

**FURTHER THINKING ABOUT VICARIOUS JURISDICTION:
REFLECTING ON GOODYEAR V. BROWN AND LOOKING
AHEAD TO DAIMLER AG V. BAUMAN**

LONNY HOFFMAN*

1. INTRODUCTION

A question that arises with surprising frequency in civil litigation turns out to be as important as it is poorly understood: should a defendant ever be subject to jurisdiction based on what someone else did? *International Shoe Co. v. Washington*, the case that brought federal jurisdictional law into the modern era, recognized the necessity of attributing contacts to any non-natural legal entity, such as a corporation, whose presence is “manifested only by activities carried on in its behalf by those who are authorized to act for it.”¹ Almost three quarters of a century later, the courts are regularly called upon to decide whether it is permissible to exercise jurisdiction vicariously, a term I have used previously to describe any attempt that is made to impute the contacts of one person or entity to another.² The issue arises most often with related corporate entities. One common fact pattern is when the plaintiff tries to establish jurisdiction over a nonresident corporate parent by looking to the forum activities of its subsidiaries.³ Many other

* George Butler Research Professor of Law, University of Houston Law Center. My thanks to Steve Burbank, Aaron Bruhl, Charles “Rocky” Rhodes, Lee Rosenthal and Allan Stein for providing helpful comments on an earlier draft of this paper. I am grateful to the University of Pennsylvania Journal of International Law for inviting me to participate in the Mass Torts Symposium in November 2012. I presented an earlier version of this paper at the conference. Funding for this work was provided by the University of Houston Law Foundation.

¹ 326 U.S. 310, 316 (1945).

² Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004) (analyzing jurisdiction by attribution arguments and calling for a shift away from the use of many substantive legal theories for jurisdictional purposes).

³ See, e.g., *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) (“Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there; the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent. It has long been recognized,

variations also appear in the cases. Indeed, as I am making final edits to this paper, the Supreme Court just granted certiorari in *DaimlerChrysler AG v. Bauman, et al.* (cert grant, Apr. 22, 2013; Docket No. 11-965), a case in which the argument for jurisdiction turns on the activities of two corporate subsidiaries. I discuss the *Bauman* case below.

Despite the frequency with which courts must deal with these jurisdictional arguments, the lower court case law is a mess. Significant uncertainty looms over when, and under what circumstances, the contacts of another person or entity can be substituted for those of the defendant for jurisdictional purposes. The worst problems arise when courts justify the attribution of contacts by borrowing from substantive corporate law doctrines, particularly veil piercing, alter ego, and single business enterprise theory. Especially problematic are the cases that look to the substantive law to establish general jurisdiction, one of the two major forms of adjudicatory authority that state and federal courts in the United States invoke. With general jurisdiction, state power depends solely on the defendant's relationship to the forum because the plaintiff's claim is unrelated to any of its activities there.⁴ Unlike specific jurisdiction, general jurisdiction is exercised more expansively in the United States than in most other countries; as a result, it has been a source of international controversy.⁵

That may change after the Supreme Court's most recent jurisdictional decision, *Goodyear Dunlop Tires Operations, S.A. v.*

however, that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent 'does business' in a jurisdiction through the local activities of its subsidiaries.") (citations omitted). See also Hoffman, *supra* note 2, at 1029–31 (and authorities cited therein). For a thorough collection of the cases see PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* (1983 & Supp. 2002).

⁴ See generally Hoffman, *supra* note 2; Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies and Agency*, 74 CAL. L. REV. 1 (1986) (positing "three methods by which substantive legal relations may affect the jurisdictional balance").

⁵ Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999) ("The Europeans' principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant's physical presence, property ownership, or doing business in the forum. They do not object to specific jurisdiction . . .").

Brown,⁶ though it is still too early to say. The Court left a number of key questions unanswered about how its refined test for general jurisdiction should be applied. Notably, the exercise of vicarious jurisdiction was also at issue in *Goodyear*. One of the plaintiffs' arguments was that, because various Goodyear corporate entities operated as a single enterprise, the forum contacts of their U.S.-based parent should be imputed to its foreign subsidiaries.⁷ Although the Court found the argument had not been adequately preserved in the lower courts, it is helpful to think more closely about the *Goodyear* decision with reference to this vicarious jurisdiction argument the Court did not reach. One benefit of doing so is that, in the process, we may gain a better understanding of the test for general jurisdiction that the Court incompletely set forth in *Goodyear*.

Returning to the plaintiffs' unaddressed argument in *Goodyear* also provides an opportunity to revisit the core question that lies at the heart of any vicarious jurisdictional problem: when and on what authority is it appropriate for courts to impute contacts? Attribution of contacts is a necessary part of modern jurisdictional doctrine, but, as I have previously argued, jurisdictional analysis would be improved significantly if courts stopped looking to substantive legal theories that were not designed for setting constitutional limits on judicial power.⁸ Instead of relying on veil piercing, alter ego, single business enterprise, and other substantive law doctrines to justify the exercise of jurisdiction, courts should keep a more disciplined focus on the defendant's own connection to the forum. That is, rather than looking to whether a business is adequately capitalized, or failed to follow corporate formalities, or any of the many other proxies that are regularly borrowed from substantive law to justify the attribution of contacts, a more straightforward and defensible jurisdictional doctrine would recognize that a defendant is amenable to suit in the forum if it (1) purposefully avails itself of the privilege of conducting activities within the forum or (2) reasonably should expect that someone else would act in the forum on its behalf. I

⁶ 131 S. Ct. 2846 (2011).

⁷ *Id.* at 2857 & n.6.

⁸ See Hoffman, *supra* note 2 (discussing the implications of the intersection of the substantive law regarding veil piercing and agency theory and the law of judicial jurisdiction).

argue that this alternative approach, which is amply supported by the Court's prior decisions,⁹ now gains added purchase with *Goodyear's* articulation of its refined, narrower test for exercising general jurisdiction. *Bauman* presents the Court with the next opportunity to address arguments for the exercise of vicarious jurisdiction, and lessen some existing doctrinal uncertainties in how judicial power is measured.

2. DESCRIBING THE PROBLEM

The basic impulse driving courts to attribute contacts from one person or entity to another is understandable. Not only is it sometimes necessary to impute contacts because entities and individuals do not always act on their own;¹⁰ attribution of contacts is also driven by equitable considerations. It would be terribly unjust if a defendant could avoid having to answer for his wrongdoing simply because he got someone else to do his misdeeds for him.

But if it makes sense that we must on occasion look beyond a defendant's own direct contact with the forum, courts have struggled to justify when it is appropriate to impute another's contacts to the named wrongdoer. To justify these jurisdictional leaps, courts look for a valid basis for treating another person's or entity's jurisdictionally sufficient contacts as though they were the

⁹ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (“[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. Each defendant’s contacts with the forum State must be assessed individually.”) (citations omitted); *Calder v. Jones*, 465 U.S. 783, 790 (1984) (“Petitioners are correct that their contacts with California are not to be judged according to their employer’s activities there. On the other hand, their status as employees does not somehow insulate them for jurisdiction. Each defendant’s contacts with the forum State must be assessed individually.”); *see also* *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (“Naturally, the parties’ relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction.”).

¹⁰ *United States v. Scophony Corp. of America*, 333 U.S. 795, 819 (Frankfurter, J., concurring) (upholding service of process and the exercise of jurisdiction over a foreign corporate parent based on in-state service of its domestic affiliate and noting that “[w]hat was done in the Southern District of New York on behalf of [the parent] . . . establishes that the corporation was there transacting business and was found there in the only sense in which a corporation ever ‘transacts business’ or is ‘found’”).

defendant's. The conventional practice has been to do so by importing substantive law into jurisdictional doctrine.

Invoking substantive law for jurisdictional purposes is not always problematic. Consider agency law. When someone instructs another to act on his behalf, the obliging party acts as the agent of the principal and her actions bind the principal for any injuries that the agent causes.¹¹ If the principal would be liable for its agent's actions, then it seems reasonable to say, *a priori*, that the principal is subject to jurisdiction in the forum where its agent acted. That is, the same legal foundation on which liability may ultimately be imposed on the principal for the agent's actions will often also serve to justify requiring the principal to answer, under penalty of default if it does not, in the place that its agent committed the alleged wrongdoing on its behalf.

While agency law is often imported without difficulty into the jurisdictional analysis, courts have occasionally struggled with figuring out whether one acted pursuant to another's assent and subject to his control, as agency law typically requires.¹² Answering these questions can mean having to wade deeply into the often-murky facts of the case to make what is supposed to be an early determination that jurisdiction exists.¹³ Partly to avoid getting too far into the merits, some courts create a new version of the substantive law for jurisdictional purposes so that a different (usually less demanding) test is used to establish jurisdictional amenability than to establish liability.¹⁴ This, in turn, can raise

¹¹ RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

¹² *Id.* § 1.01 ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act.").

¹³ Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 981 (2006) (describing a case in which "a preliminary hearing on jurisdiction would entail a full-dress trial on the merits as to all issues of liability").

¹⁴ See, e.g., *Tara Prods., Inc. v. Hollywood Gadgets, Inc.*, 2010 WL 1531489, at *12 (S.D. Fla., Apr. 16, 2010) ("Although the Court acknowledges that Plaintiff must satisfy a heavy burden to successfully pierce the corporate veil, the Court finds that Plaintiff's allegations of alter ego are sufficient to survive a motion to dismiss. At the motion to dismiss stage, courts are reluctant to determine the fact intensive question of whether a corporate entity is merely an alter ego to protect an individual defendant from liability.") (citation omitted).

difficulties, especially in diversity cases, as federal courts fashion a federal common law standard of agency for jurisdictional purposes that varies from the substantive law they are obliged to apply as to liability.¹⁵ Some of the decisions that apply a reformulated agency-for-jurisdiction test end up reaching results that are very hard to defend. Indeed, the *Bauman* case for which the Court has recently granted certiorari is the most recent, significant example.¹⁶

Whatever the difficulties have been in looking to agency law for deciding jurisdiction, far greater problems arise when courts turn to other substantive law doctrines. The worst abuses occur when corporate law doctrines, such as alter ego, veil piercing doctrine, and single business enterprise theory are imported into the jurisdictional analysis.¹⁷ The fundamental difficulty is that these substantive doctrines were developed to take account of interests different from those relevant to measuring constitutional limits on judicial power.¹⁸ A parent company's failure to follow

¹⁵ Moreover, when we move beyond corporations to other non-natural entities, still other difficulties arise with the application of agency law to decide jurisdictional amenability. For instance, most courts insist that jurisdiction over a partner or member confers jurisdiction over the partnership because the partner is the agent of the partnership. *See, e.g.,* *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 466 (1st Cir. 1990) ("The general rule is that jurisdiction over a partner confers jurisdiction over the partnership."). Not all agree, however. And when it comes to other non-natural entities, like unincorporated associations, the doctrine becomes even more muddled, even within circuits. Thus, after recognizing the general rule of attribution as to partnerships, the First Circuit refused to impute the contacts of one member to an unincorporated association. *Id.* at 472 (refusing to exercise general jurisdiction over an unincorporated association that "does not itself conduct significant activities in, or enjoy affiliating circumstances with, a state . . . on the basis of a member's contacts within the state unless the member carries on the in-forum activities under the association's substantial influence"). *But see* *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 54 (1st Cir. 2002) (noting that "*Donatelli's* substantial influence test does not control the entire universe of cases in which one party's contacts might be attributed to another;" suggesting, but not deciding, that *Donatelli's* attribution analysis was limited to general jurisdiction cases; and ultimately upholding the attribution of contacts from one joint venture to another to support the exercise of specific jurisdiction).

¹⁶ *See infra* text accompanying note 32 (discussing *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011)).

¹⁷ *See Hoffman, supra* note 2, at 1065–66, 1075–76 (discussing the dangers of incorporating substantive corporate law doctrines into the jurisdictional analysis).

¹⁸ *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) ("Conspiracy as an independent basis for jurisdiction has been criticized as distracting from the ultimate due process inquiry: whether the out-of-state defendant's contact with the forum was such that it should reasonably anticipate

corporate formalities, hold regular shareholder meetings, or adequately capitalize its subsidiary often has little to do with the underlying reasons why a court should be able to compel a defendant to defend against civil liability in the forum, under penalty of default if he does not.¹⁹ Indeed, these corporate law doctrines—especially veil piercing law—long have been derided for being applied in a manner difficult to defend even as to substantive liability.²⁰

The intuition behind vicariously imputing to the parent the contacts of its subsidiary is sound: if different components of a business enterprise are essentially all acting as one, it sounds reasonable to not permit the wrongdoer to avoid accountability by letting it hide behind a legal fiction. In practice, courts often get badly confused as they wrestle with vicarious jurisdiction arguments and end up reaching decisions that are neither necessary nor defensible.

3. ATTRIBUTION OF CONTACTS TO ESTABLISH GENERAL JURISDICTION

Vicarious jurisdiction arguments are made to establish both specific and general jurisdiction, the two broad categories used to describe the exercise of judicial jurisdiction. In contrast to general jurisdiction, the state's regulatory interest is easier to recognize when the claim arises out of the defendant's contact with the forum.²¹ As a result, vicarious jurisdiction arguments for the

being haled into a court in the forum state. To comport with due process, the exercise of long arm jurisdiction over a defendant must rest not on a conceptual device but on a finding that the nonresident . . . has purposefully availed himself of the privilege of conducting activities within the forum state.") (internal quotation marks and citations omitted).

¹⁹ *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 721 n.5 (Tex. App.—Austin 2000, pet. dismissed w.o.j.), cert. denied, 535 U.S. 1077 (2002) ("Although many of the factors relevant to [determining whether subsidiaries' contacts should be imputed to parent] may also be relevant in determining whether a parent corporation should be liable for the actions of its subsidiary, the determination whether two corporate entities are one and the same for jurisdictional purposes is distinct.").

²⁰ See Hoffman, *supra* note 2 at 1075–82 and authorities cited therein (summarizing critiques of veil piercing law).

²¹ See Allan Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 537 (2012) ("[B]ased on a state's regulatory interest in the underlying controversy[,] . . . [s]tates normally have authority over absent defendants to redress harm caused by the defendant's activity within or outside of

exercise of specific jurisdiction often are more defensible because the rationale for imputing contacts more closely tracks the state's interest in exercising jurisdiction. Though this finding is not to say that the specific jurisdiction cases always make sense, the most problematic jurisdictional problems tend to arise when the plaintiff's claims are entirely unrelated to the defendant's forum activities.

3.1. General Jurisdiction Doctrine

Before *International Shoe*, the only recognized grounds for establishing jurisdiction over a defendant were physical presence in the forum or consent. Under the theory of territorial jurisdiction first set out in *Pennoyer v. Neff*, it made no difference whether the plaintiff's cause of action against the defendant had any connection to the state.²² All that mattered was the defendant's physical presence in the forum. After *International Shoe* announced a more flexible contacts-based fairness test (at least for all cases not involving physical forum presence), the relatedness of the plaintiff's claim to the defendant's forum contacts suddenly mattered. A single contact is now sufficient under the *International Shoe* test to satisfy due process when the claim arises out of that contact with the forum.²³

the forum. . . . In the case of general jurisdiction, that regulatory justification is, by definition, off the table."); *but see also* Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 751-52 (2003) (reviewing ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINES, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS* (2003)) (recognizing that, in most general jurisdiction cases, the forum state's regulatory interest is slight, but favoring an approach that would require the exercise of general jurisdiction to satisfy the second-stage 'reasonableness' prong of the *Shoe* test—a prong that is now regularly applied to specific jurisdiction exercises—and noting that this approach would allow proper consideration of all relevant factors, including: a plaintiff's forum domicile and the state's regulatory interest). Whether Professor Burbank's favored approach remains viable after *Goodyear* is uncertain. *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 n.5 (2011); Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 671 (2012) (discussing *Goodyear* and noting that "the Court's footnote [5] seems to foreclose such reasoning altogether").

²² 95 U.S. 714 (1877).

²³ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (noting that some single acts, "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit"); *see also* *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding that a

International Shoe also recognized that some courts previously had upheld the exercise of jurisdiction over defendants with a great many forum contacts, even when those contacts were unrelated to the plaintiff's cause of action against him.²⁴ Today, we refer to this basis as the exercise of general jurisdiction or "all-purpose jurisdiction," as Justice Ginsburg recently called it.²⁵

The question in *Goodyear* was whether three foreign subsidiaries of Goodyear had sufficient contacts to subject them to jurisdiction in North Carolina, home of the plaintiffs' decedents, for claims arising from a bus accident in Europe. The foreign subsidiaries owned no manufacturing facilities in North Carolina and operated no businesses in the state themselves. Their only connection to North Carolina was that some of the tires they made in their overseas facilities—not the tires involved in the crash—ended up there, distributed through Goodyear's conglomerate network of which they were a part.

Because the claim asserted against them had nothing to do with North Carolina, they were amenable to suit in the state, if at all, only on the basis of general jurisdiction. Unanimously, however, the Court concluded that these modest contacts (only "a small percentage" of their tires ended up in North Carolina²⁶) were not nearly enough to establish general jurisdiction. Here's the payoff quote:

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.²⁷

California court could properly exercise jurisdiction over an Arizona corporation because "the suit was based on a contract which had substantial connection with [California]").

²⁴ *Int'l Shoe Co.*, 326 U.S. at 318 ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.").

²⁵ *Goodyear*, 131 S. Ct. at 2851 (2011).

²⁶ *Id.* at 2852 ("[A] small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates.").

²⁷ *Id.* at 2851 (quoting *Int'l Shoe Co.*, 326 U.S. at 317).

A succinct, but not self-explanatory formulation, the “essentially at home” standard did not have to be more fully fleshed out because, on the facts of this particular case, it was readily apparent that the foreign subsidiaries were far from home in North Carolina. But what about closer cases? Is a corporation essentially at home in a state in which it does substantial business and employs hundreds of employees, even if it is incorporated and has its principal place of business elsewhere?²⁸ And what about foreign companies? Do we treat them differently than domestic entities which, by definition, can always safely be sued if the plaintiff is willing to travel to the state in which the company is incorporated? Courts and commentators have been wrestling with these, and other, questions since the decision came down.²⁹

3.2. Vicarious Jurisdiction for General Jurisdiction Purposes

Lacking certainty about the rationales underpinning and full scope of general jurisdiction, lower courts have struggled in dealing with vicarious jurisdiction arguments when they are made to try to exercise this form of jurisdiction. Especially problematic have been cases in which courts blindly apply substantive law doctrines like veil piercing, alter ego, and business enterprise theory for jurisdictional purposes in contexts for which these substantive law doctrines were never intended.

Perhaps the most egregious recent example is the case on which the Court has just granted review, *DaimlerChrysler AG v.*

²⁸ Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 426 (2012) (noting that “[m]inimal guidance, though, was provided on when a corporation can be regarded to be essentially or in a sense ‘at home’ in a state” and that, beyond place of incorporation and principal place of business, “the Court did not indicate what else may satisfy the standard”); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 321–22 (2012) (“But the Court never indicated whether home could go beyond those places. Even if doing substantial ‘continuous and systematic’ business in a state—operating stores, maintaining offices, and making sales—can create general jurisdiction, the Court left unexplained how much business is sufficient to render a defendant essentially at home in a state.”); Collyn Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations after Goodyear Dunlop Tires Operations, S.A. v. Brown*, 63 S.C. L. REV. 697, 698 (2012) (noting that the Court “failed to define, for future cases, what it meant by ‘essentially at home,’ a phrase it has used in no other context”).

²⁹ See *infra* text accompanying notes 36–38.

*Bauman, et al.*³⁰ In *Bauman*, Argentine citizens brought suit against Daimler AG. Plaintiffs alleged that a subsidiary of Daimler AG's predecessor-in-interest conspired with the government in Argentina to torture and kill relatives of the plaintiffs back in the 1970s. Although the facts of the case had no connection whatsoever to California, the Ninth Circuit upheld the exercise of jurisdiction over Daimler AG in the state. Looking to California's substantive law of agency, the Ninth Circuit found that the California subsidiary was the parent's agent in the state for jurisdictional purposes. Because the California subsidiary was subject to general jurisdiction, so too was its parent company.³¹

The scope of the Ninth Circuit's decision is breathtaking. Layering a jurisdiction-by-attribution argument on top of a substantive liability-by-attribution theory, the decision permits the exercise of jurisdiction in California over a foreign parent company, even though the alleged wrongdoing was not committed in California and the alleged wrongdoer was not the foreign parent. The injured plaintiffs allege they suffered at the hands of Daimler AG's South American subsidiary and their theory of liability—yet untested—is that the corporate parent bears responsibility for its subsidiary's actions. Neither the plaintiffs, who are Argentine, nor their claims, have anything to do with California. Their sole justification for suing the foreign parent in California is that the extensive contacts of one of its other subsidiaries, which is not alleged to have had anything to do with the wrongdoing in Argentina, should be attributable to the parent, thereby rendering the parent subject to jurisdiction in California for any claim whatsoever.³²

The *Goodyear* case itself is another example of how substantive law is often badly misapplied in making a vicarious jurisdiction argument. Before the trial and appellate court, plaintiffs argued

³⁰ *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *reh'g and reh'g en banc denied*, 676 F.3d 774, *petition for cert. filed*, Feb. 6, 2012.

³¹ *Id.*

³² Daimler's request for en banc review was denied, but it yielded a vigorous dissent by Judge O'Scannlain that eight other judges joined. *Bauman*, 676 F.3d (O'Scannlain, dissenting from denial of petition for rehearing and petition for rehearing en banc). Daimler subsequently filed a petition for certiorari which was to be considered by the Supreme Court at its September 2012 conference. The Court announced no disposition of the petition, however, and as of this writing it remains pending.

that the Goodyear foreign defendants had continuous and systematic contacts in North Carolina to justify the exercise of general jurisdiction over it. Their argument was not well developed, however. Plaintiffs emphasized the thousands of tires sold in the state that were manufactured by these foreign defendants. Even if these sales would have been considered extensive enough to constitute “continuous and systematic” contacts, plaintiffs faced the added obstacle that the tires were actually sold in North Carolina not by the foreign subsidiaries but by their U.S.-based parent company. Perhaps to overcome this barrier, plaintiffs emphasized that the foreign subsidiaries were part of a “highly integrated structure” with their U.S. parent.³³ For instance, in their state appellate brief, plaintiffs argued:

The manufacturer of the tire, Goodyear Lastikleri T.A.S., is a wholly owned subsidiary and the other defendants are operating subsidiaries of a multi-national, multi-billion dollar Goodyear corporation that is based in the United States and directed by a board of directors located in the United States. They necessarily have ongoing and repeated contacts with the U.S., which directs the companies on a world-wide basis. For example, their 30(b)(6) witness testified that the U.S. directs the Turkish manufacturing company as to how many of each tire to make so it can best meet the market for tires around the world.³⁴

This portion of their brief is the closest plaintiffs came to arguing that the substantive law justified imputing to the foreign subsidiaries the contacts of their U.S.-based parent company, which conceded it was subject to general jurisdiction in North Carolina. Before the North Carolina courts, the plaintiffs never referenced single business enterprise doctrine specifically (or any other corporate law doctrine) and they never even expressly asked the lower courts to attribute the parent’s contacts to the foreign defendants. Nevertheless, the ultimate, if not well articulated point the plaintiffs were trying to make in their briefing was that these companies were all operating as a unitary business

³³ Peddie, *supra* note 28 (discussing the Courts treatment of the *Goodyear* respondents’ “primary argument”).

³⁴ Brief of Plaintiffs-Appellees at 23, *Brown v. Meter*, 199 N.C. App. 50 (N.C. Ct. App. 2000) (No. COA08-994), 2008 WL 5026893.

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enterprise; consequently, if Goodyear had continuous and systematic contacts with North Carolina, then so too must its foreign subsidiaries, whose tires are sold by Goodyear in the state.

Despite the plaintiffs' poor effort to defend the exercise of general jurisdiction, the trial court denied the defendants' motion to dismiss, finding that defendants had "continuous and systematic" contacts in the state. The North Carolina Court of Appeals upheld the trial court's decision, but in the process further complicated the record. While affirming the trial court's determination that the defendants' contacts were "continuous and systematic," the appellate court made the separate error of conflating general jurisdiction with "stream of commerce" theory, a concept that applies only when specific jurisdiction is sought over a distant manufacturer whose products have caused injury in the forum.³⁵ After the Supreme Court granted certiorari, plaintiffs' new counsel before the U.S. Supreme Court valiantly tried to avoid the convoluted reasoning of the appellate court by trying to expand on the plaintiffs' earlier attempt to invoke single business enterprise theory to justify the attribution of contacts. She did not succeed, however, as the Court declined to reach the merits of the plaintiffs' now more fully fleshed out vicarious jurisdiction argument, finding that the argument had not been preserved below.³⁶

3.3. *Insights Into Goodyear's "Essentially At Home" Standard*

Before considering whether *Goodyear* offers any lessons about how to think about vicarious jurisdiction, we must first consider a more fundamental uncertainty about the decision. Elegant and succinct, Justice Ruth Bader Ginsburg's opinion leaves unanswered how the "essentially at home" standard is to be applied as to corporate defendants. One of the key questions the decision raises

³⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (noting that the state appellate court "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries"); Stein, *supra* note 21, at 530 (discussing the lower court decision in *Goodyear* and observing that "[i]f 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").

³⁶ *Goodyear*, 131 S. Ct. at 2857 (citing *Granite Rock Co. v. Teamsters*, 130 S.Ct. 2847, 2861 (2010)).

is whether a company can ever be said to be “essentially at home” outside its state of incorporation or principal place of business.

Certainly, there is an argument to be made that *Goodyear* limits general jurisdiction over corporations to no more than these two places. Justice Ginsburg’s opinion for the Court emphasizes that general jurisdiction will lie not simply because a company has “continuous and systematic” contacts with a forum but only when those contacts are “so ‘continuous and systematic’ as to render them essentially at home in the forum State.”³⁷ This framing suggests that substantial presence in a state—what previously was often referred to as “doing business” jurisdiction—is not enough when the company’s principal place of business is elsewhere. Additionally, the Court’s description of its earlier decision in *Perkins* also seems to suggest that only a corporate presence equivalent to an individual’s domicile, which has long been understood in singular terms, will justify general jurisdiction and that this corporate domicile is to be found only in the state in which the company’s business predominates. “Ohio was the corporation’s principal, if temporary, place of business,” the Court says of the facts in *Perkins* and the place in which the company’s “sole wartime business activity was conducted.”³⁸

Recognizing that some read *Goodyear* this restrictively,³⁹ the better view is that while the corporate home usually will be its state of incorporation and, if different, also its principal place of business, the “essentially at home” standard is capacious enough to also permit general jurisdiction to be exercised, in certain rare instances, when a company engages in some (admittedly still undefined degree of) “continuous and systematic” business in a state, even if does even more business elsewhere.⁴⁰ The decision

³⁷ *Goodyear*, 131 S. Ct. at 2851 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

³⁸ *Id.* at 2857.

³⁹ See, e.g., Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012) (discussing the ramifications of *Goodyear*, 131 S. Ct. 2846).

⁴⁰ See Rhodes, *supra* note 28, at 428-29 (explaining that “[i]f a corporation is conducting core executive and administrative functions within a state, such as controlling its operations, billing its customers, accounting for its financial status, managing its employees, and establishing its pricing structure, it is acting in a similar manner to a local business in the state,” and thus “it might be ‘fairly regarded as at home’ there, even if it conducts more of such command and coordinating functions in another state . . .”).

may not provide clear guidance as to how much and what kind of “continuous and systematic” business is sufficient, but what is clear is that the Court adopted an intentionally flexible standard.

Consider the test the Court articulated and compare it to the obvious alternative it did not. Had the Court wished to entirely exclude other bases for general jurisdiction, it could have opted for a straightforward rule: when the claim is unrelated to the defendant’s forum presence, jurisdiction is allowed only where a business is organized or has its primary hub. That, of course, is exactly what Congress has done in 28 U.S.C. §1332(c), the statutory provision that defines corporate citizenship for diversity purposes as “every” state in which a company is incorporated and “the” state in which it has its principal place of business. In *Hertz v. Friend*, the Court recognized in this statutory language the legislative preference for ease of judicial administration over a more flexible standard; under §1332(c), “principal place of business” is a single place.⁴¹ By contrast, the Court in *Goodyear* left the same phrase undefined for purposes of jurisdiction to adjudicate. More critically, it also chose to describe the affiliation necessary to trigger general jurisdiction with intended wiggle-room, even though a more precise alternative was readily available.⁴²

It is also critical to say, though, that while the decision is broader than it could have been, Justice Ginsburg’s opinion for the Court nevertheless makes clear that this all-purpose form of jurisdiction is meant to be narrower than many of the cases that had upheld general jurisdiction in the past.⁴³ Before *Goodyear*, the

⁴¹ *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192-93 (2010) (“We conclude that [1332(c)’s use of] ‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s ‘nerve center.’ . . . A corporation’s ‘nerve center,’ usually its main headquarters, is a single place.”).

⁴² *But see* Lindsey D. Blanchard, *Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. ____ (forthcoming 2013) (arguing that *Hertz’s* interpretation of “principal place of business” in 1332(c) should govern *Goodyear’s* test for general jurisdiction over corporations).

⁴³ Rhodes, *supra* note 28, at 430 (“Regardless of the precise application of *Goodyear’s* ‘essentially at home’ language, the Court undoubtedly rejected the reasoning of many lower court decisions that doing some quantum of business with forum residents alone sufficed for the defendant’s amenability to any cause of action. The longstanding fiction that ‘doing business’ creates corporate

rationale for general jurisdiction was often premised on the idea that a substantial enough presence overcame any concerns about the unfairness of subjecting a defendant to suit in forum for claims unrelated to its contacts there.⁴⁴ That left room for concluding that a reasonable volume of business activity, by itself, could be sufficient to support general jurisdiction. The *Goodyear* decision roundly rejects this kind of “sprawling view of general jurisdiction.”⁴⁵ After *Goodyear*, it is evident that a corporation’s “continuous activity of some sorts within a state” may not be enough; certainly, the notion that a manufacturer or seller could be subject to general jurisdiction “on any claim for relief, wherever its products are distributed” was rejected.⁴⁶ This constriction of prior conceptions of general jurisdiction surely brings the doctrine more into harmony with international norms, as several scholars have noted.⁴⁷

Still, language matters and Ginsburg’s choice of an intentionally indeterminate test cannot be overlooked. This notion is perhaps just another way of saying that the ultimate inquiry *Goodyear* demands is worth recollecting: to determine where the defendant is at home or “essentially” at home.⁴⁸ Having opted for indeterminacy, the Court seems to have concluded that, when it comes to general jurisdiction, close enough sometimes counts.

Ginsburg’s citation to and reliance on Lea Brilmayer’s earlier analytic work further underscores that general jurisdiction may sometimes include states other than a company’s state of

‘presence’ and supports a corporation’s amenability to general jurisdiction has been vanquished.”).

⁴⁴ *See id.*

⁴⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856-7 (2011); Blanchard, *supra* note 42, at 32 (“[G]one are the days when a corporation could be haled into court based on ‘doing-business’ factors such as the amount of sales, warehouses, factories, or employees it has in a given state.”).

⁴⁶ *Goodyear*, 131 S. Ct. at 2856.

⁴⁷ Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 532 (2012) (noting that the decision is “consistent with international consensus,” citing *inter alia* Article 2 of the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, which authorizes general jurisdiction only over defendants from member states where they are domiciled).

⁴⁸ *Id.* at 533 (“What are the attributes of being ‘at home’ that justify jurisdiction? And what is the meaning of ‘essentially’? Presumably, that is something short of ‘actually’ being at home, but how short?”); Rhodes, *supra* note 42, at 425.

incorporation or principal place of business. The Court drew an analogy between an individual's domicile and a corporation's place of incorporation and principal place of business. Following Brilmayer, it described these places as "paradigm" forums for exercising general jurisdiction: "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home," then cited Brilmayer's identification of domicile, place of incorporation, and principal place of business as "paradigm" bases for exercise of general jurisdiction.⁴⁹

Critical to understanding this passage and the reference to Brilmayer's work is to recognize that while she described these paradigm bases as "unique affiliations" that an individual or corporation has with a state, Brilmayer also recognized that courts properly rely on other, non-unique bases to justify the exercise of this kind of jurisdiction, including substantial forum activities, consent, and presence. Brilmayer argued that, though less strong than the place in which it is incorporated or has its largest or most important business presence, a defendant's substantial business activity in a state could nevertheless mean that its relationship with the forum permits courts there to exercise jurisdiction over it even when the claim is unrelated to the defendant's activity there. It is this conception of "paradigm" forums for general jurisdiction that the Supreme Court adopted: they are the strongest, but not the only, affiliations that can justify the exercise of this forum of all-purpose jurisdiction.⁵⁰

The best reading, then, of *Goodyear's* "essentially at home" standard is that a corporate defendant usually will just be amenable to general jurisdiction in a corporation's two "paradigm" forums, its state of incorporation or principal place of business, but there may be occasions when other bases of jurisdiction, including enough "continuous and systematic" contacts, will also justify the exercise of general jurisdiction.⁵¹ The ordinary presumption is

⁴⁹ *Goodyear*, 131 S. Ct. at 2853-54 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723 (1988)).

⁵⁰ Brilmayer, *supra* note 49, at 782.

⁵¹ Cf. Stein, *supra* note 47, *passim* (arguing that to be met *Goodyear's* "essentially at home" has to be a place [though it could be multiple places] in which "a defendant must perceive itself, and be perceived, as a member of the community" and suggesting a number of factors to consider in making this

certainly best applied to domestic entities because, by definition, there will always be at least one state in which they can be sued on any claim whatsoever.

Foreign corporations are another matter, however. As Lindsey Blanchard has argued, the distinction between domestic and foreign entities indeed may have been precisely what the Court had in mind when it intentionally left the door more ajar than it otherwise needed.⁵² Thus, a strong argument can be made that under *Goodyear* foreign corporate defendants may be amenable to general jurisdiction in the U.S. state in which they do their most substantial business (assuming the quantum is “so continuous and systematic as to render them essentially at home in the forum State”).⁵³

3.4. Lessons From *Goodyear* About Vicarious Jurisdiction

The Court’s failure in *Goodyear* to confront the vicarious jurisdiction that plaintiffs made in that case means that debate will continue over whether a defendant, not otherwise subject to general jurisdiction, can nevertheless be held to be generally amenable to suit in the forum by attributing to it the contacts of someone or something else. In particular, the key question remaining is whether there is anything in *Goodyear*’s articulation of the “essentially at home” standard that would preclude the kind of excessive vicarious jurisdiction exercises that courts frequently permit. I think there is.

Though a more determinate test for general jurisdiction would have made it even harder to make freewheeling vicarious jurisdiction arguments, given the overall narrowing effect of the decision, it is hard to imagine that the Court would permit the kind of exercises of general jurisdiction that both the Ninth Circuit’s pre-*Goodyear* opinion in *Bauman* and the lower courts in *Goodyear*

determination); Rhodes, *supra* note 47, at 426 (concluding that under *Goodyear* a corporation can be “essentially at home” in places other than where it is incorporated or has its principal place of business but that it must be a place, “at the very minimum,” that the nonresident corporation act similarly to a local domiciliary by directing, controlling, and coordinating its operations on a continuous basis from the forum state”).

⁵² Blanchard, *supra* note 42, at 33.

⁵³ *Goodyear*, 131 S. Ct. at 2851; see also Burbank, *supra* note 21 at 752-53 (urging recognition that the scope of general jurisdiction constitutional amenability may vary depending on whether the corporation is domestic or foreign).

authorized. As for *Goodyear*, even if the plaintiffs' single business enterprise argument had been adequately developed before the lower courts, the problem with looking to that substantive law doctrine is that it turns the law of enterprise theory on its head. While there are plenty of cases that attribute contacts upstream from the subsidiary to the parent, scant authority exists for doing the reverse. After all, the fundamental rationale that justifies disregarding the otherwise separate legal status of a separately incorporated subsidiary is that the parent is controlling it, not the other way around.⁵⁴ When roles are reversed, however, it makes little sense to talk about attributing the jurisdictional amenability of the parent company to its foreign subsidiaries which do not control or direct the forum activities of the parent.

Cases like *Bauman* also seem inconsistent with *Goodyear's* narrowing of general jurisdiction. The Court in *Goodyear* asked whether foreign subsidiaries of a U.S. parent company were amenable to suit in North Carolina on claims unrelated to any activities by the subsidiaries in the state and answered, unanimously and definitively, that they were not. The Ninth Circuit's layering of jurisdictional amenability on top of its argument for imposing substantive liability on the corporate parent makes the plaintiffs' argument for jurisdiction in *Goodyear* look modest, by comparison. *Bauman* stretches the reasonableness of exercising general jurisdiction vicariously beyond any constitutional limit that Justice Ginsburg's *Goodyear* opinion can plausibly be read to recognize.

To be sure, the *Goodyear* decision still leaves room for more traditional exercises of vicarious jurisdiction over a controlling corporate parent on a general jurisdiction basis. However, Ginsburg's constriction of general jurisdiction beyond how it had been applied in many lower courts strongly suggests that, at least as to a domestic company, there is never a need to permit vicarious attribution of contacts. Even when the net of specific jurisdiction is not wide enough, the plaintiff can simply sue in the state in which

⁵⁴ See, e.g., *Administrators of Tulane Educational Fund v. Ipsen, S.A.*, 450 Fed. Appx. 326, 331 (5th Cir. 2011) ("Where a parent and subsidiary observe corporate formalities, the plaintiff has a heavy burden to establish a degree of control sufficient to impute the subsidiary's jurisdictional contacts to the parent.").

the domestic parent is incorporated or has its principal place of business.⁵⁵

The one occasion, then, when attribution of contacts may still be warranted is over a foreign corporation. As noted earlier, one might reasonably read *Goodyear* as limiting general jurisdiction only over domestic entities to their state of incorporation or principal place of business, under the theory that there will always be at least a place that a plaintiff can sue a U.S. company without fear it will move for dismissal on jurisdictional grounds. By contrast, a foreign defendant might be found to have enough dealings with a U.S. forum so as to subject it to general jurisdiction there on the ground that it was acting as if that state were its home in the United States.

Even as to foreign corporations, however, it is not necessary to borrow substantive law doctrines like veil piercing or business enterprise theory in order to justify the exercise of jurisdiction. Rather than looking to these substantive law doctrines, one need only recognize that a foreign corporate defendant may do business in the forum on its own or may do so through one of its subsidiaries (or through an entirely separate entity or person). Existing jurisdictional doctrine already permits courts to conclude that the defendant's own actions, as well as those that it asks or directs others to take on its behalf, can properly be regarded as purposeful availment by the foreign defendant of the privilege of conducting activities within the forum.⁵⁶

⁵⁵ Cf. Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 390 (2004) ("There is an argument to be made that, with the adoption of grounds of activity-based or specific jurisdiction that *International Shoe* invited, and given the continued acceptance of domicile (including state of incorporation) as a basis of general jurisdiction, 'doing business' jurisdiction should not be permitted, or should be substantially scaled back, in litigation involving domestic (U.S.) defendants.").

⁵⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("Hence, if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there") (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (alteration in original).

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4. CONCLUSION

Revisiting the vicarious jurisdiction argument the Court left unaddressed in *Goodyear* provides an opportunity to gain insights into how to interpret the incompletely articulated test for general jurisdiction that the Court announced in *Goodyear*. It also allows us to reconsider the core question that lies at the heart of any vicarious jurisdictional problem: when and on what authority is it appropriate for courts to impute contacts?

How the “essentially at home” test is applied in the future will shape our understanding of the reasons why general jurisdiction exists. That, in turn, will bear relevance to how courts handle arguments to justify the exercise of jurisdiction by vicariously imputing contacts.