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THE FORGOTTEN PROPERTY RIGHT: THE UNCONSTITUTIONALITY OF THE *AT HOME* STANDARD IN ASSERTIONS OF GENERAL PERSONAL JURISDICTION OVER CORPORATIONS

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ABSTRACT

With its move to the "at home" standard in Goodyear, *Daimler*, and *BNSF*, the Supreme Court significantly restricted the exercise of general personal jurisdiction over nonresident corporation defendants. This restriction offers questionable actual benefits to corporate defendants, but its rigid focus on defendant's rights has impacted the ability of certain plaintiffs to bring a cause of action against those defendants. Because the *at home* standard infringes on this group of plaintiffs' ability to assert their property right of redress in violation of the Due Process Clauses of the Constitution (Fifth and Fourteenth Amendments), the Court should return to the previous "continuous and systematic contacts" standard developed under *International Shoe*. Hundreds of articles have been written in the four years since *Daimler* erased fifty years of general personal jurisdiction jurisprudence. But because personal jurisdiction analysis is traditionally defendant focused, there is little mention of the plaintiff's property right in access to the courts in that literature. Personal jurisdiction rules should protect a defendant's interests, but not to the total forfeiture of a plaintiff's property right. Recognizing the *at home* standard as a misstep would resolve this constitutional conflict.

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I. INTRODUCTION

A single father from Illinois diligently saves for years to take his two sons on a dream vacation to southern California. While spending the day at the Six Flags theme park, one of the sons suffers serious injuries in an accident. A hardworking but profoundly poor single mother from Texas is ecstatic when her daughter obtains a full scholarship to the University of Alaska. While shopping at the Walmart near campus for dormitory supplies, the mother is injured. What do these unfortunate people share? The reality that under the *at home* standard, the Supreme Court has for practical purposes deprived them of their property right in judicial redress for their claims.

Civil procedure is the bridge—or barrier—between rights and the ability to exercise those rights. The rules of civil procedure serve many purposes, including managing the workload of courts, providing due process for both defendants and plaintiffs, reducing uncertainty, and ensuring a remedy for injuries.[1] These contrasting, and sometimes conflicting, considerations must balance policy objectives within the constraints of the Constitution.

The concept of personal jurisdiction answers the critical question of whether a court can demand that the parties resolve their dispute in *that particular* court.[2] In answering that question, courts have focused on the determination of two rights: first, the right of a court to compel defendants to appear; and second, a defendant's right to due process protections of life, liberty, and property.[3] This Comment argues that the Supreme Court's recent decisions eroding general personal jurisdiction raise an important consideration that has not traditionally been addressed in personal jurisdiction jurisprudence—the limits beyond which a *plaintiff's* due process rights are violated when the defendant is a corporation.

The Supreme Court has expanded and contracted its jurisprudence on personal jurisdiction like an accordion. Initially, personal jurisdiction was narrowly applied geographically;[4] then it was broadened under a theory of reasonableness;[5] and recently, it has been narrowed

1. FED. R. CIV. P. 1.
2. *See* B. Travis Brown, Note, *Salvaging General Jurisdiction: Satisfying* Daimler *and Proposing a New Framework*, 3 BELMONT L. REV. 187, 189 (2016).
3. *Id.*
4. *See* Pennoyer v. Neff, 95 U.S. 714 (1878).
5. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

again.[6] This evolution in legal interpretation is not unprecedented; a similar phenomenon exists in Commerce Clause jurisprudence. At one time, jurisprudence was narrowly construed to channels of commerce.[7] Later, the Court significantly broadened the reach of the Commerce Clause when analyzing New Deal legislation.[8] Recently, the Court has begun to move back to a narrower construction.[9] The recent jurisprudence on the Commerce Clause arguably reflects changes in society, particularly differing viewpoints on the role of the Federal government.

The recent narrowing of general personal jurisdiction application to only the states where the defendant is considered *at home* is at odds with changes in society and the realities of how corporations operate. The argument that personal jurisdiction should adapt to societal realities is not new.[10] At the same time, the number of transnational companies has grown more than 500% since 1970.[11] Despite this reality, the Court has not responded by adapting general personal jurisdiction to reflect the times, but rather moved backwards towards what the Court itself recognized was the outdated approach of *Pennoyer v. Neff*.[12]

This Comment proceeds in three parts: first, a discussion of the history of personal jurisdiction, with an emphasis on what is now known as "general personal jurisdiction;" second, a discussion of current Supreme Court jurisprudence on general personal jurisdiction and its restriction on certain plaintiffs from filing suit with no corresponding benefit to defendants; and third, a discussion on how the *at home* standard is inconsistent with due process because it fails the strict scrutiny applied to restrictions on fundamental rights.

II. HISTORY OF GENERAL PERSONAL JURISDICTION

A. Pennoyer *and the Focus on Service of Process and Federalism*

The seminal personal jurisdiction case, *Pennoyer v. Neff* in 1878, established bright-line limits on a state court's ability to reach beyond

6. *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

7. Ann Schober, Note, United States v. Morrison *15 Years Later: How the Supreme Court's Disjointed Adjudication of Commerce Clause Legislation Opens a Back Door to Restoring Federal Civil Recourse for Certain Victims of Gender-Based Violence*, 34 J.L. & COM. 161, 167 (2015).

8. *Id.* at 169.

9. *Id.* at 171.

10. *See, e.g.*, R. D. Rees, Note, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U.L. REV. 405, 433 (2003).

11. Jed Greer & Kavaljit Singh, *A Brief History of Transnational Corporations*, GLOBAL POLICY FORUM, http://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html [https://perma.cc/G9FR-93A8] (last visited Oct. 12, 2018).

12. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

its borders and compel a defendant to appear and defend a suit.[13] Less than ten years after the adoption of the Fourteenth Amendment, the Court's reasoning in *Pennoyer* focused on the sovereignty of states.[14] However, the Court also addressed the issue of a defendant's due process rights and its role in defining jurisdictional rules.[15] At the time of *Pennoyer*, travel was still exotic, expensive, and rare.[16] As such, most disputes did not involve parties from different jurisdictions.[17]

In the original claim, an Oregon attorney sought unpaid fees from Pennoyer, a resident of California.[18] The attorney brought a claim against Pennoyer in Oregon, on which he prevailed by default judgment.[19] As Pennoyer was not a resident of Oregon, service of process by publication was allowed.[20] The attorney then sought enforcement of the judgment through the court-ordered sale of Pennoyer's Oregon property.[21] The defendant purchased the plaintiff's Oregon property.[22] Pennoyer later became aware that his property had been sold, and brought action against the defendant. The relevant issue before the Court was the validity of the Oregon court exercising personal jurisdiction over Pennoyer in the original claim.[23] The Court held that on claims involving personal liability, the court could only obtain jurisdiction over a defendant "by service of process within the state, or his voluntary appearance."[24]

B. International Shoe *and the Shift to Reasonableness*

By 1945, the intervening decades brought the rise of industrialism, railroads, automobiles, and large, multistate corporations.[25] Cases involving parties from different jurisdictions rapidly increased in frequency.[26] In addition, practical and definitional obstacles to determining a corporation's "presence" had arisen.[27] Because "the

13. 95 U.S. 714, 720 (1878).
14. *Id.* at 722.
15. *Id.* at 733.
16. Wm. Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L. REV. 375, 382 (2016).
17. *Id.* at 382–383.
18. *Pennoyer*, 95 U.S. at 719.
19. *Id.* at 719-20.
20. *Id.* at 720.
21. *Id.*
22. *Id.* at 719.
23. *Id.* The Court explained that in the original action, because Pennoyer was not served with process and did not appear, the judgment was not valid against him. *Id.* at 720. Therefore, the court-ordered sale of Pennoyer's property—which Neff purchased—was unauthorized. *Id.* Additionally, the Oregon court could not establish in rem jurisdiction because Pennoyer's property was not attached in the original action, but only in relation to the enforcement action. *Id.*
24. *Id.* at 733.
25. Lambert, *supra* note 16, at 383.
26. *Id.*
27. Rees, *supra* note 10, at 420.

corporate personality is a fiction, . . . its 'presence' . . . can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[28] The nature and quality of those activities, then, is the critical measure of whether a corporation is "present."[29]

The Supreme Court responded in *International Shoe v. Washington* with a new paradigm for personal jurisdiction. The Court reasoned that the presence of a corporation could only be manifested by the activities of the corporation's agents within the forum.[30] The Court stated that continuous and systematic activities that also give rise to the claim establish a corporation's presence.[31] By contrast, "casual presence" or isolated activities that do not give rise to the claim "are not enough" to establish personal jurisdiction.[32] However, the Court also stated that "some single or occasional acts," depending on the circumstances, "may be deemed sufficient to render the corporation liable to suit."[33] Finally, the Court stated that a corporation's continuous and systematic activities could be "so substantial and of such a nature" that presence could be established even when the claim was unrelated to those contacts.[34]

The Court appeared to announce a fact-based inquiry in which the more contacts a corporation had in a forum, the less important it became for the claim to arise from those forum contacts.[35] The Court also provided two guideposts for claims arising from forum activities—what became specific personal jurisdiction—and one for claims unrelated to forum activities—what became general personal jurisdiction.[36] The uncertainty of applying this new standard might have been predicted when the *International Shoe* Court explained that "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."[37]

The factual scenario in *International Shoe* fits squarely within what has become specific personal jurisdiction. The company was incorporated in Delaware and had its principal place of business in Missouri, but employed around a dozen salesmen in Washington on a commission basis.[38] The State of Washington sought to enforce the payment of unemployment taxes by the company.[39] The Court found that the

28. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
29. *Id.* at 319.
30. *Id.* at 316.
31. *Id.* at 317.
32. *Id.*
33. *Id.* at 318.
34. *Id.*
35. *Id.* at 319.
36. Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 778 (2017).
37. *Int'l Shoe Co.*, 326 U.S. at 319.
38. *Id.* at 313.
39. *Id.* at 312.

company's activities were continuous and systematic, resulting in a large volume of business.[40] Furthermore, the company enjoyed the "benefits and protection" of state law, including access to Washington courts as a plaintiff.[41] Most importantly, the claim arose from those in-state activities.[42] Hence, International Shoe's activities in Washington fit neatly within the Court's definition of presence, and personal jurisdiction over the company was considered proper.[43]

Although *International Shoe* was a specific personal jurisdiction case, in its holding the Court announced a dramatic departure from its previous personal jurisdiction jurisprudence. In dicta, the Court stated that jurisdiction may be considered proper based on a defendant's contact with a foreign forum even when those contacts did not give rise to the controversy.[44] It was a "well-established principle[ ] of public law," even at the time of *Pennoyer*, that a defendant could be sued for any reason in its home state.[45] What the dicta in *International Shoe* has been understood to establish is that defendants could be sued beyond their home states, regardless of the situs of activities giving rise to the claim, if the defendant's contacts with the state were continuous and systematic.[46] The Court specifically declared that "there [are] instances in which the continuous corporate operations within a state [are] 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."[47] "The clear focus in *International Shoe* was on fairness and reasonableness."[48]

C. *The Rise of General Personal Jurisdiction under* International Shoe

Between 1945 and 2011, the Supreme Court decided only two cases on general personal jurisdiction. The first was *Perkins v. Benguet Consolidated Mining Co.* in 1952. Echoing *International Shoe*, the Court held that general personal jurisdiction would comport with due process if the corporation's activities in the forum were "sufficiently substantial and of such a nature" that jurisdiction was proper for claims not arising from those activities.[49] In *Perkins*, the company was head-

40. *Id.* at 320.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 318.
45. Pennoyer v. Neff, 95 U.S. 714, 722 (1878).
46. *Int'l Shoe Co.*, 326 U.S. at 320 (holding International Shoe's operations in Washington were sufficient to reasonably require the company to defend itself in a Washington court).
47. *Id.* at 318.
48. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting).
49. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952).

quartered and conducted its business in the Philippines. While the Philippines was occupied during World War II, the company's president relocated to Ohio, where he conducted the "continuous and systematic supervision of the . . . activities of the company."[50] The president kept files, held directors' meetings, and supervised the corporation's activities in the Philippines.[51] The Court found that, even though the company was headquartered in the Philippines, the Ohio activities were sufficient to allow the Ohio court to exercise personal jurisdiction, consistent with due process, over claims arising from the company's activities outside Ohio.[52]

Perkins has come to be the paradigm case for general personal jurisdiction.[53] In fact, it is the only time the Supreme Court has found the activities of a nonresident corporation to satisfy the exercise of general personal jurisdiction.[54] However, the citation of *Perkins* by Federal courts has dramatically increased since the *Goodyear* decision in 2011 established the *at home* standard.[55] But because the facts of *Perkins* essentially established that Ohio was the *temporary principal place of business*, in practical terms this "exception" to the *at home* definition of place of incorporation and principal place of business is so narrow it is all but illusory.[56]

The second case was *Helicopteros Nacionales De Colombia, S.A. v. Hall* ("*Helicopteros*") in 1984. In *Helicopteros*, the defendant ("Helicol") was a corporation incorporated and with its principal place of business in Colombia.[57] The company contracted with a joint venture based in Texas to provide transportation services in Peru.[58] The plaintiffs represented the victims of a crash in Peru involving a helicopter operated by Helicol.[59] The plaintiffs—United States citizens but not Texas residents—filed the action in Texas state court, but the parties conceded that the claim was not related to Helicol's contacts with Texas, so the court could only exercise general personal jurisdiction.[60] The record indicated that Helicol had several substantive contacts with Texas: the chief executive negotiated the transportation contract with the joint venture in Texas; Helicol periodically pur-

50. *Id.* at 448.
51. *Id.*
52. *Id.*
53. Robertson & Rhodes, *supra* note 36, at 778.
54. Brown, *supra* note 2, at 201.
55. A WestLaw search on *Perkins*' headnote eleven reveals sixteen citations by Federal courts in the fifty-nine years between *Perkins* and the *Goodyear* decision in 2011 and fifteen citations in the nearly seven years since *Goodyear*.
56. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., concurring in part and dissenting in part) (stating that limiting the exception to the *Perkins* facts "is so narrow as to read the exception out of existence entirely").
57. Helicopteros Nacionales de Colom. v. Hall, 466 U.S. 408, 409 (1984).
58. *Id.* at 410.
59. *Id.*
60. *Id.* at 415–16.

chased helicopters and equipment from a Texas company; and Helicol employees periodically traveled to Texas for training.[61]

The Court found Helicol's Texas contacts insufficient to "constitute the kind of continuous and systematic general business contacts" present in *Perkins*.[62] The Court relied on its holding in *Rosenberg Bros. v. Curtis Brown Co.* that "purchases and related trips, standing alone, are not a sufficient basis" for exercising personal jurisdiction.[63] The Court held that, because Helicol's Texas contacts were insufficient, the exercise of general personal jurisdiction over Helicol by the Texas court was inconsistent with due process.[64] While the majority framed the question as whether Helicol's Texas contacts were "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*,"[65] Justice Brennan argued eloquently in his dissent that the *Perkins* holding did not establish that the facts in *Perkins* established the *minimum* standard of continuous and systematic contacts.[66] However, the facts in *Helicopteros*, especially in light of *Rosenberg*, would be unlikely to meet even a lower threshold for continuous and systematic contacts.

Beyond these two cases, the lower courts were left to develop the concept of "general personal jurisdiction" without guidance.[67] Although no dominant test emerged,[68] the lower courts focused on whether the defendant's forum contacts could reasonably be considered continuous, systematic, substantial, or some combination thereof.[69] Despite the lack of a bright-line rule, the lower courts developed a predictable application for most of the rest of the century.[70] In fact, law school civil procedure courses taught as settled law that general personal jurisdiction over corporations was proper where business activities in the forum were significant.[71] As a result, corporations could expect to be subject to general personal jurisdiction in any number of fora, up to and including all fifty states.[72] "Under even the most restrictive view of *International Shoe*, several States could have jurisdiction over a particular cause of action."[73]

61. *Id.* at 416–18.
62. *Id.* at 416.
63. *Id.* at 417 (discussing Rosenberg Bros. v. Curtis Brown Co., 260 U.S. 516 (1923)).
64. *Id.* at 418–19.
65. *Id.* at 416.
66. *Id.* at 421 (Brennan, J., dissenting).
67. Robertson & Rhodes, *supra* note 36, at 779.
68. Lambert, *supra* note 16, at 392.
69. Robertson & Rhodes, *supra* note 36, at 779.
70. *Id.* at 779–80.
71. Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v Bauman, 76 OHIO ST. L.J. 101, 114–15 (2015).
72. Robertson & Rhodes, *supra* note 36, at 779.
73. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting).

D. Goodyear *and the At Home Concept*

Beginning with its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown* in 2011, the Supreme Court signaled a move away from a fact-intensive fairness approach to general personal jurisdiction in favor of an imprecisely defined *at home* concept. While acknowledging that the exercise of personal jurisdiction requires compliance with "traditional notions of fair play and substantial justice,"[74] the Court defined general personal jurisdiction as when a defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[75] The Court used a variety of phrases to explain the meaning of "essentially at home": a place equivalent to an individual's domicile; a place where the corporation is "fairly regarded as at home"; and the place of incorporation and principal place of business.[76] While *at home* is significantly narrower than continuous and systematic contacts, the imprecise language used to introduce this new standard left the new standard open to interpretation.[77]

The claim in *Goodyear* arose from a bus accident in France, which was caused by a tire manufactured by a Goodyear subsidiary in Turkey, that killed two children from North Carolina.[78] Because the events giving rise to the claim—the manufacture and sale of the tire and the bus accident—all involved foreign defendants and occurred outside the United States, there was no possibility of establishing specific personal jurisdiction.[79] The North Carolina court held that placing the tire in the stream of commerce was a sufficient connection to the forum to justify the exercise of general personal jurisdiction.[80] In support of this conclusion, the court found that the tire was manufactured according to United States standards, bore markings required for sale in the United States, and Goodyear "made no attempt to keep these tires from reaching the North Carolina market."[81] However, the Supreme Court rejected the North Carolina court's general personal jurisdiction analysis, explaining that the stream of commerce is a factor only applicable to establishing specific personal jurisdiction.[82] The Court noted that it previously held in *Helicopteros* that "mere

74. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

75. *Id.*

76. *Id.* at 924 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 728 (1988).

77. Lindsey D. Blanchard, Goodyear *and* Hertz*: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865, 875 (2013).

78. *Goodyear*, 564 U.S. at 918.

79. *Id.* at 919.

80. *Id.* at 922.

81. *Id.*

82. *Id.* at 927.

purchases" were an insufficient basis for general personal jurisdiction when those purchases did not give rise to the claim.[83]

Aside from the possibility that Goodyear might sell its tires in North Carolina, the defendants in *Goodyear* arguably had no contact with the forum state.[84] The Supreme Court did not need to narrow "continuous and systematic"—which courts had been applying to general personal jurisdiction cases since *International Shoe*—to "essentially at home" in order to decide the case. Even under a broad interpretation of continuous and systematic, the facts in *Goodyear* would fail to support the exercise of general personal jurisdiction.

E. Daimler, BNSF, *and the Definition of At Home*

In 2014, the Court again referenced the imprecise *at home* standard in *Daimler AG v. Bauman*, and again stated that place of incorporation and principal place of business would satisfy the standard.[85] In a footnote, however, the Court described *at home* as "comparable to a domestic enterprise in that State."[86] In another footnote the Court repeated *Goodyear*, stating that it was not eliminating the possibility that somewhere other than the place of incorporation or principal place of business could meet the *at home* standard, again using *Perkins* as an example.[87]

In *Daimler*, the plaintiffs were Argentinian citizens alleging injury in Argentina by the acts of Daimler's Argentina subsidiary.[88] Daimler was incorporated and had its principal place of business in Germany.[89] The plaintiffs sought to bring the German parent corporation into a California court by imputing to it the activities of its United States subsidiary, MBUSA.[90] MBUSA was incorporated in Delaware and had its principal place of business in New Jersey.[91] Its activities in California included several facilities and a majority position in the California luxury automobile market.[92] The Court stated that even if it assumed that MBUSA was *at home* in California, and further assumed that MBUSA's California contacts could be imputed to Daimler, the exercise of general personal jurisdiction over Daimler in California would still fail to comport with due process.[93] The Court explained that the *Goodyear* inquiry was not whether the corporation had continuous and systematic contacts with the forum, but rather whether

83. *Id.* at 929.
84. *Id.* ("petitioners are in no sense at home in North Carolina").
85. 134 S. Ct. 746, 760 (2014).
86. *Id.* at 758 n.11.
87. *Id.* at 761 n.19.
88. *Id.* at 750–51.
89. *Id.* at 751.
90. *Id.*
91. *Id.*
92. *Id.* at 752.
93. *Id.* at 760.

the forum contacts were *so continuous and systematic* that they rendered the corporation *at home* in the forum.[94]

The Court also stated that evaluating general personal jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."[95] The Court did not elaborate on this significant departure from its own precedent on general personal jurisdiction, which exclusively focused on in-forum activities.[96] Apparently, this unprecedented requirement[97] is necessary to determine where a corporation is *at home*. This implies that *at home* is a concept larger than place of incorporation and principal place of business. The majority, however, also opined that only minimal discovery would be required to determine where a corporation is *at home*.[98] This second statement is difficult to reconcile with a requirement to evaluate a corporation's worldwide activities.

Perhaps the Court was suggesting that the *at home* standard is synonymous with principal place of business. Given that more than one principal[99] place of business would be an absurd result, the Court left open the question of why the *at home* language was necessary.[100] Of course, the Court could be suggesting that *at home* is a broader concept. This argument is supported by the Court's statements that *at home* is not limited to *only* place of incorporation and principal place of business.[101] However, the Court's reference to "an exceptional case," like *Perkins,* suggests that this expansion would only include a *temporary* principal place of business.[102] *At home* is meant to be a bright-line rule, but the Court went to great pains to allow an exception and then foreclosed any real possibility of utilizing that exception. In addition to drawing us no nearer to understanding how *at home* is distinct from principal place of business, the Court called into question the very understanding of principal place of business itself.

Daimler did not object to the assertion of general personal jurisdiction over MBUSA in California; although under *Goodyear* it is likely that general personal jurisdiction could have been successfully challenged.[103] Perhaps the challenge was not brought because California

94. *Id.* at 761.
95. *Id.* at 762 n.20.
96. *Id.* at 767 (Sotomayor, J., concurring in the judgment).
97. *Id.* at 764.
98. *Id.* at 762 n.20 (majority opinion).
99. *Principal*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016) (as an adjective: chief; primary; most important).
100. Blanchard, *supra* note 77, at 883 ("the phrase 'principal place of business' [for determining subject matter jurisdiction] refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities").
101. *Daimler*, 134 S. Ct. at 762 n.19 (allowing that an exceptional case, like *Perkins*, could allow a finding of at home beyond place of incorporation and principal place of business).
102. *Id.*
103. *Id.* at 758.

was viewed as convenient or because of uncertainty about the imprecise *Goodyear* language. There was also a strong argument for a *forum non conveniens* dismissal because none of the parties were from California, none of the actions giving rise to the claim occurred there, none of the evidence or witnesses were there, and California's interest in adjudicating a claim between a German company and Argentinian citizens was tenuous at best and would add nothing to the American body of law.[104]

However, under the *at home* standard, if the *Daimler* plaintiffs had been residents of California injured in Argentina, the outcome would be the same despite the significant change in factors. Additionally, based on the Court's statements regarding agency theory and piercing the corporate veil, it is highly likely those Californians could not bring suit *anywhere* in the United States.[105] The Court did not need to invent a new, narrower construction of general personal jurisdiction because the facts of *Daimler* would fail to establish personal jurisdiction in California even under the broader *International Shoe* reasonableness standard.[106] This is similar to both *Helicopteros* and *Goodyear*, where the facts supported only the thinnest, attenuated connection between the defendant and the forum.[107]

In 2017, the Court affirmed its *at home* due process constraint on general personal jurisdiction as applicable in all situations involving an out-of-state corporation defendant in *BNSF Railway Co. v. Tyrrell*.[108] As *Perkins*, *Helicopteros*, *Goodyear*, and *Daimler* all involved defendants incorporated outside the United States,[109] *BNSF* is the first Supreme Court decision to involve a domestic corporation. In addition, the alleged harm suffered in those previous cases also occurred

104. Forum non conveniens factors include access to evidence and witnesses, the burden on the defendant, the forum's interest in adjudicating the claim, and the inconvenience to the plaintiff of refiling the claim in another forum. Emily J. Derr, Note, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 825 (2008).

105. Allowing the exercise of general personal jurisdiction over foreign corporations "whenever they have an in-state subsidiary or affiliate . . . would sweep beyond even the 'sprawling view of general jurisdiction' [the Court] rejected in *Goodyear*." *Daimler*, 134 S. Ct. at 760 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011)).

106. *Id.* at 764 (Sotomayor, J., concurring in the judgment).

107. Helicol's contacts included a contract negotiation meeting, accepting checks drawn on a Texas bank, purchases from a Texas company, and training related to those purchases. Helicopteros Nacionales de Colom. v. Hall, 466 U.S. 408, 409 (1984). Goodyear's contacts included a small quantity of products reaching North Carolina through "the stream of commerce." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 920 (2011).

108. 137 S. Ct. 1549, 1558-59 (2017).

109. The *Perkins* defendant was incorporated in the Philippines. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 439 (1952). The *Helicopteros* defendant was incorporated in Colombia. *Helicopteros*, 466 U.S. at 409. The *Goodyear* defendants were incorporated in Turkey, France, and Luxembourg. *Goodyear*, 564 U.S. at 918. The *Daimler* defendant was incorporated in Germany. *Daimler*, 134 S. Ct. at 750-51.

outside the United States, a further contrast with *BNSF*.[110] The Court reiterated that determining general personal jurisdiction requires evaluating all of a corporation's activities, both within and outside of the forum state.[111] However, the Court also stated that "in-state business . . . does not suffice to permit the assertion of general [personal] jurisdiction over claims . . . that are unrelated to any activity occurring in" the forum state.[112] Arguably, the Court stated that relative activities are a factor in determining where a corporation is *at home* but that the in-forum activities cannot support the exercise of general personal jurisdiction. Other than a vague reference to *Perkins*,[113] the Court gave no guidance on how comparative activity level relates to being *at home*. As Justice Sotomayor eloquently pointed out in her dissent, the so-called comparative activities test seems to serve no purpose.[114]

BNSF involved the claims of two plaintiffs alleging injuries related to employment with defendant BNSF.[115] The plaintiff filed the claim in a Montana state court, but the plaintiffs did not live or work for BNSF in Montana.[116] BNSF maintained operations in Montana but was incorporated in Delaware and had its principal place of business in Texas.[117] Because the claims did not arise from activities in Montana, specific personal jurisdiction was not possible.[118] The Montana courts could only assert general personal jurisdiction over BNSF.[119] The Montana Supreme Court held that *Daimler* did not control because that case did not involve the Federal Employers' Liability Act or a railroad defendant.[120] The Supreme Court rejected the Montana Supreme Court's distinction and unequivocally held that *Daimler* applies to *all* "assertions of general [personal] jurisdiction over nonresident defendants," regardless of the type of claim or defendant entity.[121] Evaluating BNSF's activities within Montana in comparison to their total operations, the Court found that the activities in Mon-

110. The *Perkins* plaintiff asserted claims related to stock in the defendant corporation. *Perkins*, 342 U.S. at 439. The *Helicopteros* plaintiffs asserted claims related to a helicopter crash in Peru. *Helicopteros*, 466 U.S. at 410. The *Goodyear* plaintiffs asserted claims related to a bus accident in France. *Goodyear*, 564 U.S. at 918. The *Daimler* plaintiffs asserted claims related to human rights violations in Argentina. *Daimler*, 134 S. Ct. at 751.

111. *BNSF*, 137 S. Ct. at 1559.

112. *Id.*

113. *Id.* at 1558 ("Because Ohio then became 'the center of the corporation's wartime activities,' suit was proper there.").

114. *Id.* at 1561 (Sotomayor, J., concurring in part and dissenting in part).

115. *Id.* at 1554 (majority opinion).

116. *Id.*

117. *Id.*

118. *Id.* at 1558.

119. *Id.*

120. *Id.*

121. *Id.* at 1558–59.

tana were insufficient to establish the company as *at home* in Montana.[122]

III. THE IMPACT OF THE *AT HOME* STANDARD

A. *Restricting General Personal Jurisdiction Fora*

The holdings in *Goodyear*, *Daimler*, and *BNSF* will likely dramatically reduce the number of fora where a corporation may be required to defend itself for injuries unrelated to the forum. Specifically, the Supreme Court stated that allowing "the exercise of general [personal] jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business[ ]'" would be "unacceptably grasping."[123] Additionally, the invention of a comparative contacts test in *Daimler*, with no guidance on what weight that test holds, virtually guarantees that general personal jurisdiction will fail outside of the place of incorporation or principal place of business.[124]

The Supreme Court articulated a "reasonableness" test in *World-Wide Volkswagen Corp. v. Woodson* for assertions of specific personal jurisdiction (when the claim is related to the contacts).[125] For defendants, this test protects their due process rights to avoid being called to defend themselves in distant, inconvenient fora.[126] Balanced against the defendant's due process rights are several factors, including "the plaintiff's interest in obtaining convenient and effective relief."[127] However, the Court also stated that regardless of the reasonableness factors, due process would not allow a state to assert personal jurisdiction against a "corporate defendant with which the state has no contacts, ties, or relations."[128] The *Goodyear*, *Daimler*, and *BNSF* holdings preclude any application of reasonableness in general personal jurisdiction analysis, making it "virtually inconceivable" that multistate or multinational corporations would ever be subject to general personal jurisdiction outside the place of incorporation or principal place of business.[129]

In *Pennoyer*, the Court presciently understood the personal jurisdiction problems posed by business entities. The Court stated that states may require partnerships and associations "to appoint an agent or

122. *Id.* at 1554, 1559.

123. Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014).

124. *BNSF*, 137 S. Ct. at 1561 (Sotomayor, J., concurring in part and dissenting in part).

125. 444 U.S. 286, 292 (1980).

126. *Id.*

127. *Id.*

128. *Id.* at 294. The defendants had virtually no contacts with the forum state beyond the foreseeability that their cars could be driven to other states. *Id.* at 295.

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

representative in the State to receive service of process."[130] The Court also stated that States may prescribe how corporations may be held accountable without "personal service upon their officers or members."[131] The Court recognized that a State and its citizens had a necessary interest in investigating conduct and, importantly, enforcing obligations.[132]

The Court recognized in *Pennoyer* that restricting personal jurisdiction could have the effect of denying certain plaintiffs the right to redress.[133] Although the Court spoke of a State's ability to determine "the civil status and capacities of all its inhabitants," and used the example of divorce, the Court understood that a restrictive rule created the possibility of denying access to court.[134] The Court specifically exempted its holding from these "civil status" proceedings to avoid the possibility that "the injured citizen would be without redress."[135]

B. *Restricting Corporations*

The Supreme Court has established that, for purposes of due process, a corporation is a person.[136] However, the *at home* standard creates a significant disparity between individual and corporate defendants: the ability to be "present" in fora beyond the home state. A person's "presence" is based on physical location, creating opportunities for states to exercise general personal jurisdiction based on physical presence.[137] With corporations, the concept of forum contacts serves as a form of substitute for physical presence.[138] However, under the *at home* standard a corporation's activities in a state other than the place of incorporation or principal place of business, no matter their degree, will not establish the corporation's presence in that state. A person is subject to general personal jurisdiction wherever he may be found, but a corporation is subject to general personal jurisdiction only where it is *at home*.

Some corporations operate extensively in many states, or even in all states.[139] In fact, for some corporations, extensive operations in a wide

130. Pennoyer v. Neff, 95 U.S. 714, 735 (1878).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 734–35.
135. *Id.* at 735.
136. *E.g.*, Charlotte, C. & A. R.R. v. Gibbes, 142 U.S. 386, 391 (1892).
137. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) (holding that assertions of personal jurisdiction based on in-state service of process are consistent with due process). The Court unanimously agreed that personal jurisdiction based on in-state service of process was valid, but differed on the justification for that holding. Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M. L. REV. 1, 8 (2016).
138. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).
139. WALMART, 2017 ANNUAL REPORT 63 (2017) (showing that Walmart operates multiple retail outlets in all fifty states).

geographic area are an integral part of their business plan.[140] For example, Walmart's corporate objectives include dominating the competition and undercutting prices through maximizing economies of scale.[141] In addition, Walmart is the largest private employer in twenty-two states.[142] These extensive activities come with concomitant obligations, which is the foundation of specific personal jurisdiction.[143] As such, these multi-state corporations may be subject to suit in any state where their contacts result in claims arising from those contacts.[144] Under the jurisprudence that developed between *International Shoe* and *Goodyear*, a corporation's extensive activities could also subject it to suit for claims not arising from those contacts. As such, a corporation like Walmart could reasonably expect to defend itself in a jurisdiction for specific claims arising from activities in that jurisdiction and from non-specific claims because of the extent of their continuous and systematic activities in that jurisdiction.

In contrast, under *Goodyear*, *Daimler*, and *BNSF*, Walmart is not subject to general personal jurisdiction anywhere other than Delaware and Arkansas.[145] To illustrate the impact of this disparity, let us consider the Texas mother injured in a Walmart store in Alaska. She may bring a claim against Walmart in the state where her injury occurred, Alaska, under specific personal jurisdiction. However, she cannot bring the claim in Texas, a state where Walmart has 585 retail outlets and more than 170,000 employees, because the injury did not occur in Texas. Because the injury occurred in Alaska, the *at home* standard would protect Walmart from defending itself in Texas courts, even if she cannot realistically bring suit in Alaska and even if both parties may prefer to adjudicate the claim in Texas rather than Alaska.

Similarly, the father from Illinois would face the same situation. Although Six Flags operates a theme park in Illinois,[146] under the *at home* standard it is only subject to general personal jurisdiction in Delaware and Texas.[147] If the son's injury occurred at the Six Flags

140. *Id.* at 4 ("Walmart stores are located within 10 miles of approximately 90 percent of the U.S. population.").

141. *Id.* at 7.

142. Evan Comen & Michael B. Sauter, *The Largest Employer in Every State*, 24/7 WALL ST. (Mar. 17, 2017, 6:00 AM), http://247wallst.com/special-report/2017/03/17/largest-employer-in-every-state/ [https://perma.cc/G2S4-52KK].

143. *Int'l Shoe Co.*, 326 U.S. at 319.

144. *Id.* at 314.

145. According to Walmart's Form 10-K filing with the Securities and Exchange Commission, it is incorporated in Delaware and has its headquarters in Arkansas. U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/Archives/edgar/data/104169/000119312511083157/d10k.htm [https://perma.cc/96B3-25QA] (last visited Oct. 22, 2018).

146. SIX FLAGS ENTM'T CORP., 2017 ANNUAL REPORT 2 (2017) (showing that Six Flags operates a theme park in Gurnee, Illinois).

147. According to Six Flags Entertainment Corporation's Form 10-K filing with the Securities and Exchange Commission, it is incorporated in Delaware and has its headquarters in Texas. U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/Arch

near their home, the suit could be brought in Illinois under specific personal jurisdiction. But because the injury occurred while the family was on vacation, the claim may only be brought in California, Delaware, or Texas.

The impact of the *at home* standard is that corporations who would have been subject to both specific and general personal jurisdiction in certain fora under the nearly seventy years of jurisprudence following *International Shoe* are now suddenly protected from general personal jurisdiction in those fora. In all states outside the state of incorporation and principal place of business, the corporation's forum activities could meet the *International Shoe* standard for specific personal jurisdiction but could not meet the *at home* standard for general personal jurisdiction. These corporations can still be sued in any jurisdiction where they have activities. The difference is that they can be sued in those jurisdictions by fewer plaintiffs.

In essence, the *at home* standard means that a plaintiff who is injured outside her home state cannot sue in her home state unless the defendant is incorporated or has its principal place of business in her home state. Although couched in terms of protecting defendants' due process rights from infringement, including inconvenience, the standard assumes it is always more convenient to defend a suit *at home*. As there are many potential factors influencing a defendant's convenience, the standard does not account for the defendant's actual convenience, whether that be positive, negative, or neutral.

C. *Restricting Claims*

In his dissent in *World-Wide Volkswagen*, Justice Brennan recognized that a plaintiff who is "forced to travel to a distant state" to seek redress could "be entirely unable to bring the cause of action."[148] By reducing the number of fora where a corporate defendant can be sued, the *at home* standard confirms this prediction in several circumstances.

One example occurs when the amount in controversy is less than the cost of traveling to a distant forum to obtain remedy. Although the value constraint exists in all claims, an important consideration in the plaintiff's choice of forum will include the relative costs of pursuing a claim in those fora. Travel costs may include transportation and lodging, lost work time, and the cost of being separated from family and social supports. In addition, legal fees may increase dramatically, especially if additional attorneys are required for appearances in a distant forum. The *at home* standard effectively increases the cost of ob-

ives/edgar/data/701374/000070137416000189/form10-k_123115.htm [https://perma.cc/5UDD-J2U8] (last visited Oct. 22, 2018).

148. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 302–03 (1980) (Brennan, J., dissenting).

taining a remedy, thereby increasing the minimum recovery that will be needed to make pursuit of the claim worthwhile.

A second example occurs when travel is not possible for the plaintiff. Disability, family or work obligations, or probation and parole can create barriers for plaintiffs to travel to distant fora. While this has always been true, the *at home* standard reduces the available fora and exacerbates the impact of travel barriers. For example, the plaintiffs in *World-Wide Volkswagen* suffered severe injuries, likely preventing them from brining suit where the defendant was *at home*.[149] Whether to a distant forum where a party was injured or a distant forum where the responsible party is "at home," the Supreme Court's suggestion that plaintiffs have "recourse to at least one clear and certain forum"[150] ignores the reality that many people are simply unable to travel freely.[151]

Likewise, the risk of injury while traveling is another litigation barrier. Travel for vacation, work, government service, or for visits to friends and family is increasingly commonplace. If a plaintiff is injured while traveling, specific personal jurisdiction would exist at the destination and general personal jurisdiction will exist only at the defendant's home. If neither forum is accessible, a plaintiff is left without any forum to bring suit. For small corporations without any contacts with the plaintiff's home state, this rule seems justified. But for large, multistate and multinational corporations with significant activities in the plaintiff's home state, the justification is less convincing.

Finally, another example occurs when the claim involves a corporation with its place of incorporation and principal place of business outside the United States. Although there may be significant activities within the United States, no state would meet the *at home* standard, thereby rendering these corporations immune from suit and denying injured plaintiffs any United States forum in which to seek redress.[152] Scholars have suggested that the Supreme Court may have "a reluctance to draw foreign disputes into United States courts," which would explain the transnational elements of *Goodyear*, *Helicopteros*, and *Daimler*.[153] However, other methods exist to achieve that purpose.[154]

149. *Id.* at 288 (majority opinion).

150. Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).

151. The reasonableness standard was not implicated by the specific facts of *World-Wide Volkswagen* because there were no significant contacts between the defendant and the forum. The Author argues that if there were significant contacts in a similar scenario, the "at home" standard would deny the plaintiffs the ability to bring their claim. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. 286.

152. The Author recognizes that if the injury occurred in the United States, the defendant may be subject to specific personal jurisdiction in the forum where the injury occurred.

153. Robertson & Rhodes, *supra* note 36, at 786.

154. If the injury occurred outside the United States, even if general personal jurisdiction were allowed, the defendant could move for a dismissal under the doctrine of

D. *Retrospective: Applying the At Home Standard to Pre-*Goodyear *Cases*

Two cases applying Florida law, one in the Florida Appellate Court and one in the Eleventh Circuit, illustrate situations where plaintiffs successfully asserted general personal jurisdiction over non-resident corporate defendants under the *International Shoe* standard, but would be unlikely to succeed today.[155] Chronologically, both cases were decided between *Helicopteros* (1984) and *Goodyear* (2011).

In *Woods v. Nova Companies Belize Ltd.*, the Florida Appeals Court held the exercise of general personal jurisdiction over the defendant corporation was consistent with due process.[156] Although the defendant was incorporated and had its principal place of business in Belize, the corporation had extensive contacts in Florida, which included shipping the majority of its product to and through the state.[157] Florida's long-arm statute provided that substantial activity provides a basis for personal jurisdiction regardless of in-state activity giving rise to the claim.[158] The court held that because the standard was high, it also satisfied the "constitutional requirements of minimum contacts."[159]

Additionally, the plaintiff was a resident of Belize, and the cause of action arose from an aircraft accident in Costa Rica.[160] This scenario mirrors *Daimler*, where both the parties and the events giving rise to the claim were foreign to the chosen forum. In *Woods*, however, the court only considered whether the defendant's Florida activities sufficiently established general personal jurisdiction, and then separately analyzed the defendant's motion to dismiss under *forum non conveniens*.[161]

In *Meier v. Sun International Hotels, Ltd.*, the Eleventh Circuit examined the exercise of general personal jurisdiction over a defendant incorporated and having its principal place of business in the Bahamas.[162] Like *Daimler*, *Meier* involved imputing a subsidiary's activities

forum non conveniens. For a discussion of forum non conveniens, see Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

155. The defendant's forum contacts would probably not satisfy either *Goodyear*'s "fairly regarded as at home" or *Daimler*'s "incorporation or principle place of business" standard. *See, e.g.*, Woods v. Nova Cos. Belize, 739 So. 2d 617, 621 (Fla. Dist. Ct. App. 1999); Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1264, 1278 (11th Cir. 2002).

156. 739 So. 2d at 621.

157. *Id.* at 619.

158. *Id.* at 620.

159. *Id.* at 621.

160. *Id.* at 619.

161. *Id.* at 621. In a divided ruling, the court denied the motion for dismissal under forum non conveniens because the plaintiff received a majority of his medical treatment in Florida. *Id.* at 622–23. The court concluded that because "the majority of the damage testimony and evidence would involve witnesses located in Florida," Florida was a reasonable forum. *Id.* at 622.

162. 288 F.3d 1264, 1268 (11th Cir. 2002).

to the foreign parent corporation for the purpose of establishing substantial activity.[163] The plaintiffs, residents of Utah, sustained injuries while on the defendant's property in the Bahamas.[164]

The plaintiffs successfully imputed the activities of the subsidiary to the defendant corporation under the Florida long-arm statute when that subsidiary was "merely an agent . . . without any semblance of individual identity."[165] The Florida subsidiary's activities included handling the majority of the reservations at the parent company's resort, coordinating advertising, marketing, purchasing, accounting, and collections activities.[166] Under reasoning similar to *Woods*, the court held that the subsidiary's activities in Florida satisfied the continuous and systematic contacts requirement of the Fourteenth Amendment.[167] Like *Woods*, the court separated the analyses of general personal jurisdiction and *forum non conveniens*.[168]

In holding that the exercise of general personal jurisdiction was consistent with due process, the court also addressed the "traditional notions of fair play and substantial justice" requirement of *International Shoe*.[169] The plaintiffs had an annual family income of $37,833.[170] By contrast, the defendants operated multiple luxury resorts and spent millions of dollars annually on advertising alone.[171] The court rejected the defendant's contention that the plaintiffs could pursue their claim in the Bahamas as "clearly inapposite to obtaining convenient and effective relief."[172]

Perhaps *Woods* and *Meier* represent the extent of the reasonableness standard that developed after *International Shoe*. Like *Goodyear* and *Daimler*, these cases involve defendant corporations, and plaintiffs in the *Woods* case, that were based outside of the United States. However, the *at home* standard applies to all scenarios involving defendant corporations. Today, Mr. Woods and Mr. Meier would face similar challenges to those that the mother from Texas and father from Illinois face in obtaining a judicial remedy.

IV. THE CONSTITUTIONALITY OF THE *AT HOME* STANDARD

"Only by providing that the social enforcement mechanism must function strictly within [the bounds of due process] can we hope to

163. *Id.* at 1272.
164. *Id.* at 1276.
165. *Id.* at 1272.
166. *Id.*
167. *Id.* at 1274.
168. *Id.* at 1276. The court remanded on the forum non conveniens motion due to insufficient evidence in the record. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

maintain an ordered society that is also just."[173] The *at home* standard results in a class of plaintiffs who are effectively denied access to the courts. This access to the courts, or right to redress, has been established as a fundamental property right subject to the protections of the Constitution. It follows then that infringement of that right must comport with due process under the Fifth and Fourteenth Amendments. Otherwise, plaintiffs are denied property without due process of law.

A. *The Fundamental Property Right to Redress*

The right to redress has been considered a property right since the time of Roman law.[174] Property interests in intangible rights to future possession existed in the English common law before the formation of the United States.[175] "[T]he term 'chose in action' includes all rights which are enforceable by action."[176] The Supreme Court has supported chose in actions for nearly 150 years.[177] The Supreme Court has held that causes of action are a "species of property" under the Due Process Clause.[178] Simply put, a "right of action is property."[179]

Fundamental rights "are most clearly present when the Constitution provides specific textual recognition of their existence and importance."[180] Property rights are deemed fundamental under the "liberties set forth in the Bill of Rights" and are subject to due process protection.[181] The Fifth and Fourteenth Amendments to the Constitution prohibit the government from depriving a person of their property without due process.[182]

When a fundamental right has been infringed, the class size of affected individuals is irrelevant to the due process analysis.[183] One of the foundational premises of our system of government is to protect minority interests.[184] In this situation, the class losing its right is likely comprised of disadvantaged individuals, arguably those that need the most protection. Any plaintiff, including corporations, may suffer

173. Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

174. GEORGE MOUSOURAKIS, ROMAN LAW & THE ORIGINS OF THE CIVIL LAW TRADITION 113 (2015).

175. *See* W. S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 1005 (1920) (citing Sir Thomas Palmer's Case, 5 Co. Rep. 24b (1601)).

176. *Id.* at 997 (emphasis omitted).

177. *See* Bushnell v. Kennedy, 76 U.S. 387 (1869).

178. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Martinez v. California, 444 U.S. 277, 281–82 (1980).

179. Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

180. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 790 (1986) (White, J., dissenting).

181. *Id.*

182. U.S. CONST. amends. V, XIV.

183. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (holding that fundamental rights may only be infringed on a showing of compelling interest and that the infringement is narrowly tailored to serve that interest).

184. THE FEDERALIST NO. 10 (James Madison).

under the *at home* standard.[185] Plaintiffs with less means, however, are more likely to suffer a complete bar to access.

Access to the courts is integral to exercising a chose in action. Hence, "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."[186] As Justice Cardozo explained, a "plaintiff owns something, and [the courts] help him to get it."[187] Courts "do not close their doors unless help would violate some fundamental principle of justice."[188]

It is noteworthy that in *Christopher v. Harbury*, the Supreme Court acknowledged that the Constitutional basis for the right of access to courts is "unsettled."[189] The Court has "grounded the right of access to courts" in the Due Process Clauses of the Fifth and Fourteenth Amendments, Equal Protection Clause of the Fourteenth Amendment, Privileges and Immunities Clause, and Petition Clause of the First Amendment.[190] This Comment assumes that the Due Process Clauses are legitimate bases for the right of access to the courts.

B. *The Requirements of Due Process*

When a fundamental right is curtailed, courts employ various tests to analyze permissibility in relation to due process.[191] Each approach attempts to answer a fundamental yet subjective question: Is there a sufficient justification for infringing on individual rights?[192] The Supreme Court performs a two-step analysis of due process violations: first, a determination of whether the plaintiff was "deprived of a protected interest," and second, "what process was his due."[193]

The Supreme Court held that it was a deprivation of a protected interest when a "procedural limitation on the claimant's ability to assert his rights" was unrelated to "a substantive element" of the underlying claim.[194] "[T]he 'property' component of the Fifth Amendment's

185. Robertson & Rhodes, *supra* note 36, at 784–85.

186. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

187. Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

188. *Id.* at 202.

189. 536 U.S. 403, 415 (2002).

190. *Id.* at 415 n.12. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (Fourteenth Amendment Due Process Clause); Murray v. Giarratano, 492 U.S. 1 (1989) (Fifth Amendment Due Process Clause); Pennsylvania v. Finley, 481 U.S. 551 (1987) (Equal Protection Clause); Chambers v. Balt. & Ohio R.R., 207 U.S. 142 (1907) (Privileges and Immunities Clause); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731 (1983) (Petition Clause).

191. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200 (1996).

192. *See id.* at 1234.

193. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). *See also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950); Martinez v. California, 444 U.S. 277 (1980).

194. *Logan*, 455 U.S. at 433.

Due Process Clause [imposes] 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'"[195] Likewise, the Fourteenth Amendment's Due Process Clause prevents States from taking actions equivalent to denying claimants "a meaningful opportunity to be heard."[196]

A "determination of the precise nature of the government function involved" and the private interest affected by the government's action must be considered when deciding the procedures that due process may require.[197] By 1850, the Supreme Court recognized that "the rights of all parties must be regarded."[198] In multiple holdings,[199] the Supreme Court emphasized that plaintiffs have a protected property interest that cannot be deprived without "an opportunity to present [their] claim of entitlement."[200] That opportunity "must be tailored" to plaintiffs' "capacities and circumstances."[201]

In *Boddie v. Connecticut*, the Supreme Court confronted the question of the plaintiff's due process rights.[202] The Court explained that a due process analysis typically focused on defendants because they had no other means of dispute resolution once they had been sued.[203] *Boddie* involved the dissolution of marriage, which could only be accomplished through judicial action.[204] The Court recognized that in certain circumstances due process analysis must shift to include the plaintiff.[205] Plaintiff's due process rights are particularly paramount when "[r]esort to the judicial process" is involuntary because it is the only means available to a plaintiff.[206] The Court concluded that "the right to a meaningful opportunity to be heard within the limits of practicality[ ] must be protected" even against laws that may "jeopardize it for particular individuals."[207]

195. *Id.* at 429 (quoting Societe Internationale v. Rogers, 357 U.S. 197 (1958)) (emphasis omitted).

196. *Id.* at 429–30, n.5 (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).

197. Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

198. Boswell's Lessee v. Otis, 50 U.S. 336, 350 (1850).

199. *See, e.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950); Bell v. Burson, 402 U.S. 535 (1971); Bd. of Regents v. Roth, 408 U.S. 564 (1972); *Logan*, 455 U.S. 422.

200. *Logan*, 455 U.S. at 434.

201. *Goldberg*, 397 U.S. at 268–69.

202. 401 U.S. 371, 375 (1971).

203. *Id.* at 376.

204. *Id.*

205. *Id.* at 376-77. The Court emphasized it was not deciding that access to courts was subject to due process protection in all circumstances. *Id.* at 382. In his concurrence, Justice Brennan questioned whether there was a Constitutional distinction between the state statute in question and "any other right arising under federal or state law." *Id.* at 387 (Brennan, J., concurring in part).

206. *Id.* at 376-77 (majority opinion).

207. *Id.* at 379-80.

C. *Strict Scrutiny of Restrictions on Fundamental Rights*

To be consistent with due process, the restriction of a fundamental right must derive from a compelling government interest and must be narrowly constructed to meet that interest.[208] The Supreme Court has stated that "a government practice or statute which restricts fundamental rights or which contains suspect classifications is to be subjected to strict scrutiny and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."[209]

There are many ways to evaluate whether a government interest is compelling.[210] A textual link to the Constitution can support the finding of a compelling interest.[211] For example, the compelling interest in a diverse student body was drawn from the First Amendment's right to academic freedom.[212] Similarly, interests in combating race discrimination were drawn from the Equal Protection Clause.[213] However, a constitutional link is not required. For example, the Court has found that the government had a compelling interest in protecting children from physical and psychological harm.[214]

Courts analyze several factors in determining whether a government action is narrowly tailored—that is, whether it satisfies a compelling interest through minimally restrictive means.[215] First, the infringement must be necessary to further the interest.[216] If the goal could be accomplished without infringing a right, then the infringement is unnecessary.[217] Second, the court evaluates whether the action is underinclusive.[218] Although not dispositive, underinclusiveness can suggest an impermissible motive or call into question the action's ability to achieve the goal.[219] For example, a statute that prohibits only certain actors from the disclosure of crime victim identities is underinclusive.[220] Third, the Supreme Court has held that overinclusive actions are not narrowly tailored.[221] However, overinclusive actions may fail narrow tailoring regardless of whether less restrictive alternatives

208. Roe v. Wade, 410 U.S. 113, 155 (1973).
209. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (internal quotes omitted).
210. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007).
211. *Id.*
212. *Bakke*, 438 U.S. at 311–13 (majority opinion).
213. Fallon, Jr., *supra* note 210, at 1321.
214. *Id.* at 1322.
215. *Id.* at 1326.
216. *Id.*
217. *Id.*
218. *Id.* at 1327.
219. *Id.*
220. *See* Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989).
221. Fallon, Jr., *supra* note 210, at 1328.

exist.[222] For example, a statute that restricts television programming at certain times because of possibly unintentional viewing is overinclusive.[223] Finally, balancing the interest and the infringement is inherent in making a qualitative determination of narrow tailoring.[224] In reality, not all interests are equally compelling, just as not all infringements are equally harmful.[225]

D. *Applying Strict Scrutiny to the* At Home *Standard*

While it may seem counterintuitive to say that narrowing a rule causes the rule to fail narrow tailoring, the *at home* standard can effectively deprive plaintiffs of access to any redress. In due process terms, general personal jurisdiction has always been concerned with defendants.[226] The government's compelling interest is to protect defendants.[227] However, both parties have due process rights at stake.[228] The problem with the *at home* standard is that, in some circumstances, it protects defendants to the detriment of plaintiffs and potentially violates the latter's due process rights. In other words, a line has been crossed which creates due process concerns for the plaintiff. Whereas the compelling interest concerns the defendant, the infringement concerns the plaintiff.

The *Daimler* Court gave several insights into its justification for adopting a narrower application of general personal jurisdiction. First, the plaintiffs asserted that a California court could properly exercise general personal jurisdiction over Daimler in a case involving a Polish citizen injured in Poland.[229] The Court found this exercise of general personal jurisdiction "exorbitant" and inconsistent with due process.[230] Second, the Court found that allowing "the exercise of general [personal] jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business" was "unacceptably grasping."[231] The Court explained that such a standard for general personal jurisdiction "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[232]

222. *Id.*
223. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 814 (2000).
224. *See* Fallon, Jr., *supra* note 210, at 1330.
225. *Id.* at 1331.
226. Rees, *supra* note 10, at 406.
227. *Id.*
228. *Id.*
229. Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014).
230. *Id.*
231. *Id.* at 761 (internal quotation marks omitted).
232. *Id.* at 761–62 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

This reasoning suggests that the Court was concerned with the scope and unpredictability of a broad definition of general personal jurisdiction. Consistent with traditional personal jurisdiction analysis, these arguments pertain to the defendant's interests, wholly ignoring the plaintiff's interests. This defendant-oriented focus is unsurprising given that courts routinely and appropriately ignore the role of the plaintiff's rights in jurisdictional analysis in most circumstances.[233]

However, applying the narrow-tailoring factors to the *at home* standard reveals significant problems for a certain category of plaintiffs. First, the *at home* standard is unnecessary because a well-functioning rule already existed. Prior to *Goodyear*, the Supreme Court provided little guidance in applying general personal jurisdiction.[234] However, the framework developed by the lower courts was largely predictable.[235]

Second, from the plaintiff's perspective, the *at home* standard is overinclusive because corporations can be both defendants and plaintiffs. A small corporation with limited assets and operations may encounter the same preclusion effect as an individual when that corporation is the plaintiff. Additionally, larger corporations have found it difficult to defend intellectual property rights against foreign infringement.[236] While the *at home* standard is meant to protect corporations in defending suits, it may also restrict their ability to file suits.

Finally, the *at home* standard is not aligned with the objective because it fails to achieve the goal of predictability in some circumstances. Large corporations may maintain more than one site with characteristics of a principal place of business, calling into question the ability to cleanly determine where the corporation is *at home*. Because the plaintiff must choose where to file suit, the *at home* standard provides little certainty in these situations about which of several possibilities is the principal place of business.

For example, Amazon is currently planning a second corporate headquarters, which will be "a full equal" to its existing headquarters.[237] Depending on the division of corporate functions, Amazon could find it equally inconvenient to litigate where the "other" headquarters is compared to the plaintiff's home forum. In addition, individual plaintiffs will likely file suit in both locations, eroding the predictability of the *at home* standard. Ultimately, if *principal place of*

233. Rees, *supra* note 10, at 412. Focusing on defendants is appropriate because they "have a due process liberty interest shielding them from overreaching fora." *Id.* at 406.

234. Robertson & Rhodes, *supra* note 36, at 779.

235. *Id.* at 779–80.

236. *Id.* at 784–85. *See, e.g.*, Gucci Am., Inc. v. Bank of China, 768 F.3d 122 (2d Cir. 2014); Acorda Therapeutics, Inc. v. Mylan Pharm., Inc., 817 F.3d 755 (Fed. Cir. 2016).

237. AMAZON, https://www.amazon.com/b?node=17044620011 [https://perma.cc/76BB-YTYG] (last visited Oct. 12, 2018).

business as a legal term of art is singular,[238] courts may be compelled to reach the strange conclusion that the corporation is not *at home* where it has its headquarters.

"If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest should have no constitutional excuse not to appear."[239] However, "[t]he defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum."[240] Furthermore, in light of the significant societal changes since *Pennoyer*, "constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary."[241] Indeed, granting the defendant "complete control of the geographical stretch of his amenability to [file] suit"[242] seems to be the unacceptably grasping position.

V. CONCLUSION

Where practical, the Supreme Court prefers bright-line rules that minimize legislation and encourage people to interact.[243] The Court has even held that its preference for bright-line rules will allow some infringement of rights in pursuit of the goal of certainty.[244] However, its attempt to apply a bright-line standard to exercises of general personal jurisdiction has not achieved this objective. Further, the standard it created impermissibly infringes on a plaintiff's due process rights.

The Supreme Court's approach to general personal jurisdiction seems to be disconnected from both its own precedent and the realities of a changing society. In *Daimler*, the Court opined that *International Shoe* does not suggest that some amount of activity in a forum gives that forum authority over a larger amount of activity not connected to that forum.[245] However, that seems to be *exactly* what *International Shoe* was suggesting—that activities within a state can justify jurisdiction in that state over wholly unrelated activities.[246] The

238. It has been suggested that the Supreme Court's use of the legal term of art "principal place of business" should be defined in alignment with *Hertz Corp. v. Friend*. 559 U.S. 77 (2010). In *Hertz*, the Court defined principal place of business for subject matter jurisdiction purposes as "the one place from which 'the corporation's high level officers direct, control, and coordinate the corporation's activities,'" referred to as the nerve center test. *See* Blanchard, *supra* note 77, at 887–88.

239. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 312 (1980) (Brennan, J., dissenting).

240. *Id.* at 301.

241. *Id.* at 309.

242. *Id.* at 311.

243. Robertson & Rhodes, *supra* note 36, at 788.

244. *See id.*

245. Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014).

246. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318–19 (1945).

Daimler footnote arguably suggests that there is no such thing as general personal jurisdiction. This argument is possibly supported by the Court's statement that "we have declined to stretch general [personal] jurisdiction beyond limits traditionally recognized,"[247] suggesting the Court views *Pennoyer*'s territorial approach is controlling law for general personal jurisdiction.

The easily applied but overly restrictive rule of *Pennoyer* did not work. The flexible focus on reasonableness that developed after *International Shoe* and worked for more than seventy years was much better suited to the rapidly changing nature of our society. The move back to *Pennoyer*-like rules in *Goodyear*, *Daimler*, and *BNSF* affords little or no real benefit to corporations, but for some plaintiffs is a fatal burden. The *at home* standard is unnecessary and does not survive strict scrutiny analysis. The Supreme Court's unexplained and unsupported harkening back to *Pennoyer* created uncertainty that has spawned more than 300 law review articles in three years. One hundred years ago, Justice Cardozo warned that "[i]t cannot be that public policy forbids our courts to help [plaintiffs] in collecting what belongs to them. . . . We shall not make things better by sending them to another state, . . . where suit may be impossible."[248] The *at home* standard does just that.

247. *Daimler*, 134 S. Ct. at 757–58.

248. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).