

**GOODYEAR, “HOME,” AND THE UNCERTAIN FUTURE OF
DOING BUSINESS JURISDICTION**

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I. INTRODUCTION

The general jurisdiction decision *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹ received relatively little attention when it was handed down on the final day of the Supreme Court’s October 2010 Term. It was overshadowed in the popular press by two high-profile First Amendment cases—addressing violent video games and campaign finance regulation—decided on the same day.² And even in more scholarly settings, *Goodyear* took a back seat to *J. McIntyre Machinery, Ltd. v. Nicaastro*,³ a companion decision that addressed the specific jurisdiction branch of personal jurisdiction.⁴

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1. 131 S. Ct. 2846 (2011).
2. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (violent video games); *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (campaign finance).
3. 131 S. Ct. 2780 (2011).
4. The Harvard Law Review’s annual Supreme Court issue, for example, included *J. McIntyre* but not *Goodyear* among the “Leading Cases” analyzed in case comments. See *The Supreme Court—Leading Cases*, 125 HARV. L. REV. 172, 311–21 (2011).

Goodyear's low profile is not hard to explain—personal jurisdiction decisions are rarely front-page news, and nothing about Justice Ginsburg's unanimous opinion flagged for readers that anything of great significance or controversy was being decided—but its low profile is misleading. Despite the lack of fireworks in the Court's opinion, *Goodyear* seems likely to have far-reaching effects on both the doctrine and theory of general jurisdiction. General jurisdiction is the branch of personal jurisdiction that allows a forum state to assert judicial authority over “any and all claims” against a defendant that has a sufficiently close connection to the state—even claims arising from conduct elsewhere that is completely unrelated to the state.⁵ *Goodyear* added what appears to be a significant new hurdle to what must be shown to establish general jurisdiction, requiring that the defendant corporation's “affiliations” with the state be sufficient “to render [it] essentially at home in the forum State.”⁶

As Allan Stein rightly observes, the “essentially at home” standard articulated by the Court casts doubt on a large body of lower court case law.⁷ Indeed, it has even been suggested that the apparent implications of *Goodyear* are so significant that they cannot have been intended—that the Court's apparent restriction of general jurisdiction to corporations that are “essentially at home” should be dismissed as “loose language,” and that *Goodyear* should be limited to its “particular facts.”⁸

As detailed below, Professor Stein is almost certainly correct that *Goodyear* significantly narrows the scope of general jurisdiction—at least as compared with the expansive approaches that have prevailed in many lower courts in the absence of Supreme Court guidance. For one thing, *Goodyear* plainly overturns those lower court cases that have permitted the exercise of general jurisdiction based on the volume of a defendant's sales into the forum state from out of state,⁹ holding that “even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”¹⁰ Of even greater import, however, the reasoning of *Goodyear* is difficult to square

5. *Goodyear*, 131 S. Ct. at 2851. The other branch of personal jurisdiction, “specific jurisdiction,” applies when the case itself arises out of or relates to activity connected with the state, “principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.” *Id.* (citation omitted).

6. *Id.*

7. Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 527 (2012).

8. See Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 214–15, 217 (2011).

9. See e.g., *Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 706 (8th Cir. 2003) (defendant holding 1% of its loan portfolio with forum state residents sufficient to support general jurisdiction over defendant); *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465–67 (6th Cir. 1989) (finding exercise of general jurisdiction valid where approximately 3% of appellees' total sales for the year occurred in the forum state); see also Peterson, *supra* note 8, at 213–14 (“The general assumption . . . has always been that . . . there is some amount of sales directly made to the forum state that would be sufficient to establish general jurisdiction.”).

10. *Goodyear*, 131 S. Ct. at 2857 n.6.

with the notion—widely accepted in lower court cases, though never endorsed by the Supreme Court—that a corporation is subject to general jurisdiction wherever it is “doing business.” Such “doing business jurisdiction” has been a uniquely American institution, a familiar feature of the judicial landscape in this country but reviled abroad.

Because doing business was not directly at issue in *Goodyear*—there was no contention that the Petitioners in the case were doing business in North Carolina—the Court had no occasion to address doing business jurisdiction directly or to explain why it adopted a standard seemingly at odds with so much lower court case law. But, as I will describe below, there was good reason for the Court to clarify, and narrow, general jurisdiction, and there is good reason to think that *Goodyear* may herald the demise of doing business as a basis for general jurisdiction.

In Part II, I sketch the pre-*Goodyear* state of general jurisdiction, which was characterized by a lack of doctrinal guidance in the Supreme Court case law; a broad and poorly rationalized general jurisdiction doctrine in lower court cases; and a theoretical void evident in both sets of decisions. Part II also describes the holding and reasoning of *Goodyear* itself.

In Part III, I explain why *Goodyear* should be understood as significantly narrowing general jurisdiction, including, in particular, why it significantly undermines merely doing business in a state as a basis for general jurisdiction—and why that is a good thing. I argue that doing business jurisdiction, contrary to common assumptions, has no meaningful historical pedigree, and that it cannot be justified under any cogent jurisdictional theory. Because general jurisdiction by definition involves claims that are unrelated to the state, it can be justified only when the defendant is so closely tied to the state as to create legitimate authority over all of the defendant’s worldwide conduct. In personal jurisdiction as in analogous areas, the sole traditional basis for such all-encompassing authority is the unique relationship between a state and its citizens or residents—an understanding that corresponds well to the Court’s new limitation of general jurisdiction to where the defendant is “at home.” In contrast, merely doing business in a state gives the state legitimate authority over the in-state conduct, but not over unrelated conduct. Just as a state cannot regulate or tax a corporation’s out-of-state activities merely because it does business in the state, the state has no legitimate interest in asserting judicial authority over such out-of-state activities. Such authority is, and should be, reserved for circumstances in which the forum state can fairly be regarded as the corporation’s home.

Goodyear thus casts significant doubt on the ongoing validity of doing business jurisdiction, and in doing so goes a long way toward putting general jurisdiction, for the first time, on a solid theoretical footing.

II. THE *GOODYEAR* CASE AND PRIOR DOCTRINEA. *General Jurisdiction Before Goodyear*

For nearly sixty years, since *Perkins v. Benguet Consol. Mining Co.*,¹¹ it has been clear that in some circumstances a state may exercise what we now call “general jurisdiction” over a corporation—i.e., jurisdiction over any and all claims against a defendant without regard to whether the dispute itself has any connection to the forum state.¹² But that is about the only thing that has been clear, at least in the Supreme Court case law, about either the doctrine or theory of general jurisdiction.

From a doctrinal standpoint, the Supreme Court’s cases provided extraordinarily little guidance. Prior to last Term’s decision in *Goodyear*, the Court had decided only two corporate general jurisdiction cases—*Perkins* and the 1984 decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*¹³—both in conclusory opinions that, as commentators have long complained, provide nothing resembling a useful test or standard for general jurisdiction.¹⁴ The standard that most lower courts extracted from those cases—a requirement of “continuous and systematic” contacts¹⁵—provided little meaningful guidance.

11. 342 U.S. 437 (1952).

12. *See id.* at 446. *Perkins* itself did not use the phrase “general jurisdiction.” That phrase was first coined in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966), and was adopted by the Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.9 (1984). Some commentators prefer the term “dispute-blind” jurisdiction. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613 (1988).

13. 466 U.S. 408 (1984). The Supreme Court also decided one case regarding so-called “tag” jurisdiction—service of process on an individual while he is physically present in the jurisdiction—which is a ground for general jurisdiction over individuals, but not corporations. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

14. *See, e.g.*, Peterson, *supra* note 8, at 213 (“Prior to *Goodyear*, the Supreme Court had given no indication of where to draw the line between these two easy cases at either end of the general jurisdiction spectrum.”); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT’L L. 327, 335 (2004) (“[T]he U.S. Supreme Court decisions, which are few and far between, have not offered much in the way of constitutional guidance.”); Twitchell, *supra* note 12, at 612 (“Regrettably, however, the Court gave no guidance [in *Helicopteros*] as to how courts are to determine the scope of general jurisdiction in the future.”).

15. The phrase “continuous and systematic” appears in both *Perkins* and *Helicopteros*. *Helicopteros*, 466 U.S. at 416; *Perkins*, 342 U.S. at 445. Its origin, however, was *International Shoe*, which used the phrase to describe contacts that were sufficient for *specific* jurisdiction. *See Int’l Shoe*, 326 U.S. at 317. At the same time, *Shoe* indicated that *general* jurisdiction would require at a minimum, contacts that were sufficiently “substantial” and of a particular “nature”—not merely contacts that were continuous and systematic. *See id.* at 318.

Among other things, it failed to address what types of contacts are necessary, how extensive those contacts must be, and how continuous they must be.¹⁶

This shortage of doctrinal guidance was accompanied by an even more striking paucity of theory. The Supreme Court has never articulated any underlying theory of general jurisdiction or even attempted to explain in a particular case *why* the contacts at issue were, or were not, sufficient to justify a state's assertion of authority over a defendant's out of state activities. The Court merely found that the corporate contacts were sufficient in *Perkins* and insufficient in *Helicopteros*, with neither case answering the underlying question: Sufficient to establish what?

The void left by the Supreme Court created the conditions for an expansion of general jurisdiction that went beyond anything the Court had ever approved. Only one modern Supreme Court case, *Perkins*, has ever upheld an exercise of general jurisdiction over a corporation, and that was an easy case in which the forum state was effectively the corporation's principal place of business.¹⁷ But lower courts have expanded general jurisdiction well beyond that easy case, applying it even to corporations with conspicuously insubstantial connections to the forum.¹⁸ And even aside from outlier cases, lower courts widely embraced the notion that any corporation "doing business" in a state was subject to general jurisdiction there—i.e., that state may assert jurisdiction over "any claim asserted against a defendant having regular and consistent commercial activities in the forum, no matter how removed the facts of the claim are from those activities."¹⁹ Indeed, the assumption that doing business in a state confers general jurisdiction became so firmly entrenched that the U.S. government's insistence on preserving it as a permissible basis for jurisdiction played a key role in scuttling efforts to adopt an international convention on the satisfaction of judgments.²⁰

16. For example, monthly deliveries of a magazine to a single South Carolina subscriber would be both "continuous" and "systematic," yet no one would contend that such contacts would suffice to create general jurisdiction.

17. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984) (noting that in *Perkins*, Ohio was "the corporation's principal, if temporary, place of business").

18. See, e.g., *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436–38 (3d Cir. 1987) (upholding general jurisdiction over bank based primarily on loans to forum citizens amounting to 0.083% of bank's total loan portfolio); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 512–13 (D.C. Cir. 2002) (general jurisdiction over corporation whose only connection with the forum was over the Internet).

19. Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173; see also Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? *It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 124 (2004) ("[I]t is not surprising that lower courts often find general jurisdiction present when a defendant has engaged in just about any kind of regular business in a state, no matter how minimal.").

20. See Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT'L L. 363, 364–66 (2004); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999).

This doctrinal development of general jurisdiction in the lower courts was not accompanied by a similar degree of theoretical development—the void left by the Supreme Court remained largely unfilled by the lower courts. As Mary Twitchell observed in a prominent 1988 article, general jurisdiction opinions have been characterized by an “absence of policy analysis” that “suggests that courts are unsure about what policies support this exercise of jurisdiction. . . . [M]ost courts simply list the defendant’s contacts and conclude that they are, or are not, sufficient.”²¹

B. Goodyear

Goodyear was in some ways an unlikely vehicle for a broadly applicable statement about general jurisdiction doctrine. First, the case was an outlier factually: The Petitioners were overseas corporations that made and sold tires for the European and Asian markets. They had no physical presence in North Carolina, did nothing to market their products (or to cause them to be marketed) in North Carolina, and only a tiny percentage of their tires ultimately found their way to North Carolina.²² These scant contacts were likely inadequate to satisfy even the most expansive lower court standards for general jurisdiction. Second, the issue that brought the case to the Supreme Court was an idiosyncratic one: the North Carolina courts’ unusual reliance on the stream-of-commerce doctrine (a doctrine of specific jurisdiction) as a basis for general jurisdiction.²³ The

21. Twitchell, *supra* note 12, at 637; see also Patrick J. Borchers, J. McIntyre Machinery, *Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1252 (2011) (“[L]ower courts predictably struggled to find any markers as to where the activities cross the threshold and allow for general jurisdiction.” (citing PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 411–13 (5th ed. 2010))); Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 829 (2004) (“A misguided, yet unfortunately common, state court approach to evaluate general jurisdiction is merely to list the defendant’s forum contacts and hold that such contacts, without considering either their quality or nature, demonstrate the requisite ‘continuous and systematic’ business activities.”).

22. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851–52 (2011). The Petitioners’ parent corporation had a substantial presence in North Carolina, but the plaintiffs did not argue in the North Carolina courts that Petitioners were subject to jurisdiction on that basis. See *id.* at 2857 (holding that the Respondents had forfeited any argument for piercing the corporate veils between the Petitioners and their parent company). In general, even when a corporate parent and subsidiary are involved, “[e]ach defendant’s contacts with the forum State must be assessed individually.” *Keeton*, 465 U.S. at 781 n.13.

23. See *id.* at 2854. It is largely because of this reliance on stream-of-commerce contacts to justify general jurisdiction—in conflict with a number of decisions holding that general jurisdiction could not be based on such contacts—that the Petitioners were able to argue in the petition for certiorari that there was a conflict in the lower courts. See *Petition for Writ of Certiorari* at 8–9, *Goodyear*, 131 S. Ct. 2846 (No. 10-76). If the North Carolina courts had reached the same result using different reasoning, the Supreme Court would have been considerably less likely to grant the petition, because the Court reserves most of its attention for cases presenting issues of federal law on which lower courts have disagreed. See, e.g., U.S. SUP. CT. R. 10 (emphasizing importance to the certiorari determination of conflicting lower court decisions on an issue of federal law).

Question Presented on which the Court granted certiorari was specifically focused on that issue,²⁴ and the Supreme Court could have reversed the North Carolina courts on the ground that mere stream of commerce contacts cannot justify general jurisdiction, and stopped there.

Justice Ginsburg's opinion, of course, did not stop there. Instead, it took the opportunity to review general jurisdiction as a whole, and—apparently recognizing the need for firmer guidance than the unhelpful continuous and systematic inquiry—reframed that inquiry as one focused on whether the corporate defendant is “at home” in the forum state: “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ *as to render them essentially at home in the forum State.*”²⁵ The Court also specifically relied on the “at home” formulation as part of its basis for reversing the decision below, concluding that personal jurisdiction was lacking because “[u]nlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina.”²⁶

The Court did not specify what it meant by at home, or address how many states could qualify with respect to a particular corporation—a question that is sure to be litigated in future cases. However, the *Goodyear* opinion did include several clues suggesting that the Court may have intended the at home standard as a narrow one, perhaps extending no further than a corporation's state of incorporation and principal place of business. In particular, the Court equated the “paradigm” forum for general jurisdiction over a corporation with an individual's home state: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”²⁷ Giving further content to this notion, the Court cited an academic article “identifying domicile, place of incorporation, and principal place of business as ‘paradig[m]’ bases for the exercise of general jurisdiction,”²⁸ and referred to *Perkins*—which it described as a case in which general jurisdiction “was permissible . . . because ‘Ohio was the corporation's principal, if temporary, place of business’”²⁹—as the “textbook case of general jurisdiction.”³⁰

24. The Question Presented was: “Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products placed in the stream of commerce by the [corporation].” Petition for Writ of Certiorari, *supra* note 23, at i.

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

26. *Id.* at 2857.

27. *Id.* at 2853–54.

28. *Id.* at 2854 (alteration in original) (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

29. *Id.* at 2856 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 n.11 (1984)).

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

III. THE IMPLICATIONS OF *GOODYEAR*

Because the facts in *Goodyear* would likely have been inadequate to establish general jurisdiction under almost any standard, the Court had little occasion to address how the at home standard would apply in closer cases. Nor did the Court explain why it had adopted a new formulation, or offer any general theory of the purposes of general jurisdiction.

Nonetheless, there are strong reasons to believe that the *Goodyear* opinion sharply restricts the broad understanding of general jurisdiction accepted by many lower courts, and in doing so places general jurisdiction doctrine on far more defensible theoretical ground than it previously occupied.

A. *Does Goodyear Change Existing Law?*

The initial question raised by *Goodyear* is whether the Court's at home formulation should be understood to change anything at all. Justice Ginsburg's opinion added the new formulation without expressly disapproving any prior Supreme Court or lower court statements of the general jurisdiction standard—other than the aberrant approach of the North Carolina courts below—and one early commentator, Todd David Peterson, argues that the at home language should be ignored and the opinion read as changing nothing. Positing that the narrow scope of general jurisdiction suggested by *Goodyear* “may simply be a product of loose language on the part of Justice Ginsburg”³¹—Peterson contends that the opinion should not be read as “restricting the current understanding in any significant way. . . . A better reading of the case would be to focus on the particular facts of *Goodyear* and limit its meaning to the conclusion that the stream-of-commerce theory may not be utilized to establish general jurisdiction.”³² Peterson notes that an at home standard would likely be inconsistent with the decisions of “a number of lower courts” that have based jurisdiction on an out-of-state corporation's “extensive sales directly into the forum state,” and with the “general assumption” that “there is some amount of sales directly made to the forum state” that would suffice to establish general jurisdiction—and he implicitly suggests that the Court could not have intended to overturn these cases and assumptions and therefore cannot have meant what it said.³³

It is doubtless true that an at home standard is inconsistent with much lower court authority, but Justice Ginsburg's new formulation cannot plausibly be

31. Peterson, *supra* note 8, at 214.

32. *Id.* at 217; see also, e.g., John Chapman, *Recent Supreme Court Rulings Did Not Change Test for General Jurisdiction Over Corporations*, HO&P BLOG (Oct. 19, 2011), <http://hop-law.com/the-united-states-supreme-court%E2%80%99s-recent-rulings-did-not/> (“The law was and still remains that a corporation may be subject to general jurisdiction in any state with which it had continuous and systematic contacts.”).

33. See Peterson, *supra* note 8, at 213–14.

written off as “loose language” or confined to the stream of commerce facts of *Goodyear* itself. The Court’s inclusion of the “at home” phrasing in three separate places in the opinion³⁴ is unlikely to have resulted from mere carelessness. Moreover, *where* the Court used the phrase is significant. The at home language cannot reasonably be minimized when the Court made it part of the very definition of the general jurisdiction standard,³⁵ as well as an integral part of the reasoning explaining why North Carolina lacked jurisdiction in *Goodyear* itself.³⁶ In addition, the Court’s identification of a corporation’s state of incorporation and principal place of business as the “paradigm” for general jurisdiction over corporations³⁷ suggests a conception of such jurisdiction that fits neatly with a requirement that the corporation be at home, and not at all with the much broader view of general jurisdiction that has prevailed in many lower courts.

This reading of the *Goodyear* opinion is buttressed by references to general jurisdiction in *Goodyear*’s companion case, *J. McIntyre*. Justice Kennedy’s plurality opinion stated that for a “domestic domiciliary, the courts of its home State” may exercise general jurisdiction, and elsewhere referred to “incorporation or principal place of business for corporations” as establishing general jurisdiction under *Goodyear*.³⁸ And Justice Ginsburg’s dissent made clear that she regarded “at home” as the relevant test under her *Goodyear* opinion, citing *Goodyear* for the proposition that the defendant in *J. McIntyre* “surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly ‘at home’ in New Jersey.”³⁹

Furthermore, the fundamental premise of the contrary argument—the assumption that the Court could not intend to articulate a standard inconsistent with substantial lower court case law—is a doubtful one. As a general matter, the Supreme Court regularly departs from what lower courts have held on questions not yet answered by the Supreme Court.⁴⁰ And, perhaps more to the

34. See *Goodyear*, 131 S. Ct. at 2851, 2854, 2857.

35. See *id.* at 2851 (explaining that foreign corporations are subject to general jurisdiction when their “affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State”).

36. See *id.* at 2857 (“Unlike the defendant in *Perkins* . . . petitioners are in no sense at home in North Carolina.”).

37. See *supra* text accompanying notes 27–30.

38. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787, 2789 (2011) (plurality opinion) (citing *Goodyear*, 131 S. Ct. at 2854).

39. *Id.* at 2797 (Ginsburg, J. dissenting) (citing *Goodyear*, 131 S. Ct. at 2850–51, 2854–57).

40. See, e.g., *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2311–12 (2011) (Breyer, J., dissenting) (noting that the Court’s holding was contrary to multiple circuit decisions); *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878–80 (2010) (criticizing as incorrect a consensus position of federal circuits); EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 720 (9th ed. 2007) (suggesting that attorneys should refrain from citing and quoting extensively from other cases, especially those of lower courts, because “what the Justices particularly want to know is *why* a case or line of cases should or should not be followed or applied” (emphasis added)).

point, the *Goodyear* opinion itself squarely rejects the basis for general jurisdiction—sales from out of state—endorsed in the line of cases at issue, expressly holding that “even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”⁴¹

In short, the conclusion is unavoidable that *Goodyear* added an important new element to the legal standard for general jurisdiction and implicitly disapproved at least one significant line of lower court authority. The real question is not whether, but rather *how much* the at home standard narrows previous understandings of general jurisdiction.

B. Does “Doing Business” Jurisdiction Survive Goodyear?

Unlike its express disapproval of general jurisdiction based on the sale of a corporation’s products in a state, *Goodyear* did not expressly address “doing business” jurisdiction.⁴² Nonetheless, *Goodyear*’s limitation of general jurisdiction to the state or states in which the corporation is at home seems inconsistent with the far more expansive notion embodied by the doing business standard—that general jurisdiction is available in any state in which the defendant has “regular and consistent commercial activities.”⁴³ Many modern corporations do business throughout the United States, and if the word “home” is to retain its ordinary meaning it cannot be applied to fifty states for a single entity. Moreover, the *Goodyear* opinion itself suggested a significantly narrower view of “home,” by equating a corporation’s home with an individual’s domicile.⁴⁴

Indeed, but for the widespread pre-*Goodyear* understanding that doing business is a permissible basis for general jurisdiction, I expect there would be little doubt that *Goodyear* does not permit a state to exercise general jurisdiction over every corporation that does business in the state. However, doing business has been so widely accepted as authorizing general jurisdiction that the implications of *Goodyear* for this basis of jurisdiction deserve careful analysis.⁴⁵

41. *Goodyear*, 131 S. Ct. at 2857 n.6.

42. The sale of a corporation’s products in a state might be regarded as a form of doing business there, but there is a significant distinction between the two concepts: a corporation’s products may be sold in a state without any activity in the state by the corporation (as in *Goodyear* itself), whereas “doing business” typically involves some physical presence and/or activity within the state.

43. Twitchell, *supra* note 19, at 173; *see also, e.g.*, Laufer v. Ostrow, 434 N.E.2d 692, 694 (N.Y. 1982) (finding general jurisdiction available when defendant “engaged in such a continuous and systematic course of ‘doing business’ here as to warrant a finding of its ‘presence’ in this jurisdiction” (quoting McGowan v. Smith, 419 N.E.2d 321, 323 (N.Y. 1981) (internal quotation marks omitted))).

44. *Goodyear*, 131 S. Ct. at 2853–54. It is also notable that the Court expressly disapproved a regime in which “any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.” *Id.* at 2856–57.

45. In this respect doing business jurisdiction is markedly different from the “mere sales” theory of general jurisdiction cited by Peterson. Peterson, *supra* note 8, at 213. Only a limited

In particular, it is worth at least pausing to consider whether doing business jurisdiction is so deeply rooted that it must be accepted for that reason alone—just as the Supreme Court upheld so-called “tag” jurisdiction over individuals almost entirely for that reason.⁴⁶ And it is also worth considering what *Goodyear* suggests about the underlying theory of general jurisdiction, and whether doing business jurisdiction can be justified under that theory.

Ultimately, these inquiries show that doing business jurisdiction has little historical or theoretical basis. There is no reason to adopt a strained reading of *Goodyear* to preserve doing business jurisdiction, and no reason to mourn its passing. To the contrary, *Goodyear*’s apparent narrowing of general jurisdiction is a constructive development and a significant step toward a more predictable and more defensible doctrine of general jurisdiction.

1. *The Lack of a Historical Tradition that “Doing Business” Supports General Jurisdiction*

Given the wide acceptance of “doing business” as a basis for general jurisdiction, it would be easy to assume that this practice was supported by a long and settled historical tradition akin to the long tradition of tag jurisdiction over individuals that the Supreme Court found persuasive in *Burnham v. Superior Court*. Easy, that is, but wrong. The doing business notion was developed in the pre-*International Shoe* period to justify jurisdiction over cases *arising from that business*—i.e., what we would now call specific jurisdiction—and it was never established as an accepted basis for exercising jurisdiction over unrelated cases.

The development of the doing business standard was a consequence of the need to address the growth of multistate corporate activity within the territorial framework for personal jurisdiction that prevailed prior to *International Shoe*. Under the regime of *Pennoyer v. Neff*, personal jurisdiction was understood to flow from state’s power over defendants physically found and served within the state’s borders.⁴⁷ This presented a problem with respect to corporations, because the original common law rule deemed a corporation “present” only in its state of

number of courts have permitted general jurisdiction based on mere sales into the forum state. *See id.* at 213–14 n.73 (citing cases). In contrast, doing business jurisdiction has been much more widely practiced and accepted, to the point that the perceived need to preserve such jurisdiction was a significant cause of the failure of the proposed Hague Convention on the recognition and satisfaction of judgments. *See supra* note 20 and accompanying text.

46. *See Burnham v. Superior Court*, 495 U.S. 604, 610–12, 615, 619, 622, 628 (1990) (plurality opinion); *id.* at 629, 636–37 (Brennan, J., concurring in judgment). Justice Brennan nominally treated historical pedigree as an “important factor” rather than as dispositive, but it is hard to imagine that “tag” jurisdiction could have been upheld in the absence of that historical tradition. *Id.* at 629.

47. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

incorporation and thus, it could be sued only in that state.⁴⁸ Later nineteenth century courts, however, aided by state statutes departing from this rule, began to permit suits where a foreign corporation conducted substantial business, *but only if the suit arose out of that in-state business*.⁴⁹

The courts developed several overlapping theories to harmonize these assertions of jurisdiction with the *Pennoyer* framework, most notably the notions that a corporation that was sufficiently active in the forum state was thereby “present” in the state (and therefore subject to service and suit in the forum), or could be deemed to have implicitly consented to jurisdiction there.⁵⁰ Eventually,

48. See *St. Clair v. Cox*, 106 U.S. 350, 354 (1882); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839); see also, e.g., *Clarke v. N.J. Steam Nav. Co.*, 5 F. Cas. 974, 976 (Story, Circuit Justice, C.C.D.R.I. 1841) (No. 2, 859) (“[A] corporation is liable to be sued only in the state, where it has its corporate existence, and from which it derives its charter, and not elsewhere.”); *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301, 306 (1841) (“We think, that in order to bring the present case within the provisions of this law, it must be shown, that the corporation in question exists within the limits of the state.”); *Peckham v. Inhabitants of the N. Parish in Haverhill*, 33 Mass. (16 Pick.) 274, 286–87 (1834) (holding that “all foreign corporations are without the jurisdiction of the process of the courts of this commonwealth”); *M’Queen v. Middletown Mfg. Co.*, 16 Johns 5, 6–7 (N.Y. Sup. Ct. 1819) (“[W]e think, a foreign corporation never could be sued here. The process against a corporation, must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists.”); see generally Edward Quinton Keasbey, *Jurisdiction over Foreign Corporations*, 12 HARV. L. REV. 1, 2 (1898) (“At common law, service of process upon a corporation could be made only upon the head or principal officer of the corporation, and within the jurisdiction of the sovereignty which created it.”).

49. See, e.g., *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406–09 (1855) (upholding Ohio’s scheme which required corporations doing business in the state to appoint a registered agent, and finding that service of process on the registered agent complied with due process); see also *Cent. R.R. & Banking Co. v. Carr*, 76 Ala. 388, 393 (1884) (citing *Cox*, 106 U.S. at 356; *Bawknigh v. Liverpool & London & Globe Ins. Co.*, 55 Ga. 194, 195, 197 (1875), *overruled in part by Newberry v. Tenant*, 49 S.E. 621 (Ga. 1904); *Smith v. Mut. Life Ins. Co. of N.Y.*, 96 Mass. (14 Allen) 336, 343 (1867); *Newell v. Great W. Ry. Co. of Can.*, 19 Mich. 336, 344–46 (1869); *Parke v. Commonwealth Ins. Co.*, 44 Pa. 422, 422–23 (1863); *Sawyer v. N. Am. Life Ins. Co.*, 46 Vt. 697, 706–07 (1874)) (finding it “well settled . . . that no action in personam [could] be maintained against a foreign corporation, unless the contract sued on was made, or the injury complained of was suffered in the State in which the action [was] brought”); JOSEPH K. ANGELL & SAMUEL AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* 228 (photo. reprint 1972) (1832) (suggesting that “if a foreign corporation . . . should locate its presence [in another state], for the express purpose of making contracts there, it would seem very strange, if the president could not be summoned there to answer to a debt contracted by him in the corporate name”); Keasbey, *supra* note 48, at 13, 22 (“[T]he general rule . . . is that foreign corporations are suable in domestic tribunals only upon causes of action arising within the domestic jurisdiction.”) (citing SEYMOUR D. THOMPSON, 6 COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS § 8007, § 8008 (1896)); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919–20 (1960) (noting that those statutes primarily reflected the need to assert jurisdiction over corporations whose activities in a state gave rise to legal claims there).

50. See Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 577–85 (1958). As Professor Kurland detailed, the “consent” and “presence” notions were used interchangeably by courts and ultimately the concept of “doing business” was used in place of both. See *id.* at 578, 584–85.

the label “doing business” was developed to signify the type of corporate activity within a state that would satisfy the presence and/or consent standards.⁵¹

In theory, this approach might have been used to support what we now call general jurisdiction over corporations deemed “present” in a state, by analogy to the states’ power to assert general jurisdiction over individuals found and served there.⁵² In practice, however, that approach was a controversial one,⁵³ and the Supreme Court “vacillated” and never resolved the issue.⁵⁴ Indeed, the Court expressly left the question open in a 1917 decision,⁵⁵ and it affirmatively suggested several times that doing business in a state would *not* permit jurisdiction over causes of action arising elsewhere. For example, while the Court approved statutes deeming corporations doing business in a state to have implicitly “consented” to service of process on state officials,⁵⁶ the Court twice held that this principle could not reach causes of action arising in other states.⁵⁷ And, in *Louisville & Nashville Railroad Co. v. Chatters*,⁵⁸ then-Associate Justice Stone—later the author of *International Shoe*—summarized prior decisions as suggesting that a foreign corporation could not “be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction.”⁵⁹

51. See *id.* at 584–85; see also Donald J. Werner, *Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 BROOK. L. REV. 565, 591 (1979) (“The courts developed the ‘doing business’ test as a form of presence sufficient to satisfy *Pennoyer*.”).

52. See *Burnham v. Superior Court*, 495 U.S. 604, 612 (1990) (plurality opinion) (“[P]ersonal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there.”).

53. See *Developments in the Law—State-Court Jurisdiction*, *supra* note 49, at 921 (observing that “in contrast to the longstanding though criticized rule that an individual ‘tagged’ with a summons in a state” could be sued there on any claim, “cases were divided as to whether a foreign corporation doing business in the forum state be sued on causes of action unrelated to its activity in that state”). In *International Shoe* itself, the Court noted the conflicting case law on this issue, observing that some decisions had rejected contentions that “continuous activity” in a state provided jurisdiction over unrelated claims, while in others “the continuous corporate operations within a state were thought so substantial and of such a nature as to justify” such jurisdiction. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

54. Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 152.

55. *Philadelphia & Reading Railway Co. v. McKibbin*, 243 U.S. 264, 268–69 (1917).

56. See *Ex parte Schollenberger*, 96 U.S. 369, 376 (1877).

57. See *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1915); *Old Wayne Mut. Life Ass’n of Indianapolis v. McDonough*, 204 U.S. 8, 22–23 (1907).

58. 279 U.S. 320 (1929).

59. *Id.* at 325 (citing *Simon*, 236 U.S. at 130; *McDonough*, 204 U.S. at 22–23); see also *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921) (citing *Simon*, 236 U.S. at 131–32; *McDonough*, 204 U.S. at 22–23)) (“But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. In the latter case the implication is limited to business transacted within the state.”); *RESTATEMENT OF CONFLICT OF LAWS* § 92 cmt. c (1934) (“A foreign corporation by doing even intrastate business

In short, as Professor Kurland explained, the Supreme Court's pre-*International Shoe* cases "never openly espoused" the view that a foreign corporation's presence in the forum state (manifested by its doing business there) could support general jurisdiction over the corporation⁶⁰ and at times questioned that view.⁶¹ Doing business was an established basis for jurisdiction growing out of that in-state business, but not for general jurisdiction extending to out-of-state conduct. Unlike the long-established jurisdiction approved in *Burnham*, doing business as a basis for general jurisdiction cannot be justified by its pedigree.

2. *The Lack of Theoretical Justification for "Doing Business" Jurisdiction*

General jurisdiction cases have long been regarded as something of a theoretical wasteland.⁶² Some of this perception undoubtedly results from a near-complete absence of Supreme Court guidance: *International Shoe*, which inaugurated the modern law of specific jurisdiction, recognized the possibility of general jurisdiction but did not define when or explain why it would be permissible,⁶³ and neither *Perkins* nor *Helicopteros* provided any explanatory theory to support the results they reached. But some of this perception simply reflects the fact that general jurisdiction as it developed in many lower courts has often defied justification. That is certainly true, I believe, of doing business as a basis for general jurisdiction.

within a State of the United States does not, in the absence of consent, subject itself to the exercise of jurisdiction of the State as to causes of action not arising out of the business done within that State.").

60. See Kurland, *supra* note 50, at 583 (citing *Tauza*, 115 N.E. at 918). As Stephen Burbank observed more recently, in response to Arthur von Mehren's suggestion that doing business jurisdiction might be justified by its purportedly long "pedigree," "[g]eneral doing business jurisdiction appears to have a very short 'pedigree,' since as late as 1930 it was unclear (at least to Learned Hand) whether such jurisdiction could constitutionally be exercised." Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 752 n.52 (2004) (reviewing ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS* (2003)) (citing *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.)).

61. See *Chatters*, 279 U.S. at 328.

62. See Twitchell, *supra* note 19, at 172-73; Sarah R. Cebik, Note, "A Riddle Wrapped in a Mystery Inside an Enigma": *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 12 (1998).

63. *International Shoe* recognized only that in some prior cases "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against [the corporation] on causes of action arising from dealings entirely distinct from those activities," *Int'l Shoe*, 326 U.S. at 318, but it did not endorse these cases, let alone indicate *how* substantial or of *what* nature the "continuous corporate operations" would have to be, or explain why such corporate activities might justify a state in asserting jurisdiction over entirely unrelated activities.

a. Asking the Right Question

To say that an assertion of jurisdiction is unjustifiable requires a theory of justification. My starting point is that personal jurisdiction, at its core, is about whether the forum state has a legitimate basis for exercising authority over the defendant.⁶⁴ While at first glance this principle may appear close to tautological, it is in fact controversial, in that it focuses on questions of sovereignty—the scope of legitimate state authority—whereas a number of commentators have maintained that personal jurisdiction should turn on considerations of litigation fairness. Martin Redish, for example, argued in a prominent 1981 article that sovereignty and federalism concerns have no proper place in the personal jurisdiction inquiry, which in his view should focus—as an application of the Due Process Clause—solely on “the concerns of due process in avoiding injustice” to private litigants.⁶⁵ Absent identifiable litigation unfairness in a particular case, he argued, there should be no limits on state-court personal jurisdiction: “[U]nder our constitutional system, the inquiry is not why *should* a state be allowed to take an action, but why *shouldn't* a state be allowed to do so.”⁶⁶ Subsequent scholars have advanced similar arguments, buttressed by the Supreme Court’s declaration in the 1982 case *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* that “personal jurisdiction restricts judicial power not as a matter of sovereignty, but as a matter of individual liberty.”⁶⁷

This rejection of sovereignty/federalism justifications, however, misreads *Bauxites* and, more fundamentally, fails to recognize that freedom from illegitimate assertions of state authority is an important aspect of the individual liberty protected by the Constitution. A central function of the Due Process Clause “is protection of the individual against arbitrary action of government,”⁶⁸ and the assertion of state authority over a defendant without regard to whether there is any affirmative basis for such authority comfortably fits most definitions of “arbitrary.” Our system is not one in which each of the fifty states

64. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 cmt. b (1971) (a state “does not have jurisdiction in the absence of some reasonable basis for exercising it”).

65. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113–14 (1981).

66. *Id.* at 1134.

67. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); see, e.g., Borchers, *supra* note 21, at 1263 (“The invocation of sovereignty as the foundation of personal jurisdiction has made little sense since the dawn of the minimum contacts era.”); John N. Droback, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1050 (1983) (“When it decides that question, the Court would be wise to follow the course set by *Ireland* and finally end the federalism theme. The theme is virtually useless as protection for federalism and state sovereignty.”); Matthew R. Huppert, Note, *Commercial Purpose as Constitutional Purpose: Reevaluating Asahi Through the Lens of International Patent Litigation*, 111 COLUM. L. REV. 624, 632 n.50 (2011) (claiming that the sovereignty/federalism rationale “has disappeared from Supreme Court doctrine”).

68. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)) (internal quotation marks omitted).

presumptively has nationwide authority, limited only by affirmative constitutional prohibitions. Rather, although the Constitution does not expressly define the limits of state authority,⁶⁹ it is an essential feature of our federal system that the scope of each state's legitimate sovereign authority is limited, and a state ordinarily may not project state power beyond its legitimate sphere of authority.⁷⁰

The courts have always enforced such limits, and have done so in a variety of areas.⁷¹ Particularly relevant to personal jurisdiction are the cases that have employed the Due Process Clause as the constitutional vehicle for such limits. As to personal jurisdiction itself, *Pennoyer v. Neff* famously constitutionalized personal jurisdiction as a matter of due process, and held that “[a]ny attempt to exercise authority beyond” state boundaries would be “an illegitimate assumption of power, and be resisted as mere abuse.”⁷² The Due Process Clause has also long been understood to prevent extraterritorial state taxation⁷³ and extraterritorial application of state substantive law.⁷⁴ In the taxation context, it is understood that fundamental fairness is directly tied to the legitimacy of the

69. As Arthur Weisburd observed, “one would not expect” the Constitution to expressly address these limits, because it “was simply intended to establish the federal government and address potential federal-state conflicts. Given the long-standing existence of the states in 1787, the Constitutional Convention not surprisingly found it unnecessary to ‘establish’ or define generally the powers of functioning state governments.” Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 384 (1985).

70. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250 (1992) (“The essential function of constitutions is to constitute the many units of government in our federal system and define and limit the power of each. It would be an astonishing oversight if our fundamental law did not state general principles allocating authority among states . . .”); *id.* at 315 (“Our constitutions create a federal government and fifty state governments. For such a scheme to work, governmental authority must be allocated among these governments both horizontally and vertically.”).

71. See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987) (noting that there is an extraterritoriality principle that “is not to be located in any particular clause. It is one of those foundational principles of federalism which we infer from the structure of the Constitution as a whole.”).

72. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878) (citation omitted). Although *Pennoyer*'s strictly territorial notions of how to *define* the legitimate reach of a state's authority have been abandoned, the Supreme Court has never retreated from the principles that each state's sphere of authority is limited, and that state attempts to assert authority beyond that sphere are illegitimate and violate the Due Process Clause. See text accompanying *infra* notes 90–97.

73. See, e.g., *Standard Oil Co. v. Peck*, 342 U.S. 382, 84–85 (1952) (“[Extraterritorial state] tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.”); *Union Tank Line v. Wright*, 249 U.S. 275, 282 (1919) (“A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment.”).

74. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (holding that “[g]iven [the state's] lack of ‘interest’ in claims unrelated to that State,” application of its law to the case was “sufficiently arbitrary and unfair as to exceed constitutional limits”); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”).

state's assertion of power: Due process permits a state to tax an individual only if the "individual's connections with a State are substantial enough to *legitimate the State's exercise of power over him*."⁷⁵ Likewise, the due process constraints on choice of law aim to prevent overreaching assertions of state authority, and embody the principle that a state may not "reach[] beyond her borders to regulate a subject which was none of her concern."⁷⁶

In short, the Constitution in general, and the Due Process Clause in particular, are understood to limit the legitimate scope of each state's authority, and to protect individuals against assertions of state authority that exceed those limits.⁷⁷ And, the Supreme Court's personal jurisdiction decisions have consistently reflected the centrality of this inquiry into the legitimacy of the state's exercise of sovereign judicial authority.

If personal jurisdiction rules were about liberty divorced from sovereignty, they would focus exclusively on matters such as notice and convenience, and—to borrow Professor Stein's example—a resident of Philadelphia could always be sued in nearby Camden, New Jersey, and vice versa,⁷⁸ leaving us with little more than a constitutionalized inquiry into venue. But of course that has not been the focus of personal jurisdiction cases.

Instead, the inquiry into the legitimacy of the forum state's exercise of authority has been front and center both before and after *International Shoe*. Although *International Shoe* rejected *Pennoyer's* focus on presence as the *basis* of legitimate state authority, *Shoe* and subsequent cases maintained *Pennoyer's* focus on the legitimacy of state authority as central to personal jurisdiction.⁷⁹ *International Shoe* itself made clear that the necessary inquiry focused on whether the forum state's assertion of judicial authority was "reasonable, *in the context of our federal system of government*."⁸⁰ *Hanson v. Denckla*⁸¹ explained that personal jurisdiction rules were "more than a guarantee of immunity from inconvenient or distant litigation"; rather, "[t]hey are a consequence of territorial limitations on the power of the respective States," and they protect a defendant

75. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (emphasis added).

76. *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940); *see also, e.g., BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

77. I should note that I take no position on whether the Due Process Clause is the best constitutional vehicle for this principle. There are reasonable arguments to be made for locating the principle in other clauses, or in the structure of the Constitution as a whole. *See, e.g., Regan, supra* note 71, at 1885; Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008). But I think it is beyond reasonable dispute that the underlying principle—that each state has a limited sphere of legitimate authority—is a necessary part of our constitutional structure and one that has long been enforced as such by the courts.

78. *See Stein, supra* note 7, at 536–37.

79. *See Werner, supra* note 51, at 568 ("What is obsolete about *Pennoyer* and what is rejected by *Shoe-Shaffer* is not the concept that the foundation of jurisdiction is power but rather the concept that the foundation of power is presence.")

80. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (emphasis added).

81. 357 U.S. 235 (1958).

against a state's "exercise of power over him" without legitimate basis.⁸² And *World-Wide Volkswagen Corp. v. Woodson*⁸³ declared that limits on personal jurisdiction "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."⁸⁴ More generally, the Court's increasing focus on whether the defendant "purposefully availed" himself of the privileges or benefits of the forum state reflects an inquiry concerned with the basis for the state's exercise of authority over the defendant.⁸⁵

Against this background, it is clear that *Bauxites* was not intended to banish inquiry into the legitimacy of the forum state's authority from personal jurisdiction. The question in that case was not whether sovereignty considerations played *any* role, but whether they played an *independent* role— independent, that is, of the defendant's due process rights—and therefore could not be waived. The Supreme Court held, unremarkably, that the personal jurisdiction right was a personal due process right rather than an independent federalism constraint, and could be waived.⁸⁶ And in doing so, it made clear that, far from rejecting sovereignty considerations in personal jurisdiction analysis, it was reaffirming them as a component of the liberty interest protected by due process: "The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."⁸⁷

In short, the fundamental question at issue remains whether the forum state has a legitimate basis for exercising state authority over the defendant. None of this is to deny that other fairness considerations—notice, convenience, and so forth—also may play a role in the personal jurisdiction inquiry. But the cases demonstrate that those considerations are rarely dispositive, and the question of legitimate state authority is primary. That presumably is particularly true of general jurisdiction, which by definition will apply only to corporations with some more-than-minimal contacts with the state and therefore is unlikely to entail severe inconvenience to the defendant.

82. *Id.* at 251.

83. 444 U.S. 286 (1980).

84. *Id.* at 292. More recently, the plurality opinion in *J. McIntyre* expressly grounded personal jurisdiction in considerations of state authority. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786–88 (2011). Unfortunately, that discussion is intertwined with a problematic consent-based theory of state jurisdictional authority. *See infra* note 88.

85. *See, e.g.*, Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 405 (2012) (observing that purposeful availment is used as a basis for justifying the state's assertion of governmental authority over the defendant).

86. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982).

87. *Id.* at 703 n.10.

b. *“Doing Business” Provides No Principled Basis for General Jurisdiction*

The question, then, is what justifies a state in asserting general jurisdiction over a corporation—and whether doing business in a state can provide that justification.

I should note here that I do not think a useful answer to this question can be derived from any a priori theory of governmental authority, such as the consent-based theories sometimes advocated by courts or commentators. The Constitution does not enact any particular theory of state governmental authority, and in any event such theories invariably rest on debatable assumptions and do little to advance the analysis.⁸⁸ The more relevant inquiry, to my mind, looks to the justifications for the exercise of state authority—and the limits on that authority—that our law has traditionally recognized.⁸⁹

I find it useful to approach this question by comparing general jurisdiction with specific jurisdiction. The justification for a state’s exercise of specific jurisdiction is relatively easy to understand: in such cases, the litigation by definition “arise[s] out of or relate[s] to” the defendant’s purposeful contacts with the state,⁹⁰ and the state is understood to have legitimate authority over a defendant with respect to that conduct. *International Shoe* explained this concept in terms of reciprocity:

88. For example, Justice Kennedy’s plurality opinion in *J. McIntyre* sought to explain personal jurisdiction as based on the defendant’s express or tacit consent, asserting that a defendant that engages in forum-directed activities thereby “submits to the judicial power” of the forum state with respect to those activities. *J. McIntyre*, 131 S. Ct. at 2787-88. The problem with this reasoning is that the notion of “consent” does no real work; whether the defendant’s conduct will be deemed consent depends entirely on first determining whether the contacts at issue are sufficient to justify jurisdiction. If the law establishes that particular conduct will confer jurisdiction, engaging in that conduct can reasonably be understood as tacit consent to jurisdiction; but if the law is that such conduct does *not* establish jurisdiction, engaging in the conduct plainly *cannot* reasonably be understood as consent. In short, it is the underlying legal rule that determines whether consent can be inferred, not the other way around. See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304 (1989) (“[T]heories of tacit consent assume almost exactly what they set out to prove.”). As Professor Brilmayer has noted, this is what led *International Shoe* to “reject implied consent as a basis of adjudicative jurisdiction. . . . [T]he implied consent theory adds nothing to the calculus, and one is better off to proceed directly to the fairness question and skip all discussion of consent.” *Id.*

I should note that the reciprocity-based reasoning of *International Shoe* (see *infra* text accompanying notes 91–94) is itself sometimes described as reflecting notions of consent. But this is a mislabeling, to my mind, as the inquiry does not look to any actual (express or implied) consent; rather, consent is merely an after-the-fact label attached to an exercise of jurisdiction that is deemed fair.

89. Cf. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 210 (“The post-realist understanding of prescriptive and adjudicatory jurisdiction is based . . . on recognition that limits on state power vis-a-vis other states are a function of practice and convention. The legitimate grounds for exercising power, in other words, are those that states recognize as legitimate . . .”).

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

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.⁹¹

In short, if the defendant chooses to “enjoy[] the benefits and protection” of the state, it is only fair that it should be subject to the state’s judicial processes with respect to obligations that “arise out of or are connected with” those forum-directed activities.⁹² So long as there is an adequate “relationship among the defendant, the forum, and the litigation,”⁹³ the state has a sufficiently legitimate interest that it cannot be said to be “reach[ing] out beyond the limits imposed on [it]” by the Due Process Clause.⁹⁴

What is noteworthy about this reasoning, for present purposes, is that the defendant’s forum-directed activities give rise to legitimate state authority with respect to those activities, *but only with respect to those activities*: the key limitation of specific jurisdiction is that due process is satisfied only “so far as” the litigation relates to the forum-directed conduct. The state authority over the defendant created by the defendant’s activities related to the forum does not extend to other activities that are not related to the forum; it is not “in for a dime, in for a dollar.” In this respect, personal jurisdiction principles reflect a requirement of proportionality or relatedness that is also embodied in the due process limits on state authority in other areas. A state’s taxation of an out-of-state corporation must, at a minimum, be proportioned to the value or income that can “in fairness be attributed to the taxpayer’s activities within the State.”⁹⁵ Likewise, a state’s prescriptive jurisdiction over a person’s in-state activity does not permit it to regulate that person’s out-of-state activity.⁹⁶

That brings us to the problem of general jurisdiction, which involves the exercise of state authority over a defendant’s conduct that does *not* arise out of or relate to contacts with the state.⁹⁷ Because the state’s assertion of jurisdiction cannot be justified by any legitimate authority over the conduct at issue—since the conduct, by definition, is unrelated to the state—it must be justified solely on

91. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

92. *Id.*

93. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

94. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

95. *Allied-Signal v. Director*, 504 U.S. 768, 780 (1992).

96. *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

97. As a technical matter, general jurisdiction can be available in cases where the litigation does arise out of in-state activities—as when a defendant is sued in its home state for conduct in that state. But the only cases in which the general jurisdiction question is meaningful—the only ones in which it provides personal jurisdiction that would not otherwise exist—are those where the conduct at issue is unrelated to the state, and specific jurisdiction is therefore unavailable.

the basis of the state's authority over the defendant.⁹⁸ The question is, what type of relationship between a state and a defendant is sufficient to give the state a legitimate claim of authority over all of the defendant's conduct, including conduct entirely unrelated to the state?

My answer to this question is very close—if not quite identical—to Professor Stein's. The only basis our law has traditionally recognized for state authority over conduct unrelated to the state is the unique relationship between a state and its citizens or residents.⁹⁹ In the personal jurisdiction context, this basis for state authority is reflected in *Milliken v. Meyer*,¹⁰⁰ a case later relied upon in *International Shoe*, which upheld the Wyoming courts' personal jurisdiction over a Wyoming citizen who was served with process out of state.¹⁰¹ The Court explained that "the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties," and "[o]ne such incidence of domicile is amenability to suit within the state."¹⁰²

The same idea is echoed in the context of state authority to prescribe substantive law and state taxation authority. In the case of taxation, a state may tax domiciliaries even on their out-of-state income, but may tax out-of-state entities only on the portion of their income earned in-state.¹⁰³ The fact that a corporation does business in the state does not permit the state to assert taxation authority over all of the corporation's income. Likewise, at least in some

98. To be sure, the state also has some interest in providing a forum for state-resident plaintiffs. But general jurisdiction is not limited to state-resident plaintiffs; when a defendant is subject to general jurisdiction in a particular forum, any plaintiff can sue it there. And even as to plaintiffs who are state residents, the Supreme Court has always held that absent sufficient contacts between the defendant and the forum, the plaintiff's residence does not provide a basis for jurisdiction. See *Kulko v. Superior Court*, 436 U.S. 84, 93–94 (1978); see also *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (rejecting a test that would make the "plaintiff's contacts with the forum . . . decisive" for jurisdiction).

99. See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 726 (1987) (arguing that general jurisdiction should be available only with respect to defendants who are so closely tied to the state that the state "posses[es] equivalent authority to that which it possesses over its own citizens"); cf. *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (holding that states may regulate citizens' "conduct . . . upon the high seas").

100. 311 U.S. 457, 463–64 (1940) (upholding the finding of personal jurisdiction over an absent citizen).

101. *Id.* But for the Court's endorsement of personal jurisdiction based on the defendant's Wyoming citizenship, the out-of-state service of process would have been fatal under the then-applicable *Pennoyer* framework.

102. *Id.*

103. See *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 280–81 (1932) ("It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on."); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't Revenue*, 128 S. Ct. 1498, 1505 (2008) (due process requires "a rational relationship between the tax and the values connected with the taxing State" (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)) (internal quotation marks omitted)).

circumstances a state may prescribe rules governing the out-of-state conduct of its citizens, even when the conduct does not affect the state,¹⁰⁴ but as to foreign corporations it may only regulate those activities that affect the state; it may not “impos[e] . . . conditions upon [a party’s] privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests.”¹⁰⁵ To be sure, the due process limits on personal jurisdiction, taxation, and choice of law are by no means identical.¹⁰⁶ However, they all reflect the same fundamental difference between a state’s power over its citizens and its power over non-citizens who have contacts with the state, and it is noteworthy that in *Milliken*, the Court relied on this commonality as a basis for its personal jurisdiction holding.¹⁰⁷

The “at home” standard adopted by the Court in *Goodyear* fits neatly with this principle, in that a state which is the corporation’s “home” (particularly if “home” is understood to be limited to domicile or place of citizenship¹⁰⁸) can be understood to have power even over out-of-state activities in the same way that states may tax and regulate the out-of-state activities of their domiciliaries. Merely doing business in a state, on the other hand, establishes only that the corporation can be said to be *present* in the state.¹⁰⁹ This falls far short of the

104. See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941); cf. *Blackmer v. United States*, 284 U.S. 421, 436 (1932) (finding that the United States retained authority over a United States citizen residing in France).

105. *Osborn v. Ozlin*, 310 U.S. 53, 62, 65 (1940); cf. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority.”).

106. Cf. *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (“The issue is personal jurisdiction, not choice of law.”).

107. See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (citing *Blackmer*, 284 U.S. 421 (prescription of substantive law); *Lawrence*, 286 U.S. at 279 (taxation)).

108. This is the one area where I may not entirely agree with Professor Stein. His view appears to be that a corporation can have the necessary citizen-type affiliation in states that are neither the corporation’s state of incorporation nor the location of its principal place of business, so long as litigation in the forum state is as convenient to the defendant as any other forum, and the defendant’s connection to the forum is comparable to its connection to any other forum. See Stein, *supra* note 7, at 545–48. While there may be some unavoidable uncertainty in identifying what counts as a principal place of business, cf. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1191–93 (2010) (resolving disagreement over divergent “nerve center,” “business activity,” and “total activities” tests for “principal place of business” in statute defining diversity jurisdiction), I am reluctant to agree with the notion that a corporation may be deemed at home in numerous states. The power of a state over its citizens’ out-of-state conduct is tied to the uniqueness of the citizen-state relationship, and should not arise merely because litigation there would not be inconvenient for the defendant or its ties are in some sense comparable to its ties to its home state. An open-ended standard of this sort would also inject undesirable uncertainty, and thereby undermine one of the chief benefits of general jurisdiction: the availability of an identifiable forum where the defendant is indisputably subject to suit. See *infra* text accompanying note 113. Finally, as Professor Stein himself notes, the availability of multiple fora opens the door to forum-shopping, see Stein, *supra* note 7, at 528, which can itself be the source of significant unfairness.

109. See, e.g., Silberman, *supra* note 14, at 334 (“The underlying rationale [of doing business jurisdiction] is that the extensive and continuous activities of the corporate defendant in the forum state represent a manifestation of the defendant’s presence there . . .”).

types of relationships that have traditionally justified plenary authority over an individual or entity.

To be sure, the Supreme Court in *Burnham* approved general jurisdiction over *individuals* based on their mere presence in the forum state, and—at least prior to *Goodyear*—some thought that would prevent the Court from disposing of doing business jurisdiction over corporations.¹¹⁰ However, the decision in *Burnham* was driven almost entirely by the long history of “tag” jurisdiction over individuals—Justice Scalia’s plurality opinion was based entirely on that history, and Justice Brennan’s concurrence, while gesturing toward what he deemed to be “significant benefits” provided by states to transient visitors, also relied heavily on history.¹¹¹ No Justice claimed that presence-based general jurisdiction could be sustained in the absence of that established history. As detailed earlier, a similar history-based argument cannot be made for doing business as a basis for general jurisdiction.¹¹²

Doing business jurisdiction also falls short when viewed in light of another core justification for general jurisdiction: the notion that “justice requires a certain and predictable place where a person can be reached by those having claims against him.”¹¹³ So long as the defendant’s state of incorporation and/or its principal place of business remain available, this purpose is satisfied, and provides no reason to extend jurisdiction to multiple other locations.

One additional basis for general jurisdiction that has been offered—which, if accepted, would come closer to justifying some forms of doing business jurisdiction—is Lea Brilmayer’s suggestion that general jurisdiction should be available when the defendant is enough of a political “insider” to invoke the political processes of the state.¹¹⁴ Under this approach, “the due process clause should permit general jurisdiction on the basis of activities when the defendant reaches the quantum of local activity in which a purely local company typically would engage.”¹¹⁵ While this approach would not permit some of the more adventurous applications of doing business jurisdiction, it appears to entail a significantly broader scope for general jurisdiction than just a corporation’s state of incorporation and principal place of business. I do not think such an approach can or should be sustained after *Goodyear*.

110. See Twitchell, *supra* note 19, at 180 (“After *Burnham*, we are left with . . . little prospect that the Court will put meaningful limits on doing-business jurisdiction in the future. . .”).

111. *Burnham v. Superior Court*, 495 U.S. 604, 610–12, 615, 619, 622, 628 (1990) (plurality opinion); *id.* at 629, 636–37 (Brennan, J., concurring in judgment); see also *id.* at 628 (White, J., concurring in part and in the judgment); *id.* at 640 (Stevens, J., concurring in the judgment).

112. See *supra* Part III.B.1.

113. von Mehren & Trautman, *supra* note 12, at 1137.

114. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 87 (suggesting that general jurisdiction is appropriate when a “person or corporate entity is enough of an ‘insider’ [in the state] that he may safely be relegated to the State’s political processes”).

115. Brilmayer, *supra* note 28, at 742.

First, under *Goodyear* itself, even if “at home” can be understood as permitting numerous “homes”—and I am not sure it can—it seems unlikely that a large corporation can be regarded as “at home” everywhere it has a presence comparable to a local small business. While the Court’s use of “at home” rather than merely “home”—and its softening of the phrase to “essentially at home” on one occasion¹¹⁶—may suggest a degree of wiggle room, the Court’s definition of the “paradigm” as state of incorporation and principal place of business makes it hard to imagine that the standard can be stretched to include states where the corporation has only a relatively small presence.¹¹⁷

Second, the analogy to a local business is highly problematic as a basis for general jurisdiction. The reason general jurisdiction over a local business is permissible is not because any particular quantum of local activity is thought to justify such jurisdiction, but because the unique privileges and protections a defendant receives from its home state permit the state to “exact reciprocal duties”¹¹⁸—and, perhaps, because justice requires at least one certain place a defendant can be sued.¹¹⁹ Neither of these justifications applies to an out-of-state defendant. Moreover, the burden general jurisdiction places on the out-of-state business is likely to be far more severe.¹²⁰ Unlike a local business, a large corporation with a small local presence is likely to be regarded as an outsider by local judges and juries. Further, under this approach, the amount of out-of-state conduct that becomes subject to the forum’s jurisdiction by virtue of the corporation’s in-state activity is likely to be far greater for an out-of-state corporation than for a small local business. And, for corporations that operate in many places, this approach will mean that they are subject to unlimited jurisdiction in *all* of those places, permitting potential plaintiffs a panoply of fora from which they can choose the most plaintiff-friendly.

Most importantly, it is not at all clear why a particular quantum of local activity should give a state legitimate authority over what will usually be a far larger quantum of unrelated out-of-state activity. In the benefit-versus-burden terms used in *International Shoe*, surely the burden of general jurisdiction in such cases is vastly disproportionate to the benefit conferred by the state.¹²¹ Professor Brilmayer argues that such local activity indicates an ability to invoke

116. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

117. The “essentially at home” phrasing might also have been intended to accommodate the facts of *Perkins*, in which the forum state was only temporarily the defendant’s principal place of business. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 n.11.

118. *Milliken v. Meyer*, 311 U.S. 457, 463–64 (1940).

119. von Mehren & Trautman, *supra* note 12, at 1137.

120. See Stein, *supra* note 7, at 537–38.

121. One does not have to agree with the result in *Burnham* to agree with Justice Scalia’s observation that, applying the exchange rationale of *International Shoe* to “tag” jurisdiction, “a contractual exchange swapping those benefits for that power would not survive the ‘unconscionability’ provision of the Uniform Commercial Code.” *Burnham v. Superior Court*, 495 U.S. 604, 623 (1990) (plurality opinion). The same might be said of an exchange of unlimited jurisdiction for the benefit of a small business presence in a state.

local political processes, but—even if so—states are not normally regarded as having general authority over all those who can invoke their political processes. Certainly a non-resident’s ability to invoke a state’s political processes would not justify the state in taxing or regulating that person’s out-of-state activity, and there is no apparent reason the state’s assertion of judicial authority over out-of-state activity should be regarded as any more legitimate.¹²²

At bottom, unless we are to expand what are usually understood to be the limits on legitimate state authority, it is hard to see any plausible argument for allowing a state to leverage a corporation’s in-state business into a source of worldwide authority over the defendant’s conduct—conduct that, by hypothesis, has no substantial connection to the state. To the contrary, this is precisely the sort of extraterritorial projection of state authority that has always been rejected as unconstitutional, whether under the Due Process Clause or otherwise.¹²³

IV. CONCLUSION

Goodyear’s addition of a new “at home” requirement to the general jurisdiction inquiry adds some welcome definition to what has been a highly ambiguous and malleable legal standard. It also significantly, and rightly, undermines the lower court case law that has accepted (but never justified) doing business in a state as a sufficient basis for general jurisdiction. Finally, *Goodyear*’s redefinition of general jurisdiction as home state jurisdiction is a major step toward bringing long-needed theoretical grounding to this area of jurisdictional doctrine. By adopting this new definition, *Goodyear* for the first time aligns general jurisdiction doctrine with a coherent understanding of the scope and limits of legitimate state authority.

122. One thing worth noting about Professor Brilmayer’s approach is that it may have resulted, at least in part, from an effort to explain general jurisdiction in a way that could accommodate doing business jurisdiction, given the widespread acceptance of doing business jurisdiction in the lower courts. Cf. Brilmayer, *supra* note 114, at 87 (“Systematic unrelated activity, such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an ‘insider’ that he may safely be relegated to the State’s political processes.”). It is not clear to me whether, in light of the cloud *Goodyear* casts on doing business jurisdiction, she would adopt the same view today.

123. See Regan, *supra* note 71, at 1885; cf. Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1135 (2010) (“A strand of dormant Commerce Clause jurisprudence provides that states may not regulate ‘commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State,’ if its ‘practical effect . . . is to control conduct beyond the boundaries of the State’ or if it risks creating a problem with ‘inconsistent legislation arising from the projection of one State regulatory regime into the jurisdiction of another State.’” (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989))).