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I. INTRODUCTION

After a series of cases in the 1980s led by *World-Wide Volkswagen Corp. v. Woodson*[1] and *Asahi Metal Industry Co. v. Superior Court of California*,[2] the Supreme Court did not revisit the subject of personal jurisdiction extensively until 2011 when it considered specific jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*[3] and general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown.*[4] Subsequently in 2014, the Supreme Court further discussed the topic in *Daimler AG v. Bauman*.[5] In particular, while discussing personal jurisdiction in both *Goodyear* and *Daimler*, the Supreme Court acknowledged that there could be a potential argument to acquire jurisdiction over out-of-state corporations by piercing the corporate veil.[6] However, the Court never discussed the substance of this veil piercing in the context of jurisdiction because the plaintiffs either forfeited the argument[7] or failed to raise the argument in the first place.[8]

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1. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

2. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987).

3. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

4. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); *see* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) ("[I]t marked for the first time in almost a quarter of a century that the United States Supreme Court engaged in an extended discussion of the minimum contacts test.").

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

6. *Id.* at 759 ("Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego."); *Goodyear*, 131 S. Ct. at 2857 ("In effect, respondents would have us pierce Goodyear corporate veils, at least for jurisdictional purposes.").

7. *Goodyear*, 131 S. Ct. at 2857 ("Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of

Despite the lack of full development of jurisdictional piercing, lower courts have since interpreted *Goodyear* and *Daimler* as positive precedents for the doctrine.[9] This sets the stage for a much-needed exploration of the elephant in the room — jurisdictional piercing.

Jurisdictional piercing is the judicial process under which the separate legal existence of a company is disregarded so as to make a shareholder of the company subject to the personal jurisdiction of a court that it would not otherwise be subject to. At times, the term "jurisdictional veil-piercing" is used instead by courts[10] and scholars.[11] It is similar to, yet different from, piercing the corporate veil as used in a liability context.[12] Traditionally, piercing the corporate veil is mostly used to make the shareholder liable for the debt of the company by asking the court to disregard the limited liability created by the incorporation of a company (hereinafter "liability piercing").[13] In both liability piercing and jurisdictional piercing, the court is asked to disregard the separate legal existence of a company, but the former is for the purpose of busting the limit on liability, while the latter is to extend the limit of jurisdiction of the court from the company to the shareholder. Thus, "liability is not to be conflated with amenability to suit

all Goodyear entities as a 'unitary business,' so that jurisdiction over the parent would draw in the subsidiaries as well. Respondents have therefore forfeited this contention, and we do not address it.") (citations omitted).

8. *Daimler*, 134 S. Ct. at 758 ("While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.").

9. On *Goodyear*, *see e.g.*, Viega GmbH v. Eighth Jud. Dist. Ct. 328 P.3d 1152, 1157 (Nev. 2014) ("Subsidiaries' contacts have been imputed to parent companies only under narrow exceptions to this general rule, including 'alter ego' theory and, at least in cases of specific jurisdiction, the 'agency' theory. The alter ego theory allows plaintiffs to pierce the corporate veil to impute a subsidiary's contacts to the parent company by showing that the subsidiary and the parent are one and the same.") (citations omitted); *see also* Beach v. Citigroup Alt. Invs. LLC, No. 12 Civ. 7717(PKC), 2014 WL 904650, at *10 (S.D. N.Y. Mar. 27, 2014) ("As with a finding of presence for jurisdictional purposes through a corporate parent, a finding of corporate presence through the presence of a parent company to find local harm requires an inquiry analogous to piercing the corporate veil."). On *Daimler*, see NYKCool A.B. v. Pacific Intern. Servs., Inc., 66 F. Supp. 3d 385, 393 (S.D. N.Y. 2014) ("The Court did not express any doubt as to the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes."); *see also* Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221 (2d Cir. 2014).

10. *See, e.g.*, PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163, 172 (Tex. 2007).

11. *See, e.g.*, Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1033 (2004).

12. *See* Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990) ("Liability and jurisdiction are independent.").

13. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) ("'Piercing the corporate veil' refers to the judicially imposed exception to [limited liability] by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own.").

in a particular forum,"[14] and either type of piercing could be raised independently or with one another.[15]

While jurisdictional piercing had never been fully explained by the Supreme Court, it was not exactly a novel concept. As far back as 1925, Justice Brandeis declined to disregard the corporate existence of the Alabama subsidiary of Cudahy Packing Company, a Maine corporation in order to subject the latter to the jurisdiction of North Carolina in *Cannon Manufacturing Co. v. Cudahy Packing Co*.[16] Framing the issue as to whether "the court lacked jurisdiction because the defendant, a foreign corporation was not within the state,"[17] Justice Brandeis made one of the most oft-quoted statements on piercing the corporate veil: "The corporate separation, though perhaps merely formal, was real. It was not pure fiction."[18] Despite not using the term jurisdictional piercing nor even piercing the corporate veil,[19] the Supreme Court clearly analyzed the possibility of extending the North Carolina court's jurisdiction on the concept of piercing the corporate veil. While *Cannon* is still considered valid law,[20] it leaves plenty of question marks over its status in the contemporary jurisdiction regime. In particular, it is not clear whether Justice Brandeis was deciding the matter on federal or state law. Although he said that the case was not based on an interpretation of the Constitution,[21] *Cannon* was decided before *Erie Railroad Co. v.*

14. Am. Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996).

15. *E.g.*, Geanacopulos v. Narconon Fresh Start, 39 F. Supp. 3d 1127, 1135 (D. Nev. 2014) (finding both liability piercing and jurisdictional piercing against out-of-state parent company).

16. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).

17. *Id*. at 336.

18. *Id*. at 337.

19. The court below had drawn analogy to liability piercing, though not using that term. S*ee* Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 176 (W.D.N.C. 1923), *aff'd*, 267 U.S. 333 (1925) ("If the issue I am passing upon were a question of preventing fraud through a corporate fiction or of preventing an escape from just liability, the court would have little trouble in holding that there is such identity between the two corporations as to enable the court to prevent fraud; but while the courts generally have held that they will look through corporate fictions to prevent such fraud or to enforce just liability, yet I know of no case where it has been found that a separate legal corporate entity can have process served upon it and such process take the place of process on some other separate legal corporate entity.").

20. *See* William A. Voxman, *Jurisdiction over a Parent Corporation in its Subsidiary's State of Incorporation*, 141 U. PA. L. REV. 327, 337–38 (1992) ("One sign that the *Cannon* doctrine is still valid is that the Supreme Court has never repudiated it despite having had occasion to do so. In fact, the Court may have implicitly recognized the doctrine's continuing validity in *Keeton v. Hustler Magazine*."). *See also* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 5 (1986) (noting that *Keeton* "may amount, in fact, to an explicit revival of the *Cannon* doctrine").

21. *Cannon*, 267 U.S. at 336 ("No question of the constitutional powers of the State, or of the federal Government, is directly presented.").

Tompkins,[22] thus making it possible for the ruling to be based on federal common law.[23] In addition, the substantive test declared by *Cannon* seems highly formalistic. Despite recognizing that the Maine parent corporation dominated the Alabama subsidiary "immediately and completely,"[24] the court upheld the corporate existence of the subsidiary since its existence as a distinct corporate entity was "in all respects observed."[25] The confusion caused by these questions continues to date, prompting one commentator to describe the law on jurisdictional piercing as "in a state of flux."[26]

Through a carefully designed empirical research on cases decided in the three full years (2012 to 2014) after the decisions of *Goodyear* and *McIntyre*, this article surveys the contemporary practices of the courts on jurisdictional piercing and attempts to determine the right test that courts should apply. To be more specific, this article will explore the following key questions:

1. In what situations is jurisdictional piercing generally applied?
    a. What is the relationship between jurisdictional piercing and liability piercing?
    b. What is the relationship between jurisdictional piercing, agency and direct jurisdiction?
2. How will jurisdictional piercing be applied?
    a. Should state law or federal law govern the jurisdictional piercing question? If it were state law, which state's law?
    b. Should the substantive test of jurisdictional piercing be the same as that of liability piercing?

Section II sets out the background and importance of jurisdictional piercing. Tracing the history of jurisdictional developments in the United States, it highlights the way in which jurisdictional piercing has regained its importance and how it is on the verge of opening a new stage of the jurisdictional regime. The methodology of the empirical research will then be described in Section III. Section IV first goes into detail on each of the aforementioned questions and applies the findings of the empirical research accordingly. Section V makes recommendations to improve the current

22. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). *See* Brillmayer & Paisley, *supra* note 20, at 5 n.26 ("It is well understood since [*Erie*], that federal courts are not free to reexamine state decisions of 'general common law.'").

23. *See* 1 PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS § 24.01, 24-4 (2d ed., 2011–2012) (arguing that *Cannon* was "exclusively concerned with federal law").

24. *Cannon*, 267 U.S. at 335.

25. *Id.*

26. *See* BLUMBERG ET AL., *supra* note 23, at 23-3.

law based on the issues displayed in Section IV. Overall, the article finds that subject to certain justifications, the test for jurisdictional piercing should generally remain in the domain of state law. However, each state should develop a jurisdictional specific test for the purpose of jurisdictional piercing, instead of blindly adopting the liability piercing test.

II. BACKGROUND AND IMPORTANCE OF JURISDICTIONAL PIERCING

Whilst the purpose of this article is not to give a detailed description of the historical developments of personal jurisdiction, some background information is necessary. Generally speaking, personal jurisdiction in the United States has been developed in four stages with the latest stage still in transition beginning with *Goodyear* and *McIntyre*.

A. STAGE 1 – TERRITORIAL JURISDICTION

In *McDonald v. Mabee*, it was stated that: "[t]he foundation of jurisdiction is physical power."[27] This is based on the fact that political power exercised by the courts of a nation in general only goes as far as its borders.[28] Sovereignty and jurisdiction have always gone hand in hand since the start of nations. In the Commentaries on the Conflict of Laws,[29] Justice Story[30] stated that the "first and most general maxim" of conflict of laws is that "every nation possesses exclusive sovereignty and jurisdiction within its own territory."[31] Accordingly, early on, people within the territory of a state were subject to the jurisdiction of the state courts.[32] The assumption of personal jurisdiction was effected through the service of process to a person within the forum, and this remains a valid exercise of jurisdiction to date.[33] The prime case illustrating this form of jurisdiction is

27. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

28. *See generally* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 77–78.

29. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARDS TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834).

30. Justice Story is widely regarded as "the father of the conflict of laws." *See* Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 38 (1935).

31. STORY, *supra* note 29, at 19.

32. *Id.* at 20 ("The sovereign has power and authority over his subjects, and the goods, which they possess within his dominions.").

33. *See* Burnham v. Superior Court, 495 U.S. 604, 610 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

Pennoyer v. Neff.[34]

In that case, Neff tried to recover a piece of land in Oregon from Pennoyer. Relying on a sheriff's deed made upon the sale of the subjected property on execution issued upon a previous default judgment rendered against Neff, Pennoyer claimed that he had valid title.[35] The issue was thus whether the previous default judgment was granted on a valid assumption of jurisdiction when process had not been served on Neff within the state of Oregon.[36] Affirming the key role played by sovereignty mentioned above, Justice Field stated that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[37] He went on to find for Neff. *Pennoyer v. Neff* has since been read as requiring the presence of the defendant within the state for the assumption of personal jurisdiction.[38] Another key development in *Pennoyer* was the inclusion of the due process clause of the Fourteenth Amendment in the jurisdictional analysis. It was stated in the judgment that judgments without proper jurisdiction violated due process of the law under the Fourteenth Amendment.

The same concept of territorial jurisdiction was also reflected in the court's approach in dealing with corporations. For example, in *Bank of Augusta v. Earle*,[39] it was stated that:

> A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation; and cannot migrate to another sovereignty.[40]

Thus, the only forum in which to sue a corporation is its place of incorporation.

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

35. *Pennoyer*, 95 U.S. at 715.

36. *Id.* at 721.

37. *Id.* at 722.

38. International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) ("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 court was prerequisite to its rendition of a judgment personally binding him."). *See also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 (3d ed. 2002) [hereinafter WRIGHT].

39. Bank of Augusta v. Earle, 38 U.S. 519 (1839).

40. *Id.* at 588.

This form of jurisdiction as elaborated in *Pennoyer* and *Bank of Augusta* made sense when there was little travel across state borders and business was mostly confined within the state. However, the economy developed, and it was soon found to be insufficient.

1. Stage 1(a) – Presence and Consent

The rather simple basis of jurisdiction faced enormous challenges during the Industrial Revolution.[41] Gone was the simple world where businesses tended to stay within the borders of a state from manufacture to distribution to consumption. Instead, business activities frequently extended across state borders, creating a need for the court to assume jurisdiction over out-of-state persons.[42] Although not welcomed at first, the increase in national business activities was accompanied by the rise of limited liability companies.[43] Unlike natural persons, legal persons are capable of doing business in multiple states at the same time.[44] This presented a serious challenge to the territorial regime. Instead of asking plaintiffs to travel to the home state of defendants for the lawsuits, it became necessary for courts to develop certain ways to assume jurisdiction over these out-of-state defendants.[45]

Two transitional concepts slowly developed to fill this gap–presence and consent. In connection with presence, a corporation is subject to, other than its state of incorporation, the jurisdiction of a state if "it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."[46] In addition, states also started to require out-of-state corporations doing business in-state to appoint service agents to receive process.[47] This constitutes consent of the out-of-state corporations to be subject to the jurisdiction.[48]

41. *Bank of Augusta*, 38 U.S. at 588.

42. *See generally* WRIGHT, *supra* note 38, at § 1065.

43. *See* Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 DUQ. L. REV. 683, 703 (2012) ("Limited liability statutes were not initially enacted across the United States, because many jurisdictions imposed shareholder liability in a number of areas of law for various causes of action.").

44. *See International Shoe Co.*, 326 U.S. at 316 ("Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its 'presence' without, as well as within, 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.") (internal citation omitted). *See also* WRIGHT, *supra* note 38, § 1066.

45. *Id.*

46. Phila. & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917).

47. *See* SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 32 (2008) ("Many states require foreign corporations, as a condition for doing business in the forum state to appoint a local agent for the receipt of service of process.").

48. *Id.*

Finally, one more possibility is piercing the corporate veil. However, the occasions when such a doctrine was applicable as well as the substantive test were all very uncertain from the beginning. The most important case at the time was of course *Cannon*. As described above, the Supreme Court refused to pierce the corporate veil of the out-of-state Maine parent due to the proper maintenance of corporate formalities between the Alabama subsidiary and the Maine parent. In fact, *Cannon* shows how consent and presence worked together in this transitional era. First, the Alabama subsidiary was subject to the jurisdiction of North Carolina because it did business there and had appointed an agent to receive service of process.[49] This is apparently an illustration of consent. Secondly, if the corporate formalities were not observed, it would then be possible for the court to hold the Maine parent subject to the jurisdiction of North Carolina, thus establishing "presence" of the Maine parent in North Carolina.[50]

Eventually, however, the stop gap measures of presence and consent proved insufficient. Presence was criticized for its lack of substance. In *Hutchinson v. Chase & Gilbert, Inc*.,[51] Justice Learned Hand summarized such criticism succinctly:

> It scarcely advances the argument to say that a corporation must be "present" in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purpose. When we say, therefore, that a corporation may be sued only where it is "present" we understand that the word is used, not literally, but as shorthand for something else.[52]

49. Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 174 (W.D.N.C. 1923) ("[Record] showed that the Cudahy Packing Company of Alabama did business in the states of Alabama, Florida, Kentucky, North Carolina, South Carolina, Virginia, and Tennessee. Frank H. Ross, care the Cudahy Packing Company of Alabama, Charlotte, N.C., was the officer or agent in charge of its business in the state of North Carolina, and upon whom process against the corporation may be served."). Note, however, that the Alabama subsidiary was not a defendant in the case.

50. Throughout *Cannon*, the Supreme Court has been framing the issue as one of presence. *See Cannon*, 267 U.S. at 334–35 ("The main question for decision is whether, at the time of the service of process, defendant was doing business within the state in such a manner and to such an extent as to warrant the inference that it was present there.").

51. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930).

52. *Id.* at 141.

Similarly, the doctrine of consent was criticized by Justice Hand in *Smolik v. Philadelphia & Reading Co*.[53]:

> When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice treats it as if it had. . . . The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.[54]

These all set the stage for the era of minimum contacts in Stage 2.

B. STAGE 2 – MINIMUM CONTACT

Whilst the doctrines of presence and consent helped alleviate the problems by extending the traditional territorial basis of jurisdiction, they were too artificial to truly address problems caused by the increasing inter-state activities. This can be illustrated by the facts of *International Shoe Co. v. State of Washington*.[55]

International Shoe was a company based in Delaware. For years, it had sold shoes in Washington through a team of Washington-based salesmen in order to solicit business there.[56] Instead of setting up a branch at a fixed location in Washington, the salesmen were given "a line of samples . . . which they display[ed] to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rented rooms in hotels or business buildings temporarily for that purpose."[57] In addition, they had no authority to accept orders. All the orders they solicited were to be transmitted to International Shoe's office at St. Louis for approval.[58] The business operations of International Shoe in Washington were organized in such a way only because this meant it could not be considered to have a presence in Washington under the precedents at the time, thus hoping to avoid being sucked into the jurisdiction of the state

53. Smolik v. Philadelphia & Reading Co., 222 F. 148, 151 (S.D.N.Y. 1915).
54. *Smolik*, 222 F. at 151.
55. *International Shoe*, 326 U.S. at 310.
56. *Id.* at 313.
57. *Id*. at 313–314.
58. *Id*. at 314.

of Washington.[59] When the state of Washington sued International Shoe for unpaid taxes, this fact was expected to be its strongest defense.

When the case went to the Supreme Court, the Court saw the case as an opportunity to reinvent the jurisdictional regime by introducing a more common sense approach of minimum contacts. Instead of changing or adding to the presence doctrine, Justice Black proclaimed that a person was subject to the jurisdiction of a court as long as he had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[60] Applying this new minimum contacts doctrine to International Shoe Co., the court found the company's business activities in the state of Washington to have been systematic and continuous and, therefore, had no difficulty finding minimum contacts.[61]

Since *International Shoe*, we have entered into the era of minimum contacts. All the efforts of subsequent courts have been directed towards interpreting and refining what "minimum contacts" mean and whether the conduct of a person fits into that definition. Notably, there have been two important interpretations, namely purposeful availment; and the distinction between specific and general jurisdiction. First, the Supreme Court found that "the constitutional touchstone remains whether [or not] the defendant purposefully established 'minimum contacts' in the forum state."[62] Then the court asks "whether the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[63] With this, the court has injected a mental aspect to the test.

Second, the Supreme Court further subdivides personal jurisdiction into two categories: specific jurisdiction and general jurisdiction. These two categories of personal jurisdiction are based on the reading of *International Shoe*[64] and adopted by the Supreme Court in *Helicopteros Nacionales de Columbia v. Hall*.[65] Specific jurisdiction stands for the kind of personal jurisdiction that "aris[es] out of or relate[s] to the defendant's

59. *International Shoe*, 326 U.S. at 315 ("Appellant also insists that its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction . . . . It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state.").

60. *International Shoe*, 326 U.S. at 316.

61. *Id.* at 320.

62. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 747 (1985).

63. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

64. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–64 (1966).

65. Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984).

contacts with the forum."[66] At the other end of the spectrum, general jurisdiction covers the situation where the suit does not "aris[e] out of or relate to the defendant's contacts with the forum"[67] yet the "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."[68]

Overall, the minimum contacts era firmly establishes the long arm jurisdiction of the courts beyond territorial jurisdiction. Specific and general jurisdictions further set up the spectrum of the types of activities that constitute minimum contacts, be it a one-off act directly related to the suit in question or substantial activities in the forum that are unrelated to the claim. It must also be noted that the minimum contacts test only serves as the outer limit to the state's long arm jurisdiction.[69] States can set out the extent of the long arm jurisdiction they wish to exercise by way of their respective long arm statute as long as it is within the constitutional limit.[70] For example, Ohio does not allow the assumption of general jurisdiction as none of the prongs under the Ohio's long arm statute allows for such a type of jurisdiction.[71] On the other hand, most states have extended their jurisdiction under long arm statutes to the maximum limit allowed under minimum contacts.[72] For these states, the two prongs of jurisdiction analysis (minimum contacts and state long-arm statute) have merged into one and they simply need to apply the minimum contacts test.[73]

Finally, it must be noted that *International Shoe* did not refer to *Cannon* nor jurisdictional piercing in general. However, as far as the particular facts in *Cannon* are concerned, jurisdictional piercing is no longer required under the minimum contacts test. In *Cannon*, the contract which was the subject of complaint was entered into by a Maine parent instead of the Alabama subsidiary.[74] Considering that the dispute arose

66. *Helicopteros Nacionales de Columbia*, 466 U.S. at 414.

67. *Id.*

68. *International Shoe*, 326 U.S. at 318.

69. *See* Le Bleu Corp. v. Standard Capital Grp., Inc., 11 F. App'x 377, 379 (4th Cir. 2001) (North Carolina's long-arm statute "has been interpreted to extend to the outer limits allowed by the Due Process Clause.").

70. *Id.*

71. Conn v. Zakharov, 667 F.3d 705, 717 (6th Cir. 2012) ("Ohio law does not appear to recognize general jurisdiction over non-resident defendants, but instead requires that the court find specific jurisdiction under one of the bases of jurisdiction listed in Ohio's long-arm statute.").

72. *See* BLUMBERG ET AL., *supra* note 23, at 23–29 n.22.

73. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002) ("As Virginia's general long-arm statute extends personal jurisdiction to the fullest extent permitted by due process, the statutory inquiry merges with the constitutional inquiry.").

74. *See Cannon*, 292 F. at 170 ("The transactions out of which the alleged breach of contract in the present case grew had no relation to any activity of the Alabama corporation. The alleged contract was made solely with the packing company, the Maine Corporation . . . and the Alabama Corporation, as

directly from a contract between the Maine parent corporation and the North Carolina plaintiff, the suit should fall squarely within the specific jurisdiction of the North Carolina court. However, what if the Maine parent learned from the case and ring-fenced its jurisdictional exposure by having the Alabama subsidiary enter into the transaction with the North Carolina plaintiff? Will the court still have jurisdiction over the Maine parent? The chess match between the court and the big corporations continues in this latest stage of the jurisdictional development.

1. Stage 2(a) – Jurisdictional Piercing

Minimum contacts appear to solve a large part of the problem that arises from out-of-state companies doing in-state business. However, the outer limit of minimum contacts continues to be a matter of huge controversy. For specific jurisdiction, the biggest problem is what is known as the "stream of commerce."[75] This metaphor represents "an extensive chain of distribution" that the product has been through before reaching the ultimate consumer in product liability cases.[76] If the out-of-state defendant simply sold its products through this stream of commerce through which it would be reasonably foreseeable to land in the hands of the ultimate users in the forum, will that constitute a basis for the assumption of specific jurisdiction by the forum court? In *Asahi Metal Industry Co. v. Superior Court of California*,[77] the Supreme Court was split on that question. Four justices led by Justice O'Connor opined that "the placement of a product into the stream of commerce, without more,"[78] would not be sufficient to establish specific jurisdiction. There must be additional conducts by the defendant that indicate "an intent or purpose to serve the market in the forum State."[79] These include "designing the product . . ., advertising . . ., establishing channels for providing regular advice to customers . . ., or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[80] This is known as the "stream of commerce plus" approach.[81] On the other hand, four

such, is in no way concerned with the merits of the controversy.").

75. This term was mentioned by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

76. *Goodyear*, 131 S.Ct. at 2854–55 (2011).

77. *Asahi*, 480 U.S. at 102.

78. *Id.* at 112.

79. *Id.*

80. *Id.*

81. *See In re* Chinese Manufactured Drywall Prods. Liab. Litig., 894 F. Supp. 2d 819, 844 (E.D.

other justices led by Justice Brennan were of the opinion that the awareness of the defendant of the distribution system along with economic benefits that resulted from the sale would be sufficient for the finding of minimum contacts.[82] The court ultimately agreed to dismiss the case for failing to comply with the reasonableness prong of *International Shoe*. By the time of the trial, the original U.S. plaintiff had already settled with the Taiwanese manufacturer, and the only issue remained in the lawsuit was between the Taiwanese manufacturer and the Japanese component manufacturer.[83] All the justices thus concurred that the assumption of jurisdiction in such a case would not be consistent with the "traditional notions of fair play and substantial justice."[84]

For general jurisdiction, the exact situations in which it would be triggered were still unclear due to a lack of precedents by the Supreme Court. Although the distinction between specific and general jurisdictions was clearly adopted by the Supreme Court in *Helicopteros*, the plaintiff in *Helicopteros* failed to find general jurisdiction.[85] The lone case recognized by the Supreme Court as an example of the exercise of general jurisdiction was *Perkins v. Benguet Consol. Mining Co*.[86] However, the case is rather dated and was decided before the formal adoption of general jurisdiction in *Helicopteros*.

As a result, on June 27, 2011, the Supreme Court took the opportunity to address these problems of specific and general jurisdictions in two separate cases. First, the stream of commerce issue was discussed in *McIntyre*.[87] In that case, a worker was injured in New Jersey whilst operating an allegedly defective machine manufactured by McIntyre UK, a company incorporated and with its principle place of business in the UK. The issue was whether the New Jersey court could exercise specific jurisdiction over McIntyre UK, a company which did not have a branch nor did business directly in New Jersey.[88] In fact, all transactions, including the

La. 2012).

82. *See id.* at 845 ("although [the Japanese manufacturer] did not design or control the system of distribution that carried its valve assemblies into [the forum], the [manufacturer] was aware of the distribution system's operation, and it knew that it would benefit economically from the sale in [the forum] of products incorporating its components").

83. *Asahi*, 480 U.S. at 105.

84. *Id.* at 121.

85. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418 (1984) (finding that helicopter purchases and purchase-linked activity in Texas were insufficient for the assumption of the general jurisdiction against the defendant in Texas).

86. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952) (finding jurisdiction over a Philippine corporation that managed its businesses in Ohio during the Japanese occupation of the Philippine).

87. *McIntyre*, 131 S. Ct. at 2780.

88. *Id.* at 2786.

transaction that brought the machine to New Jersey, were conducted through a separate agent based in Ohio. This Ohio agent was authorized by McIntyre America (hereinafter "McIntyre USA") and served as the exclusive U.S. distributor of McIntyre UK.[89] Other than the sale through McIntyre USA, the only relevant contacts of McIntyre UK consisted of (1) the official of McIntyre UK participating in certain trade exhibitions in Las Vegas, and (2) four machines manufactured by McIntyre UK ending up in New Jersey. Using the stream of commerce metaphor, will the placement of the McIntyre machines through the distribution by McIntyre USA in Ohio and eventually reaching the ultimate user in New Jersey provide the New Jersey court with specific jurisdiction?

Despite the intention to solve the "decades-old questions left open in Asahi,"[90] the Supreme Court once again failed to come to a consensus on the issue. Four justices led by Justice Kennedy held firm to the stream of commerce plus approach and rejected foreseeability on its own as a way of satisfying the purposeful availment requirement for minimum contacts.[91] On the other hand, Justice Ginsburg, in a strong dissenting opinion joined by two other justices, criticized the plurality on a number of points, including the plurality's reliance on outdated doctrines of sovereignty and implied consent.[92] Of particular interest in the discussion of this article, she found minimum contacts against McIntyre UK by highlighting, *inter alia*, the role of McIntyre USA in McIntyre UK's plan to penetrate the U.S. market.[93] However, specific jurisdiction was in the end denied since the remaining two justices in Justice Breyer's concurring opinion simply thought the assumption of jurisdiction would be inconsistent to established precedents but did not agree with the plurality's reasoning.[94] Since the justices failed to reach a majority judgment on stream of commerce, we are left in the exact same position as prior to *McIntyre*. Lower courts that previously adopted the stream of commerce approach have continued to do so after *McIntyre*.[95]

89. *McIntyre*, 131 S. Ct. at 2796.

90. *Id.* at 2785.

91. *See id.* at 2788 ("as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State").

92. *See id.* at 2794–2804 (Ginsburg, J., dissenting).

93. *See McIntyre*, 131 S. Ct. at 2796–2798 (Ginsburg, J., dissenting).

94. *See id.* at 2794 ("I again reiterate that I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.").

95. *See, e.g.*, *Chinese Mfg. Drywall Prods.*, 894 F. Supp. 2d at 849 ("The Fifth Circuit has unequivocally declared its adherence to Justice Brennan's concurrence in *Asahi* and the stream-of-commerce doctrine originated in *World–Wide Volkswagen* . . . . Thus, the Court must reject the 'stream-of-commerce-plus' approach to specific personal jurisdiction in favor of the less stringent

As for general jurisdiction, its application was put to the test in *Goodyear Dunlop Tires Operations, S.A. v. Brown.*[96] In this case, two boys were killed in a traffic accident outside Paris, France. Their parents initiated an action in North Carolina against the subsidiaries of Goodyear in Europe, alleging negligence in the manufacture of defective tires that caused the injury.[97] In contrast with the case in *McIntyre*, the action and injury complained of in *Goodyear* had all happened in France[98] and there was clearly no application of specific jurisdiction.[99] Instead, the plaintiff argued that the defendants should be subject to the general jurisdiction of the North Carolina court for placing their products in the stream of commerce to North Carolina.[100] The Supreme Court rejected this argument as stream of commerce is confined to specific jurisdiction analysis.[101] It also took the opportunity to restate the general jurisdiction doctrine. Most notably, the Court tried to confine the applicability of general jurisdiction to the "home" of the defendant: "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home [such as] place of incorporation, and principal place of business."[102]

The most significant point of the judgment for our purpose, however, is the brief discussion of piercing the corporate veil as a potential alternative to acquiring jurisdiction. As an alternative to the failed general jurisdiction argument, the plaintiff sought to "pierce the corporate veil of the European subsidiaries to impute the contacts of Goodyear to such subsidiaries."[103] Unfortunately, the court regarded the plaintiff as having forfeited the argument and did not discuss the viability nor substantive test

'stream-of-commerce' approach.") (citations omitted).

96. *Goodyear*, 131 S.Ct. at 2846.

97. *Id.*

98. *Id.* at 2852 ("They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers." The only direct connection is "a small percentage of their tires . . . were distributed in North Carolina by other Goodyear USA affiliates.").

99. *Id.* ("Acknowledging that the claims neither "related to, nor . . . ar[o]se from, [petitioners'] contacts with North Carolina," the Court of Appeals confined its analysis to "general rather than specific jurisdiction.").

100. *Id.* at 2854–55.

101. *Id.* at 2855 ("Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. . . . But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.").

102. *Goodyear*, 131 S.Ct. at 2847.

103. *Id.* at 2857.

of the jurisdictional piercing.[104] The court, however, did not reject piercing the corporate veil as a way that could potentially grant jurisdiction to the forum.

Both *Goodyear* and *McIntyre* indicate the new problem the courts face with corporate groups. It is true that the long arm jurisdiction established under *International Shoe* allowed the courts to extend their jurisdiction upstream to reach the out-of-state corporations, which either have *directly* committed the conduct being complained about (specific jurisdiction), or have *directly* conducted such a high volume of activities in the forum that the relatedness thereof does not matter (general jurisdiction). However, the out-of-state manufacturers could simply cut off the reach of the court by setting up a separate subsidiary or agent downstream to handle its affairs in the forum, such as the distribution of the goods. Using the stream of commerce metaphor, setting up subsidiaries essentially builds a dam and blocks the courts from tracing upstream. Whilst the deadlock in the stream of commerce continues post-*McIntyre*, companies are encouraged to utilize sophisticated corporate structures to avoid jurisdictional exposure.

By the same token, suing parent companies at their upstream "home" is equally difficult. As *Goodyear* has shown even though Goodyear is subject to general jurisdiction at its place of incorporation and principal place of business, these fora are not considered as home for its out-of-state subsidiaries. Whilst it is argued that the value of general jurisdiction is to ensure that there will always be at least one forum in which a plaintiff can sue,[105] such alleged value can be substantially dissipated by simply having the subsidiaries do the "dirty work" out of state.

In short, setting up intermediaries that are corporate could effectively stop the plaintiff from pursuing the corporate parent either from the place of act/injury through specific jurisdiction or from the place of incorporation/principal place of business through general jurisdiction. Thus, in the next Supreme Court case on jurisdiction, that of *Daimler AG v. Bauman*,[106] there was a bold attempt by the plaintiff to sidestep the corporate structure through the use of the agency doctrine.

In *Daimler*, a number of Argentinians filed suits in California against Daimler AG, a German company, for its violation of human rights in Argentina during Argentina's "Dirty War."[107] They claimed that California had general jurisdiction over Daimler AG in two ways. First, there was direct general jurisdiction over Daimler AG.[108] Second, there was

104. *Goodyear*, 131 S.Ct. at 2857.
105. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 665–66 (1988).
106. *Daimler*, 134 S. Ct. at 746.
107. *Id.* at 751.
108. *Id.* ("Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is

jurisdiction under an agency theory. The jurisdictional contacts of MBUSA, the subsidiary of Daimler AG in the United States with extensive operations in California, are to be imputed to Daimler AG since MBUSA has served as its agent in California.[109] Both arguments failed. As for the direct general jurisdiction based on Daimler AG's own contacts with California, this failed in the lower court.[110] Thus, the focus of the case was on the agency prong. Under the test approved by the Ninth Circuit, the court should ask whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."[111] This was considered by the Supreme Court to be too broad. If such a test were to be adopted, "[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist."[112]

Further, Justice Ginsburg was of the opinion that even if there was found to be agency between MBUSA and Daimler AG, California still could not be regarded as "home" to Daimler AG.[113] Elaborating on the "home" concept that she developed in *Goodyear*, Justice Ginsburg further narrowed down the potential home that one can make of a corporation. She emphasized that a home could not be found whenever "a foreign corporation's in forum contacts can be said to be in some sense 'continuous and systematic'"[114] but that it must be "'continuous and systematic' as to render [it] essentially at home in the forum State."[115] Accordingly, general jurisdiction does not apply because California is not the state of incorporation nor the principal place of business for either MBUSA or Daimler. It appears that being a large market for one's products and having substantial profits are not sufficient to satisfy the restated general jurisdiction test of Justice Ginsburg.[116]

a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise.").

109. *Daimler*, 134 S. Ct. at 752 ("Alternatively, plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.").

110. *Daimler*, 134 S. Ct. at 752 ("Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation.").

111. *Id.* at 759.

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

113. *Id.* 759–60.

114. *Id.* at 761.

115. *Id.*

116. *Id.* at 766–67 ("MBUSA's California sales account for 2.4% of Daimler's worldwide sales . . . in 2004, which . . . is $4.6 billion.").

Finally, on jurisdictional piercing, Justice Ginsburg recognized that "several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego."[117] Furthermore, the Ninth Circuit's aforementioned agency test was "less rigorous" than the jurisdictional piercing test. Unfortunately, since the jurisdictional piercing was never raised in the proceedings, the Supreme Court again failed to make an authoritative statement on the viability and substance of the doctrine.[118] However, with the Supreme Court rejecting agency[119] as the alternative avenue in acquiring jurisdiction, the confusing status of stream of commerce, and with *Daimler* further narrowing the possible home available for general jurisdiction, jurisdictional piercing appears to be the best hope for expanding the existing jurisdictional reach under due process.

Some lower courts have interpreted the treatment of jurisdictional piercing under *Goodyear* and *Daimler* and have regarded both cases as positive precedents for the doctrine. In *Viega GmbH v. Eighth Jud. Dist. Ct.*,[120] whilst acknowledging that *Goodyear* did not openly approve jurisdictional piercing, the court was of the opinion that *Goodyear* had "impl[ied]," but not "decid[ed]," that an alter ego theory would be appropriate in such a situation.[121] After *Daimler* was decided, the same optimism was expressed in *NYKCool A.B. v. Pacific Intern. Services, Inc.*[122] The court in that case stressed that alter ego, unlike agency, is the appropriate theory in obtaining jurisdiction: "[t]he Court did not express any doubt as to the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes."[123]

On the other hand, other courts took a more neutral stance and simply regarded the new round of Supreme Court cases as not adding any substance to the doctrine. For example, in *In re Chinese Manufactured Drywall Prods. Liab. Litig.*,[124] it was stated that "in the recent Supreme Court cases addressing personal jurisdiction over foreign defendants the Court either declined to address the imputation of minimum contacts between affiliated corporate entities, the issue was not before the Court [in]

117. *Daimler*, 134 S.Ct. at 759.
118. *Id.* at 758.
119. At least as far as the version previously adopted by the Ninth Circuit.
120. *Viega GmbH*, 328 P.3d at 1152.
121. *Id.* at 1157.
122. NYKCool A.B. v. Pacific Intern. Services, Inc., 66 F. Supp. 3d at 385.
123. *Id.* at 393.
124. *Chinese Mfg. Drywall Prods.*, 894 F. Supp. 2d at 819.

Goodyear."[125]

While the law is not clear at this stage, the potential of jurisdictional piercing may be illustrated by the three cases above. First, for general jurisdiction, by disregarding the subsidiary's corporate existence, jurisdictional contacts might be attributed upstream from the subsidiary (MBUSA) to the parent (Daimler AG) or downstream from the parent (Goodyear) to the subsidiary (European subsidiaries). The upstream attribution will not have the aforementioned issue of agency where the agent's home is not significant enough to be the principal's home.[126] This is because jurisdictional piercing will make the parent and subsidiary one entity for the purpose of general jurisdiction. The home of the subsidiary will automatically be the home of the parent. For downstream attribution, jurisdictional piercing also avoids the issue of whether the jurisdictional contacts of the principal could be imputed to the agent.[127] In the terminology of liability piercing, this upstream attribution is regarded as reverse piercing.[128]

Second, for specific jurisdiction, although the court did not even mention piercing as a possible alternative in *McIntyre*, we can still see the potential application of piercing the corporate veil in that very case. Although McIntyre USA was not even a subsidiary and shareholding is usually present in piercing the corporate veil, the majority of states allow for piercing the corporate veil over unrelated companies, at least as far as liability piercing is concerned.[129] For these jurisdictions, shareholding is all but one factor of the piercing question, the lack of which is not fatal to the claim.[130] New Jersey, the forum of the *McIntyre* case, happens to be one of these jurisdictions.[131] Thus, if the control exercised by McIntyre UK over

125. *Chinese Mfg. Drywall Prods.*, 894 F. Supp. 2d at 867 (citation omitted).

126. *See supra* notes 114–115.

127. *See* Brilmayer & Paisley, *supra* note 20, at 19 ("it is more plausible to impute the contacts of the agent to the principal than vice versa. Agents act on behalf of their principals, to whom their activities are attributed. . . . Normally, . . . control is asymmetric, so that it will be easier to show jurisdiction over the principal based upon the agent's actions than the converse.").

128. Admittedly, reverse piercing is not accepted in all states in liability piercing contexts. It is noted, however, that the Supreme Court at least did not reject outright reverse piercing for jurisdictional purposes. *Goodyear*, 131 S.Ct. at 2846.

129. *See* Buckley v. Abuzir, 8 N.E. 3d 1166, 1172, 1176–77 (Ill. App. Ct. 2014) ("[O]ur research shows that the majority of jurisdictions addressing this question allow veil-piercing against nonshareholders . . . . In short, the weight of authority supports the conclusion that lack of shareholder status — and, indeed, lack of status as an officer, director, or employee — does not preclude veil-piercing. Illinois falls in line with the majority.").

130. *See* Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc., 447 A.2d 406, 412 (Conn. 1982) ("[S]tock ownership, while important, is not a prerequisite to piercing the corporate veil but is merely one factor to be considered in evaluating the entire situation.").

131. *See* Hettinger v. Kleinman, 733 F. Supp. 2d 421, 439 (S.D. N.Y. 2010) (finding that nonshareholder status is not dispositive under New Jersey law).

McIntyre USA was so extensive, there was a chance the two companies could be regarded as one for the purpose of jurisdiction.

Looking closer at the lower court's judgment, it seems that there was substantial control applied by McIntyre UK over McIntyre USA:

> [The correspondence between McIntyre UK and McIntyre USA] support the reasonable inference that defendant retained a significant measure of control over the level of McIntyre America's inventory of defendant's machines, which remained defendant's property until McIntyre America sold them to United States customers. It is also reasonable to infer that defendant dictated the "margin" or "commission" McIntyre America would receive when a sale was accomplished. It is thus evident that the two companies were acting closely in concert with each other to sell defendant's machines to customers throughout the United States, through a distribution system in which McIntyre America was a conduit for the sales.[132]

Whether this alleged control will be sufficient to pierce the corporate veil of McIntyre UK remains unclear; it simply shows the possibility under jurisdictional piercing. In the right case, piercing the corporate veil can bridge the gap between the two divisions of the Supreme Court on stream of commerce. The plus factors listed by Justice O'Connor are not exhaustive.[133] Exercising a level of excessive control that could amount to piercing the corporate veil seems to be at least as good a plus factor as designing or marketing the products in the forum.[134]

Potentials aside, the effectiveness of jurisdictional piercing still hinges on the formulation of the courts. For example, if the forum in *McIntyre* were Texas, the lack of shareholding between McIntyre UK and McIntyre USA could be fatal as Texas law regards shareholding as essential in piercing the corporate veil.[135] A bird's-eye view of the key precedents shows highly fragmented approaches among different states, both in their choice of law approaches as well as their attitudes toward adopting the test of liability piercing for the purpose of jurisdictional piercing. These issues are further analyzed in Section IV below.

132. Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 97 (N.J. Sup. 2008).

133. *See supra* note 80.

134. *Id.*

135. *See* Bollore S.A. v. Import Warehouse, Inc., 448 F.3d 317, 325 (5th Cir. 2006) ("The great weight of Texas precedent indicates that, for the alter ego doctrine to apply against an individual under this test, the individual must own stock in the corporation.").

III. METHODOLOGY

A. PURPOSE OF THE EMPIRICAL RESEARCH

The empirical research seeks to analyze all cases decided by the courts in the United States for the three years beginning on January 1, 2012, and ending on December 31, 2014. The purpose of the research is to survey the actual practices of the courts in order to observe trends and tendencies that could shed light on the answers to the four questions stated in the introduction. In essence, it is to seek out those situations where jurisdictional piercing is applicable and the actual test (both choice of law and substantive test) adopted by the courts. It is hoped that constructive proposals could be made after getting to know the full picture from this survey. The full analysis will be set out in Section IV.

B. TIME PERIOD OF THE RESEARCH

As stated in Section II, the jurisdictional regime has entered another stage of development, albeit a transitional one, since the Supreme Court handed down the judgments of *McIntyre* and *Goodyear* in June 2011. This empirical research focused on the recent cases decided since these two judgments. The time period covered starts from 2012, the first full year after *McIntyre* and *Goodyear*, and ends in 2014, the last full year at the time of writing this article.

Whilst this time period admittedly does not account for the full history of development of jurisdictional piercing, it does track the contemporary developments of the doctrine more closely. As indicated in Section II, jurisdictional piercing serves as an alternative to direct jurisdiction test under minimum contacts. The development of the doctrine will therefore inevitably be influenced by the shaping of the mainstream minimum contacts doctrine. In addition, it is also expected that the mention of jurisdictional piercing in *Goodyear*, and subsequently *Daimler*, would inspire developments on jurisdictional piercing in lower courts. In this sense, the research will reflect the current practices more closely and block out unwanted noise from outdated information. It is believed that the three full years from *Goodyear* and *McIntyre* will yield data of the highest relevance and most predictive value.

C. IDENTIFICATION OF RELEVANT CASES

The empirical research looks at three types of cases, namely, piercing cases, conflict cases and jurisdictional cases.

1. Piercing Cases

These are cases that involve a form of piercing, including both liability piercing and jurisdictional piercing. To qualify as a piercing case, the court has to have been asked to decide on whether to pierce the corporate veil in question. The only exceptions are the rare cases where the courts decided on an important question related to piercing, yet were not asked to make a decision at that stage of the proceedings. For example, a case where the court simply decides the applicable law for piercing, i.e., choice of law question, for later proceedings is highly relevant to this research and will be considered as a piercing case.[136] Using the matrix of Table 3 in Section IV, these piercing cases cover cases in Boxes 2, 3 and 4.[137]

These piercing cases are derived from a large pool of raw cases from Westlaw that were found using the search phrases: "piercing the corporate veil" and "disregard! corporate entity."[138] These search phrases are adopted from Professor Robert Thompson's seminal work on empirical research on piercing the corporate veil (hereinafter "Thompson Study")[139] and have been widely adopted in similar pieces of research, including a recent empirical research on the applicable law of liability piercing cases (hereinafter "Choice of Law Article").[140] However, it is acknowledged that some key jurisdictional piercing cases in the past, for example *Cannon*,[141] might not have used these key phrases in their judgments. Additional searches on Westlaw were then conducted to identify cases that had cited the following key cases over the three-year period:

136. *E.g.*, in a case where the court was only asked to decide the governing law of the piercing issue without deciding on whether the veil is to be pierced. That issue was left for trial. *See* Pac. Cycle, Inc. v. PowerGroup Int'l, LLC, No. 12-cv-529-wmc, 2013 WL 5745692 (W.D. Wis. 2013) ("[The defendant] has moved for an order clarifying whether this court will apply Wisconsin or Georgia law in analyzing the question of alter ego liability.").

137. *See infra* Section IV, Table 3.

138. *See* Thompson, *supra* note 13. Thompson also used four undisclosed key numbers.

139. *Id.*

140. *See* King Fung Tsang, *Applicable Law in Piercing the Corporate Veil in the United States: A Choice With No Choice*, 10 J. PRIV. INT'L L. 227 (2014).

141. *Cannon*, 267 U.S. at 333.

- *Cannon*[142]
- *Energy Reserve Group, Inc. v. Superior Oil Co.*[143]
- In re *Teletronics Pacing Sys., Inc*.[144]

In total, 1,587 raw cases were derived from these searches. Each of these raw cases was then reviewed one by one. To ensure the consistency of the review process, all cases were reviewed and processed by the author alone.

2. Conflict Cases

Conflict cases refer to those piercing cases that have a significant relationship to more than one state.[145] In other words, a conflict case must be a piercing case. Common conflict cases include those involving an out-of-state corporation and an out-of-state parent corporation. These are generally regarded as diversity cases. Another common type are "federal question" cases which means those cases that involve federal law.[146] Other cases include, for example, contract cases involving foreign governing law, foreign place of performance or foreign laws and regulations. However, the list is not exhaustive. The aforementioned methodology is identical to the one used for the "Choice of Law Article."[147]

The conflict cases are more important for the analysis than non-conflict piercing cases because they necessarily include the choice of law issue. Conflict cases cover all cases in Boxes 3 and 4 in Table 3 in Section IV,[148] i.e. the jurisdictional cases; and part of the Box 2 cases, i.e., those nonjurisdictional piercing cases with a conflict element.

3. Jurisdictional Cases

These are conflict cases that involve jurisdictional piercing. Due to the involvement of an out-of-state parent or subsidiary, jurisdictional cases

142. *Cannon*, 267 U.S. at 333.

143. Energy Reserve Group, Inc. v. Superior Oil Co., 460 F. Supp. 483 (D. Kan. 1978).

144. *In re* Teletronics Pacing Sys., Inc., 137 F. Supp. 2d 985 (S.D. Ohio 2001).

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971). This definition is derived from section 2 of the Second Restatement ("Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state.").

146. Note that while "diversity cases" and "federal question cases" used herein for the most parts match with the respective definitions under the Federal Rules of Civil Procedures, they are not necessarily identical.

147. *See* Tsang, *supra* note 140, at 232–35.

148. *See infra* Section IV, Table 3.

are necessarily conflict cases. These cases comprise cases in Box 3 (jurisdictional piercing cases with no liability piercing) and Box 4 (jurisdictional piercing cases with liability piercing) in Table 3 in Section IV.[149] All jurisdictional cases are conflict cases as well as piercing cases. Needless to say, they constitute the most important cases for the empirical research.

D. LIMITATIONS OF THE EMPIRICAL RESEARCH

As the research was conducted based purely on decided cases, it was limited by selection bias, that is, "disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of all disputes."[150] In addition, it must be emphasized again that this research only covers the three latest full years and cannot be regarded as giving a full account of all cases on jurisdictional piercing. To provide a contrast with the recent data, data on procedural piercing in the Thompson Study is used in this article.[151] Whilst this article endeavors to replicate the methodology of the Thompson Study, the data contained therein is not individually verified by the author.

IV. THE QUESTIONS AND FINDINGS

There are four important questions to ask when it comes to jurisdictional piercing:

1. In what situations is jurisdictional piercing generally applied?
    a. What is the relationship between jurisdictional piercing and liability piercing?
    b. What is the relationship between jurisdictional piercing, agency and direct jurisdiction?
2. How will jurisdictional piercing be applied?
    a. Should state law or federal law govern the jurisdictional piercing question? If it were state law, which state's law?
    b. Should the substantive test of jurisdictional piercing be the same as that of liability piercing?

149. *See infra* Section IV, Table 3.

150. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

151. *See* Thompson, *supra* note 13, at 1060.

After setting out the background and importance of these questions, the answers derived from the findings from empirical research as described in Section III are given.

Table 1 - Basic Findings, No. of cases

	No. of piercing cases	**No. of conflict cases**	**% of conflict cases in piercing cases**	**No. of jurisdiction piercing cases**	**% of jurisdiction piercing cases in conflict cases**
2012	340	253	63.65%	44	17.39%
2013	348	265	76.15%	32	12.08%
2014	355	292	82.25%	29	9.93%
Total	1,043	810	77.66%	105	12.96%

The initial search in Westlaw yielded 1,587 cases of which 1,043 were piercing cases. The large number of piercing cases demonstrates the continued importance of piercing the corporate veil. For example, compared with the Thompson Study, there were only a total of 484 cases between 1980 and 1985.[152] The annual number of piercing cases remained stable, with a slight increase for each of the past two years.

Among the piercing cases, 810 cases are conflict cases, accounting for 77.66% of all piercing cases. This clearly shows that it is far more common for a piercing case to be a conflict case than a purely domestic one, and thus the significance of conflict of laws consideration in piercing the corporate veil. With corporations preferring to incorporate in states like Delaware and New York and doing business across the country, this is hardly surprising. The percentage of conflict cases also continued to rise, increasing from 63.65% of all piercing cases in 2012 to 82.25% in 2014.

There are 105 jurisdictional cases and these accounted for 10.67% and 12.96% of the piercing cases and conflict cases respectively. It is clear that jurisdictional piercing happened much less often than liability piercing.

152. *See* Thompson, *supra* note 13, at 1048. Yet piercing the corporate veil was already regarded as "the most litigated issue in corporate law." *See id.* at 1037.

However, with more than 100 cases relatively evenly distributed over three years, they still represent a substantial amount and prove that jurisdictional piercing is an established legal doctrine in contemporary jurisprudence. In addition, comparing these with the jurisdictional piercing cases of the Thompson Study, it should be apparent that there has been an increase in jurisdictional piercing cases in the modern era. The Thompson Study only has 141 jurisdictional cases up to 1985,[153] just roughly four times the number of cases in an average year covered by this research.

However, the significance of jurisdictional piercing cases goes beyond the sheer number from both a jurisdictional and liability perspective. First, as discussed in Section II, if the Supreme Court formally adopts piercing the corporate veil as a way to establish jurisdiction and sets out the substantive test, jurisdictional piercing will increase exponentially and open up a whole new horizon for the jurisdictional regime. Second, in regard to liability piercing, jurisdictional piercing successes is determinative to any accompanying liability piercing. If the defendant successfully defeats jurisdictional piercing, the courts will have no jurisdiction and hence no authority to adjudicate on any liability piercing. Thus, success in jurisdictional piercing essentially guarantees success in liability piercing.

However, jurisdictional piercing cases have been on the decline over the past three years, from forty-four cases in 2012 to twenty-nine in 2014. This is a rather interesting development, especially when both the number of piercing cases and conflict cases increased during the same period. One of the explanations could be the rejection of agency as an alternative way to acquire jurisdiction in *Daimler*. Whilst the court was clear that it did not reject jurisdictional piercing, both agency and jurisdictional piercing are a kind of vicarious jurisdiction based on imputing the contacts of the in-state's subsidiary to the out-of-state parent.[154] Rejecting agency, therefore, could have a chilling effect on jurisdictional piercing on lower courts. That said, this might not be the best explanation considering that the big drop in jurisdictional piercing cases predated *Daimler* and started in 2013.

The chilling effect of *Daimler* might arguably be present in the drop in piercing rate as shown below in Table 2.

153. *See* Thompson, *supra* note 13, at 1060.
154. *See* Brilmayer & Paisley, *supra* note 20, at 18–19.

Table 2 - Piercing rate

		Piercing cases	**Conflict cases**	**Jurisdictional cases**
2012	**No. of cases**	340	253	44
	Pierced cases (%)	113 (33.24%)	91 (35.97%)	8 (18.18%)
2013	**No. of cases**	348	265	32
	Pierced cases (%)	133 (38.22%)	105 (39.6%)	15 (46.88%)
2014	**No. of cases**	355	292	29
	Pierced cases (%)	122 (34.37%)	102 (34.93)%	8 (27.59%)
Total	**No. of cases**	1,043	810	105
	Pierced cases (%)	368 (35.28%)	298 (36.79%)	31 (29.52%)

The piercing rate for the piercing cases covered in the research is 35.28%, lower than the 40.18% in the Thompson Study. However, while the relevant piercing rates of conflict cases is similar, at 36.79%, the piercing rate for jurisdictional piercing cases dropped significantly to just 29.52%. This indicates a substantially bigger challenge to piercing the corporate veil in jurisdictional piercing cases. This difference in piercing rates between general piercing cases and jurisdictional piercing cases is also observed in the Thompson Study. The jurisdictional piercing rate there is 36.88% compared with an overall 40.18% of all cases.[155] The

155. *See* Thompson, *supra* note 13, at 1060.

jurisdictional piercing rate of the Thompson Study is higher than the one here but so is the difference between the two studies in overall piercing rate.

The piercing rate dropped from 46.88% in 2013 to 29.52% in 2014. Considering that *Daimler* was decided in January 2014, one could attribute the drop in 2014 almost entirely to *Daimler*. However, the data is limited to just one year in 2014. In addition, we can see that the piercing rate of 2014 is still higher than that of 2012. An argument, therefore, can be made that the 2013 high piercing rate might be just an outlier instead. Further, very few cases covered in the research actually cited *Goodyear* or *Daimler*. Particularly with regard to *Daimler* and those jurisdictional piercing cases that have cited *Daimler* are generally positive on its impact on jurisdictional piercing,[156] it will be interesting to see if the low piercing rate and drop in jurisdictional piercing cases continue.

A. QUESTION 1 – WHAT IS THE RELATIONSHIP BETWEEN JURISDICTIONAL PIERCING AND LIABILITY PIERCING?

Normally, there will be two related companies. As mentioned earlier in the discussion of *McIntyre*, they do not necessarily need to have a shareholding of one another.[157] These will be termed "C1" and "C2" hereinafter. Since the purpose of jurisdictional piercing is to impute jurisdictional contacts from one entity to another, generally only one of them will be subject to the jurisdiction of the forum but not the other. The same goes with liability and we will assume for the purpose of discussion that only one entity is liable or subject to the forum's direct jurisdiction. In addition, one related question is whether the jurisdictional piercing is raised alongside traditional liability piercing. Jurisdictional piercing might be raised together with liability piercing or they might each be raised respectively and independent of each other. Having regard to the above considerations, the exposure of C1 in terms of liability and/or jurisdiction based on its relationship with C2 can be presented in four possible scenarios:

156. *See supra* note 9.
157. *See* Hettinger v. Kleinman, 733 F. Supp. 2d 421, 439 (S.D.N.Y. 2010).

Table 3 - Interactions between jurisdictional piercing and liability piercing[158]

	C1 under forum's jurisdiction	**C2 under forum's jurisdiction**
C1 liable	No JP, No LP **1**	JP but no LP – 80 cases with piercing rate of 26.25% **2**
C2 liable	No JP but LP – 938 cases with piercing rate of 35.93% (conflict 705 cases; non-conflict 233 cases) **4**	JP & LP - 25 cases with JP piercing rate of 40% and LP piercing rate of 28% **3**

The first thing to note from Table 3 is that jurisdictional piercing and liability piercing might not coincide in any given case. Based on the framework in Table 3, we are interested in finding out the answers to the following subquestions:

- How are piercing cases distributed among Boxes 2, 3 and 4?
- How does a case falling into these boxes affect the success rate of piercing?

Each of the four scenarios will be discussed in detail below. Box 1 represents the situation where neither type of piercing is required. In that scenario, C1 (assuming to be the company with assets to satisfy potential judgment) is the only company that committed the act that is complained of and so liability piercing is not triggered. There is also no need to apply jurisdictional piercing since C1 is subject to the direct jurisdiction of the court. This direct jurisdiction can be either general or specific. For example, if C1 is incorporated in New Jersey, it will be subject to the jurisdiction of the New Jersey courts. On the other hand, C2, the related

158. The purpose of the table used here and that of Brilmayer and Paisley's article are different. Their table mainly discusses relationship between jurisdictional piercing and agency. *See* Brilmayer & Paisley, *supra* note 20, at 9.

company, does not enter into the picture either on jurisdiction or liability. Since Box 1 does not involve either type of piercing, it is not a scenario that this article is concerned with and the number of such cases is not known.

In Box 2, there are eighty cases, accounting for just 7.67% of all piercing cases. However, the majority of these are jurisdictional piercing cases, representing 76.19% thereof. Here, the plaintiff resorts to jurisdictional piercing against C1 but does not require liability piercing. If the plaintiff were to pursue jurisdictional piercing against McIntyre UK as we have discussed hypothetically in Section II, it will fit into Box 2. Since the plaintiff only pursued McIntyre UK for products-liability directly, there is no need to conduct liability piercing between McIntyre UK and McIntyre USA.[159] The plaintiff would also have no intention to make it shoulder the potential liability of McIntyre UK anyway since McIntyre USA had been made bankrupt by the time of the lawsuit.[160]

In connection with jurisdiction, since we know that the Supreme Court ultimately rejected the stream of commerce theory, direct jurisdiction over McIntyre UK could not be obtained. Instead, assuming that the control exerted by McIntyre UK over McIntyre USA was excessive and legitimate,[161] jurisdictional piercing could serve as a potential avenue to make McIntyre UK subject to the jurisdiction of the New Jersey court.

The piercing rate of Box 2 cases is 26.25%, slightly lower but still in line with the piercing rate of all jurisdictional cases of 29.52%.

There are twenty-five cases in Box 3. Box 3 requires both types of piercing as represented by the darkest shading in Table 3 above. Assuming now that McIntyre UK was just a holding company based in England, and the defective machine was manufactured and sold by McIntyre USA, it will be necessary for the plaintiff to pursue both jurisdictional and liability piercing. Technically, these are two separate exercises. Depending on the respective tests under jurisdictional piercing and liability piercing, it is possible that piercing might be successful regarding jurisdictional piercing but not liability piercing.[162] For example, if the court applies a more lenient standard for the jurisdictional piercing, the plaintiff might be successful in requiring the defendant to defend the lawsuit in New Jersey. However,

159. *McIntyre* is a products-liability case against the manufacturer, McIntyre UK. McIntyre USA, the distributor, was not a defendant in the case as it had been bankrupt at the time of the proceeding. *See Nicastro*, 945 A.2d at 97 (N.J. Super. 2008) ("McIntyre Machinery America, Ltd . . . was defendant's exclusive distributor in the United States prior to going bankrupt in 2001.").

160. *Id.*

161. *See id.* at 108.

162. Of course, if the tests for the two types of piercing are the same, one might argue for only needing one exercise of piercing for both purposes.

should the court apply a more demanding standard on liability piercing, the case will still fail and leave the plaintiff without any compensation.[163]

Since each of the cases in Box 3 has two sets of piercing, there are two piercing rates. The piercing rate of jurisdictional piercing in Box 3 is 40% which compares to just 26.25% in Box 2. Thus, the observation is that the courts are more likely to pierce the corporate veil in a jurisdictional context when liability piercing is raised in the same case. However, any strategic benefits gained by the plaintiff are moot since the liability piercing rate of Box 3 cases is 28%, not far from the 26.25% of the Box 2 jurisdictional piercing. From the perspective of the defendant, as long as one of the two piercings is successful, it will not be liable. This might explain the small number of cases involving both jurisdictional and liability piercing in Box 3. As we will see below, this will have an impact on our analysis of the test of jurisdictional piercing.[164]

Finally, there are 938 cases in Box 4 with a piercing rate of 35.93%. Breaking it down further, there are 705 and 233 conflict cases and nonconflict cases respectively. Box 4 is the opposite of Box 2. There is no need for jurisdictional piercing, but a need for liability piercing. Further, changing the facts of *McIntyre* could help illustrate this case. It is assumed first that McIntyre UK and McIntyre USA were both New Jersey corporations and, second, that McIntyre USA was the business unit that manufactured the machine with McIntyre UK being a holding company. For the plaintiff to get any financial compensation, he will have to pierce the corporate veil of McIntyre USA in order to reach McIntyre UK since McIntyre USA is bankrupt. On the other hand, since both corporations are subject to the general jurisdiction of the New Jersey courts, there will be no need for jurisdictional piercing. This case did not involve jurisdictional piercing nor did it involve conflict of laws. Everything happened in New Jersey and all parties were based in New Jersey.[165]

Having regard to the above, it appears that we are most interested in Boxes 2 and 3, as both involve jurisdictional piercing. However, cases covered in Box 4 could still be relevant even if they only involve liability piercing. This is because a large percentage of jurisdictional piercing cases

163. The reverse case, that is, success in liability piercing and failure in jurisdictional piercing, is more difficult to comprehend. If the plaintiff fails jurisdictional piercing in the first place, the court will be without jurisdiction to adjudicate the liability issue.

164. *See infra* note 173.

165. However, it is possible to have a conflict of law case affecting liability piercing, but does not involve jurisdictional piercing. For example, if we keep McIntyre USA as an Ohio corporation, there will still be general jurisdiction over McIntyre UK, and hence no need for jurisdictional piercing. But in terms of which law governs the liability piercing issue, there will be a choice of law issue. The court may have to decide whether to apply Ohio law, the state of incorporation of McIntyre USA, or New Jersey law, the law of forum.

actually borrow their tests from liability piercing as we will see in the discussion of Question 3 below.[166]

B. QUESTION 2–WHAT IS THE RELATIONSHIP BETWEEN JURISDICTIONAL PIERCING, AGENCY AND DIRECT JURISDICTION?

As *Daimler* has shown,[167] plaintiffs often endeavor to acquire jurisdiction over the out-of-state parent by both direct jurisdiction (either general or specific) and by other forms of vicarious jurisdiction (agency and/or jurisdictional piercing). Question 2 explores the relationship between direct jurisdiction and jurisdictional piercing. The following sub-questions are derived from the framework in Table 3:

- Are the jurisdictional piercing claims accompanied by a direct jurisdiction claim under traditional minimum contacts theory and/or agency?
- How does the availability of direct jurisdiction claim affect the piercing rate?

Both Questions 1 and 2 are important because they could affect the plaintiff's strategic decision in formulating his/her jurisdictional piercing argument.

166. One could also argue that liability piercing is per se relevant to jurisdictional piercing, since piercing is a concept that originated from liability piercing.

167. *See supra* notes 108–109 and accompanying text.

Table 4 - Relationship with direct jurisdiction and agency

	Jurisdictional piercing only	**Jurisdictional piercing with direct jurisdiction**	**Jurisdictional piercing with agency**	**Jurisdictional piercing with direct jurisdiction and agency**
No. of cases	42	45	4	10
Piercing cases	18	8	2	2
Piercing rate	42.86%	17.78%	50%	20%
Cases with jurisdiction	42	10	2	3
Success rate of finding jurisdiction	42.86%	22.22%	50%	30%

Table 4 shows the extent of the impact on the piercing rate of both finding piercing and jurisdiction by having a direct jurisdiction discussion under the minimum contacts test and/or agency in the same case. All jurisdictional cases are divided into the four categories in Table 4 based on the type of jurisdictional discussions by the court in each case. For the interests of the plaintiff, it does not matter under what basis the court acquires jurisdiction against the defendant as long as one of the bases succeeds. Accordingly, apart from showing the jurisdictional piercing rates under each category, the overall success rates of finding jurisdiction are also included. The distribution of simple jurisdictional piercing cases and those with additional arguments are about even, with forty-two simple cases and sixty-nine cases with additional arguments.

There are two interesting findings from Table 4. First, one may have assumed that arguing for multiple bases of jurisdiction will increase the

chances of success in finding jurisdiction. That is true but only to a very limited extent. The additional arguments only amount to three more successful cases in finding jurisdiction among the three categories with additional arguments, namely, two and one for raising additional arguments of direct jurisdiction and agency/direct jurisdiction.

Second, simple jurisdictional piercing cases with no additional arguments have a much higher success rate. Compared with the ultimate jurisdiction success rate of the other three categories combined together, simple jurisdictional piercing cases have a 42.86% piercing rate, more than just 25.42% of the combined categories. In addition, it is also higher than the general piercing rate of all jurisdictional cases (29.52%).

The best explanation for this is probably that the courts do not need to analyze other grounds for jurisdiction when there is a successful and winning argument in jurisdictional piercing. On the contrary, if the jurisdictional piercing argument is weak, both the plaintiff and the court will need to analyze the other bases. Whilst these additional bases may help at times, they are not generally sufficient to save a weak case. In conclusion, more than anything, the additional bases for jurisdiction are just signs of weakness in the jurisdictional piercing claim. Like raising liability piercing in the same case, more may not be better when it comes to jurisdictional piercing.

C. QUESTION 3 – SHOULD STATE LAW OR FEDERAL LAW GOVERN THE JURISDICTIONAL PIERCING QUESTION? IF IT WERE STATE LAW, WHICH STATE'S LAW?

The third question is in essence a choice of law question. Here, there are two levels of considerations. First, when a state court[168] is faced with a jurisdictional piercing question, does it have authority to decide the governing law? In other words, if jurisdictional piercing, like liability piercing,[169] is a state law matter, the states will be free to adopt their own governing law. However, if jurisdictional piercing, perhaps because of its strong connection and significant impact on jurisdiction, is a federal law matter, then the state courts will have no choice but to apply federal law.

Second, if jurisdictional piercing is a state law matter, the next level of consideration is which state's jurisdictional piercing law will the state

168. For the purposes of this article, federal courts sitting in diversity cases are also regarded as state courts.

169. *See* Tsang, *supra* note 140, at 227–28. Liability piercing is largely a corporate law matter, though it is possible for state courts to apply federal common law, especially for liability piercing relating to federal statutes. However, the application of federal common law in liability piercing is more a choice by the respective state courts than a federal mandate. *Id.* at 257–58.

courts apply. If liability piercing is any indicator, it has been found that the choice of law approaches of state courts vary.[170] Whilst it was widely believed that liability piercing applies the law of the state of incorporation,[171] a previous survey indicates that it is more of a mixed bag with the law of forum being a much more popular choice in practice as far as liability piercing is concerned.[172] It will be interesting to see whether the choice of law approach in jurisdictional piercing resembles that of liability piercing.

Table 5 - Choice of law between state and federal laws

	State	**Federal**
No. of cases	86	19
Pierced cases	25	6
Piercing rate	29.07%	31.58%

The first thing to notice is the predominant number of cases applying state law. This means that most courts in the United States view the choice of law question as one that is in the domain of the states. There are only eighteen cases that applied federal law. That indicates that only 18.10% of courts believe there could be only one federal test for jurisdictional piercing. Thus, it is obvious that there are clear preference in adopting state law. The convenience and familiarity could be a big factor, especially in cases where both jurisdictional and piercing issues have been raised in the same case. As we have seen though, the number of these cases is not as sizeable as one might have thought.[173]

It can also be argued that the states should make a decision as to which law to apply having regard to the current jurisdictional regime. As discussed in Section II, the jurisdictional analysis is a two-prong analysis involving first the minimum contacts test under *International Shoe* and second the state long arm statute.[174] In order to establish jurisdiction, theoretically, all courts must satisfy both prongs.[175] Whilst the majority of states collapse these two prongs into one when they interpret the reach of

170. *See* Tsang, *supra* note 140, at 253.
171. *See id.* at 227–28.
172. *See id.* at 254.
173. Less than one-fourth of all jurisdictional cases. *See supra* Table 3.
174. *See Young*, 315 F.3d at 261.
175. *Id.*

their long arm statutes to the maximum extent allowed under minimum contacts,[176] it is a choice of the state and one cannot deny the fact that states are stakeholders in the exercise of jurisdiction. As shown in Table 6 below, jurisdictional piercing was discussed by the courts in 21.90% of cases when the courts were solely considering the state's long-arm statute and not in the discussion of the federal due process issue.

Table 6 - Stages at which jurisdictional piercing is considered

State long-arm statute	23 (21.90%)
Due process: general & specific	1 (0.95%)
Due process: general	10 (9.52%)
Due process: specific	19 (18.10%)
Due process: unclear	30 (28.57%)
Unclear	22 (20.95%)
Total	105 (100%)

Second, it is perhaps more important to understand how the rule of jurisdictional piercing, as decided by a state, could be consistent with minimum contacts as Section II discusses how minimum contacts test has become the gold standard of jurisdictional analysis since *International Shoe*. With minimum contacts being a federal standard based on the interpretation of the due process clause, it seems at first glance that it will not be compatible with the state jurisdictional piercing standard. However, the key to reconciling the two lies in the nature of jurisdictional piercing. As explained by the court in *Great American Duck Races, Inc. v. Intellectual Solutions, Inc.*,[177] "[t]he theory behind finding personal jurisdiction in such alter-ego situations is that, because the corporation and individual are considered to be the same entity, the jurisdictional contacts of one are the jurisdictional contacts of the other for purposes of the due process analysis."[178] In other words, instead of providing a separate and

176. *See Young*, 315 F.3d at 261.

177. Great Am. Duck Races, Inc. v. Intell. Solutions, Inc., No. 2:12-cv-00436 JWS, 2013 WL 1092990, at *1 (Ariz. D. Mar. 15, 2013).

178. *Id.* at *2.

competitive standard like the now faded theory of "presence," jurisdictional piercing simply works to interpret who is the person/entity that is subject to the standard of minimum contacts. Jurisdictional piercing, therefore, works with minimum contacts instead of trying to bypass it. Accordingly, a number of courts have endorsed the compatibility of jurisdictional piercing and due process:

> Federal courts that have considered the issue conclude that it is compatible with due process for a court to exercise personal jurisdiction over an individual . . . that would not ordinarily be subject to personal jurisdiction in that court when the individual . . . is an alter ego . . . of a corporation that would be subject to personal jurisdiction in that court.[179]

A corporation is a creature of state law[180] and so it makes sense for the states to define what it is, including when such artificial existence is to be disregarded. As Brilmayer and Paisley argue, "[t]he substantive relations that enter into due process calculations are primarily a matter of the law that creates the cause of action, usually state law. The due process clause does not itself create notions of agency, conspiracy, and the like."[181] Accordingly, it can be argued that on the choice of law question, a state retains the authority to decide which is the test to apply for jurisdiction as much as for liability.

Once it is established that the states have autonomy on the choice of law question, it is up to each state to find out for itself the choice of law rule it prefers, much like liability piercing. To some states, that means the law of the state of incorporation.[182] For others, it may be the law of the forum.[183]

179. *Great Am. Duck Races*, 2013 WL 1092990, at *2; *see also* Pro Tanks v. Midwest Propane & Refined Fuels, LLC, 988 F. Supp. 2d 772, 781 (W.D. Ky. 2013) ("This Court believes when the unique circumstances for a corporate veil piercing and/or alter ego determination are met the proper question is not whether the parent has minimum contacts with a jurisdiction. To the contrary, the proper question is whether the parent *and/or* the subsidiary have minimum contacts, because the parent is essentially one in the same with the subsidiary—it is its 'alter ego.'") (emphasis original).

180. *See* Soviet Pan Am. Travel Effort v. Travel Comm., Inc., 756 F. Supp. 126, 131 (S.D.N.Y. 1991) ("Because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away.").

181. *See* Brilmayer & Paisley, *supra* note 20, at 25.

182. *See* John Guidry v. Seven Trails West, LLC, No. 4:12CV1652 FRB, 2013 WL 1883192, at *1, *5 (E.D. Mo. D. May 6, 2013) ("Such assertion of personal jurisdiction over the nonresident defendant . . . is contingent upon the ability of the plaintiffs to pierce the corporate veil. The law of the state of incorporation determines whether and how to pierce the corporate veil.").

183. *See* Estate of Thomson *ex rel.* Estate of Rakestraw v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008) ("In applying the alter-ego theory of personal jurisdiction in this diversity

Due to the fact that, essentially, most states view jurisdictional piercing cases as a state law matter, this makes the next choice of law question — which state's law governs the jurisdictional piercing — even more important. Table 7 sets out the different approaches adopted to decide that question:

Table 7 - State's choice of law approach

Approaches	**Jurisdictional piercing (state law)**	**Percentage of jurisdictional cases**	**Conflict cases[184]**	**Percentage of conflict cases**
Law of incorporation of subsidiary	7	8.14%	102	12.59%
Law of incorporation of parent	1	1.16%	4	0.49%
Law of forum	11	12.79%	45	5.56%
Law of underlying claim	2	2.33%	41	5.06%
Interest analysis	1	1.16%	2	0.25%
Law with the most significant relationship	0	0%	11	1.36%
No specified approaches	60	69.77%	531	65.56%
Same	2	2.33%	45	5.56%

action, we must look to Ohio law.").

184. Since nonconflict cases have no choice of law concern, they are excluded from this analysis.

(Table 7 continued- State's choice of law approach)

Consent	2	2.33%	28	3.46%
Others	0	0	1	0.12%
Total no. of conflict cases	86	100%	810	100%

The point that stands out most from Table 7 is not that a particular approach dominates the states' choice of law approaches, but that none does. The majority of cases have no choice of law analyses applied thereto during the adjudication process. 69.77% of jurisdictional piercing cases that applied state laws have not gone through choice of law analysis. This is similar to the high percentage of general conflict cases (65.56%) that did not do the same. It is therefore more important to look at the law actually applied by the courts, including the majority cases where there was no choice of law analyses.

Table 8 - Application of forum law

	Jurisdictional piercing (state law)	**Conflict cases**
Applied forum law	73	687
Percentage of forum law application	84.88%	84.81%
Applied non-forum law	13	123
Percentage of non-forum law application	15.12%	15.19%
Total cases	86	810

It is clear from Table 8 that, like liability piercing cases, jurisdictional piercing cases essentially have the law of the forum applied to them at the end, whether there is choice of law analysis or not. The most significant

differences between the two categories of cases are that jurisdictional piercing prefers law of the forum even more, accounting for 12.79% of jurisdictional piercing cases compared with just 5.56% of conflict cases; and has even less reliance on the law of the state of incorporation, accounting for only 8.14% of jurisdictional piercing cases compared with 12.59% of conflict cases (see Table 7). This is probably due to the much stronger connection and interest that the jurisdiction has with the forum. Unlike liability piercing, where the focus is between the parties, the emphasis on a relationship between a forum and the defendant seems to have a significant impact on the courts' choice of law approach.

D. QUESTION 4 – SHOULD THE SUBSTANTIVE TEST OF JURISDICTIONAL PIERCING BE THE SAME AS THAT OF LIABILITY PIERCING?

The fourth question asks what the substantive test should look like. Should it just be identical to the traditional corporate law tests adopted in liability piercing? Or should there be a specifically designed test customized for the purpose of jurisdictional piercing?

Traditionally, piercing the corporate veil is a liability concept. According to Professor Frederick Powell, the most common test used for liability piercing consists of a three-prong test: (1) excessive control, (2) fraud or injustice and (3) proximity to injury.[185]

Although the actual tests applied by the states vary, they are, nonetheless, mainly a mixing and matching of the two key components: control and fraud.[186] Generally, both components are required but there are also cases where they are used in a disjunctive sense.[187] On the other hand, should jurisdictional piercing have its own test? How relevant should elements of control and fraud play in this jurisdictional specific formula? The relationship between jurisdictional piercing and liability piercing as discussed in Question 1 is therefore highly relevant.

185. *See* FREDERICK J. POWELL, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY (1931).

186. *See* Tsang, *supra* note 140, at 245.

187. *Id.*

Table 9 - Liability test vs. jurisdictional specific test[188]

	Jurisdictional specific test	**Liability test**
Number of cases	37	64
Number of pierced cases	13	19
Piercing rate	35.14%	29.69%

The majority of jurisdictional cases have adopted the same liability test instead of creating a jurisdictional specific test. Further, in Table 9, the piercing rate of liability test (29.69%) is almost identical to the general piercing rate of the jurisdictional piercing (29.52%). However, the jurisdictional specific test has a much higher piercing rate than both the liability test and the general piercing test (35.28%). The reason for this discrepancy seems to be the treatment of fraud element.

It has been argued that the test for jurisdictional piercing should not be as demanding as liability piercing. In *Marine Midland Bank, N.A. v. Miller*,[189] it was said that "[u]nlike piercing the corporate veil, it is not necessary to show "that the shell was used to commit a fraud."[190] Alternatively, courts have said that either establishing excessive control or fraud can succeed for jurisdictional piercing. For example, in *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*,[191] Justice Kaplan was of the opinion that the control factor alone could be sufficient for jurisdictional piercing:

> New York law allows the corporate veil to be pierced *either* when there is fraud or when the corporation has been used as an alter ego. The latter normally requires a showing of . . . complete control by the dominating corporation that leads to a wrong against third parties. But this standard is relaxed where the *alter ego* theory is used not to impose liability, but merely to establish jurisdiction. In such an instance, the

188. There are only 101 cases in the Table. This is because there are four cases that did not actually specify the test.

189. Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981).

190. *Id.* at 904.

191. Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd., 475 F. Supp. 2d 456, 458 (S.D.N.Y. 2007).

> question is only whether the allegedly controlled entity was a shell for the allegedly controlling party; it is not necessary to show also that the shell was used to commit a fraud.[192]

A piercing test that only needs to satisfy one factor (control) is clearly much easier for the plaintiff than one with two factors (control and fraud). This more lenient approach is reflected in those cases that have applied the jurisdictional specific test.

Table 10 - Reason for failure in jurisdictional piercing

	Jurisdictional specific test	**Liability test**	**Total**
Control, fraud and proximity	0 (0.00%)	1 (2.22%)	1 (1.45%)
Control and fraud	1 (4.17%)	14 (31.11%)	15 (21.74%)
Just fraud	2 (8.33%)	7 (15.56%)	9 (13.04%)
Just control	18 (75.00%)	13 (28.89%)	31 (44.93%)
Insufficient facts	0 (0.00%)	6 (13.33%)	6 (8.70%)
No application	3 (12.5%)	4 (8.89%)	7 (10.14%)
Total	24 (100.00%)	45 (100.00%)	69 (100.00%)

Table 10 shows the reason why piercing failed according to the courts. There are sixty-nine failed piercing cases where the courts had set forth the jurisdictional piercing tests. These cases are further divided between those that adopted a jurisdictional specific test and a liability test. Fraud is a factor for 48.89%[193] of cases adopting a liability test while only accounting for 12.5% of cases adopting a jurisdictional specific test. Cases that failed entirely due to the lack of fraud account for 15.56% of liability test cases although only 8.33% of jurisdictional specific test cases. In addition, even if same factors are to be considered for both tests, there are suggestions that they should be considered under a more lenient standard in a jurisdictional

192. *Equity Partners*, 475 F. Supp. 2d at 459 (internal quotation marks omitted) (emphasis original).

193. Calculated by combining the categories of "Control, Fraud and Proximity," "Control and Fraud," and "Fraud only" in the Liability piercing column.

context rather than a liability context.[194]

Having discussed the more lenient standard found in the jurisdictional specific test, the question is why there should be a different standard from liability piercing and how having a lower standard can be justified. It is first necessary to consider the differences between the purposes of the two types of piercing. The purpose of jurisdictional piercing is to make the parent company subject to the jurisdiction of the forum whereas the purpose of liability piercing is to make it subject to the debt of the subsidiary. The former asks whether it is fair to require the out-of-state defendant to travel to the forum to defend itself[195] while the latter asks whether it is fair for the shareholder to be responsible for the liability of the company.[196] In other words, one examines "the relationship between the defendant, the forum, and the litigation,"[197] and the other examines the relationship between the shareholder and company (the control factor)[198] as well as the relationship between the shareholder and plaintiff (the fraud factor).[199] This point is succinctly presented by Professor Blumberg: "[b]ecause the powerful influence of limited liability, creating additional pressures opposed to any attribution of substantive liability, is entirely absent in the case of amenability to jurisdiction, one might suppose that more relaxed standards of piercing would apply."[200]

Simply put, jurisdictional piercing aims to make the shareholder come to the forum; it is several steps away from making it liable for the liability of the company. Under this approach, for cases where both piercings are alleged by the plaintiff, it remains a two-prong process: first a more lenient standard for jurisdictional piercing, followed by a more stringent liability piercing.

By combining the two variables under Questions 3 and 4, we can derive four categories of potential test to be adopted for jurisdictional

194. *See* Miramax Film Corp. v. Abraham, No. 01-CV-5202(GBD), 2003 WL 22832384, at *7 (S.D.N.Y. Nov. 25, 2003) ("The standard for piercing the corporate veil for purposes of obtaining jurisdiction is a less stringent one.").

195. *See International Shoe Co.*, 326 U.S. at 316 (Ultimately, International Shoe asks whether there exist minimum contacts that will satisfy "traditional notion of fair play and substantive justice.").

196. *See* Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982) ("In general, federal courts accord separate corporate entities great deference and will disregard the corporate form only in limited circumstances 'when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation.'").

197. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) ("[T]he relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction.").

198. *See* Gieseke *ex rel.* Diversified Water Diversion, Inc. v. IDCA, Inc., 826 N.W.2d 816, 830 (Minn. Ct. App. 2013) ("The first prong of the test focuses on the shareholder's relationship to the corporation.").

199. *Id.* at 831 ("The second prong of the test examines the relationship of the plaintiff to the corporation.").

200. *See* BLUMBERG ET AL., *supra* note 23, at § 25.05[A].

piercing. These are set out in Table 11.

Table 11 - Possible jurisdictional tests

	State law	**Federal law**
Liability test	60 cases with piercing rate of 26.67% **1**	4 cases with piercing rate: 25% **3**
Jurisdiction specific test	23 cases with piercing rate of 43.48% **2**	14 cases with piercing rate of 21.43% **4**

Each of the four categories will be examined in more detail below.

1. Category 1

Courts adopting the approach of Category 1 essentially handle jurisdictional piercing the same way they do liability piercing both in terms of choice of law and the substantive test. Since jurisdictional piercing borrows the concept from liability piercing and applies it to the jurisdictional context,[201] it is not surprising that courts will simply apply the same test to both the choice of law question and the substantive test.

First, on the choice of law question, it can be argued that the states should make the decision as to which law to apply having regard to the current jurisdictional regime.

The argument is that if a parent company is found by the court to have exercised such dominance and excessive control over its subsidiary to defraud the plaintiff or otherwise subject him/her to injustice, there is no reason why that parent company should not be regarded as the same entity as the subsidiary for both the purposes of liability and jurisdiction.[202] Following this approach, the jurisdictional piercing and liability piercing

201. *See supra* note 19 and accompanying text.

202. *See* Cardell Fin. Corp. v. Suchodolski Assocs., No. 09 Civ. 6148, 2012 U.S. Dist. LEXIS 188295, at *47–48 (S.D.N.Y. July 17, 2012) ("On an alter-ego claim for liability, the corporate veil will be pierced if a plaintiff can demonstrate that 'the alleged dominating party exercised complete domination over the corporation with respect to the subject transaction and that such domination was used to commit a fraud or other wrong which injured [the] plaintiff.'").

will effectively be merged into one piercing for those cases alleging both piercing. Thus, if the court accepts a plaintiff's jurisdictional piercing claim, there will be no need to undergo the same piercing test for a liability purpose.[203]

The data in Table 11 are clearly a huge vote of confidence in the approach of Category 1. This is not surprising considering that liability cases are the mainstay of the piercing regime. When jurisdictional piercing only accounts for less than one-tenth of all piercing cases, it is expected that courts may be influenced by the more traditional liability piercing and simply use the same test for both purposes. This is also reflected by the lack of in-depth analysis why Category 1 is to be adopted among cases choosing the Category 1 approach.

Epps v. Stewart Information Services Corp.[204] is an example of a Category 1 approach and is one of the most cited cases on jurisdictional piercing decided by the Court of Appeal of the Eighth Circuit.[205] The case involved a class-action against a nonresident holding company based on the Real Estate Settlement Procedures Act and the defendant sought to dismiss the case due to the lack of personal jurisdiction. In this case, the defendant was the only named defendant in the suit and there was no issue of liability piercing.[206] In addition, the defendant was incorporated in Delaware, had no place of business in Arkansas, was not authorized to do business in Arkansas and had no direct contact with Arkansas other than being the shareholder of two Arkansas subsidiaries.

After holding that there was no specific jurisdiction over the defendant, the court considered whether there could be general jurisdiction based on the contacts of the Arkansas subsidiaries. Positively affirming the role of jurisdictional piercing, the court said that "[p]ersonal jurisdiction can be properly asserted over a corporation if another is acting as its alter ego, even if that alter ego is another corporation."[207] Secondly, on the choice of law question, the court stated clearly that "[s]tate law is . . . to determine whether and how to pierce the corporate veil."[208] The court went on to apply Arkansas law.[209] Citing *Humphries v. Bray*,[210] a case on

203. *See, e.g.*, Coombs v. Unique Refinishers, Inc., No. 2:12CV102, 2013 WL 1319773, at *1 (N.D. Miss. Mar. 27, 2013).

204. Epps v. Stewart Information Services Corp., 327 F.3d 642 (8th Cir. 2003).

205. *See, e.g.*, Gilbert v. Security Fin. Corp. of Okla., Inc., 152 P.3d 165, 174 (Okla. 2006); Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG, 646 F.3d 589, 592 (8th Cir. 2011).

206. Making this a Box 2 case in Table 3. *See supra* note 158.

207. *Epps*, 327 F.3d at 649.

208. *Id.*

209. Note that Arkansas law is both the law of forum as well as the law of incorporation of the subsidiaries. *See id.*

210. Humphries v. Bray, 611 S.W.2d 791, 791 (Ark. Ct. App. 1981).

liability piercing, the court stated that the piercing test "is founded in equity and is applied when the facts warrant its application to prevent injustice."[211] Thus, the court seems to have adopted the same piercing test as used in liability piercing. Applying the test to the facts, it was found that the defendant was no more than an ordinary shareholder to the Arkansas subsidiaries. The piercing failed accordingly, and so did personal jurisdiction.

2. Category 2

Category 2 accords with Category 1 in terms of the choice of law analysis but differs regarding the substantive test. Instead of copying the test of liability piercing, courts adopting the approach of Category 2 argue that the substantive test should be tailored for the purpose of jurisdictional piercing due to their differences.[212]

It must be noted that Category 2 is one of the two best accepted approaches. Whilst Category 1 and its liability test seem to be more popular, the jurisdictional specific test still accounts for more than 20% of all approaches. More importantly, courts adopting Category 2, as shown in the discussion in Question 4 above and *PHC-Minden* case below, have clearly given more thought to explaining why it is the better approach. On the other hand, courts adopting Category 1 rarely display the same effort and seem to have used the liability approach out of convenience. The focus on control for the core element of the jurisdictional specific is hardly surprising and is consistent with the leading authorities discussed here.

PHC-Minden, L.P. v. Kimberly-Clark Corp.[213] is an example of a Category 2 approach. Texas has been the most consistent jurisdiction in applying a jurisdiction specific test for jurisdictional piercing, and *PHC-Minden* is one of the best representative cases on this position by the Texas Supreme Court.[214]

PHC-Minden is a products liability case. The manufacturer filed a third party claim against a hospital in Louisiana. The issue was whether Texas could assume jurisdiction over the hospital. Whilst the hospital was not a Texas resident, the manufacturer argued that its parent, a Tennessee corporation, did business in Texas and the parent's contacts should be

211. *Humphries*, 611 S.W.2d at 793.

212. *See* Grand Aerie Fraternal Order of Eagles v. Haygood, 402 S.W.3d 766, 779 (Tex. 2013) (**"**We note that 'jurisdictional veil-piercing' is distinct from 'substantive veil-piercing,' so imputing a related entity's contacts for jurisdictional purposes requires a showing that the parent controls the subsidiary's internal operations and affairs.").

213. PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163 (Tex. 2007).

214. *See also* BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789 (Tex. 2002).

imputed to the hospital, thereby subjecting the hospital to Texas's jurisdiction.

On the question of jurisdictional piercing, the court began by approving jurisdictional piercing as a means of acquiring jurisdiction, holding that "[p]ersonal jurisdiction may exist over a nonresident defendant if the relationship between the foreign corporation and its parent corporation that does business in Texas is one that would allow the court to impute the parent corporation's 'doing business' to the subsidiary."[215] While the court did not expressly address the choice of law issue, it is clear from the judgment that the court adopted state law. For example, the court stated that "the party seeking to ascribe one corporation's actions to another by disregarding their distinct corporate entities prove this allegation because *Texas law* presumes that two separate corporations are distinct entities."[216] It then clarified that Texas's test is jurisdictional specific, stating that "veil-piercing for purposes of liability ("substantive veil-piercing") is distinct from imputing one entity's contacts to another for jurisdictional purposes ("jurisdictional veil-piercing")."[217] This distinction is mainly caused by the fact that jurisdictional piercing involves consideration of due process.[218] Regarding the components of the test, most notably, "fraud — which is vital to [liability] piercing . . . — has no place in assessing contacts to determine jurisdiction."[219] Instead, "atypical control" is the only prerequisite for the piercing test.[220] In addition, the court added that certain factors that are relevant to liability piercing had no relevance to jurisdictional piercing, such as sharing of names and undercapitalization.[221] Applying the above test to the facts, it was found that there was no atypical control exerted by the parent over the hospital and the case was accordingly dismissed for lack of personal jurisdiction.

3. Category 3

Category 3 is the category that takes away the states' authority in terms of choice of law and applies a uniform substantive test that resembles the one used in the liability context. There are only four Category 3 cases, the least among the four categories. The reason for the lack of support for

215. *PHC-Minden*, 235 S.W.3d at 173.
216. *Id.*
217. *Id.* at 174.
218. *Id.* ("This makes sense in light of the fact that personal jurisdiction involves due process considerations that may not be overridden by statutes or the common law.").
219. *Id.* at 175.
220. *See id.* at 176.
221. *PHC-Minden*, 235 S.W.3d at 174.

this approach may lie in the odd *Cannon* case.

Whilst uncertainties revolve around the true meaning of *Cannon*, one way of interpreting it could fit it into this category. First, as mentioned in Section II, *Cannon* was decided before both *International Shoe and Erie*. Thus, the principle that it laid down on jurisdictional piercing could be interpreted as federal common law.[222] While *Cannon* could be theoretically overruled by both *Erie* and *International Shoe*,[223] the case remains valid in view of Supreme Court's decision in *Keeton*.[224] Apart from that, there has been a long line of lower cases applying *Cannon* to jurisdictional piercing.[225] Thus, it can be argued that *Cannon* has mandated a federal standard for jurisdictional piercing despite the lack of Supreme Court authority on how *Cannon* can be reconciled with *International Shoe*.

Whilst Justice Brandeis avoided using the term liability piercing in *Cannon*,[226] the most decisive factor cited by the court in *Cannon* appears to be corporate formality. This is different from the classic three-prong approach but does fit with another line of classic piercing cases.[227] Although this formalistic approach and the control-focused approach of Category 2 do not require the fraud prong, *Cannon*'s emphasis could be much more stringent than the test of Category 2. For large corporations, it is much easier for them to maintain corporate formalities, thus rendering it difficult to pierce the corporate veil under the more flexible and equitable based approach.[228]

However, as Table 11 has shown, much to the expectation of Professor Blumberg,[229] *Cannon* has become a non-factor in the area of jurisdictional piercing. In fact, there are only thirty-five cases that have cited *Cannon* in the three-year research period according to Westlaw, and most of them simply cited *Cannon*'s basic premise of maintaining the independent separateness of companies in jurisdiction without relying on

222. *See supra* note 22.

223. *See* John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the* Cannon *Doctrine*, 84 B.U. L. REV. 445, 456 (2004).

224. *See supra* note 22.

225. *See* Swain & Aguilar, *supra* note 223, at 450 ("Over 500 published cases have cited *Cannon* since 1925.").

226. *See supra* note 19 and accompanying text.

227. *See* BLUMBERG ET AL., *supra* note 23, at 24–28 ("The criteria for the *Cannon* doctrine will be immediately recognized as very much the same as one of the alternative criteria for establishing the first prong of classic piercing jurisprudence, turning on the subsidiary's lack of separate existence.").

228. *See* Voxman, *supra* note 20, at 330 n.9 ("Some commentators argue that *Cannon* is too formalistic in the sense that the mere existence of a parent-subsidiary relationship will almost always result in the recognition of the corporate separation between the parent and subsidiary for jurisdictional purposes.").

229. *See* BLUMBERG ET AL., *supra* note 23, at 24–26 ("With passage of time, the authority of Cannon has been significantly eroded.").

Cannon for the actual jurisdictional test. As much as the formalistic approach becomes a thing in the past in liability piercing, the same seems to be the case for jurisdictional piercing.

4. Category 4

Category 4 is the exact opposite to Category 1. It can be seen as a further transformation of *Cannon*. As *Cannon* has not made it very clear what substantive test to apply, some courts therefore have decided to adopt a jurisdictional specific test instead. Thus, it may be regarded as a mix of Categories 2 and 3. In terms of piercing rate, the contrast with Category 2 is great. Category 2 has the highest piercing rate while Category 4 has the lowest. This again reflects the huge distinction in piercing rates between the jurisdictional specific test and liability test as it has been extensively discussed in Question 4 above.

None of the cases adopting this category in the empirical research explained clearly why this is the proper approach. Searching through older authorities, the leading case that explained this approach was *Energy Reserve*.[230] In that case, the Kansas District Court took a very innovative view of choice of law. According to the court, the minimum contacts test is the one and only avenue in establishing jurisdiction since *International Shoe*.[231] Technically speaking, the court was of the opinion that piercing the corporate veil does not play "any proper role in the analysis of the constitutional propriety of the exercise of jurisdiction."[232] This is because "[t]he formalistic approach of the alter ego doctrine . . . is irrelevant to the question [of] whether the exercise of jurisdiction over an absent parent corporation would violate the Due Process Clause."[233] In other words, there can only be one federal standard based on minimum contacts. Based on this approach, the "piercing" test is necessarily jurisdictional specific. The two-prong test of control and fraud that Category 1 used for both liability and jurisdictional purposes will be merged with the standard minimum contacts test. From the court's perspective, components of liability piercing are relevant but not necessary for the finding of jurisdiction:

> Concededly, a corporation's relationship with an affiliated corporation in the forum is relevant to the due process

230. Energy Reserves Grp., Inc. v. Superior Oil Co., 460 F. Supp. 483 (D. Kan. 1978).

231. *Id.* at 496 ("All exercise of state court jurisdiction, and impliedly the exercise of personal jurisdiction in federal court . . . must be analyzed under the standards of *International Shoe*.").

232. *Id.* at 490.

233. *In re* Teletronics Pacing Sys., Inc., 953 F. Supp. 909, 915 (S.D. Ohio 1997).

> question in a manner different from that in which it pertains to the corporate law question of alter ego relationships and "veil piercing." For alter ego purposes the nature of the relationship the identity between the corporations is alone controlling. For jurisdictional purposes, the fact of the existence of the relationship however substantial or attenuated the relationship may be is a minimum "contact, tie or relation" with the forum that may render possible the constitutional exercise of jurisdiction if the relevant factors, including both convenience and the orderly administration of the laws, balance in that direction. The mere existence of the relationship is one relevant factor. The nature of the relationship the degree of control or identity bears upon the weight to be given that one factor, but it does not foreclose reliance on this factor as a legitimate consideration in the due process analysis. The distinction between the two standards should be readily apparent.[234]

Accordingly, gone are the rigid requirements of passing control and fraud prongs. Instead, control and fraud are all but two factors on the long list of facts considered by the court to see whether the case warrants the finding of minimum contacts.

Both Categories 2 and 4 advocate a jurisdictional specific test. However, the test of Category 2 appears to be about customizing the traditional piercing test whilst Category 4, as explained by *Energy Reserve*, could be viewed as rejecting the pigeonhole approach and merging the jurisdictional test with minimum contacts. Besides, technically Category 2 still tries to interpret the identity of the "person" who is subject to the minimum contacts test. On the other hand, Category 4 under *Energy Reserve* does not interpret the identity of the "person" but what constitutes a "contact."

However, even by looking at the cases in Category 4, it seems that the *Energy Reserve* approach above is devoid of practical significance. No case during the three-year research period relied on the *Energy Reserve* approach. Even for raw cases, there are only four cases that have cited *Energy Reserve* and In re *Teletronics* during the three-year research period. Despite the well-reasoned argument of *Energy Reserve*, the lack of support probably stems from a lack of higher courts' endorsement both at the State Supreme Court or Federal Court of Appeals level.[235] It is also too far from

234. *Energy Reserve*, 460 F. Supp. at 507.

235. In *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, the Court of Chancery of Delaware

the more established practices of Categories 1 and 2 which makes it a "dangerous innovation"[236] for the courts. Finally, as will be shown in *Amrep* below, the same result desired by the judge could be easily achieved by Categories 1 and 2, particularly Category 2. Thus, there is no need for the courts to overhaul their entire regime.

Alto Eldorado Partnership v. Amrep[237] is an example of a Category 4 approach and is a case decided by the Court of Appeal of New Mexico. Despite the lack of support of the *Energy Reserve* approach based on data derived from the empirical review, *Amrep* is still a worthwhile case to examine for the purpose of this article as the three judges in the case each vowed for Categories 1, 2 and 4 respectively.

The case revolved around whether the New Mexico court had jurisdiction over Amrep, an out-of-state parent company listed on the New York Stock Exchange. The key issue was whether jurisdiction could be based on Amrep's relationship with its New Mexico subsidiary.

The first judge, Judge Kennedy, adopted the Category 4 approach.[238] Following the lead of *Energy Reserve*, Judge Kennedy did not require "all of the elements of alter ego be proven in order to hale a foreign corporate parent into court, but [he] can and will consider whatever elements a plaintiff shows in assessing minimum contacts."[239] More particularly on control, he was of the view that "[t]he corporate relationship might also be probative of whether it is fundamentally fair to require the defendant to defend a suit in the forum."[240] This is the same for the fraud factor.[241] Finding that Amrep exerted excessive control over the subsidiary in New Mexico, including its day-to-day operations, Judge Kennedy found the necessary minimum contacts to claim jurisdiction.

The second judge, Judge Sutin, concurred with the finding of jurisdiction but not the reasoning of Judge Kennedy. His approach was exactly the same as Category 2. He started with the traditional three-prong liability piercing test adopted by New Mexico. After reviewing certain precedents, he found that "[a] *prima facie* showing of instrumentality or

rejected *Energy Reserves* as a case rarely followed. *See* No. 11514, 1992 WL 127567, at *718 (Del. Ch. May 28, 1992) ("It has not met with wide or easy acceptance elsewhere. It certainly does not represent the law of Delaware.").

236. *See* Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 29 (E.D. Mo. 1985).

237. Alto Eldorado Partnership v. Amrep, 124 P.3d 585 (N.M. 2005).

238. *Id.* at 595 ("[T]his principle in holding that due process guided by elements of an alter ego analysis frame our inquiry into the district court's personal jurisdiction over Amrep. The question then is not whether corporate law restricts our jurisdiction in contravention of the above principle, but whether due process allows for it.").

239. *Id.* at 594.

240. *Id.*

241. *Id.* ("[T]he showing of formation for an improper purpose . . . while not constitutionally mandated, might also be probative.").

domination should be sufficient to establish the minimum contacts necessary for jurisdiction without also having to prove the improper or fraudulent purpose and proximate causation elements required to establish liability."[242] Thus, his approach is the same as *PHC-Minden*, requiring just the first control prong for jurisdictional piercing. Finding the plaintiff had presented sufficient evidence for the first prong, he dismissed Amrep's motion for lack of personal jurisdiction.

Finally, the third judge, Judge Packard, delivered the dissenting opinion. He adopted the classic Category 1 test. Going through a long list of authorities, he criticized the other judges' approach as not being supported by precedents. Instead, he believed that the traditional three-prong liability test was proper.[243] To justify his approach, he reasoned that "corporations are formed precisely for the purpose of insulating the owners thereof and such purpose ought to be respected, whether for liability or jurisdiction."[244]

Table 12 - Underlying claim of jurisdictional piercing

	Contract	**Tort**	**Statute**	**Unclear**	**Total**
Number of cases	43	32	28	2	105
Percentage of jurisdictional piercing cases	40.95%	30.48%	26.67%	1.90%	100%
Pierced cases	13	8	9	1	31
Piercing rate	31.71%	25%	32.14%	50%	29.52%

Finally, we look at whether the jurisdictional piercing rate is influenced by the underlying claim. Under prevailing corporate theory, it is believed that courts should be more willing to piece corporate veil in tort cases than contract cases due to the fact that plaintiffs in contracting cases will have the opportunity to protect themselves by choosing the more

242. *Alto Eldorado*, 124 P.3d at 599.

243. *Id.* at 600 ("Other jurisdictions that have addressed the issue have unequivocally held that for purposes of personal jurisdiction, it is not sufficient to establish only instrumentality, and instead a plaintiff must also establish that the corporation that is using another corporation as its instrumentality has formed it or is using it to perpetrate a fraud or other injustice or for some other improper purpose.").

244. *Id.*

solvent counterparty.[245] This theory was found to be incompatible with the data from the Thompson Study.[246] For jurisdictional piercing, one might argue that the court should be more willing to grant a plaintiff's request to pierce jurisdictionally in tort cases considering that plaintiffs in contract cases can choose to contract directly with the out-of-state parent in order to get the forum court to have specific jurisdiction thereto. However, the data shows the same puzzling picture as in the Thompson Study. It is found that contract cases actually have a higher piercing rate (40.95%) than that of tort cases (30.48%). This finding, however, is not conclusive due to the lack of tort cases in the samples here.

V. RECOMMENDATIONS AND CONCLUSION

In connection with the current jurisdictional piercing practice, it is clear that the contemporary approach is to leave the decision on choice of law to each state while not supporting a federal standard across the nation. Of course, simply having a majority of courts adopting the former approach does not necessarily mean that it is the better approach. However, without any clear precedent from the Supreme Court, each state reaches this approach organically instead of having a standard imposed on them from the top. This fact suggests at least the advantage of assumed efficiency.

The analysis, however, should not stop there. The state choice of law approach shall be subject to an important caveat, that is, jurisdictional piercing must not be of such a low standard that renders the minimum contacts test meaningless. The constitutional structure of jurisdictional piercing under the state choice of law approach is to interpret what a "person" means in the minimum contacts test. If the definition of "person" is entirely up to the state to interpret without any limitation, it is theoretically for the state to adopt an unreasonably low standard for jurisdictional piercing, such as the ownership of shares. This point has been raised by Brilmayer and Paisley succinctly, stating that:

> the state may not alter the definition of state-created rights in order to defeat a federal constitutional claim. Similarly, states may not alter their procedural rules when federal rights are at stake. Discriminatory treatment of federal rights is unconstitutional, and the Supreme Court will review a state law decision

245. *See* Thompson, *supra* note 13, at 1038.

246. *See id.* at 1058 (finding that "the results show that courts pierce more often in the contract context than in tort context").

to determine whether it has a substantial basis in state law.[247]

A standard like that will essentially catch all passive out-of-state holding companies which do nothing in the forum state other than holding shares in a subsidiary that is subject to forum jurisdiction, and effectively rendering minimum contact meaningless. In other words, this definition will create minimum contacts for simple shareholding and violate the basic minimum contact test.

By analogy, *Daimler* has shown that the Supreme Court will not hesitate to clamp down on vicarious jurisdiction if the state test becomes so lenient that it would render the minimum contacts standard meaningless. As we have seen in that case, the Ninth Circuit's version of the agency test simply asks whether the agent is important to the parent.[248] Justice Ginsburg is of the view that such a low standard will have the effect of subjecting every single multinational company to the jurisdiction of every state where it does business with an agent.[249] In essence, this is a floodgate argument. While there is no reported jurisdictional piercing during the research period that adopts a low standard as simple share ownership, this is certainly an important threshold to bear in mind.

On the question of the substantive test, the issue of whether courts should adopt a jurisdictional specific test seems to hinge on whether jurisdictional piercing should be more lenient than liability piercing given the much higher piercing rate yielded under the jurisdictional specific test. The answer seems to be positive given that jurisdictional piercing simply requires the defendant to defend himself in the forum instead of having the liability conclusively imposed thereon. It also makes sense to restrict the application of the fraud factor to liability piercing instead of jurisdictional piercing. It is still hard to see why fraud has to be an essential element for jurisdictional piercing. Piercing the corporate veil, even for liability purposes, is influenced by the underlying cause of action.[250] The prime examples of a more lenient standard in a liability context are those cases involving ERISA. In ERISA cases, courts almost always refer to the federal policy behind ERISA to protect employees and thus always forgo

247. *See* Brilmayer & Paisley, *supra* note 20, at 27.

248. *See supra* note 112. It is noted that in discussing the Ninth Circuit's test on agency, the Supreme Court did not reject the test on the basis of it not being a uniform federal standard but simply object to the broad test. This could be seen as a support to the conclusion of the author's view on Question 1, that is, to adopt states' rules on jurisdictional piercing.

249. *Id.*

250. *See* Brennan v. Nat'l Action Fin. Servs., Inc., No. 12-cv-10551, 2012 WL 3888218, at *3 (E.D. Mich. Sept. 7, 2012) ("It is well established that piercing the corporate veil is not itself a cause of action.").

the fraud element as an essential factor.[251] For jurisdictional piercing, it can be argued that underlying federal justification for the assertion of jurisdiction is purposeful availment. This certainly is a much lower standard than fraud. If a parent company exerts excessive control over the subsidiary to the extent that it becomes merely an instrument of the corporation for the purpose of doing business in the forum, it could be considered as purposefully making available the benefits and protection of the forum. Fraud, on the other hand, will impose the higher standard that the underlying federal policy demands. Unlike liability piercing where piercing is supposed to happen only when the privilege of incorporation is "abused," jurisdiction does not operate in the same way. As long as an out-of-state corporation has obtained the protection and benefits of the forum, the *quid pro quo* is to be subject to the forum's jurisdiction. Therefore, the fraud factor, apparently a factor installed to cater for the concept of "abuse" can have no place in the jurisdictional piercing formula. The emphasis on control factor can also be found in the rare federal court judgments that have discussed jurisdictional piercing after *Daimler*.[252]

It is noted that adopting a more lenient, jurisdictional specific standard will have the effect of expanding the jurisdiction of the United States. While the normative aspect of the expansion of the jurisdiction is a much larger topic that this article intends to cover, such expansion, at least as far as a jurisdictional specific standard will bring thereto, is justified. First, it must be noted that unlike changing the minimum contacts standard, jurisdictional piercing remains an exception that will be applied by courts with caution. The eventual expansion of jurisdiction, therefore, as a result of the adjustment brought by the jurisdictional specific test will be limited. In addition, as we have seen in Section IV, a jurisdictional specific test only has a 5.45% higher piercing rate than the liability test. Thus, it is expected that the adjustment will only help such marginal cases, but it will not help in overhauling the entire jurisdictional regime.

Normatively, although the Supreme Court has shown concern on the effect that expanding the United States' jurisdiction will have on comity, the modest expansion suggested here should be acceptable. In *McIntyre*, it is clear that the three Justices led by Justice Ginsburg are ready to extend the jurisdiction of New Jersey to cover McIntyre UK. Drawing on the equivalent European Union jurisdiction rules, Justice Ginsburg thought it

251. *See* NLRB v. Al Bryant, Inc., 711 F.2d 543, 553 (3d Cir. 1983) (In claims pursuant to the National Labor Relations Act, the standard for establishing the existence of an alter ego is less burdensome: "[t]he focus of the alter ego doctrine . . . is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations.").

252. *See supra* note 9 and accompanying text.

was absurd for New Jersey to have no jurisdiction as the place of injury when the home court of McIntyre UK would have allowed such jurisdiction should the injury happen in the European Union.[253] This is just one example in which current United States jurisdiction is actually not as expansive as it is perceived. This view is also supported by Professor Trevor Hartley, a leading scholar on EU law and private international law.[254]

Ultimately, adopting the jurisdictional specific test reaffirms the overall goal of jurisdictional piercing; that is, to bring the jurisdictional test closer to the actual world. As stated by Justice Weinstein in *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd*., "we cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts."[255] Jurisdictional piercing is valuable because of that function and the jurisdictional specific test will help in achieving that.

253. *See McIntyre*, 131 S. Ct. at 2803 ("The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional.").

254. *See* TREVOR C. HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW 161 (2009) ("This survey suggests that there is no ground for saying that American jurisdiction over European defendants is in general more extensive than European jurisdiction over Americans; though it may be in certain cases. The real ground for European resentment is the combination of jurisdictional rules that are fairly extensive; though not necessarily more extensive than comparable European ones; with procedural rules that are significantly more favourable to the plaintiff. From a purely jurisdictional point of view, American law is no more extensive than the law of many European countries.").

255. Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1328 (1981).