

SOME SPECIFIC CONCERNS WITH THE NEW GENERAL JURISDICTION

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INTRODUCTION

General jurisdiction¹ allows a court to enter a judgment against a defendant regarding a claim that did not arise in the forum. For generations, no one has doubted that such “all-purpose jurisdiction”² can be based upon a corporation’s extensive business activities in the forum.³ Though the verbal formulations have differed, the standard phrase has been that general jurisdiction is permissible when the corporate activities in the forum are continuous and systematic.⁴ To be sure, courts have reached irreconcilable conclusions concerning where the line should be drawn,⁵ but it has long been unquestioned that at some point a corporation’s level of engagement in the forum justifies subjecting it to general jurisdiction.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁶ and *Daimler AG v. Bauman*,⁷ the Supreme Court restricted activity-based general jurisdiction over corporations. Now, general jurisdiction is proper only where the defendant is “at home.”⁸ The Court does not define “at home” but provides paradigms: a

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¹ General jurisdiction is to be contrasted with specific jurisdiction, under which the defendant is sued for a claim arising from its activities in or having an effect in the forum. *See infra* note 32 and text accompanying note 37.

² *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

³ *See infra* Part I.A.

⁴ *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) (discussing purposeful availment).

⁵ *Compare* *Bryant v. Finnish Nat’l Airline*, 208 N.E.2d 439, 441–42 (N.Y. 1965) (finding general jurisdiction over a foreign airline based upon its maintaining a one-and-a-half room office in the state and employment of several people at that office), *with* *Follette v. Clairol, Inc.* 829 F. Supp. 840, 845 (W.D. La. 1993), *aff’d mem.*, 998 F.2d 1014 (5th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994) (rejecting general jurisdiction over Wal-Mart despite its operation of 264 retail stores in Texas).

⁶ *Goodyear*, 131 S. Ct. at 2852.

⁷ *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 757, 762 (2014).

⁸ *See infra* Part I.A.

corporation is “at home” in its state of incorporation and in the state in which it has its principal place of business.⁹ The Court appears to define the latter, however, as the company’s “nerve center”—that is, the place where decisions are made, rather than where the company necessarily engages in business activities.¹⁰ Though the Court conceded in *Daimler* that there might be cases in which general jurisdiction can be based upon the transaction of business, its view on this score is extremely parsimonious.¹¹ As a result, activities-based general jurisdiction likely has been curtailed significantly.

Goodyear and *Daimler* were easy cases. In *Goodyear*, the North Carolina Court of Appeals upheld general jurisdiction over European tire manufacturers based on a stream-of-commerce theory.¹² In view of the difficulty of using the stream of commerce to support even specific jurisdiction (in which the claim arises from activities in the forum),¹³ the holding was obviously questionable. Indeed, it is not apparent that any court had previously tried to base general jurisdiction on stream-of-commerce contacts.¹⁴ In *Daimler*, the Ninth Circuit upheld general jurisdiction in California over a German automobile manufacturer by attributing to it the California contacts of its American subsidiary.¹⁵ These attributed contacts, the Ninth Circuit concluded, were sufficient to support jurisdiction in California over the German company for claims based upon acts by an Argentine subsidiary in Argentina.¹⁶ The Court reversed in both cases without dissent.¹⁷ It soon became apparent, though, that the Court was not interested in using the cases to hone the meaning of “continuous and systematic.” It wanted to establish a new and narrower test.

I do not lament the circumscription of general jurisdiction as such. Maybe it is a good thing.¹⁸ But the Court’s efforts are puzzling. For one thing, the

⁹ *Daimler*, 134 S. Ct. at 760; *Goodyear*, 131 S. Ct. at 2853–54.

¹⁰ See *infra* Part I.B.

¹¹ See *infra* Part I.C.

¹² *Goodyear*, 131 S. Ct. at 2851. Three defendants, subsidiaries of Goodyear USA, manufacture tires, respectively, in France, Luxembourg, and Turkey. *Id.* at 2850.

¹³ See *supra* note 1.

¹⁴ *Goodyear*, 131 S. Ct. at 2855 (“The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction.”).

¹⁵ *Daimler AG v. Bauman*, 134 S. Ct. 746, 751–53 (2014).

¹⁶ *Id.* Interestingly, then, *Goodyear* involved jurisdiction over the foreign subsidiary of a U.S. parent corporation, while *Daimler* involved jurisdiction over the foreign parent of a U.S. subsidiary. *Goodyear*, 131 S. Ct. at 2850; *Daimler*, 134 S. Ct. at 750–51.

¹⁷ *Goodyear*, 131 S. Ct. at 2850–51; *Daimler*, 134 S. Ct. at 750. Justice Ginsburg wrote the opinion for the entire Court in *Goodyear*. In *Daimler*, her opinion spoke for eight justices, with Justice Sotomayor concurring. *Goodyear*, 131 S. Ct. at 2850; *Daimler*, 134 S. Ct. at 750.

¹⁸ Indeed, the restriction will lessen the kind of abusive forum shopping permitted in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). In that case, a Pennsylvania plaintiff sued a manufacturing company in tort. Because the statute of limitations had expired in Pennsylvania, he sued in federal court in Mississippi, invoking diversity of citizenship jurisdiction. The Mississippi statute of limitations had not expired. Plaintiff then moved for transfer to federal

Court seems unaware that it is upsetting common understandings of general jurisdiction. *Goodyear* and *Daimler* are notable for what was *not* litigated. Embedded in each case were closer questions on which the Court's guidance would have been useful. In neither case, however, were the questions asked. In *Goodyear*, the better question was whether Goodyear USA, an Ohio corporation, should be subject to general jurisdiction in North Carolina. It had three manufacturing plants and employs hundreds of people in that state and because of these contacts, Goodyear USA assumed that it was amenable to general jurisdiction in North Carolina.¹⁹ In *Daimler*, the better question was whether Mercedes Benz USA ("MBUSA"), a Delaware entity with its principal place of business in New Jersey,²⁰ was subject to general jurisdiction in California. MBUSA maintains a regional office and vehicle preparation center in that state, and more than 10 percent of Mercedes sales in the United States are realized there.²¹ The German defendant did not question that those contacts would render MBUSA subject to general jurisdiction in California.²²

After these two decisions, however, it seems clear that Goodyear USA is not subject to general jurisdiction in North Carolina, because it is neither incorporated nor headquartered there. And MBUSA is not subject to general jurisdiction in California for the same reason. Thus, a jurisdictional basis that was

court in Pennsylvania, which was granted. Under the doctrine of *Van Dusen v. Barrack*, 376 U.S. 612, 626–43 (1964), the Mississippi choice of law rules, including the longer statute of limitations, transferred with the case. Thus, in *Ferens*, the Court held that the Mississippi statute of limitations applied, which permitted suit to proceed in federal court in Pennsylvania. *Ferens*, 494 U.S. at 527–32. The maneuver of capturing the statute of limitations of Mississippi for litigation in Pennsylvania was possible because the manufacturer was subject to general jurisdiction in Mississippi. Commentators have noted that restricting general jurisdiction will restrict such forum shopping. See, e.g., Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1001 (2012); Allan R. Stein, *The Meaning of "Essentially At Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 528 (2012). Such limitation of general jurisdiction would also restrict what Professors Klerman and Reilly have described as "forum selling." Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. (forthcoming 2016) (manuscript at 1), available at <http://ssrn.com/abstract=2538857>.

¹⁹ *Goodyear*, 131 S. Ct. at 2850 ("Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.").

²⁰ *Daimler*, 134 S. Ct. at 751. The Court refers to MBUSA as "a Delaware limited liability corporation." *Id.* at 752. The reference is ambiguous, because all corporations are "limited liability." Throughout the opinion, the Court treats MBUSA as a corporation. It seems likely, however, that MBUSA is a limited liability *company*, since its name is "Mercedes Benz USA, LLC." *Id.* at 751. Its status as an LLC would affect the manner in which the entity's citizenship is determined for diversity purposes. The Court did not discuss where a limited liability company, partnership, limited partnership, or other non-incorporated business might be "at home" for purposes of general jurisdiction. Among business forms, it discussed only corporations. Because MBUSA appears to be an LLC, though, perhaps the same analysis obtains.

²¹ *Id.* at 752.

²² *Id.* at 766 (Sotomayor, J., concurring) ("Daimler conceded at the start of this litigation that MBUSA is subject to general jurisdiction based on its California contacts.").

so clearly proper that sophisticated businesses and their lawyers did not question it has now become improper.²³ Suppose, then, a California citizen is injured in a wreck involving a rented Mercedes automobile in Alaska. She can sue MBUSA in Alaska, through specific jurisdiction, and in Delaware and New Jersey, through general jurisdiction. But she cannot sue in her home state of California.

Maybe that is the “right” answer but the Court does not tell us why “at home” is the proper metric. More puzzlingly, it never tells us why a restriction on general jurisdiction is necessary. Given MBUSA’s significant level of activity in California, why would general jurisdiction there be unfair or even inconvenient for the defendant? Why don’t the plaintiff’s interest in litigating at home and California’s interest in vindicating the claim of one of its citizens against a company that is exploiting its market augur in favor of jurisdiction? The Court discusses none of this. This lack of rationale reflects the Court’s historic failure to explain the function of general jurisdiction. Because the Court has never told us why we have general jurisdiction, it cannot explain why the doctrine should be restricted.²⁴

Part I of this essay traces the Court’s unexplained move from “continuous and systematic” to “at home,” including the restrictive paradigms it employs. Though the Court concedes in *Daimler* that general jurisdiction might be based upon corporate activities, its characterization of the leading case on point renders the basis all but unusable. As addressed in Part II, in its rush to limit jurisdiction, the Court decided issues it did not need to decide. Specifically, it concluded that general jurisdiction cannot be based upon sales made in the forum and that the assessment of general jurisdiction does not entail consideration of whether jurisdiction is fair or reasonable. Thus, such classic fairness factors as the plaintiff’s and the forum’s interests are irrelevant in determining whether general jurisdiction is proper. Like the overall restriction on general jurisdiction, the Court’s conclusions on these issues may be correct. But their unnecessary decision may unduly limit general jurisdiction in the future.

At the end of the day, as discussed in Part III, maybe my nervousness about the evisceration of activities-based general jurisdiction reflects nervousness with the current narrow state of specific jurisdiction. Under *J. McIntyre Ma-*

²³ Notably, several iconic Supreme Court cases reflect the commonplace of activities-based general jurisdiction. For example, everyone assumed that Oklahoma had general jurisdiction over Audi and Volkswagen of North America in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Similarly, in its seminal decision on choice-of-law, *Allstate Ins. Co. v. Hague*, the Court assumed that the insurance company’s activities rendered it amenable to general jurisdiction in the forum. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 (1981). Another example is *Ferens*, 494 U.S. 516, discussed *supra* note 18, in which the defendant made no effort to contest the exercise of general jurisdiction over it in Mississippi.

²⁴ For a full discussion, see Stanley E. Cox, *The Missing “Why” of General Jurisdiction*, 76 U. PITT. L. REV. 153, 162–68 (2014).

chinery, Ltd. v. Nicastro,²⁵ specific jurisdiction is problematic. In such times, general jurisdiction based upon substantial corporate activities stands as a back-stop, a gap-filler, to ensure access to justice. It seems odd to be restricting general jurisdiction in an era in which specific jurisdiction is not pulling its share of the load.

I. THE “AT HOME” APPROACH

A. *Its Unexplained Adoption*

Before *Goodyear* and *Daimler*, the general jurisdiction canon was that a corporate defendant could be sued on a claim not arising in the forum if the defendant engaged in “continuous and systematic” activities in the forum.²⁶ The phrase is found in *International Shoe Company v. Washington*.²⁷ In the four decades after *International Shoe*, the Court expressly addressed general jurisdiction only twice. In *Perkins v. Benguet Consolidated Mining Company*,²⁸ it held that a mining corporation that suspended operations in the Philippines during World War II was subject to general jurisdiction in the state in which its president conducted general corporate activities.²⁹ In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, it held that a Colombian charter air transportation service was not subject to general jurisdiction in the state in which it bought helicopters and spare parts and where its pilots were trained.³⁰ The Court found the contacts insufficient in part because it relied upon a 1923 decision, *Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.*³¹ That case had held, twenty two years before *International Shoe*, that “purchases and related trips, standing alone” cannot justify general jurisdiction.³²

²⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790–91 (2011) (rejecting specific jurisdiction); see *infra* text accompanying notes 94–99.

²⁶ See PETER HAY ET AL., *CONFLICT OF LAWS* 404–05 (5th ed. 2010).

²⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). In fact, the Court in *International Shoe* used “continuous and systematic” when discussing an instance of specific jurisdiction. See *id.* at 317. Later in the opinion, it spoke of defendants with “continuous corporate operations [that are] so substantial” as to justify general jurisdiction. *Id.* at 318. For some reason, courts rather consistently have used the “continuous and systematic” phrase in referring to general jurisdiction. *Daimler*, 134 S. Ct. at 767 n.6 (Sotomayor, J., concurring). For example, in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952), the Court based its holding on the defendant’s “continuous and systematic” business in Ohio. See also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415–16 (1984) (general jurisdiction based upon “continuous and systematic general business contacts”).

²⁸ *Perkins*, 342 U.S. 437.

²⁹ *Id.* at 447–48.

³⁰ *Helicopteros*, 466 U.S. at 409, 418.

³¹ *Id.* at 417. (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923)).

³² *Id.* (citing *Rosenberg*, 260 U.S. 516). In his dissent, Justice Brennan strongly criticized the Court’s reliance on pre-*International Shoe* authority. *Id.* at 421 (Brennan, J., dissenting). It seems that *Rosenberg* was decided before the terms “general” and “specific” jurisdiction

Perkins and *Helicopteros* presented nearly polar opposites on the scale of business activity in the forum—one clearly “continuous and systematic” and one not.³³ Through the decades, lower courts wrestled with individual cases that presented much closer questions, without guidance from the Court. Counsel developed a sense of when a client would be subject to general jurisdiction and when the client should challenge an assertion. Now, with *Goodyear* and *Daimler*, the Court has shifted the focus from “continuous and systematic” activities in the forum to whether the defendant is “at home” in the forum.³⁴ That phrase had not found currency in the lower courts. There was no clamor in the lower courts to adopt “at home” as the proper standard for general jurisdiction. In fact, it is not clear that a single state court had ever employed “at home” as a proxy for general jurisdiction.³⁵ Yet “at home” is now a constitutional standard.³⁶

All exercises of personal jurisdiction raise questions of political legitimacy. With specific jurisdiction, the forum seeks to determine liability concerning acts that occurred (or had an effect) within it. With general jurisdiction, the forum is exercising adjudicatory power not over conduct, but over the defendant itself; by definition, the conduct in suit took place elsewhere.³⁷ What gives a state the authority to regulate a non-local defendant in this way? The Court concludes that a defendant’s being “at home” in the state justifies the exercise. But why? There is a robust literature on the political legitimacy of personal jurisdiction.³⁸ The Court does not engage it, and does little more than decree that “at home” is the proxy for the task.³⁹

were part of the common parlance. The dichotomy appears to trace its origin to 1966. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–45 (1966).

³³ HAY ET AL., *supra* note 26, at 372 (“Each [case] stands towards one end of a long spectrum of corporate affiliations with the state.”).

³⁴ Initially in *Goodyear*, the Court used “essentially at home.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Later in the opinion, however, the Court dropped “essentially” and referred twice to “at home.” *Goodyear*, 131 S. Ct. at 2854, 2857. In *Daimler*, all references are to “at home”; the modifier “essentially” never appears. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

³⁵ A Lexis search on September 1, 2014 found that no state-court case had used the phrase “at home” within 18 words of “general jurisdiction” in a personal jurisdiction case before 2011. In contrast, 891 state-court cases had used the phrase “continuous and systematic” within 18 words of “general jurisdiction” in such cases.

³⁶ The Court took the phrase “at home” and the paradigms from Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988). *See Daimler*, 134 S. Ct. at 760.

³⁷ HAY ET AL., *supra* note 26, at 370 (It is “jurisdiction without regard to the character of the dispute”).

³⁸ *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1296–97 (1989); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 84–86; Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1554 (2012); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 534–46 (1991); Todd David Pe-

B. The Restrictive Paradigms

The Court did not define “at home,” but provided paradigms for the concept. For a natural person, the paradigm is her domicile.⁴⁰ In fact, however, many people (military personnel and students, for instance) live in states other than their domicile.⁴¹ It may well be proper to exercise general jurisdiction at their domiciles, but not because the defendant is in any sense “at home” there.

More broadly, because a human has only one domicile, the Court’s adoption of domicile as its paradigm implies that a person can only be “at home” in one place. This conclusion ignores the fact that historically courts have exercised general jurisdiction over natural persons where they are served with process. Indeed, in terms of pedigree, presence when served would seem to rival domicile as a paradigm for general jurisdiction.⁴² Yet the Court does not mention presence. It thus does not face the striking juxtaposition between the result in *Goodyear* and the result in *Burnham v. Superior Court*.⁴³ In the latter case, all nine justices upheld general jurisdiction in California over an individual who had been served with process in that state.⁴⁴ The result is jarring: Good-

erson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 101–02 (2010); Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 639 (2007); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 690–92 (1987); Allen R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 412–14 (2004); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850 (1989).

³⁹ The Court appears simply to agree with the position of Professor Brilmayer that general jurisdiction should be limited to where the defendant is “at home.” *Goodyear*, 131 S. Ct. at 2853–54; *Daimler*, 134 S. Ct. at 760; Brilmayer *supra* note 36, at 727–35. For a criticism of the Court’s interpretation in *Goodyear* of cases cited in *International Shoe*, see Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2001, 2007–14 (2014).

⁴⁰ See *Goodyear*, 131 S. Ct. at 2853–54 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile . . .”).

⁴¹ A good example is *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974), which is a staple in Civil Procedure casebooks. There, one of the plaintiffs was born and raised in Mississippi. Upon reaching adulthood, she moved to Louisiana, where she lived for several years to attend school. She also lived in Illinois, where she continued her schooling before returning to Louisiana. All this time, the court concluded, she remained a domiciliary of Mississippi. *Id.* at 1400. It is questionable, however, that she would have considered herself “at home” in Mississippi.

⁴² General jurisdiction based both upon domicile (“residence”) and service of process in the forum were well-established by the time of *Pennoy v. Neff*, 95 U.S. 714, 723–24 (1878).

⁴³ *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 628 (1990). Though the case generated no majority rationale, all nine justices concluded that California had general jurisdiction over the defendant. *Id.* at 607.

⁴⁴ Four justices reasoned that the historical pedigree of jurisdiction based upon service of process in the forum justified the conclusion. *Id.* at 619. Four others asserted that general jurisdiction was proper under *International Shoe*. *Id.* at 628–30. The ninth concurred with the result. *Id.* at 640. See also RICHARD D. FREER, CIVIL PROCEDURE 104–06 (3d ed. 2012) (discussing the separate opinions).

year USA can operate three manufacturing plants year-round in North Carolina but apparently cannot be sued there on a claim arising in South Carolina,⁴⁵ while Mr. Burnham, who visited California for four days, can be sued there on a claim that arose anywhere in the world.⁴⁶ The Court gives no hint about why general jurisdiction over corporations should be so much narrower than it is over humans.

Even if we accept a natural person's domicile as the paradigm for general jurisdiction, how does that concept translate to corporations? In *Goodyear* and *Daimler*, the Court concluded that two places are the "equivalent" of domicile for a corporation: the state of incorporation and the state of principal place of business.⁴⁷

But a corporation's state of incorporation is nothing like a human's domicile. Artificial persons have no rights—indeed, they have no existence—without imprimatur from a state. Moreover, the law of the state of incorporation governs the internal affairs of the corporation, even if the company does no business in that state.⁴⁸ This regulatory power, plus the raw fact that the state granted the entity its existence, supports the conclusion that the state of incorporation must have general jurisdiction over corporations formed there. In contrast, states neither create people nor imbue them with powers. General jurisdiction in the state of incorporation is undoubtedly appropriate, but not based upon an analogy to domicile. Instead, the closer analogy is to jurisdiction based upon consent, because the proprietors chose to form the business there.

A corporation's principal place of business might come closer to approximating the human domicile. A person establishes her domicile by doing two things: (1) physically going to the state, and (2) forming the subjective intent to remain there indefinitely (that is, to make it her true, fixed location).⁴⁹ As Professor Stein says, domicile is "about perceiving, and having others perceive me as a member of their community."⁵⁰ Corporations are inanimate, so it is diffi-

⁴⁵ *Goodyear*, 131 S. Ct. at 2850–51.

⁴⁶ *Burnham*, 495 U.S. at 608, 619. Concurring in *Daimler*, Justice Sotomayor uses the juxtaposition to support her assertion that the majority is too parsimonious with general jurisdiction over corporations. *Daimler AG v. Bauman*, 134 S. Ct. 746, 772–73 (2014) (Sotomayor, J., concurring). Regardless of one's reaction to *Goodyear* and *Daimler*, one consequence of the cases may be to put greater pressure on the continued existence of general jurisdiction based upon service of process in the forum.

⁴⁷ *Daimler*, 134 S. Ct. at 760; *Goodyear*, 131 S. Ct. at 2853–54. On the other hand, later in the *Daimler* opinion, the Court replaced the "and" with an "or" in saying that *Goodyear* did not limit general jurisdiction only to "a forum where it is incorporated or has its principal place of business." *Daimler*, 134 S. Ct. at 760. Later still, it speaks of exceptional cases in which general jurisdiction is proper in places "other than [the corporation's] formal place of incorporation or principal place of business." *Daimler*, 134 S. Ct. at 761 n.19 (emphasis added).

⁴⁸ *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982).

⁴⁹ FREER, *supra* note 44, at 179.

⁵⁰ Stein, *supra* note 18, at 543.

cult to talk about their “perceiving” whether they belong in a given community. But corporations do take actions, and at some point those actions may manifest that the business has joined the community in a way approximating domicile.

Indeed, in most cases involving human domicile, an analysis of activities is required. Most people do not wake up one morning and say: “I have formed the intent to make this my permanent home.” So courts must judge intent from actions. A person takes a job in the state; earns a promotion; buys a house; registers to vote; joins a church, civic organizations, and clubs; etc. At some point a court can say that she has formed the intent to make that state her domicile. So too a corporation might buy a business facility, hire employees, engage agents, join trade associations, and the like. At some point, activities such as these justify the conclusion that the company is part of the community—that it is “at home.”

But such an activities-based “principal place of business” is not what the Court has in mind. In *Daimler*, the Court cited *Hertz Corp. v. Friend*⁵¹ when it noted the principal place of business as a paradigm.⁵² *Hertz* defined principal place of business for purposes of diversity of citizenship jurisdiction. It adopted the “nerve center” test, which focuses on where managers “direct, control, and coordinate the corporation’s activities.”⁵³ The nerve center is usually the corporation’s headquarters.⁵⁴ It is important to remember, though, that *Hertz* interpreted “principal place of business” as used in 28 U.S.C. § 1332(c)(1).⁵⁵ In that statute, the phrase is preceded by the word “the,” which commands that there be only one such place.⁵⁶ In the personal jurisdiction context, it is not apparent that (1) there can be only one principal place of business, or (2) that it must be the nerve center rather than a place of activities.⁵⁷

How we define principal place of business should depend on why we have general jurisdiction in the first place. One possibility is that we want to reassure plaintiffs that there is always a place (or places) where a defendant can be sued. Specific jurisdiction can be problematic, so we want to reassure plaintiffs that

⁵¹ *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

⁵² *Daimler*, 134 S. Ct. at 760.

⁵³ *Hertz*, 559 U.S. at 92–93.

⁵⁴ *Id.* at 81 (“We believe that the ‘nerve center’ will typically be found at a corporation’s headquarters.”). Before *Hertz*, courts had disagreed on whether the principal place of business was the nerve center or place of major activities. Indeed, that is the reason the Court granted certiorari in *Hertz*. *Id.* at 80, 91 (“We seek here to resolve different interpretations that the Circuits have given this phrase. . . . The number of factors grew as courts explicitly combined aspects of the ‘nerve center’ and ‘business activity’ tests to look to a corporation’s ‘total activities,’ sometimes to try to determine what treatises have described as the corporation’s ‘center of gravity.’”).

⁵⁵ *See id.*

⁵⁶ 28 U.S.C. § 1332(c)(1) (2010) (prescribing citizenship to “the” state or foreign country in which the corporation has its principal place of business); *see Hertz*, 559 U.S. at 93 (“A corporation’s ‘nerve center,’ usually its main headquarters, is a single place.”).

⁵⁷ FREER, *supra* note 44, at 183–85.

they can bring a defendant to justice at a certain place (or places). If this predictability is the rationale, the nerve center is as good a test as any. Another possibility, however, which is consistent with concern over the political legitimacy of exercising jurisdiction, is that general jurisdiction is proper only when the defendant is an “insider”—when its affiliation with the state justifies coercion.⁵⁸ If this is the rationale, the corporation’s activities in the forum seem to be the more appropriate metric.

The Court failed to address the theoretical basis for general jurisdiction. Instead, it appears to justify the choice of nerve center in terms of convenience: it is easy to apply.⁵⁹ But this is not always so, as it appears increasingly common to divide corporate oversight functions among different locations.⁶⁰ Moreover, substantively, the nerve center is not analogous to human domicile. Corporations can separate “mind” from “body”—the board of directors in State A can command actions in State B. If principal place of business has any reasonable analog to human domicile, it is where the corporation *does* things, not where it *decides* to do things. Why would a corporation be more “at home” where its board of directors meets⁶¹ than where it interacts with a community—that is, where it hires and fires, holds employee Fourth of July picnics, sponsors youth sports teams, joins civic associations, and contributes to charities?⁶²

Might a corporation be “at home” in a state other than its state of charter and the state of its nerve center? Though the Court was less than clear on this point in *Goodyear*,⁶³ in *Daimler* it said yes, explaining that a corporation may

⁵⁸ Professor Brilmayer makes this point in the article cited by the Court. *See* *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). Professor Stein argues that the non-local defendant must be so connected with the forum that the court’s ruling against it would not be seen as an externality; in other words, the court’s ruling against that defendant would be seen as something that could hurt the forum. Stein, *supra* note 18, at 543–44. The Court fails to discuss why it concludes that Professor Brilmayer’s metric for this assessment—“at home”—is the right one.

⁵⁹ *Daimler*, 134 S. Ct. at 760 (characterizing places of incorporation and principal place of business as “easily ascertainable”).

⁶⁰ *See id.* at 772 (Sotomayor, J., concurring).

⁶¹ As will be discussed in Part II, general jurisdiction cannot be based upon purchases or sales in the forum.

⁶² Many corporations have their nerve center and activities in only one state. But the type of corporation on which general jurisdiction discussion centers—the Wal-Marts, Coca-Colas, Proctor & Gambles, Amazons, and the like—feature activities in various states other than that from which managers direct corporate activities.

⁶³ Some commentators concluded after *Goodyear* and before *Daimler* that the Court had limited general jurisdiction to states of incorporation and principal place of business. *See, e.g.,* Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 694 (2012); *see also* Stein, *supra* note 18, at 527–28. Others urged that *Goodyear* precluded general jurisdiction in a broader range of states. *See, e.g.,* Peterson, *supra* note 38, at 213–17.

also be “at home” based upon activities in a state.⁶⁴ The Court was emphatic, however, that such activities-based cases will be “exceptional.”⁶⁵ Indeed, as we now address, it is difficult to imagine cases in which such exceptional circumstances will provide plaintiffs with a true option for general jurisdiction.⁶⁶

C. Activities-Based General Jurisdiction

Though confirming that general jurisdiction may be based upon activities in the forum, the Court in *Daimler* implied that only one state may fill that bill. The implication arises from the Court’s instruction that a defendant’s contacts with the forum are assessed holistically, in the context of its overall business.⁶⁷ It is not enough that the company engages in a level of activity in-state that is comparable to that of a local business.⁶⁸ “General jurisdiction instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”⁶⁹

Assume that the largest business formed in State A engages in activity in-state that can be quantified as level 100; further, most State A businesses engage in activity there quantified as level 50. Suppose a large interstate corporation engages in activity in State A at level 125. In relation to the business community in State A, the interstate corporation is the most significant player. To the Court, that fact is irrelevant. Instead, we would need to know how this quantum of activity compares to the interstate corporation’s entire business. If the activity in State A constitutes but a small percentage of the interstate corporation’s overall business, general jurisdiction would improperly allow State A to have regulatory authority over the far greater quantum of activity out of

⁶⁴ “*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; it simply typed those places paradigm all-purpose forums.” *Daimler*, 134 S. Ct. at 760.

⁶⁵ “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.” *Id.* at 761 n.19 (citation omitted).

⁶⁶ In *Daimler*, the Court granted certiorari on whether the California contacts of MBUSA can be imputed to Daimler, a German company, so as to find general jurisdiction over Daimler. *See id.* at 751. The Court rejected the Ninth Circuit’s attribution of contacts, which was based on principles of agency and control. *Id.* at 753–54, 759–60. But it did not define the scope of attribution. *See id.* at 759. Ultimately, it concluded, even with attribution of MBUSA’s contacts, Daimler was not “at home” in California. *Id.* at 751, 760. Because the Court did not answer the question on which it granted review, we now have an interesting question: suppose a plaintiff sues Daimler in Delaware or New Jersey, basing general jurisdiction on the fact that the subsidiary is “at home” there. Does that make Daimler “at home” there?

⁶⁷ *See id.* at 762 n.20.

⁶⁸ *See id.*

⁶⁹ *Id.*

state.⁷⁰ Clearly, this “proportionality” assessment⁷¹ leads to the conclusion that activities-based general jurisdiction can be proper, if ever, in only one state.

In her concurrence in *Daimler*, Justice Sotomayor disagrees sharply on this point. To her, the focus should be the defendant’s level of activities in the forum, to see if its contacts are “akin to those of a local enterprise that actually is ‘at home’ in the State.”⁷² Thus, if the interstate corporation engaged in State A in a quantum of business, say, at level 75 or perhaps even 50, it would be subject to general jurisdiction there.⁷³ This focus would allow a court to conclude that a given corporation is “at home” in several states.⁷⁴

The debate raises an interesting question: from whose vantage point is “at home” to be assessed? The proportionality test makes sense if the question is what *the company* likely considers its home. If its activities in the forum, though comparable to local businesses, are dwarfed by its activities elsewhere, the company is unlikely to consider itself “at home” there. After all, to the business, the forum is only a way station, an outpost. Justice Ginsburg’s opinion for the Court reflects this view.⁷⁵ But what if the assessment is to be made in the eyes of the community? The corporation may employ as many people and stimulate the economy as much as the largest local business. In such a case, the community might consider the corporation to be “at home.” Justice Sotomayor’s concurrence reflects this view.⁷⁶

If we concede that activities-based general jurisdiction is proper in only one state (beyond the state of incorporation and the state of the nerve center), how much activity must there be to render a corporation “at home?” In *Goodyear*, the Court considered *Perkins v. Benguet Consolidated Mining Company*⁷⁷ to be the “textbook case” for general jurisdiction over a corporation.⁷⁸ In *Daimler*, it cited *Perkins* as the example of the type of “exceptional case” in which

⁷⁰ See *id.* For this point, the Court relies upon an argument set forth in *Feder*, *supra* note 63, at 694. Mr. Feder represented the defendants in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

⁷¹ Justice Sotomayor uses this handy label; the Court does not. *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring).

⁷² *Id.* at 769.

⁷³ “The problem, the Court says, is not that *Daimler*’s contacts with California are too few, but that its contacts with other forums are too many.” *Id.* at 764.

⁷⁴ *Id.* at 770 (“[T]here 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.”). The majority responds by saying that Justice Sotomayor’s test sanctions general jurisdiction based upon “doing business,” which the Court clearly intends to reject (or substantially restrict). *Id.* at 762 n.20 (majority opinion) (“Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”).

⁷⁵ See *id.* at 750–63.

⁷⁶ See *id.* at 763–73 (Sotomayor, J., concurring).

⁷⁷ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

⁷⁸ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011) (quoting *Donahue v. Far Eastern Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

general jurisdiction can be based upon business activities.⁷⁹ Justice Ginsburg characterizes the facts of *Perkins*, however, in a way that minimizes the impact of the case. Specifically, she concludes that *Perkins* supports general jurisdiction when “all” of a company’s business is conducted in a single state. In fact, however, the corporation over which Ohio properly exercised general jurisdiction did not conduct “all” business in that state. In *Perkins*, the plaintiff, “a non-resident of Ohio,” sued the Benguet Consolidated Mining Company in Ohio to recover dividends and damages for the company’s alleged failure to issue stock certificates to her.⁸⁰ The corporation was formed “under the laws of the Philippine Islands,” where it owned and operated gold and silver mines.⁸¹ The company suspended mining operations when the Japanese occupied the Philippines in World War II.⁸² During the interregnum, the corporate president, “who was also the general manager and principal stockholder,” returned to his home in Ohio.⁸³ Justice Ginsburg described the corporate activity in Ohio by saying that “[a]ll of Benguet’s activities were directed by the company’s president from within Ohio.”⁸⁴

That statement might not be accurate. The Court’s opinion in *Perkins* never said that “all” corporate activities were directed from Ohio. Rather, it said that the president “did many things on behalf of the company”⁸⁵ in Ohio. Justice Sotomayor recounted the facts from the opinion of the Ohio Court of Appeals.⁸⁶ By the time the case was filed, she says, Benguet had resumed mining in the Philippines and had a robust corporate presence in California, from which it negotiated the purchase of supplies as directed from the chief of staff in Manila.⁸⁷ The board of directors had met in Ohio, but had also met outside that state.⁸⁸ Thus, Justice Sotomayor concludes, the fact that the Court nonetheless upheld general jurisdiction in Ohio supports the conclusion that systematic and continuous activities—short of “all” activities—can support general jurisdiction.

⁷⁹ *Daimler*, 134 S. Ct. at 761 n.19.

⁸⁰ *Perkins*, 342 U.S. at 438–39.

⁸¹ *Id.* at 439.

⁸² *Id.* at 447.

⁸³ *Id.*

⁸⁴ *Daimler*, 134 S. Ct. at 756 n.8. Though *Perkins* is considered an example of activities-based general jurisdiction, this sentence is consistent with the conclusion that the corporation’s nerve center was in Ohio.

⁸⁵ *Perkins*, 342 U.S. at 448.

⁸⁶ *Daimler*, 134 S. Ct. at 769 n.8 (Sotomayor, J., concurring).

⁸⁷ *Id.*

⁸⁸ *Id.* (“[T]he facts of the case set forth by the Ohio Court of Appeals show just how ‘limited’ the company’s Ohio contacts—which included a single officer keeping files and managing affairs from his Ohio home office—were in comparison with its ‘general business’ operations elsewhere.”).

Nonetheless, the Court's inference in *Daimler* is that general jurisdiction is proper only if "all" corporate activities are in one state. The type of corporation that does "all" business in one state will almost always be incorporated or have its headquarters in the same state (or both). With such localized businesses, activities-based general jurisdiction will add nothing at all; the activities state already had general jurisdiction because of incorporation or having its nerve center there. By definition, requiring that "all" activities be in a single state means that activities-based general jurisdiction will not be available for interstate businesses like Goodyear USA or MBUSA.⁸⁹ With such companies, general jurisdiction will be restricted to where they are incorporated and where they have their nerve centers.

To this point, then, the Court has limited general jurisdiction by adopting "at home" as the proper test, by choosing limited examples of what constitutes "at home," and by placing the bar for activities-based general jurisdiction too high to do any good in most cases. Beyond this, the Court may have hampered future expansion by deciding issues that were not presented by the parties.

II. UNNECESSARY DECISIONS

In addition to introducing the "at home" test for general jurisdiction, the Court in *Goodyear* established what appear to be two absolute rules. First, general jurisdiction cannot be based upon a stream-of-commerce rationale.⁹⁰ This issue was squarely presented by the case and the Court's decision is plainly correct. The stream of commerce introduces a defendant's products into the forum *indirectly*. The classic example involves components: the defendant manufactures a component in State *A*. The defendant sells the component to a company in State *B*, which puts the part into its finished product. The State *B* company then sells the finished product into States *C*, *D*, and *E*. The component manufacturer's part thus gets into States *C*, *D*, and *E*, albeit indirectly, through the act of the State *B* manufacturer. The Court has failed twice to determine whether the stream of commerce can constitute a relevant contact between a manufacturer and States *C*, *D*, and *E* for purposes of *specific* jurisdiction.⁹¹ Perforce, then, such a contact cannot constitute the greater affiliation necessary for general jurisdiction.

⁸⁹ A company that does business in multiple states, like Goodyear USA and MBUSA, obviously cannot do "all" of its business in one state. The Court's characterization of *Perkins* as requiring that "all" business be done in one state, then, renders activities-based general jurisdiction impossible for large companies. *See supra* note 62.

⁹⁰ *Goodyear*, 131 S. Ct. at 2851 (holding that a stream-of-commerce rationale is "[a] connection so limited between the forum and the foreign corporation . . . [it] is an inadequate basis for the exercise of general jurisdiction.>").

⁹¹ The cases were *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) and *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987). In neither case could the Court muster more than four adherents to a position, even though *McIntyre* presented the easier fact pattern of marketing a finished product, rather than components. *McIntyre*, 480 U.S. at 2783, 2786; *Asahi*, 480 U.S. at 102–04.

In addition, however, the Court in *Goodyear* went beyond the stream-of-commerce scenario to rule out general jurisdiction based upon *any* sales into the forum. This was an issue it did not need to address. For this point, the Court quoted that portion of *Helicopteros* that relied on *Rosenberg*.⁹² In *Rosenberg*, the Court held that a company that *purchased* its inventory in the forum, and whose agents made related trips to the forum, could not be sued there on a claim arising elsewhere.⁹³ In other words, a defendant's *buying from* the forum cannot support general jurisdiction. In *Goodyear*, the Court extended *Rosenberg* to a company's *selling into* the forum.⁹⁴ Thus, neither buying from nor selling into a forum can render a corporation "at home" there. Putting aside the appropriateness of extending pre-*International Shoe* authority such as *Rosenberg*,⁹⁵ is there not an argument that buying and selling might have different jurisdictional consequences? A company that buys products from a forum does not endanger forum residents (except the seller, who runs the risk of not being paid). In contrast, a company that sells products into a forum exposes residents to the products. If the products are faulty, any number of forum residents might be harmed.⁹⁶

Might that state not have a legitimate regulatory interest concerning such a defendant? Foreclosing the issue may have an undesirable impact when (and if) the Court addresses jurisdiction based upon Internet activity. If general jurisdiction cannot be based upon the defendant's buying or selling in the forum, retail marketers such as Amazon and L.L. Bean cannot be subject to general jurisdiction, say, in California, regardless of the volume of sales or number of products shipped into the state.⁹⁷ Maybe that is as it should be, but it would seem prudent to decide the question only when it is presented, briefed, and argued.

⁹² *Goodyear*, 131 S. Ct. at 2856 (quoting *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. 408, 415–18 (1984)).

⁹³ *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923).

⁹⁴ *Goodyear*, 131 S. Ct. at 2856 (explaining that "the sales of petitioners' tires sporadically made in North Carolina through intermediaries" were insufficient ties and therefore did not warrant general jurisdiction).

⁹⁵ In *Daimler*, the plaintiffs relied upon two cases cited by the Court in *Perkins* for the proposition that general jurisdiction may be based upon a corporation's doing business (as indicated by the presence of a local office). *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.18 (2014). In that instance, the age of the authority mattered to Justice Ginsburg, who said: "*Perkins*' unadorned citations to these cases, both decided in the era dominated by *Pennoy-er*'s territorial thinking, should not attract heavy reliance today." *Id.* (citation omitted). Why *Rosenberg* should command obeisance today is hard to divine and Justice Ginsburg did not explain the different treatment.

⁹⁶ To be sure, a plaintiff harmed by a product in the state could invoke specific jurisdiction over the defendant. The question is whether there might be a state regulatory interest over the seller that would justify general jurisdiction.

⁹⁷ Over a decade ago, a Ninth Circuit panel upheld general jurisdiction over L.L. Bean based upon sales volume into California. *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079, 1082 (9th Cir. 2003). The opinion was vacated to allow the Circuit to hear it en banc, 366 F.3d 789 (9th Cir. 2004), and thereafter dismissed as moot because the parties settled, 398 F.3d 1125 (9th Cir. 2005).

The rule against basing general jurisdiction on purchases or sales implies that general jurisdiction requires the defendant's presence in the forum in a bricks-and-mortar sense.⁹⁸ If so, the Court appears to be saying that general jurisdiction has something to do with the defendant's physical engagement with the community of the forum. But, as we saw above, when it came to selecting a "paradigm" for general jurisdiction, the Court adopted not a place of activities, but the place where corporate decisions are made.⁹⁹

In *Daimler*, the Court made a surprising pronouncement about the constitutional assessment of general jurisdiction. Once a court determines that the defendant is "at home," the assessment is complete. The court does not consider whether the exercise of jurisdiction would be fair or reasonable under the circumstances. The conclusion was surprising because no party argued or briefed the issue.¹⁰⁰ Moreover, it was apparently contrary to the uniform holdings of the courts of appeals on the issue.¹⁰¹ The Court announced its conclusion in a footnote, explaining that in cases of general jurisdiction, "any second-step inquiry would be superfluous."¹⁰² After all, how can someone argue that litigation is not convenient where he is "at home?"¹⁰³

The conclusion is surprising, at least coming from Justice Ginsburg, because it admits that fairness factors cannot be used to *support* a finding of personal jurisdiction. The point requires a bit of background. There have been two general schools of thought on how courts are to apply *International Shoe*. One—pioneered by Justice Black¹⁰⁴ and championed by Justice Brennan—may be called the "mélange" approach.¹⁰⁵ Under that view, all relevant factors—

⁹⁸ HAY ET AL., *supra* note 26, at 373 (summarizing pre-*Goodyear* case law: "An important factor in whether a corporation . . . will be subjected to [general] jurisdiction is a continuing physical presence in the forum, usually in the form of an office or employees.").

⁹⁹ See *supra* Part I.A.

¹⁰⁰ Justice Sotomayor pointed out that the Court had not previously addressed the issue and that it had not been briefed by the parties. *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

¹⁰¹ Justice Sotomayor wrote that the courts of appeals "have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context." *Id.* at 764 n.1.

¹⁰² *Id.* at 762 n.20 (majority opinion) ("Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case.").

¹⁰³ On the other hand, people who do not live in their state of domicile might contest the fairness of suing them there. See *supra* note 41 (discussing *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974), in which a plaintiff had not resided in her state of domicile for several years). The argument that general jurisdiction in one's state of domicile might be unfair on such facts now appears to be foreclosed.

¹⁰⁴ In *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957), the Court, per Justice Black, upheld specific jurisdiction based upon one contact with the forum, emphasizing, *inter alia*, the forum's interest, the plaintiff's interest in litigating at home, and the relative burdens on the parties. Such mixing of "contact" and "fairness" elements in one overall assessment is typical of the mélange approach noted *infra* in text accompanying notes 105–06; see also *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 646–48 (1950).

¹⁰⁵ Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 554–69 (2012) (discussing Justice Brennan's efforts

including defendant's contacts with the forum and such fairness factors as the plaintiff's interest, the forum's interest, and burden on the defendant—are weighed together in one unstructured assessment. Under this view, considerations of fairness might offset the fact that the defendant had a marginal contact with the forum *and therefore support jurisdiction*.¹⁰⁶ The other school approaches the matter in two rigid steps: first, there must be a relevant contact, after which the court may consider factors of reasonableness.¹⁰⁷ Under this approach, the fairness factors might *defeat* jurisdiction; that is, the court might conclude that though the defendant established a purposeful contact, the exercise of jurisdiction would not be fair.¹⁰⁸

Until her opinion for the Court in *Daimler*, Justice Ginsburg appeared to be a devotee of the *mélange* approach. Her dissent in *McIntyre* excoriated the Court for making far too much of the contact analysis and giving short shrift to fairness factors that would support jurisdiction.¹⁰⁹ Though *McIntyre* was a specific jurisdiction case, Justice Ginsburg's willingness to jettison a fairness analysis in general jurisdiction appears to signal her embrace of the rigid two-step formulation for applying *International Shoe*. Later in the same footnote, in fact, she states plainly that in specific jurisdiction cases the court must find a relevant contact before assessment of fairness becomes relevant.¹¹⁰

In her concurrence, Justice Sotomayor asserts that both the contact and fairness prongs of the *International Shoe* analysis apply in general jurisdic-

to promote use of an approach that mixes factors relating to contact and factors relating to fairness in an unstructured way).

¹⁰⁶ In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), Justice Brennan wrote his only majority opinion in a personal jurisdiction case. There, he attempted to collapse the contact and fairness prongs of analysis under *International Shoe* by using a sliding-scale concept. *Id.* at 477. Specifically, he said that fairness factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.” *Id.*

¹⁰⁷ This rigid two-step approach—under which a finding of contact is necessary before factors relating to fairness or reasonableness become relevant—is exemplified by *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–94 (1980).

¹⁰⁸ The only time the Supreme Court has upheld dismissal based upon fairness factors was in *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113–15 (1987). As Professor Hay has demonstrated, the dismissal in *Asahi* was essentially an invocation of the doctrine of *forum non conveniens*. Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 601 n.65. The same may be said of *Daimler* because, in both cases, the claimants and defendants were non-American citizens and the claim arose overseas. *Daimler AG v. Bauman*, 134 S. Ct. 746, 750–51 (2014); *Asahi*, 480 U.S. at 106.

¹⁰⁹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2798–801 (2011) (Ginsburg, J., dissenting). I believe that Justice Ginsburg's opinion in *McIntyre* is an example of the *mélange* approach. I am aware that others disagree. In view of her adoption of the two-step approach in *Daimler*, perhaps I was am wrong.

¹¹⁰ *Daimler*, 134 S. Ct. at 762 n.20 (“First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case.”).

tion.¹¹¹ She would apply the fairness factors to reject jurisdiction. *Daimler*, she explains, is like *Asahi*, in which the parties are all non-U.S. citizens and the suit concerns claims arising overseas.¹¹² Thus, in the “unique circumstances of this case,” jurisdiction would be unreasonable.¹¹³

The question is not whether fairness factors should be available to defeat jurisdiction. They always have been. The question is whether considerations of fair play and substantial justice might support jurisdiction based upon a relatively low showing of contact between the defendant and the forum. After *Daimler*, the answer—certainly for general jurisdiction and apparently in specific jurisdiction as well—is no. This limitation may prove regrettable, at least in our present era, which features such a parsimonious view of specific jurisdiction.

III. THE PERILS OF RESTRICTING GENERAL JURISDICTION

Goodyear and *Daimler* are puzzling because they impose restrictions that the Court feels no need to justify. They may be harmful, however, because they come at a time when specific jurisdiction is not as robust as many think it should be.¹¹⁴ The main cause, of course, is the Court’s 2011 decision in *McIntyre*.¹¹⁵ In that case, Mr. Nicastro, a citizen of New Jersey, was severely injured at work while using a machine manufactured in England.¹¹⁶ The manufacturer sold its machines to a company in Ohio, which then sold them to businesses throughout the United States.¹¹⁷ One machine was sold to Mr. Nicastro’s employer. Mr. Nicastro sued the British manufacturer in New Jersey, and asserted a product liability claim.¹¹⁸ The Court held that New Jersey did not have specific jurisdiction over the British manufacturer.¹¹⁹

What option would Mr. Nicastro have now? The only other option for litigation in the United States would be to sue McIntyre in Ohio. One potential problem, however, is that Mr. Nicastro suffered his injury in New Jersey. Con-

¹¹¹ Justice Sotomayor asserted: “[W]e have never required that prong [contact] to be decided first.” *Daimler*, 134 S. Ct. at 765 n.2 (Sotomayor, J., concurring). The statement seems belied by *World-Wide Volkswagen* and *Burger King*. And, as noted in the preceding footnote, even Justice Ginsburg has adopted the two-step methodology.

¹¹² *Id.* at 765.

¹¹³ *Id.* at 763.

¹¹⁴ See, e.g., Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1263–75 (2011); Arthur R. Miller, McIntyre in Context: A Very Personal Perspective, 63 S.C. L. REV. 465, 475–78 (2012); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 59–83 (2012).

¹¹⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

¹¹⁶ *Id.* at 2786.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2785, 2791.

ceivably, then, an Ohio court might conclude that the claim did not arise in the forum. The case points out another hole in the jurisprudence of minimum contacts: how related must a contact be to forum activities to support specific jurisdiction?¹²⁰ The Supreme Court has failed to guide on the issue,¹²¹ and lower courts have taken different approaches. Some find specific jurisdiction on a “but for” basis: that the claim would not have arisen but for the defendant’s contact with the forum.¹²² Other courts are stricter, requiring “that the contacts must bear a direct relationship to the dispute.”¹²³ Certainly, Mr. Nicastro’s injury would not have occurred but for the sale of the machines into Ohio. And the case presents the advantage, in Ohio, of involving direct sales and not the stream of commerce. It seems likely that the case might satisfy a stricter test too, but the conclusion is not free from doubt.¹²⁴

Before *Goodyear* and *Daimler*, such a close call for specific jurisdiction in Ohio would not have been litigated, because general jurisdiction was so clear. Without doubt, courts would have concluded that McIntyre engaged in “continuous and systematic” activities in Ohio by selling and marketing all of its products sold in North America to a single Ohio company. Had such litigation been pursued, it is likely that the McIntyre (like Goodyear USA in North Carolina) would not have contested general jurisdiction.

Today, however, it seems clear that Ohio could not exercise general jurisdiction. First, McIntyre is not “at home” in Ohio, because it is formed and has its headquarters in Great Britain. Second, Ohio will not qualify for activities-based general jurisdiction, even though every machine McIntyre sold in North America was sold into Ohio. Because, as *Goodyear* established, general jurisdiction cannot be based upon sales into the forum. Third, an appeal to fairness factors will do no good. So notwithstanding that the plaintiff (injured in the United States) has an interest in suing in the United States, and notwithstanding that Ohio may have an interest in providing courtroom for an American plaintiff, general jurisdiction is not available.

In the domestic context, *Goodyear* and *Daimler* may make litigation more difficult for plaintiffs. The citizen of North Carolina who is injured by an alleged defect in a Goodyear tire while on vacation in Florida can invoke specific jurisdiction in Florida or general jurisdiction in Ohio. Until the Court’s recent efforts, he could sue at home. Now he cannot, though it is not clear why jurisdiction would be onerous or unfair to Goodyear USA in a state in which it has a large and constant corporate presence. In the international context, though, the

¹²⁰ In *International Shoe*, the Court spoke of contacts that “arise out of or are connected with” the dispute. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

¹²¹ HAY ET AL., *supra* note 26, at 361 (“Oddly enough, the Supreme Court has never addressed the question of what constitutes a related contact.”).

¹²² *Id.* at 362.

¹²³ *Id.* at 362–63.

¹²⁴ “Justice Kennedy and Ginsburg’s opinion [in *McIntyre*] hint that jurisdiction might not be proper even in Ohio” Klerman, *supra* note 38, at 1563.

stakes are higher and the Court may have put American plaintiffs in a very difficult position. On the facts of *McIntyre*, we would like to assume that Ohio would exercise specific jurisdiction. Again, though, that is not a foregone conclusion. A negative answer—in combination with the new restrictions on general jurisdiction—leaves American plaintiffs without access to American courts to vindicate claims arising in the United States. Why we would take that risk by limiting general jurisdiction in this era is a mystery.

CONCLUSION

In *Goodyear* and *Daimler*, the Court limits general jurisdiction without explaining why it is doing so. It adopts a new test—“at home”—that had absolutely no currency in case law. Though it could have ruled in both cases on narrow grounds, the Court spoke broadly and decided issues that did not need to be decided. As a result, the Court has upset well-accepted notions of general jurisdiction based upon corporate activities. It neither explains nor justifies the new restrictions and seems unaware of the potential barriers they raise to access to justice.