

## THE RULES AND STANDARDS OF PERSONAL JURISDICTION

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## THE RULES AND STANDARDS OF PERSONAL JURISDICTION

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*Recent Supreme Court decisions have put the constitutional law of personal jurisdiction in flux. The restructuring that the Court has worked on “general jurisdiction”—that is, personal jurisdiction as to a defendant where the defendant has extensive ties to the forum state but those ties do not give rise to the plaintiff’s cause of action—seems to have been motivated, at least in part, by a desire by the Court to put in place simple rules governing jurisdictional questions.*

*But the Court’s assertion that its approach broke new ground by enjoining a rule-like test along the boundary of personal jurisdiction is erroneous in a few ways. First, while examination of the preexisting landscape reveals some disagreement among lower courts, the fact is that the presence (or absence) of general jurisdiction was predictable across a broad swath of cases. And, while the Court suggested that an absence of general jurisdiction cases from its docket demonstrated a more general lack of reliance on general jurisdiction, a novel empirical examination of the Supreme Court’s general jurisdiction certiorari docket indicates that the better interpretation of the absence of general jurisdiction from the Court’s docket is that overall lower courts were applying the test for general jurisdiction with relative ease and without much conflict. Second, the Court’s new test for general jurisdiction introduces some less predictable, standard-like elements that were not part of the old test: the new test makes general jurisdiction over a corporate defendant proper only in essence in the corporation’s place of incorporation and principal place of business, and the determination of a corporation’s principal place of business may require comparisons across states and countries that are not always easy to apply or predict. Third, the Court’s new test for general jurisdiction is narrower than the old one, and the narrowing of general jurisdiction will push plaintiffs (who may wish to sue in their home jurisdiction or where they were injured, or who may wish to avoid piecemeal litigation) toward the vagaries of specific jurisdiction. Moreover, the Court’s new general jurisdiction jurisprudence has already had the ripple effect of discrediting more predictable forms of specific jurisdiction. In short, under the new regime—contrary to the Court’s stated goal—more litigants are likely to face standards as they debate the propriety of personal jurisdiction. The decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*—a case the Court currently has on its docket for the coming Term—may wind up rejecting a predictable form of specific jurisdiction.*

*Alternative arguments—that the Court did not clearly express—are, in any event, insufficient to justify a narrower rule for general jurisdiction. The movement toward the narrow regime seems likely motivated by concerns of comity in the context of foreign corporations, but comity should be self-executing, leaving one to question why it should be part of the constitutional analysis. In the context of domestic corporations, the Court’s shift from a broad test to a narrow rule may be motivated, ironically, by the presence of a broad standard governing another area of Court: the constitutional limit on state choice-of-law rules. But this seems like the choice-of-law tail wagging the personal jurisdiction dog.*

*If the Court truly wants to increase the extent to which rules govern personal jurisdiction, it should embrace a broader rule for general jurisdiction. It should also work to reduce the fractures that have*

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*characterized specific jurisdiction decisions and consider generating a sizeable core where the presence (or absence) of personal jurisdiction is relatively predictable.*

## INTRODUCTION

Recent Supreme Court decisions have put the constitutional law of personal jurisdiction in flux. In two decisions over the course of the last decade, the Court substantially narrowed the scope of general jurisdiction<sup>1</sup>—that is, personal jurisdiction as to a defendant where the defendant has extensive ties to the forum state but those ties do not give rise to the plaintiff’s cause of action.<sup>2</sup> Into the beginning of this century, most lower courts understood most multistate and multinational entities to be subject to general jurisdiction in any state forum in which those entities conducted substantial business.<sup>3</sup> The Court hinted at a change in its approach in 2011 in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>4</sup> There, the Court held that foreign subsidiaries of a major U.S. corporation (The Goodyear Tire and Rubber Co.) were not subject to general jurisdiction in North Carolina because they were “in no sense at home in North Carolina.”<sup>5</sup> The Court confirmed the importance of the “at home” analogy in its 2014 decision in *Daimler AG v. Bauman*.<sup>6</sup> There, the Court explained that general jurisdiction will ordinarily be limited to a corporate defendant’s place of incorporation and principal place of business.<sup>7</sup>

The Court’s dramatic reshaping of general jurisdiction has already had a spillover effect on specific jurisdiction—that is, personal jurisdiction as to a defendant where the plaintiff’s cause of action arises out of or relates to the defendant’s ties to the forum state.<sup>8</sup> In the 2017 case of *Bristol-Myers Squibb Co. v. Superior Court of California*,<sup>9</sup> the Court rejected the California Supreme Court’s “sliding scale approach to specific jurisdiction,”<sup>10</sup> under which “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection

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1. *Personal Jurisdiction—General Jurisdiction—Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 311 (2014) (“Although some have viewed *Daimler* as in keeping with a series of recent Court decisions limiting plaintiffs’ access to the courts, closer examination reveals that Justice Ginsburg continues to apply a theory of personal jurisdiction, derived from the seminal work of Professors Arthur von Mehren and Donald Trautman and initially introduced in *Goodyear* and her dissent in *J. McIntyre Machinery, Ltd. v. Nicaastro*, that focuses fundamentally on fairness to both litigants.” (footnotes omitted)); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1354–58 (2015) (elucidating how “*Goodyear* and *Daimler* sound the death knell for doing business as a basis for general jurisdiction”).

2. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984).

3. See *infra* notes 99–100 and accompanying text.

4. 564 U.S. 915 (2011).

5. *Id.* at 929.

6. See 571 U.S. 117, 136–39 (2014).

7. *Id.* at 137–39.

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

9. 137 S. Ct. 1773 (2017).

10. *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874, 889 (Cal. 2016), *rev’d*, 137 S. Ct. 1773 (2017).

between the forum contacts and the claim.”<sup>11</sup> The Court explained that “[o]ur cases provide no support for this approach,”<sup>12</sup> which “resembles a loose and spurious form of general jurisdiction.”<sup>13</sup> And, this coming Term, the Court has already accepted an invitation to consider reducing the scope of a more predictable form of specific jurisdiction<sup>14</sup>—which might similarly be dismissed as “loose and spurious form[s] of general jurisdiction” after *Goodyear* and *Daimler*.<sup>15</sup>

The Court has attributed the restructuring it has worked on general jurisdiction, at least in part, to the need to put in place “[s]imple . . . rules” governing jurisdictional questions and to make the presence (or absence) of personal jurisdiction more predictable.<sup>16</sup> As I have argued elsewhere in the context of subject matter jurisdiction, it is as a general matter normatively preferable to ensconce predictable rules along jurisdictional borders.<sup>17</sup> Nevertheless, as I argue in this Article, the Court’s contention that its restructuring of general jurisdiction was justified by a desire to deploy jurisdiction rules is flawed in several respects.

First, while the old test for general jurisdiction was hardly entirely rule-like, neither was it entirely, or even substantially, standard-like. An examination of the landscape before *Goodyear* reveals some disagreement among lower courts; the fact is that the presence (or absence) of general jurisdiction was predictable across a broad swath of cases.<sup>18</sup> And, while the *Daimler* Court suggested that an absence of general jurisdiction cases from its docket demonstrated a more general lack of reliance on general jurisdiction,<sup>19</sup> the better interpretation of the absence of general jurisdiction from the Court’s docket is that overall lower courts were applying the test for general jurisdiction with relative ease and without much conflict. A novel empirical examination of the Supreme Court’s

11. *Id.* (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1098 (Cal. 1996)).

12. *Bristol-Myers*, 137 S. Ct. at 1781.

13. *Id.*

14. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 140 S. Ct. 917 (2020) (mem.); *Ford Motor Co. v. Bandemer*, 140 S. Ct. 916 (2020) (mem.). The Court has consolidated the cases for argument.

15. *See Bristol-Myers*, 137 S. Ct. at 1776.

16. The Court explained:

With respect to a corporation, the place of incorporation and principal place of business are “paradig[m] . . . bases for general jurisdiction.” Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. Cf. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (“Simple jurisdictional rules . . . promote greater predictability.”). These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

*Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (citations omitted) (quoting *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988)).

17. *See Jonathan Remy Nash, On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 529–33 (2012).

18. *See infra* notes 95–98 and accompanying text.

19. *See Daimler*, 571 U.S. at 129 (“Our post-*International Shoe* opinions on general jurisdiction . . . are few.”).

general jurisdiction certiorari docket confirms the latter interpretation: over the ten-year period before the certiorari grant in *Goodyear*, few petitions asked the Court to clarify the test for general jurisdiction, and fewer still that argued to the Court that the lower courts were split on the question.<sup>20</sup> In short, the old test for general jurisdiction had substantial rule-like qualities and allowed for predictable outcomes in many cases.

Second, while the new test for general jurisdiction that the Court generated in *Goodyear* and *Daimler* is more rule-like than was the old test, it does introduce standard-like elements that were not part of the old test—elements that may, in some cases, render the applicability of general jurisdiction *less* predictable. Consider that the old regime would most likely have recognized general jurisdiction over a multistate corporation wherever that corporation conducted substantial business.<sup>21</sup> In contrast, the new regime will almost always recognize general jurisdiction exclusively in that corporation's state of incorporation and principal place of business. But in order to establish which state is a multistate corporation's principal place of business, one must compare the corporation's activities across several states.<sup>22</sup> This undertaking is rather standard-like, and in many cases it will be difficult to predict the outcome a priori.

Third, even to the extent that the new regime for general jurisdiction is more rule-like than its predecessor in meaningful ways, the fact is that it is far *narrower* than its predecessor, and the new narrow test for general jurisdiction will actually subject more plaintiffs to standards in determining the presence (or absence) of personal jurisdiction. To see this, consider that specific jurisdiction has long been and continues to be (and was predicted by its progenitors to be) inherently standard-like.<sup>23</sup> As general jurisdiction becomes more constrained, it is logical and predictable to expect that more plaintiffs will turn to specific jurisdiction in bringing cases.<sup>24</sup> Moreover, the Court has, since its decisions in *Goodyear* and *Daimler*, seen fit to jettison more rule-like species of specific jurisdiction as “loose and spurious form[s] of general jurisdiction,”<sup>25</sup> with further movement in that reduction potentially in the offing.<sup>26</sup> Thus, the remaining forms of specific jurisdiction to which plaintiffs will turn are themselves more standard-like.<sup>27</sup>

The Court's refashioning of personal jurisdiction is more problematic because, having dispatched the Court's primary justification, even alternative arguments in favor of narrower general jurisdiction do not justify the Court's

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20. See *infra* notes 101–102, 104–107 and accompanying text.

21. See *infra* notes 99–100 and accompanying text.

22. See *infra* note 155 and accompanying text.

23. See *infra* Part II.E.

24. See *infra* text accompanying notes 203–204.

25. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017).

26. See *supra* note 14 and accompanying text.

27. See *infra* text accompanying notes 206–211.

move. Different motivations may (sub rosa) have animated the Court to move toward the narrow rule in the context of domestic, as opposed to foreign, corporations. The movement toward the narrow regime seems likely motivated by concerns of comity in the context of foreign corporations. But the argument in favor of comity as a factor in the general jurisdiction calculus is not a strong one. After all, if comity is a motivating factor, we should expect state forums to consider comity voluntarily; there is no need to constitutionalize it. Moreover, as I discuss below, narrowing general jurisdiction in the international context can lead to some undesirable outcomes.<sup>28</sup>

In the context of domestic corporations, the Court's shift from a broad rule to a narrow rule may be motivated, ironically, by the presence of a broad standard governing another area of Court: the constitutional limit on state choice-of-law rules. But this seems like the choice-of-law dog wagging the jurisdictional tail. A better approach would be to reconsider constitutional limits on state choice-of-law rules.

If the Court really wants to make personal jurisdiction more rule-like and predictable, then other options are open to it. First, it could use a rule—but a broad rule—to define the limits of general jurisdiction. This would enable more plaintiffs to benefit from the predictability of available general jurisdiction. It would, as a result, reduce the need for plaintiffs to consider piecemeal litigation in order to sue multiple defendants. Second, the Court could define a sizeable, relatively predictable core of specific jurisdiction. This would provide some measure of predictability to at least some plaintiffs forced to advert to specific jurisdiction.

This Article proceeds as follows. Part I provides a general overview of rules and standards as legal instruments. It also makes a new contribution to the “rules and standards” by introducing the judicial hierarchy into that discussion. Part II explicates the relevant constitutional law of personal jurisdiction.

Part III first debunks the Court's contention that it was necessary to reform general jurisdiction in order to analyze the rule-like and standard-like aspects of personal jurisdiction. While the Court's new test for general jurisdiction is very (but not entirely) rule-like, the old regime was quite predictable across a broad swath of important cases. Moreover, the new test is much narrower than was the old one, with the result that, contrary to the Court's supposed goal, fewer litigants will enjoy predictable rules in determining the presence (or absence) of personal jurisdiction. Second, Part III considers, and rejects, the two arguments in favor of a narrower rule for general jurisdiction—one that might apply to domestic defendants and the other that might apply to international defendants. Last, Part III suggests actions the Court could take that would actually vindicate the goal of providing more rules, and greater predictability, to litigants with respect to personal jurisdiction.

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28. See *infra* text accompanying notes 240–241.

## I. RULES AND STANDARDS AS LEGAL INSTRUMENTS IN A JUDICIAL HIERARCHY

In order to see how personal jurisdiction jurisprudence deploys rules and standards, it is necessary first to appreciate the basic distinction between them. This Part first explores the contours, and the costs and benefits, of these two paradigmatic categories of legal instruments. It then explores the nuances that the judicial hierarchy introduces to the classification of rules and standards.

### A. *Categorizing Rules and Standards*

The basic definitions of rules and standards serve to highlight the differences between the two types of instruments.<sup>29</sup> Dean Kathleen Sullivan explains:

A legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently.<sup>30</sup>

A categorical test that “defines bright-line boundaries and then classifies fact situations as falling on one side or the other”<sup>31</sup> provides a paradigmatic example of a rule.

Standards are rules’ complement. In some sense, then, a standard is everything a rule is not:

A legal directive is “standard”-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards . . . giv[e] the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.<sup>32</sup>

Balancing tests typically provide excellent examples of standards: “Balancing is standard-like in that it explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake.”<sup>33</sup>

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29. Some of the discussion in Part I.A derives from Nash, *supra* note 17, at 520–24.

30. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (footnotes omitted).

31. *Id.* at 59.

32. *Id.* at 58–59 (footnotes omitted).

33. *Id.* at 60.

As a general matter, rules operate more predictably than do standards and provide more uniform results. This distinction underlies the various benefits and drawbacks of rules and standards. Not surprisingly, rules and standards make complementary claims.

First, rules and standards can make competing claims to being efficient legal instruments. Rules are easier and less costly to apply; they thus conserve judicial and general legal resources. They are also more predictable in their application, which may facilitate efficient private bargaining in the shadow of the law.<sup>34</sup> Inefficiency inheres in rules, however, to the extent that they are inflexible<sup>35</sup> and more costly to develop<sup>36</sup> (although that cost may become more justified to the extent that frequent application of the test effectively amortizes that cost).<sup>37</sup>

Standards are efficient in exactly the ways that rules are not. Standards are flexible. Judges can apply standards with greater sensitivity to the demands of each particular factual setting. Their indeterminacy and flexibility make standards “arguably more efficient than rules when the best outcome cannot be easily foreseen.”<sup>38</sup> Standards are also more readily adaptable to changes in societal circumstances and values and to changes in technology that may affect the best choice of legal instrument.<sup>39</sup> Finally, they are less expensive to promulgate.<sup>40</sup>

Standards are also inefficient in exactly the ways that rules are not. Standards are more difficult and costly to apply and less predictable in their application.<sup>41</sup> Indeed, the institutional structure of the judiciary may enhance a standard’s lack of predictability. The Supreme Court tends to eschew a role as a court of error correction, preferring instead a role devoted to resolving splits in authority in lower courts and deciding issues of national importance.<sup>42</sup> This

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34. See generally R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960) (arguing that the law should be designed to overcome transaction costs).

35. As Dean Sullivan explains, a rule may not wind up being so efficient if courts constantly seek to find loopholes and to develop exceptions. See Sullivan, *supra* note 30, at 63 (“[D]ecisionmaking economies from the application of rules . . . will be offset if decisionmakers spend time inventing end-runs around them because they just cannot stand their over- or under-inclusiveness.”). Once this happens, the so-called rule begins to look more like a standard anyway. See *id.* at 61 (“A rule may be corrupted by exceptions to the point where it resembles a standard . . .”).

36. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–69 (1992).

37. *Id.* at 573; Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 33 (2000).

38. Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 328 (2007).

39. Sullivan, *supra* note 30, at 66 (“Standards . . . are flexible and permit decisionmakers to adapt them to changing circumstances over time.”).

40. Kaplow, *supra* note 36, at 569.

41. See Jacobi & Tiller, *supra* note 38, at 328 (“Standards . . . offer little guidance as to expected behavior, thus generating some costs associated with uncertainty.” (citation omitted)).

42. See Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 275–86 (2006) (“[The Supreme Court] attempts to position itself as a source of structure, guidance, and uniformity, not as a traditional court of appeals that reviews the correctness of lower court opinions.”); see also LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 98

tendency invites the Court to leave areas governed by standards unreviewed for extended periods of time,<sup>43</sup> which creates suboptimally high unpredictability.<sup>44</sup>

Second, rules and standards each offer competing claims to being liberty- and democracy-enhancing choices of legal instruments. By virtue of their clarity and “all-or-nothing” application, rules applied against government action are said to constrain government more effectively.<sup>45</sup> In contrast, by virtue of the discretion and balancing of factors inherent in standards, standards are said to enhance democratic deliberation and to achieve fairer results.<sup>46</sup>

Third, rules and standards provide different constraints on lower courts. When promulgated by a superior court, a rule constrains hierarchically lower courts to act in conformance with the rule.<sup>47</sup> Rules thus offer the benefit to a higher court of greater ability to ensure that lower courts follow its desired policy preferences (especially where the costs of monitoring are high and where the higher court does not review all decisions by the lower courts); in contrast, a higher court can use standards to empower lower courts to execute policy preferences where the higher court believes the lower courts to be its faithful policy agents.<sup>48</sup>

While the differences between rules and standards are clear, categorizing a legal test definitively as a rule or standard can be challenging.<sup>49</sup> Still, the framework is clear enough to allow one to determine whether a legal test is better identified as a rule or a standard, i.e., whether a legal test is more rule-like

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(1994) (“[T]he Supreme Court no longer has the capacity to sit as a court of error in routine cases.”); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 731–37 (1984) (identifying “particular types of cases that the Court should hear [as part of its discretionary docket], in keeping with the concept of the Court as manager of the judicial system”).

43. See Shapiro, *supra* note 42, at 287–92 (arguing that the “Court is likely to see any inconsistencies or odd trends” in the application of a legal standard “as the ‘misapplication of a properly stated rule of law’” and to deny certiorari as a result (quoting SUP. CT. R. 10)).

44. See Frederick Schauer, *Is It Important to Be Important? Evaluating the Supreme Court’s Case-Selection Process*, 119 YALE L.J. ONLINE 77, 77 (2009) (arguing that a shrinking Supreme Court docket and an increasing number of narrowly tailored opinions leave lower courts with inadequate guidance); Shapiro, *supra* note 42, at 292–96 (stating that the Supreme Court’s failure to review standards leaves lower courts and litigants “without adequate guidance”).

45. See Sullivan, *supra* note 30, at 63–66 (stating that rules bind the government to only using “its coercive powers in given circumstances”).

46. See *id.* at 67–69.

47. Cf. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 159 (1991) (noting that rules help to allocate power among decisionmakers).

48. See Jacobi & Tiller, *supra* note 38, at 333–42 (“The higher court’s optimal decision [to create a rule or a standard] is dependent upon the mix of policy-aligned and -unaligned lower court judges . . .”); Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. 765, 771–79 (2012) (identifying the factors on which higher courts rely in deciding between a rule and a standard to achieve optimal lower court compliance).

49. See Lax, *supra* note 48, at 768–69 (discussing the shortcomings in academic attempts to distinguish between rules and standards).

or more standard-like,<sup>50</sup> and to allow one to compare legal tests and determine which are more rule-like and which are more standard-like.

*B. Distinguishing Rules and Standards in a Judicial Hierarchy*

The previous Subpart presented a general discussion of how to determine whether a legal test is better described as a rule or as a standard. To the extent that it considered rules and standards in a judicial hierarchy, it discussed the incentives for higher courts to generate rules in order to constrain lower courts. In this Subpart, I discuss how to distinguish between rules and standards in the context of legal tests generated by a high court and implemented by lower courts.

We consider a typical judicial hierarchy, where there is a high court announcing a legal test, and then numerous lower courts interpret and apply the high court's test. There are two questions that will inform our categorization. First, in keeping with the discussion in Part I.A above, we ask whether the high court's test itself embraces a more rule-like or a more standard-like character. For example, if the high court's test is explicitly a balancing test, then it is better characterized as more standard-like.

But this does not end the inquiry; the judicial hierarchy complicates matters. It forces us to confront a second question: to what extent has the high court communicated its test so clearly that lower courts all interpret the test in more or less the same way?<sup>51</sup> Put another way, how much interpretive leeway has the high-court test left in the lower courts?<sup>52</sup> For an example of interpretive leeway, the high court might have clearly embraced a balancing test but left vague the precise factors that lower courts are supposed to balance.

Table 1 presents the two-by-two matrix of the possible outcomes. In the upper row, the high court has communicated its test rather clearly and thus left little leeway in the lower courts to disagree as to the proper implementation of the test. Here, there is no division in the courts below. In the upper-left box (denoted setting I), the high court's legal test is more rule-like; in the upper-right box (denoted setting II), the high court's legal test is more standard-like.

In the lower row, in contrast, the high court has not communicated its test with clarity. Hence, the lower courts *are* divided as to the proper content of the high court's legal test. In the lower-left box (denoted setting III), the lower courts agree that the high court's legal test is more rule-like but disagree as to what the content of that rule actually is; in the lower-right box (denoted setting

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50. See Nash, *supra* note 17, at 521.

51. See generally Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002).

52. Cf. Nash, *supra* note 17, at 533–36 (explaining that higher courts should select rules if they wish to constrain lower courts and standards if they wish to empower them).

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IV), the lower courts agree that the high court’s legal test is more standard-like but disagree as to what the content of that standard actually is.

TABLE 1: MATRIX CHARACTERIZING RULES AND STANDARDS IN A JUDICIAL HIERARCHY.

		Is the high court’s legal test more rule-like or more standard-like?	
		<i>More Rule-Like</i>	<i>More Standard-Like</i>
How much interpretive leeway does the high court’s legal test leave to the lower courts?	Little	I. Legal test is an explicit bright-line rule; no division among the courts below.	II. Legal test is an explicit balancing test; no division among the courts below.
	Lots	III. Courts below split among various rules.	IV. Courts below divided among various standards.

Table 2 ranks these four possible outcomes from most to least rule-like. Setting I—where the lower courts agree that the high court’s legal test is a single bright-line test, to which I refer as an “explicit rule regime”—is without question the most rule-like. In contrast, setting IV—where the lower courts are divided as to which standard best represents the high court’s test, and to which I refer as a “standard-split regime”—is the least rule-like. Here, the standard manifests itself along both dimensions: not only is the high court’s test clearly a standard, but there is even variation as to what that standard actually entails.

TABLE 2: RANKING THE OUTCOMES FROM THE JUDICIAL HIERARCHY RULE-STANDARD MATRIX (TABLE 1) IN TERMS OF HOW RULE-LIKE THEY ARE.

Outcome	How rule-like is the outcome?
I. <u>Explicit rule regime</u> : Legal test is an explicit bright-line rule; no division among the courts below.	Most rule-like.
III. <u>Rule-split regime</u> : Courts below split among various rules.	Fairly rule-like.
II. <u>Explicit standard regime</u> : Legal test is an explicit balancing test; no division among the courts below.	Fairly non-rule-like.
IV. <u>Standard-split regime</u> : Courts below divided among various standards.	Least rule-like.

This leaves settings II and III. These two quadrants are both hybrids of rules and standards, albeit in different ways. It seems that setting III—to which I refer as a “rule-split regime”—is more rule-like than is setting II—to which I refer as an “explicit standard regime.” After all, the high court’s test in setting II is more standard-like; it is more rule-like than setting IV only because the lower courts in setting II can agree on the content of the standard. In contrast, the high court’s test in setting III is more rule-like; it is less rule-like than setting I because the lower courts in setting III cannot agree on which rule best represents the governing legal test.

## II. THE CONSTITUTIONAL LAW OF PERSONAL JURISDICTION THROUGH THE LENS OF RULES AND STANDARDS

This Part surveys the constitutional law of personal jurisdiction, including the emergence and evolution of general jurisdiction as a form of nonconsensual personal jurisdiction that states can assert consistent with the Due Process Clause.<sup>53</sup> Part II.A briefly examines the history, and limited continued existence, of territorial jurisdiction. Part II.B then turns to the modern approach for determining whether (assuming a state long-arm statute authorizes it)<sup>54</sup> a state has the constitutional power to assert personal jurisdiction over a defendant not physically within its borders. It elucidates the concepts of minimum contacts and fundamental fairness.

Part II.C looks at the overlay—critical today to an understanding of the constitutional test for personal jurisdiction—of general and specific jurisdiction. It describes the framing effects that these concepts engraft onto personal jurisdiction.<sup>55</sup> Part II.D uses the lens of rules and standards to examine the entire universe of Supreme Court cases—that is, four cases—that consider questions of general jurisdiction. Finally, Part II.E looks at specific jurisdiction jurisprudence through the same lens.

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53. In contrast, a defendant is free to consent to personal jurisdiction, even if the forum would otherwise be unable to assert personal jurisdiction consistent with the Due Process Clause. *See, e.g.,* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982).

54. *See, e.g.,* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 *TEX. L. REV.* 1589, 1592 (1992) (“There must . . . be a state law authorizing the court to subject the defendant to personal jurisdiction . . .”). Rule 4(k)(1) of the Federal Rules of Civil Procedure essentially requires, with limited exceptions, federal courts to apply the long-arm statute of the state in which they sit. *See* *FED. R. CIV. P.* 4(k)(1).

55. For an exposition of framing effects, see, for example, Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 *NOTRE DAME L. REV.* 313, 316–20 (2006).

*A. Territorial Jurisdiction*

Historically, states could assert personal jurisdiction over persons present within their borders. The Court in *Pennoyer v. Neff* confirmed that this practice was consistent with the Due Process Clause but also found unconstitutional attempts by states to assert personal jurisdiction (without consent) beyond their borders.<sup>56</sup>

A four-Justice plurality confirmed in *Burnham v. Superior Court of California* the continued vitality of the affirmative power of states to assert personal jurisdiction over persons within their borders.<sup>57</sup> This aspect of *Pennoyer*, then, remains good law—and is quite rule-like. However, the negative side of *Pennoyer*'s territorial approach—that is, restrictions that *Pennoyer* imposed on out-of-state assertions of personal jurisdiction—has given way to a more modern approach.

*B. The Regime of International Shoe*

The passage of time bore witness to technological innovation and a shift in the United States toward a more national economy. Both these developments raised significant challenges for *Pennoyer*'s territorial limitations on personal jurisdiction.<sup>58</sup> For a time, the Court recognized expansions in states' freedom to assert personal jurisdiction beyond their borders yet tried to force those expansions into the *Pennoyer* framework, often through the device of legal fiction.<sup>59</sup> Finally, in 1945, the Court saw fit to fundamentally rework its approach to personal jurisdiction.

The Court in *International Shoe Co. v. Washington*<sup>60</sup> replaced the touchstone of whether the defendant was actually physically present with a framework focused on a defendant's "contacts" with the forum state. The logic of *International Shoe* rests on the notion that "presence" in a state is, for Due Process purposes, but a proxy for "those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."<sup>61</sup> Beyond this new understanding of "presence," the Court noted that concerns of fairness—"[a]n 'estimate of the inconveniences' which

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56. 95 U.S. 714, 727 (1878).

57. 495 U.S. 604, 610–12 (1990). *But cf.* *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1069 (9th Cir. 2014) (asserting that *Burnham* does not apply to corporations).

58. *See* *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (describing evolution in personal jurisdiction law as having been "spurred by 'changes in the technology of transportation and communication, and the tremendous growth of interstate business activity'" (quoting *Burnham*, 495 U.S. at 617 (plurality opinion))).

59. *See, e.g., Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927) (upholding personal jurisdiction based on a state statute that implied consent from an out-of-state motorist's use of state's roads to appoint an in-state agent for service of process).

60. 326 U.S. 310 (1945).

61. *Id.* at 317.

would result to the corporation from a trial away from its ‘home’ or principal place of business”—should also figure into the Due Process calculus.<sup>62</sup>

The *International Shoe* Court identified two factors that should determine whether a defendant corporation was “present” in a state, and thus whether courts of the state could exercise personal jurisdiction over the corporation as a defendant in a case: the nature of the corporation’s contacts with the state and the extent of the corporation’s contacts with the state.<sup>63</sup> The Court considered a “high” and “low” for each of these factors: in terms of their nature, a corporation’s contacts could give rise to the liability at issue in the case, while in terms of their extent a corporation’s contacts could be “continuous and systematic” or “single or isolated.”<sup>64</sup> The Court used the four possible combinations of the “high” and “low” versions of the two factors to explicate a corporation’s presence, and hence (after factoring in the inconvenience to the corporation of appearing in the forum) the propriety of personal jurisdiction. Tables 3A and 3B depict two possible interpretations of these four settings as two two-by-two matrices; the only difference is the upper-right cells in the two tables.<sup>65</sup>

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62. *Id.* (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930)). The Court more recently has elucidated factors that go to the reasonableness of personal jurisdiction. *See Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 113 (1987).

63. *Int’l Shoe*, 326 U.S. at 319–20.

64. *Id.* at 317.

65. Note that Tables 3A and 3B only set out whether or not a corporation is deemed “present” in a jurisdiction under the reasoning of the opinion in *International Shoe*. *International Shoe* also made clear that the inconvenience to the out-of-state corporation was in all cases also a factor affecting the final determination of whether there is personal jurisdiction over the corporation. *See id.* The table does not address the inconvenience factor, and so the cells do not technically draw an absolute conclusion on personal jurisdiction. The inconvenience factor is inherently standard-like. Thus, one can say that standard-like considerations infuse all aspects of the *International Shoe* personal jurisdictional calculus. However, insofar as the inconvenience factor effects apply equally to all the cells, it is fair to say that the comparisons drawn in the text remain unchanged once inconvenience is factored in.

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TABLE 3A: ONE TAKE ON HOW *INTERNATIONAL SHOE* PRESENTED “PRESENCE” (WITH SHADING TO REFLECT CATEGORIZATION OF RULES AND STANDARDS).

		Extent of Contacts	
		Single or isolated	Continuous & systematic
Nature of the Contacts	Unrelated to the cause of action	No presence	Sometimes presence
	Related to the cause of action	Sometimes presence	Presence has “never been doubted”

TABLE 3B: A SECOND TAKE ON HOW *INTERNATIONAL SHOE* PRESENTED “PRESENCE” (WITH SHADING TO REFLECT CATEGORIZATION OF RULES AND STANDARDS).

		Extent of Contacts		
		Single or isolated	Continuous & systematic	
Nature of the Contacts	Unrelated to the cause of action	No presence	No presence if contacts are not “so continuous”	Presence if contacts are “so continuous”
	Related to the cause of action	Sometimes presence	Presence has “never been doubted”	

The Court began with two easy settings: First, it explained, “‘Presence’ in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . .”<sup>66</sup> Second, “[I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.”<sup>67</sup> These settings are depicted (identically) in the lower-right and upper-left cells,

66. *Id.* at 317.

67. *Id.* The Court then added: “To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.” *Id.*

respectively, of Tables 3A and 3B. There is *never* personal jurisdiction in the upper-left cell (depicted with a white background to reflect the rule that there is never jurisdiction), while there is *always* personal jurisdiction in the lower-right cell (depicted with a dark gray background to reflect the rule that there is always jurisdiction).

The Court then turned to two more complicated settings, where it is not possible to say that personal jurisdiction will always, or never, inhere. In one such setting—corresponding to the lower-left cell in Tables 3A and 3B—the corporation’s contacts *did* give rise to the liability at issue, *but* those contacts were single or isolated. There, according to the Court,

[A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, . . . other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.<sup>68</sup>

The Court’s amorphous language—emphasizing that jurisdiction “may be deemed sufficient” depending on the “nature and quality” of the contacts and the “circumstances of their commission”<sup>69</sup>—indicates that minimum contacts in this setting is standard-like (or at least more standard-like than rule-like). Once again, this setting is depicted—identically—in the lower-right cells of Tables 3A and 3B, with a light gray background reflecting the standard-like legal test.

In the final setting—corresponding to the upper-right cell in Tables 3A and 3B—the corporation’s contacts are continuous and systematic, *but* those contacts did *not* give rise to the liability at issue. Here, the *International Shoe* Court explained,

While it has been held . . . 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.<sup>70</sup>

The Court’s description of this setting is susceptible to two interpretations. On the one hand, one sees again references in the Court’s language to the amorphous “nature” of the contacts, and—other than noting that the contacts should be “*so* substantial”—the Court leaves vague exactly when presence should inhere. On this understanding, the upper-right cell is governed by a

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68. *Id.* at 318 (citations omitted).

69. *Id.*

70. *Id.*

standard-like legal regime. This is depicted in Table 3A, with the upper-right cell shaded light gray, to reflect the standard.

On the other hand, one might instead argue that the Court's requirement (for personal jurisdiction to inhere) that the contacts be "so continuous" evinces some notion of a rule-like bar, with presence actually existing in very few cases in that upper-right cell. Table 3B presents this alternative understanding, with the upper-right cell divided in two: the right part is shaded dark gray (to reflect the rule that there is always jurisdiction) and the left part is white (to reflect the rule that there is never jurisdiction).

Note that these two competing conceptions of "presence" under *International Shoe* frame matters in distinct ways. The conception presented in Table 3A suggests that the two key factors—the extent of the contacts and the nature of the contacts—both have a substantial effect on whether there is presence in a given case. Indeed, the conception represented by Table 3A is consistent with the idea that an increase in one factor might offset a decrease in the other factor—for example, presence might inhere (and therefore jurisdiction might be found) in a case where the contacts with the forum had little to do with the cause of action, provided that the contacts were substantial and numerous enough. It is this conception that seems the likely genesis for arguments that the *International Shoe* calculus should be understood to turn on a balancing of the nature of contacts, and the extent of contacts, seen as two continuous (as opposed to binary) variables.<sup>71</sup>

### C. *Specific and General Jurisdiction in the Wake of International Shoe*

Though accepted today as a natural bifurcation of personal jurisdiction, the *International Shoe* framework did not foreordain the dichotomy of general and specific jurisdiction. While the regime of *International Shoe* is broadly consistent with these concepts, the terms originated in the 1960s and were the brainchild not of the Supreme Court (or any court) but rather two academics—Professors

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71. See KEVIN M. CLERMONT, CIVIL PROCEDURE 146–47 (1st ed. 1982); William M. Richman, *Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1340–46 (1984) (reviewing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS (1983)); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 34–38 (1984); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 615 (1993) ("To encompass all the proper cases, the dichotomy should be supplemented with a sliding scale. As the extent and importance of defendant's forum contacts increase, a weaker connection between the claim and defendant's contacts should be permissible; as the extent and importance of defendant's forum contacts decrease, a stronger connection between the claim and defendant's contacts should be required." (footnote omitted)); see also Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 552 (2012) ("[Justice William] Brennan espoused what can be called a 'mélange' approach, under which all factors relevant to an *International Shoe* analysis—contact, state's interest, burden on the defendant, etc.—are considered together ad hoc to assess jurisdiction under a general rubric of fairness.").

Arthur von Mehren and Donald Trautman.<sup>72</sup> Nevertheless, the concepts of specific and general jurisdiction have come to dominate the way that lawyers (and legal academics) understand personal jurisdiction. In the 1980s, the Supreme Court itself adopted the terms.<sup>73</sup>

As the Supreme Court has put it, “[Wh]en a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum, the State is exercising ‘specific jurisdiction’ over the defendant.”<sup>74</sup> In contrast, “[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.”<sup>75</sup>

The imposition of the general-specific jurisdiction dichotomy effectively endorses a particular frame of personal jurisdiction: by defining general and specific jurisdiction so dichotomously, the approach decouples the extent of the contacts from the nature of the contacts in the presence calculus.<sup>76</sup> In other words, the general-specific jurisdiction approach moves the calculus toward the presentation in Table 3B, as opposed to Table 3A. And, as the next two Subparts demonstrate, that is exactly the direction in which the Court’s cases have gone.

#### D. General Jurisdiction

In all the years since *International Shoe*, the Supreme Court has encountered claims of general jurisdiction only four times. It thus is possible to catalog the Court’s pronouncements on the subject in relatively little space. I divide the presentation in two: I first focus on two twentieth century cases and then turn

72. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136, 1144 (1966).

73. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 235 n.162 (2014) (“The Supreme Court first employed the terminology ‘general jurisdiction’ and ‘specific jurisdiction’ in 1984, borrowing them from an influential law review article.”).

74. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

75. *Id.* at 414 n.9.

76. To the contrary, Professor Alan Trammell has recently argued for an approach to personal jurisdiction under which the nature of the contacts can offset the extent of the contacts (and vice versa), even in the wake of recent Supreme Court cases. See Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 522–46 (2015). Other commentators disagree. See Freer, *supra* note 71, at 552 (describing the Court as having “adopted a rigid, defendant-centric, two-step model in which the issue of contact between the defendant and the forum is primary”); Rhodes & Robertson, *supra* note 73, at 212 n.16 (“[W]e believe that it is unlikely that the Court is currently poised to jettison its insistence on a defendant’s purposeful contact with the forum, especially in light of the decisions in *Nicastro* and *Walden*.”). Such an approach seems to have been foreclosed by the Court’s decision in *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017); see *id.* at 1781 (rejecting the notion that “the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims . . . [.] which resembles a loose and spurious form of general jurisdiction” because the “cases provide no support for this approach”); *infra* notes 206–210 and accompanying text.

to two twenty-first century cases that seem to have shifted the lines on general jurisdiction.

### 1. *Twentieth Century Cases*

The plaintiff in the 1952 case of *Perkins v. Benguet Consolidated Mining Co.*<sup>77</sup> sought to sue the defendant—a Philippine corporation—in Ohio state court for damages arising out of her alleged status as a corporate stockholder. The Supreme Court upheld as constitutional the ability of the Ohio courts to “proceed[] *in personam* to enforce a cause of action not arising out of the corporation’s activities in the state of the forum.”<sup>78</sup> *Perkins* was an easy case for the Court to find the invocation of general jurisdiction to be proper: During the World War II Japanese occupation of the Philippines (and immediately thereafter), the president of the company (and also its general manager and principal shareholder) returned to his home in Ohio, whence he effectively ran the company, and he was acting in that capacity when he was served with process in Ohio.<sup>79</sup> To this day, *Perkins* remains the only case in which the Supreme Court has endorsed the exercise of general jurisdiction.

The Court’s next encounter with general jurisdiction came more than three decades later in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.<sup>80</sup> The plaintiffs in

77. 342 U.S. 437 (1952).

78. *Id.* at 446.

79. The *Perkins* Court elucidated:

The company’s mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There, he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors’ meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation’s properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both during the occupation of the company’s properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons.

*Id.* at 447–48.

80. 466 U.S. 408 (1984). *Helicopteros* may well have passed muster under the test for specific jurisdiction, but the case reached the Court solely on the question of the propriety of general jurisdiction. *See id.* at 415–16.

All parties to the present case concede that respondents’ claims against Helicol did not ‘arise out of,’ and are not related to, Helicol’s activities within Texas. We thus must explore the nature of

*Helicopteros* were the representatives of four individuals who perished in a helicopter crash in Peru.<sup>81</sup> The doomed helicopter had been owned and operated by the defendant<sup>82</sup>—*Helicopteros Nacionales de Colombia, S.A.* (*Helicol*), a Colombian corporation.<sup>83</sup> After negotiations undertaken in Texas, *Helicol* had contracted with the decedents' employer—a joint venture based in part in Texas.<sup>84</sup> Beyond the contract negotiations, *Helicol* had additional contacts with Texas: for years, *Helicol* had made substantial purchases from the helicopter manufacturer, sent personnel to Texas for training and consultation, and received funds from the joint venture drawn on accounts at a Texas bank.<sup>85</sup>

While *Helicol's* contacts with Texas were thus hardly negligible, neither, concluded the Court, were they substantial enough and continuous enough<sup>86</sup> to support a finding of general jurisdiction.<sup>87</sup> Indeed, the Court's decision can be seen simply to reaffirm the Court's pre-*International Shoe* holding in *Rosenberg*

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*Helicol's* contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*.

*Id.* (footnote omitted).

81. *Id.* at 409–10.

82. The plaintiffs also sued the decedents' employer and the helicopter manufacturer. *Id.* at 412 n.6.

83. *Id.* at 409.

84. *Id.* at 410–11.

85. The Court elucidated:

During the years 1970–1977, [*Helicol*] purchased helicopters (approximately 80% of its fleet), spare parts, and accessories for more than \$4 million from [the helicopter manufacturer] in Fort Worth. In that period, *Helicol* sent prospective pilots to Fort Worth for training and to ferry the aircraft to South America. It also sent management and maintenance personnel to visit [the manufacturer] in Fort Worth during the same period in order to receive 'plant familiarization' and for technical consultation. *Helicol* received into its New York City and Panama City, Fla., bank accounts over \$5 million in payments from [the decedents' employer] drawn upon First City National Bank of Houston.

*Id.* at 411.

86. The Supreme Court emphasized:

*Helicol* never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, *Helicol* never has owned real or personal property in Texas and never has maintained an office or establishment there. *Helicol* has maintained no records in Texas and has no shareholders in that State.

*Id.*

87. *Id.* at 418. The Court explained:

[W]e hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions. Nor can we conclude that the fact that *Helicol* sent personnel into Texas for training in connection with the purchase of helicopters and equipment in that State in any way enhanced the nature of *Helicol's* contacts with Texas. The training was a part of the package of goods and services purchased by *Helicol* from [the manufacturer]. The brief presence of *Helicol* employees in Texas for the purpose of attending the training sessions is no[t] . . . a significant contact . . . .

*Id.* (footnote omitted).

*Bros. & Co. v. Curtis Brown Co.*<sup>88</sup> that (as the *Helicopteros* Court put it) “makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State’s assertion of jurisdiction.”<sup>89</sup>

There is a limit to how much light these two cases could shed on the legal landscape of general jurisdiction.<sup>90</sup> Indeed, *Helicopteros* itself drew no sharp line indicating the outer boundary of general jurisdiction: contemporary commentators assailed the *Helicopteros* opinion for its lack of clarity.<sup>91</sup> And, as I have discussed above, that lack of clarity itself is enough to declare the old test not an explicit rule regime, and at least a rule-split regime.<sup>92</sup> That said, whatever *Helicopteros*’s ambiguities, substantial aspects of the test for general jurisdiction were relatively clear in the wake of the opinion. In short, the test for general jurisdiction in *Helicopteros*’s wake was fairly rule-like.

Consider first that, after *Helicopteros*, general jurisdiction would clearly be proper in a corporation’s state of incorporation and principal place of business. In this sense, the old test would be rule-like just like the test after *Goodyear* and *Daimler* (insofar as it is to this extent identical to it).<sup>93</sup>

This leaves only the question of jurisdiction over a corporation in places *other than* the corporation’s state of incorporation and principal place of business. The *Helicopteros* opinion does not suggest where the precise line between “general jurisdiction” and “no general jurisdiction” lies.<sup>94</sup> Lower courts in *Helicopteros*’s wake developed different tests to mark the outer boundary of general jurisdiction. Some courts upheld general jurisdiction over a corporation based solely upon the corporation’s substantial sales into the state.<sup>95</sup> A second

88. 260 U.S. 516 (1923).

89. *Helicopteros*, 466 U.S. at 417. *see id.* at 418 (“This Court in *International Shoe* acknowledged and did not repudiate its holding in *Rosenberg*.”); *id.* (describing the Court’s holding as “[i]n accordance with *Rosenberg*”); *id.* (“The brief presence of Helicol employees in Texas for the purpose of attending the training sessions is no more a significant contact than were the trips to New York made by the buyer for the retail store in *Rosenberg*.”).

90. *Cf.* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 895 (2000) (describing four Supreme Court cases as “[f]our [f]lares in the [d]arkness” shedding some light on the landscape of constitutional property).

91. *See, e.g.*, Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 125 (2001) (“The holdings in *Helicopteros* and *Perkins* are limited by their facts and do not give clear legal rules for contacts-based general jurisdiction.”); *see also* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (describing personal jurisdiction doctrine as “a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined”).

92. *See supra* Part I.B.

93. *See* James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 981 (2012) (citing *Follette v. Clairol, Inc.*, 829 F. Supp. 840 (W.D. La. 1993), *aff’d*, 998 F.2d 1014, 1993 WL 277163 (5th Cir. July 16, 1993), *cert. denied*, 510 U.S. 1163 (1994)).

94. *See* Trammell, *supra* note 76, at 511 (“[T]he Court contrasted the case with *Perkins*, but it offered no real clues about how to analyze cases that fell into the vast expanse between *Helicol* and *Perkins*.”).

95. *See, e.g.*, *Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) (upholding general jurisdiction over a firm that had no employees or agents in the forum state but that had “annual sales in Alabama . . . rang[ing] from \$65,000 to \$85,000”); *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 160 (Ill. 1979)

group of courts employed a test that also tended to recognize general jurisdiction broadly but required some showing of contacts beyond simply substantial sales.<sup>96</sup> Third, some courts held physical presence within the forum state to be a prerequisite for general jurisdiction.<sup>97</sup> Finally, in a test closer to the rule later to be enunciated in *Goodyear* and *Daimler*, some courts found no general jurisdiction even upon a showing of substantial sales *and* a physical presence.<sup>98</sup>

While the diverse array of tests for general jurisdictions employed by the lower courts confirms the vague nature of *Helicopteros*'s holding, a review of these tests reveals the presence of rule-like elements. Some of the tests employed by lower courts were remarkably rule-like (for example, the test described just above based solely on substantial sales in the forum). While other tests incorporated standard-like elements, they also mixed in rule-like elements (for example, the test that required some showing beyond simply substantial sales).

The substantial rule-like aspect of the approach courts took to general jurisdiction following *Helicopteros* is well exemplified by the substantially uniform treatment across these tests of multistate corporations. For this class of cases—and indeed a very substantial class of cases—the existence of general jurisdiction could be concluded with fair rule-like precision. A multistate corporation—that is, a corporation that does business, and has a physical presence, in more than one state—was subject to jurisdiction in all such states.<sup>99</sup>

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(upholding general jurisdiction over a Belgian manufacturer on the ground that its product regularly entered the forum state).

96. See, e.g., *Metro. Life Ins. v. Robertson-Ceco Corp.*, 84 F.3d 560, 570–71 (2d Cir. 1996) (finding general jurisdiction over a firm proper based on totality of contacts, including substantial sales into the forum to addresses in the forum, the presence of an office and employee in the forum, and numerous business trips into the forum by the firm's employees (and then ultimately concluding that the exercise of jurisdiction was not proper on fairness grounds)).

97. See, e.g., *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 373, 375 (5th Cir. 1987) (finding no general jurisdiction where, even though the defendant sent an “enormous stream of commerce” into the forum consisting of \$250 million in sales and \$195 million in purchases and occasionally sent representatives into the forum in connection therewith, the defendant negotiated and completed all transactions in its home state).

98. See, e.g., *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198–1200 (4th Cir. 1993) (finding general jurisdiction lacking despite the fact that defendant had several employees in the forum, entered into a contract with a forum state firm, and had millions of dollars in sales in the forum); *Hughes v. A.H. Robins Co.*, 490 A.2d 1140, 1142–43, 1150–51 (D.C. Cir. 1985) (finding general jurisdiction lacking even though the defendant maintained an office in the forum for limited purposes and made a few million dollars in sales in the forum).

99. See, e.g., *Richman*, *supra* note 71, at 614 n.88 (1993) (“General jurisdiction may also exist over out-of-staters if their forum connections are very substantial. For example, most states will have general jurisdiction over McDonalds.”); *Rhodes & Robertson*, *supra* note 73, at 214 (“Jurisdiction over defendants for disputes unrelated to the forum is called ‘general personal jurisdiction,’ and until now, first-year Civil Procedure casebooks taught students that national corporations with substantial operations in all fifty states (such as McDonalds or WalMart) would likely be subject to general personal jurisdiction in all fifty states, meaning that a traveling plaintiff . . . would be able to sue in a home forum.”).

On this important metric, most of the tests the lower courts employed were not so disparate and highly rule-like.<sup>100</sup>

The extent to which lower courts and litigants were on sure ground with the old regime for general jurisdiction is confirmed by the absence from the Supreme Court’s certiorari docket—in the years leading up to the *Goodyear* case (where the Court began to shift the boundary of general jurisdiction)—of petitions alleging a split of authority on the test for general jurisdiction. I assembled a novel dataset of Supreme Court certiorari petitions during the ten-year period from January 1, 2000 through December 31, 2009<sup>101</sup> that questioned the application of general jurisdiction. My search yielded seventeen such petitions (i.e., fewer than two per year).<sup>102</sup>

A cursory review of the petitions revealed that several petitions raised narrower questions than the overarching contours of general jurisdiction. Some petitions questioned whether the contacts of a subsidiary could be attributed to its corporate parent for general jurisdiction questions, while others questioned the applicability of general jurisdiction in the specific context of a foreign corporate defendant. Some cases (like *Daimler* itself)<sup>103</sup> raised combinations of these questions. I hand-coded each petition for whether it raised each of these questions.

I also coded each petition for the ground (or grounds) offered to induce the Court to grant the petition. Rule 10 of the Supreme Court Rules identifies two factors that increase the likelihood of a certiorari grant: (1) “conflicts” among the lower courts;<sup>104</sup> and (2) “important question[s] of federal law.”<sup>105</sup> The Rule also indicates that the Court will “rarely” grant a certiorari petition

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100. *Daimler AG v. Bauman*, 571 U.S. 117, 154 (2014) (Sotomayor, J., concurring) (“[I]here is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one.”).

101. The petition in *Goodyear* itself was filed on July 13, 2010. Petition for Writ of Certiorari, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (No. 10-76), 2010 WL 2786988.

102. In Westlaw’s library of U.S. Supreme Court “Petitions for Writ of Certiorari,” I used the search: helicopters & “general jurisdiction” & DA(aft 12-14-1999 & bef 12-14-2009). I included only actual petitions for certiorari (not replies and not amicus briefs in support of or against certiorari grants). I crafted the search on the assumption that any brief that raised the application of general jurisdiction would necessarily have cited the *Helicopteros* case. The search yielded thirty-seven petitions. Of those, twenty petitions did not actually raise a question of general jurisdiction, leaving seventeen that did.

103. See *infra* text accompanying notes 129–142.

104. SUP. CT. R. 10(a)–(b) (suggesting an increased likelihood of a certiorari grant where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort;” or where “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals”).

105. *Id.* R. 10(c) (suggesting an increased likelihood of a certiorari grant where “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court”).

alleging merely an error on the part of the court below.<sup>106</sup> I coded each petition for whether it alleged each of these three bases for a certiorari grant.<sup>107</sup>

Of the seventeen petitions in the dataset, five petitions focused not on what the overarching test for general jurisdiction should be, but only on the question of whether the contacts of a subsidiary could be attributed to its corporate parent. Of the remaining twelve petitions, four focused on the particular plight of subjecting international defendants to general jurisdiction. But general jurisdiction in the context of international defendants raises distinct questions. The assertion of personal jurisdiction domestically raises important, but internal-U.S., questions of federalism; in contrast, the assertion of personal jurisdiction internationally raises questions of comity<sup>108</sup> that have the potential to implicate U.S. foreign relations.<sup>109</sup> Commentators, too, recognize that the application of general jurisdiction internationally is especially important and vexing.<sup>110</sup>

Of the eight petitions focused on domestic defendants, only three petitions to the Supreme Court during the ten-year period sought clarification of the test for general jurisdiction, alleging that the courts below were divided over the applicable test. Even if one includes the petitions involving foreign defendants, only six of twelve petitions alleged a split among the courts below.

In short, litigants and lawyers were not clamoring for clarification of the test for general jurisdiction. Indeed, so clear was the application of general jurisdiction before the Court's holding in *Daimler* that the U.S. corporate affiliate of the defendant corporations challenged general jurisdiction in neither *Goodyear* nor *Daimler*.<sup>111</sup> And the certiorari petition in neither *Goodyear* nor

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106. *Id.* R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

107. I only coded the Rule 10 basis a petition cited with respect to some issue of general jurisdiction, not other questions of law. Thus, for example, if a petition raised a general jurisdiction law issue and a substantive law issue and only alleged a split among the courts below with respect to the substantive law issue, then I did not code the petition as alleging a split below. I also did not code a split among the courts below where the petition merely alleged that the lower court decision at issue conflicted with the approach of all other courts.

108. *See, e.g.,* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 909 (2011) (Ginsburg, J., dissenting) (“The Court’s judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional.”); *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) (“The Ninth Circuit . . . paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”).

109. *Cf. Hilton v. Guyot*, 159 U.S. 113, 222, 228 (1895) (noting foreign relations implications arising out of decisions about enforcement of foreign judgments).

110. *See, e.g.,* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 158 (2001) (“The Court’s skimpy case law leaves unanswered a number of obvious questions, such as the potential exercise of general jurisdiction over foreign multinational enterprises that sell large quantities of their products in the United States.”).

111. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 921 (2011) (“Goodyear USA . . . does not contest the North Carolina courts’ personal jurisdiction over it . . . .”); *Daimler AG*, 571 U.S. at 134 (“*Daimler* . . . failed to object below to plaintiffs’ assertion that the California courts could exercise

*Daimler* argued that the application of general jurisdiction had produced a split among the courts below.<sup>112</sup>

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To this point, I have discussed only the general jurisdiction test for presence, not the fairness factors. As I discuss below, the Court in a subsequent case indicated that the fairness factors do not apply—and probably never applied—to general jurisdiction analysis at least in the corporation’s “home,”<sup>113</sup> and possibly beyond.<sup>114</sup> That said, to whatever extent the fairness factors are part of a general jurisdiction analysis, the resultant test—because it incorporates the standard-like fairness factors—is more standard-like.

The test for general jurisdiction at the end of the twentieth century was surely characterized by large splits in authority in the lower courts. And, while it was hardly a rule-split regime, neither would it be accurate to describe it as a standard-split regime. Rather, the late twentieth century test for general jurisdiction is aptly described as part rule-split and part standard-split.

## 2. *Twenty-First Century Cases*

The Court again took a long break from addressing general jurisdiction, returning to the issue in 2011—more than a quarter century after *Helicopteros*—in *Goodyear Dunlop Tire Operations, S.A. v. Brown*.<sup>115</sup> In *Goodyear*, the plaintiffs were the parents of two boys from North Carolina who were killed in a bus accident outside Paris, France.<sup>116</sup> They alleged that the accident was the result of defective tires manufactured in Turkey by a foreign subsidiary of The Goodyear Tire and Rubber Co. (Goodyear USA), an Ohio corporation.<sup>117</sup> They named as plaintiffs in their suit in North Carolina state court Goodyear USA as well as three of Goodyear USA’s foreign subsidiaries (incorporated in France, Luxembourg, and Turkey).<sup>118</sup> Focusing on the fact that a number of tires manufactured by the foreign subsidiaries had reached North Carolina through

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all-purpose jurisdiction over [its domestic subsidiary.]); *id.* at 153 (Sotomayor, J., concurring) (“[U]ntil a footnote in its brief before this Court, even *Daimler* did not dispute [that its domestic subsidiary would be subject to general jurisdiction in California] for eight years of the litigation.”).

112. The petition in *Goodyear* presented a lower-court split, but only on the narrow question of whether putting products into the “stream-of-commerce” was sufficient to generate general jurisdiction. Petition for Writ of Certiorari at i, *Goodyear*, 564 U.S. 915 (No. 10-76), 2010 WL 2786988 at \*1. The petition in *Daimler* presented a lower-court split only on the question of when an affiliated agent’s actions should be attributed to a corporation. Petition for Writ of Certiorari at 10, *Daimler*, 571 U.S. 117 (No. 11-965), 2012 WL 379768 at \*10. The petition argued that the broad applicability of general jurisdiction to foreign corporations presented an important question for the Court’s review but did not argue that there was a lower-court split on the subject. *Id.* at 25–26.

113. See *infra* text accompanying note 149.

114. See *infra* text accompanying notes 150–151.

115. 564 U.S. 915.

116. *Id.* at 920.

117. *Id.* at 920–21.

118. *Id.* at 920.

the stream of commerce,<sup>119</sup> the North Carolina Court of Appeals found there to be valid jurisdiction over the foreign subsidiaries.<sup>120</sup> After the North Carolina Supreme Court denied discretionary review,<sup>121</sup> the Supreme Court granted certiorari.<sup>122</sup>

The Court upheld the foreign subsidiaries' challenge to general jurisdiction.<sup>123</sup> In one sense, *Goodyear* was an easy decision for the Court to reach. The Court highlighted that the state court's analysis in favor of general jurisdiction improperly "elided" the distinction between specific jurisdiction and general jurisdiction<sup>124</sup>: "[T]ies serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant."<sup>125</sup> Beyond that, the *Goodyear* Court emphasized that its earlier decision, *Helicopteros*, controlled the outcome in the case before it: "We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries."<sup>126</sup>

At the same time, the Court's opinion in *Goodyear* seemed to break new ground when it commented, contrasting the *Perkins* case, that the defendants in *Goodyear* were "in no sense at home in North Carolina."<sup>127</sup> Though ambiguous at the time, this statement proved to be a harbinger of the Supreme Court's next encounter with general jurisdiction.

The Supreme Court returned to the question of general jurisdiction three Terms after *Goodyear*. The Court's opinion in *Daimler AG v. Bauman* expanded upon the *Goodyear* opinion's reference to general jurisdiction turning on whether the defendant is "at home."<sup>128</sup>

The *Daimler* case arose out of allegations by residents of Argentina that the Argentinean subsidiary of Daimler AG (Daimler, itself a German corporation)<sup>129</sup>—Mercedes Benz Argentina (MB Argentina)—had "collaborated with [Argentinean] state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs."<sup>130</sup> The plaintiffs brought suit in California federal

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119. *Brown v. Meter*, 681 S.E.2d 382, 393–94 (N.C. Ct. App. 2009), *review denied*, 695 S.E.2d 756 (N.C. 2010) (mem.), *rev'd sub nom. Goodyear*, 564 U.S. 915.

120. *Id.* at 394–95.

121. *Brown*, 695 S.E.2d 756 (N.C. 2010) (mem.), *rev'd sub nom. Goodyear*, 564 U.S. 915.

122. 564 U.S. at 920.

123. The North Carolina courts also found valid jurisdiction as to Goodyear USA, but "Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it." *Id.* at 918.

124. *Id.* at 927.

125. *Id.*

126. *Id.* at 929.

127. *Id.*

128. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

129. *Id.* at 123.

130. *Id.* at 121.

court under the Alien Tort Statute<sup>131</sup> and the Torture Victim Protection Act,<sup>132</sup> and they also alleged torts under California and Argentina law.<sup>133</sup>

The plaintiffs relied heavily on Daimler's corporate family tree. On the merits, the plaintiffs sought to "hold Daimler vicariously liable for MB Argentina's alleged malfeasance."<sup>134</sup> As for personal jurisdiction, the plaintiffs asserted general jurisdiction<sup>135</sup> over Daimler based upon the susceptibility of Daimler's U.S. subsidiary—Mercedes-Benz USA, LLC (MBUSA)<sup>136</sup>—to jurisdiction in California.<sup>137</sup> The Supreme Court "assume[d]" that MBUSA was subject to general jurisdiction in California<sup>138</sup> and further assumed that MBUSA's California contacts were imputable to Daimler,<sup>139</sup> but it nevertheless rejected the plaintiffs' assertion of general jurisdiction over Daimler.<sup>140</sup>

The Court emphasized the "markedly different trajectories" of specific and general jurisdiction.<sup>141</sup> According to the Court, "Specific jurisdiction has been cut loose from *Pennoyer's* sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on . . . specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme."<sup>142</sup>

The *Daimler* Court invoked the *Goodyear* Court's conception of general jurisdiction, equating a jurisdiction where general jurisdiction over a defendant exists as one where the defendant is "at home."<sup>143</sup> The Court explained that the paradigm bases for general jurisdiction are a corporate defendant's place of incorporation and principal place of business.<sup>144</sup> In so doing, the Court emphasized what it perceived as the "rule-based" benefits of such an understanding of general jurisdiction for corporate entities: "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."<sup>145</sup> The Court then cited to its opinion in

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131. *Id.* at 11; *see* 28 U.S.C. § 1350.

132. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Torture Victim Protection)).

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

134. *Id.* at 122–23.

135. Personal jurisdiction over Daimler in California was necessarily general—if it existed at all—insofar as none of the claims brought by plaintiffs had any connection to the forum state of California. *See id.* at 133.

136. *Id.* at 121.

137. Plaintiffs originally also argued that Daimler's contacts, standing alone, were sufficient to subject it to general jurisdiction in California but abandoned the argument when the district court rejected it. *See id.* at 133–34.

138. *Id.* at 134, 136.

139. *Id.*

140. *Id.* at 136.

141. *Id.* at 132.

142. *Id.* at 132–33 (footnotes omitted).

143. *Id.* at 137 (quoting *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

144. *Id.*

145. *Id.*

a recent case addressing federal court subject matter jurisdiction for the proposition that “[s]imple jurisdictional rules . . . promote greater predictability.”<sup>146</sup> The Court then concluded: “These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”<sup>147</sup>

The *Daimler* Court further emphasized that the proper test for general jurisdiction required more than mere continuous and systematic contacts with the forum:

[T]he words “continuous and systematic” were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. . . . Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of “instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities.” . . . Accordingly, the inquiry under *Goodyear* is . . . whether a foreign corporation’s . . . “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”<sup>148</sup>

Finally, the *Daimler* Court explained that fairness concerns cannot preclude the exercise of general jurisdiction in a defendant’s home jurisdiction.<sup>149</sup> One can read the Court further to say that reasonable factors are not—and indeed were never intended to be—part of any general jurisdiction calculus.<sup>150</sup> However, the fact that the Court conceded that there are “exceptional case[s]”—*Perkins* being one—where “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State”<sup>151</sup> leads one to question whether the reasonableness factors should apply at least in those cases.

The test for general jurisdiction is resoundingly rule-like. It is safe to reduce the test to two basic tenets: (1) General jurisdiction over a corporation is proper in the jurisdiction where the corporation is incorporated and the jurisdiction

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

147. *Id.*

148. *Id.* at 138–39 (emphasis omitted) (footnote omitted) (citations omitted) (first quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–18); and then quoting *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

149. *Id.* at 139 n.20 (“Imposing such a checklist [of reasonableness factors] in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.”).

150. The Court explained: “[A] multipronged reasonableness check was articulated in *Asahi*, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue.” *Id.* (citations omitted). Yet the *Asahi* Court never explicitly suggested that the reasonableness factors applied only to the specific jurisdiction calculus. *See Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 113 (1987) (“[T]he determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors.”).

151. *Daimler*, 571 U.S. at 139 n.19.

where the corporation maintains its principal place of business; and (2) General jurisdiction over a corporation is almost never appropriate in other jurisdictions. *Perkins* is one example of such a rare case; the Court has subsequently referred to *Perkins* as a paradigmatic case for a corporation being “at home” in a jurisdiction other than its place of incorporation or principal place of business,<sup>152</sup> and it has otherwise remained coy as to what other types of cases might also qualify.<sup>153</sup>

We may readily understand the new test for general jurisdiction as more rule-like than standard-like. The test sounds like a rule in categorically holding general jurisdiction proper in a corporation’s place of incorporation and principal place of business. So too is the test rule-like in proclaiming general jurisdiction is almost never appropriate otherwise.

To be sure, the precise outer boundaries of general jurisdiction (beyond the state of incorporation and principal place of business) remain a mystery. As discussed above, that alone is enough to establish some resemblance to a standard—at least for lower courts, until the Supreme Court one day clarifies the actual boundary as rule-like, were it to choose to do so.<sup>154</sup> In other words, this aspect of the new test has the markings of (at least) a rule-split regime, and perhaps more likely a standard-like regime. It seems more likely, moreover, that the Court might instead elect to leave that boundary as explicitly standard-like, on the logic that cases warranting an exception to the general rule against general jurisdiction will—like *Perkins* itself—be idiosyncratic.

In addition, it is worth noting that, in declaring general jurisdiction proper in a corporation’s place of incorporation and principal place of business, and almost never anywhere else, the Court’s new test may invite litigants to contest, and task lower courts with deciding, where a corporation’s principal place of business actually is. In contrast, under the old regime, at least for multistate corporations, such precision in identifying a corporation’s lone principal place of business was not required; general jurisdiction was proper in any state in which the corporation conducted sufficiently substantial business.<sup>155</sup>

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152. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (explaining that, in *Daimler*, the Court “suggested that *Perkins* . . . exemplified such a case.”).

153. See *Daimler*, 571 U.S. at 139 n.19 (“We do not foreclose the possibility that in an exceptional case, see, e.g., *Perkins*, . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question . . .”).

154. See *supra* text accompanying notes 51–52 (discussing how Supreme Court ambiguity about a test can lead to disagreement among lower courts, which has certain standard-like qualities).

155. Justice Sotomayor spoke to this point in her concurring opinion in *Daimler*.

If anything, the majority’s approach injects an additional layer of uncertainty because a corporate defendant must now try to foretell a court’s analysis as to both the sufficiency of its contacts with the forum State itself, as well as the relative sufficiency of those contacts in light of the company’s operations elsewhere. Moreover, the majority does not even try to explain just how extensive the company’s in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.

Still, the presence of some minor standard-like elements in the new test for general jurisdiction is hardly enough to disturb the conclusion that the new test is predominantly rule-like. The rule-like aspects of the new test far outnumber the few standard-like aspects.

### *E. Specific Jurisdiction*

As compared to general jurisdiction, specific jurisdiction has generally gravitated—as Professors von Mehren and Trautman predicted it would<sup>156</sup>—toward the standard-like. But, not only has the Court ensconced standards at the boundary of specific jurisdiction, it has often done so without a clear majority. Thus, the regime governing specific jurisdiction is largely standard-split.

One overarching point that hangs over specific jurisdiction jurisprudence is that a defendant's passive contacts with a forum are insufficient to ground specific jurisdiction. As the Court put it in *Hanson v. Denckla*,<sup>157</sup> “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”<sup>158</sup> Rather, the defendant must “purposefully avail[] itself of the privilege of conducting activities within the forum State.”<sup>159</sup>

The majority's approach will also lead to greater unpredictability by radically expanding the scope of jurisdictional discovery. Rather than ascertaining the extent of a corporate defendant's forum-state contacts alone, courts will now have to identify the extent of a company's contacts in every other forum where it does business in order to compare them against the company's in-state contacts. That considerable burden runs headlong into the majority's recitation of the familiar principle that “[s]imple jurisdictional rules . . . promote greater predictability.

571 U.S. at 155 (Sotomayor, J., concurring) (quoting *id.* at 137 (majority opinion)).

[T]he Court's focus on Daimler's operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.

*See also id.* at 143 (Sotomayor, J., concurring).

An article on which the majority relies (and on which *Goodyear* relied as well . . .) expresses the point well: “We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states. . . . [T]he amount of activity elsewhere seems virtually irrelevant to . . . the imposition of general jurisdiction over a defendant.

*Id.* at 151 (quoting Brilmayer et al., *supra* note 16, at 742).

[T]he majority announces the new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's ‘nationwide and worldwide’ activities.

*Id.* at 154 (quoting *id.* at 139 n.20) (majority opinion)).

156. Von Mehren & Trautman, *supra* note 72, at 1164. Professors von Mehren and Trautman predicted: “First, a more functional and less mechanical methodology will emerge . . . . Second, . . . specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene.” *Id.*

157. *Hanson v. Denckla*, 357 U.S. 235 (1958).

158. *Id.* at 253.

159. *Id.*

The Court applied the “purposeful availment” requirement to draw a distinction in two mid-twentieth century contracts cases. On the one hand, the Court found jurisdiction to lie in California, where the defendant had solicited a new contract and whence the defendant had accepted payments from the counterparty on the contract.<sup>160</sup> On the other hand, the Court found no jurisdiction in Florida where plaintiffs brought suit over the appointment of beneficiaries under a trust agreement, where the out-of-state trust company was a necessary party to the litigation.<sup>161</sup> The woman had executed the deed of trust with the trust company in Pennsylvania and then moved to Florida where she had purported to appoint beneficiaries; the woman’s unilateral move to Florida was insufficient to support jurisdiction over the company in that state.<sup>162</sup> At the same time, the Court has emphasized that jurisdiction over a defendant in a forum is not established—under what would be a rather rule-like test—merely by the fact that the defendant entered into a contract with a counterparty in that forum.<sup>163</sup> Rather, more amorphous factors—“prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing”—“must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.”<sup>164</sup>

In keeping with the requirement that a defendant must “purposefully avail” itself of a forum’s law and benefits before jurisdiction will attach, the Court held in *World-Wide Volkswagen Corp. v. Woodson* that a corporation is not subject to suit in a forum, with respect to an accident in that forum involving a product it sold,<sup>165</sup> where: (1) the corporation sold the product in one state and someone then unilaterally moved the product to the forum state; and (2) the corporation does not otherwise sell any products into the forum state.<sup>166</sup> At the same time, the Court acknowledged that “[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>167</sup>

While the *Woodson* Court thus lent support to the “stream of commerce” theory of specific jurisdiction, it did not establish the contours of that theory. Two subsequent cases raising questions about those contours have resulted in splintered Courts with no controlling clarification.

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160. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

161. *Hanson*, 357 U.S. at 238–39, 251.

162. *Id.* at 253–54.

163. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (“If the question is whether an individual’s contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot.”).

164. *Id.* at 479.

165. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

166. *See id.* at 291–99.

167. *Id.* at 297–98.

In 1987, the Court fractured evenly on the stream-of-commerce question in deciding *Asahi Metal Industry Co. v. Superior Court of California*.<sup>168</sup> Led by Justice O'Connor, four Justices would have required, beyond the defendant putting an item in the stream and the item reaching the forum state, “an action of the defendant purposefully directed toward the forum State.”<sup>169</sup> A different set of four Justices, led by Justice Brennan, in contrast, would have sustained jurisdiction “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State.”<sup>170</sup> The Court ultimately decided the case on grounds of the fairness factors.<sup>171</sup>

Nearly a quarter century later, the Court again fractured over the contours of stream-of-commerce specific jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>172</sup> Six Justices, it seems, were content to dispatch the approach Justice Brennan had propounded in *Asahi*, but there was no majority on exactly when stream-of-commerce specific jurisdiction is supported. A four-Justice plurality endorsed the view Justice O'Connor had espoused in *Asahi*,<sup>173</sup> holding on the facts of the case that jurisdiction in New Jersey over the English corporate defendant was improper because the plaintiff had “not established that [the defendant] engaged in conduct purposefully directed at New Jersey.”<sup>174</sup> Joined by Justice Alito, Justice Breyer concurred in the judgment.<sup>175</sup> The concurring opinion followed the plurality opinion in disapproving of the reasoning of the Supreme Court of New Jersey, which adhered to Justice Brennan’s *Asahi* opinion.<sup>176</sup> But, according to Justice Breyer, “the outcome of this case is determined by our precedents.”<sup>177</sup> Justice Breyer declined to go any further<sup>178</sup>—and certainly thought it inappropriate to endorse a rule<sup>179</sup>—“without a better understanding of the relevant contemporary commercial circumstances.”<sup>180</sup> (Dissenting, Justice Ginsburg, joined by Justices Sotomayor and Kagan, argued that the defendant had sufficient affirmative contacts with the *United States as a*

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168. 480 U.S. 102 (1987).

169. *Id.* at 112 (plurality opinion) (emphasis omitted).

170. *Id.* at 117 (Brennan, J., concurring). In a separate opinion, Justice Stevens, joined by Justices White and Blackmun, explained that he did not join the stream-of-commerce portion of Justice O'Connor’s opinion because it was “not necessary to the Court’s decision.” *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment). He also explained that, even accepting the validity of the test, the plurality “misapplies it to the facts of this case.” *Id.* at 122.

171. *See id.* at 113–16 (majority opinion). All the Justices, with the exception of Justice Scalia, joined this portion of Justice O'Connor’s opinion.

172. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

173. *See id.* at 879–85 (plurality opinion).

174. *Id.* at 885–87.

175. *Id.* at 887 (Breyer, J., concurring).

176. *Id.* at 887–89.

177. *Id.* at 887.

178. *Id.* at 890.

179. *Id.* at 891.

180. *Id.* at 892–93.

*whole* and that that should suffice for an assertion of jurisdiction in New Jersey.<sup>181</sup>)

As Justice Kennedy observed in his *Nicaastro* plurality opinion, lower courts had, in *Asahi*'s wake, faced the difficult task of “reconcil[ing] the competing opinions” of Justices O’Connor and Brennan.<sup>182</sup> *Nicaastro* may have moved the goalposts, but it ultimately did not provide the majority guidance that would have made the jobs of the lower courts easier on this score.

The Court has balanced various concerns in determining the viability of specific jurisdiction. Thus, even before the overlay of the standard-like fairness factors, it is safe to categorize the tests for specific jurisdiction as standard-like. Add to this the inability of the Court to assemble a majority opinion to explain the contours of stream-of-commerce specific jurisdiction and one arrives at the characterization of specific jurisdiction as standard-split. It is, as a consequence, often highly difficult to predict how a court will rule on an assertion of specific jurisdiction.

### III. RULES, STANDARDS, AND THE SHIFTING CONTOURS OF PERSONAL JURISDICTION

With its decisions in *Goodyear* and *Daimler*, the Supreme Court shifted the contours of general jurisdiction. This Part evaluates the impact that shift had in terms of rules and standards for general jurisdiction and personal jurisdiction writ large. First, this Part describes the impact of the shift in general jurisdiction jurisprudence on the rules and standards of general jurisdiction. It argues that, counterintuitively, the Court’s decision to make general jurisdiction more rule-like has resulted in more plaintiffs seeking to invoke specific jurisdiction, the landscape of which is dominated by standards. Having thus dispatched the Court’s justification for making general jurisdiction more rule-like, this Part turns to critical examination of alternative justifications for the shift in general jurisdiction. Finally, this Part considers ways that the Court could remedy the rise of standards in personal jurisdiction—including adopting a broader rule for general jurisdiction.

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181. *Id.* at 899–901 (Ginsburg, J., dissenting). *But see id.* at 884 (plurality opinion) (“[A] defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”); Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 534–561 (2019) (arguing that, while Congress can implement national personal jurisdiction with respect to cases pending in the federal courts, the Due Process Clause requires a state court to examine minimum contacts with the state itself).

182. 564 U.S. at 883 (plurality opinion).

A. *The Impact of the Shift in General Jurisdiction Jurisprudence on the Rules and Standards of Personal Jurisdiction*

The discussion in the previous Part makes clear that the Court vastly overstated the extent to which it was introducing a rule to govern general jurisdiction in order to displace an area previously governed by standards. For one thing, the test for general jurisdiction in the years and decades following *Helicopteros* was somewhat rule-like. The demarcations of the outer boundaries of general jurisdiction were far from clear, and the lower courts were quite divided over the proper test to apply.<sup>183</sup> At the same time, however, in a more rule-like turn—and one that applied in many cases—it was well recognized that multistate corporations were subject to general jurisdiction in all states in which they conducted business.<sup>184</sup>

For another thing, the new test for general jurisdiction introduces standard-like elements that were not really a part of the old regime. General jurisdiction is now available almost exclusively in a corporation's place of incorporation and principal place of business, and nowhere else.<sup>185</sup> But the determination of a corporation's principal place of business will not always be obvious and predictable; it may require standard-like comparisons across jurisdictions.<sup>186</sup>

This said, the current test for general jurisdiction that has arisen in *Goodyear* and *Daimler*'s wake is very rule-like. With very limited exceptions, general jurisdiction only inheres in an entity's "home" forums.<sup>187</sup> And, in those forums the reasonableness factors (which normally add a standard-like overlay to whatever the governing test for presence otherwise is) have no application.<sup>188</sup>

It is safe to say, then, that with its opinions in *Goodyear* and *Daimler*, the Court overall (but not entirely) made the test for general jurisdiction more rule-like. But at the same time, it made the test for general jurisdiction far narrower: it seems clear, after all, that in any case where general jurisdiction would obtain under the current test, general jurisdiction also would likely have obtained under the old test.<sup>189</sup> But the old test extended general jurisdiction to many settings where the new test does not. Whereas the old test was *inclusive* (i.e., it erred on the side of allowing jurisdiction over corporate defendants), the new test is *exclusive* (i.e., it errs on the side of denying jurisdiction over corporate defendants).

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183. See *supra* notes 95–98 and accompanying text.

184. See *supra* notes 99–100 and accompanying text.

185. See *supra* notes 152–153 and accompanying text.

186. See *supra* note 155 and accompanying text.

187. See *supra* notes 152–153 and accompanying text.

188. See *supra* notes 149–151 and accompanying text.

189. See *supra* note 93 and accompanying text.

This reality draws into question at least some of the justifications the Supreme Court offered for its new test for general jurisdiction. The Court expressed a desire to make general jurisdiction more rule-like,<sup>190</sup> and it emphasized the need to do so in two ways. First, it disparaged the old test as implicitly standard-like in contradistinction to the new test.<sup>191</sup> However, as I have discussed above, while the old regime was not paradigmatically rule-like, neither was it paradigmatically standard-like.<sup>192</sup>

Second, the Court highlighted general jurisdiction under the old test as having fallen comparatively out of use (perhaps because of its purportedly standard-like nature) as evidenced by: (1) the paucity of Supreme Court cases in the years leading up to *Goodyear* and *Daimler*,<sup>193</sup> and (2) the more general abandonment by plaintiffs of general jurisdiction as a basis for personal jurisdiction in favor of specific jurisdiction.<sup>194</sup> But this argument is problematic. The Court offered no empirical support for the contention about the lower courts. But even if the Court's assertion was accurate—and even given the fact that the Court itself dealt with few general jurisdiction cases (and indeed, as my empirical analysis above shows, did not receive many requests to address the issues in the years leading up to *Goodyear*)<sup>195</sup>—a low level of active litigation over general jurisdiction is best explained as an absence of confusion over the contours of general jurisdiction. Consistent with the notion that standards yield less predictable outcomes,<sup>196</sup> the law-and-economics literature argues that litigation is more likely to arise where the governing legal test is unclear and inefficient.<sup>197</sup> Thus, an absence of caselaw suggests that general jurisdiction was

190. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) for the proposition that “[s]imple jurisdictional rules . . . promote greater predictability” (ellipsis in original)).

191. *See id.*

192. *See supra* notes 99–112 and accompanying text.

193. *See Daimler*, 571 U.S. at 129 (“Our post-*International Shoe* opinions on general jurisdiction . . . are few.”).

194. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011) (“[I]n the wake of *International Shoe*, ‘specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role.’” (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988))).

195. *See supra* notes 101–110 and accompanying text.

196. *See supra* text accompanying notes 41–44.

197. *See, e.g.,* Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977) (“[T]he efficiency of the common law, to the extent that it exists, can be explained by an evolutionary model—a model in which it is more likely that parties will litigate inefficient rules than efficient rules.”). Assuming that transaction costs are positive,

inefficient legal rules will impose greater costs than efficient rules on the parties subject to them. Since litigation is more likely than settlement where, *ceteris paribus*, the stakes of a case are greater, disputes arising under inefficient rules will be more likely to be relitigated than disputes arising under efficient rules.

George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977).

seen as substantially rule-like, not standard-like as the Court seems to have suggested.<sup>198</sup>

Of course, even if the old regime governing general jurisdiction was somewhat rule-like, it was certainly also somewhat standard-like.<sup>199</sup> Thus, to the extent the Court wanted to make general jurisdiction more rule-like,<sup>200</sup> it was surely successful in this endeavor. As the *Daimler* Court accurately noted, a corporation's place of incorporation and principal place of business "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable," and that, as a consequence, their availability as bases for general jurisdiction "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."<sup>201</sup>

At the same time, the Court failed to acknowledge that these bases for general jurisdiction clearly existed under the old general jurisdiction test. Plaintiffs have always had "recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."<sup>202</sup> The decision by the Court to recognize a corporation's place of incorporation and principal place of business as valid bases of jurisdiction was simply to reaffirm preexisting law. In contrast, the real move by the Court in *Goodyear* and *Daimler* was to jettison other bases for general jurisdiction that the lower courts had previously recognized. And that move has effectively relegated more plaintiffs to the standard-like whims of specific jurisdiction. This result might at first blush seem counterintuitive, insofar as the new test for general jurisdiction is more rule-like. But it is also narrower than the old test, and it is this constriction that will push more plaintiffs to try to avail themselves of specific jurisdiction, where standards reign.

Two factors combine to subject more plaintiffs to standards. First, while a plaintiff remains assured after *Goodyear* and *Daimler* of being able to sue a corporate defendant in the defendant's place of incorporation or principal place of business, these choices of forum in many cases will likely inconvenience and impose substantial costs on the plaintiff. A plaintiff is likely to find it cheaper and more convenient to sue in her home jurisdiction. The plaintiff might also find it beneficial to sue in the jurisdiction (if it is not her home jurisdiction) where she actually suffered injury. For example, witnesses might be more readily available. Moreover, to the extent that there are multiple defendants who

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198. Indeed, the prediction that the Court found vindicated was originally announced by Professors von Mehren and Trautman. *See* von Mehren & Trautman, *supra* note 72, at 1164. But Professors von Mehren and Trautman made this prediction about a point in time when in fact general jurisdiction would be governed by rules. *See id.* Thus, to the extent that the Court was correct that the prediction had come to pass, that lends support to the notion that the old regime that governed general jurisdiction was already substantially rule-like.

199. *See supra* notes 95–98 and accompanying text.

200. *See supra* note 17 and accompanying text.

201. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

202. *Id.*

are incorporated in, and have principal places of business in, various jurisdictions, the place of injury might be the one forum where the plaintiff can hope to bring all (or most) defendants before one tribunal. In short, concerns of cost, convenience, and efficiency (avoiding piecemeal litigation) might compel a plaintiff to file suit in a forum other than a corporate defendant's place of incorporation or principal place of business. But many plaintiffs who under the old regime could have relied upon general jurisdiction to do so<sup>203</sup> must now, by virtue of the Court's narrowing of general jurisdiction, rely on standard-laden specific jurisdiction.<sup>204</sup>

A second factor pushing more plaintiffs toward standard-like tests for personal jurisdiction is the fact that the Court's decisions in *Goodyear* and *Daimler* further solidified specific jurisdiction's divorce from general jurisdiction.<sup>205</sup> And a foreseeable consequence of this divorce is that what had been acceptable, more predictable forms of specific jurisdiction would be invalidated as unacceptably close to (or perhaps hybrids of) general jurisdiction. This result has already come to pass: the 2017 case of *Bristol-Myers Squibb Co. v. Superior Court of California*<sup>206</sup> raised for the Court the validity of the California Supreme Court's "sliding scale approach to specific jurisdiction,"<sup>207</sup> under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."<sup>208</sup> In an opinion by Justice Alito for an eight-member majority, the United States Supreme Court explained that "[o]ur cases provide no support for this approach,"<sup>209</sup> which, according to the Court, "resembles a loose and spurious form of general jurisdiction."<sup>210</sup> As a result, plaintiffs who choose—for reasons of cost, convenience, or efficiency—to opt to rely on specific jurisdiction to sue in a forum other than a corporate defendant's place of incorporation or principal

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203. To be sure, plaintiffs do not always enjoy, and have never always enjoyed, these prerogatives, and this Article does not argue that they should. Even under a broad rule of general jurisdiction, a corporation that is incorporated and does all of its business in a single state cannot be sued in another state, even if, for example, a product manufactured by a corporation winds up unexpectedly being transported to another state and injuring a plaintiff there. The fairness of the forum to the defendant is, and should be, a factor in constitutional personal jurisdiction analysis. That said, there seems to be little constitutional justification for depriving a plaintiff of her ability under similar circumstances to sue a corporation that *actually conducts substantial business in her home state*.

204. *Cf. Daimler*, 571 U.S. at 158–59 (Sotomayor, J., concurring) ("[I]t should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions.").

205. *See supra* text accompanying note 76; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011) (criticizing the lower court as having "elided the essential difference between case-specific and all-purpose (general) jurisdiction").

206. 137 S. Ct. 1773 (2017).

207. *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874, 889 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

208. *Id.* (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1098 (Cal. 1996)).

209. 137 S. Ct. at 1781.

210. *Id.*

place of business will face even more standard-like tests and even less predictable outcomes.<sup>211</sup>

If the goal of the Court was to ensconce rule-like tests so as to maximize jurisdictional predictability and minimize jurisdictional disputes, then in this sense *Goodyear* and *Daimler* ran counter to that goal. Contrary to the Court's stated goal, one would expect to see the overall predictability of personal jurisdiction outcomes *decrease* in *Goodyear* and *Daimler*'s wake.

Moreover, specific jurisdiction's transition to something even more standard-like may not be at an end. Having seen *Bristol-Myers Squibb*, defendants and their lawyers are already looking further to rein in more predictable forms of specific jurisdiction. The Court currently has on its docket a case raising the question of whether to extend *Bristol-Myers Squibb*. The petitions in the case of *Ford Motor v. Montana Eighth Judicial District Court* ask the Court to rule that, a manufacturer's sales of products directly into a forum state notwithstanding, specific jurisdiction cannot apply where the plaintiff was injured in an accident involving a product that was sold (originally) outside the forum state.<sup>212</sup> Ford argues that the sale of a product outside the forum cannot be a contact with the forum out of which the plaintiff's cause of action arose because the sale was not the "proximate cause" of the plaintiff's injury within the forum;<sup>213</sup> and that the defendant's sales into the forum state also cannot be a sufficient forum contact out of which the plaintiff's claim arose because those sales do not include the particular product at issue.<sup>214</sup> As the petitioner's brief puts it, the recognition of personal jurisdiction in the case would "create a 'loose and spurious form of general jurisdiction.'"<sup>215</sup>

The Court could take a step toward mitigating the typically standard-like nature of specific jurisdiction by announcing a manageable rule in products liability cases like the *Ford* case: that, "if the defendant continuously sells the injury-causing product in the forum state (even if the particular item at issue was not first sold in the forum state) and the injury occurs in the forum state, then the defendant's contacts with the forum state relate to the claim."<sup>216</sup>

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211. See *id.* at 1781–84 (Sotomayor, J., dissenting) (arguing that the majority's decision to reject as "resembl[ing] a loose and spurious form of general jurisdiction" the notion that "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims" will "make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States . . . , result[ing] in piecemeal litigation and the bifurcation of claims").

212. The Court consolidated two state court cases for argument. See *supra* note 14 and accompanying text.

213. Brief for Petitioner at 44, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, Nos. 19–368, –369, 2020 WL 1154744 (Feb. 28, 2020) [hereinafter *Ford Pet'r Br.*].

214. See *id.* at 27–29.

215. *Id.* at 3 (quoting *Bristol-Myers*, 137 S. Ct. at 1781).

216. I made this argument in a brief amicus curiae in the *Ford* case. Brief for Professor Jonathan R. Nash as Amici Curiae Supporting Respondents at 6, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, (2020) (Nos. 19–368, –369), 2020 WL 1703952 at 3\* [hereinafter *Nash Amicus Brief*].

To be sure, one can frame the result that the petitions urge the Court to adopt as rule-like as well: that “specific personal jurisdiction requires a causal connection between a defendant’s forum contacts and a plaintiff’s claims.”<sup>217</sup> But on examination, the petitioner’s approach is far less predictable—or, in other words, less rule-like—than the test that I suggest. The determination of the jurisdiction within which a plaintiff was injured will ordinarily be quite straightforward. In contrast, the determination of the place of original sale “would require proving a chain of title”; moreover, “[s]ometimes . . . it may not be clear, and indeed may be impossible to ascertain even after discovery, where an item was initially sold.”<sup>218</sup> Moreover, Ford’s suggested reliance on proximate cause to reign in the application of specific jurisdiction is problematic: “[P]roximate cause is a mere legal construct that is quite malleable in the hands of judges,” and “myriad issues can cloud proximate cause analysis in a products liability suit.”<sup>219</sup>

At the end of the day, there may be arguments that could justify a Court decision in favor of the petitioner’s less rule-like approach.<sup>220</sup> But, if the Court goes down this path, it should admit that it is choosing among rule-like approaches and defend its choice of rule-like instrument, not obfuscate matters by suggesting that it has made its decision in order to ensconce a rule over a standard.

B. *Questioning Other (Underdeveloped or Unstated) Justifications for a Narrower Rule Governing General Jurisdiction*

There are two justifications that might explain the Court’s move to introduce a narrower rule for general jurisdiction—one that applies in the

217. Ford Pet’r Br., *supra* note 213, at 3.

218. Nash Amicus Brief, *supra* note 216, at 6 (citing Brief of Respondents at 39, Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., (2020) (Nos. 19–368, –369), 2020 WL 1531238) [hereinafter Ford Resp. Br.].

219. *Id.* (citing Ford Resp. Br., *supra* note 218, at 37–39). For an argument that the position of Ford is *normatively* undesirable, see Alexandra D. Lahav, *The New Privity* (SSRN, working paper, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3413349](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413349).

220. For example, as Professor Daniel Klerman explains:

[W]hen transactions costs are high, jurisdictional rules that facilitate manufacturer control over the forum and thus over applicable law and procedure are likely to result in inefficiently pro-manufacturer law and in distortion of business decisions. This suggests that forum-selection and choice-of-law clauses should not be enforceable and that jurisdictional rules that require suit where the product was distributed, designed or manufactured, or where the manufacturer is incorporated or headquartered, are inadvisable. In contrast, a rule that allows suit where the product was sold to the consumer would result in no distortion of business decisions and in efficient law, because manufacturers could adjust their prices to reflect the quality of each state’s laws. A rule that allowed suit where the product caused injury, or where the plaintiff resided, or where many similar products were sold, however, could lead to inefficiently pro-plaintiff law, because local judges, juries and legislators could favor in-state interests, and manufacturers would have difficulty using differential pricing to ensure that state residents bore the cost.

Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1583 (2012); *see also infra* note 229.

context of domestic defendants, and another that applies in the international context. In the context of domestic corporations, the Court's shift from a broad rule to a narrow rule may be motivated, ironically, by the presence of a broad standard governing another area of the Court: the constitutional limit on state choice-of-law rules. The movement toward the narrow seems likely motivated by concerns of comity in the context of foreign corporations. I explore each in turn and conclude that neither is especially normatively compelling.

### 1. *Domestic Defendants*

It is hard to know exactly what has motivated the Court to narrow general jurisdiction in the context of domestic defendants. After all, the Court has fashioned its general jurisdiction jurisprudence—including the recent shift in general jurisdiction jurisprudence—in cases involving the application of general jurisdiction to corporations based outside the United States.<sup>221</sup> In no case has the Court ever rendered a *holding* on general jurisdiction in the context of a domestic corporate entity: all four of the Court's general jurisdiction cases involved entities incorporated abroad.<sup>222</sup>

This said, there is one argument that can be mustered in support of the normative desirability of a narrower rule for general jurisdiction: the goal of limiting undesirable forum shopping by plaintiffs, and perhaps forum selling by court systems.<sup>223</sup> We might not think it normatively desirable to allow a plaintiff to choose a forum based largely on the forum's choice of law rules. And, while we might deem it normatively appropriate for a defendant to bear some degree of inconvenience and cost to defend a case in a forum, we might be less so inclined to the extent that the plaintiff has chosen the forum for its choice of law regime.<sup>224</sup> Finally, these concerns might be exacerbated to the extent that forums, recognizing the large breadth personal jurisdiction rules afford plaintiffs in selecting a forum, take steps to try to “sell” themselves as desirable forums in which to bring suit by embracing plaintiff-friendly choice-of-law regimes.

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221. This is not surprising, since the exertion of personal jurisdiction—including general jurisdiction—over a foreign corporation raises more nettlesome issues than does the exertion of personal jurisdiction over a domestic corporation. *See supra* notes 108–110 and accompanying text (explaining that cases involving foreign defendants constituted a substantial part of the Court's certiorari docket of general jurisdiction cases for the decade of the 2000s).

222. The Court has discussed general jurisdiction in the context of specific jurisdiction cases involving *domestic* corporations, but in these cases the statements about general jurisdiction amount to dicta. *See, e.g.,* *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017).

223. *See generally* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

224. *See* *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (“[E]xorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985))).

The concern over forum-shopping and forum-selling for choice-of-law purposes is a real one. As things stand under current Supreme Court precedent, the Constitution imposes few restrictions on the freedom of a state to fashion its choice-of-law rules as it sees fit.<sup>225</sup> And, over the years, states have abandoned the traditional territorial approach<sup>226</sup> and accepted the invitation of the second Restatement on Conflict of Laws.<sup>227</sup> This invitation moves states towards a balancing approach that seeks to apply the law of the jurisdiction with the “most significant” contacts to the dispute before the court.<sup>228</sup> The resulting freedom enjoyed by states to apply their own laws to more disputes accentuates the benefits plaintiffs can gain by forum shopping. And, in turn, weaker limits on general jurisdiction multiply the likelihood a plaintiff can truly gain a large benefit by selecting a very favorable forum.<sup>229</sup>

Taking as a given the existing loose constitutional restrictions on state choice-of-law regimes, there is a normative justification for embracing narrower tests for personal jurisdiction, and perhaps even some standard-like tests in order to discourage plaintiffs from identifying more outlandish forums on choice-of-law grounds by decreasing predictability of outcome and thereby increasing litigation costs. But it might be said that the broad standard

225. See, e.g., Ann Woolhandler & Michael G. Collins, *Jurisdictional Discrimination and Full Faith and Credit*, 63 EMORY L.J. 1023, 1077 (2014) (“Discrimination in choice of law (which the Court tolerates) means that obligations arising from the same primary behavior will vary depending on where the action is brought.”); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 443–44, 452–53 (1982) (explaining that state choice-of-law decisions receive only minimal constitutional scrutiny).

226. See, e.g., Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 54 (1989).

227. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969).

228. See, e.g., Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 358 (1997) (“The concept of the most significant relationship is the core of the second Restatement. It is repeated in section after section, and constitutes the guiding principle of the second Restatement . . .”). In contrast, “[t]he first Restatement of the Conflict of Laws embodied the traditional approach to conflict of laws.” *Id.* at 332; see also Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965) (criticizing the then-proposed Second Restatement for seeking to refashion the law rather than restate the then-current law).

229. See von Mehren & Trautman, *supra* note 72, at 1122 (“If the Supreme Court were prepared to regulate interstate choice-of-law practice to a significant degree under constitutional provisions, . . . the urge to assume jurisdiction in order to ensure application of the forum’s rule would tend to disappear.”). “In view of both contemporary developments in choice-of-law thinking and the trend toward more assertive jurisdictional thinking reflected in so-called ‘long-arm’ statutes, courts and commentators are likely to become increasingly aware of choice of law as an element to be considered in thinking about adjudicatory jurisdiction . . .” *Id.* at 1130–31. Professor Klerman explains: “The danger of forum selling and the plaintiff bias provide strong reasons for constitutional regulation of personal jurisdiction, and, in particular, for rules that impose limits on jurisdictional choice.” Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 262 (2014). He argues on that basis in favor of “a narrow conception of general jurisdiction.” *Id.* He elucidates:

Under some views of general jurisdiction, a corporation, such as Starbucks, that has a physical presence in all fifty states would be subject to general jurisdiction in all states. That would clearly give rise to substantial forum shopping and the danger of forum selling. As a result, it makes sense to restrict general jurisdiction to one or two states, such as the states where the defendant is headquartered or incorporated.

*Id.*

governing constitutional choice-of-law limitations may be the tail that wags the personal jurisdiction dog.<sup>230</sup> In the language of rules and standards, the Court may have adopted a narrower rule in order to curtail lower courts' freedom to take advantage of the broad standard governing choice-of-law rules, and if that is true, then the better answer may be for the Court to revisit the constitutional regime for valid state choice-of-law tests.

To the extent that the Court is unwilling to revisit that regime wholesale,<sup>231</sup> a compromise path forward could be to have a broad rule for general jurisdiction as a default, but then for Congress to enact a statute that replaces the broad rule with a narrower rule (i.e., curtailing the freedom of a state to exercise general jurisdiction broadly) to the extent that the state would, if it had jurisdiction, apply its own law in place of the law of the jurisdiction with the most significant contacts to the dispute at hand.<sup>232</sup>

## 2. *International Defendants*

The enforcement of judgments abroad turns, in part, on whether the courts of the country that generated the judgment would enforce a judgment originating in a court of the country where enforcement is sought, i.e., whether comity between the two countries exists. Concerns of comity extend beyond enforcement to the antecedent stage of initial jurisdictional assertions. Concerns of comity logically influence the jurisdiction-asserting forum's substantive choice of law decisions once a case moves forward on the merits. In sum, where a U.S. court asserts jurisdiction over a foreign corporation with the expectation that a judgment rendered against that corporation might be enforced abroad, concerns of comity will have an impact on the U.S. court's decision making, jurisdictionally and otherwise.

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230. See Casad, *supra* note 54, at 1596 (describing "limits on the ability to acquire personal jurisdiction as a hidden method of controlling choice of law").

231. Some commentators have recommended just that. See, e.g., William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1041 (1999) (asserting that primary predictability should be the main goal of choice-of-law rules); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 313 (1990) (arguing that uniform choice-of-law rules would discourage forum shopping, and that most scholars "agree that rules facilitating this strategic behavior are undesirable"); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 296, 301 (1992) (arguing that full faith and credit means that the law governing a case should be the same wherever it is filed). *But see* Sun Oil Co. v. Wortman, 486 U.S. 717, 727–28 (1988) (declining invitation to "embark upon the enterprise of constitutionalizing choice-of-law rules," reasoning that the Court would do so "with no compass to guide us beyond our own perceptions of what seems desirable").

232. Congress would presumably draw the authority to enact such a statute from its Fourteenth Amendment enforcement power. See U.S. CONST., amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Such a statute would be narrowly tailored in that it would restrict states from invoking less justifiable choice-of-law rules. *Cf.* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 638–48 (1999) (invalidating a congressional attempt to waive state sovereign immunity under the Due Process Clause where Congress had failed adequately to identify and document a pattern of constitutional violations).

It is not surprising, then, that one of the reasons the *Daimler* Court offered for adopting the narrow rule for general jurisdiction was to harmonize American law with that of other nations.<sup>233</sup> To be sure, the extent to which the Court, and individual Justices, purported to rely on harmonization is subject to question. The Court noted that harmonization only served to “reinforce” its adoption of the narrow rule<sup>234</sup> and seemed to assign the point as within the purview of the fairness factors, not minimum contacts.<sup>235</sup> At the same time, there have been Justices who have signaled a preference to assign a greater role to considerations of comity and harmonization in the Due Process analysis. For example, Justice Ginsburg—the author of the Court opinions in *Goodyear* and *Daimler*—argued in another case that the scope of *specific* jurisdiction should also be motivated by the goal of harmonization, although her opinion there failed to attract a majority.<sup>236</sup> On the opposite side of things, there have been those who have questioned whether the laws of other nations should inform domestic constitutional analysis at all.<sup>237</sup>

But even if considerations of comity are legally permissible under the Due Process Clause, they may not provide a strong normative justification for narrower general jurisdiction. Indeed, incorporating comity into the general jurisdiction calculus may be practically superfluous. The importance of comity on the international stage rests on the practical notion of reciprocity: one country will treat a second country favorably only if the first country expects similar favorable treatment at the hands of the second country.<sup>238</sup> Thus, unless either (1) a state either does not care about whether its own citizens and corporations will be subjected to the jurisdiction of foreign courts or (2) a state believes that foreign countries will be unable or unwilling to distinguish among American states,<sup>239</sup> such that its foreign countries will be unlikely to retaliate for uncooperative behavior, comity well may induce states not to overreach in asserting personal jurisdiction. In short, to whatever extent considerations of comity drove the Court to adopt a narrow rule for general jurisdiction, those considerations may have been overstated.

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233. See *Daimler AG v. Bauman*, 571 U.S. 117, 141–142 (2014).

234. *Id.* at 142.

235. *Id.* (observing that subjecting *Daimler* to jurisdiction in California would “not accord with the ‘fair play and substantial justice’ due process demands”) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

236. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 909 (2011) (Ginsburg, J., dissenting).

237. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (“[T]he . . . premise . . . that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”).

238. See generally Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 *DUKE L.J.* 931, 936 (1997) (observing that numerous transboundary pollution cases “invoke the equitable maxim of ‘clean hands,’” which in turn “suggests a ‘golden rule,’ to the effect that the affected state is entitled to be treated by the source state in the same way as the affected state treats its own citizens”).

239. For critical discussion of this point, see, for example, Jonathan Remy Nash, *Doubly Uncooperative Federalism and the Challenge of U.S. Treaty Compliance*, 55 *COLUM. J. TRANSNAT’L L.* 3, 19–20 (2016).

Consider as well that, even accepting the appropriateness of the narrow rule for foreign corporations in some contexts, one can question whether it is proper across the board. For corporations native to other federal systems, strict application of the narrow rule raises questions about the consistency of the definition of sovereign. Consider, for example, a Canadian corporation that does business in all fifty U.S. states, such that its total American sales outweigh its Canadian sales, but also such that its Canadian sales outweigh its sales in any one U.S. state.<sup>240</sup> Under the Court's exposition of the narrow rule, a Minnesota resident could not obtain general jurisdiction over that Canadian corporation;<sup>241</sup> indeed, that would remain the case even if the corporation's sales in Minnesota were larger than its sales in any one province. It seems unfair—and illogical—to compare the corporation's total Canadian sales with sales in each U.S. state. Why not consider the corporation's sales on a province-by-province basis? Why is the relevant foreign sovereign Canada and not the Canadian province whence it draws its greatest sales?

C. *Remedying the Rise of Standards in Personal Jurisdiction*

There were paths open to the Court that truly would have allowed for greater jurisdictional predictability across a wide swath of cases. First, the Court could have chosen a rule governing general jurisdiction that authorized general jurisdiction in the cases where most lower courts previously had recognized general jurisdiction. By adopting an *inclusive*—as opposed to an *exclusive*—rule, the Court could have put in place a rule and also reduced the need for plaintiffs to consider entering the standard-like realm of specific jurisdiction. For example, in her *Daimler* concurrence, Justice Sotomayor suggested a “rule” for general jurisdiction “that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one.”<sup>242</sup> Indeed, there is normative justification for a test for general jurisdiction that looks simply at the defendant's contacts with the forum, not at those contacts as compared to the defendant's contacts with other forums.<sup>243</sup>

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240. See Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116–17 (1983) (“[A]n alien may have minimum contacts with the United States as a whole, but because of the diffused nature of its activity lack a constitutionally sufficient affiliation with any particular state.”).

241. See *Daimler AG v. Bauman*, 571 U.S. 117, 158 (2014) (Sotomayor, J., concurring) (noting that, under the majority's narrow approach, “a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum”).

242. *Id.* at 154 (Sotomayor, J., concurring). Justice Sotomayor added: “The majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.” *Id.*; see also *id.* at 156 (“[I]t is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is ‘essentially at home’ in each one.”).

243. See *id.* at 151 (“[T]he degree to which a company intentionally benefits from a forum State depends on its interactions with that State, not its interactions elsewhere.”).

Second, the Court could have chosen (and could still choose) to make specific jurisdiction more rule-like.<sup>244</sup> The production of more controlling Supreme Court precedent—in the form of clear majority opinions—would be a step in this direction. Relatedly, the Court could make the reach of specific jurisdiction more expansive such that, even if specific jurisdiction’s outer contours remain standard-like, it has a broader heartland where the application of specific jurisdiction is more predictable.<sup>245</sup> For example, perhaps the Court (or Congress) could, as Justice Ginsburg’s *Nicaastro* dissent suggests,<sup>246</sup> consider making the whole nation the relevant sovereign for personal jurisdiction purposes, at least for litigation in the federal courts.<sup>247</sup> By making specific jurisdiction more accessible and predictable, the reduction in the scope of general jurisdiction would be of less moment.

#### CONCLUSION

This Article has argued, contrary to the *Daimler* Court’s assertion, that the notion that the test for general jurisdiction shifted to a rule from a wildly unpredictable standard is incorrect. While recent cases have made the test for general jurisdiction marginally more rule-like, the real impact of the shift in jurisprudence is to narrow the scope of general jurisdiction. And—somewhat counterintuitively, and contrary to the Court’s stated goal—that shift will expose more litigants to standard-like considerations for personal jurisdiction. Possible alternative justifications for a narrower rule for general jurisdiction are ultimately unconvincing. In the end, if the Court is serious about making personal jurisdiction more rule-like, then a broader, not a narrower, rule for general jurisdiction is the better option. Additionally, instead of moving in the direction of more standard-like specific jurisdiction doctrine—as a case on the Court’s docket this Term may portend<sup>248</sup>—the Court should consider making specific jurisdiction jurisprudence more stable and predictable.

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244. Note, however, that making specific jurisdiction more rule-like would defy Professors von Mehren and Trautman’s anticipation that specific jurisdiction would remain standard-like. *See supra* note 156 and accompanying text.

245. *Cf.* H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961) (noting that legal rules generate a “core of certainty” and a “penumbra of doubt”).

246. *See supra* text accompanying note 181.

247. *See* Nash, *supra* note 181, at 534–43 (arguing for the constitutionality of such an approach).

248. *See supra* note 14 and accompanying text.