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## Cover Page Footnote

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# THE ESSENTIALLY-AT-HOME REQUIREMENT FOR GENERAL JURISDICTION: SOME EMBARRASSING CASES

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In *Daimler AG v. Bauman*, the Supreme Court held that the exercise of general jurisdiction is confined to cases in which is the defendant is "essentially at home in the forum."[1] The Court provided two examples of fora in which this criterion could be met: the defendant's "principal place of business" and its "place of incorporation."[2] It left open the possibility of other places in which a defendant might be essentially at home.[3] In so holding, the Court refused to follow the advice of a concurring justice who would have decided the case on "simpler," and presumably more traditional, grounds.[4]

The Court's reasoning is subject to various lines of criticism. The basic legal test is nothing but a metaphor.[5] As a figure of speech, a metaphor deliberately substitutes one reality for another, which hardly sounds like legal reasoning.[6] Additionally, the essentially-at-home construct bears no clear relationship to the

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1. Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

2. *Id.* at 137.

3. *Id.* (indicating that, in *Goodyear*, the Court did not hold that incorporation and principal place were the "only" places for general jurisdiction).

4. *Id.* at 143–44 (Sotomayor, J., concurring).

5. *See infra* Part I.B.

6. *See infra* Part I.B.

factors that might make jurisdiction appropriate.[7] The Court did not explain how its two examples of proper fora were derived from the basic test.[8] At a more practical level, the Court's standard produces strange results in which fora having little claim to appropriateness are preferred over other, more credible fora.[9]

Part I of this Article begins with an examination of the *Daimler* case, its expression of the essentially-at-home test, and the Court's two examples of conforming locations. The case is well known, and the examination centers upon aspects that are important to the analysis that follows. The second section of Part I discusses why a metaphor is a poor way to express a legal standard. Vagueness is part of the problem, but only the beginning of the trouble with adopting metaphor as law; metaphors are deliberate confusion of one reality with another, and, therefore, one can expect that a metaphor adopted as law will mislead those who try to follow it. The final section of Part I deals briefly with the undesirability of vague and misleading jurisdictional standards, and the Supreme Court's expressed indifference toward the trouble it causes in this area.

Part II of the Article focuses on the anomalous outcomes that can result from *Daimler*. The focus is on four situations that produce what can be called "embarrassing cases." The four are titled, in an effort at brief description, the Multistate Partnership,[10] the Border Town,[11] the Biggest Business in the State,[12] and Specific Jurisdiction Next Door.[13] The final section sets out the author's conclusions, which include the suggestion that the Court should provide a less ambiguous interpretation of the essentially-at-home requirement.

## I. METAPHOR ("ESSENTIALLY AT HOME"): A BAD WAY TO EXPRESS A LEGAL STANDARD

### *A. The* Daimler *Case*

*Daimler AG v. Bauman* featured claims under the Alien Tort Statute and the Torture Victim Protection Act against DaimlerChrysler Aktiengesellschaft, a German public stock company, for alleged acts of a Daimler subsidiary in supporting Argentina's "Dirty War."[14] The plaintiffs were survivors of persons

7. *See Daimler*, 571 U.S. at 142–43 (Sotomayor, J., concurring) (explaining that the Court's reasoning is "foreign to our due process jurisprudence").

8. *See id.* at 137–38.

9. *See infra* Part II.C (a given corporation may be the biggest business in the state, but is not "at home" there, whereas much smaller businesses are "at home" by virtue of incorporation there, though not located there).

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *See infra* Part II.C.

13. *See infra* Part II.D.

14. Daimler AG v. Bauman, 571 U.S. 117, 121–22 (2014). The defendant is referred to as "Daimler" throughout the opinion.

extrajudicially injured or killed with Argentine government participation.[15] The survivors brought suit in a federal district court in California, asserting jurisdiction on Mercedes-Benz USA's (MBUSA) contacts with California and Daimler's indirect ownership of MBUSA and participation in its actions.[16] The Supreme Court held that the district court had no jurisdiction over Daimler.[17]

The *Daimler* case is well known, but some aspects require consideration. The Court began by holding that MBUSA's contacts with California could not be attributed to Daimler based solely on its ownership and operations through MBUSA.[18] Daimler did not challenge the California Court's potential jurisdiction over MBUSA, and the Court assumed that jurisdiction over it, therefore, could exist in this one case.[19] Given the Supreme Court's reasoning,[20] MBUSA might have succeeded in a jurisdictional challenge, although that issue may not have mattered because MBUSA seemed unlikely to have been liable.[21] Daimler's contacts with California consisted of vehicles galore sold in the state through its subsidiary, in addition to its control over MBUSA.[22]

The Supreme Court emphasized the distinction between specific jurisdiction, in which the contacts and the claim are related, and general jurisdiction, in which they are not related.[23] Specific jurisdiction requires a lesser quantum of contacts,[24] but it would have taken a real stretch to make *Daimler* fit specific jurisdiction.[25] Of the tests proposed for relatedness in this context, the most credible was probably a requirement of "substantial connection" to "operative facts."[26] The operative facts supporting the plaintiffs' claims were all in Argentina or Germany, with no substantial connection to California.[27]

Thus, the case had to be supported, if at all, by general jurisdiction. But the Supreme Court had been inclined to limit general jurisdiction, and a longstanding requirement of "continuous and systematic" contacts traditionally

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15. *Id.* at 120–21.

16. *Id.*

17. *Id.* at 122.

18. *Id.* at 133, 136.

19. *Id.* at 134.

20. *See id.* at 137–39. In reality, MBUSA was not "at home" in California, where it was neither incorporated nor had its principal place of business. *See id.* at 121.

21. Daimler was the only defendant. *Id.* at 120–21.

22. *Id.* at 123.

23. *Id.* at 126–27. The Court described specific jurisdiction as that in which the defendant's activities in the state "g[a]ve rise to the liabilities sued on." *Id.* (alteration in original) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

24. The Court pointed out that a single contact might be enough in a specific jurisdiction case. *Id.* at 127.

25. The plaintiffs did not claim specific jurisdiction existed. *Id.* at 133.

26. *See* Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 584–85 (Tex. 2007) (considering various tests for distinguishing specific jurisdiction from general and concluding that the "substantial connection" to "operative facts" test is best).

27. *See Daimler*, 571 U.S. at 120–21.

served this purpose.[28] If the sales of its automobiles could count as "continuous and systematic" contacts, perhaps the plaintiffs could have justified general jurisdiction under this test because Daimler's vehicles were commonplace, of course, in California. What else do people drive in Beverly Hills? But the Supreme Court invoked two new doctrines to forestall this result.

First, the Court equated general jurisdiction with "all-purpose" jurisdiction.[29] This dubious label enabled the Court to illustrate unacceptable results from the extension of general jurisdiction: under plaintiffs' theory, "if a [Daimler product] overturned in Poland" and injured "a Polish driver and passenger," these potential claimants could bring suit in California.[30] The analogy was inappropriate because general jurisdiction need not be all-purpose.[31] Furthermore, the Polish accident would invoke Polish law of a distinctly local kind, whereas plaintiffs' suit against Daimler was brought under United States law in which there is said to be a special American interest.[32]

The second way the Supreme Court limited general jurisdiction was more explicit. It was not enough, said the Court, for a defendant's contacts with the forum to be systematic and continuous.[33] Instead, the contacts must be "so 'systematic and continuous'" that the defendant is "essentially at home in the forum State."[34] The Court used this phrase in an earlier case, *Goodyear Dunlop Tires Operations S.A. v. Brown*.[35] In *Goodyear*, however, the contacts were thin, the substantive law would not have been American, and the "essentially at home" statement seemed unnecessary to the result.[36] Repetition of the *Goodyear* dictum in *Daimler*, on the other hand, made it an operative discriminant.[37] The Court did not explain how a corporation could be "essentially at home" in a given forum.[38] To give guidance, the Supreme Court supplied two examples: a corporation's principal place of business and its place of incorporation.[39] The examples indicated how narrowly the Court intended general jurisdiction to be confined.[40]

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28. The *Daimler* opinion traces this requirement to *Int'l Shoe*, 326 U.S. at 317. *Daimler*, 571 U.S. at 126.

29. *Id.* at 137.

30. *Id.* at 121–22.

31. *See, e.g.*, Part II.B, which analyzes the case of an assertion of general jurisdiction at the border of two states. Only claims from the two bordering jurisdictions might qualify, rather than "all purpose" claims from across the world.

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

33. *Daimler*, 571 U.S. at 139.

34. *Id.*

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

36. *See id.*

37. That is, it determined the result. *Daimler*, 571 U.S. at 138–39.

38. *See id.* (providing no definition).

39. *Id.* at 137–38.

40. By defining only two potential places—both of which were close to the essence of a corporation—the Court emphasized the narrowness of its holding.

Justice Sotomayor concurred with the judgment but not the reasoning of the court.[41] She believed that traditional tools for considering jurisdiction could have achieved the appropriate result.[42] California seemed a doubtful forum even under more expansive tests such as the "reasonableness" standard expressed in several decisions.[43] As Justice Sotomayor asserted, "[t]he Court can and should decide this case on the far simpler ground that [California's] . . . exercise of jurisdiction would be unreasonable given" its foreign parties disputing over foreign conduct.[44]

### *B. The Inappropriateness of Metaphors as Legal Standards: "Essentially at Home"*

In *Daimler*, the Supreme Court set a legal standard by using a metaphor. Most of us first learned about metaphors in elementary or middle school. The subject was not logic or geometry or anything emphasizing step-by-step reasoning; instead, it was English literature.[45] We learned that poets used metaphors because they substituted one reality for another, in a way that created confusion[46]—an intermingling that demonstrated a deeper truth than logic could hold. Metaphors, almost by definition, are not a good way to express the law.

The dictionary defines "metaphor" as: "a figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest a likeness or analogy between them (as in *drowning in money*)" or "*broadly*: figurative language."[47] The use of one object in place of another to suggest a likeness is not the way lawyers ought to think.

*The Highwayman*, by Alfred Noyes, is an excellent example. This poem probably is not assigned reading in high school English classes, but it should be. The first stanza overflows (if that metaphor is permitted) with metaphors:

> The wind was a torrent of darkness among the gusty trees.
> The moon was a ghostly galleon tossed upon cloudy seas.
> The road was a ribbon of moonlight over the purple moor,
> And the highwayman came riding—
> Riding—riding—
> The highwayman came riding, up to the old inn-door.[48]

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41. *Daimler*, 571 U.S. at 142 (Sotomayor, J., concurring).

42. *Id.* at 143–44.

43. *Id.* at 145–46.

44. *Id.* at 143–44.

45. *See Definition of Metaphor*, LITERARY DEVICES: DEFINITION AND EXAMPLES OF LITERARY TERMS, https://literarydevices.net/metaphor/ (last visited Jan. 29, 2021).

46. *See id.* (indicating metaphors create meaning by comparing dissimilar entities).

47. *See Metaphor*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/metaphor (last visited Jan. 29, 2021).

48. Alfred Noyes, *The Highwayman*, POETRY FOUND., https://www.poetryfoundation.org/poems/43187/the-highwayman (last visited Jan. 29, 2021).

These figures of speech set the mood for a story that will reward the reader and can be found easily online.[49] Ultimately, the point is that the words cannot support a literal reading that leads to firm conclusions. The moon's appearance among clouds may indeed have something in common with a ghostly galleon, but a beginning astronomer could not use this information to guess at the size of the moon or its orbit—and in fact, it would mislead this hypothetical stargazer because the clouds do not "toss" the heavenly body at all. A meteorologist could not discern much about the wind from its description as a torrent of darkness. And a civil engineer trying to build a road would not be helped by knowing that it looks like a ribbon of light across a purple moor.

So too, the Supreme Court's metaphor about a corporation "essentially at home" is not helpful to someone seriously trying to guess at its meaning.[50] One can picture a corporation as a kind of living being that has a home—sitting in an easy chair by the fire, perhaps drinking a glass of middling wine while reading the newspaper or watching television; however, this word picture is not very helpful. The examples of the place of incorporation and principal place of business provide something concrete[51]—and the metaphor suggests a kind of closeness to the forum—but there are instances in which one can argue that general jurisdiction ought to apply, yet the essentially-at-home doctrine does not provide meaningful guidance.[52]

### *C. The Supreme Court's Carefree Attitude about Harm to Litigants*

The Supreme Court has emphasized that it will apply jurisdictional principles, including those that it discovers for the first time after a journey through the lower courts, despite the costs to litigants. To the Court's sheer insouciance about the plight of litigants fooled by jurisdictional rules, *Grupo Dataflux v. Atlas Global Group, L.P.* must be read to be believed.[53] Justice Scalia's opinion boasted that "[w]e have adhered to [a particular jurisdictional rule] regardless of the costs it imposes."[54] He supported this indifferent observation by citing an earlier case in which the Court did just that, with high costs to the litigants—and then proceeded to impose high costs on the litigants before him.[55]

### *D. General Jurisdiction Is Not Always "All-Purpose" Jurisdiction*

As is indicated above, the Court treated general jurisdiction as "all-purpose" jurisdiction. This equivalency was an overreach, although it helped the Court

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49. *See* Alfred Noyes, *The Highwayman*, LITERARY DEVICES: DEFINITION AND EXAMPLES OF LITERARY TERMS, https://www.literarydevices.net/the-highwayman (last visited Oct. 1, 2020) (showing text of poem and, below, showing its uses of many literary devices).

50. *See* Daimler AG v. Bauman, 571 U.S. 117, 139 (2014).

51. *See id.* at 137–38.

52. See *infra* Part II for these examples.

53. Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567 (2004).

54. *Id.* at 571.

55. *Id.* at 571, 582.

reach its intended result. There are many kinds of cases in which a particular forum does not have specific jurisdiction and is not the defendant's home, but still has a better claim to jurisdiction than other fora. The embarrassing cases in Part II of this Article furnish examples. In these cases, some of the most appropriate fora do not have all-purpose jurisdiction—in the sense of jurisdiction of all kinds—over claims against the given defendants, but should have general jurisdiction for the particular claims at issue.

## II. SOME EMBARRASSING CASES (AMONG AN INFINITE VARIETY)

### *A. The Multistate Partnership*

Imagine a partnership[56] called ABG, composed of three partners, Alpha, Betty, and Gammy. Alpha lives in New York, Betty in Wisconsin, and Gammy in Texas. They collaborate in producing garments for men and women—all three engaged in design, procurement, and manufacturing at their respective locations. Perhaps they each have offices, plants, and employees; perhaps each works from home. Their partnership is successful, and they sell their products all over the United States, but it has no place of incorporation[57] and no obvious principal place of business.[58]

One day, a customer in Oregon named Delta discovers too late that her purchase from the ABG partnership is extraordinarily flammable. She is severely and permanently injured. Soon, other cases like Delta's crop up across the country. Delta and others think they have sound claims against the manufacturer of their defective purchases. Perhaps ABG Partnership is subject to suit in the various locations in which the injuries were sustained. But perhaps not—perhaps ABG has been canny enough to sell to a distributor, and thus is shielded from direct contacts with any jurisdiction other than the partners' residential places (if those qualify).[59] Incidentally, the distributor, who calls herself Eppi (short for Epsilon), is insolvent.

Delta and others are relegated, then, to using general jurisdiction if they want to sue ABG. But is there any place where ABG is essentially at home? If so, where is it? ABG does not have a place of origin in any state. It was created

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56. One should immediately realize that a partnership has no "place of incorporation" and may have no "principal place of business," so the specific examples in *Daimler* are unhelpful. *See infra* notes 57–58.

57. *See* Alatorre v. Wastequip Mfg. Co., LLC, No. 2:12-cv-02394-MCE-DAD, 2012 U.S. Dist. LEXIS 179854, at *9–10, 14 (E.D. Cal. Dec. 19, 2012) (holding that limited liability companies are like partnerships in having no place of incorporation).

58. It is possible for an entity to have no principal place of business. *See* Myers v. Howmedica, Inc., No. 03 C 50381, 2003 U.S. Dist. LEXIS 19166, at *3 (N.D. Ill. Oct. 17, 2003) (analyzing a corporation without a principal place of business, but equally applicable to a partnership).

59. In *Daimler*, the Court rejected an agency theory for creating jurisdiction through a subsidiary. Daimler AG v. Bauman, 571 U.S. 117, 136–37 (2014). A distributor would have an even stronger case against jurisdiction because of its greater separateness.

informally, and Alpha, Betty, and Gammy did not rely on any particular state's laws in doing their business. As good entrepreneurs, rather than consulting lawyers (or buying fire retardants), they put their efforts into fashion.

The Supreme Court's examples of the place of incorporation and the principal place of business are both inapplicable in this case.[60] But the examples suggest that the choices should be few. Where is ABG essentially at home? The metaphor is extraordinarily unhelpful. Can a plaintiff argue successfully that all three of the states in which Alpha, Betty, and Gammy reside are the partnership's essential homes? Or, following the incorporation and principal place example, is the essential home the place where the most product was made? Or where the most dominant among Alpha, Betty, and Gammy happens to live? Or the place where the decision to form the partnership occurred, if it can be identified?

If there is to be ambiguity in the law, let it be about something other than jurisdiction.[61] A suit in which Delta's lawyer guesses wrong, successfully tries the case to a recovery, and goes through a series of appellate courts only to be told that the result is wiped out—that would be a cruel tragedy, even if Justice Scalia would not have cared. Even before that, ABG's lawyer can run up costs and delay recovery by the badly injured Delta, perhaps for years, by the simple expedient of arguing that whatever choice her lawyer makes is wrong.

The essentially-at-home metaphor has potential for creating many similar scenarios with entities such as the ABG partnership. When one considers the proliferation of different kinds of entities that exist in the United States, from limited liability companies to limited partnerships, the possibility of confusion is multiplied manifold.[62] Consider a labor union, which is an unincorporated association whose multiple citizenships are those of all its members.[63] Or the modern quasi-corporate entities with alphabet names like LLC, LLP, and the like. Then, add international organizations like the Société Anonyme or Aktiengesellschaft. My students have had trouble even applying the essentially-at-home concept to an individual wanting to impute jurisdiction wherever the individual has substantial property.[64] In any event, it seems that the residences of Alpha, Betty, and Gammy ought to all be places where the partnership is essentially at home—as a matter of fairness, but, unfortunately, not as a matter of clarity.

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60. *See supra* notes 57–58 and accompanying text.

61. *Cf.* Hertz Corp. v. Friend, 559 U.S. 77, 96 (2010) (justifying creation of rule that principal place of business is a company's headquarters on ground of "the necessity of having a clearer rule").

62. *See* Buschman v. Anesthesia Bus. Consultants, LLC, 42 F. Supp. 3d 1244, 1248 (N.D. Cal. 2014) (discussing that an LLC has no place of incorporation).

63. *See* United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 146 (1965).

64. These results come from in-class questioning and practice exams. When asked to imagine an individual who is a citizen of California and who individually owns a restaurant in Texas, students tend to infer that the individual is "at home" in Texas. The metaphor does not seem to offer them guidance.

### *B. The Border Town*

Imagine a rogue professional or tradesperson who sets up shop in Kansas City, Kansas. Call him Roddy McShift. He operates as a dentist, or an artisan, or an automobile mechanic. He may do business as a proprietorship, or perhaps a subchapter S corporation. Most of his clientele come from Kansas City, Missouri, in an area where the border differentiates the citizenships of close-by neighbors but does not really separate them.[65] McShift is sloppy in his repairs (whether dental or automotive) and is constantly in trouble with the Kansas regulatory authorities. In fact, he moved his business to the Kansas side to make it more difficult for his large Missouri clientele to complain about him. He advertises boldly to the Missouri side, where the population and his customers are more plentiful, and he tells Missourians that he provides high-quality, friendly service.

Roddy McShift, let us say, does damage to a patient in his dental practice. Or he ruins an antique vehicle worth high six figures by taking it for a reckless test drive and totaling it. His patient, or his automotive customer (named Vic Tumm), wants to sue him. And naturally, the customer-patient, Vic, wants to sue in his home area, in Kansas City, Missouri, where he knows his lawyer, where he was targeted by advertising, and where most of McShift's customers come from. But the events on which the suit would be founded occurred in Kansas.

Vic cannot claim specific jurisdiction if he sues in Missouri. Obviously, he does not think the forum has all-purpose jurisdiction. But it seems "fair," in the *International Shoe* sense, for his suit to be brought in Missouri. McShift has taken purposeful advantage of the privilege of conducting activities in Missouri, and he can reasonably anticipate suit there. It is really all one community, all one city, even though it is divided into two states. But to sue Roddy McShift in Missouri, Vic will have to depend upon general jurisdiction.

Here, he runs into the Supreme Court's metaphorical standard. Is Roddy McShift essentially at home in Missouri, when he operates entirely in Kansas, resides in Kansas if he is a sole proprietor, and has his LLP, LLC, or S corporation set up in Kansas if that is his form of business? The Supreme Court described a similar situation as a "seeming anomal[y]."[66] The Supreme Court's examples of "essentially at home," the place of incorporation and principal place of business, are both in Kansas for Roddy McShift.[67] Vic, the plaintiff, is stuck

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65. *See Kansas City Metropolitan Area*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kansas_City_metropolitan_area (last visited Jan. 29, 2021).

66. *See Hertz Corp.*, 559 U.S. at 96 (discussing a hypothetical corporation, headquartered in New York with the bulk of its activities in New Jersey, and observing that this example "seem[s] to cut against the basic rationale" of the law there at issue).

67. *See supra* note 39 and accompanying text (identifying these two places as jurisdictional).

with arguing that the general language, "essentially at home," applies to McShift in Missouri; however, the metaphor discloses nothing for him to hold onto.[68]

There are many border towns in America. Texarkana, Texas, and Texarkana, Arkansas, are places where Vic and Roddy might have met. Then, there is Newark-New York City-Bridgeport. Charlotte, North Carolina, and its South Carolina counterparts. Chicago and Gary, Indiana. To show that the problem is not all about big cities, consider as well Pullman, Washington, and Moscow, Idaho, where students at their respective state universities[69] have only a little way to travel before they reach the other state.[70]

Roddy McShift ought to be regarded as essentially at home in Kansas City, Missouri, as well as Kansas City, Kansas, even though there is no analysis in *Daimler* that supports (or refutes) this conclusion. The case is an embarrassing one.

### *C. Biggest Business in the State*

Imagine that the Flexxon-Noble Oil Company is one of the biggest businesses in the world. It is a Delaware Corporation with its principal place of business in Texas. It has major operations in Montana, and, in fact, it is the biggest business in Montana in terms of its expenditures in the state, as well as extractions from the state, and, therefore, its generation of wealth from the state. Flexxon routinely uses the services of Rottweiler & Dachshund, the largest law firm in Montana, to defend or prosecute its litigation in Montana.[71] And it has a significant volume of all kinds of litigation in Montana.

A Montana resident named Dean James works for a Flexxon contractor called the Helena Corporation, almost always in Montana. On the occasion in question, however, James had been sent temporarily to New Mexico, where he was working as a tool pusher[72] for Helena, helping to spud in a Flexxon well. James was seriously injured when a Flexxon-employed roughneck at the top of the rig dropped a heavy power tool that fell on him. James's lawyer back in Montana believes that the proximate cause of his injuries was an act of negligence by Flexxon.

James's lawyer files suit against Flexxon in a Montana state court in Helena, but the lawyers at Rottweiler & Dachshund are familiar with this situation. After removing James's suit to a federal court in Montana, the Rottweiler lawyers move to dismiss for lack of personal jurisdiction over Flexxon-Noble. In their view, the only proper fora for the litigation are New Mexico, where there is

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68. *See supra* note 64 and accompanying text (describing difficulty of applying *Daimler* to non-corporate defendants).

69. The University of Washington at Pullman and the University of Idaho at Moscow.

70. The two universities are only nine miles (and a 12-minute drive) apart.

71. Its litigation probably includes a wide variety of specific jurisdiction claims, from those based on major contracts in the state to those arising from local traffic accidents.

72. The tool pusher, of course, is like a foreman or on-site manager at an oil rig. Spudding in, as everyone knows, is a part of the initiation of a well bore.

specific jurisdiction, or Texas (principal place of business) or Delaware (incorporation), if James invokes general jurisdiction. Of course, neither Texas nor Delaware has much to do with the suit, and neither seems to be as appropriate a forum as Montana.

As an aside, the first substantive argument that Flexxon will raise in litigation in any of these fora will be based on Montana law. The argument will be that Flexxon is James's "statutory employer," he is a "borrowed servant," and therefore Flexxon is immune from suit under the employment compensation laws of Montana.[73] This question, if submitted to a New Mexico court, would require the judge to parse a knotty issue of foreign state law. The defense would be able to run James around the maypole for a long time with the workers' compensation arguments. In fact, the defense could increase the confusion by arguing about which state's law controls the workers' compensation issue, although it is probably Montana.[74]

Regardless, James's lawyer wants the case kept in Montana. He argues that, for purposes of this case, Flexxon-Noble is essentially at home in Montana, which makes sense: Flexxon-Noble earns more, extracts more, and consumes more in Montana than any other business. There are much smaller local businesses that would be said to be essentially at home in Montana (because of incorporation or principal place of business), but the much bigger Flexxon-Noble cannot be so labeled.[75] Flexxon even has a large volume of litigation in the state and would have no more trouble defending in Montana than in New Mexico.[76] The probable first issue that will arise on the merits, as discussed above, is even a question of Montana law.[77]

In contrast, Delaware has virtually no reason to be a forum for this litigation, but the Supreme Court's interpretation of the essentially-at-home criterion makes Delaware a likely place of jurisdiction because Flexxon is incorporated there. This happenstance traces to Delaware's status as the home of many of our largest corporations, because its corporate laws are well developed and flexible.[78] Anyone comparing the appropriateness of Montana and Delaware as potential for a—or if one prefers, comparing the "fairness" or "reasonableness" created by "contacts" with these two states—would select Montana, hands down. This is indeed an embarrassing case.

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73. *Cf.* Ellington v. Rocky Mountain Homestead, Inc., No. 05-561, 2007 Mont. LEXIS 12, at *12–13 (Mont. Jan. 17, 2007) (defining "borrowed employee" as one controlled by another employer).

74. *Cf.* Oberson v. Federated Mut. Ins. Co., 126 P.3d 459, 461–62 (Mont. 2005) (analyzing a complex conflict of laws question in workers' compensation case).

75. *See* Daimler AG v. Bauman, 571 U.S. 117, 137–39 (2014).

76. *See supra* note 72 and accompanying text.

77. *See Oberson*, 126 P.3d at 460–61.

78. *See* Jan Ting, *Why Do So Many Corporations Choose to Incorporate in Delaware?*, WHYY (Apr. 27, 2011), https://whyy.org/articles/why-do-so-many-corporations-choose-to-incorporate-in-delaware/.

But perhaps all is not lost for James in terms of his selected forum. The Supreme Court left the essentially-at-home concept vague and open-ended. Perhaps James's lawyer can argue that the facts and comparisons developed above make Flexxon-Noble essentially at home in Montana, even though it is not one of the two identified places that fit. The task is made more difficult by the absence of any relevant criteria in the Supreme Court's metaphorical test.

The hieroglyphics on the wall also are not encouraging. In *Tyrrell v. BNSF Railway Co.*, the Montana Supreme Court held that the railroad's heavy concentration of tracks in the state, together with the fact that suit was under the pro-employee Federal Employer's Liability Act, subjected it to general jurisdiction in spite of *Daimler*.[79] The United States Supreme Court reversed in *BSNF Railway Co. v. Tyrrell*.[80] There could be no general jurisdiction, it said, because the defendant was not "so heavily engaged in activity in Montana 'as to render it essentially at home'" there.[81] "[T]he general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts."[82] Furthermore, the business's activities must be considered "in their entirety," and "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[83]

Here the distinction between general jurisdiction and the Court's awkward construct of "all- purpose" jurisdiction becomes important. General jurisdiction is not always all-purpose jurisdiction, despite the Supreme Court saying so. The hypothetical plaintiff here, Dean James, is not invoking all-purpose jurisdiction. He is not saying that an accident in Poland with a German vehicle could be adjudicated here. Instead, he is arguing that Montana is a particular place where the defendant has enough contacts to be essentially at home, not that Flexxon-Noble is at home everywhere it can be found. The Court's unexplained equation of these very different concepts is a serious weakness in its reasoning.

The Court held that there can be "exceptional case[s]," where a defendant's operations outside its principal place of business or place of incorporation "may be so substantial and of such a nature as to render the corporation at home in that State."[84] The defendant's presence in Montana is not the end of the supporting facts. Flexxon is also bigger than any other business at home in the state, and it depends on the services of the plaintiff there. Further, it summoned the plaintiff from Montana to the place of injury, and Montana law will be important in the resolution of the suit.

Still, the requirement that the defendant be "essentially at home," and the Court's two narrow examples of the meaning of this requirement, suggest that

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79. Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 8–9 (Mont. 2016), *rev'd* 137 S. Ct. 1549, 1559–60 (2017).

80. *BNSF Ry. Co.*, 137 S. Ct. at 1560.

81. *Id.* at 1559 (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)).

82. *Id.* (quoting *Daimler*, 571 U.S. at 139 n.20).

83. *Id.* (alteration in original) (quoting *Daimler*, 571 U.S. at 139 n.20).

84. *Id.* at 1558.

Flexxon-Noble may not be subject to jurisdiction in the state—but, under these circumstances, Flexxon-Noble ought to be considered essentially at home in Montana. This case is another embarrassing example.

Of course, rules are always imperfect. It is always possible to conjure up examples in which any rule you choose produces an unjust result.[85] Criticism of a rule on the strength of any one hypothetical situation, therefore, is hardly fair. But the essentially-at-home rule, if applied narrowly, produces a wide variety of odd results. Once again, it seems that Justice Sotomayor was right, and her suggestion of reliance on traditional doctrine[86] would have produced a better long-arm jurisprudence.

### *D. Specific Jurisdiction Next Door*

We could probably continue creating scenarios with strange results, but the exercise must come to an end. Consider one more situation, which might be called "specific jurisdiction next door."

We can use some of the base facts of the claim in *James v. Flexxon-Noble Oil Company* set out in the section immediately above. James works for Helena Corporation, which provides services to Flexxon, and he is sent to work for Helena in New Mexico, helping to begin drilling a new exploratory oil well near Gallup. Imagine that instead of coming from Montana, he comes from Holbrook, Arizona. This city is about ninety-six miles from Gallup, New Mexico.[87] Dean James wants to file suit in Holbrook, where Flexxon summoned him from. Imagine, again, that Flexxon has activities galore in Arizona; perhaps it is not the biggest business in Arizona, but it is bigger than ninety-nine percent of local Arizona businesses.

Now, the fairness-of-jurisdiction factors favoring James's choice of forum contain all of the factors favoring general jurisdiction in the Montana example above.[88] In addition, the situation somewhat resembles the border town example outlined above, especially given the ninety-six miles dividing the chosen forum from the place of specific jurisdiction in this case.[89]

Under these circumstances, is Flexxon-Noble subject to general jurisdiction in Arizona? The essentially-at-home requirement does not resolve the question, as the Supreme Court's two narrow examples do not apply. Would there be anything unfair about allowing suit in New Mexico? Flexxon-Noble ought to be regarded as essentially at home, and the muddle among arguments about this question makes this is another embarrassing case.

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85. *See supra* note 66 (citing an example given by the Supreme Court).

86. *See supra* notes 41–49 and accompanying text.

87. https://www.google.com/distance_holbrook_az_to_gallup_nm (search "distance Holbrook, AZ to Gallup, NM") (last visited Jan. 30, 2021).

88. *See supra* text accompanying note 85.

89. *See supra* Part II.A.

## III. CONCLUSION

No court, including the august Supreme Court of the United States, ought to use a metaphor as a legal standard. A metaphor is a deliberate confusion of one thing with another, made vague on purpose,[90] in an effort to capture a greater truth than logic can convey. The law articulated by courts should avoid this approach. A court's pronouncement should allow a literal reading to reach reliable conclusions when applied to concrete facts.

The Court's essentially-at-home requirement for general jurisdiction is an awkward metaphor, providing in itself little guidance. The Court's two examples of fora that will fit the requirement are helpful, in that they show two concrete places for jurisdiction, and they serve to communicate the narrowness of general jurisdiction that the Court evidently has in mind. But the basic test, the essentially-at-home metaphor, remains open-ended. Given its metaphorical nature, the essentially-at-home standard dissolves into no standard at all.

One can readily imagine situations in which the essentially-at-home requirement produces strange, if not dysfunctional, results. The cases that this Article calls the Multistate Partnership, the Border Town, the Biggest Business in the State, and Specific Jurisdiction Next Door, are illustrations—among an infinite variety—of situations in which the Supreme Court's standard performs poorly.[91]

The Multistate Partnership fits the criteria badly because there is no place of incorporation (nor any analogue of such a place), there is no principal place of business, and there is no obvious location where the business is essentially at home. The Border Town illustrates a situation in which the most appropriate forum lies away from the Supreme Court's examples of permitted fora. The illustration of the Biggest Business in the State shows a case in which the Supreme Court's holding favors a forum with no claim to appropriateness and makes unclear the likelihood of general jurisdiction in a much better forum. The case of Specific Jurisdiction Next Door creates the same kind of unfavorable comparison.

The Supreme Court has at times exhibited a careless attitude toward the precision of its jurisdictional holdings.[92] Even when litigants have made reasoned choices based on its pronouncements, the Court has emphasized its lack of concern over wasted years of efforts by litigants.[93] To repeat: if there is to be vagueness in the law, let it be about something other than jurisdiction.

The Supreme Court should revisit its essentially-at-home shibboleth and clarify whether there is anything beyond the place of incorporation and principal place of business that can qualify. It should tell litigants how the requirement applies to other corporate and non-corporate entities. It should also explain in a

90. *See supra* Part I.B.
91. *See supra* Part II.
92. *See supra* Part I.C.
93. *See supra* Part I.C.

literal way what is meant by essentially at home, if its two narrow examples are not the only solutions. For example, a statement by the Court would help a great deal if it identified, as a place where an entity is essentially at home, a forum in which the entity has a greater presence in the state than most others, in which it can conveniently defend, and in which there are particular facts making the forum appropriate.[94]

94. The scenario sketched in Part II.C is an example.