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Categorical Confusion in Personal Jurisdiction Law

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Categorical Confusion in Personal Jurisdiction Law

Todd David Peterson*

Table of Contents

I. Introduction.....	657
II. The Substantive Due Process Limitations on Personal Jurisdiction	663
III. The Missing Theory for Contacts-Based Substantive Due Process Rules.....	679
A. The Contacts Requirement is a Substantive Due Process Principle.....	680
B. The Court's Failed Attempts to Provide Constitutional Rationale for the Substantive Due Process Contacts Requirement.....	684
C. The Consequences of the Court's Failure to Identify the Rationale for the Substantive Due Process Contacts Requirement.....	695
D. The Anomalies Inherent in the Substantive Due Process Contacts Requirement	699
IV. The Unexpected Disappearance of Corporate-Activities-Based Jurisdiction.....	701
A. The <i>Goodyear</i> Case: The Hint of a New Standard	705
B. <i>Daimler</i> : The Hint of a New Standard Converted to a Holding, but with a Possible Exception.....	719
C. The <i>BNSF</i> Case: The New Standard, But Now with No Meaningful Exception	737

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D.	<i>Bristol-Myers Squibb</i> : Corporate-Activities-Based Jurisdiction Eliminated, with No Expansion of Specific Jurisdiction.....	742
V.	The Theoretical and Practical Problems with the Court’s Current Personal Jurisdiction Standards.....	748
A.	The Court’s Current Substantive Due Process Contacts Requirements Are Theoretically Threadbare	749
B.	How the Categorical Ambiguity of the Term “General Jurisdiction” Led to the Demise of Corporate-Activities-Based Jurisdiction	757
C.	The Practical Problems Created by the Elimination of Corporate-Activities-Based Jurisdiction	762
D.	Final Questions Raised by the Elimination of Corporate-Activities-Based Jurisdiction	765
1.	How Did the Elimination of Corporate-Activities-Based Jurisdiction Occur So Easily?.....	765
2.	Why Would Justice Ginsburg Reshape Personal Jurisdiction Doctrine in a Manner that So Clearly Favors Corporate Defendants?.....	767
VI.	Where Do We Go From Here?	770
A.	The Court Should Place Procedural Due Process Considerations First and then Explain the Theoretical Foundation for Whatever Substantive Due Process Requirements the Court Believes to Be Necessary After That	771
B.	The Court Should Correct the Mistake It Made in the Categorization of Dispute-Blind Jurisdiction	772
C.	The Court Should Solve Its Other Personal Jurisdiction Categories Problem by Insuring that the Theoretical Foundations and Doctrinal Rules of Each Category are Consistent with Those of the Others.....	774

I. Introduction

Imagine two different cases over which the California courts might wish to assert personal jurisdiction. Case one is brought against Walmart by a California plaintiff who was injured by a defective Walmart product he bought in Ellsworth, Maine, while on a vacation to Acadia National Park. Although he was injured in Maine, the plaintiff now wishes to sue Walmart in his home state of California where Walmart has 303 retail outlets, fourteen distribution centers, 89,736 employees, and to which it pays \$492.8 million in taxes.¹ Case two is brought by a California plaintiff against an individual defendant who lives in Maine. The claim arose in Maine and has no connection to the state of California, but the defendant was served with process while on a three-day business trip to California. In each case the defendant moves to dismiss the complaint for lack of personal jurisdiction in California.

It might surprise you to learn that, under current Supreme Court case law, the California court would have to rule that the California suit would violate Walmart's due process rights because the claim did not arise in California and because Walmart is neither incorporated in California nor has its principal place of business in California.² On the other hand, current Supreme Court precedent would permit the suit against the individual defendant

1. *Location Facts*, WALMART, INC., <https://corporate.walmart.com/our-story/locations/united-states/california#/united-states/california> (last visited Jan. 9, 2019) (on file with the Washington and Lee Law Review).

2. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (holding that "in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [that state]"); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (rejecting the California Supreme Court's sliding scale approach for specific jurisdiction); *Daimler AG v. Bauman*, 571 U.S. 117, 136 (2014) ("Even if we were to assume that [Daimler's subsidiary, MBUSA,] is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California . . ."); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) ("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."); see also *infra* Part III (analyzing four recent Supreme Court cases on personal jurisdiction and discussing mistaken assumptions based off of them).

notwithstanding the difficulties in defending against a suit so far from home on a matter unconnected with the state of California.³ How is it that a lawsuit that would be easy for a huge corporation like Walmart to defend, in a state where it has such massive continuous contact, would violate Walmart's due process rights, while a lawsuit that would be arduous for an individual to defend, in a state where his only contact was an unrelated three-day business trip, would not violate the individual's due process rights?

This Article posits that two significant problems in the Supreme Court's personal jurisdiction case law have led to incoherent and irreconcilable results in cases involving individual and corporate defendants. First, the Court has imposed substantive due process limitations on a state's assertion of personal jurisdiction without ever explaining why such limitations are constitutionally required. Beginning with *Pennoyer v. Neff*,⁴ the Court has ruled that the Due Process Clause of the 14th Amendment requires some kind of contact between a defendant and the forum state. Although the kinds of contact that would permit personal jurisdiction have both expanded and contracted since then,⁵ the requirement for some kind of contact has remained, regardless of how convenient it might be for the defendant to litigate the case. This contacts requirement is the sole remaining branch of 19th Century substantive due process law.⁶ The absence of a theoretical explanation for why there should be any substantive due process limitation on personal jurisdiction has impoverished the Court's personal jurisdiction jurisprudence and

3. See *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990) (“[T]he Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process”); see also *infra* Part II.C (examining the consequences of the Court's failure to identify the rationale for the substantive due process contacts requirement).

4. 95 U.S. 714 (1877).

5. See *infra* Part II (discussing the Court's failure to provide a convincing theoretical justification for imposing substantive due process limitations on personal jurisdiction).

6. See Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 518 (1987) (noting that “the Court has continued to emphasize that a purposeful ‘contact’ with the forum is still required, even if that contact need not be physical”).

confused lower courts when they have tried to apply Supreme Court case law.

Moreover, because the Supreme Court initially imposed only substantive due process limitations on personal jurisdiction, the procedural due process issues have received short shrift and rarely determine the scope of personal jurisdiction. Only in 1945 did the Court hint that procedural due process issues, such as the burden on a defendant, might have a role to play in personal jurisdiction analysis,⁷ and it was not until 1987 that the Court decided a personal jurisdiction case based upon a procedural due process analysis.⁸ By not placing the procedural due process analysis first, the Court has exacerbated the substantive due process issues that have confused lower courts and the academic commentators.

Second, in the absence of clearly enunciated principles of substantive due process, the Supreme Court has relied on poorly defined categories of the types of contacts that would satisfy the substantive due process requirement. After *Pennoyer*, the categories included service on the defendant in the forum state, seizure of the defendant's property in the forum state, and citizenship or domicile of the defendant in the forum state. In addition, because a defendant could waive its 14th Amendment rights, consent to suit in the forum state was an adequate basis of personal jurisdiction. These traditional bases of jurisdiction all allowed personal jurisdiction regardless of where the claim arose, a category of jurisdiction that later became known as general jurisdiction.⁹

7. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) ("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.").

8. See *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987) (explaining the need "for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court").

9. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966) (detailing the nuances of general jurisdiction).

In *International Shoe Co. v. Washington*,¹⁰ the Court held, in part because it was so difficult to determine whether a corporation was “present” in a state when served with process, that it was only necessary that a defendant have certain “minimum contacts” with the forum state to satisfy the requirements of the Due Process Clause.¹¹ If the defendant’s contacts gave rise to the claim, a state might exercise “specific jurisdiction” even if the contacts were isolated and sporadic.¹² Alternatively, if a corporation’s contacts with a state were sufficiently “continuous and systematic,” a state could exercise personal jurisdiction without regard to where the claim arose, a subcategory that also came to be known as “general jurisdiction.”¹³

These rigid and inflexible categories gave rise to two types of problems. First, the Court has tended to discuss the rules applicable to a particular category without reference to the rules that applied to other categories, which has created the kinds of anomalous results hypothesized above. For example, in *Burnham v. Superior Court*,¹⁴ the Court upheld the continuing validity of service on an individual within the forum state as a basis of personal jurisdiction, with one opinion (written by Justice Scalia on behalf of four members of the Court) stating that it was not necessary to harmonize this category with the Court’s modern specific and general jurisdiction cases¹⁵ and another opinion (written by Justice Brennan for four members of the Court) stating that it was necessary to harmonize the category, but then utterly failing to apply the tests that the Court had developed for specific

10. 326 U.S. 310 (1945).

11. *See id.* at 316 (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it . . .”).

12. *See, e.g.,* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478–82 (1985) (discussing the contacts requirement in a breach of contract case); *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (discussing the contacts requirement in an intentional tort case).

13. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–16 (1985).

14. 495 U.S. 604 (1990).

15. *See id.* at 618 (“Due process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*.”).

and general jurisdiction.¹⁶

Second, the rigidity of the categories is exacerbated by the ambiguity of the labeling. The term “general jurisdiction” gives the courts and commentators the most problems because it refers to two different jurisdictional concepts. It can refer to all jurisdictional categories that are dispute-blind, that is, they allow jurisdiction without regard to where the claim arose. For example, all of the traditional bases of jurisdiction are dispute-blind.¹⁷ Alternatively, general jurisdiction can refer to the subcategory of “minimum contacts” based jurisdiction that arose after *International Shoe* in which dispute-blind jurisdiction was allowed based upon a corporation’s continuous and systematic contacts with the forum state. For the sake of clarity, this Article will refer to that category as corporate-activities-based jurisdiction.

The problem caused by this linguistic ambiguity is nowhere more apparent than in four recent Supreme Court cases where the plaintiffs asserted personal jurisdiction based upon corporate-activities-based jurisdiction.¹⁸ Over those cases, Justice

16. See *id.* at 631–33 (“[Many] have interpreted *International Shoe* and *Shaffer* to mean that every assertion of state-court 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*.”) (Brennan, J., concurring).

17. See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 622 (1988) (“Because service on an individual physically present in the forum gave the state jurisdiction over any transitory cause of action, regardless of its relationship to the defendant’s forum activities, these courts held that corporate ‘presence’ based on ‘doing business’ in the state created equally broad jurisdiction.”).

18. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (holding that “in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims like [defendants’] that are unrelated to any activity occurring in [the forum state]”); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (stating that “only a limited set of affiliations with a forum will render a defendant amenable to” general jurisdiction in that State”); *Daimler AG v. Bauman*, 571 U.S. 117, 136 (2014) (“The Ninth Circuit’s agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*.”); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011)

Some of the tires made abroad by Goodyear’s foreign subsidiaries . . . had reached North Carolina through “the stream of

Ginsburg essentially eliminated corporate-activities-based jurisdiction (and with it, hundreds of lower court cases basing jurisdiction on that standard) by limiting it to cases in which a corporation is “at home,” by which she meant, the state of incorporation and principal place of business.¹⁹ As we will see below, the problem is that, in discussing corporate-activities-based jurisdiction, Justice Ginsburg, used the term “general jurisdiction”²⁰ and relied on commentary discussing the term “general jurisdiction” in the larger sense of all-purpose jurisdiction. She then limited corporate-activities-based jurisdiction to the kinds of contacts required for the traditional basis of citizenship or domicile jurisdiction, which is a different subcategory of all-purpose jurisdiction.²¹ In so doing, Justice Ginsburg left nothing in the formerly well-established separate category of corporate-activities-based jurisdiction.²²

This is not simply a theoretical problem. It is a problem that affects plaintiffs, like the California plaintiff in the first hypothesized case above, who are injured by a corporate defendant outside of their home state and wish to sue on their home turf rather than incur the burden of litigating where the claim arose. The plaintiff’s home state clearly has an interest in allowing their citizen to sue, and, if the corporation has substantial ongoing contacts with the plaintiff’s home state, it is hard to see why such a suit would violate the corporation’s due process rights.

commerce”; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations. A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction.

19. *Goodyear*, 564 U.S. at 919 (“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.”).

20. *Id.*

21. *See id.* at 924 (“As a rule in these cases, this Court has inquired whether there was ‘some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws’”).

22. *See infra* Part III.B (examining the disappearance of corporate-activities-based jurisdiction through the *Daimler* holding).

This Article addresses these problems in five Parts. In Part I, the Article discusses the history of the Court's substantive due process limitations on personal jurisdiction and, in particular, the standards for corporate-activities-based jurisdiction before the Court's recent cases on that issue. Part II discusses the Court's failure to provide a convincing theoretical justification for imposing substantive due process limitations on personal jurisdiction. It also discusses the consequences of that failure in three doctrinal areas of personal jurisdiction law, the traditional basis of service on an individual in the forum state, specific jurisdiction and corporate-activities-based jurisdiction. Part III then analyzes in detail the four recent Supreme Court cases on personal jurisdiction, and discusses the mistaken assumptions underlying those decisions. Part IV explains how the Court's personal jurisdiction rules, as a whole, suffer from theoretical bareness, the ambiguity of the substantive due process categories of jurisdiction, and the rigidity of the Court's substantive due process analysis. Finally, in Part V, the Article offers some ideas for how the Court could begin to remedy the many problems with personal jurisdiction law.

II. The Substantive Due Process Limitations on Personal Jurisdiction

The Supreme Court first addressed personal jurisdiction at the beginning of the 19th Century in order to decide whether to enforce judgments under the Full Faith and Credit Clause of the Constitution.²³ The Court needed to create common law rules of personal jurisdiction in order to decide whether judgments were valid and therefore enforceable.²⁴ Because these decisions were

23. See Roger H. Transgurd, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH L. REV. 849, 850–84 (1989) (detailing the origins of personal jurisdiction and how the establishment of the Constitution necessitated it); James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 7–42 (1992) (examining the history of judicial jurisdiction and the role territoriality played in that history).

24. See Transgurd, *supra* note 23, at 867 (“The most plausible explanation then is that the first Congress intended that the Supreme Court would develop federal common law rules of jurisdiction to measure the scope of state court

based upon the common law, they could, of course, be overruled by an act of Congress.

That situation changed in 1877 when the Court decided *Pennoyer v. Neff*.²⁵ Writing for the Court, Justice Steven Field concluded that a state court could exercise jurisdiction over a defendant only if that person were served with process within the state, or if that person owned property within the state (and that property was attached at the beginning of the litigation) or if that person was a citizen of the state, or if that person consented to the jurisdiction of the state court.²⁶ Justice Field stated that these rules were not simply a matter of federal common law, they were also mandated by the Due Process Clause of the 14th Amendment.²⁷ After *Pennoyer v. Neff*, a court could not render a binding judgment on a defendant without satisfying the due process principles set forth by Justice Field, regardless of how easy or convenient it was for the defendant to appear and litigate the case.²⁸ Although Justice Field never explained why these principles were required by the Due Process Clause, it seems fairly clear that these rules are a matter of substantive, rather than procedural, due process.²⁹

jurisdiction over noncitizens.”); *see generally* D’Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); *Mils v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

25. 95 U.S. 714 (1877), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1997).

26. *Id.* at 722. This part of the Court’s decision was dictum because the 14th Amendment did not come into effect until 1868, two years after the 1866 judgment was rendered in the case under consideration in *Pennoyer v. Neff*.

27. *See id.* at 733 (“[T]he validity of such judgments may be directly questioned . . . on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”).

28. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 38–51 (1990) (arguing the Court was not clear on whether the Due Process Clause actually provided the content of personal jurisdiction rules); John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 595–97 (1995) (disagreeing with parts of Borchers’s analysis, but agreeing that the due process basis for the rule was implicitly recognized in *Riverside & Dan River Cotton Mills v. Menefee*, in which the Court treated the issue as a well-established rule).

29. *Perdue*, *supra* note 6, at 508.

The four traditional bases of jurisdiction that were allowed after *Pennoyer*, territorial service, seizure of defendants' property in the forum, citizenship, and consent, were all examples of dispute-blind jurisdiction—that is to say, general jurisdiction in the larger sense of any basis of jurisdiction that exists without regard to whether the claim arose in the forum state and would allow jurisdiction for any claim wherever it arose.³⁰ Thus, for example, as long as a defendant was served in the forum state, it was permissible for the forum to take jurisdiction over any claim wherever it arose.³¹ The same was true for the other three categories within the traditional bases of jurisdiction.³²

By the early 20th century, however, the four traditional bases of jurisdiction proved to be too restrictive for a society that was on the move and growing economically.³³ First, increasing numbers of drivers were heading to other states where they became involved in accidents and then quickly returning to their home state before they could be served with process in the state where the accident took place.³⁴ States responded to this circumstance by creating statutes that required drivers on their roads either to expressly consent to personal jurisdiction in cases arising out of their use of the state's roads, or that simply asserted drivers had impliedly consented to the state's jurisdiction by driving on their roads.³⁵

30. See Twitchell, *supra* note 17, at 622 (“[T]he contours of general jurisdiction initially expanded as states developed rules permitting jurisdiction over corporate defendants based on theories of ‘consent,’ ‘doing business,’ or ‘presence’ in the state.”).

31. See *id.* (“[S]ervice on an individual physically present in the forum gave the state jurisdiction over any transitory cause of action, regardless of its relationship to the defendant's forum activities . . .”).

32. See *id.* at 625 (“General jurisdiction would serve as a secondary basis for jurisdiction, important primarily when the cause of action did not arise from defendant's forum activities.”).

33. See *id.* at 623 (“[I]t was only in the early twentieth century that American courts and commentators incorporated this concept of limited, dispute-specific jurisdiction into their core jurisdiction theory.”).

34. See *Hess v. Pawloski*, 274 U.S. 352, 354 (1927) (explaining that a nonresident accused of negligently causing an accident would not be held accountable to an injured resident if not for Massachusetts law creating implied consent for drivers).

35. See, e.g., *id.* at 356–57 (“[T]he State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served.”); *Kane v. New Jersey*, 242 U.S. 160,

Even though the idea of implied consent was clearly a legal fiction, the Supreme Court chose to expand the jurisdictional parameters of *Pennoyer* by stretching the meaning of consent to include the new implied consent statutes because of the state's interests in providing a forum for accidents arising out the inherent dangers of motor vehicles used on the state's roads.³⁶

The second difficulty with the Court's personal jurisdiction jurisprudence involved the increasingly multi-state nature of corporate activity in the United States.³⁷ It was easy to apply the traditional basis of service within the forum state to individuals, whose physical presence within a state could easily be tracked.³⁸ It was much more difficult, however, to apply the territorial presence concept to corporations.³⁹ Originally, because a corporation is a fictitious entity whose existence is established solely through the laws of the state where it is incorporated, the Supreme Court ruled that corporations could only be sued in that state.⁴⁰ After *Pennoyer*, however, the courts first began to apply the traditional basis of consent to justify personal jurisdiction over corporations, but, as

164 (1916) (explaining that the law provides "that a nonresident owner shall appoint the Secretary of State his attorney upon whom process may be served 'in any action or legal proceeding caused by the operation of his registered motor vehicle, within this State, against such owner'").

36. See *Hess*, 274 U.S. at 356 ("In the public interest the state may make and enforce regulations reasonabl[y] calculated to promote care on the part of all, residents and non-residents alike, who use its highways.").

37. See Twitchell, *supra* note 17, at 669–70 ("[A] strong argument can be made that the *automatic* exercise of "pure" general jurisdiction over a domestic corporation is inappropriate when so many corporations lack any other significant ties with their state of incorporation.").

38. See *id.* at 633–34 ("As was true before *International Shoe*, substantial activities outside the state that affect forum residents are less likely to result in general jurisdiction than is physical activity within the state's borders . . .").

39. See *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) ("[F]or it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is 'present,' but at least it puts the real question . . .").

40. See *Bank of Augusta v. Earle*, 38 U.S. 519, 588–89 (1839) ("[A] corporation can have no legal existence out of the boundaries of the sovereignty which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory the corporation can have no existence.").

the Supreme Court later noted in *Schaffer v. Heitner*,⁴¹ the theory that a forum corporation consented to personal jurisdiction in a state in which it was doing business “was later supplemented by the doctrine that a corporation doing business in a State could be deemed ‘present’ in the State, and so subject to service of process under the rule of *Pennoyer*.”⁴²

The concept of service on corporations within the forum state was based on the idea that corporations were present in any state where they were “doing business.”⁴³ In some of these cases, the claims arose out of the business the corporations performed in the forum state.⁴⁴ In other cases, however, the corporations’ presence in the forum state permitted the state to exercise personal jurisdiction even over claims that did not arise the forum state.⁴⁵ In these cases jurisdiction was justified based on the traditional basis of service on the corporate defendant while the defendant

41. 433 U.S. 186 (1977).

42. *Id.* at 202. (citing *Int’l Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917)).

43. *See* *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218, 226–27 (1913) (“[I]n order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof.”).

44. *See, e.g., Int’l Harvester Co. v. Kentucky*, 234 U.S. 579, 585–86 (1914) (“The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts . . . [t]his course of conduct of authorized agents within the State, in our judgment, constituted a doing of business”); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245, 254 (1909) (“When the company sent such an agent into Missouri, by force of the statute he is presumed to represent the company for the purpose of service”); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 611 (1899) (“[I]t cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another State”); *Pa. Lumberman’s Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 415 (1899) (“We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that State to perform various acts of adjustment provided for by its contracts”).

45. *See, e.g., Mo., Kan. & Tex. Ry. Co. v. Reynolds*, 255 U.S. 565 (1921) (per curiam) (affirming costs based on the precedent of *St. Louis Sw. Ry. Co. v. Alexander*); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) (“The defendant was doing business within the state of New York within the meaning of section 1780, subdivision 4, of the Code of Civil Procedure . . . and the cause of action is presumed to have arisen within the state”).

was present in the forum state by virtue of the business conducted in the forum state.⁴⁶ As one well-known treatise described the theory:

The presence doctrine rested on the proposition that a forum corporation should be amenable to process absent consent only if it conducted enough business within the State to justify the inference that it was present there. Although the presence of a natural person in a State which would permit internal “tagging” to support *in personam* jurisdiction, could be fleeting at best, corporate presence had to be evidenced by continuous dealings in the State If the corporation was found to be present, jurisdiction could be sustained on claims unrelated to its local business dealings⁴⁷

The problem with using the traditional basis of territorial service with respect to corporations, however, was that the explanations for what constituted sufficient business done within the forum state became increasingly technical and formalistic, without regard for any principles upon which the substantive due process requirement of contact between the corporate defendant and the forum state might be based. This led astute observers like Judge Learned Hand to note that “presence” in the form of “doing business,” was simply a conclusory term which did “no more than put the question to be answered.”⁴⁸ Nonetheless, it was well-established that some level of business conducted in the forum state was sufficient to establish dispute-blind jurisdiction over claims regardless of where the claim arose.⁴⁹

In 1945, however, the Supreme Court finally acknowledged that it no longer made sense to rest jurisdiction over forum corporations on the criterion that they were “doing business” within the forum state.⁵⁰ In *International Shoe Co. v.*

46. See Twitchell, *supra* note 17, at 621–22 (“Some courts . . . held that a foreign corporation ‘doing business’ in a state was ‘present’ there.”).

47. JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 111 (3d ed. 2009) (footnotes omitted).

48. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) (Hand, J.).

49. See Twitchell, *supra* note 17, at 672 (“The question, then, is what sort of local presence gives a nonresident defendant a sufficiently strong relationship with the forum to trigger dispute-blind jurisdiction.”).

50. See *id.* at 623–24 (“[I]n 1945, the Court used the opportunity to sweep

Washington,⁵¹ the court addressed whether the State of Washington had personal jurisdiction over a corporation in an action filed to collect taxes arising out of the business activity conducted within the forum state.⁵² Instead of focusing on whether the corporation was “doing business” in this forum state, the court stated:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the 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.⁵³

Chief Justice Stone wrote that the demands of due process can be met “by such contacts of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend a particular suit which is brought there.”⁵⁴ The contacts that would be an acceptable basis for personal jurisdiction fell into two categories.⁵⁵ First, the plaintiff’s claim could arise out of the defendant’s contact with the forum state.⁵⁶ In those cases the forum could assert what came to be known as specific jurisdiction, even if the defendant’s contact with the forum state was “some single or occasional acts . . .”⁵⁷ Conversely, “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

aside the ‘presence’ test as a meaningful determinant of corporate jurisdiction.”).

51. 326 U.S. 310 (1945).

52. *See id.* at 311 (questioning “whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund . . .”).

53. *Id.* at 316 (internal quotation marks omitted).

54. *Id.* at 317.

55. *See id.* at 317–19 (explaining casual contact with the forum state related to the claim and “continuous corporate operations” within the forum, even if unrelated to the claim may create personal jurisdiction).

56. *See id.* at 317 (“[C]asual 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 activities there.”).

57. *Id.* at 318.

suit against it on causes of action arising from dealings entirely distinct from those activities.”⁵⁸ Although the Court’s phrasing was somewhat ambiguous, the cases cited by the Supreme Court in support of its suggestion that “continuous corporate operations within a state” could justify personal jurisdiction on claims that were “entirely distinct from those activities” support the conclusion that the Supreme Court was referring to a category of corporate-activities-based jurisdiction that was separate and apart from the all purpose jurisdiction in the state where a corporation has its place of business or is incorporated.⁵⁹ As Professor Twitchell noted,

The standard, then, is “continuous” operations within the state that are “so substantial and of such a nature” to justify dispute-blind jurisdiction. The Court offers no further gloss on this vague and open-ended description, but the cases it cites for this point involve defendants who were operating an office within the forum, staffed with their own employees.⁶⁰

For example, in *Tauza v. Susquehanna Coal Co.*,⁶¹ the Court of Appeals of New York State, in an opinion by Judge Cardozo upheld jurisdiction over a Pennsylvania Corporation that had its principal place of business in Philadelphia with respect to a claim that arose on a claim that had no connection with defendant’s contacts with the forum state.⁶² Instead, Judge Cardozo based jurisdiction on the facts that defendant had a branch office in New York State in which nine employees served as a permanent sales force in addition to other support staff.⁶³ Judge Cardozo emphasized that the defendant’s New York office “systematically

58. *Id.*

59. *Id.*

60. Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 183 (2001).

61. 115 N.E. 915 (N.Y. 1917).

62. *See id.* at 916–17 (“The defendant’s coal yards are in Pennsylvania, and from there its shipments are made. They are made in response to orders transmitted from customers in New York.”).

63. *See id.* at 917 (“[T]he defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistants, and through these agencies systematically and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York”).

and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York.”⁶⁴ Judge Cardozo’s use of the terms “continuously” and “systematically” is significant because those are the terms used by the Supreme Court in its subsequent decision in *Perkins v. Benguet Consolidated Mining Co.*,⁶⁵ to support corporate-activities-based jurisdiction as a category distinct from a corporation citizenship or domicile (state of incorporation or principal place of business).⁶⁶ Judge Cardozo specifically held that “the defendant corporation is engaged in business within this state. We hold, further, that the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted.”⁶⁷

Similarly, in *Missouri, Kansas and Texas Railway Co. v. Reynolds*,⁶⁸ the Supreme Court of the United States summarily affirmed a decision of the Supreme Judicial Court of Massachusetts in which the Court exercised jurisdiction over a forum corporation whose principal place of business was outside the forum state based on the continuous corporate activities conducted by the defendant within Massachusetts.⁶⁹ The *Alexander* case, involved the issue whether a Texas corporation, that had its principal place of business in Texas was subject to personal jurisdiction in New York state based on the activities of its employees there.⁷⁰ The Court stated that “in order to render a corporation amenable to service of process in a forum jurisdiction it must appear that the corporation is transacting business in that

64. *Id.* at 917.

65. 342 U.S. 437 (1952).

66. *See id.* at 445–46 (“[C]ontinuous and systematic corporate activities . . . are enough to make it fair and reasonable to subject that corporation to proceedings *in personam* in that state . . . to enforce causes of action relating to those very activities or to other activities of the corporation within the state.”).

67. *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917).

68. 255 U.S. 565 (1920).

69. *See id.* at 565 (affirming the decision of the Massachusetts Supreme Judicial Court “upon the authority *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218”).

70. *See St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218, 228 (1913) (explaining how a freight agent in the New York office corresponded with a negotiated with the plaintiff and was therefore acting as an authorized agent of the company making them subject to service in that state).

district to such an extent that it is subject to the jurisdiction and laws thereof.”⁷¹

In addition to this contacts requirement, the Court hinted that there is also a procedural due process component to the test for personal jurisdiction: “an estimate of the inconveniences which would result to the corporation from trial away from its home or principal place of business is relevant in this connection.”⁷² The Court ultimately expanded this procedural component into a five-factor test to determine whether personal jurisdiction over a defendant would be reasonable.⁷³

In the years after *International Shoe*, courts applying the new minimum contacts standard developed two distinct categories of contacts-based personal jurisdiction.⁷⁴ Cases in which the claim arose out of the defendant’s contact with the forum state were identified as specific jurisdiction cases.⁷⁵ In those cases, the Supreme Court required plaintiffs to establish three elements. First, the claim must arise out of the defendant’s contact with the forum state.⁷⁶ The Supreme Court has recently made it clear that it is not enough that the claim simply be related to a defendant’s contact with the forum state or that the claim should be identical to other claims that arose directly from the defendant’s contact

71. *Id.* at 226.

72. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (internal quotation marks omitted).

73. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (stating factors include: the “burden on the defendant,” a “forum State’s interest in adjudicating the dispute,” the plaintiff receiving “convenient and effective relief,” “the most efficient resolution of controversies,” and finally “furthering fundamental substantive social policies”); *see also Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (“[T]he interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice are, of course to be considered . . .”).

74. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (“[W]e have distinguished between specific or case-linked jurisdiction and general or all-purpose jurisdiction.”).

75. *Id.* at 1559 (“[T]he business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana.”).

76. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (“In order for a state court to exercise specific jurisdiction, ‘the *suit*’ must ‘aris[e] out of or relat[e] to the defendant’s contacts with the forum.’”).

with the forum state.⁷⁷ Second, the defendant's contacts with the forum state must be in some sense purposeful and not merely inadvertent or beyond the defendant's control.⁷⁸ These purposeful contacts may, in the context of an intentional tort case, be wrongful conduct that is directed at individuals in the forum state,⁷⁹ or the intentional receipt of some significant benefit from the defendant's contacts with the forum state.⁸⁰ Third, the plaintiff must show that the lawsuit is procedurally fair by balancing the burden on the defendant against the forum state's interest in the case, the interest of the plaintiff in litigating in the forum state, the shared interest of the interstate system of justice in adjudicating the case in a forum where witnesses and evidence will be easily available, and the potential impact on substantive law resulting from the court's assumption of jurisdiction in a particular case.⁸¹

The second line of cases established what the courts eventually called general jurisdiction, but which we will refer to as corporate-activities-based jurisdiction in order to distinguish it from the larger category of all-purpose dispute-blind jurisdiction, which, as previously noted, is also frequently referred to as general

77. See *id.* at 1780–81 (“The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”).

78. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (explaining how it is required that the defendant “purposefully avails itself” in order to establish jurisdiction).

79. See *Calder v. Jones*, 465 U.S. 783, 791 (1984) (holding specific jurisdiction was allowed over a liable claim against a writer who had no other contact with the forum state other than writing an article that the writer knew would harm the plaintiff in the forum state).

80. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (holding specific jurisdiction was allowed based on benefits received from the forum state arising out of a contract that had a significant connection to the forum state).

81. See *World-Wide Volkswagen*, 444 U.S. at 292 (stating the five factors the Court considers relevant in determining whether it is “reasonable” for the defendant to litigate in that forum); *Kulko*, 436 U.S. at 92 (“Like any standard that requires a determination of ‘reasonableness,’ the ‘minimum contacts’ test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed . . .”).

jurisdiction.⁸² In *Perkins v. Benguet Consolidated Mining Co.*,⁸³ the Supreme Court upheld general jurisdiction over a corporation that had its temporary corporate operations in the forum state.⁸⁴ As described by the Supreme Court, the corporation was carrying on in Ohio a “continuous and systematic, but limited, part of its general business” but “[t]he cause of action sued upon did not arise in Ohio and does not relate to the corporation’s activities there.”⁸⁵ The court accepted the Ohio Supreme Court’s ruling that the defendant was “to be treated as a foreign corporation.”⁸⁶ Thus, none of the traditional bases of jurisdiction, including citizenship or domicile, were applicable to the case.⁸⁷ Instead, the court assessed the legitimacy of jurisdiction in Ohio based on the corporate-activities-based jurisdiction branch of the *International Shoe* test.⁸⁸ After discussing the actions taken by the corporation’s president within the state of Ohio, the Court stated that the president “carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.”⁸⁹ These continuous and systematic contacts justified Ohio’s assertion of personal jurisdiction with respect to a claim that did not arise out of the defendant’s within the forum state.⁹⁰

82. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (“The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of the state are to be determined in each case.”).

83. 342 U.S. 437 (1952).

84. See *id.* at 447–49 (explaining that during the occupation of the Philippines the president of the company “carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company”).

85. *Id.* at 438.

86. *Id.* at 439.

87. See *id.* at 448 (stating “[t]he company’s mining properties were in the Philippine Islands” along with their operations before the Japanese occupation).

88. See *id.* at 445 (“The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in *International Shoe* . . .”).

89. *Id.* at 448.

90. *Id.* (“While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons.”).

After *Perkins*, both the lower courts and commentators agreed that, in order to establish corporate-activities-based jurisdiction over a claim arising outside of the forum state, it was necessary for the plaintiff to show that the defendant had continuous and systematic contacts with the forum state.⁹¹

The Supreme Court itself described the holding of *Perkins* in several cases before it actually decided another case involving continuous corporate contact jurisdiction.⁹² For example, in *Keeton v. Hustler Magazine, Inc.*,⁹³ the court stated that in *Perkins*, “jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum ‘a continuous and systematic, but limited, part of its general business.’”⁹⁴ Similarly, in *Calder v. Jones*,⁹⁵ the Supreme Court cited to *Perkins* and described the case as permitting general jurisdiction where defendant’s contacts with the forum were “continuous and systematic.”⁹⁶

The only other Supreme Court case to deal with corporate-activities-based jurisdiction prior to the recent decisions was *Helicopteros Nacionales de Colombia, S.A. v. Hall*.⁹⁷ In that case, the Court decided that a collection of separate contacts with the forum state which included the purchase of helicopters, the training of pilots, the visit of the defendant’s chief executive officer to negotiate a contract, and the receipt of checks for its services drawn on a Texas bank were insufficient to constitute the continuous and systematic contact required for general

91. See Twitchell, *supra* note 17, at 633–34.

92. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (“Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in libel action based on the contents of its magazine.”); *Calder v. Jones*, 465 U.S. 783, 788–89 (1984) (“The allegedly libelous story concerned the California activities of a California resident The article was drawn from California sources, and the brunt of the harm, in terms of both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.”).

93. 465 U.S. 770 (1984).

94. *Id.* at 779 (citing *Perkins*, 342 U.S. at 437).

95. 465 U.S. 783 (1984).

96. *Id.* at 787 (citing *Perkins*, 342 U.S. at 437).

97. 466 U.S. 408 (1984).

jurisdiction.⁹⁸ In *Helicopteros*, the Court, for the first time referred to the term general jurisdiction: “When a State exercises personal jurisdiction over a defendant in a suit not arising out or related to the defendant’s contacts with the forum, the State has been said to have be exercising ‘general jurisdiction’ over the defendant.”⁹⁹ The description of general jurisdiction, as well as the specific citations to the law review articles by Professor Brilmayer and Professors von Mehren and Trautman, suggest some conflation of the concepts of dispute-blind jurisdiction, that is, general jurisdiction in the large sense, with the corporate-activities-based jurisdiction, that is, general jurisdiction in the smaller sense of a branch of minimum contacts jurisdiction.¹⁰⁰ The Court clearly acknowledged, however, that the exercise of corporate-activities-based jurisdiction depended on a showing that the defendant had continuous and systematic contacts with the forum state, and that was the way the case was interpreted for the next 30 years.¹⁰¹

First, in describing the holding of *Perkins*, the Court cited to the portion of the *Perkins* opinion which concluded that the defendant “had 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 by an Ohio court was “reasonable and just.”¹⁰² Later, in describing the contacts necessary to establish corporate-activities-based jurisdiction, the court stated that the defendant’s contacts must “constitute the kind of continuous and systematic general business

98. See *id.* at 416–19 (“The Texas Supreme Court focused on the purchases and the related training trips in finding contacts sufficient to support an assertion of jurisdiction. We do not agree with that assessment . . .”).

99. *Id.* at 415 n.9. (citing Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81; von Mehren & Trautman, *supra* note 9, at 1136–44).

100. See von Mehren & Trautman, *supra* note 9, at 1136 (“On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.”).

101. See Twitchell, *supra* note 17, at 641 (describing the issue raised in *Helicopteros* as “whether Helicol’s contacts with the forum were ‘continuous and systematic’—the general jurisdiction question”).

102. *Helicopteros*, 466 U.S. at 415 (citing *Perkins*, 342 U.S. at 438, 445 (internal edits omitted)).

contacts the Court found to exist in *Perkins*.¹⁰³ Then, in describing the defendant's in the case at bar, the Court repeatedly discussed whether the defendant's contacts were sufficiently "continuous and systematic."¹⁰⁴

Given the Court's statements in *Perkins* and *Helicopteros*, it is not surprising that both the commentators and lower courts concluded both that corporate-activities-based jurisdiction was a separate jurisdictional category from the traditional basis of domicile or citizenship and that continuous corporate contact jurisdiction could be established by showing the defendant's continuous and systematic contacts with the forum state.¹⁰⁵

For example, one leading Civil Procedure treatise noted that after *International Shoe*, the "continuous activity of a defendant within the forum may be of such nature as to subject the defendant to jurisdiction even upon causes of action unrelated to the forum activity"¹⁰⁶ The treatise authors went on to explain that this kind of corporate-activities-based jurisdiction,

[P]rovides that a court may assert jurisdiction over a defendant whose continuous activities in the forum are unrelated to the cause of action sued upon when the defendant's contacts are sufficiently substantial and of such a nature as to make the State's assertion of jurisdiction reasonable. The Supreme Court generally has left to the states the discretion to assert or forego jurisdiction in cases in this category.¹⁰⁷

103. *Id.* at 416.

104. *Id.* (explaining one visit by the CEO to negotiate a contract is not "continuous and systematic" and is insufficient to establish jurisdiction).

105. *See, e.g.,* *Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state); *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465 (6th Cir. 1989) (holding the defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan); *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436–38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to 0.083% of its total loan portfolio, plus other contacts, was sufficient to give rise to general jurisdiction in Pennsylvania); *see also* Brilmayer, *infra* note 166; Borchers, *supra* note 28.

106. FRIEDENTHAL ET AL., *CIVIL PROCEDURE*, *supra* note 47, at 111.

107. *Id.* at 124–25.

It was generally understood that, as Professor Twitchell stated in her influential article on general jurisdiction, the post-*International Shoe* corporate-activities-based jurisdiction was a widely available successor to the old theory of corporate presence, or “doing business,” a jurisdiction.¹⁰⁸ By 1987, when Professor Twitchell exhaustively surveyed the field, courts in at least 19 different states had judicially upheld corporate-activities-based jurisdiction.¹⁰⁹ Many of these courts rested their findings of jurisdiction based on the existence of continuous and systematic contacts between the corporate defendant and the forum state.¹¹⁰ These cases based their assertion of corporate-activities-based

108. See Twitchell, *supra* note 17, at 622 (“Gradually, however, specific jurisdiction attained independent status. Judges and commentators began to embrace the more limited quid pro quo principle emerging from the foreign corporation cases: states could exercise jurisdiction over a defendant in a particular case because of what the defendant had done in the forum . . .”).

109. See *id.* at 630 (“Between 1975 and 1987, courts in at least nineteen states and the District of Columbia exercised jurisdiction over nonresident individuals and corporations under a general jurisdiction theory.”).

110. See, e.g., *Pedelahore v. Astropark, Inc.*, 745 F.2d 346, 348–49 (5th Cir. 1984) (finding “[t]he contacts of Astropark within the State of Louisiana were patently continuous and systematic”); *Lee v. Wallworth Valve Co.*, 482 F.2d 297, 301 (4th Cir. 1973) (“In light of the plaintiff’s relations to South Carolina, the interest of that State in the controversy . . . and Walworth’s substantial and continuing contacts with South Carolina, we conclude that the District Court quite properly denied the motion to quash the service of process on Walworth.”); *ex parte British Steele Corp.*, 426 So. 2d 409, 412 (Ala. 1982) (“Our review of the facts given above leads us to conclude that BSC’s activities are substantial and continuous so as to allow in personam jurisdiction to be asserted against it in causes of action which may have arisen outside of Alabama.”); *Geelhoed v. Jensen*, 352 A.2d 818, 825 (Md. 1976) (“Appellee’s living and working in the State for a period of two years constituted a course of conduct at least as continuous and systematic as that of the defendant in *Perkins*.”); *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo. Ct. App. 1980) (“Beech has engaged in continuous and systematic activity within the state. We find no unreasonable burden placed upon Beech in requiring it to defend in this state.”); *Litton Indus. Sys., Inc. v. Kennedy Van Saun Corp.*, 283 A.2d 551, 555 (N.J. Super. Ct. Law Div. 1971) (“This indication of the substantiality of defendant’s admitted business activities in this State, in the absence of any allegations to the contrary, is sufficient to sustain the jurisdiction of this court, even assuming that the contract sued on is in fact unrelated to defendant’s business activities here.”); *Garfield v. Homowack Lodge, Inc.*, 378 A.2d 351, 354 (Pa. Super. Ct. 1977) (“We hold here that the defendant’s method of soliciting business in Pennsylvania consisted of such substantial and continuous activities in this Commonwealth as to render it amenable to *in personam* jurisdiction.”).

jurisdiction on a wide range of contacts other than simply the state of incorporation or a corporation's principal place of business.¹¹¹ Although the exact standard for how much contact was required for corporate-activities-based jurisdiction varied, there was no doubt that the category was firmly, and in the minds of most, irrevocably established.¹¹² As Professor Stephen Burbank noted, “[i]t is probably too late in the day for an assertion of jurisdiction . . . where the defendant conducts substantial business systematically and continuously to be held unconstitutional.”¹¹³

III. The Missing Theory for Contacts-Based Substantive Due Process Rules

The Supreme Court has never adequately explained why the personal jurisdiction rule should require any contacts between a defendant and the forum state.¹¹⁴ Because the requirement is not a matter of procedural due process, but rather a substantive due process principle, the Court bears a greater-than-usual burden to explain why a state court's jurisdiction should be limited beyond that which would be required by procedural due process principles.¹¹⁵ The failure to justify the contacts requirement has several negative consequences. First, it taints the legitimacy of the requirement as a matter of sound constitutional law. If the Court cannot explain why due process requires any contact between the defendant and the forum state, how can the Court justify such

111. See cases cited *supra* note 110 (citing cases in which jurisdiction was found on the basis of things other than domicile or place of incorporation).

112. See Twitchell, *supra* note 60, at 172–73 (“This lack of a firm theoretical underpinning, coupled with the practical problems courts encounter in applying the doctrine today, makes its practice today more the product of circumstance and compromise than of a principled application of a well-developed theory.”).

113. Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millenium?*, 7 TUL. J. INT'L & COMP. L. 111, 119 (2000).

114. See cases cited *infra* note 123 (citing cases demonstrating a discussion of personal jurisdiction without an explicit reason for the contacts rule).

115. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 238 (2004) (“It is substantive in that territorial limitations on judicial authority vindicate the individual liberty interest in not being subject to the authority of a sovereign with which one has no affiliation . . .”).

rules?¹¹⁶ Second, the absence of a theoretical foundation for the requirement impairs the ability of the courts to apply the principle in difficult factual settings.¹¹⁷ Each of these points will be addressed below.

A. The Contacts Requirement is a Substantive Due Process Principle

The Supreme Court has never discussed whether the contacts requirement is a matter of substantive or procedural due process.¹¹⁸ Academics who have considered the constitutional source of the contacts requirement have come to differing conclusions, with the majority favoring substantive due process,¹¹⁹

116. See *infra* Part III.B.

117. See *infra* Part III.C.

118. See Weinstein, *supra* note 115, at 237–38 (“It is possible . . . that the personal jurisdiction requirement partakes of aspects of both substantive and procedural due process.”).

119. See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 566–67 (14th ed. 2001); Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1506 (2006) (“The Pennoyer Court, in dictum, tied these principles to the Fourteenth Amendment, finding that proceedings in court ‘to determine the personal rights and obligations’ of parties over whom the court lacks jurisdiction do not ‘constitute due process of law.’”); Scott Fruehwald, *Judge Weinstein on Personal Jurisdiction in Mass Tort Cases: A Critique*, 70 TENN. L. REV. 1047, 1087–93 (2003) (“As long as a defendant has some purposeful contact or connection with a state (substantive due process) and the defendant can mount a proper defense (procedural due process), then that state should be able to require an individual to appear in its courts.”); Scott Fruehwald, *The Boundary of Personal Jurisdiction: The “Effects Test” and the Protection of Crazy Horse’s Name*, 38 J. MARSHALL L. REV. 381, 422–23 (2004) (“Because substantive due process limits a state’s power (sovereignty) to restrict an individual’s liberty, it limits a state’s ability to assert personal jurisdiction through its long-arm statute over an individual with whom it has either no connection or a tenuous connection.”); Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on International Shoe and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 966 (1995) (“Unfortunately, in its personal jurisdiction jurisprudence, the Supreme Court has employed, at times, a maximalist substantive due process approach, apparently without recognizing that such an approach is no more appropriate to personal jurisdiction today than it was to progressive economic regulation in the *Lochner* era.”); Perdue, *supra* note 6, at 508–10; Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It’s Not General Jurisdiction*,

a few others favoring procedural due process,¹²⁰ while other scholars throw up their hands and call it “jurisdictional due process”¹²¹ or something beyond either procedural or substantive due process.¹²² Not surprisingly, given the silence of the Supreme

or Specific Jurisdiction, but Is It Constitutional?, 48 CASE W. RES. L. REV. 559, 588 (1998) (“In essence, the Court seems to be saying that by requiring the defendant to have purposeful contacts with the forum state, the minimum contacts test protects the defendant’s individual liberty interest and, consequently, also protects the delicate balance of sovereign power between sister states.”); Allen R. Stein, Burnham *and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597, 599 n.13 (1991) (“Professor Redish has also failed to recognize the need to develop a jurisdictional theory for use as a measure of due process. He has suggested that personal jurisdiction problems ought to be resolved through application of “functional” standards developed in the context of procedural due process cases.”); Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 672 (1991) (“As Professor Stein has correctly argued, the personal jurisdiction question is a question of substantive, not procedural, due process.”); Weinstein, *supra* note 115, at 231 n.239 (“Most commentators believe that the personal jurisdiction requirement is a species of substantive rather than procedural due process.”).

120. See, e.g., 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 17.8, at 252 n.10 (3d ed. 1986); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 822 (1991) (“The cases beginning with *Shaffer v. Heitner* and *Kulko v. Superior Court* and ending with *Burnham*, which are presented as the inexorable working out of *International Shoe* standards via the minimum contacts/fairplay doctrine actually subvert *International Shoe*’s vision.”); Crawford v. Minutemen Gourmet Foods, Inc., 489 F. Supp. 181, 182 (M.D. Ala. 1980) (finding that “[the court] may exercise personal jurisdiction . . . without exceeding the limits of procedural due process”); Coe & Payne Co. v. Wood-Mosaic Corp., 195 S.E.2d 399, 401 (Ga. 1973) (adopting Illinois’s interpretation of its similarly worded long-arm statute and noting “that the Long Arm Statute [of Illinois] contemplates that jurisdiction shall be exercised over non-resident parties to the maximum extent permitted by procedural due process”), *abrogated by* Innovative Clinical & Consulting Servs., LLC v. First Nat’l Bank of Ames, 620 S.E.2d 352 (Ga. 2005). *But see In re G. Weeks Sec., Inc.*, 5 B.R. 220, 225 (Bankr. W.D. Tenn. 1980) (discussing personal jurisdiction under the Fifth Amendment as a matter of substantive due process).

121. See Borchers, *supra* note 28, at 90 (identifying “the analytical rift” between “jurisdictional due process” and “due process analysis generally”).

122. See Weinstein, *supra* note 115, at 237

That personal jurisdiction doctrine cannot be comfortably conceptualized as procedural due process, but imposes far more rigorous scrutiny than substantive due process jurisprudence warrants, supports the thesis that the source of authority for limitations on state court jurisdiction is *sub silentio* something other than the Due Process Clause of the Fourteenth Amendment.

Court on the issue of substantive versus procedural due process with respect to the minimum contacts requirement, many academics fail to discuss this issue at all.¹²³

Not only has the Court failed to develop any coherent theory about why the Due Process Clause requires any contacts between the defendant and the forum state, it has failed to discuss whether the contacts requirement is a matter of substantive due process or procedural due process.¹²⁴ Looking at the Supreme Court's cases on personal jurisdiction, it is hard to avoid the conclusion that the contacts requirement is, at the very least, not a matter of procedural due process. As a result, in the absence of the required contacts, the forum state does not have the substantive power to adjudicate a claim against the defendant regardless of how convenient or procedurally fair it is for the defendant to assert and

123. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (stating that the rules regarding personal jurisdiction are “more than a guarantee of immunity from inconvenient . . . litigation” (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958))); see also Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 21–22 (1982) (reviewing Supreme Court jurisprudence on due process attacks on state court jurisdiction without discussing whether it is procedural or substantive due process); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1137 (1981) (suggesting a new due process analysis for personal jurisdiction without discussing procedural or substantive due process). *But see* Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 416 (1981) (arguing that the minimum contacts test is a guideline for estimating convenience and reasonableness); Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 711–12 (1983) (same).

124. The Supreme Court has obliquely hinted, although it has not stated specifically, that the minimum contacts branch of personal jurisdiction is a matter of substantive due process. For example, in *Burger King Corp. v. Rudzewicz*, the Court stated that “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful [internal] ‘contacts, ties, or relations.’” 471 U.S. 462, 471–72 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Similarly, in *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, the Court stated that the personal jurisdiction requirement “recognizes and protects an individual liberty interest” and that the need for personal jurisdiction “must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.” 456 U.S. 694, 702, 702 n.10 (1982). The Court has not, however, been more explicit than this in discussing the nature of the personal jurisdiction requirement and its link with the Due Process Clause.

defend its own rights in the case.¹²⁵ This kind of requirement sounds precisely like a substantive due process limitation on the power of a state to affect the property rights of a person subject to their court system.

If the contacts requirements that have been a part of the Court's personal jurisdiction rules since *Pennoyer* were about procedural fairness, they would be both massively over inclusive and massively under inclusive as well. The contacts requirement (whether one uses the traditional bases of jurisdiction or the minimum contacts test of *International Shoe*) would not allow personal jurisdiction over a New York corporation in a case filed in Newark, New Jersey, if the corporation has no connection with New Jersey, notwithstanding the fact that it would hardly be difficult or procedurally unfair for the corporation to cross the Hudson River to defend the case. Additionally, the contacts requirements would not prevent an individual who lives in Calexico, California, on the Mexican border, from having to defend a lawsuit in Crescent City, California, on the Oregon border, regardless of how burdensome and inconvenient it would be litigate in that forum. The contacts requirements, whether the traditional bases under *Pennoyer* or the minimum contacts after *International Shoe*, are about the absolute power of the state to impose a binding judgment on a defendant regardless of how convenient it is for the defendant to represent its interests in the forum court. Such restrictions on the power of a state sovereign are matters of substantive and not procedural due process.

Given the controversial nature of all substantive due process doctrines¹²⁶ the Court has a particularly strong burden to establish

125. See Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1303–12 (1983) (discussing the role of convenience in the jurisprudence); Earl M. Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 BYU L. REV. 1043, 1058–59 (same); Perdue, *supra* note 6, at 509–10 (“[T]he ‘contacts’ requirement of the modern approach is intended as something more than some rough test of convenience.”); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 708 (1987) (discussing the intersection of minimum contacts and convenience of trial).

126. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (declaring laws criminalizing abortion to be unconstitutional as a violation of the Due Process Clause); *Lochner v. New York*, 198 U.S. 45 (1905) (holding that laws setting maximums for work hours violated the Due Process Clause), *overruled by*

a theoretical basis for any substantive due process doctrine. The requirement for contacts between a defendant and the forum state is the sole remaining nineteenth century doctrine of substantive due process.¹²⁷ When the Supreme Court has announced new applications of substantive due process, such as the right of privacy, it has at least explained the theoretical foundations for why the substantive due process rights apply to a person's liberty or property interests.¹²⁸ The Court should explain why due process requires any substantive connection between the defendant and the forum state.

B. The Court's Failed Attempts to Provide Constitutional Rationale for the Substantive Due Process Contacts Requirement

Notwithstanding the significant need for a coherent theory explaining the substantive due process contacts requirement, the Court has failed to advance a rationale that withstands analysis. As previously noted, Justice Field did not offer any explanation why the Due Process Clause required the contacts requirements that he outlined in *Pennoyer v. Neff*.¹²⁹ In *International Shoe*, the Court explained that the exercise of specific jurisdiction was reasonable by suggesting that the benefits enjoyed by a corporation's activities within the forum state gave rise to a reciprocal obligation for the corporation to subject itself to the personal jurisdiction of the forum's courts in cases arising out of their operations within the state:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligation; 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

Ferguson v. Skrupa, 372 U.S. 726 (1963).

127. See Perdue, *supra* note 6, at 480 (describing *Pennoyer's* enduring relevance).

128. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (declaring unconstitutional a Connecticut law prohibiting the use of contraceptives).

129. See *supra* notes 25–29 and accompanying text (discussing *Pennoyer*).

respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.¹³⁰

The Court did not, however, offer a similar explanation with respect to corporate-activities-based jurisdiction. More importantly, the Court never explained why the Due Process Clause should impose any limits on personal jurisdiction other than those designed to protect against litigating in a forum that is so inconvenient that it deprives a defendant of procedural due process.

In *Hanson v. Denckla*,¹³¹ the Court was invited to conclude that due process required merely procedural fairness and some connection between the forum state and the case rather than between the defendant and the forum state, similar to the restrictions on choice of law imposed by the Due Process Clause.¹³² The five-member majority, however, concluded that the limitations on personal jurisdiction were more than protections against inconvenient litigation:

Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a forum tribunal, a defendant may not be called upon to do so unless he has had the “minimum contacts” with this State that are a prerequisite to its exercise of power over him.¹³³

The Court said no more on why the Due Process Clause imposes any territorial restrictions on state power.

The Supreme Court made its most ambitious effort to explain the substantive due process contacts requirement in *World-Wide Volkswagen v. Woodson*.¹³⁴ In that case, Justice White explained that the due process contacts requirement was a matter of interstate federalism, in which the sovereignty of individual states

130. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

131. 357 U.S. 235 (1958).

132. *See id.* at 253 (contrasting personal jurisdiction over nonresident defendants with choice of law jurisprudence).

133. *Id.* at 251.

134. 444 U.S. 286 (1980).

implies limitations on the sovereignty of other states.¹³⁵ Justice White conceded that, since *Pennoyer*, the procedural burdens on litigating in a distant state had eased considerably, but he cautioned:

We have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the framers. In the Commerce Clause they provided that the Nation was to be a common market, a “free trade unit” in which the State’s are debarred from acting as separable economic entities. But the Framers also intended that the States retain essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty on all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.¹³⁶

These limits on state sovereignty constrain state court jurisdiction regardless of how convenient the litigation might be for the defendant:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.¹³⁷

After scholars criticized this aspect of the *World-Wide Volkswagen* decision on the ground that a matter of interstate federalism could not be an individual right under the Fourteenth Amendment that could be waived by defendants,¹³⁸ the Court

135. *Id.* at 292.

136. *Id.* at 293 (internal citations omitted).

137. *Id.* at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 251, 254 (1958)).

138. *See, e.g.*, Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 109 (1983) (exploring the logical “fallacy” of the Court’s approach); Redish, *supra* note 123, at 1119–20 (noting the unpersuasive discussion of federalism in *World-Wide Volkswagen*).

quickly reversed course. In the very next decision on personal jurisdiction, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,¹³⁹ Justice White himself acknowledged that the minimum contacts requirement “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”¹⁴⁰ Justice White conceded that the Due Process Clause is the “only source of the personal jurisdiction requirement” and the Clause “makes no mention of federalism concerns.”¹⁴¹ Justice White also conceded that, if the contacts requirement were a matter of interstate federalism it would not have been waivable by individual defendants.¹⁴² Unfortunately, as we will see, this theory comes back like a bad penny.¹⁴³

World-Wide Volkswagen contains one additional rationale for the contacts requirements, although it is no more satisfying than the previous one. Plaintiffs in that case argued that the defendants could foresee that the allegedly defective automobile that was the subject of the case could be driven from New York, its state of purchase, to Oklahoma, where the accident giving rise to the claim occurred.¹⁴⁴ Because an accident in Oklahoma was reasonably foreseeable, defendants should be subject to jurisdiction in that state. Justice White, however, stated, it “is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct in connection with the forum State are such that he should reasonably anticipate being haled into court there.”¹⁴⁵ The requirement of minimum contacts with the forum state ensures that the defendant has “clear notice that it is subject to suit there, and can act to alleviate the risk of

139. 456 U.S. 694 (1982).

140. *Id.* at 702.

141. *Id.* at 702 n.10.

142. *Id.*

143. See *infra* Part III.D (discussing the elimination of corporate-activities-based jurisdiction in *Bristol-Myers Squibb Company v. Superior Court*, 137 S. Ct. 1773 (2017)).

144. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (“It is argued, however, that because an automobile is mobile by its very design and purpose it was ‘foreseeable’ that the [plaintiffs] Audi would cause injury in Oklahoma.”).

145. *Id.* at 297.

burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.”¹⁴⁶

As we will see, this theory that the due process requirement of minimum contacts provides essential notice to a defendant is dubious on a number of grounds.¹⁴⁷ First, the assertion that it allows corporations to procure insurance assumes that corporate insurance policies are based in any respect on where a corporation might be subject to personal jurisdiction. That factual assumption is unsupported by any empirical evidence that any corporate insurance policies are structured in a way that is connected in any respect to the existence of personal jurisdiction in particular states.¹⁴⁸ Second, the Court’s assertion that the risks of being subject to personal jurisdiction in a particular state might cause a corporation to sever its connection with the state is yet another assumption that is unsupported by any empirical evidence.¹⁴⁹ As a matter of common sense, corporations are unlikely to forego any commercial opportunity simply because it might subject them to personal jurisdiction in particular state. Similar arguments are often made with respect to the importance of certainty to substantive law, such as that it makes sense for a corporation to alter its behavior based on the substantive liability standards imposed by a particular state. However, there is no basis to assume that this kind of argument is transferable to questions involving the existence of personal jurisdiction. Moreover, as we will shortly see, the due process limitations on a state’s ability to apply its own substantive law to a particular case are far less strict than the limitations on personal jurisdiction.¹⁵⁰

146. *Id.*

147. *See infra* notes 162–171 and accompanying text (discussing flaws in the Court’s reasoning); *infra* Part II.D (discussing anomalies between the Court’s approach to personal jurisdiction in comparison with other due process concepts).

148. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 297 (failing to discuss the procurement of insurance policies).

149. *See id.* (assuming in passing, without introducing any supporting evidence, that a corporation would leave the state).

150. *See infra* notes 186–189 and accompanying text (discussing the Court’s jurisprudence in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981)).

As a practical matter, a standard that focuses on whether a defendant “should reasonably anticipate being haled into court”¹⁵¹ in the forum state is utterly meaningless. First, the question is completely within the Supreme Court’s control; if the Court stated that the Due Process Clause allowed defendants to be sued in any state where jurisdiction was not unreasonably burdensome, then defendants could reasonably anticipate being sued in every state. Alternatively, if the Court intends us to focus on the word “reasonably,” the statement of the principle does nothing more than restate the original question: why should it matter that the defendant have any contact with the forum state and what kinds of contacts would be sufficient to permit personal jurisdiction?

In the Court’s recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*,¹⁵² Justice Kennedy’s plurality opinion gave some hints at the structure and underlying principle of the contacts requirement but never enunciated a clear theory for the substantive due process requirement. Justice Kennedy stated that a person “may submit” to a state’s authority in different ways, including expressly consenting to jurisdiction, the defendant’s presence in the forum state at the time he is served with process, or domicile in the state “or, by analogy, incorporation or principal place of business for corporations.”¹⁵³

Justice Kennedy argued that “[e]ach of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State.”¹⁵⁴ Justice Kennedy failed to explain, however, why the Due Process Clause requires a defendant’s intention to “submit” to the jurisdiction of the forum’s courts or why these acts are appropriate signs of submission. For example, it is hard to justify the notion that an individual’s transient presence for one day in the forum state is enough to submit to the forum’s jurisdiction, but a corporation’s continuous operation of physical facilities within the forum state is not.¹⁵⁵

151. *World-Wide Volkswagen*, 444 U.S. at 297.

152. 564 U.S. 873 (2011).

153. *Id.* at 880 (plurality opinion).

154. *Id.* at 881.

155. *Compare* *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990)

Justice Kennedy barely hinted at the foundation for the minimum contacts requirement.

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or the economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts “judicial power not as matter of sovereignty, but as a matter of individual liberty,” for due process protects the individual’s right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.¹⁵⁶

Although Justice Kennedy explained the need for a “lawful” judgment in order for a forum to render a binding judgment, his opinion failed to explain why a defendant’s contacts with the forum are necessary to make that judgment lawful. On the one hand, one is tempted to suggest that the repeated use of the words “submit” and “submission” echo the Court’s now abandoned use of the doctrine of implied consent in *Hess v. Pawloski*,¹⁵⁷ a reference not lost on the dissent in *McIntyre*, which astutely commented that the idea “that consent is the animating concept” in jurisdiction cases “draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.”¹⁵⁸

Alternatively, Justice Kennedy’s opinion may suggest that, as a matter of substantive due process, any sovereign state lacks the ability to deprive any person of his property through a judicial proceeding in the absence of some benefit received by the

(upholding personal jurisdiction on the basis of a few short visits to the forum state), *with* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931 (2011) (denying jurisdiction when tires made by a corporation systematically entered the forum state).

156. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (internal citation omitted).

157. 274 U.S. 352 (1927).

158. *J. McIntyre Mach., Ltd.*, 564 U.S. at 901 (Ginsburg, J., dissenting).

defendant from a connection with the forum state that gives rise to reciprocal obligations to submit to the jurisdiction of the state's court. As explained by Justice Kennedy, "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."¹⁵⁹ In elaborating on that point Justice Kennedy quoted one of his own decisions in a matter unrelated to personal jurisdiction: "Ours is 'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'"¹⁶⁰ Because the United States and each individual state are all separate sovereigns, "a litigant may have the requisite relationship with the United States Government" to warrant the exercise of personal jurisdiction, but lack the relationship with "any individual State."¹⁶¹

The most telling proof of the hollowness of the substantive due process contacts requirement is the Court's inability to come up with fact patterns that prompt a visceral sense of injustice. Virtually every time the Court searches for an example of why it would be terribly unfair for a state to exercise jurisdiction without adequate contacts between the defendant and the forum state, the Court cheats by using a factual scenario in which jurisdiction would be procedurally unfair because of the burden on the defendant to litigate in a distant forum. For example, in *McIntyre*, Justice Kennedy illustrated the unfairness of personal jurisdiction without the adequate contacts by describing a case in which owners of a small farm in Florida could be sued throughout the country, despite never leaving Florida, if they happen to "sell crops to a large nearby distributor . . . who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town."¹⁶²

159. *Id.* at 884 (plurality opinion).

160. *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

161. *Id.*

162. *Id.* at 885.

The reason that Justice Kennedy's hypothetical strikes one as unjust is not the absence of contacts between the defendant and the forum state but rather the burden on a small farmer in Florida in litigating a case in a state as far away and difficult to reach as Alaska. That problem, however, is already addressed in the fairness component of the Supreme Court's Due Process analysis, which requires a court to balance the burden on the defendant against the interest of the forum state in hearing the case and the plaintiff's need to use the forum state's courts, as well as the convenience of the interstate system of justice.¹⁶³ There is no need for a substantive due process requirement because the procedural due process requirement is adequate to protect the small farmer from distant and inconvenient litigation.

It is telling that Justice Breyer fell prey to precisely the same problem in his concurring opinion in *McIntyre*. In explaining the need for the requisite contacts between the defendant and the forum state, Justice Breyer set forth the following hypothetical:

What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-size distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who sells a single item (a coffee mug) to a buyer from a distant State (Hawaii).¹⁶⁴

Just as with Justice Kennedy's hypothetical, any injustice inflicted by personal jurisdiction in Justice Breyer's fact pattern would be remedied by the procedural due process balancing test without any need for a contacts requirement.

In fact, it is pretty hard to work up any sense of injustice with respect to a hypothetical where there are no contacts with the forum state but where litigation would be procedurally fair. Imagine, for example, a case in which a resident of McLean, Virginia, crosses the Potomac River to have dinner in a restaurant owned by a corporation in Bethesda, Maryland, and becomes

163. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–95 (1980) (summarizing the balance between state interests and plaintiff and defendant burdens and interests).

164. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 891–92 (2011) (Breyer, J., concurring).

seriously ill from eating tainted food at the restaurant. Assume that the corporation owning the restaurant has restaurants in Maryland, Pennsylvania, and Delaware, but none in Virginia. Would anyone feel outraged if the Virginia courts were to exercise jurisdiction over the Maryland corporation? One can imagine having a bit of concern if the Virginia court were to apply its own law to the controversy, but, as we have already seen, the due process restrictions on choice of law are far more lenient than the restrictions on personal jurisdiction.¹⁶⁵

The few commentators who have attempted to develop a theoretical foundation for a substantive due process contacts requirement have reached different conclusions on the rationale for such a rule. The theory with the greatest traction, most prominently developed by Professor Lea Brilmayer, is that the minimum contacts requirement flows from a political theory about the nature of governmental power and legitimacy.¹⁶⁶ Professor Brilmayer suggests that a state's exercise of power cannot be legitimate without some relationship between the defendant and the forum state that creates a form of social contract in which the state is authorized to act coercively because the defendant intentionally acted to affiliate itself with the forum.¹⁶⁷ Several other academics have relied on some form of social contract theory to support a jurisdiction requirement for contacts between the defendant and the forum state.¹⁶⁸ Professor Roger Trangsrud has

165. See *supra* note 132 and accompanying text (comparing the restrictions imposed under choice of law against those required for asserting personal jurisdiction).

166. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 86–87 [hereinafter Brilmayer, *How Contacts Count*] (comparing limits on state jurisdiction with other limitations on state sovereignty); Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) [hereinafter Brilmayer, *Jurisdiction*] (linking jurisdictional due process issues with those concerning the right of a state to assert authority over its citizens); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 391 (1987) (framing the law of interstate relations as a question of political theory).

167. See Brilmayer, *Jurisdiction*, *supra* note 166, at 294 (“The link with political theory lies in the argument that such issues should be analyzed in terms of a state’s right to exercise coercive power over the individual or dispute.”).

168. See Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U.

made a similar social contract theory argument in support of his suggestion that jurisdictional rules should be implemented as a matter of federal common law under the Full Faith Credit Clause and not the Due Process Clause.¹⁶⁹

Other academic commentators have provided different theoretical rationales for a contacts requirement. Some, notwithstanding the Supreme Court's abandonment of the idea, still cling to a theory of interstate federalism as a foundational jurisdiction principle.¹⁷⁰ Still others have proposed similar territorial contacts requirements based not on the Due Process Clause but rather the Dormant Commerce Clause.¹⁷¹

COLO. L. REV. 5, 31–38 (1989) (proposing a distinction between conscious and intentional affiliation with a forum state); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 378 (1985) (recognizing that personal jurisdiction disputes also implicate the boundaries and limits of state sovereignty).

169. See Trangsrud, *supra* note 23, at 884–85 (discussing the benefits of grounding jurisdictional law on the theory of sovereign authority as derived from the consent of the governed).

170. See A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 619 (2007) (arguing for a new approach to jurisdictional doctrine by “reasserting the primary relevance of state sovereignty and interstate federalism”); Weinstein, *supra* note 115, at 198 (arguing for the benefits of jurisdictional rules that, among other things, promoted interstate federalism by preventing states from overreaching their authority).

171. See Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 234 (1967) (“[C]oncern with the effects on commerce of too loose a standard of jurisdiction has not abated.”); John F. Preis, *The Dormant Commerce Clause As a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 123 (2016) (“Even though the Due Process Clause is an essential component of personal jurisdiction law . . . the Dormant Commerce Clause . . . should have much to say about personal jurisdiction”). Some older Supreme Court cases cited the Dormant Commerce Clause as a reason to invalidate expansive assertions of personal jurisdiction. See *Mich. Cent. R.R. v. Mix*, 278 U.S. 492, 494–96 (1929) (agreeing with railroad defendant that asserting jurisdiction would unreasonably obstruct interstate commerce); *Atchison, Topeka & Santa Fe Ry. Co. v. Wells*, 265 U.S. 101, 103 (1924) (asserting jurisdiction over a railway would unreasonably burden interstate commerce); *Davis v. Farmers’ Co-op. Equity Co.*, 262 U.S. 312, 315–16 (1923) (reasoning that a statute that required railroads to submit to the state’s jurisdiction as a condition of maintaining one agent within the state imposed an undue burden on interstate commerce).

C. The Consequences of the Court's Failure to Identify the Rationale for the Substantive Due Process Contacts Requirement

Given the absence of a theoretical foundation for the substantive due process contacts requirement, it is not surprising that the lower courts have also struggled with personal jurisdiction problems and that even the Supreme Court has difficulty in providing consistent guidance to the lower courts. One can observe these problems in cases involving all of the different substantive due process categories of personal jurisdiction.¹⁷² We will take a look at three of the categories: the traditional basis of service on an individual in the forum state, specific jurisdiction over an upstream manufacturer whose product was incorporated into another product that was eventually sold in the forum state, and finally, the widely varying results in lower court cases on corporate-activities-based jurisdiction.

First, in *Burnham v. Superior Court*,¹⁷³ the Supreme Court addressed the continuing viability of jurisdiction based upon service on an individual within the territory of the forum state.¹⁷⁴ Once again, no opinion captured a majority of the Court. Justice Scalia announced the judgment of the Court, but only three other justices joined his opinion.¹⁷⁵ Justice Scalia's rationale for upholding in-state service as a basis for personal jurisdiction rested on its acceptance shortly after the adoption of the Fourteenth Amendment in *Pennoyer v. Neff* and its continued acceptance by all fifty states, which made it "one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"¹⁷⁶

Justice Scalia did not, however, explain how his rather static notion of due process allowed for no contraction of the traditional bases of jurisdiction, but allowed for substantial expansion beyond

172. See *infra* notes 173–185 and accompanying text (expanding on these categories).

173. 495 U.S. 604 (1990).

174. See *id.* at 619 (identifying the issue before the court as jurisdiction based solely on physical presence).

175. *Id.* at 607.

176. *Id.* at 619.

them, as clearly happened in *International Shoe*.¹⁷⁷ Moreover, by failing to address the source of the connection between due process and personal jurisdiction, Justice Scalia failed to consider whether changes in technology and American society affected the continuing validity of in-state service of process as a basis for personal jurisdiction. Just as an example, let's take one suggested theory for requiring a connection between the defendant and forum state: the neo-Lockean notion that a state has no power to assert its sovereign authority over an individual unless that individual has established a relationship with the state that makes such assertion appropriate.¹⁷⁸ Even if that principle never changes, the ultimate rules that flow from that principle may change over time as society and technology change. It may be that, in the nineteenth century, because state-to-state travel was relatively difficult and required a substantial investment of time and resources, physical presence in a state established enough of a relationship between a person and the state to warrant the exercise of personal jurisdiction. Because modern methods of transportation have made it so easy to travel from state to state for brief periods of time, physical presence in a state may no longer establish the same kind of relationship that it once did, with the result that such presence no longer satisfies the requirements of due process.

It is not enough for Justice Scalia, as a believer in original meaning, simply to assert that, if the rule of in-state service was acceptable in 1877, then it must be acceptable now. That assertion begs the question of what rule the Due Process Clause established. One cannot say that the Due Process Clause requires territorial presence as a basis of personal jurisdiction without some intervening step, which is the elaboration of some principle of due process upon which that rule depends. It may be that even an

177. See *id.* (failing to discuss the significant impact of *International Shoe* on the Court's traditional jurisprudence).

178. See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304–06 (1989) (connecting the Court's jurisprudence in *International Shoe* with the territorial limits of traditional sovereignty); Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 6 (1989) (linking the exercise of jurisdiction to "a prior assumption of state territorial sovereignty"); see also Brilmayer, *How Contacts Count*, *supra* note 166, at 86–87 (arguing that asserting jurisdiction without a relationship would be either arbitrary or discriminatory).

originalist like Justice Scalia would find that although the basic principle established by the Due Process Clause with respect to personal jurisdiction remains the same, the rules that flow from that principle might change over time as changes in technology and society cause the application of the principle to have a different effect. Because Justice Scalia never identified the underlying principle upon which personal jurisdiction rules are based, however, he neglected the most important question to be answered in *Burnham*.

Justice Brennan's opinion for himself and three other members of the Court is, if anything, even less coherent than Justice Scalia's opinion. Justice Brennan concluded that personal jurisdiction based upon in-state service of process, at least under the facts presented by *Burnham*, satisfies the requirements of *International Shoe*.¹⁷⁹ Justice Brennan argued that by visiting the forum state, "a transient defendant actually 'avails' himself of significant benefits provided by the State."¹⁸⁰ Justice Brennan failed to explain, however, how Mr. Burnham's three-day visit to the forum state provided sufficient benefits to allow California to assert what amounted to the equivalent of general jurisdiction over Mr. Burnham (i.e. jurisdiction over any claim, regardless of whether it arises out of defendant's contact with a forum state). As Justice Scalia aptly noted in his opinion, the benefits received by Mr. Burnham's three-day stay in California do not distinguish him from other persons who have enjoyed similar visits but "who were fortunate enough not to be served with process while they were there and thus are not (simply by reason of that savoring) subject to the general jurisdiction of California's courts."¹⁸¹ Although it should have been obvious to Justice Brennan that his analysis was flatly inconsistent with the *International Shoe* rubric, his analytical mistake was abetted by the Court's previous failures to identify the due process foundation for requiring a connection

179. See *Burnham*, 495 U.S. at 639 (Brennan, J., concurring) ("For these reasons, as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process.").

180. *Id.* at 637 (internal citation omitted).

181. *Id.* at 624 (majority opinion).

between the defendant and the forum state.¹⁸² In the absence of such a clearly enunciated rationale, it was easier for Justice Brennan to manipulate the language from earlier opinions because there was no underlying principle against which to test his opinion.

Finally, the absence of guidance from the Supreme Court on corporate-activities-based jurisdiction led to some widely varying results in the lower courts. Courts differed substantially on how much contact was necessary in order to establish that category of dispute-blind jurisdiction.¹⁸³ In one case a federal district court held that Pennsylvania had corporate-activities-based jurisdiction over Disneyworld in a case arising out of an accident in Florida, even though Disney had no facilities in Pennsylvania.¹⁸⁴ On the other hand, a federal district court rejected an assertion of corporate-activities-based jurisdiction over Walmart in Texas, notwithstanding the fact that Walmart had 264 stores and thousands of employees in Texas at the time.¹⁸⁵ Without a

182. See *supra* Part II.B (detailing the Court's failures to discuss the theoretical foundation for its due process analysis).

183. Compare *Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present when the defendant maintains one percent of its loan portfolio with citizens of the forum state), *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465 (6th Cir. 1989) (holding the defendant subject to general jurisdiction in Michigan when three percent of its total sales were in Michigan), and *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436–38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to less than one percent of its total loan portfolio, plus other contacts, were sufficient to give rise to general jurisdiction in Pennsylvania; specific jurisdiction not argued), with *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198–200 (4th Cir. 1993) (rejecting general jurisdiction when two percent of total sales were in forum; rejecting specific jurisdiction because product liability suit did not “arise out of the defendant's activities in the forum”), *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (rejecting general jurisdiction when about thirteen percent of total revenues occurred in the forum; specific jurisdiction not argued), and *Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp.*, 916 F. Supp. 1049, 1052–53 (W.D. Wash. 1994) (rejecting general jurisdiction when three percent of total sales occurred in forum; rejecting specific jurisdiction over patent infringement claim when the defendant sent letters into the forum threatening litigation for infringement in part because the letters had no substantive bearing on the infringement issue), *aff'd*, 78 F.3d 602 (Fed. Cir. 1996).

184. See *Cresswell v. Walt Disney Prods.*, 677 F. Supp. 284, 287 (M.D. Pa. 1987) (denying defendant's motion to dismiss).

185. See *Follette v. Clairrol, Inc.*, 829 F. Supp. 840, 845, 847–48 (W.D. La. 1993) (denying general jurisdiction in products liability action), *aff'd*, 998 F.2d

theoretical rationale for any of the substantive due process categories of personal jurisdiction, the lower courts were as befuddled about how to apply the standard as the commentators were in trying to explain it.

*D. The Anomalies Inherent in the Substantive Due Process
Contacts Requirement*

The failure of the Court to explain the basis for the Substantive Due Process contacts requirement is exacerbated by comparison to other due process concepts. First, it is strikingly odd that there are fewer due process restrictions on a state's ability to apply its own law to a particular defendant than there are with respect to a state's power to adjudicate a claim brought against a defendant. Indeed, the Court has imposed only "modest" due process restrictions on a state's application of its own law to a defendant.¹⁸⁶ For example, in *Allstate Insurance Co. v. Hague*,¹⁸⁷ the Court rejected a due process attack on a state court's decision to apply its own law even though the "connection between the forum and the controversy [was] much too tenuous to support an assertion of judicial jurisdiction."¹⁸⁸ A state's application of its own law imposes the substantive rule by which it will judge a defendant's conduct, which has a much more significant impact on a defendant's substantive rights than the mere assertion of personal jurisdiction. Therefore, one would expect that the substantive due process limitation on application of a state's own

1014 (5th Cir. 1993); see also Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2004 (2014) ("Not surprisingly, lower court decisions were all over the map.").

186. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (characterizing the limits on jurisdiction imposed by the Due Process and Full Faith and Credit clauses as "modest").

187. 449 U.S. 302 (1981).

188. Weinstein, *supra* note 115, at 241; see *Phillips Petroleum*, 472 U.S. at 320 (affirming the application of Minnesota law despite tenuous contacts between the state and the litigation).

law would be significantly more stringent than the substantive due process limitation on personal jurisdiction.¹⁸⁹

Second, given the Due Process Clause's principal focus on procedural fairness, one might well ask where procedural due process concepts fit in to the personal jurisdiction analysis. The Supreme Court did not even hint at the need for a procedural fairness analysis until *International Shoe*,¹⁹⁰ and it did not give any real substance to it until *Kulko v. Superior Court*,¹⁹¹ in 1978.¹⁹² Even then, the procedural fairness analysis seemed to be more of an afterthought in the Supreme Court's personal jurisdictional opinions. Not until *Asahi v. Superior Court*,¹⁹³ did the Supreme Court rest a personal jurisdiction decision on procedural fairness grounds.¹⁹⁴ The Court's failure to place procedural due process at the beginning of any personal jurisdictional analysis put undue stress on the substantive due process contacts requirements and, at least in part, led to the debacle of the recent corporate-activities-based jurisdiction cases to which we now turn.

189. See EUGENE F. SCHOLES, ET AL., CONFLICT OF LAWS § 321, at 151 n.7 (4th ed. 2004) ("There is much reason to suggest that the test should be stricter for choice-of-law purposes than for jurisdiction." (citations omitted)); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879–80 (1980)

From the defendant's perspective, the differing treatment of contacts in the jurisdiction and choice-of-law cases turns things on their head . . . Thus from the defendant's perspective, it seems irrational to say that due process requires minimum contacts . . . merely to hale him into the forum's court while allowing more tenuous contacts to upset the very outcome of the case.

Indeed, as Professor Silberman has noted, "[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

190. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (balancing the privileges and obligations of a corporation conducting activities in the forum state).

191. 436 U.S. 84 (1978).

192. See *id.* at 85 (citing "basic considerations of fairness" as a factor).

193. 480 U.S. 102 (1987).

194. See *id.* at 116 ("Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction . . . would be unreasonable and unfair.").

IV. The Unexpected Disappearance of Corporate-Activities-Based Jurisdiction

The foregoing description of the Supreme Court's personal jurisdiction doctrine lays the foundation for assessing the Court's recent decisions on corporate-activities-based jurisdiction. As of 2010, there was no doubt that corporate-activities-based jurisdiction was a well-established basis of jurisdiction separate and apart from citizenship or domicile jurisdiction based upon a corporation's state of incorporation or principal place of business. The Supreme Court laid the foundation for corporate-activities-based jurisdiction in *International Shoe* as the modern version of "doing business" jurisdiction, which itself was simply the corporate equivalent of territorial service on an individual defendant.¹⁹⁵ Given that the Supreme Court had recently upheld the continued viability of territorial service of process on individuals,¹⁹⁶ there was little reason to suspect that the Court would question the continued viability of corporate-activities-based jurisdiction as a valid basis for all-purpose jurisdiction. The lower courts, both federal and state, had long permitted jurisdiction over corporations that were neither incorporated nor headquartered in the forum state. The academic commentators, including those who favored some restrictions on the extent of corporate-activities-based jurisdiction, universally acknowledged that, as long as a corporation had continuous and systematic contacts with the forum state, the corporation would be subject to all-purpose jurisdiction within the forum.¹⁹⁷

195. See *supra* notes 51–60 and accompanying text (discussing *International Shoe*).

196. See *Burnham v. Superior Court*, 495 U.S. 604, 627 (1990) (upholding personal jurisdiction on the basis of a few short visits to the forum state).

197. See Brilmayer, *How Contacts Count*, *supra* note 166, at 112 (concluding that jurisdiction is proper when it "involves imposition of burdens on a domiciliary or regulation of activities or property ownership within the State"); Burbank, *supra* note 113, at 119 ("It is probably too late in the day for an assertion of jurisdiction on this basis in a state where the defendant conducts substantial business systematically and continuously to be held unconstitutional."); Twitchell, *supra* note 60, at 172–73 ("Courts seem to have articulated a fairly straightforward standard for doing-business jurisdiction: states have general jurisdiction over corporations doing continuous and systematic business in the forum.").

Indeed, some of the most visible opponents to broad corporate-activities-based jurisdiction had reversed course and acknowledged that it was necessary and appropriate to continue to recognize corporate-activities-based jurisdiction as a separate category apart from a defendant's state of incorporation and principal place of business.¹⁹⁸ Moreover, even Professor Twitchell's earlier hard line position on corporate-activities-based jurisdiction was contingent upon the Supreme Court recognizing an expanded role for specific jurisdiction.¹⁹⁹ Professor Twitchell acknowledged that she had "advocated cutting back on 'doing-business' general jurisdiction limiting it to the place of incorporation and the defendant's principal place of business . . . [because] courts were using general jurisdiction theory to reach defendants in cases in which such dispute-blind jurisdiction was improper."²⁰⁰

So, what led Professor Twitchell to change her mind on the scope of corporate-activities-based jurisdiction? She gives several reasons:

First, it is a traditional practice going back to very early cases. Second, as long as we use a weak standard, the test is fairly easy to administer because courts need assess only a single variable, the continuity and systematic nature—and, less frequently, the substantiality—of the defendant's contacts. Finally, given the variety of business activities that can occur in a forum and our uncertainties about the constitutional underpinnings of the doctrine, devising a more definitive standard is just too hard.²⁰¹

Finally, and perhaps most importantly, Professor Twitchell argues that corporate-activities-based jurisdiction is necessary in order "to fill in holes in our jurisdictional scheme. By providing an additional forum for the plaintiff, we may be engaging in some indirect economic equalization unattainable through more straight

198. See Twitchell, *supra* note 60, at 195–96 (acknowledging the benefits of doing-business jurisdiction).

199. See Twitchell, *supra* note 17, at 671–80 (arguing "that courts should avoid any unnecessary restriction of specific jurisdiction by restoring the 'dispute-specific' meaning to specific jurisdiction and allowing it the broadest scope possible consistent with due process").

200. Twitchell, *supra* note 60, at 171.

201. *Id.* at 194–95.

forward means; occasionally, doing-business jurisdiction may provide a forum by necessity where multiple plaintiffs are involved.”²⁰² As Professor Borchers has noted, corporate-activities-based jurisdiction is “necessary to cover for a major deficiency in specific jurisdiction.”²⁰³ In other words, the use of corporate-activities-based jurisdiction makes up for inadequacies in the Court’s specific jurisdiction case law in a way that benefits plaintiffs and “generally does little harm” to defendants.²⁰⁴ Indeed, if the burden on a corporate defendant is too significant, or the forum state truly has no legitimate interest in the case, then courts “can use the separate ‘reasonableness’ prong or forum non conveniens to avoid unjust results.”²⁰⁵

Perhaps most significantly, the best proof of the well-established and entrenched nature of corporate-activities-based jurisdiction is found in the fact that corporate defendants of any significant size never challenge it.²⁰⁶ In her earlier article, Professor Twitchell had noted that, in the litigated and reported cases, specific jurisdiction cases greatly outnumbered cases involving corporate-activities-based jurisdiction.²⁰⁷ In her later article, however, Professor Twitchell stated:

202. *Id.* at 195–96.

203. See Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 130 (explaining that one of specific jurisdiction’s major deficiencies is its “inability to provide a single, rational forum”).

204. See Twitchell, *supra* note 60, at 196 (noting that one reason doing-business jurisdiction generally does not harm defendants is because most defendants are domestic and are likely to have to defend somewhere in the United States).

205. *Id.*; see also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (refusing to hear a third-party claim against a foreign defendant at the place of injury when the court’s assertion of jurisdiction was unreasonable); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (noting that the “requirements inherent in the concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities”).

206. See Twitchell, *supra* note 60, at 191 n.80 (noting that, of the “thousand or so reported opinions mentioning ‘general jurisdiction’ or ‘doing-business’ jurisdiction or ‘general personal jurisdiction,’ fewer than twenty opinions a year actually held that it existed”).

207. See Twitchell, *supra* note 17, at 630 (“With the emergence of specific jurisdiction in the twentieth century, the exercise of general jurisdiction has

It is important to recognize that the published case law does not reflect the entire picture. General jurisdiction cases often fly below the radar, and it is difficult to know how frequently because such cases are not reported in the case law. There are two reasons for this. First, defendants are unlikely to object to general jurisdiction in a forum if they operate directly from a physical office there, since this has always been held to be sufficient to justify general jurisdiction. Second, because of the expense and uncertainty of pursuing personal jurisdiction challenges, some defendants may not object at all, or may pursue a forum non conveniens challenge instead.²⁰⁸

Indeed, even in cases that reached the Supreme Court because of challenges to jurisdiction by other smaller defendants or challenges by a large corporate defendant to issues other than personal jurisdiction, large corporations repeatedly failed to assert any objection to the Court's exercise of corporate-activities-based jurisdiction.²⁰⁹ For example, in *World-Wide Volkswagen*, neither Audi nor Volkswagen of America challenged Oklahoma's assertion of personal jurisdiction notwithstanding the objections of the car dealer and local distributor.²¹⁰ Similarly, in *Phillips Petroleum Co. v. Shutts*,²¹¹ the defendant never asserted a challenge to the forum state's assertion of corporate-activities-based jurisdiction even though it asserted an objection to the Court's jurisdiction over non-resident members of the plaintiff class in a class action case.²¹² Defendant had an incentive to assert a due process objection; that it failed to do so could only be the result of its assumption that such an objection had no chance of prevailing.²¹³

become rare.”).

208. Twitchell, *supra* note 60, at 193–94.

209. *See id.* at 195–96 (arguing that doing business jurisdiction is rarely challenged by large corporate defendants because “[m]ost defendants are domestic and will have to defend somewhere in the United States anyway”).

210. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288–91 (1980) (noting that one reason Audi did not object to the Court's jurisdiction was because it may have felt it had no legitimate jurisdictional defense).

211. 472 U.S. 797 (1985).

212. *See id.* at 802–03 (describing petitioner's two claims as follows: first, that the Kansas trial court did not possess personal jurisdiction over absent plaintiff class members, and second, that Kansas law could not be applied to plaintiffs having no connection with Kansas).

213. *See id.* at 812–13 (holding that Kansas's procedure of sending fully

Regardless of how well-established corporate-activities-based jurisdiction was at the turn of the century, predicting the future of any personal jurisdiction doctrine is a dangerous business because of the absence of clearly defined Supreme Court precedents and the lack of a judicially recognized theoretical foundation for the substantive due process limitations on personal jurisdiction.²¹⁴ The Supreme Court demonstrated exactly how volatile the doctrine was, beginning with a case in 2011.

A. The Goodyear Case: The Hint of a New Standard

In *Goodyear*, the Court addressed personal jurisdiction issues involved in a lawsuit brought in North Carolina by the parents of two thirteen-year-old boys who were killed in a bus accident in France.²¹⁵ The plaintiffs alleged that the bus accident resulted from a defective tire manufactured in Turkey by a foreign subsidiary of the Goodyear Tire and Rubber Company (Goodyear USA).²¹⁶ The complaint named as defendants Goodyear USA and three of its subsidiaries organized and separately incorporated in Turkey, France, and Luxemburg.²¹⁷ Goodyear USA operates manufacturing plants in North Carolina but is incorporated and has its headquarters in the state of Ohio.²¹⁸ Goodyear USA did not

descriptive notices explaining the right to “opt-out” to each class member satisfied due process).

214. See Twitchell, *supra* note 60, at 173 (explaining that the “lack of a firm theoretical underpinning, coupled with the practical problems courts encounter in applying the [doing-business jurisdiction] doctrine today, makes its practice today more the product of circumstance and compromise than of a principled application of a well-developed theory”).

215. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011) (“A bus accident outside Paris that took the lives of two 13-year-old boys from North Carolina gave rise to the litigation we here consider.”).

216. See *id.* (“Attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of The Goodyear Tire and Rubber Company . . . the boys’ parents commenced an action for damages in a North Carolina state court . . .”).

217. See *id.* (“[T]hey named as defendants Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating, respectively, in Turkey, France, and Luxembourg.”).

218. See *id.* (explaining that Goodyear is an Ohio corporation that “had plants in North Carolina and regularly engaged in commercial activity there”).

contest personal jurisdiction in the North Carolina courts, but the foreign corporate defendants moved to dismiss the case against them for lack of personal jurisdiction.²¹⁹ Here is how the Court, in an opinion by Justice Ginsburg, described the foreign defendants' contacts with the forum State:

[P]etitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed in North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.²²⁰

Because the plaintiffs' claims arose in France and had no connection with the state of North Carolina, the North Carolina courts relied on the theory of corporate-activities-based jurisdiction to justify personal jurisdiction in North Carolina.²²¹ In addition, in order to establish the continuous and systematic contacts that plaintiffs acknowledged were necessary for such jurisdiction, the North Carolina courts relied solely on the sales in North Carolina of the tires manufactured by the foreign defendants because the defendants had no physical presence within that state.²²² Indeed, because the foreign defendants themselves did not sell any of their tires in North Carolina, the

219. *See id.* ("Goodyear USA's foreign subsidiaries . . . maintained that North Carolina lacked adjudicatory authority over them.")

220. *Id.*

221. *See id.* at 921–22 (describing the lower court's decision to confine its analysis to "general rather than specific jurisdiction," which the court recognized required a 'higher threshold' showing: A defendant must have 'continuous and systematic contacts' with the forum").

222. *See id.* at 922 (noting the lower courts' emphasis on the foreign defendants' failure to make any attempt to keep their tires from reaching the North Carolina market).

lower courts relied on a stream-of-commerce theory to establish a connection between the defendants and the forum state.²²³

Justice Ginsburg began her discussion of the relevant legal standard by noting that cases after *International Shoe* distinguished between “general or all-purpose jurisdiction, and specific or case-linked jurisdiction.”²²⁴ This very broad description of general and specific jurisdiction is the first suggestion that Justice Ginsburg may be describing these categories, and in particular general jurisdiction, in the larger sense of any kind of all-purpose jurisdiction, rather than the more limited sense of corporate-activities-based jurisdiction.²²⁵

Justice Ginsburg then followed with a curious, but later very important, description of the test for general jurisdiction: “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.”²²⁶ Of course, the key phrase in this description of the law is not “continuous and systematic,” which was the generally accepted test at the time, but rather the newly minted phrase “as to render them essentially at home in the forum State.”²²⁷

The “essentially at home” criterion, at least when applied to corporate-activities-based cases, was entirely unprecedented.²²⁸ The only case Justice Ginsburg cited for this proposition was

223. *See id.* (according to the lower courts, the higher threshold was crossed “when petitioners placed their tires ‘in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina’”).

224. *Id.* at 919.

225. *See* Twitchell, *supra* note 17, at 610 (describing general jurisdiction as “dispute-blind” and without regard to the nature of the dispute, and specific jurisdiction as “dispute-specific” and based only on affiliations between the forum and the controversy).

226. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

227. *See* Twitchell, *supra* note 17, at 623–24 (explaining that the *International Shoe* Court used the opportunity to sweep aside the “presence” test in favor of a new means of determining corporate jurisdiction).

228. *See* Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 236 (2011) (explaining that prior to *Goodyear*, “the Supreme Court had given no indication of where to draw the line between . . . cases at either end of the general jurisdiction spectrum”).

International Shoe.²²⁹ There are two references to “home” on the cited page of the Court’s *International Shoe* opinion, but neither of them suggests that the corporate-activities-based jurisdiction discussed in that opinion was available only in states where a corporation was essentially at home.²³⁰ The first reference is found in the one sentence in the opinion that later provided a foundation for the Court’s procedural due process component to the minimum contacts tests: “An ‘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.”²³¹ This sentence does not refer to the contacts, or substantive due process, part of the test for personal jurisdiction.²³² Rather, the context of the sentence makes it clear that the Court is stating that, in addition to the contacts requirement, the exercise of personal jurisdiction by a state must not be so inconvenient to a defendant as to render it procedurally unfair.²³³

The second mention of the term “home” is similarly irrelevant to the requirement for corporate-activities-based jurisdiction:

Conversely it 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 [on] the corporation’s

229. *Goodyear*, 564 U.S. at 919; *see also* *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)

‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

230. *Int’l Shoe*, 326 U.S. at 317.

231. *Id.*

232. *Id.*

233. Earlier in the same paragraph, Justice Stone discussed the “presence” requirement as applied to corporations. *See id.* at 316–17

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.

(citing *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 140–41 (2d Cir. 1930)).

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.²³⁴

This excerpt not only fails to support Justice Ginsburg's addition of the phrase "at home" as an additional qualifier to the continuous and systematic contacts test,²³⁵ it supports precisely the opposite conclusion. Here, the Court is simply stating that isolated contacts are not sufficient to require a corporation to defend away from its "home."²³⁶ Moreover, by adding the phrase "or other jurisdiction where it carries on more substantial activities,"²³⁷ the Court seems clearly to be suggesting that some form of dispute-blind all-purpose jurisdiction is available in states where it carries on "more substantial activities" other than where a corporation is "at home."²³⁸

Justice Ginsburg then noted that, because the claim arose out of an accident in France, the North Carolina courts lacked specific jurisdiction.²³⁹ Instead, the state court found that there was general jurisdiction because the delivery of some of the foreign defendants' tires through "the stream of commerce" to North

234. *Id.* (citations omitted).

235. *See Goodyear*, 564 U.S. at 919 ("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." (citing *Int'l Shoe*, 326 U.S. at 317)).

236. *See id.* (noting that plaintiffs failed to demonstrate that the foreign defendants had "affiliations with the State [that were] so 'continuous and systematic' as to render them essentially at home in the forum State" (citing *Int'l Shoe*, 326 U.S. at 317)).

237. *Id.*

238. *See id.* at 928–29 (noting that "continuous and systematic general business contacts" may be sufficient to establish general jurisdiction (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984))).

239. *See id.* at 919 ("Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. The North Carolina Court of Appeals so acknowledged.").

Carolina provided the North Carolina courts with general jurisdiction over the foreign defendants.²⁴⁰ In Justice Ginsburg's view, that conclusion was "confusing or blending general and specific jurisdictional inquiries . . ." ²⁴¹ A connection as tenuous as that could not "establish the 'continuous and systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the forum corporation's contacts with the State."²⁴²

After describing the jurisdictional facts in detail in order to lay the foundation for the Court's opinion, Justice Ginsburg set forth her understanding of the law. Justice Ginsburg first discussed the *International Shoe* opinion and distinguished between assertions of specific jurisdiction and general jurisdiction.²⁴³ In discussing general jurisdiction, Justice Ginsburg made a critical error: "For an individual, the paradigm form for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at 'home.'"²⁴⁴ The problem with this statement, however, is that plaintiff's jurisdictional argument rested on general jurisdiction in the narrow sense of corporate-activities-based jurisdiction,²⁴⁵ while Justice Ginsburg's identification of domicile, place of incorporation, and principal place of business as "paradigm bases for general jurisdiction" referred to general jurisdiction in its larger sense of all-purpose jurisdiction.²⁴⁶ Citizenship or domicile

240. *See id.* ("Some of the tires made abroad by Goodyear's foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through 'the stream of commerce'; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations.")

241. *Id.*

242. *Id.* at 920.

243. *See id.* at 923–25 (explaining that adjudicatory authority is "specific" when the suit arises out of or relates to the defendant's contacts with the forum, and that it is "general" when the continuous corporate operations within a state justify suit against the corporation on an unrelated cause of action (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984))).

244. *Id.* at 924.

245. *See id.* at 930 (explaining that plaintiff asserted a "single enterprise" theory and asked the Court to consolidate foreign defendants' ties to North Carolina with those of Goodyear USA and other Goodyear entities).

246. According to Justice Ginsburg, for a corporation, the paradigmatic forum

of corporations and individuals has always been a valid traditional basis of jurisdiction separate and apart from corporate-activities-based jurisdiction, which developed from the separate traditional basis of service on a defendant in the forum state.²⁴⁷ This distinction is made entirely clear by Justice Ginsburg's citation to Professor Lea Brilmayer's article on general jurisdiction, which, at the page cited by Justice Ginsburg, clearly refers to general jurisdiction in the larger sense of all-purpose jurisdiction, not corporate-activities-based jurisdiction.²⁴⁸

Justice Ginsburg's mistake is the perfect example of why the ambiguity of jurisdictional terminology gets the courts into trouble. The term general jurisdiction can mean two entirely different things. The plaintiffs in *Goodyear* were arguing for general jurisdiction in the sense described by *International Shoe*, *Perkins*, and *Helicopteros*, as corporate-activities-based jurisdiction.²⁴⁹ Justice Ginsburg, on the other hand, is discussing an entirely different subset of all-purpose jurisdiction, citizenship/domicile, which, although it may be the paradigmatic form of all-purpose general jurisdiction, is an entirely separate

for the exercise of general jurisdiction is one in which the corporation is fairly regarded as "at home." *Id.* at 924. Justice Ginsburg cited Lea Brilmayer for additional, paradigmatic bases for general jurisdiction, including domicile, place of incorporation, and principal place of business. *Id.* (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 728 (1988)).

247. See Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 725 (1988) [hereinafter Brilmayer, *A General Look*] (explaining that historically, "courts commonly predicated jurisdiction upon the defendant's general affiliation with the forum, and not the defendant's activities in the forum that were related to the litigation").

248. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (discussing the paradigm forum for the exercise of general jurisdiction over a corporation (citing Brilmayer, *A General Look*, *supra* note 247, at 728)).

249. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (holding that Texas could not exercise general jurisdiction over Helicol because Helicol's contacts with Texas were not sufficiently continuous and systematic); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (holding that Ohio could exercise general jurisdiction over a Philippines-based corporation because the corporation's president had been carrying on a continuous and systematic part of its general business in Ohio); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (holding that Washington's exercise of general jurisdiction over *International Shoe* was proper because its activities in Washington were systematic and continuous).

category from corporate-activities-based jurisdiction.²⁵⁰ Thus, although state of incorporation and principal place of business might be the measure of the traditional basis of citizenship or domicile jurisdiction, they were never (at least until this case) deemed to be the test for corporate-activities-based jurisdiction.²⁵¹

Justice Ginsburg then went on to describe the Court's specific jurisdiction cases.²⁵² She concluded with a citation to Professor Twitchell's *Myth of General Jurisdiction* article in which Professor Twitchell stated that, in the aftermath of *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role."²⁵³ In that article, of course, Professor Twitchell focused solely on litigated cases, which, as previously discussed, tilt strongly towards specific jurisdiction analyses.²⁵⁴ But, as Professor Twitchell herself acknowledged, the importance of general corporate-activities-based jurisdiction cannot be gauged by reported opinions because most substantial corporate defendants never challenge the existence of corporate-activities-based jurisdiction.²⁵⁵ This issue is critically important because, as we shall see, Justice Ginsburg assumes that plaintiffs have no significant need for corporate-activities-based jurisdiction, a claim that is empirically questionable at best.

250. See *Goodyear*, 564 U.S. at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

251. See Brilmayer, *A General Look*, *supra* note 247, at 731–32 (explaining that, since *International Shoe*, the traditional basis for jurisdiction had been "physical power").

252. See *Goodyear*, 564 U.S. at 924–25 (discussing specific jurisdiction cases that post-date *International Shoe* (citing *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 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); *Hanson v. Denckla*, 357 U.S. 235 (1958)).

253. *Id.* at 925 (citing Twitchell, *supra* note 17, at 628).

254. See *supra* text accompanying notes 247–248 (discussing the general acknowledgement that it is necessary to recognize corporate-activities-based jurisdiction as separate from a defendant's state of incorporation and principal place of business).

255. See *supra* text accompanying notes 207–208 (discussing how and why general jurisdiction cases usually fly under the radar).

Justice's Ginsburg's opinion then turned to plaintiffs' assertion that corporate-activities-based jurisdiction could be justified based on a stream-of-commerce theory.²⁵⁶ Justice Ginsburg noted that the lower courts use of the "stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant."²⁵⁷ If anything, Justice Ginsburg understated the problem with plaintiffs' argument. The stream-of-commerce theory has never been accepted by a majority of the Court, even in the context of a specific jurisdiction case.²⁵⁸ The plaintiffs' argument is so clearly beyond any Supreme Court precedent that Justice Ginsburg could easily have stopped there. Given the weakness of plaintiffs' argument, it is not surprising that no member of the Court supported plaintiffs' case for jurisdiction.

Justice Ginsburg proceeded, however, to a lengthy discussion of the facts of both *Perkins* and *Helicopteros*, which made it clear that "North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction."²⁵⁹ These contacts fell "far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that

256. *Goodyear*, 564 U.S. at 927.

257. *Id.*

258. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) (explaining that the stream of commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that it ensures); *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (O'Connor, J., concurring) (arguing that a defendant's awareness that the stream of commerce may sweep a product to the forum state is not an act purposefully directed toward the forum state); *id.* at 117 (Brennan, J., concurring)

[A]rguing that a defendant's placement of a product into the stream of commerce is an act in which the defendant purposefully avails itself of the forum state because "[a]s long as a participant . . . is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.

259. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 917 (2011).

connects them to the State.”²⁶⁰ Justice Ginsburg concluded her analysis by stating: “Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina.”²⁶¹

This last statement by Justice Ginsburg is profoundly ambiguous and confusing. On the one hand, one might infer that the reference to the petitioners being “in no sense at home in North Carolina” was intended to define the standard for corporate-activities-based jurisdiction and limit such cases to instances where a defendant is essentially at home in the forum state. On the other hand, Justice Ginsburg’s subsequent reference to “continuous and systematic general business contacts” suggested continuity with *Helicopteros* and the many lower court cases involving corporate-activities-based jurisdiction.²⁶²

Following *Goodyear*, the courts and commentators disagreed on whether the Court had changed the well-accepted tests for general jurisdiction. Some argued that the Court’s use of the phrase “essentially at home” implied that the Court was imposing significant new restrictions on the cases that would qualify for corporate-activities-based jurisdiction.²⁶³ Others, however, concluded that the Court could not have intended such a

260. *Id.* at 929 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

261. *Id.* (emphasis added).

262. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (“The one trip to Houston by Helicol’s chief executive officer for the purpose of negotiating the transportation-services contract with Consorcio/WSH cannot be described or regarded as a contact of a ‘continuous and systematic’ nature”); *see, e.g., Pervasive Software, Inc. v. Lexware GmbH & Co.*, 688 F.3d 214, 231 (5th Cir. 2012) (“Lexware’s attenuated connections to the state fall far short of the ‘the continuous and systematic general business contacts’ necessary to make Lexware ‘at home’ in the forum.”).

263. *See, e.g., Lou Mulligan, Clarifying Personal Jurisdiction . . . or Not*, PRAWFSBLAWG (June 28, 2011, 4:05 P.M.), <https://prawfsblawg.blogs.com/prawfsblawg/2011/06/clarifying-personal-jurisdiction-or-not.html> (last visited Jan. 24, 2019) (“The opinion signals to lower courts that simply doing a lot [of] continuous business in a state is not sufficient for general jurisdiction.”) (on file with the Washington and Lee Law Review).

significant restriction and that the test would remain the same as it had ever since *Perkins*.²⁶⁴

The strongest argument in favor of giving significant doctrinal substance to Justice Ginsburg's use of the phrase "at home" came not from the opinion in *Goodyear*, but rather from the Court's decision in *McIntyre*, a specific jurisdiction case decided the same year as *Goodyear*.²⁶⁵ In discussing the possible bases of jurisdiction over the defendant in her dissenting opinion, Justice Ginsburg stated: "First, all agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly 'at home' in New Jersey."²⁶⁶ That sentence certainly suggests that Justice Ginsburg regarded the test for corporate-activities-based jurisdiction to be whether a defendant is at home in the forum state. Of course, even if one had accepted "at home" as the basis for corporate-activities-based jurisdiction, Justice Ginsburg had not given that phrase much content or explanation.²⁶⁷

The arguments in favor of a much more limited interpretation of *Goodyear* were two-fold. First, there was no support in the Supreme Court's prior precedents for the imposition of an "at home" standard for corporate-activities-based jurisdiction.²⁶⁸ As previously noted, the two references to "home" in *International Shoe* did not relate to the quantum of contacts necessary to permit corporate-activities-based jurisdiction, but instead related to fairness considerations involving burden and inconvenience to the

264. See, e.g., Peterson, *supra* note 228, at 215 (arguing that such a restrictive interpretation ignores "Justice Ginsburg's use of the term 'paradigm,' meaning 'an outstandingly clear or typical example or archetype'"); Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1267 (2011) (arguing that the nature of Goodyear USA's contacts suggested "that some sort of permanent commercial presence, often manifested in physical locations, is the hallmark of general jurisdiction").

265. *J. McIntyre Machinery*, 564 U.S. at 899 (Ginsburg, J., dissenting).

266. *Id.*

267. See *id.* (using the phrase "at home" only once, in the following sentence: "First, all agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly 'at home' in New Jersey").

268. See *supra* notes 230–238 and accompanying text (discussing the Court's two references to "home" in the *International Shoe* opinion).

defendant.²⁶⁹ In *Perkins*, the Court made no mention of the phrase “at home” nor did it suggest that the test for corporate-activities-based jurisdiction was restricted to the state of incorporation and a corporation’s principal place of business, factors that were relevant to the traditional basis of citizenship, and not to corporate-activities-based jurisdiction.²⁷⁰ Finally, in *Helicopteros*, if the Court had thought that corporate-activities-based jurisdiction had been limited to where a corporation was “at home” or solely its state of incorporation or principal place of business, the Court could have made much shorter work of the case. Nowhere in that decision did the Court suggest that corporate-activities-based jurisdiction was available only where a corporation was “at home.”²⁷¹

Second, it was hard to believe that Justice Ginsburg would make such a significant change in the standard for corporate-activities-based jurisdiction, which would overrule sixty years of lower court precedent, without discussing that precedent or even mentioning that such cases existed. Surely Justice Ginsburg must have been aware of this lower court precedent and, just as surely, Justice Ginsburg would have been aware that a significant restriction on corporate-activities-based jurisdiction would significantly tip the balance in favor of corporate defendants who had long assumed they were subject to corporate-activities-based jurisdiction in virtually every state, to the detriment of individual plaintiffs who might now be forced to travel far from their own homes in order to sue well-funded corporations who could afford to defend effectively in any state. Even if Justice Ginsburg intended that result, she certainly would not write an opinion without discussing that issue and the impact on so many years of well-entrenched precedent. Thus, it is not surprising that one widely used case book on civil procedure added a note after the *Goodyear* decision stating that it was a “wise choice” for *Goodyear USA* to have conceded general jurisdiction in

269. See *supra* notes 230–238 and accompanying text (discussing the Court’s two references to “home” in the *International Shoe* opinion).

270. The phrase “at home” is never used in the *Perkins* opinion. See generally *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

271. The phrase “at home” is never used in the *Helicopteros* opinion. See generally *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

North Carolina “given the extent of their contacts with North Carolina”²⁷²

Third, it would have been particularly surprising for Justice Ginsburg to make such a sweeping change in the law of personal jurisdiction in such an easy case. Goodyear could have been decided based on the existing understanding of the differences between corporate-activities-based jurisdiction and specific jurisdiction. Justice Ginsburg needed to say only that, given the uncertain validity of the stream-of-commerce theory in the context of specific jurisdiction, the use by the North Carolina courts of that theory to justify corporate-activities-based jurisdiction was unquestionably overreaching.²⁷³ One would never have expected a justice as highly regarded as Justice Ginsburg to make so sweeping and unnecessary a pronouncement in a case where none of the parties had briefed the issue, none of the briefs contained any discussion of the many corporate-activities-based cases in the lower courts, and none of the other justices joining in the unanimous decision would be likely to perceive the sweeping impact of such a decision.

A final reason not to regard Goodyear as a sea change in the law of corporate-activities-based jurisdiction was that corporate defendants continued to concede corporate-acts-based jurisdiction. For example, in the preliminary stages of the Supreme Court’s next big case on that subject, Daimler AG v. Bauman,²⁷⁴ the Ninth Circuit upheld an assertion of corporate-activities-based jurisdiction over Daimler with respect to a law suit challenging the activities of its wholly owned subsidiary in Argentina based upon the continuous and systematic contacts with the state of California by its American subsidiary, Mercedes-Benz USA (MBUSA).²⁷⁵

272. See STEPHEN C. YEAZELL, CIVIL PROCEDURE 138 (8th ed. 2012) (discussing what difference, if any, Goodyear’s failure to challenge personal jurisdiction would have made in the outcome of the case); see also Borchers, *supra* note 264, at 1267 (stating that there was probably corporate-activities-based jurisdiction over Goodyear USA).

273. See *supra* note 258 and accompanying text (noting that stream-of-commerce theory has never been accepted by a majority of the Supreme Court).

274. 571 U.S. 117 (2014).

275. *Id.* at 120–21.

Daimler contested the existence of personal jurisdiction in California and had an interest in making every argument it could to defeat such jurisdiction.²⁷⁶ Notwithstanding this clear incentive to make every possible jurisdictional argument, Daimler conceded that California would have corporate-activities-based jurisdiction over MBUSA, even though it was incorporated in Delaware with its principal place of business in New Jersey.²⁷⁷ Daimler would not have conceded that jurisdiction unless it believed that Goodyear had limited corporate-activities-based jurisdiction to MBUSA's states of incorporation and principal place of business.

One final indication that Goodyear made no significant change in corporate-activities-based jurisdiction is contained in an amicus brief filed in the Daimler case by Professor Lea Brilmayer, the very scholar on whom Justice Ginsburg had so prominently relied in *Goodyear* and a well-known opponent of broad corporate-activities-based jurisdiction.²⁷⁸ In her brief, the sole ground on which Professor Brilmayer argued for the reversal of the Ninth Circuit's assertion of personal jurisdiction over Daimler was the argument that the Ninth Circuit improperly attributed the contacts of MBUSA to Daimler, which was an entirely separate corporation.²⁷⁹ Brilmayer made no argument based on the standard for general corporate-activities-based jurisdiction. Indeed, Brilmayer described the standard for such jurisdiction in a manner that suggested Goodyear had imposed no changes on corporate-activities-based jurisdiction whatsoever:

This Court has repeatedly held that the Due Process Clause requires a holding of “continuous and systematic” contacts

276. *See id.* at 134–35 (arguing that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its “alter ego”).

277. *Id.* at 121.

278. *See* Brief for Daimler AG as Amici Curiae Supporting Petitioner at 1, *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (No. 11-965), 2013 WL 3377320 (describing Professor Brilmayer as one of America's most widely cited scholars writing on personal jurisdiction).

279. *See id.* at 8 (“The Ninth Circuit's test left the *actual defendant* unaccounted for. It was not MBUSA, but Daimler, that the plaintiffs wanted to sue. This deficiency should be fatal, because this Court mandates that contacts be shown for *every defendant* over whom jurisdiction is sought.”).

between the defendant and the forum. The “continuous and systematic” test for assertion of general jurisdiction is generally ascribed to *Perkins v. Benguet Consolidated Mining Co.* Although formulated six decades ago, the *Perkins* standard remains authoritative.²⁸⁰

Nevertheless, when the Supreme Court ultimately decided *Daimler*, Justice Ginsburg had a surprise in store for all those who expected that *Goodyear* had not made a significant change in the law.

B. Daimler: The Hint of a New Standard Converted to a Holding, but with a Possible Exception

The next Supreme Court case to address corporate-activities-based jurisdiction after *Goodyear* was *Daimler AG v. Bauman*.²⁸¹ *Daimler* involved a complaint filed in the Northern District of California by twenty-two Argentine residents against the German manufacturer of Mercedes-Benz vehicles.²⁸² The complaint alleged that during Argentina’s “Dirty War,” Daimler’s Argentine subsidiary “collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs.”²⁸³ Plaintiffs asserted that the State of California had personal jurisdiction over Daimler based on the California contacts of Daimler’s American subsidiary, Mercedes-Benz USA (MBUSA) which was separately incorporated in Delaware with its principal place of business in New Jersey.²⁸⁴

In response to defendant’s motion to dismiss for lack of personal jurisdiction, plaintiffs argued that MBUSA “should be

280. *Id.* at 11 (discussing the *Perkins* standard as applied by the Court in *Helicopteros* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929–29 (2011)); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (concluding that Helicol’s contacts with Texas did not constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*)).

281. 571 U.S. 117 (2014).

282. *Id.* at 120–21.

283. *Id.* at 121.

284. *Id.*

treated as Daimler’s agent for jurisdictional purposes.”²⁸⁵ As the Supreme Court noted, “[a]t times relevant to this suit, MBUSA was wholly owned by DaimlerChrysler North America Holding Corporation, a Daimler subsidiary.”²⁸⁶ MBUSA had substantial contacts with the State of California, including “multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.”²⁸⁷ In addition, MBUSA was “the largest supplier of luxury vehicles to the California market,” and over ten percent of MBUSA’s sales occurred in California, which accounted for 2.4 percent of Daimler’s world-wide sales.²⁸⁸

As previously noted, Daimler did not contest plaintiff’s allegation that California would have corporate-activities-based jurisdiction over MBUSA.²⁸⁹ Instead, Daimler argued that, because MBUSA was a separate and distinct corporate entity, the Court should not attribute MBUSA’s contacts with California to Daimler.²⁹⁰ The district court agreed that MBUSA’s contacts should not be attributed to Daimler and dismissed the plaintiff’s complaint for lack of personal jurisdiction.²⁹¹ On appeal, the Ninth Circuit initially affirmed the district court’s judgment.²⁹² On rehearing, however, the panel reversed course and upheld personal

285. *Id.* at 123

286. *Id.* at 123 n.3. Thus, Daimler was twice removed from the separate corporate entity on whose contacts with California the plaintiffs relied.

287. *Id.* at 123.

288. *Id.*

289. *See supra* note 277 and accompanying text (explaining Daimler’s concession that California would have corporate-activities-based jurisdiction over MBUSA, even though it was incorporated in Delaware with its principal place of business in New Jersey).

290. *See* Daimler AG v. Bauman, 571 U.S. 117, 134–35 (2014) (“Daimler argues, and several Courts of Appeals have held, that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.”).

291. *See id.* at 124 (granting Daimler’s motion to dismiss because Daimler’s own affiliations with California were insufficient to support the exercise of all-purpose jurisdiction and because plaintiffs failed to demonstrate MBUSA acted as Daimler’s agent).

292. *See* Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1098 (9th Cir. 2009) (affirming the District Court’s order because the District Court did not have personal jurisdiction over DaimlerChrysler).

jurisdiction over Daimler in California based upon the contacts of its subsidiary MBUSA.²⁹³ Daimler petitioned for a rehearing en banc, but that petition was denied over a dissent written by Judge O’Scannlain, on behalf of himself and seven other Ninth Circuit judges.²⁹⁴

The Supreme Court granted certiorari, and Justice Ginsburg wrote the majority opinion on behalf of herself and seven other members of the Court.²⁹⁵ Justice Ginsburg did not take long to indicate the direction in which the Court was going. Before even getting to her recitation of the facts, Justice Ginsburg established two key points. First, she observed the “absence of any California connection to the atrocities, perpetrators, or victims” in the case and noted that plaintiffs were arguing that Daimler could “be sued on any and all claims against it, wherever in the world the claims may arise.”²⁹⁶ Then Justice Ginsburg revealed the precise ground for her concern:

For example, as plaintiffs’ counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.²⁹⁷

This statement contains a number of hints about the nature of Justice Ginsburg’s concerns. First, the hypothetical itself suggests that her concern was the assertion of jurisdiction over a case that arose outside of the United States and in which the forum state has no interest. Such far-reaching assertions of personal jurisdiction are disfavored under generally accepted international

293. See *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 911 (9th Cir. 2011) (holding that DaimlerChrysler was subject to personal jurisdiction in California through the contacts of its subsidiary MBUSA and that MBUSA was acting as DaimlerChrysler’s agent).

294. See *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774 (9th Cir. 2011) (arguing that the petition for rehearing en banc should have been granted because the holding was at odds with the dictates of the Supreme Court and is inconsistent with the law of six other circuits) (O’Scannlain, J., dissenting).

295. *Daimler*, 571 U.S. at 120.

296. *Id.* at 121.

297. *Id.* at 121–22 (citations omitted).

law standards, a fact of which Justice Ginsburg was aware by virtue of her use of the term “exorbitant” to describe the exercise of jurisdiction in this case.²⁹⁸ The word “exorbitant” is a term of art in international comparative law that is used to describe excessive assertions of personal jurisdiction by a country over defendants from a foreign country, and Justice Ginsburg had used the term in just that sense in her own academic writing as a law professor.²⁹⁹

The second early hint was contained in the opinion’s next paragraph, which notes that the Court in *Goodyear* “addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction.”³⁰⁰ Then, Justice Ginsburg made a surprisingly broad leap:

As to the former, we *held* that a court may assert jurisdiction over a foreign corporation “to hear any and all claims against [it]” only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive “as to render [it] essentially at home in the forum State. Instructed by *Goodyear*, we conclude Daimler is not “at home” in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina’s conduct in Argentina.³⁰¹

In one sentence, Justice Ginsburg converted the seemingly casual references in *Goodyear* to where a corporation is “at home” into a holding that swept vastly further than necessary to resolve the issues in *Daimler*, and that virtually eliminated corporate-activities-based jurisdiction as a separate category of personal jurisdiction. As will be discussed in detail below,³⁰² the

298. See Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary Review of the Situation in the United States*, 4 INT’L L. 720, 725–26 (1970) (noting that jurisdictional bases appropriate in domestic law are largely unacceptable in the international sphere).

299. See *id.* (“Unacceptable or ‘exorbitant’ bases (principally nationality, domicile or residence of the plaintiff, presence of any assets of a non-resident defendant, and—the common law contribution to the list—defendant’s transitory presence) generally are not expected even by the rendition forum to elicit recognition outside.”).

300. *Daimler*, 571 U.S. at 122.

301. *Id.* (emphasis added) (citations omitted).

302. See *infra* note 339 and accompanying text (discussing the Supreme Court’s power to impose restraints on personal jurisdiction over foreign persons that are not otherwise required by the Due Process Clause).

Court did not need to utilize the mysterious “at home” standard to prevent courts from assuming jurisdiction over cases like Justice Ginsburg’s Polish hypothetical. Instead, by stretching for the broadest impact, Justice Ginsburg converted an ambiguous statement in the *Goodyear* opinion into a binding holding that would govern future cases.³⁰³

After reciting the facts of the case, Justice Ginsburg began her discussion of the applicable law by stating that *Pennoyer* had held “that a tribunal’s jurisdiction over a person reaches no farther than the geographic bounds of the forum.”³⁰⁴ Curiously, however, the *Pennoyer* reference does not really match the statement made by Justice Ginsburg.³⁰⁵ Justice Ginsburg then explained the differences between specific and general jurisdiction, with a citation to *International Shoe* and the following quotation from *Goodyear*: “a court may assert general jurisdiction over foreign (sister-state or a 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.”³⁰⁶ In *Goodyear*, that sentence had been

303. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1776 (2017) (expounding the proposition that “for general jurisdiction, the ‘paradigm forum’ is an ‘individual’s domicile,’ or, for corporations, ‘an equivalent place, one in which the corporation is fairly regarded as at home’” (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011))).

304. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877)).

305. The exact quotation cited by Justice Ginsburg is “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.” *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877)). That statement is not the equivalent of the description made by Justice Ginsburg, which suggests that states could not exercise jurisdictional authority over any one who was not found or served with process within the forum state. To the contrary, the *Pennoyer* Court recognized that a state could exercise jurisdiction over its citizens, individual or corporate, even if they were not present within the forum state. To say that a state’s authority is restricted by its territorial limits is not the same as saying its jurisdiction over a person reaches no farther than the geographic bounds of the forum. This distinction is not simply a semantic quibble. The key problem with Justice Ginsburg’s test for dispute-blind jurisdiction is that she fails to distinguish between the categories of citizenship or domicile jurisdiction and presence/doing business jurisdiction, which later became corporate-activities-based jurisdiction.

306. *Daimler*, 571 U.S. at 127 (quoting *Goodyear*, 564 U.S. at 919).

followed by a citation to *International Shoe*, which, as we have already seen, does not remotely support the inclusion of the “essentially at home in the forum State” qualification.³⁰⁷ After repeating that statement in *Daimler*, Justice Ginsburg included a citation to *Helicopteros* which also supplied no support for the “essentially at home” standard.³⁰⁸ Then, in a footnote, Justice Ginsburg doubled down on her reference to the Polish automobile accident hypothetical that involved no person with any connection to the State of California.³⁰⁹

It is striking that Justice Ginsburg, for the second time in the opinion, paired the description of the corporate-activities-based jurisdiction standard as “essentially at home” with the Polish hypothetical.³¹⁰ The implicit suggestion is that the new, and unprecedented, standard was necessary to prevent exorbitant assertions of jurisdiction over cases like the Polish automobile accident.³¹¹ But the Polish automobile accident, just as was true

307. See *supra* notes 229–238 and accompanying text (discussing the two references to “home” in the *International Shoe* opinion).

308. *Daimler*, 571 U.S. at 127. The cited portion of *Helicopteros* reads: “When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (citations omitted).

309. See *Daimler*, 571 U.S. at 127 n.5

Colloquy at oral argument illustrated the respective provinces of general and specific jurisdiction over persons. Two hypothetical scenarios were posed: *First*, if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court’s adjudicatory authority would be premised on specific jurisdiction. *Second*, if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction.

(citations omitted).

310. Footnote 5, in which Justice Ginsburg makes her second reference to the Polish hypothetical, is immediately preceded by the following sentence: “As we have since explained, [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.” *Id.* at 127 (emphasis added) (citations omitted).

311. See *id.* at 121–22 (“Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory

with respect to the *Daimler* case itself, could easily be excluded from jurisdiction in California by a corporate-activities-based standard that is vastly less restrictive than the one suggested by Justice Ginsburg.

To assuage concerns that such a restrictive standard for corporate-activities-based jurisdiction would disadvantage American plaintiffs, Justice Ginsburg repeated the assertion in *Goodyear* that “specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.”³¹² Citing von Mehren and Trautman’s seminal article, Justice Ginsburg claimed that the Court’s “subsequent decisions have continued to bear out the prediction that ‘specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene.’”³¹³ Justice Ginsburg further emphasized this point by later suggesting:

As is evident from *Perkins*, *Helicopteros*, and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*’s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As the Court has increasingly trained on the “relationship among the defendant, the forum, and the litigation,” *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scene.³¹⁴

Once again, Justice Ginsburg failed to mention of the multitude of general jurisdiction cases decided by the lower courts. The relative infrequency of general jurisdiction cases in the Supreme Court is no indication of the importance of corporate-activities-based jurisdiction as an aid for a plaintiff seeking easy resolution of its claims. Indeed, many regarded the failure of the Court to grant certiorari in any of the lower court cases involving corporate-activities-based jurisdiction as an indication that the

authority.”).

312. *Id.* at 128 (quoting Twitchell, *supra* note 17, at 628).

313. *Id.* (citing von Mehren & Trautman, *supra* note 9, at 1164).

314. *Id.* at 132–33 (citations omitted).

Court was willing to give states wide latitude in asserting that type of all-purpose jurisdiction.³¹⁵

If Justice Ginsburg intended only to suggest that the Supreme Court had issued many more decisions concerning specific jurisdiction than general jurisdiction, the point is unquestionably true. If, however, Justice Ginsburg meant to suggest that general jurisdiction was no longer important to plaintiffs, Justice Ginsburg was plainly incorrect. Corporate defendants never raised jurisdictional challenges in such cases because they assumed that courts had general jurisdiction over major corporations in virtually every state. That group included Daimler itself because it conceded the existence of general corporate-activities-based jurisdiction over MBUSA, notwithstanding the fact that MBUSA was not “at home” in California.³¹⁶

Justice Ginsburg then addressed the jurisdictional issues that had been the focus of all the litigation in the lower courts, including the petition for rehearing *en banc* before the Ninth Circuit.³¹⁷ Daimler had argued that the in-state contacts of Daimler’s MBUSA subsidiary could not be attributed to the separate and independent Daimler corporate entity.³¹⁸ As previously noted, Professor Lea Brilmayer’s *amica* brief to the Supreme Court

315. See FRIEDENTHAL ET AL., *supra* note 47, at 106.

316. After discussing the facts of *Perkins*, *Helicopteros*, and *Goodyear*, Justice Ginsburg reaffirmed her conversion of her hint of a new standard in *Goodyear* to the clear holding of the Court. “Because Goodyear’s foreign subsidiaries were ‘in no sense at home in North Carolina,’ we held, those subsidiaries could not be required to submit to the general jurisdiction of that State’s courts.” *Daimler AG v. Bauman*, 571 U.S. 117, 132 (2014). Then, as if to underscore the point, Justice Ginsburg repeated in a footnote, “as the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations ‘so “continuous and systematic” as to render [the forum corporation] essentially at home in the forum State.’” *Id.* at 133 n.11. Repeating the phrase multiple times, however, does not obscure the fact that it appeared seemingly from out of nowhere in *Goodyear* without any precedent in prior court cases and without any explanation for why that should be the standard for corporate-activities-based jurisdiction.

317. See *Daimler*, 571 U.S. at 134, 140 (assessing “whether a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary” and analyzing general jurisdiction within the transnational context of this particular case).

318. See *id.* at 134–35 (“Daimler argues, and several Courts of Appeals have held, that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to its alter ego.”).

vigorously and persuasively argued that it was improper to pierce the corporate veil, by attributing the actions of an entirely distinct corporate entity to the parent corporation.³¹⁹ Justice Ginsburg, however, did not accept the narrow ground to resolve this case on its easy facts. Instead, she reached out to state a much broader holding concerning the scope of corporate-activities-based jurisdiction. Although Justice Ginsburg seemingly accepted Daimler's arguments on the agency theory, she reached out for the vastly broader question:

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.³²⁰

Justice Ginsburg's long reach allowed her to address the question raised by those who believed that the "essentially at home" imposed a new and more restrictive standard for the assertion of corporate-activities-based jurisdiction: What does the phrase essentially at home mean? To answer this question Justice Ginsburg once again turned to Professor Brilmayer's article on general jurisdiction.³²¹ Citing both the state of incorporation and principal place of business as "paradigm bases for general jurisdiction," Justice Ginsburg added,

Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. *cf. Hertz Corp. v. Friend*³²² These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.³²³

This statement raises so many issues that it is hard to know where to begin. The first problem is Justice Ginsburg's assumption, based on her citation to the *Hertz* case, that principal

319. See Brief, *supra* note 278.

320. *Daimler*, 571 U.S. at 136.

321. *Id.* at 137 (citing Brilmayer, *supra* note 247, at 728).

322. 559 U.S. 77 (2010).

323. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (citing Brilmayer, *supra* note 247, at 728).

place of business would be determined based on the same rules used in determining subject-matter jurisdiction.³²⁴ This assumption violates the principle that one should not assume that a term defined in one way for a particular purpose should necessarily be defined in the same way for an entirely different purpose.³²⁵ Indeed, the purpose for which the Supreme Court selected corporate headquarters as the definition for diversity purposes (ease of administration and certainty of application) might well be different than the purpose in the personal jurisdiction context and yield different definition. In the latter, the Court is interpreting the requirements of due process and not a congressional statute.³²⁶ In that context, the appropriate location might be where a corporation has most of its operations or employees, which would be closer to identifying the place with the greatest contacts.

Second, it is incorrect to conclude that the plaintiffs would have recourse to at least one clear and certain forum, unless Justice Ginsburg meant to include forums that are not located within the United States. For example, an American injured in a rental Mercedes-Benz on a European vacation would be forced to sue Daimler in Germany and would have no access to any court within the United States, hardly a comforting thought for an American plaintiff seeking a convenient forum.

Justice Ginsburg went on to acknowledge:

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. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified and approve the exercise of general jurisdiction in every State in which a corporation “engages in a substantial, continuous, and

324. *Id.* (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

325. *See* *Guarantee Trust Co. v. York*, 326 U.S. 99, 101–02 (1945) (noting that statutes of limitations may be procedural for the purposes of state-to-state choice of law, but substantive for the purposes of federal-to-state choice of law).

326. *See* 1 JURISDICTION IN CIVIL ACTIONS § 4.02 (2018) (indicating the overlap between personal jurisdiction and the requirements of due process).

systematic course of business.” That formulation, we hold, is unacceptably grasping.³²⁷

Even though state of incorporation and principal place of business might not be the only states in which a corporation is “essentially at home,” the Court made it clear that it would be a rare case in which other bases would be allowed: “We do not foreclose the possibility that in an exceptional case, . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that state.”³²⁸

Justice Ginsburg concluded this part of the *Daimler* opinion by stating:

Here, neither *Daimler* nor MBUSA is incorporated in California nor does either entity have its principal place of business there. If *Daimler*’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA’s sales are sizeable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”³²⁹

This conclusion is notable for a number of reasons. First, it appears to limit all-purpose jurisdiction over corporations to the states where a corporation is incorporated or has its principal place of business. Second, the Court repeated its reference to the international law term of “exorbitant” jurisdiction, a statement that has significance in the comparative civil procedure field but is not used in the domestic context.³³⁰ Third, the Court did not need

327. *Daimler*, 571 U.S. at 137–38.

328. *Id.* at 139 n.19.

329. *Id.* at 139.

330. See Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 121 (“[E]xorbitant jurisdiction’ is a term of art in international law for disfavored forms of jurisdiction, and by the concluding paragraphs of the opinion, where she marshals considerations of ‘international rapport’ as additional reasons to reject jurisdiction in the case.”).

a substantive due process rule to prevent jurisdiction over this case; a procedural due process analysis would have sufficed because of California's lack of any interest in the case.

Finally, Justice Ginsburg repeated the well-worn, but empirically unsupported, statement that corporate defendants need to know where they could be subject to personal jurisdiction in order to "structure their primary conduct."³³¹ Not only is that statement factually suspect, it also fails to support the rule proffered by Justice Ginsburg. A corporation would be on just as clear notice of where it would be subject all-purpose jurisdiction if the Supreme Court established a rule that such jurisdiction existed in any state where a corporation had a branch office, or even in any state where a corporation was registered to do business.³³²

In the final part of her opinion, Justice Ginsburg focused on the "transnational context" of the *Daimler* litigation.³³³ Justice Ginsburg expressed concern that "[t]he Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed."³³⁴ In particular, Justice Ginsburg was sensitive to the amicus brief filed by the Solicitor General which expressed concern that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."³³⁵ Therefore, considerations of "international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."³³⁶

Of course, Justice Ginsburg's concern about international comity could easily have been accommodated by a far less restrictive standard than the elimination of all

331. *Daimler*, 571 U.S. at 139.

332. *See infra* Part IV.B.

333. *See Daimler*, 571 U.S. at 140 ("Finally, the transnational context of this dispute bears attention.").

334. *Id.* at 141.

335. *Id.* (citing Brief for the United States as Amicus Curiae Supporting Petitioner, *Daimler Chrysler, AG v. Bauman*, 571 U.S. 117 (2014) (No. 11-965), 2013 WL 3377321).

336. *Id.*

corporate-activities-based jurisdiction in favor of state of incorporation and principal place of business as the sole bases for corporate all-purpose jurisdiction.³³⁷ Neither international comity nor the proposed agreement on recognition and enforcement of judgments required a rule as strict as Justice Ginsburg created.³³⁸ The Supreme Court has the power, as a matter of federal common law, to impose restraints on personal jurisdiction over foreign persons that are not otherwise required by the Due Process Clause for jurisdiction over a United States citizen.³³⁹ The Supreme Court does not need to establish a rule that limits jurisdiction in cases involving *American* plaintiffs against *domestic* corporations and prevents such plaintiffs from suing in the most convenient forum when that forum would not impose a significant burden on the defendant.

Interestingly, Justice Ginsburg stated in a footnote that, at least in cases involving her very limited conception of all-purpose dispute-blind jurisdiction, there was no need to assess the procedural fairness of jurisdiction in the forum state. Justice Ginsburg called the procedural fairness analysis a “second step,” and she concluded that “[w]hen a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.”³⁴⁰ Justice Ginsburg reached this conclusion even though none of the parties had briefed this issue, and even though every circuit court that had addressed the issue had applied the procedural due process fairness test in the context of corporate-activities-based cases as well as specific jurisdiction cases.³⁴¹

337. See *id.* at 156 (Sotomayor, J., concurring) (stating that there are other judicial doctrines available to mitigate the majority’s concern with *International Shoe’s* modern-day effects on large corporations).

338. See Arthur & Freer, *supra* note 185, at 2002 (suggesting that the Court’s limits on general jurisdiction articulated in *Daimler* are strict, “a radical limitation on general jurisdiction” and that it “is surprising to see Justice Ginsburg . . . so willing to limit general jurisdiction”).

339. See, e.g., Trangsrud, *supra* note 23, at 883–94 (discussing several instances in which the Court utilized the federal common law to impose restrictions on personal jurisdiction over foreign persons, including the territorial rules and consent rules of jurisdiction).

340. *Daimler*, 571 U.S. at 139 n.20.

341. See *id.* at 144 n.1 (Sotomayor, J., concurring) (noting that the “Courts of

Justice Sotomayor concurred in the judgment of the case and agreed that “the Due Process Clause prohibits the exercise of personal jurisdiction over Daimler in light of the unique circumstances of this case.”³⁴² Rather than focusing on the contacts requirements necessary for corporate-activities-based jurisdiction, however, Justice Sotomayor found no jurisdiction based on the procedural fairness test that Justice Ginsburg had declared to be superfluous.³⁴³ Although the courts of appeals had “uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context,”³⁴⁴ Justice Sotomayor sardonically noted, “without the benefit of a single page of briefing on the issue, the majority casually adds of these cases to the mounting list of decisions jettisoned as a consequence today’s ruling.”³⁴⁵

Justice Sotomayor persuasively differed with the majority on the proper interpretation of the Supreme Court’s prior case law on corporate-activities-based jurisdiction:

I accept at face value the majority’s declaration that general jurisdiction is not limited to a corporation’s place of incorporation and principal place of business because “a corporation’s operation 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

Appeal have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context”).

342. *Id.* at 142.

343. *See id.* at 143–44

The Court can and should decide this case on the far simpler ground that, no matter how extensive Daimler’s contacts with California, that State’s exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available. Because I would reverse the judgment below on this ground, I concur in the judgment only.

344. *Id.* at 144 n.1; *see, e.g.*, *Lukin v. Prudential Sec., Inc.*, 348 F.3d 704, 713 (3d Cir. 2003); *Base Metal Trading, Ltd. v. OISC Novokuznetsky Aluminum Factory*, 283 F.3d 208, 213–14 (4th Cir. 2002); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996); *Trierweiler v. Croxton & Trench Holding Corp.*, 98 F.3d 1523, 1533 (10th Cir. 1996); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 843, 851 n.2. (9th Cir. 1993); *Donatelli v. Nat’l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987).

345. *Daimler AG v. Bauman*, 571 U.S. 117, 144 n.1 (2014).

home in the state.” Were that not so, our analysis of the defendant’s in-state contacts in *Perkins v. Benguet Consolidated Mining Co.*, . . . *Helicopteros Nacionales de Columbia, SA v. Hall*, . . . and *Goodyear* would have been irrelevant, as none of the defendants in these cases was sued in its place of incorporation or principal place of business.³⁴⁶

So, where are we left after the Court’s decision in *Daimler*? First, Justice Ginsburg again failed to recognize that Professor Brilmayer’s discussion of the “paradigm” forums of general jurisdiction was a reference to the larger meaning of general jurisdiction as all-purpose jurisdiction, and not to general jurisdiction in the sense of corporate-activities-based jurisdiction, which, after *International Shoe*, was the successor to corporate presence or doing business in the forum state.³⁴⁷ Second, by limiting jurisdiction to what is essentially the traditional basis of citizenship in the forum state, Justice Ginsburg essentially entirely eliminated the category of corporate-activities-based jurisdiction as a separate basis of all-purpose, dispute-blind jurisdiction.³⁴⁸ Third, the elimination of corporate-activities-based jurisdiction is entirely inconsistent with the Court’s previous decisions in *International Shoe*, *Perkins*, and *Helicopteros*.³⁴⁹ Each of these points will be discussed in detail below.

Justice Ginsburg fell prey to the ambiguous meaning of the term general jurisdiction. Justice Ginsburg cited Professor Brilmayer’s article on general jurisdiction, in which Professor Brilmayer noted that “[d]omicile, place of incorporation and

346. *Id.* at 154 n.9 (internal citations omitted).

347. *See id.* at 137 (asserting that *Goodyear* made clear that the paradigm forums of all-purpose jurisdiction where corporations could be subject to general jurisdiction were the forum in which the corporation is incorporated or where it has its principal place of business).

348. *See id.* at 140 n.20 (reinforcing that where a corporation operates in many places, it can hardly be deemed at home in one particular state and asserting that merely because a large quantum of corporate activity takes place in a state does not mean that that state should have authority over said corporation).

349. *See Arthur & Freer, supra note 185, at 2002* (reviewing the approach in *Goodyear* and *Daimler* in light of *International Shoe*, *Perkins*, and *Helicopteros* and opining that although “the Court purported to apply the principles of *International Shoe Co. v. Washington* and its progeny, including the Court’s two prior decisions on general jurisdiction, this simply is not so”).

principal place of business are paradigms of bases for general jurisdiction.”³⁵⁰ The context in which Professor Brilmayer discussed state of incorporation and principal place of business as bases for personal jurisdiction makes it absolutely clear that she is discussing general jurisdiction in the large sense of an all-purpose jurisdiction that is dispute-blind and not the kind of corporate-activities-based jurisdiction that was established by *International Shoe* as the successor to jurisdiction based on corporate presence or doing business in the forum state.³⁵¹ In fact, after the section headed “unique affiliations” in which Professor Brilmayer discussed state of incorporation and principal place of business as part of the traditional basis of domicile jurisdiction, Professor Brilmayer began a separate section on jurisdiction based on a corporation’s “activities.”³⁵² There, she stated that a “defendant’s activities in the forum can be the basis for either general or specific jurisdiction.”³⁵³ In that section Professor Brilmayer, speaking of general jurisdiction in the narrow sense of corporate-activities-based jurisdiction based on the activities of a defendant in a forum state, wrote that “general jurisdiction requires proof of continuous and systematic activities.”³⁵⁴

Justice Ginsburg, however, ignored this part of Professor Brilmayer’s article. Instead, she cited to Professor Twitchell’s 2001 article to the effect that “*International Shoe* ‘is clearly not saying that dispute-blind jurisdiction exists whenever ‘continuous and systematic’ contacts are found.”³⁵⁵ In Professor Twitchell’s article, however, she italicized the word “whenever” in order to emphasize the need for “something more substantial for a state’s authority to adjudicate any and all claims against a defendant.”³⁵⁶ She never suggested anything remotely as restrictive as Justice Ginsburg’s

350. Brilmayer, *supra* note 247, at 735.

351. *See id.* at 733 (“The law treats corporations like legal persons, and the place of incorporation and the principal place of business are both analogous to domicile. In some respects, the decision to incorporate in a particular state provides a more powerful basis for adjudicatory jurisdiction than does domicile.”).

352. *Id.* at 735.

353. *Id.*

354. *Id.* at 735–36.

355. *Daimler*, 571 U.S. at 138 (citing Twitchell, *supra* note 60, at 184).

356. Twitchell, *supra* note 60, at 184.

“at home” standard. Moreover, Professor Twitchell described *Perkins* as holding that a State could exercise jurisdiction over a forum corporation on a cause of action unrelated to the corporation’s forum activities if “the corporation had been carrying on ‘a continuous and systematic, but limited part of its general business’ in the forum state.”³⁵⁷ Professor Twitchell stated that forum state activities that are “something more substantial” are not limited to state of incorporation and principal place of business.³⁵⁸ As the title of the article itself indicates, Professor Twitchell was speaking about activities-based jurisdiction flowing from a corporation’s “doing business” in the forum state, and not citizenship or domicile-based jurisdiction, which is traditionally limited to state of incorporation and principal place of business.³⁵⁹ Indeed, although Professor Twitchell had previously advocated limiting corporate-activities-based jurisdiction (although, importantly, along with a significant expansion of specific jurisdiction), Professor Twitchell’s article discusses “a change of heart I have had concerning general jurisdiction.”³⁶⁰ Thus, even the most well-known academic critic of corporate-activities-based jurisdiction considerably softened her opposition and recognized the benefits of such jurisdiction, in part “to fill in holes in our jurisdictional scheme.”³⁶¹

Second, the standard enunciated by Justice Ginsburg effectively eliminated the previously well-established category of corporate-activities-based jurisdiction.³⁶² After *Pennoyer*,

357. See Twitchell, *supra* note 17, at 626.

358. See Twitchell, *supra* note 60, at 184 (stating that the Court’s language in *International Shoe* indicated that something more than systematic and continuous contacts was required “for a state’s authority to extend to any and all claims against a defendant”).

359. See *id.* at 171 (indicating that the article discusses a proposed test for “modifying the reach of doing-business jurisdiction”).

360. *Id.*

361. *Id.* at 195.

362. Compare *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (stating that the inquiry is “whether that corporation’s affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state”), with *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (articulating that in order to subject a defendant to in personam jurisdiction, defendant must have certain minimum contacts with the forum state).

corporations could be subject to all-purpose jurisdiction based either upon their citizenship or domicile in the forum (principal place of business and state of incorporation), or based on their presence in the forum at the time of service of process.³⁶³ This second category of corporate presence was eventually modified to be wherever a corporation was doing business and then, in *International Shoe*, it became a jurisdiction based on a company's corporate-activities-based-contacts with the forum state.³⁶⁴ Justice Ginsburg's test restricted the latter category of corporate-activities-based jurisdiction to the same criteria as citizenship/domicile jurisdiction, which effectively eliminated the strand of jurisdiction based on a corporation's presence/doing business in the forum state.

Third, the effective elimination of corporate-activities-based jurisdiction was plainly inconsistent with *International Shoe*, *Perkins*, and *Helicopteros*. *International Shoe* clearly approved of corporate-activities-based jurisdiction, at the very least to the extent that it was based, on the location of a branch office in the forum state, which was the case in the previous precedents cited by the *International Shoe* Court in support of its description of corporate-activities-based jurisdiction.³⁶⁵ Justice Ginsburg dismissed these earlier cases, which were also cited by the Supreme Court in *Perkins*, on the ground that the Court's "unadorned citations to these cases, both decided in the era dominated by *Pennoyer's* territorial thinking, . . . should not attract heavy reliance today."³⁶⁶ The point of these cases, however, is not that they stand on their own as valid precedents for corporate-activities-based jurisdiction, but rather that the

363. See generally *Pennoyer v. Neff*, 95 U.S. 714, 714–36 (1877) (determining that a court can exert personal jurisdiction over a party if that party is served with process while physically present within the state).

364. See *Int'l Shoe*, 326 U.S. at 316 (noting that due process requires only that a defendant has certain minimum contacts with the forum state in order to subject him to in personam jurisdiction, and that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'").

365. See *id.* at 318 ("[T]here 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 action arising from dealings entirely distinct from those activities.").

366. *Daimler*, 571 U.S. at 138 n.18 (internal citations omitted).

International Shoe Court cited them as examples of the kind of “continuous corporate operations within a state so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities.”³⁶⁷ If the Supreme Court had thought that *International Shoe* had ended doing-business jurisdiction, it would have been easy for the Court to come right out and say that and limit all-purpose jurisdiction over corporations to a defendant’s state of incorporation and principal place of business. The Court did not, however, take that approach, and instead, clearly recognized that some form of continuous corporate activity in the forum state could provide a basis of all-purpose jurisdiction beyond that which was already allowed by citizenship/domicile jurisdiction.

C. The BNSF Case: The New Standard, But Now with No Meaningful Exception

In 2017, the Court again addressed personal jurisdiction in cases where, prior to *Goodyear*, the lower courts would not have doubted that the forum state had corporate-activities-based jurisdiction. In *BNSF Railway Co. v. Tyrrell*,³⁶⁸ the Court addressed the railroad’s motions to dismiss for lack of personal jurisdiction in two cases, one brought by an employee for injuries suffered on the job and the other by the widow of an employee who died as the result of exposure to toxic chemicals on the job.³⁶⁹ Neither plaintiff resided in the forum state (Montana), nor did the events giving rise to the claim take place in that state.³⁷⁰ The defendant railroad was incorporated in Delaware with its principal place of business in Texas.³⁷¹ The Court described the defendant’s contacts with the forum state as follows:

367. *Int’l Shoe*, 326 U.S. at 318.

368. 137 S. Ct. 1549 (2017).

369. *See id.* (consolidating two cases arising under the Federal Employer’s Liability Act and deciding issues of personal jurisdiction).

370. *See id.* at 1554 (identifying that one plaintiff resided in North Dakota, the other in South Dakota, and that the activities giving rise to suit did not occur in Montana).

371. *Id.*

BNSF has 2,061 miles of rail track in Montana (about 6% of its total track mileage of 32,500), employs some 2100 workers there (less than 5% of its total workforce of 43,000), generates less than 10% of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4%).³⁷²

The Court first dealt with the plaintiffs' contention that the Federal Employer's Liability Act (FELA)³⁷³ (which makes railroads liable for damages to their employees for on-the-job injuries) granted personal jurisdiction over a railroad defendant in any district "in which the defendant shall be doing business at the time commencing such action."³⁷⁴ The Court ruled that the FELA provision was not intended to grant personal jurisdiction, but simply to establish where venue was proper and affirm that subject matter jurisdiction rested concurrently with the federal and state court systems.³⁷⁵

The Court next assessed plaintiffs' argument that the state of Montana had general jurisdiction over the railroad defendant by virtue of its continuous presence in the forum state. The Court cited *Daimler*, *Goodyear*, and *Helicopteros*, with respect to the general distinction between specific and general jurisdiction.³⁷⁶ But with respect to the standard to be applied in general jurisdiction cases, the Court referred only to *Goodyear* and *Daimler* and limited all-purpose jurisdiction to states where the defendant's affiliations with the state are so "continuous and systematic" as to render them essentially at home in the forum state.³⁷⁷ Once again, the Court identified the "paradigm" forums in which a corporate defendant is "at home" as the state of incorporation and principal place of business.³⁷⁸ Only in an "exceptional case" may a corporate defendant's contacts with another state be sufficient to render it at

372. *Id.*

373. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51–60 (2012).

374. *BNSF Ry.*, 137 S. Ct. at 1553.

375. *See id.* at 1556 (relying on the historic regard of such clause as concerning venue and analyzing jurisdiction as a separate matter).

376. *See generally id.* (referencing each case to support a discussion of the distinction between specific and general jurisdiction).

377. *See id.* at 1558 (citing *Daimler*, 571 U.S. at 127 (quoting *Goodyear*, 564 U.S. at 919)).

378. *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017).

home.³⁷⁹ Because the forum state was neither the defendant railroad's state of incorporation nor principal place of business, the Court had to determine whether the defendant's contacts made it an exceptional case.³⁸⁰

The Court discussed this issue by referring to a principle mentioned only briefly in *Daimler*:

But, as we observed in *Daimler*, the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts. Rather, the inquiry calls for an appraisal of a corporation's activities in their entirety; a corporation that operates in many places can scarcely be deemed to be at home in all of them.³⁸¹

After an analysis that was surprisingly truncated, given the extensive nature of the defendant's contacts with the forum state, Justice Ginsburg concluded that "in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in Montana."³⁸² The use of the term "clarified" was somewhat of an understatement, given that the Court was overruling a doctrine established in three prior Supreme Court cases along with hundreds of lower court cases.

Justice Sotomayor continued "to disagree with the path the Court struck in *Daimler*, which limits general jurisdiction over a corporate defendant only to those states where it is essentially at home."³⁸³ Moreover, Justice Sotomayor argued, even accepting the majority's standard, the Court should have remanded the case to the Montana Supreme Court "for it to conduct what should be a fact-intensive analysis under the proper legal framework."³⁸⁴

Justice Sotomayor reprised her argument in *Daimler* that *International Shoe* did not warrant the "restrictive 'at home' test set out in *Daimler*—a test that, as I have explained, has no home

379. *Id.* (citing *Daimler*, 571 U.S. at 139 n.19).

380. *See id.* at 1559 (analyzing BNSF's contacts and activities within the state of Montana).

381. *Id.* at 1559 (internal citations omitted).

382. *Id.*

383. *Id.* at 1560 (Sotomayor, J., dissenting) (internal citations omitted).

384. *Id.* (Sotomayor, J., dissenting).

in our precedents and creates serious inequities.”³⁸⁵ Indeed, Justice Sotomayor argued,

The majority’s approach grants a jurisdictional windfall to large multi-state or multi-national corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.³⁸⁶

Justice Sotomayor once again acknowledged the lower court cases that Justice Ginsburg had repeatedly ignored: “[L]ower courts had adhered to the continuous-and-systematic standards for decades before *Daimler*, and its predecessor *Goodyear*, wrought the present sea change.”³⁸⁷

In particular, Justice Sotomayor continued to take issue with the majority’s attention to the size of defendant’s contacts in the forum state relative to its contacts with other states. As Justice Sotomayor noted, neither *Perkins* nor *Helicopteros* applied a comparative analysis that analyzed defendant’s contacts with the forum state against its contacts with other states.³⁸⁸

385. *Id.* (Sotomayor, J., dissenting).

386. *Id.* (Sotomayor, J., dissenting).

387. *Id.* at 1560 n.1 (Sotomayor, J., dissenting) (internal citations omitted); see generally, e.g., Judy M. Cornett & Michael H. Hoffheimer, *Goodbye Significant Contacts: General Personal Jurisdiction after Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015) (examining the state of the law related to personal jurisdiction and arguing that the Court has limited traditional power of states to too great an extent); John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 616 (2015) (discussing how the Court has approached analysis of contacts with the state for general jurisdiction); Donald L. Doernberg, *Resolving International Shoe*, 2 TEX. A&M L. REV. 247, 278 (2014) (asserting that while the Court tried to limit general jurisdiction, it rather opened the door to more jurisdiction related litigation); Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 73 S.C. L. REV. 671, 672 (2012) (noting that the stated essentially at home standard articulated in *Goodyear* “casts doubt on a large body of lower court case law”).

388. See *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., dissenting) (stating that no comparative analysis was applied).

Finally, Justice Sotomayor cut to the core meaning of Justice Ginsburg's analysis in the case:

The majority does even *Daimler* itself a disservice, paying only lip service to the question the Court purported to reserve there—the possibility of an “exceptional case” in which general jurisdiction would be proper in a forum State that is neither a corporation defendant's place of incorporation nor its principal place of business. Its opinion here could be understood to limit the exception to the exact facts of *Perkins v. Benguet Consolidated Mining Co.* That reading is so narrow as to read the exception out of existence entirely; certainly a defendant with significant contacts with more than one State falls outside its ambit. . . . Despite having reserved the possibility of an “exceptional case” in *Daimler*, the majority here has rejected that possibility out of hand.³⁸⁹

That summary seems to have captured the essence of the *BNSF* case. The Court proceeded from the hint of a new and more restrictive standard in *Goodyear* to a clear enunciation of that more restrictive standard in *Daimler* but with the possibility of exceptions to that standard, to *BNSF*, in which the Court limited the possibility of an exception to the facts of *Perkins*, which makes it all but impossible to establish all-purpose dispute-blind jurisdiction over any corporation outside of the state where it is incorporated or has its principal place of business. Few, other than von Mehren and Trautman, had advocated for such a strict standard, and even those who had advocated for a somewhat stricter standard for corporate-activities-based jurisdiction before *Goodyear* had conditioned such support upon a much broader interpretation of specific jurisdiction.³⁹⁰ The Supreme Court, however, dashed any hopes for such expansion of specific jurisdiction less than a month after the *BNSF* decision was issued.

389. *Id.* at 1561–62 (internal citations omitted).

390. See von Mehren & Trautman, *supra* note 9 (proposing a new system of terminology to address jurisdictional issues).

D. Bristol-Myers Squibb: Corporate-Activities-Based Jurisdiction Eliminated, with No Expansion of Specific Jurisdiction

In *Bristol-Myers Squibb Company v. Superior Court*,³⁹¹ the Supreme Court reviewed a California Supreme Court decision denying the corporate defendant's motion to dismiss, on personal jurisdiction grounds, products liability suits against the defendant in connection with its sale of the blood thinning drug, Plavix.³⁹² Five hundred and ninety-two residents of states outside of California had joined eighty-six California residents in eight separate suits in California Superior Court.³⁹³ Defendant BMS moved to dismiss the nonresidents' claims on the ground that California did not have personal jurisdiction over the defendant with respect to those claims.³⁹⁴

The trial court initially denied defendant's motion on the ground that the California courts had general jurisdiction over the defendant because it "engages in extensive activities in California."³⁹⁵ The California intermediate appellate court denied defendant's writ of mandamus, but after the Supreme Court's decision in *Daimler*, the California Supreme Court ordered the intermediate appellate court "to vacate its order denying the mandate."³⁹⁶ At that point, the intermediate appellate court held that there was no general jurisdiction after the Supreme Court's *Daimler* decision but that the California courts had specific jurisdiction over all of the claims.³⁹⁷

The California Supreme Court upheld jurisdiction based upon a "sliding scale approach to specific jurisdiction" that blended the

391. 137 S. Ct. 1773 (2017).

392. *Id.* at 1777–78.

393. *See id.* at 1778 (describing how plaintiffs gathered and asserted a variety of state-law claims in California Superior Court based on alleged injuries from the drug produced by Bristol-Myers Squibb).

394. *See id.* ("Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims . . .").

395. *Id.*

396. *Id.*

397. *See id.* ("Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against [Bristol-Myers Squibb].").

minimum contacts categories.³⁹⁸ Using a flexible approach advocated by commentators who favored broader specific jurisdiction, the California Supreme Court ruled that “the more wide-ranging the defendant’s forum contacts the more readily is shown a connection between the forum contacts and the claim.”³⁹⁹ Because BMS had extensive contacts with the forum state, specific jurisdiction was permissible even though the connection between the non-residents’ claims in California was more attenuated than might otherwise be required for specific jurisdiction.⁴⁰⁰

Interestingly, the California court did not even address the question of whether there was general jurisdiction over BMS in California. Prior to *Goodyear*, it is doubtful that a corporation as large as BMS would have even challenged the assertion of corporate-activities-based jurisdiction in California. The company maintained five of its research and laboratory facilities in California with a total 160 employees.⁴⁰¹ In addition, BMS employed “250 sales representatives in California and maintain[ed] a small state-government advocacy office in Sacramento.”⁴⁰² Between 2006 and 2012 it sold almost 187 million Plavix pills in the state of California and took in more than \$900,000,000 from those sales, which amounted to “a little over one percent of the company’s nation-wide sales revenue.”⁴⁰³ This was precisely the kind of continuous and systematic contacts with the forum state that, prior to *Goodyear*, lower courts typically found more than adequate for the assertion of general jurisdiction.

The Supreme Court, in an opinion by Justice Alito, acknowledged that the “primary concern” in determining whether there is personal jurisdiction is “the burden on the defendant,” and

398. *Id.*

399. *Id.*

400. *See id.* at 1779 (“[T]he majority concluded that ‘BMS’s extensive contacts with California’ permitted the exercise of specific jurisdiction ‘based on a less direct connection between BMS’s forum activities and plaintiffs’ claims than might otherwise be required.’”).

401. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017) (describing the facilities that Bristol-Myers Squibb maintained in California).

402. *Id.*

403. *Id.*

that assessing the burden “obviously requires a court to consider the practical problems resulting from litigating in the forum”⁴⁰⁴ In addition, however, the limitations on personal jurisdiction also “encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”⁴⁰⁵ The contacts requirements are, as the Court stated in *Hanson v. Denckla*, “a consequence of territorial limitations on the power of the respective states.”⁴⁰⁶

The question remained, however, why should the territorial boundaries of states require any particular contacts between the defendant and the forum state rather than simply some minimum level of state interest in the particular controversy? To answer that question, the majority opinion surprisingly returned to the discredited and repudiated language of *World-Wide Volkswagen*:

The states retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each state . . . implies a limitation on the sovereignty of all its sister states. And at times this federalism interest may be decisive. As we explained in *World-Wide Volkswagen*, “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum State has a strong interest in applying its law to the controversy, even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”⁴⁰⁷

That statement, however, was wrong when the Court made it in *World-Wide Volkswagen*, and the Court correctly repudiated it in the *Insurance Company of Ireland* case.⁴⁰⁸ Recall that, in that case, Justice White acknowledged that the minimum contacts requirement “is a restriction on judicial power not as a matter of

404. *Id.* at 1780.

405. *Id.*

406. *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

407. *Id.* at 1780–81 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)) (internal citations omitted) (alterations in original).

408. *Ins. Corp. of Ir. v. Compagnie des Bauxites De Guinee*, 456 U.S. 694, 702 n.10 (1982).

sovereignty, but as a matter of individual liberty.”⁴⁰⁹ Justice White had to back down on his earlier statements in the *World-Wide Volkswagen* case because the Due Process Clause is the “only source of the personal jurisdiction requirement” and “the clause makes no mention of federalism concerns.”⁴¹⁰ As Justice White further noted, this conclusion was further reinforced by the fact that personal jurisdiction may be waived by individual defendants, which would not be allowed if the requirement involved issues of structural federalism beyond the rights of individual defendants.⁴¹¹

The Court’s ill-advised return to the discredited theory of *World-Wide Volkswagen* suggests that the Court at least recognizes there is some need to provide a theoretical justification for the contacts-based limitations on state court jurisdiction. The fact that the Court would return to the discredited theory of interstate federalism suggests how difficult it is to come up with a theoretical reason to justify these substantive due process restrictions that have been a part of the Court’s personal jurisdiction doctrine ever since *Pennoyer*. Clearly the Court recognizes that some theoretical grounding is necessary: it simply flounders, however, when it comes to linking the test to any theory of individual due process rights. As discussed below, it may be that interstate federalism is the best theoretical foundation for rules regarding personal jurisdiction within the United States, but, if that is so, the proper source for such restrictions is not the Due Process Clause but rather federal common law rules created under the authority of the Full Faith and Credit Clause.

With respect to the requirements for specific jurisdiction, the Court refused to budge from the rigid requirement that there must be “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the state’s regulation.”⁴¹² Therefore, “specific jurisdiction is confined to

409. *Id.* at 702.

410. *Id.* at 702 n.10.

411. *Id.*

412. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.”⁴¹³ “When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.”⁴¹⁴

Thus, the Court tolerated no departure from a strict categorical analysis of contacts jurisdiction as compensation for the new restrictive standard for all-purpose dispute-blind jurisdiction. Specific jurisdiction requires that each plaintiff have a claim that arises out of the defendant’s contact with the forum state, without regard to any other contacts that the defendant might have with the forum. California’s proposed “sliding scale approach” could not satisfy the Supreme Court’s strict guidelines.⁴¹⁵ The Court stood fast on prior cases, which “provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough.”⁴¹⁶

Most distressingly for potential plaintiffs, the Court ruled that even BMS’s contract with a California company (McKesson) to distribute Plavix nationally did not provide a sufficient basis for specific jurisdiction.⁴¹⁷ That conclusion is particularly problematic because the Court in *McIntyre* held that a foreign corporation’s use of an Ohio distributor to sell its machines in the United States did not allow specific jurisdiction over a product liability claim in New Jersey, where the machine was ultimately sold and where the machine injured the plaintiff.⁴¹⁸ Commentators after *McIntyre* speculated that, even though there was no general jurisdiction over the defendant in the United States and even though there was no specific jurisdiction over the defendant in New Jersey, there might be specific jurisdiction in Ohio where the distributor was located. The decision in *BMS* at least hints that jurisdiction in the state of

413. *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

414. *Id.* at 1781.

415. *Id.*

416. *Id.*

417. *Id.* at 1783.

418. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011).

the distributor would be unavailing even if a plaintiff could not sue the manufacturer in the state in which the plaintiff was injured.

Justice Sotomayor once again dissented in the case. First, Justice Sotomayor accepted the plaintiff's concession that there was no general jurisdiction over the defendant even though she continued to "believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised."⁴¹⁹ She also found that there was "nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and non-residents alike."⁴²⁰ Justice Sotomayor pointed to the specific jurisdiction requirement that a plaintiff's claim must "arise out of or relate to' the defendant's forum conduct."⁴²¹ Justice Sotomayor argued that a claim relates to a defendant's forum conduct if it has a connection with that conduct and that, in the *BMS* case, the out-of-state plaintiffs' claims "concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 states."⁴²²

Most importantly for our discussion here, Justice Sotomayor worried about how the Court's decision would affect the practical ability of plaintiffs to seek efficient redress for their claims. "Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions."⁴²³ In addition, she noted, some cases find no domestic forum at all, notwithstanding the majority opinion's assertion that plaintiffs would be protected by the ability to sue in at least the jurisdiction where a corporation was incorporated or had its principal place of business. Justice Sotomayor worried that "a defendant not headquartered or incorporated in the United States . . . is not 'at home' in any state Especially in a world in which defendants are subject to general jurisdiction in only a

419. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1785 n.2 (Sotomayor, J., dissenting).

420. *Id.* at 1784 (Sotomayor, J., dissenting).

421. *Id.* at 1786 (Sotomayor, J., dissenting) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

422. *Id.* (Sotomayor, J., dissenting).

423. *Id.* at 1789 (Sotomayor, J., dissenting).

handful of States, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiff's ability to hold corporations fully accountable for their nationwide conduct.”⁴²⁴

The significance of *Bristol-Meyers Squibb* is two-fold. First, major national corporations, whose continuous and systematic contacts with virtually every state in the United States would previously have resulted in unquestioned corporate-activities-based jurisdiction in those states, now may be sued only in their principal place of business or the state in which they are incorporated. The Court protected these corporations notwithstanding the absence of any explanation from the Court as to why it violates the due process rights of such a large corporation to be sued in a state with which it has continuous and systematic connections. Second, the Court not only has virtually eliminated continuous-corporate-activities jurisdiction—it has also failed to ameliorate the contraction by allowing more generous assertions of specific jurisdiction. As previously noted, the principal advocates for a narrower reading of corporate-activities-based jurisdiction (who, in any event, did not propose restricting it as much the Court now has) conditioned their recommendation on the understanding that the Court would fill the gap by expanding the scope of specific jurisdiction.⁴²⁵ As a result, the Court has made life considerably more difficult for individual plaintiffs and considerably easier for corporate defendants.

V. *The Theoretical and Practical Problems with the Court's Current Personal Jurisdiction Standards*

After the Supreme Court's recent personal jurisdiction cases, we are left with an even bigger theoretical, doctrinal, and practical mess. First, the Court has enunciated no theoretical basis for implying a substantive due process standard that requires contacts of any sort between the defendant and the forum state, and even if we can hypothesize some theoretical foundation, it would not require the elimination of jurisdiction based on a

424. *Id.* (Sotomayor, J., dissenting).

425. See Brilmayer, *How Contacts Count*, *supra* note 166, at 112–13; Twitchell, *supra* note 60, at 212–13.

corporation's corporate-activities-based with the forum state. Second, the Court's recent evisceration of corporate-activities-based jurisdiction is an unwarranted and doctrinally unsound departure from prior Supreme Court precedent. Third, the Court's elimination of corporate-activities-based jurisdiction, coupled with the addition of significant new constraints on specific jurisdiction, create many practical problems for individual plaintiffs, while at the same time giving a huge tactical advantage to corporate defendants. Finally, given these problems caused by the Court's recent cases, one must ask why the Court would take this approach and why, of all the Justice's, Justice Ginsburg would lead the Court in that direction.

A. The Court's Current Substantive Due Process Contacts Requirements Are Theoretically Threadbare

Before the Court imposes significant new substantive due process limitations on personal jurisdiction, it should satisfy the high burden necessary to support substantive constraints on state authority pursuant to a clause that speaks clearly only to procedure. The contacts requirements that originated in *Pennoyer* are the sole remaining relic of the Supreme Court's 19th century substantive due process cases. Based upon this heritage alone, the contacts requirement is suspect. As Erwin Chemerinsky has noted, "the very idea of substantive due process has been contested. The argument is that due process denotes procedures and that it is incorrect to use the due process clause as the place for protecting substantive rights."⁴²⁶ Indeed, the points made by Chief Justice Hughes in overruling *Lochner* and the concept of economic substantive due process might just as well apply to jurisdictional substantive due process: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law [R]egulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."⁴²⁷

426. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 559 (4th ed. 2011).

427. *W. Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937).

The considerable constraints on the procedural fairness of a state court's adjudication are more than sufficient to protect the rights of defendants. In general, procedural due process in the context of civil litigation requires a balancing of the state's interest in allowing for speedy and expeditious resolution of legal disputes against the impact on a defendant's ability to present and argue his case before being deprived of his property.⁴²⁸ In the context of a state's assertion of personal jurisdiction over a defendant, the Supreme Court has established a multi-part analysis that requires a court to balance the burden on a defendant of litigating a case in the forum state against the interest of the forum in adjudicating the claim at issue, the need of the plaintiff for that particular forum, the convenience of the interest of the interstate system of justice in resolving the dispute in a convenient and expeditious fashion, and any potential impact on substantive law.⁴²⁹

It is easy to justify this procedural due process standard, which is more than adequate to prevent jurisdictional overreaching by state courts. For example, the *Daimler* case could have reached the same result based simply upon this procedural due process standard. In that case the burden on even a large corporation like *Daimler* was significant because it would have been forced to defend in California state court a claim dealing with facts and witnesses from Argentina. This significant burden was counterbalanced by no interest in the case on the part of the state of California or its court system. Similarly, plaintiffs had no compelling need to utilize the California courts, other than simply to obtain a more beneficial substantive legal standard than would have been available to them elsewhere. Finally, the witnesses and evidence could not be conveniently marshaled in a California trial court. The *Daimler* case would have been as easy to dismiss on procedural due process grounds as was the *Asahi* case, in which

428. See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950) (discussing notice as a requirement of due process and establishing a standard that notice must be reasonably calculated to apprise the defendant of a proceeding in which he might be deprived of a property interest).

429. See generally *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1965); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

the Court utilized a similar procedural due process analysis to deny California jurisdiction over a claim that had little connection to the forum state and in which California had no significant interest.⁴³⁰

Once a defendant is protected by this robust procedural due process standard, there is little reason to see why a defendant would need any substantive due process contacts standard to prevent unjust state action. It is difficult to conjure any theoretical foundation for the claim that the due process rights of a corporation as large as *BMS* are violated if it must defend in California state court the claims of out-of-state defendants alongside those of in-state defendants.

The Supreme Court's recent decisions are striking proof of the theoretical barrenness of the contacts requirement. On the rare occasion that the court attempts to offer some theoretical explanation, it repeatedly turns to concepts of interstate federalism that would be at home in an analysis under the Full Faith and Credit Clause, but which have no place in the analysis of a constitutional provision that is an individual right waivable by the defendant. The academic critics of expansive corporate-activities-based jurisdiction (none of whom advocated for a standard as strict as Justice Ginsburg's) seem to assume that the burden is on a state to show why such a form of all-purpose dispute-blind jurisdiction is acceptable. Although such a question might be appropriate in considering what forms of jurisdiction to authorize as a legislative and policy matter, in the context of substantive due process restrictions on state power, it flips the appropriate burden on its head to assume that some form of substantive due process contact standard is necessary unless a state can articulate a persuasive theory about why such jurisdiction is reasonable.⁴³¹ The critics never state, however, why the Due Process Clause requires states to establish a basis for requiring any particular types of contact between a defendant and the forum state. This is not to say, however, that the Due Process Clause requires no theoretical foundation at all for a state's

430. See *Asahi Metal Indus.*, 480 U.S. at 113–16.

431. See, e.g., Twitchell, *supra* note 60, at 172–76; Brilmayer, *supra* note 247, at 726–27.

assertion of jurisdictional power. Instead, it is to state simply that the justification is contained in the procedural due process test, which requires the state to establish a sufficient interest in the subject matter of the litigation to warrant the burden of subjecting the defendant to the jurisdiction of the forum state's courts.

The preeminence of substantive due process factors stems from Justice Field's bald assertion, that due process required particular types of contacts with the forum state in order to permit the assertion of personal jurisdiction, which placed the sole focus of jurisdictional decision-making on contacts rather than on procedural fairness. That focus did not begin to include procedural considerations until after *International Shoe*,⁴³² and it wasn't until *Kulko v. Superior Court*⁴³³ that the Supreme Court laid out the procedural due process requirements in any detail. Thus, it is not surprising that Justice Field led everyone to focus on the substantive due process context requirement rather than procedural fairness. If we flip that preference for the contacts requirement over the procedural fairness requirement, the theoretical justification for a state's assertion of jurisdictional power rests on whatever interest is sufficient to satisfy the procedural due process test. Then the question is why any additional contacts requirement is necessary in order to justify a state's assertion of its right to hear a particular case.

Moreover, even if one accepts the notion that there needs to be some contacts requirement in order to satisfy the Due Process Clause, the contacts part of the due process analysis should not come first. Many of the substantive due process concerns posited by jurisdictional theorists disappear if one assumes that a state would have to satisfy the procedural due process test before proceeding to analyze the contacts requirement. The only reason that courts and commentators analyze the contacts requirement first is because of the historical accident (one might say mistake) that the *Pennoyer* Court created a jurisdictional test based on contacts alone and not procedural fairness. Because the Court

432. *Int'l Shoe Co.*, 326 U.S. at 317 ("An 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.").

433. 436 U.S. 84 (1978).

added procedural fairness as a separate requirement, decades after the *Pennoyer* opinion, the courts and commentators continue to treat that aspect of personal jurisdiction as an afterthought. If, however, one begins with the procedural due process test as a threshold, many of the theoretical questions about all-purpose jurisdiction disappear.

Take a look at Professor Twitchell's statement of the problem as an example:

The principle of doing-business jurisdiction seems simple on the surface: the defendant business has such strong ties with the state that it may be sued there on any cause of action. What is particularly troubling about the doctrine is the notion that a forum can hear *any* claim asserted against a defendant having regular and consistent commercial activities in the forum, no matter how removed the facts of the claim are from those activities. Why do we give a forum this power?⁴³⁴

The question raised by Professor Twitchell is only a problem if we begin with a contacts analysis and assume no procedural due process analysis is a part of the test. If one begins with the procedural due process analysis, then it is clear that, even under a doing-business form of all-purpose, dispute-blind jurisdiction, a forum will not be able to hear any claim asserted against a defendant. If the state has no legitimate interest in the litigation, then the burden on the defendant of litigating away from its principal place of business will not be justified. Therefore, any substantive due process theory about whether "doing-business" is sufficient should consider only those forums where the litigation would be fair as a matter of procedural due process. This eliminates the concern, frequently expressed by proponents of a more rigid substantive due process contacts standard, that expansive doing-business jurisdiction permits plaintiffs to forum shop in every state without regard to the issue of whether the state has a legitimate interest in the case.

The reason that the procedural due process case so rarely determines the outcome of modern personal jurisdiction litigation is not that the theory is unable to do the hard work of filtering cases where a state has no legitimate interests in adjudicating a

434. Twitchell, *supra* note 60, at 173 (emphasis added).

claim, but rather that the substantive due process contacts requirement is always addressed first and is so restrictive that the procedural due process analysis is almost always an afterthought.⁴³⁵ If the personal jurisdiction analysis were flipped, and the procedural due process test were seriously addressed first, the substantive due process contacts requirements would have relatively less work to do in the personal jurisdiction analysis.

Academic advocates of a restrictive (though not nearly as restrictive as Justice Ginsburg's) approach to corporate-activities-based jurisdiction fail to justify the need for significant due process restrictions. For example, Lea Brilmayer's "insider" analysis posits that general doing-business jurisdiction is warranted only when a corporation "is enough of an 'insider' that he may safely be relegated to the state's political processes."⁴³⁶ Professor Brilmayer expanded on this theory in a later article:

To the extent that defending in one's domicile is convenient, litigating where one carries on continuous and systematic activities is also likely to be convenient. Similarly, allowing suit where the defendant is so engaged serves the plaintiff's convenience by providing a more definite forum; indeed, a test that focuses on continuous and systematic activities eliminates the uncertainty of proving which of several places is the defendant's principal place of business. More importantly, the reciprocal benefits rationale obtains when the defendant carries out substantial activities which implicate the police powers and public facilities of the state.⁴³⁷

The "benefits" rationale makes sense, even standing on its own without the additional theoretical notion that it is important for a corporation to be an "insider." Whether a corporation has enough contacts with a state to be considered an "insider" seems relevant to the question of whether a state is warranted in applying its own substantive law to that corporation. A corporation would clearly care about the substantive standards that govern its actions and would have an incentive to lobby the legislature on such an issue.

435. The *Asahi* case is the only Supreme Court case in which personal jurisdiction has been denied solely on the basis of the absence of procedural fairness. See *Asahi Metal Indus. Co.*, 280 U.S. at 113–16.

436. Brilmayer, *How Contacts Count*, *supra* note 166, at 87.

437. Brilmayer, *supra* note 247, at 741.

It seems much less clear, however, how insider status affects the question of personal jurisdiction. It is not at all clear that an insider would have either influence or an advantage over a non-insider with respect to its ability to litigate contested cases effectively. As a practical matter, choice-of-law questions involving the applicability of substantive legal standards are far more likely to have an impact on corporate defendants than jurisdictional questions, but as noted earlier, the substantive due process constraints on choice of law are far less than the constraints on personal jurisdiction.

Professor Twitchell has criticized the reciprocal benefits rationale on the ground that, although it works well for specific jurisdiction because of the proportionality of the risks of litigation and benefit to the defendant, there is “no equivalent proportionality for an activities-based general jurisdiction. Regular and continuous activity in the forum may benefit the defendant in many regards, but this alone does not justify the burden of unlimited jurisdictional exposure in that forum.”⁴³⁸ Once again, however, this assertion makes sense only if one applies the substantive due process contacts test first, without regard to the procedural due process analysis. If one applies the procedural due process analysis first, then the potential imposition on a corporate defendant is much less because the state would only be able to assert jurisdiction in cases where it had enough of an interest to outweigh the burden on the defendant. The ongoing continuous benefit of operating within the forum state is more than enough to justify this more limited expectation.

Other academic commentators have somewhat stricter theoretical grounds for doing-business jurisdiction. For example, Allan Stein has argued that the proper standard for doing-business jurisdiction is whether the defendant has “adopted” the state as its sovereign.⁴³⁹ This would warrant a standard requiring “pervasive and systematic contacts” to determine whether the defendant has indeed “adopted the forum as its sovereign. Has it, for most other purposes, treated the forum as its home, notwithstanding its

438. Twitchell, *supra* note 60, at 175–76.

439. See Allan Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987).

domicile elsewhere?”⁴⁴⁰ In a similar vein, Sarah Cebik has suggested that the theoretical question is whether a state has an interest in the defendant that would be recognized by other states if they all agreed on a standard for general jurisdiction:

If [a state] claims to have an interest in the defendant . . . that interest must somehow be related to its function as the determiner of rights and duties. Thus, “interest” in the defendant [that is sufficient for corporate-activities-based jurisdiction] is legitimate if the state would have a reason to be concerned about the rights and duties of the defendant under any circumstances The point at which a state will be concerned with the rights and duties of a defendant under any and all circumstances is not immediately obvious.⁴⁴¹

These theoretical arguments seem much too close to concerns about the rights of one state versus another state rather than the individual rights that are guaranteed by the Due Process Clause of the Fourteenth Amendment. These concerns about how one state would regard the jurisdictional claims of another state seem much more relevant to questions involving the Full Faith and Credit Clause rather than the Due Process Clause. Such questions might be relevant with respect to the formulation of a common law standard for enforcement of judgments or a national venue rule, which could be established by Congress pursuant to its authority under the Full Faith Credit Clause. They seem out of place, however, in a discussion about a defendant’s due process rights, particularly if one assumes that a court could not allow a state to exercise corporate-activities-based jurisdiction in the absence of an interest that justifies the imposition of the burden on the corporate defendant.

440. *Id.*

441. Sarah Cebik, “A Riddle Wrapped in a Mystery Inside an Enigma”: *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 33 (1998).

B. How the Categorical Ambiguity of the Term “General Jurisdiction” Led to the Demise of Corporate-Activities-Based Jurisdiction

Any discussion of how the Court created a doctrine of all-purpose dispute-blind jurisdiction that essentially eliminates the formerly well-established category of corporate-activities-based jurisdiction must begin with a discussion of the law review article in which the terms general and specific jurisdiction originated.⁴⁴² Professors von Mehren and Trautman approached the question of personal jurisdiction as comparative law scholars. Their article was “an expanded version of a paper entitled ‘*Determination Of The Competent Court In Private International Law: The American Approach*,’ prepared for the Seventh International Congress of Comparative Law, to be held under the auspices of the International Academy of Comparative Law at Uppsala, Sweden in August 1966.”⁴⁴³ The authors analyzed the issues of personal jurisdiction using the generally accepted comparative law term, “adjudicatory jurisdiction.”⁴⁴⁴ The article analyzed jurisdictional questions not just in terms of constitutional due process limitations, but also in terms of the policy considerations that should underlie assertions of jurisdiction.⁴⁴⁵ It is important to understand the authors’ comparative law perspective in order to appreciate the goals they were trying to accomplish. Their goal in writing the paper was to explain why the terms that traditionally had categorized personal jurisdiction (like in personam, in rem and quasi in rem) served no purpose in the modern analytical context.⁴⁴⁶ After criticizing the use of these traditional terms, von Mehren and Trautman stated:

A further difficulty with current terminology is its failure to distinguish between the kinds of controversies appropriately adjudicated on the basis of a particular ground of jurisdiction. In American thinking, affiliations between the forum and the

442. See generally von Mehren & Trautman, *supra* note 9.

443. *Id.* at 1121 n.d1.

444. See *id.* at 1125.

445. *Id.* at 1121.

446. See *id.* at 1135–36.

underlying controversy normally support the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.⁴⁴⁷

In using the term general jurisdiction, von Mehren and Trautman were referring to that term in the larger sense of all dispute-blind jurisdiction and not to corporate doing-business jurisdiction, which, after *International Shoe*, became corporate-activities-based jurisdiction (and which was confusingly termed general jurisdiction by most cases and commentators).

This point is reinforced by von Mehren and Trautman's subsequent discussion of the different categories of general jurisdiction, which included domicile, presence, and consent.⁴⁴⁸ In discussing the special problems in applying these categories to corporations, the authors first noted that the easiest form of general jurisdiction to justify in the corporate context was the corporate equivalent of domicile:

From the beginning in American practice, general adjudicatory jurisdiction over corporations and other legal persons could be exercised by the community with which the legal person had its closest and most continuing and factual connections. The community that chartered the corporation and in which it has its head office occupies a position somewhat analogous to that of the community of a natural person's domicile and habitual residence.⁴⁴⁹

Under von Mehren's and Trautman's analysis, the term general jurisdiction described the large category that included all exercises of dispute-blind jurisdiction. The classic or "paradigm" form of this larger concept of general jurisdiction was the corporate equivalent of citizenship, *i.e.*, a corporation's state of incorporation and principal place of business.

447. *Id.* at 1136.

448. *Id.* at 1137.

449. *Id.* at 1141.

Von Mehren and Trautman, however, also recognized a separate category of all-purpose dispute-blind general jurisdiction, which they described as “jurisdiction only with respect to activities connected with the forum community.”⁴⁵⁰ The authors recognized that there were decisions, including *International Shoe*, in which the “Supreme Court seems to have permitted the exercise of jurisdiction with respect to activities largely though perhaps not totally unconnected with the forum community.”⁴⁵¹ The authors also recognized that the Restatement (Second) of Conflict of Laws, relying on the Supreme Court’s *Perkins* decision, concluded that a state could exercise judicial jurisdiction over a corporation that does business within its borders as to causes of action unrelated to that business if the corporation’s activities in the state are sufficiently continuous and substantial to make the exercise of such jurisdiction reasonable. Thus, general jurisdiction may be based upon a corporation’s “doing business” in the forum state the separate category based upon state of incorporation principal place of business.⁴⁵²

Significantly, however, von Mehren and Trautman were not happy about that result. They strongly preferred and advocated for jurisdictional rules that depended more on specific jurisdiction than on any form of general jurisdiction. They expressed their hope this way:

Against the background of increasingly refined thinking about specific jurisdiction to adjudicate and despite the Ohio court’s language on remand, the *Perkins* case should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction.⁴⁵³

Von Mehren and Trautman clearly preferred a jurisdictional future in which the doing-business and “presence-based” forms of general jurisdiction would diminish in significance or disappear, but also where the scope of specific jurisdiction would be greatly expanded. Thus, the authors stated:

450. *Id.* at 1142.

451. *Id.* at 1143.

452. *Id.* at 1144 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 85, Reporter’s Note (Tent. Draft no. 3, 1956)).

453. von Mehren & Trautman, *supra* note 9, at 1144.

The landscape that we have surveyed will gradually change; in particular, specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene. At the same time, the contours of present forms of specific jurisdiction will be modified substantially and entirely new forms may emerge. And if such a development does occur, there should be repercussions elsewhere; some of the principal bases of jurisdiction of the past may become exceptional and occasional devices. Thus, limited general jurisdiction should erode and perhaps ultimately disappear, as should such doubtful bases of general jurisdiction as the defendant's presence.⁴⁵⁴

Thus, while von Mehren and Trautman hoped that doing-business jurisdiction, as a form of jurisdiction based on defendant's presence in the forum state, would diminish, they also had very ambitious expectations for the expansion of specific jurisdiction.

When the plaintiff's activities are highly localized in New York, and when litigation convenience so requires, we believe that the plaintiff should be able to call the defendant to New York even though the defendant has engaged in no activity in New York and had not anticipated that his multi-state activity might produce consequences in New York. It is enough in assessing the relative fairness to plaintiff and defendant that the plaintiff whose affairs are essentially local has been injured by the activity of a defendant who has involved himself in multi-state activity.⁴⁵⁵

Needless to say, specific jurisdiction not only has failed to move in the direction hoped by Professors von Mehren and Trautman, it has retreated in the opposite direction.

When Lea Brilmayer took her "general look at general jurisdiction," she followed largely in the footsteps of Professors von Mehren and Trautman. Like her predecessors, Professor Brilmayer discussed general jurisdiction in the broad sense of all dispute-blind personal jurisdiction.⁴⁵⁶ Also like her predecessors, Brilmayer found all-purpose jurisdiction based on a corporation's state of incorporation and principal place of business to be the corporate equivalent of the domicile subcategory of general

454. *Id.* at 1164.

455. *Id.* at 1172.

456. *See* Brilmayer, *supra* note 247, at 721.

jurisdiction in the larger sense.⁴⁵⁷ So, when Professor Brilmayer wrote that the state of incorporation and principal place of business were the “paradigm bases for general jurisdiction,” she was not referring to the kind of general jurisdiction being discussed in cases like *Helicopteros*, which is a separate subcategory of the larger category of all-purpose jurisdiction based on a corporation’s continuous and substantial contacts with the forum state.⁴⁵⁸

Unlike Justice Ginsburg, however, Professor Brilmayer recognized that a separate category of general all-purpose dispute-blind jurisdiction existed based on the activities of a corporation within the forum state.⁴⁵⁹ Such activities-based general jurisdiction “requires proof of continuous and systematic activities.”⁴⁶⁰ For that point, Professor Brilmayer cited “*Helicopteros*, holding that continuous and systematic activities between the defendant and forum were necessary to establish jurisdiction over a claim unrelated to those activities.”⁴⁶¹ Significantly, Professor Brilmayer concluded that courts “should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states The amount of activity elsewhere seems virtually irrelevant to any of the convenience or fairness policies underlying the imposition of general jurisdiction over a defendant [F]or purposes of general jurisdiction, the relevant issue is the absolute amount of activity, not the activity relative to what the defendant does outside the state.”⁴⁶²

Justice Ginsburg, however, misapplied the description of the paradigm forms of the larger meaning of general jurisdiction as all-purpose dispute-blind jurisdiction to cases involving an entirely distinct subset of the larger category of dispute-blind general jurisdiction. By eventually limiting the subcategory of corporate-activities-based jurisdiction to cases involving the separate category of citizenship or domicile jurisdiction, Justice

457. *Id.* at 733.

458. *Id.* at 735.

459. *Id.*

460. *Id.* at 735–36.

461. *Id.* at 736 n.70.

462. *Id.* at 742–43.

Ginsburg effectively eliminated corporate-activities-based jurisdiction as a separate subset of the larger general jurisdiction, erasing the type of jurisdiction clearly discussed by the Supreme Court in *Helicopteros* and utilized by scores of lower court decisions over the course of 70 years.

*C. The Practical Problems Created by the Elimination of
Corporate-Activities-Based Jurisdiction*

There is little doubt that the elimination of corporate-activities-based jurisdiction is a significant hindrance to plaintiffs and a huge boon to corporate defendants. Any plaintiff who is injured outside of his or her home state is now unable to sue in that home state even if the defendant has massive operations there, as long as the operations do not include the corporate headquarters. It is cold comfort to a California plaintiff to say that he or she may travel across the country to sue a corporate defendant in New York, where its headquarters are located or Delaware, where it is incorporated. Moreover, it is clearly in a corporate defendant's interest to force a plaintiff to travel from the plaintiff's home state. The greater the plaintiff's burden and expense, the lower will be the settlement value of the case. A rational plaintiff will always accept a lower settlement if the burden to litigate is higher in a distant state. This advantage for corporate defendants is not merely theoretical. Many corporate defendants are taking advantage of *BNSF* to get cases dismissed on jurisdictional grounds. As one review of lower-court cases after *BNSF* concluded: "The practical implications of *BNSF Railway* are difficult to overstate. . . . [D]ozens of courts across the country have relied on *BNSF Railway* to dismiss lawsuits under factual circumstances that, in the past, would almost certainly have sufficed for the exercise of general jurisdiction."⁴⁶³

463. Andrew E. Shipley & Matthew F. Ferraro, *Not at Home: Reining in General Personal Jurisdiction After BNSF Railway v. Tyrrell*, MONDAQ, <http://www.mondaq.com/unitedstates/x/686252/trials+appeals+compensation/Not+At+Home+Reining+In+General+Personal+Jurisdiction+After+BNSF+Railway+Co+v+Tyrrell> (last updated Mar. 26, 2018) (last visited Apr. 16, 2019) (on file with the Washington and Lee Law Review).

A review of a few of the cases will illustrate this point. In *Grabowski v. Northrop Grumman Systems Corp.*,⁴⁶⁴ a federal district court in Maryland dismissed a case against a major defense contract that employed over 11,000 persons in the state and headquartered on one of its three business units there.⁴⁶⁵ The district court ruled that the jurisdictional analysis after *BNSF* did not “focus solely on the magnitude of the defendant’s in-state contacts” but rather required the court to assess the defendant’s “activities in their entirety, nationwide and world.”⁴⁶⁶ Because the defendant employed 65,000 persons worldwide and had 467 offices throughout the world, “Maintaining a sector headquarters with 11,000 employees is not ‘so substantial and of such a nature’ as to render Northrop Grumman at home in Maryland.”⁴⁶⁷

In *Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*,⁴⁶⁸ plaintiff health insurance plan sued companies selling generic prescription drugs.⁴⁶⁹ The court rejected plaintiff’s assertion of corporate-activities-based jurisdiction even though it found that defendants had “continuous and systematic contacts with Pennsylvania” by virtue of significant sales in the state.⁴⁷⁰ These contacts did not create “an exceptional case in which . . . operations in Pennsylvania are so substantial and important as to render them at home on Pennsylvania.”⁴⁷¹

In *Guaranteed Rate, Inc. v. Conn.*,⁴⁷² plaintiff GRI sued the defendant on a claim of conspiracy to breach fiduciary duties.⁴⁷³ The plaintiff argued that the defendant was subject to continuous-corporate-activities jurisdiction because it was registered to do business in Illinois, held an Illinois residential

464. *Grabowski v. Northrop Grumman Sys. Corp.*, No. GLR-16-3492, 2017 WL 3190647 (D. Md. June 30, 2017).

465. *Id.* at *3.

466. *Id.*

467. *Id.* (quoting *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017)).

468. *Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*, No. 16-665, 2017 WL 3129147 (E.D. Pa. July 24, 2017).

469. *Id.* at *1.

470. *Id.* at *4.

471. *Id.*

472. *Guaranteed Rate, Inc. v. Conn.*, 264 F. Supp. 3d 909 (N.D. Ill. 2017).

473. *Id.* at 912.

mortgage license, originated over \$215 million in loans in Illinois during 2016, operated thirteen branch offices in Illinois, and employed dozens of Illinois residents in those branch offices.⁴⁷⁴ Echoing the words of Justice Ginsburg in *Daimler*, the court held that plaintiff's argument was "unacceptably grasping."⁴⁷⁵ The court stated, "[i]f the maintenance of 2,000 miles of railroad track and employment of more than 2,000 workers in the forum state cannot establish general jurisdiction as the Supreme Court held in *BNSF Railway*, then the business allegedly conducted by [the defendant] in Illinois in this case cannot either."⁴⁷⁶

In *Buckles v. Continental Resources, Inc.*,⁴⁷⁷ the Montana Supreme Court dismissed a case brought by the in-state estate of a worker who had died in a North Dakota oilfield accident.⁴⁷⁸ The decedent worked for a defendant that was authorized to do business in Montana, maintained two field offices in the state, and owned and operated hundreds of oil and gas wells and motor vehicles in the state.⁴⁷⁹ The court found that because the defendant was incorporated and had its principal place of business in Oklahoma, the contacts with the forum were insufficient to render the defendant "at home" in Montana.⁴⁸⁰

These cases, and numerous others make it clear that corporate defendants will aggressively pursue motions to dismiss for lack of personal jurisdiction in cases in which, prior to the Court's recent case law, defendants could not have hoped to succeed on such a motion.⁴⁸¹ Those motions give corporate defendants a decided tactical edge by forcing plaintiffs away from their home states into

474. *Id.* at 915–16.

475. *Id.* at 916 (quoting *Daimler v. Bauman*, 571 U.S. 117, 138 (2014)).

476. *Id.*

477. 402 P.3d 1213 (Mont. 2017).

478. *See id.* at 1221 (reversing and remanding to the district court to determine whether there is specific jurisdiction).

479. *See id.* at 1215 (listing the defendant's various business contacts with Montana).

480. *See id.* (explaining Continental was not "at home" in Montana for the purposes of general jurisdiction).

481. *See Shipley & Ferrarro, supra* note 463, at 1295 (explaining how *BNSF Railway Co. v. Tyrell* changed the personal jurisdiction jurisprudence).

less convenient forums.⁴⁸² Moreover, in these cases it is hard to imagine why asking a corporate defendant to litigate in the plaintiff's chosen forum deprives the defendant of its Fourteenth Amendment due process rights, particularly given that the transitory presence of an individual defendant in the forum state can give rise to all-purpose jurisdiction over claims that arose outside the forum state.⁴⁸³ In each of the cases discussed above, the forum state had an interest in the case and defendant had sufficient continuous and systematic contacts with the forum state to warrant personal jurisdiction, even though the claims arose in a different state.⁴⁸⁴

*D. Final Questions Raised by the Elimination of
Corporate-Activities-Based Jurisdiction*

The obliteration of so many cases without even an acknowledgement of the damage to such a substantial body of precedent raises two interesting questions. First, how could Justice Ginsburg have accomplished such doctrinal destruction without significant opposition from other members of the Court? Second, why would Justice Ginsburg wish to eliminate an entire category of all-purpose dispute-blind jurisdiction, an action that could only favor corporate defendants?

*1. How Did the Elimination of Corporate-Activities-Based
Jurisdiction Occur So Easily?*

A number of factors coalesced to enable the elimination of corporate-activities-based jurisdiction. First, both *Goodyear* and *Daimler* were such easy cases that, when the justices met to vote

482. See *id.* at 1293 (discussing how lower courts have begun to follow “the Supreme Court’s narrowed view of general jurisdiction”).

483. See *id.* (explaining how “corporate defendants now have an effective shield against forum-shopping plaintiffs who seek to enmesh corporate defendants in jurisdictions with no connection to the subject matter of the litigation”).

484. See *Buckles*, 402 P.3d at 1215 (discussing the extensive contacts the defendant had with Montana).

on the resolution of the cases, no justice disagreed that the forum state lacked personal jurisdiction, nor should they have disagreed.⁴⁸⁵ In *Goodyear*, the plaintiff's theory of jurisdiction was so far-fetched, that neither the parties nor the Court was focused on the massive number of corporate-activities-based jurisdiction cases based on much more significant contacts with the forum state.⁴⁸⁶ In *Daimler*, the sole focus of the arguments before the Court was whether MBUSA's actions could be attributed to *Daimler*.⁴⁸⁷ Indeed, that question was the only issue certified by the Court when it granted certiorari in the case.⁴⁸⁸ As a result, none of the briefs focused on the substantial case law allowing corporate-activities-based jurisdiction.⁴⁸⁹

In addition, the elimination of corporate-activities-based jurisdiction was not clearly and forthrightly announced with an explanation about why so many decades of case law were being eliminated. In *Goodyear*, the suggestion (mistaken though it may have been) was only that the two places where a corporation was "at home" were the paradigm forms of corporate-activities-based jurisdiction.⁴⁹⁰ In *Daimler*, that paradigm form became the rule rather than just the example, but with the possible exception that there could be cases where corporate activities would still suffice to create all-purpose dispute-blind jurisdiction.⁴⁹¹ Only when the

485. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927, 929 (2011) (declining to exercise jurisdiction over a foreign defendant); *Daimler v. Bauman*, 571 U.S. 117, 121–22 (2014) (same).

486. See *Goodyear*, 564 U.S. at 920 ("A connection so limited between the forum and foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction.").

487. See *Daimler*, 571 U.S. at 125 (stating *Daimler* is not at home in California and cannot be sued there for injuries attributed to MBUSA's conduct).

488. See *id.* at 121 ("The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over *Daimler* in this case . . .").

489. See *id.* ("[W]e conclude *Daimler* is not 'at home' in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.").

490. See *Goodyear*, 564 U.S. at 923–24 (explaining the current jurisprudence of specific and general jurisdiction).

491. See *Daimler*, 571 U.S. at 140 ("Neither *Daimler* nor MBUSA is incorporated in California, nor does either entity have its principal place of business there.").

Court rendered its opinion in *BNSF* did it become clear that the exception was essentially limited to the facts of the *Perkins* case and would be extended no further.⁴⁹²

2. *Why Would Justice Ginsburg Reshape Personal Jurisdiction Doctrine in a Manner that So Clearly Favors Corporate Defendants?*

There is little doubt that the elimination of corporate-activities-based jurisdiction is a massive gift to corporate defendants.⁴⁹³ Corporations that once assumed they had no other choice than to accept a plaintiff's choice of forum now routinely file motions to dismiss for lack of personal jurisdiction and force plaintiffs to litigate in a less convenient forum.⁴⁹⁴ The less convenient the forum is for plaintiff and the greater expense incurred in prosecuting a case, the lower the settlement value for a defendant.⁴⁹⁵ It is not unreasonable to be surprised that the Justice who is generally regarded as the most liberal on the Supreme Court should be responsible for that turn of events.

Although only Justice Ginsburg could definitively answer that question, I will offer a tentative hypothesis to explain the result. Although Justice Ginsburg was best known as an academic for her work on gender equality,⁴⁹⁶ she began her academic life as a comparative civil procedure scholar. Her first legal job after a

492. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (declining to exercise personal jurisdiction over a railroad in Montana when the railroad only did some business in the state).

493. See Twitchell, *supra* note 17, at 635 (discussing general jurisdiction).

494. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 903 (2011) (Ginsburg, J., dissenting) ("I would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that State using McIntyre UK's shearing machine.").

495. See Shipley & Ferraro, *supra* note 463, at 1293 (explaining that *BNSF Railway* curtailed a plaintiff's ability to sue corporate defendants in foreign states).

496. See Ruth Bader Ginsburg, *The Equal Rights Amendment Is the Way*, 1 HARV. WOMEN'S L.J. 19, 21 (1978) (arguing that the Equal Rights Amendment will only prohibit the government from discriminating on the basis of sex); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 451 (1978) (discussing the history of sex equality and the Constitution).

judicial clerkship was as Associate Director of the Columbia University Project on International Procedure.⁴⁹⁷ Professor Ginsburg's first book was on Civil Procedure in Sweden,⁴⁹⁸ and she wrote one of her first law review articles on recognition and enforcement of foreign civil judgments.⁴⁹⁹ In that article, she noted,

Commentators, both here and abroad, have contrasted jurisdictional bases appropriate for international recognition purposes with bases found in domestic law, but unacceptable in the international sphere. Unacceptable or "exorbitant" bases, . . . [including the] defendant's transitory presence[,] generally are not expected even by the rendition forum to elicit recognition outside.⁵⁰⁰

Not surprisingly, Professor Ginsburg cited von Mehren's and Trautman's article *Jurisdiction to Adjudicate*⁵⁰¹ throughout her article.⁵⁰² It is not hard to understand why Justice Ginsburg would retain the skepticism that Professor Ginsburg, as a comparative civil procedure scholar, had with respect to forms of activities-based jurisdiction that were not internationally recognized.⁵⁰³ Professors von Mehren and Trautman were teaching at Harvard Law School when Justice Ginsburg was a student, and Professor Ginsburg's first year civil procedure professor was Benjamin Kaplan, a man, Justice Ginsburg later noted, "whose teaching and writing continue to inspire me."⁵⁰⁴ Professor Kaplan himself had written on comparative civil procedure issues with Professor von Mehren.⁵⁰⁵ Given the views of Professor Ginsburg's

497. See generally RUTH BADER GINSBURG & ANDERS BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* (1965).

498. See *id.* (detailing each part of civil litigation procedure in Sweden).

499. See Ginsburg, *supra* note 298, at 720 (discussing the effectiveness of judgements of foreign nation).

500. *Id.* at 725–26.

501. See von Maheren & Trautman, *supra* note 9, at 1121 (discussing issues with adjudicatory jurisdiction).

502. See generally Ginsburg, *supra* note 298.

503. See *id.* at 725–26 (explaining the differences between accepted domestic and international basis for jurisdiction).

504. Ruth Bader Ginsburg, *The Changing Complexion of Harvard Law School*, 27 HARV. WOMEN'S L.J. 303, 306 (2004).

505. See Benjamin Kaplan, Arthur T. von Mehren & Rudolph Schefer, *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443, 1442 (1958) (discussing

mentors and her own work in comparative civil procedure at such an early stage of her career, it is understandable that, even in her later role as Justice of the Supreme Court, she was skeptical of forms of activities-based jurisdiction that were greatly disfavored in the international nation-to-nation context of jurisdiction and recognition of judgments, even though corporate-activities-based jurisdiction was so well established in the United States.⁵⁰⁶

There are, however, a number of problems with Justice Ginsburg's comparativist perspective, even beyond the lack of doctrinal consistency with the decades-long history of corporate-activities-based jurisdiction in the United States. First, even if one accepts the proposition that, at the international level, the country's rules for international jurisdiction and enforcement of judgments should be harmonized with those of its trading partners, that does not mean that the same rules should be utilized, as a matter of due process, to govern state-to-state recognition of judgments in the domestic setting, where the Full Faith and Credit Clause provides an enforcement mechanism that does not exist at the international level.⁵⁰⁷ The Court could easily adopt more generous jurisdictional rules under the Due Process Clause for state-to-state jurisdictional issues and then, if it wishes, apply a stricter jurisdictional standard as a matter of federal common law under the authority of the Full Faith and Credit Clause with respect to international defendants.⁵⁰⁸

Moreover, applying the restrictive international standard to American corporate defendants in the domestic state-to-state jurisdictional context leaves a major gap in the jurisdictions that are available to American plaintiffs.⁵⁰⁹ The comparative law

German civil procedure in the country's higher courts).

506. See von Mehren & Trautman, *supra* note 9, at 1144 (discussing corporate-activities-based jurisdiction).

507. See Trangsrud, *supra* note 23, at 887 ("The Full Faith and Credit Clause directs that states shall give effect to the judgments of other states; it gives Congress power to define what effect a state must give to the judgment of a sister state.").

508. See *id.* ("If Congress later passed legislation allowing states to adjudicate the rights of noncitizens, then the rights of noncitizens could be adjudicated in state court.").

509. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 903 (2011) (declining to exercise jurisdiction in New Jersey over a foreign company when the

scholars admired by Justice Ginsburg all advocated for much broader standards of specific jurisdiction to make up for the loss of available forums resulting from a more restrictive corporate-activities-based jurisdiction.⁵¹⁰ Justice Ginsburg may herself favor broader specific jurisdiction standards, but she has not brought along a majority of her colleagues on the Court to that jurisdictional perspective.⁵¹¹

This jurisdictional gap is a perfect example of the second kind of categories problem in the Court's personal jurisdiction jurisprudence. By considering only one category of personal jurisdiction in isolation from all the others, the Court has created an incoherent personal jurisdiction doctrine that is theoretically inconsistent from category to category and leaves damaging gaps in the jurisdictions available to plaintiffs.⁵¹²

VI. *Where Do We Go from Here?*

Advocating for significant changes in Supreme Court case law is always somewhat of an exercise in wishful thinking. Nevertheless, one can hope that adding additional voice to the chorus of those calling for a rationalization of personal jurisdiction doctrine will hasten the day when the Supreme Court begins to address the many problems that continue to plague the field of personal jurisdiction. I offer three specific suggestions below.⁵¹³

company's product caused an injury in the state).

510. See von Mehren & Trautman, *supra* note 9, at 1144–47 (discussing specific jurisdiction).

511. See *J. McIntyre Mach., Ltd.*, 564 U.S. at 903 (Ginsburg J. dissenting) (arguing that McIntyre should be subject to specific jurisdiction in the place where its products caused injury).

512. See Shipley & Ferraro, *supra* note 463, at 1293 (discussing how the Supreme Court recently restricted where corporate defendants can be hauled into court).

513. *Supra* Part V.A–C.

A. The Court Should Place Procedural Due Process Considerations First and then Explain the Theoretical Foundation for Whatever Substantive Due Process Requirements the Court Believes to Be Necessary After That

The secondary status of the procedural due process analysis in questions of personal jurisdiction is the result of a historical quirk that the Supreme Court can now remedy.⁵¹⁴ In considering the power of a state court to deprive a defendant of his property, the first question should always be whether the state's interest in hearing the case outweighs the burden on the defendant of litigating in the forum. As the Court has recognized, the state's interests may involve many factors, including an interest in the subject matter of the plaintiff's claim because it arose within the state, the desire to provide an in-state forum in which a plaintiff may conveniently resolve a claim, and the convenience of litigating in the forum because of the availability of witnesses or other forms of evidence.⁵¹⁵ Because these issues are closest to the core meaning of the Due Process Clause and are the least controversial bases to limit the power of a state court system, this analysis should be the first and the primary restriction on a state's ability to hear a particular case. If the Court still concludes that, after application of a rigorous procedural due process analysis, some doctrine of substantive due process requires that a forum have, in addition, certain contacts with the defendant in order to warrant the exercise of judicial power, the Court should explain the theoretical basis for such a substantive due process requirement and then limit the scope of the requirement to the least restrictive element necessary to accomplish the theoretical goal.

514. The Court did not decide a personal jurisdiction case based upon a procedural due process analysis until 1987. *See Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987).

515. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482–83 (1985) (discussing Florida's interest in holding the defendant answerable in the state based on contacts he established in the state).

*B. The Court Should Correct the Mistake It Made in the
Categorization of Dispute-Blind Jurisdiction*

First, the Court should acknowledge that a corporation's state of incorporation and principal place of business are the paradigm forms of the larger category of all-purpose jurisdiction and not exemplars of corporate-activities-based jurisdiction. Second, the Court should recognize that corporate-activities-based jurisdiction is a category created by *International Shoe* that is distinct from the citizenship category, which encompasses a defendant's state of incorporation and principal place of business. *International Shoe*, *Perkins*, and *Helicopteros* all anticipated that some level of continuous corporate activity (less than incorporation and corporate headquarters) would be sufficient to establish all-purpose dispute-blind jurisdiction.⁵¹⁶

The Court should establish clear standards for when plaintiffs may assert corporate-activities-based jurisdiction. At the very least, a corporation that has a branch office with employees in the forum state should be subject to this type of jurisdiction. *International Shoe* explicitly approved of cases asserting corporate-activities-based jurisdiction with respect to those types of contacts with a forum state, and there is no reason now to regard them as jurisdictionally insufficient.⁵¹⁷ Indeed, in cases where the state's assertion of jurisdictional authority is procedurally reasonable, meaning the state's interest in the litigation outweighs any burden on the defendant, a corporation's registering to do business within the forum state should be a significant enough contact to warrant corporate-activities-based jurisdiction.⁵¹⁸ Such registration establishes that the corporation is receiving an ongoing benefit from the state that warrants the reciprocal burden

516. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (“[T]here 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 action arising from dealings entirely distinct from those activities.”).

517. See *id.* at 313 (explaining the various activities that the salesmen employed by appellant undertook in the forum state).

518. See Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 480–81 (2016) (arguing corporate registration in a state, appointing someone as an agent to receive service of process, and actually conducting business in the state should be enough to warrant jurisdiction).

to respond to the state's judicial process, at least in cases where the state has a sufficient interest to make jurisdiction reasonable.⁵¹⁹ Moreover, to the extent that the Court remains concerned about whether a corporation has adequate notice that it is subject to personal jurisdiction in a particular state, both the branch office and corporate registration requirements would provide clear and definitive notice to potential corporate defendants, as long as the Supreme Court clearly enunciated a contacts standard based on those requirements.

Along the same lines, the Court should also recognize that the category of jurisdiction based upon a defendant's consent should be analyzed separate and apart from the corporation's state of incorporation and principal place of business, which are the foundation for a state's assertion of the traditional basis of citizenship jurisdiction over a corporation.⁵²⁰ If a state wishes to require the consent of a corporation to jurisdiction in its court system as the quid pro quo for allowing the corporation to register to do business within the state, that should be sufficient to conclude that the corporation has consented to jurisdiction and that no other due process analysis is necessary.⁵²¹ In the aftermath of the Court's elimination of corporate-activities-based jurisdiction, a number of commentators have suggested that states could revive broad-based dispute-blind jurisdiction by requiring corporations who register to do business in the state to consent to the jurisdiction of the state's courts.⁵²² Others have opposed this tactic by suggesting that it is inconsistent with the Court's requirements

519. See *id.* at 513 (explaining how the purpose of designating an agent "is to make a nonresident suable in local courts").

520. See *Daimler v. Bauman*, 571 U.S. 117, 137 (2014) ("*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 types those places paradigm all-purpose forums.>").

521. See *Harrison*, *supra* note 518, at 480–81 (arguing that "a corporation that registers to do business in a state, appoints an agent for service of process, and actually conducts business in the state" should be deemed to consent to general jurisdiction in that state).

522. See *id.* at 513 ("At least four other courts of appeals have upheld the constitutionality of construing state registration statutes to provide jurisdiction to courts in that state over corporations that comply with the statutes . . .").

for “general jurisdiction.”⁵²³ Courts have similarly differed on whether jurisdiction based on consent must satisfy the *Daimler* “at home” test.⁵²⁴ Applying the “at home” test to the separate traditional basis of consent conflates the categories of consent and citizenship, which further confuses the due process analysis. If the Court wishes to impose additional constraints on consent, it should do so based on the specific considerations that relate to waiver of constitutional rights and not on the requirements of other categories of personal jurisdiction.

C. The Court Should Solve Its Other Personal Jurisdiction Categories Problem by Insuring that the Theoretical Foundations and Doctrinal Rules of Each Category Are Consistent with Those of the Others

Even if one accepts that different categories of personal jurisdiction are a necessary part of the judicial landscape, the Court should do its best to harmonize the various categories into one coherent doctrine. By beginning the analysis of every personal jurisdiction question with the issue whether the assertion of state power is procedurally fair, the Court will lay a decent foundation for doctrinal harmonization and coherence. After establishing such procedural due process requirements, the Court can attend to any additional substantive due process requirements in a manner that creates consistent and theoretically sound substantive due process rules for each jurisdictional basis. Categories of jurisdiction are fine, as long as the requirements for each category are clearly understood, consistently named, and theoretically coherent. By addressing the need for theoretical and doctrinal coherence, the Court can mend the dysfunctional results illustrated by the hypotheticals at the beginning of this article and create a more equitable and easily administered system of personal jurisdiction.

523. See Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1610 (2015) (arguing *Daimler* eliminated longstanding bases of personal jurisdiction).

524. See *id.* at 1611–12 (discussing a table of cases illustrating a circuit split on the issue).