Frustrated Federalism: *Daimler v. Bauman* And The Entrenchment Of Supranational Corporate Sovereignty

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At first glance, the Supreme Court case *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) seems to be unrelated to federalism. The case arose out of a California Alien Torts Statute claim and the Supreme Court's decision was entirely concerned with delineating the contours of general jurisdiction.[2] Ultimately, the Court held that corporations can only be subjected to general jurisdiction in their state of incorporation and in the state of their principal place of business.[3] While this may seem to be an area of the law conceptually and formally distinct from federalism, the decision is, on the contrary, intimately tied up with federalism and has a number of implications on its understanding and practice.

We have traditionally considered federalism issues in the context of state power versus national power.[4] Behind this, there is a broad theoretical edifice constructed by scholars that attempts to ask the question: where is federalism best protected? But working in the interstices of these debates are those organizations and entities that resist traditional categorization, that have remained, in certain ways, beyond the law just as they have shaped it. I am referring to supranational corporations.[5] In particular, I want to focus on the problems such corporations pose for traditional notions of jurisdiction,

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

3 *Id.* at 761-762.

4 *See, e.g.*, Robert R.M. Verchick & Nina A. Mendelson, *Preemption and Theories of Federalism*, *in* Preemption Choice: The Theory, Law and Reality of Federalism's Core Questions 13-22 (Cambridge University Press ed. 2009) (defining Federalism as chiefly "concerned with the distribution of power between the federal government and state governments"); Heather K. Gerken, *Our Federalism(s)*, 53 Wm. & Mary L. Rev. 1549 (2012) (lamenting the inability to consider the numerous different ways states fulfill various roles under federalism vis-a-vis their relationship with the federal government).

5 This paper will use the phrase supranational corporations (or "supranationals" for short) as opposed to multinational corporations for two reasons. First, to underscore the fact that many large corporations do not just operate across national or state borders, but over those borders—they are unconstrained by territoriality on both an international and national scale. That is, they exist above the national system, as quasi-sovereign entities in their own right. Second, supranational corporations need not actually be multi-national in scope. It is possible for a supranational to operate only within a national context.

and therefore, for traditional notions of federalism and sovereignty.

The *Daimler* decision relied heavily on traditional notions of territorial sovereignty.[6] The irony is, that in limiting general jurisdiction to a narrow understanding of "at home", the Court did not reinforce states' territorial sovereignty – rather, the decision eroded it and handed a degree of sovereignty over to supranational *corporations.* As Justice Sotomayor pointed out in her *Daimler* concurrence, supranational corporations have become too big for general jurisdiction.[7] This troubles our conceptions of federalism in a number of ways: first, it allows supranationals to enjoy immunity from general jurisdiction in at least 48 states, thus limiting those states' abilities to protect their citizens and regulate the behavior of foreign corporations – giving them less voice in national policy; second, in Heather Gerken's terms, federalism promotes either voice or exit,[8] but *Daimler* denies minorities both voice and exit. Finally, the *Daimler* decision undermines the benefits of jurisdictional redundancy – a key feature of federalism.[9] Focusing on jurisdiction through the federalism lens allows us to restore to horizontal state-state interactions some of the salience that is sometimes lost in the federalism discourse's focus on vertical state-federal relations. It also allows us to see that the fight for self-governance extends beyond formal government arrangements, beyond informal ones as well, and into the interaction between localities and capital, and between people and the supranational corporations that increasingly govern their lives.

A Short History of Jurisdiction Pre-*Daimler*

In order to understand just how sweeping the implications of *Daimler* are, it is important to understand the legal paradigms which existed beforehand. There are two types of personal jurisdiction in American law. First, there is specific jurisdiction in which a state can exercise jurisdiction over an out-of-state resident where the conduct in question arose out of the defendant's contacts with the forum state.[10] General jurisdiction, on the other hand, is a state's ability to exercise jurisdiction over an out-of-state defendant for any and all claims against it, even those occurring outside or

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6 *Daimler*, 134 S. Ct. at 757 (stating that, although, "[s]pecific jurisdiction has been cut loose from *Pennoyer* 's sway," the Court has, "declined to stretch general jurisdiction beyond limits traditionally recognized.").

7 *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

8 Heather Gerken, Foreword, *Federalism All the Way Down*, 124 Harv. L. Rev. 6, 9 (2010).

9 Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 Wm. & Mary L. Rev. 639 (1981), *available at* https://digitalcommons.law.yale.edu/fss_papers/2702.

10 *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846, 2848-2849 (2011) (explaining the core concepts of specific and general jurisdiction).

having little or nothing to do with the forum state.[11]

But these are relatively modern understandings of jurisdiction. Until the middle of the 20th century, the predominant paradigm was one of territorial sovereignty, articulated by Justice Field in *Pennoyer v. Neff* (1878).[12] Field understood jurisdiction as stemming from the:

> two well established principles of public law…that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory…The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.[13]

Jurisdiction, on this understanding, was rooted in the territorial sovereignty exercised by each state and was, as a result, coterminous with a state's borders—one state could not reach the residents of another as long as those residents stayed within their state's borders. This ruling was predicated in part on the 14th Amendment's Due Process Clause—under the territorial understanding of jurisdiction, an exercise of jurisdiction over an out-of-state individual would be a violation of that individual's due process rights.[14]

Eventually, due to "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity,"[15] the Court moved away from this strict territorial picture of jurisdiction and developed the minimum contacts standard for both specific and general jurisdiction inquiries in the seminal case of *International Shoe Co.* v. *Washington* (1945).[16] That is, both inquiries revolved around assessing the level of contact the defendant had with the forum state.[17] Given the increased flow of capital and people across state borders, the strict territorial model no longer made practical or conceptual sense—borders, historically permeable, were finally recognized as such.

Though the Court's post-*International Shoe* decisions focused primarily on specific jurisdiction, there were a number of general jurisdiction decisions as well.[18] The reigning precedents in the general jurisdiction space

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11 *Id.*

12 Carol R. Andrews, *Another Look at General Personal Jurisdiction*, 47 Wake Forest L. Rev. 999, 1002 (2012), *available at* https://scholarship.law.ua.edu/fac_articles/33.

13 *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

14 *Id.* at 733.

15 *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 617 (1990).

16 *Id.*

17 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

18 Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear,*

prior to *Daimler* were *Helicopteros Nacionales de Colombia, S.A. v. Hall*, decided in 1984 and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[19] The former, arising out of the Texas state courts, involved American plaintiffs suing a Colombian helicopter company over a fatal crash that happened in Peru.[20] The Supreme Court ultimately decided that Texas could not exercise general jurisdiction over the company because the company's contacts with the state were not sufficiently "continuous and systematic."[21] Later, in *Goodyear*, which involved the American parents of children killed in a bus crash in Paris suing the North Carolina subsidiary of Goodyear (an Ohio corporation) along with various foreign subsidiaries, the Court confirmed again invoked the lack of "continuous and systematic general business contacts" in their finding that North Carolina could not exercise general jurisdiction over the defendant.[22]

Thus, the standard was set— a state could only exercise general jurisdiction over an out-of-state resident when the out-of-state resident had continuous and systematic contacts with the forum state, a standard that, despite the Court's insistence in the discontinuity between the development of personal and general jurisdiction, is borrowed language from dicta in *International Shoe* and more or less recapitulates the personal jurisdiction standards albeit on stricter terms.[23] The Court did not entirely abandon *Pennoyer*, however, in that it still assessed the validity of states' exercises of jurisdiction with respect to the 14th Amendment—such exercises, the Court held in their contacts line of cases, must not be so grasping as to offend "traditional notions of fair play and justice."[24] At the same time, the Court sought to balance the so called *Asahi* fairness factors: "the burden on the defendant, the interests of the forum state, the interests of the plaintiff in choosing the forum, efficiency concerns, and policy interests"[25] which, under the old paradigm, were used in evaluating both general and specific jurisdiction.[26]

Daimler, and the Evisceration of General Jurisdiction, 64 Emory L. J. Online 2001, 2002 (2014), *available at* https://scholarlycommons.law.emory.edu/elj-online/23.

19 466 U.S. 408, 416 (1984); 564 U.S. 915 (2011); *see also Perkins v. Benguet Mining Co.,* 342 U.S. 437, 448 (1952) (articulating the same principles on the basis of on significantly more idiosyncratic facts); *Daimler*, 134 S. Ct. at 756-757 (tracing the development of general jurisdiction jurisprudence through *Helicopteros* and *Goodyear*).

20 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

21 *Id.* at 415-16.

22 *Goodyear*, 564 U.S. at 915.

23 *Helicopteros*, 466 U.S at 415-416

24 *International Shoe Co. v. Washington*, 326 U. S. 310*,* 326 (1945)

25 *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 116 (1987)

26 Arthur & Freer, *supra* note 17, at 2012.

Daimler: *Pennoyer* Returns

Daimler represents a paradigmatic shift in the Court's understanding of general jurisdiction. But, for reasons that will become clear in our discussion of the case, one can easily see this shift not as an advance or horizontal change, but as a marked regression to the *Pennoyer* era. But first, the facts: The plaintiffs in *Daimler* were 22 residents of Argentina who alleged that Daimler (a German corporation) collaborated with Argentinian security forces to murder, arbitrarily detain, torture, and kidnap their family members during the period of 1976-1981 (Argentina's "Dirty War").[27] Though all of the alleged acts took place in Argentina, the plaintiffs sued Daimler through their subsidiary MBUSA (incorporated in Delaware with its principle place of business in New Jersey, and wholly owned by a Daimler subsidiary) in California under a theory of general jurisdiction.[28] At the time, MBUSA had "multiple California-based facilities" and was "the largest supplier of luxury vehicles to the California marker.[29] In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales."[30]

The question before the Court was whether Daimler's contacts with California were so pervasive as to open it up to general jurisdiction in the state (California's long arm statute allows the exercise of jurisdiction to the full extent permitted by the U.S. Constitution; therefore the inquiry before the Court was conducted with respect to the contours of the 14th Amendment's Due Process Clause).[31] The Court ruled that California's exercise of jurisdiction was illegitimate.[32] "Even if we assume," the Court stated, "that MBUSA is at home in California, and…MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the state hardly render

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27 *Daimler*, 134 S. Ct. at 748. Argentina's so-called "Dirty War" was a campaign of state repression against leftists, union organizers, and others deemed subversive by the military junta which held power from 1976-1983. For a primer on the kinds of violence perpetrated on union organizers at auto plants, see Ian Steinman, *When Ford Built a Torture Chamber*, Jacobin (Feb. 23, 2018), https://jacobin.com/2018/02/ford-factory-argentina-videla-mauricio-macri. For a critical discussion of the term "Dirty War" and its applicability to the campaign of state violence in Argentina during the dictatorship years, see Constanza Dalla Porta & Pablo Pryluka, *Argentina's Dictatorship Was Not a "Dirty War." It Was State Terrorism.,* Jacobin (June 07, 2020), https://jacobin.com/2020/06/argentina-dictatorship-dirty-war-military.

28 *Daimler*, 134 S. Ct. at 748.

29 *Id.* at 752.

30 *Id.*

31 *Id.* at 751.

32 *Id.*

it at home there."[33] At this point in the decision, it appears as if the Court was going to engage in a contacts analysis (albeit a strange one, considering MBUSA's extensive contacts with the state), but, instead of engaging in the usual jurisdictional inquiries, the Court proceeded to throw the minimum contacts standard out the window. Relying on *Goodyear*, decided three years earlier, the Court stated that, "'[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individuals domicile; for a corporation, it is…one in which the corporation is fairly regarded as at home.…With respect to a corporation, the place of incorporation and principal place of business are 'paradigm…bases for general jurisdiction.'"[34]

Although the Court only identifies these two locations as paradigm cases, it proceeds, without justification, to ossify them into rules: "Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business…That formulation, we hold, is unacceptably grasping."[35] The Court here rejected the traditional general jurisdiction contacts inquiry wholesale—a corporation is only at home in its principal place of business and its place of incorporation.[36] Incredibly, the Court stated that while "[s]pecific jurisdiction has been cut loose from *Pennoyer*'s sway," general jurisdiction has not.[37] Furthermore, up until *Daimler*, the *Asahi* fairness factors had been applied to both specific jurisdiction or to general jurisdiction.[38] In *Daimler*, the Court declared, again without much explanation (beyond a statement that it had only ever been intended to apply in the specific jurisdiction context), that there is no room for the fairness factors in general jurisdiction.[39] Thus, the Court has jettisoned both contacts and fairness from the general jurisdiction inquiry. We find ourselves, then, back at the beginning—general

33 *Id.* at 760.

34 *Id*.

35 *Id.* at 761.

36 *Id.* at 760. The Court also allowed for an exceptional case in a footnote, where "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home," but the Court failed to define the contours of such a case and the unequivocal nature of the rest of the decision casts doubt upon the actual possibility of ever finding such a case. *Id.* at 761 Indeed, the practice of lower courts has suggested that such a case does not exist. *See* Douglas E. Wagner, *Hertz So Good: Amazon, General Jurisdiction's Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case*, 104 Cornell L. Rev. 1085 (2019) (outlining various failed attempts to assert general jurisdiction on the basis of the "exceptional case").

37 *Daimler*, 134 S. Ct. at 749.

38 Arthur & Freer, *supra* note 17, at 2012.

39 *Daimler*, 134 S. Ct. at 762.

jurisdiction has returned to its roots in territorial sovereignty and is again effectively coterminous with at most two states' borders (place of incorporation and principal places of business).

Despite narrowing general jurisdiction to just two locations, the Court provided scant guidance on how to determine a corporation's principal place of business, merely stating that "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."[40] It may seem as if the Court had preserved a place for a traditional contacts analysis, but what it has actually did is flip the analysis on its head. Whereas the traditional analysis "focused solely on the magnitude of the defendant's in-state contacts," the Court's new test is only concerned with "the relative magnitude of those contacts in comparison to the defendant's contacts with other States."[41] That is, in assessing the location of a corporation's principal place of business, the relevant inquiry is what percentage of the corporation's business is located in the state in question relative to the corporation's entire business worldwide (the Court does not identify the threshold above which the percentage would have to rise for a proper exercise of general jurisdiction).

In her concurrence, Justice Sotomayor identified a number of troubling implications of the decision (presented in a different order than they appear in the concurrence in the following discussion).[42] First, the majority's decision "unduly curtails the State's sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries."[43] "When a corporation chooses to invoke the benefits and protections of a State in which it operates," Justice Sotomayor writes, "the State acquires the authority to subject the company to suit in its Courts."[44] This traditional notion of jurisdiction stems from "the concept of reciprocal fairness."[45] But, because the majority has flipped the contacts inquiry on its head, there is no reciprocal fairness to be found—corporations can avail themselves of the benefits and protections of a State without opening themselves up to general jurisdiction

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40 *Id.*

41 *Id.* at 767.

42 Even though Justice Sotomayor's concurrence reads more like a dissent, she would have reached the same ruling as the majority, except she would have ruled against the plaintiffs on fairness and reasonableness grounds only. *See id.* at 764 (Sotomayor, J., concurring) (stating that, "[the] State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available").

43 *Id.* at 772.

44 *Id.* at 768.

45 *Id.*

so long as they avail themselves of the benefits and protections of a different state just a little more.

But even this is too rosy-eyed a reading—the problem extends further. The majority's test for determining a corporation's principal place of business essentially renders certain corporations too big for general jurisdiction. Justice Sotomayor writes, "a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum."[46] Because the contacts inquiry is now relative to a corporation's overall business, and because supranational corporations, by virtue of their size, will likely have extensive contacts with a multiplicity of venues, it is entirely possible, probable even, that no single forum will ever represent a majority or even plurality of the corporation's contacts. This renders corporations at home in the state where they are incorporated and *only that state,* unless the corporation declares a single forum its headquarters or principal place of business. However, it is worth nothing that the holding in *Perkins* and the holding in *Hertz Corp. v. Friend* (2010) suggest that the "nerve center," meaning the place from which a corporation directs its activities, may be one in the same as the corporation's principal place of business for a general jurisdiction analysis.[47] But, as Justice Sotomayor states, it is "increasingly common [that] a corporation 'divide[s] [its] command and coordinating functions among officers who work at several different locations."[48] As Douglas Wagner has pointed out, this problem allows supranational corporations to engage in *ex ante* forum shopping by tailoring their activities in such a way as to either preclude or complicate a "principal place of business finding" or to simply make their principal place of business the most defendant-friendly forum.[49]

Finally, Justice Sotomayor identified two particularly troubling effects. First, *Daimler* has effectively granted supranational corporations more due process rights than individuals. Whereas an individual can still be subjected to general jurisdiction in a forum just by virtue of having been served with process in the forum, even if just passing through (so-called "tag jurisdiction"), a corporation will, in most cases, escape general jurisdiction despite possibly having hundreds of employees, multiple offices, and billions of dollars of revenue in the forum state.[50]

Second, Justice Sotomayor writes that "it should be obvious that the ultimate effect of the majority's approach will be to shift the risk of

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46 *Id.* at 772.
47 *Perkins,* 342 U.S. at 494; *Hertz Corp v. Friend,* 130 S. Ct. 1181 (2010).
48 *Daimler*, 134 S. Ct. at 772.
49 Wagner, *supra* note 36, at 1089.
50 *Daimler*, 134 S. Ct. at 772-773.

loss from multinational corporations to the individuals harmed by their actions."[51] Not only does the *Daimler* decision make it significantly more difficult to hold U.S.-based supranational corporations accountable in at least 48 states, but it also makes it potentially impossible for a U.S. national harmed by a foreign corporation to ever find a proper forum. For example, "a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States,"[52] if the conglomerate is incorporated outside the U.S. and does not conduct a sufficient magnitude of business in any one forum. This would remain the case "even if no other judicial system was available to provide relief."[53]

Whose Sovereignty?

The *Daimler* decision is a return to *Pennoyer*'s strict understanding of jurisdiction as coterminous with territorial sovereignty. The irony, however, is that the effect of the decision is to strip at least 48 states of a key aspect of their territorial sovereignty in the case of U.S. incorporated corporations and to potentially strip all 50 states of that key aspect in the case of internationally incorporated corporations.

In light of such a bizarre and fundamentally unjust state of affairs one must ask, whose sovereignty is the Court really concerned with? It cannot be the states—if the Court were interested in granting the states a robust territorial sovereignty, then it would have expanded general jurisdiction in the supranational corporate context rather than restricted it. That is, it would have expanded the notion of "at home" so that states could more robustly govern the corporations that operate within their borders. And so perhaps it is only to certain states that the Court has granted sovereignty. If a corporation is at home in, say Arizona, then it is Arizona's exclusive prerogative to exercise jurisdiction over that corporation. But this is again an incomplete or inaccurate picture of what has actually occurred. Arizona may retain the sovereign prerogative of jurisdiction in certain instances, but it has lost them in the majority of instances (the only state that seems to benefit from this decision is Delaware, but more on that in the next section).

The entity that has really been granted sovereignty, then, must be the corporations themselves. Seyla Benhabib conceptualizes this problem as "the uncoupling of jurisdiction and territory."[54] She writes, "along with the

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51 *Id.* at 773.

52 *Id.*

53 *Id.*

54 Seyla Benhabib, *Borders, Boundaries, and Citizenship*, 38 PS: Pol. Sci. & Pol. 673, 676 (2005), *available at* http://www.jstor.org/stable/30044348.

spread of cosmopolitan norms, we are witnessing a shrinking of the effectiveness of popular sovereignty and the emergence of sovereignty beyond the boundaries set by the rule of law…Vis-a-vis the movement of capital and commodities, information, and technology across borders, by contrast, the state today is more hostage than sovereign."[55] This uncoupling is perhaps better conceptualized as a transfer. As Benhabib points out, "states are players with considerable power in this process: they themselves often nurture and guide the very transformations which appear to curtail or limit their own powers."[56] This is precisely what has happened with *Daimler.* The territorial boundaries of the 50 states remain the same, but they have lost an important aspect of their sovereignty. We can almost imagine sovereignty as a zero-sum game here because this sovereignty was not lost in the ether but rather transferred to corporations. The decision has unleashed capital and corporations as truly supranational entities—they now exist not only beyond borders, but above them, free from (at least one avenue of) interference in their own spheres.

Let's take Google as an example. As Justice Sotomayor points out, the decision fails to keep pace with the nature of the modern economy.[57] Alphabet Inc., for example, is the multinational conglomerate parent company of Google. Alphabet is incorporated in Delaware and has its headquarters in California. Google, Alphabet's largest and most important subsidiary, has offices in 16 states,[58] data centers in 11 states,[59] and generates massive amounts of revenue in all 50 states (ironically, a 2013 study determined that residents of Delaware were the least likely to use Google relative to residents of any other state).[60] Under *Daimler's* jurisdictional analysis, Delaware and California are the only two states in which Alphabet would be subject to general jurisdiction. If a Florida resident is struck by one of Google's self-driving cars while on vacation in Oregon, she will have to either remain in Oregon or travel to California or Delaware to successfully bring suit. This is so despite Google's enormous resources and nationwide presence—Google does not, like states, stay within its boundaries, it exists everywhere. It exerts power, both economically and politically (notably in

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55 *Id.* at 673.

56 *Id.* at 676.

57 *Daimler* 134 S. Ct. at 771 (Sotomayor, J., concurring).

58 Google, https://about.google/intl/en_us/locations/?region=north-america&office=mountain-view (last visited Sept. 22, 2022).

59 Google, https://www.google.com/about/datacenters/locations/ (last visited Sept. 22, 2022).

60 Amy Gesenhues, *Study: Delaware Least Likely State To Use Google, While Yahoo Is More Popular In Southern & Midwest States*, Search Engine Land (May 16, 2013), https://searchengineland.com/delaware-only-state-with-less-than-70-google-marketshare-in-study-of-search-engine-usage-across-us-159811.

the form of advertising, pay for sponsored search results and price comparison elevation),[61] across the country and in every state. The practical effect of the uncoupling of jurisdiction and sovereignty is that Google, jurisdictionally speaking, exerts the power of a sovereign—it cannot be challenged except in its restricted domain.

What makes *Daimler* so conceptually slippery, then, is that the uncoupling of territory and jurisdiction was accomplished via a renewed jurisprudential focus on that very coupling. In the last analysis, the circumscription of corporate homes, the imposition of a narrow territoriality on corporations, is the very thing that frees them from territoriality, the very thing that frees them from other sovereigns.

But we have yet to actually define sovereignty. Let us understand sovereignty as Heather Gerken explains it in *Federalism All the Way Down* —"a state's power to rule without interference over a policymaking domain of its own," that is, "freedom from interference and…an affirmative ability to serve as a source of law and policy."[62] With this understanding, we can begin to delve deeper into the ways that *Daimler* transferred aspects of sovereignty to corporations—the decision has granted supranational corporations both increased freedom from interference and, concomitantly, an increased ability to serve as their own sources of law and policy.

Supranational corporations have attained increased freedom from interference because they are no longer amenable to suit on a general jurisdiction theory in the majority of locations in which they operate (increased access to travel has made general jurisdiction more important than it has ever been just as it has effectively died as a legal tool in this context).[63] They

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61 Megan Graham & Jennifer Elias, *How Google's $150 billion advertising business* works, CNBC (May 18, 2021), https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html; Laurie Swenson, *Do Companies Pay Google to Be the First Result?*, Chron, https://smallbusiness.chron.com/companies-pay-google-first-result-48392.html (last visited Sept. 22, 2022).

62 Gerken, *supra* note 7, at 12.

63 For a comprehensive look at the ways in which *Daimler* and *Goodyear* have insulated corporate actors from accountability for malfeasance ranging from human rights abuses to interest rate manipulation, see Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations For Federal Causes of Action,* 121 Dick. L. Rev. 617 (2017*), available at* https://ideas.dickinsonlaw.psu.edu/dlra/vol121/iss3/2. Furthermore, as Leslie Brueckner of Public Justice pointed out in 2017, "In the wake of *Daimler*, corporations seized on lack of personal jurisdiction as a threshold defense to being sued" and that, due to the effective death of general jurisdiction, have been pushing increasingly stringent readings of specific jurisdiction with which a number of lower courts have agreed. Leslie Brueckner, *CORPORATIONS' USE OF PERSONAL JURISDICTION DEFENSE ON TRIAL IN U.S. SUPREME COURT,* Pub. Just. (Apr. 18, 2017), https://www.publicjustice.net/corporations-use-personal-jurisdiction-defense-trial-u-s-supreme-court/.

have attained an increased ability to assert their own policy preferences because states can no longer utilize the legal system to protect their own citizens (when harmed outside the forum).[64]

This deprivation means that states have also lost an effective legal tool for checking and reigning in corporate character. That is, if a corporation engages in, say, widespread damage of the environment or widespread wage-theft, a state's population may wish to provide its courts as a friendly forum to adjudicate such suits, regardless of whether the actual harm took place in the forum. Opening up a forum with plaintiff-friendly policies can be a state's way of signaling disapproval of general corporate behavior and a way of utilizing the power of the legal system to censure and regulate supranational corporations. But states have lost this power, which, in a common law system, also effectively limits a primary avenue of law making (which, in turn, is a means of exercising self-governance).

Frustrated Federalism

In order to understand how the *Daimler* decision interacts with federalism, we can look to two seminal pieces on the benefits of the federalist system—Heather Gerken's aforementioned *Federalism All the Way Down*, and Robert Cover's *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation.* While not explicitly coded as a piece on federalism, the latter's focus on jurisdictional redundancy, or the overlap of state courts with federal courts and one another, is itself an articulation of the structure of federalism in the judicial context.

Starting first with Professor Gerken, we can distill the key attributes of federalism identified in her piece down to two concepts: voice and exit. By "exit," Professor Gerken means giving minorities (states) "the chance to make policy in accord with their own preferences, separate and apart from the center."[65] The concept of "voice" is slightly more complex—essentially, in an integrated system, where exit is not an option (or is not desirable), minorities can effect change through "voice," to contribute to national policy setting by speaking out against it (or in favor) and by implementing national policies in particular ways (which amounts, in a way, to voice through action).[66] With these concepts in mind, it is not difficult to see how the *Daimler* decision undermines both. Exit can be understood as conceptually similar, if not identical, to the notion of sovereignty. If the federal government is conceived of as the "center" with respect to the concept of exit, with our understanding of supranational corporations as newly sovereign entities,

64 *See*, *infra* notes 90-95 and accompanying text.
65 Gerken, *supra* note 7, at 7.
66 *Id.* at 74.

we can also reconceptualize them as a new "center" against which states can struggle. When a supranational makes a decision regarding wages, the use of unethically sourced materials in its supply chain, or any other aspect of its operation, it has made, by virtue of its breadth and, in the case of near monopolies or monopsonies like Amazon,[67] its depth, something of a national policy decision. States retain numerous ways to struggle against these policies, particularly via legislation, but the power of the courts to exercise 'exit' has been greatly diminished.

Voice is equally undermined. The Supreme Court is a fundamentally undemocratic institution—justices are appointed for life, they are unaccountable to voters, and their decisions are beyond appeal and binding on all jurisdictions. The one way in which minorities were able to operate from within the system and to utilize their voice was to legislate or issue judicial decisions in contradiction with or in tension with Supreme Court precedent in order to attempt to force a circuit split and a renewed look at the issue. Insofar as state courts are no longer able to exercise general jurisdiction over supranationals, and thus no longer able to even entertain such cases, they have lost an important mechanism for voicing complaints and policy preferences to the Supreme Court. Furthermore, insofar as some supranationals, like Google or Amazon, have functional monopolies over information and commerce flows,[68] the possibility of mass voice-action is infeasible to either materialize or translate into policy changes. Under such circumstances, Gerken's account of the power that exists in minorities' voice without sovereignty loses currency.[69]

Cover's article demonstrates the slightly more granular, but perhaps more insidious effects of the *Daimler* decision. The article focuses on the benefits of what Cover calls "jurisdictional redundancy." In the U.S., Cover writes, "[t]here are more than fifty separate systems of state courts, for most purposes largely independent of one another, but coordinated in important respects by the full faith and credit clause and by some dubious specialized applications of due process."[70] With the addition of federal courts, two pos-

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67 Cory Doctorow, Amazon's monopsony power: the other antitrust white meat, BoingBoing (May 23, 2019), https://boingboing.net/2019/05/13/consumer-harms-everywhere.html.

68 *See id.; Russel* Brandom, T*HE MONOPOLY-BUSTING CASE AGAINST GOOGLE, AMAZON, UBER, AND FACEBOOK*, Verge (Sept. 5, 2018), https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook.

69 Gerken, *supra* note 8, at 47.

70 Cover, *supra* note 9, at 639. "What is dubious," Cover writes in a footnote, "about the application of due process is the use of the phrase to designate insufficient state authority to adjudicate quite apart from consideration of fairness to the parties." The piece was written before the Supreme Court handed down the *Asahi* fairness factors, but in a cruel twist of fate, the *Daimler* decision has made it so Cover's complaint remains accurate

sibilities of concurrency open up: "'vertical' (state-federal) and 'horizontal' (state-state)."[71] These courts are tied together by "'loose coordinating factors, enforced from time to time by the Supreme Court."[72] While federalism conversations typically focus, with good reason, on vertical relationships, horizontal relationships as well as the new vertical relationship between states and supranational corporations, are sometimes left out. *Daimler* and its ramifications implicate state-state relations far more than state-federal relations. Indeed, the formal question is purely state-state—the Supreme Court has effectively limited jurisdiction to two states, which ones will have jurisdiction? Therefore, our discussion of Cover and jurisdictional redundancy will focus on horizontal concurrency.

Before proceeding to the benefits of horizontal concurrency that have been frustrated by *Daimler*, it is important to point out what Cover identifies as the two essential attributes of the "adjudicatory act": "dispute resolution and norm articulation."[73] Both elements are performed simultaneously—when a court resolves the dispute before it, the decision also has a normative value. Or, as Justice Cardozo put it, "as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent."[74]

It is these two attributes of adjudication that are served by jurisdictional redundancy. Specifically, Cover identifies three areas in which redundancy amplifies the attributes of the adjudicatory act: Interest, Ideology, and Innovation. "These terms," he writes,

> are a shorthand for three general problems: (a) the self-interest of incumbent elites in a regime; (b) the more or less unconsciously half values and ways of seeing the world, reflected in the governing elites, which tend to serve and justify in general and long run terms the social order which the elites dominate; and (c) the consciously determined policies of the authoritative elites, especially insofar as they depart from traditional, common cultural norms and expectations.[75]

Essential to Cover's analysis is the proposition that "different polities with differing constituencies, peopled by distinct governing elites, indeed will

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today. *See id.*, n. 2.

71 *Id.* at 640.

72 *Id.* at 639.

73 *Id.* at 643.

74 *Id.* at 644.

75 *Id.* at 657.

differ from one another in some measure with respect to all three areas."[76] While Cover's analysis allows for the problem of an increasingly homogenized national polity, it still assumes, and this assumption holds up today, that despite increasing homogeneity, there remain salient political and ideological differences in the different polities that make up the country. Even among the governing (including judges and legislators), who Cover correctly identifies as sharing a certain 'vocational' solidarity, we can see ideological difference corresponding roughly to geopolitical markers (Cover asserts that these ideological differences are always a "toned down" reflection of the "social reality and right conduct held by at least locally significant groups in the society").[77]

One of the side-effects of ideological heterogeneity is that there is a built in possibility of mistrust between the different ideological camps—a mistrust, that is, between states insofar as states remain relevant geopolitical entities (even if Gerken's assertion that states may just be "convenient sites"[78] of organizing is true, this does not vitiate the fact that geography still carries some political valence, even if it is only a manufactured one [think only of the mystifying concept of the "coastal elite" which has figured so prominently in our recent political discourse]). With respect to adjudication, Cover writes that

> it is surely not the specific conflict, the facts of which are to be adjudicated, that is itself responsible for the chasms of mistrust that make it difficult…for normal adjudicatory institutions to be trusted to reach reliable findings. Rather, certain specific conflicts are understood to lie upon a perceptual or conceptual fault line determined by the different and conflicting ideologies of the relevant social groups.[79]

One of the benefits of redundancy, then, vis-a-vis ideology, is that norm-articulation becomes increasingly trustworthy and the articulated norms increasingly concretized when they are articulated across ideological and geographical lines. To bring this back to general jurisdiction, allowing a multiplicity of forums to adjudicate conflicts regarding the same corporate actor for the same potential conduct can reinforce the legitimacy of any one particular ruling if the different forums reach the same or similar results. It can reinforce it from an error-minimization perspective, but, more importantly for federalism, it can reinforce it from an ideological perspective—assuaging fears of ideological taint and eroding distrust between the states and

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76 *Id.*
77 *Id.* at 672.
78 Gerken, *supra* note 8, at 17.
79 Cover, *supra* note 9, at 662.

geographically and ideologically distinct political groups while simultaneously allowing those political groups to retain their specific identities and their own institutions.

After *Daimler*, however, this benefit has been greatly frustrated. Stripping all but two state courts of general jurisdiction in any given cases risks ossifying certain ideological concepts with respect to corporate, state, and judicial behavior. It is the multiplicity of ideologies expressed by different polities and courts that, in an idealized view at least, creates debate and democratic churn which in the common law system helps to create law reflective of the nation as a whole (both because courts will look to one another for guidance on issues of first impression and because circuit splits or coalescence are important data points for Supreme Court decisions and grants of certiorari).[80] Delaware, where over 67.6% of all Fortune 500 companies are incorporated,[81] has, after *Daimler*, thus become an outsized player in the jurisdictional game. Delaware, of course, is known throughout the world as a tax haven and an immensely pro-corporate jurisdiction (it is no accident that so many corporations chose to incorporate in the state).[82] Because Delaware can exercise jurisdiction over so many more corporations, and can therefore adjudicate significantly more claims, its specific ideological and political makeup has gained an inflated influence in the norm articulation space. This concentration of norm articulation in one forum not only risks spreading site-specific ideology on a national level. It also promotes general mistrust on an ideological level because so many forums have lost their voice in what ought to be a national conversation.[83]

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80 Indeed, *Daimler* would not be nearly as problematic a decision if there did not exist ideological differences between the forums. As Cover writes, "The political pressure for open avenues of redundancy comes about when effects are not random. Thus, to the extent that the redundant forum simply provides an avenue for forum shopping with no systematic differences arising from interest, ideology, or innovation, there will not be an identifiable and cohesive group prejudiced by the presence or absence of the alternative forum. When the forum becomes an issue to an identifiable group, it is because that group thinks that there is more than mere randomly distributed error at stake. This means that the very fact that significant groups have conflicting systematic preferences for a forum or type of forum as to some issue is a strong argument for relatively unrestrained redundancy." Cover, *supra* note 9, at 681-682.

81 Annual Report Statistics, *Delaware Division of Corporations*, https://corp.delaware.gov/stats/ (last visited Sept. 22, 2022).

82 See Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven,* N.Y. Times (June 30, 2012), https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?pagewanted=all&_r=0.

83 Even the potential recourse to federal diversity jurisdiction is unlikely to alleviate this geospatial ideological problem in light of both the *Erie* doctrine as well as the *Klaxon* rule (articulated in *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487 (1941)), which requires federal courts sitting in diversity to apply the choice-of-law

There is another, somewhat counterintuitive side effect of *Daimler*—it will lead to increased homogeneity in our political, cultural, and ideological makeup. Federalism served as a protector of heterogeneity insofar as it was able to designate, via the power of jurisdiction and other sovereign prerogatives, certain zones of exclusion, that is, zones in which local interests predominate at the expense of national or supranational interests (of course, this picture has often been a painful one with these zones of exclusion used to further racists, classist, sexist, and homophobic agendas). State judges, as Cover has asserted, are generally more responsive, sometimes too responsive, to local politics than their federal counterparts.[84] They are products, like anyone else, of these zones of exclusion. In this way they are another site of federalism. That is, they are both products and enforcers of local ideological and political interests. Understanding judges as ideological and political actors puts an enormous salience on granting communities the ability to define and actuate these interests. Supranational corporations, however, have created or are striving to create uniform desires, uniform ways of seeing, of listening, of engaging with politics, uniform ways of desiring even. The opening up of markets, the proliferation of chains, the imperative of growth—these are all made possible and presupposed by a leveling of culture and of place, by a de-topographization of the map. It is easier to create and market a product when all markets are the same.[85] *Daimler's* restrictions on general jurisdiction has made it increasingly difficult for state courts to act as agents of resistance against this de-topographization. And in so doing, *Daimler* has made it increasingly difficult for polities to define themselves away from the corporate center. The decision has unleashed, even more so than before, the homogenizing power of supranational corporations (look no further than, again, Google and Amazon. They operate in every state and their algorithms help shape our habits of consumption with respect to both information and material goods). Despite this homogeneity, the individual harms wrought by supranational corporations are always just that, individual.

To steal a phrase from the writer Teju Cole, "the death toll is always one, plus one, plus one. The death toll is always one."[86] Harms too can be widespread and homogenous in type, but their effects are local. Therefore,

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rules of the forum state. This privileging of a forum states would be unproblematic if there were many potential forum states, but *Daimler* has limited the pool.

84 Cover, *supra* note 9, at 665.

85 For an excellent and thorough articulation of this problem in the international and cultural space, see Frederic Jameson, *Notes on Globalization as a Philosophical Issue*, *in* The Cultures of Globalization 54-80 (Duke University Press ed.1998).

86 Teju Cole, Blind Spot 180 (2017).

despite the ever-increasing market concentration[87] and the attendant cultural compression resulting therefrom, the use of local courts could have been an important means for helping those whose voices have been silenced through absorption to regain individuality, to re-topographize the flattened map on which capital strives to operate. But of course, *Daimler* has worked to reduce the likelihood that this help will not materialize.

The spoiled benefits of jurisdictional redundancy extend beyond the ideological. Cover also identifies jurisdictional choice as a means of affording "a kind of fairness to people whose affairs are caught in the vice of change—whose private lives and expectations are shaken by innovation."[88] This is especially important in the supranational corporate context. The quasi-sovereign nature of these corporations, particularly corporations in the information space, means that they are operating unmoored from many regulations, which have been slow to adapt to the rapid advance of technological and economic interconnectedness. Capital marches forwards even as the courts do not. Allowing some degree of forum shopping would allow those harmed by corporate action to avail themselves of the forum that has best kept pace with supranationals, or has at least built in robust mechanisms of resistance (like strong punitive damages precedents or pro-plaintiff discovery rules). These benefits of forum shopping are intimately linked not only to dispute resolution but also to norm articulation. Cover writes, "it is important to see the nature of the plight of the litigant. She appeals to 'law' against law. It may be an appeal to law which one of several alternative forums calls no law. But so long as such a forum is only one of several, there is room…for recognition of the truly open, tentative, and transitional status of norms which do not yet command common acquiescence among all relevant authoritative courts."[89] As already stated however, *Daimler* all but ensures that norm articulation will take place in a mere handful of pro-corporate forums, thus leading to rapid concretization and rapid "acquiescence among all relevant authoritative courts."[90] The help our litigant seeks, unfortunately, will not materialize post-*Daimler.*

Conclusion

It is curious that *Daimler*, a decision so dependent upon the language of sovereignty, that so undermines the power of states, should be silent on federalism—indeed, the word never appears in the entire decision.

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87 Adil Abdela & Marshall Steinbaum, *The United States has a Market Concentration Problem: Reviewing Concentration Estimates in Antitrust Markets, 2000-Present*, FTC (Sept. 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/09/ftc-2018-0074-d-0042-155544.pdf

88 Cover, *supra* note 9, at 676.

89 *Id.* at 679.

90 *Id.* at 680.

But, as this paper has shown, far from being conceptually distinct, general jurisdiction ought to be at the core of our federalism discourse. Indeed, what is at stake in both federalism and jurisdiction is the question of which bodies are given the right to determine their political life. In particular, the interaction between supranational corporations and the states has, in light of *Daimler*, tipped even more in favor of the former. To illustrate one last example, consider the case of Amazon's second headquarters, it's "HQ2." After much fanfare and obsequious courting by cities and states, Amazon finally decided to build its HQ2 in northern Virginia.[91] In exchange for gracing Virginia with its HQ2, Amazon received a slew of benefits. Under the deal with the county, Amazon is eligible

> for up to $23 million in tax incentives — part of a larger $573 million incentive package…When journalists or citizens make public records requests for information on Amazon from Arlington County, the company will be given at least two days notice to "take such steps as it deems appropriate…" Amazon is eligible for a share of Arlington County's hotel tax revenue, which is expected to go up after the e-commerce giant comes to town. Amazon will receive 15 percent of any increase in Arlington's Transient Occupancy Tax if the company moves into a specified amount of office space each year.[92]

The county did not demand "funding for affordable housing" or "wage requirements for construction labor" in return for its largesse.[93] Instead, its only demand was that Amazon occupy a certain amount of office space each year.[94] Before *Daimler*, the people of Virginia would have received at least one benefit from the whole arrangement—general jurisdiction over Amazon. That is, the ability to exercise a robust voice with respect to judicial oversight of Amazon's nationwide affairs. But after *Daimler*, even the state containing Amazon's second headquarters is unlikely to receive the right to exercise general jurisdiction. As Douglas Wagner writes, Amazon is currently subject to jurisdiction in Delaware, where it is incorporated, and either Washington or California, one of which is their principal place of business

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91 Jesse Rifkin, Everything You Need To Know About Amazon Coming To Northern Virginia, N. Va. Mag. (Dec. 20, 2017), https://northernvirginiamag.com/culture/culture-features/2018/12/20/everything-you-need-to-know-about-amazon-coming-to-northern-virginia/.

92 Monica Nickelsburg, *Full details of Amazon's HQ2 deal with Arlington County, Va., revealed for the first time*, Geek Wire (Mar. 5, 2019), https://www.geekwire.com/2019/amazons-hq2-deal-with-arlington-county-gives-big-concessions-asks-little-of-the-company/

93 *Id.*

94 *Id.*

(or possibly neither).[95] Under *Daimler*, Amazon can only be subject to general jurisdiction in two states, therefore either Virginia will supersede California or Washington as Amazon's principal place of business, or, more likely, it will simply be yet another forum incapable of exercising general jurisdiction over Amazon despite its extensive contacts throughout the nation.[96]

As Virginia's winning offer in the nationwide race to the bottom demonstrates, supranational corporations are receiving numerous benefits from state populations without concomitant responsibilities. *Daimler*'s restriction of general jurisdiction has removed one of the few mechanisms available to localities to push back against corporate power after their representatives have invited them in. Absent such power, we find ourselves in an inevitably escalating scenario: once ground is ceded, the supranational will always ask for more. *Daimler* thus represents, finally, one more stop on the road to what Benhabib has identified as the "escape of public power from the purview of the public autonomy of citizens."[97] "The losers in the process," she writes (in words that sound in uncanny echo with Justice Sotomayor's concurrence), "are the citizens from whom state protection is withdrawn…and who thus become dependent upon the power and mercy of transnational corporations and other forms of venture capitalists."[98] Here, Benhabib describes us all—we, alas, are the losers.

95 Wagner, *supra* note 36, at 1127.

96 As Wagner writes, "Amazon's presence is permanent, physical, and unique-a state should have the power to protect its citizens from harms the corporation commits. In 2017, the corporation accounted for 44% of all U.S. e-commerce and pulled in over 50 billion dollars of revenue." Wagner, *supra* note 36, at 1128.

97 Benhabib, *supra* note 54, at 676.

98 *Id.* at 675.