

THE END OF ANOTHER ERA: REFLECTIONS ON *DAIMLER* AND ITS IMPLICATIONS FOR JUDICIAL JURISDICTION IN THE UNITED STATES

by
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The Supreme Court's decision in Daimler AG v. Bauman confirmed what the Court hinted at in its earlier decision in Goodyear Dunlop Tires v. Brown—that a corporation must be sued “at home” unless the claims being asserted relate to the corporation’s activity in the forum state. Together, the decisions put an end to an era of general jurisdiction jurisprudence in the United States. This Article highlights the impact of these decisions in both interstate and international cases. It examines related areas of jurisdictional doctrine that are likely to be affected, including new ways of defining and interpreting specific jurisdiction. It notes the developing case law raising constitutional challenges to corporate registration statutes that purport to confer general jurisdiction on the basis of the corporation’s consent. It also identifies problems created for recognition and enforcement of foreign country judgments and awards if the Daimler standard is applied in that context. This Article concludes with the observation that a more comprehensive approach to jurisdiction may be called for, including possible legislative solutions.

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INTRODUCTION

In 1977, the year the Supreme Court decided *Shaffer v. Heitner*,¹ I was a young professor of civil procedure, and I wrote an article entitled

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“The End of An Era.”² Not surprisingly, the focus of the article was the demise of the theoretical, territorial underpinnings of judicial jurisdiction that accompanied the effective overruling of the landmark case of *Pennoy v. Neff*.³ I speculated about a number of related points, including how the abandonment of “power” theories of jurisdiction might in the future affect jurisdiction based on “tag” (service on a defendant transiently present in the state) and concepts of “corporate presence.”⁴

My initial predictions appear to have been wrong on both counts. Noting that “if the minimum contacts rule now applies to all types of jurisdiction,”⁵ I predicted that the “transient presence of an individual would presumably fail to satisfy that standard.”⁶ Subsequently, of course, the Supreme Court in *Burnham v. Superior Court*⁷ proved me wrong when it upheld as constitutional the jurisdiction over a nonresident defendant who was served with process while briefly in the forum state.

As to the second point, I suggested that the doctrine of corporate presence, which “relies on systematic and continuous activities of a non-resident defendant,”⁸ was “more likely to fall within the ambit of the *International Shoe* doctrine.”⁹ For that point, I could have (but did not) cite to the specific language of *International Shoe*:

While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits *unrelated to that activity*, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on *causes of action arising from dealings entirely distinct from those activities*.¹⁰

My assessment as to whether general jurisdiction over corporations on the basis of systematic and continuous activities would prevail—a standard which I have subsequently come to criticize¹¹—was correct for

¹ 433 U.S. 186 (1977).

² Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

³ 95 U.S. 714 (1878).

⁴ Silberman, *supra* note 2, at 75–76 & n.236.

⁵ *Id.* at 75 n.236.

⁶ *Id.* at 75–76 n.236.

⁷ 495 U.S. 604 (1990).

⁸ Silberman, *supra* note 2, at 76 n.236.

⁹ *Id.* (referencing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

¹⁰ 326 U.S. at 318 (emphasis added) (citations omitted).

¹¹ See Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 Hous. J. INT'L. L. 327, 333–39 (2004) [hereinafter Silberman, *International Business Transactions*]; Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 331 (2002); see also Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 613–15 (2012) [hereinafter Silberman, *Observations*].

about 35 years, up until the Supreme Court's surprising dicta in *Goodyear Dunlop Tires v. Brown*,¹² and later in *Daimler AG v. Bauman*.¹³ Together, the two cases signal the “end of another era,”¹⁴ and thus I thought it appropriate to write again, this time with observations rather than predictions.

I. THE NEW ERA OF GENERAL JURISDICTION: AN OVERVIEW

In *Goodyear*, estates of North Carolina minors who were killed in a bus accident alleged that the accident was the result of a defective tire manufactured by foreign subsidiaries of Goodyear USA. The assertion of jurisdiction over the foreign defendants was premised on the fact that these foreign subsidiaries sold these products (or similar ones) in the United States, including in North Carolina. In a unanimous opinion by Justice Ginsburg, the Supreme Court held that the assertion of general jurisdiction violated due process.¹⁵

On its facts, *Goodyear* was an easy case under the established Supreme Court and lower court precedents. Mere sales into the forum state—whether direct or as part of the stream of commerce—had never been sufficient to satisfy the “systematic and continuous” activity necessary to satisfy general jurisdiction.¹⁶ The more interesting aspect of *Goodyear* was Justice Ginsburg's broader statement that general or “all-purpose” jurisdiction requires that the defendant's affiliations with the State be so “continuous and systematic” as to render the defendant “essentially at home in the forum State.”¹⁷ To further amplify the “at home” concept, the Court offered as paradigms the defendant's place of incorporation

¹² 131 S. Ct. 2846 (2011).

¹³ 134 S. Ct. 746 (2014).

¹⁴ In her concurring opinion in *Daimler*, Justice Sotomayor made the point directly when she referred to the “‘continuous and systematic contacts’ inquiry that has been taught to generations of first-year law students” which the Court now characterized as “‘unacceptably grasping.’” *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring in the judgment) (quoting *id.* at 760 (majority opinion)). See also Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 119 (1999) (“It is probably too late in the day for an assertion of jurisdiction on this basis in a state where the defendant conducts substantial business systematically and continuously to be held unconstitutional.”). I have recently made the same point elsewhere. See Linda J. Silberman, *Daimler AG v. Bauman: A New Era for Judicial Jurisdiction in the United States*, 16 Y.B. PRIV. INT'L L. 217–35 (forthcoming 2015).

¹⁵ *Goodyear*, 131 S. Ct. at 2850–51.

¹⁶ See, e.g., *Glatter v. Eli Lilly & Co.*, 744 F.2d 213, 214–15 (1st Cir. 1984) (finding that product advertisements in trade journals sent into the forum and eight in-state sales representatives selling in the forum were insufficient to establish general jurisdiction); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) (“[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action.”); *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 611 (5th Cir. 2008) (collecting cases).

¹⁷ *Goodyear*, 131 S. Ct. at 2851.

and principal place of business,¹⁸ but left open the question of whether alternative bases might also suffice for general jurisdiction over a nonresident corporate defendant.¹⁹

In *Daimler*, the Supreme Court repeated what it said in *Goodyear* and expressly rejected the argument that general jurisdiction can be exercised “in every State in which a corporation engages in a substantial, continuous, and systematic course of business.”²⁰ Stating that “continuous and systematic activities” alone are not sufficient for jurisdiction over claims unrelated to those activities, the Court reemphasized that a corporation’s affiliations with a state must be “so continuous and systematic as to render [it] essentially at home in the forum state.”²¹ In a footnote, the Court did acknowledge that in an exceptional case, a corporation’s operations in a state other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render it “essentially at home” in that state. But *Daimler*’s activities in California did not approach that level.²²

It is not quite clear why the Supreme Court chose to make the *Daimler* case the vehicle to further refine the “at home” point. The more significant question in the case—and the one on which the Court granted certiorari—was whether the activities of a subsidiary of a foreign parent could be attributed to the parent.²³ In *Daimler*, Argentinian workers attempted to bring their human rights lawsuit in California against the

¹⁸ *Id.* at 2854 (citing Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

¹⁹ In the wake of *Goodyear*, some scholars read the Court’s “at home” language to suggest that “continuous and systematic” business activity was no longer sufficient for establishing general jurisdiction over a corporation. *See, e.g.*, Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 680–81 (2012); Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 531–33 (2012). *But cf.* Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 215 (2011) (arguing *Goodyear*’s “at home” language is merely superfluous and did not alter current doctrine).

²⁰ *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (internal quotation marks omitted).

²¹ *Id.* at 754 (internal quotation marks omitted) (quoting *Goodyear*, 131 S. Ct. at 2851). Justice Ginsburg also emphasized the transnational context of the *Daimler* case, observing the more limited approach of other nations to assertions of general jurisdiction. She points to the European Union Regulation 1215/2012, Articles 4(1), and 63(1), 2012 O.J. (L351), that permits a defendant to be sued generally in the member state in which it is domiciled and then defines the “domicile” of a corporation as its “statutory seat,” “central administration,” or “principal place of business.” *Id.* at 763.

²² *Id.* at 761 n.19.

²³ *See* Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler AG v. Bauman*, 34 U. PA. J. INT’L L. 765, 775 & n.32 (2013); *see also* Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123, 124 (2013).

German company Daimler AG, although the alleged abuses were committed in Argentina by Daimler's *Argentine* subsidiary, Mercedes-Benz Argentina; the claims against the German parent Daimler were based on a theory of vicarious liability.²⁴ The basis for jurisdiction over Daimler was the existence of its indirect U.S. subsidiary, Mercedes-Benz USA, a Delaware corporation with its principal place of business in New Jersey and with various facilities in California. Mercedes-Benz USA is Daimler's exclusive importer and distributes cars to independent dealerships throughout the United States. However, there were no allegations that Mercedes-Benz USA had any connection to the events in Argentina that gave rise to the claim.

The district court granted Daimler's motion to dismiss the action for lack of personal jurisdiction, holding (1) that Daimler's own activities were insufficient to support the exercise of general jurisdiction; and (2) that the California activities of Mercedes-Benz USA were not attributable to Daimler on an agency theory.²⁵

In the district court, Daimler conceded that Mercedes-Benz USA was subject to general jurisdiction,²⁶ and thus the Ninth Circuit was faced with the question of whether the activities of Mercedes-Benz USA could be attributed to Daimler. Daimler argued that Mercedes-Benz USA was an independent subsidiary and that Mercedes-Benz USA's amenability to jurisdiction could not be attributed to Daimler.²⁷ The Court of Appeals for the Ninth Circuit rejected Daimler's argument, holding that for purposes of jurisdiction Mercedes was Daimler's agent, and that California could exercise jurisdiction over Daimler on the basis of Mercedes' activity in California. Mercedes was said to be Daimler's agent for two reasons. First, Mercedes was performing services sufficiently important to Daimler that would be performed by other means if Daimler did not exist.²⁸ Second, because Daimler exercised *some* degree of control over Mercedes, Mercedes' activities could be imputed to Daimler.²⁹

The Supreme Court granted certiorari to determine whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the fo-

²⁴ *Daimler*, 134 S. Ct. at 751–52.

²⁵ *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at *10 (N.D. Cal. Nov. 22, 2005), *aff'd* Order Granting Defendant's Motion to Dismiss at *3–4, *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2007 WL 486389 (N.D. Cal. Feb. 12, 2007).

²⁶ Before the Ninth Circuit, Daimler argued that because the concession was made prior to the Supreme Court's decision in *Goodyear*, Daimler should be permitted to contest general jurisdiction over Mercedes in California at the appellate level, given the new standard expressed in *Goodyear*. *Daimler*, 134 S. Ct. at 758.

²⁷ *Id.* at 752–53.

²⁸ *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 922 (9th Cir. 2011), *rev'd sub nom.* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

²⁹ *Id.*

rum state.³⁰ Although the Court answered that precise question in the affirmative, it offered little guidance for future cases about when a subsidiary's activities can be attributed to the parent, particularly in the context of general jurisdiction. The Court did reject the Ninth Circuit's view—that Mercedes was Daimler's agent for general jurisdiction purposes because its services were "important" to Daimler and that if Mercedes were not performing those services, Daimler would have had to undertake them itself. The Supreme Court observed that the Ninth Circuit's view "stacked the deck" and would create an "outcome that would sweep beyond even the sprawling view of general jurisdiction" that the Court had already rejected in *Goodyear*.³¹

However, the Court did not indicate what would justify the attribution of jurisdictional contacts in the absence of the classic piercing of the corporate veil via an alter ego theory. Indeed, the Supreme Court's opinion is quite confusing in that it says (1) Even if we assume that Mercedes-Benz USA is at home in California; and (2) Further assume that Mercedes' contacts are imputable to Daimler, "there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."³²

It is hard to fathom what is meant by that last comment: If the concession is viewed to be that Mercedes is "at home" and those "at home" contacts are "assumed" to be attributed to Daimler, it is not clear why Daimler is not subject to general jurisdiction based on the latter assumption.³³ Perhaps the Court is only imputing Mercedes' "contacts," which alone are not sufficient for "at home" jurisdiction, but that interpretation seems inconsistent with the first assumption. Alternatively, it may be that, in the absence of an alter ego or piercing situation, even an "at home" California subsidiary of a foreign parent cannot create jurisdiction over the foreign parent that is incorporated and has its principal place of business elsewhere.

The cryptic statement and the lack of clarification leaves open the question of whether there are any circumstances short of "piercing" when imputation is appropriate for general jurisdiction. And it is also not clear whether the Court would find the Ninth Circuit's definition of agency too broad in the context of specific jurisdiction as well.

The *Daimler* case should have been an easy one for the Court without having to revisit the broader question of the overall standard of general jurisdiction. Thus, the Court offers a broad solution for cases it has not even considered and dramatically changes the regime of judicial jurisdiction in the United States.³⁴ The decision also has the potential for mis-

³⁰ *Daimler*, 134 S. Ct. at 752–53.

³¹ *Id.* at 759–60 (internal quotation marks omitted).

³² *Id.* at 760.

³³ See Donald Earl Childress III, *General Jurisdiction after Bauman*, 66 VAND. L. REV. EN BANC 203, 207 (2014).

³⁴ For early commentary on the decision, see *id.* at 204–08.

chief-making in the context of the recognition and enforcement of foreign judgments.

II. A POSSIBLE VARIATION ON “AT HOME”: REQUIRING A “BRICKS AND MORTAR” PRESENCE

Along with others,³⁵ I have been a critic of the U.S. “doing business” general jurisdiction for its lack of predictable standards as well as the broad opportunities for forum shopping it presents.³⁶ Thus, I agree with the Court’s attempt to constrain general jurisdiction in some way. However, rather than restricting general jurisdiction to the place of incorporation and principal place of business of the foreign defendant, the Court could have embraced a somewhat more liberal approach consistent with its much earlier decision in *Perkins v. Benguet Consolidated Mining Co.*³⁷

In an earlier article written shortly after the *Goodyear* case was decided,³⁸ I suggested that *Goodyear* might be read to require that a nonresident corporation have some type of physical manifestation—a “bricks and mortar” presence—in the forum in order to be subject to general jurisdiction. Such a requirement would be consistent with the approach in some other countries. For example, English law permits general jurisdiction over a foreign company when the company has a fixed place of business.³⁹ Japan appears to take a similar approach and will exercise jurisdiction when a foreign defendant has a branch office in Japan.⁴⁰ It is unfortunate that the U.S. Supreme Court did not wait for a specific case to present the issue for its consideration, but the Court appears to have preempted such an interpretation by its broad statements in *Daimler*.

There are strong arguments for reining in general jurisdiction, particularly as regards foreign country defendants. However, the Court had options other than restricting general jurisdiction to the principal place of business and place of incorporation. Adoption of an actual “physical presence” standard for establishing general jurisdiction would eliminate

³⁵ See Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (2001); Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 Hous. J. INT’L L. 385, 389–391 (2004); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001).

³⁶ See Silberman, *International Business Transactions*, *supra* note 11, at 333–39; Silberman, *Observations*, *supra* note 11, at 613–14.

³⁷ 342 U.S. 437 (1952); *see also* *Daimler AG v. Bauman*, 134 S. Ct. 746, 767–70 (Sotomayor, J., concurring) (discussing *Perkins*).

³⁸ Silberman, *Observations*, *supra* note 11, at 614.

³⁹ *See* DICEY, MORRIS, & COLLINS ON THE CONFLICT OF LAWS 346, 417 (Lawrence Collins et al. eds., 14th ed. 2006 & Supp. 2011).

⁴⁰ *See* TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN 4–45 to –50 (Yasuhei Taniguchi et al. eds., 2d ed. 2004), *cited in* OSCAR G. CHASE, HELEN HERSHKOFF, LINDA SILBERMAN, YASUHEI TANIGUCHI, VINCENZO VARANO & ADRIAN ZUCKERMAN, CIVIL LITIGATION IN COMPARATIVE CONTEXT 514–15 (2007).

much of the indeterminacy of the doing-business jurisdiction and offer a measure of predictability to foreign defendants. Also, such a “physical presence” requirement is more consistent with *Burnham v. Superior Court*, which upheld as constitutional the traditional rule that individuals are subject to suit if they are physically present and served with process in the forum state.⁴¹

More significantly, the Court fails to appreciate the impact that its recent decisions on specific jurisdiction have for this new regime of general jurisdiction. Justice Ginsburg, in responding on behalf of the *Daimler* majority to Justice Sotomayor’s concerns that the narrowing of general jurisdiction would result in injustices, wrote: “Remarkably, Justice Sotomayor treats specific jurisdiction as though it were barely there.”⁴² In fact, however, it is Justice Ginsburg who overlooks the impact of the Court’s recent decisions on specific jurisdiction, such as *J. McIntyre Machinery, Ltd. v. Nicastro*,⁴³ where Justice Ginsburg herself, along with Justices Kagan and Sotomayor, were in dissent.

In *Nicastro*, a New Jersey plaintiff injured while using a shearing press in New Jersey was prohibited, as a matter of due process, from bringing suit in New Jersey against the English manufacturer, who had engaged a distributor in Ohio to market the shearing presses throughout the United States.⁴⁴ A majority⁴⁵ of the Court concluded that because the manufacturer had not targeted the New Jersey market and only a limited number of machines “ended up” in New Jersey, the defendant did not sufficiently “purposefully avail” itself of the New Jersey market to satisfy due process.

Thus, given the Court’s restrictive approach to “purposeful availment” in the context of specific jurisdiction, a foreign-country defendant who has physical offices in one state in the United States and causes injury to a U.S. plaintiff in another state will still not be subject to general jurisdiction anywhere in the country.⁴⁶ That result seems wrong. At the same time, a “bricks and mortar” rule would still permit jurisdiction over

⁴¹ Of course, given the tension between *Burnham* and *Daimler*, perhaps it is *Burnham* that will be overruled.

⁴² *Daimler*, 134 S. Ct. at 758 n.10.

⁴³ 131 S. Ct. 2780 (2011).

⁴⁴ *Id.* at 2786.

⁴⁵ For the plurality, Justice Kennedy, writing for four justices, suggested the defendant must “manifest an intention to submit to the power of the sovereign.” *Id.* at 2788. This standard was not met in *Nicastro*, where the distributor rather than the manufacturer sold the shearing press into the forum, given that “it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.” *Id.* at 2789. In his concurring opinion, Justice Breyer states that if there were more than a single, isolated sale—or if the manufacturer had targeted the forum through advertising or forum-specific design—he and Justice Alito might have found the exercise of jurisdiction proper. *See id.* at 2792 (Breyer, J., concurring in the judgment).

⁴⁶ *See id.* at 2790.

a foreign country defendant that maintained an office in a state in the United States on a claim by a foreign plaintiff who was injured in an accident abroad—the very situation that in the past provoked the critique of U.S. general jurisdiction. In that situation, however, the action would likely be dismissed on *forum non conveniens*,⁴⁷ even without invoking the amorphous “reasonableness” overlay that the *Daimler* majority rejected for cases involving assertions of general jurisdiction.⁴⁸

Even a more expansive and concrete approach to general jurisdiction, such as the requirement of an office, would not change the result in *Nicastro* (and cases like it), since the foreign manufacturer there did not have a physical office anywhere in the United States. For cases like *Nicastro* involving injuries to U.S. plaintiffs in the United States caused by foreign defendants who merely sell their products in the United States, a different solution is called for. When a non-U.S. defendant causes injury in the United States, a U.S. court should be able to assert jurisdiction over such a defendant if the defendant’s contacts *with the United States as a whole* satisfy due process—that is, if there is purposeful availment by the defendant of the United States as a whole. Federal legislation to extend the jurisdiction of the federal courts is necessary to achieve such a result, though it is unclear whether such legislation could authorize a similar reach for state courts. Over the years, several proposals of various types have been offered in Congress,⁴⁹ and perhaps additional efforts will be forthcoming in the future.

⁴⁷ See Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 69, 73 (2013) (noting courts’ ability to use *forum non conveniens* as a way to dismiss so-called “f-cubed” cases that involve a foreign plaintiff, foreign defendant, and acts that occurred in a foreign country).

⁴⁸ The majority in *Daimler* explained that a reasonableness inquiry would be “superfluous” in cases where “a corporation is genuinely at home.” *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20. Justice Sotomayor, concurring in the decision, would have preferred not to so restrict general jurisdiction and would have decided the case on the ground that the assertion of jurisdiction over *Daimler* would have been unreasonable. For an additional critique of reasonableness, see Linda J. Silberman, “Two Cheers” for International Shoe (and None for Asahi): An Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755 (1995).

⁴⁹ For example, a 1987 proposal would have authorized federal court jurisdiction over foreign defendants who injured United States claimants in the United States if the foreign defendants “knew or reasonably should have known that the product would be imported for sale or use in the United States.” S. 1996, 100th Cong. (1987). Rather than the adoption of a foreseeability test, which might not satisfy the Court’s present due process test, a more appropriate standard might look to whether the foreign defendant directed its sales to the United States as a whole and derived substantial revenue from the United States. A more recent proposal, the Foreign Manufacturers Legal Accountability Act, would have required a foreign manufacturer that desires to distribute certain products in the United States to establish a registered agent in the United States, specifically in a state with a substantial connection to the importation, distribution, or sale of the covered product. H.R. 1910, 113th Cong. (2013); H.R. 3646, 112th Cong. (2011). For further discussion of the statute, see Silberman, *Observations*, *supra* note 11, at 605–06.

III. RETHINKING THE “ARISING FROM/RELATED TO” REQUIREMENT

The restrictions on general jurisdiction will likely lead to attempts to expand specific jurisdiction by focusing on the constitutional parameters of the “arising from”/“related to” requirement of specific jurisdiction. During the oral argument in *Nicastro*, Justice Ginsburg asked the defendant’s lawyer whether there was a forum in the United States where the plaintiff could sue the English manufacturer, McIntyre.⁵⁰ Although his initial response was that McIntyre could be sued in Ohio, where the independent distributor was located and the manufacturer sent its products,⁵¹ a further colloquy with several Justices left serious doubt as to whether a viable theory existed for bringing such a suit in Ohio.⁵² However, if sales in Ohio can support jurisdiction in Ohio for an injury in New Jersey on a theory of specific jurisdiction in *Nicastro*, such a conceptualization of specific jurisdiction would provide an alternative to compensate for the restrictions on general jurisdiction resulting from *Goodyear* and *Daimler*.

Critical to the determination of specific jurisdiction is whether a plaintiff’s claim can be said to “arise from or relate to” defendant’s contacts with the forum state.⁵³ On the facts in *Nicastro*, the ability of *Ohio* to assert jurisdiction over the English manufacturer will meet the constitutional due process standard only if the claim for the injury in New Jersey is “arising out of or related to” the English manufacturer’s sales to the distributor in Ohio.⁵⁴ Lower courts have taken different views about when activities give rise to the claim when interpreting specific jurisdiction,⁵⁵

⁵⁰ Transcript of Oral Argument at 7–8, *Nicastro*, 131 S. Ct. 2780 (No. 09-1343).

⁵¹ *Id.* at 8.

⁵² *Id.* at 8–13.

⁵³ See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 224 (2014).

⁵⁴ *Nicastro*, 131 S. Ct. at 2788.

⁵⁵ For example, in *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318–19 (3d Cir. 2007), the court outlined three predominate approaches taken by state and federal courts: (1) The “proximate cause” test, which requires that the defendant’s contacts be relevant to the merits of the plaintiffs; (2) A more relaxed “but for” test looking to a foreseeable connection with the forum activity and the ultimate claim; and (3) A “substantial connection” test that looks to see whether the connection makes it fair and reasonable to assert jurisdiction. In *O’Connor*, the court applied a version of the “but for” test that required a “closer and more direct causal connection”, and permitted the plaintiff, who had fallen at the Sandy Lane Hotel in Barbados, to sue the hotel in Pennsylvania on the basis that the plaintiff arranged the massage by telephone while in Pennsylvania after the hotel had mailed a brochure to his home in Pennsylvania. *Id.* at 323. See also *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 584–85, 588 (Tex. 2007) (evaluating these tests and applying a “substantial connection” test, but ultimately finding defendant’s connections with Texas “are simply too attenuated to satisfy specific jurisdiction’s due-process concerns”). Related to the proximate-cause approach is a test proposed by Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82

but the Supreme Court has not yet interpreted the “arising from/related to” requirement in the context of due process.⁵⁶

In assessing the relationship necessary to qualify as specific jurisdiction, state and federal courts pre-*Daimler* emphasized the need to preserve the distinction between general and specific personal jurisdiction.⁵⁷ After *Daimler*, courts may take a more liberal view of “related contacts” for specific jurisdiction in order to mitigate the consequences of *Daimler*’s restrictions on general jurisdiction.⁵⁸ But a formal conceptual framework for crafting specific jurisdiction is necessary to avoid merely regenerating general jurisdiction under a different name.

Just what constitutes the appropriate connection for specific jurisdiction is being raised in a significant case in the California Supreme Court: *Bristol–Meyers Squibb Co. v. Superior Court*.⁵⁹ The case illustrates a different consequence of *Daimler*, this time in the domestic context. Since the case involves two U.S. defendants (Bristol–Meyers Squibb (BMS) and McKesson Corporation), a determination by the court that California

(1980) (arguing that a claim only arises from activities that are substantively an element of plaintiff’s claim). For further elaboration on the “substantive relevance” test, see Lea Brilmayer, Colloquy, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1455–57 (1988). See also Rhodes & Robertson, *supra* note 53.

⁵⁶ In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588–89, 595 (1991), the Supreme Court had the opportunity to address this issue, but failed to do so. In *Shute*, the plaintiff sued Carnival Cruise Lines in her home state of Washington, and the state supreme court upheld jurisdiction, interpreting their long-arm statute to permit jurisdiction over Carnival Cruise, because the Shutes’ claim “arose from” Carnival Cruise’s business advertising in Washington State. *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82 (Wash. 1989). However, the Supreme Court declined to answer whether or not this assertion of “arising from” specific jurisdiction violated due process, and instead reversed the case based on a forum selection clause that required the case be adjudicated in Florida.

⁵⁷ See *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075 (9th Cir. 2011); *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001); *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999). But see Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 635 (1988) (arguing “courts have extended the terminology of general jurisdiction beyond its traditional contours,” resulting in blurring the categories of general and specific jurisdiction in cases that historically fell under “doing business” or “presence” jurisdiction).

⁵⁸ See, e.g., *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, No. 14-935-LPS, 2015 WL 186833, at *19 (D. Del. Jan. 14, 2015) (accepting specific jurisdiction in a situation where it appeared that prior precedents had rejected such jurisdiction, observing that “[i]n a post-*Daimler* world, it may very well be that specific jurisdiction becomes a more prominent basis for exercising jurisdiction in [such] cases”); *Novartis Pharm. Corp. v. Mylan Inc.*, No. 14-777-RGA, 2015 WL 1246285, at *3–5 (D. Del. Mar. 16, 2015) (following *Acorda* in upholding general jurisdiction but permitting jurisdictional discovery for the purpose of specific jurisdiction); see also Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 876 (2012).

⁵⁹ *Bristol–Meyers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412 (Cal. Ct. App. 2014), *rev. granted*, 337 P.3d 1158 (Cal. 2014). I am grateful to Dean Peter (“Bo”) Rutledge for bringing this case to my attention in a recent presentation he gave at Pepperdine University.

does not have *general* jurisdiction over BMS does not mean that the plaintiffs completely lack a forum in the United States. However, plaintiffs, who were injured in different states by a common drug, can bring their claims against BMS in a single action only if they sue in the place of incorporation (Delaware) or the principal place of business (New York). Also, because plaintiffs have brought suit against two defendants with different principal places of business, Delaware may be the only place that all the plaintiffs can sue both defendants.⁶⁰

In *Bristol–Myers*, both resident and nonresident consumers brought suit in California against BMS, the manufacturer of the drug Plavix, and McKesson Corporation, a pharmaceutical distributor and marketing company that distributes Plavix.⁶¹ McKesson is a Delaware corporation with its principal place of business in California; Bristol–Myers is a Delaware corporation with its principal place of business in New York. Plaintiffs, consisting of 84 California residents who purchased the drug in California and 575 non-California residents who purchased and ingested the drug in other states, allege various claims resulting from injuries suffered as a result of taking the drugs. Prior to *Daimler*, the California appellate court, relying on defendants’ extensive sales activity in California, its numerous offices in California involving sales and research activities, and its registration to do business in California, concluded that Bristol–Myers was subject to *general jurisdiction* in California. Post-*Daimler*, the California Supreme Court vacated the appellate court ruling and sent the case back to the appeals court to revisit the jurisdictional issue in light of *Daimler*. The California appellate court then concluded that *Goodyear* and *Daimler* together “made clear” that BMS was not subject to *general jurisdiction* in California.⁶²

However, the California appeals court then proceeded to consider whether specific jurisdiction over BMS was appropriate. The critical feature for the analysis is whether the plaintiffs’ claims “are related to or arise out of” the forum-directed activities.⁶³ Noting that the Supreme Court had not defined what it means to “arise out of” or “relate to” a defendant’s contacts with the state, the California appellate court relied on several California Supreme Court precedents that focused on defendants’ continuing commercial connections with California such that the claim “bears a substantial connection to the nonresident’s forum contacts.”⁶⁴ In interpreting the California cases, the California appeals court concluded that where the defendant has an essentially interstate business, it can expect to be sued in a state even for injuries that occur else-

⁶⁰ It is possible that McKesson, a Delaware corporation with its principal place of business in California, was only joined for strategic reasons to prevent removal on diversity of citizenship grounds.

⁶¹ *Bristol–Myers*, 175 Cal. Rptr. 3d at 414–16.

⁶² *Id.* at 415–20.

⁶³ *Id.* at 425.

⁶⁴ *Id.* at 429–33.

where. The court emphasized that the sales of Plavix in California by BMS led to injuries to California residents and proof of deficiencies in the drug in those cases would be common for all plaintiffs. The court also pointed out that BMS could always show that the assertion of jurisdiction was “unreasonable,” and thus its due process rights were protected.⁶⁵ It remains to be seen how the California Supreme Court—and possibly at some later point the Supreme Court of the United States—will view specific jurisdiction in this context.

Although I am sympathetic to an expanded role for specific jurisdiction that would encompass something close to a “but for” standard, the approach of the California Court of Appeals to specific jurisdiction in *Bristol–Meyers* appears to reintroduce general jurisdiction by another name. There is no causal connection between the claims of the California plaintiffs and the residents of other states. A more plausible specific jurisdiction forum might be the state where the drugs were manufactured or distributed to both the California and non-California plaintiffs; all plaintiffs’ claims might be said to “arise from” such defective manufacture and thereby provide an alternative single forum in which to have all the plaintiffs assert their claims.⁶⁶ In *Bristol–Meyers*, no such connection to California can be established for the non-California plaintiffs. The claims of the California and nonresident plaintiffs are merely parallel. As for the efficiency arguments relied on by the California appeals court, only the issue of the defective quality of the drug is common to all the claims.⁶⁷

The “bricks and mortar” presence of BMS in California—my own preference for a general jurisdiction standard—would be a better rationale for the assertion of jurisdiction in the *Bristol–Meyers* case were it not foreclosed by *Daimler*. Alternatively, the fact that BMS had a registered agent for service in California might be viewed as consent to jurisdiction in California.⁶⁸ Some states, like New York⁶⁹ and Delaware,⁷⁰ construe the appointment of a registered agent as consent to general jurisdiction, but the California courts interpret their statute as merely au-

⁶⁵ *Id.* at 434–36.

⁶⁶ Such an “arising from” interpretation would also have permitted a basis for jurisdiction in Ohio in the *Nicastro* situation.

⁶⁷ Application of non-mutual issue preclusion might be used in an appropriate case, but even in this context a question might be raised whether a single jury verdict relating to “Californians” should have this broader impact.

⁶⁸ See Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 N.Y.U. L. REV. (forthcoming Nov. 2015), <http://ssrn.com/author=2267528>.

⁶⁹ See, e.g., *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009); *The Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 466–67 (S.D.N.Y. 2008); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1076 (N.Y. 1916). For a detailed account of the New York case law, see Benish, *supra* note 68 (manuscript at 16 n.110).

⁷⁰ *Sternberg v. O’Neil*, 550 A.2d 1105, 1116 (Del. 1988).

thorization for service and not jurisdiction.⁷¹ Moreover, even in states that construe their registration statutes as consent to jurisdiction, *Daimler* raises questions as whether such consent is consistent with due process.⁷² Numerous cases post-*Daimler* have asserted general jurisdiction over non-resident defendants on the basis of these registration statutes, explaining that such consent-based jurisdiction was not affected by *Daimler*.⁷³

⁷¹ See *World Lebanese Cultural Union, Inc. v. World Lebanese Cultural Union of N.Y., Inc.*, No. C 11-01442 SBA, 2011 WL 5118525, at *4 (N.D. Cal. Oct. 28, 2011) (“California courts, however, have declined to find that a party has consented to a state’s jurisdiction merely by appointing an in-state agent for service of process.” (citing *DVI, Inc. v. Superior Court*, 128 Cal. Rptr. 2d 683, 694 (Cal. Ct. App. 2002); *Gray Line Tours v. Reynolds Elec. & Eng’g Co.*, 238 Cal. Rptr. 419, 421–22 (Cal. Ct. App. 1987))).

⁷² Compare *AstraZeneca AB v. Mylan Pharm., Inc.*, No. 14-696-GMS, 2014 WL 5778016, at *5 (D. Del. Nov. 5, 2014) (mere compliance with registration statute not sufficient for general jurisdiction), with *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, No. 14-935-LPS, 2015 WL 186833, at *11–12 (D. Del. Jan. 14, 2015) (registration statute is evidence of “consent” and *Daimler* did not address “consent” as an independent basis of jurisdiction). For an extensive discussion of the role of registration statutes after *Daimler*, see Benish, *supra* note 68.

⁷³ See *Acorda Therapeutics*, 2015 WL 186833, at *1, *5 (finding that registration statute is evidence of “consent” and that *Daimler* did not address “consent” as an independent basis of jurisdiction); see also *Novartis Pharm. Corp. v. Mylan Inc.*, No. 14-777-RGA, 2015 WL 1246285, at *2–3 (D. Del. Mar. 16, 2015) (following *Acorda Therapeutics*); *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. 14-508-LPS, 2015 WL 880599, at *10–11 (D. Del. Feb. 26, 2015), *adopted*, No. 14-508-LPS, 2015 WL 1467321 (D. Del. Mar. 30, 2015) (stating that *International Shoe* and its progeny do not apply to consent-by-registration as a basis of general jurisdiction, and that registration to do business under Delaware law represents “a consent applicable to any cause of action”); *Otsuka Pharm. Co. v. Mylan Inc.*, No. 14-4508 (JBS/KMW), 2015 WL 1305764, at *11 (D.N.J. Mar. 23, 2015) (stating that complying with the state registration statute may demonstrate consent); *Beach v. Citigroup Alt. Invs.*, No. 12 Civ. 7717(PKC), 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014) (concluding that a corporation may consent to jurisdiction in New York by registering as a foreign corporation and designating a local agent (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170, 175 (1939))); *Hoffman v. McGraw-Hill Fin., Inc.*, No. ESX-C-216-13, 2014 WL 7639158, at *6 (N.J. Super. Ct. Ch. Div. Dec. 30, 2014) (upholding general jurisdiction based on consent-by-registration); *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/12, 2014 WL 3885949, at *4 (N.Y. Sup. Ct. Aug. 5, 2014) (“Although *Daimler* clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent.” (footnote omitted)). Other cases have taken a different view. See, e.g., *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, No. 14-cv-8679 (CM), 2015 WL 539460, at *6 (S.D.N.Y. Feb. 6, 2015) (holding that compliance with state registration statutes is “insufficient to confer general jurisdiction in a state that is neither its state of incorporation [nor] its principal place of business” (citing *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014))); *AstraZeneca AB*, 2014 WL 5778016, at *5 (finding mere compliance with registration statute not sufficient for general jurisdiction). For an extensive discussion of the role of registration statutes after *Daimler*, see Benish, *supra* note 68, at 16–22, 29–32.

IV. THE IMPUTATION ISSUE

Another important issue left open by the Court in *Daimler* is the appropriate criteria for attributing the activities of a subsidiary corporation to a parent corporation.⁷⁴ Rejecting the Ninth Circuit's interpretation of agency as too "sprawling," the Court did not offer much guidance for future cases.⁷⁵ Justice Ginsburg's opinion does suggest that the standard is likely to differ depending upon whether the jurisdiction being asserted is general or specific. This point is one I stressed in an online piece I wrote prior to the Supreme Court decision in *Daimler*.⁷⁶ I argued that when the issue is one of general jurisdiction, the contacts of a U.S. subsidiary of a foreign parent should be imputed to the parent only when the alter-ego standard required to pierce the corporate veil is met.⁷⁷ On the other hand, I suggested that jurisdiction over the parent on the basis of activities of the subsidiary is justified when there is a connection between the dispute and the foreign defendant, as there would be in a case of *specific* jurisdiction.⁷⁸ In such cases, the defendant's use of a subsidiary or affiliate will often have a direct connection with the claim being asserted. As Justice Ginsburg explained in *Daimler*, subsidiaries "might be [the] parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere."⁷⁹ She amplified this point further in a footnote: "[A]gency relationships . . . may be relevant to the existence of *specific* jurisdiction. . . . As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there."⁸⁰ It will be left to future cases to develop the actual parameters that will satisfy due process.⁸¹

⁷⁴ See generally Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004); Hoffman, *supra* note 23, at 775, 783.

⁷⁵ *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

⁷⁶ See Silberman, *supra* note 23, at 125–26; see also Burt Neuborne, *General Jurisdiction, "Corporate Separateness," and the Rule of Law*, 66 VAND. L. REV. EN BANC 95, 99–105 (2013).

⁷⁷ See Silberman, *supra* note 23 at 125–26. In a recent post-*Daimler* federal appellate case presenting the issue of imputing contacts to establish general jurisdiction, the Ninth Circuit embraced the distinction I advocated, although in the reverse scenario of imputing the domestic parent's contacts to the foreign subsidiary. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1065 (9th Cir. 2015). The plaintiff argued for general jurisdiction over a foreign subsidiary of Nike on the basis of Nike's contacts in Oregon, where it is headquartered. The Ninth Circuit interpreted *Daimler* to permit imputing contacts in the case of a corporate alter ego, but held that "[t]he agency test is . . . no longer available . . . to establish [general] jurisdiction." *Id.* at *15. Given that the subsidiary was not Nike's alter ego, general jurisdiction could not be established.

⁷⁸ See Silberman, *supra* note 23, at 125–26.

⁷⁹ *Daimler*, 134 S. Ct. at 759.

⁸⁰ *Id.* at 759 n.13 (emphasis in original).

⁸¹ After *Daimler*, most courts have adopted a restrictive approach to imputation in the general jurisdiction context. See, e.g., *Viega GmbH v. Eighth Judicial District Court*, 328 P.3d 1152, 1155 (Nev. 2014) (finding no general jurisdiction where

V. MISCHIEF-MAKING ON RECOGNITION AND ENFORCEMENT

In one potentially unforeseen consequence, *Daimler* may have negatively affected the recognition and enforcement of foreign country judgments and foreign arbitral awards in the United States. Every federal appellate court to take up the issue has held that jurisdiction over the defendant is required to recognize and enforce a foreign arbitral award,⁸² and state and federal courts in most states impose a similar requirement for the enforcement of foreign country judgments.⁸³ In a recent Second Circuit case, *Sonera Holding B.V. v. Çukurova Holdings A.Ş.*,⁸⁴ a Dutch corporation brought suit in federal court in New York to enforce an arbitral award rendered in Switzerland against a Turkish company, Çukurova. The district court, in a ruling prior to *Daimler*, held that the award-debtor had engaged in a continuous course of doing business in New York based on its own contacts with New York as well as on the activities of its various agents and was therefore subject to general jurisdiction. On appeal, the Second Circuit reversed. Without deciding whether defendant had met New York's "doing business" test for "corporate presence" or New York's agency theory of jurisdiction, the Court of Appeals held that "[w]hatever the purported scope of [New York law], *Daimler* confirmed that subjecting Çukurova to general jurisdiction in New York would be incompatible with due process."⁸⁵

neither the German parent company nor its U.S. subsidiary were incorporated or had its principal place of business in Nevada and there was no showing of a relationship with Nevada so continuous and systematic to be considered at home in Nevada). In specific jurisdiction cases, courts are relying on particular factors to attribute activities of the subsidiary to the parent. *See, e.g., In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 530–34 (5th Cir. 2014) (subjecting Chinese manufacturer of drywall to jurisdiction on the basis of sales in the forum by its wholly owned Chinese subsidiary, where subsidiary acted only to serve the parent, and the parent and subsidiary held themselves out as the same entity to customers).

⁸² *See, e.g., First Inv. Corp. of the Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 750 (5th Cir. 2012); *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 396–98 (2d Cir. 2009); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1118 (9th Cir. 2002); *Greatship (India) Ltd. v. Marine Logistics Solutions (Marsol) LLC*, No. 11 Civ. 420(RJH), 2012 WL 204102, at *2, *6 (S.D.N.Y. Jan. 24, 2012).

⁸³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. g (1987) ("[T]he judgment creditor must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property."). Several recent state court decisions in New York have dispensed with any jurisdictional requirement for an action to enforce a foreign judgment. *See, e.g., Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 986 N.Y.S.2d 454, 456–59 (N.Y. App. Div. 2014). The decision followed an earlier decision, *Lenchyshtyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 286 (N.Y. App. Div. 2001). For a criticism of the New York cases, see Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439 (2012).

⁸⁴ 750 F.3d 221, 223 (2d Cir. 2014).

⁸⁵ *Id.* at 224–25.

The Court of Appeals for the Second Circuit in *Sonera* did not consider whether the fact that the plaintiff was seeking confirmation of a foreign arbitral award affected the jurisdiction standard. As I explain more fully elsewhere,⁸⁶ it does not follow that the standard adopted for jurisdiction in a plenary action must be precisely the same for an action seeking recognition or enforcement of the award (or judgment). Indeed, the lesson of *Shaffer* is that although property of the defendant is insufficient to justify an action with respect to a claim unrelated to it, that property can still support an action to enforce a previously rendered judgment or award.⁸⁷ From a due process perspective, *Shaffer* can be understood to justify a less restrictive standard for general jurisdiction in the context of recognition and enforcement. Another case now before the Second Circuit may present the question directly.⁸⁸

CONCLUSION

The end of an era is marked by an event that alters a well-established ethos through a period of time. In 1977, *Shaffer* effectively eliminated quasi-in-rem type II attachment jurisdiction,⁸⁹ a long-accepted basis of personal jurisdiction that preceded even *Pennoyer* itself.⁹⁰ *Daimler* has ap-

⁸⁶ Linda J. Silberman and Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. (forthcoming 2016).

⁸⁷ *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977).

⁸⁸ See *Corporación Mexicana de Mantenimiento Integral v. PEMEX—Exploración y Producción*, 962 F. Supp. 2d 642, 657 (S.D.N.Y. 2013). The district judge in *Pemex* implied that the standard for establishing general jurisdiction to recognize an arbitral award might be less than to establish general jurisdiction to adjudicate a plenary action. Transcript of Oral Argument at 24–28, *Pemex*, 962 F. Supp. 2d 642 (No. 10 Civ. 206 (AKH)), ECF No. 56. For a more extensive discussion of *Pemex*, see Silberman and Simowitz, *supra* note 86.

⁸⁹ Justice Marshall's opinion in *Shaffer* traced the history of the power theory of jurisdiction—which formed the basis for quasi-in-rem type II attachment jurisdiction—from *Pennoyer* to *International Shoe*. See *Shaffer*, 433 U.S. at 195–205. Arguing that “if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible,” Justice Marshall found that “the property which now serves as a basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action.” *Id.* at 209. After reviewing the arguments for the necessity of quasi-in-rem type II attachment jurisdiction and finding them unavailing, he concluded: “[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.” *Id.* at 212.

⁹⁰ As with *Pennoyer*, much of the early U.S. case law was an outgrowth of collateral challenges to judgments obtained through attachment proceedings. The result in these cases invariably endorsed this type of jurisdiction. See, e.g., *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 320–21 (1870); *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336, 349–50 (1850); *Kibbe v. Kibbe*, 1 Kirby 119 (Conn. 1786); *Chamberlain v. Faris*, 1 Mo. 517, 518 (1825); *Kilburn v. Woodworth*, 5 Johns. 37, 38–41 (N.Y. Sup. Ct. 1809); *Force v. Gower*, 23 How. Pr. 294, 295–97 (N.Y.C.P. 1862); *Phelps v. Holker*, 1 Dall. 261 (Pa. 1788).

parently removed a heretofore well-entrenched concept of general jurisdiction over corporations on the basis of continuous and systematic activities even when substantial in nature.

The case has transformed, perhaps even for the better, the law of general jurisdiction in the United States. But the new era has opened up an intriguing set of additional questions for future generations of law students and lawyers: (1) Will expanded concepts of specific jurisdiction develop to mitigate the effects of *Daimler*, and if so, what will be the modern criteria for assessing specific jurisdiction?; (2) Will registration statutes that exact consent to jurisdiction offer an alternative basis for general jurisdiction?; (3) Under what circumstances will the activities of a subsidiary be attributed to the parent in both general and specific jurisdiction cases?; and (4) What impact does *Daimler* have for recognition and enforcement of foreign judgments and awards?

I concluded my article entitled “The End of an Era” with the hope that the new era would “sharpen our vision of the balances to be struck within the federal system.”⁹¹ As another era comes to a close, many of the new issues raised are transnational rather than federal in character. Yet current cases also return to familiar aspects of *International Shoe* and its progeny that may merit Supreme Court attention in coming years. The effect of tightening general jurisdiction in *Daimler*—when combined with *Nicastro*’s limitations on specific jurisdiction in products-liability cases—may call for different solutions, including legislative ones. The questions above highlight the ramifications a single decision may have in a number of related areas. My hope for the new era is that a more comprehensive approach to jurisdiction will result in a more coherent regime along with the realization that we are in an era in which transnational cases are the norm rather than the exception.

⁹¹ Silberman, *supra* note 2, at 101.