

## ARTICLES

### THE MISSING “WHY” OF GENERAL JURISDICTION

Stanley E. Cox

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# ARTICLES

## THE MISSING “WHY” OF GENERAL JURISDICTION

Stanley E. Cox\*

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## INTRODUCTION

Easy cases can produce poor rationales.<sup>1</sup> Providing unsatisfying rationales, or more accurately lack of rationales, certainly has plagued the United States Supreme Court in its general personal jurisdiction cases.<sup>2</sup> This has happened for at least three related reasons. First, the Court has taken *certiorari* only on very easy cases, where the attempted assertion of personal jurisdiction was so outrageous that no persuasive arguments could be made to support it. Second, the Court has proceeded in the general jurisdiction area as if normal minimum contacts principles do not apply, when instead the same underlying foundational principle of legitimate regulatory authority should support all personal jurisdiction assertions. This second mistake has led to a third problem: The Court has allowed description of jurisdictional trends to substitute for underlying explanation of jurisdictional validity. The overall result is that general jurisdiction cases have lurched along on the basis of unchallenged assumptions and judicially felt inclinations rather than any meaningful analysis.

These problems were again on full display in the Court’s recent case, *Daimler AG v. Bauman*.<sup>3</sup> The Court’s holding in the case is unquestionably correct. A German car manufacturer cannot automatically be subject to personal jurisdiction in California by imputing to it the “doing business” contacts of its California subsidiary in a dispute about actions of a different subsidiary in Argentina. But beyond a correct holding, the Court made only limited improvement to the confusion it has created in past sparse case law about why general personal jurisdiction is a legitimate concept.

We now know post-*Daimler* that the Court intends the “at home” test announced three terms prior in *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>4</sup> to be read restrictively. General jurisdiction over corporations will be limited to

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<sup>1</sup> Compare what Justice Thurgood Marshall wrote in another context: “Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew.” *Heckler v. Chaney*, 470 U.S. 821, 840 (1985) (Marshall, J., concurring).

<sup>2</sup> When a forum has general personal jurisdiction over a defendant, this is thought to mean that the defendant can be sued for anything the defendant has done anywhere. This kind of personal jurisdiction is sometimes called all-purpose or dispute-blind personal jurisdiction. Whether it constitutionally can exist is explored in more detail in Part II-B of this article.

<sup>3</sup> 134 S. Ct. 746 (2014).

<sup>4</sup> 131 S. Ct. 2846, 2853–54 (2011). See *infra* notes 21–41 and accompanying text for more discussion of the *Goodyear* case.

where a corporation is *truly* at home. Except in rare situations, general jurisdiction henceforth should be proper over a corporation only in the corporation's state of incorporation or principal place of business.<sup>5</sup> Such a relatively clear rule is, of course, helpful to disposing of litigation, and it provides practical guidance to litigants about where they can sue and be sued. But as to *why* this should be the rule, the Court provided little more than "because we say so." As Justice Sotomayor correctly noted in her *Daimler* concurrence,<sup>6</sup> such *ipse dixit* rationale produces disrespect for the Court's competence and suspicion that, in this area of law, there is only subjective conclusion rather than reasoned rule of law.

I believe, nevertheless, that the Court's general jurisdiction instincts in its two latest cases are right. General jurisdiction should be limited to where a defendant is most at home. It should be based—Justice Sotomayor's protestations to the contrary<sup>7</sup>—on the defendant's overall activities. It should not matter for general jurisdiction purposes how many contacts a defendant has with any particular place, however substantial those contacts might be in an absolute sense. What should

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<sup>5</sup> The Court is more ambiguous about this point than I indicate in text, perhaps leaving some wiggle room for other situations. The Court states, "*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.

But in a footnote appended to the immediately succeeding paragraph, the Court also stated:

We do not foreclose the possibility that in an *exceptional* case, *see, e.g., Perkins*, 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 (first emphasis added) (citations omitted). The *Daimler* Court began its discussion of why personal jurisdiction is lacking over *Daimler* by emphasizing the limits of general jurisdiction. *See id.* at 760 ("*Goodyear* made clear that only a limited set of affiliations . . . will render a defendant amenable to all-purpose jurisdiction there."). *Id.* (emphasizing principal place of business and place of incorporation as paradigm bases).

We will have to see how many "exceptional" situations lower courts are able to find post-*Daimler*. If the rule ends up not being applied as restrictively as I read the *Daimler* opinion desiring it to be applied, this will merely reinforce the argument made here, that without underlying foundational rationales, a precedent-only based rule for general jurisdiction necessarily provides lower courts with insufficient guidance as to how to deal with fact patterns not precisely covered by existing precedents.

<sup>6</sup> *See id.* at 766.

<sup>7</sup> *See id.* at 764 (criticizing the majority for focusing on the defendant's overall activities instead of on its substantial in-state activities); *see also id.* at 773 (criticizing the result, especially with regard to foreign corporations which would not be subject to suit by United States plaintiffs, despite the defendant's substantial United States operations).

count instead are the defendant’s choices about where it wants to be considered truly at home. As to the “why” for such a restrictive rule for general jurisdiction, the answer I here develop, and that the Court so far has failed to provide, is founded on the realization that *International Shoe Co. v. Washington*<sup>8</sup> wholly replaced all other rationales for personal jurisdiction, and that inherent in *Shoe*’s “minimum contacts” approach are significant Due Process protections from overly aggressive assertions of state court jurisdiction. Under *Shoe*, courts must justify their regulatory interest in the litigation rather than support jurisdiction based on the defendant’s territorial presence. This is true for all assertions of personal jurisdiction, general jurisdiction included. General jurisdiction is thus proper only if the forum could apply its substantive law extraterritorially to the defendant’s conduct outside the forum. Such extraterritorial regulatory authority can be exercised only against those defendants who are uniquely and truly the forum’s own.

This article proceeds in two main sections. Part One documents the lack of any helpful rationales in the Court’s general jurisdiction cases, including the recent *Daimler* decision. Not only does the Court fail to provide rationales, but many of the assumptions and comments it makes along the way are poorly thought out at best and contradicted by prior case statements or holdings at worst.

Part Two provides the theoretical meat of this article, making the case for the missing “why” in general jurisdiction jurisprudence. The short answer to why there can be general jurisdiction is that it is a permissible, although not mandatory, application of the contacts-based regulatory authority which is the only legitimate basis for personal jurisdiction post-*Shoe*. The immense regulatory power authorized by general jurisdiction can be constitutionally exercised only over those defendants who have made the forum their true home. Sovereigns are not required to wield general jurisdiction power, however, because they are not required to regulate extraterritorially. General jurisdiction is always surplusage. The place where the cause of action arose—the specific jurisdiction forum—is always the only sure place to sue post-*Shoe*. When the Court realizes these points, it will not only be able to supply the missing “why” of general jurisdiction, but it will also be in a better position to evaluate all future personal jurisdiction cases.

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<sup>8</sup> 326 U.S. 310 (1945).

## I. THE COURT'S CONFUSION CONCERNING GENERAL JURISDICTION

### A. *Helicopteros's Lack of Meaningful General Jurisdiction Guidance*

Before 2011, the Court had rendered only one minimum contacts-era general jurisdiction opinion explicitly discussing and applying the doctrine. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>9</sup> the Court embraced general jurisdiction terminology set forth in a law review article by two Harvard law professors<sup>10</sup> but provided only a vague and questionable test for when such all-purpose jurisdiction might be appropriate. The explicit recognition of two types of jurisdiction in *Helicopteros* was a mixture of good and bad. On the positive side, the *Helicopteros* Court correctly recognized that general jurisdiction is the kind of jurisdiction that holds a defendant responsible for activities occurring elsewhere. But on the negative side, the *Helicopteros* Court improperly limited the *Shaffer v. Heitner*<sup>11</sup> test requiring a “relationship among the defendant, the forum, and the litigation” to specific jurisdiction cases when it instead was designed to apply to all personal jurisdiction assertions, whether labeled general or specific.<sup>12</sup> This left the Court with no meaningful “minimum contacts”-based test for general jurisdiction situations, a problem that persists throughout all of the Court’s general jurisdiction decisions.

Rather than putting itself in a position to give guidance or explanation about the regulatory legitimacy behind general jurisdiction, the Court’s choice to ground general jurisdiction outside of proper minimum contacts analysis left the *Helicopteros* Court effectively adrift. The *Helicopteros* Court was content to place

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<sup>9</sup> 466 U.S. 408 (1984).

<sup>10</sup> See *id.* at 414 nn.8–9 (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) [hereinafter *Jurisdiction to Adjudicate*]).

In two opinions issued less than a month prior to *Helicopteros*, the Court gave hints that it was thinking about distinguishing the two types of jurisdiction. See *Calder v. Jones*, 465 U.S. 783, 787 (1984) (describing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as a case where “general jurisdiction” had been permitted on the basis of “continuous and systematic” contacts); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984) (discussing *Perkins* and stating that the contacts defendant Hustler had with New Hampshire—selling a small portion of its magazines there—“may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities”).

<sup>11</sup> 433 U.S. 186, 204 (1977).

<sup>12</sup> For more on these points, see *infra* notes 111–58 and accompanying text.

two prior cases at opposite ends of a continuum for when general jurisdiction was and was not appropriate and to hold that *Helicopteros*'s facts could not support all-purpose jurisdiction. In short, the decision provided terminology and weak precedential guidance but no meaningful justifications for general jurisdiction.

The *Helicopteros* Court correctly ruled that defendant Helicol's Texas contacts<sup>13</sup> could not support jurisdiction over Helicol for any- and everywhere. Helicol had no Texas employees, offices, nor any other on-going relationship with Texas apart from this particular venture. Presumably Helicol conducted the overwhelming bulk of its business in South America. To be able to sue Helicol in Texas for an employment dispute, for instance, between a Colombian manager and his Colombian secretary as to what took place in their Colombian office—which is what the Court's understanding of general jurisdiction, if granted, would allow—would be unwarranted based on Helicol's one-off contacts with Texas related to a Peruvian pipeline project. Under any principled Due Process analysis, the contacts were simply too thin.

The problem with the *Helicopteros* opinion, however, is that this is just about all that it announced. The Court did not provide any underlying basis for why general jurisdiction should be allowed to exist but merely embraced the terminology.<sup>14</sup> The only test that the Court provided consisted of the vague requirement that the defendant must have “continuous and systematic general business contacts” before general jurisdiction could be found appropriate.<sup>15</sup> The

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<sup>13</sup> *Helicopteros* involved a Peruvian helicopter crash in which the Colombian defendant, Helicol, was providing logistical support for a Peruvian oil pipeline construction project. *Helicopteros*, 466 U.S. at 409–10. Helicol purchased the helicopters involved in the crash in Texas, training had been provided to the joint venture entity's pilots there, and the deal that put Helicol into the project had been negotiated mainly in Texas. *Id.* at 410–11. Arguably straining the procedural posture of the case to exclude any consideration of whether these litigation-related contacts could support specific jurisdiction, the *Helicopteros* Court focused solely on whether general jurisdiction was possible. *Compare id.* at 415 n.10 (majority asserting that all parties conceded that specific jurisdiction was not possible and emphasizing that the opinion expressed no opinion about any specific jurisdiction issues), *with id.* at 424–26, 425 n.3 (Brennan, J., dissenting) (dissent contending that specific jurisdiction arguments were not forfeited and attributing the majority's refusal to engage in specific jurisdiction analysis as, at best, a narrow reading of the *certiorari* grant).

<sup>14</sup> *See id.* at 414 & n.9 (majority opinion).

<sup>15</sup> *Id.* at 415–16. The complete phrasing—“We thus must explore the nature of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in [*Perkins v. Benguet Consolidated Mining Co.*]”—could be construed to require that the level of contacts be equivalent to the level that existed in *Perkins*. *Id.* That is the way the *Daimler* court eventually would read the requirement and the way I think the requirement always should have been imposed. But there was far more ambiguity about this matter until *Daimler*. In



Court described two prior precedents, *Perkins v. Benguet Consolidated Mining Co.*<sup>16</sup> and *Rosenberg Bros. & Co. v. Curtis Brown Co.*<sup>17</sup> to demonstrate when general business contacts would be enough and when they would not.<sup>18</sup> The factual situations of those two cases, however, were so far apart that there existed an immense space between them in which general jurisdiction might or might not be appropriate.

Because of the factual space between *Rosenberg* and *Helicopteros* versus *Perkins*, and the lack of any guiding rationale about what lay behind general jurisdiction beyond the vague “continuous and systematic” requirement, it was impossible post-*Helicopteros* to know exactly where the dividing line should be drawn constitutionally between yes-you-do-get-general-jurisdiction versus no-you-do-not. Did a company have to do most or all of its business in the forum? Would it be enough if there were physical offices or employees? What about regular sales instead of regular purchases? *Helicol*’s contacts fell short not only of a requirement that a company do most of its business in a place, but also would not satisfy many

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*Helicopteros* itself, after announcing the “continuous and systematic” test, the Court did not focus on the failure of *Helicol*’s contacts to rise to some threshold level required by *Perkins* but instead emphasized that *Helicol*’s contacts were neither continuous nor systematic and matched better with a prior case, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), where jurisdiction had been found lacking. See *Helicopteros*, 466 U.S. at 416–18.

<sup>16</sup> 342 U.S. 437.

<sup>17</sup> 260 U.S. 516.

<sup>18</sup> The *Helicopteros* Court pointed to *Perkins* as a situation where general jurisdiction was appropriate. *Helicopteros*, 466 U.S. at 416. As the Court described it, the president and general manager of a Philippine mining corporation “ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business, and the exercise of general jurisdiction over the Philippine corporation was ‘reasonable and just.’” *Id.* at 415 (quoting *Perkins*, 342 U.S. at 438, 445). The Ohio contacts the Court focused on were that the president had “kept company files and held directors’ meetings in the [Ohio] office,” carried on business related correspondence there, used an Ohio bank for business transactions, and “supervised policies dealing with the rehabilitation of the corporation’s [Philippine] properties.” *Id.* In comparison, the Court noted that *Helicol* had no place of business in Texas, had never been licensed to do business there, and that its contacts with Texas consisted only “of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell’s facilities in Fort Worth for training.” *Id.* at 416.

As to the Texas purchases, the *Helicopteros* Court resurrected the pre-*Shoe Rosenberg* case, and reaffirmed it as good law for the proposition that “mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Id.* at 418. Since *Helicopteros*’s facts were essentially the same as *Rosenberg*’s, the result of no jurisdiction was clear.

states’ requirements even for “doing business” jurisdiction, given the lack of physical office or employees. Was “doing business” still permissible, especially in light of *Helicopteros*’s reliance on the pre-*Shoe Rosenberg* case? These and many other questions were left hanging by the cryptic *Helicopteros* opinion.

Post-*Helicopteros*, lower courts understandably were all over the map about when general jurisdiction would be appropriate.<sup>19</sup> Commentators justifiably were not kind to the opinion, emphasizing both the lack of any clear rule and of any foundational explanation for the general jurisdiction doctrine.<sup>20</sup> Rather than eliminate any of this confusion both in the case law and in the academic discussion about the doctrine, however, the Court remained essentially silent about general

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<sup>19</sup> *Compare, e.g.*, *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198, 1200 (4th Cir. 1993) (holding that around twenty employees making approximately \$10 million in annual sales directly into the forum is insufficient to support general jurisdiction), *with Lakin v. Prudential Sec. Inc.*, 348 F.3d 704, 708 (8th Cir. 2003) (holding that approximately \$1 million of business representing only around 1 percent of overall business is sufficient to support general jurisdiction), *and Hayes v. Ergo Tel. Co.*, 397 S.E.2d 325, 329 (N.C. Ct. App. 1990) (holding that approximately \$35 million in sales to the United States, only some of which trickled indirectly into North Carolina, is sufficient to support general jurisdiction); *compare, e.g.*, *Mich. Nat’l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989) (holding that approximately 3 percent of total sales and related activities is sufficient for general jurisdiction), *with Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (generating 12.9 percent of revenues in the forum is insufficient to support general jurisdiction); *compare, e.g.*, *Bankhead Enterps., Inc. v. Norfolk & W. Ry. Co.*, 642 F.2d 802, 805–06 (5th Cir. 1981) (holding that leasing an office and employing a staff to run it is sufficient to support general jurisdiction), *with Follette v. Clairol, Inc.* 829 F. Supp. 840, 845–48 (W.D. La. 1993) (holding that operating over two hundred sixty Walmart stores is not sufficient for general jurisdiction); *compare, e.g.*, *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 508 (D.C. Cir. 2002) (approving in principle general jurisdiction based solely on extensive internet contacts), *with Coremetrics, Inc. v. AtomicPark.com, L.L.C.*, 370 F. Supp. 2d 1013, 1019–20 (N.D. Cal. 2005) (concluding that general jurisdiction can, in some cases, be sustained primarily on the basis of internet activities), *and Revell v. Lidov*, 317 F.3d 467, 471 n.19 (5th Cir. 2002) (expressing skepticism that internet activity can support general jurisdiction).

For additional description of lower court confusion, see James R. Pielemeier, *Why General Personal Jurisdiction Over “Virtual Stores” Is a Bad Idea*, 27 QUINNIPIAC L. REV. 625, 640–52 (2009) (describing general disarray and vague standards at work in the post-*Helicopteros* opinions), and Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 809–10, 820–54 (2004) (describing the many approaches courts used, describing most as poorly reasoned and without any coherent or consistent guiding principle); *cf., e.g.*, *Aquascutum of London, Inc. v. S.S. Am. Champion*, 426 F.2d 205, 211 (2d Cir. 1970) (Judge Friendly concluding with regard to pre-*Helicopteros* confusion that “the formulation of useful general standards is almost impossible and even an examination of the multitude of decided cases can give little assistance”).

<sup>20</sup> In addition to the Rhodes and Pielemeier articles cited in the immediately preceding note, see, for example, Sarah Cebik, *“A Riddle Wrapped in a Mystery Inside an Enigma”*: *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 11–12, 22–23; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 636–42 (1988) [hereinafter *Myth of General Jurisdiction*].

jurisdiction for more than twenty-five years. The 2011 *Goodyear* case was the next vehicle the Court chose for its continued unsatisfying excursion into general jurisdiction territory.

*B. Goodyear's Atrocious facts, "At Home" Gloss, and Continuing Lack of General Jurisdiction Rationale*

It is hard to imagine a more egregious example of a lower court's abuse of general jurisdiction possibilities than what occurred in *Goodyear*.<sup>21</sup> Three foreign defendants, none of which had offices, employees, or other regular physical presence in North Carolina, were sued in North Carolina for alleged products liability injuries occurring in France involving tires manufactured abroad for foreign use.<sup>22</sup> The lower court nevertheless found general jurisdiction appropriate based on sales of other types of tires in North Carolina through other Goodyear entities.<sup>23</sup> This holding was on the far end of interpretations of what was required for general jurisdiction.<sup>24</sup> On top of this, the lower court mangled "stream of commerce" logic to find a corporation essentially subject to general jurisdiction wherever the stream of commerce sweeps its products.<sup>25</sup>

Given a fact situation so far to the extreme end of any continuum for what should count as continuous and systematic general business contacts, the plaintiffs in *Goodyear* could not and did not offer the Court any meaningful limitations on general jurisdiction. They instead tried to stretch general jurisdiction to cover sales by subsidiaries into an alleged integrated distribution network created by the parent

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<sup>21</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

<sup>22</sup> *Id.* at 2851–52.

<sup>23</sup> *Brown v. Meter*, 681 S.E.2d 382, 395 (N.C. Ct. App. 2009), *rev'd sub nom. Goodyear*, 131 S. Ct. 2846 (2011).

<sup>24</sup> The lower court's decision was arguably consistent, however, with some prior North Carolina decisions. The lower court cited two decisions where small sales unrelated to what the suit was about nevertheless supported general jurisdiction. *See id.* at 394 (relying on *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629 (N.C. 1977)); *Hankins v. Somers*, 251 S.E.2d 640 (N.C. Ct. App. 1979). Apparently because *Helicopteros* involved only regular purchases, anything else, such as regular (or even not so regular) sales, could count as doing business in North Carolina appropriate for general jurisdiction.

<sup>25</sup> *See Goodyear*, 131 S. Ct. at 2854–56. As the *Goodyear* Court summed up, "Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amendable to suit, on any claim for relief, wherever its products are distributed." *Id.* at 2856.

corporation.<sup>26</sup> In their brief and at oral argument, the plaintiffs also distanced themselves from the confused “stream of commerce” arguments the lower court made.<sup>27</sup> The *Goodyear* Court thus had an easy target in the lower court opinion, since no one was defending its primary logic or analysis. The Court also chose, however, not to address the plaintiffs’ arguments about the relationships between the Goodyear subsidiaries and the parent corporation’s control of its distribution network, even though these were the plaintiffs’ chief arguments.<sup>28</sup> The Court thus effectively spoke into a vacuum regarding what kinds of contacts were required for

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<sup>26</sup> The plaintiffs offered no arguments for general jurisdiction over the foreign defendants based on direct contacts with North Carolina, because, as plaintiffs admitted, the foreign defendants had no direct contacts with North Carolina. Instead, the plaintiffs’ theory was that the foreign companies were part of an integrated Goodyear enterprise that directed tires to North Carolina, and the foreign defendants should be subject to general jurisdiction based on their participation in that integrated enterprise. *See, e.g.*, Transcript of Oral Argument at 23–30, *Goodyear*, 131 S. Ct. 2846 (No. 10-76); Brief for Respondents at 42–43, *Goodyear*, 131 S. Ct. 2846 (No. 10-76); *see also infra* note 28. No *amicus* briefs were filed in support of the plaintiffs’ arguments.

<sup>27</sup> *See* Transcript of Oral Argument, *supra* note 26, at 23–24; Brief for Respondents, *supra* note 26, at 12–15 (describing the lower court’s stream of commerce analysis as involving an “unfortunate detour”; plaintiffs then selectively emphasizing lower court language consistent with the plaintiffs’ integrated distribution network theory); Brief for Respondents, *supra* note 26, at 35–36 (describing the lower court’s stream of commerce analysis as “imprecise” and the defendants’ characterization of the stream arguments as a “baroque portrayal”; plaintiffs then again recasting the opinion to emphasize their integrated operations points).

<sup>28</sup> The Court accepted the *Goodyear* defendants’ arguments that all of the plaintiffs’ points about an integrated corporate distribution network could be characterized as a version of veil piercing arguments that had not been raised below and that therefore should not be considered by the Court. *See Goodyear*, 131 S. Ct. at 2857 (so holding); Reply Brief of Petitioners at 13–18, *Goodyear*, 131 S. Ct. 2846 (No. 10-76) (so arguing). This effectively made all such plaintiff arguments irrelevant to the Court’s analysis. The plaintiffs’ arguments about the integrated distribution network were not mere add-ons, as the *Goodyear* Court’s citation to a few pages of the plaintiffs’ brief might lead the casual reader to assume. *See Goodyear*, 131 S. Ct. at 2857 (citing only to pages 44–50 of the plaintiffs’ brief). The plaintiffs’ arguments about the integrated distribution system instead were the main basis for jurisdiction argued before the Court. They constituted the focus of plaintiffs’ version of the facts, *see* Brief for Respondents, *supra* note 26, at 4–9; they were the way the plaintiffs recast the lower court’s opinion, *see id.* at 12–15; they were the centerpiece of plaintiffs’ summary of its argument as to why jurisdiction was appropriate, *see id.* at 17; and they formed the most important parts of the plaintiffs’ arguments in chief, *see id.* at 28–47; *cf. id.* at 55–56. The plaintiffs pointedly made these arguments during oral argument. *See* Transcript of Oral Argument, *supra* note 26, at 23–30 (emphasizing the integrated distribution network, specifically addressing waiver issues, and arguing consistency with the plaintiffs’ arguments made below). In insisting that the only issues before it were the stream of commerce arguments that the lower court had made, and from which plaintiffs were distancing themselves, the *Goodyear* Court was either attributing to the plaintiffs an incredibly stupid litigation strategy, ignoring the reality of what had been argued below, uncritically accepting the defendants’ arguments, or engaging in some combination of all of these things.

general jurisdiction. What the parties were actually arguing about, especially from the plaintiffs' side, did not figure into the Court's opinion.

The Court instead announced its own untested assumptions and moved its general jurisdiction language more toward those assumptions. This was presaged in the *Goodyear* oral argument, where one of the first questions to the defendants was not about the actual defendants in the case but instead about whether general jurisdiction over parent Goodyear would have been constitutionally appropriate in North Carolina if Goodyear had not consented to be sued there.<sup>29</sup>

Justice Kagan's question and defendants' counsel's answer prefigured what the Court would eventually make more clear in *Daimler*. The question assumed a version of general jurisdiction presumptively limited to state of incorporation and principal place of business. The defendants' response embraced that assumption and offered the "essentially . . . at home" language as being equivalent to that understanding.

As stated, however, this had not been the focus of the briefing or the parties' arguments before the *Goodyear* Court.<sup>30</sup> Rather than focus on the case or

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<sup>29</sup> The exchange was as follows:

[Justice Kagan]: Do you think there is general jurisdiction over the parent? If the consent were not in the picture, is there? Does general jurisdiction go beyond the State of incorporation, principal place of business?

[Defendants' counsel]: I think that that is a hard question. Your Honor, the short answer is I think the answer is no, but I think that that is probably a close case, again putting aside the consent. But I do think that general jurisdiction is about suing a company—at least in the case of corporations, is about suing the corporation essentially where it's located or at home. It's always fair to bring a suit against the corporation there. I think that once you get beyond that, which is a situation that would be analogous to a State's power over a citizen or a resident of the State, I think you run into great difficulty finding a basis for the State to assert authority over claims completely unrelated to any business that—or any contacts that the corporation has with the State.

Transcript of Oral Argument, *supra* note 26, at 4–5.

<sup>30</sup> In only two paragraphs of the defendants' brief was such a limited view of general jurisdiction explicitly offered to the Court. *See* Brief for Petitioners at 33–34, *Goodyear*, 131 S. Ct. 2846 (No. 10-76).

The defendants' main points instead were that under traditional pre-*Shoe* conceptions of corporate presence, which they argued were still good law as to general jurisdiction, *see id.* at 13–14, mere sales into a forum could not support personal jurisdiction. Physical presence in the form of office or employees was also needed. *See, e.g., id.* at 14 (introducing and articulating the main arguments to the same effect made in more detail at pages 13–28 of Brief for Petitioners).

arguments before it, however, Justice Ginsburg, especially, seemed anxious to confirm her assumptions about how prior precedents should be described and emphasized. She pressed both sides in oral argument to confirm her view that *Perkins* stands for a very narrow view of general jurisdiction. Defendants readily agreed.<sup>31</sup> Plaintiffs rightly resisted, emphasizing that the case law was not so clear as Justice Ginsburg asserted.<sup>32</sup> But these points were not the main focus of the plaintiffs’ or the lower court’s analysis.

The *Goodyear* opinion Justice Ginsburg wrote for a unanimous Court did not provide any underlying general jurisdiction rationales that would lead ineluctably to Justice Ginsburg’s restrictive preferences. The missing “why” for general jurisdiction continued to be missing. Given such an extreme lower court assertion of jurisdiction, perhaps little was needed to declare it unfair. The opinion primarily described the prior two general jurisdiction precedents and placed the *Goodyear* facts far short of the only situation, *Perkins*, where the Court found general jurisdiction appropriate. The *Goodyear* Court described *Perkins* as the “textbook case of general jurisdiction appropriately exercised.”<sup>33</sup> It also characterized the factual situation in *Perkins* as one where the corporation was doing all the business that it could do at the time in the forum.<sup>34</sup> *Helicopteros*’s rejection of regular

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<sup>31</sup> See Transcript of Oral Argument, *supra* note 26, at 12–13 (statement of Justice Ginsburg) (“[T]o the extent that the corporation was existing anywhere, it was in Ohio.”); *id.* (statement of defendant’s counsel) (affirming *Keeton*’s gloss on *Perkins* of Ohio “essentially involving the corporation’s principal place of business” and further agreeing that “you need [a] relationship equivalent to a citizen or resident that gives a State authority over the corporation’s actions worldwide”); see also Brief for Petitioners, *supra* note 30, at 27 (arguing that *Perkins* “sets the general-jurisdiction floor”).

<sup>32</sup> Compare Transcript of Oral Argument, *supra* note 26, at 31–32 (Justice Ginsburg asserting that the corporation had no home at the time except in Ohio), with *id.* at 32 (statement of plaintiffs’ counsel) (“[T]here was a difference in what the Court did in *Perkins* and how it was described in *Keeton*.”); *id.* (plaintiffs’ counsel explaining that jurisdiction was based on supervisory activities from Ohio without Ohio being the principal place of business); see also Brief for Respondents, *supra* note 26, at 21–22, 29 (emphasizing *Perkins* as a case involving only partial supervisory activities in Ohio of the corporation’s still extant Philippine operations and emphasizing that the company’s President was in Ohio because it was his home, not the corporation’s).

This debate about how restrictively *Perkins* should be read would become more pointed between Justice Sotomayor and the majority in *Daimler*. See *infra* notes 34, 59.

<sup>33</sup> *Goodyear*, 131 S. Ct. at 2856 (quoting *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

<sup>34</sup> *Id.* (“To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio. . . .”); *id.* at 2857 (“sole wartime business activity was conducted in Ohio. . . .”). To this extent, Justice Ginsburg was able to move the Court’s language closer to her own reading of *Perkins*’s significance. When Justice Sotomayor retreated

purchases as sufficient to support general jurisdiction was extended in *Goodyear* to a similar rejection of regular sales as being sufficient to support general jurisdiction.<sup>35</sup> But the Court failed to explain why these incremental moves in the direction of limiting general jurisdictional reach were constitutionally compelled or how they fit into any larger foundational rationales for personal jurisdiction doctrine.

The closest the *Goodyear* Court came to providing any explanation for general jurisdiction was through its new “at home” gloss. Whether the source of this new language was the *Goodyear* defendants’ response in oral argument,<sup>36</sup> or the *Shoe* language the Court cited when it introduced the phrasing,<sup>37</sup> the *Goodyear*

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from this understanding in *Daimler*, Justice Ginsburg accordingly called her to task for having joined the *Goodyear* opinion. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 756 n.8 (2014); see *infra* note 59.

<sup>35</sup> See *Goodyear*, 131 S. Ct. at 2857 n.6. In *Helicopteros* the purchases had not been regular, see *id.* at 2856, and in *Goodyear* the sales were described as sporadic, *id.*, but in both situations the Court felt comfortable opining more broadly to reject even continuous purchases or sales as sufficient to support general jurisdiction.

<sup>36</sup> See *supra* note 29 and accompanying text (“[G]eneral jurisdiction is about suing a company . . . essentially where it’s located or at home.”).

<sup>37</sup> The *Goodyear* Court introduced this terminology as follows: “A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the state are so ‘continuous and systematic’ as to render them *essentially at home* in the forum State.” *Goodyear*, 131 S. Ct. at 2851 (emphasis added) (citing *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945)).

The relevant cited portions of *Shoe* read:

[T]he demands of due process . . . may be met by such contacts of the corporation with . . . [the] forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there. An “estimate of inconveniences” which would result to the corporation from a trial away from its “home” or principal place of business is relevant in this connection. . . . [I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there. 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 has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

*Shoe*, 326 U.S. at 317 (internal citations omitted).

This *Shoe* language does not particularly support the view that a corporation is subject to general jurisdiction *only* in the place where it is essentially at home. The language at the end part of the second paragraph in fact seems to point to a different conclusion. By emphasizing that suit for unrelated



Court used the new phrasing primarily to emphasize what it found lacking on the facts before it. The Court emphasized that selling tires sporadically through intermediaries made the defendants “in no sense at home in North Carolina.”<sup>38</sup> But it was hardly clear how much more might be required to make a corporation “at home.”

The *Goodyear* Court failed to provide clear rules or a deeper explanation for what lay behind the “at home” gloss. It described domicile as the “paradigm forum” for general jurisdiction over an individual and said that a place where a corporation could be “fairly regarded as at home”—such as principal place of business or state of incorporation—would be an equivalent paradigm forum for general jurisdiction over a corporation.<sup>39</sup> But a paradigm is not the same as a requirement. What was needed and missing in the opinion was an explanation for why jurisdiction away from the paradigm would be presumptively unconstitutional, and why jurisdiction at the paradigm forum would always be permissible. Such an explanation might have forced the Court to recognize the need for regulatory legitimacy that lies behind general jurisdiction. Instead, we were told only that others had called these situations paradigmatic and that the *Goodyear* Court now also agreed.<sup>40</sup> It was clear that the facts of this case fell closer to *Helicopteros* than *Perkins*. It was clear that the Court was trying to convey a more restrictive message about general jurisdiction through its new “at home” language. But little else was clear.

In sum, the *Goodyear* opinion easily rejected the lower court’s stream of commerce analysis and found that general jurisdiction over foreign defendants for a foreign cause of action was not proper without more. But as to why general jurisdiction should be allowed to exist at all, or conversely why there should be serious limits to its permissible exercise, the *Goodyear* opinion failed to provide

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activities would violate Due Process if brought “away from its home or other jurisdiction where it carries on more substantial activities,” *id.*, the Court seems to assume that what we now call general jurisdiction would be proper at potentially many places other than the corporation’s home.

<sup>38</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. at 2846, 2857 (2011).

<sup>39</sup> *Id.* at 2853–54 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988) [hereinafter *General Jurisdiction*]).

<sup>40</sup> *See Goodyear*, 131 S. Ct. at 2853–54. The *Goodyear* Court did not say that general jurisdiction was possible *only* over a corporation at its place of incorporation or principal place of business. Nor was that Professor Brilmayer’s position in the article cited in support of these paradigmatic examples. Her “insider” view of general jurisdiction authorized general jurisdiction in situations beyond her paradigmatic examples. *See, e.g., General Jurisdiction, supra* note 39, at 742.



foundational rationales. *Goodyear*'s "at home" language seemed designed to limit general jurisdiction to less than what many commentators and courts had thought possible under *Helicopteros*'s vague test, but the case continued the *Helicopteros* practice of providing only language, description, and holding, instead of deeper foundational explanation or guidance. "Essentially at home" was hardly a self-defining phrase; it could mean any of many different things, depending on who did the hoping or explaining.<sup>41</sup>

The Court fortunately did not wait another quarter-century to take up another general jurisdiction case. Unfortunately, it still failed to provide any satisfying explanation for the restrictive rule it adopted in *Daimler*.

### C. *Daimler Insists on a Restrictive Rule but Without Supporting Rationale*

The *Daimler* oral argument prefigured the eventual result of the *Daimler* opinion. The Justices were sure that personal jurisdiction was inappropriate on the facts,<sup>42</sup> seemed confident their prior case law had already indicated this,<sup>43</sup> seemed

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<sup>41</sup> See, e.g., Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549 (2012) (discussing possible readings of *Goodyear*, advocating a middle approach to the opinion, and predicting that the unjustified formalistic rule adopted would require further clarification); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 211–18 (2011) (describing many possibilities still unresolved by the *Goodyear* opinion, urging a reading that would leave in place general jurisdiction based on substantial sales into a forum, and emphasizing a continued lack of any underlying minimum contacts rationales in the opinion); James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 989–91 (2012) (hoping for restrictive interpretations but noting no absolute clarity in the opinion concerning this); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 422–34 (2012) (discussing the possibilities of general jurisdiction beyond state of incorporation and principal place of business but also emphasizing that *Goodyear*, by relying only on post-*Shoe* case law, seemed intended to eliminate overly broad assertions of jurisdiction, similarly to *Shaffer*); Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 611–14 (2012) (unsure that *Goodyear* would bring clarity to "current mystifying case law" but hoping the "at home" requirement will necessitate physical corporate presence, so as to eliminate excesses and indeterminacy of United States "doing business" jurisdiction); Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527 (2012) (acknowledging ambiguity in *Goodyear* and suggesting "at home" should be construed restrictively but not limited to place of incorporation and principal place of business) [hereinafter *Essentially at Home*].

<sup>42</sup> See, e.g., Transcript of Oral Argument at 28–29, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2013) (No. 11-965) (Justice Ginsburg asking, incredulously, if the plaintiff's counsel really supported the proposition that a design defect case for injury to a Polish driver and passenger in Poland could be brought against Mercedes Benz in California, in response to which the plaintiff's counsel responds

unaware of holes in their jurisdictional assumptions,<sup>44</sup> and offered no serious rationales in support of their seemingly foreordained conclusion. The end result was a clearer rule lacking foundational basis.

### 1. The *Daimler* Parties and Briefs Did Not Present Moderate Arguments for General Jurisdiction

The primary reason for the lack of deeper argument in *Daimler* about what should be the justifications for general jurisdiction is that the main, if not only, issue on which *certiorari* had been granted was not the sufficiency of contacts needed to support general jurisdiction but what should be the test for attribution of a subsidiary's contacts to its parent corporation.<sup>45</sup> More so even than in *Goodyear*, the parties focused almost exclusively on issues with which the Court ended up choosing not to deal. With the Court ultimately wanting to clarify what *Goodyear*'s “at home” language meant but with no briefs focusing on that issue, the *Daimler* majority mainly wrote about what should be the test for general jurisdiction on its own. There was no focused adversarial argument that might have sharpened the *Daimler* Court's thinking.

Additionally, the facts in *Daimler* were another example of the kind of outlier general jurisdiction that puts those defending such a holding on the outlier edges of

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“yes”; Justice Kagan labeling such a general jurisdiction result “obviously in error” and “obviously a fallacy”).

<sup>43</sup> See, e.g., *id.* at 22 (Justice Kagan stating that “courts generally have an improperly broad understanding of general jurisdiction” and asking that “if the court here had understood that general jurisdiction applies when a company is essentially at home in a place, would any of these questions have arisen?”); *id.* at 51–52 (Justice Ginsburg emphasizing that this was “exactly” what *Goodyear* held and that “[t]he whole idea of *Goodyear*” was to presumptively limit corporate all-purpose jurisdiction to place of incorporation and principal place of business.).

<sup>44</sup> See, e.g., *id.* at 38 (Justice Ginsburg asserting that because specific jurisdiction has expanded, this necessarily causes general jurisdiction to shrink); *id.* at 46–47 (Justice Alito assuming a “nice clear rule” could be adopted to address policy concerns of United States jurisdiction being out of synch with international norms); *id.* at 52 (Justice Ginsburg assuming that general jurisdiction over individuals in many places, as authorized by *Burnham*, could be reconciled with a very restrictive approach to general jurisdiction over corporations).

<sup>45</sup> Justice Sotomayor correctly noted this in her concurrence. See *Daimler*, 134 S. Ct. at 765–66 (Sotomayor, J., concurring). The asserted basis for California jurisdiction was the attribution of contacts of a United States Daimler subsidiary to Daimler. Cf. *id.* at 758–59, 760 & n.16 (majority acknowledging but attempting to deflect attention from this). General jurisdiction in California over the United States subsidiary had been assumed or conceded by Daimler in the lower courts, thus additionally focusing the arguments on the attribution issue rather than on contacts Daimler itself had with California. See *id.* at 758.

justifications for the doctrine. *Daimler* involved a suit by foreign plaintiffs in California against a German corporation for activities in Argentina by one of its Argentine subsidiaries many years before litigation.<sup>46</sup> Only about 2.4 percent of Daimler's overall sales were made in California.<sup>47</sup> To sue Daimler in California for what it had done in Argentina required the plaintiffs, when pushed,<sup>48</sup> to defend "doing business," based on significant dollar sales and marketing activities, as appropriate grounds for general jurisdiction.<sup>49</sup> Under such logic, any large corporation can be sued anywhere it does significant business, for anything—a result with which the Justices seemed decidedly uncomfortable.<sup>50</sup>

This is of course not the only flavor of general jurisdiction that could have been offered to the Court. A corporation that has permanent offices and employees in a forum might be thought to be more "at home," "present," or "an insider" than a corporation that sells and directs only from outside the forum. Alternatively, when a corporation does the bulk of its business in several distinct forums, some might argue that general jurisdiction would be appropriate in these several places, even if each constitutes less than the majority of the company's overall operations. In sum, arguments that a company can have multiple real general jurisdiction homes, with each being more than just a place it does significant business, might have been made in a different case. Had these arguments been made, the Court might have been forced to explain why the regulatory justification underlying general

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<sup>46</sup> See *id.* at 750–52.

<sup>47</sup> See *id.* at 752.

<sup>48</sup> Since the main issue on which *certiorari* had been granted was attribution, the plaintiffs' main line of defense to questions about whether general jurisdiction existed over Daimler, based on Daimler's own contacts, was to argue that this was not before the Court. See, e.g., Transcript of Oral Argument, *supra* note 42, at 28–29, 38–39 (arguing that Daimler had conceded that it was subject to general jurisdiction if its United States subsidiary's contacts were attributable to it); *cf. id.* at 43–44 (arguing that if the Justices were uncomfortable deciding the case on the basis of what had been conceded by Daimler below, they should either dismiss case as improvidently granted or vacate and remand for reconsideration in light of decisions rendered since the lower court opinions were issued); *contra id.* at 7–8, 55 (Daimler arguing that even if it conceded general jurisdiction existed over its United States subsidiary, which it denied it had conceded, this still would not provide sufficient contacts to subject it to general jurisdiction).

<sup>49</sup> See *id.* at 48–53 (but emphasizing also that these issues had not been briefed and accordingly should not be the basis for the Court's decision); see also *id.* at 31 (pointing to a case approved in *Perkins* where a company had been subject to general jurisdiction based on business activities conducted on its behalf through a physical office run by another company).

<sup>50</sup> See, e.g., Transcript of Oral Argument, *supra* note 42, at 49; see also *Daimler*, 134 S. Ct. at 761–62 (labeling an approach that would subject a multinational corporation to all-purpose jurisdiction in every state where it has substantial sales "exorbitant").

jurisdiction requires even stronger forum affiliation. Instead, because no one before the Court was defending any middle ground of general jurisdiction, the *Daimler* Court could jump straight to the requirement that a corporation must be uniquely and presumably *most* at home for general jurisdiction to attach, without having to justify that result.<sup>51</sup>

## 2. Past Case Law Did Not Automatically Lead to *Daimler*'s Restrictive Approach to General Jurisdiction

The *Daimler* Court asserted that it was only being faithful to prior case law in imposing its restrictive test.<sup>52</sup> A restrictive approach to general jurisdiction, however, was not justified solely on what had been said or ruled in prior cases. Explanation of what lay behind the precedents was needed, which was exactly what was missing in prior general jurisdiction opinions and what continued not to be provided in *Daimler*. Commentators were hardly in agreement about what *Goodyear*'s “at home” gloss meant.<sup>53</sup> Accordingly, it was still possible to argue credibly to the *Daimler* Court, as plaintiffs did, that forms of substantial doing of business had not yet been squarely rejected.<sup>54</sup>

The *Daimler* Court, however, rejected the plaintiffs' reliance on pre-*Shoe* “doing business” cases approvingly cited in *Perkins*, asserting that these cases were irrelevant in the post-*Shoe* world.<sup>55</sup> Indeed they were, but only because *Shoe* wholly replaced traditionally accepted methods of obtaining jurisdiction with a completely different way of assessing the constitutionality of all assertions of personal jurisdiction, whether labeled specific or general.<sup>56</sup> The *Daimler* Court did not make any such claim but instead somewhat contrarily emphasized that the two forms of jurisdiction had proceeded along separate trajectories.<sup>57</sup> When the

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<sup>51</sup> As Justice Sotomayor noted in her concurrence, even authority on which the *Daimler* majority relied did not argue for so restrictive a test for general jurisdiction. See 134 S. Ct. at 768–69 (Sotomayer, J., concurring) (distinguishing Professor Brilmayer's approach); see also *supra* note 40.

<sup>52</sup> See 134 S. Ct. at 760–61; see also *id.* at 755–58 (describing prior case law).

<sup>53</sup> See *supra* note 41 (citing sources).

<sup>54</sup> See, e.g., Transcript of Oral Argument at 51, *Daimler*, 134 S. Ct. 746 (No. 11–965) (“*Goodyear* didn't purport to change anything. I know you used a new phrase to describe the prior precedent, but it wasn't purporting to revise it, and I don't think there was substantial argument in that case on that score.”).

<sup>55</sup> See *Daimler*, 134 S. Ct. at 761 n.18 (labeling these “unadorned citations” of cases from an “era dominated by *Pennoyer*'s territorial thinking” that “should not attract heavy reliance today”).

<sup>56</sup> See *infra* notes 81–106, 111–22 (detailing these points).

<sup>57</sup> See *Daimler*, 134 S. Ct. at 757–58.

*Helicopteros* Court had wanted to, however, it relied on pre-*Shoe* cases for post-*Shoe* general jurisdiction propositions.<sup>58</sup> Without any underlying explanation for how *Shoe*'s minimum contacts test had affected general jurisdiction's reach, the Court apparently could pick and choose without explanation from its pre-*Shoe* cases, making them either relevant or irrelevant to the picture of general jurisdiction it drew in any particular case.

The *Daimler* Court also tried to make it appear that *Daimler*'s restrictions had already been clearly adopted in its prior general jurisdiction cases. The *Daimler* Court rejected Justice Sotomayor's insistence that *Perkins* be read on its own terms, with focus on its facts.<sup>59</sup> The Court instead looked primarily to what subsequent opinions and commentators had said about *Perkins*, accepting those selective and summary glosses as the more restrictive reality of what the case meant.<sup>60</sup> The *Daimler* Court read *Perkins* as standing for the proposition that general jurisdiction is appropriate outside place of incorporation or principal place of business only when all of the activities that could be conducted by the corporation take place in that forum. As to *Helicopteros*, the *Daimler* Court emphasized the *Helicopteros* Court's reliance on *Perkins*, implying that *Perkins* was not just an example of general jurisdiction but a required level of contacts before general jurisdiction can attach.<sup>61</sup> As to *Goodyear*, the *Daimler* Court transformed unexplained paradigmatic examples into baseline requirements.<sup>62</sup>

It is not unusual for a court to selectively recast prior case law in support of a position not previously adopted clearly, and that is what the Court did in *Daimler*.

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<sup>58</sup> See *supra* notes 17–18 and accompanying text. The *Helicopteros* Court had relied explicitly upon an “unadorned citation,” see *supra* note 55, in *Shoe to Rosenberg*, a pre-*Shoe* case, as proper support for its conclusion that regular purchases could not sustain general jurisdiction.

<sup>59</sup> Compare *Daimler*, 134 S. Ct. at 755–56 & n.8 (majority opinion), with *id.* at 767–69 & n.8 (concurrence).

<sup>60</sup> See *id.* at 756 (quoting *Keeton*, 465 U.S. at 780 n.11) (“Ohio was the corporation’s principal, if temporary, place of business.”); see also *id.* at 756 n.8 (quoting *Goodyear*, 131 S. Ct. at 2856) (“To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio. . . .”); see also *Jurisdiction to Adjudicate*, *supra* note 10, at 1144 (“Given the wartime circumstances Ohio could be considered ‘a surrogate for the place of incorporation or head office.’”).

<sup>61</sup> See *Daimler*, 134 S. Ct. at 757.

<sup>62</sup> See *id.* at 758 n.11, 760–61 & n.19. The *Daimler* Court thus read *Goodyear*'s “at home” test as requiring a true and unique home to the exclusion of other places where the company also might have substantial insider presence.

But such recasting is considerably more satisfying if the court also provides a previously unstated unifying rationale that now makes everything more clear. The *Daimler* Court did not provide such a rationale but instead merely re-described and reemphasized.

Nor do all post-*Shoe* Court statements fit so neatly into the new small box for general jurisdiction that the *Daimler* Court built. Only a few years prior to *Helicopteros*'s embrace of general versus specific jurisdiction terminology, the Court in *Allstate Insurance Co. v. Hague*,<sup>63</sup> for example, revealed its then-current assumptions about where insurance giant Allstate would be subject to personal jurisdiction. Every member of the *Allstate* Court assumed, contrary to the ultimate result in *Daimler*, that a large corporation would be subject to all-purpose personal jurisdiction wherever it did significant business.<sup>64</sup> Similar assumptions were present in *Rush v. Savchuk*.<sup>65</sup> The Court's thinking and assumptions can of course change, but it is inaccurate to portray the post-*Shoe* line of personal jurisdiction cases as always evincing a trend toward the restrictive approach to general jurisdiction eventually adopted in *Daimler*. What was needed and not provided in *Daimler* was an explanation for why the Court's prior expansive assumptions about general jurisdiction were wrong.

### 3. The *Daimler* Court Failed to Provide Any Convincing Rationale for General Jurisdiction, and the Opinion Is in Tension with Other Court Holdings About How Personal Jurisdiction Should Operate

The most disappointing aspects of the *Daimler* Court's approach to general jurisdiction relate to its lack of any foundational explanation for the doctrine, and its unwillingness to address tensions between its assumptions and personal jurisdiction case law more generally. Although the *Daimler* Court's instincts about

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<sup>63</sup> 449 U.S. 302 (1981).

<sup>64</sup> Justice Brennan, writing for the plurality, emphasized in connection with his arguments as to why it would be fair to bind Allstate by Minnesota law that “Allstate was at all times present and doing business in Minnesota” and that personal “jurisdiction in the Minnesota courts is unquestioned.” *Id.* at 317 & n.23. Justice Stevens, concurring in the judgment, noted that “[b]y virtue of doing business in Minnesota, Allstate was aware that it could be sued in the Minnesota courts.” *Id.* at 329–30. Justice Powell, writing for the dissenters, rejected the idea that being subject to personal jurisdiction was relevant to the choice of law analysis but assumed that doing business within a state would subject an insurer like Allstate to some sort of all-purpose personal jurisdiction. *See id.* at 338 n.4 (“[I]t would have been crucial for the exercise of *in personam* jurisdiction.”).

<sup>65</sup> *See* 444 U.S. 320, 330–32 (1980) (assuming jurisdiction over the insurer would be valid in all states where it did business).

general jurisdiction were correct, it failed to pursue those instincts toward any broader theoretical explanation of personal jurisdiction doctrine.

The opinion proceeded descriptively regarding general jurisdiction and slid into fallacies about what that description means. Correctly noting that *Shoe*'s minimum contacts approach fundamentally changed the personal jurisdiction landscape, the Court in *Daimler* also correctly noted that *Shoe* approved of something like general jurisdiction as well as something like specific jurisdiction.<sup>66</sup> The Court further correctly emphasized that *Shoe* made jurisdictional reach possible that was not possible under *Pennoyer v. Neff*,<sup>67</sup> producing numerous cases that would fall under the label of what we now call specific jurisdiction.<sup>68</sup> The fundamental logical flaw the Court then made, however, was to assert that this rise in specific jurisdiction cases necessarily meant general jurisdiction must be read restrictively.

A dramatic rise in the number of specific jurisdiction cases does not automatically explain why there should be a shortening of general jurisdiction reach. If it was not possible to assert specific jurisdiction prior to the minimum contacts revolution, that alone could explain why specific jurisdiction cases would come to dominate dockets. Both because the ambiguities of what might be permissible under this new type of jurisdiction would need to be fleshed out, and because plaintiffs would now usually, or at least often, sue for convenience or tactical reasons in places that were *not* the defendant's home, one would expect specific jurisdiction cases to dominate the jurisdictional landscape. The *Daimler* Court, however, instead asserted that specific and general jurisdiction "have followed markedly different trajectories," with the Court "declin[ing] to stretch general jurisdiction beyond limits traditionally recognized,"<sup>69</sup> requiring affiliations so continuous and systematic as to render a corporation essentially at home in a state, "comparable to a domestic enterprise."<sup>70</sup>

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<sup>66</sup> 134 S. Ct. at 753–54.

<sup>67</sup> 95 U.S. 714 (1878).

<sup>68</sup> Both before and after describing its general jurisdiction cases, the *Daimler* Court emphasized that specific jurisdiction cases have come to dominate the jurisdictional landscape. *See Daimler*, 134 S. Ct. at 755, 758. The *Goodyear* Court had made similar points, albeit in more condensed fashion. *See id.*, 131 S. Ct. at 2853–54.

<sup>69</sup> *Id.* at 757–58.

<sup>70</sup> *Id.* at 758 n.11.



To repeat the point made in the preceding section, this restrictive test that the *Daimler* Court formulated is not unambiguously present in the prior case law. The *Daimler* Court was instead explaining and emphasizing, more in the nature of “here is what we meant to convey in *Goodyear*, even if we did not explicitly say this.”<sup>71</sup> Forcefully stating this message in *Daimler* conveys the content of the now embraced restrictive general jurisdiction test, for sure, but emphatic assertion is no substitute for persuasive reasoning. What was needed, and not provided, was an explanation for *why Daimler’s* restrictive test was constitutionally required by *Shoe*. Proper justification could not be based on maintaining “traditionally recognized” limits, given that “doing business” cases were part of the accepted tradition<sup>72</sup> and that the prior general jurisdiction cases exhibited considerable ambiguity as to what the bounds on general jurisdiction should be in the post-*Shoe* world.<sup>73</sup>

The Court instead needed to explain why the prior traditions had been invalidated by *Shoe’s* minimum contacts approach. Because *Shoe* replaced what were considered traditionally acceptable methods of obtaining jurisdiction with a completely different way of assessing the constitutionality of personal jurisdiction assertions *and* because this replacement applied to *all* assertions of jurisdiction, it

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<sup>71</sup> As an example of this point, the *Daimler* Court did not just repeat its test from *Goodyear* verbatim but felt compelled to add the additional explanation that this test means comparability to a domestic corporation, which would have a unique home. *See id.*

<sup>72</sup> *See, e.g., id.* at 761 n.18 (noting, but rejecting, two such opinions that had been cited to the *Daimler* Court). The Court did not explain *why* these cases became irrelevant as a result of *Shoe* but merely asserted that they had become so.

<sup>73</sup> *See supra* notes 18–20 and accompanying text (discussing the ambiguity left open by *Helicopteros*); *supra* notes 63–65 and accompanying text (discussing the Court’s assumptions about doing business as a basis for personal jurisdiction); *supra* note 37 (discussing the apparent assumption in *Shoe* that general jurisdiction could be proper not just at a corporation’s “home” but also where it conducted substantial activities).

As to such a restrictive test being the only match with traditional notions of Due Process, even the secondary authorities upon which the *Daimler* Court relied most for this proposition either did not advocate such a restrictive test, see *supra* notes 40, 51 and accompanying text (describing Professor Brilmayer’s reluctance to embrace such a restrictive test), or advocated it based on a theoretical perspective that the *Daimler* Court did not yet embrace, see *Daimler*, 134 S. Ct. at 761 n.18 (citing Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 685–88 (2012), for the proposition that “doing business” jurisdiction is constitutionally suspect). Mr. Feder certainly does argue against the constitutionality of doing business jurisdiction. But he also correctly labels *Goodyear’s* “at home” test a new development and justifies his restrictive version of the “at home” test on the basis of sovereignty principles, which he acknowledges the Court did not provide in *Goodyear*.



did indeed necessarily follow that both a rise of specific jurisdiction cases and severe restrictions on general jurisdiction were necessary corollaries of the replacement of territorial assumptions with minimum contacts requirements.<sup>74</sup> But the *Daimler* Court did not provide that explanation.

One reason the *Daimler* Court may have been unwilling to offer such rationale for its restrictive test, and to explain in more detail why it was required under *Shoe*'s minimum contacts approach, is because such an explanation would lead to serious inconsistency with the personal jurisdiction law governing individuals. As Justice Sotomayor<sup>75</sup> and several commentators have noted,<sup>76</sup> a minimum contacts result prohibiting all-purpose personal jurisdiction over corporations intentionally doing substantial business in a state, but allowing such personal jurisdiction over individuals merely passing through, is indefensible.<sup>77</sup> Yet we now have exactly that disconnect between *Daimler* and *Burnham v. Superior Court of California*.<sup>78</sup>

The proper way forward is not to abandon *Daimler*'s restrictive test for general jurisdiction but to justify it. The justification for a restrictive test comes directly from the limitations on personal jurisdiction imposed by *Shoe*. The *Daimler* Court was correct to reject pre-*Shoe* "doing business" cases as irrelevant to current personal jurisdiction analysis. The reason they are irrelevant is because *Shoe*'s minimum contacts approach wholly replaced *Pennoyer*'s territorial approach, thereby setting aside all presence-based forms of jurisdiction. The Court's instincts about specific jurisdiction cases were also correct. The reason specific jurisdiction cases properly dominate post-*Shoe* jurisprudence is because

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<sup>74</sup> This argument is made in Part II of this article. See *infra* notes 111–57 and accompanying text.

<sup>75</sup> *Daimler*, 134 S. Ct. at 772–73 (Sotomayor, J., concurring).

<sup>76</sup> See, e.g., Stein, *supra* note 41, at 548–49; cf., e.g., Twitchell, *supra* note 20, at 670 (arguing courts should abandon transient jurisdiction as a version of general jurisdiction over individuals).

<sup>77</sup> During oral argument, Justice Ginsburg offered, as possible justification for the inconsistency, that an individual is fully present in only one place at a time. See Transcript of Oral Argument at 52, *Daimler*, 134 S. Ct. 746 (No. 11–965). Thankfully, she did not make that argument in *Daimler*. While one's body might be fully present wherever that body happens to be present temporarily, it would be absurd to argue that I am as fully affiliated with wherever I happen to be temporarily, in comparison to the place I have made my true domicile. Justice Ginsburg temporarily visiting our law school is not Justice Ginsburg "at home," no matter how extensive or pleasant our hospitality is to her during her brief visit.

<sup>78</sup> 495 U.S. 604 (1990) (approving a version of all-purpose jurisdiction over persons served while temporarily present in a state). See *infra* notes 116–31 and accompanying text for more discussion of *Burnham*'s inconsistency with minimum contacts rationales.

there is no kind of personal jurisdiction post-*Shoe* except jurisdiction supported by regulatory purpose. Specific jurisdiction rationales replaced presence-based rationales. The problem of justifying general jurisdiction, therefore, is that it is not clear why it should be constitutionally allowed to exist at all. The next section explores these points, explaining under what circumstances general jurisdiction can be justified constitutionally in the post-*Shoe* minimum contacts world.

## II. THE MISSING “WHY” OF GENERAL JURISDICTION

### A. *Shoe Provided a Constitutional Rationale for Limits on Personal Jurisdiction, Contracting State Jurisdictional Reach Compared to What Was Assumed Proper Under Pennoyer*

The *Shoe* minimum contacts revolution is usually viewed as an expansion of jurisdictional possibilities beyond what was permitted under *Pennoyer*'s territorial approach. Properly understood, however, *Shoe* was more a contraction of sovereign authority than it was expansion. Under *Pennoyer*'s territorial assumptions, sovereign authority was plenary when capable of being exercised, whether the defendant liked it or not. Under *Shoe*'s minimum contacts approach, on the other hand, a defendant never can be fully under the power of the forum where litigation proceeds unless the defendant chooses to allow that forum to exercise such power. Minimum contacts jurisprudence justifies only limited governmental intrusion.

The right to expect a government's court system to exercise only limited power over one's affairs is an important due process liberty interest one would expect a great number of Justices on the Court to support. The Court correctly recognized such a limitation on governmental power in *Shaffer*<sup>79</sup> but then backed away from it in *Burnham*. Since only two Justices on the current Court were part of the *Burnham* debacle,<sup>80</sup> it is possible that the current Court properly might recognize the implications of *Shoe*'s contraction of sovereign jurisdictional

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<sup>79</sup> *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>80</sup> *Burnham*, 495 U.S. at 604. Justices Scalia and Kennedy are the only Justices from the *Burnham* Court who still serve. Justice Kennedy was newly appointed, so it would not be unreasonable to suppose his thinking on constitutional issues generally, and the Due Process Clause particularly, might have modified since his initial appointment. *Cf., e.g., Lawrence v. Tex.*, 539 U.S. 558, 579 (2003) (Justice Kennedy writing for the Court in a different Due Process context that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”). Accordingly, only Justice Scalia would seem locked into the views expressed in *Burnham*.

authority. Severe restrictions on general jurisdiction are a necessary corollary to required minimum contacts analysis. Being forced to provide a constitutionally defensible justification for the restrictive interpretation of general jurisdiction that most members of the current Court correctly, but only instinctively, favor might have caused the Court to better understand how *Shoe's* limited-authority contacts-based approach replaced *Pennoyer's* plenary power assumptions for personal jurisdiction. This was an important opportunity missed in both *Daimler* and *Goodyear*.

### 1. *Shoe's* Contacts Approach Was Inconsistent With and Was a Replacement of *Pennoyer's* Territorial Assumptions

The underlying principle of Due Process protection in personal jurisdiction situations is that a defendant cannot be bound by the judgment of a court that has no legitimate right to exercise authority over her. That seeming tautology is not completely empty. The idea is that there are Due Process *limits* on a court's power that protect persons from being subjected to too much court power. As to what constitutes legitimacy, or phrased oppositely, overreaching, the Due Process Clause necessarily leaves much to the Court to flesh out.

Under *Pennoyer's* territorial approach, the presumed Due Process limits were all or nothing, because they were based on assumptions of mutually exclusive territorial sovereignty.<sup>81</sup> Due Process protected a defendant from being brought before any court system where he was not domiciled<sup>82</sup> or physically present, and presumably he was not present more than one place at a time. This restriction on suit was both overly and insufficiently protective. Territorial limits were overly protective because they prevented states from adjudicating what a defendant had done within their borders if the defendant was no longer there. As *Pennoyer*

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<sup>81</sup> The *Pennoyer* Court famously pointed to what it deemed were:

two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. . . . One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.

*Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

<sup>82</sup> It was possible under *Pennoyer's* power assumptions for a domiciliary to be held jurisdictionally accountable in his domicile even while physically away from it. See *Milliken v. Meyer*, 311 U.S. 457, 462–64 (1940) (citing to numerous prior precedents in support of that explicit holding).

phrased it, “Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them.”<sup>83</sup> On the other hand, *Pennoyer*’s territorial limits were not protective enough because they allowed a sovereign to exercise complete power based only on slight presence in the forum. An individual merely passing through could be seized and sued for anything he had done anywhere, so long as properly served with process.<sup>84</sup> Power over property also could be used as a proxy for coercing a defendant to answer to any and all actions unrelated to the property.<sup>85</sup>

*Shoe* did not speak explicitly to the unconstitutionality of such excessive power granted to courts under *Pennoyer*’s territorial assumptions. *Shoe*’s facts

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<sup>83</sup> *Pennoyer*, 95 U.S. at 727.

<sup>84</sup> Some amelioration of this unfairness was provided through choice-of-law rules that, for a while, became constitutionally required. If every forum was required to apply the substantive law of the place of injury to a tort action, or the law of the place of making to determine contract rights, arguably the defendant was not inconvenienced substantively. Whether all forums actually would apply the same law in the same way was of course not guaranteed, leaving the defendant still at risk of a “wrong” substantive result.

<sup>85</sup> For such *quasi-in-rem* situations, ultimate exposure was limited to the value of the property if the defendant defaulted. But that would be small comfort for situations where the property seized was of significant value. Most states allowed for special appearance to contest jurisdiction. But a misstep under state procedural rules could subject the appearing defendant to unlimited liability. If the property actually was the defendant’s, any attempt to completely avoid jurisdiction would lose. The seizure thus would likely accomplish its intended effect: to get the defendant to submit to jurisdiction in the forum as condition for removing restrictions on the use of his seized property.

*Pennoyer* justified such unfairness by pointing to the forum’s need to provide its citizens a means of redress against those who had caused them harm:

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them. . . . Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.

*Pennoyer*, 95 U.S. at 723.

It was of course the territorially prohibited inability directly to hold those who had caused harm accountable that necessitated this end-run via seizing their property. *Shoe* properly would reverse the supposed nullity of serving process outside the territorial boundaries and legitimize litigation-related contacts as sufficient justification for sovereign regulatory reach. *Shaffer* properly would eliminate the vestiges of *quasi-in-rem* attachment as an attempted substitute for this proper power over the person, recognizing not only that such ruses were no longer needed but that they always had been fundamentally unfair.

challenged the other half of the equation: the illegitimacy of preventing states from reaching defendants who had done things the forum had a right to regulate. In approving such reach for the state of Washington against a nonresident defendant, however, the *Shoe* Court was acting inconsistently with, and thereby replacing, *Pennoyer's* territorial approach. *Pennoyer* had insisted that lack of authority over those outside the jurisdiction followed inexorably from the same foundational postulate—mutually exclusive territorial sovereignty—that gave plenary authority over those physically served inside the jurisdiction.<sup>86</sup> If jurisdiction was found to be legitimate without such territorial power, as *Shoe* expressly approved, then jurisdiction was not based on power but on something else. In short, repudiating one of the inevitable results of *Pennoyer's* foundational postulate meant that the postulate itself had been repudiated. The other result—full power based solely on physical presence—was equally invalid unless it could be supported by some rationale different than the mutually exclusive sovereignty of the several states.<sup>87</sup>

True consent, of course, obviates the need to have otherwise legitimate authority over a defendant, and *Pennoyer* itself,<sup>88</sup> as well as later decisions,<sup>89</sup> artificially and incorrectly labeled what a defendant sometimes was doing as “consent” when in reality it was no such thing. The fiction of “presence” also could be engaged in to make it seem that a court was operating in accord with *Pennoyer's* territorial requirements. A corporation could be deemed “present” through doing business and therefore subject to personal jurisdiction.<sup>90</sup> As Justice Scalia correctly noted in *Burnham, Shoe* “cast those fictions aside.”<sup>91</sup>

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<sup>86</sup> See *Pennoyer*, 95 U.S. at 722–23.

<sup>87</sup> Justice Scalia in *Burnham* would offer an alternative rationale as to personal jurisdiction over natural persons, and it would consist of “tradition.” See *infra* notes 117–24 and accompanying text for criticism of this alternative rationale.

<sup>88</sup> See *Pennoyer*, 95 U.S. at 735.

<sup>89</sup> See, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927) (deeming a motorist to have consented to jurisdiction by driving his car into a state).

<sup>90</sup> See, e.g., *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218, 226–28 (1913); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 109 (1898) (emphasizing also that such presence by virtue of doing business could apply when the cause of action did not arise in the forum state); cf., e.g., *Phila. & Reading R. Co. v. McKibbin*, 243 U.S. 264, 265 (1917) (“A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.”).

<sup>91</sup> *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 618 (1990).

*Shoe* would no longer endorse the fiction of corporate consent as a way around establishing legitimate regulatory authority. *Shoe* instead focused on the “nature and quality” of actions that led to jurisdiction.<sup>92</sup> The *Shoe* Court specifically recast *Hess v. Pawloski* as a case where a single contact of the right “nature and quality,” rather than fictive consent, justified personal jurisdiction.<sup>93</sup> Under *Shoe*’s focus, the reason an out-of-state driver was subject to jurisdiction in the state where his driving caused injury was not because he mystically appointed the forum’s Secretary of State his agent for receipt of process when he drove across the state’s borders but rather because his single act of colliding with another vehicle or pedestrian gave rise to litigation.

*Shoe*’s rejection of fictive consent also should have made clear that coerced consent could not sustain jurisdiction. Applied to corporations, this would mean that a corporation could not be forced to consent to all-purpose jurisdiction as a condition of doing limited business within a state.<sup>94</sup> Although that holding later would be made under the Commerce Clause,<sup>95</sup> the Due Process protections identified in *Shoe* were an equally valid justification for protection from such excessive court authority. A corporation’s jurisdictional liability cannot be disproportional to its forum state activities.

As to the fiction of “presence,” the *Shoe* Court correctly emphasized that corporations are not present in a physical sense but instead put themselves at jurisdictional risk through the things its agents do on its behalf.<sup>96</sup> The Court further explained that a corporation’s activities in a state “may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”<sup>97</sup> By

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<sup>92</sup> See *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 318–19 (1945).

<sup>93</sup> *Id.* at 318.

<sup>94</sup> Compare the situation where a corporation might be asked to appoint an agent for receipt of service of process in connection with any litigation that arises out of the business it does within the jurisdiction. Because the corporation would be subject to jurisdiction on the basis of forum contacts giving rise to litigation, such a requirement would be unnecessary but would not raise the same kind of overreaching problems as a consent to general jurisdiction statute.

<sup>95</sup> See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (tolling a statute of limitation indefinitely against a corporation, unless it consents to general jurisdiction by appointing an agent for service of process, violates Commerce Clause).

<sup>96</sup> See *Shoe*, 326 U.S. at 316–17.

<sup>97</sup> *Id.* at 319.

specifically endorsing, in a prior paragraph, the principle that even a single corporate act of the right type can give rise to jurisdiction,<sup>98</sup> the *Shoe* Court correctly moved the appropriate test for jurisdictional reach toward litigation-relatedness, more so than one of the main sources upon which it had relied had been able to do.<sup>99</sup>

These *Shoe* insights cleared the way for subsequent specific jurisdiction cases such as *McGee v. International Life Insurance Co.*<sup>100</sup> and *Calder v. Jones*,<sup>101</sup> where the Court found that singular or intentionally directed acts may give rise to personal jurisdiction. Applied retrospectively, *Shoe* also revealed the real basis for jurisdiction in a large number of the “doing business” cases. Jurisdiction was not based on presence but on litigation-related conduct.<sup>102</sup> By requiring that jurisdiction henceforward be based on the “quality and nature” of corporate defendant contacts rather than the “presence” or “consent” of a corporation in the state, *Shoe* repudiated *Pennoyer*’s overly assertive power rationale. Only a limited right to hold a corporation jurisdictionally accountable can be justified by a focus upon the nature and quality of contacts. This is so since such an approach necessarily takes into account what contacts mean, instead of how many there are.<sup>103</sup>

Granted, the *Shoe* Justices did not likely realize the full implications of what they were doing. *Shoe*’s language, “if he be not present within . . . the forum”<sup>104</sup> in

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<sup>98</sup> *See id.* at 318.

<sup>99</sup> *Cf.* *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930) (Judge Learned Hand rejecting the idea that a corporation can be sued away from its home based on a single act, even as to an action based on that act). The *Shoe* Court had approvingly cited *Gilbert* for the idea of presence being an unhelpful fiction for determining personal jurisdiction over corporations. *See Shoe*, 326 U.S. at 316–17.

<sup>100</sup> 355 U.S. 220 (1957).

<sup>101</sup> 465 U.S. 783 (1984).

<sup>102</sup> *See, e.g.*, *Pa. Lumbermen’s Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407 (1905) (finding jurisdiction over out-of-state insurance company for fire loss that it had insured in the forum); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245 (1909) (similar). For more examples, see Feder, *supra* note 73, at 682–83 (collecting cases and secondary authority for the proposition that many of the pre-*Shoe* doing business cases involved situations where the cause of action arose in the forum).

<sup>103</sup> *See Shoe*, 326 U.S. at 319 (emphasizing that the test is not “mechanical or quantitative” and that it requires consideration of how the activities conducted give rise to obligations).

<sup>104</sup> The Court in *Shoe* noted:

But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the

particular, would be latched onto later by Justice Scalia to improperly support the idea that *Shoe* never meant to question traditionally accepted methods of jurisdiction, especially over persons.<sup>105</sup> Granted also, *Shoe* left much ambiguity about how contacts should count to satisfy traditional notions of fair play and substantial justice. But, as Justice Scalia correctly noted in a different context, there are “two truisms” regarding what Court opinions really mean: “that actions speak louder than silence, and that (in judge-made law at least) logic will out.”<sup>106</sup> *Shoe* unambiguously allowed jurisdictional reach inconsistent with *Pennoyer*’s principles. That action, and the beginning justifications *Shoe* offered for proper jurisdictional reach, inexorably should have led to the conclusions both that the plenary power assumed under *Pennoyer*’s rationales was always henceforth constitutionally suspect and that evaluating the relation between contacts and litigation was at the center of proper personal jurisdiction analysis.

## 2. *Shaffer* Was Right, But *Burnham* Was Wrong

The Court twice has been asked unambiguously to implement the lessened sovereignty of *Shoe*’s minimum contacts requirements and declare jurisdictional reach unconstitutional that clearly would have been constitutional under *Pennoyer*’s power assumptions. In *Shaffer*, the Court correctly declared *quasi-in-rem* jurisdiction unconstitutional, in the face of concurrences pointedly disturbed by the sweep of the decision.<sup>107</sup> In *Burnham*, however, the Justices experienced a severe meltdown, with part of the Court willing to resurrect a version of territoriality masquerading as tradition and another part *unwilling* to apply *Shoe*’s restrictive message to a clearly unconstitutional method of asserting jurisdiction.

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*territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

*Id.* at 316 (emphasis added).

<sup>105</sup> See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 618–21 (1990).

<sup>106</sup> *Dickerson v. United States*, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting).

<sup>107</sup> Compare *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Justice Powell wishing to preserve jurisdiction based on attached realty, so as to avoid potential uncertainty in some of *Shoe*’s application), with *id.* at 211 (majority emphasizing that judicial certainty cannot be allowed at the expense of constitutional protections guaranteed to defendants under *Shoe*’s minimum contacts approach); see also *id.* at 219 (Stevens, J., concurring) (Justice Stevens concurring only in the judgment because he feared the opinion decided “a great deal more than is necessary”); but cf. *id.* (Justice Brennan welcoming *Shoe*’s minimum contacts replacement of *Pennoyer*’s territorial approach as “a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions” generated from *Pennoyer*).



These points have received more detailed treatment elsewhere<sup>108</sup> but require brief summary here as a necessary set up for considering how general personal jurisdiction problems should be analyzed.

First, however, a paragraph's aside about how these two decisions are placed in most Civil Procedure casebooks and why that placement is unhelpful to understanding the Court's ambivalence about the sweep of its minimum contacts jurisprudence. In *Shaffer* and *Burnham*, the Court directly confronted issues of the constitutional sweep of minimum contacts. To decide whether *quasi-in-rem* (*Shaffer*) or transient presence (*Burnham*) jurisdiction was constitutional, the Court necessarily had to answer the preliminary question whether *Shoe's* minimum contacts approach was meant to be a total, constitutionally required replacement of *Pennoyer's* assumptions, or something else. One would think this debate, engaged in meaningfully only in these two cases, would be at the center of any Civil Procedure teacher's or student's appreciation of what minimum contacts means. At the very least, one would expect that *Shaffer*—handed down after a two-decade hiatus in important personal jurisdiction decisions and providing a new test for minimum contacts analysis used in subsequent opinions<sup>109</sup>—would be introduced to students before the opinions of the 1980's. But not so. *Shaffer* and *Burnham* usually are relegated to the end of the personal jurisdiction unit in separate subsections dealing with specialty problems of *quasi-in-rem* and transient presence

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<sup>108</sup> As to *Shaffer*, see, for example, Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978). As to *Burnham*, see, for example, Stanley E. Cox, *Would That Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497 (1991) [hereinafter *Burnham Insane*]; *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559 (1991).

<sup>109</sup> The *Shaffer* Court's test of "relationship among the defendant, the forum, and the litigation," 433 U.S. at 204, was specifically applied in *Rush v. Savchuk*, 444 U.S. 320 (1980), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and endorsed as the appropriate gloss on minimum contacts in *Calder v. Jones*, 465 U.S. 783, 788 (1984). The *Helicopteros* Court restricted this test to specific jurisdiction situations, see 466 U.S. at 414, and this emphasis has continued through *Daimler*, see 134 S. Ct. at 758. The Court used the test extensively in its recent *Walden v. Fiore* opinion. See *Walden v. Fiore*, 134 S. Ct. 1115, 1121–23 (2014). While limiting *Shaffer's* test to specific jurisdiction situations was a serious mistake, see *supra* notes 9–12 and accompanying text; *infra* notes 111–58 and accompanying text, the *Helicopteros* Court nevertheless identified it as *the* test for specific jurisdiction and, accordingly, one that demands attention. See also *e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring) (Justices Breyer and Alito applying this *Shaffer* test to the facts before them).

jurisdiction.<sup>110</sup> The impression left is that these cases are out of the mainstream of minimum contacts jurisprudence when they are actually at the center of the Court’s internal debate about minimum contacts’ significance. Why those charged with teaching the meaning of minimum contacts to future generations of lawyers and judges do them the disservice of relegating these decisions to the backburner is puzzling.

*Shaffer* remains the Court’s most comprehensive treatment concerning *Shoe*’s replacement of *Pennoyer*’s territorial assumptions. Part II of the opinion explained how *Pennoyer*’s territorial assumptions were undercut by cases and commentary leading up to and following *Shoe*.<sup>111</sup> Part III of the opinion explained why *quasi-in-rem* jurisdiction had to be discarded as inconsistent with *Shoe*’s constitutionally required minimum contacts approach.<sup>112</sup> Although technically not ruling on other

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<sup>110</sup> See, e.g., BABCOCK, MASSARO & SPAULDING, CIVIL PROCEDURE: CASES AND PROBLEMS 155–76 (Aspen 4th ed. 2009); FREER & PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 106–25 (Lexis Nexis 6th ed. 2013); FRIEDENTHAL, MILLER, SEXTON & HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 165–91 (West 11th ed. 2013); HAZARD, TAIT, FLETCHER & BUNDY’S CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 265–96 (Foundation Press 10th ed. 2009); MARCUS, REDISH, SHERMAN & PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 857–85 (West 6th ed. 2013).

<sup>111</sup> The Court first noted the awkward balance that *Pennoyer*’s power approach created. Non-present defendants could not be directly sued, but their property could be jurisdictionally attached as an indirect way of accomplishing suit. See *Shaffer*, 433 U.S. at 199–200. The rigidity of the power approach required that exceptions be built into it for status determination, see *id.* at 201, and that consent be stretched and supplemented by doing business jurisdiction so that corporations could be shoe-horned into *Pennoyer*’s otherwise unyielding territorial requirements. See *id.* at 201–02. The reality of automobiles producing mobile tortfeasors was another pressure on *Pennoyer*’s territorial requirements, requiring creation of an additional loophole of fictive consent. See *id.* at 202. For *in personam* jurisdiction situations, *Shoe* finally replaced these fictions with proper focus on how contacts matched with where and what suit was about. See *id.* at 203–04. As the *Shaffer* Court summed up: “Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.” *Id.* at 204.

<sup>112</sup> The Court started by emphasizing that litigation based on *quasi-in-rem* jurisdiction determined a defendant’s interests on the merits and, therefore, presumptively had to be justified under *Shoe*’s test for determining the propriety of jurisdiction over persons. *Id.* at 207. The Court dismissed to a footnote, as unconvincing, the argument that because *quasi-in-rem* liability is limited to the value of the property, this might allow more leniency. *Id.* at 207 n.23. The Court then noted that if suit actually was about the property, for example who owned it or whether its improper maintenance caused injury, allowing jurisdiction would be completely consistent with the prior announced required focus on “ties among the defendant the state and the litigation.” *Id.* at 207–09. But when the property was completely unrelated to what suit was about, the Court justifiably was suspicious that the property’s attachment was designed to accomplish indirectly a general personal appearance that could not directly have been constitutionally required. See *id.* at 209.

methods of jurisdiction beyond *quasi-in-rem*,<sup>113</sup> the *Shaffer* opinion, fairly read, sweepingly presumed that *Shoe*'s minimum contacts requirements totally replaced *Pennoyer*'s territorial approach. As the Court summed up at the end of Part III: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in [*Shoe*] and its progeny."<sup>114</sup>

The Court reinforced this message two years later in *Rush v. Savchuk*,<sup>115</sup> explaining:

In *Shaffer v. Heitner*, we held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." . . . In determining whether a particular exercise of state-court jurisdiction is consistent with [D]ue [P]rocess, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation."<sup>116</sup>

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The Court then rejected one by one the arguments made in favor of nevertheless keeping in place *quasi-in-rem* jurisdiction. It was not needed to ensure satisfaction of judgments, since the Full Faith and Credit Clause required judgment recognition and enforcement; in situations where assets might disappear during trial, proper attachment could be obtained on the basis of proved necessity. *See id.* at 210. The Court rejected the argument that attaching property was needed as a more sure and easy way of obtaining jurisdiction than minimum contacts, first disagreeing that minimum contacts analysis was inherently difficult but insisting regardless that a desire for certainty can never trump the need for constitutional fairness. *See id.* at 211. Finally, the Court rejected the argument that because *quasi-in-rem* had been in practice for long time, it must by this pedigree be constitutional. *See id.* at 211–12. As the Court emphasized:

"[T]raditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

*Id.* at 212 (internal citations omitted).

<sup>113</sup> *See id.* at 208 n.30.

<sup>114</sup> *Id.* at 212; *see also, e.g., id.* at 207 (a single standard—that of [*Shoe*—should measure constitutionality of *in rem* as well as *in personam* actions).

<sup>115</sup> 444 U.S. 320 (1980).

<sup>116</sup> *Id.* at 327 (internal citations omitted).

Twelve years later, *Burnham* provided the Court an opportunity to confirm *Shaffer*'s message that minimum contacts analysis is the sole measure of personal jurisdiction constitutionality. Similar to *Shaffer*'s rejection of *quasi-in-rem* jurisdiction, the *Burnham* Court should have ruled that transient presence jurisdiction cannot survive *Shoe*'s minimum contacts analysis. Instead, the Court unanimously held transient jurisdiction constitutional, producing a disastrous set of opinions that sent wrong messages about minimum contacts jurisprudence and created special difficulties for general jurisdiction.

In Justice Scalia's lead opinion, three and one-half *Burnham* Justices<sup>117</sup> retreated from *Shaffer*'s message that minimum contacts is the sole measure of personal jurisdiction's constitutionality, asserting that methods traditionally used at the time of the Fourteenth Amendment's adoption cannot violate Due Process.<sup>118</sup> As Justice Brennan's concurrence correctly emphasized, this approach was “foreclosed” by *Shoe* and *Shaffer*.<sup>119</sup> Even while Justice Scalia's plurality opinion mangled *Shaffer* to make it seem that *Shaffer* was dealing with a much more limited issue than the meaning of minimum contacts across the board,<sup>120</sup> the plurality undercut its own logic by criticizing the *Shaffer* Court for doing what it understood itself required to do.<sup>121</sup> Because minimum contacts had replaced *Pennoyer*'s territorial approach, the *Shaffer* Court was required to evaluate *quasi-in-rem* without giving determinative weight to tradition. Tradition at most caused the *Shaffer* Court to pause and ask, “Are we really getting our minimum contacts

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<sup>117</sup> Justice White is the one-half Justice. He cited *Shaffer* for the principle that even traditional methods of personal jurisdiction can be reexamined under Due Process and declared invalid, but he joined all of Justice Scalia's plurality opinion except the parts that explicitly criticized *Shaffer* and that attacked the Brennan concurrence. See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 628 (1990).

Justice White's unusual position that a traditional jurisdictional rule can stand, despite unfairness in particular cases, so long as “there has been no showing . . . that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case,” rightly died with his *Burnham* concurrence. See also Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659 (1991) (detailing reasons why Justice White's approach must be rejected).

<sup>118</sup> See, e.g., *Burnham*, 495 U.S. at 619.

<sup>119</sup> *Id.* at 629 (Brennan, J., concurring). For more of the concurrence's detail on this point, see *infra* note 125.

<sup>120</sup> See *id.* at 619–21.

<sup>121</sup> See *id.* at 621–22 (criticizing *Shaffer* for conducting an “independent inquiry” into Due Process fairness of *quasi-in-rem* jurisdiction).

analysis right?”<sup>122</sup> But tradition could not substitute for sufficient minimum contacts under *Shaffer*, since minimum contacts was the only proper way to assess the constitutionality of personal jurisdiction.

The Scalia plurality’s *Burnham* approach created two related problems for general jurisdiction analysis going forward. First, by abandoning minimum contacts analysis in the situation of full power over individuals, the plurality’s approach reinforced the probability that something other than true minimum contacts analysis would be used to justify full power in other general jurisdiction situations. *Helicopteros*’s vague and unexplained “continuous and systematic” test could operate on a separate track instead of being tested by *Shaffer*’s required focus on “relationship among the defendant, the forum, and the litigation.” Second, by specifically endorsing tradition as an acceptable or even preferred alternative to minimum contacts analysis,<sup>123</sup> the plurality’s approach posed potentially

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<sup>122</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 211–12 (1977) (stating that historical practice is some evidence in support of the argument that Due Process has been satisfied but “is not decisive”).

<sup>123</sup> Justice Scalia did not argue that the *Burnham* result satisfied minimum contacts requirements, since it could not. He instead argued that minimum contacts could not possibly have replaced a prior method of jurisdiction that was assumed constitutional at the time of the Fourteenth Amendment’s adoption.

Justice Scalia’s tradition-based approach to Due Process protections in *Burnham* is similar to his tradition-based skepticism regarding substantive Due Process protections for privacy rights. See, e.g., *Lawrence v. Tex.*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting). In the choice-of-law context, see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988) (Justice Scalia authoring the Court’s opinion and emphasizing that traditional choice-of-law rules cannot violate Due Process). In all substantive Due Process contexts, Justice Scalia worries that Justices will project their subjective sense of fairness onto blank constitutional text, and he insists that there be something more solid against which to measure constitutionality. Justice Scalia reverts to tradition for presumptive content, but he includes also in *Burnham* the escape valve of overwhelming majority change of practice as a permissible way to go contrary to what formerly was thought fair.

The more satisfying way to flesh out Due Process content, however, is to focus on what would actually be fair to defendants versus what people formerly assumed would be fair. It is a proper judicial task to determine what Due Process requires based on many factors, including not just historical understandings but also underlying sovereignty protections, principles of *res judicata*, reasonable defendant expectations, and appreciation of the practical and logical consequences on individual liberty of different jurisdictional rules.

There are additional problems with Justice Scalia’s history-first approach. One of the most obvious problems with freezing historical practice as constitutionally acceptable is that there are two Due Process Clauses in the Constitution, adopted at significantly different time periods. It would be very odd that the same language could mean significantly different things depending on when each identical phrase was adopted. It would be more sensible to construe the repeated Fourteenth Amendment phrasing as not meant to impose specific historical practice on the states but instead to require the states to abide by the same principles of fundamental fairness that constrain the federal government.

determinative counterweight to severe restrictions on general jurisdiction. This was so since companies could be assumed traditionally subject to jurisdiction where they “did business.”<sup>124</sup> Both of these messages provided no hint of significant limits for general jurisdiction. The Scalia approach certainly did not presage where the Court eventually would go in *Daimler*.

Minimum contacts analysis was equally disserved by the Brennan concurrence in *Burnham*. These four Justices ran the other way from *Shaffer*'s messages, claiming to apply minimum contacts analysis, but severely diluting and misapplying the doctrine so as to find jurisdiction constitutional that violated core concepts of limited sovereignty at the heart of minimum contacts protections. On the positive side, the Brennan concurrence purported to reaffirm *Shaffer*'s message that minimum contacts analysis is the only measure of personal jurisdiction's constitutionality.<sup>125</sup> But the concurrence then immediately undercut this

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A second problem concerns Justice Scalia's escape valve of changed Due Process meaning when state practice significantly changes. How many states must change practice before something becomes no longer fundamentally fair? Justice Scalia's answer of an “overwhelming majority” is aimed at protecting democratic interpretations of fairness from judicial interpretations. See *Burnham*, 495 U.S. at 627. Fair enough, but it is still an arbitrary line. Why does overwhelming majority practice now make something unfair? Especially as to states that have not gone with the supermajority trend, why should what has always been fair for that polity now become constitutionally unfair? Constitutional restrictions on what a state otherwise desires to do should have more satisfying rationale than “Sorry, you were outvoted.” A better way to incorporate changed state practice into constitutional analysis is to consider such change an important factor in determining what might now be revealed to be fundamentally unfair, rather than to make overwhelming state practice the definition of fairness. Although Justice Scalia detests the use, majority foreign practice similarly can become a factor in revealing the unconstitutionality of prior assumptions.

<sup>124</sup> See, e.g., *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57–58 (2d Cir. 1985) (discussing New York's version of “doing business” jurisdiction under the New York statutory provision designed to keep in place traditionally valid methods of obtaining jurisdiction). The *Daimler* Court bolstered its limits on general jurisdiction by noting the perception among foreigners that United States “doing business” jurisdiction is an accepted traditional method of jurisdiction that leads to unfair results and thus frustrates negotiation of a judgments recognition convention. See *Daimler A.G. v. Bauman*, 134 S. Ct. 746, 762–63 (2014). While Mr. Feder recently has argued that many older “doing business” cases are better understood as cases where the cause of action arose out of the doing of business, he nevertheless acknowledges that the situation was unclear as to whether the traditional “doing business” line of cases could support broader jurisdiction. See Feder, *supra* note 73, at 681–84.

<sup>125</sup> “In *Shaffer*, we stated that ‘all assertions of state-court jurisdiction must be evaluated according to the standards set forth in [*Shoe*] and its progeny.’ The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process.” *Burnham*, 495 U.S. at 629–30 (Brennan, J., concurring) (emphasis added) (internal citations omitted). As Justice Brennan summed up:

If we could discard an “ancient form without substantial modern justification” in *Shaffer*, we can do so again. Lower courts, commentators,

endorsement of *Shaffer* by adding back in exactly what *Shaffer* forbade—giving undue weight to historical practice.<sup>126</sup> The concurrence treated longstanding, continuing use of transient presence jurisdiction as if it were a minimum contacts fairness consideration when in fact it was nothing but an “ancient form without substantial modern justification.” Instead of discarding this ancient form, the *Burnham* concurrence looked for ways to justify it.

The transient presence jurisdiction approved by the *Burnham* concurrence is a version of general jurisdiction.<sup>127</sup> A defendant personally served is subject to suit for anything that she did anywhere. In the *Burnham* case, apart from being handed process, Mr. Burnham’s contacts with California consisted of a short business trip and a visit with his children. As Justice Scalia persuasively argued, to subject a defendant to unbounded jurisdictional power on the basis of a few days worth of contacts is an unconscionable bargain that cannot be justified under any sensible

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and the American Law Institute all have interpreted *International Shoe* and *Shaffer* to mean that *every* assertion of state-court jurisdiction, even one pursuant to a “traditional” rule such as transient jurisdiction, must comport with contemporary notions of due process. Notwithstanding the nimble gymnastics of Justice Scalia’s opinion today, it is not faithful to our decision in *Shaffer*.

*Id.* at 631–33 (footnotes and internal citations omitted).

<sup>126</sup> Compare *Shaffer*, 433 U.S. at 211–12 (stating that history is not determinative and that the perpetuation of ancient forms without modern justification violates Due Process), with *Burnham*, 495 U.S. at 636–37 (stating that longstanding practice means the transient rule is “entitled to a strong presumption that it comports with due process”).

<sup>127</sup> None of the Justices approached the case as if it had anything to do with California’s regulatory authority over Mr. Burnham’s domestic relations obligations. This was a second tragedy of the decision. See *Burnham Insane*, *supra* note 108, at 555–71 (arguing that minimum contacts analysis might have supported jurisdiction but noting and analyzing the resulting tension with *Kulko v. California Superior Court*, 436 U.S. 84 (1978)).



notion of Due Process fairness.<sup>128</sup> Yet that is precisely the bargain the *Burnham* concurrence found satisfied Due Process.<sup>129</sup>

Rather than engage in true minimum contacts analysis, with the inevitable result that transient presence jurisdiction would fall, Justice Brennan’s *Burnham* concurrence pretended to apply minimum contacts analysis, unwilling to accept that result. If Justice Brennan’s logic had been applied to the *quasi-in-rem* jurisdiction declared unconstitutional in *Shaffer*, especially as to real estate, the result would have come out opposite. One can imagine a revised *Shaffer* opinion reading something like the following:

Attachment statutes put a defendant on notice that owning property can subject the owner to the jurisdiction of the court where the property is located. There is accordingly no unfair surprise to an owner when jurisdiction results, for the owner has knowingly assumed some risk that the state will exercise power over him by his owning property there.<sup>130</sup> Additionally, the property owner receives significant benefits from the state in connection with his property ownership, including the full police power protection of his property and the full use of the state’s court system to confirm and protect his property rights. Given that the *quasi-in-rem* jurisdictional obligation extends only to the value of the property and no further, the jurisdictional obligations imposed are proportionate to the benefits received and thereby satisfy minimum contacts fairness requirements.

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<sup>128</sup> See *Burnham*, 495 U.S. at 623–24. The same four members of the Court who in *Burnham* now argued that three days’ worth of benefits could satisfy reciprocal Due Process considerations specifically had rejected just such a bargain only a few years previously, and this when the Court was specifically thinking about all-purpose jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (citing *Kulko*, 436 U.S. at 93 for the proposition that “basing California jurisdiction on 3-day and 1-day stopovers in that State ‘would make a mockery of’ due process limitations”). The *Burnham* concurrence either had selective amnesia or deliberately failed to retain its will regarding these points.

<sup>129</sup> See *Burnham*, 495 U.S. at 637–38. The only additional “benefit” that the *Burnham* defendant received beyond the same three days of California presence labeled “a mockery of due process” by the *Helicopteros* Court, see *supra* note 128, was receipt of summons. As Justice Scalia correctly argued, that additional contact can hardly count as a benefit that creates concomitant obligations, and can be justified instead only on some non-minimum contacts basis. See *Burnham*, 495 U.S. at 623–25.

<sup>130</sup> It is telling that the *Burnham* concurrence supported its reasonable expectations analysis by quoting Justice Stevens’s *Shaffer* concurrence rather than the *Shaffer* majority. See *Burnham*, 495 U.S. at 637 (Brennan, J., concurring) (quoting *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring) (“If I visit another State, . . . I knowingly assume some risk that the State will exercise its power. . . .”). The *Shaffer* majority rejected such end-runs around minimum contacts analysis by instead requiring focus on the defendant’s forum contacts and the nature of the litigation. This is precisely why Justice Stevens did not join that opinion but felt compelled to offer a non-minimum contacts alternative in his concurrence.



The *Shaffer* Court of course rejected exactly such arguments.<sup>131</sup> To offer them in *Burnham* to support transient presence jurisdiction was completely dishonest to *Shaffer*'s and *Shoe*'s minimum contacts analysis. One would hope that if asked anew to address the issue of transient presence jurisdiction, the Justices now on the Court who are sympathetic to the idea that minimum contacts totally replaced territoriality would come up with a different answer than the *Burnham* Court did as to the constitutionality of transient presence jurisdiction. There being but one minimum contacts test that must be applied to all attempted assertions of jurisdiction, the right result is always to deny jurisdiction when the defendant has insufficient contacts with the forum to justify the attempted litigation.

*B. General Personal Jurisdiction Can be Exercised  
Constitutionally Over a Defendant Only Where That  
Defendant Is Most at Home*

Given that *Shoe* constitutionally required replacement of territorial assumptions with a contacts approach, the real question regarding general jurisdiction is why it should be allowed to exist at all. General jurisdiction potentially exposes a defendant to suit for anything and everything. The minimum contacts approach instead is premised upon the idea of limited sovereignty over persons, proportional to their contacts with the sovereign. What kinds of contacts could ever make it fair to expose a defendant to unlimited jurisdictional liability? The somewhat tautological answer is only that level of contacts that would make it fair for the sovereign to adjudicate that defendant's conduct, wherever it occurred. The real answer may be that such truly all-purpose jurisdiction does not exist but that something sufficiently like it can be justified that we could call general jurisdiction.

It is not enough to say, as Justice Ginsburg did, following von Mehren and Trautman's lead, that with the rise of specific jurisdiction, there is no longer much need for general jurisdiction, so the doctrine should be restricted. If general jurisdiction exists independently of specific jurisdiction, a rise in one form of jurisdiction would not automatically result in the decline of the other. But if the two forms of jurisdiction are not separate and alternative forms of personal jurisdiction, but instead have a single shared source of legitimacy, then the rise of specific jurisdiction does indeed signal the demise of general jurisdiction. Because the two forms of jurisdiction do actually share the same minimum contacts justifications,

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<sup>131</sup> See *supra* notes 107, 112 and 130.

general jurisdiction indeed became suspect once specific jurisdiction was recognized as legitimate under *Shoe*'s minimum contacts rationales.

If a sovereign wants to authorize what we call general jurisdiction, why would it be constitutional to do so? The preliminary presumption should be against plenary authority. Minimum contacts is based on the Due Process-protected interest of the defendant to be free from judicial authority unless the defendant's contacts give the forum legitimate regulatory, as opposed to mere physical, power over the defendant. To have general jurisdiction, the forum would need legitimate regulatory authority over a defendant's actions potentially anywhere in the world. Such power is legitimate only when the forum can apply its substantive law to the defendant's conduct, regardless of where that conduct occurred. Such extraterritorial regulatory authority exists only over a defendant who has chosen to make the forum its true and (presumptively) only home.

### 1. The Court Needs to Stop Denying the Connection Between Adjudicative and Legislative Jurisdiction

The Court has strongly resisted linking adjudicative authority with legislative authority.<sup>132</sup> This is a mistake. The Court's resistance partially may have been fueled by fear that such linking would eliminate meaningful restrictions on assertions of sovereignty. After all, the most vocal advocate for linking personal jurisdiction with choice-of-law was Justice Brennan.<sup>133</sup> Under Justice Brennan's view of how minimum contacts should work, the thinnest of contacts can support personal jurisdiction.<sup>134</sup> This thinnest level of personal jurisdiction contacts then

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<sup>132</sup> See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (stating that choice-of-law concerns are distinct from and should not complicate jurisdictional inquiry); *Shaffer*, 433 U.S. at 214–16 (rejecting the argument that if the forum's law can be applied, the forum should have personal jurisdiction); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (“The issue is personal jurisdiction, not choice of law.”).

<sup>133</sup> See, e.g., *Shaffer*, 433 U.S. at 224–26 (Brennan, J., dissenting in part) (arguing strongly that similar considerations animate both doctrines and concluding that “when a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied, . . . we could wisely . . . adopt[] a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.”).

<sup>134</sup> See, e.g., *Burnham*, 495 U.S. at 637–38 (Brennan, J., concurring) (finding a three-day visit to the forum sufficient to support general jurisdiction-type claims); *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 422–24 (1984) (Brennan, J., dissenting) (finding purchases, training, and negotiation sufficient to support general jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 306–07 (1980) (Brennan, J., dissenting) (basing jurisdiction on consumer's foreseeable use of product in the forum); see also *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 102 (1978) (Brennan, J., dissenting) (summarily concluding that “appellant's connection with the State of California was not too

presumptively supports application of forum law.<sup>135</sup> Conversely, under Justice Brennan's view of how aggregation of contacts for choice-of-law works, contacts that do not give rise to litigation nevertheless can support application of forum law.<sup>136</sup> Once the ability to apply forum law is acknowledged, personal jurisdiction presumptively should follow.<sup>137</sup> With no meaningful limits on either side of his linking, Justice Brennan's version of equating choice-of-law and personal jurisdiction meant that he never saw a case where he did not want to assert personal jurisdiction<sup>138</sup> and seldom found unconstitutional any application of forum law.<sup>139</sup> If Justice Brennan's version of linking personal jurisdiction and choice-of-law were accepted, there would indeed be few meaningful restrictions on state power to assert regulatory authority under either doctrine. The lack of limits in one doctrine would undermine whatever potential limits there might be in the other.

But opposing Justice Brennan's too-easy personal jurisdiction and too-easy choice-of-law results does not mean that the two concepts are not intertwined. Perhaps one small ray of hope in the otherwise-cloudy *J. McIntyre Machinery, Ltd. v. Nicastrò* plurality opinion is an introductory comment acknowledging that the two doctrines require common Due Process analysis that guarantees limits on state power.<sup>140</sup> While linking adjudicative jurisdiction with legislative jurisdiction works

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attenuated, under the standards of reasonableness and fairness implicit in the Due Process Clause, to require him to conduct his defense in the California courts.”).

<sup>135</sup> See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317–18 n.23 (1981).

<sup>136</sup> See, e.g., *id.* at 313–20 (aggregating three such contacts to support the application of forum law); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 735–39 (Brennan, J., concurring) (finding a sufficient state interest to justify applying a longer statute of limitations than where the cause of action arose).

<sup>137</sup> See, e.g., *Shaffer*, 433 U.S. at 224–26 (Brennan, J., dissenting in part).

<sup>138</sup> The only Supreme Court case in which Justice Brennan did not find personal jurisdiction permissible was *Asahi Metal Industries Co. v. Superior Court of California*, in which he emphasized: “This is one of those rare cases in which minimum requirements inherent in the concept of ‘fair play and substantial justice’ . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.” 480 U.S. 102, 116 (1987) (internal quotations omitted). The main battle in *Asahi* was over stream of commerce jurisdiction for not-so-rare cases, and in that battle Justice Brennan of course supported the exercise of personal jurisdiction.

<sup>139</sup> The only case where Justice Brennan did not support the application of forum law was *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

<sup>140</sup> See 131 S. Ct. 2780, 2786–87 (2011) (“[The need for Due Process protections against unlawful exercises of power] is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.”).

equally well for specific jurisdiction situations, the focus in this article is on general jurisdiction. As to the kind of extraterritorial power over a defendant that comes with general jurisdiction—being able to sue in the forum for what the defendant did elsewhere—what other justifications for such power exist besides the ability to bind by forum law?<sup>141</sup>

## 2. Non-Regulatory Arguments for General Jurisdiction Do Not Provide Constitutionally Required Limits

The underlying rationale for general jurisdiction cannot be that the defendant affirmatively desires general jurisdiction to exist. No defendant desires to be sued. Corporate defendants under *Pennoyer*'s territorial assumptions may well have preferred a restrictive interpretation of “presence” that would find them “present” only where they were most at home. Corporate defendants in the modern world, similarly, would likely prefer a restrictive interpretation of general jurisdiction that finds such jurisdiction possible only where the defendant is most at home, versus also where the company merely does substantial business. But resisting jurisdiction in places where suit has been attempted is hardly the same thing as affirmatively inviting suit somewhere else. If a defendant is sued in a forum where the defendant does not mind being sued, the defendant can waive personal jurisdiction protections and allow litigation to proceed. However, as to signing a blank check of affirmative authorization for plaintiffs to have jurisdiction somewhere, regardless of whether one eventually wants to be sued there or not, I cannot imagine a sensible defendant being in favor of such policy.<sup>142</sup>

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<sup>141</sup> “Binding by forum law” necessarily means that the forum’s court system is doing the binding. The focus is not so much upon the purported content of the law applied as upon the fact that the forum is applying law. Thus, the requirements of personal jurisdiction always moot choice-of-law concerns. Another sovereign cannot constitutionally obtain personal jurisdiction, for example, on condition that it agree to apply the law of a forum with legitimate power to regulate. Insisting that the forum state itself has legitimacy to regulate is a necessary check on sovereign authority required by Due Process. Once a sovereign has such legitimacy to apply law, however, it necessarily has the power to apply its own law. To this extent, personal jurisdiction requirements become the more meaningful restrictions on substantive results when choice-of-law scrutiny is minimal. *Cf.* Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 619–26 (2007) (arguing that more searching scrutiny of personal jurisdiction than of choice-of-law is appropriate under Due Process).

<sup>142</sup> One argument that at first might appear to be a version of defendant desire for general jurisdiction upon further consideration is not. In many cases, the reason the defendant does not want to be sued is because the defendant believes it did nothing wrong. When the defendant contests the very basis of the plaintiff’s lawsuit by saying, “I did not do what you allege,” there is much inconvenience in having to go to a distant forum to win that merits argument. The defendant might desire instead that the plaintiff sue the defendant where the defendant is most at home. The defendant might be thought to be arguing

Nor should the answer be that plaintiffs need a general jurisdiction forum as the one sure place they can sue a defendant.<sup>143</sup> The short but full answer to the claim of the one-sure-place justification for general jurisdiction is that general jurisdiction is not at all a sure place, because general jurisdiction is not a plaintiff's right. There is no constitutional obligation in minimum contacts jurisprudence that the place where a defendant is most at home must make its defendant available for suit.<sup>144</sup> When it was not possible for a plaintiff to sue a defendant where the defendant had done the plaintiff harm, as under *Pennoyer's* jurisdictional assumptions, there was indeed a need for some other place the defendant would have to answer for his actions. Under *Pennoyer's* assumptions, all sovereigns were assumed unable to reach beyond their borders to bring back defendants to answer for their actions. With such assumptions, a necessary corollary was that all sovereigns also had something akin to a reverse extradition obligation to make the defendant answerable in the forum where he could be found for actions that other sovereigns had a right to regulate.

But *Shoe* cured the inability of a forum to obtain personal jurisdiction over defendants who had engaged in legitimately regulable forum conduct. Once it was possible under *Shoe* to sue in the forum that had an interest in regulating the conduct, the need to make the defendant available elsewhere disappeared. It is in

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that there should *only* be general jurisdiction instead of specific jurisdiction in such situations. Having general jurisdiction as a default location where plaintiff instead could sue, the argument could go, might assist a court in deciding that specific jurisdiction, on hotly disputed facts, should not be found to exist in a distant forum. But the defendant cannot and should not automatically be able to prevent a plaintiff from attempting to assert specific jurisdiction where, if plaintiff's allegations are correct, the cause of action actually arose. And to repeat the points in text: (1) even in such situations, the defendant does not likely want to submit to blank-check-like jurisdiction at home in all situations but only in those situations where the defendant perceives this to be to its advantage based on the particular facts of the particular case; and (2) the defendant can waive personal jurisdiction objections in all such situations, and would likely prefer that option over automatically being subject to personal jurisdiction regardless of what the lawsuit is about and regardless of the underlying merits.

<sup>143</sup> *Cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (place of incorporation and principal place of business "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims"). Almost all commentators, even those quite sympathetic to a limited view of general jurisdiction, similarly seem to fall into this trap of assuming that general jurisdiction must be kept as a fallback, sure-place-for-suit for plaintiffs seeking a forum. *See, e.g., Jurisdiction to Adjudicate*, *supra* note 10, at 1137 ("[J]ustice requires a certain and predictable place where a person can be reached by those having claims against him."); *Myth of General Jurisdiction*, *supra* note 20, at 665–66 ("the one forum in which the plaintiff can be sure of obtaining jurisdiction without a fight"; also noting traditional international recognition).

<sup>144</sup> For more detail on these points, see *infra* notes 162–72 and accompanying text.

this sense that the Court, following von Mehren and Trautman’s lead, has correctly described the rise of specific jurisdiction as carrying with it the subsidence of general jurisdiction, especially for general jurisdiction premised only on “presence” or a large “quantity” of contacts. Under minimum contacts rationale, the one *sure* place that jurisdiction can be justified is not where the defendant may be found, does business, or even is most at home—but where the defendant’s contacts gave rise to the cause of action. Because of this availability under specific jurisdiction, there is no longer any obligation to make the defendant available for others who want to sue.

Some commentators nevertheless have argued that general jurisdiction remains a plaintiff necessity, or at least an option that should remain constitutionally available for plaintiffs’ benefit.<sup>145</sup> Some have argued that this is especially true in situations where the plaintiff wishes to sue in her home forum, and the cause of action arose somewhere else very far away.<sup>146</sup> Justice Sotomayor raised similar points in her *Daimler* concurrence as arguments against what she considered the harshness of the majority’s restrictive test.<sup>147</sup> The basic problem with such arguments is that they turn personal jurisdiction doctrine into a weighing of relative convenience. This is wrong for two related reasons. First, it moves the focus away from the defendant’s Due Process liberty interests, which, after all, are what should most matter if personal jurisdiction protections are indeed constitutionally guaranteed individual rights.<sup>148</sup> Second, it moves the focus away from the forum’s regulatory legitimacy, transforming personal jurisdiction protections from a constitutional limit on state authority into a weighing of private

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<sup>145</sup> See, e.g., Patrick J. Borchers, *The Problem with General Jurisdiction*, 119 U. CHI. LEGAL F. 119, 129–32 (2001).

<sup>146</sup> See, e.g., Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 171 U. CHI. LEGAL F. 209–10 (2001) (citing Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 340–41 (2003)).

<sup>147</sup> See *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring).

<sup>148</sup> As to defendant’s Due Process rights, the Court has rejected plaintiffs’ convenience or the desire for a forum as being able to substitute for the defendant’s purposeful availment. The most that the Court has done is to equivocate somewhat, in *McGee* and *Burger King*, about how non-defendant factors fit into the jurisdictional balance. *Burger King*’s perplexing language about how “these considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required,” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (citations omitted), has not been applied in subsequent opinions. When push comes to shove, the Court has always correctly defaulted to Due Process as a right designed to protect defendants from forum overreaching.

party burdens.<sup>149</sup> Defendant availability under specific jurisdiction—i.e., where contacts gave rise to the cause of action—means that there is no longer any obligation to make a defendant available elsewhere for others who want to sue. This defendant availability in the specific jurisdiction forum also means it becomes *unconstitutional* to sue elsewhere if there is no regulatory-connectedness with that other place.

### 3. Commentators Have Advocated a Regulatory Justification For Personal Jurisdiction Consistent With the Points Here Made

The connection here emphasized between regulatory authority and personal jurisdiction has been noted by a number of commentators, including in the context of general jurisdiction, with the correct implication that this connection makes general jurisdiction unconstitutional if too easily obtained. More than twenty years ago, Professors Maier and McCoy forcefully argued that general jurisdiction should be held unconstitutional because of the disconnect between defendant affiliation and legitimacy to regulate by forum law.<sup>150</sup> They correctly understood that a forum should not be allowed to adjudicate unless it legitimately can regulate. Professor Brilmayer and her coauthors also noted the links between legislative and

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<sup>149</sup> A version of the plaintiff's-need-for-a-forum argument is to emphasize the lack of inconvenience to the defendant in the forum selected by the plaintiff. The real problem, however, is potential inconvenience to the plaintiff in having to litigate where the cause of action arose. If the plaintiff cannot get specific jurisdiction anywhere at all, that might be a serious problem. *See infra* note 168 (discussing the potential unconstitutionality of short arm statutes). If the problem is, however, that the plaintiff cannot get specific jurisdiction in a place she thinks is sufficiently related to what the controversy is about, even though other specific jurisdiction forums are available for suit, that may only reveal a problem in the limits the Court has imposed on specific jurisdiction doctrine. *Cf., e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (questionably prohibiting specific jurisdiction where a manufacturer knows its expensive specialty product would be sold and used); *Kulko v. Cal. Super. Ct.*, 436 U.S. 84 (1978) (questionably prohibiting personal jurisdiction over a father where his minor children needed his support and where he had sent one of them to live with the mother); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (questionably prohibiting personal jurisdiction over corporate directors in the state which gives life to the corporation they direct and whose laws likely would determine if they are correctly governing). But to cure those potential problems in specific jurisdiction doctrine by opening up general jurisdiction to many, if not all, comers, as Professor Stein quite rightly notes, would be like "setting one's house on fire if the radiators aren't working effectively. The harm from the fix far exceeds the benefit." Stein, *supra* note 41, at 542.

<sup>150</sup> *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991). Professors Maier and McCoy included in their conception of forum law, as I do, the reality that the label attached to the law applied is not so important as the fact that the forum is applying law in the manner it sees fit. *See, e.g., id.* at 252.



adjudicative legitimacy in general jurisdiction situations, leading them to adopt a restrictive view of general jurisdiction.<sup>151</sup> Ms. Cebik some ten years later focused upon sovereign enforcement interests based on unique affiliations that other sovereigns would respect as a basis for general jurisdiction.<sup>152</sup> More recently Mr. Feder, who represented the *Goodyear* defendants before the Court, emphasized a need to match regulatory authority with general jurisdiction legitimacy.<sup>153</sup> Even more recently, Professor Sterk has emphasized the need to restrict general jurisdiction so as not to interfere with the specific jurisdiction forum’s legitimate regulatory authority.<sup>154</sup> Numerous other commentators have recognized a relationship between regulatory legitimacy and specific jurisdiction, to varying extents.<sup>155</sup>

When they move to general jurisdiction analysis, however, commentators and courts sometimes seem seduced by the labels of general and specific jurisdiction into believing that they must analyze general jurisdiction significantly differently from the way they analyze specific jurisdiction. That is a mistake. There are not two different underlying rationales for personal jurisdiction in the post-*Shoe* world.

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<sup>151</sup> See *General Jurisdiction*, *supra* note 39, at 771–83; see also Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) [hereinafter *Related Contacts*] (arguing for strong substantive relatedness in specific jurisdiction situations).

<sup>152</sup> See Cebik, *supra* note 20, at 24–25, 31–48. This focus led her to limit general jurisdiction to the place of incorporation, the place where general corporate policy is made, and the place where core activities that constitute the corporation’s existence take place. See *id.* at 36–40. “Doing business” jurisdiction accordingly was unconstitutional. See *id.* at 40–41.

<sup>153</sup> See Feder, *supra* note 73, at 673. His emphasis upon asking the correct sovereignty-based questions led Mr. Feder to conclude that general jurisdiction based on doing business cannot constitutionally be justified. Only a more unique relationship could justify the burdens imposed by general jurisdiction. In Mr. Feder’s view, this mandates that a corporation legitimately can be subject to general jurisdiction only in its place of incorporation or principal place of business. See *id.* at 691–95.

<sup>154</sup> See Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1183–87 (2013).

<sup>155</sup> See, e.g., *Related Contacts*, *supra* note 151 (emphasizing specific jurisdiction’s legitimacy as grounded in regulatory authority); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980) (arguing that it makes no sense to divorce choice-of-law analysis from personal jurisdiction analysis); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 534 (1991) (suggesting that personal jurisdiction limits should be acknowledged more straightforwardly as a limit on the ability to apply substantive law); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 738–65 (1987) (urging regulatory focus as a way to properly allocate potentially conflicting sovereignty concerns in personal jurisdiction analysis); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 412 (2004) (similar); Sterk, *supra* note 154, at 1183–87 (similar).



After minimum contacts rationales replaced territorial assumptions, there was but one foundation for all forms of personal jurisdiction. Professors and courts, especially the Supreme Court, should use the same approach they use when explaining the legitimacy of specific jurisdiction to explain and justify general jurisdiction.<sup>156</sup> Under the regulatory approach to minimum contacts that *Shaffer* properly recognized *Shoe* as adopting, this means identifying what kinds of contacts allow a forum to tell a person that she is subject to that forum's regulatory authority for things she does outside the forum's borders.

#### 4. General Jurisdiction, Like All Forms of Personal Jurisdiction, Is Based on the Forum's Interest in Regulating the Defendant's Conduct

The *Shaffer* test of "relationship among the defendant, the forum, and the litigation" was identified as the test for specific jurisdiction in *Helicopteros*, but this *Shaffer* language was *not* limited to any particular kind of minimum contacts reach by the *Shaffer* Court itself.<sup>157</sup> The *Shaffer* Court instead was summarizing how minimum contacts analysis had replaced territorial assumptions across the board. In setting aside *quasi-in-rem* jurisdiction, which, like general jurisdiction, is

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<sup>156</sup> Justice Sotomayor, to her credit, seems to be doing this. The guiding star for her in both specific and general jurisdiction situations seems to be a presumption that personal jurisdiction protects against only gross unfairness. She seeks roughly reciprocal fairness and takes into account the plaintiffs' need for a forum. *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746, 768 (2014) (reciprocal fairness); *id.* at 771 (no fundamental unfairness in having multiple general jurisdiction forums); *id.* at 773 (the plaintiff's need of a forum); *cf.* Transcript of Oral Argument at 54, *Daimler*, 134 S. Ct. 746 (No. 11-965) (advocating that the *Daimler* case be disposed of on the basis of the unreasonableness of the assertion of jurisdiction). While I disagree strongly with the expansive general jurisdiction results that would be allowed under Justice Sotomayor's approach and believe that her approach disregards important limits on state sovereignty that are inherent in proper minimum contacts analysis, I appreciate that Justice Sotomayor is trying to fit both general and specific jurisdiction into a common personal jurisdiction framework.

<sup>157</sup> The *Helicopteros* Court and the von Mehren and Trautman article upon which it relied were thus partly right and partly wrong in the way they approached general and specific jurisdiction. *See supra* notes 10–12 and accompanying text. They were right to identify two different types of jurisdiction. They were wrong to suggest that the test for general jurisdiction should be based on something other than the kind of litigation-related regulatory authority that underlies all minimum contacts analysis. As to the correctness of identifying two different types of jurisdiction, this is based on the reality that the two kinds of jurisdiction are factually different. In specific jurisdiction situations, the underlying factual actions that give rise to the cause of action occur in or are aimed at the forum. It is this direct impact upon the forum that creates forum regulatory legitimacy and the accompanying power to adjudicate. For general jurisdiction situations, on the other hand, the underlying factual actions that give rise to the cause of action occur outside the forum. Forum legitimacy to regulate that conduct is based on a defendant's affiliation with the forum so strong that the forum has potential regulatory control over the defendant wherever the defendant operates.

based on contacts with the forum that did not give rise to the cause of action, the *Shaffer* Court was not open to using some different test for assessing the constitutionality of such assertions of jurisdiction. The relationship between the defendant, the forum, and the litigation was the constitutionally required measuring test for *all* post-*Shoe* personal jurisdiction assertions.

Instead of seeing general jurisdiction as the antithesis of specific jurisdiction, both kinds of jurisdiction are variations on the same theme of the need to weigh the quality and nature of the defendant’s contacts against judicial obligations that the forum wishes to impose upon the defendant. There is no dichotomy between these two distinct “flavors” of personal jurisdiction. They both require courts to look at the defendant’s contacts with the forum and assess whether the kind of litigation exposure the forum wants to impose on the defendant is justified by the defendant’s forum contacts.

Litigation is never in the abstract but instead always comes in the form of particular suits. Under what we label general jurisdiction, therefore, it might be helpful to ask why the defendant should be exposed to the particular litigation that the plaintiff brings. This would compel focus upon the regulatory issues involved in all proper minimum contacts personal jurisdiction analysis. In many situations formerly and improperly labeled as general jurisdiction, we might find that the defendant’s contacts in the forum in fact relate or gave rise to the suit that the plaintiff has brought. For instance, for many breach of contract, business fraud, or infringement claims, when the plaintiff sues the defendant where it was “doing business,” this is often where the wrongful conduct occurred. The reason personal jurisdiction exists is not because the defendant had lots of contacts with the forum state but rather because this is the place where the cause of action arose.

Even when the cause of action did not arise in the forum, focusing on what the suit is about explains why (or whether) it would be fair to sue this defendant in this forum for that conduct. The focus moves from the artificial construct of thinking about suing a defendant for anything he did anywhere because of defendant contacts considered in isolation, to the more accurate and meaningful inquiry of why (or whether) it is fair for this forum to hold this defendant responsible for particular things he did elsewhere. The inquiry shifts from whether the defendant is present to whether the defendant’s forum contacts support the forum’s interest in the particular litigation. This shift in focus leads to the realization that the forum’s interest in a defendant’s foreign actions exists only if the forum would desire and be able to regulate that conduct. In short, general jurisdiction should be allowed to exist under Due Process only when the forum can apply its law extraterritorially to the defendant’s conduct.

### 5. Only the Defendant's True Home State Constitutionally Can Exercise General Jurisdiction Regulatory Power Over a Defendant

The extraterritorial regulatory power associated with general jurisdiction can be applied constitutionally only against those who are uniquely the forum's own. Justice Kennedy's arguments in *Nicastro* regarding jurisdiction as consensual submission, though misapplied in the specific jurisdiction context, have great force with regard to general jurisdiction.<sup>158</sup> A defendant who truly "submits" to the full authority of a sovereign is exactly in the kind of situation that justifies general jurisdiction authority. When a defendant has voluntarily and fully made the forum state its true home, it is not unfair for that state to hold that defendant responsible for conduct wherever it occurred. A natural person citizen is not merely an insider but a member of "the people" that constitute the ultimate source of a state's legal legitimacy. For corporations, the place of incorporation is the source of the corporation's legal existence, and source of legal protections, such as internal corporate affairs laws and other favorable legal provisions, which presumptively must be recognized by other states in our federal system. Common law notions of limiting personal jurisdiction over corporations to the state of incorporation may have been correct in identifying that location as the corporation's presumptively only true home.<sup>159</sup> While a corporation also might be called uniquely and truly at home at its principal place of business, this should depend on how strongly the defendant itself considers and established that place as its sole headquarters.<sup>160</sup> The idea of such true and voluntarily selected home as the only place(s) where general

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<sup>158</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (describing the form of general jurisdiction approved in *Goodyear* as a "general submission to a State's powers").

<sup>159</sup> See, e.g., Edward Quinton Keasbey, *Jurisdiction over Foreign Corporations*, 12 HARV. L. REV. 1 (1898) (discussing this understanding, considering that it might be possible for a corporation also to have a domicile where it establishes its headquarters, but rejecting all-purpose jurisdiction based on more limited doing of business outside the state of incorporation).

<sup>160</sup> Whether a defendant can have more than one true home may be fairly debated. It is possible, even for individuals, to be held responsible in more than one state for things like "home" taxation obligations or civic obligations based on multistate residency. But the idea of a single and unique domicile for individuals has persisted in the law for good reason. Marital domiciles and decedents' domiciles capture the kind of unique intentional affiliation that I think alone can justify general jurisdiction. Corporations properly may be held judicially accountable in many places proportional to their insider affiliation for many things, but to be held accountable for everything they do everywhere would seem to require a deliberate, all-purpose affiliation akin to the individual's domicile. Place of incorporation seems to me preliminarily the best fit, but I am open to arguments also focusing on something like the European "seat" or United States principal place of business, based on establishing a headquarters.

jurisdiction is permissible may be even more restrictive than the “essentially at home” test the *Daimler* Court has embraced.<sup>161</sup> If so, that would be appropriate for a regulatory power that potentially reaches conduct anywhere in the world.

With unique affiliation comes the possibility that the state will hold its own accountable without regard to where they have acted. The state’s tax or tort laws alike can be applied against the forum’s own for earnings or actions elsewhere. But such power to apply law extraterritorially should not exist for any state except the one with which the defendant has deliberately and generally affiliated. Extraterritorial regulatory authority—which is what general jurisdiction makes available to courts able to exercise it—must be proportional to the level of availment of benefits and protections of forum law in which the defendant has engaged. Such all-purpose availment occurs only with the defendant’s true home state. That state is also therefore the only place general jurisdiction can be exercised constitutionally.

#### 6. A Forum Constitutionally Able to Exercise General Jurisdiction Is Not Required to Do So

Explaining when general jurisdiction constitutionally might be allowed does not require that a state actually authorize it. This was explicitly acknowledged in *Perkins*.<sup>162</sup> Lurking in most thinking about general jurisdiction, however, seems to be a contrary assumption that general jurisdiction constitutionally *must* be exercised. But that is not the way personal jurisdiction works. The Court in *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*<sup>163</sup> similarly emphasized that a prerequisite to personal jurisdiction is affirmative authorization by the sovereign that wishes to assert it. While the need for an explicit long arm statute can be questioned,<sup>164</sup> there is no doubting the larger principle that a state cannot be forced

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<sup>161</sup> *Cf.*, e.g., *Essentially at Home*, *supra* note 41, at 545–47 (arguing that some corporations should be found “at home” in more places than their states of incorporation and principal places of business).

<sup>162</sup> *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (“[W]e find no requirement of federal due process that either *prohibits* Ohio from opening its courts to the cause of action here presented or *compels* Ohio to do so.”) (emphasis in original).

<sup>163</sup> 484 U.S. 97, 104 (1987).

<sup>164</sup> *See Stanley E. Cox, Comment, Giving the Boot to the Long-Arm: Analysis of Post-International Shoe Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the “Minimum Contacts” Test*, 75 KY. L.J. 885, 910–22 (1987) [hereinafter *Giving the Boot*] (arguing that substantive law rather than long arm statutes express a state’s desire to reach defendant conduct and that long arm statutes often obscure rather than assist courts when determining jurisdictional reach).

to exercise personal jurisdiction when it does not think defendants have done anything for which they need to be sued.

So suppose a state abolished general jurisdiction, even though many defendants certainly exist who would be most at home in that state. Would this be unconstitutional? I do not see any reason why a state may not completely eliminate general jurisdiction. Although fundamentally wrong in his tradition-based approach to personal jurisdiction issues,<sup>165</sup> even Justice Scalia never insisted that all jurisdiction that traditionally existed must be implemented. In *Burnham*, he emphasized that states are perfectly free to abolish transient presence jurisdiction if they wish.<sup>166</sup> General jurisdiction is not required to be authorized.

With the specific jurisdiction forum always available as the obvious place of regulatory authority over a defendant, general jurisdiction is always surplusage. A forum that wants to protect its own from forum-shopping plaintiffs does not have to make its defendants available to such plaintiffs for their strategic advantage.<sup>167</sup> Abolishing general jurisdiction would be neither an irrational nor arbitrary policy choice. There is no *plaintiff* Due Process right to be assured a forum for suit in places where a cause of action did not arise.<sup>168</sup> Just because a forum could authorize general jurisdiction over its own, it does not have to.

And this is the way extraterritorial application of substantive law also works. A forum does not have to apply its laws extraterritorially to its defendants' foreign conduct. Nor does it automatically apply all the laws it could apply extraterritorially. It depends on the particular law involved. In the United States

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<sup>165</sup> See *supra* notes 117–24 and accompanying text.

<sup>166</sup> See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 627 (1990).

<sup>167</sup> An “at home” defendant is not always a popular defendant. For example, Professor Robert Sedler shared with me years ago that he was asked several times to help ensure suits against General Motors (“GM”) would remain in Michigan at a time when prior layoffs at GM increased the likelihood of an anti-GM jury pool for forum shopping-plaintiffs whose claims arose outside Michigan.

<sup>168</sup> It might be unconstitutional, however, for a forum where a cause of action arose to prevent suit there. Why a forum would ever want to do that would be very puzzling. If a cause of action truly arose in the forum, the defendant’s actions committed in or directed at that forum caused harm there. And when we say, “caused harm there,” we necessarily mean caused harm as defined by that forum’s substantive law. If the forum created a cause of action under its substantive law but then prevented those harmed under that law from being able to sue those who had harmed them there, that would seem inconsistent at best, and constitutionally arbitrary or discriminatory at worst. Such “short arm statutes” might be found unconstitutionally to deprive plaintiffs of interests the state’s substantive law had given them. See *Giving the Boot*, *supra* note 164, at 923–32.

federal sphere, there is in fact a presumption that the forum’s laws are not meant to apply extraterritorially.<sup>169</sup> Specific legislative intent is required. On the underlying Alien Tort Statute (“ATS”) claim in the *Daimler* litigation, for example, it is almost certain that United States ATS law could not have been applied even against a clearly “at home” California defendant, since the underlying suit was for actions the defendant committed in Argentina.<sup>170</sup>

To determine, then, whether so-called general jurisdiction actually should be exercised would require many forums to look at what the suit is about and whether the forum wishes to regulate such conduct. If no extraterritorial reach would be possible under the forum’s laws, that is a good argument that the case should be dismissed. This would be especially true if the forum’s long arm statute does not address general jurisdiction expressly, the doctrine having been allowed to exist in that state solely as a result of prior case law. Skepticism about general jurisdiction when the forum’s laws could not be applied extraterritorially would be doubly merited if that case law had its genesis in pre-*Shoe* “doing business” cases mainly designed to help forum plaintiffs sue out-of-state defendants.

If a jurisdiction explicitly authorizes general jurisdiction through its long arm statute, however, analysis might be more complicated. This could also be true under a long arm statute that explicitly authorizes jurisdictional reach to constitutional limits. On the one hand, the long arm statute would be saying, “assert jurisdiction as much as possible without regard to what the suit is about.” On the other hand, the forum may have no regulatory interest in that conduct. To the extent such statutes were adopted in the mistaken belief that a version merely of “doing business” could constitutionally support general jurisdiction, that motivation is unconstitutionally incorrect under the “true home” test embraced in *Goodyear* and *Daimler* and advocated in this article. The versions of general jurisdiction that the plaintiffs advocated in *Goodyear* and *Helicopteros* were for the benefit of in-state or in-country plaintiffs and were aimed at out-of-state (actually, out-of-country) defendants—not the forum’s own.<sup>171</sup> A forum’s long arm statute enacted to assist

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<sup>169</sup> See, e.g., *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2877–78 (2010); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

<sup>170</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (applying presumption against extraterritorial application of United States law to ATS claims). As the *Daimler* Court noted, “[r]ecent decisions of this Court . . . have rendered plaintiffs’ ATS claim[] infirm.” *Daimler AG v. Bauman*, 134 S. Ct. 746, 762–63 (2014) (citing *Kiobel*, 133 S. Ct. 1659).

<sup>171</sup> *Daimler* involved both foreign defendants and foreign plaintiffs, with the foreign plaintiffs attempting to grab United States law for foreign conduct.

insider plaintiffs in grabbing out-of-staters cannot accomplish that goal through the limited kind of general jurisdiction constitutionally permitted post-*Daimler*. Accordingly, any such long arm statute might profitably be revised, re-construed, or perhaps even struck and ignored (because of its intention to reach out in an unconstitutional manner). Long arm construction being solely a matter of state law, once a state understands that a so-called general jurisdiction long arm will not assist in-state plaintiffs to obtain jurisdiction over out-of-state defendants, I would expect at least some legislatures or judges to readjust their jurisdictional authorizations.

Assuming a state nevertheless wishes to implement its general jurisdiction long arm authorization whenever constitutionally possible, how would this work when the state also has no desire to apply its law extraterritorially to the defendant's conduct at issue in the litigation? The only test that makes sense remains one tied to the forum's potential to apply its law extraterritorially to the defendant's conduct. It is in this manner that personal jurisdiction may sometimes not be the same as choice-of-law.<sup>172</sup> Personal jurisdiction measures the *potential* to apply forum law to the defendant's conduct. Actual choice-of-law rules, however, may end up applying a different jurisdiction's law to the conduct. Under the general jurisdiction scenario contemplated here, the state would have personal jurisdiction legitimacy to hear the case because the defendant was so much the forum's own that the forum could have applied its substantive law extraterritorially to the defendant's conduct elsewhere. But because the forum chooses not to apply that substantive law, even though it still wishes to hear the case, the forum would have to apply some other jurisdiction's law. That law necessarily would have to be the law of a forum that would have had specific jurisdiction over the case.

This may appear at first blush to be a version of general jurisdiction premised on the idea that the forum is constitutionally obligated to make defendants available for others' benefit. But that is not the case. Under minimum contacts rationale, the forum is never compelled by any other jurisdiction's interests to grant general jurisdiction over its own. Instead, the decision whether to authorize general jurisdiction is always the forum's. This means that the defendant, who is the forum's own, is always in a position to try to persuade his state, through change of its general jurisdiction default authorizations, that such power should not be authorized. If the forum instead says, "No, we want you to be held accountable, even if not under our own substantive law, for what you have done elsewhere," that

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<sup>172</sup> See also *supra* note 141 (discussing similar differences between the two doctrines).

is still a legitimate regulatory decision justified by the defendant’s deliberate decision to make this state its true home.

In the end, it may not matter much what law the forum claims in name to apply to a general jurisdiction defendant’s conduct. The power to regulate means that whatever law the forum applies to the defendant’s conduct is that jurisdiction’s law, justified by that jurisdiction’s connections with the defendant. The legitimacy of general jurisdiction is found in the forum’s right to regulate its own. When the Supreme Court finally recognizes this, it will be able to provide the missing “why” to the limits it correctly has imposed on general jurisdiction reach.