that the Ninth Circuit opinion did not mention the standard announced in *Goodyear*, the Court could have remanded for reconsideration.[77] It could have reversed because the exercise of jurisdiction was unreasonable or because the Ninth Circuit's standards for unreasonableness were too lax or erratic. Or the Court could have decided only the issue presented and decided whether the jurisdictional contacts of the subsidiary should be attributed to the parent.[78]

Instead, the Supreme Court reversed and remanded, holding that California could not exercise general personal jurisdiction over Daimler AG. Resuming her role as spokesperson for the Court on matters of general personal jurisdiction, Justice Ginsburg penned a strongly worded opinion that made clear that a subsidiary's contacts would rarely be attributable to a parent corporation and that contacts-based general jurisdiction would rarely if ever exist except in a corporation's place of incorporation and principal place of business. Yet, because of rhetorical fissures in the opinion, it is difficult to determine exactly what the decision means for the future.

1. *Characterization of the Issue and Rhetorical Reach of Opinion*

Justice Ginsburg opened her opinion by asserting that the case "concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States."[79] She narrowed this broad formulation—which could describe an issue of either subject-matter jurisdiction or personal jurisdiction—in her statement of the issue presented: "whether the Due Process

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personal jurisdiction over Daimler could not be reconciled with this Court's decision in [*Goodyear*]," and she added that Daimler's petition for rehearing en banc was denied "[o]ver the dissent of eight judges . . . ." *Id.*

[77] Justices Breyer and Ginsburg asked whether the Court should remand on subject matter jurisdiction grounds after *Kiobel*. Transcript of Oral Argument, *supra* note 54, at 36–37, 45.

[78] "The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Petition for Writ of Certiorari at i, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965).

[79] *Daimler*, 134 S. Ct. at 750.

Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler . . . in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."[80]

This characterization of the case as entirely foreign foreshadowed the outcome.[81] Yet, as Justice Sotomayor protested in her concurrence, the Court's statement of the question presented is far broader than the question on which the Court granted certiorari and that the briefs addressed.[82]

The expansion of the issue foreshadowed a correspondingly broad holding. Justice Ginsburg repeatedly expresses alarm at the possibility that general jurisdiction could reach a wholly foreign dispute. Immediately after stating the question presented, she ridiculed the plaintiffs' position by referring to an imaginary case that was discussed during oral argument: "So if a Mercedes Benz vehicle overturned in Poland and injured the Polish driver and passenger, suit for the design defect could be brought in California?"[83] The Court refused to permit such broad general jurisdiction. "Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority."[84]

The Court's preliminary formulations gave notice that its general jurisdiction analysis would not focus on the defendant's activity or contacts in the forum but on the identity of the plaintiff and the location where the actionable conduct occurred. The preliminary summary of the holding is notable for the absence of any reference to the corporation's contacts with the forum. Pursuant to the Court's preliminary formulation, no "foreign" corporation can ever be held to general jurisdiction in a state forum when the plaintiff is also foreign and the actionable conduct occurred outside the United States.

Only in the third paragraph did the opinion explain that a foreign corporation is subject to general jurisdiction "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum state.'"[85] Under this standard, the Court concluded that "Daimler is not 'at home' in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in

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[80] *Id.* at 751.

[81] Alternative characterizations suggesting a different outcome are possible: Whether a case alleging violations of international and federal laws by one of the world's largest corporations that engages in billions of dollars of sales in California is properly brought in California when no other forum appears to be reasonably available; or whether due process prevents California from treating a corporation that employs a subsidiary corporation based in California as a domestic corporation for purposes of general jurisdiction.

[82] *See infra* Part III.C.1; *see supra* note 78.

[83] Transcript of Oral Argument, *supra* note 54, at 29. Justice Ginsburg referred twice to this hypothetical situation in her opinion. *Daimler*, 134 S. Ct. at 751, 754–55 n.5.

[84] *Daimler*, 134 S. Ct. at 751.

[85] *Id.* (alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

Argentina."[86] Although the decision thus grounds its conclusion on the at-home test, its opening paragraphs might support a reading of the opinion as an effort to insulate foreign corporations from suit in the United States for foreign claims. Such a reading is reinforced by Justice Ginsburg's reference to "exorbitant" jurisdiction, inasmuch as "exorbitant jurisdiction" is a term of art in international law for disfavored forms of jurisdiction, and by the concluding paragraphs of the opinion, where she marshals considerations of "international rapport" as additional reasons to reject jurisdiction in the case.[87]

2. *The Facts*

After its preliminary summary, the Court reviewed the facts and proceedings below, again emphasizing the international context of the case.[88] The Court described the defendant, Daimler AG, as a German public stock company with headquarters in Stuttgart, Germany, that manufactured Mercedes-Benz cars in Germany.[89]

In response to Daimler AG's motion to dismiss for lack of personal jurisdiction, the plaintiffs presented two alternative theories: first, that Daimler AG's own contacts were sufficient to confer general jurisdiction on the

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[86] *Id.*

[87] *Id.* at 762–63. The consideration of international rapport occurs only after the Court has concluded that jurisdiction violates due process. *See infra* text accompanying note 293. This irrelevance of the issue only serves to underscore the rhetorical importance that the Court attributed to it in signaling the Court's sensitivity to international criticisms of U.S. practices. This was the principal interest of the United States as amicus supporting Daimler AG. *See* Brief for the United States, *supra* note 62, at 1–3.

[88] *Daimler*, 134 S. Ct. at 751–52 ("The incidents recounted in the complaint center on MB Argentina's plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States."). The Court, perhaps significantly, did not add that none of the injured persons were California residents.

Justice Ginsburg elsewhere criticized Justice Sotomayor for overlooking the availability of specific jurisdiction and went so far as to write that it is "hard to conjure up an example" of a case where eliminating general jurisdiction would lead to deep injustice. *Id.* at 758 n.10. It is unclear after *Daimler* whether California can hold a corporation with a massive presence in the state accountable for the murder of California citizens in Argentina. Perhaps Justice Ginsburg would allow the citizenship of the plaintiffs to lead to a different outcome. Perhaps Justice Ginsburg does not consider the denial of a forum to be a deep injustice.

[89] *Id.* at 752. While this is the main activity relevant to its contacts in California established through MBUSA, it was hardly its only commercial activity. *See supra* note 75. The Court did not mention that Daimler AG maintained an operational center in Michigan. *See Bauman I*, 644 F.3d 909, 913 n.6 (9th Cir. 2011). Left completely out of the opinion is the fact that Daimler AG at the time of the commencement of the action and until 2007 also included Chrysler Car Corp., an enterprise with contacts in the United States and California far more extensive than importing and selling Mercedes-Benz cars. *See id.* at 913 n.7, 926. The plaintiffs did not challenge on appeal the trial court's holding that Daimler AG's own contacts by themselves were insufficient for general jurisdiction. *Daimler*, 134 S. Ct. at 758.

California courts, and second, that the activities of Daimler AG's subsidiary were sufficient to confer general jurisdiction and should be attributed to Daimler AG.[90] The Court noted that MBUSA is a Delaware corporation with its principal place of business in New Jersey. However, the Court also catalogued MBUSA's "multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine."[91] The Court noted that MBUSA is "the largest supplier of luxury vehicles to the California market," with its sales accounting for "2.4% of Daimler's worldwide sales."[92]

Thus far, the Court relied, if selectively, on the lower courts' findings. However, when it turned to the general distributor agreement between Daimler AG and MBUSA, the Court departed from the Ninth Circuit's findings.[93] Whereas the Ninth Circuit examined and emphasized contractual provisions giving Daimler AG control over MBUSA, the Court quoted only summary language establishing MBUSA as an "independent contractor" and an "independent business."[94] According to the Court "[t]he agreement 'does not make [MBUSA] . . . a general or special agent, partner, joint venturer or employee" of Daimler AG, nor does MBUSA have any "authority to make binding obligations for or act on behalf of" Daimler AG.[95] By relying on this language, the Court privileged the forms of corporate organization over functional aspects of corporate activity.[96]

3. *A History Lesson*

Nearly half the Court's opinion is devoted to a historical review of the doctrine of general jurisdiction. The Court began by contrasting the "strict territorial approach" of *Pennoyer v. Neff* and the "less rigid understanding" of *International Shoe*.[97] Justice Ginsburg traced the emergence of separate categories of personal jurisdiction to *International Shoe*, where the Court referred with approval to "situations where a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to

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[90] *Daimler*, 134 S. Ct. at 752.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* (quoting General Distribution Agreement between Daimler AG and MBUSA).

[95] *Id.* (alteration in original) (quoting General Distribution Agreement between Daimler AG and MBUSA).

[96] In contrast, the Ninth Circuit focused on the substance of the relationship between the two corporations. *See Bauman I*, 644 F.3d at 913–18; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 310–11 (1945) (disregarding forms of employment under which foreign corporation styled in-state sales representatives as independent contractors).

[97] *Daimler*, 134 S. Ct. at 753. The Court's history overstates the purely territorial reasoning behind *Pennoyer*. *See infra* note 51 (criticizing the Court's statement about the purely territorial reasoning of *Pennoyer*).

justify suit against it on causes of action arising from dealings entirely distinct from those activities.'"[98]

After defining general jurisdiction, the Court illustrated the difference between specific and general jurisdiction with an example discussed during oral argument.[99] A California plaintiff injured in California by a German-made Daimler AG product could assert a theory of specific jurisdiction because the claim related to the sale of the product in the state.[100] In contrast, a Polish plaintiff injured in Poland by a Daimler AG product could not establish specific jurisdiction in California because the claim was unrelated to California.[101] The defendants conceded that Daimler AG might be subject to specific jurisdiction in the first case.[102] Justice Ginsburg was troubled that the plaintiffs claimed general jurisdiction would reach the Polish case.[103] The Court's example focused on the identity of the plaintiff and the foreign location of the accident, not the nature and extent of the corporation's affiliations with California. The Court does not provide an example of a case where both specific and general jurisdiction would be proper. Nor does it consider an example that features only the facts essential for general jurisdiction, such as a case where a California resident injured in Poland sues Daimler AG in California.[104]

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[98] *Daimler*, 134 S. Ct. at 754 (alteration in original) (quoting *Int'l Shoe*, 326 U.S. at 318). Justice Ginsburg's reading of *International Shoe* construes it as a foundation for a restrictive theory of general jurisdiction that does not focus on corporate contacts or activity. This is reflected in her insistence that the case classifies all personal jurisdiction into two exclusive categories. *But see* Hoffheimer, *supra* note 4, at 558–61 (describing Chief Justice Stone's typology as a range of four categories of cases). It is also reflected in her failure to address the central analytic method employed in *International Shoe*, where the Court observed that "corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact," and that such corporate presence in any state "can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Int'l Shoe*, 326 U.S. at 316. For the court in 1945 presence thus symbolizes those activities that are sufficient for jurisdiction. *See id.* at 316–17. The context (referring explicitly to the state of the corporation's "origin") leaves little room for doubt that the Court historically regarded the corporation's contacts or activities as the predicate for all forms of jurisdiction, including general jurisdiction over a corporation in its state of incorporation. *See id.*

[99] Transcript of Oral Argument, *supra* note 54, at 11–14.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 29, 32.

[104] In *Guidi v. Inter-Continental Hotels Corp.*, U.S. citizens sued a New York based hotel for shootings at an Egyptian hotel operated by defendant. Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 142 (2d Cir. 2000). The Second Circuit reversed a dismissal for forum non conveniens, recognizing the plaintiffs' need for a U.S. forum. *Id.* It is unclear why the hotel should obtain a different result merely by reincorporating or moving its principal place of business to Egypt. Such a case, inasmuch as it eliminates the foreign plaintiff and the suspicion of forum shopping, reveals the only facts essential for general jurisdiction, the defendant's relationship to the forum. Justice Ginsburg's failure to discuss such a case is inexplicable. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750–63 (2014).

Justice Ginsburg repeated the theme from *Goodyear* that after *International Shoe* specific jurisdiction expanded to become the "centerpiece of modern jurisdiction theory" while general jurisdiction has played "a reduced role."[105] The Court views personal jurisdiction as comprising two separate sets and reasons that as specific jurisdiction increases, general jurisdiction must decrease. While the expanded opportunities for specific jurisdiction have reduced the number of situations where plaintiffs need general jurisdiction,[106] the Court offers no explanation for why the constitutional expansion of one set would require a corresponding restriction in the other.[107]

As in *Goodyear*, Justice Ginsburg's survey of general jurisdiction cases ignored in rem actions. And she reprised her reading of leading opinions. She labeled *Perkins* as the "textbook case" of general jurisdiction,[108] insisting that general jurisdiction was proper because the forum state "was the corporation's principal, if temporary, place of business."[109] Defending this reading becomes

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[105] *Daimler*, 134 S. Ct. at 755 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (2011)). She stated this bluntly during oral argument: "[N]ow that we have specific jurisdiction, so you can sue where the event occurred, just as specific jurisdiction has expanded, so general jurisdiction has shrunk." Transcript of Oral Argument, *supra* note 54, at 38–39.

There is nothing irrational about one student's conclusion that many of the same reasons that supported an expansion of specific jurisdiction should also support an expansion of general jurisdiction. *See* Kristina L. Angus, Note, *The Demise of General Jurisdiction: Why the Supreme Court Must Define the Parameters of General Jurisdiction*, 36 SUFFOLK U. L. REV. 63, 80–81 (2002).

[106] This is confirmed by empirical research. *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 38 (1998) (finding that only twelve percent of plaintiffs utilized general jurisdiction, possibly due to difficulties in succeeding under that theory).

[107] The Court noted that "[o]ur post-*International Shoe* opinions on general jurisdiction . . . are few." *Daimler*, 134 S. Ct. at 755. This observation does not begin to explain why the Court should limit general jurisdiction.

[108] *Id.* at 755–56 (quoting *Goodyear*, 131 S. Ct. at 2856) (internal quotation marks omitted).

[109] *Id.* at 756 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779–80 n.11 (1984)) (internal quotation marks omitted). Justice Ginsburg insisted that the case turned on the fact that "[a]ll of Benguet's activities were directed by the company's president from within Ohio." *Id.* at 756 n.8. In response to Justice Sotomayor's interpretation of *Perkins*, Justice Ginsburg displayed skepticism about any form of "doing business" general jurisdiction. *Id.* (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966) (contending that during the wartime circumstances, Ohio became "a surrogate for the place of incorporation or head office," and *Perkins* "should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction" based on doing business in a forum)). Justice Ginsburg similarly insisted during oral argument that "everything that the corporation was doing occurred in Ohio." Transcript of Oral Argument, *supra* note 54, at 32.

In fact, the company had located significant assets in California and most of the directors' meetings occurred outside Ohio. *See* Hoffheimer, *supra* note 4, at 566 n.96. The

important for limiting the effect of *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[110] which she interpreted as a fact-specific opinion that held that "the company's Texas connections did not resemble the 'continuous and systematic general business contacts . . . found to exist in *Perkins*.'"[111] Justice Ginsberg interpreted *Helicopteros* as establishing that purchases and related trips and training are not enough to support general jurisdiction but she did not acknowledge that the decision necessarily assumed the possibility of contacts-based general jurisdiction outside of a corporation's place of incorporation and principal place of business.[112]

Finally, Justice Ginsburg described *Goodyear* as holding that foreign tire manufacturers were not subject to general jurisdiction in a state where only a small percentage of tires were distributed; she explained that the manufacturers thus lacked "any affiliation" with the state[113] and were "in no sense at home" there.[114] Her discussion of *Goodyear* models the use of the new terminology coined in that opinion. It avoids referring to contacts.[115] Instead it substitutes language that the defendants were not "at home" in the state.[116]

Having completed her survey of cases, Justice Ginsburg again contrasted general and specific jurisdiction: "[s]pecific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized."[117] Her survey suggests that specific jurisdiction, liberated from traditional limits, has expanded to fill most of the jurisdictional gaps created by *Pennoyer*'s restrictions. In contrast, general jurisdiction remains captive in *Pennoyer*'s corral, an archaic doctrine rarely useful in the modern world.

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more important point, made by Justice Sotomayor, was that the Court itself characterized the mining company's activity *in* Ohio as a "limited[] part of its general business." *Daimler*, 134 S. Ct. at 768 n.7 (Sotomayor, J., concurring) (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952)).

[110] *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

[111] *Daimler*, 134 S. Ct. at 757 (alteration in original).

[112] The concurrence pointed out this revisionist history of the cases. *See infra* notes 152–54 and accompanying text.

[113] *Daimler*, 134 S. Ct. at 757. This characterization is tendentious. The sales established sufficient affiliation to support specific jurisdiction over claims arising from the products sold in the state, at least according to Justice Ginsburg. *See infra* note 210.

[114] *Daimler*, 134 S. Ct. at 757 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011)).

[115] She quoted language from *International Shoe* that "a corporation's 'continuous activity of some sorts within a state' is not enough to support'" general jurisdiction. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).

[116] *Id.* at 761 (quoting *Goodyear*, 131 S. Ct. at 2851).

[117] *Id.* at 757–58.

4. *Analysis*

The Court takes four points as givens for its analysis. First, Daimler AG is not subject to specific jurisdiction in California. Second, Daimler AG's own contacts with California are "too sporadic to justify the exercise of general jurisdiction."[118] Third, MBUSA is not an alter ego of Daimler AG. Fourth, MBUSA is subject to general jurisdiction in California.

With these propositions as its starting point, it appears that the Court is poised to answer the question addressed by the briefs and oral arguments: whether the Ninth Circuit's agency theory for attributing jurisdictional contacts comports with the Due Process Clause.

a. *Rejecting the Benefits Test for Attributing Jurisdictional Contacts*

Justice Ginsburg found that the Ninth Circuit's decision "rested primarily on its observation that MBUSA's services were 'important' to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist."[119] She rejected the adequacy of the Ninth Circuit's test for agency, quoting Judge Diarumid O'Scannlain's dissent to the effect that the test will always be satisfied because the very fact that the parent corporation assigns a task to a subsidiary indicates that it would be important enough for the parent to perform it itself if the subsidiary did not exist.[120] For Justice Ginsburg, the test leads to unacceptable results because it would invariably "subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate . . . ."[121] The Ninth Circuit test gets no credit for attempting to relate the problem of attributing jurisdictional contacts to the underlying principle of reciprocal benefits and burdens that historically grounded general jurisdiction.[122]

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[118] *Id.* at 758.

[119] *Id.* at 759.

[120] *Daimler*, 134 S. Ct. at 759–60. This reasoning rests on an appeal to intuition. Yet it is questionable whether Daimler AG would itself perform all functions in the absence of a subsidiary. For example, if MBUSA provides booths for dealers at California auto shows, Daimler AG might not engage in such practices without a subsidiary. Moreover, to the extent that Daimler AG benefits from the subsidiary's in-state activity due to increased sales, it is uncertain why its contacts should not be attributed to the parent. Judge O'Scannlain rejected such attribution because of a firm prior commitment to the idea of "corporate separateness." *Bauman V*, 676 F.3d 774, 777 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc). The independence of the corporate fiction was, however, precisely the issue for decision.

[121] *Daimler*, 134 S. Ct. at 760 (quoting *Goodyear*, 131 S. Ct. at 2856).

[122] The benefit derived by the parent provides the most obvious way to measure whether it is fair to subject the parent to general jurisdiction. And looking at the actual importance of the subsidiary's activities prevents the attribution of contacts when the activities are trivial and not beneficial to the parent. It is enough for the Court that the test is too easily satisfied:

b. *Rejecting Contacts-Based General Jurisdiction over Daimler AG*

In rejecting the Ninth Circuit's agency theory for attributing contacts, the Court answered the question on which it accepted certiorari. But Justice Ginsburg went further, declaring:

> Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.[123]

Justice Ginsburg devotes the fewest words to the most far-reaching part of her decision. Her opening sentence appears to state a paradox inasmuch as her givens included the fact that MBUSA was subject to general jurisdiction in California. Hence, if the subsidiary's contacts were imputed to the parent, it logically would seem to require that the parent, too, would have sufficient contacts.[124] Although she might have been clearer, she evidently did not find that logic requires this result for three separate reasons. First, the subsidiary's jurisdiction is only "at home" by stipulation, and this stipulation need not imply that it has sufficient contacts for general jurisdiction.[125] Second, Justice Ginsburg does not accept that general jurisdiction over any party is established by sufficient contacts. Third, she insists that the parent's relationship to the state must be evaluated separately from that of its subsidiaries, and the evaluation of the parent will involve a consideration of its activity outside the forum.

Justice Ginsburg's declaration that general jurisdiction over Daimler AG would not exist even counting MBUSA's in-state contacts makes clear that in-state contacts are no longer the essential ingredient of general jurisdiction. To say that Daimler AG would not be "at home" in California even with MBUSA's contacts means that something other than contacts defines what it means that to be "at home" in a state. Her subsequent discussion of whether Daimler AG is "at home" in California lends credence to this distinction. She reads *Goodyear*,

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Justice Ginsburg rejected it with the observation that it "would sweep beyond even the 'sprawling view of general jurisdiction' we rejected in *Goodyear*." *Id.*

The jurisdictional problem in *Daimler* was the opposite of the one in *Goodyear*, where the parent conceded it was subject to personal jurisdiction and the only issue was whether the limited sales of its European subsidiaries were sufficient for general jurisdiction over them. *See id.* at 750–51. While the parent corporation facilitated the distribution of some of the subsidiaries' products, its other substantial activity in no way benefited the European affiliates. *Id.* In contrast, the subsidiary's activity in California directly and materially benefited Daimler AG. *Id.*

[123] *Id.* at 760.

[124] Plaintiff's counsel appears to have made this logical argument. Transcript of Oral Argument, *supra* note 54, at 40.

[125] There was no formal stipulation, but in arguing the issues of jurisdiction, no party contested the sufficiency of the subsidiary's contacts for general jurisdiction. *See supra* notes 74–76. The United States observed in its amicus brief that MBUSA might not be subject to general jurisdiction after *Goodyear*. Brief for the United States, *supra* note 62, at 13–14, 17.

which introduced the "essentially at home" test, as holding "that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there."[126]

She repeated her claim from *Goodyear* that the "paradigm forum" for general jurisdiction over individuals is their place of domicile,[127] and the "paradigm fora" for corporations are their places of incorporation and principal places of business.[128] She reasoned that limiting general jurisdiction to a limited number of places is beneficial because they are "unique," indicating "only one place." For the first time, she also argued that the restriction is desirable because these places are "easily ascertainable."[129] For this latter proposition, she cited *Hertz Corp. v. Friend*,[130] where the Court had adopted a bright-line test for the "principal place of business" in the diversity statute.[131] She asserted that "[t]hese bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."[132] Eliminating general jurisdiction elsewhere leaves a "nice clear rule" that personal jurisdiction over a corporation exists in only two places, no matter what its subsidiaries do.[133]

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[126] *Daimler*, 134 S. Ct. at 760 (citing *Goodyear*, 131 S. Ct. at 2853–54).

[127] *Id.* (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)). It was never explained why domicile rather than presence provided the "paradigm" for individuals. As a practical matter, jurisdiction based on presence is almost certainly invoked far more frequently than domicile, though it may be hard to find an empirical study supporting this claim.

[128] *Id.*; *cf. Goodyear*, 131 S. Ct. at 2853–54.

[129] *Daimler*, 134 S. Ct. at 760.

[130] Hertz Corp. v. Friend, 559 U.S. 77, 77–78 (2010).

[131] *See infra* note 226 (questioning the relevance of a prudential construction of language in the diversity statute as authority for imposing due process limits on state personal jurisdiction).

[132] *Daimler*, 134 S. Ct. at 760. The certainty of jurisdiction in two places obviously does not explain why other places cannot have jurisdiction as well.

One of the scholars cited by the Court who questioned the continuing utility of general jurisdiction had suggested that if the courts embraced her proposal for expansive specific jurisdiction (which they have not), then "they will not need to use general jurisdiction to reach tenuously related cases. They may then opt to limit the scope of general jurisdiction to a set of clearly defined circumstances in order to provide certainty and administrative efficiency, or they may choose to use the broader 'fair-for-any-claim' test to explore the limits of the constitutional power to exercise dispute-blind jurisdiction over nonresidents." Twitchell, *supra* note 8, at 681. The article neither proposed eliminating jurisdiction for residents nor urged that administrative efficiency provide constitutional limits on state power.

[133] *See* Brief of the U.S. Chamber of Commerce et al. as Amici Curiae in Support of the Petitioner at 9, *Daimler*, 134 S. Ct 746 (No. 11-965) [hereinafter Brief of the U.S. Chamber of Commerce II] ("Read together [the precedents] establish a clear and predictable rule: Corporations are subject to general jurisdiction only in their state of incorporation and principal place of business."). Justice Ginsburg cited this brief as matter in the record authorizing the Court to address issues not described in the petition for writ of certiorari. *Daimler*, 134 S. Ct. at 760 n.16. Justice Ginsburg also cited the amicus brief of Professor

c. *The Possibility of Exceptional Cases*

The Court's opinion does not formally preclude jurisdiction over corporations outside the paradigm states of incorporation and place of business. Justice Ginsberg conceded that "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business . . . ."[134] At the same time, she rejected the theory that a corporation is subject to general jurisdiction "in every State in which [it] 'engages in a substantial, continuous, and systematic course of business.'"[135] Such broad jurisdiction is "unacceptably grasping."[136]

The Court did not offer reasons or policies to support its key conclusion. It thus remains unclear why a corporation like Daimler AG, with U.S. sales equal to 1% of Germany's(?) GDP,[137] should not be subject to jurisdiction in every state where it has continuous and systematic contacts, even if that means it becomes subject to jurisdiction in all fifty states. The only explanation Justice Ginsburg offered is that allowing "exorbitant" general jurisdiction in all states "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[138] But this explanation does not address the fact that Daimler AG and comparable corporations had already structured their commercial activity so as to derive considerable revenue from California sales with the full expectation of possible general jurisdiction based on preexisting circuit authority.

Lea Brilmayer as raising this matter. *Id.* (citing Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner at 10–12, *Daimler*, 134 S. Ct. 746 (No. 11-965) [hereinafter Brief of Professor Lea Brilmayer]). Professor Brilmayer seems, however, to have actually endorsed the contacts-based approach applied by the Ninth Circuit and rejected by the Court. *See* Brief of Professor Lea Brilmayer, *supra*, at 10 ("To establish general jurisdiction, plaintiffs must show "continuous and systematic' contacts between *each defendant* and the forum.").

Justice Alito asked during argument, "[W]hy shouldn't the rule be that, unless a corporation is incorporated in the jurisdiction or has its principal place of business in the jurisdiction, . . . the acts of the subsidiary are not attributable, unless it's an alter ego[?] It's a nice, clean rule." Transcript of Oral Argument, *supra* note 54, at 47–48. Only the possibility of exceptional cases prevents the Court from adopting this rule formally.

[134] *Daimler*, 134 S. Ct. at 760.

[135] *Id.* at 761 (citing Brief for Respondents at 16–17 & nn. 7–8, *Daimler*, 134 S. Ct. 746 (No. 11-965)).

[136] *Id.* Justice Kagan had similarly observed during argument, "If [Daimler AG] were subject to general jurisdiction in California, so, too, it would be subject to general jurisdiction in every State in the United States, and all of that has got to be wrong." Transcript of Oral Argument, *supra* note 54, at 31.

[137] *Bauman I*, 644 F.3d 909, 912–13 (9th Cir. 2011). The Ninth Circuit fails to make clear whether it is referring to the GDP of Germany or the United States.

[138] *Daimler*, 134 S. Ct. at 761–62 (2014) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 461, 472 (1985)).

In sum, Justice Ginsburg took pains to emphasize that the place of incorporation and principal place of business are the "exemplar" places of general jurisdiction.[139] Though conceding that general jurisdiction might not be limited to those places and that "continuous and systematic" affiliations might also establish general jurisdiction,[140] she qualified this concession in a footnote: "We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[141]

Three points about this footnote are important. First, not foreclosing a possibility is not the same as saying it exists.[142] Second, the only authority mentioned supporting exceptional contacts-based general jurisdiction is a case Justice Ginsburg insists in another footnote was actually brought in the company's principal place of business. Third, Justice Ginsburg suggested no examples of cases that might support contacts-based general jurisdiction, though she insisted Daimler AG's activities in California "plainly do not approach that level."[143]

C. *Justice Sotomayor's Concurrence*

Justice Sotomayor wrote a separate opinion, concurring in the judgment. In her view, California cannot exercise general jurisdiction over Daimler AG, because doing so would be so unreasonable that it would violate due process "in light of the unique circumstances of this case."[144] Justice Sotomayor differed with the majority on two points. First, she pointed out that the majority opinion goes beyond the question that the Court accepted for review.[145] Second, she rejected the majority's repudiation of contacts-based general jurisdiction.[146]

1. *The Controversy over the Issue Presented*

Justice Sotomayor objected to the Court's reaching the issue of the sufficiency of contacts to support general jurisdiction. Doing so removed the

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[139] *Id.* at 760 (refusing under the facts to look beyond "exemplar bases" of general jurisdiction in place of incorporation and principal place of business).

[140] *Id.* at 761 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

[141] *Id.* at 761 n.19 (citation omitted).

[142] The tentative acceptance of a possibility is a remarkable retreat from *Goodyear*. It signals the possible rejection of all contacts-based general jurisdiction, which may be a view embraced by members of the Court joining the opinion. *See infra* note 174 (discussing many Justices' rejection of the burdens and fairness factors in personal jurisdiction).

[143] *Daimler*, 134 S. Ct. at 761 n.19.

[144] *Id.* at 763 (Sotomayor, J., concurring).

[145] *See id.* at 764.

[146] *See id.*

issue from the appropriate consideration of the courts below,[147] and the Court was denied the benefit of briefing on the issue.[148] Moreover, because the defendant did not argue contacts were insufficient, it did not develop a factual record appropriate for judicial review.[149] While the record indicated the presence of significant sales-related contacts,[150] the record did not disclose other information relevant to general jurisdiction such as the location of key files and the responsibility of employees in California.[151]

2. *Misreading Precedent*

Justice Sotomayor recognized that the contacts-based test for general jurisdiction derived from *International Shoe* and had been approved repeatedly by the Court in prior decisions.[152]

> Our cases have long stated the rule that a defendant's contacts with a forum State must be continuous, substantial, and systematic in order for the defendant to be subject to that State's general jurisdiction. We offered additional guidance in *Goodyear*, adding the phrase "essentially at home" to our prior formulation of the rule. We used the phrase "at home" to signify that in order for an out-of-state defendant to be subject to general jurisdiction, its continuous and

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[147] *Id.* (observing that the ground of decision was "neither argued nor passed on [by the courts] below . . . .").

[148] The issue was raised for the first time in a footnote to Daimler AG's brief. *Id.* (citing Brief for Petitioner at 31–32 n.5, *Daimler*, 134 S. Ct. 746 (No. 11-965)). Not even the most aggressive arguments in the briefs urged a rejection of contacts-based general jurisdiction. *Cf.* Brief of the U.S. Chamber of Commerce II, *supra* note 133, at 6.

[149] *Daimler*, 134 S. Ct. at 766 (Sotomayor, J., concurring) ("The relevant facts are undeveloped because Daimler conceded at the start of this litigation that MBUSA is subject to general jurisdiction based on its California contacts. We therefore do not know the full extent of those contacts, though what little we do know suggests that Daimler was wise to concede what it did.").

[150] Daimler AG's U.S. subsidiary operated a regional headquarters and multiple offices in California. *Id.* at 767. The record does not contain clear information about the volume of U.S. and California sales of products manufactured in the U.S. by Daimler AG affiliates, but it supports the conclusion that many of the more than 200,000 Daimler AG vehicles imported into the U.S. were sold in California, and that the total annual sales in California reached $4.6 billion, which accounted for 2.4% of Daimler AG's worldwide sales. *Id.* at 766–67.

[151] *Id.* at 767. Justice Sotomayor observed that the Court found general jurisdiction in *Perkins* based on facts that might have been present in *Daimler* but that are not known because of the record. *Id.* (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952) (permitting general jurisdiction based on defendant's maintaining an office in the state, keeping files, and overseeing company activity from the state)).

[152] *See id.* "Until today, our precedents had established a straightforward test for general jurisdiction: Does the defendant have 'continuous corporate operations within a state' that are 'so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities?'" *Id.* (Sotomayor, J., concurring) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984)).

> substantial contacts with a forum State must be akin to those of a local enterprise that actually is "at home" in the State.[153]

Furthermore, Justice Sotomayor insisted that prior decisions had focused on the relationship of the defendant with the forum state: "In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts, not the relative magnitude of those contacts in comparison to the defendant's contacts with other States."[154] After reviewing the treatment of the facts in the leading general jurisdiction decisions, she concluded that the Court's steady focus on in-state contacts "follows from the touchstone principle of due process in this field, the concept of reciprocal fairness."[155] Justice Sotomayor explained: "When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts."[156]

Justice Sotomayor's view that reciprocal fairness supports jurisdiction in a specific state because of the defendant's relationship with that state makes the defendant's out-of-state activity irrelevant. She saw Justice Ginsburg's attention to out-of-forum contacts as a new approach that is "untethered" from the Court's historic focus on relationship with the forum.[157] And Justice Sotomayor viewed it as promoting undesirable results: "After all, the degree to which a company intentionally benefits from a forum State depends on its interactions with that State, not its interactions elsewhere."[158]

Under the Court's precedents and its "settled approach," Justice Sotomayor found "little trouble" in concluding that Daimler AG had sufficient contacts with California so as to render it "at home" and subject to general jurisdiction in the state.[159]

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[153] *Id.* at 769 (citation omitted).

[154] *Id.* at 767.

[155] *Daimler*, 134 S. Ct. at 768.

[156] *Id.* (citing *Int'l Shoe*, 326 U.S. at 319; J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2796–97 (2011) (plurality opinion)).

[157] *Id.* at 768–69.

[158] *Id.* She cited and quoted a law review article elsewhere cited by the majority that supports the conclusion that out-of-state contacts should not prevent jurisdiction. *Id.* at 769 (citing Brilmayer et al., *supra* note 127, at 742). The author of the article submitted an amicus brief in support of Daimler AG but did not address the issue of contacts-based general jurisdiction as the litigants did not understand the issue to be before the Court. *See* Brief of Professor Lea Brilmayer, *supra* note 133.

[159] *Daimler*, 134 S. Ct. at 769 (Sotomayor, J., concurring). For Justice Sotomayor this conclusion is unavoidable given Daimler AG's concessions that its subsidiary is subject to general jurisdiction in the forum state and the Court's concession that its subsidiary's contacts may be attributable to it. *Id.* at 769–70.

3. *"At Home" Can Be Many Places*

Justice Sotomayor, who had joined the Court's unanimous opinion in *Goodyear*, saw that opinion as endorsing contacts-based general jurisdiction.[160] She challenged Justice Ginsburg's reading of the "essentially at home" metaphor from *Goodyear* as an effort to restrict jurisdiction and to require a consideration of out-of-state contacts.[161] For Justice Sotomayor, such a restrictive reading was inconsistent with the Court's general jurisdiction cases.[162]

Justice Sotomayor squarely faced the prospect that alarmed the majority: the possibility that a large corporation could be subject to general jurisdiction in every state. She dismissed the majority's concern that permitting such broad general jurisdiction would render jurisdiction unpredictable.[163] She regarded broad jurisdiction as the "inevitable consequence" of the global economy,[164] and pointed out that any unfairness or inconvenience resulting from broad contacts-based general jurisdiction could be ameliorated by the reasonableness requirement for personal jurisdiction or doctrines such as forum non conveniens, change of venue, and long-arm statutes.[165]

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[160] *See supra* text accompanying note 153 (quoting Justice Sotomayor's concurring opinion and explanation of "at home" as paraphrase for sufficient contacts).

[161] *Daimler*, 134 S. Ct. at 769 n.8 (Sotomayor, J., concurring). Competing views of the "essentially at home" test led to a sharp exchange about the facts in *Perkins*, the "textbook case" of general jurisdiction. Justice Sotomayor insisted that the majority's comparative approach cannot be a correct application of the "at home" requirement given that the Court approved of general jurisdiction in *Perkins*. According to her, the company's in-state operations in that case were only a part of its business, yet the Court relied exclusively on the in-state contacts in finding general jurisdiction. *Id.* (Sotomayor, J., concurring) (citing *Perkins*, 342 U.S. at 438 (finding general jurisdiction where company carried on a "continuous and systematic, but limited, part of its general business")).

In contrast, Justice Ginsburg insisted *Perkins* applied an implicit comparative analysis and relied on the fact that the company was not operating outside the forum state. She saw the facts as showing that the defendant established its principal place of business in Ohio. *See supra* notes 108–09 and accompanying text. Justice Ginsburg's characterization of the facts simultaneously supports a restrictive, comparative approach to general jurisdiction and avoids any theoretical commitment to contacts-based jurisdiction outside the principal place of business.

[162] None of its earlier decisions finding lack of general jurisdiction did so simply because the defendants were sued outside their place of incorporation or principal place of business. *Daimler*, 134 S. Ct. at 770 n.9 (Sotomayor, J., concurring).

[163] *Id.* at 770 ("But there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one.").

[164] *Id.* at 771 ("In the era of *International Shoe*, it was rare for a corporation to have such substantial nationwide contacts that it would be subject to general jurisdiction in a large number of States. Today, that circumstance is less rare. . . . [I]t is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is 'essentially at home' in each one.").

[165] *Id.*

4. *Injustice of the Majority's Approach*

Justice Sotomayor pointed to four "deep injustice[s]" resulting from the majority's approach.[166] First, the restriction of general jurisdiction interferes with state sovereignty. To the extent that a company has the requisite contacts with a state, that state should be able to adjudicate disputes against that company. She gave the example of "a company [that] divides its management functions equally among three offices in different States, with one office nominally deemed the company's corporate headquarters."[167] Under the majority's holding, only the state in which the nominal headquarters is located can exercise general jurisdiction even if the company's activities in the other states are more substantial.[168]

Second, the majority's comparative approach to evaluating contacts discriminates against small and local businesses. "Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be."[169]

Third, the majority's formal rules are inconsistent with the evolving law governing general jurisdiction over individuals. Pursuant to *Burnham v. Superior Court*, a state can exercise general jurisdiction over an individual on the basis of a "one-time visit," regardless of that individual's comparative contacts with other states.[170] But, after *Daimler*, a corporation cannot be held to general jurisdiction in a forum in which it "owns property, employs workers, and does billions of dollars' worth of business" without a comparative analysis of its contacts elsewhere.[171]

Fourth, "the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions."[172] While the majority expressed little concern for foreign plaintiffs suing a foreign defendant for foreign conduct, Justice Sotomayor observed that its decision reached farther. She provided examples of cases where the majority opinion appears to preclude jurisdiction over claims by U.S. plaintiffs in appropriate state courts.[173]

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[166] *Id.* at 772.

[167] *Id.*

[168] *Daimler*, 134 S. Ct. at 772.

[169] *Id.*

[170] *Id.* at 772–73 (citing Burnham v. Super. Ct., 495 U.S. 604 (1990) (Scalia, J.)).

[171] *Id.* at 773.

[172] *Id.*

[173] First, she noted that contact-based jurisdiction will be unavailable to U.S. businesses in actions against foreign corporations with substantial business presence in the U.S. when the claims arise outside the U.S. "[A] U.S. business that enters into a contract in a foreign country to sell its products to a multinational company there may be unable to seek relief in any U.S. court . . . even if that company has considerable operations in numerous U.S. forums." *Id.* Second, contacts-based general jurisdiction would be unavailable to a U.S. plaintiff suing a U.S. company in a U.S. forum for claims arising in another state: "a General Motors autoworker who retires to Florida would be unable to sue GM in that State for

5. *Alternative Basis for Decision*

Despite the presence of continuous and systematic contacts, Justice Sotomayor concurred in the legal conclusion that forcing Daimler AG to submit to personal jurisdiction in California would violate the defendant's due process rights. She applied the two-part analysis elaborated by the Court in specific jurisdiction cases,[174] embraced by most lower courts,[175] and applied by the Ninth Circuit in the proceedings below.[176] Under this test, (1) a defendant must have sufficient contacts with the forum state, and (2) the exercise of personal jurisdiction must not be unfair or unreasonable. *Asahi Metal Industries* provided Justice Sotomayor with an example of disposing of a jurisdictional challenge on the test's second prong.[177]

Similarly, Justice Sotomayor concluded that due process prohibits the exercise of personal jurisdiction over Daimler AG under the facts of the case:

> The same considerations resolve this case. It involves Argentine plaintiffs suing a German defendant for conduct that took place in Argentina. Like the plaintiffs in *Asahi*, [plaintiffs] have failed to show that it would be more convenient to litigate in California than in Germany, a sovereign with a far greater interest in resolving the dispute. *Asahi* thus makes clear that it would be unreasonable for a court in California to subject Daimler to its jurisdiction.[178]

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disabilities that develop from the retiree's labor at a Michigan parts plant, even though GM undertakes considerable business operations in Florida." *Id.* at 773 n.12. Finally, a U.S. tourist whose child is injured in a foreign hotel owned by a multinational corporation would be unable to sue the foreign corporation in any U.S. state, even if the foreign corporation "has a massive presence in multiple States." *Id.* at 773. This example is discussed by Twitchell, *supra* note 8, at 670–71.

[174] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). While the Supreme Court had developed the two-part test in specific jurisdiction cases, before *Daimler* the Court never clearly limited the test to specific jurisdiction analysis. A number of Justices have become vocally critical of any legal standards requiring a judicial evaluation of burdens and fairness. *See* Burnham v. Super. Ct., 495 U.S. 604 (1990) (Scalia, J.); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (Kennedy, J.).

[175] Although the majority objected that general jurisdiction does not encompass a reasonableness prong, Justice Sotomayor responded that "[t]he Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context." *Daimler*, 134 S. Ct. at 764 n.1 (Sotomayor, J., concurring). Justice Sotomayor correctly noted that her own reasoning rested on a ground not briefed or argued below, stating, "I would decide this case under the reasonableness prong without foreclosing future consideration of whether that prong should be limited to the specific jurisdiction context." *Id.* at 765.

[176] *Bauman I*, 644 F.3d 909, 912 (9th Cir. 2011). Before *Daimler*, even legal scholars proposing restrictions on general jurisdiction approved of the reasonableness test. *E.g.*, B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1129, 1131 (1990).

[177] *Daimler*, 134 S. Ct. at 765 (Sotomayor, J., concurring) (discussing Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987)).

[178] *Id.*

Justice Sotomayor's opinion closes by emphasizing her disagreement with the majority.[179]

IV. REMAINING UNCERTAINTIES

Justice Ginsburg's opinion offers a number of reasons in support of its holding, from the administrative convenience of the rule to its empowerment of corporate planning and liability avoidance. The exact scope of the holding and the relative importance of the values supporting it create a number of uncertainties about its application in future cases. This part identifies and discusses some of the legal issues that will become the focus of future litigation.

A. *Service on Agent Appointed to Receive Service of Process*

In the age of *Pennoyer*, service on in-state agents established valid general jurisdiction either because the appointment signified the nonresident defendant's presence in the state's territory or because the appointment constituted consent to jurisdiction.[180] *International Shoe* put an end to presence-based arguments that service on an agent automatically established jurisdiction.[181] *International Shoe* replaced the search for presence and constructive consent with a functional analysis of the nonresident's activity in the forum state. As the Court now understands that decision, specific jurisdiction required only minimum contacts regardless of the method of service.[182] In contrast, general jurisdiction required a higher level of activity, which the majority now characterizes (for corporations) as requiring that the corporation be "at home" in the state.[183] Appointing an agent obviously does not constitute making a legal home in the forum state so as to support general jurisdiction.

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[179] *Id.* at 773.

> The Court rules against [plaintiffs] today on a ground that no court has considered in the history of this case, that this Court did not grant certiorari to decide, and that Daimler raised only in a footnote of its brief. In doing so, the Court adopts a new rule of constitutional law that is unmoored from decades of precedent.

Id.

[180] *See supra* Part II.B.

[181] Dean Perdue traces the evolution of the Court's personal jurisdiction jurisprudence from a focus on the sovereignty consequences of exercising personal jurisdiction to a focus on the liberty interests of defendants. In this process, she argues the Court construed due process limits as substantive criteria. Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 730–39 (2012).

[182] *See supra* note 43 and accompanying text.

[183] *See supra* text accompanying note 16; *see also* Rhodes, *supra* note 38, at 861. The courts originally understood such a substantial level of activity very differently. It was meant to contrast not with minimum contacts but rather with such an occasional or transient level

But *International Shoe* did not address consent theories of jurisdiction. And it remains uncertain whether appointment of an agent for purposes of service of process can constitute effective consent to either specific or general jurisdiction that dispenses with the need for any further affiliation with the state.[184] The consent theory for service on an agent is controversial.[185] Lower courts are divided over this issue,[186] and the Supreme Court has expressed keen interest in it.[187]

The Court's recent decisions provide no clear guidance. Their emphasis on history, certainty, and corporate control might support the continued validity of service on agents appointed to receive process,[188] and appointing an agent might

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of activity that the corporation would not be deemed present. *See supra* text accompanying note 45.

[184] *E.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . .").

[185] Scholars have challenged the sufficiency of consent to validate jurisdiction resulting from service on an agent appointed to accept service. *See* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1066 (2012) ("I contend that neither 'doing business' nor registration, by itself, confers general jurisdiction. General jurisdiction is limited to the one or two states in which the corporation is at home."); Brilmayer et al., *supra* note 127, at 757–58; Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 981 (1981); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 3–4 (1990); D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 1 (1990); Charles W. "Rocky" Rhodes, *supra* note 27, at 444 ("This method of obtaining jurisdiction is thus ripe for invalidation by the Supreme Court."); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1163 (2003) (suggesting that general jurisdiction should be unconstitutional under a due process analysis that focuses on predictability and arguing that "even if the Due Process Clause does not prohibit general jurisdiction through registration statutes, the unpredictability they introduce invalidates the consent theory upon which this species of personal jurisdiction is premised."); *see also* Eric A. Chiappinelli, *The Myth of Director Consent: After* Shaffer, *Beyond* Nicastro, 37 DEL. J. CORP. L. 783, 785 (2013) (arguing Delaware statute subjecting directors of Delaware corporations to specific jurisdiction violates due process and cannot be sustained under a consent theory). *But see* Rhodes & Robertson, *supra* note 18, at 258–63 (arguing that plaintiffs may succeed in avoiding effects of *Daimler* by asserting that corporation's registration to do business constitutes consent to general jurisdiction).

[186] *Compare* Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183–84 (5th Cir. 1992) (holding that appointment of agent does not establish consent to general jurisdiction), *with* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) (holding that appointment establishes valid consent to general jurisdiction). *See generally* Rhodes, *supra* note 27, at 441 n.328 (collecting cases).

[187] *See* Hoffheimer, *supra* note 4, at 600–01 (discussing Justice Ginsburg's colloquy during oral argument in *Goodyear*).

[188] *See id.* at 601. *But see* Rhodes, *supra* note 27, at 436–41 (arguing that early cases provide no unambiguous support for such jurisdiction and that the consent decisions are linked to discredited territorial assumptions).

satisfy the volitional-submission theory of jurisdiction embraced by a minority of the Court.[189] But consent and service on agents are conspicuously absent from Justice Ginsburg's historical narrative. Moreover, the recent decision makes plain that doing business, the prerequisite for registering, is itself insufficient for general jurisdiction,[190] and Justice Ginsburg suggested that older decisions upholding general jurisdiction based on service on local agents have been effectively overruled by the Court's modern, functional approach.[191] The cases she questioned did not distinguish sharply between agents appointed specifically to receive service and local agents that were invested with such authority by operation of law.[192]

Even if serving agents supports general jurisdiction, *Daimler* does not offer states the means to reach large foreign corporations like Daimler AG. Such corporations accomplish in-state objectives through intermediaries and thus avoid appointing agents for service of process. In contrast, the consent theory might support jurisdiction over those corporations and subsidiaries that can be effectively coerced into appointing agents as a condition for obtaining licenses, qualifying as a party, or obtaining other legal benefits.[193]

B. *The Scope of the Opinion in* Daimler

Daimler presented unusual facts. The claims were brought by foreign nationals against a foreign corporation for claims that arose entirely outside the United States. The defendant's contacts with California were mostly related to sales of products to consumers, and it marketed those products through intermediaries. The defendant did not do most of its business in the United

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[189] *See infra* note 256 and accompanying text (discussing submission theory).

[190] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014).

[191] *Id.* at 761 n.18 (discussing plaintiffs' counsel's citations to Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898) and Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917) (Cardozo, J.) (both holding that general jurisdiction was proper over nonresident defendant with local office in state)). Justice Ginsburg acknowledged that the Court had cited *Tauza* in *International Shoe*, 326 U.S. 310, 318 (1945), and again cited *Tauza* and *Barrow* in *Perkins*, 342 U.S. 437, 446 & 446 n.6 (1952). She cautioned: "[The] unadorned citations to these cases, both decided in the era dominated by *Pennoyer*'s territorial thinking should not attract heavy reliance today." *Daimler*, 134 S. Ct. at 761 n.18 (citation omitted). She added a *see generally* cite to a scholar who questioned whether doing business continues to provide a valid basis for general jurisdiction. *Id.* (quoting Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012)).

[192] *See Tauza*, 115 N.E. at 918 (citing *Barrow*, 170 U.S. 100) (observing that jurisdiction results from service on a managing agent with "equal force" as service on agent appointed to receive process).

[193] Denying nonresident corporations some legal benefits is unconstitutional. *Cf.* Bendix Autolite Corp. v. Widwesco Enters., Inc., 486 U.S. 888, 889 (1988) (holding tolling statute of limitation in claims against foreign corporation that did not appoint agent for service in state violated Commerce Clause).

States, and neither it nor its subsidiary did most of their U.S. business in California.[194]

Nevertheless, the opinion in *Daimler* leaves little room for arguing that the holding should be limited to its unusual facts. The Court reached beyond the issues required to resolve the appeal to address contacts-based general jurisdiction. Justice Ginsburg insisted on an expansive rereading of the "at home" language in *Goodyear* and concluded that the corporate activity in *Daimler* did not support general jurisdiction. As one influential source summarizes the opinion, "[o]utside of 'an exceptional case,' the Court ruled, general jurisdiction will generally be limited to the places where a corporation is incorporated and [maintains] its principal place of business."[195]

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[194] The record does not even support a finding that a plurality of its products were sold in California. *See supra* note 75.

[195] William Baude, *Opinion Recap: A Stricter View of General Jurisdiction*, SCOTUSBLOG (Jan. 15, 2014, 11:30 AM), http://www.scotusblog.com/2014/01/opinion-recap-a-stricter-view-of-general-jurisdiction/, *archived at* http://perma.cc/555G-J2A8. Relying on *Daimler*, Circuits have quickly concluded that defendants with more extensive contacts outside a state were not "at home" in the forum. *See* Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014) (no general jurisdiction over Cayman Islands defendant in Texas when plaintiff failed to show its contacts are "continuous and systematic" enough to render it "at home" in forum); Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014) (no general jurisdiction over Chinese defendant in N.Y. because this is not the "exceptional case" in which defendant's "continuous and systematic contacts" rise to the level of being "at home" in forum); Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 226 (2d Cir. 2014) (no general jurisdiction over Turkish corporation in N.Y. because even "a substantial, continuous, and systematic course of business . . . fall[s] short of [the contacts] required to render it at home" in the forum); *In re* Roman Catholic Diocese of Albany, 745 F.3d 30, 40 (2d Cir. 2014) (no general jurisdiction over N.Y. defendant in Vermont because defendant's contacts were insufficient to render it "at home" in forum); Martinez v. Aero Caribbean, 764 F.3d 1062, 1070 (9th Cir. 2014) (no general jurisdiction because defendant's forum contacts "are minor compared to its other worldwide contacts").

Federal trial court opinions may suggest a growing impatience with all contacts-based analyses. In some cases where a corporation is not incorporated and does not have its principal place of business in the forum, the courts apply a functional presumption against jurisdiction, placing the burden on the plaintiff to show an "exceptional case" for jurisdiction over and above showing "substantial, continuous, and systematic" contacts. *See, e.g.*, HealthSpot, Inc. v. Computerized Screening, Inc., No. 1:14–CV–00804, 2014 WL 6896298, at *4 (N.D. Ohio Dec. 8, 2014) (no general jurisdiction over Nevada corporation because Ohio "is not a 'paradigm all-purpose forum[]' as defined by the Supreme Court" and plaintiff has not "sufficiently shown this to be an 'exceptional case' in which general jurisdiction would nonetheless be proper"); Locke v. Ethicon Inc., No. 4:14–CV–2648, 2014 WL 5819824, at *4–7 (S.D. Tex. Nov. 10, 2014) (no general jurisdiction over N.J. defendants in Texas where plaintiffs failed to show that this was "an exceptional case" despite showing that defendants' Texas revenues were $18,697,674 from 2004–2013 compared to $10,464,887 N.J. revenues in same period; that defendants hire "Texas-based sales representatives, division managers, and a consultant"; and that defendants maintained a nationwide website); Wish Atlanta, LLC v. Contextlogic, Inc., No. 4:14–CV–00051 (CDL), 2014 WL 5091795, at *2, *4 (M.D. Ga. Oct. 9, 2014) (no general jurisdiction over Del./Cal. corporation in Georgia despite defendant's contracts with 8 Georgia suppliers; 99,446

C. *Comparative Evaluation of Where a Corporation Is "At Home"*

Daimler requires a comparative evaluation of a corporation's interstate or international activity. While continuous and systematic affiliations may possibly still establish a "home" in exceptional cases,[196] Justice Ginsburg emphasized that such a corporation must be "comparable to a domestic enterprise in that State."[197] Though Daimler AG through its subsidiary maintained a higher volume of enterprise activity within California than most California small businesses, Justice Ginsburg dismissed those contacts as "slim" and insufficient for general jurisdiction.[198] Quoting verbatim (for the second time) *Goodyear*'s requirement that such affiliations be so continuous and systematic that they render the corporation "at home,"[199] she concluded that Daimler AG did not meet this requirement. Her conclusion was supported by two facts. First, neither Daimler AG nor its subsidiary was incorporated in or maintained a principal place of business in California.[200] Second, Daimler AG's in-state activity was not sufficient for general jurisdiction because of its high level of activity in other states.[201]

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registered Georgia website users; and 16,731 Georgia transactions yielding $506,669.58 in sales because, under *Daimler*, general jurisdiction over a corporation is exclusive to principal place of business or state of incorporation); Estate of Thompson v. Mission Essential Pers., LLC, No. 1:11CV547, 2014 WL 4745947, at *4 (M.D.N.C. Sept. 23, 2014) (no general jurisdiction over Ohio corporation in N.C. because only in "exceptional situations" will general jurisdiction lie outside of the states of incorporation and principal place of business). State courts have likewise refused to find general jurisdiction based on more extensive business activity or contacts outside the state. Ali v. Beechcraft Corp., No. N11C-12-253 FSS, 2014 WL 3706619, at *3 (Del. Super. Ct. June 30, 2014).

In one case a court refused to dismiss under *Daimler* because it found the circumstances "exceptional" in that the defendants were not corporations and thus not subject to the traditional analyses for determining their place of incorporation or principal place of business and because the defendants further failed to identify any other country in which they were "at home." Sokolow v. Palestine Liberation Org., No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014). *But cf.* Toumazou v. Turkish Rep. of N. Cyprus, No. 09-1967, 2014 WL 5034621, at *4 (D.D.C. 2013) (no general jurisdiction despite defendant's forum contacts including offices, employees, putative ambassador, and interactive website because "the TRNC is 'at home' in northern Cyprus, as its name suggests, not in the District of Columbia.").

[196] *Daimler*, 134 S. Ct. at 758 n.11 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

[197] *Id.*

[198] *See supra* text accompanying note 123.

[199] *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 131 S. Ct. at 2851).

[200] *Id.*

[201] *Id.* at 761–62 ("If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. . . . It was therefore error . . . to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California . . . .").

Justice Sotomayor's concurring opinion objected that the Court's reasoning would allow the largest international corporations to escape general jurisdiction by virtue of the volume of their activity outside any particular state territory.[202] Justice Ginsburg responded by defending her comparative approach to evaluating contacts. Under this approach, the level of activity required to establish a corporate "home" is not the volume or character of in-state business. Rather the approach evaluates whether the nonresident corporation's activity is focused in the state by considering activity outside the state.[203]

It should be noted that this reasoning appears to mischaracterize the plaintiff's argument. Daimler AG's contacts in California were not only based on a high level of sales (probably among the highest in the world). Its contacts also included a permanent regional corporate infrastructure, established through its active supervision of its subsidiary. *See supra* text accompanying note 91. Similar contacts did not exist in most states.

[202] *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring) ("In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly 'too big to fail'; today the Court deems Daimler 'too big for general jurisdiction.'").

[203] *Id.* at 762 n.20.

> To clarify in light of Justice Sotomayor's opinion concurring in the judgment, the general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States.

Id. (alteration in original) (citation omitted). Developing case law demonstrates that the lower courts have heeded Justice Ginsburg's insistence on a comparative approach. *See* Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc., 751 F.3d 796, 802–04 (7th Cir. 2014) (California corporation's nationwide interactive website did not support general jurisdiction in Indiana because so holding would open defendant up to general jurisdiction in every state); Locke v. Ethicon Inc., No. 4:14–CV–2648, 2014 WL 5819824, at *5 (S.D. Tex. Nov. 10, 2014) (despite showing a greater volume of sales in forum state than in state of incorporation, general jurisdiction unavailable because "[f]atally, the plaintiffs limit their product sales analysis to Texas and New Jersey without 'apprais[ing] [the defendants'] activities in their entirety, nationwide and worldwide.'") (alteration in original); NExTT Solutions, LLC v. XOS Techs., Inc., No. 3:13 CV 1030, 2014 WL 6674619, at *7 (N.D. Ind. Nov. 25, 2014) (rejecting general jurisdiction despite defendant's decade-long relationship with Indiana customers, resulting in $1–2 million in sales annually, because "XOS appears to have stronger affiliations with other states, namely Florida, where all of its officers reside, where its office is located, and from where, over the last five years, it derived more revenue . . . ."); Fed. Home Loan Bank v. Ally Fin., Inc., No. 11–10952–GAO, 2014 WL 4964506, at *2 (D. Mass. Sept. 30, 2014) (vacating prior order finding general jurisdiction under *Goodyear*, applying "tighter assessment" under *Daimler*, and finding "[a]lthough [the defendants] do have significant 'continuous and systematic' contacts with Massachusetts . . . these defendants have similarly substantial contacts with dozens of other states."); Estate of Thompson v. Mission Essential Pers., LLC, No. 1:11CV547, 2014 WL 4745947, at *3–4 (M.D.N.C. Sept. 23, 2014) (finding Magistrate Judge who recommended dismissal had properly considered "percentages or relative amounts of Defendant's activity attributable to North Carolina in light of Defendant's total

Justice Ginsburg sees the comparative approach as necessary to prevent the exorbitant exercise of general jurisdiction by all states where sales are "sizable."[204] It is possible that multi-state marketing presents a situation where the foreign corporation has a greater need for commercial and legal predictability and where the state has a reduced interest in regulating foreign corporate conduct. If this is so, then neither *Daimler*'s holding nor its comparative approach would apply with equal force to activity such as operating a factory or mines in a state. For example, if a foreign corporation operates factories in two U.S. states, permitting general jurisdiction in those states would not provide precedent for general jurisdiction in all states where its sales were sizable.

D. *Corporate Expectations*

Contacts-based general jurisdiction in multiple states alarmed Justice Ginsburg because of its disruptive effect on corporate planning.[205] The role of expectations for general jurisdiction remains uncertain. First, it is uncertain whether courts should consider expectations in all general jurisdiction cases as a rough guide to where a corporation is "at home," or only in cases involving multi-state sales where corporations arguably act in reliance on the law regulating jurisdiction. Second, it is uncertain whether expectations are relevant only for determining contacts-based general jurisdiction, or whether they provide the underlying principle that would also guide the determination of the place of incorporation and principal place of business. Finally, it is uncertain whether the relevant expectations are actual expectations of corporate officers or the hypothetical expectations that should be attributed to reasonable employees of a reasonable corporation.

The underlying rationale for looking to expectations for general jurisdiction is undeveloped.[206] The Court's treatment of expectations in other jurisdictional

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activities in the U.S. and globally."); Shrum v. Big Lots Stores, Inc., No. 3:14–CV–03135–CSB–DGB, 2014 WL 6888446, at *7 (C.D. Ill. Dec. 8, 2014) ("Although [defendant's] contacts with Illinois are fairly extensive and deliberate, they do not satisfy the general jurisdiction standard because this court must assess the entirety of [defendant's] activities—not just the magnitude of its contacts with Illinois—in determining general jurisdiction."); *see also* Marcus Uppe, Inc. v. Global Computer Enters., Inc., No. 14–530, 2014 WL 6775282, at *1, *3 (W.D. Pa. Dec. 2, 2014) (rejecting general jurisdiction over nonresident corporation that "provides and maintains cloud-based information technology services" which are utilized by users nationwide because "Plaintiff's theory that Defendant is geographically rooted nowhere, and thus is everywhere, conflicts with the current jurisprudence reinforcing that 'the threshold for establishing general jurisdiction is very high,' and a corporate defendant must specifically be 'at home' in the forum state.").

[204] *Daimler*, 134 S. Ct. at 761.

[205] *See supra* text accompanying note 138.

[206] Justice Ginsburg reasoned that general jurisdiction over corporations is analogous to jurisdiction in an individual's domicile. *See supra* notes 126–28 and accompanying text. But the principal decision recognizing domicile-based general jurisdiction paid no heed to

contexts provides little guidance. On the contrary, the confusion generated by the role of expectations provides a compelling argument against importing expectations as a criterion for general jurisdiction over corporations. In unanimously upholding transient jurisdiction over individuals served in the forum state, members of the Court divided sharply over the constitutional relevance of expectations. Four members maintained that tradition and subsisting practices provided the sole criteria for determining whether established forms of personal jurisdiction conformed to due process.[207] Four other members of the Court found transient jurisdiction constitutional based in part on the fact that longstanding practice created reasonable expectations of jurisdiction.[208]

The Court's attention to expectations in specific jurisdiction decisions has not provided greater clarity. Expectations were first addressed in *World-Wide Volkswagen Corp. v. Woodson*,[209] where the Court rejected mere foreseeability of in-state injury as a sufficient basis for specific jurisdiction. Rather, the majority observed that what was relevant was whether the defendant's contacts with a state were "such that he should reasonably anticipate being haled into

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expectations. Rather the Court explained that such jurisdiction was rooted in reciprocal legal relationship: a state in protecting the person and property of its domiciliary "may also exact reciprocal duties," including the duty to answer all lawsuits in its courts. Milliken v. Meyer, 311 U.S. 457, 463 (1940); *see* Blackmer v. United States, 284 U.S. 421, 443 (1932) (approving contempt jurisdiction in U.S. courts over U.S. citizen residing in France who refused to respond to summons). While *Blackmer* is often cited as authority for citizenship-based general jurisdiction, the Court explained that it was not addressing jurisdiction for matters other than allegiance to the sovereign. *See id.* at 438 n.5.

[207] Burnham v. Super. Ct., 495 U.S. 604, 619 (1990) (opinion of Scalia, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.).

[208] "[O]ur common understanding *now*, fortified by a century of judicial practice, is that jurisdiction is often a function of geography. The transient rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process." *Id.* at 637 (Brennan, J., concurring, joined by Marshall, Blackmun & O'Connor, JJ.). Justice Stevens did not mention expectations as a factor that supported jurisdiction. *See id.* at 640 (Stevens, J., concurring).

Justice Scalia identified the problem with expectations: the expectations are reasonable not because they are fair in some independent moral sense but only because state courts in fact exercise jurisdiction over persons served in their territory and the duration of the practice means it is constitutionally valid:

> That continuing tradition, which anyone entering California should have known about, renders it 'fair' for [the defendant served in state to be subject to its general jurisdiction]—at least 'fair' in the limited sense that he has no one but himself to blame. [The concurring Justices' argument in reliance on expectations] is a circular one. . . . [F]airness exists here because there is a continuing tradition.

Id. at 625 (Scalia, J., joined by Rehnquist, C.J., & Kennedy, J.).

[209] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

court there."[210] Justice Brennan objected that such a test provided no guidance because it was circular.[211]

In none of the cases citing this language has the Court actually considered the reasonable expectations of corporations.[212] When the concept originated in *World-Wide Volkswagen*, Justice Marshall identified the key dilemma:

> I sympathize with the majority's concern that persons ought to be able to structure their conduct so as not to be subject to suit in distant forums. But that may not always be possible. Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums.[213]

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[210] *Id.* at 297. Justice Stevens proposed that the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* (Stevens, J., concurring). Justice Brennan cited Justice Stevens' language with approval in a decision for the Court involving a contract dispute. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (Brennan, J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

[211] As Justice Brennan observed, this sort of foreseeability was circular and provided no useful guide.

> The Court suggests that this [foreseeability of being subject to jurisdiction] is the critical foreseeability rather than the likelihood that the product will go to the forum State. But the reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is.

World-Wide Volkswagen, 444 U.S. at 311 n.18 (Brennan, J., dissenting). Justice Ginsburg cited Justice Brennan's quotation regarding foreseeability. Daimler AG v. Bauman, 134 S. Ct. 746, 761–62 (2014) (quoting *Burger King*, 471 U.S. at 472).

[212] In *Burger King*, the Court considered the knowledge and reasonable expectations of a natural person. *See Burger King*, 471 U.S. at 480. It rejected the lower court's finding that the individual defendant had no reason to anticipate suit in Florida, finding instead that substantial evidence indicated the Michigan resident actually knew he was affiliating with a Florida-based corporation and voluntarily reached out to enter into a structured, twenty year, million dollar, long term contract with the Florida corporation. *Id.* From this the Court concluded that specific jurisdiction was presumptively valid. *Id.*

Justice Breyer, concurring in *Nicastro*, would have permitted an exercise of specific jurisdiction if the manufacturer had delivered goods into the stream of commerce with the expectation they be purchased in the forum state. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 297). He suggested that such expectations might be established by evidence of a list of potential customers in the forum state. *Id.* (Breyer, J., concurring). *See* Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 509 (2012). Evidence of such a list would evidently not persuade either the plurality or the dissent, and the development of an evidentiary record on such matters would consume resources with no corresponding benefit.

[213] *World-Wide Volkswagen*, 444 U.S at 316 (Marshall, J., dissenting, joined by Blackmun, J.)

If party expectations mean reasonable legal expectations, then the test is circular.[214] If the criterion is the actual anticipation of litigation, then the inquiry requires a digression into factual matters that experience demonstrates are of dubious relevance.[215]

E. *Place of Incorporation and Principal Place of Business*

While a majority of the Court agrees to the new formal rules that will usually restrict general jurisdiction over corporations to their place of incorporation or principal place of business, members of the Court embrace fundamentally different theories of jurisdiction that will affect their future application of the formal rules. While no Justice has elaborated his or her theory fully, it is possible to distinguish at least two approaches. Justice Kennedy views jurisdiction as proper only when a defendant "manifest[s] an intention to submit to the power of a sovereign."[216] Justice Ginsburg has criticized this theory.[217] While failing to propose an alternative theory, she advances arguments that rely heavily on the need for convenience as a principal justification for general jurisdiction.[218]

1. *Place of Incorporation*

Different theories of jurisdiction may lead to different conclusions about the place or places of incorporation in disputes that raise the question. Normally the place of incorporation is not in question. But questions can arise when corporations reincorporate in another state,[219] when corporations act as alter

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[214] Justice Ginsburg herself addressed the problem of expectations in her dissenting opinion in *Nicastro*. While a plurality found that the British manufacturer did not expect to be subject to jurisdiction in New Jersey, where one of its products allegedly caused serious injuries, *Nicastro*, 131 S. Ct. at 2790 (Kennedy, J.), Justice Ginsburg protested that any such expectation would have been unreasonable under the circumstances, which included a well-established pattern of decisions approving the exercise of jurisdiction in similar cases. *Id.* at 2801 (Ginsburg, J., dissenting).

[215] This is illustrated by the record in Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987), which contained conflicting self-serving affidavits swearing that a party did or did not expect to be subject to jurisdiction in California. *Id.* at 107. While *Asahi* produced split opinions, no Justice found the affidavits bearing on actual expectations of corporate agents to be useful, and no opinion relied on them.

[216] *Nicastro*, 131 S. Ct. at 2788 (plurality opinion for four members of the Court).

[217] *Id.* at 2798 (Ginsburg, J., dissenting, joined by Kagan & Sotomayor, JJ.).

[218] *E.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (citing von Mehren & Trautman, *supra* note 109, at 1144–63); *id.* at 760 (relying on ease of determination as the principal ground for supporting principal place of business). *But see* Note, *Personal Jurisdiction—General Jurisdiction*—Daimler AG v. Bauman, 128 HARV. L. REV. 311, 311 (2014) (positing that "Justice Ginsburg continues to apply a theory of personal jurisdiction . . . that focuses fundamentally on fairness to both litigants.").

[219] In theory a corporation can be incorporated under only one sovereign's law and cannot change its place of incorporation. *Cf.* 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 41 (1935) (text by vested rights theorist advocating idea of corporate

egos or agents for each other, and when conduct sufficient to create a corporation under one state's law is not sufficient under another's.[220] When the place of incorporation shifts, questions can arise about whether the place should be determined at the time of the events giving rise to litigation or at the time of the commencement of the action.

The theories supporting general jurisdiction may lead to different conclusions in close cases. If a defendant's place of incorporation provides a constitutionally permissible basis for general jurisdiction because the corporation voluntarily submits to that sovereign's courts for all claims, then the corporation's power to control its submission would seem to include the power to terminate submission. Such an approach would privilege conduct creating a de jure corporation. Under this approach general jurisdiction would focus on the question of whether a corporation exists under the law of attempted incorporation at the time of the commencement of the action.

If, in contrast, judicial convenience, fundamental fairness, and the need to fill gaps in the law of specific jurisdiction provide underlying reasons for general jurisdiction in the place of incorporation, then the corporation's power to manipulate its place becomes less important. Under such an approach, general jurisdiction might focus on whether the place of liability-creating conduct recognized the existence of a corporation at the time of liability-creating conduct.

Similarly, without some explanation for why corporations are constitutionally subject to general jurisdiction in their state of incorporation, there is little guidance as to the issue of whether unincorporated associations of various kinds should be treated like corporations or as groups of separate persons.[221] In *Daimler*, Justice Ginsburg criticized the agency test applied by the Ninth Circuit but did not propose an alternative. Her critique, in the context of due process analysis and without citation to any authority, strongly suggests that the Court will apply an independent due process analysis for such relationships. Perhaps a federal standard of agency, enterprise liability, and

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domicile based on single unchanging original place of incorporation). In fact, a corporation with a continuing legal identity can readily change its place of incorporation by creating a new corporation in a second state, transferring its assets, and dissolving. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 523–24 (1928).

[220] *E.g.*, Paper Prods. Co. v. Doggrell, 261 S.W.2d 127, 128–29 (Tenn. 1953) (recognizing de facto corporation under Tennessee law where failure to file charter resulted in disregard of corporate existence and partnership liability under law of Arkansas, where charter should have been filed).

[221] The defendant in *Perkins*, for example, was a hybrid limited liability company with some attributes of partnerships and some of corporations. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 439 n.2 (1952) (treating the defendant as a corporation because it had that status under state law). *But see* Perkins v. Benguet Consol. Mining Co., 98 N.E.2d 33, 37–38 (Ohio 1951) (observing that defendant had attributes of a corporation for purposes of state service of process rules but not necessarily for purposes of limiting liability of shareholders).

piercing the corporate veil will be necessary in order to prevent local doctrines from eviscerating the due process restrictions on general jurisdiction over corporations. But the issue has never been presented to or decided by the Court.

2. *Principal Place of Business*

Because a corporation can manipulate its place of incorporation, the identification of a principal place of business becomes of great practical significance for plaintiffs. This is illustrated by a corporation that manufacturers and sells its cars exclusively in California but that incorporates in Mordor. Can that corporation avoid general jurisdiction in California by locating its corporate headquarters in sovereign Mordor? Before *Daimler*, such a manufacturer would be subject to general jurisdiction in California based on its contacts there. After *Daimler* the answer will depend on how courts define principal place of business and whether they recognize the facts as falling within an exceptional form of contacts-based general jurisdiction.

Justice Ginsburg acknowledged the rule that a corporation is subject to general jurisdiction in the state where it maintains its principal place of business, but she offered no reason for the rule.[222] Her opinion in *Daimler* offers a tentative explanation based on the need to provide at least one place for litigating all claims against a corporation,[223] but this does not explain why general jurisdiction need exist anywhere when specific jurisdiction is available; nor does it explain why general jurisdiction should exist outside the place of incorporation.

There are sound reasons for not restricting general jurisdiction to place of incorporation. Permitting general jurisdiction where a corporation maintains its principal place of business may serve as a limit on the power of corporations to manipulate the states where they are subject to jurisdiction, preventing corporations from evading responsibility to answer lawsuits in a state where they actually engage in all or most of their business activity.

Unfortunately, in explaining convenience as a reason for general jurisdiction, Justice Ginsburg cited *Hertz Corp. v. Friend*,[224] an opinion

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[222] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011). *See* Hoffheimer, *supra* note 4, at 597 (observing that scholars cited by the Court provided no legal authority for the rule that general jurisdiction existed where a corporation maintained its principal place of business and proposing that the rule arose from the accepted practice by which service on an authorized agent at the corporate office both satisfied notice requirements and established firm basis for all-purpose jurisdiction).

Neither tradition nor judicial practice at the time of the adoption of the Fourteenth Amendment clearly requires the rule. Justice Holmes comes close to insisting that a corporation can be subject to general jurisdiction in only one state, the state of its incorporation, though he confronted an issue of immunity with mixed elements of legislative and adjudicatory jurisdiction. *See* Bergner & Engel Brewing Co. v. Dreyfus, 51 N.E. 531, 532 (Mass. 1898).

[223] *See supra* text accompanying notes 127–29.

[224] Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010).

construing the meaning of Congress's use of the terminology "principal place of business" in an entirely different legal context. In that case, the Court applied the nerve-center test under which the principal place of business is usually where the corporation locates its administrative offices,[225] not where it engages in most of its business.[226]

At issue in *Hertz* was the federal diversity statute, which authorizes federal courts to hear certain cases between citizens of different states and assigns a corporation's citizenship both in its place of incorporation and principal place of business.[227] There are strong reasons to question whether principal place of business should be given the same meaning for both diversity jurisdiction and for general personal jurisdiction.[228] The corporate headquarters test provides a single, easy-to-apply test that Congress plainly imposed and can easily alter. Corporations have no incentive to move their principal place of business in order to evade Congress's definitions.[229]

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[225] *Id.* at 1184 (principal place of business in the diversity statute "is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. . . . [And i]n practice it should normally be the place where the corporation maintains its headquarters . . . .").

[226] Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (quoting *Hertz Corp.*, 130 S. Ct. at 1193 ("Simple jurisdictional rules . . . promote greater predictability.") Federal courts have subject matter jurisdiction over some civil actions between citizens of different states. U.S. CONST. art. III; *see also* 28 U.S.C. § 1332(a) (2012). Congress defines a corporation's citizenship as both its place of incorporation and its "principal place of business." *Id.* § 1332(c). Lower courts were long divided over whether "principal place of business" meant the place where a corporation conducted most of its business (the so-called "muscle test") or the place where it located its corporate headquarters (the so-called "nerve center test"). *Hertz Corp.*, 130 S. Ct. at 1191. The Supreme Court adopted the nerve-center test for reasons specific to the context—policy goals unique to diversity jurisdiction and to the legislative history of the statute. *See* Hoffheimer, *supra* note 4, at 598. The Court relied on the greater judicial convenience of the nerve center test, but it did so because of clear legislative history indicating that Congress wanted to avoid imposing a test that would be difficult to apply. *Id.* Moreover, the Court in imposing the nerve center test on the diversity statute did so with full awareness that it was offering a prudential construction of a statute that Congress was empowered to alter by subsequent legislation. *Id.* (identifying reasons why the nerve center test for subject matter jurisdiction is not necessarily an appropriate measure for personal jurisdiction).

[227] 28 U.S.C. § 1332(c)(1).

[228] Congress's purpose in defining corporate citizenship to include its principal place of business was to *eliminate* federal subject matter jurisdiction. Creating two places of citizenship deprives federal courts of subject matter jurisdiction in up to twice as many cases—destroying diversity in claims brought by plaintiffs that are citizens of either of the corporation's places of citizenship. In contrast, defining general personal jurisdiction to include a corporation's principal place of business potentially doubles the number of courts that may constitutionally exercise personal jurisdiction.

[229] Even if corporations wanted to evade federal court (which they usually do not) in order to prevent diversity, they would need to predict in advance the state citizenship of adversaries.

In contrast, corporations will certainly seek to structure their activity, including the location of their corporate headquarters, so as to avoid being subject to general personal jurisdiction. The parties did not brief, nor did the Court address, the question whether good policy or due process requires deference to such corporate decisions.

While Justice Ginsburg's passing reference to *Hertz* should, accordingly, not be read as endorsing the nerve center test for defining principal place of business for general personal jurisdiction, it is a safe prediction that corporations will aggressively argue that the test applies to general personal jurisdiction in cases where it benefits them.

Courts should carefully distinguish diversity and general jurisdiction. When a corporation engages in all or most of its business in the state of California, due process should not prevent California from exercising general jurisdiction just because the corporation locates its place of incorporation and corporate offices in Mordor. Courts should either find that the corporation's principal place of business is in California, or they should find that the corporation engages in such continuous and systematic contacts so as to render it essentially at home in the forum "comparable to a domestic enterprise in that State."[230]

F. *Reasonableness as a Limit on General Jurisdiction*

For specific jurisdiction, the Court prescribed a two-part analysis that requires a consideration of (1) minimum contacts and (2) the reasonableness or fairness of exercising jurisdiction.[231] *Goodyear* left open the question of whether general jurisdiction requires a comparable two-part analysis of (1) where the corporation is "at home," and (2) the reasonableness or fairness of exercising jurisdiction.[232]

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[230] *Daimler*, 134 S. Ct. at 758 n.11. *See infra* Part IV.G (discussing exceptional cases).

[231] *E.g.*, Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *See generally* PETER HAY ET AL., CONFLICT OF LAWS § 5.12, at 368–69 (5th ed. 2010); WEINTRAUB, *supra* note 6, § 4.8A(1), at 205. This approach always attracted some criticism, *see* Solimine, *supra* note 106, at 42 nn.178–79 (discussing scholarly criticism), and its present status is uncertain. *See also* Hoffheimer, *supra* note 4, at 588 n.228 (noting the absence of evaluation of the second part of the analysis in recent opinions); Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 766 (2012) (concluding that *Nicastro* "logically questions the continued authority of the fairness branch to due process analysis," even for specific jurisdiction.)

[232] *See* Hoffheimer, *supra* note 4, at 588–90 (arguing that Court's opinion suggests few, if any, situations where general jurisdiction will require two-part analysis and concluding that the only possible surviving use of the reasonableness-fairness factors would be to eliminate jurisdiction where, despite systematic and continuous contacts, other considerations militate against jurisdiction). Hoffheimer proposed that general jurisdiction might be available for claims by North Carolina plaintiffs based on Goodyear USA's high level of activity in North Carolina but that reasonableness limits might prevent general jurisdiction over actions by nonresidents. *Id. Daimler*'s disapproval of reasonableness suggests that North Carolina may not exercise general jurisdiction because it is neither

The Ninth Circuit applied the two-part test in *Daimler* and found both that sufficient contacts existed and that the exercise of jurisdiction was reasonable.[233] Justice Sotomayor also applied the two-part test in her concurrence, but reached a different conclusion. First, she observed that Daimler AG's subsidiary engaged in sufficient contacts to permit general jurisdiction.[234] Second, she reasoned that "no matter how extensive [defendant's] contacts with California, [general jurisdiction] would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available."[235]

Justice Ginsburg decided the case without addressing the reasonableness of exercising general jurisdiction and criticized Justice Sotomayor for employing reasonableness as an additional limitation on general jurisdiction. In a footnote that avoided any reference to the experience of lower courts in applying the two-part test, Justice Ginsburg first observed that reasonableness was never a "free-floating test" and then declared that it was limited to specific jurisdiction.[236] To avoid any misunderstanding, she added: "When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous."[237]

Restricting general jurisdiction to places where corporations are "at home" makes it less likely that general jurisdiction over them will be unreasonable. Consequently, Justice Ginsburg probably did not see any role for a separate consideration of reasonableness.[238] While reaching the issue was unnecessary

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Goodyear USA's state of incorporation or principal place of business. *But see Daimler*, 134 S. Ct. at 764–65 (Sotomayor, J., concurring) (agreeing that California lacks general jurisdiction but on the ground that jurisdiction would be unreasonable in cases involving foreign plaintiffs suing a foreign defendant for foreign conduct, and given the existence of a more appropriate forum).

[233] *See supra* notes 72–74 and accompanying text.

[234] *Daimler*, 134 S. Ct. at 763–64 (Sotomayor, J., concurring).

[235] *Id.* at 764.

[236] *Id.* at 762 n.20 ("True, a multipronged reasonableness check [has been] articulated . . . but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue.") (citation omitted). Justice Ginsburg's observation that reasonableness is not free-floating is curious in light of the fact that Justice Sotomayor's concurrence relies precisely on the fact that it is part of a larger two-part analysis. *Id.* at 764–65 (Sotomayor, J., concurring).

[237] *Id.* at 762 n.20.

[238] *Accord* Monestier, *supra* note 18, at 263–65 (observing that courts applying the reasonableness prong to general jurisdiction analysis found it superfluous and noting that the reasonableness inquiry would foster uncertainty). The reasonableness-fairness test has become unpopular with some members of the Court. Transcript of Oral Argument, *supra* note 54, at 56. Justice Ginsburg criticized Justice Sotomayor's approach by asserting that deciding the case on reasonableness grounds would be "a resolution fit for this day and case only." *Daimler*, 134 S. Ct. at 762 n.20. Whatever the merit of this criticism, Justice Ginsburg's additional argument that reasonableness unnecessarily complicates jurisdictional decision-making is unpersuasive. *Id.* Courts have required both contacts and reasonableness. *Cf.* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (requiring dismissal when defendant had

to the Court's decision and arguably imprudent,[239] the answer is clear for now: general jurisdiction requires only a single inquiry into whether the corporation is "at home" in the forum state.

G. *Candidates for Exceptional Cases*

While finding that Daimler AG was not subject to contacts-based jurisdiction in California, the Court conceded that prior decisions did not hold that corporations are subject to general jurisdiction *only* in their places of incorporation and principal places of business.[240] The opinion thus suggests—tentatively—that contacts-based general jurisdiction may still be permissible in exceptional cases.[241]

This part considers five situations that remain viable candidates for general jurisdiction, either because the level of the defendant's in-state activity establishes a principal place of business in the state or because a corporation's activity makes the corporation "at home" in the state.

1. *Foreign Corporation Conducting All or Most of Its Business in the Forum State*

A strong case for continuing general jurisdiction would be presented if a corporation is formed to do business in one state and does all of its business there, but is incorporated in, and establishes a principal place of business outside, the state. A similar case is presented by a corporation that evolves so that its business becomes concentrated exclusively in one state. It is difficult to distinguish such situations from corporations that engage in business in more than one state but conduct the majority of their business in a single state.

The state where a corporation does all or most of its business would unquestionably have general jurisdiction under the older requirement of "doing business." Under the Court's newer approach, general jurisdiction should still

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no contacts with the forum regardless of how convenient or reasonable the forum might otherwise be). This has provided greater rather than less convenience because it allows them to dismiss when either is absent. *Id.* Similarly, while the Court identified five reasonableness factors, courts were never required to consider all of them. *Id.*

[239] Until we know what the tests for place of incorporation and principal place of business are, it is not inconceivable that general jurisdiction at such places might be unreasonable in some situations. For example, if New Jersey is the principal place of business of MBUSA, whose jurisdictional contacts are attributable to Daimler AG, it might be better to leave undecided whether Daimler AG is subject to jurisdiction in New Jersey for torts committed in a foreign country against foreign citizens with no connection to either New Jersey or any U.S. territory.

[240] *Daimler*, 134 S. Ct. at 760; *see id.* at 770 n.9 (Sotomayor, J., concurring) ("I accept at face value the majority's declaration that general jurisdiction is not limited to a corporation's place of incorporation and principal place of business . . . .").

[241] *Id.* at 761 n.19. Courts have been reluctant to find such exceptional cases. *See* cases cited *supra* note 195.

exist under one of two possibilities. First, courts may find that conducting all or most business in a state establishes that state as the corporation's principal place of business.[242] Second, courts may find that the affiliations with the state in such situations are sufficiently systematic to make the corporation "at home" in the state "comparable to a domestic corporation," thus falling under the reserved exception for contacts-based general jurisdiction.

2. *Foreign National Corporation Engaging in Most of Its U.S. Business in One State*

In *Daimler*, neither the parent manufacturer nor its subsidiary sold most of its products in California. There was no reason why California should have general jurisdiction rather than any other state, and the Court did not see a way to permit jurisdiction in one or two states without authorizing all states to exercise general jurisdiction where sizable sales occurred.

A far more compelling case for general jurisdiction would be presented where a foreign national corporation engages in most of its U.S. business activity in a single state, even if the corporation engages in more activity outside the United States.[243] On the one hand, in such a case U.S. residents with claims against the corporation have a compelling argument for a forum in the United States. On the other hand, authorizing jurisdiction in the state where the corporation engages in most of its domestic business would restrict the potential states where the defendant must respond to litigation.

3. *Foreign Corporation Conducting All or Most of Its Business Activity in the United States but Maintaining No Principal Place of Business or Place of Incorporation in Any State*

Another situation requiring general jurisdiction is suggested by the dilemma resulting from *J. McIntyre Machinery, Ltd. v. Nicastro*, where a person injured in his or her home state may not seek relief in a court in that state with specific jurisdiction over the manufacturer. Where the manufacturer is a foreign national corporation with its principal place of business outside the United States, the corporation may evade general jurisdiction in any U.S. court. Even under the exceptions proposed above, the corporation will evade general jurisdiction if it does not engage in most of its business in a single state.

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[242] This would require repudiating any effort to apply the nerve center test to personal jurisdiction. *See supra* note 226; *see also* Monestier, *supra* note 18, at 268 n.210.

[243] The interstate basis of much due process law has been obscured by the over-general form of the rules. *See* Perdue, *supra* note 181, at 737 (arguing that federalism limits on due process emerged in *World-Wide Volkswagen* as an expression of particular concern with interference with sister-state authority). *But see* Monestier, *supra* note 18, at 267 (objecting that general jurisdiction would not exist under the comparative analysis required by *Daimler*).

The need for filling this jurisdictional gap is greatest in situations where a foreign corporation engages in most of its business in the United States. While Congress has the authority to authorize personal jurisdiction based on the total contacts with the United States (either because the United States is its principal place of business or based on exceptional contacts-based general jurisdiction), in the absence of such legislation, there should be no constitutional obstacle to allowing the state where the most U.S. contacts occur to exercise general jurisdiction.[244]

4. *Corporation with an Outsized Presence in the State*

The manufacturer and its subsidiary in *Daimler* differed only in the volume and value of their sales from many businesses engaged in interstate production and marketing of products aimed at an end market of individual consumers. A broad prohibition of contacts-based general jurisdiction was arguably necessary to prevent all businesses from being required to answer lawsuits where they engage in extensive sales.

A far stronger case for general jurisdiction can be made, without the risk of being applied abusively, to foreign corporations that establish a uniquely important business presence in a state. An example would be an automobile manufacturer that establishes a huge factory in a state. The factory may supply a large part of the domestic market. The corporation may play a preeminent role in the state economy as owner of real property (possibly acquired through eminent domain) and may exert considerable influence on the political process. The corporation probably negotiated valuable tax concessions and other benefits as a condition to entering or remaining in the state.

Regardless of the corporation's activity outside the state, it would be reasonable to permit exceptional contacts-based general jurisdiction over a corporation where it maintains such an imposing physical presence and where it plays such a dominant political role. General jurisdiction would, however, open the state courts to claims against such a corporate defendant by the Polish driver injured in Poland. If the risk of abusive jurisdiction cannot be avoided by the doctrine of forum non conveniens, then courts should restrict the reasonable extension of general jurisdiction to claims by state residents or claims in which the state has an interest. While there is some reason to fear the Polish plaintiff who wants the benefit of a U.S. court, the risks of surprise and disadvantage are reduced by limiting general jurisdiction to a small number of states where the corporation operates major facilities.

Prohibiting general jurisdiction over such a corporate defendant poses real threats to confidence in corporate accountability. If the single biggest employer in Kentucky orchestrated the murder of Kentucky citizens in Poland where the citizens were distributing Bibles or organizing a union, courts could permit the

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[244] *But see* Monestier, *supra* note 18, at 267 (noting that *Daimler* requires focus on a foreign corporation's contacts with a particular state).

victims' estates to sue the foreign corporation in Kentucky by finding that the level of in-state activity constituted an exceptional form of contacts-based jurisdiction, making the foreign corporation comparable to a domestic one. Such an exception would not open the floodgates to abusive litigation.[245]

5. *Corporations Maintaining a Permanent Physical Presence in the State By Operating Factories, Mines, or Other Non-Sales Related Activities*

The Court promulgated formal rules of general application restricting contacts-based jurisdiction in two cases in which the defendants' contacts were established by distributing and selling products to consumers in the forum state. Although Justice Ginsburg wrote nothing suggesting that the rules were limited to corporations engaged in marketing activity,[246] there is reason to question whether the rules will apply with equal force to in-state corporate activity other than marketing.

First, general jurisdiction based on sales was problematic even under tests that focused on presence.[247] Scholars addressing the adverse effect of jurisdiction on interstate commerce have presented compelling arguments for limiting jurisdiction based on marketing activity,[248] and Justice Ginsburg

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[245] Lower courts have been reluctant to find general jurisdiction based solely on a prominent presence in the territory. *E.g.*, *In re* Asbestos Products Liability Litigation (No. VI), No. 875, 2014 WL 5394310, at *9 (E.D. Pa. Oct. 23, 2014) (finding that constructing and operating a large refinery in the Virgin Islands did not establish general jurisdiction when it was only one of many refineries operated by the corporation). But no court has yet confronted a corporation that employs a majority or plurality of its workforce in a state where it is neither incorporated nor maintains its principal place of business. The example of general jurisdiction over the Boeing Company in the state of Washington has been discussed in teacher's manuals and listservs. Email from Deborah Challener, Professor of Law, Mississippi College School of Law, to author (Dec. 30, 2014, 19:51 CST) (on file with authors).

[246] On the contrary, there is reason to believe that Justice Ginsburg meant the rules, formulated in general terms, to apply broadly. Justice Sotomayor's concurring opinion interpreted the rules to prevent the parents of a child injured in a foreign hotel from suing the foreign corporate owner in the U.S. even if the corporation has a massive presence in multiple U.S. states. *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring). Justice Ginsburg responded to other arguments by the dissent but did not clarify that her formal rules need not deprive the states of jurisdiction in such a case.

[247] *See* Davis v. Farmers Co-operative Equity Co., 262 U.S. 312, 315 (1923) (Brandeis, J.) (holding that the statute authorizing service of process on a railroad agent soliciting business in the state for claims unrelated to activity in the state was a violation of the Commerce Clause). Justice Brandeis deliberately avoided deciding whether the exercise of general jurisdiction under such statutes violated the Due Process Clause. *Id.* at 318 & n.5 (citing cases).

[248] *See* Brilmayer et al., *supra* note 127, at 745–46.

repeatedly relied on burdens on interstate commerce as a reason for limiting personal jurisdiction.[249]

Second, free market and interstate commerce values served by restricting jurisdiction based on marketing activity may not be present in other cases. On the contrary, it may be appropriate to require nonresident corporations investing in a state to submit to the same legal burdens as resident corporations that they compete with or even displace—including general jurisdiction. Tradition and policy both support broad general jurisdiction over a foreign corporation that operates factories and mines or that invests heavily in local real estate.[250] Courts could recognize that contacts-based general jurisdiction in such situations falls under exceptions tentatively provided in *Daimler* on the theory that the foreign corporation's activity establishes affiliations that make it "at home" and comparable to a domestic corporation. Engaging in extensive productive or investment activity in one state does not routinely entail similar activity in other states. Accordingly, finding contacts-based general jurisdiction based on operating factories, mines, or farms does not present the danger that the corporation will be subject to general jurisdiction in many other states.[251]

V. CONSTITUTIONAL OVERREACH

A. *The Mixed Constitutional Motives for Restricting Contacts-Based General Jurisdiction*

The Court's recent general jurisdiction decisions are accompanied by unanimous and near-unanimous opinions that propound clear rules rather than standards. Their immediate effect is clear: a reduction of jurisdiction over nonresident corporations engaged in activity in more than one state or country.

The broader effect of the decisions is less clear for two reasons. First, the Court offers qualifications or exceptions that invite strategies for evading its

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[249] *See supra* note 84 and accompanying text.

[250] The argument for general jurisdiction is even stronger over foreign national corporations inasmuch as states may constitutionally exclude them from engaging in some business in the state and may more directly regulate them. U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause does not require recognition of the corporation under foreign national law. *Id.* The Privileges and Immunities Clause does not apply to any corporations. Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1899). The Equal Protection Clause allows greater regulation of foreign nationals, including prohibition of or limits on property ownership. Asbury Hosp. v. Cass Cnty., 326 U.S. 207, 211 (1945).

[251] For example, Goodyear USA may operate factories in a few states while it completes significant sales in all states. Lower courts have thus found that significant investment in real estate supports general jurisdiction. *See supra* note 30. Nevertheless, courts relying on *Daimler* are reluctant to find general jurisdiction on this basis. *E.g.*, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 875, 2014 WL 5394310, at *9 (E.D. Pa. Oct. 23, 2014) (finding no general jurisdiction based on ownership and operation of a large refinery when a corporation operated more facilities outside the territory, citing restrictive language of *Daimler*).

general rules.[252] Second, it is questionable whether a majority of the Court endorses the history and theory that Justice Ginsburg marshaled in support of the new rules.

Justice Ginsburg's opinions advocate a particular agenda for reforming the law of personal jurisdiction proposed in the 1960s and 1970s by Professors Arthur T. von Mehren and Donald T. Trautman. The goal of those scholars was to rationalize personal jurisdiction by generalizing the legal trends as they understood them at that time. Specifically, von Mehren and Trautman proposed expanding specific jurisdiction to the point where state courts could constitutionally exercise jurisdiction over all cases in which the state had an interest or state residents were affected.[253] Given the expanding role they proposed for specific jurisdiction, they regarded most of the forms of general jurisdiction as unnecessary and irrational. They thus urged the elimination of almost all forms of general jurisdiction. Nevertheless, to ensure that there would always be at least one court with jurisdiction, these scholars proposed that a single state (or two) should always have general jurisdiction—states convenient for the defendant.[254]

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[252] *See supra* Part IV.E; *see also* Rhodes & Robertson, *supra* note 18, at 208 (proposing "a method of recalibrating specific jurisdiction to account for the demise of general contacts jurisdiction").

[253] *See* von Mehren & Trautman, *supra* note 109, at 1172. Trautman was on the Harvard Law School faculty from 1953 to 1993. Von Mehren was on the Harvard Law faculty from 1946 to 1991. Justice Ginsburg attended Harvard Law School from 1956 to 1959. This Article does not advance the dubious proposition that the Court should cite more scholarship. Its point is that Justice Ginsburg relies on an idiosyncratic academic program that rests on a dated, overly optimistic generalization of the trend of the Court's decisions formulated about the time she was in law school; that the program's predictions were demonstrably inaccurate with respect to specific jurisdiction and general jurisdiction over natural persons, *see supra* notes 203–07 and accompanying text; and that the program failed to explain one-half of its proposal, now repeated as black letter law by the Court, that general jurisdiction exists at a corporation's principal place of business. *See supra* note 126. There is good reason why most scholars in the past generation have paid little attention to the article relied on by Justice Ginsburg, and it is doubtful whether several members of the Court actually embrace its motivating utilitarian values. *See infra* note 256 and accompanying text (discussing Justice Kennedy's view of jurisdiction); *see also* Note, *supra* note 218, at 318 & n.78 (asserting that "Justice Ginsburg's conception of the 'at home' test for general jurisdiction mirrors von Mehren and Trautman's view of general jurisdiction.").

[254] For corporations they proposed the place of incorporation but also recognized that the principal place of business would be valid. Von Mehren & Trautman, *supra* note 109, at 1141–42. They neither cited cases for general jurisdiction at the principal place of business nor explained why the theoretical demand for a single place should lead to general jurisdiction in more than one place. *Id.*

In more recent years Professor Brilmayer has advocated von Mehren and Trautman's reform proposals with minor changes. Brilmayer et al., *supra* note 127, at 759. Professor Brilmayer submitted an amicus brief in support of Daimler AG. Brief of Professor Lea Brilmayer, *supra* note 133. *Cf.* Daimler AG v. Bauman, 134 S. Ct. 746, 760 n.16 (2014) (referring to argument in Brilmayer brief that Daimler AG's contacts were insufficient in response to Justice Sotomayor's contention that the issue was not properly before the Court).

Justice Ginsburg's opinions not only advocate this general reform program; her historical narrative presents the evolution of the Court's decisions as closely following it.[255] In contrast, other members of the Court embrace a theory of personal jurisdiction for which the libertarian goal of freeing out-of-state defendants from the threat of jurisdiction is a greater priority than rationalizing the law. Justice Kennedy gave voice to this vision of jurisdiction in his plurality opinion in *Nicastro*. There he proposed that a defendant's volitional submission forms the predicate for all personal jurisdiction. He regards incorporating in a state or establishing a principal place of business in its territory as signaling "general submission to a State's powers."[256] Justice Kennedy was studiously

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Justice Ginsburg repeatedly cites the scholarship of Professors von Mehren, Trautman, and Brilmayer. *See id.* at 754, 755, 760; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2853, 2854 (2011); *see also* Note, *supra* note 218, at 318 n.78 (noting that Justice Ginsburg cites the von Mehren and Trautman article "five times in *Daimler*, five times in *Nicastro*, and four times in *Goodyear*.")

Von Mehren and Trautman developed their theories without considering their impact on class action litigation. The problems are on full view in a case like *Bristol-Myers Squibb Co. v. S.C. (Anderson)*, where users of a prescription drug commenced a products liability action against the manufacturer in California state court. *Bristol-Myers Squibb Co. v. S.C. (Anderson)*, 337 P.3d 1158 (Cal. 2014). The state supreme court remanded for reconsideration in light of *Daimler*, and the intermediate appellate court held that California lacked general jurisdiction over the claims by nonresident plaintiffs but could exercise specific jurisdiction over such claims, stating that "[the defendant] has engaged in substantial, continuous economic activity in California, including the sale of more than a billion dollars of Plavix to Californians. That activity is substantially connected to the [nonresident plaintiffs'] claims, which are based on the same alleged wrongs as those alleged by the California resident plaintiffs. Further, [the defendant] does not establish it would be unreasonable to assert jurisdiction over it." Bristol-Myers Squibb Co. v. Super. Ct., 228 Cal. App. 4th 605, 613, 175 Cal. Rptr. 3d 412, 415 (2014). *See generally* Rhodes & Robertson, *supra* note 18, at 228 (predicting that nationwide class actions will be disrupted by courts' refusal to grant general jurisdiction over defendant with respect to non-resident plaintiffs' claims, forcing plaintiffs to rely on specific jurisdiction, and that post-*Daimler*, "the 'connectedness' or 'relatedness' requirement is likely to emerge as the central battleground in personal jurisdiction litigation."). *Cf.* Evans v. Johnson & Johnson, No. H–14–2800, 2014 WL 7342404 (S.D. Tex. Dec. 23, 2014) (dismissing a products liability action with respect to 95 of 96 plaintiffs who were non-residents of Texas).

[255] *See, e.g.*, *Daimler*, 134 S. Ct. at 753, 755 n.7, 757 (citing Burnham v. Super. Ct., 495 U.S. 604 (1990); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011)).

[256] *Cf. Nicastro*, 131 S. Ct. at 2787 (Kennedy, J., joined by Roberts, C.J., and Scalia & Thomas, JJ.) ("Citizenship or domicile—or by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State's powers.") (citing *Goodyear*, 131 S. Ct. at 2854). He notably omitted any mention of contacts-based general jurisdiction. *See generally* Perdue, *supra* note 181, at 741 (arguing that despite Justice Kennedy's rhetorical emphasis on sovereignty, his approach is "based on a particular notion of individual liberty" and on the view that state power is limited to that conferred by the defendant); Steinman, *supra* note 212, at 497–98 (characterizing Justice Kennedy's submission theory as potentially a break with decades of precedent).

silent on whether any form of contacts or activity could ever support general jurisdiction.

Justice Kennedy and other members of the Court advocating the libertarian theory nevertheless joined Justice Ginsburg's opinions restricting general jurisdiction because her doctrine and historical explanation comport with their goals of restricting personal jurisdiction. And Justice Ginsburg has crafted opinions that avoid potential sources of disagreement. Thus, in *Daimler* Justice Ginsburg avoids committing the Court to any form of contacts-based jurisdiction, proposing that, if it exists, contacts-based jurisdiction applies only in truly exceptional cases.[257] But the same Justices who support Justice Ginsburg's theory when it eliminates personal jurisdiction are not prepared to accept Justice Ginsburg's reform agenda or her understanding of legal history when it results in the expansion of jurisdiction or even, as in *Nicastro*, the retention of an established form of specific jurisdiction.[258]

Today, no one on the Court supports a relaxation of due process limits on personal jurisdiction. In the rare case where a plaintiff proposes a new theory for expanding specific jurisdiction, the Court can readily produce unanimous opinions that avoid theory and find a lack of minimum contacts under established precedents.[259] But in situations where the competing theories lead to different outcomes, the decisive votes are cast by a minority of Justices who subscribe to neither theory. The current mix of views embraced by members of the Court leaves plaintiffs deprived of general jurisdiction based on one theory and of specific jurisdiction based on another.[260]

B. *Unnecessarily Broad*

The weak links among the claims, claimants, and the forum state in *Daimler* might appear to support the view that broad contacts-based general jurisdiction serves no necessary rational function and would be used by plaintiffs solely to obtain strategic advantages by forcing litigation in forums that were inconvenient for corporate defendants.[261] But even if most contacts-based

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[257] *See supra* note 141 and accompanying text.

[258] There is also no sign that the Court will apply the rationalizing program to personal jurisdiction over natural persons. *See supra* note 174 (discussing *Burnham*, 495 U.S. 604).

[259] *E.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (Thomas, J.) (unanimous opinion) (holding that Nevada lacked personal jurisdiction over intentional tort claims arising from seizure of a Nevada resident's property in Georgia, citing precedents requiring conclusion that Nevada lacked personal jurisdiction when contacts established with the forum state were established exclusively by the plaintiff).

[260] A clear example of this dilemma would arise if the manufacturer in *Nicastro* sold most of its products in Delaware or operated a factory there. While *Nicastro* holds that the worker injured in New Jersey cannot get specific jurisdiction there, *Daimler* provides support for the argument that there is no general jurisdiction in Delaware because the corporation is incorporated in and maintains its principal place of business in Britain.

[261] Such concerns are evident in Justice Ginsburg's repeated references to the imaginary Polish case and to her characterization of the plaintiff's theories as "grasping" and

general jurisdiction is unnecessary, it continues to serve a valuable role in securing plaintiffs access to courts in a limited range of cases. Moreover, while the real danger of abusive jurisdiction is speculative,[262] alternative methods of discouraging and eliminating abusive jurisdiction render a broader elimination of general jurisdiction unnecessary.

1. *Continuing Need for General Jurisdiction*

Contacts-based general jurisdiction remains necessary to secure access to a forum in the United States when (1) specific jurisdiction is not available in any state,[263] and (2) the defendant is incorporated and maintains its principal place of business in a foreign country.[264] The need for such cases increases with the Court's recent restriction of specific jurisdiction in *Nicastro*.[265] And it is possible that corporate reorganizations in response to the Court's holding in *Daimler* will further increase the number of corporations conducting all or most of their business in the United States that may seek to evade both specific and general jurisdiction, even for claims arising in the United States.[266]

"exorbitant." *See supra* notes 84, 136 and accompanying text; *see also* Monestier, *supra* note 18, at 258–60 (arguing that *Daimler* holding is justified in part because "broad assertions of general jurisdiction encourage forum shopping" and "allow[ing] assertions of general jurisdiction in a forum because the defendant is doing business in the forum seems to reward plaintiffs for gamesmanship").

[262] There is no question that members of the Court are convinced that abusive jurisdiction is a real danger requiring a constitutional solution. The empirical evidence is inconclusive. *See* Solimine, *supra* note 106, at 60 (noting lack of empirical evidence of widespread forum shopping); *see also id.* at 57 n.246 (recounting a communication from defense counsel expressing lack of manufacturers' concern with risk of jurisdiction).

Scholars long recognized that contacts-based general jurisdiction carried the potential for forum shopping given the fact that due process did not require plaintiff contacts with the forum. This provided a strong ground for the reasonableness requirement. *E.g.*, Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1040–41 (2004).

[263] Only in cases where a federal court is near the border of a neighboring state, where federal statutes authorize broader jurisdiction, and in cases based on federal law where there is no state court with jurisdiction may federal courts exercise jurisdiction broader than that of the state court. FED. R. CIV. P. 4(k)(1)–(2).

[264] Examples of such cases are considered in Part IV.G (discussing scope of possible exceptions to elimination of contacts-based general jurisdiction).

[265] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2804 (2011) (Ginsburg, J., dissenting); Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 641 (2012) (*Nicastro* was "wrongly decided").

[266] Before *Daimler*, a plaintiff like Nicastro might hope to get general jurisdiction in Delaware if the British manufacturer operated a factory there that made other, unrelated products. After *Daimler*, even if the Delaware plant is the British manufacturer's biggest asset and even if Delaware is the state where it conducts most of its business, it is now questionable whether the defendant is subject to general jurisdiction there.

2. *Alternative Grounds for Limiting Abusive Jurisdiction*

Alternative grounds exist that would prevent the abuse of general jurisdiction without eliminating it in cases where it provides the sole access to the courts.

a. *Reasonableness*

Justice Sotomayor's concurrence, deploying reasonableness as an additional limit on personal jurisdiction, adequately prevents abusive jurisdiction. The reasonableness criterion has proved useful in administering the law of specific jurisdiction and had achieved substantial support among lower courts in applying contacts-based general jurisdiction.[267]

Insisting on a far broader rule, Justice Ginsburg disparages Justice Sotomayor's approach for resolving only the issues in the case presented to the Court. But Justice Ginsburg's opinion does not satisfactorily explain why a broad rule eliminating contacts-based general jurisdiction was necessary to achieve the prophylactic goal of preventing abusive jurisdiction.[268]

b. *Forum Non Conveniens and Other Doctrines Prevent the "Exorbitant" Exercise of Jurisdiction over Daimler AG by the Polish Driver in California*

In addition to the possibility of recognizing reasonableness limits on the exercise of general jurisdiction, federal courts can prevent abusive jurisdiction under the existing doctrine of forum non conveniens.[269] The facts in *Daimler* provide an appropriate case for dismissal on this ground. Indeed, given the lack of plaintiff ties to the forum state and weak forum state interest in the litigation, a refusal to dismiss for forum non conveniens would arguably constitute an abuse of discretion.

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[267] Scholars also defended the reasonableness requirement. *See supra* note 176. *But see supra* note 174 (noting the impatience of some Justices with reasonableness/fairness inquiry).

[268] Her opinion suggests two reasons for the prophylactic rule. The first lies in her expressed scorn for "free floating" notions of reasonableness and fairness. *See supra* notes 236–37 and accompanying text. The second lies in an implicit distrust of lower court competence to administer such a standard. This may reflect her conviction that lower courts had radically expanded jurisdiction. Factual support for the claims is uncertain and was not provided by any advocate.

[269] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947)).

C. *Disregard of Historical Roots and Subsisting Nature of Practice*

The Court's rejection of contacts-based general jurisdiction over corporations in order to promote some theoretical goal disregards the historical roots and subsisting nature of the practice. History and practice were decisive considerations, if not the conclusive criteria, for all members of the Court in upholding transient general jurisdiction,[270] despite scholarly criticism and lack of international recognition of the practice.[271] The actual scope of judicial authority exercised by states should be a primary criterion in determining the scope of due process. Disregarding evidence of historical practice is inconsistent as a matter of constitutional theory and creates divergent bodies of case law governing natural persons and corporations.[272]

D. *New Formalism: Rebirth of Vested Rights*

1. *Formal Rules Prevent Good Analysis*

International Shoe looked beyond form in an effort to regulate the economic reality of commercial activity.[273] The Court's new formalism is bad theory to the extent it prevents a concrete consideration of meaningful differences between kinds of cases.[274] The new rules are also bad theory to the extent they substitute new metaphors ("at home") for old terminology ("substantial contacts"), old terminology that was itself an attempt to avoid unhelpful metaphors ("presence"). Justice Ginsburg effects a similar shift without adding clarity by adding language emphasizing corporate "affiliations" rather than contacts with the forum.[275]

The family imagery suggested by "home," reinforced, perhaps unintentionally, by the Latin roots for "affiliation," seems uniquely

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[270] *See* Burnham v. Super. Ct., 495 U.S. 604, 619 (1990) (Scalia, J.); *id.* at 628 (White, J., concurring in part) ("Although the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid, . . . there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case.") (citation omitted); *id.* at 636–37 (Brennan, J., concurring); *id.* at 640 (Stevens, J., concurring).

[271] *See* WEINTRAUB, *supra* note 6, § 4.10, at 225 n.565 (citing scholarship critical of transient jurisdiction); *id.* at 225 (suggesting that transient jurisdiction conflicts with "widely held views of exorbitant jurisdiction").

[272] The confusion resulting from diverging lines of authority is aggravated for unincorporated associations, and the Court's recognition of this may explain its failure to articulate coherent rules addressing jurisdiction based on corporate joint ventures and enterprise liability.

[273] Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[274] For example, the formal rules do not distinguish between interstate marketing activities and in-state manufacturing, mining, and farming.

[275] *See supra* note 58 and accompanying text.

inappropriate for the analogical work the images are asked to perform. *International Shoe* insisted that corporations do not even occupy space so as to establish "presence" apart from the legal acts society empowers them to perform through agents.[276] It should be unnecessary to add that the same corporations do not make homes with fireplaces or form family relationships. Adopting anthropomorphizing metaphors does not aid analysis but does leave the Court's opinions open to ridicule, inviting comparison to a notorious misconstruction of corporations as "people" based on a misunderstanding of a recent decision extending First Amendment rights to corporations.[277]

2. *Formal Rules Obscure Bad Results*

The Court's formal rules, coupled with its novel metaphors, do not just prevent consideration of appropriate facts. They tend to conceal the Court's movement towards bad rules: rules that generate undesirable results for many cases.

Justice Ginsburg expressed alarm at the prospect of abusive jurisdiction and her concomitant goal of facilitating corporate planning, embracing arguments repeatedly advanced by the Chamber of Commerce of the United States.[278] The Court's consideration of economic arguments has a long tradition. The future Justice Brandeis successfully employed the practice of marshalling social and economic research in arguments to the Court. But his practice relied on substantial research on economic effects, not just on an appeal to the personal views of members of the Court. Moreover, such economic arguments were advanced in support of social legislation and against judicial restrictions on state regulatory authority.

The Court's formal rules restricting contacts-based jurisdiction are based on economic assumptions devoid of empirical support about adverse consequences on trade. And rather than freeing states to regulate economic behavior, the Court's new rules impose due process prohibitions on the exercise of jurisdiction by state courts.

Taken to their logical conclusion, the new formal rules introduce a new era of vested rights for corporations. Prohibiting states from disregarding corporate expectations formed outside the state has the effect of cloaking corporations with unprecedented immunities that were never suggested by earlier decisions,

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[276] *Int'l Shoe*, 326 U.S. at 316–17.

[277] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (holding that corporations and other associations enjoy First Amendment right to spend money in advocating views); Jim Haag, *Who Said It? Romney, Obama or Mr. Burns*, THE VIRGINIAN-PILOT (Oct. 22, 2012), http://hamptonroads.com/2012/10/who-said-it-romney-obama-or-mr-burns, *archived at* http://perma.cc/4BWJ-CBMZ (posing a question of whether the statement "Corporations are people. . ." was made by a presidential candidate or television cartoon character Mr. Burns).

[278] *See* Brief of the U.S. Chamber of Commerce II, *supra* note 133; Brief of the U.S. Chamber of Commerce I, *supra* note 17.

immunities unthinkable to either the drafters of the Due Process Clause or to the authors of the seminal case[279] imposing due process limits on personal jurisdiction.[280]

E. *Federalism Concerns*

Requiring constitutional deference to expectations of jurisdictional immunity by foreign corporations rests on questionable economic policy.[281] But even if the Court's restriction of contacts-based general jurisdiction promoted economic growth, good policy would not provide a sufficient ground for the Court to interfere with state jurisdiction. Grounding such limitations in the Due Process Clause reveals a laudable concern with the liberty interest of out-of-state defendants. But it arguably exceeds the Court's constitutional authority by interfering with the powers assigned to two different sovereign authorities under the Constitution.

1. *Interference with Legislative and Regulatory Power of States*

Interference with state sovereignty was the first "deep injustice" that Justice Sotomayor identified in the majority opinion in *Daimler*.[282] Prohibiting states from exercising contacts-based general jurisdiction constitutes an activist expansion of due process jurisprudence that results in a direct interference with the sovereign authority of states. Justice Black long ago identified this constitutional danger. Concurring in the result in *International Shoe*, he expressed the concern that the new standard—requiring minimum contacts and fair play and justice—might be applied in the future to limit jurisdiction. And Justice Black regarded the threat of such limits as an interference with the powers reserved to state courts.[283]

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[279] Pennoyer v. Neff, 95 U.S. 714 (1878).

[280] We borrow the language of jurisdictional immunity from Justice Sotomayor. Daimler AG v. Bauman, 134 S. Ct. 746, 772 (2014) (Sotomayor, J., concurring) (providing a legally accurate description of the intended effect of the majority rule).

[281] Both authors question whether any empirical evidence supports the need for the rule and remain unconvinced that it will achieve economic benefits.

[282] *Daimler*, 134 S. Ct. at 772 (Sotomayor, J., concurring) ("[T]he majority's approach unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries."). While acknowledging that specific jurisdiction will exist in many cases, Justice Sotomayor observed, "[W]e have never held that to be the outer limit of States' authority under the Due Process Clause." *Id.* at 772 n.10; *accord* Rhodes & Robertson, *supra* note 18, at 263–69 (noting the threat to state sovereignty posed by restriction of personal jurisdiction and urging reformulation of jurisdiction to preserve state power to protect its citizens).

[283] Int'l Shoe Co. v. Washington, 326 U.S. 310, 324–25 (1945) (Black, J.).

2. *Preemption of Congressional Authority to Regulate Interstate and Foreign Commerce*

Imposing due process limits on contacts-based general jurisdiction interferes with powers that the Constitution expressly gives to Congress to regulate interstate and foreign commerce.[284] Congress remains the branch better qualified to adopt rules that are shaped either by empirical policy considerations or by political values.[285]

F. *Neglect of Other Constitutional Values*

The Court's formal rules restricting contacts-based general jurisdiction protect corporations' liberty interests and prevent states from interfering with interstate and foreign commerce. But the Court's exclusive concern with due process protections for defendants continues a troubling pattern of neglecting or undervaluing other constitutional rights and interests.[286] The focus on due process has prevented consideration of rights protected by and powers regulated under the Commerce Clause and the First Amendment. It also neglects residual rights including meaningful access to courts implied by a Constitution establishing justice[287] and expressly protected by due process.[288]

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[284] U.S. CONST. art. I, § 8. Paradoxically, one of the arguments advanced by the United States government in favor of reversing in *Daimler* was the need to leave room for Congress to regulate jurisdiction over foreign corporations engaged in international trade. Brief for the United States, *supra* note 62, at 3. By holding that foreign corporations are immune to general jurisdiction outside their place of incorporation and principal place of business, and by grounding this immunity in a liberty interest protected by the Due Process Clause, the Court limits the power of Congress to enact appropriate legislation to regulate litigation over foreign corporations engaged in substantial trade activity in the U.S. While Congress could still empower federal courts to exercise specific jurisdiction based on the level of sales activity in the U.S. when the activity relates to the claims, Congress can no longer require a foreign corporation to submit to general jurisdiction based on the volume of contacts unrelated to the claims unless they are tantamount to making the U.S a principal place of business or fall under a tentative exception.

It seems undesirable that a corporation that may conduct virtually all its business in U.S. territory should not be required to answer claims in U.S. courts. *See supra* Part IV.G. The Constitution vests Congress, not the Court, with the power to regulate foreign commerce and thus the power to regulate personal jurisdiction in such cases.

[285] The due process basis of *Daimler* will similarly preclude treaties under which federal or state courts are authorized or required to exercise general jurisdiction outside a corporation's place of incorporation or principal place of business.

[286] One need not go so far as to say with Justice Brennan that *International Shoe*'s "almost exclusive focus on the rights of defendants[] may be outdated," in order to appreciate that the defendant's liberty interests are not the only constitutional values at issue in restricting personal jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 308 (1980) (Brennan, J., dissenting).

[287] U.S. CONST. pmbl.

[288] *See* Christopher v. Harbury, 536 U.S. 403, 412–15 & n.12 (2002).

Daimler is a missed opportunity. The particular problems of sales provided an occasion for the Court to fine tune its constitutional analysis rather than to adopt even more metaphors for contacts. The recent evolution of the Court's application of its tests for general jurisdiction exposes the inadequacy of the Court's constitutional framework. Due process considerations do not satisfactorily explain the comparative approach that the Court requires to determine where a corporation is "at home." Similarly, while the Court explains the general jurisdiction rules for corporations as analogous to those for individuals,[289] it fails to explain why individuals, who suffer far greater burdens when forced to litigate in distant courts, enjoy far fewer protections than corporations.[290]

The dormant Commerce Clause offers a promising foundation for limits on jurisdiction over foreign corporations based exclusively on sales. But the Commerce Clause has disappeared from the Court's jurisprudence.[291] Similarly, the First Amendment might offer a more contextually specific approach to limiting personal jurisdiction over extraterritorial speech that balances a state's interest in protecting persons from suffering harm within the state against the shared interests of states in preventing speech from subjecting the speaker to unanticipated jurisdiction in distant states. But the First Amendment is not available as a separate limitation on personal jurisdiction.[292]

G. *Improper Consideration of International Law and Foreign Practices*

Justice Ginsburg turned to the international context of the dispute in *Daimler* only after she concluded that general jurisdiction is prohibited under purely local U.S. legal principles.[293] She nevertheless considered arguments from international law that supported a restriction of general jurisdiction. These included the fact that contacts-based general jurisdiction is not recognized in the

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[289] *See supra* notes 127–28 and accompanying text.

[290] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 772–73 (2014) (Sotomayor, J., concurring) ("[T]he majority's approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, but a large corporation that owns property, employs workers, and does billions of dollars' worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well)." (citations omitted)).

The incongruous treatment is not limited to transient jurisdiction. An individual with no contacts with a forum remains subject to general jurisdiction based on technical domicile there until he or she establishes a new domicile. *See supra* note 206. Scholars have questioned jurisdiction based on such technical domicile. *See* HAY, *supra* note 231, at 398; WEINTRAUB, *supra* note 6, § 4.11, at 225.

[291] *See supra* note 243 and accompanying text.

[292] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 n.12 (1984).

[293] *See Daimler*, 134 S. Ct. at 762.

European Union,[294] that foreign government objections to general jurisdiction had impeded reciprocal agreements on the enforcement of judgments,[295] that foreign investment in the United States "could" have been discouraged by such general jurisdiction,[296] and that general jurisdiction based on "doing business" has resulted in "international friction."[297]

While none of these considerations directly grounded the Court's holding, Justice Ginsburg nevertheless observed that "[c]onsiderations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."[298] It should be noted that Justice Ginsburg avoided suggesting that foreign practices are due even the vague deference known as "comity." Instead she coined a new terminology with no known legal meaning: "international rapport."

The Court's brief consideration of international norms would have been better omitted because it was unnecessary to the holding. While the Court did emphasize the foreign facts of the case, nothing in its analysis paid special attention to international aspects of the case. Moreover, the treatment of international norms is troubling. Justice Ginsburg cited partisan arguments and speculations that appeared to lack factual or empirical support in the record.

Finally, her reference to the EU's more restrictive approach to personal jurisdiction illustrates why foreign practices are of little value as a guide to due process. The EU regulations resulted from a process of negotiation among sovereigns in which commercial interest groups played a significant role in pressuring member states to submit to more restrictive forms of jurisdiction. Furthermore, EU restrictions on general jurisdiction place limited burdens on European plaintiffs, who can reach any defendant's home state in a few hours by train.

Justice Ginsburg misses the irony inherent in finding that the Due Process Clause limits general jurisdiction in a way that mirrors the restrictions negotiated by foreign corporate lawyers and adopted by independent sovereigns during the heyday of neoliberalism. Whether the United States should voluntarily adopt such restrictions is debatable as a matter of policy, especially in the absence of the quid pro quos that induced European member states to submit. But the adoption of such restrictions on the sovereign power of state courts should be left to the states and to Congress.

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[294] *Id.* at 763 (citing EU regulations authorizing jurisdiction at a corporation's domicile and specific jurisdiction at its regional branch for claims arising out of the operations of the regional branch).

[295] *Id.* (citing arguments in Brief for the United States, *supra* note 62, at 2 (No. 11-965)).

[296] *Id.* (citing arguments in Brief for the United States, *supra* note 62, at 2 (No. 11-965)).

[297] *Id.* (citing argument from Brief for Respondents, *supra* note 135, at 35 (No. 11-965)).

[298] *Id.* (citations omitted).

VI. CONCLUSION

The Due Process Clause prevents states from exercising general jurisdiction over corporations except where the corporation is "at home."[299] *Daimler* moves the Court far towards restricting this corporate "home" to the place of incorporation and principal place of business.[300] Despite the Court's emphasis on the historical roots for these holdings, this Article shows that eliminating general jurisdiction in states where corporations maintain a permanent, significant legal presence or other comparable substantial level of activity constitutes a radical departure from settled law.[301]

The new law announced by *Daimler* may produce appropriate results in cases where a state has no reason for providing a forum—where, for example, a Polish driver injured in Poland brings a product liability claim in California against a German car manufacturer that does unrelated business in California.[302] But it produces questionable results in other cases. For example, where defective German products kill Alaska residents in Alaska, the German manufacturer may be exempt from both specific[303] and general personal jurisdiction in Alaska.[304] Before *Daimler*, Alaska residents could sue the German manufacturer in California, where it maintains a regional headquarters and conducts billions of dollars in annual business. In deciding a case with facts more like the imaginary Polish driver's, *Daimler* announces a broad rule that closes the California courthouse to the Alaska residents. Unless the Court limits *Daimler*, the Alaska plaintiff must litigate in Germany or nowhere.

This Article argues that the Court has moved too far, too fast towards restricting general personal jurisdiction. It questions the historical pedigree offered for a narrow definition of a corporation's "home." It asserts that policy benefits attributed to the new rule are speculative, while adverse policy consequences are real and severe. Finally, this Article insists that, even if restricting jurisdiction produces economic benefits, such policy benefits do not provide a principled constitutional foundation for interfering with the authority of states to require legal entities present and active in their territories to answer lawsuits against them—especially when that authority, if not quite as old as the Republic, is as old as the corporation.

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[299] *See supra* note 58 and accompanying text.

[300] *See supra* Part III.B.4.b.

[301] *See supra* Part II.

[302] Justice Ginsburg was especially concerned by this imaginary case. *See supra* notes 100–01 and accompanying text. This Article points out that jurisdiction in such a case is adequately limited by the doctrine of forum non conveniens. *See supra* note 269 and accompanying text.

[303] J. McIntryre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

[304] Even before the holding in *Daimler*, the German manufacturer did not engage in sufficient continuous and general business activity to be subject to general jurisdiction in Alaska.