END OF THE LINE FOR GENERAL TERRITORIAL JURISDICTION

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I walked up to the great one
I asked for a line of talk
He said if you've got money
I will see that you don't walk.

Mississippi John Hurt[1]

INTRODUCTION

Two railroads drove the economic development and settlement of Montana. By 1883 the Northern Pacific Railroad cut through the southern half of the state, connecting the Midwest to the Pacific Northwest.[2] Billings, the state's largest city, was founded as a railroad town named after one of Northern Pacific's presidents.[3] Ten years later the Great Northern Railway completed a second route to the West Coast through northern Montana,[4] transforming a sparsely populated region into a band of over forty towns with populations

1. MISSISSIPPI JOHN HURT, *Waiting for a Train*, *on* SACRED & SECULAR: LIBRARY OF CONGRESS RECORDINGS, VOL. 1 (Heritage Records 1963) (author's transcription); *cf.* JIMMIE RODGERS, *Waiting for a Train*, *on* VICTOR 40014 (Victor Talking Machine Co. 1928) ("brakeman" rather than "great one").

2. *See* ALBRO MARTIN, JAMES J. HILL AND THE OPENING OF THE NORTHWEST 270 (1976); THE OFFICIAL NORTHERN PACIFIC RAILROAD GUIDE 18 (1893).

3. THE OFFICIAL NORTHERN PACIFIC RAILROAD GUIDE, *supra* note 2, at 218.

4. *See* RALPH W. HIDY ET AL., THE GREAT NORTHERN RAILWAY: A HISTORY 85 (1988) (discussing the expansion of the Great Northern Railway in the 1890s); MARTIN, *supra* note 2, at 388–97.

ranging from 100 to over 1000.[5] While railroads faltered in the jet age, the two corporations' physical presence in Montana survived under new forms—after 1970 when they merged with other railroads into Burlington Northern, and after 1995 when further merger resulted in today's BNSF Railway Company.[6]

Northern Pacific and Great Northern thrived during an epoch when plaintiffs could sue them in Montana for claims that arose anywhere in the world.[7] But in spring 2017, the Supreme Court held

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5. *See* David H. Hickcox, *The Impact of the Great Northern Railway on Settlement in Northern Montana, 1880-1920*, 148 RAILROAD HIST. 59, 59, 62 (1983). In addition to luring settlers, Great Northern played the leading role in developing Glacier National Park for which it provided exclusive passenger service. *See* NAT'L PARK SERV., ARCHITECTURE IN THE PARKS: NATIONAL HISTORIC LANDMARK THEME STUDY 134–44 (1985), http://www.npshistory.com/publications/architecture-in-the-parks.pdf; *see also Glacier Park Lodge*, NAT'L PARK LODGE ARCHITECTURE SOC'Y, http://nplas.org/glacierpark.html (last visited June 20, 2020).

6. *See* HIDY ET AL., *supra* note 4, at 303–04; BNSF RY., THE HISTORY OF BNSF: A LEGACY FOR THE 21ST CENTURY 3, https://www.bnsf.com/about-bnsf/our-railroad/pdf/History_and_Legacy.pdf (last visited June 20, 2020). The Supreme Court unanimously approved the merger in 1970. *See* United States v. Interstate Commerce Comm'n, 396 U.S. 491, 495 (1970). Two previous attempts to merge the lines were unsuccessful. First, the Roosevelt Administration blocked an attempted 1901 merger into the Northern Securities Company, which would have resulted in one of the largest corporations in the world. *See* N. Sec. Co. v. United States, 193 U.S. 197, 321–22, 360 (1904); HIDY ET AL., *supra* note 4, at 93. Political opposition also effectively prevented a second merger in 1930. *See* HIDY ET AL., *supra* note 4, at 194–95.

7. Until 1977, plaintiffs could commence an action *in rem* in Montana regardless of where the claims arose by attaching real or personal property. *See* Shaffer v. Heitner, 433 U.S. 186, 196–97 (1977) (discussing the lower court's assertion of jurisdiction based on seizure of property located in the state, consistent with then-prevailing norms). The *Shaffer* Court declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212. After 1977, plaintiffs could still commence an action in Montana against a corporation regardless of where the claims arose, provided the corporation met the requirements of *International Shoe*. *See* Int'l Shoe v. Washington, 326 U.S. 310 (1945). The settled law could be restated without any suggestion of controversy in the mid-twentieth century. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) (AM. LAW INST. 1971) ("A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction."); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 5 cmt. c (AM. LAW INST. 1980) ("Corporations . . . could be compelled by the threat of exclusion to appoint an agent for service of process and thereby obliged to submit to jurisdiction.").

in *BNSF Railway Co. v. Tyrrell*[8] that a Reconstruction Era amendment to the U.S. Constitution[9] prevents Montana courts from exercising personal jurisdiction over claims against BNSF by railroad employees or anyone else unless their claims arise in or relate to the corporation's conduct in the state of Montana.[10]

BNSF is one of six jurisdiction cases decided by the Roberts Court, each of which holds that a lower court exceeded constitutional limits on its authority by hearing the lawsuit.[11] *BNSF* ranks as the least surprising of the Court's jurisdiction decisions, and it has received comparatively little scholarly attention.[12] Back in 2011, the

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8. 137 S. Ct. 1549 (2017).

9. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .").

10. *BNSF Ry. Co.*, 137 S. Ct. at 1558–59. The two cases consolidated in *BNSF* were brought by non-Montana plaintiffs. *See* Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 3 (Mont. 2016). But the Court's rejection of general jurisdiction means that Montana residents, including BNSF employees, may no longer obtain general personal jurisdiction over BNSF in Montana. States may still exercise specific (or case-linked) jurisdiction over nonresident defendants conducting business in the state when that business gives rise to or is related to the plaintiff's claims. But the Court has made clear that courts must not mix the specific and general jurisdiction analyses and apply a sliding scale in evaluating contacts that augments jurisdiction based on unrelated business activity. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017).

11. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1782–84; *BNSF Ry. Co.*, 137 S. Ct. at 1554; Walden v. Fiore, 571 U.S. 277, 279 (2014); Daimler AG v. Bauman, 571 U.S. 117, 121–22 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929, 931 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879, 887 (2011); *see generally* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101 (2015) (contending that the Supreme Court has over-restricted the power of states to exert jurisdiction over nonresident corporations); Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 60 U. KAN. L. REV. 549 (2012) [hereinafter *Jurisdiction After Goodyear*] (asserting that the *Goodyear* opinion offers an unstable consensus that requires further lower court interpretation); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729 (2012) (arguing that sovereignty no longer plays a central role in personal jurisdiction analyses); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 497–98 (2012) (discussing Justice Kennedy's acceptance of the concept of individual submission to a state's sovereignty).

12. For example, Westlaw collects 77 law review articles citing reference to *J. McIntyre* for the year after the decision and Westlaw collects 48 law review articles citing references to *BNSF* for the year after the decision. *BNSF*'s elimination of contacts-based general jurisdiction has attracted less critical commentary than the Court's earlier restriction of specific jurisdiction, perhaps because in most cases some

Court announced that corporations are subject to general or all-purpose jurisdiction only where they are "at home,"[13] and *BNSF* fulfills predictions that the Court would interpret "at home" narrowly.[14]

But this Article proposes that *BNSF* constitutes the Court's most radical break with established judicial practice. General personal jurisdiction based on territorial presence measured by substantial business activity in the forum state was so deeply and widely established that Justices assumed its legality implicitly[15] and parties never thought to challenge it.[16] This Article argues that by

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forum will remain available under principles of specific personal jurisdiction. The Court emphasized that the injured workers could bring claims either where the claims arose or in the "home" states of the railroad defendants. *BNSF Ry. Co.*, 137 S. Ct. at 1558. Pro-Court commentary concluded that plaintiffs still had three places to file FELA claims under *BNSF* (the place where the claims arose, the defendant's place of incorporation, and the principal place of business). *See* Molenda L. McCarty, Note, *Getting Back on Track:* BNSF Railway Co. v. Tyrrell *Clarifies FELA Jurisdiction and Venue in State Court*, 79 MONT. L. REV. 145, 171 (2018).

Two of the plaintiffs' options are lost immediately when the defendant corporation merges into a Canadian corporation. And specific jurisdiction may be ruinously inconvenient when a railway worker suffers injury in a distant state—or a foreign country. The actions dismissed in *Daimler* and *Goodyear* cannot be brought in any court in the United States.

The restriction of jurisdiction has serious consequences for aggregation as well. Justice Sotomayor points out that actions against two corporations from different states will be impossible to bring together in a single court when the actions arise in different states. *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1788–89 (Sotomayor, J., dissenting).

13. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919. *See generally Jurisdiction After Goodyear*, *supra* note 11, at 582–84 (discussing the origin and meaning of the at-home doctrine).

14. *See generally* Cornett & Hoffheimer, *supra* note 11, at 139 (discussing the effect of *Daimler* to limit general jurisdiction over corporations to the place of incorporation and the principal place of business); *Jurisdiction After Goodyear*, *supra* note 11, at 581–82 (noting that *Goodyear*'s opinion provided authority for applying "at home" doctrine to restrict general jurisdiction over a corporation to its principal place of business and place of incorporation, though arguing against such an interpretation).

15. For example, the dissenting Justices in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 521–22 (1953) (Jackson, J., dissenting), expressed concern that the Court's decision would promote forum shopping precisely because large corporations are subject to general jurisdiction in many places where they do business: "Suppose this plaintiff might have obtained service of process in several different states—an assumption not extravagant in the case of many national corporations." *Id.* at 521.

16. *See Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 918 (noting that parent corporation Goodyear USA did not challenge general jurisdiction in North Carolina where it maintained major productions facilities and was qualified to do

eliminating general jurisdiction outside of states where corporations are incorporated or maintain their principal place of business, the Court has de facto rejected the realistic possibility of a third place for general jurisdiction where a corporation maintains sufficiently significant contacts. It argues further that rejecting contacts-based general jurisdiction signals a decisive retreat from the analytic framework that has dominated the Court's evaluation of personal jurisdiction since *International Shoe*.[17] Moreover, eliminating judicial jurisdiction over a corporation in a state where it owns vast real estate and engages in extensive commercial activity marks a startling break with remnants of centuries-old traditions under which states routinely exercised territorial jurisdiction over both individuals and business associations within their territory.[18]

Justice Ginsburg's opinion for the Court in *BNSF* follows the pattern of the Roberts Court's other jurisdiction opinions: it presents its holding as required by existing precedent[19] and suggests that

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business); Phillips Petroleum v. Shutts, 472 U.S. 797, 802 (1985) (acknowledging that defendant did not raise the issue of personal jurisdiction over itself in Kansas where it was qualified to do business and operated numerous gas leases when a class action was brought seeking recovery for identical wrongs committed in numerous states); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 317–18 (1980) (Blackmun, J., dissenting) (recognizing that the German manufacturer did not challenge personal jurisdiction and the national importer waived the issue on appeal); *see also* MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE 56–57 (2017) (discussing *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), and explaining that the forum in that case would lack general jurisdiction after *Goodyear* and *Daimler* because the corporation would not be "at home" in the forum); Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 31 FLA. L. REV. F. 21, 27–28 n.62 (2018) (adding *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) to the list of cases that could not be litigated under current law).

17. *See* Shaffer v. Heitner, 483 U.S. 186, 212 (1977) (extending minimum-contacts analysis of *International Shoe* to all forms of personal jurisdiction).

18. Jacobs points out that the injured railroad workers in *BNSF* would have fared better if they had commenced their action over a century earlier. Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1622 (2018). The ironic consequence of restricting jurisdiction over corporations is that individuals remain subject to personal jurisdiction merely by traveling through a state's territory, provided they are served in the territory. A plaintiff could establish valid general jurisdiction over a passenger by serving him or her while he or she is traveling through Montana. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990). In contrast, the plaintiff can no longer get general jurisdiction over corporations like BNSF that engage in billions of dollars of commerce in the state.

19. I argue elsewhere that the Roberts Court is engaged in a "stealth revolution" by radically changing settled law while purporting to adhere to controlling case law. *See* Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 499 (2018) [hereinafter *Stealth Revolution*].

narrowing personal jurisdiction is a necessary response to lawless lower courts.[20] Justice Ginsburg's rhetoric in *BNSF* even led some commentators to conclude that "[t]he Court seemed almost exasperated."[21]

Nearly unanimous opinions in *BNSF* and the other general jurisdiction decisions support the inference that "[i]t's hard to say that this is an agenda item of one faction of the [C]ourt."[22] Yet it is unclear what the members of the Court agree on other than limiting access to courts. *BNSF* makes no effort to link the new limits on state courts either to the text or history of the Due Process Clause.

This Article argues that *BNSF* lacks doctrinal coherence and fails to articulate sound policy grounds for a radical rupture with settled law. It contends that the displacement of territorial presence by a domicile-based model of general jurisdiction is supported by neither the language nor history of the Due Process Clause.[23] And while it concedes that a restrictive application of the at-home doctrine may promote certainty and reduce litigation abuse caused by plaintiff forum shopping, it argues that the doctrine will prevent some plaintiffs from obtaining access to justice. The Court's shrinking of general jurisdiction is constitutionally problematic because it interferes with states' sovereign duty to provide a forum; and it is bad policy because it cedes too much authority to foreign countries and distant states where corporations unilaterally choose to incorporate and establish a principal place of business. Finally, this Article surveys the reception of *BNSF* by legal scholars in the first two years after its publication. It finds that that leading scholars criticize the decision as theoretically unsound and result-oriented, raising doubts as to the decision's intellectual legitimacy and longevity.

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20. I discuss and question Justice Ginsburg's narrative in *BNSF* of lower court intransigence. *See Stealth Revolution*, *supra* note 19, at 543–44.

21. Ashley Simpson et al., *Recent Developments in Toxic Tort & Environmental Law*, 53 TORT TRIAL & INS. PRAC. L.J. 683, 691 (2018).

22. Mark Walsh, *Making it Personal: Court Limits Where Plaintiffs Can Bring Claims in Three Rulings*, 103 A.B.A. J. 20, 21 (2017) (quoting Andrew J. Pincus, a partner at Mayer Brown who filed an amicus curiae brief for the U.S. Chamber of Commerce in Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017)).

23. Justice Ginsburg makes no effort to relate the at-home doctrine to the text or history of the Due Process Clause. She derives the doctrine from law reform proposed by two mid-century law professors and from a contested construction of *International Shoe*. *See* Cornett & Hoffheimer, *supra* note 11, at 156–57 (discussing the origin of at-home doctrine by authors of a 1966 law review article).

Part I closely analyzes the *BNSF* decision, examining the case history in the state courts, Justice Ginsberg's opinion, and Justice Sotomayor's reasons for dissenting. Part II discusses legal uncertainties created by the majority opinion. Part III considers reactions to the decision by legal scholars and contrasts the academic reception of *BNSF* to the initial scholarly response to *International Shoe*.[24]

I. ENFORCING AND EXTENDING NEW LIMITS ON GENERAL JURISDICTION: *BNSF RAILWAY CO. V. TYRRELL*

A. Background

BNSF Railway Company is today a Delaware corporation with its principal place of business in Texas.[25] BNSF is one of the largest employers in the state of Montana, where it maintains a large permanent, physical presence; owns 2061 miles of railroad track; operates an automotive facility; and employs 2100 workers.[26] The corporation is licensed to do business in the state of Montana and

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24. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (landmark decision holding that due process requires only that there be minimum contacts for personal jurisdiction to ensure that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice").

25. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017) (citing Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 3 (Mont. 2016)).

26. *BNSF Ry. Co.*, 137 S. Ct. at 1554 (citing *Tyrrell*, 373 P.3d at 3). Other contacts in the record include: BNSF established 40 new facilities in Montana since 2010; invested $470 million in state between 2010 and 2014; carried tens of millions of tons of goal, grain, and petroleum from or through the state annually; and established an economic development office in Billings, Montana in 2013. *Tyrrell*, 373 P.3d at 3 (quoting Monroy v. BNSF Ry. Co., Cause No. DV 13-799 (Aug. 1, 2014) (opinion incorporated in trial court ruling on motion to dismiss in Tyrrell's case)).
With over 2000 employees, the defendant is one of the largest private employers in the state. Walmart (with 4508 employees) was the largest employer in 2016. *See* Evan Come et al., *The Largest Employer in Every State*, 24/7 WALL ST. (Mar. 11, 2016), https://247wallst.com/special-report/2017/03/17/largest-employer-in-every-state/; *accord* Brief of Brotherhood of Maintenance of Way Employees Divison/IBT as Amicus Curiae Supporting Respondents at 12–13 n.5, *BNSF Ry. Co.*, 137 S. Ct. 1549 (No. 16-405) [hereinafter Brotherhood Brief] (citing Come et al., *supra*). BNSF reported operating 2748 miles of rail lines in Montana in 2013. Brotherhood Brief, *supra*, at 11 n.2. BNSF was by far the largest railroad in Montana and "has developed a de facto monopoly over rail shipping in Montana." Brief for Respondents at 6, *BNSF Ry. Co.*, 137 S. Ct. 1549 (No. 16-405) [hereinafter Brief for Respondents].

maintains offices in the state.[27] It conducts direct advertising in Montana, using Montana media,[28] appears frequently in the Montana courts,[29] and plays an active role in state politics through a government relations office that lobbies for its interest in the state legislature.[30] Over the years, BNSF has been sued repeatedly in Montana courts by employees injured in other states. Montana courts long exercised personal jurisdiction without challenge, and state practice prevented dismissal on grounds of forum non conveniens.[31]

In 2011 and 2014, Robert Nelson and the estate of Brent Tyrrell sued BNSF Railway Company in Montana state courts.[32] Each lawsuit stated claims under the Federal Employers Liability Act (FELA), a federal law that makes railroads liable for injuries sustained by their workers in the course of employment.[33] Neither Nelson nor Tyrrell resided or worked in Montana, and none of their injuries occurred in Montana.[34] Their lawyers filed suit in Montana

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27. *Tyrrell*, 373 P.3d at 7. There was discussion at oral argument of the significance of the corporation's being registered to do business in the state. *See* Transcript of Oral Argument at 4, *BNSF Ry. Co.*, 137 S. Ct. 1549 (No. 16-405) [hereinafter Transcript of Oral Argument].

28. *Tyrrell*, 373 P.3d at 8.

29. As of March 11, 2020, a Westlaw search of reported decisions from state and federal courts in Montana in which BNSF is a named party since 2000 yields 196 cases. *See* WESTLAW, http://next.westlaw.com (search in search bar for "advanced: DA(aft 01-01-2000) & TI(BNSF)" and limit results to cases in Montana with "Include related federal" cases selected).

30. Transcript of Oral Argument, *supra* note 27, at 36.

31. Bracy v. Great N. Ry. Co., 343 P.2d 848, 850 (Mont. 1959) (holding trial court did not abuse discretion in refusing to dismiss FELA claim brought by nonresident against out-of-state railroad). *See generally* McCarty, *supra* note 12, 163–65 (discussing cases refusing to dismiss on grounds of forum non conveniens).

32. The plaintiffs served process on BNSF's registered agent in Montana, and the plaintiffs argued that appointing the agent constituted consent to jurisdiction. *See* Brief for Petitioner at 10, *BNSF Ry. Co.*, 137 S. Ct. 1549 (No. 16-405) [hereinafter Brief for Petitioner]; Brief for Respondents, *supra* note 26, at 9. The Court did not reach this issue because it was not the basis of the decision by the state court.

33. Unlike workers compensation statutes, FELA requires fault. Federal Employers Liability Act, 45 U.S.C. § 51 (2012). However, the Act provides a uniform standard, eliminating state law defenses and permitting recovery that might not be available under state tort law. *Id.* Courts had a long history of applying FELA broadly to achieve the remedial purposes attributed to it.

34. Nelson was a resident of North Dakota, and he claimed his knee was injured during the course of his work as a fuel truck driver for BNSF. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017). The record indicates that Nelson was

as a form of forum shopping: they expected to secure litigation advantage in Montana courts.[35]

Both federal and state law seemed to support personal jurisdiction. FELA § 56 provides:

> [1] Under this chapter an action may be brought in a district court of the United States . . . in which the defendant shall be doing business at the time of commencing such action. [2] The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.[36]

Montana state law authorizes personal jurisdiction over all persons "found" in the state.[37]

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disabled as the result of a fall he suffered on the job in Washington state. *See* Brief for Petitioner, *supra* note 32, at 9.

Tyrrell had worked for BNSF in South Dakota, Minnesota, and Iowa. Brief for Respondents, *supra* note 26, at 7. Tyrrell's lawsuit alleged he contracted fatal kidney cancer from exposure to chemicals while working for BNSF. The state court opinion (but not the Supreme Court's) indicates that he died from the cancer. Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 3 (Mont. 2016). For more details, see Brief for Respondents, *supra* note 26, at 7. Tyrrell's claim was brought by his surviving spouse who was an appointed administrator in South Dakota. *BNSF Ry. Co.*, 137 S. Ct. at 1554. She herself was a South Dakota resident. Brief for Respondents, *supra* note 26, at 7. The Supreme Court opinion recognized the lack of connections to Montana: "Neither plaintiff alleged injuries arising from or related to work performed in Montana; indeed, neither Nelson nor Brent Tyrrell appears ever to have worked for BNSF in Montana." *BNSF Ry. Co.*, 137 S. Ct. at 1554.

35. The opinions do not explain why the plaintiffs brought their actions in Montana rather than some other state. Both actions were commenced in the same county, a county where BNSF's registered agent is located. *Tyrrell*, 373 P.3d at 2; Brief for Respondents, *supra* note 26, at 7. The defendant's brief identifies Montana procedures that provide incentives for FELA claimants to litigate in Montana state court. Brief for Petitioner, *supra* note 32, at 10–13. Nevertheless, other plaintiffs were bringing FELA claims in state courts outside Montana. *See*, *e.g.*, Barrett v. Union Pac. R.R. Co., 390 P.3d 1031, 1040 (2017) (holding Oregon lacks general jurisdiction over FELA claims brought against an out-of-state railroad for out-of-state injuries).

36. 45 U.S.C. § 56. Bracketed numbers represent what Justice Ginsburg refers to as the "first relevant sentence" and the "second relevant sentence." *BNSF Ry. Co.*, 137 S. Ct. at 1553.

37. MONT. R. CIV. P. 4(a)(3) (defining person to include nonresident corporations); *id.* at 4(b)(1) ("All persons found within the state of Montana are subject to the [personal] jurisdiction of Montana courts.").

B. State Court Proceedings

Nelson's and Tyrrell's lawsuits were filed in a new era, after the Supreme Court had signaled that it was eager to restrict lower courts' exercise of general jurisdiction.[38] BNSF filed motions to dismiss in both actions for lack of personal jurisdiction. In Nelson's action, the trial court granted the motion; in Tyrrell's, the trial court denied the motion.[39] Consolidating interlocutory appeals, the Montana Supreme Court found that BNSF was subject to general jurisdiction both under a congressional grant of authority and under state law, and it further found that such jurisdiction did not violate due process.[40]

1. Montana's Construction of Federal Statute as Conferring Jurisdiction

The Montana Supreme Court held that FELA authorized general personal jurisdiction based on the language of the statute,[41] on congressional intent,[42] and on case law.[43] The Montana court also found that the scope of BNSF's in-state activity subjected the defendant to general personal jurisdiction under Montana law.[44] The court then considered whether the authority supporting personal jurisdiction was overruled by the Court's recent decision in *Daimler*.[45]

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38. Nelson commenced his action in March 2011, Tyrrell in May 2014. *BNSF Ry. Co.*, 137 S. Ct. at 1554. The Supreme Court had granted the petition for certiorari in *Goodyear* in September 2010 and published the opinion in 2011. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011). The Court granted the writ of certiorari in *Daimler* in April 2013 and published its opinion in January 2014. *See* Daimler AG v. Bauman, 571 U.S. 117, 122 (2014).

39. *BNSF Ry. Co.*, 137 S. Ct. at 1554 (citing *Tyrrell*, 373 P.3d at 2). Applying long familiar law, the trial judge that denied the motion to dismiss considered the scope of the defendant's activity, finding it was sufficiently "substantial, continuous and systematic" to support general jurisdiction under the state long arm statute. *Tyrrell*, 373 P.3d at 3.

40. Accordingly, the court reversed in Nelson's and affirmed in Tyrrell's case. *Tyrrell*, 373 P.3d at 9.

41. *Id.* at 7.

42. *Id.* at 4.

43. *Id.* at 4–5 (citing Pope v. Atl. Coast Line R.R. Co., 345 U.S. 379, 383 (1953); Miles v. Ill. Cent. R.R. Co., 315 U.S. 698, 702 (1942)).

44. *Id.* at 2, 8–9.

45. *Id.* at 5–6.

The Montana court noted older Supreme Court precedent that had expressly approved general jurisdiction over a railroad for claims arising outside the state based solely on its operating lines in the state.[46] The court also sought to limit the impact of *Daimler* by emphasizing its distinct legal context and noting that permitting jurisdiction over railroad employers was consistent with the "Supreme Court's 'liberal construction'" of FELA in favor of providing a remedy for injured workers.[47] The court likewise held that the statue authorization of general personal jurisdiction was constitutional.[48] Justice Shea's opinion acknowledged that *Daimler* restricted general jurisdiction to places where a corporation is "at home."[49] But Justice Shea emphasized *Daimler* involved claims by non-United States residents that arose outside the United States[50] and were asserted against a non-resident corporation whose in-state conduct was established by the acts of a legally distinct corporation that was not acting as its agent.[51] Furthermore, Justice Shea took the *Daimler* opinion's claim at face value that it did not significantly alter existing law:

> Moreover, *Daimler* did not present novel law. Rather, the U.S. Supreme Court emphasized prior holdings that general jurisdiction requires foreign corporations to have affiliations so "continuous and systematic" as to render them "at home" in the forum state. . . . Therefore, *Daimler* did not overrule decades of consistent U.S. Supreme Court precedent

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46. *Id.* at 6–7 (quoting Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284, 286 (1932)).

47. *Id.* at 7 (citing Urie v. Thompson, 337 U.S. 163, 180 (1949)).

48. Conformity with due process was the required second part of the court's analysis, and the court rejected the defendant's argument that general personal jurisdiction violated due process by referring back to its earlier narrow construction of *Daimler*. The court did not apply the *Daimler* standard itself, nor did it conclude that the facts failed to establish general jurisdiction under *Daimler*. *Id.* at 8–9.

49. Daimler AG v. Bauman, 571 U.S. 117, 122 (2014).

50. *Tyrrell*, 373 P.3d at 5 ("The U.S. Supreme Court granted certiorari 'to decide whether, consistent with the Due Process Clause . . . , Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and occurring entirely abroad.'") (quoting *Daimler*, 571 U.S. at 125).
The plaintiff's counsel did not argue that *Daimler* was limited to international litigation, but she emphasized the special social-economic context of railroads and FELA litigation that supported broad jurisdiction. Transcript of Oral Argument, *supra* note 27, at 32–37.

51. *Tyrrell*, 373 P.3d at 6.

> dictating that railroad employees may bring suit under the FELA wherever the railroad is "doing business."[52]

2. Justice McKinnon's Dissent

Justice McKinnon dissented, insisting that *Daimler* foreclosed general jurisdiction based on substantial, continuous, and systematic business.[53] She conceded that BNSF conducted substantial business in Montana, but she followed *Daimler*'s directive not to consider the in-state business in isolation.[54] Comparing BNSF's activity inside and outside the forum state, Justice McKinnon noted that the corporation receives less than 10% of its revenue from Montana, maintains about 6% of its tracks in the state, and employs less than 5% of its work force in Montana, percentages that "though slightly greater, differ little from those the Court found to be insufficient in *Daimler*."[55] She contended that places where a corporation was "at home" were strictly limited to its place of incorporation and principal place of business, rejecting any exception for large corporations like BNSF.[56]

Finally, Justice McKinnon rejected the majority's conclusion that Congress authorized state court personal jurisdiction in FELA

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52. *Id*. (quoting *Daimler*, 571 U.S. at 139).

53. Justice McKinnon wrote:

> [T]his Court entirely rejects the "at home" standard in favor of substantially the same formulation that the Supreme Court rejected. Despite the Unites State Supreme Court's conclusion that permitting general jurisdiction wherever a nonresident defendant is engaging in a substantial, continuous, and systematic course of business would deprive the defendant [of] due process of law, this Court holds that BNSF can be hailed into Montana state courts under the "doing business" standard. . . . This case is quite clearly controlled by the United States Supreme Court's holdings in *Goodyear* and *Daimler* and the "at home" standard set forth therein.

Tyrrell, 373 P.3d at 9 (McKinnon, J., dissenting).

54. *Id*.

55. *Id.* at 11 (citing *Daimler*, 571 U.S. at 123–24). From this Justice McKinnon concluded, "it is clear that BNSF is not at home in Montana." *Id.*

56. *Id.* at 10 (citing *Daimler*, 571 U.S. at 137). While acknowledging that the Court left open the possibility of other places where a corporation might be "at home," she noted that such cases must be "exceptional," and there was "nothing exceptional about BNSF's contacts with Montana that would permit general jurisdiction." *Id.* at 10–11; *see Daimler*, 571 U.S. at 139 n.19.

claims. She read § 56 as authorizing venue, not personal jurisdiction.[57] Even if Congress meant to authorize personal jurisdiction, she insisted such authorization would be invalid because "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it."[58]

C. The Supreme Court: Reading BNSF *as an Easy Case*

The Supreme Court reversed the Montana Supreme Court, with Justice Ginsburg's opinion for the Court repeating many of the reasons provided by Justice McKinnon in dissenting below.

1. Finding No Congressional Authorization of Personal Jurisdiction in FELA

Justice Ginsburg first determined that the Montana court erred in construing § 56 of FELA as a congressional grant of personal jurisdiction.[59] Then she concluded that general jurisdiction was not

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57. *Tyrrell*, 373 P.3d at 13.

58. *Id.* at 13. Justice McKinnon reasoned that general personal jurisdiction would be unconstitutional where a corporation is not at home, and hence Congress could not authorize such jurisdiction. *Id.* at 14. The argument that FELA could not constitutionally authorize general personal jurisdiction over a corporate defendant that was not at home in the forum state was advanced by petitioner and was the chief argument advanced in Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in support of petitioner. *See* Brief of Washington Legal Foundation and Allied Education Foundation as Amici Supporting Petitioner at 6–20, *Tyrrell*, 373 P.3d 1 (No. DA 14–0825) [hereinafter Brief of Washington Legal Foundation]. Justice Kennedy raised the issue at oral argument: "Could Congress pass a statute conferring jurisdiction on—in Montana state courts under the circumstances of this case?" Transcript of Oral Argument, *supra* note 27, at 7.

59. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1553 (2017). No member of the Court disagreed with this conclusion, although the Court's conclusion disregarded a tradition of giving broad remedial effect to FELA and was inconsistent with dictum in prior decisions. *Cf. Tyrrell*, 373 P.3d at 11 ("Unless there is some hidden meaning in the language Congress has employed, the injured [plaintiff] may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy.") (quoting Miles v. Ill. Cent. R.R. Co., 315 U.S. 698, 706–07 (1942) (Jackson, J., concurring)).

The Court's construction of FELA has the result, conceded by BNSF, that Montana residents employed by BNSF in Montana but injured while working temporarily in another state are barred from litigating their FELA claims in their home state courts. *Tyrrell*, 373 P.3d at 7 (majority opinion). BNSF acknowledged at

available because BNSF was neither incorporated in Montana nor maintained its principal place of business in that state.

Her opinion rhetorically reinforced the impression that the legal issues were straightforward. Before considering the case law, she twice asserted that the statute's language did not support the plaintiffs' theory that it granted personal jurisdiction.[60] Evading more nuanced arguments from policy and history, she forced the plaintiffs to ground the grant of personal jurisdiction to the text of § 56.[61] She then dismissed the text as authority because the first relevant sentence employed language that authorized venue, not personal jurisdiction,[62] and the second relevant sentence "speaks to" subject matter jurisdiction, not personal jurisdiction.[63] Although the Court had never previously addressed the issue, she noted the absence of any Supreme Court cases supporting the plaintiffs[64] and found the legislative history inconclusive.[65]

Justice Ginsburg quickly disposed of the assertion that the second relevant sentence—"[t]he jurisdiction of the courts of the

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oral argument that a railroad worker working far from home would be required to litigate either in the place of injury or in the defendant's place of incorporation or principal place of business. Transcript of Oral Argument, *supra* note 27, at 11–12.

60. *BNSF Ry. Co.*, 137 S. Ct. at 1553, 1555 (repeating observation that the first relevant sentence is a venue rule while the second addresses subject matter jurisdiction).

61. *Id.* at 1555 ("[Plaintiffs] contend that § 56's first relevant sentence confers personal jurisdiction on federal courts, and that the section's second relevant sentence extends that grant of jurisdiction to state courts.").
The plaintiffs actually presented a more nuanced argument that the entire history and purpose of the statute presupposed the authority of plaintiffs to bring FELA actions in any state where the defendant employers did business. They further contended that this understanding was accepted by Congress when it amended the statute without altering its language. Transcript of Oral Argument, *supra* note 27, at 19–21.

62. She noted that "Congress generally uses the expression, where suit 'may be brought,' to indicate the federal districts in which venue is proper." *BNSF Ry. Co.*, 137 S. Ct. at 1555 (citing 28 U.S.C.A. § 1391(b) (West 2020)). "In contrast, Congress's 'typical mode' of providing for the exercise of personal jurisdiction has been to authorize service of process." *Id.* (citing Clayton Act, 15 U.S.C.A. § 22 (West 2020)).

63. *Id.*

64. *Id.* ("Nowhere in [*Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941)] or in any other decision did we intimate that § 56 might affect personal jurisdiction.").

65. *See id.* at 1556 ("Legislative history 'throws little light' here." (quoting *Kepner*, 314 U.S. at 50)). She did not consider historical context or the remedial policies behind FELA nor did she consider the prevailing understanding of the statute in state courts or lower federal courts. *See id.*

United States under this chapter shall be concurrent with that of the courts of the several States"—constituted a grant of personal jurisdiction.[66] The Court had previously construed that phrase as a grant of subject matter jurisdiction to federal courts and a clarification of state court jurisdiction.[67] And she read "concurrent jurisdiction" as a term of art that denoted subject matter jurisdiction.[68]

Justice Ginsburg considered four Supreme Court decisions on which the Montana Supreme Court had relied.[69] Though language in the cases seemingly assumed that broad personal jurisdiction was appropriate, Justice Ginsburg rejected their authority because none of them specifically addressed the issue of personal jurisdiction[70] and because some of the cases "were decided before this Court's transformative decision on personal jurisdiction in *International Shoe v. Washington*."[71]

2. Finding General Jurisdiction Unconstitutional Because *BNSF* Is Not at Home in Montana

Justice Ginsburg's short treatment of the constitutional limits of general personal jurisdiction summarizes the doctrinal rules announced in recent decisions and emphasizes the categorical distinction between specific and general jurisdiction.[72] While she

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66. *Id.* (quoting 45 U.S.C.A. § 56 (West 2020)).

67. *Id.* at 1557. Congress amended that statute to provide the clarification after one state had held that its courts lacked authority to hear federal claims under the statute. *Id.*; *see also* Brief for Respondents, *supra* note 26, at 23 (discussing Hoxie v. N.Y.C, New Haven & Hartford R.R. Co., 73 A. 754 (Conn. 1909)).

68. *Id.* ("As Justice McKinnon recognized in her dissent from the Montana Supreme Court's decision in Nelson and Tyrrell's cases, '[t]he phrase "concurrent jurisdiction" is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." (quoting Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 13 (Mont. 2016) (McKinnon, J., dissenting))).

69. *BNSF Ry. Co.*, 137 S. Ct. at 1557 (citing and discussing Pope v. Atl. Coast Line R.R. Co., 345 U.S. 379 (1953); Miles v. Ill. Cent. R.R. Co., 315 U.S. 698 (1942); *Kepner*, 314 U.S. 44 (1941); Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284 (1932)).

70. *Id.* (observing that "[n]one of the decisions . . . resolved a question of personal jurisdiction").

71. *Id.* (citing Daimler AG v. Bauman, 571 U.S. 117, 138–39 n.18 (2014)).

72. *Id.* at 1558. Justice Ginsburg summarized the history:

> In *International Shoe*, this Court explained that a state court may exercise personal jurisdiction over an out-of-state defendant who has "certain minimum contacts with [the State] such that the

lauds *International Shoe* as a "pathmarking decision,"[73] her discussion of *International Shoe*'s analytic scheme eliminates any role for the consideration of "minimum contacts" or "fair play and substantial justice" in the exercise of general jurisdiction:

> *Goodyear* and *Daimler* clarified that "[a]court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliation with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." The "paradigm" forums in which a corporate defendant is "at home," we explained, are the corporation's place of incorporation and its principal place of business. The exercise of general jurisdiction is not limited to these forums; in an "exceptional case," a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render the corporation at home in that State." We suggested that *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), exemplified such a case. In *Perkins*, war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio. Because

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> maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Elaborating on this guide, we have distinguished between specific or case-linked jurisdiction and general or all-purpose jurisdiction. Because neither [of the plaintiffs] alleges any injury from work in or related to Montana, only the propriety of general jurisdiction is at issue here.

Id. (citations omitted).

The Court's opinion avoids a complete summary: it notably omits rules governing specific personal jurisdiction and the rules that apply to individuals. Members of the Court are divided over the approach to specific jurisdiction. *See, e.g.*, J. McIntyre Mach. v. Nicastro, 564 U.S. 873, 880–81 (2011) (plurality opinion) (proposing that personal jurisdiction derives from voluntary submission to juridical power of state). *But see id.* at 901 (Ginsburg, J., dissenting) (noting that "invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful"). *See generally* Cornett and Hoffheimer, *supra* note 11, at 148 n.226 (discussing division of Justices over submission theory in other cases).

73. *See* J. McIntyre Mach. v. Nicastro, 564 U.S. 873, 893 (2011) (Ginsburg, J., dissenting).

> Ohio then became "the center of the corporation's wartime activities," suit was proper there.[74]

She then announces the formal rule that decides the case: the at-home doctrine applies to all defendants (or at least all corporate defendants), and "the constraint does not vary with the type of claim asserted or business enterprise sued."[75]

The Montana courts had not questioned the at-home rule itself; for them, the question was the scope of the new rule, a question that was squarely left open by the Supreme Court because *Daimler*, in announcing the new rule, had emphasized the international context of the dispute and had identified specific features of international practice that were lacking in *BNSF*. Without further discussion of the issue of scope, Justice Ginsburg assumes the formal rule from *Daimler* applies in all contexts and quickly concludes that BNSF is not "at home" in Montana.[76] The defendant, "is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State."[77] Noting that BNSF has over 2000 miles of track and more than 2000 employees in Montana, she did not address other evidence of its role in the state economy but emphasized that "as we observed in *Daimler*, 'the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts.' Rather, the inquiry 'calls for an appraisal of a corporation's activities in their entirety'; '[a] corporation that operates in many places can scarcely be deemed at home in all of them.'"[78] Consequently, general jurisdiction was improper.[79]

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74. *BNSF Ry. Co.*, 137 S. Ct. at 1558 (citations omitted).

75. *Id.* at 1559. Justice Ginsburg explained that the Montana court erred when it distinguished *Daimler* on the ground that the decision did not apply to a FELA claim or railroad defendant. *Id.* Justice Ginsburg's quotations from *Daimler* also made clear that the Montana court erred in supposing *Daimler* was limited to claims arising abroad brought against international defendants. *See* Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 5 (2016) (quoting the issue certified in *Daimler*). The plaintiffs did not defend the reasoning of the Montana Supreme Court and did not argue that *Daimler* did not govern the case. *See* Brief for Respondents, *supra* note 26, at 42–47.

76. *BNSF Ry. Co.*, 137 S. Ct. at 1559.

77. *Id.*

78. *Id.* (citing *Daimler*, 571 U.S. 139 n.20).

79. *Id.*

3. Legal Effect of Clarifying and Extending *Daimler*: Confining Corporate "Home" to Place of Incorporation and Principal Place of Business

The Court's holding in *BNSF* significantly changed existing law. First, it extended *Daimler* to all assertions of general jurisdiction against nonresident corporations.[80] Second, in applying *Daimler* to the facts in *BNSF*, it went far towards eliminating places where a corporation may be sued for all claims outside its place of incorporation and principal place of business.

Daimler had offered no clear guidance as to what other activity might suffice to establish a corporate home. Possible candidates for exceptional cases included: 1) a forum state where nonresident corporations conduct all or most of their business; 2) a forum state where a foreign national corporation conducts most of its U.S. business; 3) a forum state where a corporation has an outsized presence based on uniquely important business presence in the state; and 4) a forum state where a corporation maintains a permanent physical presence through factories, mines, or other non-sales activities.[81] The holding in *BNSF* indicates that neither massive in-state activity nor permanent physical presence can provide grounds for general personal jurisdiction.[82]

D. A Lone Dissenter: Justice Sotomayor Urges Restraint in Applying the At-Home Test

Justice Sotomayor agreed that FELA does not authorize state courts to exercise personal jurisdiction over railroads and further agreed that the Montana Supreme Court erred in its analysis of the

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80. Despite the unusual facts of *Daimler*, there was no reason to limit the reach of that opinion to international litigation involving international defendant corporations. *See generally* Cornett and Hoffheimer, *supra* note 11 (arguing that *Daimler* cannot be fairly read as limited to its unusual facts). At the same time, the Court's rationale for the comparative approach to the "at home" doctrine suggested the possibility that contact-based jurisdiction should survive where the level of corporate activity made its activity comparable to a domestic corporation's. *See* Cornett and Hoffheimer, *supra* note 11, at 155 ("[F]inding contact-based general jurisdiction based on operating factories, mines, or farms does not present the danger that the corporation will be subject to general jurisdiction in many other states.").

81. Cornett and Hoffheimer, *supra* note 11, at 151–55.

82. *BNSF Ry. Co.*, 137 S. Ct. at 1559.

due process issue. But, she dissented from the Court's determination that general jurisdiction was lacking.[83] She voiced continuing disagreement with *Daimler*'s "at home" requirement for general jurisdiction[84] and regarded the issue of whether BNSF is "at home" as a fact question requiring an investigation of circumstances that should have been left to the state courts on remand.[85]

Her dissenting opinion critically views the majority decision as a further stage in formalizing the analysis and restricting the relationships that support personal jurisdiction: "What was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation's principal place of business or place of incorporation."[86] For her this effectively eliminates any meaningful possibility of a corporation establishing a "home" for purposes of general jurisdiction outside its place of incorporation and principal place of business. Though Justice Ginsburg continued to recognize the theoretical possibility of such a third home because of the holding in *Perkins v. Benguet Consolidated Mining Co.*,[87] Justice Sotomayor protests that "[the Court's] opinion here could be understood to limit that exception to the exact facts of [*Perkins*]. That reading is so narrow as to read the exception out of existence entirely; certainly a defendant with significant contacts with more than one State falls outside its ambit."[88] Despite previously reserving the possibility of such a contacts-based exceptions in *Daimler*, "the majority here has rejected that possibility out of hand."[89]

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83. *See id.* at 1560 (Sotomayor, J., concurring in part and dissenting in part).

84. *Id.*

85. *Id.*

86. *Id.* In this context, she notes *Daimler*'s comparative consideration of in-state and out-of-state contacts "proves all but dispositive. The majority makes much of the fact that BNSF's contacts in Montana are only a percentage of its contacts with other jurisdictions." *Id.* at 1561. To the approach of the majority, she contrasts the approach of the Court in *International Shoe*, where the court focused on the defendant's activity in the forum state: "the relative percentage of contacts is irrelevant." *Id.*

87. 342 U.S. 437, 447–49 (1952) (holding exercise of jurisdiction by Ohio courts over non-Ohio business entity with mining activity in Philippines was not prohibited by the Due Process Clause when mining activity was discontinued during Japanese occupation and business entity's principal officer had returned to Ohio, established an office there, and conducted some business there).

88. *BNSF Ry. Co.*, 137 S. Ct. at 1561–62.

89. *Id.* at 1562.

Justice Sotomayor also dissented from the Court's decision to apply the *Daimler* standard itself and from the Court's independent determination that general jurisdiction was constitutionally prohibited; she contended the application of the standard should have been left to the lower courts: "with its ruling today, the Court unnecessarily sends a signal to the lower courts that the exceptional-circumstance inquiry is all form, no substance."[90]

Justice Sotomayor's dissenting opinion identifies adverse practical consequences of the majority's new approach, explaining that the majority's reasoning will preclude contacts-based general jurisdiction over most corporations.[91] As Justice Sotomayor had predicted in a prior opinion, the largest corporations will be subject to general jurisdiction only in their places of incorporation and principal places of business.[92] For a growing number, this may mean they are not subject to general jurisdiction anywhere in the U.S.:

> The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.[93]

Finally, only in Justice Sotomayor's dissenting opinion does any member of the Court address the impact of the decision on injured railroad workers. She writes: "It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt

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90. *Id.*

91. *Id.* at 1560.

92. Daimler AG v. Bauman, 571 U.S. 117, 158 (2014) (Sotomayor, J., concurring) (noting that "the proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates").

93. *BNSF Ry. Co.*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part).

of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connection."[94]

II. NEW UNCERTAINTIES AFTER *BNSF*

Two large areas of uncertainty are generated by the Court's decision in *BNSF*. The first area concerns the indeterminate scope of the decision resulting from the formal reasons offered by the Court and by the Court's decision to reverse rather than remand. The second area concerns a specific question the opinion carefully avoids: whether general jurisdiction based on a state statute that imposes jurisdiction as a condition of doing business in the state is constitutionally valid.

A. Uncertain Effect of the Decision

1. The Battle of the Footnotes: The Contested Meaning of *International Shoe* and the Vitality of Continuous Historical Practice

Justice Ginsburg responded to Justice Sotomayor's dissent in a long footnote that chides Justice Sotomayor for resurrecting an old controversy[95]—and accuses her of misunderstanding the posture of the case on appeal.[96] Ironically, the very length of the footnote textually undermines the simple narrative presented by Justice Ginsburg's opinion for the Court.[97] If the dissent's objections are so sophomoric, why do they require such a detailed response?

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94. *Id.* at 1561.

95. *Id.* at 1559 n.4 (majority opinion) ("Justice Sotomayor . . . renews a debate comprehensively aired in [*Daimler*].").

96. *Id.* ("This Court's opinion is not limited to § 56 because the Montana Supreme Court went on to address and decide the question [of personal jurisdiction].").

Justice Ginsburg here misunderstands the specific concern raised of the dissent. Justice Sotomayor does not object to the Court addressing the constitutionality of personal jurisdiction (though she dissents from the new standard the Court has evolved). *See id.* at 1560 (Sotomayor, J., concurring in part and dissenting in part). Because the majority opinion has now clarified that the case is governed by the *Daimler* standard—a legal conclusion conceded by the plaintiffs (though apparently not by all amicus briefs)—she regards the proper procedure to be remanding the case to the state court with directions to apply the correct standard. *Id.*

97. Justice Ginsburg's note chastising Justice Sotomayor contains more words than the paragraph of the majority opinion that evaluates whether *BNSF* satisfies *Daimler*'s requirements for general jurisdiction in Montana. *Id.* at 1562 n.4 (majority opinion).

The focus of Justice Ginsburg's attention is Justice Sotomayor's suggestion that the Court has radically departed from its approach in *International Shoe*, the decision that famously required (for actions in personam where a defendant was not present in the state) only minimum contacts so that the exercise of jurisdiction did not offend traditional notions of fair play and substantial justice.[98] While *International Shoe* referred to the relationship of the lawsuit to the forum contacts as one factor, nothing in the opinion suggested that all cases must be divided into specific and general personal jurisdiction. Rather, Chief Justice Stone expressly observed, generalizing from existing practice, that what would later be called general or all-purpose jurisdiction is available when "continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[99]

Justice Sotomayor pointed out in her dissent that *International Shoe* neither contained the "at home" requirement for corporations nor suggested any need for a comparative evaluation of in-state and out-of-state activity to determine where a corporation was sufficiently active to support personal jurisdiction without offending due process.[100] In response, Justice Ginsburg's footnote rebukes Justice Sotomayor for failing to understand that *International Shoe* was a case of specific personal jurisdiction, and for that reason, the Court did not need to compare in-state and out-of-state contacts.[101]

The mystery is not who is correct as a matter of legal history.[102] The mystery is why Justice Ginsburg wrote so forcefully to

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98. Justice Ginsburg herself quoted the relevant part of the opinion. *Id.* at 1558.

99. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

100. *See BNSF Ry. Co.*, 137 S. Ct. at 1561 (Sotomayor, J., concurring in part and dissenting in part) ("*International Shoe*, which the majority agrees is the springboard for our modern personal jurisdiction jurisprudence, applied no comparative contacts test. . . . the Court did not engage in a comparison between International Shoe's contacts within the State of Washington and the other States in which it operated.").

101. *Id.* at 1559 n.4 (majority opinion) ("This Court, therefore, had no occasion in *International Shoe* to [compare in-state and out-of-state activity].").

102. Justice Sotomayor correctly pointed out that *International Shoe* was never limited to specific jurisdiction cases:

> The majority's view of *International Shoe* is overly restrictive. The terms "specific jurisdiction" and "general jurisdiction" are nowhere to be found in that opinion. And . . . there is no material difference between the "continuous and systematic" terminology . . . used for . . . specific jurisdiction and the

marginalize the perspective of a dissenting Justice who highlighted the lack of express authority of the Court's novel approach. In doing so, Justice Ginsburg's footnote raises further mysteries related to the majority's own understanding of *International Shoe*. Does the Court really conceive of its current set of classifications and rules as logically embedded in Chief Justice Stone's language in 1945? Or does the majority view the language of the venerable opinion as an occasion to develop new rules that serve needs unforeseen in 1945?

One lingering mystery is why Justice Ginsburg, a former professor of civil procedure who professes admiration for *International Shoe*, fails to mention the social and economic forces that led the Court to relax limits on personal jurisdiction law in 1945. Still more mysterious is Justice Ginsburg's continuing failure to address what corresponding social changes since 1945 require a reversal of a century-long trend to relax constitutional limits on personal jurisdiction.

2. The Disregard of Cases on Point and the Uncertain Status of Not-Quite-Overruled Precedents

Justice Ginsburg's reference to the "pathmarking" decision of *International Shoe* and her footnote responding to the dissent indicate her conviction that the legitimacy of the Court's general personal jurisdiction decisions requires presenting them as evolving from *International Shoe*. But her opinion signals a shifting attitude towards that decision and its place in history. While Chief Justice Stone's opinion in *International Shoe* proposed a new way of thinking about jurisdiction; it never purported to overrule prior cases supporting jurisdiction. Indeed, the outcome in *International Shoe* could easily have been reached by utilizing the fictions of constructive presence and consent that the Chief Justice rejected. Early commentary assumed for good reason that conventional forms of doing business satisfied minimum contacts.[103]

> "continuous" and "substantial" terminology [the opinion] used for what we now call general jurisdiction.

Id. at 1562 n.2 (Sotomayor, J., concurring in part and dissenting in part) (citing Daimler AG v. Bauman, 571 U.S. 117, 149 n.6 (2014) (Sotomayor, J., concurring)).

103. *E.g.*, Note, *Extending In Personam Jurisdiction by Enforcing State "Blue Sky" Laws Against Non Residents*, 59 YALE L.J. 360, 366 n.25 (1950) (reading *International Shoe* not as a radical departure from prior cases but merely as a rejection of the fiction of corporate presence); Recent Case, *Foreign Corporations—Jurisdiction—Corporation Consenting to Service in Actions Arising from Business Transacted in State Held Subject to Service Because of Co-Conspirators' Prior Acts*

In contrast, Justice Ginsburg now sees the decision as marking a radical break in practice, and her vision of legal history has practical significance. Thus, she cautions against relying on pre-*International Shoe* cases—not just the ones that rejected jurisdiction but also the ones that permitted jurisdiction.[104] She specifically questions the continued viability of holdings that preceded her own opinions announcing the restriction of general jurisdiction to places where a corporation is "at home."[105]

3. The Disregard of Longstanding Practices and the Uncertain Relevance of Historical Continuity

Though Justice Ginsburg rightly asserts that no decision by the Court ever held that FELA conferred personal jurisdiction on state courts, she never addresses the fact that it was common practice for state courts to exercise personal jurisdiction over defendants in

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Within State, 60 HARV. L. REV. 462, 463 (1947) (discussing transacting business as satisfying *International Shoe*'s minimum contacts test).

104. *See BNSF Ry. Co.*, 137 S. Ct. at 1557–58.

105. *See id.* at 1558; *see also* Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898) (upholding general jurisdiction against a foreign corporation in an U.S. court for assault by a corporation employee on the plaintiff in Derry, Ireland). Cases long held general jurisdiction was available over corporations in states where they were authorized to do business. *See* R.R. Co. v. Harris, 79 U.S. 65 (1870) (upholding personal jurisdiction over a Maryland corporation sued in D.C. court for injury suffered in a crash in Virginia while en route to Ohio). The opinion did not justify the result in the fact that the ticket was purchased in D.C., which might establish a basis for case-linked or specific jurisdiction. *See id.* at 68. On the contrary, Justice Swayne grounded jurisdiction in the fact that the corporation submitted to jurisdiction as a condition of being authorized by the state to construct its railroad there. *Id.* at 76, 86. And Justice Swayne rejected as a "startling proposition" the railroad's attempt to require litigation against the corporation in a foreign state. *Id.* at 83.

In applying the new at-home test, Justice Ginsburg discounted the relevance of older cases on point. *BNSF Ry. Co.*, 137 S. Ct. at 1557–58 (citing Daimler AG v. Bauman, 571 U.S. 117, 138 n.18 (2014)) (cautioning against relying on soundness of pre-*International Shoe* case law in the area of personal jurisdiction). One case, *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), postdated *International Shoe*, but she gives it scant attention. *See BNSF Ry. Co.*, 137 S. Ct. at 1557. Likewise, she has consistently discounted the relevance of comparing the level of corporate activity to the level of activity that supported general jurisdiction in *Perkins*, characterizing the facts in *Perkins* as so extreme due to wartime circumstances that the forum had become the defendant's de facto principal place of business. *See BNSF Ry. Co.*, 137 S. Ct. at 1558 (citing Perkinds v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).

FELA cases either by construing FELA as a grant of personal jurisdiction or by applying state statutes.[106] Personal jurisdiction in such cases was so well established that lawyers did not think of challenging it, and the Supreme Court repeatedly approved of FELA litigation in remote states in a variety of contexts.[107] It is true that the railroads did not challenge personal jurisdiction in any of these cases.[108] Instead the railroads raised a variety of less fundamental defenses—venue or abuse of equitable discretion[109]—for the reason that is obvious in hindsight: no one imagined that personal jurisdiction could be lacking where a railroad maintained a permanent physical presence, owned rail lines seized through eminent domain, and employed many workers.

Moreover, general jurisdiction was not just supported by theories that the railroads were present and doing business. Actions were

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106. *See id.* This paradox was addressed by Justice Kistler in a roughly contemporary decision by the Oregon Supreme Court that anticipated the holding and much of the reasoning in *BNSF*. *See* Barrett v. Union Pac. R.R. Co., 390 P.3d 1031, 1037–39 (Or. 2017). Justice Kistler gave careful attention to why the Supreme Court's leading decisions, *Kepner* and *Miles*, did not address personal jurisdiction. *Id.* (citing Miles v. Il. Cent. R.R. Co., 315 U.S. 698 (1942); Balt. & Ohio R.R. Co. v. Kepner, 314 U.S. 44 (1941)). He noted that the Supreme Court in a separate line of decisions had repeatedly upheld jurisdiction based on a corporation doing business in state. *Id.* at 1039 (citing Davis v. Farmers Co-Operative Co., 262 U.S. 312, 316 (1923) (upholding personal jurisdiction over railroad company based on railroad doing business in the state)). Justice Kistler concluded, "[i]n light of [these cases], it should come as no surprise that the defendant railroads in *Kepner* and *Miles* did not question whether the forum had personal jurisdiction over them." *Id.* "The most that plaintiff can extract for *Kepner* and *Miles* is that the parties in those cases implicitly assumed that the forum states had jurisdiction because the railroads were 'doing business' there." *Id.* at 1040.

107. *See Pope*, 345 U.S. at 380–81, 387 (upholding right of Georgia railroad employee injured in Georgia to bring FELA action in Alabama); Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 6 (Mont. 2016) (quoting lower court's reference to liberal construction of FELA's venue provision).

108. Lower courts occasionally referred to general personal jurisdiction, though it was rarely raised directly. A Montana court, for example, referred to general jurisdiction in *Labella v. Burlington Northern, Inc.* when reversing a trial court decision to dismiss a FELA claim on grounds of forum non conveniens. 595 P.2d 1184, 1186–87 (Mont. 1979). As part of its analysis, the court observed, "[t]he District Courts of Montana clearly have jurisdiction." *Id.* at 1186. The reference was unmistakably to personal jurisdiction inasmuch as subject matter jurisdiction was never in question and would not be relevant for determining forum non conveniens. In the facts before the court, the defendant corporation was incorporated in Minnesota, the plaintiff resided in Washington state, and the plaintiff's claim arose in Spokane, Washington. *Id.* at 1185.

109. *See, e.g.*, *Pope*, 345 U.S. at 383.

routinely commenced by legal attachment that established in rem jurisdiction, a valid form of jurisdiction on which the Court imposed no further due process restrictions before 1977.[110]

It is a mystery why the Court attributes no significance to longstanding practices. Justice Ginsburg approved of dictum that federal law must expressly authorize federal courts to exercise personal jurisdiction[111] and further signaled that federal statutes

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110. In *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), the Court held that all forms of personal jurisdiction must satisfy the standards of *International Shoe*.
Justice Walters made the important point that FELA jurisdiction would not have been problematic in the age when actions could be commenced by proceedings in rem. *Barrett*, 390 P.3d at 1041 (Walters, J., dissenting).
Justice Nelson described the commencement of an action against a railroad in 1860:

> The *suit was commenced in the usual way*, by process of attachment and summons. Freeman, the [U.S.] marshal, and plaintiff in error, to whom the processes were delivered[,] attached a number of railroad cars, which according to the practice of the [federal] court, were seized and held as a security for the satisfaction of a demand suit in case a judgment was recovered.

Freeman v. Howe, 65 U.S. 450, 453 (1860) (emphasis added). Jurisdiction by attachment was not in question. *See id.* The case found itself before the Court because the U.S. marshal and state sheriff were seizing the same property in efforts to establish jurisdiction in federal and state courts. *Id.* at 454; *see also* Zittman v. McGrath, 341 U.S. 446 (1951) (expressing the view that state quasi in rem jurisdiction was deeply rooted in history and normally supported valid personal jurisdiction, but finding state law conflicted with federal law governing rights of enemy aliens).

111. *See BNSF Ry. Co.*, 137 S. Ct. at 1555–56; Omni Capital Int'l, Ltd. v. Rudolf Wolff, & Co., 484 U.S. 97, 98 (1987) (holding absent federal statute that federal court lacked authority to subject foreign national defendant to personal jurisdiction beyond scope of federal rule which incorporated state law (citing FED. R. CIV. P. 4)). The Solicitor General, appearing as amicus curiae in support of BNSF, placed great weight on *Omni* in arguing that FELA did not authorize personal jurisdiction. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) [hereinafter United States Brief]; *see also* Transcript of Oral Argument, *supra* note 27, at 12–13. The Court agreed. *BNSF Ry. Co.*, 137 S. Ct. at 1556 (citing *Omni Capital Int'l Ltd.*, 484 U.S. at 104) ("[A] basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.").
Some of the law attributed to this opinion is hyperbole. For example, proper service is not required for personal jurisdiction. A defendant who is not properly served but who appears and does not properly raise the defense of insufficient service or lack of personal jurisdiction becomes subject to personal jurisdiction. *See* FED. R. CIV. P. 12(h). While the Court might rationalize this result by reference to consent, the practice did not derive from constructive consent but rather from the prior prevailing practice under which a defendant who enters a general appearance becomes subject to the jurisdiction of the court by virtue of being legally present in court. The former

should be read narrowly to avoid construing them as authorizing personal jurisdiction. But in doing so she never responded to the plaintiffs' argument that such a construction would "render . . . illusory" the litigation advantages that Congress plainly thought it was giving to plaintiffs under FELA.[112]

4. The Uncertain Role of the Supreme Court in Policing Jurisdiction and the Question of the Mandate Reversing Rather than Remanding with Instructions

After finding that BNSF was governed by the *Daimler* standard, Justice Ginsburg proceeded to apply the standard to the facts and to conclude that the railway was not subject to general jurisdiction in Montana.[113] Justice Ginsburg's opinion never responded to the objection raised by Justice Sotomayor—that the application of the standard to the facts should be left to lower courts.[114] Accordingly, it remains uncertain why the Court applied the *Daimler* standard itself.

One possible explanation is that Justice Ginsburg saw the case as providing an opportunity to model how lower court judges should evaluate jurisdictional facts to ascertain where a corporation is "at home."[115] A second possible explanation is that the Court meant to

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Federal Rules of Equity and Federal Rules of Civil Procedure extended to a defendant the privilege of challenging service of process and personal jurisdiction without designating the appearance as a special appearance. *See* FED. R. CIV. P. 12(b). But the older theory supporting personal jurisdiction was based on de facto power, not consent. This older approach is retained in criminal cases where a defendant's presence in court establishes personal jurisdiction even if the presence resulted from unlawful abduction from another jurisdiction. *E.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 659–62 (1992).

112. Brief for Respondents, *supra* note 26, at 11. If Justice Ginsburg is correct, then legislative history may be ambiguous regarding the intent of Congress for its language to apply to personal jurisdiction as well as venue. But she identified no ambiguity in the broad remedial purposes that courts had consistently attributed to FELA.

113. *BNSF Ry. Co.*, 137 S. Ct. at 1559 (concluding that "in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana"). The Court reversed for "further proceedings non inconsistent with this opinion." *Id.* at 1560. Barring a finding of jurisdiction based on consent, the only further proceeding consistent with the decision must be dismissal.

114. *See id.* at 1562 (Sotomayor, J., concurring).

115. If so, her opinion signals that such a determination can be made very quickly indeed; the only facts she refers to are the miles of track in Montana, the numbers of employees in Montana, and the percentages of mileage and employees

signal more generally that a corporation's home is a question of law that requires little or no factfinding.[116] Rigid application of the formal rules may be necessary to allow potential defendants to structure their conduct with advance understanding of where they will be liable to suit.[117] A third possibility is that reversal was required as an exercise of supervisory jurisdiction to signal the Court's growing impatience with lower courts that were deliberately evading the Court's new rules on personal jurisdiction.[118]

In treating the determination of a corporation's home as a mechanical process governed by formal rules suitable for appellate decision-making, Justice Ginsburg appears to give great weight to

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compared to the total national mileage and employees. *Id.* at 1554, 1559 (Ginsburg, J., majority). The opinion earlier referred to the total revenue generated in Montana and percentage of national facilities sited in Montana, *id.* at 1554, but did not refer to those contacts again in determining the corporation's home, *id.* at 1559.

116. Eliminating lower court factfinding promotes the position advocated by the U.S. Chamber of Commerce that the benefit of the predictability of the Court's "at-home" test is eroded by any return to the old "substantial, continuous, and systematic" business test either as an alternative or exception to the places of incorporation and principal place of business. Brief for the Chamber of Commerce of the United States et al. as Amici Curiae Supporting Petitioner at 20, *BNSF Ry. Co.*, 137 S. Ct. 1549 (No. 16-405) [hereinafter Brief for Chamber of Commerce]. Predictability is a weak argument for the reasons identified by Justice Kagan during argument: "[P]redictability just honestly doesn't seem like what's at issue here given that . . . it's perfectly predictable to have litigation in any of the 50 States." Transcript of Oral Argument at 14, Bristol-Myer Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (No. 16-466).

117. Allowing courts to consider a third home would defeat the simplicity and predictability of the "at home" test by requiring a fact-intensive jurisdictional analysis that "subjects nearly every company that does some business in Montana to the risk that it could be haled into a Montana court." Brief for Chamber of Commerce, *supra* note 116, at 6; *see also id.* at 23 ("The Montana Supreme Court's decision also needlessly reintroduces complex factual inquiries into what should be clean-cut jurisdictional analyses. When the Court explained in *Daimler* that a corporation is typically at home only where it is incorporated or has its principal place of business, it noted that these 'affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.'" (quoting Daimler AG v. Bauman, 571 U.S. 117, 137 (2014))); Brief of Washington Legal Foundation, *supra* note 58, at 21–22 (making a similar argument about need for predictability).

118. The U.S. Chamber of Commerce repeatedly argued that reversal was necessary to curb rogue courts that were deliberately evading the Court's jurisdictional holdings. Brief for Chamber of Commerce, *supra* note 116, at 24–25. After discussing a variety of recent state court decisions, the Chamber concluded, "These recent cases underscore the need for the Court in *this* case to emphatically reaffirm its 'authoritative interpretation' of the Due Process Clause . . . . [W]hen, as here, a state court has ignored federal law, it is imperative that the Court make clear that its decisions must be followed." *Id.* at 30–31.

the values of certainty and predictability; yet, by denying that the Court is changing the law, and thus avoiding the need to explain the change, she fails to explain what policies are served by uniformity and predictability and why such policies are decisive for fashioning rules for corporations but not for individuals.[119]

B. The Uncertain Future of Jurisdiction Under Registration Statutes

All states have corporate registration statutes that require out-of-state corporations to register and designate agents who are authorized to receive legal service.[120] *BNSF* did not reach the issue of whether service on an agent appointed under corporate registration statutes is constitutionally valid.[121] The Justices have expressed interest in the question,[122] and lower courts[123] and commentators are divided.[124]

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119. Defendant corporations argue that certainty and predictability are important for a stable business environment. *See* Brief for National Ass'n of Manufacturers as Amicus Curiae Supporting Petitioner at 15–16, *BNSF Ry. Co.*, 137 S. Ct. 1549 (No. 16-405); Brief for Chamber of Commerce, *supra* note 116, at 6, 20. The government also argued that unduly expansive and unpredictable jurisdiction "pose risks for foreign and interstate commerce" and may deter foreign corporations from investing or doing business in a state. Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Bristol-Myer Squibb Co.*, 137 S. Ct. 1773 (No. 16-466).

120. *See* Kevin D. Benish, Note, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1647 (2015) (appendix) (compiling state statutes).

121. *See supra* note 32.

122. Justices Kagan and Ginsburg have questioned counsel about the propriety of jurisdiction under a registration statute if the issue had been properly presented, and counsel informed the Court about the split of authority among lower courts. Transcript of Oral Argument at 4–6, 15–18, Goodyear Dunlop Tires Operations S.A. v. Brown, 131 U.S. 186 (2011) (No. 10-76).

123. *See generally* Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 507–31 (2016) (discussing cases ruling one way or the other on the issue of registration conferring jurisdiction); Charles W. ("Rocky") Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436–41 (2012) (same).

124. *See generally* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1347 nn. 16–18 (2015) (citing authorities concluding that service on appointed agent under registration statute does not comport with due process, arguing registration cannot be regarded as consent and is unconstitutional because it eliminates the need for minimum contacts, results in exorbitant jurisdiction, and promotes forum shopping). Most commentators and "[a] very small minority of courts" agree that appointment of an agent does not establish jurisdiction based on corporate "presence." *Id.* at 1371–72, 1374. The remaining justification, consent, is less controversial. *Id.* at 1377–79;

The validity of registration-jurisdiction is supported by the theory of consent-jurisdiction that the Court has approved in other contexts to uphold all-purpose jurisdiction.[125] Moreover, an opinion by Justice Holmes held that general jurisdiction was valid when an appointed agent was served in the forum state,[126] and the idea of registration-service has been approved in cases reaching back to the decision that first imposed due process limits on states' exercise of personal jurisdiction.[127]

Nevertheless, commentators have questioned whether registration statutes are tantamount to placing unconstitutional conditions on doing business in a state.[128] And it is an open question whether the Roberts Court would find either consent or tradition a sufficient basis for upholding a form of jurisdiction that would facilitate the revival of abusive or exorbitant general jurisdiction that the Court worked to eliminate by decisions restricting general jurisdiction to places where corporations are at home.

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see also Benish, *supra* note 120, at 1612, 1639, 1642 (arguing general jurisdiction under registration statutes after *Daimler* constitutes a form of impermissible forfeiture of constitutional rights); Craig Sanders, Note, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 NW. U. L. REV. 1323, 1345 (2017) (concluding that the "proposition that mandatory registration equals consent, which in turn equals general jurisdiction . . . cannot survive a dupe process analysis after *Daimler*"). *But see* Harrison, *supra* note 123, at 540–41 (presenting a nuanced approach contending that sufficiently explicit consent should provide basis for general jurisdiction in some situations and considering the need to avoid overly restricting access to courts and paying attention to values of tradition and certainty); Chris Carey, Comment, *Explicit Consent-By-Registration: Plaintiffs' New Hope After the "At Home" Trilogy*, 67 U. KAN. L. REV. 195, 197 (2018) (proposing that the Court should defy expectations and uphold personal jurisdiction asserted under express-consent statutes); Nicholas D'Angelo, Note, *Emerging From* Daimler*'s Shadow: Registration Statutes as A Means to General Jurisdiction Over Foreign Corporations*, 91 ST. JOHN'S L. REV. 211, 213 (2017) (arguing for increased use of general jurisdiction under registration statutes).

125. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (specifically enforcing a forum-selection clause in a fine-print form contract that required plaintiffs who resided on the West Coast and were injured in Mexico to litigate in Florida).

126. Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917) (upholding general jurisdiction based on service on registered agent).

127. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), Justice Field acknowledged the validity of personal jurisdiction resulting from service on agents appointed by businesses and further approved of constructive appointments in certain contexts.

128. *See* Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transactional Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 662–65 (2015) (discussing the argument that registration statutes may violate the dormant commerce clause as imposing an unconstitutional condition on engaging in business in state).

III. SCHOLARLY REACTIONS

Within two years of the release of the Court's opinion in *BNSF*, references to the decision appeared in dozens of law review articles.[129] Most authors discussed the case with other recent decisions and characterized the decisions as signaling an abrupt change in the law of personal jurisdiction[130] and reducing potential

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129. A search on June 3, 2019 of Westlaw citing references database linked to its report of *BNSF Ry. Co. v. Tyrrell* yielded 251 secondary sources, 68 catalogued under law reviews and legal periodicals. A separate Westlaw search of "BNSF /3 Tyrrell before May 31, 2019" found 105 secondary sources, 24 catalogued under law reviews and legal periodicals. (A separate search using misspelling Tyrell found a few additional citing references). Merging the lists and excluding trade journals like *ABA Journal*, *Colorado Lawyer*, *Trial* left citations in 26 legal academic journals.

Defense-oriented journals and sites predictably celebrated the *BNSF* decision. *E.g.*, Brett A. Tarver & Anthony J. Martucci, *Farewell to Extreme Litigation Tourism: A Summer of Personal Jurisdiction Narrowing by the Supreme Court*, DRI (Oct. 2017). Curiously, a plaintiff-oriented journal, after a preview that lamented "a troubling decades-long trend towards limiting access to civil justice," *Pound Forum on Jurisdiction Issues*, 53 TRIAL 61 (Apr. 2017), described the decision itself in narrow terms as making it harder for railroad workers to find a forum. Jeffrey White, *Switching Tracks on Jurisdiction*, 54 TRIAL 56 (Feb. 2018).

130. *E.g.*, Richard J. Mason, *Is the Concept of Nationwide Service of Process in Jeopardy?*, 36 AM. BANKR. INST. J. 18, 75 (2018) ("[T]he Supreme Court appears to be steering sharply away from the 'minimum contacts' concept recognized in *International Shoe*."); Michael Paisner, *What Do the New Rules of Personal Jurisdiction Mean for In-House Counsel?*, 35 ACC DOCKET 58, 58 (2017) (referring approvingly to Court's recent jurisdictional "revolution"); Cassandra Burke Robinson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 781–82 (2017) ("*Daimler* utterly upended the structure of personal jurisdiction. [Rejecting territorial presence based on contacts] was a major change. It required re-writing every first-year Civil Procedure casebook . . . ."); *Id.* at 803 (the Roberts Court "significantly reshaped the contours of personal jurisdiction"); David W. Robertson et al., *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 42 TUL. MAR. L.J. 373, 380, 384 (2018) (observing that Court's "sea change" in personal jurisdiction "continues unabated" in *BNSF* and characterizing *International Shoe*'s minimum contacts doctrine as "dead"); Jeffrey W. Stempel, *Judicial Peremptory Challenges as Access Enhancers*, 86 FORDHAM L. REV. 2263, 2275 n.71 (2018) (noting "the required minimum [for minimum contacts] has been ratcheted up significantly in recent years") (citing BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1773 (2017)); *see also* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1412, 1448–50 (2018) (arguing that the Court's failure to find general jurisdiction based on substantial physical presence constituted a "major shift" and proposing a rational-basis criterion for specific personal jurisdiction, implicitly justifying the restriction of general jurisdiction). *But see* Richard D. Freer, *Personal Jurisdiction: The Walls Blocking an Appeal to Rationality*, 72 VAND. L. REV. EN

plaintiffs' access to courts.[131] A small minority approved of the Court's reasoning.

A. BNSF *Boosters*

Professors Gerline Berger-Walliser and Catherine Walsh regarded *BNSF* as the logical application of the formal rules announced in preceding cases, and they welcomed the decision for clarifying rules and bringing greater certainty to the law of personal jurisdiction.[132] Law student Molenda L. McCarty published a cogent defense of *BNSF*, opening with a quotation that "we should move away from the view that shopping for juries and laws are 'rights.'"[133] She focused on Montana's unique rejection of forum non conveniens in FELA cases, which gave plaintiffs an unreviewable power to select Montana as a forum,[134] leading to a flow of litigation that

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BANC 99, 111 (2018) (questioning whether the Court would embrace Steinman's proposed version of reasonableness-fairness criteria).

131. *See* Cynthia L. Fountaine, *"Don't Come Around Here No More": Narrowing Personal Jurisdiction Over Non-Resident Corporations in Illinois*, 42 S. ILL. U. L.J. 593, 637 (2018) ("The new personal jurisdiction framework poses significant access to justice hurdles for plaintiffs and makes it more difficult to achieve the benefits of aggregation and consolidation of similar claims against the same defendants."); Jacobs, *supra* note 18, at 1622 (observing that plaintiffs would have been better off in *BNSF* and other recent decisions if they had been filed a century earlier). Fountaine illustrates the plaintiff's dilemma with an Illinois action against a Chinese corporation where, under recent decisions, the plaintiff injured in Illinois was unable to establish general jurisdiction over the foreign corporation and was unable to satisfy the requirements for specific jurisdiction because marketing was not targeted to the state. Fountaine, *supra*, at 638 (citing and discussing Young v. Ford Motor Co., 90 N.E.3d 647 (Ill. App. Ct. 2017)).

132. Gerline Berger-Walliser, a business law professor trained in the civil law, described *BNSF* as "squarely appl[ying] its precedent set forth in *Goodyear*, *McIntyre*, *Walden*, and *Daimler*." Gerline Berger-Walliser, *Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction Over Foreign Corporate Defendants in US Courts*, 51 VAND. J. TRANSNAT'L L. 1243, 1273 (2018); Catherine Walsh, *General Jurisdiction Over Corporate Defendants Under the CJPTA: Consistent with International Standards?*, 55 OSGOODE HALL L.J. 163, 194–95 (2018) (seeing *BNSF* as a formulaic application of the Court's holding in *Daimler* that brings U.S. jurisdictional limits closer to those that prevail in Europe).

133. McCarty, *supra* note 12, at 145 n.1 (quoting Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 305–06 (1996)).

134. McCarty, *supra* note 12, at 164–65 (discussing Labella v. Burlington Northern, Inc., 595 P.2d 1184, 1185, 1187 (Mont. 1979) (citing Montana *ex rel.* Great N. Ry. Co. v. District Court, 365 P.2d 512, 514 (Mont. 1961))).

"ultimately result[ed] in the current *BNSF* decision."[135] Her conclusion cited Justice McKinnon's dissenting words that a defendant "does not forfeit liberty or have a diminished liberty interest merely because the plaintiff brings a FELA action. Nor does a defendant forfeit constitutional protection by operating a railroad."[136] In short, McCarty regarded the decision as judicial tort reform, needed to address a defect in Montana venue law.

B. BNSF *Critics*

Professor Arthur R. Miller, perhaps the leading expert on federal civil procedure,[137] offered a negative judgment on developments in the law of civil procedure. Citing the Court's general jurisdiction cases, including *BNSF*, he wrote:

> [The Court] has virtually eliminated general jurisdiction, which previously could be based on the defendant's continuous and systematic contacts with the forum even if the events in litigation occurred elsewhere. It now is limited to those for a in which the defendant is "at home." The [Court] appears to eliminate longstanding notions of corporate presence and doing business and restricts jurisdiction over disputes unrelated to the forum to the defendant's state of incorporation and the state of its principal place of business in the United States, except in as yet to be defined "exceptional case." [138]

Miller called attention to lack of persuasive policy grounds offered by the Court's opinions and to the fact that the new approach overwhelmingly favors large corporations: "The Court offered no real explanation for its deviation from what had long been settled doctrine or articulate why the cabining of general jurisdiction was

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135. McCarty, *supra* note 12, at 165.

136. McCarty, *supra* note 12, at 174 (quoting Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 12 (Mont. 2016) (McKinnon, J., dissenting)).

137. For decades courts have referred to Miller and coauthors as "the leading commentators on federal procedure." State Farm Fire & Cas. Co. v. Morua, 979 S.W.2d 616, 621 (Tex. 1998) (Hecht, J., concurring); *see also* Mernick v. McCutchen, 121 A.3d 905, 909 (N.J. Super. Ct. App. Div. 2015).

138. Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 747 (2018) (footnotes omitted). Note that Miller refers to *Daimler* in the text but also cites to *BNSF*. *Id.* at 747 n.18.

desirable. But it is clear who benefits from the constriction: domestic and foreign economic entities."[139]

Professor Symeonides, the preeminent conflict of laws scholar in the United States, expressed reservations about the Court's restriction of general jurisdiction in *BNSF*. He acknowledged that the breadth of doing-business general jurisdiction had required reform that warranted the corrections to doctrine in earlier cases like *Goodyear*, but he described *BNSF*'s elimination of general jurisdiction over corporations beyond their places of incorporation and principle places of business as an overreaction: "[T]he Court's understanding of 'exceptional cases' in *BNSF* suggests that the Court has overcorrected what needed correcting."[140]

Professor Scott Dodson, distinguished professor at Hastings, likewise questioned the Court's elimination of contacts-based general jurisdiction. He considered two defense interests served by restricting general jurisdiction to the places where they are at home:

> First, the funneling of cases into the home states of defendants gives them, as a general matter, the home-field advantages of close proximity, local favoritism, and insider knowledge, while out-of-state plaintiffs face the corresponding disadvantages. Few plaintiffs, for example, relish the idea of suing Walmart in Bentonville, Arkansas. Worse, if the defendant is a foreign entity, the plaintiff may be forced to sue abroad, where the relative advantages and disadvantages become significantly more pronounced.[141]

Second, he observed, reducing territorially based general jurisdiction inhibits the aggregation of claims and parties in a single case.[142] In

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139. *Id.* at 747–48.

140. Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM J. COMP. L. 1, 9 (2018).

141. Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 78 (2018).

142. *Id.* He elaborated:

> If a plaintiff wishes to sue two defendants that are not at home in a common state, the plaintiff may be forced to sue the defendants separately. And if multiple plaintiffs wish to sue those two defendants for similar injuries that arose in different states, then not even the state of injury would allow joinder of the claims in a common forum. The resulting disaggregation allows defendants to

contrast to Symeonides, Dodson was not persuaded that earlier restrictions on personal jurisdiction were required to correct plaintiffs' abuse of excessively liberal forum choices. On the contrary, he pointed out, legal developments already gave defendants power to control the places where they are sued by, on the one hand, recognizing their unqualified power to consent to litigation in forums where they are sued, and, on the other hand, giving them "nearly unfettered power to select favorable states for litigation—even though those states are otherwise unavailable under personal jurisdiction law—through contractual forum-selection clauses, which the Obama-era Supreme Court unanimously endorsed."[143]

Professor Peterson at George Washington University Law School offered the most sustained critical discussion of the Court's elimination of general jurisdiction based on corporate contacts and territorial presence. He emphasized that general jurisdiction based on corporate activities was well established as of 2010 and that the Court's retreat from it was unexpected.[144] He described the unfolding of the new doctrine in three stages. First, he noted that *Goodyear* provided only a hint of a new standard and that there were cogent arguments against reading Justice Ginsburg's opinion in *Goodyear* as rejecting contacts-based jurisdiction.[145] Second, he described *Daimler* as adopting the new standard as rule of decision while also suggesting possible exceptions.[146] Third, he described in *BNSF* "limit[ing] the possibility of an exception to the facts of *Perkins*, which makes it all but impossible to establish all-purpose

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> deploy an 'empty chair' defense and force plaintiffs to bear the costs and expense of multiple lawsuits, costs which corporate defendants often bear more easily than plaintiffs.

Id. (internal citations omitted).

143. *Id.* (internal citations omitted).

144. Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law,* 76 WASH. & LEE L. REV. 655, 701 (2019).

145. *See id.* at 714–15. First, Professor Peterson noted that the complete absence of precedent for replacing contacts-based jurisdiction with the new at-home standard, which he sees as derived from a citizenship-based construct. *Id.* at 715–16. Second, he noted that "it was hard to believe that Justice Ginsburg would make such a significant change in the standard for corporate-activities-based jurisdiction, which would overrule sixty years of lower court precedent, without discussing that precedent or even mentioning that such cases existed." *Id.* at 716. Third, he noted that it would be "surprising for Justice Ginsburg to make such a sweeping change in the law of personal jurisdiction in such an easy case." *Id.* at 717.

146. *Id.* at 719–20.

dispute-blind jurisdiction over any corporation outside of the state where it is incorporated or has its principal place of business."[147]

Professor Peterson regarded the Court's decisions as departing from settled law by eliminating the "previously well-established category of corporate-activities-based jurisdiction."[148] He traced Justice Ginsburg's hostility toward broad general jurisdiction to categorical ambiguity in the term "general jurisdiction" (which described residual categories of both contact-based and citizenship-based personal jurisdiction);[149] emphasized negative practical consequences of *BNSF*;[150] and characterized the at-home doctrine as "a massive gift to corporate defendants."[151]

Student editors at Harvard noted that *BNSF* demonstrated "much more bluntly than [earlier decisions] just how much the at-home test has altered general jurisdiction [and] highlights a number of problems with the newly narrowed doctrine."[152] They emphasized that unlike its predecessors, *BNSF* expressly declared that the "at home" test was not automatically satisfied by systematic and continuous forum contacts.[153] The editors asserted that the simplified statement of the "at home" test in *BNSF* revealed three doctrinal tensions. First, it revealed an inconsistency with the rigorous requirements for jurisdiction over corporations and transient "tagging" jurisdiction over individuals.[154] Second, the Court's motives for the "at home" test revealed a strong interest in curbing forum shopping, while the plaintiff's motives for commencing an action are "jurisdictionally irrelevant."[155] Third, *BNSF* demonstrated more clearly than previous cases how the "at

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147. *Id.* at 741.

148. *Id.* at 735.

149. *See id.* at 711–12, 733–34, 761–62.

150. *See id.* at 762–65 (discussing cases finding lack of personal jurisdiction).

151. *Id.* at 767.

152. *Leading Case, Civil Procedure—Personal Jurisdiction*—BNSF Railway Co. v. Tyrrell, 131 HARV. L. REV. 333, 333 (2017).

153. *Id.* at 339.

154. *Id.*

> Read together, [the cases] present a troubling contrast: courts lack general jurisdiction over a corporation with dozens of offices, thousands of employees, and almost half a billion dollars in recent investments in a state that provides nearly ten percent of its revenue but is not its corporate home; but, for example, courts can hear any cause of action against a person served while his airplane crosses over the forum state mid-flight.

Id. at 340.

155. *Id.* at 341.

home" test will suppress litigation of valid claims.[156] While seeing that *Goodyear* and *Daimler* "make *BNSF* an easy case," the editors concluded that *BNSF* remains "difficult to justify on due process grounds, and this problem stems from deeper conflicts underlying the Court's recent personal jurisdiction doctrine."[157]

Student author Julialeida Sainz criticized *BNSF* for restricting plaintiffs' access to courts and argued: "Courts should revert to the continuous and systematic test of *International Shoe Co.* rather than comparing the companies [sic] in-state contacts with its contacts in the entire country."[158]

C. The Court's Jurisdiction Jurisprudence Is Slow to Gain Legitimacy

The weight of scholarly criticism suggests that the Court is failing to establish the legitimacy of its new approach within one segment of the legal community. The perception that the Roberts Court's personal jurisdiction decisions are result-oriented[159] is not confined to academic journals published by law schools; an article in the *ABA Journal* acknowledged the perception by some that the

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156. *See id.* The test reduces forum shopping, "but it also prevents [plaintiffs] from suing in [a] convenient forums when they are injured outside their domicile by a corporation with different home states than their own." *Id.* (citing BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1560–61 (2017) (Sotomayor, J., concurring in part and dissenting in part)).

157. *Id.* at 342.

158. Julialeida Sainz, *The New Personal Jurisdiction: How the Supreme Court Is Making It Easier for Corporate Defendants to Avoid Litigation*, 5 ST. THOMAS J. COMPLEX LITIG. 1, 11 (2018) (citing *BNSF Ry. Co.*, 137 S. Ct. at 1561 (Sotomayor, J., concurring in part and dissenting in part) ("The focus should be on the quality and quantity of the defendant's contacts in the forum State."). Peterson advances a similar argument in urging the Court to recognize corporate-activities-based jurisdiction as a separate category of general jurisdiction. *See* Peterson, *supra* note 144, at 772.

159. *See* sources cited *supra* notes 132–58 (postdating the publication of *BNSF*). An impressive body of literature had already emerged that charged the Court with pro-business, pro-defense, and anti-plaintiff bias. *See, e.g.*, VITIELLO, *supra* note 16, at 69, 70 (arguing that before *BNSF*, outcomes of the Roberts Court's personal jurisdiction decisions reflect both pro-corporate and anti-plaintiff biases). The opinions also had earlier defenders. *See, e.g.*, William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L. REV. 375, 427 (2016) (acknowledging that the at-home test significantly changed the approach followed by courts for six decades but welcoming its narrowing of personal jurisdiction as "clear and internally consistent").

Court's decisions were promoting a pro-business agenda.[160] The failure of *BNSF* and the general jurisdiction decisions to attain broad support among legal academicians is ironic, given that their author herself is a former civil procedure professor.

The academic response to *BNSF* differs starkly from scholarly reactions to the Court's revision of traditional personal jurisdiction doctrine in *International Shoe*, a decision widely described in later years as revolutionary.[161] In the five years after *International Shoe*, of twenty law review publications that cite the case,[162] not one questions Chief Justice Stone's reasoning, and not one suggests that the rule of decision was designed to correct abuses by lower courts or to alter outcomes so as to favor either plaintiffs or defendants as a group.[163] One reviewer described *International Shoe* as exemplifying the maturation of the Court's approach to personal jurisdiction;[164] other commentators saw the decision as helping to remove unnecessary abstractions but as otherwise neutral in its influence on outcomes.[165] Likewise, in the two years following *Shaffer v.*

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160. Mark Walsh, *Making it Personal*, 103 A.B.A. J. 20, 21 (2017) ("Some legal analysts viewed the decisions on jurisdiction as part of a pro-business pattern under the [C]ourt led by Chief Justice John G. Roberts Jr.").

161. *See Stealth Revolution*, *supra* note 19, 503–04 n.14 (discussing cases and articles that apply the term "revolution" or "revolutionary" to *International Shoe*). The earliest cases and articles did not characterize the opinion as marking a radical break with the past. *Id.*

162. Number based on citations collected under the law reviews indexed under citing references to the case in Westlaw, with a date restriction of citations to those dated before December 3, 1950. The Westlaw database of law reviews for that time period is incomplete. It does not include, for example, Note, *The Growth of the* International Shoe *Doctrine*, 16 U. CHI. L. REV. 523 (1949) (providing a detailed positive evaluation of *International Shoe*).

163. Thomas Reed Powell emphasized the unanimous support for the outcome but also noted Justice Black's "vehement concurring opinion" that objected to the flexible language employed by the Chief Justice. Thomas Reed Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 710, 712 (1947). Powell added, "[p]resumably even Mr. Justice Black would demand some ties with a state to sue a defendant there . . . ." *Id.*

164. Fowler V. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155, 1157 (1947)

165. *See* Note, *Extending In Personam Jurisdiction by Enforcing State "Blue Sky" Laws Against Non Residents*, *supra* note 103, at 366 n.25 (characterizing *International Shoe* as not making radical break from prior cases but rather substituting a utilitarian evaluation of corporate activity for previous fictions of corporate presence); Note, *The Growth of the* International Shoe *Doctrine*, *supra* note 162, at 524.

Heitner,[166] where the court jettisoned a century-old framework for understanding personal jurisdiction, not one law review article challenged Justice Marshall's opinion as theoretically unsound or hinted that the result was biased in favor or plaintiffs or defendants.[167] The lack of critical commentary is notable given that one Justice dissented from the holding,[168] and two other Justices concurred with the result but expressed disagreement with the breadth of Justice Marshall's opinion.[169]

Perhaps most sobering are the personal reflections of two experienced law professors who address the frustration of teaching the current state of the law to aspiring lawyers. In submitting an amicus curiae brief urging the Court to clarify the law of personal jurisdiction, Dean Morrison explained in the required statement of interest:

> Alan B. Morrison is an associate dean at George Washington University Law School, where he teaches personal jurisdiction, as part of his civil procedure course, and the basic constitutional law course. He is filing this brief because he is frustrated by the incoherence of this Court's doctrines relating to personal jurisdiction and with his inability to provide his students with a rationale for the Court's decisions.[170]

Professor Challener contemplates the cynicism that the Roberts Court's personal jurisdiction opinions are likely to promote among students at the start of their legal education. She summarizes the conflicting reasons offered for limiting personal jurisdiction and

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166. 433 U.S. 186 (1977).

167. I examined sixteen law review articles and notes collected as citing references to the case, further limiting the search to secondary sources, law reviews, and material dated before June 24, 1979. The most critical discussion of the opinion was in a note emphasizing that the opinion left open questions as to the effect of a state statute deeming acceptance of position as corporate director consent, and observing that the decision did not resolve lingering issues about jurisdiction by necessity. *See* Note, *Supreme Court 1976 Term: Quasi In Rem Jurisdiction*, 91 HARV. L. REV. 152, 161 (1977).

168. *Shaffer*, 433 U.S. at 219 (Brennan, J., dissenting).

169. *Id.* at 217 (Powell, J., concurring); *id.* at 219 (Stevens, J., concurring).

170. Brief for Alan B. Morrison as Amicus Curiae Supporting Respondents at 1, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) No. 16–466 [hereinafter Brief for Alan B. Morrison].

asks: "Given the confused nature of the [Roberts] Court's personal jurisdiction decisions, how much, really, do first-year law students learn about the law of personal jurisdiction?"[171] She observes that they will learn to "parrot phrases like 'minimum contacts,' 'purposeful availment,' 'stream of commerce,' and maybe even 'fair play and substantial justice'" but will learn next to nothing of practical use.[172] She continues:

> Although they may miss much of the nuance in personal jurisdiction, they get the big picture. They understand that the Court has greatly reduced the fora available to plaintiffs and they see that the Court has failed to explain why it is doing so. Moreover, students recognize that the Court's recent decisions benefit defendants and harm plaintiffs. And regardless of whether they think a conservative Supreme Court with a pro-defendant bias is a good thing or a bad thing, they realize that the Court does not clarify why a plaintiff can't sue in a forum that is obviously convenient for that plaintiff and just as obviously does not burden the defendant.[173]

Professor Challener's conclusion about the moral lessons students will draw is sobering: first-year students

> leave civil procedure with a much less glowing view of the Court than they typically began law school with. They sense that the Court, at least in its personal jurisdiction decisions, is being unfair and not quite honest. . . . By the time civil procedure is over, many law students have a dim and suspicious view of individual justices and the Court as an institution.[174]

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171. Deborah J. Challener, *Teaching and Learning Personal Jurisdiction After the Stealth Revolution*, 70 FLA. L. REV. F. 96, 99 (2018).

172. *Id.*

173. *Id.*

174. *Id.*

D. The Way Forward

Law professors bear some responsibility for the current state of the law. Justice Ginsburg derived from mid-twentieth century legal scholars the dichotomy between general and specific jurisdiction, the vision that general jurisdiction should play a subordinate role in assuring at least one forum where a corporation could be sued, and the preference for linking that place to the place of incorporation and principal place of business.[175]

Legal academics have not just identified the internal incoherence and possible bias in the Roberts Court's jurisdiction decisions. They have begun to propose alternative theoretical approaches. Two consequences of the Court's rigid application of the "at home" doctrine are that the Court has avoided examining why forum shopping is undesirable[176] and that it has failed consider other constitutional bases for limiting excessive exercises of juridical jurisdiction by states and federal courts.

It is not clear that plaintiff forum shopping in *BNSF* was so egregious that it required a federal correction.[177] But it is easy to

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175. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (proposing general and specific jurisdiction as exclusive dichotomy and coining the terminology); *see also id.* at 1139–44 (arguing personal jurisdiction should be based on specific jurisdiction outside of the place where a corporation is incorporated or has located its head office). Justice Ginsburg cites von Mehren and Trautman fourteen times in three of her personal jurisdiction opinions. *See Leading Cases: Section II: Federal Jurisdiction and Procedure*, 128 HARV. L REV. 219, 318 n.78 (2014) (citing Daimler AG v. Bauman, 571 U.S. 117 (2014) (five times); Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915 (2011) (four times); and J. McIntyre Mach. Ltd. v. Nicastro. 564 U.S. 873 (2011) (five times)); Cornett and Hoffheimer, *supra* note 11, at 156 n.253 (discussing Justice Ginsburg's adoption of dated, idiosyncratic scholarship by Harvard Law faculty from the 1950s and 1960s); *see also Jurisdiction After Goodyear*, *supra* note 11, at 582–83 n.192 (noting the role *International Shoe* played in the *Goodyear* decision).

176. *See* VITIELLO, *supra* note 16, at 57, 65, 66–67 (discussing the Court's failure to explain the problem of forum shopping).

177. Neither plaintiff resided, worked, or was injured in Montana, but they lived in North Dakota and South Dakota, and to obtain specific personal jurisdiction, Nelson would have needed to travel to Washington state where he injured his knee. *See* Brief for Respondents, *supra* note 26, at 7–8. While the plaintiffs' cases did not present the most sympathetic cases for general jurisdiction, Montana was far more convenient for Nelson than Washington, and Montana was more convenient for both plaintiffs than either Delaware or Texas where the defendant was incorporated and maintained its principal place of business. *See* Petition for Writ of Certiorari at 3, 6, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (No. 16–405) (2017).

imagine cases where a state could exceed constitutional bounds by requiring corporations to answer lawsuits with tenuous connections to the state.[178] General jurisdiction in principle can result in great litigation inconvenience in cases that have no relationship to the place of litigation.[179] Courts have long recognized that litigation inconvenience can become fundamentally unfair. *International Shoe*'s requirement that jurisdiction comport with fundamental notions of fair play and substantial justice expressly addressed such concerns as the small local business forced to litigate in distant, hostile forums with which it has no contacts.[180] Ironically, the Roberts Court's hostility to "free form notions of fairness" deprive the Court of essential tools for preventing due process violations.

While scholars have been suspicious of sovereignty justification for personal jurisdiction, cases can no doubt arise where one state exerts its juridical jurisdiction so as to interfere improperly with business activity outside the state. Avoiding such overreaching lies at the heart of Justice Ginsburg's insistence on a comparative evaluation of contacts in general jurisdiction analysis. But depriving one state of authority because a defendant has more activity in other states works a double injustice. It deprives one state of authority notwithstanding a real interest in the case; and the formal

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178. Professor Jacobs blames *International Shoe*'s "open-ended balancing test" for "decades of unwarranted judicial invasion of the states' sovereign authority to define the jurisdictional consequences of activities that take place within their borders," and he advocates a return to the territorial model of personal jurisdiction. Jacobs, *supra* note 18, at 1647. In light of the Roberts Court decisions, Patrick Borchers renews a suggestion he advanced earlier in his career that the Court should abandon due process review of personal jurisdiction and leave the limits on juridical jurisdictions to states and legislatures. Patrick J. Borchers, J. McIntyre Machinery, Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1271–72 (2011).

179. Restricting general jurisdiction to the place of incorporation and principal place of business reduces the risk of inconvenience only because it is asserted or assumed that such places are not inconvenient to corporations. But there is little reason to assume Delaware is less convenient than places where corporations conduct significant business just because Delaware is their place of incorporation.

180. *See Nicastro*, 564 U.S. at 885 (plurality opinion) (expressing concern over the hypothetical case of a small farmer in Florida who never left Florida but was forced to litigate in Alaska where the farm product was distributed by intermediaries). Justice Sotomayor concurred with the result in *Daimler* because jurisdiction would be unreasonable. *Daimler AG*, 571 U.S. at 160 (Sotomayor, J., concurring); *see also* Transcript of Oral Argument at 29, *Daimler*, 571 U.S. 117 (No. 11–965) (Ginsburg, J., expressing concern with a hypothetical case where a Polish citizen injured in Poland sued Daimler in an U.S. state).

application of the rule can result in the elimination of juridical jurisdiction from all states.

Scholars are beginning to respond creatively to deficits in the Court's jurisdiction analysis. They have proposed a variety of ways to reinvigorate the procedural due process interest that corporations have in being shielded from seriously inconvenient litigation.[181] And they are beginning to develop proposals that the federal interest in preventing states from disrupting a nationwide free market economy is more appropriately evaluated and controlled under the Commerce Clause cases that balance state interests and accord ultimate authority to Congress.[182]

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181. The Court has repeatedly identified due process as a limit on juridical jurisdiction necessary to prevent states from interfering with the authority of other states. *E.g.*, Hanson v. Denckla, 357 U.S. 235, 251 (1958) (observing that restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States."). This sovereignty-basis of limits on personal jurisdiction is controversial because it derives from neither the text nor history of the Due Process Clause. *See generally Stealth Revolution*, *supra* note 19, at 539–40 (exploring uncertain sources and legal implications of sister-state interests in localizing litigation). Some experienced scholars propose that the Court abandon sovereignty as an independent criterion. *See* VITIELLO, *supra* note 16, at 66 (proposing that due process should be satisfied for jurisdictional purposes by fair notice and opportunity to be heard unless a cogent constitutional argument can be developed against forum shopping (citing McGee v. International Life Ins. Co., 355 U.S. 220 (1957))). Vitiello's fundamental approach is similar to that once advanced by Justice Brennan. *See* Shaffer v. Heitner, 433 U.S. 186, 219–28 (1977) (Brennan, J., dissenting); *see also* Matthew P. Demartini, Comment, *Stepping Back to Move Forward: Expanding Personal Jurisdiction By Reviving Old Practices*, 67 EMORY L.J. 809, 814 (2018) (proposing return to a mélange or reasonableness test found in early decisions after *International Shoe* (citing Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 558 (2012); Bernadette B. Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107 (2015))).

182. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ."); *see also* Cornett and Hoffheimer, *supra* note 11, at 165 (identifying the Dormant Commerce Clause as "promising foundation" for jurisdictional limits based on sales); Brief for Alan B. Morrison, *supra* note 170, at 1 (urging the Court to replace the Due Process Clause to the Dormant Commerce Clause of the Fourteenth Amendment with as a source of jurisdictional limits on state courts). Morrison writes:

> [T]he Due Process Clause of the Fourteenth Amendment has proven a wholly unsatisfactory answer to the question of whether a state may constitutionally require an out-of-state business to defend a lawsuit brought in that state. Instead, this brief argues that this Court's opinions under the Dormant Commerce Clause,

CONCLUSION

BNSF Railway Co. v. Tyrrell[183] holds that corporations are not subject to general or all-purpose jurisdiction in states where they have a massive permanent, physical, commercial, and legal presence.[184] The decision limits general jurisdiction over corporations to the places where a corporation is "at home"—those states and foreign countries chosen by corporate actors as their places of incorporation and principal places of business.[185]

This Article contends that *BNSF* breaks with long-settled law and rests on questionable constitutional foundations. It argues that the restriction of juridical power is required by neither precedent nor constitutional principle; twists a Reconstruction Era amendment into a form of corporate immunity in what may be the only court open to plaintiffs; and thus frustrates a prime directive of government, "to . . . establish justice."[186]

This Article further argues that the Court provides inadequate policy reasons for eliminating a longstanding form of personal jurisdiction rooted in territorial presence. It challenges the Court's narrative that restrictions are required to curb abusive, exorbitant, and grasping decisions by trial courts. And it asserts that the Court's

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> with its focus on possible undue burdens on out-of-state businesses from being forced to defend an action in a particular state court, is a much surer source of a proper balance in this area.

Id.; *see* Cornett and Hoffheimer, *supra* note 11, at 164 (arguing that constitutionalizing rigid limits on contacts-based jurisdiction under the Due Process Clause interferes with power to regulate commerce that the Constitution expressly vests in Congress, and that the legislative branch is better qualified to adopt rules informed by economic policy and political values); *see also* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 138 (2016) (arguing that jurisdiction under registration statutes constitutes impermissible discrimination under the Dormant Commerce Clause when claim arises out of state).

183. 137 S. Ct. 1549 (2017).

184. *Id.* at 1559 (citing *Daimler*, 571 U.S. at 139, n.20).

185. *Id.* at 1558 (citing *Daimler*, 571 U.S. at 127, 137; Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919, 924 (2011)). While not fully jettisoning the historic language of contacts, the Court's comparative evaluation of contacts leaves no reasonable prospect for general jurisdiction over a corporation engaged in interstate or international commerce beyond the paradigmatic place of incorporation and principal place of business.

186. U.S. CONST. pmbl.

new restriction reveals an exaggerated concern for defendants in extreme and hypothetical cases and a corresponding neglect of the real burden on real plaintiffs in real cases.

Finally, this Article shows that the paucity of support for *BNSF* is fueling an emerging crisis in the Court's moral authority and intellectual integrity. To a degree unprecedented in the history of the Court's jurisdiction decisions, a significant number of leading scholars have openly questioned the competence and good faith of the Court's decision-making. Educators publicly lament the difficulty of teaching opinions that appear slipshod and result oriented. In the absence of persuasive grounding in policy or history, academics and practitioners publicly speculate that the decision reflects the pro-corporate, pro-defendant, or anti-plaintiff bias of the individual Justices.

This Article urges the Court to repair damage it has done to doctrine and to the Court's own reputation by placing greater weight on historical continuity and less weight on rigid adherence to recently minted formal rules. It urges the Court to attend to the practical consequences and perceived bias of its decision-making. And it urges the Court to hesitate before extending *BNSF* or imposing further limits on state courts' territorial jurisdiction under the Due Process Clause of a Constitution devoted to assuring a "more perfect Union."[187]

187. *Id.*