12-2014

Where is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction

Tanya Monestier

Follow this and additional works at: http://docs.rwu.edu/law_fac_fs

Part of the Jurisdiction Commons, and the Litigation Commons

Recommended Citation

66 Hastings L.J. 233, 294 (2014)
Where Is Home Depot “At Home”?:
*Daimler v. Bauman* and the End of Doing Business Jurisdiction

TANYA J. MONESTIER*

In January 2014, the U.S. Supreme Court decided *Daimler AG v. Bauman*. The case was supposed to resolve a very important question that had divided courts for decades: when, for jurisdictional purposes, can the contacts of a subsidiary be imputed to its parent? The Supreme Court dodged this question. Instead, it answered a different, but equally important, question: under what circumstances is a corporation “at home” such that a state has general jurisdiction over it? The Court had introduced the “at home” language to the discourse on general jurisdiction a few years earlier in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, when it held that a state has general jurisdiction over a corporation if its activities within the state are so continuous and systematic as to render the corporation essentially “at home” there. At the time, courts and commentators were not one-hundred percent clear on the meaning of the “at home” language. After *Daimler*, they will be.

*Daimler* reinforced the idea that the “at home” basis for general jurisdiction is intended to be exceptional. Ordinarily, a corporation is only “at home”—and therefore subject to general jurisdiction—in, at most, two places: its state of incorporation and its principal place of business. In making this pronouncement, the Supreme Court has done away with a very well established, albeit wholly under-theorized, basis for general jurisdiction: “doing business.” For the better part of a century, courts had assumed general jurisdiction over corporations on the basis that they were doing business in the forum, as evidenced by the corporation’s commercial presence in the state. This basis of jurisdiction was perceived as exorbitant by foreigners and often condemned as promoting forum shopping. *Daimler* officially sounds the death knell for doing business jurisdiction in the United States.

In this Article, I examine the decisions of the majority and the concurrence, highlighting the critical areas of disagreement. I lay out the key implications of *Daimler*: the end of

* Associate Professor, Roger Williams University School of Law. I would like to thank Nicole Manzo for her invaluable research assistance in the preparation of this Article. Thank you as well to Professor Colleen Murphy, who provided very helpful comments on a previous draft of this Article.
doing business jurisdiction in the United States, the doctrinal pressure on alternative bases of jurisdiction to fill the void left by Daimler, and the real-world consequences for litigants and courts. I also look at the critical questions that Daimler left unanswered—in particular, the standard for imputation of jurisdictional contacts from a subsidiary to a parent and the propriety of imputation where the underlying basis of jurisdiction is that the subsidiary is incorporated in the state or has its principal place of business there. The implications of the Daimler decision will be felt by both plaintiffs and defendants for years to come. Accordingly, it warrants a careful look.
WHERE IS HOME DEPOT “AT HOME”? 235

Table of Contents

Introduction .......................................................................................................................... 235
I. An Introduction to General Jurisdiction ........................................................................ 237
II. The Decision in Daimler v. Bauman ............................................................................. 246
   A. The Facts .................................................................................................................. 246
   B. The Proceedings Below ......................................................................................... 247
   C. The Supreme Court’s Decision ............................................................................. 249
III. Key Points of Disagreement .................................................................................. 253
   A. An Absolute or Comparative Test for General Jurisdiction? .............................. 253
   B. What Is the Meaning of “At Home”? ...................................................................... 259
   C. A Reasonableness Inquiry for General Jurisdiction? ......................................... 262
IV. The Implications of Daimler ..................................................................................... 265
   A. The End of Doing Business Jurisdiction ............................................................... 265
   B. Additional Pressure on Alternative Bases of Jurisdiction ..................................... 276
   C. Practical Consequences for Litigants and Courts ............................................... 282
V. Unanswered Questions .............................................................................................. 286
   A. When Should a Subsidiary’s Contacts Be Imputed to the Parent? ....................... 287
   B. What If the Basis of Jurisdiction Is Place of Incorporation or Principal Place of Business? .................................................................................................................. 288
Conclusion .................................................................................................................. 292

Introduction

A shopper in Tallahassee, Florida slips and falls at The Home Depot ("Home Depot"), suffering various personal injuries. She later moves to Dallas, Texas, and ultimately decides to sue Home Depot in Texas with respect to the Florida slip-and-fall. Until earlier this year, a court probably would have concluded that Texas had jurisdiction over Home Depot because Home Depot was doing business in Texas. After all, Home Depot has a total of 178 physical stores in Texas, not to mention thousands of employees.1 After the Supreme Court’s decision in Daimler AG v. Bauman,2 however, a Texas court would likely conclude the opposite: Texas does not have jurisdiction over Home Depot with respect to a slip-and-fall accident that occurred in Florida. The Court in Daimler made it very clear that a court can only exercise general jurisdiction over a corporate defendant in three places: (1) in its state of incorporation; (2) in the state where it has its principal place of business;

and (3) in exceptional cases, anywhere else where the corporation has continuous and systematic general business contacts and can fairly be regarded to be “at home.” The Court emphasized repeatedly that the third basis for general jurisdiction would be used only on rare occasions and that large multinational corporations could not be regarded “at home” anywhere and everywhere they conducted a large volume of business.\(^3\)

After Daimler, the question, “Where is Home Depot ‘at Home’?” invites a simple response. Home Depot is “at home” in Delaware (its state of incorporation) and in Georgia (the state of its principal place of business).\(^4\) These are likely the only two states that can assert general jurisdiction over Home Depot.\(^5\) This marks a radical departure from decades of case law holding that general jurisdiction was appropriate where a company was doing business in the forum—in the sense of having continuous and systematic general business contacts with the forum.\(^6\) Accordingly, Daimler marks the official end of doing business jurisdiction in the United States.

This Article will examine in detail the Daimler decision and its implications for future cases. In Part I, I provide a brief introduction to general jurisdiction, tracing the history of the Supreme Court’s jurisprudence on the continuous and systematic test for general jurisdiction over corporations. In Part II, I outline the Daimler case, discussing both the majority and concurring decisions.\(^7\) I sketch out in

---

3. Id. at 760–61, 761 n.19.
4. Id. at 760–62, 762 n.20 (“A corporation that operates in many places can scarcely be deemed at home in all of them.”); accord Transcript of Oral Argument at 30–31, Daimler, 134 S. Ct. 746 (No.11-965), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-965_1647.pdf (according to Justice Kagan, if Daimler “were subject to general jurisdiction in California, so, too, it would be subject to general jurisdiction in every State in the United States, and all of that has got to be wrong”).
6. This leaves aside registering to do business as an independent basis for general jurisdiction. See infra Part IV.B.
Part III the key areas of disagreement between the majority and the concurrence: the nature of the test for general jurisdiction, the meaning of the words "at home," and the propriety of a reasonableness test for general jurisdiction. In Part IV, I explore the implications of the Daimler decision on a broader level. I conclude that Daimler marks the official end of doing business jurisdiction in the United States; the consequence of this is that there will be additional pressure on alternative bases of jurisdiction to fill the void left by Daimler. I also discuss some practical ramifications of Daimler for litigants and courts. In Part V, I look at some unanswered questions in the wake of Daimler. Most glaringly, the Court in Daimler did not answer the question for which it had ostensibly granted certiorari—when can the jurisdictional contacts of a subsidiary be imputed to a parent? A related question presented by the Court's decision in Daimler concerns jurisdictional imputation when the underlying basis of jurisdiction is that the subsidiary is incorporated in the forum or has its principal place of business there. Finally, in Part VI, I offer some concluding remarks.

I. AN INTRODUCTION TO GENERAL JURISDICTION

American law has, for the most part, adhered to a two-part conceptual structure in analyzing personal jurisdiction, dividing the analysis between specific jurisdiction and general jurisdiction. Specific jurisdiction is premised on the relationship between the defendant, the forum, and the underlying cause of action. It is said that where the cause of action is "related to or arising from" the defendant's in-state activities, the state has specific jurisdiction over the defendant. For instance, if a manufacturer sells a defective product in State X and a resident is injured by the product in State X, it is likely that State X will have specific jurisdiction over the defendant. General jurisdiction, on the other hand, is premised on the relationship between the defendant and the forum. Notably, courts asserting general jurisdiction over a defendant can do so in the absence of any connection between the state and the underlying cause of action. Rather, the connection between the defendant and the


There are two well-established bases of general jurisdiction over corporations: a corporation can always be sued on any cause of action, first, in its state of incorporation and second, in the state of its principal place of business. In both of these scenarios, the state is regarded as possessing general jurisdiction over the corporation because of the unique relationship between the state and the corporation. General jurisdiction is an extremely powerful form of jurisdiction, since it can result in a court adjudicating a controversy with absolutely no connection to the state. Consider the following example: ABC Corp. is a manufacturer of running shoes that is incorporated in the state of Delaware. It operates a Mexican plant where it employs Mexican workers pursuant to a contract executed in Mexico and governed by Mexican law. If an employment dispute arises between the Mexican workers and ABC Corp., Delaware courts will have authority to hear the dispute. Since ABC Corp. is incorporated in Delaware, the courts of Delaware have the ability to adjudicate any and all disputes concerning ABC Corp., regardless of where the dispute arose.

Although the labels of “specific jurisdiction” and “general jurisdiction” are often attributed to an influential article written by Professors von Mehren and Trautman, the seeds of this jurisdictional

13. See Erichson, supra note 8, at 84 (“General jurisdiction is justified by the relationship between a state and those who make the state their home.”).

14. See Daimler, 134 S. Ct. at 760; see also Brilmayer et al., supra note 11, at 728.

15. In A General Look at General Jurisdiction, Professors Brilmayer, Haverkamp, and Logan describe why general jurisdiction over a corporation based on its state of incorporation is appropriate:

First, the corporation intentionally chooses to create a relationship with the state of incorporation, presumably to obtain the benefits of that state’s substantive and procedural laws. Such a choice creates a unique relationship that justifies general jurisdiction over the corporation. Second, the corporation, unlike an individual, cannot ever be absent from the state of incorporation. Third, even if a corporation neither does business nor maintains an office in the incorporating state, the incorporation process itself provides notice of the potential for judicial jurisdiction. Finally, the corporation is likely to be familiar with that state’s law, arguably more familiar than an individual domiciliary would be, because the corporation presumably based its incorporation decision in part on the state’s substantive law.

Brilmayer et al., supra note 11, at 733–34. The authors point out that these rationales also apply, perhaps with slightly less force, to the state of the corporation’s principal place of business. Id. Accord Erichson, supra note 8, at 86–87.

16. See Arthur T. von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1136 (1966) (“In American thinking, affiliations between the forum and the underlying controversy normally support only 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.”). Note that some authors have questioned the utility of this bipartite framework. See Carol Andrews, Another Look at General Personal Jurisdiction, 47 WAKE FOREST L.
framework can be found in *International Shoe Co. v. Washington* itself. In *International Shoe*, the Supreme Court noted that jurisdiction over a corporation could be appropriate where the corporation engaged in activities in the forum that were "so substantial and of such a nature" as to justify suit in an action wholly unrelated to a corporation's in-state activities. Although on its facts, *International Shoe* was a specific jurisdiction case, it nonetheless telegraphed the structure of personal jurisdiction analysis that would guide courts for years to come.

Prior to 2011, the Supreme Court had decided only two cases dealing with general jurisdiction. The first, *Perkins v. Benguet Consolidated Mining Co.*, involved a Philippine mining corporation sued in Ohio over a cause of action that was not related to the corporation's activities in Ohio. The plaintiff sought to establish that Ohio had general jurisdiction over the Philippine company, even though the company was not incorporated in Ohio and did not have its principal place of business there. Nevertheless, the Court found that the defendant was subject to general jurisdiction in Ohio. The Court observed that the defendant had ceased its mining activities in the Philippines, and to the extent that it was carrying on any business, it was doing so in Ohio. After examining the activities undertaken in Ohio by the president of the corporation, the Court stated, "he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." Accordingly, the Court found that it would not offend due process to assert personal jurisdiction over the defendant corporation.

The next Supreme Court pronouncement on general jurisdiction came three decades later in *Helicopteros Nacionales de Colombia, S.A. v. Hall*. In *Helicopteros*, the plaintiffs sued a Colombian corporation in Texas with respect to a helicopter accident that took place in Peru. The plaintiffs maintained that the defendant had sufficient contacts with
Texas to support the exercise of general jurisdiction: the defendant purchased helicopters and other equipment in Texas; the defendant sent pilots and management personnel into Texas to be trained and to consult on technical matters; the defendant negotiated the contract under which it provided transportation services to the joint venture that employed the decedents in Texas; and the defendant accepted checks drawn on a Texas bank into its New York bank account. Unlike Perkins, the majority of the Supreme Court in Helicopteros found that these contacts did not constitute continuous and systematic general business contacts sufficient to support the exercise of general jurisdiction over the defendant. For instance, the Court noted that “one trip to Houston by Helicol’s chief executive officer for the purpose of negotiating the...contract...cannot be described or regarded as a contact of a ‘continuous and systematic’ nature.” Similarly, the defendant’s acceptance of checks drawn on a Texas bank was of “negligible significance” in determining whether the defendant had sufficient contacts in Texas to ground general jurisdiction.

The “continuous and systematic general business contacts” language from Helicopteros thereafter became the operative test for general jurisdiction over corporations. Courts would ask whether a corporation had sufficiently continuous and systematic general business contacts with a state so as to justify the assertion of general jurisdiction over a corporation. States developed their own factors to consider in evaluating whether a corporation’s contacts rose to the level of being continuous and systematic. Generally speaking, courts would look at factors that were thought to approximate the corporation’s physical presence in the state, such as the number of employees in the state, the volume of sales and/or purchases in the state, the corporation’s registration to do business in a state, and so on.

The concept of continuous and systematic general business contacts eventually morphed with the notion of “doing business.” That is, if a
corporation was doing business in a forum with a degree of permanence and regularity, then it had continuous and systematic general business contacts with the forum and would be subject to general jurisdiction there. Thus, doing business essentially became synonymous with, or a proxy for, the *Helicopteros* standard of continuous and systematic general business contacts.  

There were few guideposts for courts deciding whether a corporation was doing business such that it would be subject to general jurisdiction. Accordingly, courts were largely left to their own devices in determining when a corporation would or would not be subject to general jurisdiction. This arguably resulted, at least in some cases, in exorbitant assertions of jurisdiction over corporations doing business in a state.

One such case is the Ninth Circuit’s 2003 decision in *Gator.com Corp. v. L.L. Bean, Inc.* There, a California-based software company, Gator.com, sued Maine clothing manufacturer L.L. Bean in federal court in California seeking a declaratory judgment that its pop-up Internet software did not infringe upon the defendant’s trademark rights or

---

Transacting Business Jurisdiction Over Non-U.S. Individuals and Entities, U.S. Dep’t of State, http://1997-2001.state.gov/www/global/legal_affairs/dubinsky.html (last visited Dec. 14, 2014) (“It is difficult to summarize with precision the types and quantities of business activities within a state of the United States that will support a conclusion that the defendant is ‘doing business’ there and will be required to defend a lawsuit unrelated to its activities in that state. The phrase most frequently repeated by the Supreme Court is ‘continuous and systematic general business contacts’ within the jurisdiction.”).

34. See Meir Feder, Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L. Rev. 671, 675 (2012) (“Lower courts [have] widely embraced the notion that any corporation ‘doing business’ in a state [is] subject to general jurisdiction there.”). In addition, many states have directly codified “doing business” jurisdiction in their individual long-arm statutes. See, e.g., 735 ILL. COMP. STAT. ANN. 5/2-209(b)(4) (LexisNexis 2009); MICH. COMP. LAWS ANN. § 600.7111(3) (West 1996); 42 PA. CONS. STAT. ANN. § 5301(a)(2)(iii) (West 2004); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2008). Note that this is different than “transacting business,” which is commonly associated with specific jurisdiction. See Roger W. Kirby, Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd., 7 Hastings Bus. L.J. 223, 247 n.128 (2011) (“Essentially, doing business refers to a continuous and systematic business activity in the forum, which would subject defendant to a claim for any cause. Transacting business concerns an isolated but purposeful business transaction in [the forum] and the plaintiff’s claim arises out of the particular transaction.”) (alteration in original) (quoting N.Y. C.P.L.R. § 302 (McKinney 2008)).

35. See Feder, supra note 34, at 674–76 (“The Supreme Court has never articulated any underlying theory of general jurisdiction or even attempted to explain in a particular case why the contacts at issue were, or were not, sufficient to justify a state’s assertion of authority over a defendant’s out of state activities.”).

36. See id. at 675.

37. See James R. Pielemeier, Goodyear Dunlop: A Welcome Refinement of the Language of General Jurisdiction, 16 LEWIS & CLARK L. REV. 695, 984–85 (2012) (observing that “a number of lower courts have not required truly substantial contacts to warrant general personal jurisdiction”); Sherry, supra note 8, at 117 (noting that some courts “had loosened the definition of continuous and systematic contacts so far that any company with substantial sales in a state was subject to general jurisdiction in that state”).

38. 341 F.3d 1072 (9th Cir. 2003).
otherwise violate state or federal law.\textsuperscript{39} The case turned on the question of whether the California court had general jurisdiction over the defendant, L.L. Bean.\textsuperscript{40} The court noted that L.L. Bean was a Maine corporation with its principal place of business in that state.\textsuperscript{41} It maintained physical stores in Maine, Delaware, New Hampshire, Oregon, and Virginia.\textsuperscript{42} In addition, it sold over one billion dollars in merchandise annually to consumers in 150 different countries.\textsuperscript{43} The court indicated that a large percentage of L.L. Bean’s sales came from its mail-order and Internet businesses, with approximately sixteen percent of its sales in 2000 deriving from the latter.\textsuperscript{44} After noting that the standard for general jurisdiction is “fairly high”\textsuperscript{45} and that the case presented a “close question,”\textsuperscript{46} the Ninth Circuit ultimately concluded that California did have general jurisdiction over L.L. Bean.\textsuperscript{47} The court stated that the defendant’s overall commercial contacts with California, primarily through its website, met the continuous and systematic test articulated in \textit{Helicopteros}.\textsuperscript{48} The court held that there was nothing unfair about requiring the defendant to be subject to the authority of the California court where it “has deliberately and purposely availed itself, on a very large scale, of the benefits of doing business within the state.”\textsuperscript{49}

Commentators questioned the propriety of this decision, pointing out the jurisdictional ramifications of the court’s ruling.\textsuperscript{50} If L.L. Bean could be held to be doing business (in the jurisdictional sense) in California, then it could easily be held to be doing business in all fifty states. Would this mean that L.L. Bean was subject to general jurisdiction in every state? By extension, would this mean that all large companies with a substantial presence in all fifty states—either physical or virtual—would be subject to general jurisdiction everywhere in the United States?\textsuperscript{51}

\textsuperscript{39} Id. at 1075.
\textsuperscript{40} Id. at 1076.
\textsuperscript{41} Id. at 1074.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 1076 (quoting Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986)).
\textsuperscript{46} Id. at 1078.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 1079.
\textsuperscript{50} See generally James R. Pielemeier, Why General Personal Jurisdiction over “Virtual Stores” is a Bad Idea, 27 QUINNIPAC L. REV. 625 (2009).
\textsuperscript{51} See Andrews, supra note 16, at 1066–67 (“Take as an example a corporation such as McDonald’s. Before Goodyear was decided, Professor Glannon argued that, because the corporation has a very strong physical presence in most states, through its numerous employees and restaurants, McDonald’s has ‘continuous and systematic’ contacts in these states and is subject to general jurisdiction in all such states.”).
In 2011, the Supreme Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown*, using it as an opportunity to clarify the scope of general jurisdiction. In *Goodyear*, North Carolina plaintiffs sued tire manufacturer Goodyear USA and several of its foreign subsidiaries in North Carolina, stemming from an accident that took place in France. Goodyear’s subsidiaries, based in Turkey, France, and Luxembourg, challenged the jurisdiction of the North Carolina court. The lower court in *Goodyear* had held that the foreign defendants were subject to general jurisdiction in North Carolina because they had placed their product into the stream of commerce, and their product eventually made its way into North Carolina. Justice Ginsburg, writing for the plurality, first noted that the North Carolina Court of Appeals had erred by eliding general jurisdiction and specific jurisdiction. She clarified that the metaphor of “stream of commerce” is only appropriate when assessing whether a defendant had certain minimum contacts with the jurisdiction to support the exercise of specific jurisdiction, that is, jurisdiction related to the defendant’s contacts with the forum. Turning to the issue of general jurisdiction, Justice Ginsburg concluded that the defendants’ “attenuated connections to the State [fell] far short of the ‘the continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.” She noted that the paradigm bases for general jurisdiction over a corporation are its state of incorporation and the state of its principal place of business. In addition, she stated that a court could assert general jurisdiction over a corporation where the corporation’s affiliations with a state were “so ‘continuous and

52. 131 S. Ct. 2846 (2011).
53. Id. at 2850.
54. Id. The defendant Goodyear USA did not challenge jurisdiction. Id. Arguably, in light of the result in *Goodyear* itself, this was a mistake. Presumably, Goodyear USA did not contest jurisdiction because it clearly was doing business in North Carolina and therefore believed it would be subject to general jurisdiction. However, in light of the ultimate result in *Goodyear* and in particular, the Court’s holding that general jurisdiction over a corporation is only appropriate if a corporation has continuous and systematic general business contacts such as to render the corporation essentially “at home” there, the concession was likely in error. See also infra note 91.
56. Goodyear, 131 S. Ct. at 2849.
57. Id. (“The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and general jurisdiction. Flow of a manufacturer’s products into the forum may bolster an affiliation germane to specific jurisdiction.... A corporation’s ‘continuous activity of some sorts within a state,’ *International Shoe* instructed, ‘is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” (citation omitted) (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945))).
58. Id. at 2857 (citation omitted) (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 416 (1984)).
59. Id. at 2853–54.
systematic' as to render them essentially at home in the forum State.\(^{60}\) On the facts of Goodyear, Justice Ginsburg readily concluded that the foreign defendants were "in no sense at home in North Carolina."\(^{61}\) Following Goodyear, courts and commentators debated the meaning of the Court's new "at home" language.\(^{62}\) Some argued that the Court intended to effectuate a dramatic change in the law of general jurisdiction, such that assertions of general jurisdiction on the basis of continuous and systematic contacts would be rare.\(^{63}\) Others argued that the Court could not have intended to do away with decades of doing business jurisdiction precedent without explicitly acknowledging what it was doing.\(^{64}\) Many courts following Goodyear actually did pay attention to the new "at home" language, resulting in more limited assertions of general jurisdiction.\(^{65}\) But some courts still "push[ed] the envelope after Goodyear, distinguishing Goodyear and finding general personal jurisdiction on the basis of sales (or salespeople) alone, without any other physical presence."\(^{66}\)

\(^{60}\) Id. at 2851.
\(^{61}\) Id. at 2857.
\(^{62}\) See Lindsey D. Blanchard, Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions, 44 McGeorge L. Rev. 865, 875–78 (2013) (discussing a variety of different scholarly interpretations of the "at home" language).
\(^{63}\) See, e.g., Feder, supra note 34, at 677 ("The Court did not specify what it meant by at home, or address how many states could qualify with respect to a particular corporation—a question that is sure to be litigated in future cases. However, the Goodyear opinion did include several clues suggesting that the Court may have intended the at home standard as a narrow one, perhaps extending no further than a corporation's state of incorporation and principal place of business."); Pielemeier, supra note 37, at 991 ("In any event, a limitation of general jurisdiction over corporations to places where they are 'at home,' appears clearly to envision fewer places than one could envision under tests of 'presence,' 'doing business,' and 'continuous and systematic general business contacts.'").
\(^{64}\) See, e.g., Todd David Peterson, The Timing of Minimum Contacts After Goodyear and McIntyre, 80 Geo. Wash. L. Rev. 202, 214–15, 217 (2011) ("Thus, Justice Ginsburg suggests that, under the specific facts of Goodyear, the plaintiff's theory of personal jurisdiction reaches far beyond existing precedent, but she does not explicitly suggest that she intends to go further than this case requires and reverse the multitude of lower court cases that rest general jurisdiction on direct sales to the forum state. That result would be vastly more far reaching than what the decision in Goodyear requires and would work a major change in lower court caselaw without consideration of the very different facts of those cases.").
\(^{65}\) See, e.g., Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1225 (9th Cir. 2011) (stating that a celebrity gossip website’s contacts with California fell “well short of the requisite showing for general jurisdiction”); see also Pervasive Software Inc. v. Lexware GmbH & Co. KG, 688 F.3d 214, 230–31 (5th Cir. 2012).
For instance, in *Hess v. Bumbo International Trust*, a federal court in Texas was faced with the question of whether to assert general jurisdiction over a South African manufacturer of allegedly defective infant seats.\(^6\) In *Hess*, Arizona plaintiffs sued Bumbo in Texas with respect to an injury that took place in Arizona when the plaintiff's infant son “flipped out” of the baby seat, “fracturing his skull and requiring extensive medical treatment.”\(^6\) The Texas court, like the court in *L.L. Bean*, noted that the case was a “close call,” but nonetheless concluded that, “despite the high threshold for general jurisdiction, the evidence in this case establishes that Bumbo has continuous and systematic commercial contacts with Texas sufficient to enable this Court’s exercise of personal jurisdiction over it.”\(^6\) The court focused almost exclusively on Bumbo’s connections with a Texas-based distributor to justify the assertion of general jurisdiction over Bumbo.\(^7\) It noted that “a quarter (and at certain points all) of the Bumbo Baby Seats sold in the United States were distributed from Texas,” resulting in what the court considered a “substantial sales presence.”\(^8\) Moreover, the distributor was closely involved in a recall of the baby seat in 2007; it liaised with various regulators and retail stores in order to manage Bumbo’s response to the recall.\(^9\) According to the court, “[t]he longevity, continuity, and volume of Bumbo’s business with its Texas-based distributor establish the type of contacts that allow Bumbo to be considered ‘at home’ in Texas.”\(^10\)

Although the Texas court used *Goodyear*’s “at home” language, one might easily question whether the court heeded the spirit of the decision. Bumbo had no actual presence in Texas—it had no stores and no employees in Texas.\(^11\) Instead, it selected a Texas-based distributor to be the middleman between the corporation and various retail establishments.\(^12\) The court did not actually analyze how many baby seats were sold in Texas, how much of Bumbo’s revenue was derived from Texas, whether Bumbo extensively marketed the product in Texas, or whether Bumbo had any other Texas-based contacts. Instead, it focused on establishing jurisdiction in Texas through the presence of an independent U.S. distributor.\(^13\) It is not clear that these connections were the sort of connections that Justice Ginsburg in *Goodyear* would have

---

68. Id. at 591–92.
69. Id. at 593.
70. Id. at 593–94.
71. Id. at 595. Of the 3.85 million Bumbo Baby Seats in the United States, nearly one million of these were distributed by Bumbo’s Texas-based distributor, Wartburg Enterprises. Id. at 593.
72. Id. at 594.
73. Id. at 595.
74. Id.
75. Id. at 593–94.
76. Id. at 595–96.
regarded as being so continuous and systematic to render Bumbo "at home" in Texas.\footnote{\textsuperscript{77}}

Less than two years after the Court decided \textit{Goodyear}, it released its decision in \textit{Daimler}.\footnote{\textsuperscript{78}} Although many expected \textit{Daimler} to focus on the agency issue presented in the question for certiorari, the Court largely ducked that question.\footnote{\textsuperscript{79}} Instead, the Court focused primarily on the "at home" language that it had introduced into the general jurisdiction discourse in \textit{Goodyear}.\footnote{\textsuperscript{80}} Justice Ginsburg, writing for the eight-Justice majority, more explicitly stated what she had alluded to in \textit{Goodyear}: the new "at home" basis for jurisdiction was intended to seriously restrict assertions of general jurisdiction.\footnote{\textsuperscript{81}} The decision, if followed by lower courts, will officially mark the end of doing business jurisdiction in the United States.

\section*{II. The Decision in \textit{Daimler v. Bauman}}

\subsection*{A. The Facts}

In \textit{Daimler}, Argentinian plaintiffs sued a German automaker, DaimlerChrysler ("Daimler"), in federal court in California.\footnote{\textsuperscript{82}} The plaintiffs alleged that Daimler's wholly owned Argentinian subsidiary had collaborated with state security forces in Argentina in kidnapping,
detaining, torturing, and killing plaintiffs and/or their relatives during Argentina’s “Dirty War” between 1976 and 1983.\(^8^3\) The complaint did not name Daimler’s Argentinian subsidiary as a defendant; rather, the plaintiffs sought to hold Daimler, the parent company, vicariously liable for the actions of its Argentinian subsidiary.\(^8^4\) The plaintiffs sought to establish jurisdiction over Daimler in California based on the presence of a different Daimler subsidiary in California, Mercedes-Benz USA (“MBUSA”).\(^8^5\) MBUSA serves as Daimler’s exclusive importer and distributor of Mercedes-Benz automobiles in the United States.\(^8^6\) It is incorporated in Delaware and has its principal place of business in New Jersey.\(^8^7\) MBUSA also has significant contacts with California.\(^8^8\) In particular, it has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.\(^8^9\) Further, MBUSA is the largest supplier of luxury vehicles to the California market, with over ten percent of all sales of new vehicles in the United States taking place in California.\(^9^0\) Daimler conceded\(^9^1\) that these contacts between MBUSA and California would suffice to ground personal jurisdiction over MBUSA.\(^9^2\)

B. THE PROCEEDINGS BELOW

After the suit was filed, Daimler moved to dismiss the action for lack of personal jurisdiction, arguing that it had insufficient contacts with California to render it subject to suit there.\(^9^3\) In response, the plaintiffs

---

\(^8^3\) Id. at 751.
\(^8^4\) Id. at 752. The plaintiffs “asserted claims under the Alien Tort Statute, and the Torture Victim Protection Act of 1991, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina.” Id. at 751 (citations omitted). In light of recent Supreme Court rulings, both federal claims in Daimler were likely to be dismissed in any event. See generally Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (holding that the Alien Tort Statute does not apply extraterritorially); Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (holding that only a natural person is an “individual” who can be held liable under the Torture Victim Protection Act).

\(^8^5\) Daimler, 134 S. Ct. at 752. Technically, MBUSA is a subsidiary of a DaimlerChrysler North America Holding Company, which itself is a Daimler subsidiary. Id. at 752 n.3. Thus, MBUSA is an indirect subsidiary of Daimler. Id. at 752.

\(^8^6\) Id.
\(^8^7\) Id.
\(^8^8\) Id.
\(^8^9\) Id.

\(^9^0\) Id. Additionally, MBUSA’s California sales constituted 2.4% of Daimler’s worldwide sales. Id.

\(^9^1\) The concession was likely in error given the holding in Daimler itself. See Sherry, supra note 8, at 117 (noting that “DaimlerChrysler unwisely conceded [that MBUSA’s contacts with California] were sufficient to satisfy the ‘continuous and systematic’ test for general jurisdiction”).

\(^9^2\) Daimler, 134 S. Ct. at 765 (Sotomayor, J., concurring).

\(^9^3\) Id. at 752. In particular, Daimler claimed: (1) MBUSA’s contacts in California could not be imputed to it because MBUSA was not Daimler’s agent; (2) without MBUSA’s contacts, Daimler lacked sufficient contacts in California to ground general jurisdiction; and (3) even if there were sufficient contacts with California, an assertion of jurisdiction would be unreasonable. Id.
filed declarations and exhibits demonstrating Daimler’s presence in California and alternatively arguing that MBUSA’s substantial contacts with California should be imputed to Daimler for jurisdiction purposes on a theory of agency. After allowing jurisdictional discovery on the plaintiffs’ agency allegations, the district court granted Daimler’s motion to dismiss. The court found that Daimler had insufficient contacts with California to ground general jurisdiction and that the relationship between Daimler and MBUSA fell short of the requisite standard for agency.

Originally, the Ninth Circuit affirmed the district court’s ruling solely on the basis of agency, stating that “because there is insufficient control and because MBUSA does not serve as [Daimler’s] representative, the contacts of MBUSA cannot be imputed to [Daimler].” The court, however, granted the plaintiffs’ petition for rehearing and then reversed its initial holding. The opinion was authored by the original dissenting judge, Judge Reinhardt, who expressed the views outlined in his earlier dissent. Judge Reinhardt stated that the imputation of contacts was appropriate because “MBUSA’s business was sufficiently important to [Daimler] that without MBUSA or another representative, [Daimler] would have performed those services itself. Moreover, [Daimler] had the right to control to one extent or another nearly every aspect of MBUSA’s business.” In addition, Judge Reinhardt conducted a reasonableness inquiry and found that Daimler “ha[d] not met its burden of presenting a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice.” The U.S. Supreme Court granted certiorari on the question of “whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.”

94. Id.
96. Id. at *2.
98. See Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 931 (9th Cir. 2011); Bauman v. DaimlerChrysler Corp., 603 F.3d 1141 (9th Cir. 2010).
99. See generally Bauman, 644 F.3d 909.
100. Id. at 931.
101. Id. at 930 (quoting Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1134 (9th Cir. 2003)) (internal quotation marks omitted).
102. Petition for a Writ of Certiorari, supra note 79, at i. Note that Daimler’s petition to the Ninth Circuit for rehearing and rehearing en banc was denied over an eight-judge dissent, despite Daimler’s claim that the Ninth Circuit’s holding was inconsistent with Goodyear. See generally Bauman v. DaimlerChrysler Corp., 676 F.3d 774 (9th Cir. 2011). Professor Silberman commented on how “odd” it was that the Supreme Court granted certiorari in the Daimler case:
C. THE SUPREME COURT'S DECISION

Justice Ginsburg, writing for an eight-Justice majority, concluded that the contacts between MBUSA and California, even if imputed to Daimler, were insufficient to ground jurisdiction over Daimler. After going through a lengthy history of the Supreme Court's jurisprudence on general and specific jurisdiction, the Court examined what many had assumed would be the central issue in the case: when can a subsidiary's contacts be imputed to the parent for jurisdictional purposes? The Court briefly examined the various tests that had been advanced to answer this question. Daimler, for instance, had argued that a party's jurisdictional contacts can only be imputed to its parent when the "former is so dominated by the latter as to be its alter ego." The Ninth Circuit, on the other hand, had adopted a "less rigorous" agency test for jurisdictional imputation: an agency relationship exists, and thus contacts can be imputed, where the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would..."

It is difficult to comment on the Bauman case without noting how odd the grant of certiorari was in the first place. The petition for certiorari was pending before the Supreme Court for almost two years, and the Court agreed to hear the case only days after it decided Kiobel... Even if personal jurisdiction were ultimately sustained in Bauman, the claims asserted under the Alien Tort Statute would have to be dismissed under the Kiobel precedent.

Silberman, supra note 8, at 132.


104. The Court acknowledged the interplay between these two forms of jurisdiction and noted that "[s]pecific jurisdiction has been cut loose from Pennoyer's sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized." Id. at 757-58 (citing Mary Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 619, 676 (1988) ("[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants."). Scholars post-Daimler have criticized the logic that an expansion of specific jurisdiction means a contraction of general jurisdiction. See Cornett & Hoffheimer, supra note 8, at 24-25, 25 n.102 ("[T]he Court offers no explanation for why the constitutional expansion of one set would require a corresponding restriction in the other... The Court noted that '[o]ur post-International Shoe opinions on general jurisdiction... are few.' This observation does not begin to explain why the Court should limit general jurisdiction." (quoting Daimler, 134 S. Ct. at 755)); Cox, supra note 8, at 17 ("The fundamental logical flaw the Court made, however, was to assert that this rise in specific jurisdiction cases necessarily meant general jurisdiction must be read restrictively. A dramatic rise in the number of specific jurisdiction cases does not automatically explain why there should be a shortening of general jurisdiction reach."). For additional analysis of the interplay between general and specific jurisdiction, see generally Trammell, supra note 8.

105. Daimler, 134 S. Ct. at 753-60.

106. Id. at 759.

107. Id. Accord Brief for Petitioner at 12, Daimler, 134 S. Ct. 746 (No. 11-965) ("Attributing a subsidiary's jurisdictional contacts to its parent only when the two companies are truly alter egos affords defendants the certainty and predictability that due process requires and ensures that defendants are subject to suit only in those jurisdictions in which they themselves possess the requisite minimum contacts. Here, because it is undisputed that Daimler AG and MBUSA are not alter egos, the jurisdictional contacts of MBUSA may not be attributed to Daimler AG.").
undertake to perform substantially similar services.”

On the facts of *Daimler*, the Ninth Circuit had concluded that MBUSA's services were "important" to Daimler, as evidenced by Daimler's "hypothetical readiness to perform those services itself if MBUSA did not exist." The Court rejected this latter test as being one that "stacks the deck, for it will always yield a pro-jurisdiction answer." It noted that anything that a corporation does via an intermediary, such as an independent contractor, subsidiary, or distributor, is presumably something that the corporation would otherwise have done itself in the absence of that intermediary. The Court did not, however, endorse the alter ego test for imputation—or any other test for that matter. Instead, it declared that "we need not pass judgment on the invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained."

With no more direction on the imputation issue which was thought to be the reason for granting certiorari in the case, the Court proceeded with the analysis, concluding that *even if one assumes* that MBUSA is subject to general jurisdiction in California, and *even if one assumes* that MBUSA's contacts are imputable to Daimler, there still would be no basis for general jurisdiction over Daimler in California. Thus, the rest of the opinion was premised on MBUSA being subject to general jurisdiction in California (on the basis that it was "at home" there) and on the contacts which rendered it "at home" in California being imputable to Daimler.

At this point, Justice Ginsburg took the opportunity to revisit the Court's decision in *Goodyear*, which she had penned a few years earlier. She stated that *Goodyear* made it plain that only a limited set

---

108. *Daimler*, 134 S. Ct. at 759 (emphasis omitted) (quoting Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001)).
109. Id. at 749.
110. Id. at 759.
111. Id. at 759–60. This position was also advanced by Professor Brilmayer in her Brief in Support of Petitioner. See Brief of Amici Curiae Professor Lea Brilmayer Supporting Petitioner at 14, *Daimler*, 134 S. Ct. 746 (No. 11-965) ("After all, whenever this 'test' is invoked, it is likely to generate a pro-jurisdiction outcome. It is difficult to conceive what, if anything, this definition of agency excludes. If a service was cost-effective enough to have been arranged in the first place, why wouldn't Daimler want to either establish in-house capacity or else hire a replacement?").
113. Id. at 759.
114. Id. at 760.
115. Id. at 760–61. The plaintiffs in their brief had implored the Court to focus on the issue presented in the case (that of agency) and not use this case as an opportunity to revisit the *Goodyear* "at home" standard. See Brief for the Respondents at 15–16, *Daimler*, 134 S. Ct. 746 (No. 11-965) ("This Court should reject any effort (direct or subtle) to provoke a decision on the standard for general jurisdiction. Any such argument was forfeited below and not adequately raised in the petition for certiorari. Nor has the question percolated in the lower courts since this Court's decision in *Goodyear* two terms ago. And neither the parties nor the Government has adequately briefed the
of affiliations with a state would subject a defendant to general jurisdiction there. 116 With respect to corporations, “the place of incorporation and principal place of business are the ‘paradigm[.] . . bases for general jurisdiction.’”117 The Court noted that “[t]hose affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.” 118 It also observed that “[t]hese 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.”119 The Court stressed the exceptionality of the “at home” basis for general jurisdiction, stating that it did not “foreclose the possibility that in an exceptional case” general jurisdiction could be asserted over a corporation in a state other than its state of incorporation or principal place of business.120 The Court stated very briefly, and in a footnote, that the “at home” inquiry calls for “an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”121 It elaborated that “a corporation that operates in many places can scarcely be deemed at home in all of them.”122

On the facts, the Court concluded that Daimler’s “slim contacts” with California meant that it was not “at home” there.123 The Court did not specifically address exactly what these slim contacts were or why they were not sufficient to render Daimler “at home” in California. Rather, it cited concerns about predictability and exorbitant assertions of jurisdiction to justify its conclusion that California did not have general jurisdiction over Daimler.124 The Court also pointed to the “transnational” context of the dispute to bolster its conclusion that jurisdiction was not appropriate.125 It observed that an expansive approach to personal jurisdiction could pose a “risk[] to international comity” and that “other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”126 Accordingly, the Court reversed the judgment of the Ninth Circuit.

---

117. Id. at 760 (quoting Brilmayer et al., supra note 11, at 735).
118. Id.
119. Id.
120. Id. at 761 n.19.
121. Id. at 762 n.20.
122. Id.
123. Id. at 761–62.
124. Id.
125. Id. at 762–63.
126. Id. at 763.
holding that the assertion of general jurisdiction over Daimler would violate due process.\textsuperscript{127}

Justice Sotomayor concurred in the result—that there was no general jurisdiction over Daimler in California—but for very different reasons.\textsuperscript{128} Justice Sotomayor would have dismissed the case on the basis that the assertion of jurisdiction over Daimler was unreasonable.\textsuperscript{129} She stated that the inquiry into jurisdiction consists of two parts, contacts and reasonableness, and that the inquiry is the same whether one is dealing with general or specific jurisdiction.\textsuperscript{130} She noted that the case involved Argentinian plaintiffs suing a German defendant for conduct that took place in Argentina and that the plaintiffs failed to show that it would be more convenient to litigate in California, rather than Germany, a country with a far greater interest in resolving the dispute.\textsuperscript{131}

Even though Justice Sotomayor would have decided the case on the basis that the assertion of jurisdiction would have been unreasonable, she felt it necessary to address the Court’s holding on the “at home” test.\textsuperscript{132} For Justice Sotomayor, the “at home” test does not involve looking at a corporation’s nationwide or worldwide activities and comparing them to the corporation’s activities in the forum.\textsuperscript{133} Rather, the “at home” test looks solely at the magnitude of the defendant’s forum contacts, not the relative magnitude of those contacts vis-à-vis the defendant’s contacts with other forums.\textsuperscript{134} Justice Sotomayor stated that if the Court had applied the appropriate approach to general jurisdiction, it would have had “little trouble” concluding that Daimler’s California contacts, imputed from MBUSA, rendered Daimler “at home” in California.\textsuperscript{135} In other words, if MBUSA was “at home” in California and those contacts were imputed to Daimler, then Daimler would also be “at home” in California. For Justice Sotomayor, a corporation could be “at home” in

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 763–64 (Sotomayor, J., concurring).

\textsuperscript{129} Id. at 764 (Sotomayor, J., concurring).

\textsuperscript{130} Id. at 764–65 (Sotomayor, J., concurring). The majority did not believe that the reasonableness prong for jurisdiction applied when dealing with assertions of general jurisdiction. Id. at 762 n.20.

\textsuperscript{131} Id. at 765 (Sotomayor, J., concurring). \textit{But see} Brief of Amici Curiae German Institute for Human Rights & Other German Legal Experts in Support of Respondents at 2–3, \\textit{Daimler}, 134 S. Ct. 746 (No. 11-965) (“For the respondent victims of serious violations of internationally-recognized human rights in this case, and for others like them, Germany is an inadequate alternative forum. German courts would apply the harsh limitation period of the \textit{lex loci damni}, and German law imposes additional logistical and financial hurdles on non-European plaintiffs that effectively close off the German courts to the respondents in this case.”).

\textsuperscript{132} \textit{Daimler}, 134 S. Ct. at 766–67 (Sotomayor, J., concurring).

\textsuperscript{133} Id. at 767 (Sotomayor, J., concurring).

\textsuperscript{134} See id. (Sotomayor, J., concurring).

\textsuperscript{135} Id. at 769 (Sotomayor, J., concurring).
multiple places, so long as it enjoyed extensive benefits in those places such that it should be subject to the burden of litigating there.\textsuperscript{136}

III. Key Points of Disagreement

The two opinions, although they come to the same ultimate result, diverge considerably in their reasoning and implications. Although \textit{Daimler} was a decisive 8-1 “win” for the majority, the points elucidated by Justice Sotomayor in the concurrence represent a very different way of conceptualizing general jurisdiction, and accordingly, both opinions are worth exploring in detail.

Interestingly, much of the substantive discussion in \textit{Daimler} takes place in the footnotes. In total, there are thirty-two footnotes in \textit{Daimler}, many of them fairly extensive.\textsuperscript{137} Moreover, the opinions are replete with “footnote jabs” between Justice Ginsburg and Justice Sotomayor;\textsuperscript{138} presumably, the opinions were written independently, and then footnotes were added to respond specifically to the arguments of the other side. Thus, much of the “meat” in \textit{Daimler} is curiously absent from the text of the opinions themselves, but instead found in the footnotes.

Below, I discuss the three main areas of disagreement between the majority and the concurrence: the nature of the test for general jurisdiction; the meaning of the words “at home”; and the propriety of analyzing the reasonableness factors for the assertion of general jurisdiction.

A. An Absolute or Comparative Test for General Jurisdiction?

The most significant difference of opinion between the majority and the concurrence derives from the question of how to assess the contacts

\textsuperscript{136}Id. at 768–89, 771 (Sotomayor, J., concurring).

\textsuperscript{137}See generally id.

\textsuperscript{138}The tone of the judgment is rather caustic at times. See id. at 756 n.8 (accusing Justice Sotomayor of “selectively referring to the trial court record in \textit{Perkins}”); id. at 758 n.10 (stating that “[r]emarkably, Justice Sotomayor treats specific jurisdiction as through it were barely there”); id. at 760 n.16 (stating that Justice Sotomayor’s assertion that the majority strayed from the question on which it granted certiorari is “doubly flawed”); id. at 262 n.20 (stating that Justice Sotomayor “favors a resolution fit for this day and case only”); id. at 764 n.1 (Sotomayor, J., concurring) (noting that “without the benefit of a single page of briefing on the issue, the majority casually adds each of these cases to the mounting list of decisions jettisoned as a consequence of today’s ruling”); id. at 765 n.2 (stating that “although the majority frets that deciding this case on the reasonableness ground would be a ‘resolution fit for this day and case only,’ I do not understand our constitutional duty to require otherwise”); id. at 768 n.7 (stating that “[t]he majority suggests that I misinterpret language in \textit{Perkins} that I do not even cite”). One particular article on \textit{Daimler} focused less on the substance of the case and more on the \textit{ad hominem} nature of the debate between the two Justices: “For those readers not interested in studying this basic doctrine, what might be of greater interest is Ginsburg’s manifest impatience with what she evidently regards as Sotomayor’s utter cluelessness. . . . Sotomayor, I will add, fires back.” Ed Whelan, \textit{Court Ruling Invites Scathing Criticism?}, Nat’l Rev. (Jan. 14, 2014, 2:37 PM), http://www.nationalreview.com/bench-memos/368445/court-ruling-invites-scathing-criticism-ed-whelan.
between a forum and a corporation for the purposes of general jurisdiction—in absolute or comparative terms. Although not phrased in this manner, the Court holds that the test is a comparative one: what are the corporation’s contacts with the forum state vis-à-vis its contacts with other states (or countries)? The Court does not address this issue in the text of the actual opinion, but instead relegates it to a footnote. In footnote 20, the Court writes, “the general jurisdiction inquiry does not ‘focu[s] solely on the magnitude of the defendant’s in-state contacts.’ General jurisdiction instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”

Presumably, the Court’s view is that while Daimler’s contacts with California, through its subsidiary, might have been substantial in and of themselves, they were not particularly significant when viewed against the backdrop of Daimler’s worldwide operations. Accordingly, Daimler, even if it has significant contacts with California, is nonetheless not “at home” in California. Indeed, the adoption of the comparative test for general jurisdiction—an examination of the defendant’s contacts with the forum state in relation to its nationwide and worldwide contacts—is the main take-away from the case.

Justice Sotomayor, on the other hand, is of the view that the “at home” test for general jurisdiction is not a comparative one, but rather an absolute one. Once a corporation meets some requisite level of connection with the forum (through its stores, employees, sales, marketing, and the like), then the corporation is “at home” in the forum and is subject to general jurisdiction there. She notes that “[i]n every case where we have applied [the continuous and systematic general business contacts] test, we have focused solely on the magnitude of the defendant’s in-state contacts, not the relative magnitude of those contacts in comparison to the defendant’s contacts with other States.”

She illustrates this point by discussing *Helicopteros, Perkins,* and *Goodyear,* noting that in each of these cases, the Supreme Court did not focus on the defendant’s contacts with other states, but rather its contacts (or lack thereof) with the forum state seeking to assert general jurisdiction. She continues:

When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts. The majority’s focus on the extent of a corporate defendant’s out-of-forum contacts is untethered from this rationale. After all, the degree to which a company intentionally benefits from a forum State depends on its interactions with that State,

---

139. *Daimler*, 134 S. Ct. at 762 n.20.
140. *Id.* (quoting *id.* at 767 (Sotomayor, J., concurring)).
141. *Id.* at 767–70 (Sotomayor, J., concurring).
142. *Id.* at 767 (Sotomayor, J., concurring).
143. *Id.* at 767–68 (Sotomayor, J., concurring).
not its interactions elsewhere. An article on which the majority relies . . . expresses the point well: “We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states. . . . [T]he amount of activity elsewhere seems virtually irrelevant to . . . the imposition of general jurisdiction over a defendant.”144

Justice Sotomayor then follows through with the logical consequence of her position: If MBUSA’s contacts with California render it “at home” there, and those contacts are imputed to Daimler, then so too is Daimler “at home” in California.145 Both entities, in other words, have surpassed the threshold of contacts required to sustain general personal jurisdiction in California. Justice Sotomayor points to what she considers the absurdity of the Court’s holding:

The problem, the Court says, is not that Daimler’s contacts with California are too few, but that its contacts with other forums are too many. In other words, the Court does not dispute that the presence of multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers throughout a State would be enough to support the exercise of general jurisdiction over some businesses. Daimler is just not one of those businesses, the Court concludes, because its California contacts must be viewed in the context of its extensive “nationwide and worldwide” operations.146

The Court’s adoption of a comparative test functions to create a much higher standard for the assertion of general jurisdiction than previously existed. Not only does the defendant have to have continuous and systematic contacts with the forum, but those contacts must be more significant than the contacts it has with other states or countries. Only where the contacts with the forum are much greater than the contacts the corporation has with other forums (such that one can regard the corporation as “at home”) will the assertion of general jurisdiction be justified. Accordingly, the Court’s comparative approach to the continuous and systematic inquiry has the effect of dramatically reining in general jurisdiction. On the other hand, Justice Sotomayor’s absolute

144. Id. at 768–69 (Sotomayor, J., concurring) (citations omitted) (quoting Brilmayer et al., supra note 11, at 742).

145. Id. at 769–70 (Sotomayor, J., concurring) (“Had the majority applied our settled approach, it would have had little trouble concluding that Daimler’s California contacts rise to the requisite level, given the majority’s assumption that MBUSA’s contacts may be attributed to Daimler and given Daimler’s concession that those contacts render MBUSA ‘at home’ in California. . . . Under this standard, Daimler’s concession that MBUSA is subject to general jurisdiction in California (a concession the Court accepts, ante, at 758, 759) should be dispositive. For if MBUSA’s California contacts are so substantial and the resulting benefits to MBUSA so significant as to make MBUSA ‘at home’ in California, the same must be true of Daimler when MBUSA’s contacts and benefits are viewed as its own.”).

146. Id. at 764 (Sotomayor, J., concurring) (observing that much like the concept that multinational corporations are “too big to fail,” the consequence of the majority’s holding is that multinational corporations like Daimler are “too big for general jurisdiction”).
approach would essentially preserve the status quo. If a corporation has a sufficient level of contacts with a state, then that state will possess general jurisdiction over the corporation irrespective of the corporation’s contacts elsewhere. So which approach to general jurisdiction is the “right” one? Should general jurisdiction be a comparative inquiry or an absolute one? Should assertions of general jurisdiction be broad or narrow?

On balance, it appears that Justice Sotomayor has the better argument based on legal precedent, while the Court has the better argument based on policy. Justice Sotomayor is correct in her view that, according to past Supreme Court precedent, the continuous and systematic inquiry is an absolute one. Once the defendant has a certain threshold of contacts with the forum, that forum has general jurisdiction over the defendant. The fact that the defendant also has contacts with other forums has largely been irrelevant in the general jurisdiction analysis. It is the unique relationship between the forum state and the defendant that gives the state the right to adjudicate any and all disputes concerning the defendant; the fact that the defendant may also have that same, or a similar, relationship with another state has generally been of no moment in the general jurisdiction analysis.

With that said, it is unclear that continuous and systematic general business contacts (or, in more common vernacular, doing business) was ever an appropriate basis for general jurisdiction. Many commentators have questioned the conceptual basis for this ground of jurisdiction. For example, Professor Erichson starts off a recent article with the following statement:

What, if anything, gives a state sufficiently plenary power over a person that the state may adjudicate claims against the person even if the claims arose elsewhere? Particularly with regard to corporations, this basic question has lacked a clear answer. The standard for general jurisdiction remains unsatisfactorily vague, with ambiguous Supreme Court guidance on doctrine and even less explanation of why such jurisdiction exists.


148. In Gator.com Corp. v. L.L. Bean and Hess v. Bumbo, for instance, the courts did not look at the defendants’ contacts with other jurisdictions in assessing whether or not the defendants were subject to general jurisdiction in the forum. Rather, the courts concentrated solely on whether the defendants had the requisite level of contacts with California and Texas, respectively, to ground general jurisdiction. See Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003); Hess v. Bumbo Int’l Trust, 954 F. Supp. 2d 590 (S.D. Tex. 2013).

149. See Brilmayer et al., supra note 11, at 743 (“Significantly, for purposes of general jurisdiction, the relevant issue is the absolute amount of activity, not the amount of activity relative to what the defendant does outside the state.”).

150. Erichson, supra note 8, at 81–82. In Professor Erichson’s next sentence, referring to Daimler, he states, “[t]he coming Supreme Court term offers the Court an opportunity to clarify.” Id. at 82. Unfortunately, the Supreme Court in Daimler did not provide much in the way of theoretical guidance
Other commentators have also struggled to provide a compelling justification for general jurisdiction based on the defendant's continuous and systematic contacts with the forum. In fact, one professor whose thoughts on doing business jurisdiction were published in the *Harvard Law Review* had a self-proclaimed "change of heart" on the topic but nonetheless had a hard time finding a compelling theoretical rationale for the doctrine and a workable solution as to how to implement it in practice.

Leaving aside its murky conceptual basis, there are at least three important policy reasons why it makes sense to circumscribe general jurisdiction in the way that the Court has done. First, an expansive interpretation of general jurisdiction poses risks to international comity. The Court asserts, quite correctly, that "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case." The Court points to the fact that under the Brussels Regulation, which governs jurisdiction and the enforcement of judgments in the European Union, a corporation may generally be sued in the nation in which it is "‘domiciled,’ a term defined to refer only to the location of the corporation’s ‘statutory seat,’ ‘central administration,’ or ‘principal place of business.’" It also observes that past negotiations for a worldwide treaty on the enforcement of judgments have been impeded, in part, due to foreign perceptions that U.S. courts have adopted overly "expansive views of general jurisdiction." In addition, the Court notes a particular concern expressed by the amici in *Daimler* that unpredictable assertions of general jurisdiction over U.S. subsidiaries of foreign corporations could discourage foreign
investment. For the Court, all of these foreign policy considerations militate against overly expansive assertions of general jurisdiction and reinforce the Court’s determination that subjecting Daimler to jurisdiction in California would not be consistent with due process.

Second, overly broad assertions of general jurisdiction based on a corporation doing business in a forum would lead to unpredictable results for defendants. A corporate defendant would never know with certainty if its conduct met the “magical” threshold necessary to constitute continuous and systematic general business contacts. Thus, for the Court, the notion that assertions of general jurisdiction should be predictable is at the epicenter of the decision. Justice Sotomayor takes issue with the predictability rationale, positing that “there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one.” She reasons that “[t]he majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.”

What Justice Sotomayor overlooks is that, in its application, the continuous and systematic test has been unpredictable. The results of lower courts are incredibly variable—with some courts subjecting a corporation with relatively few contacts to general jurisdiction and other courts not subjecting a corporation with quite significant contacts to general jurisdiction. A test with a higher threshold of connection, such as the “at home” test in Daimler, would, or should, lead to increased predictability for defendants.

Third, broad assertions of general jurisdiction encourage forum shopping. Arguably, as a matter of policy, U.S. courts should not be open for business to out-of-state or out-of-country plaintiffs whose cause of action has nothing to do with the defendant’s connections to the

156. Daimler, 134 S. Ct. at 763 (citing Brief for the Respondents, supra note 115, at 35; Brief for the United States as Amicus Curiae Supporting Petitioner at 2, Daimler, 134 S. Ct. 746 (No. 11-965)).
157. See id. at 761–62 (“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 sizable. 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.’” (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985))).
158. Id. at 770 (Sotomayor, J., concurring).
159. Id. (Sotomayor, J., concurring).
160. This is already being borne out by the post-Daimler case law. See infra pp. 271–73.
161. Professor Sherry argues that Daimler itself presents a “paradigmatic example of egregious forum shopping.” Sherry, supra note 8, at 111. Accord Childress, Transnational Law Market, supra note 8, at 68 (“As much as [Daimler] is about general jurisdiction, it is also about the growth of a transnational law market where plaintiffs shop the world for favorable courts and law, and states and defendants respond to that forum shopping.”).
WHERE IS HOME DEPOT “AT HOME”?  

The Court provides an example of what it would consider to be an “exorbitant” exercise of jurisdiction: a California court asserting jurisdiction over Daimler, a German company, in a design defect lawsuit brought by Polish plaintiffs who were injured by a Daimler vehicle in Poland. The Court’s concerns make sense and are reflected in much of the commentary on general jurisdiction over the past few decades. There is something seemingly unpalatable about having defendants answer in a forum that has nothing to do with the underlying dispute. While we may be comfortable having that forum be limited to two places (place of incorporation or principal place of business), we are not as comfortable having that forum be “anywhere and everywhere.” To allow assertions of general jurisdiction in a forum because the defendant is doing business in the forum seems to reward plaintiffs for gamesmanship. If a plaintiff can find a forum where the defendant is doing business, she can sue there over something that happened in the state next door, and be rewarded through the application of the forum’s procedural (and perhaps substantive) law. Thus, it was likely that underlying policy considerations related to forum shopping shaped the Court’s ultimate conclusion and reasoning.

B. WHAT IS THE MEANING OF “AT HOME”?  

It follows from the above that the majority and the concurrence also differ in the meaning that they ascribe to the two most important words

162. The concern is particularly acute for foreign country defendants who Professor Twitchell argued were “appalled to find that general jurisdiction exposure is the price of doing regular business in U.S. markets.” Twitchell, supra note 33, at 197.

163. Daimler, 134 S. Ct. at 751, 754 n.5.

164. See, e.g., Allan R. Stein, The Meaning of “Essentially At Home” in Goodyear Dunlop, 63 S.C. L. Rev. 527, 540–41 (2012) (“A handful of judicial districts across the country have become magnets for litigation against large, interstate corporations because of their tendency to render large jury awards. The more permissive the constitutional standards for the exercise of general jurisdiction, the more these problems arise. Accordingly, as a matter of sound policy and fairness, there is a practical need to constrain general jurisdiction. And as long as the plaintiff is able to pursue a defendant in its home forum, there is little necessity for expanding the options to include multiple jurisdictions that have no connection to the underlying controversy.”).

165. In endorsing a restrained approach to general jurisdiction, the Court emphasizes that general jurisdiction is exceptional in that it allows for the assertion of state power in cases having nothing to do with the state. Daimler, 134 S. Ct. at 762 (“It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA’s contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.” (emphasis added)); id. at 762 n.20 (“Nothing in International Shoe and its progeny suggests that ‘a particular quantum of local activity’ should give a State authority over a ‘far larger quantum of . . . activity’ having no connection to any in-state activity.” (emphasis added) (quoting Feder, supra note 34, at 694)).

166. See id. at 762 n.20.

167. See, for example, Ferens v. John Deere, 494 U.S. 516 (1990), which Professor Stein described as “[t]he poster-child for the cost of general jurisdiction” and “an unmitigated train wreck.” Stein, supra note 164, at 540.
in Goodyear: “at home.” The Supreme Court in Goodyear had qualified the continuous and systematic general business contacts test for general jurisdiction with the phrase “at home.” Thus, general jurisdiction was only appropriate where a corporation had continuous and systematic general business contacts such that it could fairly be regarded to be “at home.” In the months following Goodyear, commentators debated the meaning of these two words and questioned whether the Supreme Court really intended to change the test for general jurisdiction over corporations.

In Daimler, Justice Ginsburg’s message was clear: when I said “at home” in Goodyear, I really meant “at home.” According to the Court, the “at home” language is intended to be a significant limitation on the scope of general jurisdiction. The Court states that “[a] corporation that operates in many places can scarcely be deemed at home in all of them.” To be “at home,” the corporation must have a relationship with the state which approximates that between a state and a local enterprise. Accordingly, it would be an “exceptional” case where a corporation could be “at home” in a place other than its state of incorporation or the state of its principal place of business. The Court’s view of “at home” directly correlates to its adoption of a comparative test for general jurisdiction. One can only assess whether a corporation is “at home” when one considers what other homes a corporation might have. Thus, it is only through this comparative exercise that one can ascertain the strength and significance of the connection between the corporation and the forum state.

169. Id.
170. See, e.g., Ericson, supra note 8, at 88 (stating that “the Court [in Goodyear] qualified its language in ways that could call into question whether it meant to adopt a home-state test”); Feder, supra note 34, at 672 (stating that it has been suggested “that the apparent implications of Goodyear are so significant that they cannot have been intended—that the Court’s apparent restriction of general jurisdiction to corporations that are ‘essentially at home’ should be dismissed as ‘loose language,’ and that Goodyear should be limited to its ‘particular facts’”); see also supra notes 62–64 and accompanying text.
171. Professors Rhodes and Robertson argue that the Court’s language in Daimler was more direct than Goodyear. Rhodes & Robertson, supra note 8, at 10 n.35 (“In Goodyear, the Court described general jurisdiction as appropriate in fora in which the defendant was ‘essentially at home,’ ‘fairly regarded as at home,’ or ‘in [a] sense at home.’ In a judicial sleight of hand, [Daimler] dropped the qualifications from Goodyear and instead phrased the governing injury as merely whether the defendant was ‘at home.’” (citation omitted) (quoting Goodyear, 131 S. Ct. at 2853–54, 2857).
173. Id. at 762 n.20.
174. See id. at 758 n.11 (“As the Court made plain in Goodyear and repeats here, general jurisdiction requires affiliations ‘so continuous and systematic’ as to render [the foreign corporation] essentially at home in the forum State.” i.e., comparable to a domestic enterprise in that State.” (citation omitted) (quoting Goodyear, 131 S. Ct. at 2851)).
175. See id. at 761 n.19.
Justice Sotomayor would ascribe a very different meaning to “at home.” In Justice Sotomayor’s view, as long as a corporation “enjoys extensive benefits in multiple forum States[,] it is ‘essentially at home’ in each one.”\(^{176}\) Thus, for Justice Sotomayor, there is nothing particularly significant about the catch-phrase that the Court repeatedly invokes. For her, a corporation is “at home” where it does business in a state such that it is enjoying the benefits of the state and therefore should be subject to its burdens.\(^{177}\) Although Justice Sotomayor signed on to the judgment in \textit{Goodyear} which added the new “at home” language to the continuous and systematic inquiry, she apparently did not intend for it to be a paradigm shift in the law of general jurisdiction. Both Justices use the \textit{Perkins} case to illustrate their intended meaning of “at home”; not surprisingly, both have very different reads on the underlying facts in \textit{Perkins} and the conclusions to be drawn from those facts.\(^{178}\)

The Court’s position hews closer to an intuitive understanding of the concept of “home.” The idea of “home”—closely associated with the legal construct of domicile\(^{179}\)—usually only connotes one place, or at least a limited number of places. In this respect, it is difficult to conceive of “home” as being anywhere and everywhere that a defendant does business.\(^{180}\) Moreover, Justice Sotomayor’s interpretation is difficult to justify from a pure interpretation standpoint. If the “at home” language was intended to be essentially superfluous, why add it to the test? If the test is interpreted as Justice Sotomayor suggests, how is “continuous and

\[\text{176. Id. at 771 (Sotomayor, J., concurring).}\]
\[\text{177. Id. at 768–69 (Sotomayor, J., concurring).}\]
\[\text{178. Compare id. at 756–57, 756 n.8, 761 n.19, with id. at 767–68, 767 n.5, 768 n.7, 769 n.8 (Sotomayor, J., concurring).}\]
\[\text{179. See Goodyear, 131 S. Ct. at 2853–54 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” (citing Brilmayer et al., supra note 11, at 728)); see also Brilmayer et al., supra note 11, at 733 (“The law treats corporations like legal persons, and the place of incorporation and the principal place of business are both analogous to domicile.”)).}\]
\[\text{180. Professor Stein offers an account of “at home” for corporations based upon a loose analogy to the concept of “home” for individuals. Stein, supra note 164, at 543. In his words:}\]

A corporation no more has a home, in the sense that a person does, than it has feet. But I think there is an apt corporate analogue to the out-of-state discomfort that I experience: the notion of being an outsider to the legal community provides an appropriate measure of jurisdictional overreaching. The touchstone of the inquiry under this approach is to consider whether the judge or jury would view imposition of liability on the defendant to be an externality—a cost that would not be internalized by the forum community.

\[\text{Id. But cf. Cornett & Hoffheimer, supra note 8, at 64 (“The family imagery suggested by ‘home,’ reinforced, perhaps unintentionally, by the Latin roots for ‘affiliation,’ seems uniquely inappropriate for the analogical work the images are asked to perform. \textit{International Shoe} insisted that corporations do not even occupy space so as to establish ‘presence’ apart from the legal acts society empowers them to perform through agents. It should be unnecessary to add the same corporations do not make homes with fireplaces or form family relationships. Adopting anthropomorphizing metaphors does not aid analysis but does leave the Court’s opinions open to ridicule.”}).}\]
systematic” any different than “continuous and systematic such that a corporation is ‘at home’”? It seems that the latter formulation of general jurisdiction must be a different test than the former. Accordingly, the gloss put on the “at home” test by the Court is more readily defensible than that put on it by Justice Sotomayor.

C. A REASONABLENESS INQUIRY FOR GENERAL JURISDICTION?

The majority and the concurrence also disagree on whether the reasonableness check on jurisdiction applies only to specific jurisdiction, or also applies to general jurisdiction. In earlier cases, in particular World-Wide Volkswagen Corp. v. Woodson, Burger King Corp. v. Rudzewicz, and Asahi Metal Industry Co. v. Superior Court, the Court adopted a two-pronged test for the assertion of jurisdiction over a defendant. The contacts prong of the test looks at whether the defendant has sufficient contacts with the forum to support the exercise of personal jurisdiction, while the reasonableness prong looks at whether the assertion of jurisdiction in the circumstances would be unreasonable. Although the test was articulated in cases involving specific jurisdiction, many lower courts had applied the inquiry to all assertions of jurisdiction, including general jurisdiction.

As a preliminary matter, it should be noted that the status of the Asahi reasonableness factors for specific jurisdiction had been somewhat uncertain in the aftermath of J. McIntyre Machinery, Ltd. v. Nicastro.

181. Both parties in their briefs assumed that the reasonableness test would apply to questions of general jurisdiction. See Brief for Petitioner, supra note 107, at 37–39 (arguing that the assertion of general jurisdiction was per se unreasonable); Brief for the Respondents, supra note 115, at 11 (arguing for a case-specific reasonableness inquiry). Some commentators also believed that a reasonableness check would apply to assertions of general jurisdiction. See, e.g., Sherry, supra note 8, at 119–20.


183. Daimler, 134 S. Ct. at 762 n.20. For an articulation of the reasonableness factors, see Asahi, 480 U.S. at 113 (“A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.’” (quoting World-Wide Volkswagen, 444 U.S. at 292 (citations omitted))).


185. 131 S. Ct. 2780 (2011). Although the Court first articulated the reasonableness factors in World-Wide Volkswagen, the factors are more commonly referred to as the “Asahi reasonableness factors.” See World-Wide Volkswagen, 444 U.S. at 292; see also Daimler, 134 S. Ct. at 762 n.20.
In *Nicastro*, none of the Justices mentioned the reasonableness factors, leading some to question whether the Court intended to eliminate them from the specific jurisdiction inquiry. In *Daimler*, both the majority and concurrence confirmed that the reasonableness prong of the specific jurisdiction test is alive and well.

In *Daimler*, Justice Sotomayor would have resolved the dispute on the basis of the *Asahi* reasonableness factors. For Justice Sotomayor, the inherently foreign nature of the dispute counseled against the assertion of personal jurisdiction over Daimler—even though for her, the assertion of personal jurisdiction against Daimler would have been constitutionally permissible. The Court, on the other hand, is of the view that the reasonableness test applies only to assertions of specific jurisdiction, not to assertions of general jurisdiction. This is because the nature of general jurisdiction is such that it is *de facto* fair and reasonable to require a defendant to answer to suit in that particular forum. In Justice Ginsburg’s words, “[w]hen a corporation is genuinely at home in the forum State, however, any second-step [reasonableness] inquiry would be superfluous.”

Each Justice’s view of the propriety of the reasonableness inquiry for general jurisdiction stems from her respective view of the appropriate scope for general jurisdiction. For the Court, a reasonableness inquiry is unnecessary when the underlying test for general jurisdiction has been severely circumscribed. In other words, since there will be very few cases that satisfy the Court’s “at home” test, there is no need to engage in a reasonableness check on jurisdiction. The fact that the test is satisfied means that it is *per se* reasonable to assume general jurisdiction. For Justice Sotomayor, on the other hand, the still-expansive nature of the
general jurisdiction test she endorses in *Daimler* would benefit from a reasonableness check. Given that a corporation could be “at home” in many different places, the reasonableness prong provides a necessary safeguard against exorbitant and inappropriate assertions of jurisdiction.

To Justice Sotomayor’s credit, a reasonableness check on general jurisdiction could alleviate some of the Court’s stated concerns about international comity and forum shopping. In cases where the assertion of jurisdiction would offend international comity or reward forum shopping, courts would have the discretion to apply the reasonableness factors and decline to exercise general jurisdiction over a defendant. However, the reasonableness factors would vest courts with a great deal of discretion, thereby undermining the predictability that the Court sought to foster by adopting a new standard for general jurisdiction. Defendants would never be able to predict with any degree of certainty (1) whether there was general jurisdiction under the absolute approach, and (2) whether a court would choose to exercise jurisdiction after applying the reasonableness factors.

Moreover, it appears from pre-*Daimler* case law applying the reasonableness factors to general jurisdiction that courts rarely used the factors to limit the exercise of general jurisdiction. Once a court determined that a defendant had continuous and systematic general business contacts with a state, it almost always followed that the exercise of general jurisdiction was appropriate. In *Gator.com*, for instance, even though the Ninth Circuit observed that general jurisdiction over the defendant was “a close question,” it nonetheless determined that the

---

195. See Silberman, *supra* note 8, at 131 (noting that doing business jurisdiction “presents the strongest case for ‘reasonableness’ scrutiny because it offers a potential curb on the forum-shopping opportunities that such general jurisdiction presents”).
196. See *supra* Part III.A.
197. The *Daimler* case itself provides a perfect illustration of this. The Ninth Circuit concluded that the assertion of jurisdiction was reasonable, while Justice Sotomayor concluded that it was not. Compare *Bauman v. Daimler Chrysler Corp.*, 644 F.3d 909, 925-30 (9th Cir. 2011), with *Daimler*, 134 S. Ct. at 764-65 (Sotomayor, J., concurring).
exercise of general jurisdiction would not be unreasonable. Accordingly, a reasonableness check on general jurisdiction—although an interesting solution in theory—would likely not rein in general jurisdiction in the way that the Court in *Daimler* actually intended.  

* * *

Although *Daimler* was unanimous in its holding that a California court could not assume jurisdiction over the defendant, the reasoning of the majority and concurrence could not be more different. The Court in *Daimler* conceptualizes general jurisdiction in a radically different way than Justice Sotomayor. And, as discussed below, the Court’s conceptualization of general jurisdiction will have dramatic implications for years to come.

**IV. THE IMPLICATIONS OF DAIMLER**

The academic debates between the majority and concurrence are fascinating, but many wonder what *Daimler* means for real-world litigants. Below, I describe some of the consequences of *Daimler*. First, and most importantly, *Daimler* signals the end of doing business jurisdiction in the United States. Second, *Daimler* will put pressure on alternative bases of jurisdiction to fill any potential voids in the jurisdictional framework. Third, as Justice Sotomayor points out, *Daimler* will have various practical consequences for litigants and courts.

**A. THE END OF DOING BUSINESS JURISDICTION**

The message in *Daimler* has come through loud and clear: doing business jurisdiction is a dead letter. Courts are no longer to look at

---

199. 341 F.3d 1072, 1078 (9th Cir. 2003). The burden is on the defendant to establish that the assertion of jurisdiction is unreasonable. *See id.* at 1081. This burden makes it even more unlikely that a court would decline to exercise general jurisdiction under the reasonableness factors, as there is essentially a presumption in favor of exercising jurisdiction once it is found to exist.

200. Justice Sotomayor also endorses the absolute approach to general jurisdiction (coupled with a reasonableness check) because it better accommodates access to justice for plaintiffs than the Court’s approach. *See Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (“Under the majority’s rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States.”). On this point, see *infra* Part IV.B and, in particular, *infra* note 267.

201. *See* David D. Siegel, *U.S. Supreme Court Severely Circumscribes “Presence” as Basis for Personal Jurisdiction of Foreign Corporations—Claim Itself Must Have Local Roots; If It Hasn’t, Corporation’s Overall Contacts with State Won’t Support Jurisdiction*, 265 SIEGEL’S PRAC. REV. 1, 1 (2014) (noting that “a truckload of cases on personal jurisdiction goes careening into the abyss under [*Daimler*]”). It is important to note that the reported case law only represents part of the picture. Professor Twitchell states that “[g]eneral 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.” Twitchell, *supra* note 33, at 193. She observes that many defendants, particularly small businesses, concede the existence of general jurisdiction because it is simply too expensive to litigate the issue. *Id.* at 194. Accordingly, the *Daimler* decision will likely have significance beyond that which is measurable through the case law.
whether a corporation is doing business in a state, in the sense of having continuous and systematic general business contacts there. Rather, courts are to look at whether a corporation has continuous and systematic general business contacts with a state such that the corporation is fairly regarded as being “at home” there. Courts must evaluate “at home” using a comparative approach, that is, by assessing a corporation’s contacts with the forum in relation to its contacts with other forums. “At home” is seen as being a unique place akin to the corporation’s state of incorporation or its principal place of business.

The Court emphasized that, outside of principal place of business and place of incorporation, there will only be rare circumstances where a corporation will meet the “at home” test. The Court, in discussing Perkins, stated:

We do not foreclose the possibility that in an exceptional case, see, e.g., Perkins, a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.

At a different part of the judgment, the Court stated that the Perkins case “should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction based on nothing more than a corporation’s ‘doing business’ in a forum.” Based on the tenor of the judgment, and the very nature of the “at home” test that the Court endorses, it appears that this exception is really a non-exception. Professor Trammell, for instance, argues that “in the overwhelming majority of cases, there will be no occasion to explore whether a Perkins-type exception might apply.” He then answers the logical question posed by his conclusion: why, then, did the Court not state directly that general jurisdiction is limited to a corporation’s place

---

202. The Court engages in a sleight of hand in this respect, implying that the test for general jurisdiction was never simply continuous and systematic general business contacts:

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

Daimler, 134 S. Ct. at 760-61 (citation omitted). The formulation that the Court condemns as being “unacceptably grasping” is actually the standard that was endorsed by the Supreme Court and prevailed in the case law for the past fifty-plus years.

203. Id. at 761 n.19.
204. Id. (citation omitted).
205. Id. at 756 n.8 (quoting von Mehren & Trautman, supra note 16, at 1144) (internal quotation marks omitted).
206. Trammell, supra note 8, at 17.
of incorporation and principal place of business?207 In response, Professor Trammell argues:

First, the Court in *Goodyear* and *Daimler* took pains not to overrule any of its precedents. *Perkins* thus necessitates leaving the door ever so slightly ajar. Second, the Court probably did not want to create an ironclad rule, lest a corporation manipulate its (technical) principal place of business in order to gain a jurisdictional advantage. In a slightly different context, the Court recognized the need for a modicum of flexibility in defining a corporation’s principal place of business for that very reason.

... 

The Court has left open only the slimmest possibility that general jurisdiction might be permissible in a state that is the functional equivalent of one of those paradigm examples. While such an exception is theoretically possible, the Court suggests that it will be the rarest of rarities.208

Not all scholars agree. For instance, Professors Cornett and Hoffheimer identify five situations that could be “candidates” for exceptional cases:

1. A foreign corporation conducting all or most of its business in the forum State;
2. A foreign national corporation engaging in most of its U.S. business in one State;
3. A foreign corporation conducting all or most of its business activity in the U.S. but maintaining no principal place of business or place of incorporation in any state;
4. A corporation with an outsized presence in the state; and
5. Corporations maintaining a permanent physical presence in the state by operating factories, mines, or other non-sales related activities.209

It is not clear, however, that these are actually candidates for exceptional cases post-*Daimler*. For instance, the second situation looks at whether a foreign corporation engages in most of its U.S. business in one state. However, if the business it does in that state is insignificant compared to its worldwide operations, then general jurisdiction would still not be present under *Daimler*. Similarly, situation number three would likely not satisfy a *Daimler* exception because it focuses on the wrong issue—a foreign corporation’s contacts with the United States as a whole. The inquiry under *Daimler* is a foreign corporation’s contacts with the forum *state* and whether those contacts are sufficient to render the foreign corporation “at home” in that state. Further, numbers four and five are similar in that they look at a significant presence (physical or otherwise)

207. Id.
208. Id. at 17–18.
209. Cornett & Hoffheimer, supra note 8, at 53–57.
in a state; however, if this presence is not particularly significant in relation to the corporation’s nationwide and/or worldwide contacts, then it too would fail the *Daimler* test. The only scenario that might be an exception to *Daimler* would be the first, a foreign corporation conducting all or most of its business in the forum state. However, this may not be an exception at all; if a corporation is conducting all or most of its business in the forum state, it would seem that that state constitutes the corporation’s principal place of business.\(^{210}\) For instance, *Perkins* was a case that would likely fit under the first scenario—and the Court in *Daimler* essentially found that the forum in *Perkins* (Ohio) was the corporation’s *de facto* principal place of business during the war.\(^{211}\) Despite Professors Cornett and Hoffheimer’s attempt to identify scenarios that might engage the *Daimler* “exception,” it appears from the overwhelming thrust of the decision that the “exception” was really not meant as an exception at all. Accordingly, it will be exceedingly rare for a court to assert general jurisdiction over a corporation based on its contacts with the forum in a state other than its principal place of business or place of incorporation.

The end of doing business jurisdiction will undoubtedly provide some solace to foreign defendants concerned that they might be subject to all-purpose jurisdiction in certain (or all) U.S. states. It was thought that asserting general jurisdiction over foreign country defendants\(^{212}\) was particularly unfair for a variety of reasons. First, foreign country defendants may not expect or foresee the possibility of general jurisdiction based on doing business in a state.\(^{213}\) Second, even if they could foresee the possibility, most foreign country defendants are not able to predict with any degree of certainty when general jurisdiction will be exercised. Although the problem is not unique to foreign country defendants specifically, it is arguably more acute given foreign country defendants’ inexperience with American jurisdictional principles.\(^{214}\)

\(^{210}\) This would be true at least under the “place of operations” test that is sometimes used to determine principal place of business. See, e.g., Kimberly Nakamuru, Comment, *Touching a Nerve: Hertz v. Friend’s Impact on the Class Action Fairness Act’s Minimum Diversity Requirement*, 44 Loy. L.A. L. Rev. 1019, 1022 (2011) (“[T]he ‘place of operations’ test locates a corporation’s principal place of business in the state which contains a substantial predominance of corporation operations. Under the place-of-operations test, the first step is to determine the amount of business activity in each state, and then, if the amount of activity is ‘significantly larger’ or ‘substantially predominates’ in one state that state is the corporation’s principal place of business. The nerve-center test places a corporation’s principal place of business in the state containing the corporation’s headquarters.” (quoting *Tosco Corp. v. Cmtys. for a Better Env’t*, 236 F.3d 495, 500-02 (9th Cir. 2001)) (internal quotation marks omitted)).

\(^{211}\) *Daimler AG v. Bauman, 134 S. Ct. 746, 756, 756 n.8 (2014).*

\(^{212}\) The term “foreign defendant” is generally thought to refer to a defendant from outside the forum state (whether from another state or another country). Accordingly, the term “foreign country defendant” is used to refer specifically to a corporate defendant from a country outside the United States.

\(^{213}\) See Twitchell, *supra* note 33, at 197.

\(^{214}\) See id. at 198.
Third, the consequences of doing business jurisdiction are more severe for foreign country defendants than for domestic defendants. For an American defendant, being subject to general jurisdiction on the basis that it is doing business somewhere means, at worst, having to defend in an additional American state. For a foreign country defendant, it means being subject to a “dramatically different judicial system a long distance from home.”

In *Daimler*, multiple briefs were submitted by amici advocating in favor of a restrained test for general personal jurisdiction and against a broad theory of jurisdictional imputation. For instance, the United States filed a brief in support of the defendant, stating that “expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States’ diplomatic relations and its foreign trade and economic interests.” It argued that “[f]rom an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity” and that a foreign business enterprise might be unwilling or unlikely to engage in commerce with the United States if the so-called “price of admission” is to subject itself to general jurisdiction anywhere it is doing business. Another of the amici, Viega GmbH & Co. KG and Viega

215. *Id.*

216. Multiple amicus briefs were also submitted in favor of the plaintiffs in *Daimler*, arguing that broad assertions of general jurisdiction by U.S. courts were necessary to remedy international wrongs and were consistent with foreign jurisdictional practice. See, e.g., Brief for Amicus Curiae Earthrights International in Support of Respondents at 4, *Daimler*, 134 S. Ct. 746 (No. 11-965) (“International practice confirms the fairness of exercising jurisdiction based upon the contacts of agent/subsidiaries acting on the parent’s behalf. The fact that other nations, including Germany, exercise similar and sometimes broader jurisdiction refutes any claim that jurisdiction is out of step with international practice or that jurisdiction will chill investment in the United States or lead other nations to ‘retaliate’ against us.”); Brief of Amici Curiae German Institute for Human Rights & Other German Legal Experts in Support of Respondents, *supra* note 131, at 15 (“Daimler long ago crossed the line at which every corporation, American or foreign, can expect to encounter the general jurisdiction of a forum with which it has such extensive contacts. ... When the claims in question concern crimes against humanity and violations of internationally-recognized human rights, Daimler should not be permitted to hide from a trial on the merits of such claims behind a fig-leaf subsidiary.” (citations omitted)).

217. *Id.* at 1. The amicus briefs submitted in support of Daimler all expressed similar concerns. See generally Brief Amicus Curiae of Atlantic Legal Foundation in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of the Chamber of Commerce of the United States of America, the National Foreign Trade Council, the Federation of German Industries, the Association of German Chambers of Industry and Commerce, & the Organization for International Investment as Amici Curiae in Support of the Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of Economiesuisse, the Swiss Bankers Association, ICC Switzerland, Association of German Banks, & the European Banking Federation as Amici Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of Amici Curiae New England Legal Foundation & Associated Industries of Massachusetts in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of the Product Liability Advisory Counsel, Inc. as Amicus Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner, *supra* note 111; Brief of Amici Curiae Viega GmbH & Co. KG & Viega International GmbH in Support of Petitioner DaimlerChrysler AG,
International GmbH, provided a real-life example of a foreign company that, because it had been subject to general jurisdiction in the United States, chose to decrease its business presence in the United States and increase it elsewhere. It is clear that these arguments had an effect on the Court in Daimler, as they appeared prominently in the last section of the judgment. Thus, foreign defendants—and in particular, foreign country defendants—can breathe a sigh of relief in the aftermath of Daimler, secure in the knowledge that they will likely not be held to account for wrongs in a distant and seemingly arbitrary forum.

Just as foreign defendants (particularly foreign country defendants) are likely to be relieved by Daimler, the plaintiffs' bar is likely to be incensed by it. One article in the popular press indicates that the decision has “bombshell consequences for domestic tort litigation” and could “result in major upheavals in standard operating procedures for much of the plaintiff’s bar.” The article continues, “[i]f state courts willingly heed Daimler’s dictates, the decision’s impact on tort litigation in this country will be immediate and dramatic. Lawyers will no longer be permitted to seek out plaintiff-friendly forums (think Madison County, Illinois) that bear no relation to the parties and the cause of action.”

The author also posits that Daimler could have huge consequences for class action litigation and “may even spell the end of nationwide class actions against multiple defendants filed anywhere other than the states (if any) in which all corporate defendants are at home.” It is unclear what impact, if any, Daimler will have on class action litigation. It is

---

Daimler, 134 S. Ct. 746 (No. 11-965). Many also noted the affront to international comity that could arise if the United States were to continue to endorse an expansive approach to general jurisdiction.

219. Brief of Amici Curiae Viega GmbH & Co. KG & Viega International GmbH in Support of Petitioner DaimlerChrysler AG, supra note 218, at 4 (“Bauman erroneously subjects companies like the German Viega Companies to litigation in a forum state notwithstanding the lack of any contacts with that forum.... The German Viega Companies have scaled back investment in the U.S. because of Bauman, and those cases that have followed Bauman. Since these Bauman-influenced decisions, the German Viega Companies have been expanding investments in other countries, such as ones in Asia, with more predictable legal environments. Absent reversal, the German Viega Companies will consider divesting in the United States, and will recommend to other similarly situated companies to do the same.”).

220. See Daimler, 134 S. Ct. at 763.

221. Twitchell notes:

Because of the heightened fairness problems present when general jurisdiction is exercised over foreign corporations, it would seem to follow that if we are going to curtail general doing-business jurisdiction anywhere, it should be here. And yet there is a paradox: the fairness problems may be greater, but the needs of domestic plaintiffs also increase.

Twitchell, supra note 33, at 199.


223. Id.; accord LESTER BRICKMAN, CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., ANATOMY OF A MADISON COUNTY (ILLINOIS) CLASS ACTION: A STUDY OF PATHOLOGY (2002).

224. Samp, supra note 222.
unlikely, however, that Daimler portends the demise of the nationwide class action.225 At least for the time being, Daimler’s direct impact will likely be on parties in traditional two-party litigation.

Since Daimler was decided, most courts have followed its mandate.226 For instance, in In re Roman Catholic Diocese of Albany, N.Y., Inc., the Court of Appeals for the Second Circuit granted a writ of mandamus instructing the Vermont district court to grant the defendant’s motion to dismiss for lack of personal jurisdiction.227 In that case, the plaintiff filed an action in Vermont against the defendant, Diocese of Albany, alleging that he was sexually abused by a former priest.228 The district court had accepted that Vermont had general jurisdiction over the Diocese based primarily on the fact that “at least thirteen of the Diocese’s approximately 200 priests conducted a combined total of sixteen services of worship in Vermont” and that “from July 2002 to February 2009, the Diocese authorized...a New York priest, to celebrate Sunday morning mass at a Vermont church.”229 The Second Circuit disagreed with the district court, stressing the high threshold that now must be established under the Daimler “at home” test.230 The court observed that the “Diocese operates no office or facility in Vermont, has no sales in the forum, and the percentage of its contacts with Vermont compared to its activities elsewhere (namely, New York) are trivial.”231 It concluded that even “imputing the border parishes’ contacts with Vermont to the Diocese (which the district court declined to do) would not render the Diocese ‘at home’ there.”232 In fact, the Second Circuit noted that “[t]he Diocese’s scant contacts with Vermont do not come

225. In an excellent article, Professor Andrews outlines four potential bases of jurisdiction over defendants in nationwide class actions. See Carol Rice Andrews, The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,” 58 SMU L. REV. 1313, 1349–74 (2005). One of those bases is that the defendant is doing business in the forum and therefore subject to general jurisdiction there. Id. at 1355–60. However, she suggests that perhaps the most common basis of jurisdiction over defendants in nationwide class actions is corporate registration, which obviously remains untouched by Daimler. Id. at 1360–67 (“Corporate registration seems to be a commonly assumed basis for jurisdiction over out-of-state corporations. Indeed, such assumption probably explains the lack of debate concerning jurisdiction over the defendant in nationwide class actions.”). For a discussion of corporate registration as a basis for general jurisdiction, see infra Part IV.B.


227. 745 F.3d at 33.

228. Id. at 34. The Diocese is incorporated and has its principal place of business in New York. Id. The plaintiff apparently filed the action in Vermont because the relevant statute of limitations had expired in New York. Id. at 37.

229. Id. at 34.

230. Id. at 39.

231. Id. at 40.

232. Id.
close" to establishing general jurisdiction under the new *Daimler* standard.\textsuperscript{233}

The Connecticut district court engaged in a similar analysis in *Brown v. CBS Corp.*\textsuperscript{234} *Brown* involved a lawsuit against Lockheed Martin, among others, stemming from injuries related to asbestos exposure.\textsuperscript{235} The defendant was incorporated in Maryland and had its principal place of business there.\textsuperscript{236} Nonetheless, the plaintiff sought to establish general jurisdiction in Connecticut.\textsuperscript{237} The plaintiff alleged that the defendant was subject to general jurisdiction in Connecticut on the basis that the defendant had continuous and systematic general business contacts there.\textsuperscript{238} The district court rejected this basis for jurisdiction, stating that “[a]lthough Lockheed’s contacts with Connecticut may appear substantial, when viewed in relation to its operations as a whole, Lockheed’s Connecticut activities account for a relatively trivial amount of its overall business.”\textsuperscript{239} The court accepted the plaintiff’s descriptions of the contacts between the defendant and Connecticut\textsuperscript{240} but concluded

\textsuperscript{233} *Id.* at 39. The court expressed concern about any contrary holding (including the holding of the district court below):

If the Diocese is “at home” in Vermont, it begs the question: how many homes might it have? Would the Diocese be “at home” in New Jersey if one of its hundreds of priests were to conduct a wedding or two in that State over a matter of years? Would circulation of *The Evangelist* to a Wyoming resident render the Diocese “at home” there? It is difficult to see where jurisdiction would end; foreign-state and foreign-country corporations could be found “at home” essentially anywhere, based on the briefest and most trivial of contacts. The Supreme Court explicitly rejected such an expansion of general jurisdiction in *Daimler AG*. *Id.* at 40–41.

\textsuperscript{234} No. 3:12CV01495 AWT, 2014 WL 1924469 (D. Conn. May 14, 2014).

\textsuperscript{235} *Id.* at *1.

\textsuperscript{236} *Id.*

\textsuperscript{237} *Id.* at *6.

\textsuperscript{238} *Id.* at *6–7. The plaintiff also relied on a consent theory of jurisdiction, arguing that “by registering to do business in Connecticut and designating the Secretary of the State as its agent for process [under Conn. Gen. Stat. § 33-929], Lockheed consented to be subject to the personal jurisdiction of Connecticut courts.” *Id.* at *3. The court concluded that irrespective of the corporation’s registration to do business, “the requirements of the due process clause must also be met.” *Id.* at *4. In other words, the corporation’s act of registering to do business might address consent to service of process but not consent to personal jurisdiction. For additional discussion on consent as a basis for general jurisdiction, see infra Part IV.B.

\textsuperscript{239} *Brown*, 2014 WL 1924469, at *6.

\textsuperscript{240} *Id.* at *7 ("Lockheed Martin currently has 28 employees working in four separate cities, it leases property in New London with its name on the building and a telephone listing, it has derived about $160 million in revenue from Connecticut since 2008, and it pays corporate income tax in Connecticut." (internal quotation marks omitted)). The court noted, however:

[T]hese contacts represent only a small portion of Lockheed’s overall business in the United States. The figures cited by the plaintiff represent “less than five one-hundredths of one percent of Lockheed Martin’s employees” nationwide, and “less than five one-hundredths of one percent to just over one tenth of one percent of Lockheed Martin’s total revenue” for any particular year. Furthermore, while Lockheed does lease and operate out of one 9,000 square foot space in Connecticut, and has leased other properties in the past, it owns
that “in every respect, these contacts are less extensive than those found by the Supreme Court to be insufficient to establish general jurisdiction in *Daimler*. For example, the court observed that the defendant’s Connecticut-based revenue accounted for a mere 0.1% of its national revenue, a much smaller percentage than the 2.4% of worldwide sales in *Daimler*. The court concluded that “[i]f Daimler cannot fairly be said to be ‘at home’ in California, Lockheed is definitively not ‘at home’ in Connecticut.”

It is clear that the courts in *In re Roman Catholic Diocese of Albany and Brown* fully appreciated the consequences of the Supreme Court’s decision in *Daimler*. However, as is to be expected, the contraction of general jurisdiction might work an injustice (or what appears to be an injustice) in certain cases. Justice Sotomayor recognized this in her concurrence, when she predicted that the ultimate effect of the Court’s

---

Id. (alterations in original) (citations omitted).

241. Id. at *8.

242. Id.

243. Id.

decision would be to shift the risk of loss from large corporations to the individuals that those corporations have harmed.\textsuperscript{245} She provides an example of “a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate” and notes that under the Court’s approach, the parents would be “unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States.”\textsuperscript{246}

Justice Sotomayor’s observations have proved to be prescient. Just a few weeks after \textit{Daimler} was decided, the Southern District of Florida issued a decision dealing with the issue of whether a Florida court could assert general jurisdiction over a foreign corporation that managed the property where the American plaintiff was injured.\textsuperscript{247} In \textit{Barriere v. Juluca}, the defendant corporation was incorporated in Anguilla and had its principal place of business there. The accident giving rise to the litigation occurred at the defendant’s resort property in Anguilla. Although the plaintiff was domiciled in Texas, she sued in Florida where she argued that the defendant was subject to general jurisdiction.\textsuperscript{248} The Florida court accepted the plaintiff’s characterization of the factual connections between Florida and the Anguillan defendant: \textsuperscript{249} (1) the defendant maintains a sales office in Miami; (2) the defendant’s assets are managed by Florida-based consultants; and (3) co-defendants in the action promote, manage, operate, and provide reservation services for resorts, including the defendant; provide extensive sales and promotional support; set forth the standards required to maintain association with the co-defendants’ group; and regularly inspect the defendant’s premises in Anguilla.\textsuperscript{250} The court noted that “[t]hese allegations . . . are sufficient for this court to find that [defendant] Cap Juluca has such minimum contacts

\textsuperscript{245} Daimler AG v. Bauman, 134 S. Ct. 746, 775 (2014) (Sotomayor, J., concurring).

\textsuperscript{246} Id. The argument was also advanced by the amicus, American Association for Justice. Brief for the Amicus Curiae American Association for Justice in Support of Respondents at 5, Daimler, 134 S. Ct. 746 (No. 11-965) (“If petitioner’s view prevails, non-US corporations can avoid being sued in this country by doing all their business through a wholly-owned subsidiary, an arrangement over which they have total control and over which those whom they injure have no input or even knowledge. To allow such wholesale avoidance of personal jurisdiction would undermine the minimum contacts test as it has evolved since \textit{International Shoe} and result in great unfairness to injured persons and a significant reduction in corporate accountability.” (citation omitted)).

\textsuperscript{247} See Barriere v. Juluca, No. 12-23510, 2014 WL 652831, at *1 (S.D. Fla. Feb. 19, 2014). (“Allegedly, Plaintiff Aimee Barriere slipped and fell on wet tiles as she was descending stairs on her way to the beach and suffered serious injury.”).

\textsuperscript{248} Id.

\textsuperscript{249} These connections are attenuated for general jurisdiction even under the pre-\textit{Daimler} standard. In effect, the only direct connection between the defendant and Florida was that it had a sales office there. The other connections identified by the court are indirect—it hired Florida-based consultants to manage its assets and certain co-defendants in the case do business in Florida. See id. at *5, *8.

\textsuperscript{250} Id. at *8 (“Plaintiffs have alleged that Leading Hotels of the World is the actual or apparent agent of Cap Juluca and that Cap Juluca maintained control over Leading Hotels of the World, or alternatively, that Leading Hotels of the World maintained control over Cap Juluca.”).
with Florida to be considered "at home.""

The Florida court recognized that "Daimler has undoubtedly limited the application of general jurisdiction to foreign defendants," but did not read the case as mandating that Florida courts cast aside their previous precedents. The court failed to grapple with the implications of the Daimler Court's "at home" language and its admonition that the "at home" basis for jurisdiction would be "exceptional." Instead, the court based its decision on the adverse policy consequences of not assuming jurisdiction, stating that "[a] contrary result would effectively permit foreign corporations to freely solicit and accept business from Americans in the United States and at the same time be completely shielded from any liability in U.S. courts from any injury that may arise as a result." It is clear that the court assumed general jurisdiction over the Anguillan defendant, not because it was truly "at home" in Florida, but because the failure to do so would leave American plaintiffs without an effective

---

251. Id.
252. Id. at *9. The court selectively quoted from Daimler in an effort to bolster its questionable conclusions. It stated:

What is clear from Daimler is that, for a court to exercise general jurisdiction over a foreign corporation, that corporation must be "at home" in the forum. "At home" can be read to mean "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit...on causes of action arising from dealings entirely distinct from those activities." While the Court did not expand on the specifics, it noted that it would be possible for a corporation to be "at home" in places outside of its place of incorporation or principal place of business.

Id. at *7 (citations omitted) (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014)). Two things are misleading about this passage. First, the court's statement that "at home" means "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit...on causes of action arising from dealings entirely distinct from those activities" is inaccurate. Id. (quoting Daimler, 134 S. Ct. at 761) (internal quotation marks omitted). The quoted passage is simply a statement of what it means for a court to have general jurisdiction, not what "at home" means. According to the Supreme Court, "at home" is intended to mean "comparable to a domestic enterprise in that State." Daimler, 134 S. Ct. at 758 n.11. Second, the court in Barriere noted that it "would be possible for a corporation to be 'at home' in places outside of its place of incorporation or principal place of business." Barriere, 2014 WL 652831, at *7. What it failed to mention is that the Court indicated that it would "not foreclose the possibility that in an exceptional case" a corporation could be subject to general jurisdiction in a place other than its state or incorporation or principal place of business. Daimler, 134 S. Ct. at 761 n.19 (emphasis added). The court in Barriere did not give any credence to the Court's statements about the exceptionality of general jurisdiction outside of the paradigm cases.

253. The court in Barriere also ignored the Supreme Court's statement that a reasonableness check is superfluous for general jurisdiction and proceeded to analyze why the assertion of jurisdiction over the Anguillan defendant was, in fact, reasonable on the facts of the case. Barriere, 2014 WL 652831, at *8-9. See Daimler, 134 S. Ct. at 762 n.20.

254. Barriere, 2014 WL 652831, at *8. See also id. at *9 (noting that ignoring previous precedents because of Daimler "would effectively deprive American citizens from litigating in the United States for virtually all injuries that occur at foreign resorts maintained by foreign defendants even where, as here, the corporations themselves maintain an American sales office in Florida and heavily market in the jurisdiction").
remedy. As laudable a goal it is to provide redress in the United States for injuries sustained abroad, the result simply cannot be squared with the Supreme Court’s decision in Daimler. It will likely be in cases like these—where the consequences of not assuming jurisdiction appear unfair—that will prove the most fertile testing ground for Daimler’s holding.

B. ADDITIONAL PRESSURE ON ALTERNATIVE BASES OF JURISDICTION

In light of Daimler, one should expect plaintiffs’ counsel (as well as courts) to find creative ways around the decision. The Barriere case, discussed above, presents one way that courts will attempt to circumvent the decision: by reading the decision selectively and in a way that does not comport with the underlying thrust of the case. More than likely, however, courts will heed the guidance of Daimler and restrict general jurisdiction to circumstances where the defendant is truly “at home.” This is already evidenced in the case law that has been decided since Daimler was released earlier this year.

With that said, one can envision at least three arguments that plaintiffs who are unable to establish general jurisdiction under Daimler might advance in an attempt to establish personal jurisdiction over a defendant. First, a plaintiff might argue that the case involves specific jurisdiction and that the cause of action “arises out of” or “relates to” the defendant’s contacts with the forum. Had the plaintiffs in Barriere, for instance, been domiciled in Florida rather than Texas, this could have been a plausible approach to establishing jurisdiction, notwithstanding the decision in Daimler. The argument would have been as follows: plaintiff’s decision to take a vacation at the defendant’s hotel in Anguilla arose, at least in part, from the defendant’s extensive marketing and

255. Professor Childress also identifies Barriere as a case where a lower court found general jurisdiction in a situation “beyond what the Court...intended in its Goodyear and Bauman decisions.” Childress, After Bauman, supra note 8, at 202. He correctly notes that the “reason for this is that the jargon of personal jurisdiction obscures what is really at stake in individual cases: the competing demands of access to justice for plaintiffs and fairness for defendants.” Id.

256. See Siegel, supra note 201, at 2 (“The opportunities for personal jurisdiction of [sic] foreign corporations are of course much reduced after Daimler, but not gone entirely.”).

257. See supra pp. 271–73.

258. Rhodes and Robertson argue that the Daimler decision may also put pressure on pendant jurisdiction to fill any holes in the jurisdictional scheme. Rhodes & Robertson, supra note 8, at 35–44. They posit that:

After Bauman, the constitutional case for allowing the exercise of pendant personal jurisdiction becomes even stronger. . . . The ability to hear these intertwined claims becomes especially important once the scope of general jurisdiction is reduced. Without the availability of pendant personal jurisdiction as a safety valve, limiting general jurisdiction means limiting the number of fora that could hear the case as a whole—and therefore potentially requiring that different courts hear different claims within a larger case.

Id. at 41–42.
promotional efforts in Florida. In this respect, the underlying cause of action could be said to "arise out of" or "relate to" the defendant's conduct in the forum.

This logic was used in Nowak v. Tak How Investment Ltd., where the Court of Appeals for the First Circuit held that there was specific jurisdiction over a Hong Kong hotel concerning a death at the hotel's pool. In Nowak, the court noted that there was a "meaningful link" between the hotel's contact with the forum, Massachusetts, and the harm suffered:

"The Hotel's solicitation of Kiddie's business and the extensive back-and-forth resulting in Burke's reserving a set of rooms for Kiddie employees and their spouses set in motion a chain of reasonably foreseeable events resulting in Mrs. Nowak's death. The possibility that the solicitation would prove successful and that one or more of the guests staying at the Hotel as a result would use the pool was in no sense remote or unpredictable; in fact, the Hotel included the pool as an attraction in its promotional materials." The court further noted that "[i]f [a] resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage." Accordingly, the court was of the view that the cause of action in Nowak arose from the transaction of business by the defendant in the forum. In the aftermath of Daimler, one should expect plaintiffs in these sorts of cases to cast their analysis of jurisdiction as involving questions of specific jurisdiction, not general jurisdiction. This will, in turn, require courts to explore the outer parameters of the "arises out of" or "relates to" aspect of specific jurisdiction.

Second, a plaintiff might attempt to make an argument for courts to accept jurisdiction on the basis that they are a "forum of necessity" or a...
This doctrine has largely been rejected in American law, but it is gaining some traction internationally. Under the doctrine, courts would enjoy a residual discretion to assume jurisdiction in circumstances where there is no other forum in which the plaintiff can reasonably seek relief. In other words, the forum of necessity doctrine accepts that there will be exceptional cases where the jurisdictional test is not satisfied, but that concerns for access to justice nonetheless justify the assumption of jurisdiction. Consider, for instance, the hypothetical presented at the beginning of this Article: a plaintiff who slips and falls at a Home Depot store in Florida but later moves to, and sues in, Texas. Depending on the circumstances, this scenario might be a prime candidate for the forum of necessity doctrine. If, for instance, the plaintiff was unable to physically travel to Florida and could not afford the expense of litigating out of state, these might provide sufficiently compelling circumstances to justify the invocation of the forum of necessity doctrine.

264. Professor Twitchell argued in her article, Why We Keep Doing Business with Doing Business Jurisdiction, that doing business jurisdiction sometimes provided a forum of necessity where there was no other basis of jurisdiction over a defendant. Twitchell, supra note 33, at 195-96 (“Finally, we use doing-business jurisdiction . . . 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 straightforward means; occasionally, doing-business jurisdiction may provide a forum by necessity where multiple defendants are involved.”). Given that Daimler has drastically circumscribed the ambit of general jurisdiction, courts may feel the need to develop an independent forum of necessity doctrine to fill any residual gaps.

265. See, e.g., Samuel P. Baumgartner, Changes in the European Union’s Regime of Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States, 18 SW. J. INT’L LAW 567, 580 n.109 (2012) (“In the U.S., the Supreme Court has twice refused to consider adoption of a forum of necessity on the facts before it when the minimum contacts required by the due process clause were otherwise missing.” (citing Helicopteros, 466 U.S. at 419 n.13; Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977)); see also Peter Hay et al., Conflict of Laws § 6.6, at 402 (5th ed. 2010) (“The boundaries of this necessity doctrine, and whether it really exists, are the subject of some considerable debate.”)); Christopher A. Whytock, Foreign State Immunity and the Right to Court Access, 93 B.U. L. REV. 2033, 2051 (2013) (“In the United States, the doctrine’s status is debated. If it exists at all, it would seem to exist as a factor for courts to weigh at the reasonableness stage of the jurisdictional due process inquiry, with the lack of an available alternative forum favoring jurisdiction. In other jurisdictions, the doctrine of jurisdiction by necessity is recognized and, when applicable, it authorizes (but does not require) a court to assert jurisdiction.”).

266. Professor Whytock describes the doctrine as follows:

[U]nder the doctrine of jurisdiction by necessity (forum necessitatis), “a court has exceptional jurisdiction if justice so demands, even absent the usual requirements, because no other forum is available to the plaintiff.” The doctrine not only operates to provide court access that might not otherwise be available, but also is sometimes justified as permitted, or even required, by a legal right to court access or the international law prohibition of denial of justice.


267. Arguably, the forum of necessity doctrine would be preferable to Justice Sotomayor’s reasonableness check on general jurisdiction in ensuring access to justice for plaintiffs. Justice
Courts in Canada appear to have accepted the forum of necessity doctrine. In *Van Breda v. Club Resorts Ltd.*, the seminal case on personal jurisdiction in Canada, the Supreme Court refrained from deciding the issue of whether forum of necessity was a part of Canadian law. However, the Ontario Court of Appeal in that case had endorsed a forum of necessity doctrine, and lower courts in Canada have accepted its applicability in the appropriate cases. The doctrine is also accepted in countries such as France, Germany, the Netherlands, Ireland, Portugal, and Switzerland. One U.S. commentator observes that “[i]n theory, there is no reason why forum of necessity couldn’t be adopted by U.S. courts or legislatures.” However, the major conceptual problem with forum of necessity is that the doctrine applies when a court otherwise does not possess personal jurisdiction over a defendant. How can the assertion of jurisdiction in these circumstances comport with due process? This will be the central question to be answered in any attempt to invoke the doctrine of forum of necessity in U.S. law.

Perhaps the most plausible route to establishing jurisdiction over a foreign defendant who is not otherwise “at home” in the forum will be to look to whether it has registered to do business in the forum and then to use that registration as an independent basis for jurisdiction over the defendant. Every state has a corporate registration statute that requires
a corporation that is doing business in the state to register with the state, pay a fee, and appoint an agent for service of process.\textsuperscript{275} Courts are divided on the jurisdictional consequences associated with registering to do business in a state. Some courts hold that the act of registering to do business and appointing an agent in a state is simply a way of effectuating service of process in cases where the state otherwise has personal jurisdiction over a defendant.\textsuperscript{276} Other courts have found that registering to do business pursuant to a state statute confers specific jurisdiction over the defendant with respect to the business that is actually being conducted in that state.\textsuperscript{277} Yet other courts hold that the mere act of registering to do business in a state subjects a corporation to general jurisdiction there, such that the corporation can be sued in that state with respect to any and all claims, including those without any connection to the state.\textsuperscript{278} Those courts holding that corporate registration confers general jurisdiction over a defendant usually rely on the notion of consent.\textsuperscript{279} That is, by taking proactive steps to register under a state

\textsuperscript{275} See, e.g., N.Y. Bus. Corp. Law § 1301(a) (McKinney 2003) ("A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article. A foreign corporation may be authorized to do in this state any business which may be done lawfully in this state by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business."); id. § 305(a) ("[E]very ... authorized foreign corporation may designate a registered agent in this state upon whom process against such a corporation may be served.").

\textsuperscript{276} See, e.g., Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181, 183 (5th Cir. 1992) ("Whether jurisdiction in the sense of due process exists depends upon concepts of 'fairness' and 'convenience' and not upon mere compliance with procedural requirements of notice, nor even corporate 'presence' within this state, ... A registered agent, from any conceivable perspective, hardly amounts to "the general business presence" of a corporation so as to sustain an assertion of general jurisdiction."); see also In re Mid-Atl. Toyota Antitrust Litig., 525 F. Supp. 1265, 1277 (D. Md. 1981).

\textsuperscript{277} See, e.g., Gray Lines Tours v. Reynolds Elec. & Eng'g Co., 238 Cal. Rptr. 419, 421 (Cal. Ct. App. 1987) ("Thus far the highest court in California has given to this legislation no construction which authorizes service of process upon the statutory agent of the foreign corporation defendant where the suit is found upon a cause of action in no way connected with business transacted within this state. In the absence of any such interpretation, the decisions ... rendered by the highest court in the land require in this instance that the California law authorizing service of process upon a foreign corporation doing business within the state be construed so as to exclude from the operation thereof suits founded upon causes of action not arising in the business done by such foreign corporation in this state." (citations omitted) (quoting Miner v. United Air Lines Transp. Corp., 16 F. Supp. 930, 931 (S. D. Cal. 1936)) (internal quotation marks omitted)).

\textsuperscript{278} See, e.g., Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) ("[A]ppointment of an agent for service of process ... gives consent to the jurisdiction of the Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary."); see also Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991).

\textsuperscript{279} See Knowlton, 900 F.2d at 1199 ("A defendant may voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it. One of the most solidly
statute and appoint an agent for service of process, a corporation has knowingly and voluntarily consented to general jurisdiction in the courts of that state. Since consent is an independent basis for jurisdiction, separate and apart from minimum contacts, it does not run afoul of due process to assert jurisdiction over a corporation based on the corporation registering to do business in a state.\footnote{280}

A surprising number of states adhere to this latter view of corporate registration.\footnote{281} New York, for example, is one of those states that regards registering to do business as conferring general jurisdiction over a corporation.\footnote{282} In Rockefeller University v. Ligand Pharmaceuticals Inc., the Southern District of New York stated that “[i]n maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction.”\footnote{283} The court further stated that “[t]he continuing existence of the privilege to do business in New York, regardless of whether it is exercised, rightfully yields jurisdictional consequences if the consent to service on the Secretary of State goes unrevoked.”\footnote{284} One would imagine that many thousands of businesses are registered to do business under the New York statute. Therefore, even where a corporation is not “at home” in New York, in the Daimler sense of the term, it nonetheless will be subject to general jurisdiction there if it has registered pursuant to the New York registration statute.

It is likely in the post-Daimler era that more cases will be predicated on the defendant’s consent to jurisdiction via its registration under the relevant state statute. Many courts that have not yet had occasion to address the jurisdictional consequences of state registration statutes will likely have occasion to do so in the near future. Since plaintiffs are going to have very limited success in arguing that a foreign corporation is “at home” in a state other than its state of incorporation or principal place of business, registration provides one potential avenue for asserting

\footnote{280. See Rockefeller Univ. v. Ligand Pharm. Inc., 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008) ("Because jurisdiction is premised upon consent, it is doubtful that the minimum contacts test under the due process clause presents an impediment to the exercise of jurisdiction."); see also Andrews, supra note 16, at 1073 ("Under Bauxites, consent is a proper basis for jurisdiction, independent of International Shoe minimum contacts analysis.").}


\footnote{283. 581 F. Supp. 2d at 466.}

\footnote{284. Id. at 467 (quoting N.Y. C.P.L.R. § 301 cmt. C301:6 (McKinney 2001)).}
jurisdiction over otherwise unattainable foreign corporations. Of course, this does not apply in cases where the corporation has not registered to do business in any state.\(^{285}\)

Courts and commentators have debated the constitutionality of registration as a basis for general jurisdiction.\(^{286}\) Many are concerned that subjecting a corporation to general jurisdiction on the basis of its registration to do business in a state is incompatible with due process.\(^{287}\) In the words of one Texas court:

The idea that a foreign corporation consents to jurisdiction in Texas by completing a state-required form, without having contact with Texas, is entirely fictional. Due process is central to consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. "Extorted actual consent" and "equally unwilling implied consent" are not the stuff of due process.\(^{288}\)

Though the Supreme Court endorsed registration as a basis for general jurisdiction nearly 100 years ago in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,\(^{289}\) this was well before *International Shoe* and the development of more contemporary understandings of due process. In fact, during oral argument in *Goodyear*, Justice Ginsburg telegraphed concern about registration as a basis for general jurisdiction.\(^{290}\) Although there will be increased pressure on registration to do business to fill the gaps left open by *Daimler*, it too is a basis for jurisdiction that is ripe for revisiting.

C. PRACTICAL CONSEQUENCES FOR LITIGANTS AND COURTS

In her concurrence, Justice Sotomayor outlines some practical consequences for litigants and courts stemming from the Court's decision in *Daimler*. First, she points out that one can expect additional

---

285. For instance, in the *Barriere* case, this option would not be open unless the defendant registered to do business somewhere in the United States.


287. See Kipp, supra note 286, at 17 n.71 ("One may wonder... why, if it is the Due Process Clause... which denied the power of the state to imply consent to suit on claims arising out of transactions occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing."); Taylor, supra note 286, at 1168 ("[T]he assertion of general jurisdiction through registration, arguably among the most egregious assertions of jurisdiction, has slipped through a tear in the fabric of due process protection.").


289. 243 U.S. 93 (1917).

jurisdictional discovery as a result of *Daimler*. She notes that “[r]ather than ascertaining the extent of a corporate defendant’s forum-state contacts alone, courts will now have to identify the extent of a company’s contacts in every other forum where it does business in order to compare them against the company’s in-state contacts.” The Court does not adequately respond to this critique, other than to say that “it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home.” Justice Sotomayor is likely correct that the effect of the Court’s decision is to increase jurisdictional discovery. A plaintiff seeking to establish that a corporation is “at home” in a certain state will need information concerning not only the corporation’s activities within the state, but also its activities outside the state. With that said, much of this information was likely provided as part of discovery anyway, as attested to by the fact that the *Daimler* record contained information on not only Daimler’s connections with California, but how those connections were insignificant compared with its connections elsewhere. A corporation will likely be all too happy to provide a plaintiff with information about its national or international activities in an effort to defeat jurisdiction.

Second, Justice Sotomayor points out that the Court’s approach “will treat small businesses unfairly in comparison to national and multinational conglomerates.” She posits that “[w]hereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be.” Justice Sotomayor is correct that, jurisdictionally speaking, large businesses may fare better than small businesses. For instance, Home Depot, a large multinational corporation with almost two thousand locations across the United States, will likely only be considered “at home” in two places—its state of incorporation (Delaware) and its principal place of business (Georgia). By contrast, Benny’s, a New England home improvement store with stores in Rhode Island, Massachusetts, and Connecticut, could conceivably be deemed

---

292. *Id.* at 771 (Sotomayor, J., concurring).
293. *Id.* at 762 n.20. Justice Ginsburg, in turn, uses this as an opportunity to say that Justice Sotomayor’s reasonableness check on jurisdiction would “indeed compound the jurisdictional inquiry.” *Id.*
294. See *id.* at 752 (“MBUSA’s California sales account for 2.4% of Daimler’s worldwide sales.”).
295. *Id.* at 772 (Sotomayor, J., concurring).
296. *Id.* (Sotomayor, J., concurring).
“at home” in each of these three states.298 It is likely that the forty-two Home Depot locations in Massachusetts 299 generate much more revenue than the twelve Benny’s stores in Massachusetts.300 However, under Daimler, Home Depot will not be subject to general jurisdiction in Massachusetts, while Benny’s may be.301 Would this be treating Benny’s unfairly vis-à-vis Home Depot? Maybe. But maybe that is simply the price to pay for reining in general jurisdiction while retaining the flexibility to find general jurisdiction in states other than the state of incorporation or principal place of business.

Third, Justice Sotomayor observes that the practical effect of Daimler is to shift the risk of loss from multinational corporations to the individuals harmed by their actions.302 Thus, litigants who otherwise could have sued a defendant in a forum because the defendant was doing business there will now be restricted in where they can sue—and in some cases, will not be able to sue in the United States altogether. Justice Sotomayor’s position assumes that plaintiffs are not willing (or able) to sue in a foreign forum. Simply because American plaintiffs may not get redress in the United States does not necessarily mean that they will not get redress period.303 American courts should be careful not to assume that only the United States can “hold [a defendant] to account” for tortious conduct.304 While there will undoubtedly be sympathetic situations where courts want to provide a forum for redress for injured American plaintiffs, such as in the Barriere case,305 that motivation cannot be the sole guiding force behind the adoption of an appropriate test for general jurisdiction.

298. See Benny’s, Inc., Find The Best Company, http://companies.findthebest.com/1/977685/Benny-s-Inc-in-Smithfield-RI (last visited Dec. 14, 2014). Benny’s is incorporated in Rhode Island and has its principal place of business in Rhode Island. Id.
301. Given the narrowness of the Daimler exception, it is not clear that Benny’s would actually be subject to general jurisdiction in Massachusetts or Connecticut. The point, however, is that as between the two companies, Benny’s is far more likely than Home Depot to meet the “at home” test.
303. See Stein, supra note 164, at 542 (“[I]t doesn’t really bother me that the plaintiffs in Goodyear Dunlop were forced to pursue their remedies for the injuries suffered in France in a French court. And I don’t think I would have been any more troubled had the defendants conducted significantly greater activities in the forum. Not everyone gets to sue at home.”).
304. Daimler, 134 S. Ct. at 773 (Sotomayor, J., concurring). Accord Childress, Transnational Law Market, supra note 8, at 79 (“[O]ne should not lose sight of the plaintiff’s need for justice in the individual case. Yet, we should not be so bold as to assume that justice in the United States is the only justice that should count. Unless it can be shown that no other forum would grant the plaintiffs access to justice, U.S. courts should resist creative assertions of general jurisdiction.”).
Fourth, Justice Sotomayor points out that the Court’s approach in *Daimler*:

creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, but a large corporation that owns property, employs workers, and does billions of dollars’ worth of business in the State will not be, simply because the corporation has similar contacts elsewhere.306

Justice Sotomayor is correct that there is a perceived disconnect between rules that allow for the assertion of general jurisdiction over individuals based upon the simple act of serving an individual with process, and not allowing general jurisdiction over corporations that have significant and enduring contacts with the forum. Others have also noted this disconnect and advocated for revisiting the oft-maligned rule that presence in the jurisdiction when served with process is a legitimate basis for general jurisdiction over individuals.307

With that said, there is nothing conceptually problematic about two completely independent rules for jurisdiction leading to seemingly incongruous results.308 In her quote, Justice Sotomayor is referring to presence-based jurisdiction over individuals, which the Supreme Court determined in *Burnham v. Superior Court* to be compatible with due process.309 There is no equivalent form of jurisdiction over corporations; that is, one cannot serve a corporate officer or director in a forum and thereby obtain jurisdiction over the corporation by virtue of service.310 Thus, Justice Sotomayor’s comparison between service on an individual, on the one hand, and a defendant’s continuous and systematic contacts with the forum, on the other, is inapposite. Rather, jurisdiction over a corporation premised on its continuous and systematic general business contacts that render it “at home” is most closely akin to jurisdiction

---

306. *Daimler*, 134 S. Ct. at 772–73 (Sotomayor, J., concurring) (citation omitted).

307. See *Burnham v. Superior Court*, 495 U.S. 604 (1990); see also Stein, *supra* note 164, at 549 (“All of the reasons that support limiting general jurisdiction to a corporate defendant’s home base apply with even greater force to individual defendants.... Although I do not expect the Court to reverse course, I hope the Court will move off of its position that jurisdiction over persons is justified by raw territorial power, whereas jurisdiction over corporations must be justified by a deeper sense of fairness and a more meaningful connection between the defendant and the forum state.”); Twitchell, *supra* note 33, at 181 (“[T]he benefits received by a defendant with continuous commercial activities within a state certainly exceed the thin potential benefits received by the hapless traveler who barely sets foot in the forum’s territory.”).

308. Indeed, the idea that registering to do business (without actually doing business) is a basis for general jurisdiction while doing business in the *Helicopteros* sense is not a basis for general jurisdiction is also seemingly incongruous. *See supra* Part IV.B. But because the two rely on two different bases for their legitimacy (consent versus contacts), there is nothing technically incompatible about the two co-existing.


310. Unless, of course, the corporation is registered to do business in the forum and the forum regards such registration as consent to general jurisdiction. In this case, however, the basis of jurisdiction is usually not regarded as presence, but rather consent.
based on an individual’s domicile. While Justice Sotomayor’s comments have an intuitive appeal, she is essentially comparing apples (presence-based jurisdiction for individuals) and oranges (domicile-based jurisdiction for corporations).

Fifth, Justice Sotomayor implies that the Court’s approach has made the general jurisdiction inquiry increasingly difficult for courts. She observes that the new rule requires the defendant to not only possess continuous and systematic contacts with a state, but also that “those contacts must . . . surpass some unspecified level when viewed in comparison to the company’s ‘nationwide and worldwide’ activities.”

Justice Sotomayor is of the view that this comparative exercise “injects an additional layer of uncertainty” and that that “courts will now have to identify the extent of a company’s contacts in every other forum where it does business in order to compare them against the company’s in-state contacts.” Justice Sotomayor is likely right that the comparative approach adopted by the Court could marginally complicate the jurisdictional analysis. However, it is worth noting that the continuous and systematic test that existed pre-Daimler (with or without the “at home” qualifier) was hardly a precise science. Lower courts never exhibited any consistency on what was required to meet the continuous and systematic threshold. Moreover, the standard has now been set so high that in most cases, the defendant will fall far short of being “at home”—making the precise balancing of forum-based versus non-forum-based contacts largely irrelevant.

The Daimler decision will certainly cause upheaval in the case law for many years to come, as litigants and courts try to come to grips with its consequences. The biggest implication of Daimler is that doing business jurisdiction has been wiped off the jurisdictional map. This, in turn, may result in other grounds for jurisdiction having to “pick up the slack.” While Daimler is important for what it did say, it is also important for what it did not say. Below, I explore the critical questions that the Supreme Court left unanswered in Daimler.

V. Unanswered Questions

Those awaiting the Supreme Court’s decision in Daimler thought that it would resolve a very important jurisdictional question: when is

311. See Erichson, supra note 8, at 85–86 (discussing domicile based-jurisdiction, citing Milliken v. Meyer, 311 U.S. 457 (1940), and noting that “a similar logic extends to corporations”).


313. Id. at 770–71 (Sotomayor, J., concurring).

314. See supra note 244.
"vicarious jurisdiction" appropriate?\textsuperscript{315} Unfortunately, the Court did not answer this question and instead answered another question not argued before the Court: when is a corporation "at home" for the purposes of the general jurisdiction inquiry? Even though this latter question was important, and the Court helpfully clarified the meaning of the "at home" language it had introduced in Goodyear, it was regrettably silent on the issue of imputing a subsidiary's contacts to a parent. It was also silent on imputing alternative bases of jurisdiction—place of incorporation or principal place of business—from a subsidiary to a parent for general jurisdiction purposes.

A. WHEN SHOULD A SUBSIDIARY'S CONTACTS BE IMPUTED TO THE PARENT?

The issue that was surprisingly ducked by both the Court and the concurrence was the one issue that everyone expected this case to decide: when can the contacts of a subsidiary be attributed to a parent for personal jurisdiction purposes? In some ways, the answer to this question might not matter anymore in many cases. If the parent company is sufficiently national or global, with contacts dispersed across many forums, then even with imputation of the subsidiary's contacts, there still would not be general jurisdiction over the parent under the Court's strict "at home" standard. However, one could imagine scenarios involving less national or less global companies whose connections are spread out across fewer jurisdictions. In these circumstances, it would be important to know what test is appropriate to use for imputation of contacts, since there could still be a plausible argument that even under the new "at home" standard, the parent is subject to general jurisdiction.

To the Court's credit, it did reject the Ninth Circuit's agency test for imputation of jurisdictional contacts as being one that, in almost all cases, would yield a pro-jurisdictional result.\textsuperscript{316} However, it did not clarify if some other, perhaps stricter, form of agency could justify the imputation of a subsidiary's contacts to a parent. If some form of agency theory could be used to justify the imputation of contacts between the agent and its principal for general jurisdiction purposes, then this finding would presumably apply in any agent-principal relationship, not just a subsidiary-parent relationship.\textsuperscript{317} After Daimler, it is clear that the Ninth Circuit's "sufficiently important" agency test has been rejected—but it is

\textsuperscript{315.} See generally Hoffman, supra note 8 (coining the term "vicarious jurisdiction").

\textsuperscript{316.} Daimler, 134 S. Ct. at 759-60.

\textsuperscript{317.} See Brief of Amici Curiae Professor Lea Brilmayer Supporting Petitioner, supra note 111, at 21-22 (providing an example of general jurisdiction premised on the hypothetical retention by Daimler of "ABC, a typical modern law firm" that acts as an agent of Daimler).
not clear that all agency tests have been rejected.\textsuperscript{318} Thus, it is presumably open to a plaintiff to argue that the contacts of a defendant’s agent, in certain circumstances, should be imputed to the principal for the purposes of general jurisdiction.\textsuperscript{319} What those circumstances are is an open question.\textsuperscript{320}

The Court should have used \textit{Daimler} as an opportunity to answer the question it was actually supposed to answer and that matters greatly in the real world of litigation: when will the jurisdictional contacts of one party count against another party?\textsuperscript{321} Or, more precisely, when will the jurisdictional contacts of a subsidiary count against its parent?\textsuperscript{322} Courts have been divided on the issue of the attribution of jurisdictional contacts from a subsidiary to a parent for many years,\textsuperscript{323} and the Supreme Court in \textit{Daimler} missed the perfect opportunity to provide some clarity and guidance to courts.

B. \textbf{WHAT IF THE BASIS OF JURISDICTION IS PLACE OF INCORPORATION OR PRINCIPAL PLACE OF BUSINESS?}

Both the Court and the concurrence in \textit{Daimler} focused exclusively on the imputation of contacts from a subsidiary to a parent company for

\begin{footnotesize}
\footnote{318. See \textit{Daimler}, 134 S. Ct. at 759–60. Professor Erichson argues that an agency test is incompatible with a home state test for general jurisdiction: One cannot be at home through an agent. One cannot be a citizen through an agent. When a principal acts through an agent who is a citizen of a state, the principal does not thereby become a citizen. The principal’s conduct through the agent may subject the principal to specific jurisdiction for claims arising out of the conduct, but it does not alter the principal’s home state. Erichson, supra note 8, at 91–92.}

\footnote{319. See Collyn A. Peddie, \textit{Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown}, 63 S.C. L. Rev. 697 (2012); see also Silberman, supra note 8, at 125–26 (noting that “mere agency—or even the more liberal ‘multinational enterprise’ concept—is much harder to justify [than alter ego] in the context of general jurisdiction”).}

\footnote{320. On the issue of imputation generally, see Hoffman, \textit{supra} note 8; Peddie, \textit{supra} note 319; Silberman, \textit{supra} note 8. Interestingly, the Court also referred to the General Distributor Agreement signed by MBUSA and Daimler in assessing the agency question. \textit{Daimler}, 134 S. Ct. at 752. This leaves open the possibility that a determination of agency will turn, at least in part, in how the parties structure their relationship in writing.}

\footnote{321. \textit{Contra} Sherry, \textit{supra} note 8, at 116 (“The imputation question must be answered eventually, but it should be addressed in a more appropriate case: one in which the plaintiffs have a real connection to the forum state and the parent company can plausibly be held liable for the acts of its subsidiary. That is not this case. Deciding a broad, recurring question in the context of a unique case is too likely to lead to an answer that is right for this case but wrong for the run-of-the mill case.”).}

\footnote{322. Professor Winship observes that the question is actually more complicated than it appears given different forms of corporate structure. Winship, \textit{supra} note 8, at 441. She states, “[g]enerally courts have not wrestled with the consequences of the specific corporate relationship—whether the subsidiary is direct or indirect, how many tiers are between the parent and subsidiary, or whether the subsidiary is wholly or partially owned.” \textit{Id.}}

\footnote{323. See Hoffman, \textit{supra} note 8, at 766 (“Despite the frequency with which courts must deal with these jurisdictional arguments, the lower court case law is a mess.”).}
purposes of assessing whether the parent is subject to general jurisdiction in the forum. What if the underlying basis of jurisdiction over the subsidiary, however, is not continuous and systematic general business contacts sufficient to render the corporation "at home," but rather state of incorporation or principal place of business? For instance, in *Daimler* itself, what if MBUSA was incorporated in California or had its principal place of business there? If this underlying basis of general jurisdiction over MBUSA could—under whatever theory—be imputed to the parent, what does that mean for general jurisdiction over the parent?\(^\text{324}\)

There are at least three possible analyses here. First, if jurisdiction over the subsidiary is based on being incorporated in the forum or having its principal place of business there, and that jurisdictional contact is imputed to the parent, one could argue that the parent is *de facto* subject to general jurisdiction in the forum as well. Using a variation of the facts of *Daimler* itself, one could argue that if MBUSA was incorporated in California and that jurisdictional contact was imputed to Daimler, then Daimler would also be regarded as being incorporated in California and therefore subject to general jurisdiction there. Depending on how expansive the underlying test for imputation is, this approach could have quite significant jurisdictional consequences. If courts adopted a liberal view of imputation, then a parent could be subject to general jurisdiction in any state where any of its subsidiaries are incorporated or have their principal place of business. This would give a lot of power to a state like Delaware, where the majority of corporations in America are incorporated.\(^\text{325}\) Thus, Delaware would not only have general jurisdiction over the companies that have incorporated in Delaware, but also potentially the parents of those companies, provided that a court would impute this jurisdictional contact to the parent.

This approach was recently taken by the U.S. District Court of Minnesota in *George v. Uponor Corp.*\(^\text{326}\) In *George*, the parent company was incorporated in Finland, while its subsidiary was incorporated in Illinois and had its principal place of business in Minnesota.\(^\text{327}\) The court,

---

\(^\text{324}\) Professor Childress also identifies this as an unanswered question in the wake of *Daimler*:

This raises an interesting question: would Daimler be subject to general jurisdiction in Delaware or New Jersey, where MBUSA would be subject to general jurisdiction, as these are its places of incorporation and principal place of business? Given that under the Court's test MBUSA is at home in these fora, can its contacts be imputed to Daimler? We do not know the answer to that question in light of the Court's silence on imputation. But, I suspect that the answer would be no in light of the Court's strong language limiting general jurisdiction.

Childress, *After Bauman*, supra note 8, at 201.

\(^\text{325}\) *See generally* Lewis S. Black, Jr., *DEP'T OF STATE Div. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE* (2007).

\(^\text{326}\) 988 F. Supp. 2d 1056 (D. Minn. 2013).

\(^\text{327}\) Id. at 1060.
applying a form of agency test, held that jurisdiction was appropriate because the parent "exercises a sufficient degree of control and domination over [the subsidiary] to satisfy due process." Consequently, because the subsidiary was subject to general jurisdiction in Minnesota (its principal place of business), so too was the parent. George was decided prior to the Supreme Court's decision in Daimler. After Daimler was released, the defendant moved for reconsideration. The court upheld its earlier decision that the parent was subject to general jurisdiction in Minnesota. In so doing, it distinguished Daimler, stating:

In contrast, Uponor Corp.'s subsidiary in this case, Uponor, Inc., does not simply conduct business in Minnesota. Unlike MBUSA, Uponor, Inc.'s principal place of business is in the forum state, and Uponor Corp. conducts much if not most of its American operations, in addition to sales, through Uponor, Inc. Finding personal jurisdiction over Uponor Corp. in Minnesota on this basis does not broadly expose the parent company to jurisdiction in any state where it conducts business.

It is clear that the George court viewed the imputation question presented in Daimler (imputation of contacts) as different from that presented in in the case before it (imputation of principal place of business). In the latter scenario, it viewed general jurisdiction as following automatically from the imputation of the subsidiary's principal place of business to the parent.

There is arguably a conceptual problem with subjecting a parent to general jurisdiction in a state because its subsidiary is incorporated there or has its principal place of business there. It essentially results in a corporation being incorporated or having its principal place of business in two places. In our hypothetical variation of Daimler, Daimler would be regarded as incorporated or having its principal place of business in both California and Germany. This would not square well with the Court's statement that "[t]hose affiliations [principal place of business and place of incorporation] have the virtue of being unique—that is, each ordinarily indicates only one place."

A second approach would be to impute the underlying basis of jurisdiction, whether incorporation or place of business, and view that basis, alongside all the other contacts between the parent and the forum, as either supporting or not supporting the exercise of general jurisdiction over the parent. In other words, the underlying basis of jurisdiction over the subsidiary would be viewed as just another contact for the court to

328. Id. at 1066.
329. Id. at 1066–67.
330. Id. at 1078.
331. Id. at 1078–79.
332. Id. at 1079.
consider when assessing whether the parent was subject to general jurisdiction in the forum. In our hypothetical variation of *Daimler*, the forum would consider whether all of the contacts between Daimler and California, including the imputed jurisdictional contact (subsidiary incorporated in California), would render Daimler subject to general jurisdiction in California. This approach would essentially involve a holistic weighing of the parent’s independent jurisdictional contacts with the forum and adding to those contacts the fact that its subsidiary is incorporated in the forum or has its principal place of business there. This approach, however, is both difficult to conceptualize and to apply. It is not clear that “place of incorporation of a subsidiary,” for instance, is a jurisdictional contact in the same way that more traditional contacts are, such as physical places of business in the state, employees in the state, purchases in the states, sales to the state, etc. Even if it were a legitimate jurisdictional contact, how does the fact that a corporation’s subsidiary is incorporated in the state play out in analyzing continuous and systematic business contacts, such that the corporation is fairly regarded to be “at home”? That is, it is unclear how to weigh this jurisdictional contact (if it is one) alongside all others in applying the new “at home” test. Moreover, even if this factor could be weighed as part of an overall assessment of contacts, one is left with the same issue presented in *Daimler*: if place of incorporation of a subsidiary is just another contact, this will not mean much if the parent is a large multinational corporation. In other words, the impact of this contact will be watered down in cases where the parent is a large corporation such as Daimler. Further, one might argue that this approach defeats the “imputation” aspect of whatever jurisdictional attribution theory a court were to use (e.g. agency, alter ego, etc.). Imputation connotes something more than simply looking at the place of a subsidiary’s incorporation as a factor in assessing general jurisdiction over a parent.

A third approach is to say that while one can impute contacts, one cannot impute the other two bases of general jurisdiction. Under this approach, the argument is that it makes sense to impute the contacts of a subsidiary, such as sales, revenues, and employees, because the subsidiary is under the umbrella of the parent (albeit the two entities are separately incorporated). However, it does not make sense to impute a jurisdictional status that a corporation can have with only one territorial entity. So while factual “contacts” may carry over and have independent jurisdictional consequences for the parent, a descriptive status, such as place of incorporation or principal place of business, cannot. This approach has the benefit of being the cleanest of the three and avoids most conceptual snags and practical difficulties in application. However, one could argue that of the three possible bases for general jurisdiction over a corporation, state of incorporation and principal place of business...
are the “paradigm” cases for general jurisdiction, and therefore should carry some jurisdictional consequence for the parent. Otherwise stated, the “at home” basis for general jurisdiction is the most tenuous basis of the three—and should be the least likely to have jurisdictional ramifications for a parent.

***

The Supreme Court in *Daimler* left two very important jurisdictional questions for another day: (1) when should a subsidiary’s contacts be imputed to its parent? and (2) how does imputation work if the underlying basis of jurisdiction over the subsidiary is that it is incorporated in the forum or has its principal place of business there? The Court’s silence in this respect is unfortunate since many cases involving general jurisdiction implicate some form of agency relationship. For instance, in both the *Bumbo* and *Barriere* cases discussed above, jurisdiction over the defendant was premised, at least in part, on its relationship with an agent in the forum. Nonetheless, the Court’s reinforcement of the “at home” test may make the imputation question less pressing than it once was. Since many parents are large multinational corporations with contacts dispersed throughout the country or the world, it is unlikely that they would be considered “at home” even with the imputation of contacts. The analysis is, of course, slightly different if the underlying basis of jurisdiction is that the subsidiary is incorporated in the forum or has its principal place of business there. Here, it is an open question as to what courts will do.

**CONCLUSION**

This Article asks in its title, “Where is Home Depot ‘at Home’?” Up until very recently, the answer was not entirely clear. In particular, it was not clear whether Home Depot was “at home” in every state where it conducts a significant amount of business—which presumably is in each and every state. Today, there should be more clarity on the issue. Home Depot is “at home” in its state of incorporation (Delaware) and its principal place of business (Georgia). Beyond that, it is unlikely that any court following the letter and spirit of *Daimler* will find that there is general jurisdiction elsewhere.

The decision in *Daimler* effects a dramatic change to the law of personal jurisdiction in the United States. It marks the end of doing business jurisdiction, a basis for personal jurisdiction that has prevailed in the case law for over a century.334 No longer will a court be able to exercise dispute-blind jurisdiction over a defendant on the basis that it has continuous and systematic contacts with the forum. Defendants will

---

334. Twitchell, *supra* note 33, at 203 (noting that “we have used [doing business jurisdiction] regularly for more than a century”).

applaud the case; plaintiffs will try to find ways around it. How *Daimler* plays out in the long run, however, ultimately remains to be seen.