

WHY *DAIMLER* ACCOMMODATES PERSONAL JURISDICTION IN MASS TORT LITIGATIONS

*Alani Golanski**

I. INTRODUCTION

When she authored the majority opinion in *Daimler AG v. Bauman*,¹ did Justice Ruth Bader Ginsburg intend to fracture mass tort litigations, which typically involve numerous out-of-state defendants as well as out-of-state plaintiffs? The question seems odd for at least two reasons. First, we usually speak of the court rather than the judge who writes in its name. Second, the question too easily elicits a negative answer; there is nothing about the *Daimler* opinion that has anything to do with mass tort litigation,² and so there is no basis for saying that Justice Ginsburg held any intent whatsoever in relation to that species of litigation.

Yet the question appears both appropriate and necessary. Appropriate, because Justice Ginsburg has singularly undertaken to reform and modernize the Supreme Court's personal jurisdiction jurisprudence over the past several years. Necessary, because courts around the nation handling mass tort litigations have been, or are at the risk of, misreading her opinion in *Daimler* and failing to discern its theoretical underpinnings. The majority opinion in *Daimler* appears to narrowly compress the range of jurisdictions in which courts may exercise general jurisdiction over corporate entities.³ A deeper reading of the case and its intellectual roots demonstrates, however, that this approach to general jurisdiction correlates with an expansive view of specific jurisdiction capable of accommodating the multiparty, multi-jurisdictional mass tort

* LL.M., James Kent Scholar, Columbia University School of Law; M.A. Philosophy, Graduate Center of the City University of New York; J.D., University of Connecticut School of Law. The author directs the appellate litigation unit at Weitz & Luxenberg, P.C., New York, New York.

¹ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

² *See generally id.* at 751 (explaining that the issue before the Court arose from human rights violations perpetrated during Argentina's 1976–83 "Dirty War").

³ *See id.* at 761–62.

scenario.

Justice Ginsburg began honing her view in 2011 via both her dissenting opinion in *J. McIntyre Machinery v. Nicastro*⁴ and her opinion for a unanimous Court issued on the same day in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.⁵ *Daimler* followed in 2014.⁶ In each of these opinions, Justice Ginsburg cited repeatedly to a 1966 *Harvard Law Review* article by Arthur T. von Mehren and Donald T. Trautman, entitled: “Jurisdiction to Adjudicate: A Suggested Analysis.”⁷ In that work, Professors von Mehren and Trautman proposed that fairness to both parties in the context of modern multistate controversies called for “a fresh methodology and terminology” covering adjudicatory jurisdiction.⁸ They framed the new concepts “specific” and “general” jurisdiction,⁹ soon to “become the touchstones of contemporary personal jurisdiction analysis.”¹⁰ Because the program von Mehren and Trautman outline in “Jurisdiction to Adjudicate” motivated Justice Ginsburg’s approach, therein also lies the theoretical ground for assessing how *Daimler* should be applied in mass tort contexts.

Toward that end, Part II homes in on the concept of a mass tort and justifies the inclination to locate a single forum to serve as the host venue in such litigations. Part III elucidates the relevant concepts and concerns announced by von Mehren and Trautman in their seminal article; also discussed is Professor Mary Twitchell’s later writing advocating a fuller turn from general to specific jurisdiction. Part IV then addresses Justice Ginsburg’s application of the von Mehren and Trautman, as well as Twitchell, scholarship. Part V provides an assessment of why Justice Ginsburg’s ultimate jurisdictional opinion in *Daimler* should not be interpreted to present a constitutional obstacle to the efficient, centralized handling of mass tort litigations. The article concludes with Part VI.

⁴ See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 910 (2011) (Ginsburg, J., dissenting).

⁵ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011).

⁶ *Daimler*, 134 S. Ct. at 746.

⁷ See, e.g., *id.* at 754, 755, 756 n.8, 758 n.9, 762 n.20; *Goodyear*, 564 U.S. at 919, 923, 929 n.5; *Nicastro*, 564 U.S. at 899, 909–10; see generally Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (providing an in-depth analysis on jurisdictional issues).

⁸ See von Mehren & Trautman, *supra* note 7, at 1121–23.

⁹ *Id.* at 1136.

¹⁰ Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 610–11 (1988). The traditional jurisdictional categories had been “in personam,” “in rem,” and “quasi in rem.” See von Mehren & Trautman, *supra* note 7, at 1135 n.31, 1136.

II. THE MASS TORT CENTRALIZED LITIGATION MODEL

Neither courts nor scholars have agreed on a tightly wrapped definition of “mass tort.” Typically, the term has been applied to litigations arising from widespread catastrophic personal injuries.¹¹ This article similarly focuses on the personal injury paradigm, although the jurisdictional analysis should translate to mass torts rooted in financial harm.¹²

Some courts have rested on the basic hornbook notion that a mass tort is a “civil wrong that injures many people.”¹³ Others have considered most important the idea that “mass tort cases with their inherent complexity fall within the definition of extreme cases,” hence “requiring special management.”¹⁴ While true, these definitions are, of course, inadequate.

To qualify as a mass tort, a litigation will ordinarily satisfy four criteria.¹⁵ First, consistent with the lexicographic view, the number of injured individuals in a mass tort will be substantial.¹⁶ This will involve not simply injury to “many people,” but to a number so great as to potentially task the judicial system and result in the need to resolve efficiency and docket concerns.¹⁷ An attendant characteristic will often be the large number of defendants or collateral entities.¹⁸ The mass tort often arises from vertical and horizontal actors playing contributory roles: vertical due to the lack of a privity defense and hence defendants at various points in the chain of distribution, and horizontal owing to the competitive marketplace.¹⁹ Collateral entities will include insurers and lien

¹¹ See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 8 (2007).

¹² See Anthony J. Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 MICH. L. REV. 1213, 1216 (2008) (reviewing NAGAREDA, *supra* note 11).

¹³ See, e.g., *Robinson v. United States*, 175 F. Supp. 2d 1215, 1218 n.2 (E.D. Cal. 2001) (quoting *Mass Tort*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

¹⁴ *In re Diet Drug Litig.*, 895 A.2d 493, 505 (N.J. Super. Ct. 2005) (quoting *Smith v. Am. Home Products Corp. Wyeth-Ayerst Pharm.*, 855 A.2d 608, 626–27 (N.J. Super. Ct. 2003)).

¹⁵ See Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U. C. DAVIS L. REV. 917, 925 (1995).

¹⁶ See *id.*

¹⁷ See *id.* at 925–26. In its 1989 report, the American Bar Association Commission on Mass Torts chose to define “mass tort litigation” as involving “at least [one hundred] civil tort actions arising from a single accident or use of or exposure to the same product or substance,” although one Commission member argued for a definitional threshold of “[ten thousand] present and reasonably to be expected cases,” to distinguish between routine and problematic mass torts. AM. BAR ASS'N, REPORT OF THE FIFTY-FOURTH ANNUAL MEETING OF AMERICAN BAR ASSOCIATION, 54 REPORTS OF A.B.A. 394, 485 (1989) [hereinafter A.B.A. REPORT].

¹⁸ See Redish & Beste, *supra* note 15, at 927 (“[M]ass tort cases are distinguishable by the sheer force of their numbers and burdens.”).

¹⁹ See NAGAREDA, *supra* note 11, at 26–28.

holders.²⁰

Second, the many cases comprising the mass tort, given the common source of injury, will involve numerous overlapping factual and legal issues and circumstances.²¹ These will tend to include: issues about the sorts of exposures or contacts with the injury-producing mechanism or substance; similar proofs concerning general causation (i.e., the capability of the harmful substance or toxin to cause the injury); substantially similar principles from general medicine and industrial hygiene; overlapping evidence concerning treatment modalities; identical proofs about what the defendants knew or should have known about the hazard; common legal standards rooted in negligence and products liability failure-to-warn and design defect jurisprudence; similar treatment and status of bankrupt tortfeasors; common representation of numerous parties by the same counsel; a similar game plan on the part of defendants to mitigate their own liability; and likely other common legal and factual matters.²²

Third, the issues in mass tort cases tend to be far more complex than in ordinary tort cases.²³ For instance, whereas in the ordinary negligence case the causation element folds into a unitary concept, in a mass tort litigation arising in the products liability or toxic tort context the causation element subdivides into three components at issue: “[(1)] the legal connection between the breach of duty and the harm . . . [(2)] the general capability of the [product] to cause the harm . . . [and (3)] the link in the particular case between the [product] and the harm[.]”²⁴ Further complications stem from the long latency periods arising from toxic exposures, which are often deemed to engender a need to relax certain evidentiary burdens, and also to reconcile the possibly competing needs of present and future litigants.²⁵ Allocations of fault and the molding of judgments are affected by the likelihood that several of the multiple tortfeasors

²⁰ See Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 16 (2009).

²¹ See Redish & Beste, *supra* note 15, at 926.

²² See A.B.A. REPORT, *supra* note 17, at 405–08; see, e.g., *Atwell v. Bos. Sci. Corp.*, 740 F.3d 1160, 1164–65 (8th Cir. 2013) (noting the need for consistency and judicial economy when courts handle the complex issues and facts arising in mass tort litigation); *Dunlavey v. Takeda Pharms. Am., Inc.*, No. 6:12–CV–1162, 2012 WL 3715456, at *1 (W.D. La. Aug. 23, 2012) (providing an example of how litigants are commonly aligned in mass tort litigation).

²³ See Redish & Beste, *supra* note 15, at 926.

²⁴ Alani Golanski, *Paradigm Shifts in Products Liability and Negligence*, 71 U. PITT. L. REV. 673, 676 (2010).

²⁵ See, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 637–38 (1997) (Breyer, J., dissenting) (citing JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 64 (1995)).

have declared bankruptcy.²⁶ Commentators have added that mass tort is often further complicated by the existence of “satellite litigation,” as when toxic tort defendants engage in protracted collateral litigation with their insurers.²⁷

Finally, especially owing to the complexity and varieties of proof required, and to the sophisticated expertise usually retained, mass tort cases are far more expensive to litigate than the typical tort case.²⁸ Questions about whether a defendant’s conduct failed to satisfy the governing standard of liability often involves technological and policy issues that require comprehensive discovery, expertise, and preparation.²⁹ The causation issues, as suggested above, can become specially demanding, particularly when confounding factors are involved that may point to a number of possible causal sources.³⁰

It should now be apparent that in a mass tort litigation implicating multistate conduct and contacts, centralized litigation venues should permit jurists to gain sufficient supervisory expertise, litigants to consolidate their efforts and experts, and doctrinally consistent rulings to be issued. All of this, as well as coordinated settlement mechanisms, may result in substantial economies of scale and other efficiencies.³¹ Accordingly, for instance, Judge Jack Weinstein set down certain criteria that he argued “must be satisfied in mass tort cases, . . . [including] the concentration of decision making in one or a few judges . . . [and] a single forum responsible for resolving legal and factual issues.”³²

Professor Francis McGovern similarly outlined a four-step process for handling mass torts that have “matured,” meaning that threshold questions of general causation, possible federal legislative preemption, approximate settlement values, and so forth, have

²⁶ See, e.g., *N.Y.C. Asbestos Litig. v. A.C. & S.*, 750 N.Y.S.2d 469, 476 (N.Y. Sup. Ct. 2002) (citing *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 846 (2d Cir. 1992)).

²⁷ See Redish & Beste, *supra* note 15, at 926.

²⁸ See *id.* at 927.

²⁹ See, e.g., *Georgia-Pacific Corp. v. Carter*, 265 S.W.3d 107, 112 (Ark. 2007) (quoting *Summons v. Mo. Pac. R.R.*, 813 S.W.2d 240, 245 (Ark. 1991)).

³⁰ See, e.g., *id.*; see generally Redish & Beste, *supra* note 15, at 926 (discussing how issues can arise as to whether defendant actually caused plaintiff’s injury).

³¹ See, e.g., *Schultheis v. Davne*, 35 Phila. 546, 558 (C.P. Phila. 1998) (“The mass tort program was developed specifically to deal efficiently with great numbers of complex but similar cases by coordinating and streamlining discovery, pretrial motions, and trial in such cases.”).

³² WEINSTEIN, *supra* note 25, at 131; see also Jeffrey M. Eilender, *Forum Non Conveniens and Comprehensive Hazardous Waste Coverage Suits*, 90 COLUM. L. REV. 1066, 1081 (1990) (“With the advent of mass tort suits, the most convenient forum today often means a single forum.”).

mostly been resolved.³³ Professor McGovern's proposal is as follows: "(1) consolidat[e] all cases of a single mature mass tort into one forum; (2) resolv[e] all common issues in that forum; (3) collect[] information concerning all injuries; and (4) develop[] a systematic process for resolving all remaining issues."³⁴

Centralized or single-forum handling of mass tort cases avoids the inefficiencies that may result from duplicative determinations of similar issues in multiple jurisdictions, and fosters uniform and thereby hopefully equitable treatment of the litigants.³⁵ Toward these ends, jurisdictions adopt rules of courts aimed at facilitating the handling of mass tort claims.³⁶ They may authorize, for example, the appointment of a coordinating judge authorized to assign a master caption, create a central case file and docket, establish a service list, periodically issue case management orders after consultation with counsel, and appoint and define the roles of steering committees and counsel of parties and liaison counsel.³⁷

Even if some may inevitably argue against recognizing a center point for mass tort litigations,³⁸ it is at least the case that, as just shown, substantial thought and resources have been expended in favor of a unified administration of those claims. At times, these efforts have even involved the coordinated supervision of state and federal judges in the focal jurisdiction.³⁹ Receptiveness to the unified administration of mass tort claims therefore appears

³³ See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659, 690 (1989).

³⁴ *Id.* at 690; see also COMPLEX LITIG. PROJECT § 6.01 cmt. a (AM. LAW. INST., Proposed Official Draft 1993) (proposing that mass torts could best be treated as class cases in a single forum under a single substantive rule); cf. Note, *Successor Liability, Mass Tort, and Mandatory-Litigation Class Action*, 118 HARV. L. REV. 2357, 2367 (2005) ("Among the features that make bankruptcy appealing for mass tort defendants are mandatory aggregation of all claims into a single forum, 'acceleration and estimation of unmatured and contingent claims,' and the finality and certainty provided by discharge of all claims.").

³⁵ See, e.g., *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 862 n.1 (3d Cir. 1991) (Scirica, J., concurring) (internal citations omitted).

³⁶ See generally *id.* (discussing the impact of legislation that affects how courts can handle mass tort litigation).

³⁷ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 202.69(c)(2) (2016).

³⁸ See, e.g., *In re TMI Litig.*, 940 F.2d at 862 n.1 (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460–84 (1957) (Frankfurter, J., dissenting)).

³⁹ See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 129 F.R.D. 434, 434 (E.D.N.Y. & N.Y. Sup. Ct. 1990) ("Several hundred cases from the United States District Courts in the Southern and Eastern Districts of New York have been assigned to Judge Jack B. Weinstein. Several hundred similar state cases have been assigned to New York Supreme Court Justice Helen E. Freedman."); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.312 (2004) ("In the silicone gel breast implant and diet drug litigations, state and federal judges created working relationships that came close to achieving a comprehensive approach to state-federal cooperation.").

justified, at least to some great extent,⁴⁰ and the question will be how the *Daimler* decision should impact this desirable mechanism.⁴¹

III. VON MEHREN AND TRAUTMAN'S "JURISDICTION TO ADJUDICATE"

At the root of *Daimler*'s doctrinal analysis, substantial insight into *Daimler*'s "intent" and theoretical underpinnings derives from the von Mehren and Trautman article. Although "Jurisdiction to Adjudicate" preceded the advent of mass tort litigation and therefore did not directly address the topic, this article shows that *Daimler*'s jurisprudential commitments, as articulated by Justice Ginsburg, do not cut against the centralized mass tort docket.

Von Mehren and Trautman began by noting that jurisprudential thinking about how to locate the appropriate forum for handling multistate controversies had been in flux, and proposed a new "ordering of jurisdictional problems" based on "a fresh methodology and terminology."⁴² After outlining certain problems of analysis and terminology that had tended "to obscure the issues of policy underlying the problems of jurisdiction to adjudicate,"⁴³ von Mehren and Trautman neatly differentiated and designated the two main grounds of jurisdiction: specific jurisdiction, which arises from "affiliations between the forum and the underlying controversy," and general jurisdiction, which arises from relationships "between the forum and the person or persons whose legal rights are to be affected."⁴⁴

The authors then structured their inquiry into the bipartite nature of personal jurisdiction by privileging considerations of fairness and functionality.⁴⁵ Analyzing general jurisdiction, they noted three types of connections that had been deemed to directly affiliate the defendant and the forum: the defendant's domicile,

⁴⁰ None of this is to deny, on the other hand, that there may be occasions when centralization is not desirable or not fully feasible. Whether unified administration may, under certain circumstances, create inefficiencies or become unmanageable or unfair to certain litigants raises concerns beyond the scope of this article, which ultimately aims to show that, to the extent that centralized treatment would otherwise be optimal for the reasons stated, it ought not be deemed threatened by the *Daimler* jurisdictional model.

⁴¹ The separate topic of class action treatment of mass tort cases or issues is beyond the scope of this piece. See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 816 (5th Cir. 2014) ("[I]t is indeed 'possible to satisfy the predominance . . . requirements of Rule 23(b)(3) in a mass tort or mass accident class action' despite the particular need in such cases for individualized damages calculations." (internal citation omitted)).

⁴² Von Mehren & Trautman, *supra* note 7, at 1121–22.

⁴³ *Id.* at 1136.

⁴⁴ *Id.*

⁴⁵ See *id.* at 1122–23.

presence, and consent.⁴⁶ Von Mehren and Trautman agreed that domicile is “clearly a proper basis for general jurisdiction,” but rejected “mere presence . . . [as a] basis for assuming general jurisdiction.”⁴⁷ They noted that, as a factual matter, presence is typically supplemented with other factors, such as the forum being plaintiff’s domicile, or the location of evidence or important witnesses, or closely connected to the underlying controversy.⁴⁸

Von Mehren and Trautman were a bit ambivalent about the third directly affiliating factor—consent—as a basis for general jurisdiction.⁴⁹ It could hardly be deemed unfair for a court to exercise general jurisdiction over a defendant that had consented *after* the action was brought.⁵⁰ Consent obtained *before* the action was brought, however, might or might not support such jurisdiction, depending on whether, upon examination, the prior consent is found to have been “a fair one,” and not corralled by coercion or through the exercise of “greatly superior bargaining power.”⁵¹ In all events, say von Mehren and Trautman, as with presence, jurisdiction based on consent is usually associated with other affiliations that would ground the exercise of personal jurisdiction.⁵²

The authors of “Jurisdiction to Adjudicate” then emphasized that general adjudicatory jurisdiction over a corporation with regard to its activities unconnected to the forum most clearly pertained when the community had either chartered the corporation or hosted its “managerial and administrative center.”⁵³ When served in the jurisdiction in which it is incorporated or maintains top-level managerial and administrative functions, the defendant “has no legitimate ground on which to object to litigation in any of these several forums” even if management is dispersed.⁵⁴

Apart from a corporate defendant’s state of incorporation or principal place(s) of business, and arguably consent with voluntariness established, von Mehren and Trautman viewed other bases for asserting general jurisdiction as problematic, “particularly

⁴⁶ *See id.* at 1137.

⁴⁷ *Id.*

⁴⁸ *See id.* at 1137–38.

⁴⁹ *See id.* at 1138.

⁵⁰ *See id.* at 1138–39.

⁵¹ *Id.* at 1138; *see also* *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (“A statute calling for such a designation [of an agent for service of process who consents] is constitutional, and the designation of the agent [is] ‘a voluntary act.’” (citation omitted)).

⁵² *See* von Mehren & Trautman, *supra* note 7, at 1138.

⁵³ *Id.* at 1141–42.

⁵⁴ *See id.*

in light of the emergence in recent years of a variety of bases for specific jurisdiction.”⁵⁵ This emergence “reflect[ed] the growing mobility and complexity of modern life and an increasingly functional approach to jurisdictional issues.”⁵⁶ The authors emphasized, moreover, that “with commercial and economic life increasingly dominated by corporations,” specific jurisdiction derived from “indirectly affiliating circumstances” that establish some link between the controversy and the forum removes the unjustified bias favoring defendants as against “ordinary plaintiff[s]” under general jurisdiction analysis.⁵⁷

In their article, von Mehren and Trautman soon turned to “perhaps the most difficult and unsettled topic in the entire subject of adjudicatory jurisdiction, . . . [that] involving multiple or indeterminate parties.”⁵⁸ They deemed the turn to an analysis rooted in specific jurisdiction as particularly important because “[t]he ultimate justification for the exercise of such jurisdiction rests on the *practical necessity* that some forum be able to speak with respect to *the situation as a whole*.”⁵⁹ Emerging theories warranting expansive specific jurisdiction, in the authors’ view, included “a notion of real or implied consent to jurisdiction to adjudicate, deriving from participation in an enterprise whose affairs require a unitary regulation . . . [and] a principle that, in situations demanding general and uniform regulation, jurisdiction to adjudicate can be taken by the forum that is the obvious focal point for the litigation, provided that fair procedures are used.”⁶⁰

Again prior to the commencement of mass tort litigations in American law, von Mehren and Trautman cited Justice Traynor’s decision in *Atkinson v. Superior Court*⁶¹ as illustrative of an emerging “approach to specific jurisdiction in more complex situations.”⁶² In *Atkinson*, the class of plaintiff musicians alleged in their California lawsuit that their defendant union had improperly contracted with their defendant employers for the payment of royalty amounts to a New York trustee, also a defendant, for certain

⁵⁵ *Id.* at 1139; *see also* Twitchell, *supra* note 10, at 650 (“Courts are expanding the scope of specific jurisdiction in practice, but they have not articulated the theoretical justification for such an expansion.”).

⁵⁶ Von Mehren & Trautman, *supra* note 7, at 1146–47.

⁵⁷ *Id.* at 1147.

⁵⁸ *Id.* at 1153.

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Id.* at 1154.

⁶¹ *Atkinson v. Super. Ct. L.A. Cty.*, 316 P.2d 960 (Cal. 1957).

⁶² Von Mehren & Trautman, *supra* note 7, at 1161.

trust purposes, instead of to the employee musicians.⁶³ There was no basis for exercising general jurisdiction as to the trustee.⁶⁴

Justice Traynor reasoned in *Atkinson*, however, that the obligation the musicians sought to enforce grew out of their employment in California.⁶⁵ Fairness demanded that the conflicting claims against the trustee be finally adjudicated, and that “[t]he evil of exposing the obligor to actions to enforce the same obligation in two jurisdictions with the attendant risk of double liability,”⁶⁶ warranted the exercise of what von Mehren and Trautman would come to identify as specific jurisdiction, based on the “[t]otality of [c]ontacts” as between the forum and the controversy.⁶⁷

Von Mehren and Trautman more generally instructed that:

[I]n litigation involving multiple or indeterminate parties[,] . . . specific jurisdiction to adjudicate lies with the forum providing the most appropriate focus for matters calling for a unified administration. This principle would suggest the taking of jurisdiction in some situations in which it is not now taken, as well as the limiting of jurisdiction to a single forum in situations where several forums now assume it.⁶⁸

Next addressing the continuing evolution of jurisdictional principles, von Mehren and Trautman stressed that the exercise of specific jurisdiction would be particularly appropriate “when very strong considerations of convenience, relating not only to the plaintiff but also to the taking of evidence and other litigational considerations, point to a particular community. This . . . class of situations [dealing with convenience] is most clearly illustrated in cases involving multiple or indeterminate parties”⁶⁹ Especially giving “every reason to disturb the traditional bias in favor of defendant” are circumstances in which a sophisticated defendant’s “commercial involvement in multistate activity” has harmed the plaintiff.⁷⁰

Benefitting from two further decades of jurisprudence, and also presaging the Supreme Court’s opinion in *Daimler*, Professor

⁶³ See *Atkinson*, 316 P.2d at 961–62.

⁶⁴ See *id.* at 965; see also von Mehren & Trautman, *supra* note 7, at 1162 (describing how there was a lack of general jurisdiction over the trustee in *Atkinson*).

⁶⁵ See *Atkinson*, 316 P.2d at 966.

⁶⁶ *Id.*

⁶⁷ See von Mehren & Trautman, *supra* note 7, at 1161–62.

⁶⁸ *Id.* at 1162–63. The authors continued, with particular regard to estate law, that “convenience demands an efficient, unified administration, which cannot be provided if the estate is handled in several courts.” *Id.* at 1163.

⁶⁹ *Id.* at 1167.

⁷⁰ *Id.* at 1171.

Twitchell placed a gloss upon “Jurisdiction to Adjudicate.” She noted that courts had often been using “the ‘general’ jurisdiction label when conferring jurisdiction on a dispute-specific basis.”⁷¹ Professor Twitchell relied on the broad language used by the Supreme Court in *International Shoe Co. v. Washington*⁷² to justify the constitutionally permissible exercise of specific jurisdiction in relation to obligations that “arise out of *or are connected with* the activities within the state.”⁷³

Accordingly, Professor Twitchell reported: “[M]any courts have devised a looser ‘relatedness’ standard for specific jurisdiction. They have considered the nature of the cause of action in deciding jurisdiction if a claim ‘pertains to,’ ‘coincides with,’ ‘relates to,’ or is ‘connected with’ a defendant’s forum activities.”⁷⁴ Twitchell noted that “[u]nder dispute-specific jurisdiction, the state need not determine whether it would permit jurisdiction over all claims asserted against the defendant in the forum, as it would under dispute-blind jurisdiction.”⁷⁵ Professor Twitchell finally emphasized that “[i]f the court’s decision to exercise jurisdiction is colored by the nature of the claim, its decision is one of specific jurisdiction even if it was also influenced by the totality of the defendant’s contacts with the forum.”⁷⁶

Professor Twitchell’s view in favor of an emerging and expansive recognition of dispute-specific jurisdiction harmonized with that of von Mehren and Trautman.⁷⁷ As one poignant example, von Mehren and Trautman pointed to the substantial “functional justification” for the exercise of specific jurisdiction in cases of federal multi-jurisdictional interpleader.⁷⁸ Under the present statute, the forum court may issue an order restraining any claimant “from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or

⁷¹ Twitchell, *supra* note 10, at 613.

⁷² *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁷³ Twitchell, *supra* note 10, at 653–54; *see also Int’l Shoe*, 326 U.S. at 319 (“[S]o far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”).

⁷⁴ Twitchell, *supra* note 10, at 662–63.

⁷⁵ *Id.* at 664.

⁷⁶ *Id.* at 680.

⁷⁷ *See id.* at 676 & n.299.

⁷⁸ Von Mehren & Trautman, *supra* note 7, at 1158–59 & n.117; *see also* Bernadette Bollas Genetin, *The Supreme Court’s New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 114 (2015) (“Von Mehren and Trautman acknowledged that the courts had, by 1966, vastly increased specific jurisdiction, but they argued for continued expansion of the ‘more functional and less mechanical’ approach of *International Shoe*.”).

obligation involved in the interpleader action”⁷⁹

IV. JUSTICE GINSBURG’S APPLICATIONS OF THE VON MEHREN AND TRAUTMAN DOCTRINE

A. J. McIntyre Machinery, Ltd. v. Nicastro

The Court issued two rulings containing Justice Ginsburg’s opinions redefining the Court’s approach to personal jurisdiction on June 27, 2011.⁸⁰ One was her dissent in *J. McIntyre Machinery, Ltd. v. Nicastro*. Robert Nicastro had seriously injured his hand at work in New Jersey while using a metal-shearing machine manufactured in England by the British defendant J. McIntyre Machinery, Ltd. (“J. McIntyre”).⁸¹ The plurality opinion, written by Justice Anthony Kennedy, held that due process precluded jurisdiction over J. McIntyre because the company had not “purposefully avail[ed] itself of the privilege of conducting activities within the forum State.”⁸²

The plurality’s holding was predicated on the insufficiency for due process purposes of defendant’s contacts with New Jersey, which consisted solely of: (1) J. McIntyre’s use of an American, non-New Jersey distributor to market its machines in the United States; (2) J. McIntyre’s attendance at trade conventions in the United States, but never in New Jersey; and (3) the introduction into New Jersey likely only of the one machine that injured Mr. Nicastro, but in any event of no more than four of its machines.⁸³

Accordingly, held the *Nicastro* Court, specific jurisdiction over J. McIntyre would have to be premised upon its general release of its product into the “stream of commerce,” yet “the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures.”⁸⁴

In dissent, Justice Ginsburg reframed the factual circumstances of *Nicastro* to make clear that the defendant was a foreign

⁷⁹ 28 U.S.C. § 2361 (2012).

⁸⁰ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Ginsburg, J., dissenting).

⁸¹ See *Nicastro*, 564 U.S. at 878 (plurality opinion).

⁸² *Id.* at 877 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

⁸³ See *Nicastro*, 564 U.S. at 878 (plurality opinion).

⁸⁴ *Id.* at 886. Importantly, and implicitly setting the *Nicastro* circumstances apart from most mass tort contexts, the Court explained: “The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” *Id.* at 882.

industrialist who sought to develop a market in the United States for its machines, hoping to derive substantial revenue from sales in the country.⁸⁵ Justice Ginsburg reasoned: “Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach.”⁸⁶ By denying the New Jersey courts’ jurisdiction over this defendant, said Justice Ginsburg, the Court was “turn[ing] the clock back to the days before modern long-arm statutes,” thereby permitting the wily manufacturer to “Pilate-like wash its hands of a product by having independent distributors market it.”⁸⁷

The dissent emphasized J. McIntyre’s promotion of its machine as “the world’s best[,] . . . use[d] throughout the [w]orld,”⁸⁸ as well as the national scope of its marketing efforts “across the United States,”⁸⁹ representing its “purposeful” steps to reach customers nationwide.⁹⁰ Hence, J. McIntyre endeavored “to reach and profit from the United States market as a whole”⁹¹ Translating the factual setting into a legal analysis, Justice Ginsburg relied on von Mehren and Trautman, explaining that the modern approach must center on reason and fairness, which will include considerations of litigational convenience and the ability to gather the evidence.⁹²

B. Goodyear Dunlop Tires Operations, S.A. v. Brown

Writing for a unanimous Court in the second ruling decided on June 27, 2011, Justice Ginsburg in *Goodyear Dunlop Tires Operations, S.A. v. Brown* declined to afford the North Carolina courts jurisdiction over foreign subsidiaries of a United States parent corporation with regard to claims unrelated to any activity of the subsidiaries in the forum state.⁹³ In *Goodyear*, young soccer players from North Carolina were traveling on a bus near Paris, France, when a tire manufactured by a European Goodyear

⁸⁵ See *id.* at 893 (Ginsburg, J., dissenting).

⁸⁶ *Id.*

⁸⁷ *Id.* at 893–94 (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).

⁸⁸ *Nicastro*, 564 U.S. at 894 (Ginsburg, J., dissenting).

⁸⁹ *Id.* at 896.

⁹⁰ *Id.* at 898.

⁹¹ *Id.*

⁹² *Id.* at 903 & n.10 (citing von Mehren & Trautman, *supra* note 7, at 1167).

⁹³ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918, 923, 929, 931 (2011).

subsidiary failed and caused the bus to crash.⁹⁴

By speaking in the negative, the *Goodyear* Court implicitly tendered factors that would be included in an expansive dispute-specific jurisdictional assessment.⁹⁵ In this vein, Justice Ginsburg noted that the defendants manufactured their tires for sale in Europe and Asia rather than the United States, those tires differed in size and construction from tires ordinarily sold in the United States, defendants were not registered to do business in North Carolina, did not solicit business there, and took no affirmative action to ship their tires into North Carolina.⁹⁶ The Court further stressed that “the type of tire” involved in the accident was never distributed in North Carolina.⁹⁷

These appear to be dispute-specific factors by Justice Ginsburg’s understanding, particularly since she distinguishes a general jurisdiction grounding as one “arising from dealings *entirely distinct* from those activities” that give rise to the causes of action.⁹⁸ Clearly, the characteristics of defendants’ tire-marketing efforts would not have been “entirely distinct” from the activity of distributing the defective tire, or type of tire, resulting in the boys’ deaths.⁹⁹ Also implicitly, a corporation’s “continuous activity of some sorts within a state” would support specific jurisdiction over suits related to that activity.¹⁰⁰ By contrast, general jurisdiction to hear any and all claims against a corporate defendant pertains when that defendant is “essentially at home in the forum State.”¹⁰¹

C. Daimler AG v. Bauman

Justified in concluding that, under *Goodyear*, it could not be deemed to be “essentially at home” in California, the German entity DaimlerChrysler Aktiengesellschaft (“Daimler”) obtained Supreme Court review of the Ninth Circuit’s holding to the contrary.¹⁰² In *Daimler*, Argentinian plaintiffs alleged that they or their relations

⁹⁴ See *id.* at 918.

⁹⁵ See *id.* at 920–21.

⁹⁶ See *id.*

⁹⁷ See *id.* at 921.

⁹⁸ *Id.* at 924 (emphasis added) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

⁹⁹ See *Goodyear*, 564 U.S. at 929–30.

¹⁰⁰ *Id.* at 927 (quoting *Int’l Shoe Co.*, 326 U.S. at 318). In her *Goodyear* opinion, Justice Ginsburg again cites liberally to von Mehren and Trautman, and also to Professor Twitchell. See, e.g., *Goodyear*, 564 U.S. at 919, 923, 925, 929 n.5.

¹⁰¹ *Goodyear*, 564 U.S. at 919 (citing *Int’l Shoe Co.*, 326 U.S. at 317).

¹⁰² See *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014).

had been kidnapped, tortured, and killed by Argentina's security forces during its 1976-1983 "Dirty War" in collaboration with plaintiffs' employer, an Argentinian Daimler subsidiary.¹⁰³ The plaintiffs alleged general jurisdiction based on the California contacts of yet another Daimler subsidiary, one incorporated in Delaware with its principal place of business in New Jersey.¹⁰⁴

As Justice Ginsburg noted at the outset, the *Daimler* plaintiffs did not allege specific jurisdiction, given the absence of any California link to "the atrocities, perpetrators, or victims described in the complaint."¹⁰⁵

Again by negative implication, this language suggests that a finding of *some* California connection to the atrocities or perpetrators would have supported dispute-specific jurisdiction.¹⁰⁶ Moreover, elaborating on the new contours of the general versus specific jurisdictional divide, Justice Ginsburg emphasized, as a point of illustration, that "the placement of a product into the stream of commerce 'may bolster an affiliation germane to *specific* jurisdiction[.]'"¹⁰⁷

Nor was there a ground for subjecting Daimler to general jurisdiction in California.¹⁰⁸ Courts now tend to construe *Daimler* as narrowly limiting general jurisdiction over corporate entities to the place of their incorporation or principal place of business.¹⁰⁹ However, while again oft-citing to von Mehren and Trautman, as well as Twitchell, in favor of compressed general and significantly enhanced specific jurisdictional parameters, Justice Ginsburg cautioned that the place of incorporation and principal place of business supplied "paradigm" but not exclusive criteria for all-purpose forums.¹¹⁰ Left open, for instance, was the circumstance in

¹⁰³ *See id.* at 751.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 757 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011)).

¹⁰⁸ *See Daimler*, 134 S. Ct. at 763 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹⁰⁹ *See, e.g., Kipp v. SKI Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015) ("[G]eneral jurisdiction exists only when the organization is 'essentially at home' in the forum State. Thus far, the Court has identified only two places where that condition will be met: the state of the corporation's principal place of business and the state of its incorporation." (internal citations omitted)).

¹¹⁰ *See Daimler*, 134 S. Ct. at 758 n.9, 760; *see also* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 735 (1988) (discussing the paradigms of general jurisdiction); Twitchell, *supra* note 10, at 633 (providing generalizations about a defendant's contacts).

which a corporation had “consented” to suit in the forum.¹¹¹ Accordingly, some courts have reasoned that, even after *Daimler*, the rule remains that a corporation’s consent to jurisdiction, by virtue of having registered an agent within the state for service of process, affords that state’s courts general jurisdiction over the corporation.¹¹²

V. THE COURT’S EVOLVING VIEW OF SPECIFIC JURISDICTION ACCOMMODATES CENTRALIZED MASS TORT LITIGATIONS

The mass tort has become a distinct species of American litigation since von Mehren and Trautman issued “Jurisdiction to Adjudicate.” Participants in the legal system have existentially committed to recognizing the “mass tort” as a distinct litigation entity.¹¹³ The roots of the semantic and legal recognition of the unified mass tort are found in what Professor David Rosenberg describes as “the centralized corporate sources, statistical predictability, massive scale, and relative uniformity of disease risks indicat[ing] that mass exposure cases may be amenable to aggregative rather than traditional case-by-case procedures”¹¹⁴

Issues of coordination, fairness, efficiency, technological and interpersonal practicability, choice-of-law concerns, and so on, will inform decisions about the optimal level at which multistate mass torts should be centralized in a single forum.¹¹⁵ This article does

¹¹¹ See *Daimler*, 134 S. Ct. at 755–56 (quoting *Goodyear*, 564 U.S. at 928).

¹¹² See, e.g., *Mitchell v. Eli Lilly & Co.*, 159 F. Supp. 3d 967, 977 (E.D. Mo. 2016) (“[After *Daimler*,] consent is an independent basis for jurisdiction, which requires no foray into Due Process.”). Recall that von Mehren and Trautman would deem such consent binding unless coerced. See *supra* note 51 and accompanying text. Moreover, the *Daimler* Court spoke of the “exceptional case” in which a corporation’s “operations” in the forum might be substantial enough to warrant the imposition of general jurisdiction absent the incorporation or principal-place-of-business factors. See *Daimler*, 134 S. Ct. at 761 n.19. This limited departure would not rule out a finding of general jurisdiction based on (unexceptional) consent, which is a matter separate from business “operations.” See, e.g., *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F. Supp. 3d 572, 583, 598 (D. Del. 2015).

¹¹³ See, e.g., N.Y. CTY. CT. R. P. (V) (“[S]everal Justices have been designated by the Administrative Judge to serve as part of a Center for Complex Litigation, which handles mass tort cases.”); *Schwab v. Philip Morris USA Inc.*, 228 F.R.D. 165, 168 (E.D.N.Y. 2005) (“[Do] limits on a unified approach to a mass tort creat[e] the risk of duplication and splitting?”); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1826 (2006) (“[The proposed] statute would allow the [mass tort] parties to negotiate a global resolution based upon negotiation criteria, rather than trial outcome criteria.”).

¹¹⁴ David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851, 855 (1984).

¹¹⁵ See generally Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1867–68 (1997) (explaining issues that impact litigation and the satisfactory adjudication of a matter).

not aim to deny that there may be occasions when less than full centralization is preferable.¹¹⁶ When, however, centralized treatment would otherwise be beneficial, the courts' jurisdiction to implement this treatment ought to be deemed compatible with *Daimler's* foundational principles.

By von Mehren and Trautman's functional analysis of specific jurisdiction,¹¹⁷ the typical characteristics of a mass tort weigh heavily in favor of the designated forum's having personal jurisdiction over the litigants.¹¹⁸ In many respects, mass tort litigations present heightened reasons for the exercise of centralized jurisdiction when compared to the sorts of probate, stakeholder, and collective bargaining multiparty matters noted in "Jurisdiction to Adjudicate."¹¹⁹ Specifically, complex mass tort litigations require sophisticated scientific and medical judicial awareness and related gatekeeper expertise, consistency of outcomes, nuanced resolutions of cutting-edge legal issues, sophisticated approaches to settlement, a grasp of atypical ethical issues, intricate judgment molding know-how, a purposeful effort at obtaining overall litigation convenience, and so forth.¹²⁰ The interests associated with these complexities have routinely been advanced by unified administration.¹²¹

In a functional due process analysis, the very factors that counsel unified treatment also support dispute-specific jurisdiction. As von Mehren and Trautman said about the emergence of specific jurisdiction over parties to a decedent's estate: "The basic argument for such a jurisdiction is that convenience demands an efficient, unified administration, which cannot be provided if the estate is handled in several courts."¹²² Justice Weinstein later wrote in similar, but more particularized, terms about personal jurisdiction in the diethylstilbestrol ("DES") mass tort litigation, arising from birth defects allegedly caused by ingestion of DES by women seeking to prevent miscarriage or other complications of pregnancy:

¹¹⁶ See *supra* notes 35–41 and accompanying text.

¹¹⁷ See von Mehren & Trautman, *supra* note 7, at 1164 ("[A] more functional and less mechanical methodology will emerge . . .").

¹¹⁸ See, e.g., *id.* at 1161–62.

¹¹⁹ See *id.* at 1161–63.

¹²⁰ See generally *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 835, 846, 850 (2d Cir. 1992) (providing an example of the complicated calculations needed to settle mass tort litigation); Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. L. REV. 511, 511, 513, 519 (2008) (discussing the ethical concerns in asbestos-related mass tort litigation, including deferred dockets, challenges involving settlement and allocations, and more).

¹²¹ See *supra* notes 31–34 and accompanying text.

¹²² Von Mehren & Trautman, *supra* note 7, at 1163.

This diversity case presents a classic illustration of why traditional limits on personal jurisdiction must be modified for mass torts. . . . DES was developed and tested in laboratories throughout the country and the world. Permission to use it was sought and obtained from the federal Food and Drug Administration by pharmaceutical companies scattered across the nation. Some companies conducted national advertising and a national corps of salespersons hawked the drug in doctors' offices in every part of the country. Discussions among medical specialists and word-of-mouth information traded among doctors and patients led to national acceptance of the drug as useful for the prevention of miscarriages. Even companies producing exclusively for local markets relied on the nationally developed understanding and consensus about DES and used knowledge and chemicals from all parts of the United States and the world. Thousands of persons in hamlets and cities across the country are now claiming to have been adversely affected by exposure to the drug. In short, the technology, marketing, sociology, and possible ill effects of DES knew no state boundaries. The national nature of the resulting toxic tort litigation must be reflected in the law's treatment of jurisdictional issues.¹²³

As Judge Weinstein's description indicates, obtaining specific jurisdiction over defendants in a mass tort litigation rests on the "practical necessity" of having some forum address "the situation as a whole," the language von Mehren and Trautman used to justify adjudicatory jurisdiction over multiple or indeterminate parties in a multistate action.¹²⁴ As von Mehren and Trautman further explained, an enhanced view of specific jurisdiction comporting with modern societal and commercial circumstances rests on the multi-jurisdictional actor's "real or implied consent to jurisdiction to adjudicate, deriving from participation in an enterprise whose affairs require a unitary regulation[.]"¹²⁵

In many cases, the out-of-state defendant will have consented to jurisdiction in the forum state by having registered an agent for service of process.¹²⁶ Although, as shown, von Mehren and

¹²³ *In re DES Cases*, 789 F. Supp. 552, 557 (E.D.N.Y. 1992).

¹²⁴ *See* von Mehren & Trautman, *supra* note 7, at 1153.

¹²⁵ *See id.* at 1146–47, 1154.

¹²⁶ *See, e.g.,* Mitchell v. Eli Lilly & Co., 159 F. Supp. 3d 967, 976 (E.D. Mo. 2016) (quoting Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990)).

Trautman were ambivalent about whether such consent affords a basis for *general* jurisdiction,¹²⁷ where the mass tort defendant has registered in furtherance of the very enterprise that has resulted in the mass tort, then such consent should reasonably be deemed a factor supporting dispute-specific jurisdiction.¹²⁸ This consent is an indicium of the forum's connection to the tortious enterprise and causes of action.¹²⁹

Also noteworthy is von Mehren and Trautman's attraction to, and reliance upon, Justice Traynor's reasoning in *Atkinson*.¹³⁰ The fairness element motivating Justice Traynor's assertion of jurisdiction over the New York party included the potential "evil" of inconsistent outcomes exposing the musicians' employers to the risk of double liability if sued in separate jurisdictions.¹³¹ The specter could similarly haunt fragmented mass tort actions. For example, the out-of-state defendant might be subject to independent suits both by the plaintiff coming in to its domicile jurisdiction and third-party contribution actions filed by judgment debtors.¹³²

"Jurisdiction to Adjudicate" supports disturbing the traditional jurisdictional bias favoring the defendant when that defendant is a sophisticated commercial entity that has been "involv[ed] in multistate activity" that has harmed the plaintiff.¹³³ Von Mehren and Trautman's language effectively presages the mass tort, and commends the forum court's assertion of broadened dispute-specific jurisdiction arising from such multistate conduct. The exercise of personal jurisdiction in situations in which it may not have been previously taken is motivated by a substantial "functional justification" in the mass tort setting.¹³⁴

More explicitly in this regard, von Mehren and Trautman endorse the reversal of "the traditional bias in favor of the defendant" by way of the counterexample—profoundly suggestive of the mass tort phenomenon—annexed to the following hypothetical:

Suppose, for example, that *P*, a resident of *X*, while traveling through *Y*, purchases an article manufactured by *D*, a small

¹²⁷ See *supra* notes 49–52 and accompanying text.

¹²⁸ See *Mitchell*, 159 F. Supp. 3d at 977 (citing *Knowlton*, 900 F.2d at 1199–1200).

¹²⁹ See, e.g., *id.* (discussing the activities of a business that are relevant to causes of action).

¹³⁰ See *supra* notes 61–67 and accompanying text.

¹³¹ See *Atkinson v. Super. Ct. L.A. Cty.*, 316 P.2d 960, 966 (Cal. 1957).

¹³² See, e.g., *Suggs v. Hale*, 629 S.E.2d 11, 15 (Ga. Ct. App. 2006) ("[A] contribution claim . . . may be brought later in a separate suit. . . [and w]here no judgment finding both tortfeasors liable has been entered, a right of contribution still exists.").

¹³³ See von Mehren & Trautman, *supra* note 7, at 1171.

¹³⁴ See, e.g., *id.* at 1158 n.117, 1164 n.137 (describing functional justifications).

X firm whose products are normally sold only in *X*, and that the article then injures *P* in *Z* because of faulty manufacture. It seems unnecessary and essentially unfair to allow *P* to sue *D* in *Y*, although if *D* knew its products were sold in *Y*, the quantum of multistate economic activity would probably justify *Y*'s taking jurisdiction if a resident of *Y* was injured in *Y*. It would also seem unfair to permit *P* to sue *D* in *Z* if *D*, though knowing its products would be sold in *Y*, did not contemplate that the article might be taken to *Z*. *The unfairness disappears, however, if D's activities are pervasively multistate.*¹³⁵

Professor Twitchell's complimentary arguments in support of expansive specific jurisdiction also readily connect to the mass tort paradigm. She emphasized language in *International Shoe* that justifies the constitutionally permissible exercise of specific jurisdiction in relation to obligations that not only "arise out of" the defendant's in-state activities, but that are loosely "connected with" those activities.¹³⁶ Professor Twitchell endorsed the exercise of specific jurisdiction if the "claim 'pertains to,' 'coincides with,' 'relates to,' or is 'connected with' a defendant's forum activities."¹³⁷

In the mass tort context, where the underlying misconduct, the use or misuse of technology, research and marketing, and the harms inflicted on the public "knew no state boundaries[,] . . . [t]he national nature of the resulting toxic tort litigation must be reflected in the law's treatment of jurisdictional issues."¹³⁸ Justice Weinstein's assessment aligns with the von Mehren and Trautman, as well as Twitchell, analyses.

And, more to the point, Justice Ginsburg's reasoning in *Nicastro*, *Goodyear*, and *Daimler*—closely and self-consciously patterning those scholarly sources and thus self-evidently deeming them to be heavily persuasive¹³⁹—is reasonably seen as cohering with these jurisdictional analyses as well.¹⁴⁰ In *Nicastro*, for instance, Justice

¹³⁵ *Id.* at 1169 (emphasis added).

¹³⁶ See Twitchell, *supra* note 10, at 624 (emphasis in original); see also *Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945) (stating the standard relied upon in Professor Twitchell's article).

¹³⁷ Twitchell, *supra* note 10, at 662–63.

¹³⁸ *In re DES Cases*, 789 F. Supp. 552, 558 (E.D.N.Y. 1992).

¹³⁹ See discussion *supra* Parts IV(A), IV(B), IV(C).

¹⁴⁰ See Adrian Vermeule, *Judicial History*, 108 YALE L. J. 1311, 1322 (1999) ("[J]udges, after all, [do] attempt to communicate one formulation rather than another; asking which formulation they intended seems no more or less exceptionable than it does in other domains of legal interpretation. Even outside the domains in which federal judges possess authorized lawmaking authority, then, the intentions of the judges who create a judicial opinion might

Ginsburg asked whether the defendant had “endeavor[ed] to reach and profit from the United States market as a whole.”¹⁴¹ The *Goodyear* Court spoke of the marketing of the “type” of tire in the forum jurisdiction, not solely of the particular defective tire.¹⁴² *Daimler*’s language reiterated that some forum connection, such as “the placement of a product into the stream of commerce,” could support the case for related-to specific jurisdiction.¹⁴³ When a defendant’s conduct in furtherance of an enterprise releases a service or product into the stream of commerce that by its design or nature contributes to a mass tort—as opposed to the isolated defective product at issue in *Nicastro*—the balancing of interests and factors should weigh in favor of a unified jurisdictional situs.¹⁴⁴

There will, of course, be limits to the use of expansive dispute-specific jurisdiction even in the mass tort setting. Conceivably, for example, there may be instances in which an out-of-state plaintiff has joined in a mass tort litigation, but solely against a small, localized defendant having engaged in the conduct at issue solely in the plaintiff’s home jurisdiction.¹⁴⁵ In that circumstance, unfairness concerns should outweigh the functional benefits of retaining that action within the mass tort.¹⁴⁶

Yet, as Justice Sonia M. Sotomayor recognized in her concurring opinion in *Daimler*, the majority opinion, by compressing general jurisdiction, departed from the jurisprudence “that has been taught

be thought a permissible interpretive touchstone.”); *see also* *Arizona v. Gant*, 556 U.S. 332, 341 (2009) (citations omitted) (noting that there is both textual and evidentiary support for an interpretation of a prior Court opinion).

¹⁴¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 898 (2011) (Ginsburg, J., dissenting).

¹⁴² *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 921 (2011).

¹⁴³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 757 (2014) (citing *Goodyear*, 564 U.S. at 916).

¹⁴⁴ *See* Joan M. Shaughnessy, *The Other Side of the Rabbit Hole: Reconciling Recent Supreme Court Personal Jurisdiction Jurisprudence With Jurisdiction to Terminate Parental Rights*, 19 LEWIS & CLARK L. REV. 811, 816–17 (2015) (“If limitations on jurisdiction are a matter of procedural due process, then arguably . . . cost-benefit balancing analysis[] should be taken into account in assessing the permissibility of assertions of jurisdiction. Similarly, if the limitations are a matter of substantive due process, the elaborate structure the Court has constructed, requiring different levels of justification for state intrusions into different protected interests, should be relevant. Either way, the Court’s larger due process jurisprudence suggests that the liberty interest of the defendant being protected by cases like *Walden* and *Daimler* is not absolute but is subject to defeasance under certain circumstances.”).

¹⁴⁵ *See, e.g., Manning v. PD-Rx Pharms., Inc.*, No. 5:15-cv-00566-R, 2016 U.S. Dist. LEXIS 70992, at *6, *15 (W.D. Okla. June 1, 2016).

¹⁴⁶ *See id.* at *6–7, *15–16 (stating that though the products liability plaintiffs alleged injuries resulting from their use of propoxyphene-containing pain-relief products, defendants were not incorporated or principally located in Oklahoma, not a single plaintiff was an Oklahoma resident, and plaintiffs broadly claimed that their harm was solely related to the genre of activities defendants may have performed in the forum state).

to generations of first-year law students”¹⁴⁷ Although Justice Sotomayor intended to call into question the majority’s general jurisdictional analysis, Justice Ginsburg’s program, resting on “Jurisdiction to Adjudicate,” contemplated an inverse departure from the prior dispute-specific jurisdictional doctrine, and thereby, in other words, presupposed that the Court would expansively construe the reach of specific jurisdiction.¹⁴⁸

The dispute-specific issue after *Daimler* is “whether the defendant’s conduct connects him to the forum in a meaningful way.”¹⁴⁹ The defendant’s alleged misconduct, which is conceptually prior to the plaintiff’s harm, creates the link to the controversy, wherever that conduct has intruded.¹⁵⁰ When the defendant’s “activities are pervasively multistate,” its conduct triggers multistate dispute-specific jurisdiction.¹⁵¹

Divorced from the defendant’s conduct and from the domain of its harmful impacts, the exercise of all-purpose *general* jurisdiction would be “so exorbitant . . . [as to be] barred by due process constraints on the assertion of adjudicatory authority.”¹⁵² Therefore, the general jurisdictional analysis after *Daimler* is a comparative one, appraising the “corporation’s activities in their entirety” and discerning the forum(s) wherein the entity could have anticipated all-purpose litigation.¹⁵³ *Daimler* is reasonably construed, on the other hand, to broadly accommodate *specific* jurisdiction over defendants that have engaged in “the multistate activity of a commercial enterprise which can expect, plan for, and insure against litigation that will arise from time to time out of its activities.”¹⁵⁴

The California Supreme Court has recently construed *Daimler* in a manner consistent with the above analysis. In the mass tort case *Bristol-Myers Squibb Co. v. Superior Court*,¹⁵⁵ lawsuits were filed by

¹⁴⁷ *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring) (citation omitted).

¹⁴⁸ *See id.* at 757–58, 758 n.9.

¹⁴⁹ *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

¹⁵⁰ *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 787 (1984) (“The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects.”).

¹⁵¹ *See* von Mehren & Trautman, *supra* note 7, at 1168–69.

¹⁵² *Daimler*, 134 S. Ct. at 751.

¹⁵³ *See id.* at 761–62, 762 n.20.

¹⁵⁴ Von Mehren & Trautman, *supra* note 7, at 1172; *see also* *Bradshaw v. Mentor Worldwide, LLC*, No. 4:15-CV-332 SNLJ, 2015 U.S. Dist. LEXIS 72088, at *5 (E.D. Mo. June 4, 2015) (“It is notable that scores of products liability cases regarding pharmaceuticals or medical devices involve similar arrangements of in-state and out-of-state plaintiffs.”).

¹⁵⁵ *Bristol-Myers Squibb Co. v. Superior Ct.*, No. S221038, 2016 Cal. LEXIS 7124 (Cal. Aug. 29, 2016).

678 individuals, 592 of them nonresidents of California, who had used defendant's drug Plavix, prescribed to inhibit blood clotting but alleged to have caused a host of serious and sometimes fatal injuries.¹⁵⁶ The pharmaceutical defendant Bristol-Myers Squibb ("BMS") moved to quash service of summons on the ground that the court lacked personal jurisdiction over it to adjudicate the nonresidents' claims because those nonresident plaintiffs had not ingested Plavix in California and had neither sustained their injuries nor been treated in that forum state.¹⁵⁷

Noting that BMS was neither incorporated nor headquartered in California, and that its total California operations were a small portion of its activities elsewhere in the United States, the *Bristol-Myers* Court, relying upon *Daimler*, concluded that the defendant was not subject to general jurisdiction.¹⁵⁸ With regard to specific jurisdiction, however, the Court concluded that the nonresident plaintiffs' claims arose "from the same course of conduct that gave rise to California plaintiffs' claims . . . [and hence that] the joint litigation of the nonresident [and resident suits was] . . . not an unreasonable exercise of specific jurisdiction over defendant BMS."¹⁵⁹

Notably, although it did not cite to von Mehren and Troutman's work, the *Bristol-Myers* Court justified its holding in terms that bear a strong affinity to the logic of "Jurisdiction to Adjudicate." In this regard, the Court explained:

[B]ecause mass tort injuries may involve diverse injuries or harm not amenable to the efficiency and economy of a class action, they present special problems for the proper functioning of the courts and the fair, efficient, and speedy administration of justice. . . . By separating the nonresident plaintiffs from the resident plaintiffs and forcing the nonresidents to sue in other states, it is fair to anticipate delays in the California proceedings that would be created by the litigation and appeals of discovery and factual conflicts in the various other forums. In that event, the California plaintiffs' litigation could be stalled for a significant period

¹⁵⁶ *Id.* at *4, *5–6.

¹⁵⁷ *Id.* at *6.

¹⁵⁸ *See id.* at *21, *22.

¹⁵⁹ *Id.* at *56–57. The Court used a three-pronged due process approach, asking: "(1) whether the defendant has 'purposefully directed' its activities at the forum state; (2) whether the plaintiff's claims arise out of or are related to these forum-directed activities; and (3) whether the exercise of jurisdiction is reasonable and does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at *25–26 (internal citations omitted).

without resolution. Likewise, defendants would suffer the costs created by delay and uncertainty as to their potential liability, if any.¹⁶⁰

VI. CONCLUSION

Justice Ginsburg's opinion for the Court in *Daimler* self-consciously flowed from her adherence to the new jurisdictional jurisprudence announced by Professors von Mehren and Trautman in "Jurisdiction to Adjudicate."¹⁶¹ The opinion does not specifically focus on either specific jurisdiction or the mass tort scenario.¹⁶² Yet the von Mehren and Trautman program initiated a major shift to a definition of specific jurisdiction expansive enough to accommodate "the growing mobility and complexity of modern life and an increasingly functional approach to jurisdictional issues."¹⁶³ While not reaching the mass tort paradigm, Professor Twitchell, for instance, in work upon which Justice Ginsburg similarly relied, endorsed the "looser 'connectedness' test as a starting point for making more sensitive assessments" of dispute-specific jurisdiction.¹⁶⁴ This test should be deemed, at least for the most part, to accommodate specific personal jurisdiction over the parties in mass tort litigations.

¹⁶⁰ *Id.* at *54–55.

¹⁶¹ See *Personal Jurisdiction—General Jurisdiction—Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 318 (2014) ("The notion that von Mehren and Trautman's thinking influenced Justice Ginsburg's view of personal jurisdiction is not merely speculative. Their article is the most cited source in her opinions in *Goodyear*, *Nicastro*, and *Daimler*.").

¹⁶² See *id.* at 313–14 (discussing that Justice Ginsburg's analysis in *Daimler* instead focuses on general jurisdiction).

¹⁶³ Von Mehren & Trautman, *supra* note 7, at 1146–47.

¹⁶⁴ Twitchell, *supra* note 10, at 681.