

12-2014

Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction

Tanya J. Monestier

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Recommended Citation

Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233 (2014).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol66/iss1/5

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Where Is Home Depot “At Home”?: *Daimler v. Bauman* and the End of Doing Business Jurisdiction

TANYA J. MONESTIER*

In January 2014, the U.S. Supreme Court decided Daimler AG v. Bauman. The case was supposed to resolve a very important question that had divided courts for decades: when, for jurisdictional purposes, can the contacts of a subsidiary be imputed to its parent? The Supreme Court dodged this question. Instead, it answered a different, but equally important, question: under what circumstances is a corporation “at home” such that a state has general jurisdiction over it? The Court had introduced the “at home” language to the discourse on general jurisdiction a few years earlier in Goodyear Dunlop Tires Operations, S.A. v. Brown, when it held that a state has general jurisdiction over a corporation if its activities within the state are so continuous and systematic as to render the corporation essentially “at home” there. At the time, courts and commentators were not one-hundred percent clear on the meaning of the “at home” language. After Daimler, they will be.

Daimler reinforced the idea that the “at home” basis for general jurisdiction is intended to be exceptional. Ordinarily, a corporation is only “at home”—and therefore subject to general jurisdiction—in, at most, two places: its state of incorporation and its principal place of business. In making this pronouncement, the Supreme Court has done away with a very well established, albeit wholly under-theorized, basis for general jurisdiction: “doing business.” For the better part of a century, courts had assumed general jurisdiction over corporations on the basis that they were doing business in the forum, as evidenced by the corporation’s commercial presence in the state. This basis of jurisdiction was perceived as exorbitant by foreigners and often condemned as promoting forum shopping. Daimler officially sounds the death knell for doing business jurisdiction in the United States.

In this Article, I examine the decisions of the majority and the concurrence, highlighting the critical areas of disagreement. I lay out the key implications of Daimler:

* Associate Professor, Roger Williams University School of Law. I would like to thank Nicole Manzo for her invaluable research assistance in the preparation of this Article. Thank you as well to Professor Colleen Murphy, who provided very helpful comments on a previous draft of this Article.

the end of doing business jurisdiction in the United States, the doctrinal pressure on alternative bases of jurisdiction to fill the void left by Daimler, and the real-world consequences for litigants and courts. I also look at the critical questions that Daimler left unanswered—in particular, the standard for imputation of jurisdictional contacts from a subsidiary to a parent and the propriety of imputation where the underlying basis of jurisdiction is that the subsidiary is incorporated in the state or has its principal place of business there. The implications of the Daimler decision will be felt by both plaintiffs and defendants for years to come. Accordingly, it warrants a careful look.

TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION..... | 235 |
| I. AN INTRODUCTION TO GENERAL JURISDICTION | 237 |
| II. THE DECISION IN <i>DAIMLER V. BAUMAN</i> | 247 |
| A. THE FACTS..... | 247 |
| B. THE PROCEEDINGS BELOW | 248 |
| C. THE SUPREME COURT’S DECISION..... | 249 |
| III. KEY POINTS OF DISAGREEMENT | 253 |
| A. AN ABSOLUTE OR COMPARATIVE TEST FOR GENERAL JURISDICTION?..... | 254 |
| B. WHAT IS THE MEANING OF “AT HOME”?..... | 260 |
| C. A REASONABLENESS INQUIRY FOR GENERAL JURISDICTION? ... | 262 |
| IV. THE IMPLICATIONS OF <i>DAIMLER</i> | 266 |
| A. THE END OF DOING BUSINESS JURISDICTION..... | 266 |
| B. ADDITIONAL PRESSURE ON ALTERNATIVE BASES OF JURISDICTION | 276 |
| C. PRACTICAL CONSEQUENCES FOR LITIGANTS AND COURTS | 283 |
| V. UNANSWERED QUESTIONS | 287 |
| A. WHEN SHOULD A SUBSIDIARY’S CONTACTS BE IMPUTED TO THE PARENT? | 287 |
| B. WHAT IF THE BASIS OF JURISDICTION IS PLACE OF INCORPORATION OR PRINCIPAL PLACE OF BUSINESS? | 289 |
| CONCLUSION | 293 |

INTRODUCTION

A shopper in Tallahassee, Florida slips and falls at The Home Depot (“Home Depot”), suffering various personal injuries. She later moves to Dallas, Texas, and ultimately decides to sue Home Depot in Texas with respect to the Florida slip-and-fall. Until earlier this year, a court probably would have concluded that Texas had jurisdiction over Home Depot because Home Depot was doing business in Texas. After all, Home Depot has a total of 178 physical stores in Texas, not to mention thousands of employees.¹ After the Supreme Court’s decision in *Daimler AG v. Bauman*,² however, a Texas court would likely conclude the opposite: Texas does not have jurisdiction over Home Depot with respect to a slip-and-fall accident that occurred in Florida. The Court in *Daimler* made it very clear that a court can only exercise general jurisdiction over a corporate defendant in three places: (1) in its state of incorporation; (2) in the state where it has its principal place of business;

1. The Home Depot, Inc., Annual Report (Form 10-K) 11 (Mar. 27, 2014).

2. 134 S. Ct. 746 (2014).

and (3) in exceptional cases, anywhere else where the corporation has continuous and systematic general business contacts and can fairly be regarded to be “at home.”³ The Court emphasized repeatedly that the third basis for general jurisdiction would be used only on rare occasions and that large multinational corporations could not be regarded “at home” anywhere and everywhere they conducted a large volume of business.⁴

After *Daimler*, the question, “Where is Home Depot ‘at Home?’” invites a simple response. Home Depot is “at home” in Delaware (its state of incorporation) and in Georgia (the state of its principal place of business).⁵ These are likely the only two states that can assert general jurisdiction over Home Depot.⁶ This marks a radical departure from decades of case law holding that general jurisdiction was appropriate where a company was doing business in the forum—in the sense of having continuous and systematic general business contacts with the forum.⁷ Accordingly, *Daimler* marks the official end of doing business jurisdiction in the United States.

This Article will examine in detail the *Daimler* decision and its implications for future cases. In Part I, I provide a brief introduction to general jurisdiction, tracing the history of the Supreme Court’s jurisprudence on the continuous and systematic test for general jurisdiction over corporations. In Part II, I outline the *Daimler* case, discussing both the majority and concurring decisions.⁸ I sketch out in

3. *Id.* at 760–61, 761 n.19.

4. *Id.* at 760–62, 762 n.20 (“A corporation that operates in many places can scarcely be deemed at home in all of them.”); accord Transcript of Oral Argument at 30–31, *Daimler*, 134 S. Ct. 746 (No.11-965), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-965_1647.pdf (according to Justice Kagan, if *Daimler* “were subject to general jurisdiction in California, so, too, it would be subject to general jurisdiction in every State in the United States, and all of that has got to be wrong”).

5. See *Fuller v. Home Depot Servs., LLC*, No. 1:107-CV-1268-RLV, 2007 WL 2345257, at *3 (N.D. Ga. Aug. 14, 2007).

6. This leaves aside registering to do business as an independent basis for general jurisdiction. See *infra* Part IV.B.

7. The departure started in 2011 when the Supreme Court added the “at home” qualifier to the test for general jurisdiction over corporations in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

8. For an analysis of the *Daimler* case prior to the Supreme Court’s decision, see generally Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013) [hereinafter Childress, *Transnational Law Market*]; Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81 (2013); Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler AG v. Bauman*, 34 U. PA. J. INT’L L. 765 (2013); Suzanna Sherry, *Don’t Answer That! Why (and How) the Supreme Court Should Duck the Issue in DaimlerChrysler v. Bauman*, 66 VAND. L. REV. EN BANC 111 (2013); Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123 (2013); Verity Winship, *Personal Jurisdiction and Corporate Groups: DaimlerChrysler AG v. Bauman*, 9 J. PRIVATE INT’L L. 431 (2013). For an analysis of the Supreme Court’s decision in *Daimler*, see generally Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. 197 (2014) [hereinafter Childress, *After Bauman*]; Judy M. Cornett &

Part III the key areas of disagreement between the majority and the concurrence: the nature of the test for general jurisdiction, the meaning of the words “at home,” and the propriety of a reasonableness test for general jurisdiction. In Part IV, I explore the implications of the *Daimler* decision on a broader level. I conclude that *Daimler* marks the official end of doing business jurisdiction in the United States; the consequence of this is that there will be additional pressure on alternative bases of jurisdiction to fill the void left by *Daimler*. I also discuss some practical ramifications of *Daimler* for litigants and courts. In Part V, I look at some unanswered questions in the wake of *Daimler*. Most glaringly, the Court in *Daimler* did not answer the question for which it had ostensibly granted certiorari—when can the jurisdictional contacts of a subsidiary be imputed to a parent? A related question presented by the Court’s decision in *Daimler* concerns jurisdictional imputation when the underlying basis of jurisdiction is that the subsidiary is incorporated in the forum or has its principal place of business there. Finally, in Part VI, I offer some concluding remarks.

I. AN INTRODUCTION TO GENERAL JURISDICTION

American law has, for the most part, adhered to a two-part conceptual structure in analyzing personal jurisdiction, dividing the analysis between specific jurisdiction and general jurisdiction. Specific jurisdiction is premised on the relationship between the defendant, the forum, and the underlying cause of action.⁹ It is said that where the cause of action is “related to or arising from” the defendant’s in-state activities, the state has specific jurisdiction over the defendant.¹⁰ For instance, if a manufacturer sells a defective product in State X and a resident is injured by the product in State X, it is likely that State X will have specific jurisdiction over the defendant. General jurisdiction, on the other hand, is premised on the relationship between the defendant and the forum.¹¹ Notably, courts asserting general jurisdiction over a defendant can do so in the absence of any connection between the state and the underlying cause of action.¹² Rather, the connection between the defendant and the

Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction after Daimler AG v. Bauman*, OHIO ST. L.J. (forthcoming 2014); Stanley E. Cox, *The Missing ‘Why’ of General Jurisdiction*, U. PITT. L. REV. (forthcoming); Bernadette Bollas Genetin, *The Supreme Court’s New Approach to Personal Jurisdiction*, SMU L. REV. (forthcoming 2015); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. (forthcoming 2014); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. (forthcoming 2015).

9. See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

10. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

11. See Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988).

12. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear*, 131 S. Ct. at 2851.

state is considered so significant that the connection, in itself, is regarded as infusing the state with jurisdictional power over the defendant.¹³

There are two well-established bases of general jurisdiction over corporations: a corporation can always be sued on any cause of action, first, in its state of incorporation and second, in the state of its principal place of business.¹⁴ In both of these scenarios, the state is regarded as possessing general jurisdiction over the corporation because of the unique relationship between the state and the corporation.¹⁵ General jurisdiction is an extremely powerful form of jurisdiction, since it can result in a court adjudicating a controversy with absolutely no connection to the state. Consider the following example: ABC Corp. is a manufacturer of running shoes that is incorporated in the state of Delaware. It operates a Mexican plant where it employs Mexican workers pursuant to a contract executed in Mexico and governed by Mexican law. If an employment dispute arises between the Mexican workers and ABC Corp., Delaware courts will have authority to hear the dispute. Since ABC Corp. is incorporated in Delaware, the courts of Delaware have the ability to adjudicate any and all disputes concerning ABC Corp., regardless of where the dispute arose.

Although the labels of “specific jurisdiction” and “general jurisdiction” are often attributed to an influential article written by Professors von Mehren and Trautman,¹⁶ the seeds of this jurisdictional

13. See Erichson, *supra* note 8, at 84 (“General jurisdiction is justified by the relationship between a state and those who make the state their home.”).

14. See *Daimler*, 134 S. Ct. at 760; see also Brilmayer et al., *supra* note 11, at 728.

15. In *A General Look at General Jurisdiction*, Professors Brilmayer, Haverkamp, and Logan describe why general jurisdiction over a corporation based on its state of incorporation is appropriate:

First, the corporation intentionally chooses to create a relationship with the state of incorporation, presumably to obtain the benefits of that state’s substantive and procedural laws. Such a choice creates a unique relationship that justifies general jurisdiction over the corporation. Second, the corporation, unlike an individual, cannot ever be absent from the state of incorporation. Third, even if a corporation neither does business nor maintains an office in the incorporating state, the incorporation process itself provides notice of the potential for judicial jurisdiction. Finally, the corporation is likely to be familiar with that state’s law, arguably more familiar than an individual domiciliary would be, because the corporation presumably based its incorporation decision in part on the state’s substantive law.

Brilmayer et al., *supra* note 11, at 733–34. The authors point out that these rationales also apply, perhaps with slightly less force, to the state of the corporation’s principal place of business. *Id. Accord* Erichson, *supra* note 8, at 86–87.

16. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (“In American thinking, affiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.”). Note that some authors have questioned the utility of this bipartite framework. See Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L.

framework can be found in *International Shoe Co. v. Washington* itself.¹⁷ In *International Shoe*, the Supreme Court noted that jurisdiction over a corporation could be appropriate where the corporation engaged in activities in the forum that were “so substantial and of such a nature” as to justify suit in an action wholly unrelated to a corporation’s in-state activities.¹⁸ Although on its facts, *International Shoe* was a specific jurisdiction case, it nonetheless telegraphed the structure of personal jurisdiction analysis that would guide courts for years to come.

Prior to 2011, the Supreme Court had decided only two cases dealing with general jurisdiction. The first, *Perkins v. Benguet Consolidated Mining Co.*, involved a Philippine mining corporation sued in Ohio over a cause of action that was not related to the corporation’s activities in Ohio.¹⁹ The plaintiff sought to establish that Ohio had general jurisdiction over the Philippine company, even though the company was not incorporated in Ohio and did not have its principal place of business there.²⁰ Nevertheless, the Court found that the defendant was subject to general jurisdiction in Ohio.²¹ The Court observed that the defendant had ceased its mining activities in the Philippines, and to the extent that it was carrying on any business, it was doing so in Ohio.²² After examining the activities undertaken in Ohio by the president of the corporation, the Court stated, “he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.”²³ Accordingly, the Court found that it would not offend due process to assert personal jurisdiction over the defendant corporation.²⁴

The next Supreme Court pronouncement on general jurisdiction came three decades later in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.²⁵ In *Helicopteros*, the plaintiffs sued a Colombian corporation in Texas with respect to a helicopter accident that took place in Peru.²⁶ The plaintiffs maintained that the defendant had sufficient contacts with

REV. 999, 1075 (2012) (“Finally, some courts and commentators have suggested that jurisdiction is proper in cases that fall between the definitions or categories of specific and general jurisdiction. They object to strict characterization of a case as falling in one category or the other. They suggest either a ‘sliding scale’ or ‘hybrid’ approach. Professor Richman proposes a sliding scale theory, and Professor Simard a hybrid form of jurisdiction. The theories vary slightly, but both would find proper jurisdiction in fact patterns that are ‘near misses’ on both the relatedness and extent of contacts factors.”).

17. 326 U.S. 310 (1945).

18. *Id.* at 318.

19. 342 U.S. 437, 438–39 (1952).

20. *Id.* at 447–48.

21. *Id.* at 448.

22. *Id.* at 447–48.

23. *Id.* at 448.

24. *Id.*

25. 466 U.S. 408 (1984).

26. *Id.* at 409–10.

Texas to support the exercise of general jurisdiction: the defendant purchased helicopters and other equipment in Texas; the defendant sent pilots and management personnel into Texas to be trained and to consult on technical matters; the defendant negotiated the contract under which it provided transportation services to the joint venture that employed the decedents in Texas; and the defendant accepted checks drawn on a Texas bank into its New York bank account.²⁷ Unlike *Perkins*, the majority of the Supreme Court in *Helicopteros* found that these contacts did not constitute continuous and systematic general business contacts sufficient to support the exercise of general jurisdiction over the defendant.²⁸ For instance, the Court noted that “one trip to Houston by Helicol’s chief executive officer for the purpose of negotiating the . . . contract . . . cannot be described or regarded as a contact of a ‘continuous and systematic’ nature.”²⁹ Similarly, the defendant’s acceptance of checks drawn on a Texas bank was of “negligible significance” in determining whether the defendant had sufficient contacts in Texas to ground general jurisdiction.³⁰

The “continuous and systematic general business contacts” language from *Helicopteros* thereafter became the operative test for general jurisdiction over corporations.³¹ Courts would ask whether a corporation had sufficiently continuous and systematic general business contacts with a state so as to justify the assertion of general jurisdiction over a corporation. States developed their own factors to consider in evaluating whether a corporation’s contacts rose to the level of being continuous and systematic. Generally speaking, courts would look at factors that were thought to approximate the corporation’s physical presence in the state, such as the number of employees in the state, the volume of sales and/or purchases in the state, the corporation’s registration to do business in a state, and so on.³²

The concept of continuous and systematic general business contacts eventually morphed with the notion of “doing business.”³³ That is, if a

27. *Id.* at 410–11, 416.

28. *Id.* at 416–19.

29. *Id.* at 416.

30. *Id.*

31. In addition to, of course, state of incorporation and principal place of business.

32. *See, e.g., Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (“The standard for establishing general jurisdiction is ‘fairly high,’ and requires that the defendant’s contacts be of the sort that approximate physical presence. Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state’s markets, designates an agent for service of process, holds a license, or is incorporated there.” (citations omitted) (quoting *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986)).

33. *See, e.g., Mary Twitchell, Why We Keep Doing Business with Doing Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172–73 (“Courts seem to have articulated a fairly straightforward standard for doing-business jurisdiction: states have general jurisdiction over corporations doing continuous and systematic business in the forum.”); Paul R. Dubinsky, *The Reach of Doing Business Jurisdiction and*

corporation was doing business in a forum with a degree of permanence and regularity, then it had continuous and systematic general business contacts with the forum and would be subject to general jurisdiction there. Thus, doing business essentially became synonymous with, or a proxy for, the *Helicopteros* standard of continuous and systematic general business contacts.³⁴ There were few guideposts for courts deciding whether a corporation was doing business such that it would be subject to general jurisdiction.³⁵ Accordingly, courts were largely left to their own devices in determining when a corporation would or would not be subject to general jurisdiction.³⁶ This arguably resulted, at least in some cases, in exorbitant assertions of jurisdiction over corporations doing business in a state.³⁷

One such case is the Ninth Circuit’s 2003 decision in *Gator.com Corp. v. L.L. Bean, Inc.*³⁸ There, a California-based software company, Gator.com, sued Maine clothing manufacturer L.L. Bean in federal court in California seeking a declaratory judgment that its pop-up Internet

Transacting Business Jurisdiction Over Non-U.S. Individuals and Entities, U.S. DEP’T OF STATE, http://1997-2001.state.gov/www/global/legal_affairs/dubinsky.html (last visited Dec. 14, 2014) (“It is difficult to summarize with precision the types and quantities of business activities within a state of the United States that will support a conclusion that the defendant is ‘doing business’ there and will be required to defend a lawsuit unrelated to its activities in that state. The phrase most frequently repeated by the Supreme Court is ‘continuous and systematic general business contacts’ within the jurisdiction.”).

34. See Meir Feder, Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L. REV. 671, 675 (2012) (“[L]ower courts [have] widely embraced the notion that any corporation ‘doing business’ in a state [is] subject to general jurisdiction there.”). In addition, many states have directly codified “doing business” jurisdiction in their individual long-arm statutes. See, e.g., 735 ILL. COMP. STAT. ANN. 5/2-209(b)(4) (LexisNexis 2009); MICH. COMP. LAWS ANN. § 600.711(3) (West 1996); 42 PA. CONS. STAT. ANN. § 5301(a)(2)(iii) (West 2004); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2008). Note that this is different than “transacting business,” which is commonly associated with *specific jurisdiction*. See Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd.*, 7 HASTINGS BUS. L.J. 223, 247 n.128 (2011) (“Essentially, doing business refers to a continuous and systematic business activity in the forum, which would subject defendant to a claim for any cause. Transacting business concerns ‘an isolated but purposeful business transaction in [the forum] and the plaintiff’s claim arises out of the particular transaction.’” (alteration in original) (quoting N.Y. C.P.L.R. § 302 (McKinney 2008))).

35. See Feder, *supra* note 34, at 674–76 (“The Supreme Court has never articulated any underlying theory of general jurisdiction or even attempted to explain in a particular case *why* the contacts at issue were, or were not, sufficient to justify a state’s assertion of authority over a defendant’s out of state activities.”).

36. See *id.* at 675.

37. See James R. Pielemeier, Goodyear Dunlop: A Welcome Refinement of the Language of General Jurisdiction, 16 LEWIS & CLARK L. REV. 969, 984–85 (2012) (observing that “a number of lower courts have not required truly substantial contacts to warrant general personal jurisdiction”); Sherry, *supra* note 8, at 117 (noting that some courts “had loosened the definition of continuous and systematic contacts so far that any company with substantial sales in a state was subject to general jurisdiction in that state”).

38. 341 F.3d 1072 (9th Cir. 2003).

software did not infringe upon the defendant's trademark rights or otherwise violate state or federal law.³⁹ The case turned on the question of whether the California court had general jurisdiction over the defendant, L.L. Bean.⁴⁰ The court noted that L.L. Bean was a Maine corporation with its principal place of business in that state.⁴¹ It maintained physical stores in Maine, Delaware, New Hampshire, Oregon, and Virginia.⁴² In addition, it sold over one billion dollars in merchandise annually to consumers in 150 different countries.⁴³ The court indicated that a large percentage of L.L. Bean's sales came from its mail-order and Internet businesses, with approximately sixteen percent of its sales in 2000 deriving from the latter.⁴⁴ After noting that the standard for general jurisdiction is "fairly high"⁴⁵ and that the case presented a "close question,"⁴⁶ the Ninth Circuit ultimately concluded that California did have general jurisdiction over L.L. Bean.⁴⁷ The court stated that the defendant's overall commercial contacts with California, primarily through its website, met the continuous and systematic test articulated in *Helicopteros*.⁴⁸ The court held that there was nothing unfair about requiring the defendant to be subject to the authority of the California court where it "has deliberately and purposely availed itself, on a very large scale, of the benefits of doing business within the state."⁴⁹

Commentators questioned the propriety of this decision, pointing out the jurisdictional ramifications of the court's ruling.⁵⁰ If L.L. Bean could be held to be doing business (in the jurisdictional sense) in California, then it could easily be held to be doing business in all fifty states. Would this mean that L.L. Bean was subject to general jurisdiction in every state? By extension, would this mean that all large companies with a substantial presence in all fifty states—either physical or virtual—would be subject to general jurisdiction everywhere in the United States?⁵¹

39. *Id.* at 1075.

40. *Id.* at 1076.

41. *Id.* at 1074.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1076 (quoting *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986)).

46. *Id.* at 1078.

47. *Id.*

48. *Id.*

49. *Id.* at 1079.

50. See generally James R. Pielemeier, *Why General Personal Jurisdiction over "Virtual Stores" is a Bad Idea*, 27 QUINNIPIAC L. REV. 625 (2009).

51. See Andrews, *supra* note 16, at 1066–67 ("Take as an example a corporation such as McDonald's. Before *Goodyear* was decided, Professor Glannon argued that, because the corporation has a very strong physical presence in most states, through its numerous employees and restaurants,

In 2011, the Supreme Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown*, using it as an opportunity to clarify the scope of general jurisdiction.⁵² In *Goodyear*, North Carolina plaintiffs sued tire manufacturer Goodyear USA and several of its foreign subsidiaries in North Carolina, stemming from an accident that took place in France.⁵³ Goodyear’s subsidiaries, based in Turkey, France, and Luxembourg, challenged the jurisdiction of the North Carolina court.⁵⁴ The lower court in *Goodyear* had held that the foreign defendants were subject to general jurisdiction in North Carolina because they had placed their product into the stream of commerce, and their product eventually made its way into North Carolina.⁵⁵ Justice Ginsburg, writing for the plurality, first noted that the North Carolina Court of Appeals had erred by eliding general jurisdiction and specific jurisdiction.⁵⁶ She clarified that the metaphor of “stream of commerce” is only appropriate when assessing whether a defendant had certain minimum contacts with the jurisdiction to support the exercise of specific jurisdiction, that is, jurisdiction related to the defendant’s contacts with the forum.⁵⁷ Turning to the issue of general jurisdiction, Justice Ginsburg concluded that the defendants’ “attenuated connections to the State [fell] far short of the ‘the continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.”⁵⁸ She noted that the paradigm bases for general jurisdiction over a corporation are its state of incorporation and the state of its principal place of business.⁵⁹ In addition, she stated that a court could assert general jurisdiction over a corporation where the

McDonald’s has ‘continuous and systematic’ contacts in these states and is subject to general jurisdiction in all such states.”).

52. 131 S. Ct. 2846 (2011).

53. *Id.* at 2850.

54. *Id.* The defendant Goodyear USA did not challenge jurisdiction. *Id.* Arguably, in light of the result in *Goodyear* itself, this was a mistake. Presumably, Goodyear USA did not contest jurisdiction because it clearly was doing business in North Carolina and therefore believed it would be subject to general jurisdiction. However, in light of the ultimate result in *Goodyear* and in particular, the Court’s holding that general jurisdiction over a corporation is only appropriate if a corporation has continuous and systematic general business contacts such as to render the corporation *essentially “at home” there*, the concession was likely in error. *See also infra* note 91.

55. *See Brown v. Meter*, 681 S.E.2d 382, 395 (N.C. Ct. App. 2009).

56. *Goodyear*, 131 S. Ct. at 2849.

57. *Id.* (“The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and general jurisdiction. Flow of a manufacturer’s products into the forum may bolster an affiliation germane to *specific* jurisdiction. . . . A corporation’s ‘continuous activity of some sorts within a state,’ *International Shoe* instructed, ‘is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” (citation omitted) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945))).

58. *Id.* at 2857 (citation omitted) (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

59. *Id.* at 2853–54.

corporation's affiliations with a state were "so 'continuous and systematic' as to render them essentially at home in the forum State."⁶⁰ On the facts of *Goodyear*, Justice Ginsburg readily concluded that the foreign defendants were "in no sense at home in North Carolina."⁶¹

Following *Goodyear*, courts and commentators debated the meaning of the Court's new "at home" language.⁶² Some argued that the Court intended to effectuate a dramatic change in the law of general jurisdiction, such that assertions of general jurisdiction on the basis of continuous and systematic contacts would be rare.⁶³ Others argued that the Court could not have intended to do away with decades of doing business jurisdiction precedent without explicitly acknowledging what it was doing.⁶⁴ Many courts following *Goodyear* actually did pay attention to the new "at home" language, resulting in more limited assertions of general jurisdiction.⁶⁵ But some courts still "push[ed] the envelope after *Goodyear*, distinguishing *Goodyear* and finding general personal jurisdiction on the basis of sales (or salespeople) alone, without any other physical presence."⁶⁶

60. *Id.* at 2851.

61. *Id.* at 2857.

62. See Lindsey D. Blanchard, *Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 McGEORGE L. REV. 865, 875–78 (2013) (discussing a variety of different scholarly interpretations of the "at home" language).

63. See, e.g., Feder, *supra* note 34, at 677 ("The Court did not specify what it meant by at home, or address how many states could qualify with respect to a particular corporation—a question that is sure to be litigated in future cases. However, the *Goodyear* opinion did include several clues suggesting that the Court may have intended the at home standard as a narrow one, perhaps extending no further than a corporation's state of incorporation and principal place of business."); Pielemeier, *supra* note 37, at 991 ("In any event, a limitation of general jurisdiction over corporations to places where they are 'at home,' appears clearly to envision fewer places than one could envision under tests of 'presence,' 'doing business,' and 'continuous and systematic general business contacts.'").

64. See, e.g., Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 214–15, 217 (2011) ("Thus, Justice Ginsburg suggests that, under the specific facts of *Goodyear*, the plaintiff's theory of personal jurisdiction reaches far beyond existing precedent, but she does not explicitly suggest that she intends to go further than this case requires and reverse the multitude of lower court cases that rest general jurisdiction on direct sales to the forum state. That result would be vastly more far reaching than what the decision in *Goodyear* requires and would work a major change in lower court caselaw without consideration of the very different facts of those cases.").

65. See, e.g., *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1225 (9th Cir. 2011) (stating that a celebrity gossip website's contacts with California fell "well short of the requisite showing for general jurisdiction"); see also *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 230–31 (5th Cir. 2012).

66. Sherry, *supra* note 8, at 118–19. See, e.g., *J.B. ex rel. v. Abbott Labs. Inc.*, No. 12-cv-385, 2013 WL 452807, at *3 (N.D. Ill. Feb. 6, 2013) (finding general jurisdiction over a defendant pharmaceutical company on the basis that "[b]y soliciting business, selling and marketing products, and employing a sales team in the Southern District, Abbott could reasonably anticipate being haled into the District"; the court indicated that "the Supreme Court [in *Goodyear*] did not replace or redefine the well-established standard for establishing general jurisdiction"); *McFadden v. Fuyao N. Am., Inc.*, No. 10-CV-14457, 2012 WL 1230046, at *2–3 (E.D. Mich. Apr. 12, 2012) (quoting the "at home" language

For instance, in *Hess v. Bumbo International Trust*, a federal court in Texas was faced with the question of whether to assert general jurisdiction over a South African manufacturer of allegedly defective infant seats.⁶⁷ In *Hess*, Arizona plaintiffs sued Bumbo in Texas with respect to an injury that took place in Arizona when the plaintiff’s infant son “flipped out” of the baby seat, “fracturing his skull and requiring extensive medical treatment.”⁶⁸ The Texas court, like the court in *L.L. Bean*, noted that the case was a “close call,” but nonetheless concluded that, “despite the high threshold for general jurisdiction, the evidence in this case establishes that Bumbo has continuous and systematic commercial contacts with Texas sufficient to enable this Court’s exercise of personal jurisdiction over it.”⁶⁹ The court focused almost exclusively on Bumbo’s connections with a Texas-based distributor to justify the assertion of general jurisdiction over Bumbo.⁷⁰ It noted that “a quarter (and at certain points all) of the Bumbo Baby Seats sold in the United States were distributed from Texas,” resulting in what the court considered a “substantial sales presence.”⁷¹ Moreover, the distributor was closely involved in a recall of the baby seat in 2007; it liaised with various regulators and retail stores in order to manage Bumbo’s response to the recall.⁷² According to the court, “[t]he longevity, continuity, and volume of Bumbo’s business with its Texas-based distributor establish the type of contacts that allow Bumbo to be considered ‘at home’ in Texas.”⁷³

Although the Texas court used *Goodyear*’s “at home” language, one might easily question whether the court heeded the spirit of the decision. Bumbo had no actual presence in Texas—it had no stores and no employees in Texas.⁷⁴ Instead, it selected a Texas-based distributor to be the middleman between the corporation and various retail establishments.⁷⁵ The court did not actually analyze how many baby seats were sold in Texas, how much of Bumbo’s revenue was derived from Texas, whether Bumbo extensively marketed the product in Texas, or whether Bumbo had any other Texas-based contacts. Instead, it focused on establishing jurisdiction in Texas through the presence of an

from *Goodyear* but failing to apply the new standard when finding general jurisdiction over a Chinese corporation).

67. 954 F. Supp. 2d 590, 591 (S.D. Tex. 2013).

68. *Id.* at 591–92.

69. *Id.* at 593.

70. *Id.* at 593–94.

71. *Id.* at 595. Of the 3.85 million Bumbo Baby Seats in the United States, nearly one million of these were distributed by Bumbo’s Texas-based distributor, Wartburg Enterprises. *Id.* at 593.

72. *Id.* at 594.

73. *Id.* at 595.

74. *Id.*

75. *Id.* at 593–94.

independent U.S. distributor.⁷⁶ It is not clear that these connections were the sort of connections that Justice Ginsburg in *Goodyear* would have regarded as being so continuous and systematic to render Bumbo “at home” in Texas.⁷⁷

Less than two years after the Court decided *Goodyear*, it released its decision in *Daimler*.⁷⁸ Although many expected *Daimler* to focus on the agency issue presented in the question for certiorari, the Court largely ducked that question.⁷⁹ Instead, the Court focused primarily on the “at home” language that it had introduced into the general jurisdiction discourse in *Goodyear*.⁸⁰ Justice Ginsburg, writing for the eight-Justice majority, more explicitly stated what she had alluded to in *Goodyear*: the new “at home” basis for jurisdiction was intended to seriously restrict assertions of general jurisdiction.⁸¹ The decision, if followed by lower courts, will officially mark the end of doing business jurisdiction in the United States.

76. *Id.* at 595–96.

77. Moreover, the court acknowledged that “[t]he relationship between Bumbo and Wartburg eventually turned sour in 2010, resulting in Bumbo filing litigation.” *Id.* at 594. The *Hess* case was decided in 2013, three years *after* the relationship that formed the basis for the general jurisdiction determination was presumably severed. This raises the independent issue of how long contacts or affiliations between the defendant and the state can be relevant for general jurisdiction purposes. Does the fact that Bumbo and its Texas distributor had a close relationship in, say, 2009 justify asserting general jurisdiction over Bumbo in 2013? It surely cannot be the case that if a defendant is, at some point, subject to general jurisdiction in a forum, it is subject to general jurisdiction forevermore in that forum. *See Andrews, supra* note 16, at 1053 (“One element of general jurisdiction assessment is the timing of the contacts. Which contacts, in terms of their timing, are relevant to general jurisdiction analysis? The Court has not directly addressed this timing issue, but, previously, many lower courts looked to a period of years immediately preceding and including the filing date. A period of years may be appropriate in some cases, but the primary focus should be current contacts at the time plaintiff filed suit. This is especially true in light of the *Goodyear* at-home standard.”).

78. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Daimler* was released the same day as *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014), a case dealing with specific jurisdiction, which held that “the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” For commentary on the *Walden* decision, see generally Genetin, *supra* note 8; Rhodes & Robertson, *supra* note 8.

79. The United States Supreme Court granted certiorari on the question of “whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.” Petition for a Writ of Certiorari at i, *Daimler*, 134 S. Ct. 746 (No. 11-965).

80. *See Daimler*, 134 S. Ct. at 760–62.

81. *See id.* at 762 n.20.

II. THE DECISION IN *DAIMLER V. BAUMAN*

A. THE FACTS

In *Daimler*, Argentinian plaintiffs sued a German automaker, DaimlerChrysler (“Daimler”), in federal court in California.⁸² The plaintiffs alleged that Daimler’s wholly owned Argentinian subsidiary had collaborated with state security forces in Argentina in kidnapping, detaining, torturing, and killing plaintiffs and/or their relatives during Argentina’s “Dirty War” between 1976 and 1983.⁸³ The complaint did not name Daimler’s Argentinian subsidiary as a defendant; rather, the plaintiffs sought to hold Daimler, the parent company, vicariously liable for the actions of its Argentinian subsidiary.⁸⁴ The plaintiffs sought to establish jurisdiction over Daimler in California based on the presence of a *different* Daimler subsidiary in California, Mercedes-Benz USA (“MBUSA”).⁸⁵ MBUSA serves as Daimler’s exclusive importer and distributor of Mercedes-Benz automobiles in the United States.⁸⁶ It is incorporated in Delaware and has its principal place of business in New Jersey.⁸⁷ MBUSA also has significant contacts with California.⁸⁸ In particular, it has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.⁸⁹ Further, MBUSA is the largest supplier of luxury vehicles to the California market, with over ten percent of all sales of new vehicles in the United States taking place in California.⁹⁰ Daimler conceded⁹¹ that these contacts between MBUSA and California would suffice to ground personal jurisdiction over MBUSA.⁹²

82. *Id.* at 750–51.

83. *Id.* at 751.

84. *Id.* at 752. The plaintiffs “asserted claims under the Alien Tort Statute, and the Torture Victim Protection Act of 1991, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina.” *Id.* at 751 (citations omitted). In light of recent Supreme Court rulings, both federal claims in *Daimler* were likely to be dismissed in any event. *See generally* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (holding that the Alien Tort Statute does not apply extraterritorially); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (holding that only a natural person is an “individual” who can be held liable under the Torture Victim Protection Act).

85. *Daimler*, 134 S. Ct. at 752. Technically, MBUSA is a subsidiary of a DaimlerChrysler North America Holding Company, which itself is a Daimler subsidiary. *Id.* at 752 n.3. Thus, MBUSA is an indirect subsidiary of Daimler. *Id.* at 752.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* Additionally, MBUSA’s California sales constituted 2.4% of Daimler’s worldwide sales. *Id.*

91. The concession was likely in error given the holding in *Daimler* itself. *See* Sherry, *supra* note 8, at 117 (noting that “DaimlerChrysler unwisely conceded [that MBUSA’s contacts with California] were sufficient to satisfy the ‘continuous and systematic’ test for general jurisdiction”).

92. *Daimler*, 134 S. Ct. at 765 (Sotomayor, J., concurring).

B. THE PROCEEDINGS BELOW

After the suit was filed, Daimler moved to dismiss the action for lack of personal jurisdiction, arguing that it had insufficient contacts with California to render it subject to suit there.⁹³ In response, the plaintiffs filed declarations and exhibits demonstrating Daimler's presence in California and alternatively arguing that MBUSA's substantial contacts with California should be imputed to Daimler for jurisdiction purposes on a theory of agency.⁹⁴ After allowing jurisdictional discovery on the plaintiffs' agency allegations, the district court granted Daimler's motion to dismiss.⁹⁵ The court found that Daimler had insufficient contacts with California to ground general jurisdiction and that the relationship between Daimler and MBUSA fell short of the requisite standard for agency.⁹⁶

Originally, the Ninth Circuit affirmed the district court's ruling solely on the basis of agency, stating that "[b]ecause there is insufficient control and because MBUSA does not serve as [Daimler's] representative, the contacts of MBUSA cannot be imputed to [Daimler]."⁹⁷ The court, however, granted the plaintiffs' petition for rehearing and then reversed its initial holding.⁹⁸ The opinion was authored by the original dissenting judge, Judge Reinhardt, who expressed the views outlined in his earlier dissent.⁹⁹ Judge Reinhardt stated that the imputation of contacts was appropriate because "MBUSA's business was sufficiently important to [Daimler] that without MBUSA or another representative, [Daimler] would have performed those services itself. Moreover, [Daimler] had the right to control to one extent or another nearly every aspect of MBUSA's business."¹⁰⁰ In addition, Judge Reinhardt conducted a reasonableness inquiry and found that Daimler "ha[d] not met its burden of presenting a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice."¹⁰¹ The U.S. Supreme Court granted certiorari on the

93. *Id.* at 752. In particular, Daimler claimed: (1) MBUSA's contacts in California could not be imputed to it because MBUSA was not Daimler's agent; (2) without MBUSA's contacts, Daimler lacked sufficient contacts in California to ground general jurisdiction; and (3) even if there were sufficient contacts with California, an assertion of jurisdiction would be unreasonable. *Id.*

94. *Id.*

95. *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2007 WL 486389, at *1 (N.D. Cal. Feb. 12, 2007).

96. *Id.* at *2.

97. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1096-97 (9th Cir. 2009).

98. *See Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 931 (9th Cir. 2011); *Bauman v. DaimlerChrysler Corp.*, 603 F.3d 1141 (9th Cir. 2010).

99. *See generally Bauman*, 644 F.3d 909.

100. *Id.* at 931.

101. *Id.* at 930 (quoting *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003)) (internal quotation marks omitted).

question of “whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.”¹⁰²

C. THE SUPREME COURT’S DECISION

Justice Ginsburg, writing for an eight-Justice majority, concluded that the contacts between MBUSA and California, even if imputed to Daimler, were insufficient to ground jurisdiction over Daimler.¹⁰³ After going through a lengthy history of the Supreme Court’s jurisprudence on general and specific jurisdiction,¹⁰⁴ the Court examined what many had assumed would be the central issue in the case: when can a subsidiary’s contacts be imputed to the parent for jurisdictional purposes?¹⁰⁵ The Court briefly examined the various tests that had been advanced to answer this question.¹⁰⁶ Daimler, for instance, had argued that a party’s jurisdictional contacts can only be imputed to its parent when the

102. Petition for a Writ of Certiorari, *supra* note 79, at i. Note that Daimler’s petition to the Ninth Circuit for rehearing and rehearing en banc was denied over an eight-judge dissent, despite Daimler’s claim that the Ninth Circuit’s holding was inconsistent with *Goodyear*. See generally Bauman v. DaimlerChrysler Corp., 676 F.3d 774 (9th Cir. 2011). Professor Silberman commented on how “odd” it was that the Supreme Court granted certiorari in the *Daimler* case:

It is difficult to comment on the *Bauman* case without noting how odd the grant of certiorari was in the first place. The petition for certiorari was pending before the Supreme Court for almost two years, and the Court agreed to hear the case only days after it decided *Kiobel*. . . . Even if personal jurisdiction were ultimately sustained in *Bauman*, the claims asserted under the Alien Tort Statute would have to be dismissed under the *Kiobel* precedent.

Silberman, *supra* note 8, at 132.

103. Daimler AG v. Bauman, 134 S. Ct. 746, 762 (2014).

104. The Court acknowledged the interplay between these two forms of jurisdiction and noted that “[s]pecific jurisdiction has been cut loose from *Pennoyer*’s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized.” *Id.* at 757–58 (citing Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 619, 676 (1988) (“[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants.”)). Scholars post-*Daimler* have criticized the logic that an expansion of specific jurisdiction means a contraction of general jurisdiction. See Cornett & Hoffheimer, *supra* note 8, at 24–25, 25 n.102 (“[T]he Court offers no explanation for why the constitutional expansion of one set would require a corresponding restriction in the other. . . . The Court noted that ‘[o]ur post-*International Shoe* opinions on general jurisdiction . . . are few.’ This observation does not begin to explain why the Court should limit general jurisdiction.” (quoting *Daimler*, 134 S. Ct. at 755)); Cox, *supra* note 8, at 17 (“The fundamental logical flaw the Court made, however, was to assert that this rise in specific jurisdiction cases necessarily meant general jurisdiction must be read restrictively. A dramatic rise in the number of specific jurisdiction cases does not automatically explain why there should be a shortening of general jurisdiction reach.”). For additional analysis of the interplay between general and specific jurisdiction, see generally Trammell, *supra* note 8.

105. *Daimler*, 134 S. Ct. at 753–60.

106. *Id.* at 759.

“former is so dominated by the latter as to be its alter ego.”¹⁰⁷ The Ninth Circuit, on the other hand, had adopted a “less rigorous” agency test for jurisdictional imputation: an agency relationship exists, and thus contacts can be imputed, where 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.”¹⁰⁸ On the facts of *Daimler*, the Ninth Circuit had concluded that MBUSA’s services were “important” to Daimler, as evidenced by Daimler’s “hypothetical readiness to perform those services itself if MBUSA did not exist.”¹⁰⁹ The Court rejected this latter test as being one that “stacks the deck, for it will always yield a pro-jurisdiction answer.”¹¹⁰ It noted that anything that a corporation does via an intermediary, such as an independent contractor, subsidiary, or distributor, is presumably something that the corporation would otherwise have done itself in the absence of that intermediary.¹¹¹ The Court did not, however, endorse the alter ego test for imputation—or any other test for that matter.¹¹² Instead, it declared that “we need not pass judgment on the invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court’s analysis be sustained.”¹¹³

With no more direction on the imputation issue which was thought to be the reason for granting certiorari in the case, the Court proceeded with the analysis, concluding that *even if one assumes* that MBUSA is subject to general jurisdiction in California, and *even if one assumes* that MBUSA’s contacts are imputable to Daimler, there still would be no basis for general jurisdiction over Daimler in California.¹¹⁴ Thus, the rest of the opinion was premised on MBUSA being subject to general

107. *Id. Accord* Brief for Petitioner at 12, *Daimler*, 134 S. Ct. 746 (No. 11-965) (“Attributing a subsidiary’s jurisdictional contacts to its parent *only* when the two companies are truly alter egos affords defendants the certainty and predictability that due process requires and ensures that defendants are subject to suit only in those jurisdictions in which they themselves possess the requisite minimum contacts. Here, because it is undisputed that Daimler AG and MBUSA are not alter egos, the jurisdictional contacts of MBUSA may not be attributed to Daimler AG.”).

108. *Daimler*, 134 S. Ct. at 759 (emphasis omitted) (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001)).

109. *Id.* at 749.

110. *Id.* at 759.

111. *Id.* at 759–60. This position was also advanced by Professor Brilmayer in her Brief in Support of Petitioner. See Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner at 14, *Daimler*, 134 S. Ct. 746 (No. 11-965) (“After all, whenever this ‘test’ is invoked, it is likely to generate a pro-jurisdiction outcome. It is difficult to conceive what, if anything, this definition of agency excludes. If a service was cost-effective enough to have been arranged in the first place, why *wouldn’t* Daimler want to either establish in-house capacity or else hire a replacement?”).

112. *Daimler*, 134 S. Ct. at 758–60.

113. *Id.* at 759.

114. *Id.* at 760.

jurisdiction in California (on the basis that it was “at home” there) and on the contacts which rendered it “at home” in California being imputable to Daimler.

At this point, Justice Ginsburg took the opportunity to revisit the Court’s decision in *Goodyear*, which she had penned a few years earlier.¹¹⁵ She stated that *Goodyear* made it plain that only a limited set of affiliations with a state would subject a defendant to general jurisdiction there.¹¹⁶ With respect to corporations, “the place of incorporation and principal place of business are the ‘paradig[m] . . . bases for general jurisdiction.’”¹¹⁷ The Court noted that “[t]hose affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.”¹¹⁸ It also observed that “[t]hese bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”¹¹⁹ The Court stressed the exceptionality of the “at home” basis for general jurisdiction, stating that it did not “foreclose the possibility that in an exceptional case” general jurisdiction could be asserted over a corporation in a state other than its state of incorporation or principal place of business.¹²⁰ The Court stated very briefly, and in a footnote, that the “at home” inquiry calls for “an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”¹²¹ It elaborated that “a corporation that operates in many places can scarcely be deemed at home in all of them.”¹²²

On the facts, the Court concluded that Daimler’s “slim contacts” with California meant that it was not “at home” there.¹²³ The Court did not specifically address exactly what these slim contacts were or why they were not sufficient to render Daimler “at home” in California. Rather, it

115. *Id.* at 760–61. The plaintiffs in their brief had implored the Court to focus on the issue presented in the case (that of agency) and not use this case as an opportunity to revisit the *Goodyear* “at home” standard. See Brief for the Respondents at 15–16, *Daimler*, 134 S. Ct. 746 (No. 11-965) (“This Court should reject any effort (direct or subtle) to provoke a decision on the standard for general jurisdiction. Any such argument was forfeited below and not adequately raised in the petition for certiorari. Nor has the question percolated in the lower courts since this Court’s decision in *Goodyear* two terms ago. And neither the parties nor the Government has adequately briefed the issue.”). Professor Cox observes that the parties in *Daimler* focused their submissions on issues that the Court ended up choosing not to deal with. Cox, *supra* note 8, at 13. According to Cox, had there been “focused adversarial argument” on the issue of the appropriate test for general jurisdiction, this “might have sharpened the *Daimler* Court’s thinking.” *Id.*

116. *Daimler*, 134 S. Ct. at 760–61.

117. *Id.* at 760 (quoting Brilmayer et al., *supra* note 11, at 735).

118. *Id.*

119. *Id.*

120. *Id.* at 761 n.19.

121. *Id.* at 762 n.20.

122. *Id.*

123. *Id.* at 761–62.

cited concerns about predictability and exorbitant assertions of jurisdiction to justify its conclusion that California did not have general jurisdiction over Daimler.¹²⁴ The Court also pointed to the “transnational” context of the dispute to bolster its conclusion that jurisdiction was not appropriate.¹²⁵ It observed that an expansive approach to personal jurisdiction could pose a “risk[] to international comity” and that “other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”¹²⁶ Accordingly, the Court reversed the judgment of the Ninth Circuit, holding that the assertion of general jurisdiction over Daimler would violate due process.¹²⁷

Justice Sotomayor concurred in the result—that there was no general jurisdiction over Daimler in California—but for very different reasons.¹²⁸ Justice Sotomayor would have dismissed the case on the basis that the assertion of jurisdiction over Daimler was unreasonable.¹²⁹ She stated that the inquiry into jurisdiction consists of two parts, contacts and reasonableness, and that the inquiry is the same whether one is dealing with general or specific jurisdiction.¹³⁰ She noted that the case involved Argentinian plaintiffs suing a German defendant for conduct that took place in Argentina and that the plaintiffs failed to show that it would be more convenient to litigate in California, rather than Germany, a country with a far greater interest in resolving the dispute.¹³¹

Even though Justice Sotomayor would have decided the case on the basis that the assertion of jurisdiction would have been unreasonable, she felt it necessary to address the Court’s holding on the “at home” test.¹³² For Justice Sotomayor, the “at home” test does not involve looking at a corporation’s nationwide or worldwide activities and comparing them to the corporation’s activities in the forum.¹³³ Rather, the “at home” test

124. *Id.*

125. *Id.* at 762–63.

126. *Id.* at 763.

127. *Id.*

128. *Id.* at 763–64 (Sotomayor, J., concurring).

129. *Id.* at 764 (Sotomayor, J., concurring).

130. *Id.* at 764–65 (Sotomayor, J., concurring). The majority did not believe that the reasonableness prong for jurisdiction applied when dealing with assertions of general jurisdiction. *Id.* at 762 n.20.

131. *Id.* at 765 (Sotomayor, J., concurring). *But see* Brief of Amici Curiae German Institute for Human Rights & Other German Legal Experts in Support of Respondents at 2–3, *Daimler*, 134 S. Ct. 746 (No. 11-965) (“For the respondent victims of serious violations of internationally-recognized human rights in this case, and for others like them, Germany is an inadequate alternative forum. German courts would apply the harsh limitation period of the *lex loci damni*, and German law imposes additional logistical and financial hurdles on non-European plaintiffs that effectively close off the German courts to the respondents in this case.”).

132. *Daimler*, 134 S. Ct. at 766–67 (Sotomayor, J., concurring).

133. *Id.* at 767 (Sotomayor, J., concurring).

looks solely at the magnitude of the defendant’s forum contacts, not the relative magnitude of those contacts vis-à-vis the defendant’s contacts with other forums.¹³⁴ Justice Sotomayor stated that if the Court had applied the appropriate approach to general jurisdiction, it would have had “little trouble” concluding that Daimler’s California contacts, imputed from MBUSA, rendered Daimler “at home” in California.¹³⁵ In other words, if MBUSA was “at home” in California and those contacts were imputed to Daimler, then Daimler would also be “at home” in California. For Justice Sotomayor, a corporation could be “at home” in multiple places, so long as it enjoyed extensive benefits in those places such that it should be subject to the burden of litigating there.¹³⁶

III. KEY POINTS OF DISAGREEMENT

The two opinions, although they come to the same ultimate result, diverge considerably in their reasoning and implications. Although *Daimler* was a decisive 8-1 “win” for the majority, the points elucidated by Justice Sotomayor in the concurrence represent a very different way of conceptualizing general jurisdiction, and accordingly, both opinions are worth exploring in detail.

Interestingly, much of the substantive discussion in *Daimler* takes place in the footnotes. In total, there are thirty-two footnotes in *Daimler*, many of them fairly extensive.¹³⁷ Moreover, the opinions are replete with “footnote jabs” between Justice Ginsburg and Justice Sotomayor;¹³⁸ presumably, the opinions were written independently, and then footnotes were added to respond specifically to the arguments of the other side.

134. *See id.* (Sotomayor, J., concurring).

135. *Id.* at 769 (Sotomayor, J., concurring).

136. *Id.* at 768–89, 771 (Sotomayor, J., concurring).

137. *See generally id.*

138. The tone of the judgment is rather caustic at times. *See id.* at 756 n.8 (accusing Justice Sotomayor of “selectively referring to the trial court record in *Perkins*”); *id.* at 758 n.10 (stating that “[r]emarkably, Justice Sotomayor treats specific jurisdiction as through it were barely there”); *id.* at 760 n.16 (stating that Justice Sotomayor’s assertion that the majority strayed from the question on which it granted certiorari is “doubly flawed”); *id.* at 262 n.20 (stating that Justice Sotomayor “favors a resolution fit for this day and case only”); *id.* at 764 n.1 (Sotomayor, J., concurring) (noting that “without the benefit of a single page of briefing on the issue, the majority casually adds each of these cases to the mounting list of decisions jettisoned as a consequence of today’s ruling”); *id.* at 765 n.2 (stating that “although the majority frets that deciding this case on the reasonableness ground would be ‘a resolution fit for this day and case only,’ I do not understand our constitutional duty to require otherwise”); *id.* at 768 n.7 (stating that “[t]he majority suggests that I misinterpret language in *Perkins* that I do not even cite”). One particular article on *Daimler* focused less on the substance of the case and more on the *ad hominem* nature of the debate between the two Justices: “For those readers not interested in studying this basic doctrine, what might be of greater interest is Ginsburg’s manifest impatience with what she evidently regards as Sotomayor’s utter cluelessness. . . . Sotomayor, I will add, fires back.” Ed Whelan, *Court Ruling Invites Scathing Criticism?*, NAT’L REV. (Jan. 14, 2014, 2:37 PM), <http://www.nationalreview.com/bench-memos/368445/court-ruling-invites-scathing-criticism-ed-whelan>.

Thus, much of the “meat” in *Daimler* is curiously absent from the text of the opinions themselves, but instead found in the footnotes.

Below, I discuss the three main areas of disagreement between the majority and the concurrence: the nature of the test for general jurisdiction; the meaning of the words “at home”; and the propriety of analyzing the reasonableness factors for the assertion of general jurisdiction.

A. AN ABSOLUTE OR COMPARATIVE TEST FOR GENERAL JURISDICTION?

The most significant difference of opinion between the majority and the concurrence derives from the question of *how* to assess the contacts between a forum and a corporation for the purposes of general jurisdiction—in absolute or comparative terms. Although not phrased in this manner, the Court holds that the test is a comparative one: what are the corporation’s contacts with the forum state vis-à-vis its contacts with other states (or countries)? The Court does not address this issue in the text of the actual opinion, but instead relegates it to a footnote.¹³⁹ In footnote 20, the Court writes, “the general jurisdiction inquiry does not ‘focu[s] solely on the magnitude of the defendant’s in-state contacts.’ General jurisdiction instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”¹⁴⁰ Presumably, the Court’s view is that while Daimler’s contacts with California, through its subsidiary, might have been substantial in and of themselves, they were not particularly significant when viewed against the backdrop of Daimler’s worldwide operations. Accordingly, Daimler, even if it has significant contacts with California, is nonetheless not “at home” in California. Indeed, the adoption of the comparative test for general jurisdiction—an examination of the defendant’s contacts with the forum state in relation to its nationwide and worldwide contacts—is the main take-away from the case.

Justice Sotomayor, on the other hand, is of the view that the “at home” test for general jurisdiction is not a comparative one, but rather an absolute one. Once a corporation meets some requisite level of connection with the forum (through its stores, employees, sales, marketing, and the like), then the corporation is “at home” in the forum and is subject to general jurisdiction there.¹⁴¹ She notes that “[i]n every case where we have applied [the continuous and systematic general business contacts] test, we have focused solely on the magnitude of the defendant’s in-state contacts, not the relative magnitude of those

139. *Daimler*, 134 S. Ct. at 762 n.20.

140. *Id.* (quoting *id.* at 767 (Sotomayor, J., concurring)).

141. *Id.* at 767–70 (Sotomayor, J., concurring).

contacts in comparison to the defendant’s contacts with other States.”¹⁴² She illustrates this point by discussing *Helicopteros*, *Perkins*, and *Goodyear*, noting that in each of these cases, the Supreme Court did not focus on the defendant’s contacts with other states, but rather its contacts (or lack thereof) with the forum state seeking to assert general jurisdiction.¹⁴³ She continues:

When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts. The majority’s focus on the extent of a corporate defendant’s out-of-forum contacts is untethered from this rationale. After all, the degree to which a company intentionally benefits from a forum State depends on its interactions with that State, not its interactions elsewhere. An article on which the majority relies . . . expresses the point well: “We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states. . . . [T]he amount of activity elsewhere seems virtually irrelevant to . . . the imposition of general jurisdiction over a defendant.”¹⁴⁴

Justice Sotomayor then follows through with the logical consequence of her position: If MBUSA’s contacts with California render it “at home” there, and those contacts are imputed to Daimler, then so too is Daimler “at home” in California.¹⁴⁵ Both entities, in other words, have surpassed the threshold of contacts required to sustain general personal jurisdiction in California. Justice Sotomayor points to what she considers the absurdity of the Court’s holding:

The problem, the Court says, is not that Daimler’s contacts with California are too few, but that its contacts with other forums are too many. In other words, the Court does not dispute that the presence of multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers throughout a State would be enough to support the exercise of general jurisdiction over some businesses. Daimler is just not one of those businesses, the Court concludes, because its California

142. *Id.* at 767 (Sotomayor, J., concurring).

143. *Id.* at 767–68 (Sotomayor, J., concurring).

144. *Id.* at 768–69 (Sotomayor, J., concurring) (citations omitted) (quoting Brilmayer et al., *supra* note 11, at 742).

145. *Id.* at 769–70 (Sotomayor, J., concurring) (“Had the majority applied our settled approach, it would have had little trouble concluding that Daimler’s California contacts rise to the requisite level, given the majority’s assumption that MBUSA’s contacts may be attributed to Daimler and given Daimler’s concession that those contacts render MBUSA ‘at home’ in California. . . . Under this standard, Daimler’s concession that MBUSA is subject to general jurisdiction in California (a concession the Court accepts, *ante*, at 758, 759) should be dispositive. For if MBUSA’s California contacts are so substantial and the resulting benefits to MBUSA so significant as to make MBUSA ‘at home’ in California, the same must be true of Daimler when MBUSA’s contacts and benefits are viewed as its own.”).

contacts must be viewed in the context of its extensive “nationwide and worldwide” operations.¹⁴⁶

The Court’s adoption of a comparative test functions to create a much higher standard for the assertion of general jurisdiction than previously existed. Not only does the defendant have to have continuous and systematic contacts with the forum, but those contacts must be more significant than the contacts it has with other states or countries. Only where the contacts with the forum are much greater than the contacts the corporation has with other forums (such that one can regard the corporation as “at home”) will the assertion of general jurisdiction be justified. Accordingly, the Court’s comparative approach to the continuous and systematic inquiry has the effect of dramatically reining in general jurisdiction. On the other hand, Justice Sotomayor’s absolute approach would essentially preserve the *status quo*. If a corporation has a sufficient level of contacts with a state, then that state will possess general jurisdiction over the corporation irrespective of the corporation’s contacts elsewhere. So which approach to general jurisdiction is the “right” one? Should general jurisdiction be a comparative inquiry or an absolute one? Should assertions of general jurisdiction be broad or narrow?

On balance, it appears that Justice Sotomayor has the better argument based on legal precedent, while the Court has the better argument based on policy. Justice Sotomayor is correct in her view that, according to past Supreme Court precedent, the continuous and systematic inquiry is an absolute one.¹⁴⁷ Once the defendant has a certain threshold of contacts with the forum, that forum has general jurisdiction over the defendant. The fact that the defendant also has contacts with other forums has largely been irrelevant in the general jurisdiction analysis.¹⁴⁸ It is the unique relationship between the forum state and the defendant that gives the state the right to adjudicate any and all disputes concerning the defendant; the fact that the defendant may also have that

¹⁴⁶ *Id.* at 764 (Sotomayor, J., concurring) (observing that much like the concept that multinational corporations are “too big to fail,” the consequence of the majority’s holding is that multinational corporations like Daimler are “too big for general jurisdiction”).

¹⁴⁷ See generally *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

¹⁴⁸ In *Gator.com v. L.L. Bean* and *Hess v. Bumbo*, for instance, the courts did not look at the defendants’ contacts with other jurisdictions in assessing whether or not the defendants were subject to general jurisdiction in the forum. Rather, the courts concentrated solely on whether the defendants had the requisite level of contacts with California and Texas, respectively, to ground general jurisdiction. See *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003); *Hess v. Bumbo Int’l Trust*, 954 F. Supp. 2d 590 (S.D. Tex. 2013).

same, or a similar, relationship with another state has generally been of no moment in the general jurisdiction analysis.¹⁴⁹

With that said, it is unclear that continuous and systematic general business contacts (or, in more common vernacular, doing business) was ever an appropriate basis for general jurisdiction. Many commentators have questioned the conceptual basis for this ground of jurisdiction. For example, Professor Erichson starts off a recent article with the following statement:

What, if anything, gives a state sufficiently plenary power over a person that the state may adjudicate claims against the person even if the claims arose elsewhere? Particularly with regard to corporations, this basic question has lacked a clear answer. The standard for general jurisdiction remains unsatisfactorily vague, with ambiguous Supreme Court guidance on doctrine and even less explanation of *why* such jurisdiction exists.¹⁵⁰

Other commentators have also struggled to provide a compelling justification for general jurisdiction based on the defendant’s continuous and systematic contacts with the forum.¹⁵¹ In fact, one professor whose thoughts on doing business jurisdiction were published in the *Harvard Law Review* had a self-proclaimed “change of heart” on the topic but nonetheless had a hard time finding a compelling theoretical rationale for the doctrine and a workable solution as to how to implement it in practice.¹⁵²

Leaving aside its murky conceptual basis, there are at least three important policy reasons why it makes sense to circumscribe general jurisdiction in the way that the Court has done. First, an expansive interpretation of general jurisdiction poses risks to international comity. The Court asserts, quite correctly, that “[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of

149. See Brilmayer et al., *supra* note 11, at 743 (“Significantly, for purposes of general jurisdiction, the relevant issue is the absolute amount of activity, not the amount of activity relative to what the defendant does outside the state.”).

150. Erichson, *supra* note 8, at 81–82. In Professor Erichson’s next sentence, referring to *Daimler*, he states, “[t]he coming Supreme Court term offers the Court an opportunity to clarify.” *Id.* at 82. Unfortunately, the Supreme Court in *Daimler* did not provide much in the way of theoretical guidance or justification for general jurisdiction. See also Cox, *supra* note 8, at 17 (“The most disappointing aspects of the *Daimler* Court’s approach to general jurisdiction relate to its lack of any foundational explanation for the doctrine, and its unwillingness to address tensions between its assumptions and personal jurisdiction case law more generally. Although the *Daimler* Court’s instincts about general jurisdiction were correct, it failed to pursue those instincts towards any broader theoretical explanation of personal jurisdiction doctrine.”).

151. See, e.g., Andrews, *supra* note 16; Brilmayer et al., *supra* note 11; Twitchell, *supra* note 104.

152. See Twitchell, *supra* note 104, at 630–43 (criticizing the elastic use of doing business as a basis for general jurisdiction); Twitchell, *supra* note 33, at 171–72 (discussing a “change of heart” concerning general jurisdiction and suggesting a more guided approach where “such jurisdiction is permitted only if the state would be justified in deciding a claim that is wholly unrelated to the defendant’s forum contacts”).

Appeals in this case.”¹⁵³ The Court points to the fact that under the Brussels Regulation, which governs jurisdiction and the enforcement of judgments in the European Union, a corporation may generally be sued in the nation in which it is “‘domiciled,’ a term defined to refer only to the location of the corporation’s ‘statutory seat,’ ‘central administration,’ or ‘principal place of business.’”¹⁵⁴ It also observes that past negotiations for a worldwide treaty on the enforcement of judgments have been impeded, in part, due to foreign perceptions that U.S. courts have adopted overly “expansive views of general jurisdiction.”¹⁵⁵ In addition, the Court notes a particular concern expressed by the amici in *Daimler* that unpredictable assertions of general jurisdiction over U.S. subsidiaries of foreign corporations could discourage foreign investment.¹⁵⁶ For the Court, all of these foreign policy considerations militate against overly expansive assertions of general jurisdiction and reinforce the Court’s determination that subjecting Daimler to jurisdiction in California would not be consistent with due process.

Second, overly broad assertions of general jurisdiction based on a corporation doing business in a forum would lead to unpredictable results for defendants. A corporate defendant would never know with certainty if its conduct met the “magical” threshold necessary to constitute continuous and systematic general business contacts.¹⁵⁷ Thus, for the Court, the notion that assertions of general jurisdiction should be predictable is at the epicenter of the decision. Justice Sotomayor takes issue with the predictability rationale, positing that “there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one.”¹⁵⁸ She

153. *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).

154. *Id. Accord* Commission Regulation 44/2001, art. 5(5), 2011 O.J. (L 12) 4 (EU) (“[A]s regards a dispute arising out of the operations of a branch, agency or other establishment [a corporation may be sued] in the courts for the place where the branch, agency or other establishment is situated.” (emphasis added)).

155. *Daimler*, 134 S. Ct. at 763. See also Brief for the Respondents, *supra* note 115, at 35 (acknowledging that the doing business basis for general jurisdiction has led to “international friction”); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999) (“The Europeans’ principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts.”).

156. *Daimler*, 134 S. Ct. at 763 (citing Brief for the Respondents, *supra* note 115, at 35; Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Daimler*, 134 S. Ct. 746 (No. 11-965)).

157. See *id.* at 761–62 (“If Daimler’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA’s sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985))).

158. *Id.* at 770 (Sotomayor, J., concurring).

reasons that “[t]he majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.”¹⁵⁹ What Justice Sotomayor overlooks is that, *in its application*, the continuous and systematic test has been unpredictable. The results of lower courts are incredibly variable—with some courts subjecting a corporation with relatively few contacts to general jurisdiction and other courts not subjecting a corporation with quite significant contacts to general jurisdiction. A test with a higher threshold of connection, such as the “at home” test in *Daimler*, would, or should, lead to increased predictability for defendants.¹⁶⁰

Third, broad assertions of general jurisdiction encourage forum shopping.¹⁶¹ Arguably, as a matter of policy, U.S. courts should not be open for business to out-of-state or out-of-country plaintiffs whose cause of action has nothing to do with the defendant’s connections to the forum.¹⁶² The Court provides an example of what it would consider to be an “exorbitant” exercise of jurisdiction: a California court asserting jurisdiction over Daimler, a German company, in a design defect lawsuit brought by Polish plaintiffs who were injured by a Daimler vehicle in Poland.¹⁶³ The Court’s concerns make sense and are reflected in much of the commentary on general jurisdiction over the past few decades.¹⁶⁴ There is something seemingly unpalatable about having defendants answer in a forum that has nothing to do with the underlying dispute.¹⁶⁵

159. *Id.* (Sotomayor, J., concurring).

160. This is already being borne out by the post-*Daimler* case law. *See infra* pp. 271–73.

161. Professor Sherry argues that *Daimler* itself presents a “paradigmatic example of egregious forum shopping.” Sherry, *supra* note 8, at 111. Accord Childress, *Transnational Law Market*, *supra* note 8, at 68 (“As much as [*Daimler*] is about general jurisdiction, it is also about the growth of a transnational law market where plaintiffs shop the world for favorable courts and law, and states and defendants respond to that forum shopping.”).

162. The concern is particularly acute for foreign country defendants who Professor Twitchell argued were “appalled to find that general jurisdiction exposure is the price of doing regular business in U.S. markets.” Twitchell, *supra* note 33, at 197.

163. *Daimler*, 134 S. Ct. at 751, 754 n.5.

164. *See, e.g.*, Allan R. Stein, *The Meaning of “Essentially At Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 540–41 (2012) (“A handful of judicial districts across the country have become magnets for litigation against large, interstate corporations because of their tendency to render large jury awards. The more permissive the constitutional standards for the exercise of general jurisdiction, the more these problems arise. Accordingly, as a matter of sound policy and fairness, there is a practical need to constrain general jurisdiction. And as long as the plaintiff is able to pursue a defendant in its home forum, there is little necessity for expanding the options to include multiple jurisdictions that have no connection to the underlying controversy.”).

165. In endorsing a restrained approach to general jurisdiction, the Court emphasizes that general jurisdiction is exceptional in that it allows for the assertion of state power in cases having nothing to do with the state. *Daimler*, 134 S. Ct. at 762 (“It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA’s contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having *nothing to do with anything that occurred or had its principal impact in California.*” (emphasis added)); *id.* at 762 n.20 (“Nothing in *International Shoe* and its progeny suggests that ‘a particular quantum of local activity’ should give a State *authority over a*

While we may be comfortable having that forum be limited to two places (place of incorporation or principal place of business), we are not as comfortable having that forum be “anywhere and everywhere.”¹⁶⁶ To allow assertions of general jurisdiction in a forum because the defendant is doing business in the forum seems to reward plaintiffs for gamesmanship. If a plaintiff can find a forum where the defendant is doing business, she can sue there over something that happened in the state next door, and be rewarded through the application of the forum’s procedural (and perhaps substantive) law.¹⁶⁷ Thus, it was likely that underlying policy considerations related to forum shopping shaped the Court’s ultimate conclusion and reasoning.

B. WHAT IS THE MEANING OF “AT HOME”?

It follows from the above that the majority and the concurrence also differ in the meaning that they ascribe to the two most important words in *Goodyear*: “at home.” The Supreme Court in *Goodyear* had qualified the continuous and systematic general business contacts test for general jurisdiction with the phrase “at home.”¹⁶⁸ Thus, general jurisdiction was only appropriate where a corporation had continuous and systematic general business contacts such that it could fairly be regarded to be “at home.”¹⁶⁹ In the months following *Goodyear*, commentators debated the meaning of these two words and questioned whether the Supreme Court really intended to change the test for general jurisdiction over corporations.¹⁷⁰

In *Daimler*, Justice Ginsburg’s message was clear: when I said “at home” in *Goodyear*, I really meant “at home.”¹⁷¹ According to the

‘far larger quantum of . . . activity’ having no connection to any in-state activity.’ (emphasis added) (quoting Feder, *supra* note 34, at 694)).

166. *See id.* at 762 n.20.

167. *See, for example, Ferens v. John Deere*, 494 U.S. 516 (1990), which Professor Stein described as “[t]he poster-child for the cost of general jurisdiction” and “an unmitigated train wreck.” Stein, *supra* note 164, at 540.

168. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

169. *Id.*

170. *See, e.g.,* Erichson, *supra* note 8, at 88 (stating that “the Court [in *Goodyear*] qualified its language in ways that could call into question whether it meant to adopt a home-state test”); Feder, *supra* note 34, at 672 (stating that it has been suggested “that the apparent implications of *Goodyear* are so significant that they cannot have been intended—that the Court’s apparent restriction of general jurisdiction to corporations that are ‘essentially at home’ should be dismissed as ‘loose language,’ and that *Goodyear* should be limited to its ‘particular facts’”); *see also supra* notes 62–64 and accompanying text.

171. Professors Rhodes and Robertson argue that the Court’s language in *Daimler* was more direct than *Goodyear*. Rhodes & Robertson, *supra* note 8, at 10 n.35 (“In *Goodyear*, the Court described general jurisdiction as appropriate in fora in which the defendant was ‘essentially at home,’ ‘fairly regarded as at home,’ or ‘in [a] sense at home.’ In a judicial sleight of hand, [*Daimler*] dropped the qualifications from *Goodyear* and instead phrased the governing injury as merely whether the defendant was ‘at home.’” (citation omitted) (quoting *Goodyear*, 131 S. Ct. at 2853–54, 2857).

Court, the “at home” language is intended to be a significant limitation on the scope of general jurisdiction.¹⁷² The Court states that “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”¹⁷³ To be “at home,” the corporation must have a relationship with the state which approximates that between a state and a local enterprise.¹⁷⁴ Accordingly, it would be an “exceptional” case where a corporation could be “at home” in a place other than its state of incorporation or the state of its principal place of business.¹⁷⁵ The Court’s view of “at home” directly correlates to its adoption of a comparative test for general jurisdiction. One can only assess whether a corporation is “at home” when one considers what other homes a corporation might have. Thus, it is only through this comparative exercise that one can ascertain the strength and significance of the connection between the corporation and the forum state.

Justice Sotomayor would ascribe a very different meaning to “at home.” In Justice Sotomayor’s view, as long as a corporation “enjoy[s] . . . extensive benefits in multiple forum States[,] it is ‘essentially at home’ in each one.”¹⁷⁶ Thus, for Justice Sotomayor, there is nothing particularly significant about the catch-phrase that the Court repeatedly invokes. For her, a corporation is “at home” where it does business in a state such that it is enjoying the benefits of the state and therefore should be subject to its burdens.¹⁷⁷ Although Justice Sotomayor signed on to the judgment in *Goodyear* which added the new “at home” language to the continuous and systematic inquiry, she apparently did not intend for it to be a paradigm shift in the law of general jurisdiction. Both Justices use the *Perkins* case to illustrate their intended meaning of “at home”; not surprisingly, both have very different reads on the underlying facts in *Perkins* and the conclusions to be drawn from those facts.¹⁷⁸

The Court’s position hews closer to an intuitive understanding of the concept of “home.” The idea of “home”—closely associated with the legal construct of domicile¹⁷⁹—usually only connotes one place, or at

172. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–61 (2014).

173. *Id.* at 762 n.20.

174. *See id.* at 758 n.11 (“As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations ‘so ‘continuous and systematic’ as to render [the foreign corporation] essentially at home in the forum State.’ *i.e.*, comparable to a domestic enterprise in that State.” (citation omitted) (quoting *Goodyear*, 131 S. Ct. at 2851)).

175. *See id.* at 761 n.19.

176. *Id.* at 771 (Sotomayor, J., concurring).

177. *Id.* at 768–69 (Sotomayor, J., concurring).

178. *Compare id.* at 756–57, 756 n.8, 761 n.19, *with id.* at 767–68, 767 n.5, 768 n.7, 769 n.8 (Sotomayor, J., concurring).

179. *See Goodyear*, 131 S. Ct. at 2853–54 (“For 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.” (citing Brilmayer et al., *supra* note 11, at 728));

least a limited number of places. In this respect, it is difficult to conceive of “home” as being anywhere and everywhere that a defendant does business.¹⁸⁰ Moreover, Justice Sotomayor’s interpretation is difficult to justify from a pure interpretation standpoint. If the “at home” language was intended to be essentially superfluous, why add it to the test? If the test is interpreted as Justice Sotomayor suggests, how is “continuous and systematic” any different than “continuous and systematic such that a corporation is ‘at home’”? It seems that the latter formulation of general jurisdiction must be a different test than the former. Accordingly, the gloss put on the “at home” test by the Court is more readily defensible than that put on it by Justice Sotomayor.

C. A REASONABLENESS INQUIRY FOR GENERAL JURISDICTION?

The majority and the concurrence also disagree on whether the reasonableness check on jurisdiction applies only to specific jurisdiction, or also applies to general jurisdiction.¹⁸¹ In earlier cases, in particular *World-Wide Volkswagen Corp. v. Woodson*, *Burger King Corp. v. Rudzewicz*, and *Asahi Metal Industry Co. v. Superior Court*, the Court adopted a two-pronged test for the assertion of jurisdiction over a defendant.¹⁸² The contacts prong of the test looks at whether the defendant has sufficient contacts with the forum to support the exercise

see also Brilmayer et al., *supra* note 11, at 733 (“The law treats corporations like legal persons, and the place of incorporation and the principal place of business are both analogous to domicile.”).

^{180.} Professor Stein offers an account of “at home” for corporations based upon a loose analogy to the concept of “home” for individuals. Stein, *supra* note 164, at 543. In his words:

A corporation no more has a home, in the sense that a person does, than it has feet. But I think there is an apt corporate analogue to the out-of-state discomfort that I experience: the notion of being an outsider to the legal community provides an appropriate measure of jurisdictional overreaching. The touchstone of the inquiry under this approach is to consider whether the judge or jury would view imposition of liability on the defendant to be an externality—a cost that would not be internalized by the forum community.

Id. But cf. Cornett & Hoffheimer, *supra* note 8, at 64 (“The family imagery suggested by ‘home,’ reinforced, perhaps unintentionally, by the Latin roots for ‘affiliation,’ seems uniquely inappropriate for the analogical work the images are asked to perform. *International Shoe* insisted that corporations do not even occupy space so as to establish ‘presence’ apart from the legal acts society empowers them to perform through agents. It should be unnecessary to add the same corporations do not make homes with fireplaces or form family relationships. Adopting anthropomorphizing metaphors does not aid analysis but does leave the Court’s opinions open to ridicule.”).

^{181.} Both parties in their briefs assumed that the reasonableness test would apply to questions of general jurisdiction. *See* Brief for Petitioner, *supra* note 107, at 37–39 (arguing that the assertion of general jurisdiction was *per se* unreasonable); Brief for the Respondents, *supra* note 115, at 11 (arguing for a case-specific reasonableness inquiry). Some commentators also believed that a reasonableness check would apply to assertions of general jurisdiction. *See, e.g.*, Sherry, *supra* note 8, at 119–20.

^{182.} *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108–15 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–77 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

of personal jurisdiction, while the reasonableness prong looks at whether the assertion of jurisdiction in the circumstances would be unreasonable.¹⁸³ Although the test was articulated in cases involving specific jurisdiction, many lower courts had applied the inquiry to all assertions of jurisdiction, including general jurisdiction.¹⁸⁴

As a preliminary matter, it should be noted that the status of the *Asahi* reasonableness factors for specific jurisdiction had been somewhat uncertain in the aftermath of *J. McIntyre Machinery, Ltd. v. Nicastro*.¹⁸⁵ In *Nicastro*, none of the Justices mentioned the reasonableness factors, leading some to question whether the Court intended to eliminate them from the specific jurisdiction inquiry.¹⁸⁶ In *Daimler*, both the majority and concurrence confirmed that the reasonableness prong of the specific jurisdiction test is alive and well.¹⁸⁷

In *Daimler*, Justice Sotomayor would have resolved the dispute on the basis of the *Asahi* reasonableness factors.¹⁸⁸ For Justice Sotomayor, the inherently foreign nature of the dispute counseled against the assertion of personal jurisdiction over Daimler—even though for her, the assertion of personal jurisdiction against Daimler would have been constitutionally permissible.¹⁸⁹ The Court, on the other hand, is of the view that the reasonableness test applies only to assertions of specific jurisdiction, not to assertions of general jurisdiction.¹⁹⁰ This is because

183. *Daimler*, 134 S. Ct. at 762 n.20. For an articulation of the reasonableness factors, see *Asahi*, 480 U.S. at 113 (“A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.’” (quoting *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted))).

184. See, e.g., *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 713 (8th Cir. 2003); *Base Metal Training, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,”* 283 F.3d 208, 213 (4th Cir. 2002); *Metro. Life Ins. Co. v. Roberston-Ceco Corp.*, 84 F.3d 560, 568–69 (2d Cir. 1996); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1533 (10th Cir. 1996); *Amoco Egypt Oil Co. v. Leonis Nav. Co.*, 1 F.3d 848, 851 n.2 (9th Cir. 1993); *Donatelli v. Nat’l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990); *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987).

185. 131 S. Ct. 2780 (2011). Although the Court first articulated the reasonableness factors in *World-Wide Volkswagen*, the factors are more commonly referred to as the “*Asahi* reasonableness factors.” See *World-Wide Volkswagen*, 444 U.S. at 292; see also *Daimler*, 134 S. Ct. at 762 n.20.

186. See, e.g., Patrick J. Borchers, J. McIntyre, Goodyear, and the *Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1265–66 (2011) (“[L]eft unclear is the status of the independent reasonableness test that the Court explicitly adopted in *Asahi*. . . none of the opinions in *J. McIntyre* (or *Goodyear Dunlop Tires Operations, S.A. v. Brown* for that matter) even mentioned it.”).

187. *Daimler*, 134 S. Ct. at 762 n.20; *id.* at 765 (Sotomayor, J., concurring).

188. *Id.* at 765 (Sotomayor, J., concurring).

189. *Id.* at 764 (Sotomayor, J., concurring).

190. *Id.* at 762 n.20 (“True, a multipronged reasonableness check was articulated in *Asahi*, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue. First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case.” (citations omitted)).

the nature of general jurisdiction is such that it is *de facto* fair and reasonable to require a defendant to answer to suit in that particular forum. In Justice Ginsburg's words, "[w]hen a corporation is genuinely at home in the forum State, however, any second-step [reasonableness] inquiry would be superfluous."¹⁹¹

Each Justice's view of the propriety of the reasonableness inquiry for general jurisdiction stems from her respective view of the appropriate scope for general jurisdiction. For the Court, a reasonableness inquiry is unnecessary when the underlying test for general jurisdiction has been severely circumscribed.¹⁹² In other words, since there will be very few cases that satisfy the Court's "at home" test, there is no need to engage in a reasonableness check on jurisdiction. The fact that the test is satisfied means that it is *per se* reasonable to assume general jurisdiction.¹⁹³ For Justice Sotomayor, on the other hand, the still-expansive nature of the general jurisdiction test she endorses in *Daimler* would benefit from a reasonableness check.¹⁹⁴ Given that a corporation could be "at home" in many different places, the reasonableness prong provides a necessary safeguard against exorbitant and inappropriate assertions of jurisdiction.¹⁹⁵

To Justice Sotomayor's credit, a reasonableness check on general jurisdiction could alleviate some of the Court's stated concerns about international comity and forum shopping.¹⁹⁶ In cases where the assertion of jurisdiction would offend international comity or reward forum shopping, courts would have the discretion to apply the reasonableness factors and decline to exercise general jurisdiction over a defendant. However, the reasonableness factors would vest courts with a great deal of discretion, thereby undermining the predictability that the Court sought to foster by adopting a new standard for general jurisdiction. Defendants would never be able to predict with any degree of certainty (1) whether there was general jurisdiction under the absolute approach,

191. *Id.*

192. *See id.*

193. *See* Erichson, *supra* note 8, at 93 ("If general jurisdiction is sensibly confined to home-state defendants, there should be no need for a reasonableness prong. The very idea of general jurisdiction is that a state's adjudicatory power over its own citizens is reasonable, without regard to the particularities of the case. . . . Application of the reasonableness prong to general jurisdiction is an artifact of an overenthusiastic embrace of 'doing business' jurisdiction. The home-state test should eliminate the need for this prong by eliminating the problematic assertions of power that it was meant to address.").

194. *Daimler*, 134 S. Ct. at 764-65 (Sotomayor, J., concurring).

195. *See* Silberman, *supra* note 8, at 131 (noting that doing business jurisdiction "presents the strongest case for 'reasonableness' scrutiny because it offers a potential curb on the forum-shopping opportunities that such general jurisdiction presents").

196. *See supra* Part III.A.

and (2) whether a court would choose to exercise jurisdiction after applying the reasonableness factors.¹⁹⁷

Moreover, it appears from pre-*Daimler* case law applying the reasonableness factors to general jurisdiction that courts rarely used the factors to limit the exercise of general jurisdiction. Once a court determined that a defendant had continuous and systematic general business contacts with a state, it almost always followed that the exercise of general jurisdiction was appropriate.¹⁹⁸ In *Gator.com*, for instance, even though the Ninth Circuit observed that general jurisdiction over the defendant was “a close question,” it nonetheless determined that the exercise of general jurisdiction would not be unreasonable.¹⁹⁹ Accordingly, a reasonableness check on general jurisdiction—although an interesting solution in theory—would likely not rein in general jurisdiction in the way that the Court in *Daimler* actually intended.²⁰⁰

* * *

Although *Daimler* was unanimous in its holding that a California court could not assume jurisdiction over the defendant, the reasoning of the majority and concurrence could not be more different. The Court in *Daimler* conceptualizes general jurisdiction in a radically different way than Justice Sotomayor. And, as discussed below, the Court’s conceptualization of general jurisdiction will have dramatic implications for years to come.

197. The *Daimler* case itself provides a perfect illustration of this. The Ninth Circuit concluded that the assertion of jurisdiction was reasonable, while Justice Sotomayor concluded that it was not. *Compare* *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 925–30 (9th Cir. 2011), *with Daimler*, 134 S. Ct. at 764–65 (Sotomayor, J., concurring).

198. *See, e.g.*, *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1171–77 (9th Cir. 2006); *W. Marine, Inc. v. Watercraft Superstore, Inc.*, No. C11-04459 HRL, 2012 WL 479677, at *3–7 (N.D. Cal. Feb. 14, 2012); *Martin v. D-Wave Sys. Int’l, Inc.*, No. C-09-03602 RMW, 2009 WL 4572742, *4–5 (N.D. Cal. Dec. 1, 2009); *PacificCorp. v. Pub. Util. Dist. No. 2 of Grant Cnty.*, Civil No. 09-1012-KI, 2009 WL 3838998, at *6–7 (D. Or. Nov. 16, 2009); *Mass. Inst. of Tech. v. Micron Tech., Inc.*, 508 F. Supp. 2d 112, 120–25 (D. Mass. 2007); *Capital Equip., Inc. v. CNH Am., LLC*, 394 F. Supp. 2d 1054, 1056–58 (E.D. Ark. 2005); *Coremetrics, Inc. v. Atomic Park.com, LLC*, 370 F. Supp. 2d 1013, 1016–25 (N.D. Cal. 2005); *World Film Servs., Inc. v. RAI Radiotelevisione Italiana S.p.A.*, No. 97 Civ. 8627(LMM), 1999 WL 47206, at *3–7 (S.D.N.Y. Feb. 3, 1999); *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1200–01 (Colo. 2005).

199. 341 F.3d 1072, 1078 (9th Cir. 2003). The burden is on the defendant to establish that the assertion of jurisdiction is unreasonable. *See id.* at 1081. This burden makes it even more unlikely that a court would decline to exercise general jurisdiction under the reasonableness factors, as there is essentially a presumption in favor of exercising jurisdiction once it is found to exist.

200. Justice Sotomayor also endorses the absolute approach to general jurisdiction (coupled with a reasonableness check) because it better accommodates access to justice for plaintiffs than the Court’s approach. *See Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (“Under the majority’s rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States.”). On this point, see *infra* Part IV.B and, in particular, *infra* note 267.

IV. THE IMPLICATIONS OF *DAIMLER*

The academic debates between the majority and concurrence are fascinating, but many wonder what *Daimler* means for real-world litigants. Below, I describe some of the consequences of *Daimler*. First, and most importantly, *Daimler* signals the end of doing business jurisdiction in the United States. Second, *Daimler* will put pressure on alternative bases of jurisdiction to fill any potential voids in the jurisdictional framework. Third, as Justice Sotomayor points out, *Daimler* will have various practical consequences for litigants and courts.

A. THE END OF DOING BUSINESS JURISDICTION

The message in *Daimler* has come through loud and clear: doing business jurisdiction is a dead letter.²⁰¹ Courts are no longer to look at whether a corporation is doing business in a state, in the sense of having continuous and systematic general business contacts there. Rather, courts are to look at whether a corporation has continuous and systematic general business contacts with a state such that the corporation is fairly regarded as being “at home” there.²⁰² Courts must evaluate “at home” using a comparative approach, that is, by assessing a corporation’s contacts with the forum in relation to its contacts with other forums. “At home” is seen as being a unique place akin to the corporation’s state of incorporation or its principal place of business.

The Court emphasized that, outside of principal place of business and place of incorporation, there will only be rare circumstances where a

201. See David D. Siegel, *U.S. Supreme Court Severely Circumscribes “Presence” as Basis for Personal Jurisdiction of Foreign Corporations—Claim Itself Must Have Local Roots; If It Hasn’t, Corporation’s Overall Contacts with State Won’t Support Jurisdiction*, 265 SIEGEL’S PRAC. REV. 1, 1 (2014) (noting that “a truckload of cases on personal jurisdiction goes careening into the abyss under [*Daimler*]”). It is important to note that the reported case law only represents part of the picture. Professor Twitchell states that “[g]eneral jurisdiction cases often fly below the radar, and it is difficult to know how frequently because such cases are not reported in the case law.” Twitchell, *supra* note 33, at 193. She observes that many defendants, particularly small businesses, concede the existence of general jurisdiction because it is simply too expensive to litigate the issue. *Id.* at 194. Accordingly, the *Daimler* decision will likely have significance beyond that which is measurable through the case law.

202. The Court engages in a sleight of hand in this respect, implying that the test for general jurisdiction was never simply continuous and systematic general business contacts:

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation “engages in a substantial, continuous, and systematic course of business.” That formulation, we hold, is unacceptably grasping.

Daimler, 134 S. Ct. at 760–61 (citation omitted). The formulation that the Court condemns as being “unacceptably grasping” is actually the standard that was endorsed by the Supreme Court and prevailed in the case law for the past fifty-plus years.

corporation will meet the “at home” test.²⁰³ The Court, in discussing *Perkins*, stated:

We do not foreclose the possibility that in an exceptional case, see, e.g., *Perkins*, a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.²⁰⁴

At a different part of the judgment, the Court stated that the *Perkins* case “should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction based on nothing more than a corporation’s ‘doing business’ in a forum.”²⁰⁵ Based on the tenor of the judgment, and the very nature of the “at home” test that the Court endorses, it appears that this exception is really a non-exception. Professor Trammell, for instance, argues that “in the overwhelming majority of cases, there will be no occasion to explore whether a *Perkins*-type exception might apply.”²⁰⁶ He then answers the logical question posed by his conclusion: why, then, did the Court not state directly that general jurisdiction is limited to a corporation’s place of incorporation and principal place of business?²⁰⁷ In response, Professor Trammell argues:

First, the Court in *Goodyear* and *Daimler* took pains not to overrule any of its precedents. *Perkins* thus necessitates leaving the door ever so slightly ajar. Second, the Court probably did not want to create an ironclad rule, lest a corporation manipulate its (technical) principal place of business in order to gain a jurisdictional advantage. In a slightly different context, the Court recognized the need for a modicum of flexibility in defining a corporation’s principal place of business for that very reason.

...

The Court has left open only the slimmest possibility that general jurisdiction might be permissible in a state that is the functional equivalent of one of those paradigm examples. While such an exception is theoretically possible, the Court suggests that it will be the rarest of rarities.²⁰⁸

Not all scholars agree. For instance, Professors Cornett and Hoffheimer identify five situations that could be “candidates” for exceptional cases:

1. A foreign corporation conducting all or most of its business in the forum State;

203. *Id.* at 761 n.19.

204. *Id.* (citation omitted).

205. *Id.* at 756 n.8 (quoting von Mehren & Trautman, *supra* note 16, at 1144) (internal quotation marks omitted).

206. Trammell, *supra* note 8, at 17.

207. *Id.*

208. *Id.* at 17–18.

2. A foreign national corporation engaging in most of its U.S. business in one State;
3. A foreign corporation conducting all or most of its business activity in the U.S. but maintaining no principal place of business or place of incorporation in any state;
4. A corporation with an outsized presence in the state; and
5. Corporations maintaining a permanent physical presence in the state by operating factories, mines, or other non-sales related activities.²⁰⁹

It is not clear, however, that these are actually candidates for exceptional cases post-*Daimler*. For instance, the second situation looks at whether a foreign corporation engages in most of its U.S. business in one state. However, if the business it does in that state is insignificant compared to its worldwide operations, then general jurisdiction would still not be present under *Daimler*. Similarly, situation number three would likely not satisfy a *Daimler* exception because it focuses on the wrong issue—a foreign corporation’s contacts with the United States *as a whole*. The inquiry under *Daimler* is a foreign corporation’s contacts with the forum *state* and whether those contacts are sufficient to render the foreign corporation “at home” in that state. Further, numbers four and five are similar in that they look at a significant presence (physical or otherwise) in a state; however, if this presence is not particularly significant in relation to the corporation’s nationwide and/or worldwide contacts, then it too would fail the *Daimler* test. The only scenario that might be an exception to *Daimler* would be the first, a foreign corporation conducting all or most of its business in the forum state. However, this may not be an exception at all; if a corporation is conducting all or most of its business in the forum state, it would seem that that state constitutes the corporation’s principal place of business.²¹⁰ For instance, *Perkins* was a case that would likely fit under the first scenario—and the Court in *Daimler* essentially found that the forum in *Perkins* (Ohio) was the corporation’s *de facto* principal place of business during the war.²¹¹ Despite Professors Cornett and Hoffheimer’s attempt to identify scenarios that might engage the *Daimler* “exception,” it appears from the

209. Cornett & Hoffheimer, *supra* note 8, at 53–57.

210. This would be true at least under the “place of operations” test that is sometimes used to determine principal place of business. *See, e.g.*, Kimberly Nakamaru, Comment, *Touching a Nerve: Hertz v. Friend’s Impact on the Class Action Fairness Act’s Minimum Diversity Requirement*, 44 *LOY. L.A. L. REV.* 1019, 1022 (2011) (“[T]he ‘place of operations’ test locates a corporation’s principal place of business in the state which contains a substantial predominance of corporation operations. Under the place-of-operations test, the first step is to determine the amount of business activity in each state, and then, if the amount of activity is ‘significantly larger’ or ‘substantially predominates’ in one state that state is the corporation’s principal place of business. The nerve-center test places a corporation’s principal place of business in the state containing the corporation’s headquarters.” (quoting *Tosco Corp. v. Cmtys. for a Better Env’t*, 236 F.3d 495, 500–02 (9th Cir. 2001)) (internal quotation marks omitted)).

211. *Daimler AG v. Bauman*, 134 S. Ct. 746, 756, 756 n.8 (2014).

overwhelming thrust of the decision that the “exception” was really not meant as an exception at all. Accordingly, it will be exceedingly rare for a court to assert general jurisdiction over a corporation based on its contacts with the forum in a state other than its principal place of business or place of incorporation.

The end of doing business jurisdiction will undoubtedly provide some solace to foreign defendants concerned that they might be subject to all-purpose jurisdiction in certain (or all) U.S. states. It was thought that asserting general jurisdiction over foreign country defendants²¹² was particularly unfair for a variety of reasons. First, foreign country defendants may not expect or foresee the possibility of general jurisdiction based on doing business in a state.²¹³ Second, even if they could foresee the possibility, most foreign country defendants are not able to predict with any degree of certainty when general jurisdiction will be exercised. Although the problem is not unique to foreign country defendants specifically, it is arguably more acute given foreign country defendants’ inexperience with American jurisdictional principles.²¹⁴ Third, the consequences of doing business jurisdiction are more severe for foreign country defendants than for domestic defendants. For an American defendant, being subject to general jurisdiction on the basis that it is doing business somewhere means, at worst, having to defend in an additional *American* state. For a foreign country defendant, it means being subject to a “dramatically different judicial system a long distance from home.”²¹⁵

In *Daimler*, multiple briefs were submitted by amici advocating in favor of a restrained test for general personal jurisdiction and against a broad theory of jurisdictional imputation.²¹⁶ For instance, the United

212. The term “foreign defendant” is generally thought to refer to a defendant from outside the forum state (whether from another state or another country). Accordingly, the term “foreign country defendant” is used to refer specifically to a corporate defendant from a country outside the United States.

213. See Twitchell, *supra* note 33, at 197.

214. See *id.* at 198.

215. *Id.*

216. Multiple amicus briefs were also submitted in favor of the plaintiffs in *Daimler*, arguing that broad assertions of general jurisdiction by U.S. courts were necessary to remedy international wrongs and were consistent with foreign jurisdictional practice. See, e.g., Brief for Amicus Curiae Earthrights International in Support of Respondents at 4, *Daimler*, 134 S. Ct. 746 (No. 11-965) (“International practice confirms the fairness of exercising jurisdiction based upon the contacts of agent/subsidiaries acting on the parent’s behalf. The fact that other nations, including Germany, exercise similar and sometimes broader jurisdiction refutes any claim that jurisdiction is out of step with international practice or that jurisdiction will chill investment in the United States or lead other nations to ‘retaliate’ against us.”); Brief of Amici Curiae German Institute for Human Rights & Other German Legal Experts in Support of Respondents, *supra* note 131, at 15 (“Daimler long ago crossed the line at which every corporation, American or foreign, can expect to encounter the general jurisdiction of a forum with which it has such extensive contacts. . . . When the claims in question concern crimes against humanity and violations of internationally-recognized human rights, Daimler should not be permitted to hide from a trial on the merits of such claims behind a fig-leaf subsidiary.” (citations omitted)).

States filed a brief in support of the defendant, stating that “expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States’ diplomatic relations and its foreign trade and economic interests.”²¹⁷ It argued that “[f]rom an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity” and that a foreign business enterprise might be unwilling or unlikely to engage in commerce with the United States if the so-called “price of admission” is to subject itself to general jurisdiction anywhere it is doing business.²¹⁸ Another of the amici, Viega GmbH & Co. KG and Viega International GmbH, provided a real-life example of a foreign company that, because it had been subject to general jurisdiction in the United States, chose to decrease its business presence in the United States and increase it elsewhere.²¹⁹ It is clear that these arguments had an effect on the Court in *Daimler*, as they appeared prominently in the last section of the judgment.²²⁰ Thus, foreign defendants—and in particular, foreign country defendants—can breathe a sigh of relief in the aftermath of *Daimler*, secure in the knowledge that they will likely not be held to account for wrongs in a distant and seemingly arbitrary forum.²²¹

217. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 156, at 1.

218. *Id.* at 2. The amicus briefs submitted in support of *Daimler* all expressed similar concerns. See generally Brief Amicus Curiae of Atlantic Legal Foundation in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of the Chamber of Commerce of the United States of America, the National Foreign Trade Council, the Federation of German Industries, the Association of German Chambers of Industry and Commerce, & the Organization for International Investment as Amici Curiae in Support of the Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of Economiesuisse, the Swiss Bankers Association, ICC Switzerland, Association of German Banks, & the European Banking Federation as Amici Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of Amici Curiae New England Legal Foundation & Associated Industries of Massachusetts in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of the Product Liability Advisory Counsel, Inc. as Amicus Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965); Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner, *supra* note 111; Brief of Amici Curiae Viega GmbH & Co. KG & Viega International GmbH in Support of Petitioner DaimlerChrysler AG, *Daimler*, 134 S. Ct. 746 (No. 11-965). Many also noted the affront to international comity that could arise if the United States were to continue to endorse an expansive approach to general jurisdiction.

219. Brief of Amici Curiae Viega GmbH & Co. KG & Viega International GmbH in Support of Petitioner DaimlerChrysler AG, *supra* note 218, at 4 (“*Bauman* erroneously subjects companies like the German Viega Companies to litigation in a forum state notwithstanding the lack of any contacts with that forum. . . . The German Viega Companies have scaled back investment in the U.S. because of *Bauman*, and those cases that have followed *Bauman*. Since these *Bauman*-influenced decisions, the German Viega Companies have been expanding investments in other countries, such as ones in Asia, with more predictable legal environments. Absent reversal, the German Viega Companies will consider divesting in the United States, and will recommend to other similarly situated companies to do the same.”).

220. See *Daimler*, 134 S. Ct. at 763.

221. Twitchell notes:

Because of the heightened fairness problems present when general jurisdiction is exercised over foreign corporations, it would seem to follow that if we are going to curtail general doing-business jurisdiction anywhere, it should be here. And yet there is a paradox: the fairness problems may be greater, but the needs of domestic plaintiffs also increase.

Just as foreign defendants (particularly foreign country defendants) are likely to be relieved by *Daimler*, the plaintiffs' bar is likely to be incensed by it. One article in the popular press indicates that the decision has "bombshell consequences for domestic tort litigation" and could "result in major upheavals in standard operating procedures for much of the plaintiff's bar."²²² The article continues, "[i]f state courts willingly heed *Daimler*'s dictates, the decision's impact on tort litigation in this country will be immediate and dramatic. Lawyers will no longer be permitted to seek out plaintiff-friendly forums (think Madison County, Illinois) that bear no relation to the parties and the cause of action."²²³ The author also posits that *Daimler* could have huge consequences for class action litigation and "may even spell the end of nationwide class actions against multiple defendants filed anywhere other than the states (if any) in which all corporate defendants are at home."²²⁴ It is unclear what impact, if any, *Daimler* will have on class action litigation. It is unlikely, however, that *Daimler* portends the demise of the nationwide class action.²²⁵ At least for the time being, *Daimler*'s direct impact will likely be on parties in traditional two-party litigation.

Since *Daimler* was decided, most courts have followed its mandate.²²⁶ For instance, in *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, the Court of Appeals for the Second Circuit granted a writ of mandamus instructing the Vermont district court to grant the defendant's motion to dismiss for lack of personal jurisdiction.²²⁷ In that case, the plaintiff filed an action in Vermont against the defendant, Diocese of

Twitchell, *supra* note 33, at 199.

222. Rich Samp, *With Bauman v. DaimlerChrysler, High Court May Have Put Brakes on Forum Shopping*, FORBES (Feb. 4, 2014, 9:00 AM), <http://www.forbes.com/sites/wlf/2014/02/04/with-bauman-v-daimlerchrysler-high-court-may-have-put-brakes-on-forum-shopping>.

223. *Id.*; accord LESTER BRICKMAN, CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., ANATOMY OF A MADISON COUNTY (ILLINOIS) CLASS ACTION: A STUDY OF PATHOLOGY (2002).

224. Samp, *supra* note 222.

225. In an excellent article, Professor Andrews outlines four potential bases of jurisdiction over defendants in nationwide class actions. See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1349-74 (2005). One of those bases is that the defendant is doing business in the forum and therefore subject to general jurisdiction there. *Id.* at 1355-60. However, she suggests that perhaps the most common basis of jurisdiction over defendants in nationwide class actions is corporate registration, which obviously remains untouched by *Daimler*. *Id.* at 1360-67 ("Corporate registration seems to be a commonly assumed basis for jurisdiction over out-of-state corporations. Indeed, such assumption probably explains the lack of debate concerning jurisdiction over the defendant in nationwide class actions."). For a discussion of corporate registration as a basis for general jurisdiction, see *infra* Part IV.B.

226. See, e.g., *Snodgrass v. Berklee Coll. of Music*, 559 F. App'x 541 (7th Cir. 2014); *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30 (2d Cir. 2014); *Brown v. CBS Corp.*, No. 3:12CV01495 AWT, 2014 WL 1924469 (D. Conn. May 14, 2014); *Rocke v. Pebble Beach Co.*, No. 12-3372, 2014 WL 1725366 (E.D. Penn. Apr. 29, 2014); *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13 (D.D.C. 2014); see also *infra* note 244.

227. 745 F.3d at 33.

Albany, alleging that he was sexually abused by a former priest.²²⁸ The district court had accepted that Vermont had general jurisdiction over the Diocese based primarily on the fact that “at least thirteen of the Diocese’s approximately 200 priests conducted a combined total of sixteen services of worship in Vermont” and that “from July 2002 to February 2009, the Diocese authorized . . . a New York priest, to celebrate Sunday morning mass at a Vermont church.”²²⁹ The Second Circuit disagreed with the district court, stressing the high threshold that now must be established under the *Daimler* “at home” test.²³⁰ The court observed that the “Diocese operates no office or facility in Vermont, has no sales in the forum, and the percentage of its contacts with Vermont compared to its activities elsewhere (namely, New York) are trivial.”²³¹ It concluded that even “imputing the border parishes’ contacts with Vermont to the Diocese (which the district court declined to do) would not render the Diocese ‘at home’ there.”²³² In fact, the Second Circuit noted that “[t]he Diocese’s scant contacts with Vermont do not come close” to establishing general jurisdiction under the new *Daimler* standard.²³³

The Connecticut district court engaged in a similar analysis in *Brown v. CBS Corp.*²³⁴ *Brown* involved a lawsuit against Lockheed Martin, among others, stemming from injuries related to asbestos exposure.²³⁵ The defendant was incorporated in Maryland and had its principal place of business there.²³⁶ Nonetheless, the plaintiff sought to establish general jurisdiction in Connecticut.²³⁷ The plaintiff alleged that the defendant was subject to general jurisdiction in Connecticut on the basis that the defendant had continuous and systematic general business

228. *Id.* at 34. The Diocese is incorporated and has its principal place of business in New York. *Id.* The plaintiff apparently filed the action in Vermont because the relevant statute of limitations had expired in New York. *Id.* at 37.

229. *Id.* at 34.

230. *Id.* at 39.

231. *Id.* at 40.

232. *Id.*

233. *Id.* at 39. The court expressed concern about any contrary holding (including the holding of the district court below):

If the Diocese is “at home” in Vermont, it begs the question: how many homes might it have? Would the Diocese be “at home” in New Jersey if one of its hundreds of priests were to conduct a wedding or two in that State over a matter of years? Would circulation of *The Evangelist* to a Wyoming resident render the Diocese “at home” there? It is difficult to see where jurisdiction would end; foreign-state and foreign-country corporations could be found “at home” essentially anywhere, based on the briefest and most trivial of contacts. The Supreme Court explicitly rejected such an expansion of general jurisdiction in *Daimler AG*.

Id. at 40–41.

234. No. 3:12CV01495 AWT, 2014 WL 1924469 (D. Conn. May 14, 2014).

235. *Id.* at *1.

236. *Id.*

237. *Id.* at *6.

contacts there.²³⁸ The district court rejected this basis for jurisdiction, stating that “[a]lthough Lockheed’s contacts with Connecticut may appear substantial, when viewed in relation to its operations as a whole, Lockheed’s Connecticut activities account for a relatively trivial amount of its overall business.”²³⁹ The court accepted the plaintiff’s descriptions of the contacts between the defendant and Connecticut²⁴⁰ but concluded that “in every respect, these contacts are less extensive than those found by the Supreme Court to be insufficient to establish general jurisdiction in *Daimler*.”²⁴¹ For example, the court observed that the defendant’s Connecticut-based revenue accounted for a mere 0.1% of its national revenue, a much smaller percentage than the 2.4% of worldwide sales in *Daimler*.²⁴² The court concluded that “[i]f Daimler cannot fairly be said to be ‘at home’ in California, Lockheed is definitively not ‘at home’ in Connecticut.”²⁴³

It is clear that the courts in *In re Roman Catholic Diocese of Albany* and *Brown* fully appreciated the consequences of the Supreme Court’s decision in *Daimler*.²⁴⁴ However, as is to be expected, the contraction of

238. *Id.* at *6–7. The plaintiff also relied on a consent theory of jurisdiction, arguing that “by registering to do business in Connecticut and designating the Secretary of the State as its agent for process [under Conn. Gen. Stat. § 33-929], Lockheed consented to be subject to the personal jurisdiction of Connecticut courts.” *Id.* at *3. The court concluded that irrespective of the corporation’s registration to do business, “the requirements of the due process clause must also be met.” *Id.* at *4. In other words, the corporation’s act of registering to do business might address consent to service of process but not consent to personal jurisdiction. For additional discussion on consent as a basis for general jurisdiction, see *infra* Part IV.B.

239. *Brown*, 2014 WL 1924469, at *6.

240. *Id.* at *7 (“Lockheed Martin currently has 28 employees working in four separate cities, it leases property in New London with its name on the building and a telephone listing, it has derived about \$160 million in revenue from Connecticut since 2008, and it pays corporate income tax in Connecticut.” (internal quotation marks omitted)). The court noted, however:

[T]hese contacts represent only a small portion of Lockheed’s overall business in the United States. The figures cited by the plaintiff represent “less than five one-hundredths of one percent of Lockheed Martin’s employees” nationwide, and “less than five one-hundredths of one percent to just over one tenth of one percent of Lockheed Martin’s total revenue” for any particular year. Furthermore, while Lockheed does lease and operate out of one 9,000 square foot space in Connecticut, and has leased other properties in the past, it owns no real property in the state. Finally, although Lockheed may have “relationships with Connecticut business” and “pay[] state income taxes and carry[] workers’ compensation insurance,” its operations and services are directed primarily toward the United States government, not Connecticut businesses and residents.

Id. (alterations in original) (citations omitted).

241. *Id.* at *8.

242. *Id.*

243. *Id.*

244. Note that *In re Roman Catholic Diocese of Albany* and *Brown* provide a much more fulsome analysis of general jurisdiction than most of the cases post-*Daimler*. In the majority of cases post-*Daimler*, the general jurisdiction inquiry is disposed of in a very cursory and conclusory manner. See, e.g., *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224–26 (2d Cir. 2014); *Associated Energy Grp., LLC v. Air Cargo Ger. GMBH*, No. 4:13-CV-2019, 2014 WL 2534909, at *4–5 (S.D. Tex.

general jurisdiction might work an injustice (or what appears to be an injustice) in certain cases. Justice Sotomayor recognized this in her concurrence, when she predicted that the ultimate effect of the Court's decision would be to shift the risk of loss from large corporations to the individuals that those corporations have harmed.²⁴⁵ She provides an example of "a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate" and notes that under the Court's approach, the parents would be "unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States."²⁴⁶

Justice Sotomayor's observations have proved to be prescient. Just a few weeks after *Daimler* was decided, the Southern District of Florida issued a decision dealing with the issue of whether a Florida court could assert general jurisdiction over a foreign corporation that managed the property where the American plaintiff was injured.²⁴⁷ In *Barriere v.*

June 4, 2014); *JWQ Cabinetry, Inc. v. Granada Wood & Cabinets, Inc.*, No. 13-4110 (FLW), 2014 WL 2050267, at *3 (D.N.J. May 19, 2014); *Krishanti v. Rajaratnam*, No. 2:09-cv-05395 (JLL) (JAD), 2014 WL 1669873, at *7 (D.N.J. Apr. 28, 2014); *Google Inc. v. Rockstar Consortium U.S. LP*, No. C 13-5933 CW, 2014 WL 1571807, at *5 (N.D. Cal. Apr. 17, 2014); *Am. Recreation Prods., LLC v. Tennier Indus., Inc.*, No. 4:13CV421 CDP, 2014 WL 1315182, at *2-3 (E.D. Mo. Mar. 31, 2014); *Air Tropiques, Sprl v. N. & W. Ins. Co. Ltd.*, No. H-13-1438, 2014 WL 1323046, at *10-11 (S.D. Tex. Mar. 31, 2014); *Lexion Med., LLC v. SurgiQuest, Inc.*, No. 13-2453 (RHK/FLN), 2014 WL 1260761, at *3-4 (D. Minn. Mar. 26, 2014); *M-I Drilling Fluids UK Ltd. v. Dynamic Air Inc.*, No. 13-2385 ADM/JJG, 2014 WL 494680, at *4 (D. Minn. Feb. 6, 2014), *order withdrawn*, 2014 WL 991129 (D. Minn. Mar. 11, 2014); *Beach v. Citigroup Alt. Invs. LLC*, No. 12 Civ. 7717(PKC), 2014 WL 904650, at *6-7 (S.D.N.Y. Mar. 7, 2014); *Hertges v. Experian Info. Solutions, Inc.*, No. 13-2699 (RHK/JJG), 2014 WL 346030, at *2 (D. Minn. Jan. 30, 2014); *Smart Trike, MNF, PTE, Ltd. v. Piermont Prods. LLC*, No. 650376/2012, 2014 WL 2042298, at *3 (N.Y. Sup. Ct. May 16, 2014). Even in the cases that engage in a more detailed analysis, the comparative component is often absent from the inquiry. *See, e.g.*, *Cutcher v. Midland Funding, LLC*, No. ELH-13-3733, 2014 WL 2109916, at *6-8 (D. Md. May 19, 2014); *Meyer v. Bd. of Regents of Univ. of Okla.*, No. 13 Civ.3128(CM), 2014 WL 2039654, at *3-4 (S.D.N.Y. May 14, 2014); *Simon v. Republic of Hung.*, No. 10-1770 (BAH), 2014 WL 1873411, at *32-39 (D.D.C. May 9, 2014); *Price v. Waste Mgmt., Inc.*, No. ELH-13-02535, 2014 WL 1764722, at *8-9 (D. Md. Apr. 30, 2014); *Rates Tech. Inc. v. Cequel Commc'ns, LLC*, No. 13 Civ. 0011 (ALC) (FM), 2014 WL 1494337, at *4-6 (S.D.N.Y. Mar. 25, 2014). This is likely because *Daimler* was so clear in restricting general jurisdiction that there is not really a need to engage in a robust jurisdictional analysis. In all but the most difficult cases, it will be plain that a corporate defendant outside its state of incorporation or principal place of business is not "at home" there.

245. *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring).

246. *Id.* The argument was also advanced by the amicus, American Association for Justice. Brief for the Amicus Curiae American Association for Justice in Support of Respondents at 5, *Daimler*, 134 S. Ct. 746 (No. 11-965) ("If petitioner's view prevails, non-US corporations can avoid being sued in this country by doing all their business through a wholly-owned subsidiary, an arrangement over which they have total control and over which those whom they injure have no input or even knowledge. To allow such wholesale avoidance of personal jurisdiction would undermine the minimum contacts test as it has evolved since *International Shoe* and result in great unfairness to injured persons and a significant reduction in corporate accountability." (citation omitted)).

247. *See Barriere v. Juluca*, No. 12-23510, 2014 WL 652831, at *1 (S.D. Fla. Feb. 19, 2014). ("Allegedly, Plaintiff Aimee Barriere slipped and fell on wet tiles as she was descending stairs on her way to the beach and suffered serious injury. ").

Juluca, the defendant corporation was incorporated in Anguilla and had its principal place of business there. The accident giving rise to the litigation occurred at the defendant’s resort property in Anguilla. Although the plaintiff was domiciled in Texas, she sued in Florida where she argued that the defendant was subject to general jurisdiction.²⁴⁸ The Florida court accepted the plaintiff’s characterization of the factual connections between Florida and the Anguillan defendant:²⁴⁹ (1) the defendant maintains a sales office in Miami; (2) the defendant’s assets are managed by Florida-based consultants; and (3) co-defendants in the action promote, manage, operate, and provide reservation services for resorts, including the defendant; provide extensive sales and promotional support; set forth the standards required to maintain association with the co-defendants’ group; and regularly inspect the defendant’s premises in Anguilla.²⁵⁰ The court noted that “[t]hese allegations . . . are sufficient for this court to find that [defendant] Cap Juluca has such minimum contacts with Florida to be considered ‘at home.’”²⁵¹ The Florida court recognized that “*Daimler* has undoubtedly limited the application of general jurisdiction to foreign defendants,” but did not read the case as mandating that Florida courts cast aside their previous precedents.²⁵² The

248. *Id.*

249. These connections are attenuated for general jurisdiction even under the pre-*Daimler* standard. In effect, the only direct connection between the defendant and Florida was that it had a sales office there. The other connections identified by the court are indirect—it hired Florida-based consultants to manage its assets and certain co-defendants in the case do business in Florida. *See id.* at *5, *8.

250. *Id.* at *8 (“Plaintiffs have alleged that Leading Hotels of the World is the actual or apparent agent of Cap Juluca and that Cap Juluca maintained control over Leading Hotels of the World, or alternatively, that Leading Hotels of the World maintained control over Cap Juluca.”).

251. *Id.*

252. *Id.* at *9. The court selectively quoted from *Daimler* in an effort to bolster its questionable conclusions. It stated:

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

Id. at *7 (citations omitted) (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)). Two things are misleading about this passage. First, the court’s statement that “at home” means “instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities” is inaccurate. *Id.* (quoting *Daimler*, 134 S. Ct. at 761) (internal quotation marks omitted). The quoted passage is simply a statement of what it means for a court to have general jurisdiction, not what “at home” means. According to the Supreme Court, “at home” is intended to mean “comparable to a domestic enterprise in that State.” *Daimler*, 134 S. Ct. at 758 n.11. Second, the court in *Barriere* noted that it “would be possible for a corporation to be ‘at home’ in places outside of its place of incorporation or principal place of business.” *Barriere*, 2014 WL 652831, at *7. What it failed to mention is that that the Court indicated that it would “not foreclose the possibility that in an

court failed to grapple with the implications of the *Daimler* Court's "at home" language and its admonition that the "at home" basis for jurisdiction would be "exceptional."²⁵³ Instead, the court based its decision on the adverse policy consequences of *not* assuming jurisdiction, stating that "[a] contrary result would effectively permit foreign corporations to freely solicit and accept business from Americans in the United States and at the same time be completely shielded from any liability in U.S. courts from any injury that may arise as a result."²⁵⁴ It is clear that the court assumed general jurisdiction over the Anguillan defendant, not because it was truly "at home" in Florida, but because the failure to do so would leave American plaintiffs without an effective remedy.²⁵⁵ As laudable a goal it is to provide redress in the United States for injuries sustained abroad, the result simply cannot be squared with the Supreme Court's decision in *Daimler*. It will likely be in cases like these—where the consequences of not assuming jurisdiction appear unfair—that will prove the most fertile testing ground for *Daimler*'s holding.

B. ADDITIONAL PRESSURE ON ALTERNATIVE BASES OF JURISDICTION

In light of *Daimler*, one should expect plaintiffs' counsel (as well as courts) to find creative ways around the decision.²⁵⁶ The *Barriere* case, discussed above, presents one way that courts will attempt to circumvent the decision: by reading the decision selectively and in a way that does not comport with the underlying thrust of the case. More than likely, however, courts will heed the guidance of *Daimler* and restrict general jurisdiction to circumstances where the defendant is truly "at home."

exceptional case" a corporation could be subject to general jurisdiction in a place other than its state or incorporation or principal place of business. *Daimler*, 134 S. Ct. at 761 n.19 (emphasis added). The court in *Barriere* did not give any credence to the Court's statements about the exceptionality of general jurisdiction outside of the paradigm cases.

253. The court in *Barriere* also ignored the Supreme Court's statement that a reasonableness check is superfluous for general jurisdiction and proceeded to analyze why the assertion of jurisdiction over the Anguillan defendant was, in fact, reasonable on the facts of the case. *Barriere*, 2014 WL 652831, at *8–9. See *Daimler*, 134 S. Ct. at 762 n.20.

254. *Barriere*, 2014 WL 652831, at *8. See also *id.* at *9 (noting that ignoring previous precedents because of *Daimler* "would effectively deprive American citizens from litigating in the United States for virtually all injuries that occur at foreign resorts maintained by foreign defendants even where, as here, the corporations themselves maintain an American sales office in Florida and heavily market in the jurisdiction").

255. Professor Childress also identifies *Barriere* as a case where a lower court found general jurisdiction in a situation "beyond what the Court . . . intended in its *Goodyear* and *Bauman* decisions." Childress, *After Bauman*, *supra* note 8, at 202. He correctly notes that the "reason for this is that the jargon of personal jurisdiction obscures what is really at stake in individual cases: the competing demands of access to justice for plaintiffs and fairness for defendants." *Id.*

256. See Siegel, *supra* note 201, at 2 ("The opportunities for personal jurisdiction of [sic] foreign corporations are of course much reduced after *Daimler*, but not gone entirely.").

This is already evidenced in the case law that has been decided since *Daimler* was released earlier this year.²⁵⁷

With that said, one can envision at least three arguments that plaintiffs who are unable to establish general jurisdiction under *Daimler* might advance in an attempt to establish personal jurisdiction over a defendant.²⁵⁸ First, a plaintiff might argue that the case involves specific jurisdiction and that the cause of action “arises out of” or “relates to” the defendant’s contacts with the forum. Had the plaintiffs in *Barriere*, for instance, been domiciled in Florida rather than Texas, this could have been a plausible approach to establishing jurisdiction, notwithstanding the decision in *Daimler*. The argument would have been as follows: plaintiff’s decision to take a vacation at the defendant’s hotel in Anguilla arose, at least in part, from the defendant’s extensive marketing and promotional efforts in Florida. In this respect, the underlying cause of action could be said to “arise out of” or “relate to” the defendant’s conduct in the forum.

This logic was used in *Nowak v. Tak How Investment Ltd.*, where the Court of Appeals for the First Circuit held that there was specific jurisdiction over a Hong Kong hotel concerning a death at the hotel’s pool.²⁵⁹ In *Nowak*, the court noted that there was a “meaningful link” between the hotel’s contact with the forum, Massachusetts, and the harm suffered:

“The Hotel’s solicitation of Kiddie’s business and the extensive back-and-forth resulting in Burke’s reserving a set of rooms for Kiddie employees and their spouses set in motion a chain of reasonably foreseeable events resulting in Mrs. Nowak’s death. The possibility that the solicitation would prove successful and that one or more of the guests staying at the Hotel as a result would use the pool was in no sense remote or unpredictable; in fact, the Hotel included the pool as an attraction in its promotional materials.”²⁶⁰

The court further noted that “[i]f [a] resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is

²⁵⁷. See *supra* pp. 271–73.

²⁵⁸. Rhodes and Robertson argue that the *Daimler* decision may also put pressure on pendant jurisdiction to fill any holes in the jurisdictional scheme. Rhodes & Robertson, *supra* note 8, at 35–44. They posit that:

After *Bauman*, the constitutional case for allowing the exercise of pendent personal jurisdiction becomes even stronger. . . . The ability to hear these intertwined claims becomes especially important once the scope of general jurisdiction is reduced. Without the availability of pendent personal jurisdiction as a safety valve, limiting general jurisdiction means limiting the number of fora that could hear the case as a whole—and therefore potentially requiring that different courts hear different claims within a larger case.

Id. at 41–42.

²⁵⁹. 94 F.3d 708, 711, 719 (1st Cir. 1996).

²⁶⁰. *Id.* at 716 (quoting *Nowak v. Tak How Inv. Ltd.*, 899 F. Supp. 25, 31 (D. Mass. 1995)).

sufficiently strong to survive the due process inquiry at least at the relatedness stage.”²⁶¹ Accordingly, the court was of the view that the cause of action in *Nowak* arose from the transaction of business by the defendant in the forum.²⁶² In the aftermath of *Daimler*, one should expect plaintiffs in these sorts of cases to cast their analysis of jurisdiction as involving questions of *specific* jurisdiction, not general jurisdiction. This will, in turn, require courts to explore the outer parameters of the “arises out of” or “relates to” aspect of specific jurisdiction.²⁶³

Second, a plaintiff might attempt to make an argument for courts to accept jurisdiction on the basis that they are a “forum of necessity” or a “forum of last resort.”²⁶⁴ This doctrine has largely been rejected in American law, but it is gaining some traction internationally.²⁶⁵ Under the doctrine, courts would enjoy a residual discretion to assume

261. *Nowak*, 94 F.3d at 715–16.

262. *Id.* at 712 (“To satisfy the requirements of the long-arm statute, Section 3(a), the defendant must have transacted business in Massachusetts and the plaintiffs’ claim must have arisen from the transaction of business by the defendant.”).

263. *See Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 427 (1984) (“[A] court’s specific jurisdiction should be applicable whenever the cause of action arises out of or relates to the contacts between the defendant and the forum.”); *see also Andrews, supra* note 16, at 1026 (“In *International Shoe*, the Court used several different terms to describe relationship and lack of relationship: activities that ‘give rise to’ liabilities, as opposed to activities that are ‘unconnected,’ ‘unrelated,’ or ‘entirely distinct’ from the claims. Since then, the Court has not defined the necessary degree of relationship”); Brilmayer et al., *supra* note 11, at 736–38 (“While it has acknowledged the importance of the relation of the claim to the forum, the Court’s opinions fail to describe exactly what type of relatedness between the claim and the forum is necessary in order to establish specific jurisdiction. . . . Just what courts mean when they speak of this amorphous concept of relatedness, however, is simply unclear.”).

264. Professor Twitchell argued in her article, *Why We Keep Doing Business with Doing Business Jurisdiction*, that doing business jurisdiction sometimes provided a forum of necessity where there was no other basis of jurisdiction over a defendant. Twitchell, *supra* note 33, at 195–96 (“Finally, we use doing-business jurisdiction . . . to fill in holes in our jurisdictional scheme. By providing an additional forum for the plaintiff, we may be engaging in some indirect economic equalization unattainable through more straightforward means; occasionally, doing-business jurisdiction may provide a forum by necessity where multiple defendants are involved.”). Given that *Daimler* has drastically circumscribed the ambit of general jurisdiction, courts may feel the need to develop an independent forum of necessity doctrine to fill any residual gaps.

265. *See, e.g., Samuel P. Baumgartner, Changes in the European Union’s Regime of Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States*, 18 Sw. J. INT’L LAW 567, 589 n.109 (2012) (“In the U.S., the Supreme Court has twice refused to consider adoption of a forum of necessity on the facts before it when the minimum contacts required by the due process clause were otherwise missing.” (citing *Helicopteros*, 466 U.S. at 419 n.13; *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977))); *see also* PETER HAY ET AL., CONFLICT OF LAWS § 6.6, at 402 (5th ed. 2010) (“The boundaries of this necessity doctrine, and whether it really exists, are the subject of some considerable debate.”); Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2051 (2013) (“In the United States, the doctrine’s status is debated. If it exists at all, it would seem to exist as a factor for courts to weigh at the reasonableness stage of the jurisdictional due process inquiry, with the lack of an available alternative forum favoring jurisdiction. In other jurisdictions, the doctrine of jurisdiction by necessity is recognized and, when applicable, it authorizes (but does not require) a court to assert jurisdiction.”).

jurisdiction in circumstances where there is no other forum in which the plaintiff can reasonably seek relief. In other words, the forum of necessity doctrine accepts that there will be exceptional cases where the jurisdictional test is not satisfied, but that concerns for access to justice nonetheless justify the assumption of jurisdiction.²⁶⁶ Consider, for instance, the hypothetical presented at the beginning of this Article: a plaintiff who slips and falls at a Home Depot store in Florida but later moves to, and sues in, Texas. Depending on the circumstances, this scenario might be a prime candidate for the forum of necessity doctrine. If, for instance, the plaintiff was unable to physically travel to Florida and could not afford the expense of litigating out of state, these might provide sufficiently compelling circumstances to justify the invocation of the forum of necessity doctrine.²⁶⁷

Courts in Canada appear to have accepted the forum of necessity doctrine.²⁶⁸ In *Van Breda v. Club Resorts Ltd.*, the seminal case on personal jurisdiction in Canada, the Supreme Court refrained from deciding the issue of whether forum of necessity was a part of Canadian law.²⁶⁹ However, the Ontario Court of Appeal in that case had endorsed a forum of necessity doctrine, and lower courts in Canada have accepted its applicability in the appropriate cases.²⁷⁰ The doctrine is also accepted

266. Professor Whytock describes the doctrine as follows:

[U]nder the doctrine of jurisdiction by necessity (*forum necessitatis*), “a court has exceptional jurisdiction if justice so demands, even absent the usual requirements, because no other forum is available to the plaintiff.” The doctrine not only operates to provide court access that might not otherwise be available, but also is sometimes justified as permitted, or even required, by a legal right to court access or the international law prohibition of denial of justice.

Whytock, *supra* note 265, at 2050 (quoting Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1053–54 (2006)).

267. Arguably, the forum of necessity doctrine would be preferable to Justice Sotomayor’s reasonableness check on general jurisdiction in ensuring access to justice for plaintiffs. Justice Sotomayor’s reasonableness check presupposes that the forum has continuous and systematic general business contacts with the forum (as assessed, according to her, in absolute terms). In cases where the prospective defendant lacks these continuous and systematic contacts, the plaintiff is simply out of luck. For instance, if the hypothetical Home Depot plaintiff slipped and fell at a purely local Florida hardware store, she would not be able to sue in Texas, irrespective of how difficult (or impossible) it would be for her to travel back to Florida and litigate there. The forum of necessity doctrine, on the other hand, may permit a plaintiff who is truly unable to sue in the most appropriate forum to sue elsewhere.

268. For a discussion of the forum of necessity doctrine in Canada, see generally Janet Walker, *Muscutt Misplaced: The Future of Forum Necessity Jurisdiction in Canada*, 48 CAN. BUS. L.J. 135 (2009).

269. [2012] 1 S.C.R. 572, paras. 59, 82, 86, 100 (Can. S.C.C.).

270. See *Van Breda v. Village Resorts, Ltd.* (2010), 98 O.R. 3d 721, para. 100 (Can. Ont. C.A.); *Bouzari v. Bahremani*, [2011] O.J. No. 5009 (Can. Ont. Sup. Ct. J.); *Elfarnawani v. Int’l Olympic Comm.*, 2011 ONSC 6784, paras. 61–70 (Can. Ont. Sup. Ct. J.); *Jafarzadehahmadsargoorabi v. Sabet*, 2011 ONSC 5827, para. 73 (Can. Ont. Sup. Ct. J.); *Van Kessel v. Orsulak*, 2010 ONSC 6919, paras. 45–53 (Can. Ont. Sup. Ct. J.); see also *W. Van Inc. v. Daisley*, 2014 ONCA 232, paras. 1, 15–43 (Can. Ont. C.A.) (noting that the issue in the case was “whether the court should exercise its residual discretion to

in countries such as France, Germany, the Netherlands, Ireland, Portugal, and Switzerland.²⁷¹ One U.S. commentator observes that “[i]n theory, there is no reason why forum of necessity couldn’t be adopted by U.S. courts or legislatures.”²⁷² However, the major conceptual problem with forum of necessity is that the doctrine applies when a court otherwise does not possess personal jurisdiction over a defendant. How can the assertion of jurisdiction in these circumstances comport with due process?²⁷³ This will be the central question to be answered in any attempt to invoke the doctrine of forum of necessity in U.S. law.

Perhaps the most plausible route to establishing jurisdiction over a foreign defendant who is not otherwise “at home” in the forum will be to look to whether it has registered to do business in the forum and then to use that registration as an independent basis for jurisdiction over the defendant.²⁷⁴ Every state has a corporate registration statute that requires a corporation that is doing business in the state to register with the state, pay a fee, and appoint an agent for service of process.²⁷⁵ Courts are divided on the jurisdictional consequences associated with registering to do business in a state. Some courts hold that the act of registering to do business and appointing an agent in a state is simply a way of effectuating service of process in cases where the state otherwise has personal jurisdiction over a defendant.²⁷⁶ Other courts have found that registering to do business pursuant to a state statute confers specific

assume jurisdiction based on the common law forum of necessity exception to the real and substantial connection test recognized by this court in *Van Breda v. Village Resorts Ltd.*”).

271. See Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 135 (2013).

272. *Id.* at 136.

273. *But see* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 7 (2006) (arguing that “nonresident, alien defendants do not have due process rights under the Fourteenth and Fifth Amendments and . . . contrary to conventional wisdom, sovereignty principles are what limit a court’s jurisdiction”).

274. See Rhodes & Robertson, *supra* note 8, at 51 (“Given the constriction of general jurisdiction in *Bauman*, the natural next step for plaintiffs is to seek other grounds for general jurisdiction—and the most obvious place to look for such consent is in a state registration filing that designates a corporate agent for service of process.”).

275. See, e.g., N.Y. BUS. CORP. LAW § 1301(a) (McKinney 2003) (“A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article. A foreign corporation may be authorized to do in this state any business which may be done lawfully in this state by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business.”); *id.* § 305(a) (“[E]very . . . authorized foreign corporation may designate a registered agent in this state upon whom process against such a corporation may be served.”).

276. See, e.g., *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181, 183 (5th Cir. 1992) (“Whether jurisdiction in the sense of due process exists depends upon concepts of ‘fairness’ and ‘convenience’ and not upon mere compliance with procedural requirements of notice, nor even corporate ‘presence’ within this state. . . . A registered agent, from any conceivable perspective, hardly amounts to ‘the general business presence’ of a corporation so as to sustain an assertion of general jurisdiction.”); see also *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1277 (D. Md. 1981).

jurisdiction over the defendant with respect to the business that is actually being conducted in that state.²⁷⁷ Yet other courts hold that the mere act of registering to do business in a state subjects a corporation to general jurisdiction there, such that the corporation can be sued in that state with respect to any and all claims, including those without any connection to the state.²⁷⁸ Those courts holding that corporate registration confers general jurisdiction over a defendant usually rely on the notion of consent.²⁷⁹ That is, by taking proactive steps to register under a state statute and appoint an agent for service of process, a corporation has knowingly and voluntarily consented to general jurisdiction in the courts of that state. Since consent is an independent basis for jurisdiction, separate and apart from minimum contacts, it does not run afoul of due process to assert jurisdiction over a corporation based on the corporation registering to do business in a state.²⁸⁰

A surprising number of states adhere to this latter view of corporate registration.²⁸¹ New York, for example, is one of those states that regards registering to do business as conferring general jurisdiction over a corporation.²⁸² In *Rockefeller University v. Ligand Pharmaceuticals Inc.*,

277. *See, e.g.*, *Gray Lines Tours v. Reynolds Elec. & Eng'g Co.*, 238 Cal. Rptr. 419, 421 (Cal. Ct. App. 1987) ("Thus far the highest court in California has given to this legislation no construction which authorizes service of process upon the statutory agent of the foreign corporation defendant where the suit is found upon a cause of action in no way connected with business transacted within this state. In the absence of any such interpretation, the decisions . . . rendered by the highest court in the land require in this instance that the California law authorizing service of process upon a foreign corporation doing business within the state be construed so as to exclude from the operation thereof suits founded upon causes of action not arising in the business done by such foreign corporation in this state." (citations omitted) (quoting *Miner v. United Air Lines Transp. Corp.*, 16 F. Supp. 930, 931 (S. D. Cal. 1936)) (internal quotation marks omitted)).

278. *See, e.g.*, *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) ("[A]ppointment of an agent for service of process . . . gives consent to the jurisdiction of the Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary."); *see also* *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991).

279. *See Knowlton*, 900 F.2d at 1199 ("A defendant may voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it. One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State." (citation omitted)).

280. *See Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008) ("Because jurisdiction is premised upon consent, it is doubtful that the minimum contacts test under the due process clause presents an impediment to the exercise of jurisdiction."); *see also* *Andrews, supra* note 16, at 1073 ("Under *Bauxites*, consent is a proper basis for jurisdiction, independent of *International Shoe* minimum contacts analysis.").

281. *See, e.g.*, *Bohreer v. Erie Ins. Exch.*, 165 P.3d 186, 191 (Ariz. Ct. App. 2007); *Sternberg v. O'Neil*, 550 A.2d 1105, 1116 (Del. 1988); *Merriman v. Crompton Corp.*, 146 P.3d 162, 170 (Kan. 2006); *Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991); *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 272 (N.M. Ct. App. 1993).

282. *See Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 438 (1916); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175 (N.Y. App. Div. 1983).

the Southern District of New York stated that “[i]n maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction.”²⁸³ The court further stated that “[t]he continuing existence of the privilege to do business in New York, regardless of whether it is exercised, rightfully yields jurisdictional consequences if the consent to service on the Secretary of State goes unrevoked.”²⁸⁴ One would imagine that many thousands of businesses are registered to do business under the New York statute. Therefore, even where a corporation is not “at home” in New York, in the *Daimler* sense of the term, it nonetheless will be subject to general jurisdiction there if it has registered pursuant to the New York registration statute.

It is likely in the post-*Daimler* era that more cases will be predicated on the defendant’s consent to jurisdiction via its registration under the relevant state statute. Many courts that have not yet had occasion to address the jurisdictional consequences of state registration statutes will likely have occasion to do so in the near future. Since plaintiffs are going to have very limited success in arguing that a foreign corporation is “at home” in a state other than its state of incorporation or principal place of business, registration provides one potential avenue for asserting jurisdiction over otherwise unattainable foreign corporations. Of course, this does not apply in cases where the corporation has not registered to do business in any state.²⁸⁵

Courts and commentators have debated the constitutionality of registration as a basis for general jurisdiction.²⁸⁶ Many are concerned that subjecting a corporation to general jurisdiction on the basis of its registration to do business in a state is incompatible with due process.²⁸⁷ In the words of one Texas court:

283. 581 F. Supp. 2d at 466.

284. *Id.* at 467 (quoting N.Y. C.P.L.R. § 301 cmt. C301:6 (McKinney 2001)).

285. For instance, in the *Barriere* case, this option would not be open unless the defendant registered to do business somewhere in the United States.

286. See generally Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1 (1990); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, CARDOZO L. REV. (forthcoming 2015); Pierre Riou, Note, *General Jurisdiction over Foreign Corporations: All That Glitters is Not Gold Issue Mining*, 14 REV. LITIG. 741 (1995); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163 (2003).

287. See Kipp, *supra* note 286, at 17 n.71 (“One may wonder . . . why, if it is the Due Process Clause . . . which denied the power of the state to imply consent to suit on claims arising out of transactions occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing.”); Taylor, *supra* note 286, at 1168 (“[T]he assertion of general jurisdiction through registration, arguably among the most egregious assertions of jurisdiction, has slipped through a tear in the fabric of due process protection.”).

The idea that a foreign corporation consents to jurisdiction in Texas by completing a state-required form, without having contact with Texas, is entirely fictional. Due process is central to consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. “Extorted actual consent” and “equally unwilling implied consent” are not the stuff of due process.²⁸⁸

Though the Supreme Court endorsed registration as a basis for general jurisdiction nearly 100 years ago in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,²⁸⁹ this was well before *International Shoe* and the development of more contemporary understandings of due process. In fact, during oral argument in *Goodyear*, Justice Ginsburg telegraphed concern about registration as a basis for general jurisdiction.²⁹⁰ Although there will be increased pressure on registration to do business to fill the gaps left open by *Daimler*, it too is a basis for jurisdiction that is ripe for revisiting.

C. PRACTICAL CONSEQUENCES FOR LITIGANTS AND COURTS

In her concurrence, Justice Sotomayor outlines some practical consequences for litigants and courts stemming from the Court’s decision in *Daimler*. First, she points out that one can expect additional jurisdictional discovery as a result of *Daimler*.²⁹¹ She notes that “[r]ather than ascertaining the extent of a corporate defendant’s forum-state contacts alone, courts will now have to identify the extent of a company’s contacts in every other forum where it does business in order to compare them against the company’s in-state contacts.”²⁹² The Court does not adequately respond to this critique, other than to say that “it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home.”²⁹³ Justice Sotomayor is likely correct that the effect of the Court’s decision is to increase jurisdictional discovery. A plaintiff seeking to establish that a corporation is “at home” in a certain state will need information concerning not only the corporation’s activities within the state, but also its activities outside the state. With that said, much of this information was likely provided as part of discovery anyway, as attested to by the fact that the *Daimler* record contained information on not only Daimler’s connections with

288. *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993).

289. 243 U.S. 93 (1917).

290. Transcript of Oral Argument at 15–16, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (No. 10-76), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-76.pdf.

291. *Daimler AG v. Bauman*, 134 S. Ct. 746, 770–71 (2014) (Sotomayor, J., concurring).

292. *Id.* at 771 (Sotomayor, J., concurring).

293. *Id.* at 762 n.20. Justice Ginsburg, in turn, uses this as an opportunity to say that Justice Sotomayor’s reasonableness check on jurisdiction would “indeed compound the jurisdictional inquiry.” *Id.*

California, but how those connections were insignificant compared with its connections elsewhere.²⁹⁴ A corporation will likely be all too happy to provide a plaintiff with information about its national or international activities in an effort to defeat jurisdiction.

Second, Justice Sotomayor points out that the Court's approach "will treat small businesses unfairly in comparison to national and multinational conglomerates."²⁹⁵ She posits that "[w]hereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be."²⁹⁶ Justice Sotomayor is correct that, jurisdictionally speaking, large businesses may fare better than small businesses. For instance, Home Depot, a large multinational corporation with almost two thousand locations across the United States,²⁹⁷ will likely only be considered "at home" in two places—its state of incorporation (Delaware) and its principal place of business (Georgia). By contrast, Benny's, a New England home improvement store with stores in Rhode Island, Massachusetts, and Connecticut, could conceivably be deemed "at home" in each of these three states.²⁹⁸ It is likely that the forty-two Home Depot locations in Massachusetts²⁹⁹ generate much more revenue than the twelve Benny's stores in Massachusetts.³⁰⁰ However, under *Daimler*, Home Depot will not be subject to general jurisdiction in Massachusetts, while Benny's may be.³⁰¹ Would this be treating Benny's unfairly vis-à-vis Home Depot? Maybe. But maybe that is simply the price to pay for reining in general jurisdiction while retaining the flexibility to find general jurisdiction in states other than the state of incorporation or principal place of business.

Third, Justice Sotomayor observes that the practical effect of *Daimler* is to shift the risk of loss from multinational corporations to the individuals harmed by their actions.³⁰² Thus, litigants who otherwise could have sued a defendant in a forum because the defendant was doing business there will now be restricted in where they can sue—and in some

294. See *id.* at 752 ("MBUSA's California sales account for 2.4% of Daimler's worldwide sales.").

295. *Id.* at 772 (Sotomayor, J., concurring).

296. *Id.* (Sotomayor, J., concurring).

297. *Stores, Products, and Services*, HOME DEPOT, <https://corporate.homedepot.com/OurCompany/StoreProdServices/Pages/default.aspx> (last visited Dec. 14, 2014).

298. See *Benny's, Inc.*, FIND THE BEST COMPANY, <http://companies.findthebest.com/1/977685/Benny-s-Inc-in-Smithfield-RI> (last visited Dec. 14, 2014). Benny's is incorporated in Rhode Island and has its principal place of business in Rhode Island. *Id.*

299. The Home Depot, Inc., Annual Report (Form 10-K) 11 (Mar. 27, 2014).

300. See *All Benny's Locations*, MY STORE 411, <http://www.mystore411.com/store/listing/1224/Benny-s-store-locations> (last visited Dec. 14, 2014).

301. Given the narrowness of the *Daimler* exception, it is not clear that Benny's would actually be subject to general jurisdiction in Massachusetts or Connecticut. The point, however, is that *as between the two companies*, Benny's is far more likely than Home Depot to meet the "at home" test.

302. *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring).

cases, will not be able to sue in the United States altogether. Justice Sotomayor’s position assumes that plaintiffs are not willing (or able) to sue in a foreign forum. Simply because American plaintiffs may not get redress *in the United States* does not necessarily mean that they will not get redress *period*.³⁰³ American courts should be careful not to assume that only the United States can “hold [a defendant] to account” for tortious conduct.³⁰⁴ While there will undoubtedly be sympathetic situations where courts want to provide a forum for redress for injured American plaintiffs, such as in the *Barriere* case,³⁰⁵ that motivation cannot be the sole guiding force behind the adoption of an appropriate test for general jurisdiction.

Fourth, Justice Sotomayor points out that the Court’s approach in *Daimler*:

creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, but a large corporation that owns property, employs workers, and does billions of dollars’ worth of business in the State will not be, simply because the corporation has similar contacts elsewhere.³⁰⁶

Justice Sotomayor is correct that there is a perceived disconnect between rules that allow for the assertion of general jurisdiction over individuals based upon the simple act of serving an individual with process, and not allowing general jurisdiction over corporations that have significant and enduring contacts with the forum. Others have also noted this disconnect and advocated for revisiting the oft-maligned rule that presence in the jurisdiction when served with process is a legitimate basis for general jurisdiction over individuals.³⁰⁷

303. See Stein, *supra* note 164, at 542 (“[I]t doesn’t really bother me that the plaintiffs in *Goodyear Dunlop* were forced to pursue their remedies for the injuries suffered in France in a French court. And I don’t think I would have been any more troubled had the defendants conducted significantly greater activities in the forum. Not everyone gets to sue at home.”).

304. *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring). Accord Childress, *Transnational Law Market*, *supra* note 8, at 79 (“[O]ne should not lose sight of the plaintiff’s need for justice in the individual case. Yet, we should not be so bold as to assume that justice in the United States is the only justice that should count. Unless it can be shown that no other forum would grant the plaintiffs access to justice, U.S. courts should resist creative assertions of general jurisdiction.”).

305. *Barriere v. Juluca*, No. 12-23510, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014); see, e.g., *Meier v. Sun Int’l Hotels, Ltd.*, 288 F.3d 1264 (11th Cir. 2002).

306. *Daimler*, 134 S. Ct. at 772–73 (Sotomayor, J., concurring) (citation omitted).

307. See *Burnham v. Superior Court*, 495 U.S. 604 (1990); see also Stein, *supra* note 164, at 549 (“All of the reasons that support limiting general jurisdiction to a corporate defendant’s home base apply with even greater force to individual defendants. . . . Although I do not expect the Court to reverse course, I hope the Court will move off of its position that jurisdiction over persons is justified by raw territorial power, whereas jurisdiction over corporations must be justified by a deeper sense of fairness and a more meaningful connection between the defendant and the forum state.”); Twitchell, *supra* note 33, at 181 (“[T]he benefits received by a defendant with continuous commercial activities

With that said, there is nothing conceptually problematic about two completely independent rules for jurisdiction leading to seemingly incongruous results.³⁰⁸ In her quote, Justice Sotomayor is referring to presence-based jurisdiction over individuals, which the Supreme Court determined in *Burnham v. Superior Court* to be compatible with due process.³⁰⁹ There is no equivalent form of jurisdiction over corporations; that is, one cannot serve a corporate officer or director in a forum and thereby obtain jurisdiction over the corporation by virtue of service.³¹⁰ Thus, Justice Sotomayor's comparison between service on an individual, on the one hand, and a defendant's continuous and systematic contacts with the forum, on the other, is inapposite. Rather, jurisdiction over a corporation premised on its continuous and systematic general business contacts that render it "at home" is most closely akin to jurisdiction based on an individual's domicile.³¹¹ While Justice Sotomayor's comments have an intuitive appeal, she is essentially comparing apples (presence-based jurisdiction for individuals) and oranges (domicile-based jurisdiction for corporations).

Fifth, Justice Sotomayor implies that the Court's approach has made the general jurisdiction inquiry increasingly difficult for courts. She observes that the new rule requires the defendant to not only possess continuous and systematic contacts with a state, but also that "those contacts must . . . surpass some unspecified level when viewed in comparison to the company's 'nationwide and worldwide' activities."³¹² Justice Sotomayor is of the view that this comparative exercise "injects an additional layer of uncertainty" and that that "courts will now have to identify the extent of a company's contacts in every other forum where it does business in order to compare them against the company's in-state contacts."³¹³ Justice Sotomayor is likely right that the comparative approach adopted by the Court could marginally complicate the jurisdictional analysis. However, it is worth noting that the continuous and systematic test that existed pre-*Daimler* (with or without the "at

within a state certainly exceed the thin potential benefits received by the hapless traveler who barely sets foot in the forum's territory.").

308. Indeed, the idea that registering to do business (without actually doing business) is a basis for general jurisdiction while doing business in the *Helicopteros* sense is not a basis for general jurisdiction is also seemingly incongruous. See *supra* Part IV.B. But because the two rely on two different bases for their legitimacy (consent versus contacts), there is nothing technically incompatible about the two co-existing.

309. See *Burnham*, 495 U.S. 604.

310. Unless, of course, the corporation is registered to do business in the forum and the forum regards such registration as consent to general jurisdiction. In this case, however, the basis of jurisdiction is usually not regarded as presence, but rather consent.

311. See Erichson, *supra* note 8, at 85–86 (discussing domicile based-jurisdiction, citing *Milliken v. Meyer*, 311 U.S. 457 (1940), and noting that "a similar logic extends to corporations").

312. *Daimler AG v. Bauman*, 134 S. Ct. 746, 770 (2014) (Sotomayor, J., concurring).

313. *Id.* at 770–71 (Sotomayor, J., concurring).

home” qualifier) was hardly a precise science. Lower courts never exhibited any consistency on what was required to meet the continuous and systematic threshold. Moreover, the standard has now been set so high that in most cases, the defendant will fall far short of being “at home”—making the precise balancing of forum-based versus non-forum-based contacts largely irrelevant.³¹⁴

* * *

The *Daimler* decision will certainly cause upheaval in the case law for many years to come, as litigants and courts try to come to grips with its consequences. The biggest implication of *Daimler* is that doing business jurisdiction has been wiped off the jurisdictional map. This, in turn, may result in other grounds for jurisdiction having to “pick up the slack.” While *Daimler* is important for what it did say, it is also important for what it did not say. Below, I explore the critical questions that the Supreme Court left unanswered in *Daimler*.

V. UNANSWERED QUESTIONS

Those awaiting the Supreme Court’s decision in *Daimler* thought that it would resolve a very important jurisdictional question: when is “vicarious jurisdiction” appropriate?³¹⁵ Unfortunately, the Court did not answer this question and instead answered another question not argued before the Court: when is a corporation “at home” for the purposes of the general jurisdiction inquiry? Even though this latter question was important, and the Court helpfully clarified the meaning of the “at home” language it had introduced in *Goodyear*, it was regrettably silent on the issue of imputing a subsidiary’s contacts to a parent. It was also silent on imputing alternative bases of jurisdiction—place of incorporation or principal place of business—from a subsidiary to a parent for general jurisdiction purposes.

A. WHEN SHOULD A SUBSIDIARY’S CONTACTS BE IMPUTED TO THE PARENT?

The issue that was surprisingly ducked by both the Court and the concurrence was the one issue that everyone expected this case to decide: when can the contacts of a subsidiary be attributed to a parent for personal jurisdiction purposes? In some ways, the answer to this question might not matter anymore in many cases. If the parent company is sufficiently national or global, with contacts dispersed across many forums, then *even with* imputation of the subsidiary’s contacts, there still would not be general jurisdiction over the parent under the Court’s strict

314. See *supra* note 244.

315. See *generally* Hoffman, *supra* note 8 (coining the term “vicarious jurisdiction”).

“at home” standard. However, one could imagine scenarios involving less national or less global companies whose connections are spread out across fewer jurisdictions. In these circumstances, it would be important to know what test is appropriate to use for imputation of contacts, since there could still be a plausible argument that even under the new “at home” standard, the parent is subject to general jurisdiction.

To the Court’s credit, it did reject the Ninth Circuit’s agency test for imputation of jurisdictional contacts as being one that, in almost all cases, would yield a pro-jurisdictional result.³¹⁶ However, it did not clarify if some other, perhaps stricter, form of agency could justify the imputation of a subsidiary’s contacts to a parent. If some form of agency theory could be used to justify the imputation of contacts between the agent and its principal for general jurisdiction purposes, then this finding would presumably apply in any agent-principal relationship, not just a subsidiary-parent relationship.³¹⁷ After *Daimler*, it is clear that the Ninth Circuit’s “sufficiently important” agency test has been rejected—but it is not clear that *all* agency tests have been rejected.³¹⁸ Thus, it is presumably open to a plaintiff to argue that the contacts of a defendant’s agent, in certain circumstances, should be imputed to the principal for the purposes of general jurisdiction.³¹⁹ What those circumstances are is an open question.³²⁰

The Court should have used *Daimler* as an opportunity to answer the question it was actually supposed to answer and that matters greatly in the real world of litigation: when will the jurisdictional contacts of one

316. *Daimler*, 134 S. Ct. at 759–60.

317. See Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner, *supra* note 111, at 21–22 (providing an example of general jurisdiction premised on the hypothetical retention by Daimler of “ABC, a typical modern law firm” that acts as an agent of Daimler).

318. See *Daimler*, 134 S. Ct. at 759–60. Professor Erichson argues that an agency test is incompatible with a home state test for general jurisdiction:

One cannot be *at home* through an agent. One cannot be a *citizen* through an agent. When a principal acts through an agent who is a citizen of a state, the principal does not thereby become a citizen. The principal’s conduct through the agent may subject the principal to specific jurisdiction for claims arising out of the conduct, but it does not alter the principal’s *home state*.

Erichson, *supra* note 8, at 91–92.

319. See Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 63 S.C. L. REV. 697 (2012); see also Silberman, *supra* note 8, at 125–26 (noting that “mere agency—or even the more liberal ‘multinational enterprise’ concept—is much harder to justify [than alter ego] in the context of general jurisdiction”).

320. On the issue of imputation generally, see Hoffman, *supra* note 8; Peddie, *supra* note 319; Silberman, *supra* note 8. Interestingly, the Court also referred to the General Distributor Agreement signed by MBUSA and Daimler in assessing the agency question. *Daimler*, 134 S. Ct. at 752. This leaves open the possibility that a determination of agency will turn, at least in part, in how the parties structure their relationship in writing.

party count against another party?³²¹ Or, more precisely, when will the jurisdictional contacts of a subsidiary count against its parent?³²² Courts have been divided on the issue of the attribution of jurisdictional contacts from a subsidiary to a parent for many years,³²³ and the Supreme Court in *Daimler* missed the perfect opportunity to provide some clarity and guidance to courts.

B. WHAT IF THE BASIS OF JURISDICTION IS PLACE OF INCORPORATION OR PRINCIPAL PLACE OF BUSINESS?

Both the Court and the concurrence in *Daimler* focused exclusively on the imputation of *contacts* from a subsidiary to a parent company for purposes of assessing whether the parent is subject to general jurisdiction in the forum. What if the underlying basis of jurisdiction over the subsidiary, however, is not continuous and systematic general business contacts sufficient to render the corporation “at home,” but rather state of incorporation or principal place of business? For instance, in *Daimler* itself, what if MBUSA was incorporated in California or had its principal place of business there? If this underlying basis of general jurisdiction over MBUSA could—under whatever theory—be imputed to the parent, what does that mean for general jurisdiction over the parent?³²⁴

There are at least three possible analyses here. First, if jurisdiction over the subsidiary is based on being incorporated in the forum or having its principal place of business there, and that jurisdictional contact is imputed to the parent, one could argue that the parent is *de facto* subject to general jurisdiction in the forum as well. Using a variation of the facts

321. *Contra* Sherry, *supra* note 8, at 116 (“The imputation question must be answered eventually, but it should be addressed in a more appropriate case: one in which the plaintiffs have a real connection to the forum state and the parent company can plausibly be held liable for the acts of its subsidiary. That is not this case. Deciding a broad, recurring question in the context of a unique case is too likely to lead to an answer that is right for this case but wrong for the run-of-the mill case.”).

322. Professor Winship observes that the question is actually more complicated than it appears given different forms of corporate structure. Winship, *supra* note 8, at 441. She states, “[g]enerally courts have not wrestled with the consequences of the specific corporate relationship—whether the subsidiary is direct or indirect, how many tiers are between the parent and subsidiary, or whether the subsidiary is wholly or partially owned.” *Id.*

323. *See* Hoffman, *supra* note 8, at 766 (“Despite the frequency with which courts must deal with these jurisdictional arguments, the lower court case law is a mess.”).

324. Professor Childress also identifies this as an unanswered question in the wake of *Daimler*:

This raises an interesting question: would Daimler be subject to general jurisdiction in Delaware or New Jersey, where MBUSA would be subject to general jurisdiction, as these are its places of incorporation and principal place of business? Given that under the Court’s test MBUSA is at home in these fora, can its contacts be imputed to Daimler? We do not know the answer to that question in light of the Court’s silence on imputation. But, I suspect that the answer would be no in light of the Court’s strong language limiting general jurisdiction.

Childress, *After Bauman*, *supra* note 8, at 201.

of *Daimler* itself, one could argue that if MBUSA was incorporated in California and that jurisdictional contact was imputed to Daimler, then Daimler would also be regarded as being incorporated in California and therefore subject to general jurisdiction there. Depending on how expansive the underlying test for imputation is, this approach could have quite significant jurisdictional consequences. If courts adopted a liberal view of imputation, then a parent could be subject to general jurisdiction in any state where any of its subsidiaries are incorporated or have their principal place of business. This would give a lot of power to a state like Delaware, where the majority of corporations in America are incorporated.³²⁵ Thus, Delaware would not only have general jurisdiction over the companies that have incorporated in Delaware, but also potentially the parents of those companies, provided that a court would impute this jurisdictional contact to the parent.

This approach was recently taken by the U.S. District Court of Minnesota in *George v. Uponsor Corp.*³²⁶ In *George*, the parent company was incorporated in Finland, while its subsidiary was incorporated in Illinois and had its principal place of business in Minnesota.³²⁷ The court, applying a form of agency test, held that jurisdiction was appropriate because the parent “exercises a sufficient degree of control and domination over [the subsidiary] to satisfy due process.”³²⁸ Consequently, because the subsidiary was subject to general jurisdiction in Minnesota (its principal place of business), so too was the parent.³²⁹ *George* was decided prior to the Supreme Court’s decision in *Daimler*. After *Daimler* was released, the defendant moved for reconsideration.³³⁰ The court upheld its earlier decision that the parent was subject to general jurisdiction in Minnesota.³³¹ In so doing, it distinguished *Daimler*, stating:

In contrast, Uponsor Corp.’s subsidiary in this case, Uponsor, Inc., does not simply conduct business in Minnesota. Unlike MBUSA, Uponsor, Inc.’s principal place of business is in the forum state, and Uponsor Corp. conducts much if not most of its American operations, in addition to sales, through Uponsor, Inc. Finding personal jurisdiction over Uponsor Corp. in Minnesota on this basis does not broadly expose the parent company to jurisdiction in any state where it conducts business.³³²

325. See generally LEWIS S. BLACK, JR., DEL. DEP’T OF STATE DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE (2007).

326. 988 F. Supp. 2d 1056 (D. Minn. 2013).

327. *Id.* at 1060.

328. *Id.* at 1066.

329. *Id.* at 1066–67.

330. *Id.* at 1078.

331. *Id.* at 1078–79.

332. *Id.* at 1079.

It is clear that the *George* court viewed the imputation question presented in *Daimler* (imputation of contacts) as different from that presented in in the case before it (imputation of principal place of business). In the latter scenario, it viewed general jurisdiction as following automatically from the imputation of the subsidiary’s principal place of business to the parent.

There is arguably a conceptual problem with subjecting a parent to general jurisdiction in a state because its subsidiary is incorporated there or has its principal place of business there. It essentially results in a corporation being incorporated or having its principal place of business in two places. In our hypothetical variation of *Daimler*, Daimler would be regarded as incorporated or having its principal place of business in *both* California and Germany. This would not square well with the Court’s statement that “[t]hose affiliations [principal place of business and place of incorporation] have the virtue of being unique—that is, each ordinarily indicates only one place.”³³³

A second approach would be to impute the underlying basis of jurisdiction, whether incorporation or place of business, and view that basis, alongside all the other contacts between the parent and the forum, as either supporting or not supporting the exercise of general jurisdiction over the parent. In other words, the underlying basis of jurisdiction over the subsidiary would be viewed as just another contact for the court to consider when assessing whether the parent was subject to general jurisdiction in the forum. In our hypothetical variation of *Daimler*, the forum would consider whether all of the contacts between Daimler and California, including the imputed jurisdictional contact (subsidiary incorporated in California), would render Daimler subject to general jurisdiction in California. This approach would essentially involve a holistic weighing of the parent’s independent jurisdictional contacts with the forum and adding to those contacts the fact that its subsidiary is incorporated in the forum or has its principal place of business there. This approach, however, is both difficult to conceptualize and to apply. It is not clear that “place of incorporation of a subsidiary,” for instance, is a jurisdictional contact in the same way that more traditional contacts are, such as physical places of business in the state, employees in the state, purchases in the states, sales to the state, etc. Even if it were a legitimate jurisdictional contact, how does the fact that a corporation’s subsidiary is incorporated in the state play out in analyzing continuous and systematic business contacts, such that the corporation is fairly regarded to be “at home”? That is, it is unclear how to weigh this jurisdictional contact (if it is one) alongside all others in applying the new “at home” test. Moreover, even if this factor could be weighed as part of an overall

333. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

assessment of contacts, one is left with the same issue presented in *Daimler*: if place of incorporation of a subsidiary is just another contact, this will not mean much if the parent is a large multinational corporation. In other words, the impact of this contact will be watered down in cases where the parent is a large corporation such as *Daimler*. Further, one might argue that this approach defeats the “imputation” aspect of whatever jurisdictional attribution theory a court were to use (e.g. agency, alter ego, etc.). Imputation connotes something more than simply looking at the place of a subsidiary’s incorporation as a factor in assessing general jurisdiction over a parent.

A third approach is to say that while one can impute contacts, one cannot impute the other two bases of general jurisdiction. Under this approach, the argument is that it makes sense to impute the contacts of a subsidiary, such as sales, revenues, and employees, because the subsidiary is under the umbrella of the parent (albeit the two entities are separately incorporated). However, it does not make sense to impute a jurisdictional *status* that a corporation can have with only one territorial entity. So while factual “contacts” may carry over and have independent jurisdictional consequences for the parent, a descriptive status, such as place of incorporation or principal place of business, cannot. This approach has the benefit of being the cleanest of the three and avoids most conceptual snags and practical difficulties in application. However, one could argue that of the three possible bases for general jurisdiction over a corporation, state of incorporation and principal place of business are the “paradigm” cases for general jurisdiction, and therefore should carry some jurisdictional consequence for the parent. Otherwise stated, the “at home” basis for general jurisdiction is the most tenuous basis of the three—and should be the least likely to have jurisdictional ramifications for a parent.

* * *

The Supreme Court in *Daimler* left two very important jurisdictional questions for another day: (1) when should a subsidiary’s contacts be imputed to its parent? and (2) how does imputation work if the underlying basis of jurisdiction over the subsidiary is that it is incorporated in the forum or has its principal place of business there? The Court’s silence in this respect is unfortunate since many cases involving general jurisdiction implicate some form of agency relationship. For instance, in both the *Bumbo* and *Barriere* cases discussed above, jurisdiction over the defendant was premised, at least in part, on its relationship with an agent in the forum. Nonetheless, the Court’s reinforcement of the “at home” test may make the imputation question less pressing than it once was. Since many parents are large multinational corporations with contacts dispersed throughout the country or the world, it is unlikely that they would be considered “at

home” even with the imputation of contacts. The analysis is, of course, slightly different if the underlying basis of jurisdiction is that the subsidiary is incorporated in the forum or has its principal place of business there. Here, it is an open question as to what courts will do.

CONCLUSION

This Article asks in its title, “Where is Home Depot ‘at Home’?” Up until very recently, the answer was not entirely clear. In particular, it was not clear whether Home Depot was “at home” in every state where it conducts a significant amount of business—which presumably is in each and every state. Today, there should be more clarity on the issue. Home Depot is “at home” in its state of incorporation (Delaware) and its principal place of business (Georgia). Beyond that, it is unlikely that any court following the letter and spirit of *Daimler* will find that there is general jurisdiction elsewhere.

The decision in *Daimler* effects a dramatic change to the law of personal jurisdiction in the United States. It marks the end of doing business jurisdiction, a basis for personal jurisdiction that has prevailed in the case law for over a century.³³⁴ No longer will a court be able to exercise dispute-blind jurisdiction over a defendant on the basis that it has continuous and systematic contacts with the forum. Defendants will applaud the case; plaintiffs will try to find ways around it. How *Daimler* plays out in the long run, however, ultimately remains to be seen.

³³⁴ Twitchell, *supra* note 33, at 203 (noting that “we have used [doing business jurisdiction] regularly for more than a century”).
