
2014

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Recommended Citation

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 (2014).
Available at: <https://scholarlycommons.law.emory.edu/elj-online/23>

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BE CAREFUL WHAT YOU WISH FOR: GOODYEAR, DAIMLER, AND THE EVISCERATION OF GENERAL JURISDICTION

*Thomas C. Arthur**
*Richard D. Freer***

ABSTRACT

International Shoe and its progeny permit states to assert general jurisdiction over nonresidents that have “continuous and systematic” contacts with the forum. In Goodyear Dunlop Tires Operations, S.A. v. Brown decided in 2011, and Daimler AG v. Bauman decided in early 2014, the Supreme Court made a sharp break from these cases, stating that general jurisdiction based on minimum contacts now exists only where a defendant is “at home.” The opinions in these cases are unpersuasive. While the Court purported to follow International Shoe and its two prior decisions on general jurisdiction, this simply is not so. Nor does the Court justify its use of an analogy to the traditional basis of domicile to determine to legitimate scope of contacts-based jurisdiction. Arguably, an analogy to presence would be more apt. Worse, these two cases, when added to the Court’s grudging approach to specific jurisdiction, put some plaintiffs at risk of being unable to bring a defendant to justice in an American court.

Goodyear and Daimler could have been decided on far narrower grounds; the Court should read them in the future to be limited to those grounds. It should restrict the novel “at home” test to cases that have no relation at all, not even the plaintiff’s residence, to the forum state. For all other cases of general jurisdiction the Court should provide a “floor” of appropriate “systematic and continuous” contacts necessary in every case. And it should further direct the lower courts to employ the “fairness factors” developed in its specific jurisdiction cases to ensure that jurisdiction will be available in those cases in which it is still needed.

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INTRODUCTION

There is an old Southern saying: “Be careful what you wish for. You just might get it!” We and other Civil Procedure teachers for years have wished that the Supreme Court would clarify the standard for determining whether a state could exercise general jurisdiction based on a nonresident’s contacts with the state. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*¹ and *Daimler AG v. Bauman*,² the Supreme Court granted this wish. We should have been more careful in our wishing.

The opinions in these cases state that general jurisdiction exists only where a defendant is “at home.” In reaching these holdings, the Court made a sharp break from the prevailing practice of the lower courts, which had permitted states to assert general jurisdiction over nonresidents that had “continuous and systematic” contacts with the forum. While the Court purported to apply the principles of *International Shoe Co. v. Washington*³ and its progeny, including the Court’s two prior decisions on general jurisdiction, this simply is not so. Nothing in those cases counseled the limitations wrought by the Court. Worse, the Court’s decisions in these two cases leave a large gap in the appropriate scope of state adjudicatory jurisdiction, putting some plaintiffs at risk of being unable to bring a defendant to justice in an American court.

We argue here the Court should adopt a less grudging approach to general jurisdiction. *Goodyear* and *Daimler* could have been decided on far narrower grounds; the Court should read them in the future to be limited to those grounds. It should restrict the novel “at home” test to cases that have no relation at all, not even the plaintiff’s residence, to the forum states. For all other cases of general jurisdiction the Court should provide a “floor” of appropriate “systematic and continuous” contacts necessary in every case. And it should further direct the lower courts to employ the “fairness factors” developed in its specific jurisdiction cases to ensure that jurisdiction will be available in those cases in which it is still needed.

¹ 131 S. Ct. 2846 (2011).

² 134 S. Ct. 746 (2014).

³ 326 U.S. 310 (1945).

I. THE OPINIONS IN *GOODYEAR* AND *DAIMLER*A. *Background: General Jurisdiction Before Goodyear and Daimler*

International Shoe authorizes two forms of in personam jurisdiction based on minimum contacts. “Specific jurisdiction” is limited to cases arising from or otherwise related to a nonresident’s contacts with the forum state. “General jurisdiction,” like the traditional bases of personal jurisdiction (service while defendant is present in the state, domicile, and actual consent), is not so limited; it applies to all claims, even those arising outside the forum state.⁴ By accepted canon in the wake of *International Shoe*, contacts-based general jurisdiction has been permissible when a defendant’s contacts are “continuous and systematic.”⁵ Both specific and general in personam jurisdiction pre-existed *International Shoe*, but had been based on fictive presence or consent rather than on the more realistic and functional basis of contacts with the forum.

Specific jurisdiction has received the lion’s share of the Court’s attention since *International Shoe*, with the consequence that almost all of the judicial explication of minimum contacts doctrine and its rationales has come in specific jurisdiction cases. By contrast, the Court expressly addressed general jurisdiction only twice in the four decades after *International Shoe*. In *Perkins*, it held that a Philippine mining corporation that suspended operations during World War II was subject to general jurisdiction in Ohio, where the company had its de facto headquarters, as its president conducted general corporate activities from his residence there.⁶ In *Helicopteros*, it held that a Colombian charter air service was not subject to general jurisdiction in the state in which it had bought helicopters and in which its pilots were trained.⁷

⁴ As Professor Twitchell showed in her famous article, the division between the two varieties of contacts based jurisdiction is not this tidy. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 629–30, 643–45 (1988); see also *infra* text accompanying notes 8–9.

⁵ Actually, *International Shoe* used the phrase “continuous and systematic” when discussing an instance of specific jurisdiction. 326 U.S. at 317. Later in the opinion, the Court 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. *Daimler*, 134 S. Ct. at 767 n.6 (Sotomayor, J., concurring in the judgment). In *Perkins v. Benguet Consolidated Mining Co.*, the Court based its holding on the defendant’s “continuous and systematic” business in Ohio. 342 U.S. 437, 448 (1952). In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court spoke of “continuous and systematic general business contacts.” 466 U.S. 408, 416 (1984).

⁶ 342 U.S. at 447–48.

⁷ 466 U.S. at 409, 418.

On their facts, both cases were easy. In neither did the Court provide a methodology for deciding the hard cases. Not surprisingly, lower court decisions were all over the map. To cite just two of our favorite examples, Texas was held to lack general jurisdiction over Wal-Mart despite its operation of 264 large stores with thousands of employees,⁸ while the New York Court of Appeals upheld general jurisdiction over the Finnish national airline, which maintained only a one and a half room office in Manhattan with a handful of employees.⁹ Commentators were also divided. Some, most notably Professor Brilmayer,¹⁰ would have permitted general jurisdiction only in cases like *Perkins*, arguing that with the growth of specific jurisdiction there was no longer much need for general jurisdiction. Its only legitimate use, they argued, was to provide one definite forum where a corporation could be sued on any case, and that “unique” place should be a jurisdiction with a legitimate claim to regulate even the corporation’s out of state activities.¹¹ Professor Twitchell, on the other hand, noting significant limitations on specific jurisdiction, argued that general jurisdiction should be permissible in appropriate cases to “fill the gaps” created by those limitations.¹²

B. *Goodyear and Daimler*

The Court revisited general jurisdiction in *Goodyear* in 2011 and *Daimler* in 2014. In *Goodyear*, the Court reversed North Carolina’s assertion of general jurisdiction over three European tire manufacturers based on a stream-of-commerce theory.¹³ In *Daimler*, it reversed a Ninth Circuit decision that upheld general jurisdiction in California over a German corporation based upon activities by its American subsidiary for alleged criminal activity by its Argentine subsidiary in Argentina.¹⁴ Once again, the cases were easy. The lower court assertions of jurisdiction in both cases were so extreme that the outcomes at the Court were never in doubt. *Goodyear* was a unanimous decision, written by Justice Ginsberg. Justice Ginsburg wrote for eight justices in *Daimler*, and Justice Sotomayor concurred in the judgment.

⁸ *Follette v. Clairol, Inc.*, 829 F. Supp. 840, 845, 847–48 (W.D. La.), *aff’d*, 998 F.2d 1014 (5th Cir. 1993).

⁹ *Bryant v. Finnish Nat’l Airline*, 208 N.E.2d 439, 441–42 (N.Y. 1965).

¹⁰ Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 725 (1988).

¹¹ *See id.* at 741.

¹² *See* Twitchell, *supra* note 4, at 681; Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 190–93, 195–97; *see also* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 130–32.

¹³ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854–57 (2011).

¹⁴ *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014).

More noteworthy is the fact that in each case the parties assumed that there was general jurisdiction over other defendants based upon their “continuous and systematic” contacts with the forum. In *Goodyear*, Goodyear USA, an Ohio corporation, did not contest that it was subject to general jurisdiction in North Carolina, in which it has three manufacturing plants and employs hundreds.¹⁵ In *Daimler*, the defendant did not contest that Mercedes-Benz USA (MBUSA), a Delaware entity with its principal place of business in New Jersey, was subject to general jurisdiction in California, based upon its facilities and sales there.¹⁶ It seems clear in the wake of these two decisions that both would today escape general jurisdiction. Yet the Court seems unaware that it has so eviscerated the common understanding of general jurisdiction.

Under *Goodyear* and *Daimler*, we no longer consider whether the defendant has “continuous and systematic” ties with the forum state. Instead, the defendant must be “at home” in that state. The Court provided “paradigms” for this open-ended phrase. Individuals are “at home” where domiciled. Corporations are “at home” both where chartered and where they maintain their principal places of business. The latter, however, is defined narrowly as their headquarters rather than where they conduct their greatest activity. In *Daimler*, the Court appears to convert the “paradigms” into rules, which will admit of exception only in the rare case in which virtually all corporate activity takes place in one state.¹⁷ In addition, in *Daimler*, the Court mysteriously (and without briefing) decided that the “fairness factors,” which have animated the application of *International Shoe* for generations, simply do not apply in general jurisdiction cases.¹⁸ Further, while the Court provided “paradigms” for “corporations,” it said nothing about how one might determine where noncorporate associations (including labor unions, partnerships, and limited liability companies) might be “at home.”

II. THE PROBLEMS WITH *GOODYEAR* AND *DAIMLER*

Goodyear and *Daimler* are disappointing in two fundamental ways. First, the Court’s reasoning is unpersuasive. The Court still has not told us why we

¹⁵ See 131 S. Ct. at 2852.

¹⁶ 134 S. Ct. at 758.

¹⁷ *Id.* at 760–61.

¹⁸ *Id.* at 754–58.

have contacts-based general jurisdiction at all.¹⁹ Nor has it explained why that jurisdiction must be limited to the defendant's actual "home," as opposed to states where a defendant is sufficiently comfortable to feel "at home." Why, for example, is it only appropriate to exercise general jurisdiction over Wal-Mart in Arkansas, and not in Texas or in California? Or why, for example, is it only appropriate to exercise general jurisdiction over the elder President Bush in Texas, and not in Maine? At most, the Court hints that it accepts the position of those commentators, especially Professor Brilmayer, who argue that general jurisdiction based on contacts is appropriate only in one "unique" location, the defendant's actual "home."²⁰ But while Justice Ginsburg cites Professor Brilmayer's article for her paradigms, she does not explain why her very contestable position is correct. And, again, the Court seems unaware that it has swept away common understandings, such as those that led Goodyear USA and MBUSA to assume that they were subject to general jurisdiction, respectively, in North Carolina and California.

Second, and more importantly, the Court's strict new limits on general jurisdiction leave a palpable gap in the scope of state court adjudicatory jurisdiction. A radical limitation of general jurisdiction might not be objectionable if the exercise of specific jurisdiction were robust. But it is not, as shown by *J. McIntyre Machinery, Ltd. v. Nicastro*.²¹ It is surprising to see Justice Ginsburg—herself the leading critic of the current parsimonious reach of specific jurisdiction—so willing to limit general jurisdiction. Moreover, as Professor Twitchell has explained, there are many cases that do not fit neatly into the categories of specific and general jurisdiction.²² These "hybrid cases" account for most of the lower court cases upholding "general jurisdiction," and permit courts to hear cases in which jurisdiction is or may be precluded by the Court's grudging approach to specific jurisdiction in stream of commerce cases like *Nicastro* or where the case may not be "related enough" for specific jurisdiction.

¹⁹ Professor Cox argues persuasively that the Court fails in these two cases to articulate even a theoretical basis for the existence of general jurisdiction. Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, 76 U. PITT. L. REV. (forthcoming 2015) (manuscript at 7–13, 17–19), available at <http://ssrn.com/abstract=2418495>.

²⁰ The Court relied upon Professor Brilmayer for the phrase "at home" and for the paradigmatic cases. *Goodyear*, 131 S. Ct. at 2853–54 (citing Brilmayer et al., *supra* note 10, at 728).

²¹ 131 S. Ct. 2780 (2011).

²² Twitchell, *supra* note 4, at 643 n.152.

A. *The Court's Unpersuasive Reasoning*

Justice Ginsburg's opinions in both cases provide extensive discussions of the leading precedents, especially *International Shoe* and *Perkins*, suggesting that the new "at home" doctrine flows naturally, perhaps inevitably, from them. A telling response to this suggestion is that the "at home" standard was news to the lower courts and to commentators, who did not find it in the precedents. It is produced out of thin air: the "at home" test for general jurisdiction appears for the first time at the beginning of Justice Ginsburg's opinion in *Goodyear*.²³ Her primary support for the test is the following: "See *International Shoe*, 326 U.S., at 317."²⁴ But *International Shoe* does not say, or even imply, at that or any other page that general jurisdiction is available only where the defendant is "at home."

Indeed, the two times the Court mentions "home" in *International Shoe* suggest the exact opposite. In the first, the Court states that "[a]n 'estimate of inconveniences' which would result to the corporation from a trial *away from its 'home' or principal place of business* is relevant" in determining whether its activities in the forum state made it reasonable to require it to litigate there.²⁵ In the second, the Court states that the precedents denying general jurisdiction absent substantial contacts rely on the judgment that to "require the corporation in such circumstances to defend the suit *away from its home or other jurisdiction where it carries on more substantial activities*" would impose an unreasonable burden and violate due process.²⁶ The obvious implication, of course, is that general jurisdiction is reasonable, even *away from home*, wherever a corporate defendant "carries on more substantial activities."²⁷ (Again, the notion was so well established that, as noted, no general jurisdiction objection was raised concerning either *Goodyear USA* or *MBUSA* in *Goodyear* and *Daimler*, respectively.)

The closest the Court comes to providing a standard for general jurisdiction in *International Shoe* is when the Court discusses two "instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from

²³ The first mention in *Goodyear* is to where the defendant is "essentially at home." 131 S. Ct. at 2851. Thereafter, throughout that opinion and in *Daimler*, "essentially" is jettisoned.

²⁴ *Goodyear*, 131 S. Ct. at 2851.

²⁵ *Int'l Shoe Co.*, 326 U.S. at 317 (emphasis added).

²⁶ *Id.* (emphasis added).

²⁷ *Id.*

dealings entirely distinct from those activities.”²⁸ Significantly, one of these cases, *Tauza v. Susquehanna Coal Co.*,²⁹ upheld general jurisdiction over a corporation based only upon its maintaining a branch office in New York, where nine salesmen worked. *Tauza* was also cited in *Perkins*, along with another decision that based general jurisdiction on the establishment of a branch office in the forum.³⁰ Yet while Justice Ginsburg in *Daimler* emphasizes the “so substantial” language from *International Shoe*,³¹ she dismisses *Tauza* in a footnote saying that it was “decided in the era dominated by *Pennoyer*’s territorial thinking” and therefore “should not attract heavy reliance today.”³² Perhaps so, but the fact remains that *International Shoe*, the “canonical opinion”³³ on which she relies so heavily, cited it as an example of contacts “so substantial”³⁴ as to justify general jurisdiction, and *Perkins*, the “textbook case”³⁵ of appropriate general jurisdiction, also relied on it.

If anything, then, *International Shoe* and *Perkins* both suggest that general jurisdiction is *not* limited to a corporation’s “home,” but may be had in any state where it maintains an office. Indeed, this may be a more accurate description of the facts in *Perkins* itself. As Justice Sotomayor demonstrated in her concurring opinion, Justice Ginsburg’s statement that “[a]ll of Benguet’s activities were directed by the company’s president from within Ohio” is only correct for the limited period of the Japanese occupation of the Philippines during World War II.³⁶ By the time the case was filed, when jurisdiction must be determined, 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. The board of directors had met not only in Ohio, but also outside that state. Even the Court’s opinion

²⁸ *Id.* at 318.

²⁹ 115 N.E. 915 (N.Y. 1917) (Cardozo, J.)

³⁰ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (citing *Mo., Kan. & Tex. Ry. Co. v. Reynolds*, 255 U.S. 565 (1921); *Tauza*, 115 N.E. 915).

³¹ *E.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (citing *Int’l Shoe Co.*, 326 U.S. at 318).

³² *Id.* at 761 n.18. Ironically, in *Goodyear*, Justice Ginsburg embraces, indeed expands, the sway of a 1923 decision. *Rosenberg Bros. v. Curtis Brown Co.* held that general jurisdiction cannot be based upon a defendant’s act of buying supplies from the forum. 260 U.S. 516, 518 (1923). In *Goodyear*, the Court extended *Rosenberg* to hold that general jurisdiction cannot be based upon a defendant’s selling products into the forum. *See supra* note 13 and accompanying text. Why some pre-*International Shoe* authority is to be ignored while other pre-*International Shoe* authority is worthy of extension is not clear.

³³ *Daimler*, 134 S. Ct. at 754.

³⁴ *Id.*

³⁵ *Id.* at 755–56.

³⁶ *Compare id.* at 756 n.8 (Justice Ginsburg’s analysis), *with id.* at 769 n.8 (Sotomayor, J., concurring in the judgment) (providing alternative perspective regarding appropriateness of finding of general jurisdiction).

in *Perkins* refutes the assertion that “all” corporate activities were directed from Ohio. The Court said that the president “did many things on behalf of the company,” rather clearly recognizing that business was transacted elsewhere.³⁷ Arguably, when the case was filed the center of Benguet’s activities was Manila.

Justice Ginsburg’s leading precedent in *Daimler*, of course, is *Goodyear*, which she claims established the “at home” standard as she explains it in *Daimler*.³⁸ But neither *Goodyear*’s facts nor its language supports this restrictive understanding of “at home.” Goodyear’s foreign subsidiaries had almost no contact at all with North Carolina, and Goodyear USA, which had three large plants in the state, did not challenge jurisdiction there. And one can be “at home” away from one’s literal home. A good host, for example, invites guests to make themselves “at home.” More to the point, states compete vigorously to persuade out-of-state businesses to build new facilities in their states and provide jobs to their residents, often providing tax breaks and other incentives that are not available to locals. Goodyear USA would not have invested millions to build its three plants in North Carolina had it not felt “at home” there. To be sure, the Court in *Goodyear* did suggest that the “paradigm[s]” for general jurisdiction were individual and corporate domicile and corporate headquarters³⁹ and that the “textbook” case for general jurisdiction was *Perkins*.⁴⁰ But the “paradigm” case need not be the only case, just the easy one. If the Court in *Goodyear* meant to limit general jurisdiction to these paradigms, it could and should have said so. It didn’t.

Justice Ginsburg seems also to reason by analogy to an individual’s domicile, equating that with a corporation’s headquarters.⁴¹ This is unpersuasive for three reasons. First, as the great teaching case of *Mas v. Perry*⁴² demonstrates, an individual may leave her domicile behind, never to live there again, yet not establish a new one for many years. In such cases, she

³⁷ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952).

³⁸ *Daimler*, 134 S. Ct. at 751.

³⁹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011).

⁴⁰ *Id.* at 2856.

⁴¹ We say “seems” because she never says exactly what the significance of her “paradigms” are, although it is hard to escape the implication that the traditional basis of an individual’s domicile is the appropriate measure of contacts-based general jurisdiction. Justice Ginsburg cites both individual domicile and corporate domicile, i.e., state of incorporation, as paradigms of general jurisdiction. *Daimler*, 134 S. Ct. at 760 (citing *Goodyear*, 131 S. Ct. at 2853–54). Neither, of course, is based on minimum contacts; both are traditional bases which owe nothing to *International Shoe*.

⁴² 489 F.2d 1396, 1400 (5th Cir. 1974).

is no longer really “at home” in her legal domicile. A suit would be far more convenient where she currently resides.

Second, a corporation’s state of incorporation, although its legal domicile, is nothing like a human domicile. A corporation’s principal place of business might come closer to approximating a person’s home, but not as defined in these two cases. 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. Courts infer this subjective intent from actions. A person takes a job in a different state, earns a promotion, buys a house, registers to vote, joins a church, civic organizations and clubs, etc. At some point we say that she has formed the intent to make that place her domicile. So too a corporation might buy a business facility, hire employees, join trade associations, and otherwise act as if it is “at home,” as Goodyear USA did in North Carolina.⁴³ But an activities-based “principal place of business” is not what the Court has in mind. In *Daimler*, the Court relies on *Hertz Corp. v. Friend*,⁴⁴ which defined “principal place of business” for purposes of diversity of citizenship jurisdiction, adopting the “nerve center” (basically headquarters) test.⁴⁵ This makes sense as a test for general jurisdiction only if a corporation can be “at home” in a single state. The Court makes this assumption, but fails to explain why.

Third, all three traditional sources of personal jurisdiction—consent and presence as well as domicile—provide general jurisdiction over an individual. The Court arbitrarily analogizes from the one that provides jurisdiction only in a single state. Why? In particular, why isn’t presence in the forum state, the truly paradigmatic example of personal jurisdiction, the more apt analogy? If an individual’s voluntary presence (plus service of process) in a state suffices for general jurisdiction, as all nine justices agreed in *Burnham v. Superior Court*,⁴⁶ why can giant corporations like Goodyear USA and Wal-Mart not be sued on unrelated claims in states where they have a far more substantial, systematic, and continuous “presence”? The irony is obvious. Goodyear USA

⁴³ See *Goodyear*, 131 S. Ct at 2852.

⁴⁴ 130 S. Ct. 1181 (2010).

⁴⁵ *Id.* at 1192; see also *Daimler*, 134 S. Ct at 760 (citing *Hertz*). Before *Hertz*, courts had disagreed on whether the principal place of business was the headquarters or place(s) of activities. *Hertz* resolved that disagreement, but it is important to remember that *Hertz* interpreted “the principal place of business” as that phrase is used in 28 U.S.C. § 1332(c)(1). *Hertz*, 130 S. Ct. at 1192 (emphasis added). There can be only one. In the common law world of personal jurisdiction, it is not apparent why there can only be one principal place of business—or why it should not be based upon where the corporation actually interacts with the community.

⁴⁶ 495 U.S. 604, 615 (1990).

can operate three manufacturing plants in North Carolina 365 days a year and apparently not be sued there on a claim arising in South Carolina. Mr. Burnham, however, who visited the Golden State for less than a week, can be sued there on a claim that arose in Timbuktu. The majority in *Daimler* does not discuss this disconnect.⁴⁷

The real basis of Justice Ginsburg's opinions seems to be that the assertion of adjudicative jurisdiction over a nonresident can only be justified if the forum state could legitimately regulate the nonresident's conduct. In the view of commentators adopting this position (principally Professor Brilmayer),⁴⁸ this will be appropriate in only two circumstances. The first is where the nonresident voluntarily undertakes activities, or at least causes an effect, in the forum state, as in cases of specific jurisdiction. The second is where the nonresident is the functional equivalent of a citizen or "insider," hence the selection of corporate domicile or headquarters. But while Justice Ginsburg cites Professor Brilmayer's arguments, especially for the paradigm cases, she does not expressly explain why their approach is correct.⁴⁹ In particular, she fails to show why an individual's domicile, rather her presence in the state, is the appropriate "paradigm" for general jurisdiction. The Brilmayer approach has been applied neither in the law of personal jurisdiction generally, as illustrated in *Burnham*,⁵⁰ nor in the decisions upholding general jurisdiction on the basis of minimum contacts.

More importantly, the insistence that personal jurisdiction must be limited to cases in which a state can legitimately, as a matter of American political theory, regulate a defendant's conduct is fundamentally inconsistent with the Court's traditional model of adjudicatory jurisdiction. The new approach appears to assume that the forum will illegitimately regulate the "outsider's" conduct by inappropriately applying forum law to the defendant's out-of-state conduct. This is a strange view. For one thing, it is utterly inconsistent with the Court's longstanding indifference to states' application of their own law in questionable cases, as illustrated by the permissive test in *Allstate Insurance Co. v. Hague*.⁵¹ If the Court wishes to rein in states' extraterritorial application

⁴⁷ Justice Sotomayor uses the irony to support her assertion that the majority is too parsimonious with general jurisdiction over corporations. *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring in judgment).

⁴⁸ Brilmayer et al., *supra* note 10, at 782.

⁴⁹ See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

⁵⁰ 495 U.S. at 619–20 (unanimously upholding general jurisdiction over defendant served with process in California after being present there for a few days, although doing so on different theories).

⁵¹ 449 U.S. 302, 318 (1981).

of their laws, we would expect it to do so directly and not indirectly by limiting adjudicatory jurisdiction only to cases where it deems it appropriate for the forum to apply its own law.

Even more telling, of course, is that the Brilmayer approach to general jurisdiction conflates personal jurisdiction and choice of law. The two, while related, are not identic, and for good reason. Under the traditional model of adjudicatory jurisdiction, a state may assert jurisdiction to provide an appropriate forum—in some cases the only available forum—for a dispute governed by another state’s law. While some courts may abuse the traditional model, as we believe the Minnesota courts did in *Allstate*,⁵² the traditional model has generally worked well, providing convenient fora for the resolution of many disputes. Prior to *Goodyear* and *Daimler*, the Court’s personal jurisdiction cases were consistent with the traditional model. If this were not so, upholding “tag” jurisdiction in *Burnham* would make no sense. The fact that there is no movement, outside of legal academia, to overturn tag jurisdiction suggests that the traditional model continues to work well in real life, where hardly anyone is served with process while flying over a state or in an airport lounge (the horrors so beloved by Civil Procedure professors).

More to the point, the Court’s minimum contacts decisions have never asserted that the due process limitations on jurisdiction are designed to protect defendants from the application of forum law. Instead, as *International Shoe* explained, the limitations balance the burdens on defendants from litigating away from home against the interests of plaintiffs and forum states.⁵³ States’ regulatory interests have been important in this regard, of course, but the states’ interest in providing a convenient forum for their residents has also been important, as has the interest of plaintiffs in a convenient forum and the other interests reflected in the fairness factors which the Supreme Court has identified in the almost seventy years since *International Shoe*. These “fairness” factors were the basis for the Court’s decision in *Asahi Metal Industry Co. v. Superior Court*,⁵⁴ and have been used by the lower courts to decide close cases of both specific and general jurisdiction.

To get to the heart of the matter, the view expressed by Professor Brilmayer and implicitly adopted by the Court is that adjudication of a lawsuit against a nonresident is equivalent to regulating or taxing her. But this is not so, unless

⁵² *See id.*

⁵³ *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317, 319 (1945).

⁵⁴ 480 U.S. 102, 116 (1987).

the forum applies its own law to that dispute. Often states do apply their own law to nonresidents, typically in specific jurisdiction cases. But often they do not. The Court's adjudicative jurisdiction cases have been decided with the background assumptions that (1) courts can and do apply appropriately apply choice of law rules to interstate disputes, (2) they are capable of competently finding and applying other states' law when appropriate, and (3) the resulting ability of the states to provide "an interstate judicial system" for "the most efficient resolution of controversies" is of great value. Indeed, the utility of the judicial interstate system is one of the "fairness factors" that the Court has developed and applied in its minimum contacts jurisprudence.

Both the Court and the commentators it cites also argue that the growth of specific jurisdiction since *International Shoe* has limited the need for general jurisdiction to the provision of one "unique" location (the defendant's home) where it can always be sued, implicitly arguing that the scope of specific jurisdiction suffices to preserve all the advantages of the interstate judicial system. If this were so, our objections to the Court's reasoning would be little more than the usual law professor carping, perhaps amusing but ultimately unimportant. But as we show in the next section, specific jurisdiction is not sufficiently broad to eliminate the need for a more generous scope of general jurisdiction.

B. The Gap in the Scope of State Court Adjudicatory Jurisdiction

As Professor Twitchell demonstrated, the terms "specific" and "general" jurisdiction are a bit misleading.⁵⁵ They suggest that all cases fit neatly into two categories. Supposedly, specific jurisdiction covers all cases arising from or otherwise related to defendants' contacts with the forum state, while general jurisdiction covers those that are not related to defendants' contacts. The problem comes with the meaning of "related case." If that term is limited to cases actually arising from the defendants' contacts, as Professor Brilmayer has urged and some courts have held, then there exists a set of "somewhat related" cases that lie between the two categories, at least if the general jurisdiction category is limited to cases having no connection whatsoever with the forum state. Professor Twitchell points to *Helicopteros* to illustrate her point. While the tort claim there arose from the crash of the defendant's helicopter in Peru, the case was related to Texas in a variety of ways: the helicopter that crashed was manufactured there, the pilot who flew it was

⁵⁵ Twitchell, *supra* note 4, at 629–30, 643–45.

trained there by the manufacturer, and the contract under which the plaintiffs' decedents were being transported in Peru was negotiated in Texas with the decedents' Texas employer, which paid the defendant from a Houston bank account. Most important of all, the plaintiffs and their decedents were citizens of Texas.⁵⁶

Professor Twitchell concluded that perhaps most of the cases upholding "general jurisdiction" in the lower courts have either fallen within this gap between a narrowly defined specific jurisdiction and "pure" general jurisdiction or, even if arising from in-state contacts, would have been ineligible for specific jurisdiction under decisions like *Nicastro*.⁵⁷ Courts have relied expressly on defendants' "systematic and continuous" contacts with the forum state to avoid these problems in cases where jurisdiction seemed to make sense, often based, at least implicitly, on the fairness factors, which the Court too casually rejects for general jurisdiction determinations.

We agree with Professor Twitchell and Justice Sotomayor that states other than those of corporate or individual domicile or corporate headquarters should retain the authority to assert jurisdiction in at least some of these cases—and even in some cases which are completely unrelated to the defendants' activities in the forum. For example, if someone slips on a wet floor in a Wal-Mart store while on vacation in Alaska, why shouldn't she be able to sue Wal-Mart at her home in Georgia? Georgia is not Wal-Mart's "home" as narrowly defined in *Goodyear* and *Daimler*, but the company is certainly "at home" there in any sensible meaning of the phrase, having invested millions of dollars and currently employing thousands of workers in the state.

The equation of "at home" with domicile/headquarters may be appropriate in cases with absolutely no contact with the forum state—lacking even an in-state plaintiff—but it is unnecessarily grudging for other cases. After all, the burden of defending in the state, either from actual expense or hostility toward an outsider, is simply not a factor in this hypothetical. Yet the burden of defending away from home is the key interest protected by due process, at least according to *International Shoe* and its progeny. Moreover, the plaintiff has a legitimate interest in pursuing litigation in her home state.

⁵⁶ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 409–12 (1984).

⁵⁷ See Twitchell, *supra* note 4, at 662–65; Twitchell, *supra* note 12, at 190–93.

CONCLUSION

Significantly, the facts of *Goodyear* and *Daimler* would have permitted the Court to decide both cases on very narrow grounds, as Justice Sotomayor urged the Court to do in *Daimler*. We submit that in future cases the Court should follow these precedents only for what they actually did and not for their unfortunately overbroad language. In future cases, it would make sense for the Court to specify some easily ascertainable minimum level of contacts—e.g., actual physical presence like Goodyear’s plants or Wal-Mart’s stores, to avoid exorbitant assertions of jurisdiction and to provide more guidance to potential defendants. It would also be appropriate to direct the lower courts to use the fairness factors, especially the plaintiff’s interest in a convenient forum and the state’s interest in providing one, to limit this jurisdiction appropriately to those cases where it is still needed.