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Salvaging General Jurisdiction: Satisfying Daimler And Proposing A New Framework

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SALVAGING GENERAL JURISDICTION: SATISFYING *DAIMLER* AND PROPOSING A NEW FRAMEWORK

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INTRODUCTION

"The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause."[1]

General jurisdiction is slowly being eroded. What was once a well-trodden path used to hale corporate defendants into the courthouse is now increasingly barred or shut. In its most recent general jurisdiction opinion, *Daimler AG v. Bauman*,[2] the U.S. Supreme Court continued its trend towards divesting general jurisdiction of its utility. This is a mistake. The 21st century's economy is increasingly complex, and general jurisdiction must evolve with this complexity. Failing to do so allows intricate corporate structures to insulate corporate defendants from the jurisdiction of U.S courts. Although the theory of personal jurisdiction has come a long way since the landmark decisions in *Pennoyer v. Neff*[3] and *International Shoe v. Washington*,[4] it must continue to evolve. Arguably, another catalytic opinion is needed to belatedly nudge general jurisdiction into modernity.

This note explores the history of general jurisdiction, provides a means to satisfy the currently rigorous general jurisdiction standard, and proposes a new standard that is more cogent in the modern age. In doing so, Part I of this note explains the theory behind general jurisdiction and how it differs from specific jurisdiction, and Part II describes the history of the Supreme Court's general jurisdiction jurisprudence since *Pennoyer*. After examining the theory of general jurisdiction and Supreme Court precedent on the issue, Part III traces the steps of the *Daimler* case, from the Northern District of California to the Supreme Court, with each courts' nuances highlighted. Part IV then explains the necessary steps plaintiffs must take to satisfy the new rigors of general jurisdiction. Finally, Part V provides a new definition and standard of general jurisdiction, one that will hopefully be more consistent with the original theory of general jurisdiction that was first outlined in *Pennoyer* and *International Shoe*.

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1. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 422 (1984) (Brennan, J., dissenting).
2. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).
3. Pennoyer v. Neff, 95 U.S. 714 (1877).
4. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

I. THEORY OF GENERAL JURISDICTION

Jurisdiction is essentially the power of a court over persons and things.[5] More specifically, personal jurisdiction is defined as a "court's power to bring a person into its adjudicative process."[6] Most, if not all, of the cases on personal jurisdiction, however, define the term by focusing on the interplay of two rights: the right of a sovereign state to exercise proper jurisdiction over persons within its borders, and the right of an individual to have life, liberty and property protected by due process of law.[7] In practice, states use long-arm statutes to subject persons both within and without the state to the jurisdiction of its courts.[8] It is the prerogative of the courts to decide if such exercises of personal jurisdiction comport with the Due Process Clause of the Federal Constitution.[9]

State long-arm statutes differ.[10] Some statutes extend the jurisdiction to the fullest extent allowed by the Due Process Clause.[11] Other statutes are more nuanced and delineate the situations in which a person's conduct will subject him to the jurisdiction of the courts of that state.[12]

This section on the theory of general jurisdiction is intended to serve several purposes. First, understanding the theory of personal jurisdiction is instructive for defining the appropriate scope of general jurisdiction. To do this, an exploration of background principles of personal

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5. Jurisdiction is defined as "[a] government's general power to exercise authority over all persons and things within its territory; esp., a state's power to create interests that will be recognized under common-law principles as valid in other states." *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

6. *Personal Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed, 2014). Black's Law Dictionary further defines personal jurisdiction as "jurisdiction over a defendant's personal rights, rather than merely over property interests." *Id.*

7. Wendy Collins Perdue, *What's "Sovereignty" Got to Do With It? Due Process, Personal Jurisdiction, & the Supreme Court*, 63 S.C. L. REV. 729, 729–30 (2012).

8. *See generally* 50 STATE STATUTORY SURVEYS: CIVIL LAWS: CIVIL PROCEDURE, PERSONAL JURISDICTION, 0020 SURVEYS 10 (Westlaw 2015) [hereinafter STATE SURVEYS] ("Generally, a court has personal jurisdiction over the residents of the state in which the court is situated. Each state has a 'longarm' [sic] statute, which specifies the circumstances under which a nonresident may be subject to the personal jurisdiction of the court.").

9. *See* Eric C. Hawkins, *General Jurisdiction & Internet Contacts: What Role, if Any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 FORDHAM L. REV. 2371, 2372. The theory of judicial review found in *Marbury v. Madison* provides the rationale for the federal courts' role of defining the scope of the Due Process Clause. Marbury v. Madison, 5 U.S. 137, 177 (1803). *See also* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)., 326 U.S. 310, 316 (1945).

10. *See* STATE SURVEYS, *supra* note 8.

11. *E.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2004) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

12. *E.g.*, MASS. GEN. LAWS ANN. CH. 209D § 2-201 (West 1988).

jurisdiction is needed. Second, this section discusses the actual theory of general jurisdiction: where it comes from and what it does. Third, this section explains the main rationales for general jurisdiction. Although many scholars have argued that general jurisdiction is obsolete and unworkable in today's world,[13] such a conclusion is shortsighted. At least Justice Sotomayor of the Roberts Court has reason to believe that general jurisdiction is alive and well, and should be preserved.[14] By ensuring that general jurisdiction is, indeed, alive and well, the Court will prevent corporate defendants from unfairly avoiding the jurisdiction of state courts.[15]

A. Personal Jurisdiction Principles

At its core, personal jurisdiction is "simple and elegant."[16] Describing this simplicity, Professor Simoni Grassi notes that personal jurisdiction is based on two fundamental ideas: connecting factors and reasonable expectations.[17] However, the Supreme Court has not been entirely successful at articulating the law of personal jurisdiction in conjunction with this theory.[18] This sub-section attempts to outline the theory of personal jurisdiction.

The core of the contemporary theory of personal jurisdiction can be traced to Professors Arthur von Mehren and Donald Trautman's oft-cited article, *Jurisdiction to Adjudicate*.[19] The heart of their theory is thus:

> In American thinking, affiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect,

13. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

14. Daimler AG v. Bauman, 134 S. Ct. 746, 763–73 (2014) (Sotomayor, J., concurring).

15. *See id.* at 772–73.

16. Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 618 (2014).

17. *Id.*

18. *Id.*

19. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

> between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.[20]

As the Court has developed the doctrine of personal jurisdiction over the last half-century, it has approvingly cited von Mehren and Trautman, specifically this paragraph.[21]

In the last 30 years, Professors Lea Brilmayer and Mary Twitchell have led the debate over personal jurisdiction.[22] Portions of this scholarly debate concern even the terms used in describing personal jurisdiction. For example, Brilmayer states the following:

> Rather than using the terms "general" and "specific," which she thinks mislead courts and scholars, [Professor Twitchell] would have us use the terms "dispute-blind" and "dispute-specific." Dispute-blind jurisdiction exists when a court would have adjudicative jurisdiction over any cause of action whatsoever the defendant, or at least, as she sometimes qualifies this, over "most" disputes. A finding of dispute-specific jurisdiction, in contrast does not compel the conclusion that jurisdiction would exist in most or all other cases; instead, as Professor Twitchell sometimes states, it takes the "nature" of the dispute into account.[23]

Essentially, Twitchell and Brilmayer are attempting to make sense of the Court's often confusing personal jurisdiction jurisprudence.[24]

There are numerous articles that outline the theory of specific personal jurisdiction (or Twitchell's "dispute-specific" jurisdiction).[25] But

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20. *Id.* at 1136.

21. *E.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

22. *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, n.a1 (1998) ("The author wishes to thank Professor Twitchell for good humor and scholarly openness that is rarely encountered in such response/rejoinder episodes."); Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

23. Brilmayer, *Related Contacts and Personal Jurisdiction*, *supra* note 22, at 1446 (citing Twitchell, *supra* note 13, at 613, 637).

24. *See generally* Brilmayer, *Related Contacts and Personal Jurisdiction*, *supra* note 22; Brilmayer, *A General Look at General Jurisdiction*, *supra* note 22; Twitchell, *supra* note 13.

25. *See, e.g.*, James M. Brogan, *Personal Jurisdiction After Goodyear & McIntyre One Step Forward; One Step Backward?*, 34 U. PA. J. INT'L L. 811 (2013); Braham Boyce Ketcham, *Related Contacts For Specific Personal Jurisdiction Over Foreign Defendants: Adopting a Two-Part Test*, 18 TRANSNAT'L L. & CONTEMP. PROBS 477 (2009); Linda

the focus of this note is general jurisdiction.[26] Therefore, regarding background principles, all that need be remembered is this: For a court to exercise specific *in personam* jurisdiction, the lawsuit must arise out of "minimum contacts" between the defendant and the forum state.[27] More importantly, the delineation between general and specific jurisdiction "has helped courts focus on their reasons for exercising jurisdiction in particular cases."[28]

Regarding personal jurisdiction as a whole, Professor Twitchell notes that there are a number of approaches to the conceptual framework of personal jurisdiction that are somewhat inconsistent with the original meaning of general and specific jurisdiction.[29] She identifies two factors as the source of this problem: (1) courts are unsure of the meaning of general and specific jurisdiction and (2) courts are unsure of how to use the general-versus-specific framework to determine when it is fair to exercise jurisdiction.[30] The result of this confusion is what Twitchell calls:

> An impoverished body of general jurisdiction case law that fails to explore the question of the state's general adjudicatory power over nonresident defendants, and an impoverished body of specific jurisdiction case law that fails to recognize that courts often exercise what is, in fact, specific jurisdiction over claims only tenuously tied to a defendant's forum contacts.[31]

This note attempts to make sense of this "impoverished body of general jurisdiction case law" and provide a reasonable understanding of general jurisdiction that fits in the framework of contemporary jurisprudence. The theory of general jurisdiction is extremely important in building a coherent general jurisdiction framework. That theory is discussed next.

Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619 (2001).

26. Reference the relative definitions, *supra* notes 5 & 6.

27. This is the hallmark language of *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). For a more detailed discussion of specific jurisdiction, the articles mentioned *supra* at note 22 provide an excellent starting point.

28. Twitchell, *supra* note 13, at 611.

29. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 612.

B. General Jurisdiction Theory

In her influential article, *The Myth of General Jurisdiction*, Professor Twitchell explains much of the theory supporting modern-day general jurisdiction jurisprudence.[32] Although she uses the term "dispute-blind" instead of general jurisdiction and "dispute-specific" instead of personal jurisdiction, she views those terms as interchangeable. The same premise applies here.

Before the 21st century and the modern understanding of personal jurisdiction, American courts defined jurisdiction in terms of the "sovereign's relationship with the defendant or his property, rather than in terms of character of the suit itself."[33] During this time, the justification for personal jurisdiction existed solely on the criteria that define modern-day general jurisdiction.[34] Twitchell notes, "As international and interstate commercial relations grew more extensive in the mid-nineteenth century, the nature of the dispute began to play a more prominent role in . . . American jurisdiction decisions."[35] Notably, this movement produced serious concern regarding one particular type of party: corporate defendants.[36] This development culminated in the landmark decision of *Pennoyer v. Neff*, which Twitchell points to as the source of the dispute-blind and dispute-specific bases of personal jurisdiction.[37] Initially, the delineations of general jurisdiction expanded as states developed rules allowing jurisdiction over corporate defendants based on the corporation's "consent, doing business, or presence" in the state.[38] After *International Shoe,*[39] however, leading commentators read the proverbial writing on the wall and predicted that general jurisdiction would take a backseat to specific jurisdiction.[40] Nonetheless, *International Shoe* provided not only

32. *See* Twitchell, *supra* note 13.

33. *Id.* at 615.

34. *Id.*

35. *Id.* at 618.

36. *Id.* at 619, n.39 ("Some states and territories made foreign corporations subject to process if they had officers or agents in the forum or were doing business there . . . . However, the accepted doctrine that a corporation had no existence beyond the state of its incorporation . . . led other early nineteenth-century commentators and jurists to conclude that it could not be subject to personal jurisdiction elsewhere.").

37. Twitchell, *supra* note 13, at 619–20. Professor Twitchell goes on to say: "The dominant theme of *Pennoyer* was that a state has absolute power over defendants or property found within its territorial boundaries, regardless of the nature of the dispute. Nevertheless, the Court in *Pennoyer* acknowledged that a state has some power to exercise jurisdiction over nonresident defendants based on the state's interest in the particular suit." *Id.*

38. *Id.* at 622.

39. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

40. Von Mehren & Trautman, *supra* note 19, at 1164. Specifically, those authors wrote that "the landscape that we have surveyed will gradually change; in particular, specific

the theoretical framework for the continued existence of personal jurisdiction but also a nuanced "fairness rationale" that has dominated modern-day personal jurisdiction jurisprudence.[41]

As the doctrine of personal jurisdiction progressed, "courts developed rules permitting jurisdiction over disputes closely related to the forum but framed them in ways that paid lip service to general jurisdiction requirements."[42] But at its root, general jurisdiction is uniquely focused on the "nature of the contacts between the defendant and the forum."[43] This doctrine is juxtaposed with specific jurisdiction, which is focused on the "relationship between the forum and the dispute being litigated."[44] And, as Professors von Mehren and Trautman predicted, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role."[45]

Despite that reduced role, the difference between general and specific jurisdiction is the focus of the inquiry. Specific jurisdiction examines the connection between the *facts of the controversy* and the *lawsuit* in question. General jurisdiction, however, examines the *relationship between the defendant and the forum*. Essentially, some defendants have such a close relationship with a forum that it would be patently unfair to insulate them from the jurisdiction of the forum's courts, with no concern as to the forum's interest in the facts of the case.[46] Whereas specific jurisdiction may be focused on fairness to the defendant, general jurisdiction focuses on fairness to the *forum*. This theory echoes the theory of estoppel.[47]

Unexpectedly, Professor Twitchell presents several problems with general jurisdiction, as well as several reasons for the endurance of general jurisdiction.[48] As to the problems, Twitchell admits: (1) "general

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jurisdiction will come into sharper relief and form a considerably more significant part of the scene." *Id.* As history would have it, they were right.

41. Twitchell, *supra* note 13, at 625. A pertinent section of the *International Shoe* opinion states: "[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Int'l Shoe*, 326 U.S. at 318. This "fairness" rationale provides support for an expansive view of general jurisdiction.

42. Twitchell, *supra* note 13, at 622.

43. *Id.* at 627.

44. *Id.*

45. *Id. See also* von Mehren & Trautman, *supra* note 19.

46. *See Int'l Shoe*, 326 U.S. at 318.

47. In other words, there are some situations in which it would be unfair to *not* require a defendant to answer a lawsuit in a particular jurisdiction, mirroring the rationale for estoppel (i.e., requiring a defendant to do something that it would be unfair for him to *not* do).

48. Twitchell, *supra* note 13, at 629–33.

jurisdiction is outdated" and (2) "courts have no clear concept of what general jurisdiction is or how it relates to specific jurisdiction."[49] As to the endurance, or hardiness, of general jurisdiction, Twitchell recognizes that: (1) it fills a gap left by other jurisdictional theories; (2) it is innocuous; (3) it encompasses foreseeable exercises of jurisdiction; (4) it has been preserved by the judiciary; and (5) personal jurisdiction alone is inadequate.[50]

General jurisdiction has been divided into four main categories or paradigms.[51] First, there are "unique affiliations" that are in many ways the heart of general jurisdiction.[52] The three types of unique affiliations—domicile, place of incorporation, and principal place of business—decide many questions of personal jurisdiction in modern day legal practice.[53] Professor Brilmayer notes, "Domicile is the place with which a person has a settled connection for certain legal purposes, either because the person's home is there or because the law assigns this significance to that place."[54] Since the "law treats corporations like legal persons . . . the place of incorporation and the principal place of business are both analogous to domicile."[55]

Second, the defendant's activities in the forum state can serve as a basis for general jurisdiction.[56] However, this type of jurisdiction requires a more nuanced analysis. Although a "single activity may suffice to establish general jurisdiction," some level of "continuous and systematic activities" is generally required.[57] Third, and more controversially, transient jurisdiction may exist because of an "individual's mere presence in the state for service of process."[58] Fourth, a party may always consent to personal jurisdiction, since it is a waivable affirmative defense.[59]

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49. *Id.* at 629.
50. *Id.* at 632.
51. *See* Brilmayer, *A General Look*, *supra* note 22, at 728–71.
52. *Id.* at 728.
53. *Id.*
54. *Id.*
55. *Id.* at 734.
56. Brilmayer, *A General Look*, *supra* note 22, at 735.
57. *Id.* at 735–36.
58. *Id.* at 748.
59. *Id.* at 755. Professor Brilmayer also delves into the world of *in rem* and *quasi in rem* jurisdiction as forms of general jurisdiction. For purposes of this article, however, the nuances and intricacies of *in rem* jurisdiction need not be explored at length.

C. Rationale for General Jurisdiction

A lawsuit based on general jurisdiction typically "involves the adjudication of a controversy that is centered outside the forum."[60] This means that the defendant must have a significant relationship with the forum such that notions of due process are justified[61] and use of that relationship must comport with "traditional notions of fair play and substantial justice."[62] Professor Brilmayer succinctly identifies the rationale and requirement for general jurisdiction:

> [O]nly a direct relationship between the forum and the defendant justifies the imposition of the state's coercive power. That relationship does not rest upon the state's right to regulate the outside activities, but on its power over the individual directly. The defendant's local activities, therefore, must be substantial enough to justify such power; they cannot be sporadic or occasional, even though sporadic activities themselves might be subject to local regulation when they are the source of the dispute.[63]

These ideas require careful consideration in today's complex global economy. Justice Brennan admonishes us thusly:

> By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.[64]

Echoing the fairness rationale mentioned above in the discussion on general jurisdiction theory, he goes on to explain that as "active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and

60. Brilmayer, *A General Look*, *supra* note 22, at 771.
61. *Id.*
62. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
63. Brilmayer, *A General Look*, *supra* note 22, at 771.
64. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 422 (1984) (Brennan, J., dissenting).

reasonable to subject them to the obligations that may be imposed by those jurisdictions."[65] The main obligation "that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities."[66] This fairness rationale continues to echo throughout the historical line of cases defining personal jurisdiction following *Pennoyer*.

II. HISTORY OF GENERAL JURISDICTION

The Supreme Court's back-and-forth with general jurisdiction is anything but helpful. Instead of a "coherent vision of the law of personal jurisdiction . . . the Court's fact-specific, case-by-case approach has produced an ever-widening doctrinal morass."[67] The problem is that the Court's approach has seemingly lost sight of the bedrock of personal jurisdiction: due process.[68] This section traces the history of the Court's personal jurisdiction jurisprudence. In doing so, this section's goal is to help the litigator determine how to satisfy general jurisdiction under the *Daimler* standard and to help the judiciary craft a more coherent and simplistic general jurisdiction standard that fits within the notions of modern-day due process.

A. *Pennoyer v. Neff*

Where it all begins—*Pennoyer v. Neff*.[69] In many ways, *Pennoyer* is still the flagship case for personal jurisdiction, even if it is not the leading case for personal jurisdiction analysis today.[70] Most importantly, in *Pennoyer*, the Supreme Court tied personal jurisdiction to the Due Process Clause of the Fourteenth Amendment.[71] The Court famously established this principle:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice

65. *Id.* at 423.
66. *Id.*
67. Grossi, *supra* note 16, at 618.
68. *Id.* at 619. *See* U.S. CONST. amend. XIV.
69. Pennoyer v. Neff, 95 U.S. 714 (1877).
70. Lindsey D. Blanchard, *Goodyear & Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865, 869–70 (2013). Blanchard's article provides a succinct and helpful exposition of a history of personal jurisdiction.
71. *Id. See Pennoyer*, 95 U.S. at 733.

> to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings.[72]

Later opinions of the Court use this due-process rationale to intuit the substantive criteria of personal jurisdiction.[73] The facts and holding of *Pennoyer* are not nearly as important as its catalytic nature. The territorial approach of the *Pennoyer* Court in 1877 was eventually replaced by the contacts theory of personal jurisdiction laid down by Justice Stone in *International Shoe*. But the link between personal jurisdiction and due process is extremely important for the development of personal jurisdiction as a whole, and more distinctly, the evolution of general jurisdiction.

B. *International Shoe*

When *International Shoe* came onto the scene of personal jurisdiction, the entire field was redesigned. An entirely new doctrine of personal jurisdiction emerged; what was once governed by territoriality is now governed by minimum contacts and reasonableness.

International Shoe Company operated a nationwide business selling shoes and other footwear.[74] It was a Delaware corporation with its principal place of business in Missouri.[75] It employed about a dozen salesmen that peddled footwear in Washington.[76] The issue before the lower courts, and ultimately the Supreme Court, was whether Washington could exercise personal jurisdiction over the corporation and thus subject it to state taxes.[77] The Supreme Court ultimately held that Washington could exercise personal jurisdiction over the parent company, International Shoe, in Missouri.[78]

The Court laid down the still-current foundation of personal jurisdiction:

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72. *Pennoyer*, 95 U.S. at 733.
73. Blanchard, *supra* note 70, at 870.
74. Int'l Shoe Co. v. Washington, 326 U.S. 310, 313 (1945).
75. *Id.*
76. *Id.*
77. *Id.* at 314.
78. *Id.* at 322.

> Historically, the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have *certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."*[79]

This is the core holding of *International Shoe* that has survived numerous iterations of personal jurisdiction rules.[80]

Notably, the Court's discussion of corporations and personal jurisdiction is of great import here.[81] For instance, the Court claimed that because "the corporate personality is a fiction," personal jurisdiction over corporations relies on the law of agency—"the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[82] Much of the Court's opinion on this matter laid the groundwork for the doctrine of general jurisdiction.[83] This dicta led to the conclusion that when a corporation conducts activities in a state and enjoys its attendant protections, obligations may arise, such as requiring the corporation to answer a lawsuit in that state.[84] From this language, the

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79. *Id.* at 316 (emphasis added) (internal citations omitted) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

80. *E.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) ("The canonical opinion in this area remains *International Shoe* . . . .") (internal citations omitted); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918-19 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952).

81. *Int'l Shoe*, 326 U.S. at 317.

82. *Id.*

83. *E.g.*, *id.* at 317 ("Presence in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given."); *id.* at 318 ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."); *id.* at 319 ("Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.").

84. *Int'l Shoe*, 326 U.S. at 319.

Court has crafted the doctrine of general jurisdiction over the last three-quarters of a century. Unfortunately, the Court has not remained entirely consistent with this original idea, crafted in the mid-twentieth century, regarding the interplay of corporate structure and personal jurisdiction.

C. *Perkins*

It is here, in *Perkins v. Benguet Consolidated Mining Co.*,[85] that the doctrine of general jurisdiction began to take shape (or at least the shape it has more-or-less kept for the last 60 years). The defendant in this case, like International Shoe, was a corporation.[86] The company operated mining properties in the Philippines, but during its occupation by the Japanese, the president of the corporation returned home to Ohio, where he continued to essentially direct the company.[87] He cashed checks, held directors' meetings, and supervised policies of the corporation.[88] The Supreme Court found that the defendant "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."[89] It ultimately held that the corporation was thus subject to personal jurisdiction in Ohio.[90]

In reaching this decision, the Court first dealt with the agency problem—only the president of the company was in Ohio.[91] On this issue, the Court held:

> [I]f an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf [then] there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative.[92]

Second, and more importantly, the Court clarified the doctrine of general jurisdiction. For a corporation to be subjected to general jurisdiction in a state in which it is not incorporated, the "amount and kind of activities which must be carried on by the foreign corporation in the state of the

85. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
86. *Id.* at 438.
87. *Id.* at 447–48.
88. *Id.* at 448.
89. *Id.*
90. *Id.* at 449.
91. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 444 (1952).
92. *Id.*

forum so as to make it reasonable and just to subject the corporation to the jurisdiction of the state are to be determined in each case."[93] Those kinds of activities must be "continuous and systematic," such as: (1) directors' meetings, (2) business correspondence, (3) banking, (4) stock transfers, (5) payment of salaries, and (6) purchasing of machinery.[94] Not surprisingly, all of these activities were the exact activities performed by the president of Benguet Consolidated Mining Company.

Because the Court found that the corporation's activities were continuous and systematic, the corporation was subject to suit in Ohio for acts that were unrelated to the suit's underlying dispute.[95] Unfortunately for proponents of an expansive theory of general jurisdiction, this is the only U.S. Supreme Court case in which the Court has found the activities of a corporation to be of such a continuous and systematic nature as to justify the exercise of general jurisdiction.[96]

D. *Helicopteros*

Helicopteros Nacionales de Columbia, S.A. v. Hall was the Supreme Court's first significant general jurisdiction case after *Perkins*.[97] With this case, the Court began the trend toward narrowing the scope of general jurisdiction.[98] Here, the defendant (Helicopteros, or Helicol) was a Columbian corporation with its principal place of business in Columbia.[99] The facts giving rise to the lawsuit involved a helicopter crash in Peru in which the lives of four American citizens were claimed.[100] Their survivors and decedents brought suit and attempted to hale the defendant, Helicol, into court in Texas.[101]

Here, Helicol's contacts with Texas were not connected to the subject of the suit, so the plaintiffs turned to general jurisdiction—which the Court ultimately rejected.[102] The Court first reiterated the holding of *Perkins*, namely that "due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient

93. *Id.* at 445.
94. *Id.*
95. *Id.* at 448-49.
96. *Cf.* Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984).
97. *See Helicopteros*, 466 U.S. at 408.
98. *Id.*
99. *Id.* at 409.
100. *Id.* at 409–10.
101. *Id.* at 410.
102. *Id.* at 418.

contacts between the State and the foreign corporation."[103] The Court summarized Helicol's relevant contacts with Texas this way:

> It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiating session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.[104]

The Court concluded that the contacts here were less significant than those in *Perkins*, so the plaintiffs could not rely on general jurisdiction as their personal jurisdiction theory.[105]

The Court then took an interesting turn. It dismissed as insignificant the contacts between the purchases of equipment and related training trips.[106] But it did so based on the holding of a pre-*International Shoe* opinion, which found that purchases and related trips were not enough "for a State's assertion of jurisdiction."[107] Nonetheless, the Court imported this holding from *Rosenberg Bros. & Co. v. Curtis Brown Co.*: "[M]ere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."[108]

Writing alone, Justice Brennan took a contrary position.[109] He was wary of the court's citing of the *Rosenberg Bros.* case to establish the constitutional boundaries of due process as evidenced in general jurisdiction.[110] Brennan would have held that the undisputed contacts in this case were sufficient to satisfy general jurisdiction—"Helicol has

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103. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

104. *Id.* at 416.

105. *Id.*

106. *Id.* at 417. Notably, the Texas Supreme Court found these contacts to be dispositive of the general jurisdiction issue. *Id.*

107. *Id.* The Court looks to the case of *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (Brandeis, J.). Although the case may be important in the balance of the Court's personal jurisdiction jurisprudence, it is odd indeed to rely on such a short, undetailed opinion from the *Pennoyer* era of personal jurisdiction. *Cf. Helicopteros*, 466 U.S. at 419–20 (Brennan, J., dissenting).

108. *Helicopteros*, 466 U.S. at 418.

109. *Id.* at 419 (Brennan, J., dissenting).

110. *Id.* at 420.

purposefully availed itself of the benefits and obligations of the forum."[111] He then began to poke holes in the majority's arguments.[112]

First, Justice Brennan explained he did not read *Perkins* to establish the "necessary minimum" that a corporation's contacts must reach before it may be subject to general jurisdiction.[113] Brennan reasoned that the "vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause."[114] He went on to explain his rationale:

> [T]his trend toward expanding the permissible scope of state jurisdiction over foreign corporation and other nonresidents is entirely consistent with the traditional notions of fair play and substantial justice that control our inquiry under the Due Process Clause. As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities.[115]

Although this may seem incongruent with the concept of "minimum contacts," it is not incongruent with the doctrine of "fair play and substantial justice."[116] The modern interpretation of specific jurisdiction by the Court is rightly linked to the doctrine of minimum contacts.[117] But this is not so with general jurisdiction.[118] *International Shoe* made clear that when corporations take advantage of the benefits of a state, they might also incur reciprocal obligations.[119] Justice Brennan's iteration of general jurisdiction is entirely consistent with the Court's holding in *International Shoe*.[120] If the ultimate question is fairness to the defendant, it makes little

111. *Id.*
112. *Id.* at 420–28.
113. *Id.* at 421.
114. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 422 (1984).
115. *Id.* at 423.
116. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
117. *See* Grossi, *supra* note 16, at 622–24.
118. *Id.* at 623.
119. *Int'l Shoe*, 326 U.S. at 318–20.
120. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 419–427 (1984) (Brennan, J., dissenting).

sense that the decision of whether to exercise general jurisdiction lies with the Court on an ad hoc basis.[121] Leaving foreign corporations at the mercy of the Court's fact-finding and balancing seems inconsistent with "traditional notions of fair play and substantial justice."[122] Justice Brennan's idea is much more understandable in light of the due process heart of personal jurisdiction.[123]

E. *Goodyear*

Goodyear Dunlop Tires Operations, S.A. v. Brown arises from a bus accident in France that claimed the lives of two 13-year-old boys from North Carolina.[124] The plaintiff–parents of the two boys filed suit in North Carolina state court against Goodyear USA, an Ohio corporation, as well as three of Goodyear USA's indirect subsidiaries in Luxembourg, Turkey, and France, each of which disputed the North Carolina court's personal jurisdiction over them.[125] Notably, these subsidiaries were "not registered to do business in North Carolina."[126] Furthermore, they had "no place of business, employees, or bank accounts in North Carolina."[127] Finally, even though a small percentage of their tires were distributed with the state by other Goodyear affiliates, the subsidiaries did "not design, manufacture, or advertise their products in North Carolina . . . [and did] not solicit business in North Carolina."[128]

Led by Justice Ginsburg, the Court held that those connections with North Carolina were insufficient to warrant an exercise of general jurisdiction by North Carolina state courts.[129] Even under the form of general jurisdiction this note proposes, these contacts are likely not within the gambit of activities that would warrant a reasonable extension of general jurisdiction. What is disconcerting about this opinion is not the holding, but the rule that emerges.[130] The Court here exclaims that

121. *Id.* at 427 ("Our interpretation of the Due Process Clause has never been so dependent upon the applicable substantive law or the State's formal pleading requirements.").

122. *Id.* ("[T]he principal focus when determining whether a forum may constitutionally assert jurisdiction over a nonresident defendant has been on fairness and reasonableness to the defendant.").

123. *See id.* at 419–27.

124. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011).

125. *Id.* at 919–21. Goodyear USA did not dispute the North Carolina court's jurisdiction over it. *Id.* at 919.

126. *Id.* at 921.

127. *Id.*

128. *Id.*

129. *Id.* at 930–31.

130. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011).

jurisdiction "could be asserted where the corporation's in-state activity is 'continuous and systematic' and *that activity gave rise to the episode-in-suit*."[131] This is *systematically* concerning. It appears that Justice Ginsburg here is mixing elements of specific jurisdiction with elements of personal jurisdiction.

Purportedly, *International Shoe* stands for the proposition that the activities of a defendant can be significant enough to satisfy general jurisdiction even if the contacts are unrelated to the instant suit.[132] In no uncertain terms, the *International Shoe* Court explains: "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action *arising from dealings entirely distinct from those activities*."[133] This distinction seems to escape the Court's opinion in *Goodyear*.

While the Court incorporates both *Perkins* and *Helicopteros*, it still finds that the defendant's contacts with North Carolina are not continuous and substantial enough to warrant the exercise of general jurisdiction.[134] Like in *Helicopteros*, the Court simply groups the factual scenarios from prior general jurisdiction cases together and measures the contacts in the present case against them.[135]

In finding that the defendant's contacts did not satisfy general jurisdiction, the Court, rather slyly, states a new rule for general jurisdiction that will carry over into *Daimler*.[136] Citing *International Shoe*, von Mehren, Trautman, and Brilmayer, the Court provides the current jurisdictional rule:

> A court may assert general jurisdiction (sister-state or foreign-country) over corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to *render them essentially at home in the forum State*. Specific jurisdiction, on the other hand, depends on an "affiliatio[n] between the forum and the underlying controversy," principally, activity

131. *Id.* (emphasis in original).

132. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

133. *Id.* (emphasis added). While Justice Ginsburg quotes a relevant section of *International Shoe* in saying that "continuous activity of some sorts" will not be enough to require those defendants to be amenable to suit in that State, *Goodyear*, 564 U.S. 915 at 927 (quoting *Int'l Shoe*, 326 U.S. at 318), she arguably still moves general jurisdiction to a much less significant place than the *International Shoe* court intended.

134. *Goodyear*, 564 U.S. 915 at 930.

135. *Id.* at 929 ("Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction.").

136. *Id.* at 919–20.

> or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.[137]

Although this standard is the current rule that plaintiffs must satisfy, the phrase "essentially at home in the forum state" is not found in any prior general jurisdiction cases.[138] For better or worse, plaintiffs must now plead enough jurisdictional facts to satisfy the Court's current understanding of being "essentially at home."

III. *DAIMLER*

On January 14, 2014, the Supreme Court decided its fourth general jurisdiction case, adding to the limited body of case law governing an important doctrine.[139] Several citizens of Argentina sued Daimler AG in a California federal court looking to recover under the Alien Tort Statute.[140] The plaintiffs claimed that Daimler, through its Argentinian subsidiary, "collaborated with the Argentinian government to detain, torture, and kill some of the subsidiary's employees."[141] Although quite complicated, at heart, the plaintiffs alleged that jurisdiction was proper due to the California contacts of Mercedes-Benz USA, LLC (MBUSA), another Daimler subsidiary.[142] Ultimately, the Supreme Court rejected this argument and, in another opinion authored by Justice Ginsburg, further narrowed the scope of general jurisdiction.[143] The following four sections explore the most pertinent portions of this case's procedural history: (A) the original proceeding in the U.S. District Court for the Northern District of California; (B) the appeal and subsequent en banc review in the U.S. Court of Appeals for the Ninth Circuit; (C) the authoritative opinion of the U.S. Supreme Court; and (D) the compelling concurring opinion by Justice Sotomayor.

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137. *Id.* at 919 (emphasis added).

138. *E.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014); *Goodyear*, 564 U.S. 915 ; J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

139. *Daimler*, 134 S. Ct. 746. *See* Cam Barker et al., *U.S. Supreme Ct. Update*, 26 APP. ADVOC. 436, 443–45 (2014); Elizabeth M. Weldon & Marjorie A. Witter, *Keeping Current*, 2014-MAY BUS. L. TODAY 1 (2014).

140. Barker, *supra* note 139, at 443.

141. *Id.*

142. *Id.*

143. *Id.* at 444.

A. Northern District of California

In *Bauman v. Daimlerchrysler AG*, one Chilean citizen and 22 Argentinian citizens filed suit against a host of corporations, both foreign and domestic, alleging that Mercedes-Benz Argentina collaborated with the Argentinian government to kidnap and torture the plaintiffs and the plaintiffs' relatives during the Dirty War of 1976–1983.[144] The multiple corporate defendants (and their attendant corporate structures) are very confusing, but necessary to understand because agency is important for establishing general jurisdiction over corporate defendants. At root, the plaintiffs alleged that because DaimlerChrysler Argentina (DCA; and formerly known as Mercedes-Benz Argentina) is "either a division or wholly owned subsidiary of" DaimlerChrisler AG (DCAG), then DCAG is subject to the personal jurisdiction of California via agency.[145] DCAG moved to dismiss for lack of personal jurisdiction.[146] The district court tentatively granted the motion,[147] and then later solidified the order and dismissed the case for lack of personal jurisdiction over DCAG.[148]

The district court then delved into an extremely detailed analysis of the defendants' personal jurisdiction argument.[149] It laid out a two-part test adapted from *Helicopteros*: "(1) whether defendant has systematic and continuous contacts with California; and (2) whether the assertion of general jurisdiction is reasonable."[150] Before proceeding, the court recognized the difficulty of its inquiry:

> This case presents a difficult question: can a federal court exercise personal jurisdiction over a case arising under federal subject matter jurisdiction in which plaintiffs are all foreign nationals and the defendant is a foreign corporation which has subsidiaries doing business in the United States?[151]

Under then-current Ninth Circuit jurisprudence, the plaintiff had to establish that the defendant had been "conducting business in California,

144. Bauman v. DaimlerChrysler AG, No. C–04–00194–RMW, 2005 U.S. Dist. LEXIS 31929, at *4 (N.D. Cal. Nov. 22, 2005) (Order Tentatively Granting Defs.' Mot. to Dismiss).

145. *Id.* at *3–4.

146. *Id.* at *1–3.

147. *Id.* at *61.

148. Bauman v. DaimlerChrysler AG, No. C–04–00194–RMW, 2007 WL 486389, at *6–7 (N.D. Cal. Feb. 12, 2007) (Order Granting Mot. to Dismiss).

149. *Bauman*, 2005 U.S. Dist. LEXIS 31929, at *10–61.

150. *Id.* at *10.

151. *Id.* at *11.

not merely with California."[152] The district court then lays out its framework for determining "systematic and continuous contacts":

> First, [courts] seek to determine whether there is "some kind of deliberate physical presence" in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation. . . . Second, courts "look at whether the company has engaged in active solicitation toward and participation in the state's markets, i.e., the economic reality of the defendant's activities in the state."[153]

The court analyzed the nine different contacts that the plaintiffs alleged the defendant had with the state of California.[154] It concluded that five of these nine contacts were not attributable to DCAG but rather to its subsidiaries.[155] Thus, these contacts were "not properly considered direct contacts of DCAG to California."[156] The remaining four contacts were found to be "direct" contacts with California, but they were not enough to satisfy this first prong of general jurisdiction—systematic and continuous contacts.[157]

The plaintiffs also alleged that DCAG had sufficient contacts with California due to the agency relationship between itself and its subsidiaries, specifically MBUSA.[158] It alleged the following contacts: (1) "MBUSA has its principal place of business in New Jersey and is wholly-owned by DaimlerChrysler North America Holding Company, a Delaware corporation[,]" (2) MBUSA serves the U.S. as DCAG's "exclusive Mercedes-Benz importer and sales agent," (3) "MBUSA is the single largest supplier of luxury vehicles to the California car market," and (4) MBUSA maintains an office and Vehicle Preparation Center in California.[159] The plaintiffs posited that these contacts created an agency relationship that could impute the subsidiary's contacts to the parent company.[160]

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152. *Id.*
153. *Id.* at *13.
154. *Id.* at *17–31.
155. Bauman v. DaimlerChrysler AG, No. C–04–00194–RMW, 2005 U.S. Dist. LEXIS 31929, at *23 (N.D. Cal. Nov. 22, 2005).
156. *Id.*
157. *Id.* at *30–31.
158. *Id.* at *31.
159. *Id.*
160. *Id.*

In the Ninth Circuit, a court may impute a subsidiary's contacts to its parent when the "subsidiary is the parent's *alter ego* or where the subsidiary acts as the *general agent* of the parent."[161] These tests are different and either may be used to impute a subsidiary's contacts to a parent for purposes of personal jurisdiction.

> To establish that the subsidiary is the alter ego of the parent corporation, the plaintiffs must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.[162]

> The agency test is related, but not identical.

> To satisfy the agency test, plaintiffs must make a prima facie showing that the subsidiary represents the parent corporation by performing services sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] corporation would undertake to perform similar services. The agency test permits the imputation of contacts where the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake.[163]

It seems that the plaintiffs' evidence would clearly meet either of these tests, thus allowing the five MBUSA contacts to be imputed to DCAG. Unfortunately, the plaintiffs did not argue the alter ego test.[164] But regarding the agency test, the district court found that, on balance, the plaintiffs provided no evidence that DCAG exercised operational control over MBUSA.[165]

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161. Bauman v. DaimlerChrysler AG, No. C–04–00194–RMW, 2005 U.S. Dist. LEXIS 31929, at *31 (N.D. Cal. Nov. 22, 2005) (emphasis added).

162. *Id.* at *33.

163. *Id.* at *34 (internal quotations and citations omitted). The Court also identified several factors that may be considered in making a determination as to whether a subsidiary's contacts satisfy the agency test: "(1) what percentage of the parent corporation's business comes from the subsidiary; (2) whether the parent corporation's only agent in the United States is the subsidiary; and (3) whether the parent corporation conducts marketing activities in the United States." *Id.* at *34.

164. *Id.* at *33.

165. *Id.* at *36.

The district court then proceeded to conduct an excruciatingly detailed analysis of whether the exercise of personal jurisdiction would be reasonable.[166] It is unclear why the court did this, because it had already found the first prong of the general jurisdiction test was not met.[167] Nonetheless, the court ruled that the exercise of personal jurisdiction in this case would violate the defendant's due process rights.[168]

B. Ninth Circuit

1. Three-Judge Panel Decision

On appeal, the Ninth Circuit affirmed the district court,[169] over the strong dissent of Judge Reinhardt,[170] who eventually wrote the en banc decision reversing the three-judge panel.[171] The Ninth Circuit began its analysis by noting what was implicit in the district court's opinion: that the "existence of a relationship between a parent company and its subsidiaries" is not enough.[172] What the Ninth Circuit went on to parse, however, is the distinction between a parent–subsidiary relationship and a holding company–subsidiary relationship.[173] The court concluded that subsidiaries do not conduct business as agents when the "business of the parent is the business of investment."[174] It then defined the facts needed to prove the existence of a requisite agency relationship: "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures."[175] The Ninth Circuit also clarified the agency test in that circuit:

> First, the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent, notwithstanding the maintenance of corporate formalities. Control must be over

166. *Id.* at *38–61.

167. Bauman v. DaimlerChrysler AG, No. C–04–00194–RMW, 2005 U.S. Dist. LEXIS 31929, at *29–31 (N.D. Cal. Nov. 22, 2005).

168. *See Bauman*, 2007 WL 486389, at *6–7 (holding that jurisdictional discovery did not produce any significant evidence to change the court's mind on declining to extend personal jurisdiction).

169. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1098 (9th Cir. 2009).

170. *Id.* at 1098–1106 (Reinhardt, J., dissenting).

171. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 911 (9th Cir. 2011) (en banc) (Reinhardt, J., for the majority).

172. *Bauman*, 579 F.3d at 1094.

173. *Id.* at 1095.

174. *Id.* (internal quotation marks omitted).

175. *Id.*

> and above that to be expected as an incident of ownership. Second, the agent-subsidiary must also be sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services.[176]

Ultimately, the court concluded that the jurisdictional facts did not establish "pervasive and continual control."[177] Although the court found that the question was close, there was no "prima facie showing that DCAG would undertake to perform substantially similar services in the absence of MBUSA."[178]

In his dissent, Judge Reinhardt formulated the argument that would eventually prevail at the en banc level.[179] Specifically, he argued that the new test required a "much stronger relationship between parent and subsidiary than is necessary or desirable," and that the result would be "to shield foreign corporations from actions in American courts—although they have structured their affairs so as to reap vast profits from American markets—and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice."[180]

Judge Reinhardt then chipped away at the majority's exceedingly stringent test. After quoting the same rule as the majority,[181] he found that the "principal focus of the agency test for purposes of general jurisdiction . . . is not 'control'—much less 'pervasive and continual' control—but rather the *relative importance of the services provided to the parent corporation*."[182] In Reinhardt's view, the majority essentially conflated the two tests which now, in practice, requires plaintiffs to meet the more stringent alter ego test.[183]

The important takeaway from Judge Reinhardt's dissent is that the court was "establishing a test for agency in a specialized context."[184] As he explained:

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176. *Id.* at 1095.

177. *Id.* at 1096.

178. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1096 (9th Cir. 2009). Also, unlike the district court, the Ninth Circuit did not get to the issue of reasonableness because there were not continuous and systematic contacts. *Id.* at 1097.

179. *Id.* at 1098–1106 (Reinhardt, J., dissenting).

180. *Id.* at 1098.

181. *See* Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001).

182. *Bauman*, 579 F.3d at 1098 (Reinhardt, J., dissenting) (emphasis added) (citations omitted). Notably, the actual *text* of the agency test requires a "showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation . . . ." *Id.* (quoting *Unocal*, 248 F.3d at 928).

183. *Bauman*, 579 F.3d at 1099.

184. *Id.* at 1100.

> We are deciding one question only: whether DCAG has sufficient minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Indeed, our tests for agency and alter ego when the issue is jurisdictional are merely shorthand devices for defining what constitutes traditional notions of fair play and substantial justice for purposes of the due process analysis of *International Shoe* based upon the parent-subsidiary relationship.[185]

Here, Judge Reinhardt is absolutely correct. Personal jurisdiction, as a threshold issue, should not require the specificity of vicarious liability or a "scope of employment" determination. The purpose of general jurisdiction is to get the defendant (usually a corporate one) into the courtroom. If the issue were one of, say, whether to pierce the corporate veil, then the majority's test may well be appropriate. But in a situation like this, such a stringent test defeats the purposes of general jurisdiction.[186]

What is exceedingly frustrating about this case is that both parties agreed that "MBUSA's contacts with California warrant the exercise of general jurisdiction."[187] The only hiccup in haling DCAG into court is the majority's overly exacting agency test for general jurisdiction. Judge Reinhardt quoted Judge Weinstein, and the quotation is apt:

> To any layman it would seem absurd that our courts could not obtain jurisdiction over a billion dollar multinational which is exploiting the critical New York and American markets to keep its home production going at a huge volume and profit. This perception must have a bearing on our evaluation of fairness. The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution.[188]

Reinhardt concluded by pointing to the obvious: it would seem strange to an ordinary California citizen, who sees Mercedes-Benz vehicles

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185. *Id.* at 1100 (citations omitted) (internal quotation marks omitted).

186. It is worth noting here that Judge Reinhardt listed (with much more detail than the majority) a host of ways in which DCAG exerts control over MBUSA. *See id.* at 1101. In his view, such control satisfies even the majority's more stringent analysis. *Id.*

187. *Id.* at 1102.

188. *Id.* at 1103 (quoting Bulova Watch Co. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1327 (Weinstein, C.J.)).

constantly on the street, that the ultimate financial owner of Mercedes-Benz cannot be haled into court in California.[189]

2. Panel Rehearing

The panel rehearing was the best news that the plaintiffs had during the entirety of this litigation. It may have been their only favorable ruling. At the outset, Judge Reinhardt set the tone of the opinion by bringing up the point that the district court "did not hold an evidentiary hearing when it ruled on DCAG's motion to dismiss for lack of personal jurisdiction."[190] Citing *Doe v. Unocal Corp*., he clarified that "the plaintiffs 'need *only* demonstrate facts that *if true* would support jurisdiction over the defendant.'"[191]

Although it is apparent which side Judge Reinhardt was on in writing this opinion, frankly, it is a nice change of pace. Writing for the Ninth Circuit Panel, Judge Reinhardt first discussed the vast amount of revenue that DCAG received through its subsidiaries in the United States, especially its sales of Mercedes-Benz automobiles.[192] Next, the court, in some detail, delved into the General Distributor Agreement between DCAG and MBUSA that, in the words of the court, "establishe[d] extensive requirements for MBUSA as the general distributor."[193]

Although repetition of the court's findings is not needed here, an overview of the components of the agreement bears mentioning. For example, DCAG exercised some level of control over the following aspects of its subsidiaries: sales objectives and network, dealership standards, business systems (accounting, inventory, etc.), collection of customer information, management personnel requirements, vehicle service standards, warranty terms, technical service publications, advertising standards, signage, prices, change in corporate formation, working capital, customer satisfaction policies, trademark ownership, and ability to contract with third parties.[194] These facts ended up being dispositive for the court upon reconsideration.

Since a court of appeals may review a lack of personal jurisdiction under the de novo standard, it may re-weigh the facts, testimony, record, and legal standards without deference to the district court's findings or legal

189. *Bauman*, 579 F.3d at 1103. Judge Reinhardt continued by finding that exercising personal jurisdiction in this case comports with the reasonableness factors. *Id.* at 1103–06.

190. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 913 (9th Cir. 2011) (rehearing).

191. *Id.* (citing Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001) (per curiam)).

192. *Bauman*, 644 F.3d at 913–14.

193. *Id.* at 914.

194. *Id.* at 914–17.

conclusions.[195] After considering the facts, the court, on appeal, comes out the other way from the district court. It is important to note here that the plaintiffs' facts *must be taken as true* because the district court did not hold an evidentiary hearing.[196]

First, the court concluded that MBUSA has requisite contacts with California.[197] In fact, both parties agreed that California courts might lawfully exercise general jurisdiction over MBUSA.[198] Therefore, the court appropriately framed the question as "whether MBUSA's extensive contacts with California warrant[ed] the exercise of general jurisdiction over DCAG."[199]

Second, just like the Ninth Circuit in its revoked opinion, and the district court before that, the two parent–subsidiary tests were in the limelight. What Judge Reinhardt made clear is that the alter ego test is conclusively about *control*, whereas the agency test is about the *importance* of the subsidiary's services to the parent company.[200] In this light, Judge Reinhardt framed the question thusly:

> For the agency test, we ask: Are the services provided by MBUSA sufficiently important to DCAG that, if MBUSA went out of business, DCAG would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative? *We answer this question in the affirmative.*[201]

This test essentially asks whether the subsidiary is performing a service that the parent would perform itself in the subsidiary's absence. As interesting as this sounds, such a question gets to the heart of this general jurisdiction battle and the frustration of Judge Reinhardt (and later Justice Sotomayor). The vast and intricate legal structure of a corporation, which is a legal fiction, should not make it impossible for that company to be haled into court simply because it sends an agent to do its work. The deep pocket (here, DCAG) truly lies at the top of this parent-subsidiary structure. If a wronged plaintiff cannot reach the legal person who allegedly financed and oversaw the company that tortured and killed the plaintiffs

195. *See id.* at 919 (discussing the standard of review) (citing Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 538 (9th Cir. 1986)).

196. *Bauman*, 644 F.3d at 913.

197. *Id.* at 920.

198. *Id.* at 920 n.11.

199. *Id.* at 920.

200. *Id.*

201. *Id.*

and their decedents, then there must be a serious gap in the legal system. Judge Reinhardt identified such a gap here.

The court found that "MBUSA's services were sufficiently important to DCAG and . . . DCAG had the right to substantially control MBUSA's activities," and therefore, MBUSA was DCAG's agent.[202] After this finding, the burden was on the defendant to show that an exercise of personal jurisdiction would be unreasonable.[203] Weighing the reasonableness factors, the court determined that DCAG had not carried this burden.[204] In summary, the court stated: "[W]e conclude that it is reasonable to exercise jurisdiction over DCAG in California, a state that has itself become a major hub for world commerce and attracts business not only from all over Europe, but from all over Asia as well."[205]

C. Supreme Court

As often happens, everything changes at the Supreme Court. The careful distinctions between the agency and alter ego theories are of no moment because the Court, per Justice Ginsburg, held that general jurisdiction covers an extremely narrow set of circumstances, and this is not one.[206] What is remarkable about this holding is that the Court *assumes* that all nine of the contacts outlined in the district court's opinion qualify as such for personal jurisdiction purposes, and yet, these contacts are still insufficient for general jurisdiction.[207]

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202. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 924 (9th Cir. 2011) (rehearing).

203. *Id.*

204. *Id.* The seven factors considered are:

> [T]he extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum sate's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiff; and the existence of an alternative forum.

Id. at 925.

205. *Id.* at 930. In concluding, the court cited *Burger King v. Rudcewiecz* for the proposition that "the Supreme Court 'long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests' that failed to take account of reality." *Id.* (quoting Burger King v. Rudcewiecz, 471 U.S. 462, 478–79 (1985)).

206. Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) ("Even if we were to assume that MBUSA is at home in California, and further to assume that 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 it at home there.").

207. Such a conclusion is ironic because this is a much different ground than the one relied on by the district court or the Ninth Circuit in its first opinion. The district court granted the motion to dismiss because it found that only three of the nine contacts were imputable to DCAG, and that they were not enough for personal jurisdiction. Likewise, the Ninth Circuit, in its first opinion, found that the motion to dismiss was proper because all

The Court first thoroughly recited the facts[208] and procedural history[209] and efficiently outlined the histories of personal jurisdiction[210] and general jurisdiction.[211] Justice Ginsburg then recognized that Professors von Mehren and Trautman were correct in their prediction: Specific jurisdiction has played a central role in determining personal jurisdiction and general jurisdiction has taken a back seat.[212] The Court then summarized its general jurisdiction jurisprudence:

> *International Shoe* distinguished between, on the one hand, exercises of specific jurisdiction, as just described, and on the other, situations where a foreign corporation's continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. As we have since explained, [a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum state.[213]

Because the Court found that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme," it declined to stretch general jurisdiction beyond its traditionally recognized limits.[214] Thus, the culmination of *Pennoyer*, *International Shoe*, *Perkins*, *Helicopteros*, *Goodyear*, and *Daimler* resulted in this rule: For a defendant to be subject to a court's general jurisdiction, he must be "essentially at home in the forum state." This is a far cry from the principles of *Perkins*, where "continuous corporate operations within a state" justified suit against the corporation "on causes of action arising from dealings entirely distinct

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nine contacts could not be attributed to DCAG. Here, the Court looks past that, imputes all nine contacts to DCAG, and *still* finds insufficient connection to California.

208. *Id.* at 751–52.

209. *Id.* at 752–53.

210. *Id.* at 753–54.

211. *Id.* at 754–58 (discussing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); and Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).

212. *Daimler*, 134 S. Ct. at 755–56.

213. *Id.* at 754 (internal quotation marks omitted) (citing *Goodyear*, 564 U.S. 915 at 919; *Helicopteros*, 466 U.S. at 414, n.9).

214. *Daimler*, 134 S. Ct. at 757–58.

from those activities."[215] A corporation can only have a few true homes: its place of incorporation and its principle place of business. It does not appear that the Court would find general jurisdiction even on the facts of *Perkins* in today's jurisdictional world.

The Court next turned to the Ninth Circuit's agency theory for imputing contacts from MBUSA to DCAG.[216] It gave the theory little consideration, however, reasoning:

> Even if [it] were to assume MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject [DCAG] to general jurisdiction in California, for [DCAG's] slim contacts with the State hardly render it at home there.[217]

The Court declined to look beyond the forum where a corporation is "incorporated or has its principal place of business" to a "State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'"[218] The Court found that formulation "unacceptably grasping."[219] This is a little bit shocking. Although Justice Ginsburg recognized the general jurisdiction avenue laid down in *International Shoe*,[220] the Court circled back to the idea of being "essentially at home in the forum state."[221] When the Court found that DCAG was not at home in California through its agent of MBUSA, it reversed the Ninth Circuit and found the case wanting of personal jurisdiction.[222]

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215. *Perkins*, 342 U.S. at 446.

216. *Daimler*, 134 S. Ct. at 759.

217. *Id.* at 760.

218. *Id.* at 760–61.

219. *Id.*

220. *Id.* at 761 ("Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature to justify suit . . . *on causes of action arising from dealings entirely distinct from those activities*.'" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)) (italics in original).

221. *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. 915 at 919). Interestingly, here, Justice Ginsburg relies on an article by Professor Twitchell for the proposition that general jurisdiction does not simply exist "wherever continuous and systematic contacts are found." *Daimler*, 134 S. Ct. at 761 (citing Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 184 (2001)).

222. *Daimler*, 134 S. Ct. at 763.

D. Sotomayor Concurrence

Justice Sotomayor alone disagreed with the Court's analysis of personal jurisdiction.[223] She recognized the core of the majority's problem: "In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly 'too big to fail'; today the Court deems Daimler 'too big for general jurisdiction.'"[224] Justice Sotomayor eloquently expressed her concern as follows:

> As to substance, the Court's focus on Daimler's operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.[225]

She then began her analysis and critique of the majority opinion. First, although the lower courts use a reasonableness prong when analyzing general jurisdiction, the Supreme Court has never required such analysis, and it does not do so in this opinion.[226] But, since Bauman never argued against the use of the reasonableness prong, it should be considered in this case and left open to decide in future cases.[227] Because Bauman failed to show that it was more reasonably convenient to litigate in California, Justice Sotomayor ultimately agreed with the majority's outcome.[228] However, since the parties were not asked to brief or orally argue whether it was reasonable to litigate in California, Justice Sotomayor criticized the Court's fact-intensive analysis on that issue.[229]

Second, Justice Sotomayor raised the argument that the facts in this case were almost analogous to *Perkins*.[230] She argued that if full briefing had been done on the issue the Court actually decided, all of the contacts attributed to DCAG by way of MBUSA would be enough to satisfy general jurisdiction.[231]

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223. *Id.* at 763–73 (Sotomayor, J., concurring). Despite disagreeing with the Court's analysis of personal jurisdiction, Justice Sotomayor did agree with the Court's ultimate result. *Id.*

224. *Id.* at 763.

225. *Id.*

226. *Id.* at 764–65.

227. *Id.* at 765.

228. Daimler AG v. Bauman, 134 S. Ct. 746, 765 (2014).

229. *Id.* at 766.

230. *Id.*

231. *Id.*

Third, Justice Sotomayor returned to the earlier-articulated tension between Professors Brilmayer and Twitchell.[232] She recognized that when a "corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts."[233] This conclusion touches on the reasonableness of a broader general jurisdiction rule: that "there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one."[234] Just because the *International Shoe* world did not have many corporations the size of Daimler does not mean that the rule laid down in that case is inapplicable now.[235]

Finally, Justice Sotomayor recognized the "deep injustice" that the *Daimler* rule would produce.[236] She gave four reasons why the modern personal jurisdiction jurisprudence produces unfair results. First, it disallows states' adjudication of corporations that have continuous and substantial business operations within their borders.[237] Second, under this new rule, large corporations will escape personal jurisdiction, while smaller businesses will find themselves in court for the same lawsuits.[238] Third, because transient jurisdiction still exists, the lone traveler in a state can be subjected to the jurisdiction of its courts, but a multinational corporation cannot.[239] Fourth, the effect of keeping large corporations out of a state's courts denies harmed individuals the just compensation they deserve.[240] In summary, Justice Sotomayor pointed out many of the problems with the majority's analysis and provided some guidance on crafting a better general jurisdiction rule.

IV. SATISFYING THE *DAIMLER* TEST

Like it or not, the *Daimler* rule is the current test. Therefore, plaintiffs need to know how to satisfy the current requirements of general jurisdiction. In order to help plaintiffs meet these requirements, this section covers a few topics. First, it explains what this new test actually means.

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232. *Id.* at 768.

233. *Id.* Justice Sotomayor then references Professor Brilmayer for the proposition that the focus should solely be on the corporation's interactions with the forum state. *Id.* (citing Brilmayer, *A General Look*, *supra* note 22, at 742).

234. Daimler AG v. Bauman, 134 S. Ct. 746, 770 (2014).

235. *Id.*

236. *Id.* at 772.

237. *Id.*

238. *Id.*

239. *Id.* at 773.

240. Daimler AG v. Bauman, 134 S. Ct. 746, 773 (2014).

Second, it discusses some novel methods of satisfying general jurisdiction, specifically focusing on lower court decisions and the use of internet contacts. Third, it provides a plaintiff's checklist, which may prove helpful for plaintiffs attempting to use general jurisdiction to hale corporate defendants into court.

A. What the Test Actually Means

The good news for plaintiffs is that general jurisdiction still exists.[241] The bad news for plaintiffs is that it has been essentially limited to the factual scenario of *Perkins*.[242] Or, it has at least been limited to those situations in which the contacts in a forum state are equal to or exceed those in *Perkins*.[243] According to the Court, the corporate defendant must be "essentially at home in the forum state."[244]

However, there is some good news for plaintiffs. Specifically, the Court did not reject the agency theory of imputing a subsidiary's contacts to a parent corporation.[245] This means that a plaintiff can use the contacts of a subsidiary to help pull a parent defendant into the forum state.[246] Accordingly, one will need to utilize either the agency or alter ego theory set forth in the Ninth Circuit opinion.

Here is a suggestion for satisfying the current test. First, find as much money changing hands within a state as possible. Then find a way to impute those transactions to a parent corporation. Finally, list as many potential ways the parent company has taken advantage of the privileges of doing business in the forum state. Here you can also rely on the contacts of the subsidiary if they may be properly imputed to the parent corporation.[247]

B. Wiggle Room in the Circuit/District Courts

The next places to look for help in haling a corporate defendant into court under a general jurisdiction theory are (1) malleability in the standard

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241. Although the Supreme Court has significantly narrowed the scope of general jurisdiction, it is still a valid jurisdictional theory. *See id.* at 754–55.

242. *Id.* at 755–56.

243. *Id.*

244. For an analysis of a specific corporation's contacts under the new *Daimler* standard, see Tanya J. Monestier, *Where is Home Depot "At Home"?: Daimler v. Bauman & the End of Doing Business Jurisdiction*, 66 HASTINGS L. J. 233 (2014).

245. *Daimler*, 134 S. Ct. at 758–62.

246. *Id.*

247. Look to Professor Brilmayer here for a much broader survey of case law surrounding the imputation of a subsidiary's contacts to a parent corporation. *See* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction & Substantive Legal Relations: Corps., Conspiracies, & Agency*, 74 CAL. L. REV. 1 (1986).

found by lower courts and (2) the use of internet contacts. Although the use of internet contacts is slightly more controversial, the use of such contacts is increasingly dominating the personal jurisdiction analysis in an internet-saturated world.

1. Interpretations of *Daimler*'s Requirements

Ten federal circuits have considered *Daimler*'s new requirements at length and, for the most part, have not strayed too far from the Court's directives.[248] Perhaps the most restrictive is the Second Circuit. It has said that aside from an exceptional case, "a corporation is at home . . . only in a state that is the company's formal place of incorporation or its principal place of business."[249]

The Fifth Circuit has also considered general jurisdiction in a post-*Daimler* world. Although it did not call general jurisdiction an exceptional case, it recognized that it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."[250] The difference between the Second and Fifth Circuits may lie in the fact that the sheer number of corporate defendants that the Second Circuit encounters makes it less amenable to general jurisdiction from a pure efficiency rationale. Therefore, a plaintiff's chances are better in the Fifth Circuit than in the Second Circuit.

Perhaps because it was reversed in *Daimler*, the Ninth Circuit has also refused to extend general jurisdiction beyond the facts of *Perkins*.[251] It has used the "exceptional case" language from *Daimler* to find that a corporation did not have the requisite contacts in California to support general jurisdiction.[252] Moreover, the Ninth Circuit overlooked Justice Sotomayor's concerns in her concurrence and found that the defendant corporation's contacts in California must be compared with its

248. *E.g.*, Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134–35 (2d Cir. 2014); Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014); Martinez v. Aero Caribbean, 764 F.3d 1062, 1070 (9th Cir. 2014).

249. *Gucci*, 768 F.3d at 134–35 (quoting *Daimler*, 134 S. Ct. at 761). Other notable post-*Daimler* general jurisdiction cases are: Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 225 (2d Cir. 2014); *In re* Roman Catholic Diocese of Albany, N.Y., Inc., 745 F.3d 30, 38–39 (2d Cir. 2014).

250. Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014). *See also In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521 (5th Cir. 2014).

251. *E.g.*, Martinez v. Aero Caribbean, 764 F.3d 1062, 1070 (9th Cir. 2014).

252. *Id.*

worldwide contacts.[253] Thus, a plaintiff's chances for successfully arguing general jurisdiction in the Ninth Circuit are not good.

The most wiggle room may be found in the federal district courts. In *Barriere v. Juluca*, the U.S. District Court for the Southern District of Florida provided some insight into how a plaintiff may properly use the theory of general jurisdiction in a post-*Daimler* world.[254] The court characterized the *Daimler* rule as follows:

> What is clear from *Daimler* is that, for a court to exercise general jurisdiction over a foreign corporation, that corporation must be "at home" in the forum. "At home" can be read to mean "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . *on causes of action arising from dealings entirely distinct from those activities*." While the Court did not expand on the specifics, it noted that it would be possible for a corporation to be "at home" in places outside of its place of incorporation or principal place of business.[255]

The court first noted that the defendant would have been subject to personal jurisdiction before the *Daimler* decision.[256] Then, it found that, although *Daimler* "limited the application of general jurisdiction," it did not eliminate its application altogether.[257] Ultimately, the court determined that *Daimler* did not limit the exercise of general jurisdiction over a foreign corporate defendant.[258] However, it should be noted that other district courts have come out the other way in similar factual circumstances.[259]

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253. *Id.* ("General jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." (quoting *Daimler*, 134 S. Ct. at 762 n.20)).

254. Barriere v. Juluca, No. 12–23510–CIV, 2014 WL 652831, at *6 (S.D. Fla. Feb. 19, 2014).

255. *Id.* at *7.

256. *Id.* at *8.

257. *Id.* at *9.

258. *Id.* It should be noted that there are two factual differences between this case and *Daimler*. First, Florida has an extensive history of using general jurisdiction to hale parent corporations into court when their resort subsidiaries are responsible for injuries to patrons. *Id.* Second, unlike *Daimler*, the subsidiary was a co-defendant in the action, along with the parent company. *Id.* The way around *Daimler* could be found in haling both the parent *and* the subsidiary into court for trial.

259. *E.g.*, George v. Uponor Corp., 988 F. Supp. 2d 1056, 1063 (D. Minn. 2013).

2. Internet Contacts

"The increasing use of the internet for the transaction of business, especially involving the marketing and sale of goods and services, has raised important issues regarding the assertion of personal jurisdiction over foreign companies."[260] This section argues that the use of internet contacts can help satisfy general jurisdiction in a post-*Daimler* world.

First, the use of internet contacts for purposes of general jurisdiction is not a new idea.[261] Most law students in the last decade have encountered the so-called *Zippo* test for internet contacts.[262] This test separates internet websites into three categories: (1) interactive websites, (2) passive websites, and (3) quasi-interactive websites.[263] Contacts from an interactive website will often qualify for specific jurisdiction purposes.[264] On the other hand, contacts from a passive website will never qualify for specific jurisdiction purposes.[265] Finally, contacts from a quasi-interactive website can sometimes qualify for specific jurisdiction purposes.[266] Courts in almost every federal circuit have either used or cited the *Zippo* test in a positive manner.[267] However, circuits are split on whether *Zippo* should apply in the general jurisdiction context.[268]

The most helpful case in this arena is undoubtedly *Gator.com Corp. v. L.L. Bean, Inc.*, from the Ninth Circuit.[269] Although later dismissed as moot, the analysis from the Ninth Circuit has provided extremely helpful guidance in using internet contacts in the general jurisdiction context.[270] The court found that although there were fewer *physical* contacts than were normally required under general jurisdiction principles, the defendant's "extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that, as alleged by [the plaintiff], its website is clearly and deliberately structured to operate as a sophisticated virtual

260. Thomas A. Dickerson et al., *Personal Jurisdiction & the Marketing of Goods & Servs. on the Internet*, 41 HOFSTRA L. REV. 31, 32 (2012).

261. Kristin Woeste, *General Jurisdiction & the Internet: Sliding Too Far?*, 73 U. CIN. L. REV. 793, 799 (2004).

262. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. Woeste, *supra* note 261, at 796 n.17.

268. *Id.* at 799 n.36 (citing Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003).

269. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003), *vacated and rehearing granted en banc by* 366 F.3d 789 (9th Cir. 2004), *dismissed as moot by* 398 F.3d 1125 (9th Cir. 2005).

270. *Id.*

store in California," were sufficient to subject it to general jurisdiction there.[271]

Although other circuits have rejected the *Zippo* test for general jurisdiction,[272] some courts have adopted a compromise.[273] A number of commentators have said that *Zippo* contacts could not satisfy general jurisdiction when the physical contacts are lacking.[274] But it does not appear that the Supreme Court has created two categories of contacts, one for general, and the other for specific jurisdiction. Instead, it has required the following: If the defendant's contacts are related to the underlying controversy, few contacts are needed; if the defendant's contacts are unrelated to the underlying controversy, many contacts are needed. Whether or not those contacts were established via the internet is of no moment.

Although it is a new area of jurisdiction jurisprudence, internet contacts could provide the way forward for the stringent general jurisdiction framework established in *Daimler*.[275] One scholar sums up this new horizon of internet contacts for general jurisdiction like this:

> The test for general jurisdiction needs to be refined such that businesses can plan their Internet activities to reflect the geographical extent to which they wish to be subject to the jurisdiction of foreign fora. With additional clarity to the jurisdictional analysis, businesses can refine their e-commerce policies to comport with the comfort level.[276]

Not only do internet contacts make the general jurisdiction requirement easier to satisfy, but a clearer rule from the Supreme Court could provide both plaintiffs and corporate defendants with the appropriate notice as to the requisite standard.

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271. Woeste, *supra* note 261, at 801–02 (quoting *Gator.com Corp.*, 341 F.3d at 1078).

272. *E.g.*, Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 715 (4th Cir. 2002).

273. Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003).

274. *See* Woeste, *supra* note 261, at 809.

275. For a vibrant discussion of this topic, see the following secondary sources: Charles W. "Rocky" Rhodes, *Rethinking Personal Jurisdiction Over the World-Wide Web*, 52 THE ADVOC. (TEXAS) 53 (2010); Eric C. Hawkins, *General Jurisdiction & Internet Contacts: What Role, If Any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 FORDHAM L. REV. 2371 (2006); Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: the Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005). *See also* Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154 (W.D. Wis. 2004) (discussing the use of internet contacts in general jurisdiction).

276. *See* Woeste, *supra* note 261, at 815.

C. General Jurisdiction Plaintiff's Checklist

This section provides a no-nonsense checklist for a plaintiff attempting to satisfy the new rigorous standard of general jurisdiction in *Daimler*. When filing suit in a particular state against a foreign corporate defendant, use these guidelines to help in your pleading.

(1) Is the defendant incorporated in the state of litigation? If so, general jurisdiction is absolutely allowed.

(2) Is the defendant's principal place of business in the state of litigation? If so, general jurisdiction is absolutely allowed.[277]

(3) Does the defendant have an office, bank account, employees, government contracts, an agent for service of process, corporate meetings, a mailing address, a history of business deals, or other financial connection with the state of litigation? If so, attach evidence of these contacts (and as many as possible) to the initial pleading or to the response brief (in the case of a motion to dismiss for lack of personal jurisdiction).

(4) Does the defendant have a website? If so, look to the *Zippo* test to determine whether the website contacts are sufficient for personal jurisdiction purposes.

(5) Are you lacking access to any of this information? If the defendant files a motion to dismiss for lack of personal jurisdiction, ask for a hefty amount of jurisdictional discovery. This should help unearth the needed evidence to satisfy general jurisdiction.

(6) Remember that, although general jurisdiction is now limited, it is *not* impossible to satisfy. All that is required is evidence of continuous and systematic contacts to the extent that will justify the exercise of personal jurisdiction.

V. A NEW WAY FORWARD

No matter what side of the general jurisdiction debate one falls on, it is easy to see that a new formulation for general jurisdiction is needed.[278] Many of the problems that Justice Sotomayor identified in her *Daimler* concurrence are indeed arising across the corporate litigation landscape in this country.[279] But in addition to the injustices of current general jurisdiction jurisprudence, the current framework is wholly inconsistent with the theory of general jurisdiction articulated in *International Shoe*.[280]

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277. Here, look to the guidance of *Hertz Corp. v. Friend* and use the "nerve center" test. Hertz Corp. v. Friend, 559 U.S. 77, 92–94 (2010).

278. *See* Grossi, *supra* note 16, at 618.

279. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 763–73 (2014) (Sotomayor, J., concurring).

280. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–19 (1945).

This section proposes a new rule for general jurisdiction and then explains the foreseeable impact and justification for such a rule.

General jurisdiction should be defined as follows:

> A court may exercise personal jurisdiction over a defendant via general jurisdiction if the following elements are satisfied: (1) the state's relevant long-arm statute permits the exercise of jurisdiction; and (2) the defendant's contacts evidence a continuous and systematic utilization of the benefits and protections of the forum state to such a degree that the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice.

This rule accomplishes several goals. First, it requires compliance with a state's long-arm statute, which admittedly is an infrequent issue. Second, it utilizes the *contacts inquiry* first established by the landmark decision of *International Shoe*.[281] Third, it incorporates the *reasonableness inquiry* of "fair play and substantial justice" that is evidenced in all personal jurisdiction jurisprudence.[282] Fourth, it focuses on the extent of the defendant's use of the benefits and protections of the forum state. The thinking goes that if a defendant is going to take advantage of a state's amenities and opportunities, it is only fair that such a defendant be subject to suit in the courts of that state. This is called reciprocal fairness.

Such a rule is supported by several concerns voiced in academia and case law regarding properly formulated personal jurisdiction principles. This rule does not ignore the costs associated with a defendant litigating in a foreign forum; rather, the fairness rationale picks up this consideration and includes it in the court's analysis.[283] Furthermore, this test focuses the analysis away from the defendant's ease of litigation and towards the plaintiff's need for relief. Such a shift has been advocated in the world of legal academia.[284] Also, the *Daimler* decision has inordinately shrunk the scope of jurisdictional discovery, thus preventing plaintiffs from finding

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281. *Id.* at 316–17.

282. *See, e.g.*, *Daimler*, 134 S. Ct. at 754 ("The canonical opinion in this area remains *International Shoe* . . . .") (internal citations omitted); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918–19 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952).

283. *See* Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 250 (2014).

284. *See* Kate Bonacorsi, *Not at Home With "At-Home" Jurisdiction*, 37 FORDHAM INT'L L.J. 1821, 1853–54 (2014).

possible connection between a defendant and a forum state.[285] All of these concerns lend credence to the new rule proposed in this article.

CONCLUSION

"The U.S. Supreme Court effected a sea change in general jurisdiction jurisprudence on Jan. 14, 2014, when it issued its decision in *Daimler AG v. Bauman*."[286] As such, many consider American personal jurisdiction law to be in disarray.[287] The Supreme Court has strayed from the principles of general jurisdiction laid out in *International Shoe* and *Perkins*, stripping general jurisdiction of its power and relegating it to a minute position within personal jurisdiction doctrine. Although it is still possible to meet the strict *Daimler* test using lower court decisions and internet contacts, a new test is needed. Such a test would focus on the plaintiff's right to a remedy and the ultimate fairness of exercising jurisdiction. Although this test is still not a bright line, and still fact-intensive, such is the nature of personal jurisdiction. If the scope of general jurisdiction is opened up, the dangers of corporate shadow-games effecting personal jurisdiction will be lessened. And ideally, injured plaintiffs may be able to have their day in court against the parties that are actually responsible rather than a shallow-pocketed subsidiary.

285. Jamin S. Soderstrom, *The Shrinking Scope of Jurisdictional Discovery*, 78 TEX. B.J. 20, 21 (2015).

286. *Id.* at 20.

287. Klerman, *supra* note 283, at 245.