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THE RISE OF GENERAL JURISDICTION OVER OUT-OF-STATE ENTERPRISES IN THE UNITED STATES

Peter Hay*

ABSTRACT

In June 2023, the U.S. Supreme Court continued its revision of personal jurisdiction law, in this case by refining, thereby perhaps expanding, the law of when a court may exercise general personal jurisdiction – that is, jurisdiction over all claims – over a non-resident person or an out-of-state enterprise. In Mallory v. Norfolk Southern Railway Co., it held in a 4+1:4 decision that, when a state requires a non-resident company to register to do business in the state and such registration constitutes consent to jurisdiction over all claims against it, such exercise is permitted. In reaching its conclusion, the Court applied a more than a century old (1917) precedent. The plurality of four Justices also compared the exercise of such jurisdiction to “tag jurisdiction” (general jurisdiction over persons present in the state at the time of service) and did not consider the Court’s much more recent cases on specific (claim-related) jurisdiction to be in contrast with (i.e., to overrule) the 1917 decision. The dissent disagreed and, in light of the majority’s new revision, considered specific jurisdiction now significantly deleted. Indeed, it does seem that the distinction between general and specific jurisdiction continues to become considerably blurred.

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INTRODUCTION

In a 2023 decision, the United States Supreme Court again addressed general personal judicial jurisdiction after having readdressed and broadened specific jurisdiction in 2021. It held that an out-of-state enterprise that registers to do local business in a state, as required by most states in the United States, is subject to general jurisdiction in that state. A majority of five to four Justices thereby followed a 1917 decision as precedent (Pennsylvania Fire), which had affirmed a state court judgment that had equated registration with consent to jurisdiction. Four Justices of the majority also explained why this decision was consistent with prior case law (with which the dissent of four Justices disagreed), while the fifth simply followed the precedent, but raised another issue not addressed by anyone else. The following details the above and offers some thoughts for consideration.

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1 In 2021, the Court focused on the “relatedness” of the activities of an enterprise in the forum state, in which it was neither incorporated nor had its principal place of business, to the claim that arose from a product brought into that state by someone else but caused injury there. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021); see infra notes 53, 55, and the extensive annotation by Mathias Reimann, Jurisdiction in Product Liability Litigation: The US Supreme Court Finally Turns Against Corporate Defendants, 3 IPRAX 302 (2022); see also Peter Hay, Product Liability: Specific Jurisdiction over Out-of-State Defendants in the United States, 4 IPRAX 338, 339 (2021); Peter Hay, American Judicial Jurisdiction Over Out-of-State Defendants Revisited, in FESTSCHRIFT FÜR HAIMO SCHACK 622, 629 (2022).

2 Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2045 (2023). Registration is required to provide information to local authorities and also to inform the public about the new enterprise. Id. Part of the requirement is also the appointment of a local agent and his or her address for the receipt of documents (such as service of process, instituting a lawsuit). Id.

I. THE CASE AND THE SUPREME COURT’S HOLDING

The plaintiff (Mallory), a resident of Virginia, sued the Norfolk Southern Railway Company, in Pennsylvania when he was diagnosed with cancer. He attributed the diagnosis to exposure to carcinogens while working for the defendant company in Virginia where the company was incorporated and had its headquarters. After his retirement he had lived in Pennsylvania for a while but had moved back to Virginia prior to the suit. The trial court decided in the plaintiff’s favor, but the Pennsylvania Supreme Court reversed. It held that assertion of personal jurisdiction would violate Due Process on the basis of the U.S. Supreme Court’s more recent jurisprudence. Since the Georgia Supreme Court had reached the contrary conclusion, also on the basis of U.S. Supreme Court precedent as well as its own interpretation of the Georgia registration law, the U.S. Supreme Court agreed to review the Pennsylvania decision (granted certiorari) to resolve the inconsistency in how its precedent was interpreted by the states.

The U.S. Supreme Court agreed with the Pennsylvania lower court and therefore with the Georgia Supreme Court. The decision (Part III(B) of the judgment) was written by Justice Gorsuch, in which four other Justices joined. Part III(B), therefore, supported by five of the nine Justices, constitutes the Court’s holding. Only three other Justices joined in his Parts II, III(A), and IV, in which Justice Gorsuch explains why the decision is not contrary to and does not expand prior case law on the subject of general jurisdiction. These parts are not (yet) the holding.

Four other Justices agreed with Justice Gorsuch’s Part III(B) that “Pennsylvania Fire controls this case.” The reason given in that case and detailed further in the new Georgia decision is that in the Mallory case the defendant consented to jurisdiction because Pennsylvania statutes not only

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4 Mallory, 143 S. Ct. at 2030.
5 Id.
6 Id.
7 Id. at 2031.
9 It denied certiorari in the Georgia case after having rendered its decision in Mallory. See id.
required registration of enterprises doing local business but also provided that they would then be subject to jurisdiction on all claims. The defendant therefore knew that general jurisdiction could be asserted and, by registering, assented to it. An interesting small difference between the Pennsylvania and Georgia cases is that the Pennsylvania statute provides for jurisdiction, while the Georgia Supreme Court comes to this result through statutory construction and prior case law. Thus, even if not notified in any direct way at the time of registration, a Georgia defendant should have known that it would subject to general jurisdiction, said the Georgia Court.

II. THE REASONING OF THE PLURALITY AND THE DISSENT’S CRITIQUE

It is Justice Gorsuch’s Parts II and IIIA that raise Reimann’s question with respect to the Ford decision whether “these statements . . . herald a new, less corporation-friendly, era in the Court’s jurisdiction jurisprudence. In Part II of his opinion, joined by three Justices, he refers to the historical distinction between “transitory” actions (which follow the person) and “local” actions confined to the judicial territory (e.g., in rem actions). He reminds the reader that the 1810 decision in Massie v. Watts applied the distinction, allowing

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12 In both Mallory and Cooper, the emphasis was on local business activity, as it had to be, because interstate commercial activity (for instance, Norfolk Southern Railway trains passing through Pennsylvania en route to another state) is not subject to an individual state’s regulation. See Cooper Tire & Rubber Co., 312 Ga. at 422; Mallory, 143 S. Ct. at 2028.
13 In her concurrence (to Justice Gorsuch’s Part III(B)), Justice Jackson added that Due Process, if and when in issue, is a waivable right. Mallory, 143 S. Ct. at 2045 (Jackson, J., concurring) (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)). By registering and doing business—in the face of the statutory assertion of jurisdiction—the defendant consented or waived its rights. Both “consent” and “waiver” are something voluntary, as is “assent,” a term used in the text. However, enterprises submit or face a loss of business. It is an “either-or” situation. It thus differs, for instance, from a voluntary appearance (the German “rügelose Einlassung”), Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 39, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.). For a view that registration may provide for consent and that this is valid, see Matthew D. Kaminer, The Cost of Doing Business? Registration as Valid Consent to General Jurisdiction, 78 WASH. & LEE L. REV. ONLINE 55 (2021), https://scholarlycommons.law.wlu.edu/wlulr-online/vol78/iss1/3/.
15 On the one hand, Georgia law provides for specific jurisdiction over “non-resident” defendants for claims arising from in-state activity. O.C.G.A. § 9-10-91 (2010). But O.C.G.A. § 9-10-90 defines as “non-resident” a corporation not authorized to do or transact business in this state.” O.C.G.A. § 9-10-90 (2010). An (“authorized”) out-of-state company thus becomes a “resident,” the specific jurisdiction provision no longer applies: the company is subject to (general) jurisdiction like any other resident.
16 Reimann, supra note 1, at 306.
17 Mallory, 143 S. Ct. at 2034.
jurisdiction “wherever [the defendant] may be found.” This became known as “tag” or “transient” jurisdiction. The defendant was subject to general local jurisdiction if served (“tagged”) within its judicial territory. Burnham v. Superior Court of California retained and applied such jurisdiction to natural persons as recently as 1990. When “some firms sought to hide behind their foreign character,” states began to pass long-arm statutes, subjecting foreign enterprises to jurisdiction for claims arising from local activities.

Different rules thus applied to natural persons (general jurisdiction when served in the state) and corporations (only specific jurisdiction if not a local company but the claim arose from or related to its local activity). In Part III(A) Justice Gorsuch therefore writes, “What sense [does it make to treat a fictitious corporate person differently [from a natural person]?” The simple answer is that a natural person is one individual—subject to general jurisdiction at his or her domicile and, on the basis of Burnham, also where “tagged”—while the “fictitious corporate person” could be present in every state of the Union.

General—“tag”—jurisdiction over in-state-registered out-of-state-incorporated corporations thus seems appropriate to Justice Gorsuch. What may seem to preclude such extensive assertion of jurisdiction are decisions of the Court issued long after the 1917 decision that the Court now follows as

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18 Id. (citing Massie v. Watts, 10 U.S. (6 Cranch) 148, 162-63 (1810)).
20 Mallory, 143 S. Ct. at 2034-35.
21 Id. at 2036 (citing Gold Issue Min. & Mill. Co. v. Penn. Fire Ins. Co., 184 S.W. 999, 1016-18 (Mo. 1916), aff’d, 243 U.S. 93 (1917)). This is the Missouri state case that reached the U.S. Supreme Court in 1917 in Penn. Fire Ins. Co. v. Gold Mining & Milling Co., 243 U.S. 93 (1917) and this note.
22 As Justice Barrett wrote in her extensive dissent (joined by three other Justices), “[t]hat is . . . a non sequitur.” Mallory, 143 S. Ct. at 2062 (Barrett, J., dissenting) (alteration in original) (citation omitted). It also overlooks that Burnham, 495 U.S. at 604, allowed the continuance of the old practice (its long “pedigree,” Burnham, 495 U.S. at 610, 619), which also was “continuing.” Id. at 615, 619, 628. To treat a nationally active enterprise as present wherever it is, has neither a pedigree nor it is a continuing practice. Mallory, 143 S. Ct. at 2059-62 (Barrett, J, dissenting). The only exception is 142 years old and was not endorsed by the U.S. Supreme Court: Pope v. Terre Haute Car & Mfg. Co., 87 N.Y. 137, 1881 WL 13055 (N.Y. 1881).
23 In the two introductory paragraphs of his opinion—before even reaching Part I, which contains the facts of the case —Justice Gorsuch refers to “tag” jurisdiction by presenting a hypothetical case. Mallory, 143 S. Ct. at 2032. For comprehensive and directly on point discussion of “tag jurisdiction,” see Patrick J. Borchers, Ford Motor Co. v. Montana Eighth Judicial Circuit and “Corporate ‘Tag’ Jurisdiction in the Pennoyer Era” 72 CASE W, RES. L. REV. 45 (2021). This very thorough and highly relevant analysis was not mentioned by Justice Gorsuch who dealt with no academic commentary on judicial jurisdiction.
precedent. The more recent decisions are also precedent and the lower court in Mallory thought that at least one of them was binding on it.

With respect to general jurisdiction, the decisions in Goodyear (2011) and Daimler (2014)24 did away—at the latest—with the 1952 decision in Perkins which had upheld general jurisdiction over enterprises that did “continuous and systematic” business in the forum state.25 These two newer cases acknowledged that the landmark decision in International Shoe (addressed below) had mentioned the possibility of suits on out-of-state claims but had considered this to be exceptional, i.e., limited to cases in which the defendant was very much engaged in in-state business and that the exercise of jurisdiction would not be unfair.26 Goodyear and Daimler picked this limitation up and sought to define how much in-state business activity was needed to allow general jurisdiction over out-of-state defendant companies.27 The in-state business operations must be “so substantial [that the defendant can be regarded as] essentially at home”28 in the forum state. A corporation is “at home”—mainly, but not necessarily exclusively—in its state of incorporation or principal place of business.29 Simple “doing business tests . . . framed before specific jurisdiction evolved in the United States” are “not a valid basis for general jurisdiction.”30

International Shoe was a specific jurisdiction case: the State of Washington was allowed to exercise jurisdiction over the Missouri company to collect taxes imposed on it for its in-state activity.31 In its opinion, the Court reviewed prior case law and then “[a]pp[li]ed th[o]se standards.” The Shoe Company’s “systematic and continuous [activities]” resulted in a large amount of business and “the obligation . . . here sued upon arose out of those very activities.”32 Then came the famous phrase—recited in numerous cases since then—that it was

25 Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 445 (1952). In this case, the defendant did not have a registered agent, but its president was served while present in the forum state. Id. at 444. The Court also discussed “fairness” (id. at 444-45). See Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945).
26 It was also dictum. The decision in International Shoe was based on specific jurisdiction (by today’s standards, see text Int’l Shoe Co., 326 U.S. at 310) or, as Justice Gorsuch now writes, on consent. See Int’l Shoe Co., 326 U.S. at 310.
27 Daimler, 571 U.S. at 127, 136; Goodyear, 564 U.S. at 931-32.
29 Id. at 139 n.19.
31 Int’l Shoe Co., 326 U.S. at 310.
32 Id. at 320.
permissible “and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant] has incurred there.”33 The beginning reference to “systematic and continuous business” still echoes Perkins,34 but all that follows relates to the claim that arose from these activities. In a way, the Court’s language resembled that of a typical early state long-arm statute: the non-resident is subject to jurisdiction for claims arising from what he or she (or the company) does in this state.35 The Court made it clear in Shaffer v. Heitner over thirty years later that “all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.”36 It added: “To the extent that prior decisions are inconsistent with this standard, they are overruled.”37 In 2017, the Court wrote that “Daimler . . . applies to all state-court assertions of general jurisdiction over non-resident defendants; the constraint does not vary with the type of claim asserted.”38 It was more specific in the same year, repeating the Daimler test: general jurisdiction “for an individual . . . is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded at home.”39 No wonder then that the Pennsylvania Supreme Court in Mallory had thought that the lower court’s assertion of general jurisdiction “clearly, palpably, and plainly violates the [Due Process Clause of the] Constitution.”40 How then can the majority in Mallory vacate the Pennsylvania state judgment and allow the assertion of general jurisdiction?

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33 Id.
36 Id. at 212.
37 Id. at 212 n.39.
The majority (the plurality of four with Justice Alito concurring)\(^41\) decided to follow *Pennsylvania Fire*\(^42\) because the defendant assented to the provisions of the Pennsylvania statute by registering with knowledge of it.\(^43\) Justice Gorsuch, joined only by three other Justices, suggested that “tag” jurisdiction should perhaps apply to corporations\(^44\) and undertook to explain why the result reached by the majority was not inconsistent with *International Shoe*: “all [that decision] did was [to] stake out an additional road to jurisdiction over out-of-state corporations.”\(^45\) While jurisdiction can, of course, be based on consent, *International Shoe*, he wrote, approved jurisdiction over an out-of-state corporation “that has not consented to in-state suits”\(^46\) when, as in *International Shoe*, claims were based “on the quality and nature of [its in-state] activity.”\(^47\)

Of course, jurisdiction can be based on consent or submission, either express (for instance, by a choice-of-court agreement) or by an act such as appearing in court.\(^48\) In *Pennsylvania Fire*, which the majority cites as binding precedent, the defendant had consented in a document, i.e., expressly.\(^49\) In the present case, jurisdiction is imposed, just as long-arm statutes create,\(^50\) and *International Shoe* permitted when the claim arises from an in-state act.\(^51\) This was not the case in *Mallory*. What the Pennsylvania statute did, and the majority upheld, was “to make ‘doing business’ synonymous with consent.”\(^52\) When, in *Ford v. Montana*, the Court upheld specific jurisdiction when the defendant had not brought the defective automobile into the state but the claim “related” to its extensive in-state business involving the same model of car, Justice Gorsuch expressed his concern about decisions that had limited jurisdiction over out-of-state corporations.

\(^{41}\) He concurred primarily on the ground that Pennsylvania had a right to impose a registration requirement on the defendant which did substantial business in the state so that the requirement did not violate the latter’s right to “fair play and substantial justice,” given that the defendant knew of the statute. *Mallory*, 143 S. Ct. at 2047 (Alito, J., concurring) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

\(^{42}\) *Penn. Fire Ins. Co.*, 243 U.S. at 93.

\(^{43}\) See supra note 14 and accompanying text; see also Justice Jackson’s concurrence, supra note 13 and accompanying text.

\(^{44}\) Discussed briefly above at note 23.

\(^{45}\) *Mallory*, 143 S. Ct. at 2039 (alterations in original) (emphasis added).

\(^{46}\) Id. (emphasis added).

\(^{47}\) Id. (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).


\(^{51}\) *Int’l Shoe Co.*, 326 U.S. at 321.

\(^{52}\) *Mallory*, 143 S. Ct. at 2063 (Barrett, J., dissenting). For brief discussion of “consent” as distinguished from being submitted, see supra note 13.
state corporations. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court denied the exercise of specific jurisdiction over an English manufacturer of a machine that severely injured a New Jersey worker because the machine had not been brought into the state by the defendant company itself but by an independent distributor. This case limited specific jurisdiction; *Daimler* and *Goodyear* limited general jurisdiction. So, in *Ford*, joined by Justice Thomas, Justice Gorsuch strongly supported expanding jurisdiction over corporations. He concurred in Justice Kagan’s opinion for the Court in which she stressed that “relatedness” of the claim sufficed—it need not arise casuistically from the activity: specific jurisdiction was thereby somewhat expanded. *Mallory* now expands general jurisdiction with extensive activity amounting to consent when the law so provides, even if only by interpretation and statutory construction. As Justice Barrett wrote in her strong dissent: “If States take up the Court’s invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be ‘superfluous.’”

The defendant Norfolk Southern Railway Company indeed does very extensive business in Pennsylvania, as the majority emphasizes. It also does business in twenty-two other states and the District of Columbia: 19,300 route miles (over 31,000 km). Of these miles, it services 2,402 in Pennsylvania, 2,021 in Ohio, and 1,990 in its state of incorporation, Virginia, to cite a few

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53 Ford Motor Co. v. Mont. Eighth Jud. Dist., 141 S. Ct. 1017 (2021). For comments, see supra note 1. In *Ford*, Justice Gorsuch emphasized that the exercise of jurisdiction over a nationally active corporation would not be “unfair.” *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring). A great many decisions recite the fairness part of the famous holding of *International Shoe*, 326 U.S. at 310. He found this fair in the current case, as did Justice Alito in his concurrence. See *Mallory*, 143 S. Ct. at 2047 (Alito, J., concurring). The two references cited overlook, as do others, that the exercise of jurisdiction in *International Shoe* was fair because the claim arose locally. Also, “fairness”—like so many general tests—is in the eye of the beholder: litigation may be far away from where the evidence is, courts may (and will differ) with regard to how much how much activity makes for “fairness,” and Justice Ginsburg was concerned with the effect on a company’s structuring itself. See *Daimler A.G. v. Bauman*, 571 U.S. 117, 139 (2014). For discussion and criticism, see also James P. George, *Running on Empty: Ford v. Montana and the Folly of Minimum Contacts*, 30 Geo. Mason L. Rev. 1 (2022).


55 *Ford*, 141 S. Ct. at 1034 et seq.

56 Id. at 1026.

57 See supra note 15 and accompanying text.


All of the foregoing states require registration of foreign corporations. The Ohio Revised Code already may provide what Justice Barrett thinks states might generally adopt (but perhaps phrase more explicitly): the application for registration constitutes “the irrevocable consent of the corporation to service of process on [the] agent” who must be appointed as part of the registration process. Neither the quoted provision nor the subsection requiring the appointment of an agent refers to business transacted within the state of Ohio nor to claims arising from it. The quoted provision thus does not refer expressly to general jurisdiction, nor does the Pennsylvania law. But judicial interpretation, as in Georgia, could reach the same result.

Given the defendant company’s extensive activities in so many states, the plaintiff could have sued in any one of them that had statutory provisions akin to those in Georgia, Pennsylvania, Ohio, or others. As general jurisdiction over corporations becomes more extended, the distinction between it and specific jurisdiction becomes blurred or irrelevant. Extending specific jurisdiction, for instance in products liability cases against foreign-country manufacturers, as in cases like *J. McIntyre*, would have been much more preferable.

Extending general jurisdiction also may encourage forum-shopping. This was the case in *World-Wide VW v. Woodson* and in *Keeton v. Hustler*.

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63 Id. § 1703.031(3).

64 42 PA. CONS. STAT. § 5301(a) (1976).


66 J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 904 (2011) (Ginsburg, J., dissenting) (citing Peter Hay, *Judicial Jurisdiction Over Foreign-Country Corporate Defendants - Comments on Recent Case Law*, 63 OR. L. REV. 431, 433 (1984)). As it is, Congress might have authority to provide for jurisdiction on the basis of national contacts, but courts may not extend jurisdiction that far. See Daimler A.G. v. Bauman, 571 U.S. 117, 885-86 (2014). It is an interesting question whether the *Mallory* decision does not go too far, see infra text accompanying note 102 et seq.

Magazine. The Supreme Court denied jurisdiction in *World-Wide VW*, while it upheld it in *Keeton*. If the parties are from different states or countries, suit may be in, or could be removed to, the appropriate federal court and can be transferred to a more convenient federal court. However, the transferee court has to apply the same law that the transferor court would have, and the latter court would have had to apply its local state substantive and conflicts law.

In international cases, both state and federal courts could dismiss for *forum non conveniens*. But if the plaintiff is local: would they? It is in the court’s discretion.

### III. Will Expanded American General Jurisdiction Affect Judgment Recognition Abroad?

Member states of the European Union (EU) and European Economic Area (EEA) continue to apply national law to the recognition of judgments rendered by non-member states. In many respects, however, the systems are alike. For general jurisdiction, EU law specifies the state of a company’s statutory seat, central administration, or principal place of business. German law requires that the foreign court had “international jurisdiction,” which means that it exercised jurisdiction on the same basis as a German court would have (the “mirror image” principle), meaning, for instance, that American “tag” jurisdiction is not acceptable.

*Keeton v. Hustler Mag. Inc.*

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[68] *Keeton v. Hustler Mag. Inc.*, 465 U.S. 770 (1984). The plaintiff’s claim was time-barred in all states except New Hampshire, where she sued Hustler Magazine for defamation. *Id.* New Hampshire, where copies of the magazine were sold, had the “single publication” rule: the New Hampshire claim could be used to claim damages for pecuniary and non-pecuniary injury suffered everywhere. *Id.*


[72] *Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 328*, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.); *see also HAIMO SCHACK*, INTERNATIONALES ZIVILVERFAHRENSRECHT 192, 354 (8th ed. 2021). With respect to “tag” jurisdiction, it is interesting to note that the 1966 and 2005 Uniform Laws on the recognition of foreign country judgments (the first in effect in ten states, the second in thirty states) both commingle “jurisdiction” and *forum non conveniens*. *See Uniform Foreign-Country Money Judgments Recognition Act*, (Unif. L. Comm’n 2005); *see also Uniform Foreign Money Judgments Recognition Act*, 11 AM. J. COMP. L. 412 (1962); *Foreign-Country Money Judgments Recognition Act*, UNIFORM LAW COMMISSION (2005), https://www.uniformlaws.org/committees/community-home?CommunityKey=ae2820c30-094a-4d8f-b722-84d8d44a8f3e. They provide that a foreign country judgment shall not be refused recognition for lack of personal jurisdiction if the judgment debtor was personally served with process in the foreign country. *Uniform Foreign-Country Money Judgments Recognition Act § 5(a),*
consider exorbitant: it is the exercise of jurisdiction based on the local presence of (even unrelated) property. With respect to corporations, German law otherwise remains mainly seat-oriented as does Swiss law.

Everywhere out-of-state companies must register to do local business, including in European countries and in the United States. But registration in Europe mainly serves to provide information to the authorities and the public. It does not constitute consent to general jurisdiction. If business is conducted by means of an establishment, even if the latter is independent, local law may provide for jurisdiction over the foreign corporation for claims arising from the local establishment’s activities.

In the Mallory case, the defendant was connected with Pennsylvania but did not have its seat there. Pennsylvania also was not permitted, under U.S. law,
to base jurisdiction on the company’s having property in the state (e.g., rails and railroad ties). Claims against it also did not arise from the activities of a local establishment. Under the “mirror-image” rule of German law (and other countries), Pennsylvania state court judgment—now permitted after the U.S. Supreme Court’s ruling—may not be entitled to recognition in Germany.

The 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments would not change anything. In force for EU countries and Ukraine since September 1, 2023, the Convention was signed by the United States in March 2022, but has not been ratified so far. Assuming that it was or would be ratified, American judgments based on the exercise of Mallory-type general jurisdiction over an out-of-state corporation may be refused recognition under the Convention, although they may be recognized under national law (described above to be unlikely). Article 5(1)(d) of the Convention accepts the exercise of jurisdiction if the defendant had an establishment in the rendering state and the claim arose out of the activities of the establishment in that state (the same as under German law). This is not the case in Mallory. Under article 5(1)(j) of the Convention, judgments in tort cases against non-residents may be enforced if the tortious conduct occurred in the rendering state. This is also not the case in Mallory. By declaration, contracting states may exclude judgments involving parties of the recognizing state when everything, except the place of suit, was connected with the latter. They may also exclude specific matters or invoke forum public policy to deny recognition.

80 Id.
83 2019 Hague Convention, supra note 82, art. 18(1).
84 Id. art. 5(1)(d), 17, 7(c), respectively. Declarations can be made and filed by a Contracting State at the time of signature, ratification, “or at any time thereafter.” Id. art. 30.
85 In the Goodyear case, the amicus curiae brief of the United States had pointed out that the exercise of general jurisdiction by American courts was not well received abroad. Brief for the United States as Amicus Curiae Supporting Petitioners, 564 U.S. 915, 131 S. Ct. 2846 (2011) (No. 10-76), at *33. In Daimler, the Brief for Petitioner stated the same. Brief for Petitioner, Daimler A.G. v. Bauman, 571 U.S. 117 (2014) (No. 11-965), 2013 WL 3362080, at *35-37; Reply Brief of Petitioner, Daimler A.G. v. Bauman, 571 U.S. 117 (2014) (No. 11-965), 2013 WL 5290566, at *21; see supra text at note 73.
IV. THE EFFECT OF MALLORY ON FOREIGN-COUNTRY ENTERPRISES

In the *J. McIntyre* decision, the Supreme Court disallowed the exercise of specific jurisdiction over the foreign manufacturer when it was not the defendant but an independent distributor that had brought the defective product into the forum state where it caused injury.\(^{86}\) Since the manufacturer did not conduct “related” business in the forum state, the newer decision in *Ford* also would not have helped the plaintiff.\(^{87}\) However, there is a fine line. If the manufacturer had conducted a great deal of related business, *Ford* might support jurisdiction, although there is not sufficient case law at this time to know how much related business activity is required.

Assuming that there is in-state business activity, but that it is not related to the claim, the foreign enterprise probably is required to register in that state and obtain permission. The state’s law requiring registration may have required consent, equated registration with consent to jurisdiction, or provided for equal treatment with resident (forum) enterprises.\(^{88}\) *Mallory* would now permit the exercise of general jurisdiction—way beyond what was sought in *J. McIntyre*. Indeed, *Ford* has also become irrelevant because the Ford Motor Company was registered in Montana.\(^{89}\)

In order to guard against the jurisdiction in a particular state, the claim against the foreign-country company must not arise from something the company has done or brought into the forum state (*J. McIntyre*),\(^{90}\) it must not have been doing a substantial amount of related business in the state (*Ford*), nor have registered or have been obliged to register in the forum state (*Mallory*), whereby the last one more or less replaces the previous one, as noted.

What if the foreign-country company establishes (incorporates) a subsidiary in the particular state, to which it sells its products abroad and which then imports and sells them in the forum state? The subsidiary—other than an unincorporated branch—is a local company and as such subject to local

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\(^{89}\) *Ford*, 141 S. Ct. at 1019.

\(^{90}\) *J. McIntyre*, 546 U.S. at 876.
jurisdiction, but, in legal theory, the parent (as a separate corporation) is not. However, the legal separateness of the two legal entities may be disregarded: the subsidiary may be regarded as the agent of the parent, or its alter ego, or one might regard the two as one ("single enterprise theory"). All these are ways to "pierce the corporate veil," used for procedural purposes and not only for substantive liability. When the U.S. Supreme Court discounted consideration of the local subsidiary as the parents’ agent in Daimler for general jurisdiction, it did not consider the “single enterprise theory” in Goodyear because it had not been raised in the lower courts. The idea of a “single enterprise,” of course, gets back to the piercing of corporate veils. In Schlunk, the Illinois Appellate Court did it for the purpose of service of process on the wholly owned Illinois subsidiary of Volkswagen A.G. (VW AG). Without specifically addressing the issue, the Illinois court assumed that the parent was subject to general jurisdiction on the basis of doing extensive business; besides, Illinois had a registration statute with which VW AG had complied. The U.S. Supreme Court, accepting these lower court determinations, held that service on a domestic (American) company did not require application and use of the Hague Service of Documents Convention. The U.S. Supreme Court thus has not dealt with the single enterprise or corporate veil issues in the jurisdictional context thus far. Given the Mallory decision, this also becomes less important.

92 Id.
94 Daimler A.G. v. Bauman, 571 U.S. 117, 128 (2014). Justice Ginsburg also wrote, by dictum, that agency power either would have to be conferred for acts in the forum (not the case here) or be a general agency power, in which case the parent would thereby also be “at home” in the forum state (in the Goodyear sense, supra Part II), which Daimler was not. Id. For comparison with German and EU law, see supra notes 78, 83.
CONCLUSION

Justice Ginsburg, delivering the opinion of the U.S. Supreme Court in both the *Goodyear* and *Daimler* decisions,\(^{100}\) wrote in *Daimler* that specific jurisdiction “has become the centerpiece of modern jurisdictional theory, while general jurisdiction has played a reduced role.”\(^{101}\) She chastised general jurisdiction (as sought by the plaintiff in this way: “the global reach would presumably be available in every . . . State in which . . . sales are sizeable. Such exorbitant exercises of all-purpose jurisdiction ‘would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit’”).\(^ {102}\)

With *Mallory*, things seem to get turned around. Required registration to do in-state business becomes consent,\(^ {103}\) specific jurisdiction becomes nearly “superfluous,”\(^ {104}\) and the exercise of general jurisdiction over corporations can now be justified in a number of ways. An American or foreign-country out-of-state corporation can avoid it by not doing sizeable business in the particular state itself—that would require registration which, in turn, could be phrased or interpreted to constitute consent—but, instead, it could use an independent distributor or incorporate a subsidiary locally. The latter raises the question whether separateness will be honored. Guiding case law is still lacking on this question. Also, still unaddressed—because not litigated in the courts below—is the issue raised by Justice Alito in his concurrence in *Mallory*: might the Constitution’s Commerce Clause\(^ {105}\) restrain states from imposing burdens on other states by “enact[ing] regulations [e.g., the registration requirements] that affect commerce among the States.”\(^ {106}\) These thoughts raise issues of federalism that inhere in the Commerce Clause and, one might suggest, closely relate to Justice Ginsburg’s statement.

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102 *Id.* at 139, 142 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).
104 *Id.* at 2065 (Barrett, J., dissenting); supra note 58.
105 *Mallory*, 143 S. Ct. at 2051 (Alito, J., concurring).
106 *Id.* at 2051-52 (quoting Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 215 L. Ed. 2d 336, 352 (2023)).
A number of issues thus still need to be resolved. For the present, however, general jurisdiction over corporations may be exercised in many more settings than before. This is not a good development. Daimler has practically been made obsolete (the defendant company, after all, is doing business all over the United States). The unfortunate specific jurisdiction decision in J. McIntyre has not been overcome. With respect to general jurisdiction, so far only “tag” jurisdiction has not yet been imposed on corporations.

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107 For instance, the “dormant Commerce Clause” issue, which had not been addressed in the lower courts in Mallory and therefore was not before the Supreme Court; see Mallory, 143 S. Ct. at 2051 (Alito, J., concurring); id. at 2051-52 (quoting Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 215 L. Ed. 2d 336, 352 (2023)).

Reimann, The Renewed Threat of “Grasping” Jurisdiction Over Corporations – and Its Limits, 2023 IPRax 571, 575, nn.36, 38, disagrees that general jurisdiction has been much expanded, and that Daimler has become less important. Indeed, it is a fact, as he writes, that several states have not asserted general jurisdiction based on a company’s registration and, yes, Minnesota, did not do so in Ford v. Montana. One reason might be that Mallory had not yet opened the door. Today, registration statutes can be amended to incorporate Pennsylvania’s consent language or, if express language is lacking, courts wishing to base jurisdiction on registration can so interpret their registration statute, as did the Georgia Supreme Court in Cooper (supra notes 8, 15). See also O.C.G.A. §§ 9-10-91 & O.C.G.A. § 9-10-90 (2010) and accompanying text.