Vanderbilt Law Review

Volume 68 | Issue 2 Article 4

3-2015

A Tale of Two Jurisdictions

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The Supreme Court has recently clarified one corner of personal jurisdiction—a court's power to hale a defendant into court—and pointed the way toward a coherent theory of the rest of the doctrine. For nearly seventy years, the Court has embraced two theories of when jurisdiction over a defendant is permissible. The traditional theory, general jurisdiction, *authorizes jurisdiction when there is a tight connection between the defendant and the forum. The modern theory,* specific jurisdiction, *focuses more on the connection between the lawsuit itself and the forum. Although the two theories should have developed in tandem, the doctrine has become a morass.*

This Article makes three contributions. First, it elucidates the unsettling disjunction that has developed between general and specific jurisdiction. Second, from a doctrinal perspective, it demonstrates that the Court has severely constrained the reach of general jurisdiction in a way that would have been surprising just four years ago. In all likelihood, a corporation is subject to general jurisdiction only in its state of incorporation and where it maintains its principal place of business. This doctrinal development sensibly has restricted general jurisdiction to what I call the saturation point—the place (or very limited number of places) where a defendant cannot have more significant contacts anywhere else. Third, it posits that the concept of a saturation point for general jurisdiction logically suggests a saturation point for specific jurisdiction—that is, a place where the lawsuit itself could not have more significant ties to any other forum. The latter saturation point winds up being more of a thought experiment, but one that bookends a coherent vision of the entire doctrine. The constitutional test for the exercise of jurisdiction at either saturation point is exceedingly demanding, but personal jurisdiction can exist along a continuum. Between the two saturation points, when a particular forum has some connection to both the defendant and also the lawsuit, the constitutional test is quite lax. In other words, the notion of saturation points

* Associate in Law, Columbia Law School. I am grateful to Derek Bambauer, Jane Bambauer, Emily Berman, Pamela Bookman, Robin Effron, Heather Elliott, Claudia Haupt, Brian Lee, Dave Marcus, Roger Michalski, Henry Monaghan, Melissa Mortazavi, James Nelson, Alex Raskolnikov, Laurent Sacharoff, Nelson Tebbe, Ryan Williams, and Maggie Wittlin, as well as the participants in the Seventh Annual Junior Federal Courts Workshop, for their generous comments and suggestions.

and the continuum between them can sensibly integrate the two forms of personal jurisdiction, which until now have had an uneasy relationship.

I. INTRODUCTION

For those of us who are strangely enamored of the nuances of personal jurisdiction, the last four years have been the best of times and the worst of times, an age of wisdom and an age of foolishness.[1] On the one hand, the Supreme Court has clarified general jurisdiction, which gives a court power over a defendant in *any* lawsuit, even one that has no connection to the forum. For decades, general jurisdiction had languished with scant and unsatisfying attention from the Court. But in 2011 and 2014, the Court spoke with a nearly unanimous voice in two cases to define that form of personal jurisdiction with remarkable precision.[2] On the other hand, important aspects of specific jurisdiction remain mired in confusing and fractured jurisprudence. That species of jurisdiction gives a court power over a defendant when the lawsuit itself is closely connected to the forum. Despite the promise of greater clarity in 2011, the Court yet again failed to muster even a majority opinion.[3]

1. *See* CHARLES DICKENS, A TALE OF TWO CITIES 3 (Washington Square Press 1973) (1859).

2. *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (eight-Justice majority); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (unanimous).

3. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (four-Justice plurality).

This Article has three goals. First, it demonstrates that general and specific jurisdiction have had an uneasy relationship from the beginning and have conspired to generate an illogical and unpredictable jurisprudence. Second, it shows that the Supreme Court has significantly reined in general jurisdiction to an extent that would have been surprising just four years ago. In so doing, it brought theoretical cohesion to that aspect of personal jurisdiction. Third, this Article argues that the Court's recent general jurisdiction case law points toward a coherent theory of personal jurisdiction, grounded in the notion that due process protects parties against the arbitrary exercise of judicial power. In so doing, the latent theory within the recent case law offers a way to resolve the long-festering disjunction between general and specific jurisdiction.

Part II elucidates the disjunction. General jurisdiction was rooted in distinctly territorial notions of judicial power. As people and businesses became less geographically concentrated, a territorial approach to jurisdiction often led to bizarre results and, in turn, a series of legal fictions that attempted to correct the worst injustices. Specific jurisdiction aspired to scuttle those fictions and create a pragmatic and flexible basis for jurisdiction. It focused on the reasonableness of jurisdiction in any given place and, in particular, whether the lawsuit itself bore an acceptable relationship to the forum. If all had proceeded according to plan, specific jurisdiction would have become the primary way to hale defendants into court. But that didn't happen. The Supreme Court erected significant barriers to the exercise of specific jurisdiction. To fill the resulting jurisdictional gaps, lower courts often took advantage of the Supreme Court's sparse edicts on general jurisdiction and pressed that doctrine into service in expansive and unpredictable ways. But most of those ad hoc developments were untethered to any sound theory of jurisdiction. Consequently, the two species of personal jurisdiction have never been truly complementary.

Part III argues that the Supreme Court has tightened the concept of general jurisdiction to an extent that, until quite recently, would have been unfathomable. In so doing, the Court provided theoretical cohesion to this aspect of the jurisdictional calculus. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*[4] and *Daimler AG v. Bauman*,[5] the Court made plain that many lower courts' expansive approaches to general jurisdiction over corporations were improper. Instead, a corporation may be subject to general jurisdiction only where

4. 131 S. Ct. 2846.
5. 134 S. Ct. 746.

it is "at home,"[6] and the paradigm of being at home is when a corporation has incorporated in a state or maintains its principal place of business there.[7] But could a corporation be at home somewhere else? It's possible, suggested the Court, but highly improbable.[8] Those answers represented a sea change in general jurisdiction, and *Daimler* signaled that there is almost no play in the joints.

Part IV demonstrates that the near unanimity regarding general jurisdiction sheds light on how to resolve the Court's seemingly insuperable divisions regarding specific jurisdiction. General jurisdiction and specific jurisdiction are not binary. Instead, they simply are terms that describe different points along a constitutional continuum. Within the new general jurisdiction case law lies the germ of a coherent theory, one that has eluded the Supreme Court for decades but can offer a unifying vision of personal jurisdiction.

The seminal case of *International Shoe Co. v. Washington*[9] essentially recognized two relationships that exist along different axes and define the personal jurisdiction continuum—first, the connection between the defendant and the forum; second, the connection between the lawsuit and the forum. If my conclusion in Part II is correct, the Supreme Court has held that when there is no relationship between the lawsuit and the forum, general jurisdiction is constitutionally permissible only at what I call the saturation point. What I mean by this is the place (or limited number of places) where the defendant has so many contacts that there is no other state or country with which the defendant has more significant contacts. Restricting general jurisdiction to the saturation point vindicates a vision of due process that protects parties against the arbitrary exercise of judicial power.

This idea of a saturation point along one axis—the relationship between the defendant and the forum—suggests that there is a saturation point along the other. Courts and scholars have not explicitly entertained or explored this concept. In theory, though, there is a point at which the connection between a lawsuit and the forum is so strong that the assertion of personal jurisdiction is permissible even if the defendant has no connection to the forum. This saturation point is more

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6. *Daimler*, 134 S. Ct. at 754, 760–62; *Goodyear*, 131 S. Ct. at 2851, 2854, 2857; *see also* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 531–32 (2012) (arguing that *Goodyear*'s "at home" formulation articulated a necessary, not merely sufficient, condition for proper exercise of general jurisdiction).

7. *See Daimler*, 134 S. Ct. at 760; *Goodyear*, 131 S. Ct. at 2853–54.

8. *See Goodyear*, 131 S. Ct. at 2853–54; *see also* PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures/Jerry Bruckheimer Films 2003) (Barbossa, upon seeing Jack Sparrow alive: "It's not possible." / Sparrow: "Not *probable*."). *But don't see* PIRATES OF THE CARIBBEAN: ON STRANGER TIDES (Walt Disney Pictures/Jerry Bruckheimer Films 2011).

9. 326 U.S. 310, 318 (1945).

theoretical than real. It is conceptually useful, however, because it identifies the other outer constitutional boundary for personal jurisdiction. Together, these saturation points suggest a lucid theory of jurisdiction based on the concept of nonarbitrariness.

Most cases will not implicate the extreme of either saturation point. They will involve at least some connection between the defendant and the forum as well as some connection between the lawsuit and the forum. That vast middle ground is an area in which the nonarbitrariness principle requires neither relationship to be as strong as it is at either saturation point. The fallacy committed by a plurality (and perhaps a majority) of the Supreme Court has involved taking the stringent standards that govern the extremes and applying them to the middle. In fact, the constitutional test for personal jurisdiction in this middle ground is far more forgiving than current jurisprudence suggests.

Although *Goodyear* and *Daimler* brought considerable theoretical cohesion to general jurisdiction, a practical problem looms. Under the Court's current case law, general jurisdiction is now appropriately narrow, but specific jurisdiction has remained inappropriately limited. The result is an even larger jurisdictional lacuna than the one that had developed insidiously over the last several decades.

The gap need not exist. Because the Constitution imposes exacting standards at the saturation points, but very few restraints in most other cases, the theory developed here would work a vast expansion of specific jurisdiction and significantly alter current doctrine. But this reconceptualization of the doctrine also reveals a wide berth for Congress and the Court to craft prudential restraints on courts' adjudicative power. In so doing, those institutions can address subconstitutional concerns about convenience, predictability, and fairness. This potentially productive dialogue between the legislature and the judiciary cannot happen, though, until the Supreme Court finally differentiates between the truly constitutional and the merely prudential restraints that govern personal jurisdiction.

II. THE DISJUNCTION BETWEEN SPECIFIC AND GENERAL JURISDICTION

Until relatively recently, personal jurisdiction was grounded in territorial theories of judicial power. The centuries-old idea found expression in the canonical case of *Pennoyer v. Neff*: "[E]very State

possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[10]

As courts began to realize that old theories were not up to the challenges presented by a less geographically concentrated society, they developed a modern, pragmatic theory of personal jurisdiction. Although the pragmatic theory should have done most of the heavy lifting in fashioning a new approach fit for twentieth-century realities, its reach became oddly circumscribed. The old and new theories never meshed as early commentators had hoped, and a long-festering disjunction has ensued.

A. The Rise and Unfulfilled Promise of Specific Jurisdiction

Major developments in the late nineteenth and early twentieth centuries—primarily the growth of corporations and the increased mobility of individuals—put stress on the formalism of the old territorial approach to personal jurisdiction.[11] As corporations expanded operations beyond state borders, the likelihood that they might cause harm outside of their home states increased dramatically. Courts responded along two different dimensions, even though at the time they did not conceptualize their responses in that way. In fact, the jurisprudence initially was something of a hodgepodge.[12]

One response essentially tried to fit corporations into the old territorial paradigm. If an individual was amenable to personal jurisdiction in her domicile, what was the equivalent place for a corporation? This approach speaks to the central concept underlying general jurisdiction—discerning where a defendant (whether an individual or an entity) is amenable to jurisdiction for *any* lawsuit. Professor Twitchell aptly termed this form of jurisdiction "dispute-blind," insofar as it is indifferent to any connection between the dispute itself and the forum.[13] In the process of trying to determine the corporate equivalent of domicile, courts invoked a number of metaphors, attempting to suss out where a corporation was "present" or actually "doing business."[14] As courts grappled with those somewhat

10. 95 U.S. 714, 722 (1877).

11. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 620–21 (1988); Stein, *supra* note 6, at 534. Before then, the formalisms were far less problematic, mainly because most disputes were localized. *See* Twitchell, *supra*, at 615.

12. *See* James R. Pielemeier, Goodyear Dunlop*: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 974 (2012).

13. *See* Twitchell, *supra* note 11, at 613.

14. *See id.* at 621–22; Pielemeier, *supra* note 12, at 973.

metaphysical questions,[15] they reached results that often defied consistency and sound theory.[16]

The other response to this dilemma was the rise of what has become known as specific jurisdiction. It was dispute-specific, focusing on where the dispute itself (rather than the defendant) was based.[17] While courts had experimented along these lines for several decades, *International Shoe* revolutionized the jurisdictional landscape by candidly introducing a dispute-specific theory.[18] It began to differentiate the concepts that Professors von Mehren and Trautman later gave the now-familiar monikers of *specific* and *general* personal jurisdiction.[19] *International Shoe* dispensed with the idea that dispute-specific jurisdiction turned on old metaphors of "presence"[20] and "consent."[21] Instead, when a lawsuit "arise[s] out of or [is] connected with the [corporation's] activities within the state," due process allows that state to exercise jurisdiction over the corporation.[22] The analysis thus no longer relies on old formalisms but rather on a defendant's contacts with the forum and the reasonableness of asserting jurisdiction.[23]

Commentators believed that general jurisdiction would diminish in importance as the Supreme Court embraced a more robust role for specific jurisdiction.[24] But the doctrine didn't develop that way. Despite a willingness to decide a range of specific jurisdiction cases over the ensuing decades,[25] the Court did not clearly define exactly what

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15. Professor Stein calls it a "category mistake" to ask whether a corporation is physically present in a state at the time of service of process. Stein, *supra* note 6, at 535.

16. *See* Pielemeier, *supra* note 12, at 972–75.

17. *See* Twitchell, *supra* note 11, at 611, 613.

18. *See id.* at 623–25. Before *International Shoe*, courts experimenting with dispute-specific jurisdiction had couched their analysis in the old nomenclature. One such legal fiction was the idea of "implied consent." *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927).

19. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

20. *See* 326 U.S. 310, 316–17 (1945) (describing "presence" as a conclusion rather than a mode of analysis); *see also* Pielemeier, *supra* note 12, at 779 (referring to the Supreme Court's disapproval of the "presence" test); Stein, *supra* note 6, at 535 (referring to "presence" analysis as a "category mistake"); Twitchell, *supra* note 11, at 624 ("[*International Shoe*] held that the 'presence' formulation begged the question . . . .").

21. *See* 326 U.S. at 318–19 (similarly treating "consent" in dispute-specific contexts as a "fiction").

22. *Id.* at 319.

23. *See id.* at 316–17.

24. *See* von Mehren & Trautman, *supra* note 19, at 1144, 1164; Twitchell, *supra* note 11, at 628, 676.

25. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (noting that the "Court's decisions have elaborated primarily on circumstances that warrant the exercise of

kind of relationship must exist between the lawsuit and the forum in order for specific jurisdiction to be proper.[26] More significantly, the Court placed significant constraints on its scope.[27]

The essential test for specific jurisdiction, as decades of civil procedure students have learned, is whether the defendant has "certain *minimum contacts*" with the forum "such that the maintenance of the suit does not offend 'traditional notions of *fair play and substantial justice*.' "[28] This two-prong test—minimum contacts and basic fairness—still serves as the backbone of specific jurisdiction analyses. Other commentators have ably recounted the doctrinal permutations and complexities that have since developed.[29] For present purposes, though, it suffices to note just some of the most prominent ways in which the Court has cabined specific jurisdiction.

Since *International Shoe*, the Court's specific jurisdiction case law has focused almost entirely on the defendant. While the doctrine nominally considers the possible inconvenience to a plaintiff if the lawsuit were relocated to a different forum,[30] it overwhelmingly treats a defendant's inconvenience as paramount in the jurisdictional calculus. At one point, the Court asserted that one of the primary purposes of the minimum contacts prong was to "protect[ ] the defendant against the burdens of litigating in a distant or inconvenient forum."[31] It has also treated inconvenience to defendants within the fairness prong of the analysis.[32] Exactly what degree of inconvenience

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specific jurisdiction, particularly in cases involving 'single or occasional acts' occurring or having their impact within the forum State").

26. *See* Twitchell, *supra* note 11, at 629–30, 633, 637; *see also* Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 727–28.

27. *See* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 130–32; Stein, *supra* note 6, at 542.

28. *Int'l Shoe*, 326 U.S. at 316 (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

29. For particularly good overviews of the major cases since *International Shoe*, see Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 56–78 (1990), and William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 599–637 (1993). Professor Effron also offers a nice overview and a very useful discussion of the Court's 2011 personal jurisdiction decisions. *See* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 872–91 (2012).

30. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (noting that plaintiff's forum choice is a relevant consideration under *International Shoe*'s fairness prong); Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (same).

31. *World-Wide Volkswagen*, 444 U.S. at 292.

32. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–14 (1987) (majority opinion) (noting that fairness factors include consideration of "the burden on the defendant" and that "the burden on the defendant in this case is severe").

presents constitutional concerns remains somewhat murky;[33] nonetheless, inconvenience to the defendant remains a central feature of the specific jurisdiction analysis.[34]

Perhaps the most conspicuous way in which the Court has adopted a defendant-centric focus is through its refinement of the minimum-contacts prong. It is not enough that the defendant simply have a meaningful contact with the forum (for example, if the defendant's product causes harm in the forum state). Rather, the contact must result from the defendant's "purposeful availment" of the forum's benefits and protections.[35] Thus, if a local automobile retailer sells a car in New York, the purchaser drives the car across the country, and the car becomes involved in an accident in Oklahoma, the retailer is not subject to personal jurisdiction in Oklahoma.[36] Why? Although there is a meaningful contact with Oklahoma (the car sold by the defendant caused harm there), the contact did not result from the defendant's *purposeful* association with the forum. Instead, the car wound up in Oklahoma through the plaintiff's "unilateral activity."[37] This insistence on the defendant's intentional contact with the forum proves especially vexing when a product has moved through an extensive distribution chain. The Court continues to express skepticism that a manufacturer, simply by placing its product into the stream of commerce, has demonstrated sufficient purposeful contacts with states and countries along the distribution chain.[38]

The test for specific jurisdiction thus has become increasingly demanding.[39] Although this modern theory of personal jurisdiction—with its focus on contacts and reasonableness—was supposed to become

33. *Compare id.* at 114 (noting unconstitutional inconvenience of compelling a Japanese manufacturer to travel to California and litigate in a foreign judicial system), *with* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483–84 (1985) (holding that inconvenience experienced by a Michigan franchisee in traveling to Florida to try case was not "so substantial as to achieve *constitutional* magnitude" (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957))).

34. Many scholars have roundly criticized this development. *See, e.g.*, A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 627 (2006) (arguing that "the constitutionalization of convenience turns out to be one of the greatest flaws of personal jurisdiction doctrine as currently conceived"); *see also* Borchers, *supra* note 29, at 95 (arguing "that the convenience rationale is, at a minimum, severely overstated").

35. *Burger King*, 471 U.S. at 475; *see also* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

36. *See World-Wide Volkswagen*, 444 U.S. at 288–91.

37. *Id.* at 298 (quoting *Hanson*, 357 U.S. at 253).

38. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (plurality opinion) (noting that placement of product into stream of commerce does not demonstrate that defendant has "targeted the forum").

39. *See* Borchers, *supra* note 27, at 130–32; Stein, *supra* note 6, at 542.

the dominant mode of analysis, it actually created severe jurisdictional gaps. But general jurisdiction remained alive and well. In fact, because of the Supreme Court's crabbed approach to specific jurisdiction, general jurisdiction still played an outsize role, but with only limited and vague guidance from the Court.

B. The Persistence of General Jurisdiction

International Shoe recognized the continuing salience of true general jurisdiction, in the sense that such jurisdiction is dispute-blind.[40] There was widespread agreement that a corporation would be subject to general jurisdiction at least at its "home bases"—its place of incorporation and its principal place of business.[41] But how much further it might extend remained unclear initially. During the next sixty-six years, the Supreme Court decided only two general jurisdiction cases. Because both seemed so easy on their facts, they offered only limited guidance to lower courts.

The first, *Perkins v. Benguet Consolidated Mining Co.*, involved a suit in Ohio against a foreign mining corporation.[42] Although the defendant's mining operations were centered almost entirely in the Philippines, those operations had ceased during the Japanese occupation of the Philippines in World War II. The company's president and general manager returned to his home in Ohio and managed the corporation's activities from there for the remainder of the war.[43] The Supreme Court held that Ohio could exercise general jurisdiction over the defendant.[44] As scholars and courts have recognized, the case comfortably fit into the traditional conception of general jurisdiction because the company effectively had relocated its principal place of business, albeit temporarily, to Ohio.[45]

The second case, *Helicopteros Nacionales de Colombia, S.A. v. Hall* ("*Helicol*"),[46] presented an easy example at the other end of the

40. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

41. *See* von Mehren & Trautman, *supra* note 19, at 1141–42; Twitchell, *supra* note 11, at 633; *see also* Brilmayer et al., *supra* note 26, at 735.

42. 342 U.S. 437, 447 (1952).

43. *Id.* at 447–48.

44. *See id.* at 448.

45. *See, e.g.*, Brilmayer et al., *supra* note 26, at 734; Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 213 (2011); von Mehren & Trautman, *supra* note 19, at 1144; *see also* Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 60 U. KAN. L. REV. 549, 566–67 (2012) (describing *Perkins* as presenting "extreme facts" and noting the Supreme Court's later characterization that Ohio had become defendant's "de facto principal place of business").

46. 466 U.S. 408 (1984).

spectrum. The defendant had no physical operations in Texas. Its only contacts with the forum included sending its CEO to Texas for one contract negotiation, purchasing goods and services from Texas, sending personnel to Texas for occasional training, and drawing money from a Houston bank into its own account in New York.[47] Although such contacts clearly would have been sufficient for any action arising out of them,[48] the Court had little trouble concluding that they fell far short of the standard for general jurisdiction. Notably, the Court contrasted the case with *Perkins*, but it offered no real clues about how to analyze cases that fell into the vast expanse between *Helicol* and *Perkins*.[49]

In theory, the lack of guidance from the Supreme Court regarding general jurisdiction should not have mattered that much. But general jurisdiction retained an oddly prominent place because of the confluence of two factors. First, as discussed above, the promise of a broad and flexible doctrine of specific jurisdiction never came to full fruition. Second, the Supreme Court offered only limited guidance on the appropriate standards for general jurisdiction and indicated a basic unwillingness to police its bounds. Lower courts largely embraced the opportunity to give the doctrine a wide reading. Consequently, general jurisdiction often provided a surer grounding for haling defendants into court, and it served to fill jurisdictional gaps left by the Supreme Court's often hidebound approach to specific jurisdiction.[50]

Lower courts' tests for general jurisdiction often were quite lax and, even more frequently, bereft of any sound theoretical justification. A number of courts continued to invoke the old pre–*International Shoe* metaphors of "presence" and "doing business."[51] They usually insisted on a showing of direct sales into the forum and a fairly minimal physical presence there.[52] Despite the fact that those metaphors originally had sought to capture the corporate equivalent of an individual's domicile,[53] courts often applied such tests in a way that exposed some defendants to general jurisdiction even when those defendants manifested none of the "traditional indicia of such jurisdiction—a home base, an agent for

47. *Id.* at 416.

48. Twitchell, *supra* note 11, at 639–40.

49. *See Helicol*, 466 U.S. at 414–16.

50. Borchers, *supra* note 27, at 130–32; Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 196–97; *see also* Meier Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 680–81 (2012) (noting ubiquity of "doing business" approach to general jurisdiction).

51. Pielemeier, *supra* note 12, at 981–82; Twitchell, *supra* note 11, at 635–36.

52. *See* Feder, *supra* note 50, at 680 n.20.

53. *See supra* notes 13–16 and accompanying text.

service of process, [or] a local office."[54] In other words, the "doing business" test encompassed far more than a corporation's principal place of business and could include almost any place where a corporation engaged in regular business activities.[55] As a result, the old metaphors had strayed far from their intended goal. Moreover, their continued vitality was perplexing in light of *International Shoe*'s admonition that such metaphors were mere conclusions rather than actual modes of analysis.[56]

Other courts set the bar even lower, holding that defendants could be subject to general jurisdiction based only on a high volume of sales in the forum (despite a lack of physical presence there).[57] Such an approach has proved especially controversial when courts assert general jurisdiction based only on the availability of a defendant's website and a certain volume of Internet sales into the forum.[58] Professor Pielemeier has argued that perhaps the most frustrating approach involved tallying the defendant's contacts with the state and then simply announcing whether they were sufficient to justify general jurisdiction.[59]

Even courts that insisted on a higher showing—say, requiring that the defendant have some physical presence, such as a small office[60]—failed to offer a sound theoretical justification for why such a minimal connection to the forum should make the defendant answerable for any and every lawsuit there. General jurisdiction was filling some of the gaps left by the Court's specific jurisdiction case law but in a haphazard and unpredictable way. The disjunction between the two thus persisted. By the time the Supreme Court decided *Goodyear*, general jurisdiction had become a "theoretical wasteland."[61]

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54. Twitchell, *supra* note 11, at 635.

55. *See id.* at 633–36.

56. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945); *see also* Pielemeier, *supra* note 12, at 982.

57. *See* Peterson, *supra* note 45, at 213–14 (describing courts' "general assumption" that extensive direct sales could lead to general jurisdiction); Pielemeier, *supra* note 12, at 983 (describing this as the minority position); *see also* Borchers, *supra* note 27, at 127–29 (noting that "no clear answer exists" whether a certain volume of direct sales can lead to general jurisdiction).

58. *See, e.g.*, Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1076–80 (9th Cir. 2003); Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 509–13 (D.C. Cir. 2002); *see also* Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 436–41 (2004) (characterizing *Gator.com* and *Gorman* as the exceptions to the rule that courts have "resisted finding general jurisdiction based solely on defendant's maintenance of a web site accessible from the forum").

59. Pielemeier, *supra* note 12, at 983.

60. *See* Twitchell, *supra* note 11, at 634 (noting that courts were more likely to find general jurisdiction appropriate when defendant engaged in physical activity within state borders).

61. Feder, *supra* note 50, at 684.

III. "AT HOME": CONSTRICTING THE SCOPE OF GENERAL JURISDICTION

A. Goodyear *and its Aftermath*

Twenty-seven years after its last decision on general jurisdiction, the Supreme Court revisited the doctrine in *Goodyear*, which concerned a bus accident in France in which two North Carolina boys died.[62] The boys' parents sued an American corporation and three of its foreign subsidiaries in North Carolina state court, alleging that faulty tires caused the accident.[63] Although the parent company, Goodyear USA, did not contest jurisdiction in the North Carolina courts, the three subsidiaries did.[64] Yet again, the general jurisdiction question seemed straightforward. As the Supreme Court noted, the subsidiaries were "not registered to do business in North Carolina"; had "no place of business, employees, or bank accounts in North Carolina"; and did "not solicit business in North Carolina."[65]

In one sense, the Supreme Court expeditiously corrected a convoluted—perhaps even specious[66]—jurisdictional analysis by the North Carolina courts. (The state courts had imported the stream-of-commerce theory, which might establish specific jurisdiction over a defendant, into the general jurisdiction analysis.[67]) But in a lucid opinion by Justice Ginsburg on behalf of a unanimous Court, *Goodyear* accomplished far more than mere error correction.

The opinion was a masterstroke. It cleaned up old (and occasionally misleading) metaphors, loose language, and convoluted opinions. It managed to reconcile the holdings of the Supreme Court's cases yet also convey unmistakably that the lower courts had been far too indulgent in finding general jurisdiction. Moreover, it introduced the phrase "at home," which succinctly captures the essence of general jurisdiction and became the lodestar by which lower courts should reorient their analysis.

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62. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850 (2011).

63. *Id.* The three subsidiaries were based in Turkey, Luxembourg, and France.

64. *Id.*

65. *Id.* at 2852. The defendants' only connection with North Carolina was the limited distribution of some of their tires there. But none of the tires distributed in North Carolina included the models that were on the bus in question. *Id.*

66. *See* Stein, *supra* note 6, at 530 ("If a first-year law student had written that answer on my Civil Procedure final exam, I would have had a hard time giving it a passing grade.").

67. *See Goodyear*, 131 S. Ct. at 2854–56. In the specific jurisdiction context, the stream-of-commerce metaphor can permit courts to assert jurisdiction when a defendant's product moves through an extensive distribution chain and causes harm to the end consumer in the forum. To the extent that jurisdiction is permissible, though, it extends only to lawsuits that arise directly from the harm that the product causes in the forum. *See id.* at 2855–56.

The first problem to which *Goodyear* attended was the shorthand phrases that lower courts had used as the tests for specific and general jurisdiction. As noted above, *International Shoe* contained the kernel of this idea.[68] Although that opinion made great strides in many respects, it did not articulate a fully formed theory to differentiate the two species of personal jurisdiction.[69] To fault it for not having anticipated these nuances would be unfair, but some of its phrases wound up having an insidious influence on the development of the case law. When articulating the concept of general jurisdiction, for instance, *International Shoe* said that general jurisdiction could be permissible when a defendant's "continuous corporate operations" are "*so substantial* and of *such a nature*" as to justify jurisdiction over the defendant regarding *any* lawsuit.[70] By contrast, specific jurisdiction is appropriate when a corporation's forum activities are "continuous and systematic, but also *give rise to the liabilities sued on*."[71]

Subsequent cases truncated and inverted those phrases. The Court's general jurisdiction analysis in *Perkins*, for example, asked simply whether the defendant had engaged in "continuous and systematic corporate activities" in the forum.[72] *Helicol* then enshrined the "continuous and systematic" phrase as the test for general jurisdiction.[73] Divorced from the rest of the qualifying language in *International Shoe*, the "continuous and systematic" language had created a deceptively low bar for asserting general jurisdiction. *Goodyear* never explicitly called out the mischief that the shorthand phrase had caused. But Justice Ginsburg's opinion took pains to reintroduce *International Shoe*'s contextualizing language, both for specific and general jurisdiction.[74]

In reorienting the analysis, *Goodyear* made three important moves. First, it identified a corporation's principal place of business and

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68. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–18 (1945).

69. The nomenclature owes to Professors von Mehren and Trautman. *See generally* von Mehren & Trautman, *supra* note 19 (describing specific and general jurisdiction).

70. *International Shoe*, 326 U.S. at 318 (emphasis added).

71. *Id.* at 317 (emphasis added). In fact, the Court went on to make clear that "continuous and systematic" activities were not necessary in the specific jurisdiction context. *Id.* at 318. It was a factual description of International Shoe's activities in Washington. The key for specific jurisdiction is whether the contacts, however limited, give rise to the lawsuit. *See id.*

72. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952). Although *Perkins* had substituted the "continuous and systematic" phrase from *International Shoe*'s description of specific jurisdiction for the "continuous and substantial" phrase, it is not clear that that transposition is meaningful. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 767 n.6 (2014) (Sotomayor, J., concurring in judgment).

73. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984); *see also* Pielemeier, *supra* note 12, at 979–80; Twitchell, *supra* note 11, at 675.

74. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011).

its place of incorporation as the paradigms of where general jurisdiction would be appropriate.[75] Second, it made clear that *Perkins* is the "textbook case" of when general jurisdiction is permissible outside of the paradigms.[76] In so doing, *Goodyear* underscored that the relationship between the defendant and the forum in *Perkins* was not simply substantial but that, in fact, the forum effectively had become the defendant's principal place of business during World War II.[77] Finally, the Court introduced a new phrase that grounded the general jurisdiction inquiry—whether the defendants' contacts with the forum are so substantial "as to render them essentially *at home*" there.[78] The Court cited the "at home" phrase twice more and used it as the standard for assessing whether the defendants were amenable to general jurisdiction in North Carolina.[79] In some ways, the "continuous and systematic" language understandably had become a convenient shorthand because the *International Shoe* phraseology was quite a mouthful.[80] The notion of "at home" expressed the same sentiment but in a pithier, more quotable way. It is a succinct distillation that beautifully conveys how high the bar is.

Goodyear represented a dramatic shift. Courts[81] and

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75. *Id.* at 2853–54.

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

77. *See id.*

78. *Id.* at 2851 (emphasis added).

79. *See id.* at 2854, 2857.

80. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.").

81. *See, e.g.*, Abelesz v. OTP Bank, 692 F.3d 638, 659–60 (7th Cir. 2012) (describing "at home" standard as "stringent"); Henry A. v. Willden, No. 2:10-CV-00528-RCJ, 2014 WL 1809634, at *6 (D. Nev. May 7, 2014) ("The Supreme Court recently twice clarified that the reach of general jurisdiction is narrower than had been supposed in the lower courts for many years."); Estate of Thompson *ex rel.* Thompson v. Mission Essential Pers., LLC, No. 1:11CV547, 2013 WL 6058308, at *5 (M.D.N.C. Nov. 14, 2013) (construing *Goodyear* and stating that "the bar for determining general jurisdiction has been raised"); *see also* Gucci Am., Inc. v. Weixing Li, No. 11-3934-CV, 2014 WL 4629049, at *11 (2d Cir. Sept. 17, 2014) (recognizing that *Daimler* abrogated Second Circuit precedent on general jurisdiction); Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 224–26 & n.2 (2d Cir. 2014) (recognizing stringency of the "at home" standard and suggesting that earlier New York precedent on general jurisdiction might no longer pass muster); Gilmore v. Palestinian Interim Self-Gov't Auth., No. 1-853 (GK), 2014 WL 2865538, at *4–5 (D.D.C. June 23, 2014) (suggesting that *Goodyear*'s articulation of "at home" standard was a significant doctrinal shift); Meyer v. Bd. of Regents of Univ. of Okla., No. 13 CIV. 3128 CM, 2014 WL 2039654, at *2 (S.D.N.Y. May 14, 2014) (treating "at home" language in *Daimler* as limiting general jurisdiction to paradigm examples).

commentators[82] overwhelmingly recognized that the Court had contracted the scope of general jurisdiction and that significant change was afoot. The only real question was *how* significant it would be.[83]

A relatively safe assumption was that a corporation's physical presence in the forum should be a necessary, but not sufficient, condition for the exercise of general jurisdiction.[84] In all likelihood, that requirement should put an end to some courts' practice of exercising general jurisdiction based only on regular sales, including online sales, into the forum.[85] Moreover, it is hard to imagine that a corporation with only a minimal physical presence in the forum will be at home there. Consequently, the "doing business" approach that many courts had adopted—albeit with amorphous standards—probably is no longer valid.[86]

Goodyear, to my mind, was always more ambitious than that, an opinion that effectively restricted general jurisdiction to the paradigm examples (principal place of business and place of incorporation) or their functional equivalents (as in *Perkins*). Other scholars acknowledged that this was a plausible, if not exactly ineluctable, reading of *Goodyear*.[87] Some scholars who were genuinely enthusiastic about *Goodyear*'s constriction of general jurisdiction and the level of clarity and coherence that it provided nonetheless resisted the idea that it had trimmed general jurisdiction to that extent.[88] Moreover, some of those scholars noted that, despite *Goodyear*'s tremendous strides, the

82. *See* Stein, *supra* note 6, at 527–28 (arguing that *Goodyear* "cast[ ] doubt over a large body of lower court decisions"); Feder, *supra* note 50, at 680; Pielemeier, *supra* note 12, at 989–91; *see also* Hoffheimer, *supra* note 45, at 587 (arguing that "[t]he restriction of general jurisdiction to one or two states would effect a radical shift").

83. *See* Feder, *supra* note 50, at 680.

84. *See* Stein, *supra* note 6, at 545.

85. *See id.*; Pielemeier, *supra* note 12, at 989–90; *see also* Peterson, *supra* note 45, at 213–14.

86. *See* Feder, *supra* note 50, at 695 (concluding that *Goodyear*'s "at home" requirement "undermines the lower court case law that has accepted . . . doing business in a state as a sufficient basis for general jurisdiction"); *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 761 n.18 (2014) (noting that precedent finding general jurisdiction based on " 'doing business' in the forum . . . should not attract heavy reliance today").

87. *See* Pielemeier, *supra* note 12, at 990; *see also* Hoffheimer, supra note 45, at 587 (recognizing but criticizing this possibility). Professor Pielemeier also notes that Justices Kennedy, Kagan, and Sotomayor entertained this possibility during oral argument. *See* Pielemeier, *supra* note 12, at 990. In light of Justice Sotomayor's opinion in *Daimler*, though, the musings during oral argument probably merit a grain or two of salt. *See Daimler*, 134 S. Ct. at 767–71 & n.9 (Sotomayor, J., concurring in judgment) (arguing that general jurisdiction should not be limited to place of incorporation and principal place of business).

88. *See, e.g.*, Stein, *supra* note 6, at 547.

Court still would need to clarify certain remaining questions—chief among them the precise scope of the phrase "at home."[89]

Notwithstanding the general scholarly enthusiasm for *Goodyear* and the consensus that, at the very least, it had significantly constrained general jurisdiction, skeptics remained. Some scholars called the opinion "troubling"[90] and doubted whether the Court actually had upended so much case law.[91] They suggested that a defendant's direct sales into a forum, even in the absence of any physical presence there, still might warrant the exercise of general jurisdiction.[92] Furthermore, a minority of courts has clung to the idea that *Goodyear* left lower court jurisprudence completely undisturbed.[93] In that vein, some courts continue to rely solely on a high volume of forum sales to justify asserting general jurisdiction.[94] And when one court decided a question of general jurisdiction, it dismissed *Goodyear*—with literally no analysis—as "not on point."[95]

Although one justifiably can identify certain outstanding questions about the precise scope of *Goodyear*'s edicts on general jurisdiction, some of the skeptics' arguments manufacture ambiguity

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89. *See* Effron, *supra* note 29, at 889; Stein, *supra* note 6, at 545–48; *see also* Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 617, 619–20 (2012) (noting outstanding questions and arguing that "the analytic mechanisms for deciding hard cases remain underdeveloped"); Hoffheimer, *supra* note 45, at 610 (posing a series of questions that *Goodyear* purportedly did not resolve).

90. Hoffheimer, *supra* note 45, at 583; *see also* Peterson, *supra* note 45, at 213 ("The problem with . . . *Goodyear* is that it could be read much more broadly than the facts of this particular case might suggest.").

91. *See* Hoffheimer, *supra* note 45, at 551 (arguing that *Goodyear* "achieved consensus only because it can be read in radically different ways"); Peterson, *supra* note 45, at 217 (assailing "conflicting metaphors and references" that "do not lead in any clear direction").

92. *See* Hoffheimer, *supra* note 45, at 576; Peterson, *supra* note 45, at 213–14; *see also* Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 613 (2012) (arguing that *Goodyear* "is not clear" on whether general jurisdiction requires a defendant's physical presence in forum).

93. *See, e.g.*, Hess v. Bumbo Int'l Trust, 954 F. Supp. 2d 590, 596 n.1 (S.D. Tex. 2013) ("*Goodyear* did not purport to announce new principles or change the law of personal jurisdiction; it applied existing principles in a modern stream-of-commerce context."); *see also* J.B. *ex rel.* Benjamin v. Abbott Labs. Inc., 12-CV-385, 2013 WL 452807, at *2 (N.D. Ill. Feb. 6, 2013) (rejecting the argument that "*Goodyear* created a 'new standard to govern the exercise of general jurisdiction over a corporation' ").

94. *See, e.g.*, Ruben v. United States, 918 F. Supp. 2d 358, 360 (E.D. Pa. 2013); Ashbury Int'l Grp., Inc. v. Cadex Defence, Inc., No. 3:11CV00079, 2012 WL 4325183 (W.D. Va. Sept. 20, 2012); *see also* McFadden v. Fuyao N. Am. Inc., No. 10-CV-14457, 2012 WL 1230046 (E.D. Mich. Apr. 12, 2012) (exercising general jurisdiction over defendant, which had no physical presence in forum, based only on business negotiations in and regular sales into that forum).

95. Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, 807 F. Supp. 2d 699, 704 (N.D. Ill. 2011). *But see* Abelesz v. OTP Bank, 692 F.3d 638 (7th Cir. 2012) (reversing *Magyar Nemzeti Bank*).

where there is none. Perhaps this is born simply of a disagreement with the Court's project. No fair reading, though, can ignore the Court's clear intent to shift the mode of analysis and, through the "at home" standard, dramatically restrain the more adventurous interpretations of general jurisdiction. But the persistence of certain questions—large and small, reasonable and unduly imaginative—necessitated another intervention by the Court.

B. Daimler AG v. Bauman[96]

Daimler reaffirmed the "at home" test for general jurisdiction. Without explicitly saying so, it also moved ever closer to the most restrictive interpretation of that standard. And similar to *Goodyear*, it saw the Court speak with a nearly unanimous voice through an opinion by Justice Ginsburg. (Justice Sotomayor concurred in the judgment.)

Daimler involved allegations that Mercedes-Benz Argentina ("MB Argentina"), a subsidiary of the company now known as Daimler AG ("Daimler"), had collaborated with the Argentine government during the "Dirty War" of 1976–1983 and perpetrated horrific human rights abuses. The plaintiffs sued Daimler, a German corporation, in California.[97] Because the lawsuit concerned events in Argentina, personal jurisdiction in California was appropriate only if Daimler could be subject to general jurisdiction there. The plaintiffs contended that another Daimler subsidiary, Mercedes-Benz USA, LLC ("MBUSA"), had sufficient contacts with California to be amenable to general jurisdiction there and that those contacts were imputable to Daimler, MBUSA's parent. In other words, they contended that MBUSA was "Daimler's agent for jurisdictional purposes."[98]

The Supreme Court rejected the assertion of general jurisdiction over Daimler on two grounds. First, it dispensed with the agency argument in a mere three paragraphs.[99] Second, and far more interestingly, the Court held that even if the subsidiary's California contacts were imputable to Daimler, Daimler still would not be subject to general jurisdiction there.[100]

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96. 134 S. Ct. 746 (2014).

97. *Id.* at 750–51.

98. *Id.* at 752. The plaintiffs also alleged that Daimler itself had enough contacts with California to justify the exercise of general jurisdiction over it. The district court rejected that argument, and the plaintiffs did not challenge that finding. *See id.* at 752, 758.

99. *Id.* at 759 (holding that subsidiary's jurisdictional contacts are imputable to parent corporation only when subsidiary "is so dominated by the [parent] as to be its alter ego").

100. *Id.* at 760.

In some ways, *Daimler* was another easy case. Neither Daimler nor MBUSA was incorporated in California, and neither maintained its principal place of business there.[101] Moreover, MBUSA's California sales represented only 2.4% of Daimler's worldwide sales volume.[102] But the Court's framing of the issue suggests that the paradigm examples of general jurisdiction—except in the rarest cases—will be the exclusive means of obtaining general jurisdiction over a corporation.

For starters, there no longer can be any doubt that "at home" is the standard for assessing when general jurisdiction is appropriate.[103] The majority opinion in *Daimler* used the phrase eighteen times.

After the Court recounted its earlier general jurisdiction case law, including *Goodyear*, it observed that "general and specific jurisdiction have followed markedly different trajectories post–*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but *we have declined to stretch general jurisdiction beyond limits traditionally recognized.*"[104] The last phrase is instructive. In the nineteenth century, the "limits traditionally recognized" derived from a sovereign's authority over people and property within its borders.[105]

The Court then subtly but unmistakably underscored its conclusion with a citation to a seminal article by Professors von Mehren and Trautman.[106] In one passage cited by *Daimler*, they argue that "the sole community where it is fair to require [a corporation] to litigate any cause of action . . . is the corporate headquarters—presumably both the place of incorporation and the principal place of business, where these differ."[107]

Daimler largely made the same point when it discussed *Goodyear* as standing for the proposition that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose [general] jurisdiction there."[108] Immediately afterward, in

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101. *Id.* at 761.

102. *Id.* at 752.

103. *Cf.* Peterson, *supra* note 45, at 215 (arguing that "it reads too much into Justice Ginsburg's statement [in *Goodyear*] to suggest that [a corporation's 'home'] is the only place in which general jurisdiction may be asserted").

104. *Daimler*, 134 S. Ct. at 757–58 (emphasis added).

105. *See* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 149–50 (arguing that, in response to the Supreme Court's suggestion that a corporation is subject to general jurisdiction only in its place of incorporation, states in the nineteenth century began to force corporations wishing to do business in the state to "consent" to jurisdiction).

106. *See Daimler*, 134 S. Ct. at 758 n.9 (citing von Mehren & Trautman, *supra* note 19, at 1177–79).

107. von Mehren & Trautman, *supra* note 19, at 1179.

108. *See Daimler*, 134 S. Ct. at 760.

describing that "limited set of affiliations" for corporations, the Court reiterated what it had said in *Goodyear*: "the place of incorporation and principal place of business are paradigm bases for general jurisdiction."[109]

Of course, the mere description of paradigm examples does not deem them to be the exclusive places where general jurisdiction is appropriate.[110] Indeed, *Daimler* acknowledged as much.[111] At various points throughout the opinion, though, the Court signaled how little room there is for deviation from the paradigm examples. *Daimler* fleshed out the concept of being at home in a state, making plain that a corporation must be "comparable to a domestic enterprise in that State."[112] Moreover, it explained that only an "exceptional case" would justify any deviation from the paradigms and, critically, cited *Perkins* as the quintessential exception to the overarching rule.[113] In *Perkins*, the defendant effectively had relocated its corporate operations to Ohio.[114] The Court's understanding long has been that Ohio had become the defendant's "principal, if temporary, place of business."[115] *Perkins* thus set the bar exceedingly high—essentially, the functional equivalent of a paradigm forum. This presumably is the type of situation that *Daimler* envisioned as the "exceptional case" in which a defendant's affiliations with the forum are "comparable" to those of a domestic company. In fact, *Daimler* went so far as to suggest that

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109. *Id.* (internal quotation marks and alterations omitted).

110. *See* Peterson, *supra* note 45, at 215 (making such an argument about *Goodyear*'s language).

111. *Daimler*, 134 S. Ct. at 760 ("*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."); *id.* at 761 n.19 ("We do not foreclose the possibility that . . . 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.").

112. *Id.* at 758 n.11. Such comparability is not based on an absolute quantum of contacts with the state. Otherwise, as *Daimler* argued, a large corporation could be subject to general jurisdiction everywhere because it might have just as many contacts with a state as does a local business that operates only in that one state. The Court argued, in contrast to Justice Sotomayor, that a "corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n.20; *see also infra* notes 132–134 and accompanying text.

113. *Daimler*, 134 S. Ct. at 761 n.19.

114. "To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011); *see also Daimler*, 134 S. Ct. at 756 n.8 (quoting *Goodyear*'s understanding of *Perkins*).

115. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, n. 11 (1984); *see also Daimler*, 134 S. Ct. at 756 n.8 (noting that "Ohio could be considered 'a surrogate for the place of incorporation or head office' " (quoting von Mehren & Trautman, *supra* note 19, at 1144)).

Perkins might have set the bar so high as to render it a one-off situation.[116]

Perhaps most tellingly, when the Court actually analyzed whether Daimler or MBUSA was at home in California, it trained on the fact that neither company was incorporated in California and that neither maintained its principal place of business there.[117] Full stop. The Court offered no further discussion of other ways that the companies might have been at home in California. In other words, in the overwhelming majority of cases, there will be no occasion to explore whether a *Perkins*-type exception might apply.

If I am right, one might query, why didn't the Court state directly that general jurisdiction is proper only in a paradigm forum? 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.[118] 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.[119]

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Daimler thus confirmed the most ambitious reading of *Goodyear*. A corporation likely is subject to general jurisdiction only in a state where it has incorporated or maintains its principal place of business. 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.[120] Just as first-year medical students learn not to privilege bizarre diagnoses, lawyers and scholars would do well to heed the same adage here: "When you hear hoofbeats, think of horses, not zebras."

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116. *See Daimler*, 134 S. Ct. at 756 n.8 (noting that "*Perkins* 'should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction' " (quoting von Mehren & Trautman, *supra* note 19, at 1144)).

117. *See id.* at 761.

118. *See* Borchers, *supra* note 27, at 137 (arguing for such flexibility in general jurisdiction doctrine).

119. *See* Hertz Corp. v. Friend, 559 U.S. 77, 96–97 (2010) (interpreting "principal place of business" for purposes of diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1)).

120. *See Daimler*, 134 S. Ct. at 760, 761 n.19.

IV. CONSTITUTIONAL SATURATION POINTS AND THE BOUNDS OF PERSONAL JURISDICTION

The last three years have witnessed a sea change in the Supreme Court's general jurisdiction case law. Just as remarkable as the extent of the change is the level of consensus that the Court has achieved in effecting it: *Goodyear* was unanimous, and the *Daimler* majority opinion commanded eight votes. By contrast, the Court has evinced an entrenched division on certain questions of specific jurisdiction. Most conspicuously, it has struggled for nearly thirty years to determine whether, and to what extent, specific jurisdiction is proper when a defendant places a product into the stream of commerce, the product moves through a sophisticated distribution chain, and the product then causes harm in the forum state. The Court failed to generate a majority opinion in 1987 when it first confronted the issue,[121] and it seemed even more fractured in 2011 when it tried again to resolve the question.[122]

Scholars have recognized this strange dichotomy in the Court's treatments of specific and general jurisdiction, a state of affairs that reflects the entrenched notion that the two concepts operate independently. Indeed, part of the problem in *Goodyear* was the North Carolina courts' reliance on the analytical tools of specific jurisdiction in the general jurisdiction context. But treating the two species of personal jurisdiction as independent misses an important undercurrent.

This Part demonstrates that a theory lurks within the Court's consensus on questions of general jurisdiction, a theory that can bridge the divide between the two species of personal jurisdiction. In severely tightening the standards for general jurisdiction, the Court has brought much needed theoretical cohesion to that corner of the doctrine. But what is right with general jurisdiction today suggests what is wrong with specific jurisdiction.

Goodyear and *Daimler* vindicate a distinct vision of personal jurisdiction: courts may not exercise their adjudicative power in arbitrary ways. But the Court's specific jurisdiction case law has developed layer upon layer of requirements that have little, if anything, to do with protecting against arbitrariness. For decades, scholars have grappled with the major questions that the specific jurisdiction jurisprudence has raised since *International Shoe*, including the

121. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

122. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

current approach's focus on contacts and purposefulness,[123] its defendant-centric nature,[124] and its elusive constitutional source.[125] Amidst the apparent doctrinal chaos, though, there is the germ of a coherent theory. Reorienting specific jurisdiction around the nonarbitrariness principle that underpins the new general jurisdiction holds the possibility of fostering a more cohesive and flexible jurisdictional regime.

A. Two Saturation Points

As I have discussed earlier, personal jurisdiction originally was predicated on what today courts and scholars call general jurisdiction. It depended entirely on the relationship between the defendant and the forum, even when the lawsuit itself had no connection to the forum.[126] *International Shoe* introduced a new dimension to the theory—the possibility that personal jurisdiction could be predicated on the relationship between the lawsuit and the forum.[127] Although the latter idea was not entirely novel, *International Shoe* marked the advent of an approach that candidly relied on that relationship. In earlier decades, courts had incorporated dispute-specific considerations into their jurisdictional analyses only by way of legal fictions, such as implied consent, that were rooted in the old territorial approach.[128]

To conceptualize the two different types of relationships that undergird personal jurisdiction analyses since *International Shoe*, imagine the following basic graphic representation. (It looks rather bare now, but as the analysis proceeds, it will become more interesting.) The x-axis represents the quantity and quality of the defendant's contacts with the forum. This was the traditional dimension of personal jurisdiction analysis. By contrast, the y-axis represents the extent of

123. *See, e.g.*, Brilmayer & Smith, *supra* note 89, at 618; Spencer, *supra* note 34, at 624.

124. *See, e.g.*, Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 736–37 (2012); Spencer, *supra* note 34, at 624.

125. *See, e.g.*, Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 574–82 (1995); Borchers, *supra* note 29, at 87–101; Perdue, *supra* note 124, at 733–39; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115–33 (1981).

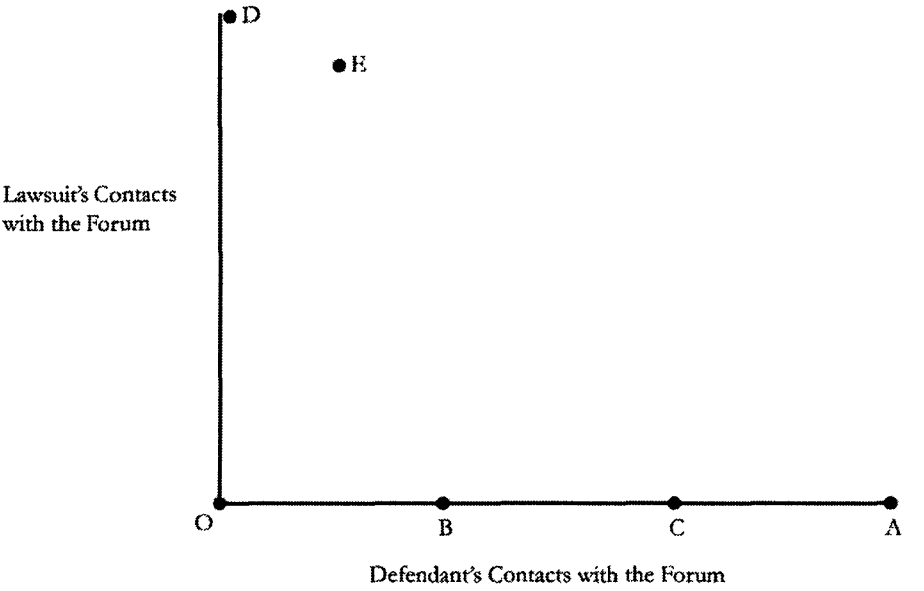
126. *See* Twitchell, *supra* note 11, at 614–15. *But see id.* at 618 (noting that through certain dispute-specific devices, courts, in fact, "only occasionally decided disputes having absolutely no relationship with the forum").

127. *See supra* notes 17–24 and accompanying text; *see also* Twitchell, *supra* note 11, at 625; von Mehren & Trautman, *supra* note 19, at 1136.

128. *See supra* note 18; *see also* Twitchell, *supra* note 11, at 621.

the lawsuit's relationship to the forum, the dimension that *International Shoe* and its progeny have developed.

Figure 1



1. The Saturation Point of General Jurisdiction. By definition, general jurisdiction is dispute-blind and thus involves no connection between the lawsuit and the forum. Accordingly, the y-value for the outer boundary of general jurisdiction is "0"; in other words, true general jurisdiction is some point along the x-axis. (Of course, if a defendant is subject to general jurisdiction in a forum and there is also some level of connection between the lawsuit and the forum, that's fine. But the outer boundary of general jurisdiction must fall on the x-axis.)

One place where general jurisdiction always existed was at point "A," the farthest right point on the x-axis. This is where a defendant has the greatest possible connection to the forum. For an individual, it is her domicile;[129] for a corporation, the principal place of business or the place of incorporation.

129. Individuals also may be subject to general jurisdiction in a forum based on personal service of process there—so-called transient or "tag" jurisdiction—even when the individual has only a minimal connection to the forum. *See* Burnham v. Superior Court, 495 U.S. 604 (1990). Numerous commentators have criticized the rule's continuing endurance. *See generally, e.g.*, Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675 (1991); Allan R. Stein, Burnham *and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597 (1991); Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659 (1991).

Before *Goodyear*, the expansive approaches that lower courts had taken regarding general jurisdiction located that boundary well to the right of the origin on the graph (point "O") but also well to the left of point "A." As I have described above, some courts held that general jurisdiction was appropriate based on a relatively minimal connection between the defendant and the forum, such as a certain volume of sales in the forum. It's a guestimate, but call this point "B." Other courts insisted on a higher showing—a more continuous relationship with the forum and some sort of physical presence, perhaps even a branch office. Call this point "C." Figuring out where to locate that outer boundary—whether at "B" or "C" or somewhere in between—did not correspond to any well-developed theory of general jurisdiction.[130]

In *Goodyear* and *Daimler*, the Supreme Court located the outer boundary of general jurisdiction at "A." This is what I refer to as the saturation point—the point at which it is impossible for the defendant to have more significant contacts with any other forum. My formulation of the saturation point allows for different states to assert general jurisdiction over an entity—for instance, where the corporation maintains its principal place of business and also where it has incorporated. Both states are places where the corporation is "at home," albeit in different ways. In some respects, these two paradigm forums are incommensurable. It is difficult to say that a corporation is more at home in one than in the other. But one can say that the corporation does not have more significant contacts anywhere else.[131]

This formulation of the saturation point also accounts for the slight leeway that *Daimler* still allows for a case like *Perkins*, one in which general jurisdiction is appropriate in the functional equivalent of

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Count me among those who regard transient jurisdiction as an anachronism that is inconsistent with modern approaches to jurisdiction, including the theory developed here, and should remain the stuff of truly terrible movies. In that vein, never, ever see SERVING SARA (Paramount Pictures 2002).

130. *See* Feder, *supra* note 50, at 684 (calling general jurisdiction a "theoretical wasteland").

131. In many ways this is an attempt to discern the corporate equivalent of an individual's domicile. That concept will include a corporation's principal place of business, which, while often readily discernible, sometimes presents a tricky question. For purposes of the diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1) (2012), the Supreme Court has created a bright-line rule: a corporation's principal place of business is its "nerve center," which in almost every instance will be the corporation's headquarters. *See* Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010). In the personal jurisdiction context, the inquiry into a corporation's principal place of business is probably more flexible even though, in most cases, it also will point to the "nerve center." Moreover, unlike in the context of § 1332, it is possible—if highly unlikely (and slightly oxymoronic)—for a corporation to have more than one principal place of business for purposes of personal jurisdiction. The chief candidate for this idea is probably the Boeing Company, which in 2001 moved its headquarters to Chicago, Illinois, but still maintains extensive operations in Seattle, Washington. I am skeptical whether Boeing is still subject to general jurisdiction in Washington, but I acknowledge that Boeing presents an anomalously close call.

a paradigm forum. In *Perkins*, the lawsuit commenced when the defendant was directing corporate operations from its temporary principal place of business in Ohio. Consequently, at that moment in time, the defendant was not more at home anywhere else.

Moreover, this understanding of the saturation point suggests that identifying where a corporation is at home depends on more than an analysis of the total quantum of contacts that the defendant has with the forum.[132] Even if a corporation has deep and significant contacts with a particular place, the relevant question remains whether the defendant has *more* significant contacts elsewhere. Such an approach captures the unique relationship between a defendant and the place (or limited number of places) where it truly is at home. In the wake of *Goodyear*, some commentators advocated this approach,[133] which the *Daimler* majority clearly—and, to my mind, correctly—adopted.[134]

For decades, the idea of shrinking general jurisdiction to the paradigm examples seemed little more than an academic pipe dream.[135] The last four years, though, have seen just such a momentous shift, which actually might lead the way to a more coherent understanding of how personal jurisdiction, writ large, should operate.

2. The Saturation Point of Specific Jurisdiction. As the Court has confined general jurisdiction to the saturation point along the x-axis, *Goodyear* and *Daimler* raise the intriguing possibility of a second saturation point, one along the y-axis. Courts and scholars long had been aware that point "A" on the graph was one possible boundary of general jurisdiction, even if most believed that the boundary should lie somewhere to the left of "A." But scholars and American courts have not yet explored the possibility of a saturation point of specific jurisdiction.

The idea behind a saturation point along the y-axis is that there is a point at which the connection between a lawsuit and the forum is so tight that a particular defendant actually does not need to have any connection to the forum. To borrow a phrase, when the lawsuit itself is "at home" in the forum, a state may entertain that lawsuit. In exercising

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132. *Cf.* Daimler AG v. Bauman, 134 S. Ct. 746, 767 (2014) (Sotomayor, J., concurring in judgment) (arguing that general jurisdiction turns 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"); Brilmayer et al., *supra* note 26, at 742 (arguing that courts "should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states").

133. *See* Feder, *supra* note 50, at 694; Stein, *supra* note 6, at 537–38.

134. *See Daimler*, 134 S. Ct. at 762 n.20.

135. *See* Spencer, *supra* note 34, at 656–57; Twitchell, *supra* note 11, at 676; von Mehren & Trautman, *supra* note 19, at 1144, 1179. *But see* Twitchell, *supra* note 50, at 171–72 (expressing a "change of heart" and suggesting a more expansive approach to general jurisdiction).

jurisdiction, the state does not act arbitrarily, notwithstanding the defendant's limited or nonexistent relationship to the state.

This saturation point is more theoretical than real. In fact, imagining such a case is almost impossible. If a lawsuit is inextricably connected to the forum, any given defendant is likely to have *some* connection—however tenuous, unintentional, or insubstantial—to the forum. For this reason, the saturation point, identified as point "D" on Figure 1, probably does not actually touch the y-axis, even though it moves as close as possible to the axis.[136]

There actually is no need to stretch one's imagination to find a real or convincing case, though. The concept of a saturation point along the y-axis is more of a thought experiment. But the idea inheres in the very concept of specific jurisdiction. Scholars who fleshed out the theory of specific jurisdiction—including its provenance and its purpose—implicitly recognized that it does not depend on any relationship between the defendant and the forum. Instead, specific jurisdiction, in its purest form, depends only on a connection between the lawsuit and the forum.[137]

This notion derives in part from one of the principal insights of *International Shoe* and its progeny, which focused on the reasonableness of asserting specific jurisdiction.[138] *International Shoe* itself had no occasion to explore the outer limits of specific jurisdiction. The defendant had a significant affiliation with the forum,[139] and the connection between the lawsuit and the forum was also tight.[140] Thus, in Figure 1, *International Shoe* probably falls somewhere around point "E." Nonetheless, the case reflected a clear conceptual shift away from

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136. Perhaps the situation that comes closest to this concept is when a plaintiff brings a lawsuit that is truly at home in the forum but mistakenly sues the wrong party, which has no connection to the forum. Today, such a defendant could move to dismiss the claim for lack of personal jurisdiction. *See, e.g.*, FED. R. CIV. P. 12(b)(2). Under the theory developed here, the defendant would be subject to personal jurisdiction but, instead, could bring an early motion to dispose of the claim on the merits. *See, e.g.*, FED. R. CIV. P. 12(b)(6) (motion for failure to state a claim upon which relief can be granted); FED. R. CIV. P. 56 (motion for summary judgment). I am grateful to Heather Elliott for suggesting this example.

137. *See* Twitchell, *supra* note 11, at 627 ("Under [its] original definition[ ], . . . specific jurisdiction was based on the relationship between the forum and the dispute being litigated."); *see also* von Mehren & Trautman, *supra* note 19, at 1136 ("[A]ffiliations 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.").

138. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317, 320 (1945) (noting reasonableness of assertion of specific jurisdiction); *see also, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957) (noting that the centrality of events in California made California a reasonable forum).

139. *See Int'l Shoe*, 326 U.S. at 313–14 (noting that defendant employed salesmen and regularly engaged in business in forum).

140. *See id.* at 311–12 (noting substantive claim for unpaid unemployment taxes incurred in, and owed to the government of, the forum).

the idea that courts should have to pigeonhole all assertions of personal jurisdiction into the old territorial framework that looked solely at the relationship between the defendant and the forum. Instead, jurisdiction could be reasonable when the lawsuit arose in the forum.

The entire concept of the y-axis suggests a saturation point, even though the Court thus far has been reluctant to recognize it. In the years since *International Shoe*, the Court's specific jurisdiction jurisprudence has grown increasingly restrictive.[141] Contrary to my hypothesis above, the Court has repeatedly insisted that a defendant always must demonstrate some level of connectedness to the forum[142] and that the defendant's contacts with the forum must be purposeful rather than merely fortuitous.[143] Moreover, the question of what exactly counts as a purposeful affiliation with a forum has been a source of great consternation and has divided the Court for years.[144] In other words, while the theory of specific jurisdiction—and a concern for the connection between a lawsuit and the forum—suggests a saturation point, the current jurisprudence has not embraced the full breadth of the theory.

European courts probably have come closest to realizing the notion of a saturation point along the y-axis. Under the Brussels I Regulation,[145] personal jurisdiction in the European Union focuses in large part on the connection between the underlying lawsuit and the forum.[146] For example, under Article 5(3) of Brussels I, specific jurisdiction[147] is appropriate in torts cases "where the harmful event occurred or may occur." This provision is unconcerned with whether the defendant has intentionally directed or targeted its activities toward the forum;[148] instead, it looks primarily to the locus of the lawsuit. Similarly, Article 6(2) permits a court to exercise jurisdiction over third-party defendants who are connected to the litigation but not necessarily

141. *See, e.g.*, Borchers, *supra* note 27, at 130.

142. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

143. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–88 (2011); *World-Wide Volkswagen*, 444 U.S. at 297–98.

144. The stream-of-commerce cases offer the most vivid illustration of the conundrum. *See Nicastro*, 131 S. Ct. 2780; Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

145. Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 ("Brussels I").

146. *See* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1050 (2006) ("[E]ach of the [Brussels I] provisions on specific jurisdiction is justified by the close connection between the dispute and the court called upon for its resolution."); *see also* Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT'L L. 363, 368–69 (2004).

147. In European civil procedure parlance, "special jurisdiction." *See, e.g.*, Brussels I, *supra* note 145, art. 5.

148. *Cf. World-Wide Volkswagen*, 444 U.S. at 297–98 (insisting on purposeful affiliation).

the forum itself. Thus, when a French company sued its various French insurers in French court, the defendants were able to join a Spanish insurer as a third-party defendant, even though the Spanish insurer otherwise had no connection to France. The indemnification proceeding was centered in France, and jurisdiction, therefore, was appropriate over all potentially liable insurers, including the Spanish defendant.[149]

Although the European approach comes closest to what I envision, it does not exactly correspond to the notion of a saturation point. For example, the provision regarding third-party joinder does not insist that the original proceeding be in the forum where the lawsuit is most at home. Instead, the plaintiff has latitude to choose a forum as long as that choice "does not amount to an abuse"[150] or reflect a bare desire to subject the defendant to jurisdiction in a foreign court.[151] Moreover, the European Court of Justice has insisted that the third-party action must still have some connection to the original proceedings before the forum court.[152] In other words, the saturation point of specific jurisdiction along the y-axis, as I have conceived it, is probably more demanding than Brussels I in insisting on the best and tightest connection between the lawsuit and the forum. And because the saturation point, as a theoretical matter, is concerned only with that relationship, it does not formally insist on any connection between the defendant and the forum.

B. The Germ of a Theory

By situating the outer boundary of general jurisdiction at one saturation point, the Court rationalized the case law regarding that species of personal jurisdiction. It also tapped into a coherent theory that can provide a way out of the personal jurisdiction morass.

The two saturation points that I have described represent the constitutional boundaries at two extremes. These points are instructive

149. Case C-77/04, Groupement d'intérêt économique Réunion européenne v. Zurich España, Société pyrénéenne de transit d'automobiles (Soptrans), 2005 E.C.R. I-4509, I-4534 ("Soptrans"). The European Court of Justice found that there was "a sufficient connection between the original proceedings," i.e., the French company's lawsuit against its French insurers, "and the third-party proceedings" against the Spanish insurer. *Id.* ¶¶ 25, 27, 36.

150. *Id.* ¶ 36.

151. *See* Brussels I, *supra* note 145, art. 6(2) (authorizing jurisdiction over third-party defendants as long as plaintiff did not choose original forum "solely with the object of removing [the defendant] from the jurisdiction of the court which would be competent in his case").

152. *See* Michaels, *supra* note 146, at 1050 (citing *Soptrans*, 2005 E.C.R. I-4509, ¶36) ("[T]he Court . . . restricts the jurisdiction of [Brussels I] for third-party proceedings to cases in which there is a 'sufficient connection between the original proceedings to support the conclusion that the choice of forum does not amount to an abuse.' ").

precisely because they reveal when a court may exercise personal jurisdiction even in the absence of one of the relationships. Put another way, the saturation points demonstrate exactly why the relationships captured by the different axes should be independently meaningful. At the same time, the saturation points are truly exceptional. Through their exceptionalism, they reveal why the modern approach to personal jurisdiction typically insists that a court should have some connection, however minimal, to both the lawsuit and the particular defendant.

Consider first the relationship represented by the x-axis—that of the defendant with the forum. Locating the boundary of general jurisdiction at the saturation point captures an essential notion about legitimate state power. To avoid exercising power arbitrarily, a forum usually must have *some* relationship to both the lawsuit and the defendant. Therefore, in most situations, a state acts arbitrarily when it exercises power over a defendant regarding a case that has no connection to the forum. The one exception—and thus the one circumstance in which such exercise of power is not arbitrary—is when the defendant is truly at home in the state.

The Court in *Daimler* recognized that whether a defendant is at home in the forum does not depend simply on the magnitude of a defendant's contacts with the state. That aspect of the analysis is critical and correct. For ease of analysis, imagine a natural person—say, a Silicon Valley tech magnate billionaire whose domicile is in California but who maintains a vacation home in Montana. Such a person might own more property in Montana and invest more in the Montana economy than most Montanans. Why should that billionaire not be subject to general jurisdiction in Montana? To my mind, the answer turns on notions of consent and submission.[153]

In a meaningful sense, natural persons choose their domicile. It is the sovereign to which they owe a certain fidelity and to which they have submitted for certain regulatory purposes. For example, the state of people's domicile has the power to tax their income based solely on their residency there (even if most people don't exactly celebrate that fact).[154] That state also has the power to determine when driver's licenses expire and what people have to do to renew them. And, critically, it is the community in which people vote and choose the leaders who will create the rules that govern their everyday lives. While the California billionaire might pay property taxes in Montana and otherwise establish ties with the state, he is not truly at home there, in

153. *See* Stein, *supra* note 6, at 547.

154. *See* Lawrence v. State Tax Comm'n, 286 U.S. 276, 279 (1932) ("[D]omicile in itself establishes a basis for taxation.").

the sense of having consented to be a member of the community for *all* purposes, including voting and being subject to myriad regulations. Admittedly, the Californian has not literally consented to pay taxes, serve on a jury, or be sued in any particular instance. But he has actually chosen California as his home as well as the bundle of rights and responsibilities that attend that choice.[155]

Although the notion of consent is somewhat ethereal, it expresses why the billionaire is amenable to personal jurisdiction regarding any lawsuit in California but not in Montana. That idea of being at home in the forum is what distinguishes California's ability to assert general jurisdiction and thus makes such an exercise of power nonarbitrary.

The same concept holds true with respect to the relationship between the lawsuit and the forum. Usually a court would act arbitrarily if it claimed jurisdiction over a defendant who had no connection with the forum. But an exception to the usual rule applies when the relationship between a lawsuit and the forum is so strong that no other state could claim a more significant connection to the lawsuit. In such cases—at the saturation points—the exercise of state power becomes nonarbitrary. At those points, a state can overcome the presumption that it should have a connection to both the lawsuit and the defendant.

Other scholars have recognized the nonarbitrariness principle that undergirds personal jurisdiction.[156] In fact, it encapsulates the essence of what due process protects: a defendant's interest in not being subject to arbitrary assertions of power. Professor Spencer has argued persuasively that the prohibition against arbitrariness explains why true general jurisdiction is permissible only at what I call the saturation point along the x-axis.[157] While critical, that is only half the battle. The other saturation point identifies the converse boundary, and only by identifying *both* points can an analysis reveal the full range of options between them.

Of course, points "A" and "D" in Figure 1 are not the only instances in which personal jurisdiction is permissible. But the saturation points essentially bookend the analysis. In so doing, they

155. As noted above, the enduring concept of transient jurisdiction is inconsistent with this vision of how general jurisdiction should operate with respect to natural persons. *See supra* note 129.

156. *See* Spencer, *supra* note 34, at 634, 636; *see also* Borchers, *supra* note 29, at 90 (arguing that state assertions of personal jurisdiction need survive only rational basis review); Borchers, *supra* note 125, at 577–79 (same).

157. *See* Spencer, *supra* note 34, at 656.

give content to the nonarbitrariness principle that ultimately is the touchstone of personal jurisdiction analysis.

One facet of nonarbitrariness is an underlying concern about state sovereignty.[158] The Supreme Court has vacillated over the years about whether and to what extent state sovereignty figures into the personal jurisdiction calculus.[159] Although many scholars have argued that such sovereignty concerns are vestiges of an outmoded way of thinking,[160] recent commentary has emphasized the subtle but important role that sovereignty still plays.[161]

The idea is part intuition, part political theory. Imagine, for example, a New York defendant who lives in northern Manhattan. Without traffic, the Superior Court in Hackensack, New Jersey, is a ten- or fifteen-minute drive just across the George Washington Bridge from the defendant's home.[162] By contrast, the state courthouse in Brooklyn, New York—not just in the defendant's home state, but in his home city!—is twice as far away. The intuition is that state boundaries still matter, even when a New Jersey court is more convenient than a particular courthouse in New York City. That intuition in turn captures the theoretical point about how someone is a member of a polity that chooses its leaders and organizes its judicial system. Consequently, state boundaries do not simply serve as a proxy for convenience but rest on fundamental notions about the definition of political and judicial power.[163]

Sovereignty thus remains deeply embedded in notions about whether a court acts arbitrarily or nonarbitrarily. But despite the constitutive role that it plays in defining judicial power, it does very

158. *See id.* at 639.

159. *Compare, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (invoking interstate federalism as part of personal jurisdiction analysis), *and* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (same), *with* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U. S. 694, 702 (1982) (describing personal jurisdiction as a protection of individual liberty rather than of state sovereignty), *and* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (same).

160. *See, e.g.*, Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 75–87 (1984); Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 540–54 (1982); Redish, *supra* note 125, at 1113–15, 1120–21.

161. *See* Feder, *supra* note 50, at 687–88; Perdue, *supra* note 124, at 739; Stein, *supra* note 6, at 536–37, 542–43.

162. Assuming, of course, that "traffic studies" aren't impeding progress over the bridge.

163. Not everyone will share this intuition. Professor Redish, for example, argues that personal jurisdiction should turn exclusively on questions of fairness and convenience. *See* Redish, *supra* note 125, at 1137–42. But a theory of personal jurisdiction that completely ignores the relevance of state boundaries must have some explanation for why state courts and perhaps even states themselves continue to exist as anything other than convenient (and sometimes terribly inconvenient) administrative units.

little analytical work in answering specific questions. State sovereignty does not meaningfully contribute to an analysis of, for example, whether a state may exercise jurisdiction over a foreign defendant whose product harms a forum resident. As Professor Perdue has explained, sovereignty "is simply the label we apply to whatever judicial authority is granted to the states. . . . [It] is what is left at the end of the analysis, rather than the starting point."[164]

State sovereignty helps explain *why* the personal jurisdiction analysis depends on the two relationships expressed by the axes in Figure 1. In that vital sense, sovereignty is a constitutive element of the nonarbitrariness principle. It means that contrary to the suggestions of some scholars, courts at least are asking the right overarching questions about the relationship between the forum and the defendant and the relationship between the forum and the lawsuit. The importance of those relationships reveals why personal jurisdiction is not simply a doctrine of convenience. At the same time, sovereignty does not specify exactly *where* the outer boundaries of personal jurisdiction should lie. As I have argued, the notion of the saturation points makes progress toward answering the latter question by fleshing out the nonarbitrariness principle. The following section turns to the question of where else the exercise of judicial power is appropriate.

C. The Bounds of Personal Jurisdiction

1. Abandoning Thresholds. Personal jurisdiction obviously can exist at places other than the two saturation points. In fact, there is a vast middle ground between them where the exercise of jurisdiction is permissible. Since *International Shoe*, though, the Court's jurisprudence has treated personal jurisdiction as a binary proposition based on certain thresholds; that is, a defendant may qualify for general jurisdiction or specific jurisdiction.

At present, the case law relies on these thresholds and, in turn, creates the jurisdictional lacunae discussed in Part II. With respect to general jurisdiction, once a defendant has amassed enough contacts with a forum, she has crossed a threshold and is amenable to jurisdiction in that particular state regarding any claim. The precise threshold had remained somewhat mysterious until *Daimler*. For ease of graphic representation, though, assume an older vision of general jurisdiction in which the threshold was lower than it is today. The vertical line at point "X" in Figure 2 below represents that threshold.

164. Perdue, *supra* note 124, at 739.

Everything to the right of the line is an area in which general jurisdiction is permissible.

Specific jurisdiction, on the other hand, has required two thresholds. First, it insists on a certain level of "minimum contacts" between the defendant and the forum,[165] a much lower threshold than the connection necessary for general jurisdiction. This is the vertical line at point "Y." Second, specific jurisdiction also has required a fairly tight connection between the lawsuit and the forum. The Supreme Court's formulation over the years has required that the lawsuit "aris[e] out of or relate[ ] to the defendant's contacts with the forum."[166] Those are actually quite different standards, as lower courts have recognized over the years.[167] The precise level of connectedness does not matter for purposes of the present analysis. Instead, the point is that the Supreme Court and lower courts typically have treated the required nexus as a threshold. Although it might vary in accordance with different formulations, I have located this threshold at point "Z." Consequently, current jurisprudence permits specific jurisdiction in the area to the right of the line at "Y" and above the line at "Z."[168]

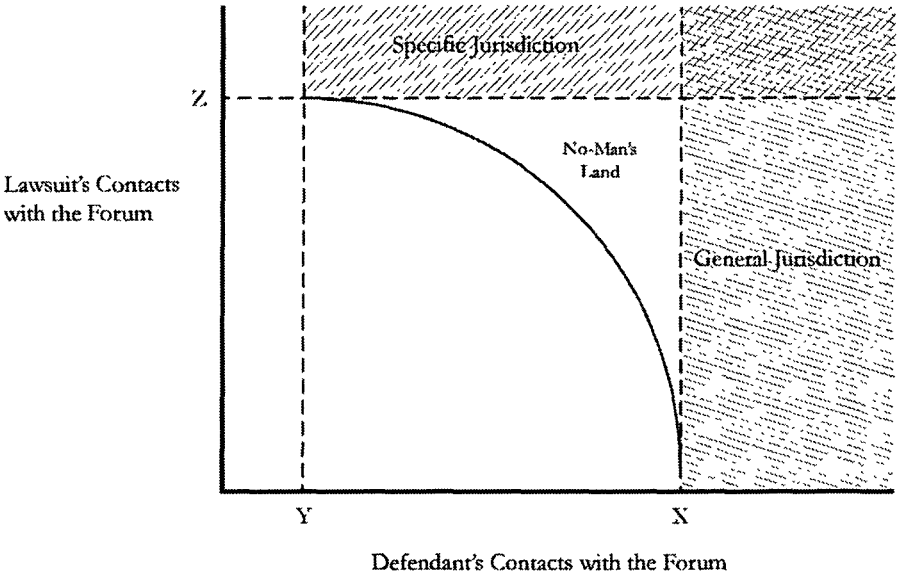
165. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

166. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

167. *See* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 318–20 (3d Cir. 2007) (exploring different levels of connectedness between lawsuit and forum necessary for specific jurisdiction); *see also, e.g.*, Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) (noting that the First, Second, and Eighth Circuits follow a stringent "proximate cause" test); Shute v. Carnival Cruise Lines, 897 F.2d 377, 385–86 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) (requiring "but-for" causation); Third Nat'l Bank in Nashville v. WEDGE Grp. Inc., 882 F.2d 1087, 1091 (6th Cir. 1989) (requiring "substantial connection").

168. Figure 2 is based on a diagram suggested by Professor Richman. *See* William M. Richman, *Part I—Casad's* Jurisdiction in Civil Actions*; Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CALIF. L. REV. 1328, 1341 (1984) (book review). Although his diagram accurately depicts the Court's current jurisprudence in most respects, Professor Richman does not take account of the fact that the Court has not countenanced the exercise of jurisdiction in the area to the *left* of the line at point "Y."

Figure 2



One of the principal conclusions from this Article is that, contrary to the current case law, the outer boundary of personal jurisdiction is not dichotomous. Instead, it exists along a continuum between the two saturation points that I have described. Thirty years ago, Justice Brennan rejected the idea that personal jurisdiction is rigidly binary,[169] and other scholars have explored the idea of a sliding scale.[170] Professor Richman has noted: "As the extent and importance of defendant's forum contacts increase, a weaker connection between the claim and the defendant's contacts should be permissible; as the extent and importance of defendant's forum contacts decrease, a stronger connection between the claim and defendant's contacts should be required."[171]

Despite offering a very useful conceptualization of a sliding scale, Professor Richman and others remained tethered to the idea of thresholds. Their concern focused on marginal cases that didn't quite qualify for specific or general jurisdiction, represented by the no-man's

169. *See Helicol*, 466 U.S. at 425–28 (Brennan, J., dissenting) (arguing that while plaintiffs' cause of action did not arise out of defendant's forum contacts, it was significantly related to those contacts).

170. *See* Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 34–38 (1984); Richman, *supra* note 29, at 615–16; Richman, *supra* note 168, at 1338–45.

171. Richman, *supra* note 29, at 615.

land in Figure 2.[172] In other words, they sought to bridge the widening gap between specific and general jurisdiction as the Court had developed those concepts.[173] Moreover, Professor Richman's idea of a sliding scale between the current notions of specific and general jurisdiction would still lead to the conclusion that a defendant is not amenable to jurisdiction in a state with which she has not established a sufficient degree of purposeful contact. In fact, he viewed the sliding scale as opening the jurisdictional door to "only a small fraction" of the cases in which jurisdiction is presently impermissible.[174]

As discussed more fully below, the nonarbitrariness principle suggests a continuum that permits jurisdiction in far more instances than would the current case law or even Professor Richman's sliding scale. Reorienting personal jurisdiction around the notion of nonarbitrariness suggests that the Constitution probably permits nearly every attempt to exercise specific jurisdiction that the Supreme Court has considered since *International Shoe*.

The better view of the outer limits of personal jurisdiction is a true continuum between the saturation points. A conceptualization of personal jurisdiction that relies on thresholds and then seeks to fill resulting gaps does not correspond with a robust theory of how sovereignty and nonarbitrariness actually define the boundary of permissible jurisdiction. The saturation points and the continuum between them do just that, and in a way that abandons any need to define thresholds. Not only does this approach offer a more theoretically satisfying notion of personal jurisdiction, but on a practical level, it also relieves courts of the need to define exactly where those thresholds for specific jurisdiction are. As alluded to above, such questions have vexed courts for decades.[175]

2. The True Continuum. The remaining question, then, is what path the continuum traces between the saturation points. Although one could imagine various shapes, in all likelihood the curve representing the outer boundary of personal jurisdiction is a severely concave curve. A court may assert personal jurisdiction at all points along the curve and to its right, but jurisdiction is impermissible in the relatively small

172. This, in fact, is the zone that Professor Richman represents in his diagram. *See* Richman, *supra* note 168, at 1341.

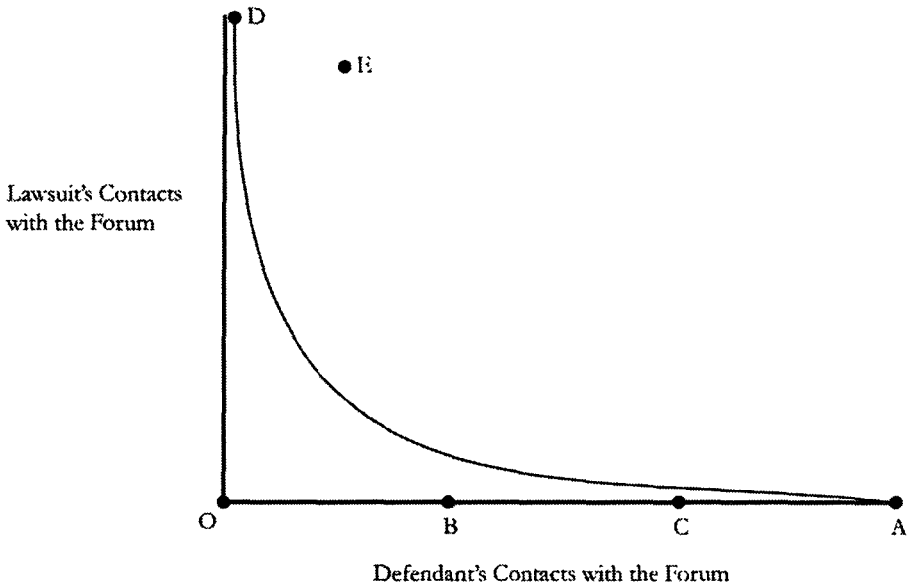
173. *See id.* at 1345 (arguing that sliding scale should "supplement[ ]" existing conceptions of personal jurisdiction); *see also* Borchers, *supra* note 27, at 138 ("[W]e need to build a bridge between general and specific jurisdiction."); Lewis, *supra* note 170, at 34 ("Although the Court has not subscribed expressly to blending claim-related and nonclaim-related contacts, its decisions certainly do not foreclose that approach.").

174. Richman, *supra* note 168, at 1344 n.62.

175. *See supra* note 163 and accompanying text.

region to the left of the curve. Figure 3 adds this curve to Figure 1, which sketched the two basic relationships and identified where certain cases might fall. This vision of how personal jurisdiction should operate contrasts markedly with the current case law, as represented in Figure 2.

Figure 3



This is not a precise mathematical representation but rather is conceptual. The basic idea is that although the saturation points require an incredibly tight connection between the defendant and the forum when there is no relationship between the lawsuit and the forum (and vice versa), the standard becomes much more lax once both relationships are present to at least some degree. This approach corresponds with the nonarbitrariness principle that long has been at the heart of constitutional due process. Once a forum has some connection to both the defendant and the lawsuit—even if those connections are minimal—there is little risk that the forum will act arbitrarily if it exercises personal jurisdiction over the defendant.

In fact, the starting point of the modern approach to personal jurisdiction usually assumes that both relationships should be present. When they are, the Constitution almost always authorizes a court to exercise jurisdiction. The converse is also true: when one of the relationships is absent, the Constitution usually forbids jurisdiction. For those reasons, a court's exercise of jurisdiction based only on the existence of one relationship will be an exception to the overarching

rule, one which is justified only when that single relationship is so tight as to reach the saturation point. The severely concave slope of the curve thus derives from the nonarbitrariness principle.[176] Admittedly, this approach reorients the personal jurisdiction doctrine, but it is more faithful to the underlying tenets of the procedural guarantees that the Due Process Clauses embody. Many scholars have argued that the current personal jurisdiction doctrine more closely resembles a *substantive* due process analysis, as it presently focuses on "the fairness of the underlying result, rather than with the mechanism used to get there."[177] But the constitutional boundaries of a court's power to hale a defendant into court more logically should protect *procedural* fairness—the means by which a court compels a defendant's appearance. Those questions remain antecedent to concerns about substantive fairness, which arise only at a later stage in the litigation.

The Supreme Court has demonstrated what the nonarbitrariness approach to personal jurisdiction might look like in practice. It would rely, in nearly every respect, on the standards by which the Court assesses the propriety of a state's choice-of-law decision. For choice-of-law purposes, the Court has held that a particular state's substantive law may govern a dispute as long as the dispute has "a significant contact or significant aggregation of contacts" with the state, "such that choice of [that state's] law is *neither arbitrary nor fundamentally unfair*."[178] In that context, the nonarbitrariness approach accords significant deference to a state's choice of a particular body of substantive law. Moreover, the Supreme Court's jurisprudence has proved equally deferential to the manner in which one state applies

176. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))); *see also* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (noting that procedural due process includes right "to be heard at a meaningful time and in a meaningful manner" (internal quotation marks omitted)); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (noting that procedural due process includes right to notice).

177. David S. Welkowitz, *Beyond* Burger King*: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 24–25 (1987); *see also, e.g.*, Borchers, *supra* note 29, at 90 n.469; Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 976–87 (1995); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 508–10 (1987); Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 572–77 (2007).

178. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion) (emphasis added); *see also id.* at 326 (Stevens, J., concurring in judgment) ("It may be assumed that a choice-of-law decision would violate the Due Process Clause if it were *totally arbitrary* or if it were *fundamentally unfair* to either litigant.") (emphasis added); *cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814–23 (1985) (reiterating *Allstate* standard but holding that Kansas substantive law could not govern when ninety-nine percent of leases and ninety-seven percent of plaintiffs had no connection to Kansas).

a sister state's substantive law.[179] An analogy to the constitutional standards governing choice-of-law decisions thus suggests how personal jurisdiction should operate.

To recognize that the Court in many respects has already created the blueprint for a nonarbitrariness principle is not to overlook a jurisprudential oddity. When it comes to a state's decision about which substantive law to apply to a dispute, the current constitutional standards are notoriously undemanding—that is, subject only to review for arbitrariness. But on the question of whether the state can exercise personal jurisdiction over a defendant, the standards are much more exacting. Justice Black noted this anomaly in *Hanson v. Denckla*,[180] in which he argued that Florida substantive law could govern the dispute despite the majority's holding that Florida could not exercise personal jurisdiction over a Delaware defendant.[181] For many years scholars have argued that, if anything, the approaches to personal jurisdiction and choice-of-law are backwards. A court's power to subject a defendant to particular substantive rules arguably merits greater scrutiny than a court's power to hale that defendant into court.[182] Some scholars have advocated a more robust and stringent test in the choice-of-law realm,[183] while others have suggested that both issues—personal jurisdiction and choice-of-law—should be subject to the same deferential standard.[184] Either way, commentators largely have reached consensus that the standards governing personal jurisdiction should not be more stringent than those that apply to choice-of-law decisions.

I hesitate to wade too deeply into the choice-of-law realm or critique its nuances here. In fact, the utility of applying the nonarbitrariness principle in the jurisdictional context does not depend on whether the same test should continue to govern choice-of-law

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179. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988):

> To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.

180. 357 U.S. 235 (1958).

181. *See id.* at 258–59 (Black, J., dissenting); *see also id.* at 254 n.27 (majority opinion) (reserving judgment on whether Florida substantive law could apply).

182. *See* James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879–80 (1980); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978); *see also* Brilmayer et al., *supra* note 26, at 782 (arguing that a court's legislative jurisdiction—the power to apply substantive law—is narrower than a court's adjudicative jurisdiction).

183. *See, e.g.*, Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1251–66 (2011).

184. *See* Spencer, *supra* note 34, at 658–60.

questions. But the basic intuition underlying the Court's deferential approach regarding the selection of substantive law seems especially apt in the personal jurisdiction realm. As Professor Spencer has argued, the procedural due process concerns in both contexts protect against arbitrariness.[185] While he correctly resists a "facile" equation of the two analyses, he notes that they often will point in the same direction.[186] Figure 3 reflects the idea that an appropriate focus on due process concerns about arbitrariness will countenance most assertions of personal jurisdiction when the forum has some connection, even when quite limited, with both the defendant and the underlying dispute.[187]

D. The Way Forward

I have argued that locating true general jurisdiction at the saturation point along the x-axis in Figures 1 and 3 holds the promise of resolving a host of other problems. In concluding this Article, I offer three essential lessons that courts can glean from the developments described here.

First, the saturation points elucidate how certain modes of analysis can ensnarl the jurisdictional calculus. For example, when the Supreme Court in *Nicastro*[188] held that the defendant was not amenable to specific jurisdiction in New Jersey, where the defendant's product harmed the plaintiff, the plurality drew on language and analyses that define one saturation point. Justice Kennedy's plurality opinion spoke of ascertaining whether the defendant had "submitted" or "consented" to jurisdiction in the forum.[189] At one point, the opinion formulated the specific jurisdiction inquiry as training on whether the defendant had "manifest[ed] an intention to submit to the power of a sovereign."[190]

Justice Ginsburg chastised the plurality for trying to reinvigorate notions of "consent" that *International Shoe* and its progeny had discarded as legal fictions.[191] That's mostly right. Insofar as she was speaking about the fact that consent is largely irrelevant to specific jurisdiction analyses, she was absolutely correct (and, in fairness, the sole question in *Nicastro* pertained to specific

185. Admittedly, the choice of substantive law might also implicate substantive fairness concerns.

186. *See* Spencer, *supra* note 34, at 658–60.

187. *See* Borchers, *supra* note 29, at 89–90 (arguing for deferential approach to state assertions of personal jurisdiction based on nonarbitrariness principle).

188. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

189. *See, e.g.*, *id.* at 2788–89 (plurality opinion).

190. *Id.* at 2788.

191. *See id.* at 2798–99 (Ginsburg, J., dissenting).

jurisdiction).[192] Nevertheless, consent is still a meaningful concept when identifying the saturation point at which true general jurisdiction exists. I have argued that point "A" in Figures 1 and 3, in locating the place where a person and an entity are truly at home, relies on what Professor Stein has called "bona fide consent."[193] At that point, natural persons and entities have truly chosen their home. But at any other point along the continuum, notions of consent are indeed fictional, as Justice Ginsburg argued. The plurality's mistake, then, was importing an analysis that applies only at the saturation point for general jurisdiction into the rest of the jurisdictional analysis.

The concepts that define the two saturation points are appropriately strict. They ferret out the tightest possible connection between the forum and the defendant, on one hand, and the forum and the lawsuit, on the other hand. But the strictness of the analysis in identifying those two points—"A" and "D" in Figure 3—belies the tremendous leeway that exists almost everywhere else along the continuum.

The second lesson, a corollary of the first, is that despite the strictness of the saturation points, constitutional due process is much more forgiving when the forum has a connection to both the defendant and the lawsuit. Such latitude suggests that the Constitution probably approves almost every exercise of specific jurisdiction that the Supreme Court has deemed to be problematic.

To illustrate how the nonarbitrariness principle liberalizes personal jurisdiction, consider the recent *Nicastro* case in which the defendant had taken steps to market an industrial shearing machine throughout the United States. One such machine moved through the usual distribution chain, wound up in New Jersey, and seriously injured the plaintiff there.[194] The defendant had a mild but relevant connection to New Jersey because the defendant sought to serve the entire United States, including New Jersey, through the usual flow of its products through the distribution chain. Moreover, the connection between the lawsuit itself and New Jersey was quite strong. Accordingly, the nonarbitrariness principle makes the stream-of-commerce cases like *Nicastro* relatively easy from a constitutional perspective.

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192. A defendant may actually consent to personal jurisdiction once a lawsuit has begun or in advance (through a forum selection clause). But the difficult specific jurisdiction inquiries do not involve just express consent. Nevertheless, Justice Kennedy cast those questions in terms of implied consent or submission. *See id.* at 2787–88 (plurality opinion).

193. *See* Stein, *supra* note 6, at 547; *see also supra* note 153 and accompanying text.

194. *Nicastro*, 131 S. Ct. at 2786 (plurality opinion).

The same is true in *World-Wide Volkswagen*. Although the local New York retailer had conducted no business in Oklahoma, the retailer sold the automobile that ultimately caused significant harm in Oklahoma.[195] Admittedly, the connection between the defendant and the forum is even weaker than in *Nicastro* because the New York retailer had not intended to serve the Oklahoma market. But that connection is probably enough, particularly because the epicenter of the litigation was in Oklahoma—the accident took place there, the plaintiffs were hospitalized there, and nearly all of the relevant evidence was there.

Or consider the *Helicol* case, which involved a lawsuit in Texas against a Colombian defendant regarding a helicopter crash in Peru. Although the Court did not directly consider whether specific jurisdiction was appropriate,[196] evaluating the case from that angle is instructive. In passing, the Court expressed skepticism whether specific jurisdiction would have been appropriate,[197] and Professor Richman has articulated a similar ambivalence about whether his proposed sliding scale would allow jurisdiction.[198] Under a nonarbitrariness approach, though, jurisdiction is clearly proper. There was a nontrivial connection between the defendant and the Texas forum as well as between the lawsuit and the forum. The defendant had purchased eighty percent of its helicopter fleet from Texas and sent many of its pilots to Texas for training,[199] including the pilot whose alleged negligence caused the crash in Peru.[200] Even without the fairly tight causal connections, the extent of both relationships suggests that specific jurisdiction over the defendant in Texas would have been far from arbitrary.

Other commentators have reached the same basic conclusion: nearly every personal jurisdiction case that the Supreme Court has considered since *International Shoe* probably complies with the nonarbitrariness principle.[201] But the concept of saturation points

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195. *See* 444 U.S. 286, 288–89 (1980).

196. The Supreme Court concluded that the defendant's regular contacts with Texas came nowhere close to satisfying the standards of general jurisdiction. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416–18 (1984). Moreover, the Court did not directly consider the question of specific jurisdiction because the parties had conceded that the defendant's contacts with Texas did not give rise to the claim. *Id.* at 415–16 & n.10.

197. *See id.*; *see also id.* at 418 n.12.

198. *See* Richman, *supra* note 168, at 1345 n.63.

199. *Helicol*, 466 U.S. at 411.

200. *Id.* at 426 (Brennan, J., dissenting).

201. *See* Borchers, *supra* note 125, at 577–78 (arguing that assertions of specific jurisdiction that the Supreme Court invalidated were not, in fact, arbitrary and thus should have passed constitutional muster); *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 255 (2004) (arguing that under

grounds that conclusion in a coherent theory of personal jurisdiction that explains the proper scope of both general and specific jurisdiction. Moreover, this approach also points the way toward a true specific jurisdiction—the idea that jurisdiction can be proper based solely on a tight connection between the forum and the lawsuit itself.

The third lesson might be somewhat surprising in light of the second. Because of the incredibly lax constitutional standard for personal jurisdiction between the saturation points, the Supreme Court acts appropriately when it crafts common-law limitations on courts' power.[202] If I and others are correct in our assessment of the limited restraint that the Constitution offers,[203] there is the potential for courts to exercise personal jurisdiction in inconvenient[204] and intuitively (though not unconstitutionally) unfair ways. That which is lawful is not always beneficial or edifying.[205] Or, as Justice Stevens has put the point in the choice-of-law context, the Constitution gives states plenty of room to adopt "unsound" policies.[206]

At the federal level, litigants and courts already have several tools at their disposal to ameliorate some of these problems. These include venue provisions,[207] the power to transfer cases to a more convenient forum,[208] and the ability to dismiss cases based on the common-law doctrine of forum non conveniens.[209] While these and similar tools at the state level address many concerns about convenience and general fairness to the litigants, new problems arise frequently. For instance, in the Internet context, does a virtual company expose itself to personal jurisdiction everywhere in the United States unless it takes affirmative steps to withdraw from certain states? Does it matter whether the company is a large multinational corporation or a small mom-and-pop operation? And what happens

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an arbitrariness standard "every assertion of state court jurisdiction considered by the Supreme Court since it introduced the minimum contacts test in *International Shoe Co. v. Washington* would easily pass muster").

202. Professor Borchers, who has embraced my second conclusion, draws a diametrically opposed lesson from the laxness of the constitutional standards that govern specific jurisdiction. He views the Constitution's permissiveness as an invitation for states to experiment. *See* Borchers, *supra* note 29, at 103–04.

203. *See* Borchers, *supra* note 125, at 577 (calling the Constitution a "weak check" on personal jurisdiction); *see also* Weinstein, *supra* note 201, at 255.

204. *See* Spencer, *supra* note 34, at 632 (arguing that inconvenience hardly ever rises to the level of unconstitutionality).

205. *See 1 Corinthians* 10:23–24.

206. Allstate Ins. Co. v. Hague, 449 U.S. 302, 331–32 (1981) (Stevens, J., concurring in judgment).

207. *See* 28 U.S.C. §§ 1390, 1391 (2012).

208. *See id.* §§ 1404, 1406.

209. *See, e.g.*, Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429–30 (2007).

when a defendant has engaged in intangible activity (say, operating a website) and allegedly caused intangible harm (say, infringing a protected trademark)?[210]

In an ideal world, Congress would act to address novel concerns, as it has done in important respects through venue and transfer provisions. Within the loose personal jurisdiction doctrine described above, Congress has the power to provide more rigorous protections.[211] That is probably desirable. But if Congress does not act, the appropriate solution is not simply to allow states to exercise personal jurisdiction subject only to a demonstrably weak constitutional check.[212]

Like Congress, the Supreme Court also has the power to articulate prudential limits on the exercise of personal jurisdiction. Even after *Erie Railroad Co. v. Tompkins* famously declared that "[t]here is no federal *general* common law,"[213] federal courts still retain the power to craft a more modest, specialized form of common law.[214] This new federal common law is narrower in scope (as it governs only unique areas of federal concern)[215] and broader in effect (as it now creates law that also binds state courts).[216] Professor Monaghan argues that one species of the new federal common law is a "constitutional

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210. A coauthor and I attempt to address these questions and craft a concrete approach in light of the theory developed here. *See* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. (forthcoming 2015).

211. Several scholars have argued that Congress has direct power to control state courts' jurisdiction over persons. *See, e.g.*, Borchers, *supra* note 29, at 104–05 (locating such power in both the Full Faith and Credit Clause and the Commerce Clause); Weinstein, *supra* note 201, at 279 n.408 (locating such power in the Full Faith and Credit Clause). Other scholars have suggested that Congress might have only an indirect power to regulate at least some state assertions of personal jurisdiction. Because Congress may regulate how states accord full faith and credit to one another's judicial proceedings, *see* U.S. CONST. art. IV, § 1, if a state court in State A fails to comply with congressional directives, Congress can prevent federal courts and the courts of sister states from recognizing any judgment rendered by State A's courts. *See, e.g.*, Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 Nw. U. L. Rev. 1301, 1326 n.153, 1347 (2014).

212. *Cf.* Borchers, *supra* note 29, at 103 (arguing that the Supreme Court should get "out of the business of regulating personal jurisdiction" and "throw the matter back to the states").

213. 304 U.S. 64, 78 (1938) (emphasis added).

214. For example, on the same day that the Supreme Court decided *Erie*, it created federal common law, coincidentally in a decision also authored by Justice Brandeis. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

215. Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

216. *See id.*; Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10 (1975); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 897 (1986) ("Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state court judges through the supremacy clause."). By contrast, pre-*Erie* federal common law created law only for the federal courts. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1268 (1996).

common law," which is inspired, but not compelled, by the Constitution.[217] In his formulation, two hallmarks characterize constitutional common law. First, it is interstitial. Usually it articulates a remedial or procedural rule to operationalize a given constitutional provision that, without guidance from Congress or the Supreme Court, would remain ineffectual.[218] Second, because the specific common-law rule is not actually constitutionally compelled, it is subject to revision by Congress.[219]

In a creative and thorough examination of the source and nature of personal jurisdiction rules, Professor Weinstein builds on Professor Monaghan's insights and argues that nearly all of the limits on personal jurisdiction qualify as constitutional common law.[220] Since the early years of the republic, the bounds of personal jurisdiction have usually derived from such common law rules.[221] In crafting those rules then and now, the Supreme Court gives effect to the structural concerns embedded in the Full Faith and Credit Clause as well as Congress's implementing legislation.[222] Critically, though, whenever the Court exercises this power to promote a perceived need for national uniformity,[223] those common-law rules are always subject to congressional tweaking.[224] In these situations, "[t]he Court, in effect, opens a dialogue with Congress."[225]

All of this suggests that the actual constitutional standards governing personal jurisdiction are quite lax and that additional restrictions are often desirable. But the space for prudential or quasi-constitutional innovation concerns only the area between the two saturation points, as the saturation points are already subject to rigorous standards. These are situations in which a court hales a foreign defendant into a forum where that defendant is not at home. Precisely because out-of-staters might be subject to the various whims

217. Monaghan, *supra* note 216, at 9, 28, 36. For example, the classic *Miranda* warning is a prophylactic rule that seeks to effectuate the Fifth Amendment's privilege against self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436 (1966). The Fifth Amendment does not actually compel this rule, which is simply one way to operationalize the overarching privilege. *See* Monaghan, *supra* note 216, at 20.

218. *See* Monaghan, *supra* note 216, at 18–20.

219. *See id.* at 27–30.

220. *See* Weinstein, *supra* note 201, at 173–74, 255, 265.

221. *See id.* at 175–81; *see also* Borchers, *supra* note 29, at 23 (noting that, until the end of the nineteenth century, federal common law defined the contours of personal jurisdiction in federal court).

222. *See* Weinstein, *supra* note 201, at 283–90.

223. *See* Monaghan, *supra* note 216, at 12–13.

224. *See* Weinstein, *supra* note 201, at 278, 288.

225. Monaghan, *supra* note 216, at 29.

of state courts, the need for nationwide uniformity and predictability is paramount. Experimentation by the states, especially if they are inclined to exploit the tremendous latitude the Constitution gives them to bring foreign defendants into their courts, seems undesirable.[226] In many instances, Congress is the best institution to adopt such policies.[227] But if Congress does not or cannot respond expeditiously,[228] the Court has the power, which it has always exercised, to craft prudential rules when the Constitution otherwise would allow states to exercise their discretion haphazardly.

My argument suggests that while the saturation points are constitutionally compelled, including the newly tightened parameters of general jurisdiction, the vast majority of the other limitations on personal jurisdiction are probably prudential. An evaluation of the wisdom of those prudential limitations is beyond the purview of this Article. Nonetheless, a proper understanding of which limits are constitutional and which are prudential will enable a more productive conversation between the Supreme Court and Congress. The Court acts appropriately when it seeks to address modern problems and craft sensible limits on the bounds of courts' power over litigants. But the Court should make clear which of those doctrines are prudential and thus subject to reformation by the political branches.

V. CONCLUSION

Within the Supreme Court's virtual unanimity on the question of general jurisdiction lies the hope of a coherent and unified theory of personal jurisdiction, one rooted in procedural due process and the notion of nonarbitrariness. The Court has identified the saturation point at which general jurisdiction is appropriate—where the connection between the defendant and the forum is as tight as possible. It also has implied the existence of another saturation point. The two points together help define the outer constitutional limits of personal jurisdiction. Although the boundary that traces its way between the two saturation points suggests a lax constitutional regulation of personal jurisdiction in most instances, I have argued that that laxness also reveals possibilities for innovation. As seemingly hidebound

226. *See* Borchers, *supra* note 27, at 122 (noting prevalence of state long-arm statutes that expressly—or through judicial construction—extend as far as the Constitution allows).

227. Weinstein, *supra* note 201, at 282.

228. *See* Monaghan, *supra* note 216, at 28.

constitutional notions become suppler, Congress and the Supreme Court can work cooperatively and creatively to fashion sensible prudential limits on courts' adjudicative powers.

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