

# Res Ipsa Loquitur (Or Why the Other Essays Prove My Point)

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As all the Roundtable essays note, *DaimlerChrysler* asks the Supreme Court to decide whether and when the in-forum activities of a corporate subsidiary should give rise to general personal jurisdiction over the corporate parent. My four co-contributors provide four wonderfully different perspectives on that question. And what those different perspectives should tell us is—as I argued in my original contribution—that it would be a mistake for the Supreme Court to decide that question in this case.

On the difficult question of exactly when a court should impute the activities of a subsidiary to the parent for purposes of general jurisdiction, I read my co-contributors as answering never (Erichson), almost never (Childress), sometimes (Silberman), and always (Neuborne).<sup>1</sup> Reading all four essays together leaves almost no room for further argument, as each author’s arguments are effectively countered by another author.

Neuborne argues that limiting jurisdiction *based on* the formalities of corporate separateness is “using the corporate form to erase the rule of law,”<sup>2</sup> while Erichson contends that exercising

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1. Erichson argues that a corporation can never “be *at home* through an agent,” and thus that general jurisdiction can never be imputed that way. Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 94 (2013). Childress suggests that the “default rule” should limit jurisdictional imputation to cases in which “a corporation’s affiliate is really just the corporation itself, its ‘alter ego.’” Donald E. Childress, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 79 (2013). Silberman points to the occasional case in which the “business of the . . . subsidiary . . . relate[s] closely to the business that gave rise to the claim against the parent,” suggesting that imputation of general jurisdiction is appropriate in such cases. Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123, 129 (2013). Finally, Neuborne cautions against a return to “the nineteenth century’s metaphysical approach to ‘corporate separateness,’ ” and suggests that the Court “should be nine-zip on the attribution to Daimler” of the California activities of its American subsidiary. Burt Neuborne, *General Jurisdiction, “Corporate Separateness,” and the Rule of Law*, 66 VAND. L. REV. EN BANC 95, 104, 108 (2013).

2. Neuborne, *supra* note 1, at 102.

jurisdiction *despite* the formalities of corporate separateness is politically illegitimate because the corporate parent does not have a sufficient relationship with the forum state.<sup>3</sup> Silberman urges a “more functional approach . . . that does not rely on formal notions of agency at all,”<sup>4</sup> while Childress wants a highly formalist approach that depends on whether the subsidiary and the parent are “alter ego[s].”<sup>5</sup> Consistent with her functional approach, Silberman also prefers a balancing test, even to the point of folding the current specific tests back into the all-things-considered approach of *International Shoe*.<sup>6</sup> The other three, in contrast, see a need for a bright-line rule.

The take-away point from all of this squabbling is that the Court is likely to do more harm than good if it decides the imputation question before it absolutely has to. And, as I argued in my original essay, it doesn’t have to in *DaimlerChrysler*.

The only remaining question is one discussed by several of the Justices at oral argument:<sup>7</sup> Did DaimlerChrysler waive the argument that California lacks personal jurisdiction over it because MBUSA’s contacts are not sufficient to create general jurisdiction? Although the Ninth Circuit noted that DaimlerChrysler “[did] not dispute that MBUSA is subject to general jurisdiction in California,”<sup>8</sup> two independent reasons nevertheless allow the Supreme Court to rest its decision on insufficient contacts between MBUSA and California.

First, the Court has always drawn a distinction between waiver of *claims* (or objections) and waiver of *arguments*. In *Yee v. City of Escondido*<sup>9</sup> the Court noted that “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”<sup>10</sup> DaimlerChrysler clearly raised the objection that California courts could not exercise personal jurisdiction over it. The company is permitted to make all three arguments in support of that single claim: MBUSA’s contacts cannot be attributed to DaimlerChrysler; it would

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3. Erichson, *supra* note 1, at 91.

4. Silberman, *supra* note 1, at 125.

5. Childress, *supra* note 1, at 79.

6. See Silberman, *supra* note 1, at 131–32 (“A return to the more traditional *International Shoe* formulation . . . underscores the need for *balancing* a state’s interest in asserting jurisdiction in light of the defendant’s contacts with the forum.”).

7. See Oral Argument at 6:15–7:14 (Ginsburg), 7:15–8:24 (Kagan), 23:1 (Ginsburg), 38:19–39:9 (Kennedy), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-965\\_1647.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-965_1647.pdf).

8. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 914 (9<sup>th</sup> Cir. 2011).

9. 503 U.S. 519 (1992).

10. *Id.* at 534. See also Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 245 n.2 (2000) (distinguishing between a claim and a “theory” supporting it).

be unfair to exercise jurisdiction; and California cannot exercise general jurisdiction over MBUSA.

Second, the Ninth Circuit's finding of personal jurisdiction rests on attributing to DaimlerChrysler the *contacts* that MBUSA has with California, not on transferring a finding of general jurisdiction from the subsidiary to its parent: "The question is whether MBUSA's extensive contacts with California warrant the exercise of general jurisdiction over [DaimlerChrysler]." <sup>11</sup> The Court must decide, therefore, whether MBUSA's contacts with California are sufficient to make DaimlerChrysler "at home" in that state. The contacts might be unable to do so for either of two reasons: either they cannot be attributed to DaimlerChrysler, or, even if they are attributed to DaimlerChrysler, they are insufficient to confer general jurisdiction under *Goodyear*. DaimlerChrysler has preserved both of these arguments by objecting to the exercise of general personal jurisdiction based solely on the actions of its subsidiary. The second argument is no different from a determination that the contacts are insufficient to confer general jurisdiction over MBUSA, the position that my original essay urges on the Court.

Having conceded that there is little new to say because the other four essays successfully annihilate one another (which leaves ducking the question as the Court's best option), and that nothing prevents the Court from resting its holding on a lack of general jurisdiction over MBUSA, I should stop here. But the editors have allotted me 2500 words, and I intend to use at least some of them to pick nits.

First, I take issue with Erichson's underlying approach to personal jurisdiction. He argues that, as a matter of political legitimacy, a forum has adjudicatory authority only over those who purposefully affiliate themselves with that forum, either through their conduct (for specific jurisdiction) or through their decision to establish a home-state relationship (for general jurisdiction). <sup>12</sup> But that is too narrow an approach to the requisite affiliation. He never explains why doing business in a forum and deriving revenue from that business cannot be enough to make full adjudicatory authority legitimate. States should be able to say: "If you want our money, you must be amenable to our judicial authority regardless of the subject matter of the claim." He offers no justification for drawing the lines of political legitimacy and judicial authority where he does. So the philosophical argument from which he derives the rule that the acts of an agent can never confer general jurisdiction is flawed.

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11. *Bauman*, 644 F.3d at 920.

12. Erichson, *supra* note 1, at 84–86.

Moreover, he would apply his ban on imputation even when the non-resident parent corporation is a citizen of another state rather than of another country.<sup>13</sup> Both his argument from political legitimacy and the resultant ban on imputation are especially problematic in that situation. As Wendy Perdue pointed out more than twenty years ago, “[i]nherent in our existence as a nation is that each state and its citizens necessarily accepts the political legitimacy of all the other states,” so that “[c]oncerns about political legitimacy might appropriately underlie personal jurisdiction in the international, but not in the interstate, context.”<sup>14</sup> In short, whatever the correct rule on imputation, it should not depend on our current regime that indefensibly allows arbitrary state lines to determine as a *constitutional* matter where in the United States an American citizen can be sued.

Second, there is still the issue of whether the imputation question even arises in this case. If California did not have general jurisdiction over MBUSA, then it is irrelevant whether MBUSA’s activities in California can be imputed to DaimlerChrysler. And even the two authors who seem most attentive to *Goodyear* and to the differences between general and specific personal jurisdiction—Silberman and Erichson—do not explain why the lack of general jurisdiction over MBUSA is not dispositive of the case. Silberman never mentions the problem. Erichson, although he calls the parties’ “assumption” of general jurisdiction over MBUSA “questionable” and “misguided,”<sup>15</sup> does not view that as a ground on which to reverse the Ninth Circuit.

In the end, what the four essays suggest is something that law professors—and generations of law students—have recognized for decades: the law of personal jurisdiction is a morass. The Court has wavered between individual liberty and state sovereignty as a justification for limits on personal jurisdiction, never convincingly showing how either one is connected to the current two-part test for jurisdiction. It has left the contours of both prongs of the test vague and unpredictable. It has not explained why some purposeful acts are sufficient to invoke jurisdiction and others are not. And every time it decides a difficult case that might resolve some of these issues, it fails to produce a majority opinion.

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13. *Id.* at 90–92.

14. Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C.L. REV. 529, 547 (1991).

15. Erichson, *supra* note 1, at 92 n.37.

In light of the Court's past performance on personal jurisdiction questions, I don't have much confidence that a decision on the imputation merits in *DaimlerChrysler* will shed much light on the subject. It is much more likely to create more questions than it answers; or, alternatively, to dictate a short-sighted, all-encompassing rule unjustified by any underlying principle. Perhaps the Court will have to confront the imputation question eventually. But it should try to sort out the mess it has made of basic personal jurisdiction issues before it ventures into this more complex territory.