

# Why the Supreme Court Should Give the Easy Answer to an Easy Question: A Response to Professors Childress, Neuborne, Sherry and Silberman

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None of us thinks that the Supreme Court should affirm the Ninth Circuit's ruling that California had general jurisdiction over DaimlerChrysler. But we differ on the extent to which we think the Supreme Court should use *DaimlerChrysler AG v. Bauman*<sup>1</sup> to clarify the law of personal jurisdiction, rather than sidestep the core questions. And if the Justices are to speak on general jurisdiction, we differ on exactly what we think they ought to say.

Professors Burt Neuborne and Suzanna Sherry would have the Court duck the issue on which it granted certiorari, but in different ways. Professor Neuborne thinks the Court should dismiss the appeal for lack of subject matter jurisdiction.<sup>2</sup> Professor Sherry, while not asking the Court to dismiss and not necessarily asking the Court to shy away from personal jurisdiction questions altogether, urges the court to avoid the particular issue of whether jurisdiction can rest on the imputed contacts of a corporate subsidiary.<sup>3</sup>

In contrast to Professors Sherry and Neuborne, I hope the Supreme Court will address head-on the personal jurisdiction issues.<sup>4</sup>

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1. 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 1995 (2013).

2. Burt Neuborne, *General Jurisdiction, "Corporate Separateness," and the Rule of Law*, 66 VAND. L. REV. EN BANC 95, 97–99 (2013).

3. Suzanna Sherry, *Don't Answer That! Why (and How) the Supreme Court Should Duck the Issue in DaimlerChrysler v. Bauman*, 66 VAND. L. REV. EN BANC 111, 114–16 (2013).

4. The Court does not lack subject matter jurisdiction to decide the case. Even if the plaintiffs' federal law claims have been undermined by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) and *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), the federal courts continue to have supplemental jurisdiction over the non-federal claims. See 28 U.S.C. § 1367(a) (granting supplemental jurisdiction); 28 U.S.C. § 1367(c)(3) (giving district court discretion to dismiss supplemental claims if all federal claims have been dismissed).

Even after the Court's unanimous decision in *Goodyear Dunlop Tires Operations v. Brown*,<sup>5</sup> too much confusion remains concerning the standard for general jurisdiction over corporations.<sup>6</sup> Little is gained by keeping lawyers and judges in the dark about jurisdictional limits (except, perhaps, for the lawyers who litigate these issues and the academics who write about them). The *DaimlerChrysler* case offers an opportunity to shed some light. The issues that need to be addressed, frankly, are not that complicated.

The heart of the *DaimlerChrysler* appeal may be resolved with the following two questions and answers, neither of which should be terribly controversial after *Goodyear*. First, what state or states possess plenary power over a defendant so that the state may exercise adjudicatory authority without regard to where claims arose? The obvious answer is the defendant's home state. For an individual, the home state is the person's state of domicile; for a corporation, it is the corporation's state of incorporation and its principal place of business.<sup>7</sup> Second, if a defendant is neither incorporated in the forum state nor maintains its principal place of business there, may a state nonetheless be considered the defendant's "home state" for purposes of general jurisdiction because of the activities of the defendant's subsidiary acting as an agent? As I argued in my initial piece, this second question should be answered in the negative.<sup>8</sup>

The Supreme Court sometimes faces situations in which it is wise to avoid a hard issue because the particular case does not tee up the issue well enough, but *DaimlerChrysler* is not such a case. The basic question that the Court needs to address is what the Court meant in its *Goodyear* decision concerning the permissible scope of general jurisdiction over corporations.<sup>9</sup> If I am correct that *Goodyear* established a home-state test for general jurisdiction, and that *home state* means state of incorporation or principal place of business, then

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5. 131 S. Ct. 2846 (2011).

6. See Sherry, *supra* note 3, at 118–19 & n.32 and cases cited therein.

7. In general, a corporation has one principal place of business. As two of us have noted in this Roundtable, circumstances may justify finding more than one principal place of business for purposes of general jurisdiction, such as when a corporation maintains dual headquarters or when its headquarters are separated from its primary operations. See Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 86–87 (2013); Sherry, *supra* note 3, at 118 n.31.

8. See Erichson, *supra* note 7, at 91–92.

9. In this regard, *DaimlerChrysler* differs from *J. McIntyre Machinery Ltd. v. Nicaastro*, 131 S. Ct. 2780 (2011). In *Nicaastro*, Justices Breyer and Alito offered a plausible argument for declining to resolve the highly contentious stream-of-commerce issue on which the Court had split 4-4-1 in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), because the issue deserves a full briefing in a case that involves modern forms of commerce. See *Nicaastro*, 480 U.S. at 2791 (Breyer, J., concurring).

the answers to the remaining issues—including whether general jurisdiction may be established on an agency theory based on the contacts of a corporate subsidiary—follow naturally.

Sherry and Neuborne rightly worry that a Supreme Court reversal of the Ninth Circuit in *DaimlerChrysler* could entrench an outdated conception of corporate personhood.<sup>10</sup> Sherry argues that “setting a high bar for piercing the corporate veil across the board—including in all jurisdictional contexts—continues and entrenches a formalist approach to corporate separateness that does not reflect either the reality or the diversity of corporate forms and that allows corporations to externalize costs.”<sup>11</sup> But the *DaimlerChrysler* case does not require setting a high bar “across the board—including in all jurisdictional contexts,” as Sherry puts it. It simply requires the Court to say that *general jurisdiction* depends upon a corporation’s home state, and that a corporation does not establish a home state through the contacts of a subsidiary acting as an agent. Contacts through an agent may be highly relevant to specific jurisdiction, but they do not establish a home state for purposes of general jurisdiction. As long as the Court draws a clear distinction between specific jurisdiction and general jurisdiction, Sherry’s concern about an across-the-board standard for imputation of contacts is, I hope, misplaced.

Neuborne notes that the question to ask is not a metaphysical question about where a corporation is “present,” but rather “a pragmatic question of whether a forum jurisdiction has a legitimate regulatory interest in asserting adjudicatory authority over a corporate parent who is using a wholly owned-and-controlled subsidiary to engage in behavior in the forum jurisdiction that justifies regulation of the parent.”<sup>12</sup> I agree that the state’s regulatory interest is the correct inquiry. In presenting this question, however, Neuborne implies that the state’s regulatory interest may justify *general* jurisdiction based on the contacts of a subsidiary acting as an agent. Again, I think the problem is a failure to account fully for the difference between specific and general jurisdiction. In specific jurisdiction cases along the lines of *Nicastro*,<sup>13</sup> the best answer to Neuborne’s question will often be yes. When a case arises out of the use of a product in a state, the state has a regulatory interest in asserting adjudicatory authority over a company that purposefully sold the product into the state, even if it did so through a subsidiary. In general jurisdiction cases such as *DaimlerChrysler*, however, the answer is no. A state does not have a

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10. See Sherry, *supra* note 3, at 116; Neuborne, *supra* note 2, at 99–102.

11. Sherry, *supra* note 3, at 116.

12. Neuborne, *supra* note 2, at 101.

13. *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

legitimate regulatory interest in asserting adjudicatory authority over a foreign company for claims that do not arise out of the company's contacts with the forum state. When Neuborne says that "[n]othing in *Nicastro* casts doubt on the existence of *in personam* jurisdiction over a foreign automobile manufacturer who uses a wholly owned-and-controlled subsidiary to sell very large numbers of cars in a given forum," he is correct as long as he is referring to specific jurisdiction, but not if he is referring to personal jurisdiction over the foreign manufacturer for claims unrelated to the company's business in the forum state.

Assuming the Supreme Court goes forward with addressing general jurisdiction in *DaimlerChrysler*, Professors Childress, Sherry, Silberman and I largely agree on a tight test for general jurisdiction, but it is worth noting several points of language and emphasis. Professor Donald Childress and I agree, I think, on what would constitute a sound rule of general jurisdiction and how that rule should apply in the *DaimlerChrysler* case.<sup>14</sup> We disagree slightly, however, about how the Justices ought to engage the question. Childress encourages the Justices to ask a *why* question: "the Justices should ask the plaintiffs' lawyers why they brought the case in California."<sup>15</sup> He lists a number of the reasons why foreign plaintiffs choose to sue in U.S. forums, offering a helpful account of transnational forum shopping.<sup>16</sup> But showing that litigants forum shop is not the same as showing that it should matter to the Supreme Court in its analysis of the due process constraints on judicial power. For purposes of personal jurisdiction over the defendant, does it matter *why* plaintiffs' lawyers chose a particular forum? If the district court has power to hear the case (subject matter jurisdiction, personal jurisdiction, venue), and if the court lacks a basis for dismissing or transferring as a discretionary matter (forum non conveniens, venue transfer), then the court must hear the case regardless of what the court thinks of the plaintiffs' motives in choosing the forum. And if the court lacks power to hear the case, then the court must dismiss regardless of the purity of plaintiffs' motives. While transnational forum shopping provides a vivid backdrop to the

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14. See Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 79 (2013) ("Unless it is clear that a corporation's affiliate is really just the corporation itself, its 'alter ego,' the default rule for general jurisdiction should be that suit is proper only in the corporation's principal place of business or state of incorporation (here Germany), or in the place of the harm (Argentina or perhaps Germany).").

15. *Id.* at 72.

16. See *id.* at 73 (noting that foreign plaintiffs may prefer U.S. substantive law, notice pleading, liberal discovery, punitive damages, and civil juries). In addition to the items on Childress's list, I would mention contingent fees, the American Rule on legal fees, and the availability of class actions as further reasons why foreign plaintiffs sometimes choose United States forums.

*DaimlerChrysler* case, plaintiffs' motives have no bearing on whether California lacked general jurisdiction over the defendant.

Professor Sherry invokes the reasonableness prong of personal jurisdiction as a potential avenue for resolving the case, though it is not her preferred solution: "Another good option would be to hold that regardless of whether DaimlerChrysler has sufficient contacts with California, it would be unreasonable for a California court to exercise jurisdiction over it."<sup>17</sup> While I agree that jurisdiction over DaimlerChrysler would be unreasonable in this case, I would not want the Court to go that route. The reasonableness inquiry should have no place in general jurisdiction analysis because the very point of general jurisdiction is that the relationship between the defendant and the forum state gives the state adjudicatory power over the defendant, without regard to the particulars of the dispute.<sup>18</sup>

Professor Linda Silberman, taking a comparative approach to the question of jurisdictional imputation, concludes that imputation of contacts on an agency theory ordinarily makes sense only for specific jurisdiction, not general jurisdiction.<sup>19</sup> I agree not only with her conclusion, but also with her reasoning that "the United States should strive for harmonization when the rest of the world has the better policy."<sup>20</sup> I have tried to show that the home-state test makes sense from the *bottom up*, looking at the justification for general jurisdiction through the lens of the citizen-state relationship.<sup>21</sup> Silberman shows that the home state test, and the rejection of agency-based imputation for general jurisdiction, make sense from the *outside in*, by looking at what is unusual about United States jurisdiction doctrines and asking whether those divergences are warranted.<sup>22</sup>

My main difference with Professor Silberman is that I embrace what she calls the "rigid dichotomy"<sup>23</sup> between general and specific jurisdiction. She points to *Frummer v. Hilton International*<sup>24</sup> as a case

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17. Sherry, *supra* note 3, at 119. See also Neuborne, *supra* note 2, at 105 (noting that, because of the absence of a regulatory interest, "it would be constitutionally unreasonable under *Asahi* to force Daimler AG to defend the acts of its Argentine subsidiary in California").

18. Erichson, *supra* note 7, at 92–93.

19. See Linda J. Silberman, *Jurisdictional Imputation in Bauman v. DaimlerChrysler: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123, 126 (2013) ("[F]or most *general* jurisdiction cases, the contacts of a U.S. subsidiary should be relevant only when the alter ego standard is met. The more expansive agency or enterprise theories are most appropriate in cases of specific jurisdiction, and possibly (as I will illustrate) in some narrowly defined cases of general jurisdiction.").

20. *Id.* at 134.

21. Erichson, *supra* note 7, at 83–85.

22. Silberman, *supra* note 19; see also Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 SUP. CT. REV. 591 (2012).

23. *Id.* at 129.

24. 19 N.Y.2d 533 (1967).

in which general jurisdiction might be warranted by a subsidiary's forum-state activity that did not directly give rise to the claim but that is "related closely to the business that gave rise to the claim against the parent."<sup>25</sup> This raises a valid point about the interest a forum state may have in asserting power over a defendant; Silberman presents a more nuanced account than I offered in my initial piece. A claim may implicate a state's regulatory interest even if the state is neither the defendant's home state nor a place where the claim arose, if the claim relates to activity that the defendant conducts in the forum state. But the problem is that this sort of interest can be so diffuse that it is difficult to see how it offers a workable test for the assertion of power. It is true that cases such as *Frummer*, unlike *DaimlerChrysler*, may present plausible connections among the defendant, the claim, and the forum state. But such connections beyond the defendant's home state should not provide an adequate basis for general jurisdiction after *Goodyear*. To the extent a court's assertion of power hinges on the relatedness of the claim to the forum, the argument ought to depend more on the logic of specific jurisdiction than general jurisdiction, although admittedly it has aspects of both. In the end, I agree with Professor Silberman's comment that, despite the appeal of a nuanced functional approach, "such line-drawing in the category of general jurisdiction cases may be so difficult that one is moved to constrain imputation on an agency theory to cases of specific jurisdiction."<sup>26</sup>

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25. Silberman, *supra* note 19, at 129.

26. *Id.* at 132.