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OF McINTYRE AND GOODYEAR DUNLOP TIRES*

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## The Meaning of Essentially at Home in Goodyear Dunlop

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## THE MEANING OF “ESSENTIALLY AT HOME” IN *GOODYEAR DUNLOP*

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Dorothy had it mostly right: There are few places like home. This, I believe, is the most significant takeaway from the Supreme Court’s recent decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>1</sup> A unanimous Court rejected an attempt by the North Carolina state courts to assert general jurisdiction<sup>2</sup> over three foreign tire manufacturers charged with responsibility for a bus accident in France.<sup>3</sup> Casting doubt over a large body of lower court decisions that found mere systematic commercial activity in the forum sufficient to establish general jurisdiction,<sup>4</sup> the Court appeared to declare that defendants are not subject to general jurisdiction unless they are “essentially at home” in the forum.<sup>5</sup>

*Goodyear Dunlop* was, on its facts, a very easy case. Defendants’ indirect contacts with the forum would have probably been insufficient even to establish

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1. 131 S. Ct. 2846 (2011).

2. General jurisdiction refers to the authority of a court to assert personal jurisdiction over a defendant regardless of whether the cause of action has any connection to the forum. Specific jurisdiction, in contrast, refers to the authority that a court has to assert personal jurisdiction over a particular claim connected to the forum. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

3. *Goodyear*, 131 S. Ct. at 2580–51.

4. See, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1074 (9th Cir. 2003) *reh’g granted* by 366 F.3d 789 (9th Cir. 2004), and *vacating as moot* by 398 F.3d 1125 (9th Cir. 2005) (finding general jurisdiction over defendant based on maintenance of website and solicited sales to forum residents); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996) (regular sale to forum residents plus in-state visits to dealers and customers supports general jurisdiction); *Rittenhouse v. Marby*, 832 F.2d 1380, 1390 (5th Cir. 1987) (defendant’s operation of in-state office one day per week subjects it to general jurisdiction); *Provident Nat’l Bank v. Cal. Fed. Sav. and Loan Ass’n*, 819 F.2d 434, 438 (3d Cir. 1987) (establishing general jurisdiction on the basis of depositor’s resident in forum and dealings with a local bank); *Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) (basing general jurisdiction on substantial sales to forum residents).

5. *Goodyear*, 131 S. Ct. at 2851.

*specific* jurisdiction over claims arising from those contacts.<sup>6</sup> The lower court's finding of general jurisdiction over a largely *unrelated* cause of action was thus deeply flawed.<sup>7</sup> Much of what the Supreme Court offered to guide future cases is, therefore, dictum and raises as many questions as it answers. Nonetheless, I believe that the case will prove to be one of the wisest and most consequential jurisdictional decisions in recent years.

General jurisdiction over an out-of-state defendant serves little or no legitimate purpose. A plaintiff can always pursue a defendant in the defendant's home forum<sup>8</sup> and, in most cases, can proceed where the claim arose.<sup>9</sup> Allowing a plaintiff additionally to pursue a defendant wherever it regularly conducts business opens the door to flagrant forum shopping and invites difficult choice-of-law problems. Although *Goodyear Dunlop* leaves many questions unanswered, its apparent constriction of general jurisdiction thus represents a positive development. This Article will attempt to provide guidance to courts attempting to construe the "essentially at home" standard and suggest that it represents a sound and workable basis to assess the limits of general jurisdiction.

## I. THE *GOODYEAR DUNLOP* DECISION

The case arose out of a bus accident outside of Paris that injured several members of a soccer team from North Carolina.<sup>10</sup> The plaintiffs alleged that a defective tire, manufactured in Turkey by a Goodyear subsidiary and distributed by other Goodyear subsidiaries, was a cause of the accident.<sup>11</sup> The plaintiffs brought suit in a North Carolina state court against Goodyear Dunlop and three of its foreign subsidiaries.<sup>12</sup> The North Carolina Youth Soccer Association was also named as a defendant, thereby preventing removal to federal court.<sup>13</sup>

6. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (plurality opinion) (manufacturer of a machine sold in the forum by a third party not subject to personal jurisdiction for a claim arising from the use of the machine in the forum).

7. See *Goodyear*, 131 S. Ct. at 2851–52 (citing *Brown v. Meter*, 681 S.E.2d 382, 384, 388, 392–94 (N.C. Ct. App. 2009), *rev'd sub nom. Goodyear*, 131 S. Ct. 2846) (discussing case history and connection with North Carolina).

8. See, e.g., *Planning Group of Scottsdale, L.L.C. v. Lake Mathews Props., Ltd.*, 246 P.3d 343, 346 (Ariz. 2011) (citing *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)); *Follette v. Clairol, Inc.*, 829 F. Supp. 840, 846 (W.D. La.) (general jurisdiction over corporation should be limited to place of incorporation or principal place of business), *aff'd*, 998 F.2d 1014 (5th Cir. 1993).

9. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (specific jurisdiction is permitted "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum").

10. *Goodyear*, 131 S. Ct. at 2851.

11. *Id.* at 2850–52.

12. *Id.* at 2850.

13. See Amended Complaint, *Brown v. Meter*, 681 S.E.2d 382 (N.C. Ct. App. 2009) (No. 05 CVS 1922), *rev'd sub nom. Goodyear*, 131 S. Ct. 2846. The original complaint named only the several soccer organizations responsible for organizing the travel and alleged that as joint venturers, they were all responsible for the driver's negligent operation of the bus. See Complaint at ¶¶ 5–8, 10, 681 S.E.2d 382 (No. 05 CVS 1922). Plaintiffs alleged that an agent of the joint venture

The three foreign subsidiaries moved to dismiss for lack of personal jurisdiction.<sup>14</sup> The trial court denied the motion without citing a single case,<sup>15</sup> finding jurisdiction supported by several factors:

1. The tire contained information written in English, and was approved for sale in the United States.<sup>16</sup>
2. In the three year period from 2004 through 2007, several thousand tires manufactured by the defendants were shipped into North Carolina, “although not by the original manufacturer.”<sup>17</sup>
3. The defendants, “on a continuous and systematic basis caused tires to be sent into the United States for sale, and knew or should have known that some of those tires were distributed for sale in North Carolina” by their U.S. parent, Goodyear-Dunlop.<sup>18</sup>

The court found that the quantity of tires shipped into the state supported general jurisdiction, but it also found that “the cause of action . . . [was] closely related to the contacts with the defendants” and that “North Carolina ha[d] a substantial interest in allowing its citizens a forum.”<sup>19</sup>

The state appellate court affirmed in an only slightly better crafted opinion.<sup>20</sup> Without even citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>21</sup> the only general jurisdiction decision from the Supreme Court in the last fifty years,<sup>22</sup> the court determined that general jurisdiction was supported by defendants’ continuous and systematic contacts with North Carolina.<sup>23</sup> Although the court concluded that the cause of action here was *not* related to defendants’ contacts with the state,<sup>24</sup> it relied on Justice Brennan’s concurrence in *Asahi*

distracted the driver by “animated conversation,” and that this distraction caused the accident. *Id.* at ¶ 51. The Goodyear defendants were subsequently added by amended complaint. Amended Complaint, *supra*.

14. *Brown*, 681 S.E.2d at 385, ¶ 2.

15. *Id.* at 385–87.

16. *Id.* at 385, ¶¶ 4–5.

17. *Id.* at 385, ¶¶ 6–8. Allegedly, 5,906 tires manufactured by Goodyear Lastikleri T.A.S., the Turkish subsidiary, 33,923 tires manufactured by the French subsidiary, and 6,402 tires manufactured by the Luxembourg subsidiary were sent into the state. *Id.*

18. *Id.* at 386, ¶¶ 10–13.

19. *Id.* at 386–87, ¶¶ 19–22.

20. *See id.* at 382.

21. 466 U.S. 408 (1984).

22. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011) (“In only two decisions postdating *International Shoe* . . . has this Court considered whether an out-of-state corporate defendant’s in-state contacts were sufficiently ‘continuous and systematic’ to justify the exercise of general jurisdiction over claims unrelated to those contacts . . .” (citing *Helicopteros*, 466 U.S. 408; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952))).

23. *Brown*, 681 S.E.2d at 394–95.

24. *Id.* at 388.

*Metal Industry Co. v. Superior Court*<sup>25</sup> in finding sufficient contacts to support jurisdiction because defendants had placed their tires in the “stream of commerce” with “the expectation that they would be purchased in the forum state.”<sup>26</sup> The court thus failed to recognize that *Asahi* was a case about specific jurisdiction that arose directly from the failure of the defendant’s product in the forum.<sup>27</sup> If a first-year law student had written that answer on my Civil Procedure final exam, I would have had a hard time giving it a passing grade.<sup>28</sup>

Justice Ginsburg, writing for a unanimous Court, had little difficulty in concluding that the defendants’ contacts with the forum fell “far short” of the level of contacts necessary to sustain its assertion of jurisdiction over “claims unrelated to anything that connects them to the State.”<sup>29</sup> Noting that the lower court had “elided the essential difference between” specific and general jurisdiction,<sup>30</sup> the Court found the defendants’ contacts to be no more significant than in *Helicopteros*, in which the defendant *directly* engaged in far more substantial economic activity in the forum: the defendant there had bought its entire fleet of helicopters, trained its pilots, and negotiated in the forum state the terms of the transaction that led to plaintiffs’ injury.<sup>31</sup> “We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners’ tires sporadically made in North Carolina through intermediaries.”<sup>32</sup>

25. 480 U.S. 102 (1987).

26. *Brown*, 681 S.E.2d at 389–90 (quoting *Asahi*, 480 U.S. at 119 (Brennan, J., concurring)).

27. *Asahi*, 480 U.S. at 105.

28. The court’s confusion extended to its use of North Carolina precedent. In all of the state court cases cited, either the claim arose from the use of the defendant’s product in the forum, see for example, *Carswell Distrib. Co. v. U.S.A.’s Wild Thing, Inc.*, 468 S.E.2d 566, 568 (N.C. Ct. App. 1996) (distributor brought action for economic injury in North Carolina caused by defective boats sent to plaintiff in North Carolina); *Cox v. Hazelock, Ltd.*, 411 S.E.2d 640, 643 (N.C. Ct. App. 1992) (plaintiff injured by water pressure sprayer in North Carolina); *Warzynski v. Empire Comfort Sys., Inc.*, 401 S.E.2d 801, 805 (N.C. Ct. App. 1991) (plaintiff injured in North Carolina by a gas heater); *Bush v. BASF Wyandotte Corp.*, 306 S.E.2d 562, 563 (N.C. Ct. App. 1983) (injury to plaintiff in North Carolina by defendant’s defective product); *Hankins v. Somers*, 251 S.E.2d 640 (N.C. Ct. App. 1979) (defendants charged with stealing North Carolina plaintiff’s art concept and selling the art in North Carolina), or the defendant had sent its product directly into the forum and had not simply inserted the product into the stream of commerce, see for example, *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632–33 (N.C. Ct. App. 1977) (defendant’s direct sale of over \$50,000 in coins to forum residents supported general jurisdiction).

29. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)). The Court refused to consider whether the corporate relationships between Goodyear USA and its foreign subsidiaries provided additional support for jurisdiction over the subsidiaries because plaintiffs failed to assert that argument in a timely fashion, and they had therefore waived that argument pursuant to Supreme Court Rule 15.2. *Id.*

30. *Id.* at 2855.

31. *Id.* at 2856 (citing *Helicopteros*, 466 U.S. at 416).

32. *Id.*

That unassailable conclusion would have been sufficient to dispose of the case, and technically, that is the only "holding" of the decision.<sup>33</sup> But the opinion goes further, and therein lies its significance. The Court also found the defendants' contacts to be well short of those present in *Perkins v. Benguet Consolidated Mining Co.*,<sup>34</sup> the only Supreme Court decision to sustain the exercise of general jurisdiction over an out-of-state defendant.<sup>35</sup> The defendant in *Perkins* was a Philippine corporation that had moved its business to Ohio during the Japanese occupation of the Philippines.<sup>36</sup> The Court sustained Ohio's exercise of general jurisdiction over the defendant for a claim not substantially related to any activity in Ohio.<sup>37</sup> Justice Ginsburg's opinion in *Goodyear Dunlop* notes that "[u]nlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina."<sup>38</sup>

That observation on its own may have simply reflected the obvious fact that Ohio had a much stronger jurisdictional claim in *Perkins*, which the Court described as "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum."<sup>39</sup> If a defendant is at home in the forum, that is a *sufficient* connection to support general jurisdiction.<sup>40</sup> But Justice Ginsburg further appears to suggest that general jurisdiction is constitutionally permissible *only* in a situation like that in *Perkins*: "A court may assert general jurisdiction over foreign (sister-state or foreign-country) 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."<sup>41</sup> She doesn't say that this is the only

33. Cf. Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown* (August 29, 2011), <http://ssrn.com/abstract=1919208> (arguing that the decision is amenable to radically different interpretations).

34. 343 U.S. 437 (1952).

35. *Goodyear*, 131 S. Ct. at 2857 (citing *Perkins*, 342 U.S. 437, 447–48 (1952)).

36. *Perkins*, 342 U.S. at 447–48. The president, who was also the general manager and principal shareholder of the corporation, had a farm in the Ohio town where the company was relocated. Hoffheimer, *supra* note 33, at 17–18 & n.55.

37. *Perkins*, 342 U.S. at 448. But see Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 124 (arguing that the claims asserted for unpaid dividends and damages flowing from the failure to issue stock certificates were related to defendant's corporate activities in Ohio). Cf. Hoffheimer, *supra* note 33, at 19 n.61 (arguing that Ohio could have exercised personal jurisdiction on the basis that "[t]he corporate officers authorized to perform the duties were in Ohio; corporate funds were in Ohio; and an Ohio bank served as transfer agent for shares in the corporation").

38. *Goodyear*, 131 S. Ct. at 2857.

39. *Id.* at 2856 (quoting *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)) (internal quotation marks omitted).

40. See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 633 (1988) [hereinafter Twitchell, *The Myth*] ("[G]eneral jurisdiction is almost always available at a defendant's 'home base.'").

41. *Goodyear*, 131 S. Ct. at 2851 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

circumstance in which general jurisdiction is permitted, but that is the clear implication. In other words, that level of activity is not simply sufficient, it is necessary.

Notwithstanding the Court's citation of *International Shoe* for that proposition, the *International Shoe* decision simply states that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of actions arising from dealings entirely distinct from those activities."<sup>42</sup> The "essentially at home" language is new, and neither of the two cases cited by *International Shoe* suggest the need for home-like contacts.<sup>43</sup> Indeed, as far as I can tell, the essentially at home standard does not appear in any prior federal or state judicial decision.<sup>44</sup>

This constraint, however, aligns the Court with many academic commentators, including myself, who have advocated limiting significantly the operation of general jurisdiction.<sup>45</sup> It is also consistent with international consensus: Article 2 of the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments permits general jurisdiction over member-state defendants only in their state of domicile,<sup>46</sup> and the draft Hague Convention on International Enforcement of Judgments would have prohibited

42. *Int'l Shoe*, 326 U.S. at 318 (citing *Mo., Kan. & Tex. Ry. Co., v. Reynolds*, 255 U.S. 565 (1921); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (Ct. App. N.Y. 1917)).

43. In *Reynolds*, jurisdiction was sustained on the basis of a Kansas corporation's appointment of an agent in the forum for receipt of service of process, *see Reynolds v. Mo., Kan. & Tex. Ry. Co.*, 228 Mass. 584, 588 (1917), and in *Tauza*, jurisdiction was sustained on the basis that the existence of the defendant's sales office, with seven desks and employees, in the forum constituted "doing business." *Tauza*, 115 N.E. at 916–17.

44. A Westlaw search for "essentially at home" yields no jurisdiction cases decided prior to *Goodyear*. Professor Hoffheimer suggests the possibility that it was appropriated from the Ninth Circuit decision in *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125 (9th Cir. 2002). Hoffheimer, *supra* note 33, at 43 n.157 ("for general jurisdiction a defendant must not only enter the house but [sit] down and [make] itself at home" (quoting *Glencore Grain*, 284 F.3d at 1125) (internal quotation marks omitted)).

45. *See, e.g.*, Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 726 (1988) [hereinafter Brilmayer, *General Jurisdiction*]; Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 161–63 (2001); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 256 (1991); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987) [hereinafter Stein, *Styles of Argument*]; Twitchell, *The Myth*, *supra* note 40, at 676; von Mehren & Trautman, *supra* note 2, at 1144. Professor Twitchell subsequently professed a change of heart in a later article, in which she was prepared to extend general jurisdiction to states in which defendants are doing business through continuous and systematic forum activities. *See Mary Twitchell, Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001) [hereinafter Twitchell, *Doing Business*].

46. LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, *CIVIL PROCEDURE: THEORY AND PRACTICE* 211–12 (3d ed. 2009).

signatories from exercising jurisdiction based on a defendant merely doing business in the forum.<sup>47</sup>

Assuming that the Court intends to permit the exercise of general jurisdiction over out-of-state corporations *only* when they are “essentially at home” in the forum, courts must flesh out what that means. What are the attributes of being “at home” that justify jurisdiction? And what is the meaning of “essentially”? Presumably, that is something short of “actually” being at home, but how short? Can a large corporation be essentially at home in numerous states, or should that phrase be understood only in reference to a situation like *Perkins*, in which the forum was, for all practical purposes, the only place that defendant could be sued?<sup>48</sup>

In order to answer these crucial questions, we have to understand why general jurisdiction is constitutionally justified.

## II. FROM PRESENCE TO CONTACTS: IN SEARCH OF A THEORY OF JURISDICTIONAL JUSTIFICATION

The law of personal jurisdiction was fundamentally altered by *International Shoe*<sup>49</sup> and the ramifications of that change are still being worked out, sixty-seven years later. As the Court replaced a doctrine built on physical presence<sup>50</sup> with one based on minimum contacts,<sup>51</sup> it never adequately developed the conceptual underpinnings of the new foundation. This failure has caused profound confusion in both specific and general jurisdiction.<sup>52</sup> Specific jurisdiction, at least, has been the subject of numerous Supreme Court decisions since *International Shoe*.<sup>53</sup> General Jurisdiction, by sharp contrast, was the subject of only two decisions<sup>54</sup> prior to *Goodyear Dunlop*, three if you count

47. See Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 338–39 (2003); Juenger, *supra* note 45, at 161–63.

48. Cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984) (emphasizing that in *Perkins*, “Ohio was [Benguet Mining’s] principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State”).

49. 326 U.S. 310 (1945).

50. See *Pennoyer v. Neff*, 95 U.S. 714, 723 (1878).

51. See *Int’l Shoe*, 326 U.S. at 316.

52. See Juenger, *supra* note 45, at 155–56 (“[W]e still don’t know when states may assert dispute-blind jurisdiction over nonresident corporations.”).

53. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

54. See *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).



*Burnham*.<sup>55</sup> This lack of appellate guidance has allowed a cacophony of disparate approaches in the lower courts.<sup>56</sup>

*Pennoyer v. Neff* constitutionalized the law of personal jurisdiction.<sup>57</sup> It held that assertions of jurisdiction by courts that lacked legitimate authority over the defendant violated the Due Process Clause.<sup>58</sup> This core holding was just reaffirmed by *J. McIntyre*: Due process demands a legitimate justification for the state's exercise of coercive authority over defendants.<sup>59</sup>

The sole measure of constitutional legitimacy in *Pennoyer* was the physical presence of the person or property of the defendant in the forum at the time that jurisdiction was asserted.<sup>60</sup> If the defendant was then served, or his property then attached, the court's authority was considered legitimate and passed constitutional muster.<sup>61</sup> *Pennoyer* made no distinctions between cases related and unrelated to the forum.<sup>62</sup> If the defendant was present and served, he was subject to the state's judicial authority for all purposes.<sup>63</sup> If the defendant was absent, his prior wrongdoing in the forum was irrelevant.<sup>64</sup> Thus, the distinction between general and specific jurisdiction is an artifact of the post-*International Shoe* model.<sup>65</sup>

As Professor Kurland demonstrated, the relatively simple *Pennoyer* model based on physical presence was destabilized by the rise of the corporate form.<sup>66</sup> In order to determine whether an individual defendant was present in the state at the time it was served with process, the court needed only to look at where he was standing when process was served.<sup>67</sup> Corporations, however, have no feet. They own property, employ agents, and engage in activity. But the person of a corporation is not embodied in any physical form comparable to an individual's

55. *Burnham v. Superior Court*, 495 U.S. 604 (1990) (upholding general jurisdiction over an individual on the basis of service of process in the state).

56. See Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 809–10 (2004) (describing six basic approaches jurisdictions employ); Twitchell, *The Myth*, *supra* note 40, at 629 (analyzing the conceptual confusion surrounding the meaning and scope of general jurisdiction).

57. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1878).

58. See *id.* at 733.

59. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) ("[W]hether a judicial judgment is lawful depends on whether the sovereign has authority to render it."); cf. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011) ("A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

60. *Pennoyer*, 95 U.S. at 722.

61. *Id.* at 733–34.

62. *Id.* at 722.

63. *Id.*

64. *Id.* at 733.

65. See Twitchell, *The Myth*, *supra* note 40, at 614–15.

66. Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla*, 25 U. CHI. L. REV. 569, 577–86 (1958).

67. See *id.* at 574 (describing the bases of personal jurisdiction over individuals).

body.<sup>68</sup> Accordingly, to ask whether the person of the corporation was physically present in the state at the time of service of process is something of a category mistake.

This category mistake was recognized by *International Shoe*:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far “present” there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.<sup>69</sup>

Unfortunately, the Court brought considerably less clarity to the question of the criteria of jurisdictional reasonableness. The Court’s discussion of what we now deem general jurisdiction was particularly sparse, noting that there have been “instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on [unrelated] causes of action.”<sup>70</sup> But what about those operations justified such expansive authority?

The Court hinted at a few pertinent criteria. First, “[a]n ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.”<sup>71</sup> As I,<sup>72</sup> and others,<sup>73</sup> have argued elsewhere, notwithstanding its prominent place in the *International Shoe* decision, convenience has had relatively little traction in subsequent Court decisions. The Court has made clear that a convenient forum does not thereby acquire jurisdiction absent other significant connections

68. See *id.* at 577 (explaining that a corporation’s presence is thought of as fictive).

69. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (citations omitted).

70. *Id.* at 318.

71. *Id.* at 317 (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.)).

72. See Stein, *Styles of Argument*, *supra* note 45, at 704–05; Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 427–28 (2004) [hereinafter Stein, *Regulatory Precision*] (marginal burden of litigation created by an inconvenient forum is trivial in relation to overall burden of litigation).

73. See Brilmayer, *General Jurisdiction*, *supra* note 45, at 730 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

between the defendant and the forum.<sup>74</sup> And, the inconvenience of the forum will rarely divest a court of authority in cases in which defendants do have significant connections with the forum.<sup>75</sup>

However, convenience might be thought to have more relevance to questions of general jurisdiction than specific. The Court's explicit comparison with litigation in the corporate home strongly suggests that a distinctive feature of being at home is that it is convenient to litigate there, even when the litigation is unconnected to the forum.<sup>76</sup> Accordingly, an appropriate criterion for whether a corporate defendant is essentially at home in the forum might be whether its activities in the forum are so pervasive as to make it no more burdensome to litigate an unrelated claim in the forum than in the principal place of business. Presumably, under such a criterion, we could look to the location of business records and executives who would be responsible for participating in and overseeing the litigation.

I don't want to dismiss such a criterion out of hand, but I think our intuitions are ultimately not so different than in cases of specific jurisdiction. Imagine a corporation headquartered in Camden, New Jersey (yes, there are still one or two). Camden is two miles from the center of Philadelphia. It is serviced by the Philadelphia airport, and many employees who work there live in Pennsylvania. Assume that the corporation conducts some regular, but limited, sales in Pennsylvania, so that there is "purposeful availment" there. However, they have been sued in Pennsylvania for claims arising in California, completely unrelated to their Pennsylvania activity. Would any court find the company's Pennsylvania activity sufficient to justify general jurisdiction simply because it would be no more burdensome for the company to litigate in Philadelphia than in Camden? I think not.

That is not to say that convenience is not a necessary condition for the operation of general jurisdiction, but I don't think it is appropriate to make it the touchstone. Missing from the convenience justification is an account of Pennsylvania's authority. What gives the state the authority to act coercively on the defendant? *International Shoe* suggested two possible justifications, and both are problematic as applied to general jurisdiction: jurisdiction represents a quid pro quo for the benefits that a defendant has received in availing itself of its connections with the state,<sup>77</sup> and the commission of a single act in a state can

74. See *World-Wide Volkswagen*, 444 U.S. at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 251, 254 (1958)).

75. *Hanson*, 357 U.S. at 251. But see *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114–16 (1987) (determining that the burden to the Japanese manufacturer of litigating in California, coupled with lack of state interest in the controversy, rendered jurisdiction constitutionally inappropriate).

76. See *Int'l Shoe*, 326 U.S. at 317 (citing *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

77. *Int'l Shoe*, 326 U.S. at 319 (exercising the privilege of doing business justifies subjecting a defendant to the burden of defending a lawsuit).

subject a defendant to jurisdiction “because of [its] nature and quality and the circumstances of [its] commission.”<sup>78</sup>

I have elsewhere argued that this later justification focusing on the circumstances of the single bad act is based on a state’s regulatory interest in the underlying controversy.<sup>79</sup> States normally have authority over absent defendants to redress harm caused by the defendant’s activity within or outside of the forum.<sup>80</sup> Such authority to assert specific jurisdiction can be easily squared with the operation of a federal system: a state’s assertion of authority will rarely be considered extravagant when it is ultimately grounded in a legitimate desire to protect persons or property within its borders, at least when defendant has volitionally affiliated itself with the state.<sup>81</sup> And, a limited number of states will be in a position to adjudicate such related claims.

In the case of general jurisdiction, that regulatory justification is, by definition, off the table. The forum state is asserting a kind of extra-territorial regulatory authority: the authority to hold the defendant accountable for actions that it took outside the state and that had no significant impact within the state.

It is possible that one could develop a theory of general jurisdiction based on the level of benefit that a defendant has received from the forum: general jurisdiction would be justified under such an approach when the defendant has availed itself of massive forum benefits.<sup>82</sup> I don’t find such a justification compelling as applied to specific jurisdiction,<sup>83</sup> and assessing an appropriate level of reciprocal benefits to justify general jurisdiction seems particularly arbitrary. How much benefit must a defendant receive before it is appropriate to impose the burden of general jurisdiction? Is there any necessary proportionality between the amount of benefit a defendant receives from continuous activities in the forum and the burden of defending all litigation there?<sup>84</sup>

Some scholars have asserted that general jurisdiction is appropriate whenever an out-of-state corporation has the same level of contacts, and thus receives the same level of benefits, as does an in-state corporation.<sup>85</sup> The

78. *Id.* at 318.

79. See Stein, *Styles of Argument*, *supra* note 45, at 699; see also Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85–86.

80. See, e.g., *Calder v. Jones*, 465 U.S. 783, 784–85 (1984) (sustaining personal jurisdiction in California over defendants who had libeled plaintiff from outside California).

81. See Stein, *Styles of Argument*, *supra* note 45, at 698 & n.48 (citing *Int’l Shoe*, 326 U.S. at 317, 319).

82. See Brilmayer, *General Jurisdiction*, *supra* note 45, at 733 (“On balance, the reciprocal benefits and burdens rationale provides the most satisfactory basis for the state’s exercise of coercive power.”).

83. Stein, *Styles of Argument*, *supra* note 45, at 734–38; accord, Twitchell, *Doing Business*, *supra* note 45, at 175.

84. See Twitchell, *Doing Business*, *supra* note 45, at 175.

85. See Brilmayer, *General Jurisdiction*, *supra* note 45, at 742 (“[T]he due process clause should permit general jurisdiction on the basis of activities when the defendant reaches the quantum

problem with this approach is that it compares apples and oranges. Just because a defendant might enjoy the same benefits as a domestic corporation does not mean that the burden of litigating there is equivalent. The defendant could still be treated as an outsider by the judge and jury,<sup>86</sup> and the multiplicity of forums with jurisdictional authority over such defendants exposes them to flagrant forum shopping.<sup>87</sup> Multiplicity creates a unique burden: being amenable to general jurisdiction in one place may be an appropriate burden; being amenable to general jurisdiction in multiple places can be oppressive. This approach also has the potential of expanding general jurisdiction to the lowest common denominator of contacts that the smallest domestic corporation has with the state. One could imagine that most Fortune 1000 companies have greater contact with all fifty states than the smallest corporation in those states. This represents a particularly poor measure of being essentially at home insofar as such contacts might be trivial compared to the defendant's home-state contacts.

I want to suggest an alternative understanding of essentially at home that is derived not so much from a quid pro quo theory as a citizenship-like affiliation. The touchstone of such a relationship, I suggest, should be whether the defendant would consider itself at home in the forum. This approach is based on the premise that defendants have a unique relationship with their home; the relative singularity of that relationship is at the core of its justification.

While we would resist allowing most states to control the behavior of persons outside their borders, we *are* comfortable with a citizen's home state asserting extraterritorial authority; the power of a state to tax out-of-state income<sup>88</sup> of a citizen or to regulate his extraterritorial behavior is well established.<sup>89</sup> Indeed, that kind of extraterritorial authority is a big piece of our understanding of the nature of citizenship. As a United States citizen, I owe an allegiance to the American government—it is sovereign in relation to me—

of local activity in which a purely local company typically would engage.”); Rhodes, *supra* note 56, at 888.

86. See Twitchell, *The Myth*, *supra* note 40, at 171 (“[U]nlike citizens or corporations based within the forum, [an out-of-state corporation] is often not ‘local’ in its own eyes or in the eyes of the community because its major economic ties are outside the boundaries of the state and it has strong ties to at least one other sovereign.”).

87. See *id.* (“If general jurisdiction is permitted to extend beyond the defendant's home base, plaintiffs may forum-shop among the various states where general jurisdiction is available, looking for the most favorable choice-of-law rule.”).

88. Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 5–6 (noting that domicile provides jurisdiction basis to tax income regardless of source: “Enjoyment of the privileges of residence in the State and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the cost of government” (quoting New York *ex rel* Cohn v. Graves, 300 U.S. 308, 312–13 (1937)) (internal quotation marks omitted)).

89. See *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); Brilmayer, *General Jurisdiction*, *supra* note 45, at 732. See generally I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. (forthcoming 2012) (on file with author) (analyzing expansive authority of states to regulate extraterritorial conduct of citizens).

regardless of my physical location. Thus, giving the home state plenary *judicial* authority over its citizens comports with a broader, universal authority that states normally possess over their citizens.<sup>90</sup>

The question, then, is whether other states with which defendant may be closely affiliated can legitimately assert that same kind of extraterritorial authority. As Lea Brilmayer has pointed out, there is a more compelling case for limiting the number of states that can assert extraterritorial legislative authority than those that can assert extraterritorial judicial authority.<sup>91</sup> It would obviously create systemic chaos and impose an intolerable burden on individuals for multiple governments to tax the same income, or to criminalize different conduct in the same place. The relative singularity of citizenship<sup>92</sup> represents an essential firewall against conflicting sovereign regulations of the same primary conduct.

A multiplicity of adjudicative jurisdictional authority does not generate the same level of systemic chaos.<sup>93</sup> Even though a defendant might be amenable to suit in a number of places, the defendant is typically subject to a single lawsuit by any given plaintiff. But giving a plaintiff an array of possible forums with general jurisdiction to pick from does generate a substantial level of systemic chaos and unfairness.

The poster-child for the cost of general jurisdiction is *Ferens v. John Deere Co.*<sup>94</sup> The plaintiff, a citizen of Pennsylvania, was injured by a John Deere combine harvester in Pennsylvania.<sup>95</sup> He, unfortunately, waited three years before filing suit.<sup>96</sup> As a result, his tort claim was time-barred in Pennsylvania, as well as in most other states.<sup>97</sup> The plaintiff, thus, chose to file suit in Mississippi, where the statute of limitations on his claim was six years, and where John Deere, a Delaware corporation with its principal place of business in Illinois, sold a lot of tractors.<sup>98</sup> Under the Supreme Court’s holding in *Sun Oil v. Wortman*,<sup>99</sup> Mississippi was constitutionally permitted to apply their own statute of limitations to any claim pending in their courts.<sup>100</sup> Deere did not challenge personal jurisdiction,<sup>101</sup> apparently concluding that its continuous and

90. See *Milliken v. Meyer*, 311 U.S. 457, 462–63 (1940); Brilmayer, *General Jurisdiction*, *supra* note 45, at 732 (“The state can extract these special responsibilities from its domiciliaries even when they are absent from the state . . .”).

91. See Brilmayer, *General Jurisdiction*, *supra* note 45, at 775–78.

92. Both individuals and corporations can maintain multiple citizenships. However, courts tend to confine the concept of “domicile” to a single place. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) (1971) (“[N]o person has more than one domicile at a time.”).

93. See Brilmayer, *General Jurisdiction*, *supra* note 45, at 778.

94. 494 U.S. 516 (1990).

95. *Id.* at 519.

96. *Id.*

97. *Id.*

98. *Id.* at 519–20.

99. 486 U.S. 717 (1988).

100. *Ferens*, 494 U.S. at 521 (citing *Ferens v. Deere & Co.*, 487 U.S. 1212 (1988)).

101. See Petition for Writ of Certiorari, *Ferens*, 494 U.S. 521 (No. 88-1512), 1989 WL 1174065.

systematic contacts with Mississippi rendered it subject to general jurisdiction there, a conclusion supported by a wealth of precedent.<sup>102</sup>

Having thus revived his claim by filing suit in Mississippi, the plaintiff then moved to transfer the case back to Pennsylvania pursuant to 28 U.S.C. § 1404(a).<sup>103</sup> Concurring in the plaintiff's assertion that the case had no meaningful connection to Mississippi and would be more appropriately adjudicated in Pennsylvania, the court transferred the case to Pennsylvania.<sup>104</sup> When the defendant moved to have the transferred case dismissed under the one-year Pennsylvania statute of limitations, the Supreme Court determined that the Pennsylvania transferee court was bound to apply the Mississippi transferor court's statute of limitations.<sup>105</sup> Plaintiff was thus able to have his cake and eat it too; he was permitted to litigate in his home forum, but appropriate Mississippi law.

From both a federalism and individual fairness perspective, the case is an unmitigated train wreck. Pennsylvania's authority to determine how long its causes of action are viable was displaced by Mississippi's assertion of judicial authority, and the defendant lost the case simply because the plaintiff had the power to pick one of the many fora in which John Deere was then amenable to general jurisdiction.<sup>106</sup>

One might be tempted to conclude that the real culprits in *Ferens* were either *Sun Oil*, which allowed Mississippi to apply their own statute of limitations,<sup>107</sup> and/or *Van Dusen v. Barrack*,<sup>108</sup> which mandated application of the Mississippi statute upon transfer.<sup>109</sup> There is no question that those cases exacerbated the problem, but neither of those doctrines would have mattered without general jurisdiction. Moreover, even in cases in which choice of law is less directly affected, general jurisdiction strains the rational allocation of authority in a federal system,<sup>110</sup> and it unbalances the scales of justice by giving the plaintiff the power to manipulate the outcome by picking a favorable forum. A handful of judicial districts across the country have become magnets for litigation against

102. See *supra* note 4 and accompanying text.

103. *Ferens*, 494 U.S. at 520.

104. *Id.*

105. *Id.* at 531–32 (explaining rationale for holding that Mississippi law applies).

106. See *id.* at 527 (reasoning that the plaintiff can already forum shop); cf. Brilmayer, *General Jurisdiction*, *supra* note 45, at 725 n.18 (discussing similar outcomes in other cases).

107. *Ferens*, 494 U.S. at 521 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988)).

108. 376 U.S. 612 (1964).

109. See *Ferens*, 494 U.S. at 523 (explaining the application of *Van Dusen*).

110. Cf. Maier & McCoy, *supra* note 45, at 252:

Once it is conceded that a forum has judicial jurisdiction, that forum unavoidably controls or determines the result in that case between the parties before it. Even if the forum court decides to “apply” a foreign state’s rule of law, the forum does not apply that law as an agent of the foreign state or as a surrogate for the foreign state’s courts. Rather, it makes its own “law” when it decides the case, using only for guidance the local law policies that the foreign state’s courts would apply if the case were being decided as a wholly domestic case in the foreign state.

large, interstate corporations because of their tendency to render large jury awards.<sup>111</sup> The more permissive the constitutional standards for the exercise of general jurisdiction, the more these problems arise.<sup>112</sup> Accordingly, as a matter of sound policy and fairness, there is a practical need to constrain general jurisdiction. And as long as the plaintiff is able to pursue a defendant in its home forum, there is little necessity for expanding the options to include multiple jurisdictions that have no connection to the underlying controversy.

Perhaps the most compelling case for a more expansive approach is in the case of a forum resident injured by a foreign defendant, the situation in *Goodyear Dunlop*.<sup>113</sup> Unlike a claim against a domestic defendant, the plaintiff does *not* have as easy of an option as simply traveling to another American forum to seek her remedy. Some scholars, notably Linda Silberman<sup>114</sup> and Mary Twitchell,<sup>115</sup> have suggested that providing general jurisdiction to *resident* plaintiffs based on a pervasive contacts approach would provide plaintiffs with an assured domestic remedy without exposing the defendant to excessive forum shopping by non-resident plaintiffs.

Although this approach might represent a pragmatic compromise, it is difficult to construct a principled justification, consistent with the rest of the Court’s jurisdictional approaches, for treating cases brought by in-state plaintiffs differently than claims brought by out-of-state plaintiffs. These are cases which, by definition, lack sufficient connection with the forum to qualify for specific jurisdiction. The only time general jurisdiction will be invoked is when the wrongful conduct and injury occurred elsewhere. The only nexus with the forum is plaintiff’s domicile. The Court has repeatedly emphasized that there must be a constitutionally appropriate relationship between the defendant and the forum, and the *plaintiff’s* connection to the forum does not serve to compensate for a defendant’s otherwise insufficient contacts.<sup>116</sup> The Court reemphasized this

111. See Alexander Lemann, Note, *Sheep in Wolves’ Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121, 121 n.4 and accompanying text (2011) (citing John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL’Y 143, 160–64 (2001); Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 499 (2000)).

112. See Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 385 (2001) [hereinafter Stein, *Frontiers of Jurisdiction*] (discussing general jurisdiction and the problems associated with forum shopping).

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

114. See Silberman, *supra* note 47, at 340–41.

115. See Twitchell, *Doing Business*, *supra* note 45, at 209–10 (citing Silberman, *supra* note 47, at 340–41).

116. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 412 n.5 (1984) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984); *Calder v. Jones*, 465 U.S. 783, 788 (1984)); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980). *But see Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1986) (prior dismissal of claim by resident plaintiff weakens the state’s interest in asserting jurisdiction over remaining foreign parties).



principle in *Goodyear Dunlop*.<sup>117</sup> And perhaps I betray my roots as a defense lawyer (and the spouse of a defense lawyer) by conceding that it doesn't really bother me that the plaintiffs in *Goodyear Dunlop* were forced to pursue their remedies for the injuries suffered in France in a French court. And I don't think I would have been any more troubled had the defendants conducted significantly greater activities in the forum. Not everyone gets to sue at home.

The other principal defense of general jurisdiction comes from those who view the doctrine as a necessary gap filler to accommodate the inadequacies of specific jurisdiction.<sup>118</sup> I share their view that the Court has unduly constrained specific jurisdiction,<sup>119</sup> and *Nicastro* only compounds the problem. I think Justice Ginsburg was right there as well.<sup>120</sup> Nonetheless, using general jurisdiction to fix inadequacies in specific jurisdiction strikes me as akin to setting one's house on fire if the radiators aren't working effectively. The harm from the fix far exceeds the benefit. In most cases where the plaintiff is unable to use specific jurisdiction, she has the option of traveling to the defendant's home state; she is not without a remedy. Moreover, it strikes me as particularly unrealistic to assume that a Court bent on constraining specific jurisdiction would be open to an expansive understanding of general, and these cases certainly bear that out.

But my support for a home-base approach to general jurisdiction goes beyond practical or policy-based reasons. There is something different about the authority that one's home state has toward members of its political community.

Let me offer an admittedly anecdotal and perhaps idiosyncratic personal observation. I work in New Jersey but live in Pennsylvania. Much of my extended family lives in New York and New Jersey, where I grew up. I know the New Jersey Turnpike like the back of my hand. I have continuous and systematic connections with most of the mid-Atlantic states. Yet when I return from visiting family and cross over the Delaware River into Pennsylvania, I feel a palpable sense of relief. Part of that comfort is, no doubt, attributable to my sense that my long journey is almost over (and that I no longer have to choose between driving 75 miles per hour or being run off the road by a sixteen wheeler). But there is something else, a sense that I have entered into a legal order that does not view me as an outsider. No cop is going to pull me over for

117. 131 S. Ct. at 2857 n.5 (general jurisdiction has "never been based on the plaintiff's relationship to the forum" (quoting von Mehren & Trautman, *supra* note 2, at 1137) (internal quotation marks omitted)).

118. See Borchers, *supra* note 37, at 129–30 ("[C]urrent specific jurisdiction doctrine contains several irrational elements, some of which make general jurisdiction an unpleasant necessity."); Twitchell, *Doing Business*, *supra* note 45, at 196–97 ("[T]he doctrine often operates in reality as something of a *specific* jurisdiction catchall . . . . What other cases have taken away, a practical use of doing-business jurisdiction can restore." (footnote omitted)).

119. See Borchers, *supra* note 37, at 130–32 (explaining the deficiencies of specific jurisdiction); Twitchell, *Doing Business*, *supra* note 45, at 195–96.

120. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2804 (2011) (Ginsburg, J., dissenting).

going five miles over the speed limit simply because I have out-of-state plates on my car. I still have almost an hour of driving left, but I am home.

I suspect that most citizens standing in the customs and immigration line upon return from international travel experience a comparable feeling of relief, even when they have traveled to other democratic states, and even when they were in no other sense glad to be home.

It is that sense of membership that differentiates my home state from other places that I have substantial connections with. My sense of belonging is not simply about having the privilege of voting, or driving, or owning property, or being in close proximity to my belongings (although all of those things contribute to and are consequences of Pennsylvania being my domicile). It is about perceiving, and having others perceive me as a member of their community.<sup>121</sup> This, I assert, is what ultimately justifies limiting general jurisdiction to places where the defendant is essentially at home. I cannot complain about the authority of my state to hold me accountable for my actions elsewhere. I will be treated as fairly here as anywhere else.

But how does that sense of "home" translate into determining when a corporate defendant is essentially at home in the forum? When I use my own sense of being at home as a measure of a corporation's, I run the risk of replicating the same kind of category mistake that rendered "presence" an unworkable measure of jurisdiction over corporations.<sup>122</sup> A corporation no more has a home, in the sense that a person does, than it has feet.<sup>123</sup> But I think there is an apt corporate analogue to the out-of-state discomfort that I experience: the notion of being an outsider to the legal community provides an appropriate measure of jurisdictional overreaching. The touchstone of the inquiry under this approach is to consider whether the judge or jury would view imposition of liability on the defendant to be an externality—a cost that would not be internalized by the forum community.

This account of general jurisdiction is similar to, but distinct from Lea Brilmayer's approach.<sup>124</sup> Brilmayer, in my view, comes as close to getting it right as any commentator. She recognizes the important distinction between "insiders" and "outsiders," but pegs her definition to the level of political participation and influence exerted in the forum state by the defendant.<sup>125</sup> I think this distinction misses the mark slightly for several reasons, as I have argued elsewhere.<sup>126</sup>

121. Cf. *Burnham v. Superior Court*, 495 U.S. 604, 640 n.14 (1990) (Brennan, J., concurring) (citing protection of unfairness to outsiders as the "*raison d'être* of various constitutional doctrines").

122. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (explaining the presence theory with respect to corporations).

123. See Hoffheimer, *supra* note 33, at 40 (corporations cannot have domiciles in the same sense as persons, since the concept of domicile focuses on presence and intent).

124. See Brilmayer, *General Jurisdiction*, *supra* note 45, at 742–43.

125. *Id.*

126. See Stein, *Frontiers of Jurisdiction*, *supra* note 112, at 381–82.

First, it is both over and under inclusive.<sup>127</sup> There are many corporations that have significant influence on political processes in many states<sup>128</sup>—particularly after *Citizens United*.<sup>129</sup> Yet, absent other affiliating circumstances, I don't think we would be prepared to say that their contacts were sufficient to sustain general jurisdiction, even under a "continuous and systematic" test,<sup>130</sup> let alone under one that asks whether the defendant is at home in the forum.<sup>131</sup> Conversely, some citizens of the forum, convicted felons or minors, for instance, may lack the ability to engage fully in the political life of the state, yet, they would nonetheless be at home in the forum and subject to general jurisdiction there.<sup>132</sup>

Second, there is a bit of a disconnect between democratic participation and litigation fairness. Brilmayer asserts that the corporation's political participation is a hedge against its being a non-citizen.<sup>133</sup> Brilmayer argues, "The basic inquiry must be whether defendant's level of activity rises to the level of activity of an insider, so that relegating the defendant to the political process is fair."<sup>134</sup> However, in litigation, a defendant is not relegated to the political process, it is relegated to the judicial process. A corporation's political activity or influence has little bearing on whether the judge and jury perceive it as a member of their community. Although one might argue that general jurisdiction is a quid pro quo for the corporation's participation in the political life of the forum, that is not the same as being an insider. The corporation would still feel disadvantaged, and may well be disadvantaged, by their outsider status in front of a jury that neither knew nor cared about the corporation's political influence. Indeed, it is precisely that out-of-stater animus that many forum shoppers seek to exploit.<sup>135</sup>

Finally, a theory based upon democratic theory seems unduly provincial, and fails to account for the jurisdictional claims of non-democratic regimes.<sup>136</sup> Should we view all jurisdictional claims by a monarch to be illegitimate simply because no one is able to engage in meaningful political participation? Should we support the monarch's assertion of general jurisdiction over any outsider who has the same negligible ability to participate in the political life of the monarchy?

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127. *See id.* at 382.

128. *See* Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1253 (1999).

129. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913 (2010) ("[T]he Government may not suppress political speech on the basis of speaker's corporate identity.").

130. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

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

132. *See* Stein, *Frontiers of Jurisdiction*, *supra* note 112, at 382.

133. *See* Brilmayer, *General Jurisdiction*, *supra* note 45, at 742.

134. *Id.*

135. *See supra* text accompanying notes 86–87.

136. *See* Stein, *Frontiers of Jurisdiction*, *supra* note 112, at 382.

### III. DETERMINING WHETHER A DEFENDANT IS “ESSENTIALLY AT HOME” IN THE FORUM

How then should courts measure whether a corporate defendant is “essentially at home” in the forum? Bright lines have not been a characteristic of personal jurisdiction since *International Shoe*, and I don’t want to pretend that this approach will completely simplify matters. However, the essentially at home formulation does begin to provide some standards to an otherwise largely ad hoc inquiry.<sup>137</sup> Let me suggest some pertinent factors derived from the principle that a defendant must perceive itself, and be perceived, as a member of the community:

1. *Physical presence matters.* *Goodyear Dunlop* should effectively prevent courts from finding general jurisdiction on the basis of business activity that is clearly conducted from out-of-state.<sup>138</sup> In *Helicopteros*, the Court held that mere purchases in the forum were insufficient.<sup>139</sup> Now, it appears that mere sales are insufficient as well.<sup>140</sup> This should certainly foreclose a finding of general jurisdiction based on the mere operation of a website that services residents of the forum, a development that has been roundly criticized by a number of commentators.<sup>141</sup>
2. *Litigation in the forum must be as convenient to the defendant as in any other forum unrelated to the litigation.* Although I earlier dismissed convenience as a sufficient condition of general

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137. Cf. Rhodes, *supra* note 56, at 829–32 (describing as “the *ipse dixit* approach,” the common tendency of courts to simply list defendant’s contacts and then conclude, without analysis, that the contacts are or are not sufficient to establish jurisdiction).

138. This is consistent with the position of several federal circuits that the defendant’s activity in the forum must approximate physical presence in order to support general jurisdiction. See, e.g., *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1074 (9th Cir. 2011) (“For general jurisdiction to exist over a nonresident defendant[,] . . . the defendant must engage in ‘continuous and systematic general business contacts’ that ‘approximate physical presence’ in the forum state.” (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000))); *Shrader v. Biddinger*, 633 F.3d 1235, 1243 (10th Cir. 2011) (“[A]s we are dealing with general jurisdiction, the commercial contacts here must be of a sort ‘that approximate physical presence’ in the state—and ‘engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state’s borders’” (quoting *Bancroft*, 233 F.3d at 1086)); *Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010) (“The threshold for general jurisdiction is high; the contacts must be sufficiently extensive and pervasive to approximate physical presence.” (citing *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 n.16 (7th Cir. 2003))).

139. *Helicopteros*, 466 U.S. at 418.

140. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011).

141. See James R. Pielemeier, *Why General Personal Jurisdiction Over “Virtual Stores” Is a Bad Idea*, 27 QUINNIPIAC L. REV. 625, 656–61 (2009); Stein, *Regulatory Precision*, *supra* note 72, at 436–41.

jurisdiction,<sup>142</sup> I think it is a necessary one. A corporation cannot be considered at home in the forum if there is another forum in which it would be considerably more convenient for the defendant to litigate a matter unconnected to that forum.

3. *A corporation can be at home in more than one place.* The Supreme Court recently held that a corporation's principal place of business for purposes of diversity jurisdiction can only be in one place, and should be considered the place where corporate decision-making is located, rather than in the place where the largest amount of corporate activity is conducted.<sup>143</sup> Although I think it is crucial for courts to constrain the number of places where corporations are subject to general jurisdiction, there is no need to limit that to a single place, or to privilege the locus of corporate decision-making. The crucial inquiry is whether a jury would view imposition of liability on the defendant to be an externality—a cost imposed on an outsider that would not have significant impact within the forum state. Although I am wary of multiplying the forums in which a defendant can be said to be essentially at home, there is no reason why it could not have an insider status in more than one place. It is particularly appropriate for courts to take into consideration how invested a defendant is in the forum state, and how apparent that investment is to the community.<sup>144</sup> Accordingly, the number of employees should count, as well as other indicia of presence, such as manufacturing facilities or corporate offices.
4. *Defendant's connection to the forum must be comparable to its connection with any other forum.* Even where a defendant does conduct visible operations in the forum, it may still be a victim of out-of-state animus if it is perceived as an outsider.<sup>145</sup> If the level of corporate activity in the forum is significantly less than its activity elsewhere, there is a risk that it will not be perceived as a member of the community. For instance, Exxon Mobil maintains significant operations in all fifty states, yet I doubt that it would be treated as hospitably in Pennsylvania as in the courts of Texas, its principal place of business.<sup>146</sup> Accordingly, the operation of a branch office, a factor urged by a number of commentators as a meaningful

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142. See *supra* text accompanying notes 72–75.

143. See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192–93 (2010).

144. Cf. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1074 (9th Cir. 2011) (“To determine whether a nonresident defendant’s contacts are sufficiently substantial, continuous, and systematic, we consider their ‘[l]ongevity, continuity, volume, economic impact, physical presence, and integration into the state’s regulatory or economic markets.’” (quoting *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1172 (9th Cir. 2006))).

145. See *supra* text accompanying notes 121–126.

146. Exxon Mobil, [http://www.exxonmobil.com/corporate/contactus\\_contact\\_businessheadquarters.aspx](http://www.exxonmobil.com/corporate/contactus_contact_businessheadquarters.aspx) (last visited Feb. 9, 2012).

measure of general jurisdiction,<sup>147</sup> should not be dispositive. A house is not a home.

5. *Bona fide consent matters.* If there is one consistent thread running through the jurisdictional due process cases, it is that a defendant can volitionally submit to the authority of a state that would otherwise lack authority over the defendant.<sup>148</sup> Pursuant to this principle, it is appropriate to subject a defendant to general jurisdiction in its state (or states) of incorporation even if its presence in the state is not otherwise apparent.<sup>149</sup> An entity’s choice of incorporation in a particular state is entirely voluntary and involves continuing responsibility to and regulatory governance by the state.<sup>150</sup> The state of incorporation is treated as the corporate home for other purposes, such as tax liability<sup>151</sup> and diversity jurisdiction.<sup>152</sup> Indeed, in the nineteenth century, it was the only place that a corporation could be sued *in personam* insofar as its corporate status as a juridical person was only recognized in its state of incorporation.<sup>153</sup> On the other hand, states commonly require the corporate appointment of an agent for receipt of service of process as a condition of doing business in the state.<sup>154</sup> Even before *Goodyear Dunlop*, some courts rejected such “consent” as coerced, and not a sufficient basis for the exercise of general jurisdiction,<sup>155</sup>

147. See, e.g., Borchers, *supra* note 37, at 137–38 (discussing whether general jurisdiction should exist where a defendant has a branch facility); Brilmayer, *General Jurisdiction*, *supra* note 45, at 741 (addressing the relevance of local activities in determining general jurisdiction).

148. See Stein, *Styles of Argument*, *supra* note 45, at 748–56.

149. Brilmayer, *General Jurisdiction*, *supra* note 45, at 733 (noting that the decision to incorporate in a given state provides in some respects a more compelling basis for jurisdiction than domicile).

150. Cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (incorporation within the state demonstrates “general submission to a State’s powers” (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011))). State of incorporation was deemed a sufficient jurisdictional basis even under *Pennoyer v. Neff*, 95 U.S. 714, 735 (1878) (“[A] State, on creating corporations . . . may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked . . .”).

151. Hellerstein, *supra* note 88, at 5.

152. 28 U.S.C. § 1332(c)(1) (2006).

153. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) (“It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created.”); Kurland, *supra* note 66, at 577.

154. Brilmayer, *General Jurisdiction*, *supra* note 45, at 756 n.183 (“[A]ll fifty states require the appointment of a local agent as a condition for transacting certain kinds of business in the state.”).

155. Compare *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (“[T]he principles of due process require a firmer foundation than mere compliance with state domestication statutes.”), and *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (consent to jurisdiction through corporate registration effective only where there are sufficient minimum contacts and jurisdiction is otherwise constitutionally permissible), with *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (appointment of agent for service

and that position is strengthened by the essentially at home standard. A state would not have the right to subject a defendant simply doing business there to general jurisdiction;<sup>156</sup> a requirement of consent as a condition of doing business thus inappropriately leverages the state's authority.

To those who might view these criteria as unduly constraining, I would pose the following query: Why *should* general jurisdiction be more expansive? As long as the plaintiff can pursue a claim in the defendant's home, or where the claim arose, why should the plaintiff be given the strategic advantage of suing elsewhere? Multiplying the plaintiff's jurisdictional options only unbalances the scales of justice and vests the responsibility for enforcing one state's law in another state that has no meaningful connection to the controversy. From both a fairness and systemic perspective, it cannot be justified.

#### IV. P.S. WHAT ABOUT GENERAL JURISDICTION OVER INDIVIDUALS?

At the risk of sounding like a rabid sports fan obsessed with a bad call in a championship game long ago, I want to point out a fairly bizarre fact: the confluence of *Goodyear Dunlop Tires Operations, S.A. v. Hall* and *Burnham v. Superior Court*, means that it is now much easier to establish general jurisdiction over individuals than over corporations. To the surprise and dismay of most commentators,<sup>157</sup> the Court held in *Burnham* that an individual could be subjected to jurisdiction in any state in which he was served with process, regardless of whether the litigation or the individual had any connection to the forum.<sup>158</sup> The Court went out of its way there to suggest that individuals might be insulated from assertions of general jurisdiction based on a pervasive contacts theory.<sup>159</sup> Even at the time, there was something perverse about making in-state service a more acceptable basis for general jurisdiction than continuous and

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pursuant to state registration statute valid basis for general jurisdiction). See generally Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163 (2003) (discussing general registration statutes).

156. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) ("[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." (citing *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8, 21 (1907); *St. Clair v. Cox*, 106 U.S. 350, 359–60 (1882); *Frene v. Louisville Cement Co.*, 134 F.2d 511, 515 (D.C. Cir. 1943))).

157. See generally *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L. J. 559 (1991).

158. See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990).

159. See *id.* at 610 n.1 ("It may be that whatever special rule exists permitting 'continuous and systematic' contacts to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'" (quoting *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952); *Int'l Shoe*, 326 U.S. at 316)).

systematic contacts.<sup>160</sup> But having raised the bar in *Goodyear Dunlop*, the Court has now made the contrast even starker and stranger.

All of the reasons that support limiting general jurisdiction to a corporate defendant's home base apply with even greater force to individual defendants. Litigation away from an individual defendant's home is apt to be far more burdensome than for a corporation, and an out-of-state individual risks being subjected to outsider bias as much or more than a foreign corporation. Moreover, the multiplicity of jurisdictions where an individual might be found and served could be enormous, thereby increasing significantly the opportunities for forum shopping by the plaintiff.

Although I do not expect the Court to reverse course, I hope the Court will move off of its position that jurisdiction over persons is justified by raw territorial power, whereas jurisdiction over corporations must be justified by a deeper sense of fairness and a more meaningful connection between the defendant and the forum state. It is time to fulfill the promise of *Shaffer v. Heitner*, that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*.”<sup>161</sup> If, as asserted by Mitt Romney, we should treat corporations fairly because “[c]orporations are people,”<sup>162</sup> perhaps people can be treated almost as fairly as we treat corporations.

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160. Cf. Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L. J. 597, 608 n.51 (1991) (arguing that Justice Scalia “must conclude that service within the forum is not merely as good a justification as a defendant's pervasive and systematic contacts with the forum, but rather that is a *superior* justification” (citing *Burnham*, 604 U.S. at 610 n.1)).

161. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

162. Philip Rucker, *Mitt Romney Says “Corporations Are People” at Iowa State Fair*, *PostPolitics*, Wash. Post (Aug. 11, 2011), available at [http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html).



