

General Jurisdiction, “Corporate Separateness,” and the Rule of Law

*Burt Neuborne**

I.	INTRODUCTION	95
II.	IS THERE SUBJECT MATTER JURISDICTION?.....	97
III.	CAN THE SUBSTANTIAL CONTACTS OF A WHOLLY OWNED SUBSIDIARY BE ATTRIBUTED TO THE PARENT?	99
IV.	MAY A CORPORATE PARENT BE SUED ON CLAIMS UNRELATED TO ITS WHOLLY OWNED SUBSIDIARY’S CONTACTS WITH THE FORUM?.....	105
V.	SHOULD CORPORATIONS BE TREATED MORE FAVORABLY THAN NATURAL PERSONS IN ASSERTING CLAIMS WITH LITTLE OR NO RELATIONSHIP WITH THE FORUM?	106
VI.	CONCLUSION	108

I. Introduction

In 2004, twenty-two Argentine citizens filed suit in the Northern District of California against DaimlerChrysler AG (“Daimler AG”) and Mercedes-Benz USA, alleging that officials of Mercedes-Benz Argentina had cooperated and conspired with the Argentine military during the so-called “dirty war” from 1976–83 to arrest, torture, and kill labor union activists working in a Mercedes-Benz plant.¹ Calling it

* Inez Milholland Professor of Civil Liberties, New York University School of Law. My thanks to Rey Watson (J.D. candidate N.Y.U. 2015), for his excellent research assistance and perceptive analysis.

1. DaimlerChrysler AG (now Daimler AG) is a German corporation whose employees are engaged in the manufacture of automobiles, notably the Mercedes-Benz. Mercedes Benz USA is a wholly owned Delaware subsidiary of Daimler AG, whose employees are engaged in the sales, marketing, and distribution in the United States of products manufactured by Daimler AG. The two corporations share the same Chairman. Officials of Daimler AG set the prices and generally retain contractual power to control the terms on which Daimler AG products are sold in the United States. The two companies are careful, however, to maintain formal separation. Mercedes Benz USA takes title to the cars in Germany and ships them to the United States for distribution and sale, where employees of Mercedes Benz USA conduct the day-to-day business of selling the cars free from direct supervision by the corporate parent. It will not come as a surprise that Mercedes Benz USA sells lots of Mercedes-Benz automobiles in California. Profits from the sale of Mercedes-Benz cars in California flow upwards, significantly enhancing Daimler

a “close question,” the district court dismissed the plaintiffs’ complaint in 2007 for lack of *in personam* jurisdiction over Daimler AG, without passing on federal subject matter jurisdiction, *forum non conveniens*, or whether Daimler AG was liable for the actions of employees of its Argentine subsidiary.² In 2009, a panel of the Ninth Circuit affirmed the dismissal,³ but, on rehearing, reversed the district court, ruling that the very substantial contacts of Mercedes-Benz USA with California could be attributed to its corporate parent, Daimler AG, for the sole purpose of determining whether *in personam* jurisdiction exists over the corporate parent. Rehearing en banc was denied, with eight judges dissenting.⁴ The Supreme Court granted certiorari⁵ one week after deciding *Kiobel v. Royal Dutch Petroleum Co.*⁶

AG’s bottom line. Mercedes Benz Argentina is also a wholly owned subsidiary of Daimler AG engaged in the manufacture and sale of automobiles in the South American market. There is no indication that cars manufactured by Mercedes Benz Argentina are sold in the United States. Nor is there any evidence of direct communication, control, or coordination between Mercedes Benz USA and Mercedes Benz Argentina, although both are wholly owned-and-controlled by Daimler AG.

2. Bauman v. DaimlerChrysler AG, C-04-00194RMW, 2007 WL 486389 (N.D. Cal. Feb. 12, 2007) (following a limited jurisdictional discovery phase granted in 2005 WL 3157472 (N.D. Cal. Nov. 22, 2005)). My friend and NYU colleague, Linda Silberman, reminds me that plaintiffs did not name Mercedes Benz USA as a defendant in the district court, presumably because they wished to invoke the alien-based jurisdiction of the Alien Tort Statute (“ATS”). Now that the ATS has fallen out of the case, using the power vested in me by Vanderbilt Law School, I have granted plaintiffs a retroactive amendment to assert the strongest case for subject matter jurisdiction. Unless Mercedes Benz USA is added, no Article III power exists once the federal question dropped out of the case.

3. 579 F.2d 1088 (9th Cir. 2009).

4. 676 F.3d 774 (9th Cir. 2011) (O’Scannlain, J., dissenting).

5. 133 S. Ct. 1995 (2013).

6. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). The Court ruled in *Kiobel* that the ATS (28 U.S.C. §1350) granting federal subject matter jurisdiction to suits by alien plaintiffs against alien defendants for certain violations of the law of nations did not apply extraterritorially to an alleged violation of customary international law occurring in a sovereign jurisdiction outside of the United States. *Kiobel’s* strange path to the Supreme Court began when a district judge upheld subject matter jurisdiction under the ATS but certified the question of whether, and to what extent, Royal Dutch Petroleum was legally responsible for the acts of its wholly owned Nigerian subsidiary. Rather than decide the certified question that provided the sole source of its appellate jurisdiction, the Second Circuit panel claimed to be empowered to dismiss on subject-matter jurisdiction grounds, holding that corporations were not derivatively liable for violations of customary international law committed by their agents or employees. The panel appears to have confused the merits question of whether the ATS established a cause of action against a corporation with the question of subject-matter jurisdiction. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (holding the issue was a merits question, not a jurisdictional one). The Supreme Court granted certiorari on the applicability of the Alien Tort Statute to corporations. After hearing oral argument, however, the Court also declined to pass on the only issue before it, ordering re-argument on the merits question of whether the ATS applies extraterritorially. The decision in *Kiobel* followed. Thus, no appellate court ever bothered to answer the certified question that was the only basis of appellate jurisdiction. Whatever happened to the final order rule?

The two *in personam* jurisdictional issues formally before the Supreme Court in *Bauman* are:

(1) May the very substantial California contacts of Daimler AG's wholly owned United States sales-and-distribution subsidiary, Mercedes-Benz USA (a Delaware corporation), be attributed to Daimler AG in deciding whether *in personam* jurisdiction exists in California over the German parent?

(2) If so, may California exercise general jurisdiction over Daimler AG in connection with claims arising under Argentine and California law, asserting human rights violations allegedly committed in Argentina against Argentine citizens by Daimler AG's wholly owned Argentine subsidiary, Mercedes-Benz Argentina?

II. IS THERE SUBJECT MATTER JURISDICTION?

It is, to be generous, unclear whether subject matter jurisdiction exists in the Supreme Court over what is left of the *Bauman* case. During the nine years that it took for the *in personam* issues in *Bauman* to reach the Supreme Court, plaintiffs' federal causes of action have disintegrated. In 2004, plaintiffs, invoking colorable federal jurisdiction, alleged that officials of Mercedes-Benz Argentina had violated customary international law within the meaning of the Alien Tort Statute ("ATS") (28 U.S.C. § 1350), and the statutory provisions of the Torture Victim Protection Act ("TVPA") (28 U.S.C. § 1350 note §2(e)). Plaintiffs' ATS cause of action failed when the Supreme Court rejected extraterritorial application of the Statute in *Kiobel*.⁷ Plaintiffs' TVPA claim had been extinguished a year earlier when the Supreme Court ruled in *Mohamad v. Palestinian Authority*⁸ that the TVPA did not apply to corporations. Thus, when the Supreme Court granted certiorari in *Bauman* (a week after deciding *Kiobel*), plaintiffs' only surviving claims against Daimler AG were under California and Argentine law. The claims do not arise under the Constitution or laws of the United States, nor can they be supported

7. A last-gasp ATS argument might seek to distinguish *Kiobel* on the ground that, unlike Royal Dutch Petroleum, Daimler AG established a sufficient affiliation with the United States in 2004 after its merger with Chrysler by maintaining a co-headquarters arrangement in Germany and Michigan for the merged companies, providing the United States with a regulatory interest over the merged corporation that would satisfy the conditions for ATS applicability. But, under *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), the Court appears to have contemplated a *single* "nerve center" definition of corporate citizenship which almost certainly remained in Germany even after the Chrysler merger.

8. 132 S. Ct. 1702 (2012).

by diversity/alienage jurisdiction under current complete diversity requirements of 28 U.S.C. § 1332.⁹

The most plausible argument for subject matter jurisdiction at this stage of the *Bauman* case rests on the fact that when the district court and the Ninth Circuit panel decided the *in personam* issues in 2007 and 2011, colorable federal jurisdiction existed under the ATS and the TVPA, vesting both lower courts with discretion under *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 674 (1999), to decide the *in personam* issue before considering whether subject matter jurisdiction actually existed.¹⁰ Since the Ninth Circuit was authorized under *Ruhrgas* to decide the *in personam* issue at the time the decision was issued, and since appellate power exists in the Supreme Court under 28 U.S.C. § 1254 over any case “in the Court of Appeals,”¹¹ arguably the Supreme Court retains pendent subject matter jurisdiction under *United Mineworkers v. Gibbs*¹² or 28 U.S.C. § 1367(a) to review the *in personam* issues, even after it becomes clear that federal subject matter jurisdiction never actually existed in the lower courts.¹³ The exercise of such power is, however, a departure from the usual rule that both subject matter jurisdiction and Article III case-and-controversy requirements must exist at all stages of a federal case.¹⁴ Moreover, the literal language of 28 U.S.C. § 1367(b) would seem to block the exercise of supplemental jurisdiction over Daimler AG, which had been joined under Rule 20 as a defendant in 2004, because, in retrospect, the only basis for federal jurisdiction in the district court

9. If, as plaintiffs asserted in the district court, Daimler AG maintained a co-corporate headquarters in Michigan as well as in Germany in 2004, Daimler AG might be deemed a citizen of Michigan for § 1332 purposes under the “nerve center” approach to corporate citizenship. Even if a co-corporate Daimler AG headquarters existed in Michigan in 2004, *Hertz Corp.*, 559 U.S. 77, speaks of a single § 1332 “nerve center,” which was much more likely to have been in Germany than in Michigan.

10. *Ruhrgas* released federal judges from a duty to decide whether subject matter jurisdiction exists before passing on other issues like *in personam* jurisdiction or class action eligibility.

11. 28 U.S.C. § 1254 grants the Supreme Court appellate power over any case “in the Court of Appeals.” Section 1254 is not, however, a grant of substantive subject matter jurisdiction. Since, at the time cert. was granted in *Bauman*, no colorable subject matter jurisdiction remained in the court of appeals, it’s not even clear that *Bauman* was properly “in” the court of appeals when the Supreme Court acted.

12. 383 U.S. 715 (1966).

13. In Article III mootness cases, for example, the Court retains residual discretionary appellate power over moot issues that are “capable of repetition but evasive of review.” See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Roe v. Wade*, 410 U.S. 113, 113–14, 125 (1973).

14. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (Article III standing must exist at all phases of a federal case); *Ex parte McCardle*, 74 U.S. 506 (1869) (dismissing appeal after post-argument withdrawal of subject matter jurisdiction by Congress).

was § 1332.¹⁵ Even if supplemental jurisdiction is not literally blocked under § 1367(b), the factors listed in § 1367(c) authorize, perhaps compel, dismissal of the foreign/state law claims.

While, in several cases, the Supreme Court has disposed of other important non-merits issues without deciding whether subject-matter jurisdiction existed,¹⁶ colorable, federal subject matter jurisdiction existed in each case at the time the Court elected to decide other issues. I know of no case in which the Supreme Court has addressed an important issue after it has become clear that colorable, federal subject matter jurisdiction no longer exists. Since federal subject matter jurisdiction appears to be lacking over what's left of *Bauman*, the Court should dismiss the appeal for lack of subject matter jurisdiction, whether or not the issue is raised by the parties.¹⁷

III. CAN THE SUBSTANTIAL CONTACTS OF A WHOLLY OWNED SUBSIDIARY BE ATTRIBUTED TO THE PARENT?

If, however, the Court is unable to resist the urge to use the *Bauman* case as a piñata, the *in personam* issues formally before the Court raise important questions about corporate structure, regulatory authority, and the rule of law. The informative amicus brief in support of the petition for certiorari filed by the Chamber of Commerce candidly admits that large transnational corporations use the corporate form—the Chamber calls it the principle of “corporate separateness”—to subdivide wholly owned-and-controlled, integrated economic enterprises into a series of watertight corporate boxes in order to limit the enterprise’s exposure to unwelcome regulatory authority and to cabin liability for misconduct by corporate employees. In a triumph of formalist thinking, Daimler AG, the Chamber of Commerce, and the New England Legal Foundation all invoke the 1925 vision of a corporation, not as a legal metaphor for a cluster of

15. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

16. *See, e.g.*, *Amchem Products v. Windsor*, 521 U.S. 591 (1987) (class action status); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (same); *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007) (*forum non conveniens*).

17. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action”); SUP. CT. R. 24(e) (requiring briefs to contain “a concise statement of the basis for jurisdiction in this Court, including the statutory provisions . . . on which jurisdiction rests”). Dismissal of the appeal for lack of subject matter jurisdiction would leave the question of whether something like the *Munsingwear* doctrine mandates vacation of the lower court opinions, as well. In *United States v. Munsingwear*, 340 U.S. 36 (1950), the Court dismissed an appeal as moot but required vacation of the lower court opinions in the light of the parties’ inability to obtain appellate review.

individual legal rights and duties, but as a tangible entity with a logically driven, separate legal status that can transcend the regulatory power of the legal systems that give the corporation life. In fact, Daimler's reliance on a sacrosanct principle of "corporate separateness" seeks to restore an outdated vision of a corporation as a tangible entity with an inherent legal life of its own, derived from logic, not policy.

It's hard to believe that the modern business corporation is only 150 years old in this country.¹⁸ Beginning with the Jacksonian decision to make the corporate form widely available to ordinary persons, and culminating in 1890 in New Jersey's unrestricted corporation statute permitting one corporation to own another, the corporate form rapidly came to dominate economic life on both sides of the Atlantic. The dramatic proliferation of the corporate form unlocked vast productive capacity and improved the lives of millions, but also raised substantial concerns over the unprecedented economic and social power concentrated in the owners and managers of the newly ascendant corporate enterprises. Much of nineteenth-century legal thought was devoted to integrating the corporate form into the existing legal and social structure. Many disputes turned on whether business corporations should be treated as: (1) tangible entities with logically-derived legal rights; (2) legal fictions without independent legal status; or (3) artificial institutions whose legal status is shaped not by logic, but by policy.¹⁹

Cannon Manufacturing Co. v. Cudahy Packing Co. marked the high point for treating corporations as if they were free-standing, tangible beings.²⁰ In *Cannon*, the Court ruled that the in-state activities of a wholly owned-and-controlled corporate subsidiary could not be attributed to the corporate parent in deciding whether the corporate parent was physically "present" in the forum state in the pre-*International Shoe* era when in-state physical presence was the

18. I describe the history of the business corporation and the economic importance of its four most important attributes—limited liability, entity shielding, perpetual life, and negotiable shares—in Burt Neuborne, *Of "Singles" Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769, 776–81 (2012) [hereinafter "*Singles*"].

19. As Justice Breyer noted in *Hertz Corp.*, 559 U.S. 77 (2010), Chief Justice John Marshall insisted that the corporation was simply a metaphor for the individual human beings who constituted it. That was also John Norton Pomeroy's position in his influential brief in *Santa Clara County*. I attempt to describe the nineteenth century Supreme Court's efforts to decide whether a corporation is a "citizen" within the meaning of Article III, a collection of individuals for the purposes of a right to do business in "foreign" states, a "person within the meaning of the 14th Amendment's due process and equal protection clauses, a "principal" for the purposes of *respondeat superior* or contractual liability, and a freestanding entity for the purposes of punitive damages and criminal prosecution. See "*Singles*," *supra* note 17 at 781–89.

20. 267 U.S. 333 (1925).

sole path to *in personam* jurisdiction. Justice Brandeis, writing for the Court in *Cannon*, was careful to note that a statute might well require jurisdictional attribution, and that substantive liability of the parent for the acts of the subsidiary might well exist regardless of jurisdiction, but that, in the absence of a statute or overwhelming policy concern, the common law principle of “corporate separateness” must be observed in deciding whether a parent corporation is, in fact, physically “present” in a jurisdiction.²¹

One year later, in 1926, John Dewey’s masterful survey of corporate legal personality swept away the nineteenth-century, metaphysical approach to “corporate separateness” as an inherent attribute of corporate legal personality.²² Dewey’s study demonstrated conclusively that corporations have no inherent legal rights or status that flow logically from their mere existence as legal abstractions. Instead, they are vested with “corporate separateness” by the legal system only when such a legal status makes sense pragmatically.²³ For example, in *United States v. Scophony Corp. of America*,²⁴ the Court unanimously construed the Clayton Act as attributing the actions of a partially-owned and controlled American subsidiary to its British parent for the purposes of establishing *in personam* jurisdiction in New York over the British parent. Both Justice Rutledge, writing for the Court, and Justice Frankfurter, concurring, took pains to warn against slipping back into treating corporations as though they were just another member of the human family.

After *International Shoe* and *Scophony*, the real question is not a metaphysical discussion of whether the corporate parent is, or is not, physically “present” in the forum state. Rather, it is a pragmatic question of whether a forum jurisdiction has a legitimate regulatory interest in asserting adjudicatory authority over a corporate parent who is using a wholly owned-and-controlled subsidiary to engage in behavior in the forum jurisdiction that justifies regulation of the parent. Applying *Scophony* to the facts of *Bauman*, California has an unquestioned regulatory interest in the safety and reliability of the numerous Mercedes-Benz cars that Mercedes-Benz USA sells in

21. Arguably, California’s long-arm statute exercising power to the limits of the due process clause fulfills Justice Brandeis’s recognition in *Cannon* that a statute may displace the presumptive common law rule of “corporate separateness.” The Court made it clear in *United v. Bestfoods*, 524 U.S. 51 (1998), that Congress could have imposed liability on corporate parents for the activities of wholly owned subsidiaries but had failed to do so.

22. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655 (1926); see also Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935).

23. Adolf Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947).

24. 333 U.S. 795 (1948).

California at the behest of its corporate parent. That's why no one challenges California's *in personam* power over Mercedes-Benz USA. But Mercedes-Benz USA doesn't manufacture the cars. That task is performed by Daimler AG in Germany. If California's interest in enhancing the safety and reliability of the large number of Daimler AG products sold in California is to be effectively advanced, the state must be able to assert adjudicatory authority over the manufacturing entity with direct power to fix or prevent defects—Daimler AG.

In an ordinary “stream-of-commerce” case like *Asahi Metal Industries Co. v. Superior Court*,²⁵ the manufacturer loses control over the geography of the product when it sells the product to an arm's length distributor, complicating the ability of a forum jurisdiction to assert adjudicatory power over the manufacturer of an allegedly defective product. That's what makes “stream-of-commerce” cases so hard—the legitimate regulatory concerns of the forum collide with the legitimate concern of a manufacturer to tailor its exposure to the laws of a particular jurisdiction. As the Court's inability to forge a majority in *J. McIntyre Machinery, Ltd. v. Nicastro*,²⁶ demonstrates, a quarter century after *Asahi*, the Court still cannot reach agreement on which interest should predominate. But when, as in *Bauman*, the distributor is wholly owned and controlled by the manufacturer, the defendant-manufacturer retains ultimate control over the geography of its product, while simultaneously seeking to limit exposure to regulation by a forum state with a legitimate regulatory interest over the manufacturer. Under those circumstances, there simply is no reason to allow the manufacturer to use a wholly owned-and-controlled subsidiary to avoid exposure to the legitimate regulatory interests of the forum jurisdiction. That's called using the corporate form to erase the rule of law.²⁷

The lower courts have struggled to apply a commonsense, functional approach to jurisdictional attribution, often phrasing the results in “agency” terms to fit within traditional “corporate separateness” analysis. Thus, the Ninth, Eleventh, and Second Circuits hold that a wholly owned-and-controlled subsidiary's contacts with a forum should be attributed to the corporate parent for *in personam* jurisdictional purposes if the subsidiary is either the “alter ego” of the parent or is carrying out an economically integrated,

25. 480 U.S. 102 (1987).

26. 131 S. Ct. 2780 (2011).

27. See Collyn Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction Over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 63 S.C. L. REV. 697 (2012); Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CAL. L. REV. 731 (2008).

symbiotic function that is crucial to the economic success of the parent, and that triggers the legitimate regulatory concerns of the forum state.²⁸ Most of the remaining circuits to have passed on the issue of whether to allow attribution consider whether the wholly owned subsidiary is deemed the “agent” of the corporate parent, a concept loosely modeled on whether the quality and quantity of the subsidiary’s in-state activities should submit the parent to regulatory scrutiny in the forum jurisdiction.²⁹ Only the Eighth Circuit, in dicta, insists on a purely formalistic approach harking back to the 1920s.³⁰

Mercedes-Benz USA, measured formally, is not the “alter ego” of Daimler AG. But the two companies have a vital symbiotic relationship: Daimler AG, a German car manufacture, relies on Mercedes-Benz US, its wholly owned-and-controlled subsidiary, for car sales and distribution in the United States. This is a textbook example of a functional relationship that should trigger jurisdictional attribution in a state with a legitimate regulatory interest in Daimler AG’s manufacturing activities. Indeed, that’s just what happened in *World-Wide Volkswagen v. Woodson*.³¹ In *WWVW*, Audi NSU, a German automobile-manufacturing corporation, established a wholly owned American sales-and-distribution subsidiary (Volkswagen USA) as well as regional (World-Wide Volkswagen) and local (Seaway Volkswagen) sales affiliates. When an Audi sold by Seaway in New York suffered a catastrophic accident in Oklahoma,³² the Supreme Court ruled that Oklahoma lacked power to assert specific jurisdiction over Seaway and Worldwide Volkswagen, but all parties appeared to recognize that general jurisdiction existed over the German manufacturing parent (Audi NSU) and the American sales-and-distribution subsidiary (Volkswagen USA).³³ Daimler AG is in the same jurisdictional posture as Audi NSU.

28. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Stubbs v. Wyndham Nassau Resorts & Crystal Palace*, 447 F.3d 1357, 1361 (11th Cir. 2006); *Meier ex rel Meier v. Sun Int’l Hotels Ltd.*, 288 F.3d 1264, 1267 (11th Cir. 2002).

29. *Donatelli v. Nat’l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990); *IDS Liofe Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 541 (7th Cir. 1998).

30. *Viasystems, Inc. v. EBM-Pabst St. Georgen GmbH & Co.*, *KG*, 646 F.3d 589, 596 (8th Cir. 2011) (involving an attenuated 28%, two-steps-removed, parent-subsidiary relationship).

31. 444 U.S. 286 (1980).

32. In *WWVW*, plaintiffs’ Audi was rear-ended by an insolvent drunk driver with no insurance. The initial impact did not cause serious injuries, but jammed the doors of the Audi and punctured its gas tank. The gasoline caught fire, severely burning the trapped occupants.

33. 444 U.S. at 562, n.3. I say “appeared” because neither Volkswagen USA nor Audi NSU challenged Oklahoma’s *in personam* jurisdiction over them. The jurisdictional litigation in *WWVW* was not about substantive liability. Plaintiffs’ counsel, who had sued in an Oklahoma state court with a strong pro-plaintiff reputation, had joined two New York corporate defendants in the hope of blocking diversity-based removal to federal court. Once the New York defendants were dismissed on jurisdictional grounds, the case, alleging design defects in the Audi gas tank,

Nothing in *Nicastro*³⁴ casts doubt on the existence of *in personam* jurisdiction over a foreign automobile manufacturer who uses a wholly owned-and-controlled subsidiary to sell very large numbers of cars in a given forum. In *Nicastro*, a fragmented Court declined to permit New Jersey to exercise specific jurisdiction over a British manufacturer whose machines were distributed and sold in the United States by an independently owned sales-and-distribution company that had indirectly placed a single machine into New Jersey, where it allegedly malfunctioned. While the *Nicastro* Court was unable to muster an opinion supported by five Justices, all nine Justices stressed the arm's length relationship between the British manufacturer and the independent American distributor, rendering it inappropriate to attribute the distributor's isolated contact with New Jersey to the British manufacturer. If, as in *Bauman*, the American distributor in *Nicastro* had been wholly owned and controlled by the British manufacturer, it would almost certainly have changed the jurisdictional outcome.

Nor does anything in *Goodyear Dunlop Tires Operation, S.A. v. Brown*,³⁵ change the ground rules on jurisdictional attribution. In *Goodyear*, the American parent, Dunlop USA, conceded that it was subject to general jurisdiction in North Carolina, but challenged the existence of general jurisdiction over three foreign subsidiaries incorporated and operating in Luxemburg, Turkey, and France. A unanimous Court recognized that general jurisdiction in North Carolina over the foreign subsidiaries could not be based on an unintentional trickle of foreign-manufactured tires into the state; but we knew that already under *Helicopteros*.³⁶

Thus, *Goodyear* and *Nicastro* tell us little more than that it would be impossible to assert general or, on the facts of *Bauman*, specific jurisdiction in California over Mercedes-Benz Argentina. Unless the Court elects to replace existing, functional jurisdictional-attribution rules with a return to nineteenth-century, metaphysical reasoning, *Bauman* should be nine-zip on the attribution to Daimler AG of the California-based activities of its wholly owned-and-controlled American sales-and-distribution subsidiary. Moreover, the

was removed to federal court in Tulsa, where it proceeded to trial against both the German manufacturing parent and the United States sales-and-distribution subsidiary under a theory of general jurisdiction. The federal jury eventually ruled in favor of defendants, finding that the drunk driver's excessive speed had caused the gas tank puncture.

34. 131 S. Ct. 2780 (2011).

35. 131 S. Ct. 2846 (2011).

36. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) (requiring high level of sustained contact for general jurisdiction).

sustained and very substantial nature of the contacts would appear to vest California with general jurisdiction under *Helicopteros*.

IV. MAY A CORPORATE PARENT BE SUED ON CLAIMS UNRELATED TO ITS WHOLLY OWNED SUBSIDIARY'S CONTACTS WITH THE FORUM?

But that doesn't mean that California may exercise general jurisdiction over Daimler AG in connection with the behavior of its wholly owned-and-controlled Argentine subsidiary. In *Asahi*,³⁷ the Court ruled that even if adequate minimum contacts exist to assert specific jurisdiction over a foreign corporation, the Due Process Clause imposes an additional requirement of "reasonableness," obliging the forum state to demonstrate a significant interest in forcing the foreign corporation to defend in an American court. Dewey's functional approach would ask whether California has a sufficiently strong regulatory interest over the allegedly unlawful activities of Mercedes-Benz Argentina to warrant using its *in personam* power over Daimler AG as a lever to regulate those activities. The answer to that question is clearly "no." While California surely has a "reasonable" interest in asserting general jurisdiction over Daimler AG in connection with disputes concerning the safety of the types of Mercedes-Benz cars sold in California by Daimler AG's United States subsidiary,³⁸ California does not appear to have a conventional interest in exercising general jurisdiction over Daimler AG as a means of influencing the behavior of Daimler's wholly owned Argentine subsidiary toward Argentine citizens residing in Argentina.³⁹ Without such a foundational regulatory interest, it would be constitutionally unreasonable under *Asahi* to force Daimler AG to defend the acts of its Argentine subsidiary in California.

The only California regulatory interest over Mercedes-Benz Argentina asserted by the Ninth Circuit was the shared interest of all civilized states in vigorously enforcing fundamental human rights norms. But such a purely enforcement-based interest comes perilously close to an assertion of universal jurisdiction over human rights violators. The argument is not quite universal jurisdiction, but it's a

37. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

38. Thus, as in *WWVW*, general jurisdiction would exist over Daimler AG in California in connection with an accident in California involving a Mercedes Benz sold in New York by Mercedes Benz USA and driven to California. I am assuming that the volume of business conducted in California by Mercedes Benz USA comfortably satisfies the threshold for general jurisdiction set in *Helicopteros* and *Dunlop*.

39. I am assuming that the plaintiffs are citizens and residents of Argentina and that the challenged actions took place in Argentina.

close cousin—making it constitutionally “reasonable” to assert general jurisdiction over human rights claims that have no relationship with the forum so long as some tenuous relationship between the alleged perpetrator corporation and some related subsidiary can be found within that jurisdiction. Given the radical implications of universal jurisdiction in human rights cases, the Supreme Court is not about to embrace it, or anything close to it.

On the surface, therefore, *Bauman* should be an easy case. Daimler AG may be sued in California on the basis of its United States subsidiary’s massive contacts with the forum, but not in connection with the alleged actions of its Argentine subsidiary having no connection with California.

V. SHOULD CORPORATIONS BE TREATED MORE FAVORABLY THAN
NATURAL PERSONS IN ASSERTING CLAIMS WITH LITTLE OR NO
RELATIONSHIP WITH THE FORUM?

Lurking in the background, however, is the difficult question of whether the “reasonableness” prong of *Ashai* should apply to general jurisdiction over corporations. Since *Asahi* was a specific jurisdiction case, the issue is open. Once upon a time, under the territorial/physical power theory of jurisdiction, as long as a United States sovereign had physical power over a defendant, or a defendant’s property, the sovereign had authority to adjudicate any claims against the defendant, whether or not a nexus existed between the forum and the facts giving rise to the claim.⁴⁰ Everything was general jurisdiction. Under the territorial/power theory, *in personam* jurisdiction over a defendant rested on service of process on the sovereign’s turf, treating physical service of process as the civilized equivalent of placing a defendant in custody. *In rem* jurisdiction was explained by the sovereign’s plenary power over property within its borders. *Quasi in rem* jurisdiction developed as a method of asserting power over a defendant outside the physical reach of in-state service, by asserting adjudicatory power over so much of the defendant’s property as was located within the sovereign’s reach.

The territorial/physical power theory of adjudicatory jurisdiction came apart when it was forced to operate on legal abstractions like corporations and abstract property rights that have no tangible existence. Kafkaesque judicial efforts to define when an incorporeal abstraction, called a corporation, or a form of intangible property was physically “present” in a forum jurisdiction provoked a crisis in the theory of adjudicatory jurisdiction that ended in

40. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

International Shoe. In the years after World War II, the territorial/physical power theory of adjudicative authority was almost entirely overthrown by a doctrine that asked whether a sovereign *ought* to have adjudicatory power based on a defendant's "minimum contacts" with the jurisdiction. Under *International Shoe*, *in personam* jurisdiction was dramatically expanded to out-of-state, corporate defendants whose forum-related contacts make it fair to assert adjudicatory authority over them.⁴¹ Not surprisingly, given the intellectual impossibility of treating intangible abstractions as having a physical presence in a jurisdiction, the Court also grafted a minimum contacts requirement onto *quasi in rem* jurisdiction.⁴²

Only one aspect of the territorial/physical power theory of jurisdiction survived the "minimum contacts" shipwreck—unlimited *in personam* jurisdiction over a flesh-and-blood defendant served with process while physically present in the jurisdiction.⁴³ Under *Burnham*,⁴⁴ a human defendant served with process while physically present in a state may be sued about anything, whether or not the subject of the litigation has any link with the forum jurisdiction.⁴⁵ The corporate analogue of *Burnham* is "general jurisdiction," based on the idea that a corporation's activities within a state can be so significant and intensive that the corporate abstraction should be treated as being "at home" there, and be suable about anything. Life would be easier if Justice Brennan had prevailed in *Burnham* in urging the Court to subordinate in-state service over a human individual to the idea of minimum contacts. If Justice Brennan had prevailed, general jurisdiction over corporations would be readily absorbed into the minimum contacts world, with a requirement of "reasonableness"

41. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948).

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

43. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

44. *Id.*

45. The unanimous result in *Burnham* obscures the fierce disagreement within the Court over whether the fundamental fairness standard of *International Shoe* governs in-state service on a human being. Justice Brennan, writing for four Justices, argued that the Court's interpretation of an evolving Fourteenth Amendment procedural due process clause in *International Shoe* required in-state service to be fundamentally fair in order to satisfy due process. He reasoned that service on Mr. Burnham was fundamentally fair in large part because he knew, or should have known, that his transient physical presence in California would subject him to service about anything. Justice Scalia, writing for three Justices, argued that Justice Brennan's reasoning was hopelessly circular and that historic practice governed, rendering the fairness issue irrelevant. Justice White joined the Scalia opinion on its common law history and result but not its history-driven theory of constitutional interpretation. Justice Stevens also agreed with the result but refused to be drawn into the long-running constitutional food fight between Justices Brennan and Scalia over whether the meaning of the constitution evolves over time. Most courts read *Burnham* as making it unnecessary to carry out an independent fairness analysis in a transient physical presence case.

limiting the forum's reach over both individuals and corporations. But Justice Scalia's opinion in *Burnham*, retaining the in-state-service vestige of the unrestricted power theory, leaves us with the need to maintain a corporate analogue to the unlimited adjudicatory power generated by in-state service over an individual. That analogue is general jurisdiction.

Under the Court's precedents, if the defendant in this case were a German citizen, "Mr. A.G. Daimler," who wandered into California where he was served with process, California would possess unquestioned adjudicatory authority under *Burnham* to adjudicate a civil claim arising out of alleged human rights violations in Argentina. Of course, the case might still be dismissed under *forum non conveniens* or lack of subject matter jurisdiction, but no question of adjudicatory authority would exist. The hard question raised in *Bauman* is whether Daimler AG, once it is deemed "at home" in California as a matter of general jurisdiction because of the massive activities of its United States sales-and-distribution subsidiary, should face less jurisdictional exposure than Mr. A.G. Daimler would have faced if he had been a flesh-and-blood defendant served in California. It's one thing in *Citizens United* to treat corporations no worse than individuals,⁴⁶ but it is another thing to treat them materially better. Thus, whatever the role of *Asahi's* "reasonableness" requirement in testing the legitimacy of specific jurisdiction over a foreign corporation or an out-of-state, individual defendant, an additional "reasonableness" requirement cannot be imposed on general jurisdiction over a corporation without opening an indefensible gulf between the treatment of individual and corporate defendants when both are deemed "present" or "at home" in the forum jurisdiction. Why on earth should we discriminate *in favor* of corporations in enforcing human rights norms?

VI. CONCLUSION

The one unacceptable outcome of *Bauman* would be to resurrect the nineteenth century's metaphysical approach to "corporate separateness." In a world where transnational corporations wield immense power, the rule of law itself is put at risk by a doctrine that permits transnational corporations to subdivide their activities into wholly owned-and-controlled, watertight legal boxes in order to avoid taxes, minimize regulatory authority, and cabin liability for the unlawful acts of corporate agents. Maybe it makes pragmatic sense to

46. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (treating corporate and individual speakers equally).

allow corporations to slice and dice their integrated activities that way in certain contexts. But the answer to whether it makes sense rests with a careful consideration of how we wish the corporate world to be structured, not on transcendental nonsense about the inherent nature of “corporate separateness.”