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When Is It Necessary for Corporations to Be Essentially at Home: An Exploration of Exceptional Cases

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COMMENTS

WHEN IS IT NECESSARY FOR CORPORATIONS TO BE ESSENTIALLY AT HOME?: AN EXPLORATION OF EXCEPTIONAL CASES

INTRODUCTION

This comment examines the current state of the law surrounding the exercise of general jurisdiction and forecasts the circumstances under which the Supreme Court is likely to clarify its recent decisions. Its purpose is to explore the principles announced in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *Daimler AG v. Bauman* and consider whether the due process rationales offered in the past coincide with the new essentially at home standard imposed for general jurisdiction. Moreover, this comment analyzes the reactions of the lower courts in the wake of these decisions and predicts where the Supreme Court is headed in cases involving foreign[1] corporations. The recent decisions prioritize predictability for the defendant above rationales offered in the past. The Court left open a small opportunity for discretion, but has stopped just short of establishing a bright-line rule. Thus, lower courts must try to identify what exceptional hypothetical facts are necessary to exercise general jurisdiction over a corporate defendant outside of its principal place of business and state of incorporation.

There are occasions when a plaintiff may decide to bring a suit in a state other than where the cause of action arose. Whether it be the plaintiff's home state or a location that has favorable laws, general jurisdiction allows a plaintiff to make that choice. Such a

1. In jurisdiction analyses, the term foreign often refers to out-of-state corporations. Here, and throughout this comment, the term foreign refers to corporations that are based in a nation other than the United States.

circumstance could arise if a plaintiff's injury occurs outside of the United States. General jurisdiction exists when a defendant's contacts with the forum state are so sufficiently substantial that suit may be brought against him in that state, despite the dispute's lack of relation to those contacts.[2] Accordingly, the proper analysis for the exercise of jurisdiction considers the "relationship among the defendant, the forum, and the litigation."[3]

Part I of this comment reviews the historical background of personal jurisdiction and introduces the varying rationales offered over time from the members of the Supreme Court. In Part II, the Court's most recent decisions are explored in depth, and lower courts' interpretations and applications of the essentially at home standard are evaluated. Part III analyzes the validity of the possible policy justifications for the recent decisions in light of rationales offered in the past. Finally, Part IV predicts the circumstances under which the Court may rule that a defendant's contacts are sufficient for the exercise of general jurisdiction and suggests that the predictability rationale will govern the law of general jurisdiction.

I. HISTORICAL BACKGROUND

Personal jurisdiction has an extensive history, and the background is vital to understanding modern jurisprudence. Beginning with the traditional bases for jurisdiction, the Supreme Court revealed its rationales when applying these standards to corporations. *International Shoe Co. v. Washington* introduced the minimum contacts test and several decisions have refined how the doctrine is applied today.

2. Calder v. Jones, 465 U.S. 783, 787–88 (1984). General jurisdiction is also referred to as all-purpose jurisdiction. Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 HOUS. L. REV. 631, 636 (2016). The Supreme Court began referencing the distinction between the two types of analyses using the current terms—general and specific—in *Helicopteros Nacionales de Columbia, S. A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984); and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985). The terms, and the distinction between them, rapidly became essential to the personal jurisdiction analysis.

3. Shaffer v. Heitner, 433 U.S. 186, 186 (1977).

A. *Presence and Consent: Traditional Bases for Jurisdiction*

Historically, courts determined whether the exercise of personal jurisdiction was proper based on voluntary appearance, consent, or physical presence in the forum. Courts did not distinguish between specific jurisdiction and general, or all-purpose, jurisdiction.[4] Indeed, courts applied the same analysis whether the cause of action arose in the forum state or elsewhere.[5] Even before rules for testing the validity of a court's jurisdiction were established, early cases indicate the Supreme Court struggled with determining proper jurisdiction when claims involved corporations.[6] The difficulty arises because corporations are fictional entities without a simple measure for domicile other than state of incorporation, but the Court recognizes that corporations' power reaches beyond state borders.[7]

In the nineteenth century, the Supreme Court struggled with the extent to which a corporation could engage in activities outside of its state of incorporation. For example, in *Bank of Augusta v. Earle*, the Court held that the plaintiff, a bank incorporated in Georgia, had the ability to enter into a valid contract in another state.[8] Accordingly, the bank also had the right to sue to recover pursuant to that contract.[9] The bank brought suit in Alabama against a citizen of Alabama.[10] The Court revealed its early concerns with corporations engaging in activities outside of their states of incorporation, stating that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places."[11]

Similarly, in *Lafayette Insurance Co. v. French*, the Court held that a judgment handed down by a court in Ohio was enforceable

4. Heiser, *supra* note 2, at 636.
5. *Id.*
6. *See id.* at 636–37.
7. *See id.* at 637.
8. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 585, 597 (1839).
9. *See id.* at 597.
10. *Id.* at 521.
11. *Id.* at 588.

against an Indiana insurance company.[12] Lafayette Insurance conducted business in Ohio pursuant to a state law that recognized a corporation's existence for purposes of entering into contracts there and subjected them to suit through notice to its agents.[13] A registered agent of Lafayette was notified of the suit, but Lafayette failed to appear in the Ohio court.[14] Thus, a default judgment was handed down in favor of the plaintiff.[15] When the plaintiff sought to enforce the judgment against Lafayette in Indiana, the defendant argued that the Ohio judgment was invalid due to lack of personal jurisdiction.[16] In holding for the plaintiff, the Court reasoned that the exercise of jurisdiction was proper because Lafayette engaged in business in the forum state, its agent received service of process, and the dispute arose from a contract involving a citizen of Ohio.[17] Here, jurisdiction was proper because the defendant consented to service of process in Ohio.[18]

In deciding *Pennoyer v. Neff*, approximately twenty years later, the Court began to analyze personal jurisdiction in terms of the Due Process Clause of the Fourteenth Amendment.[19] This case did not involve a corporation, but was a significant step in the evolution of personal jurisdiction jurisprudence. The interstate federalism rationale for personal jurisdiction finds its origin in this opinion.[20] The Court also considered presence in the forum as a traditional basis for the exercise of jurisdiction.[21] The *Pennoyer* Court said that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[22] It follows that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[23]

The Court held that a default judgment from an underlying action was invalid because the judgment was rendered when the

12. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855).
13. *Id.* at 406.
14. *See id.* at 407.
15. *See id.* at 405.
16. *Id.* at 405.
17. *Id.* at 408.
18. *Id.*
19. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
20. *See id.* at 722.
21. *Id.* at 734.
22. *Id.* at 722.
23. *Id.*

plaintiff was not personally served with process, did not appear in the case, and was not a resident of the state.[24] Thus, the subsequent sale of the property in controversy was not authorized.[25] The Court reasoned that personal jurisdiction was based on the mutually exclusive sovereign power of the sister states over persons and property within its borders, stating that "[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."[26] Accordingly, jurisdiction was not proper in the underlying action when the defendant was not present in the forum.[27] The Court articulated that the analysis would be more complicated if a corporation were involved, but that question was not before the Court in *Pennoyer*.[28]

Likewise, in *Flexner v. Farson*, the Court held that a Kentucky judgment was void against Illinois defendants because the exercise of jurisdiction in the underlying dispute was improper.[29] Defendants were doing business in Kentucky through an agent in the state.[30] The defendant's formal agent was served after the agency relationship had ended.[31] The defendants failed to appear in Kentucky, and a judgment was rendered against them.[32] The plaintiffs brought an action in Illinois to enforce the judgment.[33] In affirming the Illinois lower courts, the Supreme Court reasoned that Kentucky lacked authority to require individuals to register agents within its borders in order to do business.[34] Thus, service on the former agent did not constitute presence to allow jurisdiction in Kentucky over the nonresident individuals.[35]

At this point in history, the law restricted where defendants could be sued based on voluntary appearance, consent, or physi-

24. *Id.* at 734, 736.
25. *Id.* at 734.
26. *Id.* at 722.
27. *Id.* at 734.
28. *Id.* at 735–36.
29. Flexner v. Farson, 248 U.S. 289, 292–93 (1919).
30. *Id.* at 292.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 293.
35. *Id.*

cal presence in the forum.[36] During this time, the Due Process Clause of the Fourteenth Amendment and the interstate federalism rationale provided the foundation for such restrictions.

B. *Origin of Minimum Contacts*

The Supreme Court addressed whether the exercise of personal jurisdiction over a corporation was proper in *International Shoe Co. v. Washington*.[37] This decision established the minimum contacts test, which replaced *Pennoyer*'s territorial presence test.[38] The Court held that a shoe company incorporated in Delaware, with its principal place of business in Missouri, was amenable to suit in Washington in a case involving nonpayment of unemployment taxes for the salesmen employed in the forum.[39] The Court explained that jurisdiction was proper in any state where a corporate defendant conducted continuous and systematic business activities.[40] The holding justified the minimum contacts test, applying a fairness rationale rather than the interstate federalism rationale abided by in *Pennoyer*.[41]

The Court reasoned that "due process requires only that in order to subject a [nonresident] defendant to a judgment . . . he have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[42] The opinion also articulated for the first time a distinction between causes of action that arise in the forum state and those that arise elsewhere.[43] Although the

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36. *See generally, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (physical presence or voluntary presence); Lafayette Insur. Co. v. French, 59 U.S. 404, 407 (1855) (consent); Bank of Augusta v. Earle, 38 U.S. 519, 597 (1839) (physical presence of a corporation).

37. Int'l Shoe Co. v. Washington, 326 U.S. 310, 311 (1945).

38. *See id.* at 316; Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

39. *Int'l Shoe*, 326 U.S. at 313, 321.

40. *Id.* at 326.

41. *See id.* at 320.

42. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

43. That is, the Court articulated a separate analysis for general, or all-purpose, jurisdiction where the cause of action did not arise in the forum state.

> While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

Court decided this case based on a specific jurisdiction analysis because the cause of action arose from International Shoe's contacts with Washington, it also explained that where corporate operations within a state were so substantial and continuous, personal jurisdiction is proper for "causes of action arising from dealings entirely distinct from those activities."[44] Thus, the Court established that, according to the minimum contacts test, the exercise of jurisdiction over a corporate defendant would be proper in any state where the corporation carries out continuous and systematic business activities.[45]

C. *Development of Minimum Contacts*

Between 1945 and 2011,[46] the Supreme Court handed down only two opinions applying the minimum contacts test in a general jurisdiction context.[47] In *Perkins v. Benguet Consolidated Mining Co.*, the Court held that the Ohio court could exercise jurisdiction over a shareholder's claim against a Philippine mining company that had moved its office to Ohio during World War II.[48] Indeed, *Perkins* is an uncharacteristic case because the Ohio state courts concluded they did not have jurisdiction over the foreign corporation, but the Supreme Court ruled the state did indeed have the power.[49]

The Court explained that the company's continuous and systematic in-state activities, including "directors' meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery," satisfied the level of contacts necessary to comply with due process.[50] The Court reasoned that the state of Ohio was the defendant's primary, though temporary, place of business during wartime; thus the exercise of

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Id. at 318 (citations omitted).

44. *Id.* at 318–320.

45. *See id.* at 318.

46. These dates represent the span of time between the decision in *International Shoe*, which was based on minimum contacts, and the opinion formulated by the Court in *Goodyear*, in which the analysis shifted to an essentially at home analysis. *See id.*; Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915 (2011).

47. PETER HAY ET AL., CONFLICT OF LAWS 409 (5th ed. 2010).

48. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438–39, 447–48 (1952).

49. *Id.* at 448; HAY ET AL., *supra* note 47, at 409.

50. *Perkins*, 342 U.S. at 445–46.

jurisdiction was fair.[51] Accordingly, even though the shareholder's claim arose elsewhere and the corporation was incorporated in the Philippines, it was amenable to suit in Ohio.[52]

On the other hand, in *Helicopteros Nacionales de Colombia, S. A. v. Hall*, the Court considered the level of contacts a Colombian corporation had with a forum state and decided those contacts were insufficient to exercise jurisdiction over the corporation for a claim unrelated to the contacts.[53] A wrongful death action was brought against the helicopter charter service in Texas, arising from a helicopter crash in Peru involving Americans.[54] The trial court found for the plaintiffs and the defendant appealed, arguing that the Texas court lacked personal jurisdiction.[55] Eventually, the Texas Supreme Court affirmed that jurisdiction was proper.[56]

Helicopteros petitioned the Supreme Court, arguing that it lacked sufficient contacts with Texas to be amenable to suit in a claim that arose outside the forum and was unrelated to its Texas contacts.[57] The Court reversed the holding because Helicopteros's contacts were insufficient for the Texas court to exercise general jurisdiction.[58] Helicopteros's activities in Texas included making purchases, sending staff for training, drawing payments from Texas banks, and attending the negotiation session for the charter service with the employer of the deceased.[59] The Court explained that "mere purchases, even if occurring at regular intervals, [were] not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."[60]

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51. *Id.* at 448. "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation." *Id.* at 445.

52. *Id.* at 439–48.

53. Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 409, 416 (1984).

54. *Id.* at 410.

55. *See id.* at 412.

56. *Id.* at 412–13.

57. *Id.* at 409.

58. *Id.* at 418–19.

59. *Id.* at 416.

60. *Id.* at 418 (citing Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923)).

D. *Jurisdiction Rationales of the Supreme Court*

The Supreme Court revealed varying jurisdiction rationales in *Burnham v. Superior Court*.[61] While the minimum contacts analysis was not reached in this case, it is important to note the justifications offered by the Justices for empowering a particular forum to exercise jurisdiction over a defendant.[62] The Court could not agree on a majority opinion; however, all members of the Court agreed that due process did not bar the state's assertion of personal jurisdiction over the defendant when he was served while temporarily in the forum state.[63]

Justice White wrote separately to articulate his view that because presence as a basis for personal jurisdiction had been so widely held for an extensive period in history and had not in that time been held unfair, the Court need not change the status quo.[64] This long history, he elaborated, allowed potential defendants to predict when they would be amenable to suit.[65] He implied that a different analysis may be conducted in a case where the defendant is not in the forum intentionally or voluntarily.[66] Justice White's concurrence illustrates the importance of the predictability rationale.[67] Similarly, Justice Stevens thought it was sufficient to rely upon history in his concurring opinion, along with the importance of fairness in exercising personal jurisdiction in a particular forum.[68]

Justice Brennan authored a concurring opinion to express his view that history is not controlling when determining whether a

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61. *See generally* Burnham v. Superior Court, 495 U.S. 604 (1990) (including a plurality and three concurrences).

62. *See id.* at 619. The plurality opinion expressed a return to the interstate federalism rationale, stating that although *International Shoe* established that a "defendant's litigation-related 'minimum contacts' [with a state] may take the place of physical presence as the basis for jurisdiction," nothing in the case law supports the proposition that "a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction." *Id.* at 618–19. The opinion reasoned that due process was satisfied by the defendant's presence in the forum. *Id.* at 619.

63. *Id.* at 628 (White, J., concurring); *id.* at 628–29 (Brennan, J., concurring); *see id.* at 640 (Stevens, J., concurring).

64. *Id.* at 628 (White, J., concurring).

65. *See id.*

66. *See id.*

67. *See id.*

68. *Id.* at 640 (Stevens, J., concurring).

jurisdiction rule satisfies due process.[69] Moreover, he explained that the analysis must be conducted in light of contemporary notions of due process.[70] Presence is generally sufficient to satisfy due process because, by travelling to the forum, the defendant receives benefits from the state and it would be improper to allow him to be immune from the authority of that state as a defendant.[71] Here, the justification articulated was the reciprocal benefits and burdens rationale.[72]

The rationales offered in the concurring opinions in *Burnham* include predictability,[73] fairness,[74] and reciprocal benefits and burdens.[75] Only one of these justifications endures in the new essentially at home standard for personal jurisdiction: predictability.[76]

II. ESSENTIALLY AT HOME

The essentially at home standard was first articulated in *Goodyear Dunlop Tires Operations, S. A. v. Brown* in 2011[77] and was applied in *Daimler AG v. Bauman* in 2014.[78] The Supreme Court articulated that the appropriate test for asserting jurisdiction over a corporation is whether its connections with the forum state are so "continuous and systematic" as to render it "essentially at home" in the forum.[79] Also in 2011, the Supreme Court handed down a fractured opinion in a specific jurisdiction case, *J. McIntyre Machinery, Ltd. v. Nicastro*.[80] The Court's rationales reveal the varying views among the Justices about jurisdiction

69. *Id.* at 629 (Brennan, J., concurring).

70. *Id.* at 630.

71. *See id.* at 637–38.

72. *See* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1013 (2012) (discussing reciprocal benefits and burdens as a component of fairness).

73. *See Burnham*, 495 U.S. at 628 (White, J., concurring).

74. *See id.* at 629 (Brennan, J., concurring); *id.* at 640 (Stevens, J., concurring).

75. *See id.* at 637–38 (Brennan, J., concurring).

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

77. Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.").

78. *See Daimler*, 134 S. Ct. at 751 ("Instructed by *Goodyear*, we conclude Daimler is not 'at home' in California.").

79. *Goodyear*, 564 U.S. at 919.

80. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

overall, and offer insight into how the Justices analyze general jurisdiction.[81] *Goodyear Dunlop* introduced the origin of the essentially at home standard that was developed three years later in *Daimler*. *J. McIntyre* provides the jurisdiction rationales of the Court in the context of specific jurisdiction exercised over a foreign corporation. Today, lower courts are interpreting and applying the essentially at home standard.

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

A unanimous Supreme Court held that the foreign defendants were not amenable to suit in North Carolina for claims unrelated to their activities in the state.[82] The wrongful death action which arose from a bus accident that occurred near Paris, France, alleged that the accident was caused by a defective tire distributed by Goodyear subsidiaries and manufactured in Turkey by another subsidiary.[83] The case was brought in North Carolina, the home state of the deceased, against Goodyear and its foreign subsidiaries.[84] Goodyear's subsidiaries' contacts with the forum consisted of a small percentage of its tires regularly sold in North Carolina.[85]

In holding for the defendants, the Court explained that systematic and continuous activities are essential to exercise general jurisdiction, but are not necessarily sufficient alone.[86] Indeed, the Court clarified that the exercise of general jurisdiction over a corporate defendant is improper when based solely on the defendant's regularly occurring sales in the forum.[87] Rather, the Supreme Court articulated that the appropriate test for asserting jurisdiction over a corporation is whether its connections with the forum state "are so 'continuous and systematic' as to render [it] essentially at home in the forum state."[88]

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81. *See generally id.* (including a plurality, a concurrence, and a dissenting opinion).

82. *Goodyear*, 564 U.S. at 917–18, 920.

83. *Id.* at 918, 920.

84. *Id.* at 918.

85. *Id.* at 921 ("[T]ens of thousands out of tens of millions manufactured [in North Carolina] between 2004 and 2007.").

86. *Id.* at 927.

87. *Id.* at 930–31 n.6.

88. *Id.* at 919.

Moreover, the Court explained that the "paradigm forum[s] for the exercise of general jurisdiction" are where the corporation is incorporated and where it has its principal place of business.[89] While the Court did not hold that the paradigm forums are the only available forums in which to bring suit against a corporate defendant, some commentators anticipate the Court is moving toward holding that corporations are amenable to suit for causes of action arising outside the forum in only two states: the state of incorporation or the state of a corporation's principal place of business, which can be the same state in some instances.[90] The principal place of business is "the place where a corporation's officers direct, control, and coordinate the corporation's activities."[91] The Supreme Court stopped just short of ruling that the paradigm forums are the only available forums; however, it remains to be seen what exceptional systematic and continuous contacts are necessary for the defendant to be ruled essentially at home.

This standard appears to be narrower than the systematic and continuous contacts test articulated in *International Shoe* and applied in *Perkins*. For instance, the Court stated that jurisdiction cannot be based solely on sales in the forum state, as the defendant in *Goodyear* maintained sales in North Carolina.[92] In reversing the judgment of the state court, the *Goodyear* Court determined that the foreign subsidiaries were not amenable to suit in North Carolina because their connections fell short of the continuous and systematic contacts necessary to empower the state to entertain suit against them on claims unrelated to those contacts.[93]

B. J. McIntyre Machinery v. Nicastro

In *J. McIntyre*, the Supreme Court analyzed whether the exercise of jurisdiction was proper over a foreign defendant who sued

89. *Id.* at 924.

90. *See id.*; *see, e.g.*, Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 105–06 (2015).

91. Hertz Corp. v. Friend, 559 U.S. 77, 77, 92–93 (2010) (interpreting the federal diversity jurisdiction statute). Some disagree whether this definition applies in a personal jurisdiction context rather than a citizenship context. *See* Cornett & Hoffheimer, *supra* note 90, at 148–49.

92. *Goodyear*, 564 U.S. at 929.

93. *Id.* at 920.

in the forum where the injury occurred.[94] Thus, Justice Ginsburg conducted an analysis for specific jurisdiction and offered rationales for exercising jurisdiction that could help justify the outcome in *Goodyear*, even though the latter dealt with general jurisdiction.[95] Overall, the holding was six to three in favor of the defendant, striking down the exercise of personal jurisdiction.[96]

Justice Kennedy's plurality opinion was joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas.[97] The opinion explained that due process requires that a defendant submit to the state's authority in order to exercise jurisdiction over the defendant corporation.[98] Accordingly, it was "not enough that the defendant might have predicted that its goods [would] reach the forum State."[99] Rather, the defendant must target the forum to make it amenable to suit there.[100] Targeting can be inferred by a submission to the benefits of a state.[101] That is, the "defendant must 'purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"[102] The opinion downplayed the consideration of fairness and focused instead on the importance of the defendant purposefully availing itself of the forum, which provides greater predictability for the defendant.[103] The reciprocal benefits and burdens rationale also remained important in the Court's jurisdiction analysis.[104]

Justice Breyer's concurrence was joined by Justice Alito.[105] They wrote separately to articulate a narrower holding.[106] They agreed that the exercise of jurisdiction was improper, but their

94. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011).

95. *See id.* at 899 (Ginsburg, J., dissenting). Note that *Goodyear* was a unanimous holding whereas in *J. McIntyre*, the Justices could not achieve a majority. *Goodyear*, 564 U.S. at 917; *J. McIntyre*, 564 U.S. at 877.

96. *J. McIntyre*, 564 U.S. at 877, 887, 893.

97. *Id.* at 877.

98. *Id.* at 879–80.

99. *Id.* at 882.

100. *Id.*

101. *Id.*

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

103. *See id.* at 882–83.

104. *See id.* at 882.

105. *Id.* at 887 (Breyer, J., concurring).

106. *Id.*

reasoning was based on due process precedent alone.[107] They took issue with the plurality's "broad pronouncements that refashion basic jurisdictional rules."[108] In particular, the facts of the case did not present issues arising from recent changes in commerce and communication, making it "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."[109]

Justice Ginsburg wrote the dissent and was joined by Justice Sotomayor and Justice Kagan.[110] They expressed concern that a foreign manufacturer can indiscriminately sell to the United States with no particular state in mind, but rather with an objective "to sell as much as it can, wherever it can" and not be amenable to suit in a state where its products end up.[111] They explain that to be fair to people who are injured by those products sold, the determination of jurisdiction requires consideration of the burden to the defendant, the convenience to the plaintiff, and the forum state's interest.[112] The dissent articulated that a balancing test that considers fairness to each party is necessary to determine whether the exercise of jurisdiction is proper.[113]

C. Daimler AG v. Bauman

Daimler AG v. Bauman is the first Supreme Court case that tested the essentially at home standard for general jurisdiction articulated in *Goodyear*.[114] The Court unanimously held that the forum state could not exercise jurisdiction over an Argentinean corporation for claims arising outside of the forum.[115] Twenty-two residents of Argentina filed suit in a California court claiming causes of action pursuant to the Alien Tort Statute, the Torture Victim Protection Act of 1991, California law, and Argentina law.[116] The plaintiffs alleged that Mercedes-Benz Argentina, a

107. *Id.*
108. *Id.* at 890.
109. *Id.* at 887.
110. *Id.* at 893 (Ginsburg, J., dissenting).
111. *Id.* at 893.
112. *See id.* at 903–04.
113. *Id.* at 909–10.
114. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014).
115. *Id.* at 750–51.
116. *Id.*

subsidiary of Daimler, collaborated with state security forces during Argentina's "Dirty War" to "kidnap, detain, torture, and kill" employees of Mercedes-Benz Argentina, including the plaintiffs or persons closely related to them.[117] Plaintiffs asserted that personal jurisdiction over Daimler was predicated on the California contacts of Daimler's subsidiary, Mercedes-Benz USA.[118] Mercedes-Benz USA was incorporated in Delaware and its principal place of business was in New Jersey.[119]

The defendant moved to dismiss the case for lack of jurisdiction.[120] The plaintiffs argued that jurisdiction over Daimler was proper based on Mercedes-Benz USA's contacts with California, including a regional office and other facilities located in the state and its position as the largest retailer of luxury vehicles in the California market.[121] The district court granted Daimler's motion to dismiss, and the plaintiffs appealed.[122] In a second hearing of the case, the Ninth Circuit reversed, holding that Mercedes-Benz USA had sufficient contacts with California to satisfy the requirements for general jurisdiction, and that contacts of Mercedes-Benz USA, as Daimler's agent, could be imputed to Daimler for jurisdictional purposes.[123]

The Supreme Court granted certiorari and reversed the Ninth Circuit Court of Appeals, holding that Daimler was not amenable to suit in California for claims arising in Argentina based on acts of its Argentinian subsidiary because its contacts in the forum were insufficient.[124] The Court explained that California was neither the state of incorporation nor the principal place of business of Daimler's U.S. subsidiary, Mercedes-Benz USA.[125] Moreover, the corporation's affiliations with the state were insufficient to render it essentially at home in California.[126] The Court went on to say that "the place of incorporation and principal place of busi-

117. *Id.* at 751.
118. *Id.* at 751–52.
119. *Id.* at 752.
120. *Id.*
121. *Id.*
122. *See id.*
123. *See id.* at 753; Bauman v. Daimler Chrysler Corp., 644 F.3d 909, 912 (9th Cir. 2011).
124. *See Daimler*, 134 S. Ct. at 753, 762.
125. *Id.* at 761.
126. *Id.* at 762.

ness are 'paradig[m] . . . bases for general jurisdiction'" as "[t]hose affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."[127]

The Court also noted that a corporation can indeed be considered essentially at home in a forum that is not its state of incorporation nor its principal place of business, thus resolving the question left open from *Goodyear*; however, that issue was not reached under the facts of *Daimler*.[128] Accordingly, the California courts did not have the power to exercise jurisdiction over the defendant corporation.[129] However, the Court did not articulate the precise circumstances under which an exceptional case would arise.

Justice Sotomayor concurred in the outcome but disagreed with how the majority arrived at the determination that California lacked jurisdiction over Daimler.[130] She wrote separately to express her concern that the majority opinion reflected an analysis of general jurisdiction that placed too much weight on the proportionality of contacts with a particular forum as compared to other states.[131] She stated that the proportionality rationale does not contemplate "that Daimler's contacts with California are too few, but that its contacts with other forums are too many."[132] Justice Sotomayor also noted that the majority seemed to consider Daimler "too big for general jurisdiction" because its contacts with California were extensive, but its contacts with other forums were similarly too great, allowing it to be excluded from jurisdiction in California.[133]

Additionally, Justice Sotomayor suggested that the general jurisdiction analysis ought to consider the reasonableness factors

127. *Id.* at 760 (quoting Lea Brilmayer et al., *A General* Look *at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988)).

128. *Id.* at 761 n.19.

129. *Id.* at 762.

130. *Id.* at 763 (Sotomayor, J., concurring).

131. *See id.* at 764 ("[T]he 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 contacts must be viewed in the context of its extensive 'nationwide and worldwide' operations.").

132. *Id.*

133. *Id.*

articulated in precedential specific jurisdiction cases.[134] This analysis would call for balancing the burden to the defendant, the interest of the plaintiff, judicial systematic efficiency, the interest of the state, and the interests of sister states.[135] Ultimately, Justice Sotomayor agreed that the California court could not exercise personal jurisdiction over Daimler because the court of another nation was a more appropriate forum to hear the case.[136]

D. *Reaction of the Lower Courts*

By applying the principles articulated in *Goodyear* and *Daimler*, courts are more often than not striking down the exercise of general jurisdiction over corporations.[137] However, there is currently a split among the courts regarding whether a corporation consents to personal jurisdiction in a forum on all matters by registering to do business and appointing an agent for service of process in that forum.[138] So far, courts have not been presented with an exceptional case where the defendant's contacts with the forum were so continuous and systematic that it could be considered at home there, despite its principal place of business and state of incorporation being in another forum.

In *Genuine Parts Co. v. Cepec*, the Supreme Court of Delaware held that an out-of-state defendant corporation was not amenable to suit in the forum for claims of wrongful exposure to asbestos.[139] The court reasoned that the cause of action arose outside the forum, and the defendant could not be considered at home in Dela-

134. *See id.* at 765. "The Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context." *Id.* at 764 n.1.

135. *Id.* at 764–65; *see also id.* at 762 n.20 (rejecting the balancing approach that the concurrence suggests and explaining that the reasonableness factors articulated by the court in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987), are only applicable in the specific jurisdiction analysis).

136. *Id.* at 765.

137. *See, e.g.*, Farber v. Tennant Truck Lines, Inc., 84 F. Supp. 3d 421, 432 (E.D. Pa. 2015) (holding the exercise of general jurisdiction was improper because "[i]f Tennant's activities 'sufficed to allow adjudication of this [Illinois]-rooted case' in Pennsylvania, 'the same global reach would presumably be available in every other State' in which Tennant's revenue, number of pick-ups and drop-offs, and amount of highway travel are sizable") (citation omitted).

138. Kevin D. Benish, Note, Pennoyer's *Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1612–13 (2015).

139. Genuine Parts Co. v. Cepec, 137 A.3d 123, 128 (Del. 2016).

ware because "[i]t has never had a corporate office in Delaware, does not conduct its board or shareholder meetings in this state, and does not have any officers here."[140]

However, the corporation had employees in Delaware, sold products from its stores in Delaware, and generated revenue in Delaware.[141] Applying the proportionality scheme presented in *Daimler*, the court decided this activity was insufficient to exercise jurisdiction because the proportion of the corporation's activity that occurred in Delaware was less than one percent of its overall business.[142]

Finally, even though the corporation was registered to do business in Delaware and had a designated agent for service of process, the court explained that "Delaware's registration statutes must be read as a requirement that a[n out-of-state] corporation must appoint a registered agent to accept service of process, but not as a broad consent to personal jurisdiction in any cause of action, however unrelated to the [out-of-state] corporation's activities in Delaware."[143] The opinion discussed the conflict among the courts regarding registration in the forum state, but maintained that "the majority of federal courts that have considered the issue of whether consent by registration remains a constitutional basis for general jurisdiction after *Daimler* have taken the position that we adopt."[144]

Likewise, in *Brown v. CBS Corp.*, the United States District Court for the District of Connecticut granted the defendant corporation's motion to dismiss for lack of personal jurisdiction over claims arising out of injuries from asbestos exposure.[145] The court explained that, pursuant to Connecticut's registration requirements, the corporation was deemed to have consented to personal jurisdiction there, so long as it did not offend the Due Process

140. *Id.*

141. *See id.*

142. *See id.*

143. *Id.* at 127–29. *But see* Novartis Pharm. Corp. v. Mylan Inc., No. 14-777-RGA, 2015 U.S. Dist. LEXIS 31812, at *6–8 (D. Del. Mar. 16, 2015) (holding consent by registration in compliance with Delaware law was sufficient to exercise general jurisdiction "follow[ing] *Acorda* and *Forest Labs.*"); Forest Labs., Inc. v. Amneal Pharm. LLC, No. 14-508-LPS, 2015 U.S. Dist. LEXIS 23215, at *8–9 (D. Del. Feb. 26, 2015) (holding consent to general jurisdiction through required registration remains a valid exercise of jurisdiction).

144. *Genuine Parts Co.*, 137 A.3d at 145.

145. Brown v. CBS Corp., 19 F. Supp. 3d 390, 391 (D. Conn. 2014).

Clause.[146] The court then applied an analysis for general jurisdiction and found that the exercise of jurisdiction would violate due process because the defendant was not essentially at home in the forum.[147]

The defendant had employees at four different locations in Connecticut, paid state corporate income tax on revenue earned, and maintained workers' compensation insurance policies for its employees in the forum.[148] Finally, the corporation was registered to do business in Connecticut and had designated an agent for service of process.[149] The court stated that consenting to general jurisdiction by registration pursuant to a long-arm statute did not end the inquiry.[150] Courts must still determine whether the exercise of jurisdiction comports with due process, and registration to do business in the forum is not dispositive.[151]

The Court then engaged in the due process, essentially at home analysis. Once again, because the activity was less than 1 percent of the corporation's total revenue, the court decided this was a "relatively trivial amount."[152] The court compared the amount of contacts of the defendant corporation with those of the defendant in *Daimler* and determined that the contacts were even fewer in this case; thus the corporation could not be found to be at home in the forum.[153]

Some courts disagree about the impact of *Goodyear* and *Daimler* on the personal jurisdiction analysis when a traditional basis for jurisdiction is established. The traditional basis in question is consent. In the United States District Court for the District of Delaware, there appears to be a split even among the judges on the issue of consent by registration following *Daimler*. In *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*, the court held that administrative statutes "merely outline procedures for doing business in the state; compliance does not amount to consent to

146. *Id.* at 396.
147. *See id.* at 397.
148. *Id.* at 391–92.
149. *Id.* at 394.
150. *Id.* at 395 (citation omitted).
151. *See id.*
152. *Id.* at 397–98.
153. *Id.* at 398–99.

jurisdiction or waiver of due process."[154] The court denied the defendant corporation's motion to dismiss for lack of personal jurisdiction, finding specific jurisdiction on other grounds.[155] However, despite its having registered to do business in Delaware, the court held the defendant had not consented to jurisdiction because it could not be deemed essentially at home in the forum, and it was incorporated and had its principal place of business in West Virginia.[156]

Alternatively, in *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, the same court held that "due process may also be satisfied by consent of the party asserting a lack of personal jurisdiction,"[157] rather than by a finding of sufficient minimum contracts. The opinion recognized that another member of the same court had recently reached a contrary conclusion, but reasoned that the holding in *Daimler* did not eliminate consent as a basis for jurisdiction.[158]

> It seems an odd result that while there is not general jurisdiction over a corporation in every state in which the corporation does business, there may be general jurisdiction over a corporation in every state in which that corporation appoints an agent to accept service of process as part of meeting the requirements to register to do business in that state. But if consent remains a valid basis on which personal jurisdiction may arise—and the undersigned Judge concludes that *Daimler* did not change the law on this point—then this result, though odd, is entirely permissible.[159]

III. ANALYSIS

The separation of the two notions—fairness and predictability—leads to some circular reasoning because the notions often overlap. Thus, it is difficult to comprehend how the Supreme Court justifies placing predictability at a premium above fairness when, in reality, in order for the exercise of jurisdiction to be fair, it must also be predictable. A case where a plaintiff cannot pre-

154. AstraZeneca AB v. Mylan Pharm., Inc., 72 F. Supp. 3d 549, 557 (D. Del. 2014).
155. *Id.* at 560.
156. *See id.* at 552, 554–55.
157. Acorda Therapeutics, Inc. v. Mylan Pharm., Inc., 78 F. Supp. 3d 572, 580 (D. Del. 2015).
158. *Id.* at 590–91.
159. *Id.* at 591.

dict where a corporate defendant could be hailed to court lacks fairness. Moreover, if the exercise of jurisdiction were unpredictable to either the plaintiff or the defendant, does that not render the situation unfair?

In determining whether the exercise of jurisdiction over a defendant is proper, notions of fairness to all parties in a dispute most likely will yield to predictability for the defendant because the new standard is more restrictive. The essentially at home standard prioritizes predictability above other policy justifications offered in the past. However, consider whether it is predictable to plaintiffs that a corporation could not be brought to court in a particular state when the cause of action did not arise there, but they perceive the presence of the corporation through marketing and sales in the state. Such a circumstance may indeed surprise a plaintiff.

A. *Fairness Rationale*

The discussion of the fairness rationale must begin with the question: fair to whom? *International Shoe* recognized that to comport with due process, the exercise of jurisdiction should be fair.[160] The Court articulated that the minimum contacts test could not be a "quantitative" test that measured a single factor to determine whether jurisdiction was proper.[161] Rather, the Court explained that in each instance, a court must weigh a variety of factors, and consider the totality of the circumstances in deciding whether the exercise of jurisdiction is appropriate in light of a particular case with a unique set of facts.[162] *International Shoe* placed fairness at the forefront of the jurisdiction analysis, considering the interests of plaintiffs, defendants, and the states.[163]

The minimum contacts analysis was applied in many cases in the context of specific jurisdiction, but only two Supreme Court decisions have been handed down since *International Shoe* in the

160. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

161. *See id.* at 319 ("[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

162. *See id.* at 318–19.

163. *See id.* at 316, 319.

realm of general jurisdiction before *Goodyear* and *Daimler*.[164] Prior to these most recent cases, lower courts found systematic and continuous commercial activity in a forum was sufficient to establish general jurisdiction.[165] However, under the essentially at home standard, such commercial activity is found to be insufficient.[166]

The Court appears to consider the fairness to the defendant being called to suit, not the extent of fairness to the plaintiff or the state. For instance, the balance of conveniences test endorsed in Justice Sotomayor's concurrence in *Daimler* contemplates whether jurisdiction would be fair to both parties involved in the action, as well as in consideration of the state's interests.[167] Justice Ginsberg, writing for the majority, explicitly rejected the balance of conveniences test in the context of general jurisdiction, thus rebuffing consideration of fairness to parties or interests other than those belonging to the defendant.[168]

If the proper analysis for exercising general jurisdiction considers fairness to the state, such an analysis would inherently include the reciprocal benefits and burdens rationale and the interstate federalism rationale. Both rationales look to the interests of the state to determine whether the exercise of jurisdiction over a particular defendant is proper. These rationales consider fairness to the state as part of the totality of the circumstances to determine whether it is fair to call a particular defendant to the forum's courts. The Supreme Court has not stressed the importance of these rationales in its recent decisions on jurisdiction.

Under the reciprocal benefits and burdens rationale, when a defendant receives benefits from a forum state, he should be subject to the burden of appearing as a defendant in the state's courts.[169] That is, "by invoking the benefits and protections of the forum's laws, the nonresident defendant is seen as 'consenting' to

164. *See* HAY ET AL., *supra* note 47, at 409.

165. *See, e.g.*, Gater.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1074 (9th Cir. 2003) (exercising general jurisdiction over defendant based on its solicitation of sales to forum residents).

166. *See supra* Part II.D.

167. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 764–65 (2014) (Sotomayor, J., concurring).

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

169. *See* Bearry v. Beech Aircraft Corp., 818 F.2d 370, 375 (5th Cir. 1987).

being sued there."[170] A corporation that "exercises the privilege of conducting activities within a state, [and therefore] enjoys the benefits and protection of the laws of that state" may then have obligations arising from the exercise of that privilege.[171]

The interstate federalism rationale addresses the concern that when a state's power reaches beyond its boundaries, it impedes the power of the sister states.[172] This concern appeared in the early case law dealing with the ability of corporations to engage in business in one state when incorporated in a different state.[173] The rationale was considered most significantly in *Pennoyer*, where the Court held that the state could not exercise jurisdiction over an individual while he was in another state.[174] However, as commerce began to cross state borders with more regularity, the view of the power of a corporation expanded as well.[175] The Court recognized in its decision in *International Shoe* that it is possible for an entity to have presence in more states than an individual.[176] Additionally, the commercial realities of modern commerce may be eroding the significance courts give this consideration in determining jurisdiction. In the age of the internet, where interstate commerce is the norm rather than the exception, courts appear to be less concerned with overreaching its powers into other states when it considers its authority over a corporation that is carrying on business in a significant number of states.

However, should reciprocal benefits and burdens and interstate federalism concerns be considered in the case of a corporation that is based in another country? Some argue that the recent decisions restricting the exercise of jurisdiction over foreign corporations in U.S. courts are a "source of protection for non-United States defendants, albeit one which is likely unavailable to United States-based defendants" when called to suit in other nations.[177]

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170. *Id.*

171. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

172. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

173. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

174. *Pennoyer*, 95 U.S. at 722, 736.

175. *See Int'l Shoe*, 326 U.S. at 316–17; Benish, *supra* note 138, at 1616–17.

176. *Int'l Shoe*, 326 U.S at 316–17.

177. James L. Stengel & Kristina Pieper Trautmann, *Determining United States Jurisdiction Over Transnational Litigation*, 35 REV. OF LITIG. 1, 39 (2016).

B. *Predictability Rationale*

Predictability is emerging as the driving force in determinations of general jurisdiction. This rationale has been offered repeatedly in jurisdictional jurisprudence. "Due Process requires that the defendant be given adequate notice of the suit" prior to the exercise of general jurisdiction.[178] "By ensuring the 'orderly administration of the laws,'" the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[179]

If a corporate defendant carries out sufficient activity in a forum, it can expect to be called to suit there for claims related to its activities. Moreover, if those activities are extensive, the defendant can predict that it may be called to suit there on other matters arising outside the forum. In the past, a corporation's activities were measured by business conducted in the forum, typically including a combination of purchases, sales, contracts, and similar business contacts. The question that arises after *Goodyear* and *Daimler* is whether significant revenues alone will ever be sufficient to exercise general jurisdiction. If not, then there is the potential that a foreign corporation that has no physical presence anywhere in the United States, but generates large revenue from sales to U.S. customers, is not amenable to suit in any state on claims unrelated to those sales.

This exact scenario may now, following *Daimler*, be predictable to a defendant. Arguably, it will not be predictable to the average plaintiff who sees the presence of a corporation through marketing and sales without an awareness of where the corporation is at home. Moreover, the Court considers predictability, just like fairness, from the perspective of defendants and does not consider what may be predictable from the vantage point of plaintiffs.

178. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

179. *Id.* at 297 (quoting *Int'l Shoe*, 326 U.S. at 319).

1. Paradigm Forums: Comparing an Individual's Domicile with a Corporation's Principal Place of Business and State of Incorporation

The holdings in *Goodyear* and *Daimler* limit the exercise of general jurisdiction to a corporation's principal place of business or state of incorporation, unless the facts present an exceptional case.[180] This restriction is similar to that in place for the exercise of jurisdiction over individuals. An individual indicates general submission to a state's powers by establishing domicile,[181] and accordingly, is amenable to suit for all matters in this forum.[182] This part will explore the rationale behind this jurisdictional test for individuals and determine whether the justifications could apply to how the Court is setting up a corporation's "homes" to be similarly limited. It will also consider whether such a justification makes sense in light of the ability of a corporation, as an artificial entity, to be present in a different way than natural persons.

In the case of an individual, domicile is established when a person enters a state with the intent to make that state her home.[183] Intent can be inferred by an individual's actions and assertions.[184] For example, obtaining a driver's license, purchasing property, paying taxes, registering to vote, maintaining employment, or receiving state benefits could indicate an intent to remain in a particular state.[185] Domicile is the last location where these two factors—presence and intent to remain—coincided.[186] Moreover, once domicile is established, it can only be changed by acquiring a new domicile.[187]

Alternatively, in the case of a corporation, the principal place of business is determined by "the place where a corporation's offic-

180. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 761 n.19 (2014); Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 927–28 (2011).

181. *See* Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974) (analyzing the meaning of an individual's domicile in the context of subject matter jurisdiction based on diversity of citizenship).

182. *Goodyear*, 564 U.S. at 924.

183. *See Mas*, 489 F.2d at 1399.

184. *See* Mitchell v. United States, 88 U.S. 350, 353 (1874).

185. *See id.*

186. *Mas*, 489 F.2d at 1399.

187. *Id.* at 1399–1400.

ers direct, control, and coordinate the corporation's activities."[188] The nerve center test determines a corporation's principal place of business based on its headquarters, assuming the headquarters is the center of control, and not simply an office where the corporation holds its board meetings to which directors have to travel to attend.[189] The Supreme Court offered the predictability rationale to support the establishment of this test for purposes of determining a corporation's version of domicile in the context of subject matter jurisdiction based on diversity of citizenship.[190] The Court stated that "[s]imple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions."[191]

Similarly, the selection of a state of incorporation is a conscious and calculated decision for most businesses.[192] Indeed, a corporation gives a great deal of consideration to the choice of law it selects to govern its internal affairs in the process of business planning.[193] Some businesses, typically smaller corporations, select the state of incorporation based on where they intend to carry out most of their business for convenience and to keep costs low.[194] Large corporations, on the other hand, will opt to incorporate in the state with the most favorable laws.[195]

In *International Shoe*, the Supreme Court recognized that corporations have an ability to be present that is inherently different from what is possible for individuals.[196] Hence, the Court decided that a measure of contacts was necessary to determine whether a corporation is amenable to suit in a particular forum.[197]

188. Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010) (articulating the nerve center test to determine the principal place of business in the context of subject matter jurisdiction based on diversity of citizenship). There is some disagreement about whether the Court intended the nerve center test to apply in any context other than in the interpretation of the diversity statute. *See* Cornett & Hoffheimer, *supra* note 90, at 148–49.

189. *Hertz*, 559 U.S. at 93.

190. *Id.* at 94.

191. *Id.*

192. *See* 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 369–70 (1917).

193. *Id.*

194. FRANKLIN A. GEVURTZ, CORPORATION LAW 38–39 (2d ed. 2010).

195. *Id.* at 39.

196. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

197. *Id.* at 317.

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.[198]

While the minimum contacts test was the Court's effort to break away from the restraints of a *Pennoyer* presence analysis in cases determining jurisdiction over a corporation, the establishment of the essentially at home standard signals a return to the same restraints, only now prioritizing predictability above other policy justifications offered in the past.

IV. PREDICTION

The Supreme Court seems to say that predictability overrides all other justifications, but there are circumstances under which the Court may—and should—consider the facts of a case exceptional. The outcomes of both *Goodyear* and *Daimler* did not shock many people.[199] What shocked the system was dicta from *Goodyear* introducing the new essentially at home standard and the paradigm forums.[200] Also, commentators are struggling to grasp the proportionality scheme and the outright rejection of the balance of conveniences arising from *Daimler*.[201] The lower courts are testing the concept of proportionality of business activity to determine a corporation's home and are considering predictability only from the perspective of the defendant, rather than a balancing test.[202]

After *Goodyear* and *Daimler*, it remains unclear in what circumstances a court could rule that the commercial activity in a forum is sufficiently systematic and continuous to consider the corporation essentially at home. Thus, the one caveat is that all the benefits of predictability are diminished because the Court

198. *Id.* at 316 (citing Klein v. Bd. of Tax Supervisors, 282 U.S. 19, 24 (1930)).

199. *See* Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT'L & COMP. L. 1, 3 (2014).

200. *See id.*

201. *See* Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1162–64 (2015); Kaitlin Hanigan, *A Blunder of Supreme Propositions: General Jurisdiction After* Daimler AG v. Bauman, 48 LOY. L. REV. 291, 301 (2014).

202. *See supra* Part II.D.

has yet to determine where else in addition to the paradigm forums a plaintiff can initiate a case against a corporation. It remains to be seen how the policy justifications offered in the past should apply to foreign corporations when the cause of action arises outside the forum.

The predictability rationale's ascension to the forefront of the jurisdiction analysis will have implications in future litigation. Moreover, in the case of foreign corporations that do not have a principal place of business, nor a state of incorporation in the United States, a different standard may be required in order to be predictable as well as fair. The Supreme Court Justices may be waiting for exceptional cases to allow them to determine the type of activities required to find that a corporation carries on activities in a forum so systematic and continuous as to make it essentially at home there.

A. *Predictability Governs*

The Court seems to say that predictability overrides all other justifications.[203] On the one hand, this can be viewed as reasonable. Indeed, if all parties know exactly where the case needs to be brought, then the plaintiff does not expend time and resources bringing suit in a forum where the case could not stand. Furthermore, plaintiffs can consider the need to travel to bring suit as part of the cost of litigation and value a case accordingly. There is a possibility that this additional consideration could discourage otherwise meritorious claims from being litigated due to the increased cost. However, a limited selection of forums could also minimize plaintiff forum shopping, which may increase overall efficiency.

Arguably, the Court has left open a narrow window for an exercise of jurisdiction outside of the paradigm forums.[204] The question remains: if neither purchases nor sales are the appropriate measure to determine whether a corporation is essentially at home in a forum, then what is the correct measure? A corporation interacts with states other than its state of incorporation primarily by

203. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).
204. *Id.* at 761 n.19.

doing business there.[205] After determining the kind of activity required, the extent to which those activities must be carried out in order to render a corporate defendant essentially at home remains undetermined.

The Supreme Court's decisions prioritizing predictability over justifications offered in the past are reasonable because corporations operate differently in modern commerce. Particularly in the case of large corporations that function through various levels of parent companies and subsidiaries, "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity" have increased the reach of a modern corporation.[206] The Court today probably recognizes that general jurisdiction cannot be so broad and unpredictable as to offend relations with other nations by exercising jurisdiction over large, multinational corporations distantly removed from the United States on matters unrelated to its activities in that state. However, the Court also articulated that it is not prepared to rule that there are only one or two forums in which a corporation may be subject to jurisdiction.[207] This shows the Court acknowledged an opportunity to clarify the evolving law of personal jurisdiction, but it did not go far enough to establish a bright-line rule.

The Court seems to realize that general jurisdiction cases presented to it did not demonstrate the necessary facts to establish such a rule. However, in the interests of predictability, the Court is likely going to establish such a rule when the proper facts come before it. Neither the Court nor anyone else can foresee how technology and globalization will continue to alter the landscape of business internationally. Indeed, the Court can only decide the cases that come before it. Thus, the opportunity for adaptability remains available until a case presents itself involving a corporation with sufficient contacts in the forum state that it can be considered at home without the forum being its principal place of business or state of incorporation. Then, lower federal and state courts can use the precedent for comparison. An appropriate

205. *See* FLETCHER, *supra* note 192, at 820, 820 n.17.

206. *See* Burnham v. Superior Court, 495 U.S. 604, 617 (1990); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 268–69 (6th ed. 2010) (explaining that the separation between a parent corporation and its subsidiary is real, but the subsidiary may act as an agent for the parent in conducting the parent's business in a forum).

207. *See Daimler*, 134 S. Ct. at 761 n.19.

precedential case might be one where a corporation does not have a principal place of business nor a state of incorporation in the United States and the lack of alternative forums may be considered in addition to a measure of contacts with a forum. Until certain facts present themselves to the Court, the essentially at home standard will remain narrow and somewhat unresolved.

B. *Foreign Corporations*

In applying the restrictive essentially at home test for general jurisdiction, the standard may need to be different for foreign corporations that do not have a principal place of business nor a state of incorporation in the United States. The Supreme Court may consider a variation of the standard in a case where there is no other forum available to hear the case, making the exercise of jurisdiction necessary.

For example, in *Mullane v. Central Hanover Bank & Trust Co.*, the Court decided a case where it could not classify the exercise of jurisdiction as either *in rem* or *in personam*.[208] The Court determined that jurisdiction was nonetheless proper, stating that

> the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident.[209]

Thus, the importance of having a forum available to resolve the matter outweighed the concerns surrounding the proper exercise of jurisdiction.

Whether the doctrine of necessity exists remains a subject of debate.[210] In light of the restrictive essentially at home standard, there is a strong argument for the development of such a doctrine. However, while the Court has discussed the possibility of a doctrine of necessity,[211] it has yet to embrace it based on the facts presented in each case where it has been mentioned. For in-

208. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 312–13, 320 (1950) (determining that New York state courts had personal jurisdiction over trust beneficiaries).

209. *Id.* at 313.

210. HAY ET AL., *supra* note 47, at 402.

211. Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 419 n.13 (1984).

stance, in *Shaffer v. Heitner*, the Court stated that "[t]his case does not raise, and we therefore do not consider, the question [of jurisdiction] . . . when no other forum is available to the plaintiff."[212]

Similarly, in *Helicopteros*, the Court concluded that the plaintiffs failed to carry their burden to merit a ruling based on jurisdiction by necessity.[213] The Court explained that the record did not support the plaintiff's assertion that there was no alternative forum, thus the Court refused to adopt such a "potentially far-reaching modification of existing law."[214] Commentators have considered whether the *Perkins* decision, where the Court held that jurisdiction was proper over a foreign corporation, is an example of jurisdiction by necessity, although this was not articulated in the opinion.[215] Likewise, in *Burger King Corp. v. Rudzewicz*, the Court stated that "'the plaintiff's interest in obtaining convenient and effective relief," could be considered in appropriate cases "to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts."[216] This indicates that a lack of alternative avenues for a plaintiff to obtain relief may be considered in determining whether the exercise of jurisdiction over a defendant is proper.

The discussions in past decisions on the doctrine of jurisdiction by necessity have deliberately left open the possibility to apply such a notion in future cases. It does appear, however, that the circumstance would be narrow. For instance, the Court in *Helicopteros* did not state with certainty that the case could indeed be brought by plaintiffs in Columbia or Peru; rather, it said that the plaintiffs had failed to prove that the case could not be brought in either nation.[217] This phrasing indicates that the Court will presume the case could be heard in another court unless the plaintiff proves other options are not available. Moreover, a finding of jurisdiction by necessity may be impacted if the only other forums available were governed by vastly different law in other nations,

212. Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977).

213. *Helicopteros*, 466 U.S. at 419 n.13.

214. *Id.*

215. HAY ET AL., *supra* note 47, at 410.

216. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

217. *Helicopteros*, 466 U.S. at 419 n.13.

making it certain that the plaintiffs could not assert—let alone prevail on—their claim.

C. *Exceptional Cases*

In *Daimler*, the Supreme Court stated that there remains a possibility that "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," but that would be an "exceptional case."[218] The Court did not elaborate as to what would be viewed as exceptional because the facts of the case at hand did not require further analysis.[219] Lower courts are left to speculate whether exceptional facts are present in any given case where the defendant is called to court for a cause of action arising elsewhere and the forum is neither its principal place of business nor its state of incorporation. Indeed, it remains unresolved when a corporate defendant can be essentially at home outside of the paradigm forums. What set of facts is the Supreme Court waiting for to clarify this standard?

One possibility is that a case may be presented where the operations of a corporation evolved and its business became concentrated in a state where it was not incorporated, nor where it established its principal place of business.[220] The Court could decide to disregard the nerve center test for the principal place of business test and simply call this new state the corporation's principal place of business based on the level of activity relative to other states.[221] Using an alternative measure to determine principal place of business would allow the Court to maintain jurisdiction in a paradigm forum while still taking into account actual activities conducted in the forum. This scenario would still limit the forums where a corporate defendant is at home.

Jurisdiction may also be proper in a case where a foreign corporation engages in most of its activity in a single state of the

218. Daimler AG v. Bauman, 134 S. Ct. 746, 759 n.19 (2014).
219. *Id.*
220. Cornett & Hoffheimer, *supra* note 90, at 151–52.
221. *Id.* at 152, 152 n.242.

United States.[222] This would limit the analysis to comparing contacts in the forum state with other states, rather than the proportionality of business carried on by the corporation overall. This scenario could arise in a case where a foreign corporation maintains an outsized presence in a particular state by establishing a factory or distribution center in the forum.[223]

Alternatively, the Court may determine general jurisdiction is proper in a case where a foreign defendant neither maintains a principal place of business nor a state of incorporation in the United States, but conducts most of its business activity overall in the United States.[224] This approach would focus on the proportion of the corporation's activity in the United States compared to the rest of the world, rather than focusing on its activity in proportion to the other states.[225]

CONCLUSION

Predictability reigns as the jurisdiction rationale at the forefront of the recent decisions of the Supreme Court, surpassing considerations of fairness to plaintiffs and the interests of the states. The restrictive essentially at home standard for determining whether a court has the authority to exercise jurisdiction over a corporation in a claim that arose outside the forum parallel restrictions placed in the case of individuals establishing domicile. A corporation's equivalent for domicile are its principal place of business, its state of incorporation, and an unknown forum where the level of contacts—and surrounding facts—determines that the case is exceptional.

The restrictive essentially at home standard may warrant the emergence of jurisdiction by necessity in a case where there are no alternative forums available to a plaintiff because the corporation has its principal place of business and its state of incorpora-

222. *Id.* at 152.

223. *Id.* at 153. *But see generally* Gliklad v. Bank Hapoalim B.M., No. 155195/2014 (N.Y. Sup. Ct. 2014) (denying general jurisdiction over a foreign bank with its place of incorporation and principal place of business in Israel, even though the defendant bank had a New York branch that was "the center of its operations in the United States, where it actively conducts business").

224. *See* Cornett & Hoffheimer, *supra* note 90, at 153.

225. *See id.*

tion outside of the United States. In all likelihood, disagreements will emerge among the lower courts as they continue to speculate whether exceptional facts are present in any given case presented outside the paradigm forums. Thus, a future case is likely to be taken up by the Supreme Court in order to clarify what facts present an exceptional case where the exercise of general jurisdiction comports with due process outside the paradigm forums. Until such a decision is handed down, the essentially at home standard will remain unresolved.

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