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The General Jurisdiction Two-Step

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ABSTRACT

The Supreme Court's watershed case on general personal jurisdiction, Daimler AG v. Bauman*, celebrated its tenth birthday this year, yet it continues to be misunderstood.* Daimler *was the second of two decisions on general jurisdiction handed down by the Court following several decades of near-total silence on this doctrine*. Daimler*, together with its immediate predecessor* Goodyear Dunlop Tires Operations, S.A. v. Brown*, held that corporate defendants could be subject to general jurisdiction only in states where they are deemed "at home" or "essentially at home" and gave two paradigm examples of places that would constitute a corporation's "home": place of incorporation and principal place of business. Before these cases, general jurisdiction was commonly understood to have a much broader reach. Courts frequently exercised general jurisdiction over defendant corporations who were "doing business" in the forum state, such that companies could be subject to general jurisdiction in all fifty states merely for "doing business" nationwide. This application stretched general jurisdiction beyond the "continuous and systematic contacts" approach that was originally envisioned by the seminal* International Shoe *decision.*

Accordingly, the Goodyear/Daimler *duo was right to strike down the "doing business" test because it permitted an excessively broad application of general jurisdiction. But the pendulum has swung so far in the other direction that courts are exercising a version of the "at home" test that includes only its two paradigmatic examples. Neither*

approach strikes the right balance. In lieu of these extremes, this Article proposes a Two-Step "home" and "fairness" test for courts to use in determining a corporate defendant's "home" for purposes of exercising general jurisdiction. This test comports with the Supreme Court's recent general jurisdiction holdings, so lower courts and practitioners could begin implementing it immediately. And just maybe, this softened version of the "at home" test could help Daimler *celebrate future birthdays with more clarity and less combat.*

INTRODUCTION

Tesla, Inc. is a giant in the world of electric cars.[1] After all, who hasn't heard of Tesla CEO Elon Musk?[2] Tesla was founded in 2003 in San Carlos, California, so if Tesla had a birth certificate, California would be its place of birth.[3] But does Tesla still "live" in California such that it would call California its current "home"? From the United States Supreme Court's decisions on general or all-purpose personal jurisdiction[4]—specifically *Goodyear Dunlop Tires Operations, S.A. v. Brown*[5] and *Daimler AG v. Bauman*[6]—we know that discerning Tesla's "home" state is critical for identifying which state (or states) possesses the sweeping power of general jurisdiction

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[1] Sarah Edwards, *The 6 Biggest Global Electric Vehicle Companies*, *Insights*, THOMASNET (Aug. 26, 2024), https://www.thomasnet.com/insights/the-5-biggest-global-electric-vehicle-companies/ [https://perma.cc/M5D6-GJ7K] ("With a market cap of over $665 billion, Tesla is the largest EV manufacturer in the world. Various attributes differentiate Tesla from other automakers, but the most notable is its supply chain.").

[2] Brian Baker, *Elon Musk in 2024: What to Know About the World's Richest Person*, *Investing*, BANKRATE (Feb. 7, 2024), https://www.bankrate.com/investing/elon-musk/ [https://perma.cc/4Q72-ULB9].

[3] Eric Reed & Dominic Diongson, *History of Tesla & Its Stock: Timeline, Facts, & Milestones*, THESTREET (Apr. 30, 2024, 3:51 PM), https://www.thestreet.com/technology/history-of-tesla-15088992.

[4] By way of background, a court exercises all-purpose or general jurisdiction when that forum has personal jurisdiction authority over the defendant for all types of claims, regardless of whether those claims relate to or arise out of the defendant's contacts with the forum state. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 610 (1988). Accordingly, this type of jurisdiction can be defined as "dispute-blind" jurisdiction. *Id.* at 613. General personal jurisdiction is distinguishable from specific personal jurisdiction (or "dispute-specific" jurisdiction), which occurs where the court's exercise of jurisdiction depends on whether the claims at issue arise out of or relate to defendant's contacts with the forum state. *See id.*

[5] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011).

[6] Daimler AG v. Bauman, 571 U.S. 117, 137 (2014).

over Tesla. But a corporation's "home" has not always been so obviously central to the general jurisdiction analysis.[7]

Before *Goodyear* and *Daimler*, many courts, scholars, and practitioners would have conceded that Tesla was subject to general jurisdiction wherever it was "doing business." This standard would have included most U.S. states, given Tesla's substantial product sales nationwide[8] and its ever-spreading network of superchargers and brick-and-mortar facilities (i.e., stores and galleries, service centers, and collision centers).[9] The looseness of this "doing business" test permitted the widespread use of general jurisdiction in a manner far beyond its traditional doctrinal limits.[10] Put differently, the sweeping grant of general jurisdiction authority whereby courts could hear cases against defendants that were completely unrelated to the defendants' contacts with the forum was always meant to be permitted only where such a far-reaching jurisdictional exercise would not violate due process or offend traditional notions of fair play and substantial justice. But the Court looked the other way, leaving this practice unchecked for decades and lulling the legal community into a complacent acceptance of the "doing business" version of general jurisdiction.[11]

After this sustained, near-total silence on where corporate defendants may be subject to general jurisdiction, the Court landed a swift "one-two punch" with 2011's *Goodyear*[12] and then *Daimler* three years later.[13] *Goodyear* held that courts could "hear any and all claims

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7 *See infra* Section I.A, B.

8 *Tesla Sales by State*, WORLD POP. REV., https://worldpopulationreview.com/state-rankings/tesla-sales-by-state [https://perma.cc/SPX5-AHYW] (last visited Feb. 22, 2024); *see also* Daniel Shvartsman, *Tesla Growth and Production Statistics: How Many Vehicles Are Sold Across the Globe?*, *Statistics*, *Academy Center*, INVESTING (July 3, 2024), https://www.investing.com/academy/statistics/tesla-facts/ [https://perma.cc/Q22A-592U].

9 *See Locations*, TESLA, https://www.tesla.com/findus/list (last visited Feb. 22, 2024) (showing all Tesla locations worldwide); https://www.tesla.com/findus/list/superchargers/United%20States (last visited Feb. 22, 2024) (showing supercharger locations); https://www.tesla.com/findus/list/stores/United%20States (last visited Feb. 22, 2024) (showing store and gallery locations). Paul Fosse, *Tesla's Incredible Growth, Past & Future — How The Company Could Continue Hyper Growth*, CLEANTECHNICA, https://cleantechnica.com/2019/03/24/teslas-incredible-growth-past-future-how-the-company-could-continue-hyper-growth/ [https://perma.cc/5X9W-8392] (last visited Aug. 4, 2024).

10 *See infra* note 114.

11 *See infra* Section I.B.2.

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

13 Daimler AG v. Bauman, 571 U.S. 117 (2014). A few years later, the Court returned to general jurisdiction in *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402 (2017). But *BNSF* was little more than a frame-by-frame reiteration of *Daimler*'s holding: "BNSF, we repeat, is not

against [corporations] when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[14]

Daimler held that, absent special circumstances that would create a nondescript "exceptional case," the "paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business."[15] It did *not* hold, however, that these two "paradigm" forums for general jurisdiction are the *only* forums where courts are permitted to exercise general jurisdiction over corporations.[16] Rather, the Court clarified the general jurisdiction inquiry. While a showing that a corporation "engages in a substantial, continuous, and systematic course of business" in a state is not sufficient for general jurisdiction, instead, "the proper inquiry . . . is whether a foreign corporation's 'affiliations with the State are so continuous and systematic as to render [the corporation] essentially at home in the forum State.'"[17]

Of course, this "doing business" to "home-based" version of general jurisdiction—purportedly derived from *International Shoe*'s focus on the defendant's "contacts" within the forum state—is not the only way to establish general jurisdiction over a defendant.[18] The Supreme Court has also expressly acknowledged versions of general jurisdiction through two alternative methods: (1) tag jurisdiction, which occurs when a plaintiff "tags" the defendant by serving them while they are in

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incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State." *Id.* at 414 (quoting *Daimler*, 571 U.S. at 127). Therefore, this Article credits the "at home" test for general jurisdiction to a combination of the *Goodyear* and *Daimler* holdings.

[14] *Goodyear*, 564 U.S. at 919 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

[15] *Daimler*, 571 U.S. at 118, n.19. Note that the paradigms mentioned in *Daimler* include only *one* principal place of business but are not expressly limited to one location for corporations. Some have called on courts to designate more "principal *places* of business" to determine "home" for general jurisdiction when warranted by the defendant's contacts. *See* Robert Ellis Stengel, *Boeing, Boeing, Gone: General Jurisdiction over Corporations, Principal Place of Business, and a Second Look at the Total Activities Test*, 88 BROOK. L. REV. 275, 309–10 (2022). My solution agrees with this notion. *See infra* Part III. However, all references to the narrow "paradigm-only" test practiced by lower courts post-*Daimler* refer to the more common practice whereby courts indicate only one "principal place of business" per corporate defendant.

[16] *Daimler*, 571 U.S. at 137–38.

[17] *Id.* at 119 (quoting *Goodyear*, 564 U.S. at 919).

[18] *See generally Int'l Shoe Co.*, 326 U.S. at 316 (establishing the minimum contacts test to determine personal jurisdiction over an out-of-state defendant).

the forum state, and (2) jurisdiction by consent, which occurs when a defendant consents to the forum state's exercise of general jurisdiction.[19] These two theories are alternative ways to demonstrate a defendant's presence and based primarily on a defendant's voluntariness in the forum or consent to jurisdiction. This Article addresses only where general jurisdiction may be established when neither tag nor consent is available. Without either of these two justifications for general jurisdiction, courts must rely on the concept predicted in *International Shoe*: that general jurisdiction can exist where a corporation's "continuous corporate operations within a state [are] 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."[20]

So where is Tesla "at home"? Tesla's most recent U.S. Securities and Exchange Commission 10-K annual filing states that Tesla is incorporated in Delaware and lists its "[a]ddress of principal executive offices" as "1 Tesla Road, Austin, Texas."[21] If courts interpret *Goodyear*/*Daimler*'s "at home" test as a paradigm-only approach, then only a corporation's principal place of business and its place of incorporation can serve as "homes" for general jurisdiction. Then, the answer to our question of whether Tesla can call California "home" is a simple "no." Most scholars and courts agree that in the wake of the Court's *Goodyear*/*Daimler* knockout, any forums beyond these two paradigms are "down for the count" with slim to no chance of being

[19] *See, e.g.*, Burnham v. Superior Ct. California, 495 U.S. 604, 619 (1990) (for tag jurisdiction); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023) (for jurisdiction by consent). Other scholars have debated the scope of these alternative forms of general jurisdiction at length. *E.g.*, Andrea Coles-Bjerre, *A Linguistic Critique of Tag Jurisdiction: Justice Scalia and the Zombie Metonymy*, 68 AM. U. L. REV. 1, 23–28 (2018); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1296 (1998); *Personal Jurisdiction — General Jurisdiction — Consent-by-Registration Statutes —* International Shoe *and Its Progeny —* Mallory v. Norfolk Southern Railway Co., 137 HARV. L. REV. 360, 365 (2023).

[20] *Int'l Shoe Co.*, 326 U.S. at 318.

[21] Tesla, Inc., Annual Report (Form 10-K) 1 (Jan. 26, 2024), https://ir.tesla.com/_flysystem/s3/sec/000162828024002390/tsla-20231231-gen.pdf.

able to exercise the sweeping general jurisdiction authority,[22] at least by way of this "at home" test.[23]

But this interpretation reads *Goodyear*/*Daimler*'s "at home" test too narrowly, and it shrinks the scope of this type of general jurisdiction beyond the mandates of *Daimler*'s text and its holding. Accepting the paradigm-only test may seem like the only way forward after *Daimler*, so it makes sense that this is the most common reaction to the case.[24] But limiting a corporation's home only to its paradigm examples is a premature "tap-out." A broader reading of *Goodyear*/*Daimler*'s test is possible and preferable.

Unwilling to accept the apparent paradigm-only rigidity that has gripped the nation after *Daimler*, this Article fights for a more holistic understanding of what constitutes a corporation's "home" or its "essential home."[25] While the "doing business" test was too broad, the

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22 *See, e.g.*, Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014) ("It is, therefore, incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."); Judy M. Cornett, *The Rulification of General Personal Jurisdiction and the Search for the Exceptional Case*, 89 TENN. L. REV. 571, 609 (2022); James J. Dries, *In Search of the Illusive Exceptional Case for the Exercise of General Jurisdiction*, BAKER MCKENZIE (May 23, 2017), https://www.lexology.com/library/detail.aspx?g=56f674f6-767e-4941-ba5a-d6a18269a621 [https://perma.cc/L8S9-6S4V]; *see also* Priscilla Heinz, Comment, *When Is It Necessary for Corporations to Be Essentially At Home?: An Exploration of Exceptional Cases*, 51 U. RICH. L. REV. 1179, 1195–98 (2017) (surveying the exceptional case and its rarity in the lower courts).

23 Again, this Article addresses only one of the ways by which courts can assert general personal jurisdiction: wherever a corporate defendant has such substantial contacts that it can be considered "home or essentially at home." As discussed previously, courts could also exercise general jurisdiction against corporate defendants under either of the "tag jurisdiction" or the "jurisdiction by consent" theories. *See supra* note 19 and accompanying text; *see also* Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 657–58 (2017) (arguing that courts should be able to exercise general jurisdiction over corporate defendants if they are tagged or "served while 'doing business' in a state"). *But see* Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 21 (1907) (holding that the jurisdictional "tagging" that is permissible for individuals is not permitted for corporations).

24 Cornett, *supra* note 22, at 609 (concluding that lower courts "have heeded the message that corporations are subject to general jurisdiction only in their states of incorporation and principal place of business," and they are treating "the 'exceptional case' as an illusion, fending off efforts by plaintiffs to hold even the largest and wealthiest corporations to jurisdiction in states where their contacts are merely continuous and systematic").

25 This Article works within the current general jurisdiction's "at home" test as articulated by *Goodyear* and *Daimler*. Scholars have illustrated various reasons why this overall "home" metaphor and corresponding test are problematic. *See* Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465, 468–70 (2020); Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 594

paradigm-only version of the "at home" test is too narrow. Instead of swinging from one extreme to the other, I propose a Two-Step "home" and "fairness" test for courts to use in determining a corporate defendant's most natural "home" for purposes of exercising general jurisdiction.

Importantly, this Two-Step test falls within the traditional general jurisdiction doctrines reinforced in *Goodyear* and *Daimler*. Some may contend that *Daimler* took fairness off the table for general jurisdiction with its throwaway remark in footnote 20 that conducting a fairness determination "[w]hen a corporation is genuinely at home in the forum state, . . . would be superfluous."[26] But this statement is both wrong and nonbinding dicta, and as such,[27] it does not bar the addition of fairness to the general jurisdiction analysis. Accordingly, the Two-Step test comports with the recent Supreme Court holdings on general jurisdiction even if it is not necessarily supported by the dicta therein. This means that district courts could begin implementing this Article's General Jurisdiction Two-Step method immediately without waiting for the Supreme Court's approval. Ultimately, this Article urges the Court's formal adoption of some version of this general jurisdiction Two-Step to put in place a doctrinally sound, happy-medium test for general jurisdiction.

Employing a general jurisdiction test that strikes this balance is important because it will open more forums for plaintiffs harmed by corporations to bring their suits. Still, it will do so only to the extent that it is fair for the corporate defendants.[28] Where the "doing business" version of general jurisdiction allowed for this convenience for

(2022); Cornett, *supra* note 22, at 588; Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 HOUS. L. REV. 631, 649 (2016). Acknowledging the potential validity to these arguments, they are outside the scope of this paper, which is intentionally operating within the existing *Goodyear*/*Daimler* framework.

26 Daimler AG v. Bauman, 571 U.S. 117, 139 n.20 (2014).

27 *See infra* Section II.B; *see also infra* notes 197, 248–50, and accompanying text. Justice Ginsberg states that a reasonableness, "second-step inquiry would be superfluous" whenever a corporation is deemed to be "genuinely at home in the forum State." Daimler AG v. Bauman, 571 U.S. 117, 139 n.20 (2014). But this throwaway observation buried in a footnote was not crucial to the majority's holding that California could not exercise general jurisdiction over Daimler. Put differently, if this language in footnote 20 was lifted from the decision, Justice Ginsburg's ultimate decision and the underlying reasoning that general jurisdiction was improper here would remain unchanged. If the holding had been based on the fairness or lack thereof of California exercising general jurisdiction—like Justice Sotomayor argued it ought to be in her concurrence—then the reasoning here would be crucial to the holding and not dicta.

28 *See, e.g.*, *infra* CONCLUSION (Tesla example).

plaintiffs, it failed to reign in general jurisdiction in a way that would be both doctrinally sound and fair to the corporate defendants being sued. The General Jurisdiction Two-Step solution serves both needs. First, the test allows courts to exercise general jurisdiction in forums *beyond* where the corporate defendant's principal place of business and place of incorporation are located, expanding the scope of general jurisdiction. But on the other hand, this test also mandates a showing based on objective metrics of *how* the corporate defendant is "essentially at home" in the forum and requires the court to conclude that exercising general jurisdiction over a defendant by haling them into court to adjudicate claims unrelated to their contacts with the forum state is *fair*.[29]

This Article proceeds in three parts. Part I dives deep into the three Eras[30] of general jurisdiction. Part II picks up the baton by articulating various methods for finding a middle-ground application of *Daimler*'s "at home" test and suggesting that this Article's General Jurisdiction Two-Step test emerges as the ideal solution. Part II continues by explaining why general jurisdiction needs a fairness consideration as the "second step" for this test. Then, Part II distinguishes the general personal jurisdiction fairness process from the specific personal jurisdiction fairness-factors process.

Part III then combines the broader "home" and "fairness" textual support from Part I and the rationale supporting the addition of a fairness component in Part II. Part III concludes by proposing a Two-Step "home" and "fairness" test for general jurisdiction to ensure that a court's exercise of general jurisdiction would be fair and would not "offend traditional notions of fair play and substantial justice."[31]

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29 This Article focuses on how the Two-Step test would apply to corporate defendants, but it could also carry over to individual defendants. For example, if a United States citizen who resides permanently in Texas and intends to remain there, but if that citizen also travels to California multiple times per week such that they actually spend more time there than in Texas, the Two-Step test could allow for general jurisdiction in California over that individual. For a more complete analysis of *Goodyear* and *Daimler*'s impact on general jurisdiction for individual defendants, see Jeffrey L. Rensberger, *There's No Place Like Essentially at Home: General Jurisdiction over Individuals Apart from Domicile and Presence*, 77 ARK. L. REV. (forthcoming).

30 If Taylor Swift can measure her two-decade songwriting career in "Eras," surely general personal jurisdiction can use the same metric for its century-and-a-half history. Edward Standley, *#A Journey Through Taylor Swift's Eras: Exploring the Evolution of Her Music and Style*, LINKEDIN (Oct. 12, 2023), https://www.linkedin.com/pulse/journey-through-taylor-swifts-eras-exploring-her-music-standley/ [https://perma.cc/8TAA-DEJ7].

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

I
A DOCTRINAL HISTORY OF GENERAL JURISDICTION'S HOME-BASE AND FAIRNESS

Scholars largely agree that recent personal jurisdiction cases *Goodyear* and *Daimler* narrowed the scope of general jurisdiction because they put an end to the "doing business" test for determining general jurisdiction.[32] Before these cases soundly rejected this test, lower courts implemented the "doing business" test to exercise general personal jurisdiction over any defendant who "has extensive ties to the forum state" but in situations where that defendant's "ties do not give rise to the plaintiff's cause of action," which would put them outside the reach of specific personal jurisdiction.[33] The effect was that "most lower courts understood most multistate and multinational entities to be subject to general jurisdiction in any state forum in which those entities conducted substantial business."[34]

Even admitting that this was the practical effect of the "doing business" test, it does not follow from this fact that "doing business" was ever doctrinally supported or an accurate application or exercise of general jurisdiction. In other words, even if the practical effect of ending the "doing business" practice for general jurisdiction actually narrowed the scope of general jurisdiction, the general jurisdiction doctrine remains unchanged. "Doing business" was never supported by precedent. The Court's insistence in *Goodyear* and *Daimler* that companies be "at home" in states for the states to exercise general jurisdiction is more in line with what general jurisdiction is and has always been.

First, Section I.A discusses the origins of both tests and depicts the overall confusion surrounding "doing business." Second, Section I.B

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32 *See, e.g.*, Nash, *supra* note 25, at 467 (pointing out how in *Goodyear* and *Daimler*, "the Court substantially narrowed the scope of general jurisdiction"); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1354–58 (2015) (noting how "*Goodyear* and *Daimler* sound the death knell for doing business as a basis for general jurisdiction"); Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012). (noting that before *Goodyear* "lower courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there"); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207 (2014).

33 Nash, *supra* note 25; *e.g.*, Laufer v. Ostrow, 434 N.E.2d 692, 694 (N.Y. 1982) (finding general jurisdiction available when defendant "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction") (quoting McGowan v. Smith, 419 N.E.2d 321, 323 (N.Y. 1981)).

34 Nash, *supra* note 25; *see also* Rhodes & Robertson, *supra* note 32.

catalogues all personal jurisdiction cases involving general jurisdiction into three separate Eras.[35] First came the Court's *Fearless* launch into the personal jurisdiction debate with landmark cases *Pennoyer* and *International Shoe*.[36] The second era includes *Perkins* and *Helicopteros*, the Court's only general jurisdiction cases during the sixty-six years following *International Shoe*, a lengthy period where the Court gained its *Reputation* for silence on this subject.[37] Finally, the colorfully optimistic third era discusses the two cases that shattered the Court's near silence—*Goodyear* and *Daimler*—along with follow-on cases, all demonstrating that the Roberts Court is a *Lover* of a "home-based" theory for general jurisdiction.[38]

The purpose of tracing the Supreme Court's general jurisdiction opinions through their Eras is twofold. First, it tests the constitutional validity of a common pre-*Daimler* practice of courts exercising general jurisdiction over companies that were "doing business" in the forum and compares that method with the modern "at home" version of general jurisdiction to see which has greater doctrinal support.[39]

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35 The labels and overall organizational structure for this section were inspired by Taylor Swift's iconic Eras tour. *See* Kevin Olivieri, *Taylor Swift Cements Her Place as a Musical Legend with "The Eras Tour*,*"* THE MONTCLARION, https://themontclarion.org/entertainment/taylor-swift-cements-her-place-as-a-music-legend-with-the-eras-tour/ [https://perma.cc/7YQL-B83H] (last visited Feb. 22, 2024). Though this may seem random at first, its thematic purpose emerges on closer inspection.

36 Just as *Pennoyer* and *International Shoe* put personal jurisdiction on the map and remain the core cases for the genre, so too, Taylor's *Fearless* album established her as a crossover artist (Country to Pop) and was recognized as the most-awarded album in country music history. *See Taylor Swift's FEARLESS Album Officially Lauded as Most Awarded Album in Country Music History*, BIG MACHINE RECORDS (Mar. 18, 2010), https://www.prnewswire.com/news-releases/taylor-swifts-fearless-album-officially-lauded-as-most-awarded-album-in-country-music-history-88431737.html [https://perma.cc/UW26-P8HC].

37 Where *Perkins* and *Helicopteros* provided the only guidance from the Court as to how to apply general jurisdiction during this decades-long dark age, Taylor's *Reputation* album too showcases insight from her personal dark age after the Kanye West drama and the subsequent yearlong disappearance from the public eye. *See* Skylar Elizabeth, *All of Taylor Swift's Album Eras and Their Distinctive Styles*, L'OFFICIEL (Dec. 13, 2023), https://www.lofficielusa.com/pop-culture/every-taylor-swift-album-era-style [https://perma.cc/8QDJ-L3AW].

38 Some might go so far as to label the theory: Home-Based General Jurisdiction (Roberts Court Version). *Goodyear*, *Daimler*, and other more recent cases—depending on your point of view—represent a "rainbow after the storm" in the form of cautious optimism for a clearer general personal jurisdiction future, just as *Lover* served as Taylor's literal and metaphorical rainbow album. *See* Elizabeth, *supra* note 37.

39 This "doing business" test was "widely accepted in lower court cases" but "never endorsed by the Supreme Court." Feder, *supra* note 32, at 673. Courts implementing the "doing business" test believed that defendant "national corporations with substantial

Second, it highlights the recurring role that fairness has played throughout general jurisdiction's lifetime, which reveals a long-standing support for (or at least openness to) including fairness within the general jurisdiction analysis.

A. General Jurisdiction and "Doing Business": A Murky, Intertwined History

Many personal jurisdiction stories start with *International Shoe*,[40] but general jurisdiction as a concept predates *International Shoe*'s foundation for the cleaving of specific jurisdiction from general jurisdiction:

> Prior to the twentieth century, English and American courts justified almost all exercises of jurisdiction in terms of the sovereign's relationship with the defendant or his property, rather than in terms of the character of the suit itself. Each of the three major theoretical foundations for personal jurisdiction—power, consent, and allegiance—supported this dispute-blind focus. Courts did not consider themselves to be exercising general jurisdiction; they simply did not regard the character of the dispute as relevant to personal jurisdiction analysis.[41]

But general jurisdiction's dominance in the early days of personal jurisdiction was due primarily to the fact that *International Shoe* and its progeny had not yet highlighted specific jurisdiction as a thoroughfare for establishing personal jurisdiction.[42] In most cases

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operations in all fifty states (such as McDonald's or Walmart) would likely be subject to general personal jurisdiction in all fifty states" based on that practice of conducting business nationwide. Rhodes & Robertson, *supra* note 32, at 213–14, 216–27; Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001); *see also* Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 124 (2004) ("[I]t is not surprising that lower courts often find general jurisdiction present when a defendant has engaged in just about any kind of regular business in a state, no matter how minimal.").

40 *See* Cornett, *supra* note 22, at 577.

41 Twitchell, *supra* note 4, at 614–15 (footnote omitted).

42 *See infra* Section II.B.1. *But see, e.g.*, Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLORIDA L. REV. 387, 395 (2012) (citing cases) (highlighting pre-*International Shoe* cases where a version of specific personal jurisdiction was exercised: "Individual defendants could also 'implicitly consent' to suit by engaging in certain activities within the forum as defined by state law, assuming the lawsuit was sufficiently related to the defendant's forum conduct.").

predating *International Shoe* and this shift, the parties could be found where the dispute arose.[43]

Interestingly, the "doing business notion was [also] developed in the pre-*International Shoe* period to justify jurisdiction over cases arising from that business—*i.e.*, what we would now call specific jurisdiction —and it was never established as an accepted basis for exercising jurisdiction over unrelated cases."[44] It is a noteworthy tale of how the "doing business notion" evolved from a specific jurisdiction test into a general jurisdiction test.

Apparently, the "doing business" test grew out of a pre-*International Shoe* "need to address the growth of multistate corporate activity within [*Pennoyer*'s prevailing] territorial framework for personal jurisdiction."[45] The theory was that if a corporation was "doing business" in a forum and was sufficiently active therein, it could be deemed "present" there or to have consented to jurisdiction there, and either would suffice as justifications for courts to exercise personal jurisdiction.[46] So, the "doing business" label originally denoted only "the type of corporate activity within a state that would satisfy the presence and/or consent standards."[47]

After *International Shoe*, lower courts continued using the "doing business" method for establishing personal jurisdiction, but whether this method supported general jurisdiction rather than specific

43 Twitchell, *supra* note 4, at 615 (first citing *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 938 (1960); and then Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1153 (1978)).

44 Feder, *supra* note 32, at 681; Philip B. Kurland, *The Supreme Court, the Due Process Clauses and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 576 (1958) (quoting Austin W. Scott, *Jurisdiction over Nonresidents Motorists*, 39 HARV. L. REV. 563, 563 (1926) (supporting the idea that a nonresident's business in the forum state would only "subject him to the jurisdiction of the courts of the state *as to causes of action arising out of such business*; and that a nonresident by doing business within a state . . . subjected himself to the jurisdiction of the courts of the state as to such causes of action.")).

45 Feder, *supra* note 32, at 681 ("Under the regime of *Pennoyer v. Neff*, personal jurisdiction was understood to flow from state's power over defendants physically found and served within the state's borders.").

46 *Id.* at 682 (citing Kurland, *supra* note 44, at 577–85).

47 *Id.* at 683, n.51 (citing Donald J. Werner, *Dropping the Other Shoe:* Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOK. L. REV. 565, 591 (1979) ("The courts developed the 'doing business' test as a form of presence sufficient to satisfy *Pennoyer*.")).

jurisdiction was unclear.[48] Indeed, the use of "doing business" to establish general jurisdiction was controversial from the outset.[49] Still, this practice persisted because the Court never specifically outlawed it.[50]

In fact, before 2011's *Goodyear* and 2014's *Daimler*, the Court decided only two general jurisdiction cases,[51] unlike in the specific jurisdiction realm where the Court has taken many cases.[52] This dearth of direction from the Supreme Court on the "doing business" practice for establishing general jurisdiction opened the door for lower courts to continue to exercise general jurisdiction in this manner.[53] The practice became so commonplace that "first-year Civil Procedure casebooks taught students that national corporations with substantial operations in all fifty states (such as McDonald's or Walmart) would likely be subject to general personal jurisdiction in all fifty states."[54]

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48 Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1066 (2012) ("Satisfaction of that standard resulted in general jurisdiction in some cases but only specific jurisdiction in others, depending on the court and theory of jurisdiction."); Kurland, *supra* note 44, at 579–80.

49 *See* Andrews, *supra* note 48 ("It would be a distortion of the historical role of the 'doing business' standard to conclude that it automatically confers general jurisdiction."); *Developments in the Law—State-Court Jurisdiction*, *supra* note 43, at 921 (noting that "cases were divided as to whether a foreign corporation doing business in the forum state could be sued on causes of action unrelated to its activity in that state"). The Court noted this conflicting case law in *International Shoe* when it compared some decisions rejecting the idea that a defendant's "continuous activity" in a forum state provided jurisdiction over unrelated claims with other decisions in which "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify" such jurisdiction. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

50 Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 152 (2001).

51 Feder, *supra* note 32, at 683 (describing general jurisdiction Supreme Court precedents as a "theoretical wasteland"); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 724 (1988).

52 *See, e.g.*, J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011); Asahi Metal Industry Co. v. Superior Ct. of California, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957); Hanson v. Denckla, 357 U.S. 235 (1958).

53 *See, e.g.*, Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 508 (D.C. Cir. 2002); Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1174 (9th Cir. 2006); McManaway v. KBR, Inc., 695 F. Supp. 2d 883, 894–96 (S.D. Ind. 2010).

54 Rhodes & Robertson, *supra* note 32, at 214, n.23 (first citing JOSEPH W. GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 259 (2011) (using McDonald's as an example of a company that would likely be subject to jurisdiction in all fifty states); and then Rush v. Savchuk, 444 U.S. 320, 330 (1980) (noting in dicta that "State Farm is 'found,' in the sense of doing business, in all 50 States' and that such forum contacts would support adjudicative jurisdiction 'even for an unrelated cause of action.'")).

Despite its popularity, some scholars criticized the emergence of this "doing business" test as overbroad and unsupported by the Court's precedents.[55] But lower courts continued to use it.[56]

Put simply, permitting courts to exercise general jurisdiction over companies based simply on their "doing business" in the forum state "is too broad a standard."[57] General jurisdiction has always been a "sweeping" jurisdiction with far-reaching consequences.[58] It may be too late now, but perhaps a better characterization of the two forms of personal jurisdiction would be *limited* (for specific) and *unlimited* (for general). Such a far-reaching and unlimited grant of jurisdiction should not be granted lightly or on a mere showing that a company is "doing business" in the forum state.[59]

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55 *See, e.g.*, Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 122 (2001) ("[Doing business jurisdiction] is notoriously indeterminate and seems to exist without regard for supposed due process limits."); Twitchell, *supra* note 4, at 677 (predicting *Goodyear* and *Daimler* decades before they were decided, Professor Twitchell stated that "the home base approach is the most desirable test for dispute-blind jurisdiction because it provides more certainty than the open-ended 'doing business' or 'continuous and substantial' contacts tests and guarantees that a plaintiff will have at least one, and often several, places to sue an American defendant."). *But see* Twitchell, *supra* note 39, at 171–72.

56 *See supra* notes 47 and 53.

57 Andrews, *supra* note 48, at 1067; *see also* Daimler AG v. Bauman, 571 U.S. 117, 137–38 (2014) (citations omitted) ("Plaintiffs would have us . . . 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."); D.E. Wagner, Note, Hertz *So Good: Amazon, General Jurisdiction's Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case*, 104 CORNELL L. REV. 1085, 1100 (2019) (citing Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 93 (2013) (articulating the idea that "general jurisdiction's exercise had become too broad in application as doing business matured").

58 *See* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 242 (5th Cir. 2022) (quoting Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 358 (2021), *cert. denied sub nom.* Douglass v. Kaisha, 143 S. Ct. 1021, 1021 (2023)); *c.f. id.* at 259, 263–65 (Elrod, J. dissenting) (discussing how differences between the Fifth and Fourteenth Amendments' Due Process Clauses, and the federalism concerns at issue for the latter, explain why the "constitutional constraints on Congress's ability to authorize sweeping" personal jurisdiction based on the Fourteenth Amendment are "*absen[t]*" for jurisdiction based on the Fifth Amendment).

59 Even scholars criticizing *Daimler*'s "at home" test concede that the "equation of 'at home' with domicile/headquarters may be appropriate in cases with absolutely no contact with the forum state." Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish for:* Goodyear*,* Daimler*, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2014 (2014). If that's the case, then the "at home" formulation makes the most sense across the general jurisdiction board given the nature of this type of jurisdiction. General jurisdiction, by definition, is authority that can be exercised against defendants in cases where the defendant has "absolutely no contact with the forum state." *Id.*

Still, scholars and courts alike have praised the "doing business" test for its ease and predictability.[60] But predictability should not override constitutional soundness. Since "doing business" should never have been enough to permit a grant of general jurisdiction authority, as this Article argues,[61] the notion that this test was predictable is inapposite.[62]

B. While "Doing Business" Has No Home, Daimler*'s "At Home" Test Has Some Foundation*

Scholars and courts expressed surprise at the Court's "overhaul" of general jurisdiction in *Goodyear* and *Daimler*, but these decisions were actually quite consistent with the doctrinal theories behind "general jurisdiction."[63] Support for *Daimler*'s "at home" test derives from the language in earlier general jurisdiction cases, the foundational *International Shoe* case that paved the specific/general divide, and even

60 *See, e.g.*, Nash, *supra* note 25, at 468. *But see* Twitchell, *supra* note 4, at 677 (contending more than twenty years before *Goodyear* that a "home base approach is the most desirable test for dispute-blind jurisdiction because it provides more certainty than the open-ended 'doing business' or 'continuous and substantial' contacts tests").

61 *See infra* Section I.B.

62 To quote Disney's Cinderella, "just because it's what's done, doesn't mean it's what should be done." CINDERELLA (Disney 2015). Meir Feder—counsel for Petitioner in *Goodyear*—wrote that it is at least "worth considering . . . whether doing business jurisdiction can be justified" under the theory that it is "so deeply rooted" in practice. Feder, *supra* note 32, at 681. Feder cited tag jurisdiction as an example of this: "[I]t is worth at least pausing to consider whether doing business jurisdiction is so deeply rooted that it must be accepted for that reason alone—just as the Supreme Court upheld so-called 'tag' jurisdiction over individuals almost entirely for that reason." *Id.* Feder continues, stating "it is hard to imagine that 'tag' jurisdiction could have been upheld in the absence of that historical tradition." *Id.* at 681, n.46. But to the contrary, *Burnam*'s tag jurisdiction is based on more than just a common practice of permitting it among the lower courts. Unlike "doing business," *Burnam*'s tag jurisdiction is rooted in the very fabric of foundational personal jurisdiction doctrine and is based on *Pennoyer* principles of presence. Burnham v. Superior Ct. of California, 495 U.S. 604, 619 (1990). Because *Burnam* could have been decided based on this rationale alone, the historic tradition supporting tag jurisdiction is not so essential to the holding here, which distinguishes *Burnam*'s preservation of tag jurisdiction from the Court's refusal to do likewise with the "doing business" iteration of general jurisdiction.

63 Immediately after *Goodyear*, several scholars called for the Court to formalize a "home" theory for general jurisdiction long before *Goodyear* and *Daimler*. Andrews, *supra* note 48, at 1067 (first citing Twitchell, *supra* note 4, at 667–70 (noting that "general jurisdiction should be retained solely at a defendant's home base"); and then Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987) ("When general jurisdiction is asserted, the court should not determine simply whether it would be inconvenient or burdensome for the defendant to litigate in the forum, but whether the defendant has adopted the forum as its sovereign.")).

the case credited with "starting it all" for personal jurisdiction, *Pennoyer v. Neff*.[64]

This section examines the general jurisdiction jurisprudence in detail to demonstrate how *Goodyear*/*Daimler*'s "at home" standard is the "invisible string" connecting the cases,[65] while the phantom "doing business" standard is no more than a "Blank Space."[66] Additionally, this section lays the foundation supporting Part II's call for a fairness analysis to be part of the general jurisdiction test.

1. Fearless: Pennoyer *and* International Shoe

Pennoyer's territorial view of jurisdiction housed its "power theory," whereby a forum's courts could exercise jurisdiction over defendants who were physically present in that forum state.[67] Under this theory, the Court reasoned that a state's courts "may compel persons domiciled within its limits to execute" jurisdiction over out-of-state property because the defendant's presence in the forum state justified this jurisdictional reach.[68] This reliance on "domicile[]" to determine presence for general jurisdiction is an early indication that courts should only be exercising this sweeping, dispute-blind form of

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64 Pennoyer v. Neff, 95 U.S. 714 (1878); *see* Kurland, *supra* note 44, at 570 (crediting *Pennoyer* for setting "the origins of our modern law of personal jurisdiction").

65 *See* TAYLOR SWIFT, *invisible string*, *on* FOLKLORE (Republic Records 2020).

66 *See* TAYLOR SWIFT, *Blank Space* (Taylor's Version), *on* 1989 (Taylor's Version) (Universal Music Group 2023).

67 *Pennoyer*, 95 U.S. at 722; *see also* Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (stating that, under *Pennoyer*, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power"); 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, 1615 (2015).

68 *Pennoyer*, 95 U.S. at 723; *see* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 71 (2021) ("One of the oldest civil procedure chestnuts, *Pennoyer v. Neff*, establishes that a condition of due process is that only a sovereign with power over the party has legitimate authority to decide her case."); Robert D. Nussbaum, *The Shortcomings of New York's Long-Arm Statute: Defamation in the Age of Technology*, 88 ST. JOHN'S L. REV. 175, 178 (2014) (footnotes omitted) ("In *Pennoyer v. Neff*, the Supreme Court first established that states automatically possess jurisdiction over individuals and property residing within that state."); Louis U. Gasparini, *The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century Under the New York CPLR*, 12 ALB. L.J. SCI. & TECH. 191, 192 (2001). *But see* Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 474–75 (2022) (contending that *Pennoyer*'s vision for permitting dispute-blind jurisdiction based on presence was both too broad and too narrow).

jurisdiction over defendants who are sufficiently present in that forum such that they could be considered "domiciled" there.[69]

Assuming as true that *Goodyear* and *Daimler*'s "at home" test has roots in *Pennoyer*'s power through presence theory, might this then demonstrate that the "at home" approach "represent[s] a retreat to" the very same *Pennoyer* theories which were "later rejected in *International Shoe*"?[70] While scholars have posed this valid argument, the Court's groundbreaking decision in *International Shoe* laid an additional foundation for the dispute-blind jurisdiction described in *Goodyear* and *Daimler*. *International Shoe* took *Pennoyer*'s presence concept and applied it to corporations, making the novel observation that a corporation's "'home' or 'principal place of business' is relevant" to the consideration of whether a court's exercise of jurisdiction would "satisfy due process requirements."[71] "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its '*home*' *or principal place of business* is relevant in this connection" between a forum state's exercise of jurisdiction over a defendant and the due process concerns.[72]

Although *International Shoe* involved a question of what would later be labeled specific jurisdiction (whether a plaintiff could hale a defendant corporation into a forum's court based on the defendant's contacts with that forum when those in-state contacts gave rise to the suit),[73] it explained how a corporate defendant's "'home' or principal

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69 *See Pennoyer*, 95 U.S. at 723.

70 *See* Stengel, *supra* note 15, at 284; Donald L. Doernberg, *Resoling* International Shoe, 2 TEX. A&M L. REV. 247, 282 (2014) (arguing that the current Court has "retreated to the pre-*Shoe* concept of corporate 'presence'").

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

72 *Id.* at 317 (emphasis added). Professors Arthur and Freer highlight this same passage to make the opposite argument: that *International Shoe*'s reference here is suggesting that general jurisdiction can and perhaps should be available outside the defendant's "home" presumably because it is in those cases where courts would need to consider the "estimate of inconveniences" at play in haling a corporation into court somewhere other than its "'home' or principal place of business." *See* Arthur & Freer, *supra* note 59, at 2007. But even assuming this is exactly what the Court is suggesting here, in doing so, the Court is discussing it within its specific jurisdiction context, so it is not saying that general jurisdiction should *not* be limited to a home-based theory. But even from a specific jurisdiction perspective, the Court is still indicating that a defendant's home or principal place of business is a key factor in determining a court's jurisdiction over that defendant, whether specific or general.

73 Professors Arthur T. von Mehren & Donald T. Trautman were the first to assign these labels to the two main types of in personam jurisdiction. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–63 (1966).

place of business" would be relevant in both specific and general jurisdiction contexts:

(1) Specific (Dispute-Specific) Jurisdiction

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.[74]

(2) General (Dispute-Blind) Jurisdiction

> Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there . . . . To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.[75]
>
> While it has been held, in cases on which appellant relies, 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*.[76]

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

75 *Id.* (citation omitted). Here again, Professors Arthur and Freer highlight this same text to make the opposite argument: that *International Shoe*'s references to "home" imply that "general jurisdiction is reasonable, even away from home, wherever a corporate defendant 'carries on more substantial activities.'" Arthur & Freer, *supra* note 59, at 2007. But I wouldn't go quite as far as Arthur and Freer to say that a corporate defendant can be sued "away from home[] *wherever* [it] carries on more substantial activities." *See id.* (emphasis added). Instead, it is only fair for courts to exercise general jurisdiction where a corporate defendant's contacts with the forum state are so pervasive as to justify that expansive exercise of personal jurisdiction. The *International Shoe* Court's dicta on this topic indicates synonymous places where general jurisdiction is appropriate, not greater and lesser alternatives, when it says "home or other jurisdiction where [the corporation] carries on more substantial activities"—meaning that general jurisdiction would make sense only at a defendant's home or that defendant's "essential home" where the defendant carries out more substantial activities. It makes little sense that the Court would signal two very different types of general jurisdiction here: (1) a home versus (2) any other place where the corporation does business.

76 *Int'l Shoe Co.*, 326 U.S. at 317–18 (emphasis added) (citation omitted).

Though dicta, the Court's observations about general jurisdiction foreshadow a *Goodyear*/*Daimler* world where a corporation's "home" plays a lead role. First, the Court notes that a corporate defendant's "'home' or principal place of business is relevant" to the jurisdictional question.[77] Then, it specifies that a "casual presence" would not suffice for general jurisdiction because requiring a corporate defendant "to defend the suit away from its home or other jurisdiction where it carries on more substantial activities" would be too burdensome to "comport with due process."[78] By the time the Court begins describing what activity would be sufficient to justify a court's general jurisdiction—"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"[79]—the requirement that corporate defendants have such pervasive contacts that they could be considered home or essentially home in a forum to justify general jurisdiction is evident from the comparison between contacts required for specific versus general jurisdiction. While the minimum contacts required for specific jurisdiction may be "continuous and systematic" and must "also give rise to the [cause of action]," the unrelated contacts required to "justify suit" under a general jurisdiction theory must be "continuous" and "thought so substantial and of such a nature as to justify" an unrelated suit.[80]

To justify general jurisdiction, a defendant's activities in the forum state must be more substantial than the "minimum contacts" required

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77 *Id.* at 317.

78 *Id.*

79 *Id.*

80 In Justice Sotomayor's *Daimler* concurrence, she highlights her agreement with the majority that there is no "material difference between" *International Shoe*'s "continuous and substantial" formulation for general jurisdiction and *Helicopteros*'s "continuous and systematic" formulation. Daimler AG v. Bauman, 571 U.S. 117, 149 n.6 (2014) (Sotomayor, J., concurring). I am not convinced, however, regarding the lack of a material difference between these two words. Stripping the words down to their pure definitions, substantial means "considerable in quantity" or "significantly great" whereas systematic means "methodical in procedure" or "marked by thoroughness and regularity." *Substantial*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/substantial [https://perma.cc/8XG6-7AWG] (last visited Feb. 22, 2024); *Systematic*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/systematic [https://perma.cc/87JN-CP6S] (last visited Feb. 22, 2024). Turning to general jurisdiction, systematic seems broader than substantial in that a corporate defendant's continuous and *substantial* presence might justify a forum court's exercise of general jurisdiction where that defendant's continuous and *systematic* contacts would not. By definition, systematic is little more than a synonym for continuous. But these are musings best reserved for a different paper.

for a forum to exercise specific personal jurisdiction.[81] This broader, dispute-blind authority is based on a "direct relationship between the forum and the defendant," a relationship which rests upon the state's "power over the [defendant] directly."[82] "The defendant's local activities, therefore, must be substantial enough to justify such power; they cannot be sporadic or occasional."[83] Indeed, the oft-cited article that first coined the labels "specific" and "general" for the two main types of personal jurisdiction took this concept even further:

> This approach suggests that, absent the kind of total, close, and continuing relations to a community implied in incorporation or in the location of a head office within a state, jurisdiction over legal persons—aside perhaps from the possibility of limited general jurisdiction based on the location of assets—should take the form of specific jurisdiction.[84]

Accordingly, the very same article that birthed the "specific" and "general" labels, also voiced *Goodyear*/*Daimler*'s "home or essentially at home" test for general jurisdiction nearly fifty years before the Court decided these cases.[85]

Thus, the origins of the *Goodyear*/*Daimler* "at home or essentially at home" test for general jurisdiction build off the "home" references in *International Shoe*.[86] To the extent that the Court has "backed away from some of *International Shoe*'s minimum-contacts analysis,"[87] this is an observation about specific personal jurisdiction with little bearing on the Court's approach for general jurisdiction.[88]

2. Reputation: Perkins *and* Helicopteros

In addition to the foundational support for a home-based understanding of general jurisdiction provided by *Pennoyer* and *International Shoe*, *Goodyear*/*Daimler*'s "at home" doctrine is also supported by the only two decisions in the sixty-six-year gap between

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81 *Daimler*, 571 U.S. at 127.

82 Brilmayer et al., *supra* note 51, at 771.

83 *Id.*

84 von Mehren & Trautman, *supra* note 73, at 1144 (emphasis omitted).

85 *Id.*

86 *See* Andrews, *supra* note 48, at 1066.

87 *See* Doernberg, *supra* note 70, at 248.

88 *See Daimler*, 571 U.S. at 132 (first citing von Mehren & Trautman, *supra* note 73, at 1177–79; then Twitchell, *supra* note 4, at 676; and then Borchers, *supra* note 55, at 139) ("Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized.").

1945's *International Shoe* and 2011's *Goodyear* where the Court addressed general jurisdiction head-on: *Perkins* and *Helicopteros*.[89]

The first time the Court gave its official stamp of approval for the concept and practice of general personal jurisdiction was in *Perkins v. Benguet Consolidated Mining Co.*[90] The question was whether the actions of a foreign company's "interim president" and "general manager and principal stockholder" in the forum state of Ohio were sufficient for the Ohio courts to exercise general personal jurisdiction over that company.[91] The company's acting president ran the company from his home state, Ohio, during World War II instead of from the company's foreign base; the president's key actions in that Ohio office highlighted by the Court included:

(1) "maintain[ing] an office in which he conducted his personal affairs and d[oing] many things on behalf of the company";

(2) keeping "files of the company";

(3) carrying on "correspondence relating to the business of the company and to its employees";

(4) drawing and distributing "salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him";

(5) using and maintaining "in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds";

(6) using a "bank in Hamilton County, Ohio . . . as [a] transfer agent for the stock of the company";

(7) holding "[s]everal directors' meetings [at the] office or home in Clermont County"; and

(8) "supervis[ing] policies dealing with the rehabilitation of the corporation's properties [abroad and dispatching] funds to cover purchases of machinery for such rehabilitation."[92]

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89 *See Goodyear*, 564 U.S. at 925 (identifying *Perkins* and *Helicopteros* as the "only two decisions postdating International Shoe" when the Court has "considered whether an out-of-state corporate defendant's in-state contacts were sufficiently 'continuous and systematic' to justify the exercise of general jurisdiction over claims unrelated to those contacts").

90 *See* Brilmayer et al., *supra* note 51 ("The Supreme Court voiced its approval of general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*").

91 Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) ("It remains only to consider, . . . whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio.").

92 *Id.* at 447–48.

Thus, the Court held, the company president "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company," such that "it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding."[93] The *Perkins* Court quoted the three general jurisdiction paragraphs from *International Shoe*. The Court demonstrated how it was basing its decision on *International Shoe*'s suggestion that "continuous corporate operations within a state" could be "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."[94]

More than thirty years later, the Supreme Court addressed general jurisdiction again in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[95] This case questioned whether a Texas court could exercise general jurisdiction over Helicol, a Colombian corporation, in a wrongful death case that arose out of a helicopter crash in Peru.[96] Like the defendant company in *Perkins*, Helicol was not licensed to do business in the forum, nor was the forum state Helicol's principal place of business.[97] Otherwise, the facts of *Helicopteros* could not have been more different from those in *Perkins*; where the former is almost completely absent from the forum state, the latter is almost completely present in the forum state.[98] Helicol's contacts with Texas consisted of the following:

(1) "sending its chief executive officer to Houston for a contract-negotiation session;"

(2) "accepting into its New York bank account checks drawn on a Houston bank;" and

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93 *Id.* at 448. Interestingly, this foundational general jurisdiction case has become the exception rather than the rule. *Infra* Part III. This is especially interesting considering that the *Goodyear* Court described *Perkins* not as an "exceptional case" but as a "textbook case of general jurisdiction." *Goodyear*, 564 U.S. at 928 (citation omitted). Perhaps "textbook" in this case meant "only" (i.e., the only case granting general jurisdiction) rather than "standard"?

94 *Perkins*, 342 U.S. at 446 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318–19 (1945)).

95 466 U.S. 408 (1984).

96 *Id.* at 409–10, 415–16 (explaining that it was analyzing whether general jurisdiction existed because all parties conceded that the claims at issue "did not 'arise out of,' and [were] not related to, Helicol's activities within Texas" (citations omitted)).

97 *Id.* at 416; *Perkins*, 342 U.S. at 439 n.2.

98 *See Helicopteros*, 466 U.S. at 414–17.

(3) "purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums[,] and sending personnel to . . . facilities in [Texas] for training."[99]

The Court held that none of these contacts with the forum state could be "regarded as a contact of a 'continuous and systematic' nature," as described in *Perkins* and *International Shoe*.[100] Thus, no general jurisdiction existed here because Helicol's contacts with the forum state "were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment."[101]

The Court rooted its decision on the "presence" concept from *International Shoe* by referencing an early nineteenth-century personal jurisdiction opinion, *Rosenberg Bros. & Co. v. Curtis Brown Co.*[102] This case, the *Helicopteros* Court concluded, made "clear that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction."[103] These commercial visits, "even if occurring at regular intervals, would not warrant the inference that the corporation was *present* within the jurisdiction of [the forum state]."[104] And regarding the *Helicopteros* facts, the Court held that the "mere purchases, even if occurring at regular intervals" and the "brief *presence* of Helicol employees in Texas for the purpose of attending the training sessions" were not sufficient to satisfy the due process concerns of Texas courts exercising general jurisdiction.[105]

True, these two general jurisdiction cases do not cleanly state—like their future counterparts *Goodyear* and *Daimler*—that courts cannot exercise general jurisdiction unless a defendant is "at home" in that forum state. But both decisions invoke *International Shoe*'s "presence"-based guidance, and they both state versions of the same refrain. For a court to exercise general jurisdiction over a defendant, that defendant's contacts must be so "continuous and substantial as to

99 *Id.* at 416.

100 *Id.*

101 *Id.* at 416, 418–19 (first citing *Perkins*, 342 U.S. at 437; and then Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)); *see* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 928–29 (2011) (summarizing the *Helicopteros* holding that the links to the forum state "did not 'constitute the kind of continuous and systematic general business contacts . . . found to exist in *Perkins*,' and were insufficient to support the exercise of [general] jurisdiction" (quoting *Helicopteros* 466 U.S. at 415–16)).

102 *Helicopteros*, 466 U.S. at 418 (citing Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923)).

103 *Id.* at 417.

104 *Id.* (emphasis added) (quoting *Rosenberg*, 260 U.S. at 518).

105 *Id.* at 418–19 (emphasis added).

make it reasonable for the state to exercise such jurisdiction."[106] Both set the standard for general jurisdiction much higher than merely checking for whether the defendant is "doing business" in the forum. To the contrary, neither decision even contemplates that courts could exercise the sweeping power of general jurisdiction when a defendant does so little.[107]

Still, in the years following *Perkins* and *Helicopteros*, several lower courts cited these decisions to support a rule that "doing business" in a forum state was sufficient to support that forum's exercise of general jurisdiction.[108] However, several lower courts cited these general jurisdiction cases for their actual holdings that general jurisdiction must be supported by activities so "continuous and systematic" that it would "not violate federal due process" or "offend traditional notions of fair play and substantial justice" to exercise general personal jurisdiction.[109] This confusion percolated in the lower courts for almost three decades before the Court took up another general jurisdiction case in 2011: *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[110]

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106 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) (AM. L. INST. 1971); *see supra* notes 101–02, *infra* notes 108–10, and accompanying text.

107 The only discussion that *Helicopteros* includes regarding whether the defendant is doing business in the forum is to say that the occasional business connections that Helicol had with Texas were "insufficient to satisfy" due process. *Helicopteros*, 466 U.S. at 416–19. In *Perkins*, the primary discussion of whether "doing business" could constitute sufficient contacts for general jurisdiction came from the Court's citation of the Supreme Court of Ohio's decision below, which concluded that the "doing of business" should *not* justify general jurisdiction. 342 U.S. at 441 ("The doing of business in this state by a foreign corporation . . . will not make the corporation subject to" general jurisdiction, which is necessary "to enforce a cause of action not arising in this state and in no way related to the business or activities of the corporation in this state." (citations omitted)).

108 *E.g.*, Sandstrom v. Chemlawn Corp., 904 F.2d 83, 88 (1st Cir. 1990); Am. Express Int'l, Inc. v. Mendez-Capellan, 889 F.2d 1175, 1180 (1st Cir. 1989); Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 509 (D.C. Cir. 2002), *overruled by* Erwin-Simpson v. AirAsia Berhad, 985 F.3d 883 (D.C. Cir. 2021); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374, 376 (5th Cir. 1987); Wolf v. Richmond Cnty. Hosp. Auth., 745 F.2d 904, 909 (4th Cir. 1984); *see also* Access Telecom, Inc. v. MCI Telecommunications Corp., 197 F.3d 694, 717–18 (5th Cir. 1999) (applying the "doing business" standard but without citing to *Perkins* or *Helicopteros*).

109 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *see, e.g.*, Barcelona Hotel, Ltd. v. Mahoney Hadlow & Adams, 440 N.Y.S.2d 660, 661 (N.Y. App. Div. 1981) (decision rested not merely on the defendant "doing business" but on whether that business constituted a sufficient "continuous, systematic, and regular presence" such that it does not offend due process to permit general jurisdiction—court found that a law firm whose only contact was mail and telephone transactions did not have a "continuous, systematic and regular" presence) (citation omitted); Olsen ex rel. Sheldon v. Mexico, 729 F.2d 641, 648 (9th Cir. 1984) (similar); Bucks Cnty. Playhouse v. Bradshaw, 577 F. Supp. 1203, 1207 (E.D. Pa. 1983) (similar).

110 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

3. Lover: Goodyear*,* Daimler*, and Beyond*

In *Goodyear*, the Court considered whether a North Carolina court could exercise general jurisdiction over Goodyear USA's foreign subsidiaries—the claims were unrelated to any activity that the foreign subsidiaries engaged in within North Carolina.[111] The Court cited *International Shoe* and held that a "court may assert general jurisdiction over foreign . . . 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."[112] "For an individual," the Court reasoned, "the paradigm forum for the exercise of general jurisdiction is the individual's domicile."[113] It then follows that "for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[114] The only contact that Goodyear USA's foreign subsidiaries had with North Carolina was that "a small percentage of [their] tires (tens of thousands out of tens of millions) . . . were distributed within North Carolina by other Goodyear USA affiliates."[115] A unanimous Court held that defendants were "in no sense at home in North Carolina."[116] The Court concluded that "[t]heir attenuated connections to the State fall far short of '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."[117]

Scholars disagree as to whether *Goodyear* created a new "essentially at home" test or was just applying settled law from *International*

111 *Id.* at 918.

112 *Id.* at 919 (quoting *Int'l Shoe Co*., 326 U.S. at 317).

113 *Id.* at 924.

114 *Id.*; Brilmayer et al., *supra* note 51, at 728 ("An examination of the paradigms of general jurisdiction's bases—domicile, place of incorporation, and principal place of business—will illuminate the underlying rationales for each type of jurisdiction we discuss.").

115 *Goodyear*, 564 U.S. at 921. In fact, the Court took much longer explaining Goodyear USA's foreign subsidiaries' lack of contacts with North Carolina, including that they "[were] not registered to do business in North Carolina"; "have no place of business, employees, or bank accounts in North Carolina"; "do not design, manufacture, or advertise their products in North Carolina"; and "do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers." *Id.*

116 *Id.* at 929.

117 *Id.* (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984)) (internal citation omitted).

Shoe.[118] Whatever the case, *Goodyear* focused on the right question for determining whether a court can exercise general jurisdiction: "whether an out-of-state corporate defendant's in-state contacts were sufficiently 'continuous and systematic' to justify the exercise of general jurisdiction over claims unrelated to those contacts."[119]

This high level of continuous and systematic contacts is required to justify a court's exercise of general personal jurisdiction because courts cannot base their general jurisdictional authority on the unrelated conduct at issue—the fact that the conduct is unrelated to the subject matter of the lawsuit is what makes it a case that *needs* general rather than specific jurisdiction.[120] Rather, general jurisdiction must be based on the forum state's authority over the defendant itself (since there is no authority over the conduct at issue that is unrelated to the state), which should be ascertained by the defendant's relationship with the forum state.[121] Therefore, where the defendant's conduct at issue in the case does not provide a basis for the state's jurisdictional authority (like it would in a specific jurisdiction case), the defendant itself must be the basis for that jurisdictional authority.[122] Meir Feder, Petitioner's counsel in *Goodyear*, observed as much, stating:

> The "at home" standard adopted by the Court in *Goodyear* fits neatly with this principle, in that a state which is the corporation's "home" (particularly if "home" is understood to be limited to domicile or place of citizenship) can be understood to have power even over out-of-state activities in the same way that states may tax and regulate the out-of-state activities of their domiciliaries. Merely doing business in a state, on the other hand, establishes only that the corporation can be said to be present in the state. This falls far short of the types of relationships that have traditionally justified plenary authority over an individual or entity.[123]

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118 *Compare* Doernberg, *supra* note 70, at 265 (contending that *Goodyear* "created the essentially-at-home test for exercising general jurisdiction over corporations and cited *International Shoe*"), *with* Andrews, *supra* note 48, at 1050 ("The *Goodyear* clarification is not a new standard but is instead the correct reading of *International Shoe*.").

119 *Goodyear*, 564 U.S. at 925.

120 Here again, Professor Twitchell's "dispute-blind" v. "dispute-specific" characterizations are more descriptive than the more commonly used general v. specific labels. Twitchell, *supra* note 4, at 613–15.

121 Feder, *supra* note 32, at 690–91.

122 *Id.* at 691; Stein, *supra* note 63, at 726 (arguing that general jurisdiction should be available only with respect to defendants who are so closely tied to the state that the state "posses[es] equivalent authority to that which it possesses over its own citizens").

123 Feder, *supra* note 32, at 692–93 (footnotes, emphasis, and citations omitted).

Goodyear cleanly teed up the official death knell for "doing business" that would come just three years later: *Daimler AG v. Bauman*.[124]

Daimler involved another foreign defendant, this time a German parent company, Daimler.[125] Daimler's U.S. subsidiary had substantial contacts with California, and the plaintiff argued an agency theory to try and attribute Daimler's U.S. subsidiary's California contacts to Daimler, the German parent company.[126] The Court denied this "sweep[ing]" agency theory[127] and unanimously agreed that general jurisdiction should be denied.[128] It further stated that even assuming for the sake of argument that the U.S. subsidiary is at home in California and that its contacts could be imputable to Daimler, California courts still could not subject Daimler to general jurisdiction because "Daimler's slim contacts with the State hardly render it at home there."[129] The Court then took the next few paragraphs to proffer a more precise test for general jurisdiction:

> *Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "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." With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] . . . bases for general jurisdiction." Those affiliations have the virtue of being unique—that

124 Daimler AG v. Bauman, 571 U.S. 117 (2014); Wagner, *supra* note 57, at 1098 (stating "reading *Goodyear* and *Daimler* as the death knells of doing business jurisdiction makes sense"). Still, there is some continuing relevance to the question of whether a corporation is "doing business" in a forum state. States can still require "as a statutory condition for the corporation to do business in the state, that the corporation register with state authorities and appoint an agent to accept service of process." Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEG. 377, 401 (2020); *see also* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023) (holding that a state can require companies to consent to general personal jurisdiction as a condition of doing business in that state).

125 *Daimler*, 571 U.S. at 120–21.

126 *Id.* at 123.

127 *Id.* at 136 ("The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' we rejected in *Goodyear*.").

128 Justice Sotomayor wrote separately to indicate her disagreement with the majority's theory for the denial, but all nine justices agreed that general jurisdiction should be denied here. *Id.* at 142 (Sotomayor, J., concurring in the judgment).

129 *Id.* at 136.

> is, each ordinarily indicates only one place—as well as easily ascertainable.[130]

After pinpointing these paradigms, doctrinal examples of corporate "homes" where courts could exercise general jurisdiction, the Court proceeded to identify what would *not* suffice: "[T]he exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business' . . . is unacceptably grasping."[131]

Having disposed with the "doing business" general jurisdiction once and for all—at least at its broadest reaches—*Daimler* next addressed why "doing business" general jurisdiction fails to comport with *International Shoe*.[132] First, it notes that the "continuous and systematic" phrase was used first and foremost "in *International Shoe* to describe instances in which the exercise of specific jurisdiction would be appropriate."[133] The Court then contrasts this with *International Shoe*'s original conception of general jurisdiction: "Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . *on causes of action arising from dealings entirely distinct from those activities*.'"[134]

Adding one and one together, the Court deduces that *International Shoe* "is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found."[135] Something more must be required. But what? To answer, the Court looks to *Goodyear*: "Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'"[136]

130 *Id.* at 137 (alterations in original) (citations omitted) (first quoting Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 924 (2011); and then Brilmayer, *supra* note 51, at 724).

131 *Id.* at 138.

132 *Id.* at 138–39 (quoting and extensively citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–18 (1945)).

133 *Id.* at 138 (quoting *Int'l Shoe Co.*, 326 U.S. at 317).

134 *Id.* (quoting *Int'l Shoe Co.*, 326 U.S. at 318).

135 *Id.* (quoting Twitchell, *supra* note 39, at 184).

136 *Id.* at 138–39 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

The academic outcry after *Daimler* was far stronger and more unified than after *Goodyear* regarding the decision's significance for personal jurisdiction. Most agreed with Justice Sotomayor's concurrence[137] that the *Daimler* majority (or a combination of *Goodyear* and *Daimler*) had narrowed jurisdiction far beyond what its precedents dictated.[138] But again, whether *Daimler* was invoking an old or new version of general jurisdiction, the Court here, like in *Goodyear*, focused on the right question to determine the proper bounds of general jurisdiction: whether "a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'"[139]

In the ten years since *Daimler*, the Court has continued on this path and remains homeward bound. In its next general jurisdiction case, *BNSF Ry. Co. v. Tyrrell*,[140] the Court considered two companion cases that both arose under the Federal Employers' Liability Act (FELA), a statute that allows employees to sue railroads for money damages for "on-the-job injuries."[141] Both cases were brought in Montana even though the employee-plaintiffs neither worked there nor were injured there.[142] The Court reiterated its *Goodyear*/*Daimler* test—noting its *International Shoe* roots—and explained that a court may exercise general jurisdiction only over a corporation that is "at home in the forum state."[143] The Court confirmed that the strict, doctrinal "'paradigm' forums in which a corporate defendant is 'at home' . . . are the corporation's place of incorporation and its principal place of business."[144] But it continued to permit the possibility of an "'exceptional case,' [in which] a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.'"[145] The Court held that Montana courts could not exercise general jurisdiction over the corporate

137 *Id.* at 149–60 (Sotomayor, J., concurring).

138 *E.g.*, Arthur & Freer, *supra* note 59, at 2002 (stating that in *Goodyear* and *Daimler*, "the Court made a sharp break [both] from the prevailing practice of the lower courts" and from the "principles of *International Shoe Co. v. Washington* and its progeny"); Gardner et al., *supra* note 68, at 457.

139 *Daimler*, 571 U.S. at 127 (quoting *Int'l Shoe Co.*, 326 U.S. at 318).

140 581 U.S. 402 (2017).

141 *Id.* at 404.

142 *Id.* at 404–05.

143 *Id.* at 413.

144 *Id.*

145 *Id.*

defendant because it was not incorporated there, did not maintain its principal place of business there, and was not "so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State."[146]

This theme of tracing *Goodyear*/*Daimler*'s lengthy roots for the "at home" test was echoed in the Court's most recent brush with general jurisdiction, *Mallory v. Norfolk S. Ry. Co.*— this case, however, considered a claim to general jurisdiction based neither on contacts nor the "at home" test, but instead, on consent.[147] Still, several of the justices' decisions in this case gave nods to *Goodyear*/*Daimler*'s "home" test for general jurisdiction. For example, Justice Barrett recognized the "home" theme in her dissenting opinion: "While *International Shoe* expanded the bases for specific jurisdiction, it did no such thing for general jurisdiction. On the contrary, *International Shoe* itself recognized that general jurisdiction for a corporation exists in its 'home' or principal place of business. That line has remained constant."[148]

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From this highlight reel of general jurisdiction precedent, we gather that while the Court's general jurisdiction decisions may be sparse, they built enough of a foundation to support a *theoretical* home for *Daimler*'s "at home" jurisdiction test.[149] On the other hand, the "doing

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146 *Id.* at 414. Justice Sotomayor took issue with the Court's outright holding in the "first instance" that BNSF was not "essentially at home" in Montana. *Id.* at 416 (Sotomayor, J., concurring in part and dissenting in part). She believed that the Court should have remanded this decision "to the Montana Supreme Court for it to conduct what should be a fact-intensive analysis under the proper legal framework." *Id.* (Sotomayor, J., concurring in part and dissenting in part). This supports the "fact-intensive" process for determining "essentially at home" that I recommend as part of the Two-Step test. *See infra* Section III.A.

147 Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023).

148 *Id.* at 178 n.7 (Barrett, J., dissenting) (citations omitted).

149 To be sure, I am not contending that the Supreme Court crafted a clear test for general jurisdiction—far from it. *See* Feder, *supra* note 32, at 674 & n.14 (noting that *Perkins* and *Helicopteros* "provide nothing resembling a useful test or standard for general jurisdiction" (first citing Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 213 (2011); and then Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 335 (2004))); Twitchell, *supra* note 4, at 612 ("Regrettably, however, the Court gave no guidance [in *Helicopteros*] as to how courts are to determine the scope of general jurisdiction in the future."). Instead, I am making the narrower claim that the general jurisdiction precedent, sparse as it may be, provides more support for *Daimler*'s more rigorous "at home" version of the test and provides no support for the less demanding "doing business" test. As Part I illustrates, all

business" iteration of general jurisdiction authority is built on nothing but sand (at least doctrinally speaking).[150]

Additionally, each "Era" of general jurisdiction cases added layers of support for including a fairness analysis in the general jurisdiction context. As highlighted in Part I, the consistent emphasis on Due Process and fairness principles throughout the general jurisdiction cases demonstrated the Supreme Court's overarching support for ensuring a fairness baseline for all types of personal jurisdiction. The next Part elaborates on why general jurisdiction needs a fairness analysis and what that should look like.

II
USING FAIRNESS TO FIND A MIDDLE GROUND

The "doing business" test may have been too broad, but limiting the current doctrinal "at home" test to only its two paradigm examples—a corporation's principal place of business and place of incorporation—is too narrow. Unfortunately, this paradigm-only world has been interpreted as our post-*Daimler* reality.[151] Implementing a fairness component into the general jurisdiction test is key to finding an ideal middle-ground option between the two extremes.

Assuming that the Court was right to gut the "doing business" version of general jurisdiction, since it was always too expansive to justify true general jurisdiction,[152] it does not necessarily follow that general jurisdiction is proper only in the paradigm forums: where a defendant is incorporated or has its principal place of business. *Goodyear* does not mandate this narrow view,[153] and *Daimler* takes pains to insist otherwise, emphasizing: "*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

the Supreme Court's personal jurisdiction cases that speak to general jurisdiction mandate a stronger showing than just that the defendant is "doing business" in the forum to justify all-purpose/dispute-blind jurisdiction.

150 Indeed, the "doing business" test was done away with in other contexts long ago, as expressly acknowledged in the Court's 1957 case, *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

151 *See generally supra* INTRODUCTION and Part I.

152 *See supra* Part I.

153 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) (using place of incorporation and principal place of business as *examples* of where a corporation can be "fairly regarded as at home," but never holding that these two places are a corporation's only homes).

typed those places paradigm all-purpose forums."[154] A strict "at home" test may arguably make sense for individual defendants as opposed to corporations because a real person physically cannot spread out and "dwell" in several states like a company can.[155]

If the paradigm-only version of "at home" is, in fact, the current test for general jurisdiction, then Justice Sotomayor is right that there is no home for such a rigid test in the Court's precedents.[156] There should be a middle ground where defendants can be deemed "essentially at home" to establish general jurisdiction, and *Daimler* technically allows for this. So, how do courts find that happy-medium, middle ground?

A. Ideas for Defining a Corporation's "Home or Essential Home"

Scholars and practitioners have suggested a myriad of different approaches for defining a corporation's "home." This section begins by discussing a few of these ideas and identifies reasons why courts should decline to adopt them. It concludes by proposing a solution for this query that incorporates fairness into the general jurisdiction analysis.

1. Hertz*'s "Nerve Center" Test*

In recent years, corporations have begun borrowing the "nerve center" test from the subject matter jurisdiction context and contending that this should become the general personal jurisdiction test for "home" via a corporation's principal place of business.[157] This "nerve center" test originated from the Supreme Court case, *Hertz Corp. v. Friend*,[158] where the Court held that for purposes of determining a federal court's diversity subject matter jurisdiction under 28 U.S.C. § 1332(c)(1), the statute's text referencing the corporation's "'principal

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154 Daimler AG v. Bauman, 571 U.S. 117, 137 (2014).

155 *See* Keri Martin, *What Remains of Vicarious Jurisdiction for Establishing General Jurisdiction over Corporate Defendants After* Daimler AG v. Bauman*?*, 12 SETON HALL CIRC. REV. 1, 5 (2015) ("While individuals are deemed 'at home' in the singular location of their domicile, a corporation is 'at home' in both its state of incorporation and its principal place of business, if the two are distinct." (footnote omitted)); Twitchell, *supra* note 4, at 633. *But see* Doernberg, *supra* note 70, at 280–86; Rensberger, *supra* note 29.

156 BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 416 (2017) (Sotomayor, J., concurring in part) (citing *Daimler*, 571 U.S. at 149–60 (Sotomayor, J., concurring in judgment)).

157 *See* Wagner, *supra* note 57, at 1106–09 (citing examples of corporate defendants making this argument); *see also id.* at 1106 (citing Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO STATE L.J. 101, 149 (2015)) (noting that professors Cornett and Hoffheimer predicted that this would occur).

158 Hertz Corp. v. Friend, 559 U.S. 77 (2010).

place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities" or, in other words, its "nerve center."[159]

But borrowing subject matter jurisdiction's test for "principal place of business" for diversity jurisdiction and mapping this onto the test for general jurisdiction is rife with problems.[160] For one, the Supreme Court has declined to merge the standards even when presented with clear opportunities to do so.[161] *Daimler*, for example, cited *Hertz* within its discussion of paradigm homes for general jurisdiction, but it did not adopt *Hertz*'s standard for what constitutes a "principal place of business."[162] Indeed, the Court has taken pains to specify that its application of the "nerve center" test is specifically for purposes of determining "federal diversity jurisdiction."[163] Moreover, subject matter jurisdiction and personal jurisdiction determinations answer entirely distinct questions. So, it does not make sense from a functional perspective to give these different questions the same answer for what "principal place of business" means in each context.[164]

In subject matter jurisdiction diversity cases, courts use a corporation's "principal place of business" to determine its domicile and use that marker to ensure complete diversity between all plaintiffs

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159 *Id.* at 92–93.

160 Cornett & Hoffheimer, *supra* note 157 (cautioning courts to "carefully distinguish diversity and general jurisdiction").

161 Stengel, *supra* note 15, at 296–97; Wagner, *supra* note 57, at 1115 (noting that the subject matter jurisdiction case establishing the "nerve center" test for diversity jurisdiction, "*Hertz*[,] said nothing about personal jurisdiction and *Daimler*," the general personal jurisdiction case relying on the "at home" standard, "said nothing about nerve centers"). *But see id.* at 1116 (citing sections of *Daimler* that indicate the "Supreme Court's tacit approval of the nerve center test for general jurisdiction because they imply that a corporation's principal place of business is the location from which a corporation's activities are directed").

162 Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (citing Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)).

163 Wagner, *supra* note 57, at 1116–17 (citing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325 (2016), as an example).

164 "There are strong reasons to question whether principal place of business should be given the same meaning for both diversity jurisdiction and for general personal jurisdiction." Cornett & Hoffheimer, *supra* note 157, at 148; *see also id.* at 148 n.228 (noting that creating two places of citizenship for corporations "deprives federal courts of subject matter jurisdiction in up to twice as many cases" by destroying complete diversity more often, whereas "defining general personal jurisdiction to include a corporation's principal place of business potentially doubles the number of courts that may constitutionally exercise personal jurisdiction."); Wagner, *supra* note 57, at 1100 ("Moreover, the policy rationales that underlie subject-matter jurisdiction and personal jurisdiction are not identical, so it is not simple to map *Hertz*'s rationale onto general jurisdiction.").

and all defendants.[165] Complete diversity grants federal courts subject matter jurisdiction because it allows parties to be in federal court as a neutral ground where there will be less chance of home-state biases affecting the result.[166] Notably, "complete diversity" is also a statutory requirement of section 1332(a)(1) and not a constitutional requirement.[167] And per the terms of section 1332(c), it "is legally impossible for a corporation to have more than one principal place of business."[168]

General personal jurisdiction, on the other hand, uses "principal place of business" as one way to determine where a corporation has contacts with a forum that are "so 'continuous and systematic' as to render [the defendant] essentially at home in the forum state."[169] This depiction of a corporation's "principal place of business" has no statutory counterpart that limits it to one place, like the "principal place of business" for diversity jurisdiction has in section 1332(c).[170] Nor should it; when the question is one of due process or where it would be fair for courts to exercise general jurisdiction over defendants, the answer could encompass more than one principal place of the defendant's business because foreseeably the defendant could have contacts with several states that are so continuous and systematic as to render them home in those places.

In addition to these definitional differences between general personal jurisdiction and diversity subject matter jurisdiction, several other distinctions demonstrate why using the "nerve center" test makes sense for determining a corporation's domicile for diversity subject matter jurisdiction but not for determining that corporation's "home" for general personal jurisdiction. First, these two jurisdiction types arise from different constitutional provisions: while the Fifth and Fourteenth Amendments' Due Process Clauses provide for the courts' personal jurisdiction authority, Article III, Section 2 provides for federal courts' subject matter jurisdiction authority.[171] Article III establishes a much more precise and more rigorous restraint on the courts' authority than

165 RICHARD D. FREER, CIVIL PROCEDURE 213–14, 221–25 (5th ed. 2022).

166 *Id.* at 209–10.

167 *Id.* at 214.

168 *Id.* at 223.

169 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

170 Erichson, *supra* note 57, at 86 ("Unlike the definition of principal place of business under the diversity jurisdiction statute, there is no reason why general jurisdiction cannot encompass multiple home states in special cases.") (footnote omitted).

171 *Compare* U.S. CONST. amends. V, XIV, *with id.* Art. III, § 2.

the Due Process Clauses. Article III, Section 2 allows federal courts to hear only certain types of cases and controversies, while the Due Process Clause allows all courts to hear cases so long as doing so does not "offend traditional notions of fair play and substantial justice."[172]

Second, "domicile" for subject matter jurisdiction diversity is case-specific, meaning a different configuration of plaintiffs and defendants could permit or deny a particular court to hear a case involving those parties.[173] But "home" for general personal jurisdiction is a designation that bars or allows a court to hear a case against that defendant regardless of what the configuration of parties is before that court.[174]

Third, as any first-year law student knows, subject matter jurisdiction is not waivable, while personal jurisdiction is.[175] If courts must be able to address the issue of subject matter jurisdiction *sua sponte* and without any briefing or argument from the parties,[176] then

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172 *See Int'l Shoe Co.*, 326 U.S. at 316; Stengel, *supra* note 15, at 297 & n.182 ("The principal place of business is a creature of statute. Imposing such a limitation, crafted by Congress for an entirely different purpose, upon a doctrine limited only by the Constitution constitutes judicial overreach.") (quoting Seungwon Chung, Note, *The Shoe Doesn't Fit: General Jurisdiction Should Follow Corporate Structure*, 100 MINN. L. REV. 1599, 1638 (2016)).

173 For example, if a defendant's "domicile" according to its "nerve center" is in Texas, then a suit by a New York plaintiff versus the Texas defendant would be diverse, permitting the federal court to have diversity subject matter jurisdiction over that case. But a suit by a Texas plaintiff versus the Texas defendant would lack complete diversity, so that same court would lack jurisdiction over the same defendant in this new configuration of the parties.

174 For example, if a defendant is deemed at home in Texas for purposes of general jurisdiction, then Texas courts could exercise general jurisdiction over that defendant for any suit regardless of the citizenship of any other parties involved. *See* Stengel, *supra* note 15, at 289 (noting and explaining a similar point that the "lack of subject matter jurisdiction does not have the same drastic geographic implications as lack of personal jurisdiction" because a "plaintiff who lacks access to the federal courts in Washington through diversity jurisdiction can bring the same action in Washington state court; a plaintiff who cannot acquire personal jurisdiction over a defendant in Washington is shut out of both the state and federal courts there.").

175 Bradley Scott Shannon, *Reconciling Subject-Matter Jurisdiction*, 46 HOFSTRA L. REV. 913, 929 (2018) (noting that the issue of subject matter jurisdiction "can be raised at any time by anyone—even on appeal by the court itself, or even by a party who participated actively in the action without challenging the jurisdiction . . . . Subject-matter jurisdiction, unlike territorial jurisdiction, cannot be conferred by the defendant's consent, collusion, waiver, or estoppel.") (quoting ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 268 (2001)). *But see* Jessica Berch, *Waiving Jurisdiction*, 36 PACE L. REV. 853, 899 (2016) (making a "case for waiver of constitutional subject-matter jurisdiction defects").

176 Jessica Wagner, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 VA. L. REV. 549, 561–62 (2016) ("Under the Federal Rules of Civil Procedure, however, an absence of subject matter jurisdiction is not a waivable objection, and federal courts are required to dismiss a case *sua sponte* if they lack subject matter jurisdiction.").

a single "principal place of business" for a corporation determined by its "nerve center" makes sense for determining domicile for diversity because this is readily discernable without a fact-intensive analysis, a fairness check, or arguments from the parties.

So, while the "nerve center" can serve as a starting place for determining a corporation's principal place of business or home for general jurisdiction, this should not be the *sole* basis for determining where the corporation has contacts that are so "continuous and systematic" that it would not "offend traditional notions of fair play and substantial justice" to exercise general jurisdiction in the forum.[177]

2. The "Contacts Plus" Test

Another option for finding the "exceptional case" teased by *Daimler* is the "contacts plus" test:[178]

> Under a contacts plus test, the exceptional case could be a conjunctive test requiring a certain (absolute) quantum of contacts and facts similar to *Perkins*, but not rising to the level of requiring a "surrogate" principal place of business where the paradigmatic principal place of business has been temporarily invalidated. A corporation could be "at home" in its state of incorporation, its principal place of business, and in the state or states in which the corporation's contacts satisfy the requirements of the exceptional case, an absolute contacts plus uniqueness inquiry. The contacts plus test would be useful because it would shift all contacts inquiries to the exceptional case, leaving the principal place of business inquiry for the nerve center test—simplifying the majority of general jurisdiction inquiries.[179]

This is a good start for expanding general personal jurisdiction beyond the post-*Daimler* paradigm-only approach. It has the right idea of looking to a defendant's contacts to determine where it could be considered "at home or essentially at home" in the "exceptional case" where it is neither incorporated nor has its principal place of business in the forum state.

But the "contacts plus" test, standing alone, is insufficient because it confines its application only to "exceptional cases" and expressly

177 *See Int'l Shoe Co.*, 326 U.S. at 316; RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 106.

178 Wagner, *supra* note 57, at 1112–14 (2019) (explaining what the "contacts plus" test is and discussing how it is derived from the Second Circuit's treatment of general jurisdiction post-*Daimler* in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016)).

179 *Id.* at 1113 (footnotes omitted).

rejects a consideration of fairness.[180] This fairness concept is central to the due process considerations underlying personal jurisdiction from the beginning:

> The contacts plus test uses a uniqueness inquiry, rather than a reasonableness inquiry, to demonstrate its distance from the five-factor *Asahi* reasonableness test for specific jurisdiction that Justice Sotomayor advocated to be incorporated into general jurisdiction in *Daimler*. Accordingly, the contacts plus test sits between the expansive possibilities for general jurisdiction under the doing business test and a true reasonableness inquiry on the one end and the confinement of general jurisdiction to the two paradigmatic examples on the other.[181]

Accordingly, while on the right track, the "contacts plus" test is incomplete as a test for general jurisdiction.

3. The Total Activities Test

Before the Supreme Court clarified the test for determining "principal place of business" for diversity subject matter jurisdiction in 2010's *Hertz Corp. v. Friend*, the "total activities" test was what several circuits used to determine a corporation's domicile or principal place of business in that context.[182] Under this test, courts looked "to both a corporation's 'nerve center' and its 'place of activities'—the location where the bulk of its production or service activities occur—and" chose a principal place of business between the two depending on whichever afforded a "greater weight" in the circumstances after considering "the totality of the facts."[183]

Although the Supreme Court adopted the "nerve center" test over the "total activities test" to determine a corporation's principal place of business or domicile for diversity subject matter jurisdiction, perhaps a "modified version of the Total Activities test, one that considers a corporation to have its 'principal *places* of business' at both its 'nerve center' and 'locus of operations,'" could serve as the test for determining a corporation's principal place of business or home for general personal jurisdiction:[184]

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180 *Id.* at 1113 n.148 (2019) (rejecting the addition of a fairness or "reasonableness requirement" as "a route often argued but seemingly never successful").

181 *Id.* at 1113–14.

182 Stengel, *supra* note 15, at 290 (noting that the "Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits used the Total Activities test, functionally a synthesis of the Corporate Activities and Nerve Center tests.").

183 *Id.*

184 *Id.* at 305.

> Under the Total Activities test for personal jurisdiction, the court would locate the corporation's "nerve center," usually its corporate headquarters, and then look at the extent of the corporation's business operations in other locations. If a "bulk of the corporation's actual physical operations" (1) are located in a different state than its "nerve center;" (2) are significantly larger than the corporation's operations in any other single location; and (3) constitute a substantial percentage of the corporation's total operations, then the court should find that this alternate location is the corporation's "locus of operations." The "locus of operations" need not consist of the majority of the corporation's operations; it need only consist of much more significant operations than the corporation has at any other location, including its "nerve center," and constitute a significant percentage (20 percent at a minimum) of its total operations. When this occurs, the court must determine that the corporation has two "principal places of business" and is subject to general jurisdiction at both locations.[185]

This is another strong starting point for broadening the general jurisdiction "at home" test beyond the "paradigm-only" approach and extending it to its full capacity. However, this modified "total activities" test is still too narrow and incomplete because it too, like the "contacts plus" test, does not include a fairness consideration.

The overall concept of permitting courts to designate more than one forum as "principal *places* of business" makes sense. As discussed, many post-*Daimler* cases employing the "paradigm-only" test took for granted that there could be only one "principal place of business."[186] But unlike in subject matter jurisdiction's diversity context where this is limited by statute to one forum, courts are free to exercise general personal jurisdiction wherever due process permits, or wherever such an exercise would not "offend traditional notions of fair play and substantial justice."[187] It is for this very reason that restraining these "principal places" to two forums—a corporate defendant's "nerve center" and its "locus of operations"—is still too narrow. Rather, courts should be able to deem forum states as "homes" for corporate defendants wherever their "principal *places* of business," plural, are located, including their "nerve center" and their "*loci* of operations."[188]

To reiterate, since the *Daimler* Court stated that a corporate defendant's place of incorporation and principal place of business were just "paradigm examples" of where a corporation is considered

185 *Id.* at 305–06 (footnotes omitted).

186 *See supra* Section II.A.1.

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

188 My General Jurisdiction Two-Step test labels these "essential homes" for corporations as "hubs." *Infra* Section III.A.

"at home," they should be treated as such—mere examples, not exclusive labels. So, the test for finding a corporation's "home or essential home" is not limited to identifying its paradigm examples—wherever a defendant is incorporated or has a single principal place of business. The proper test for finding a corporation's home should be wherever it has contacts with a forum state that were so "continuous" and "substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities," such that it would "not offend traditional notions of fair play and substantial justice" for the courts in that state to exercise general jurisdiction over that defendant."[189] Here again, a fairness determination must be included, given the central importance of fairness to due process.

* * *

As explained above, none of these propositions sufficiently obtain a true middle-ground approach between the overbroad "doing business" standard of old and the "paradigm-only" standard frequently applied by courts after *Daimler*. Though these tests all provide helpful guideposts, they lack the necessary flexibility that courts must have to exercise general jurisdiction over corporations in this global economy whenever it is most fair to do so.

This is where this Article's General Jurisdiction Two-Step test comes into play. Section II.B begins by explaining why general jurisdiction needs a fairness component in the first place. Then, Section II.C examines why the fairness component for general jurisdiction should differ from the specific jurisdiction fairness factors. Section II.D explains how the general jurisdiction fairness analysis would operate as distinguishable from its specific jurisdiction counterpart.

B. The Case for Fairness in General Jurisdiction—Why We Need It

Fairness has always been the backbone of personal jurisdiction ever since *Pennoyer* rooted personal jurisdiction in the Due Process Clause.[190] The United States Constitution's Amendments contain two

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[189] *See Int'l Shoe Co.*, 326 U.S. at 316, 318.

[190] "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to deter mine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." Pennoyer v. Neff, 95 U.S. 714, 733 (1878); *see, e.g.*, Martin H. Redish,

separate Due Process Clauses: The Fifth Amendment states that "No person shall be . . . deprived of life, liberty, or property without due process of law,"[191] and the Fourteenth Amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law."[192] "Process" that is "due" implies at least a baseline of fairness at a minimum. If due process is truly the foundation for personal jurisdiction and if fairness means anything, fairness should apply *throughout* personal jurisdiction cases, not just to the specific personal jurisdiction cases.[193] Indeed, in the Court's earliest general jurisdiction case, *Perkins*, the Court noted that the essence of its task was to ensure "general fairness to the corporation."[194]

Thus, the general jurisdiction test needs some consideration of fairness. Justice Sotomayor advocated this general premise in her concurrence in *Daimler*.[195] The majority ignored Sotomayor's calls for a consideration of fairness in a footnote, stating that conducting a fairness determination "[w]hen a corporation is genuinely at home in the forum State, . . . would be superfluous."[196] But this conclusory statement should not prevent the inclusion of fairness into the general jurisdiction analysis because it is both wrong and nonbinding dicta.[197]

Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court, 22 RUTGERS L.J. 675 (1991); Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1287–89 (2017) (highlighting Pennoyer's "entirely defensible" and central holding to identify "due process as a limit on state jurisdiction").

191 U.S. CONST. amend. V.

192 *Id.* amend. XIV. The references here to both Due Process Clauses are merely to identify the clauses and make a textual point about the plain language of both. This Article does not take a stance on whether these clauses should be interpreted the same way for personal jurisdiction purposes. *See* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 262–65 (5th Cir. 2022) (en banc) (Elrod, J., dissenting) (disagreeing with the en banc majority's application of Fourteenth Amendment case law to a Fifth Amendment due process case), *cert. denied sub nom.* Douglass v. Kaisha, 143 S. Ct. 1021 (2023).

193 Megan M. La Belle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 EMORY L.J. 781, 846–47 (2023).

194 *See* Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 445 (1952); Cornett, *supra* note 22, at 580 ("The Court characterized its duty as determining a standard ensuring 'general fairness to the corporation.'").

195 Daimler AG v. Bauman, 571 U.S. 117, 151, 156 (2014) (Sotomayor, J., concurring).

196 *Id.* at 139 n.20.

197 *Id.* at 144–45, 144 n.1 (2014) (Sotomayor, J., concurring) (indicating that she would "decide this case under the reasonableness prong" and noting that "Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context") (citing Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996)); Nash, *supra* note 25, at 492 (pointing to the Court's inclusion of "exceptional case[s]" as an indication that "the reasonableness factors should apply at least in those

While the fairness calculation will be an easy call in some cases, other cases could and would arise where the fairness question is a closer call—perhaps one could label these "exceptional cases." Also, after years of lying dormant, fairness is gaining steam in personal jurisdiction cases, as indicated by the Court's *Ford* decision in 2021 (admittedly a specific personal jurisdiction decision).[198] This case brought fairness considerations back into the limelight after years of being near-completely ignored.

The indication from *Daimler* that companies could be "essentially at home" somewhere other than their place of incorporation and principal place of business indicates by that very possibility that there should be a fairness calculation as part of the determination as to whether a court has general jurisdiction. *Daimler* itself is a product of Justice Ginsburg's steadfast commitment to fairness throughout her personal jurisdiction jurisprudence.[199]

Moreover, using fairness in the general jurisdiction context provides a method for determining where a corporate defendant could be considered "at home" outside the two paradigm examples identified in *Daimler*. As explained previously, the Court has been careful to carve out this non-paradigm method of establishing a corporate defendant's home,[200] and a fairness process will help courts and scholars alike to identify exceptional cases.

Some may contend that using fairness to broaden general jurisdiction to include more exceptional cases might lead to this exception swallowing the rule, but perhaps this eventuality would be a welcome outcome. After all, *Perkins*, the first general jurisdiction case,

cases"); *see infra* notes 248–50, and accompanying text. *But see* Brown v. Lockheed Martin Corp., 814 F.3d 619, 630 (2d Cir. 2016) (agreeing with *Daimler*'s contention that a fairness consideration in general jurisdiction would be "superfluous" and declining to conduct such an inquiry); Fidrych v. Marriott Int'l, Inc., 952 F.3d 124, 137–38, 137 n.2 (4th Cir. 2020) (same).

198 Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021); Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 585 (2022) (noting that *Ford* "brings hope that the Court may be invigorating the role of fairness or reasonableness, which it had long subjugated to other considerations in the *International Shoe* canon.").

199 *See Personal Jurisdiction — General Jurisdiction —* Daimler AG v. Bauman, 128 HARV. L. REV. 311, 316, 320 (2014) (explaining that the "at home" test may appear "rigid" at first glance, a "[c]loser examination of *Daimler*, however, reveals that Justice Ginsburg is not operating from formalist or ideological conceptions of when jurisdiction ought to be exercised" but instead from a framework that "focuses fundamentally on fairness to both parties").

200 *See supra* notes 16–17 and accompanying text.

was described by the *Daimler* majority as the quintessential "exceptional case," yet prior to *Daimler*, *Perkins* was never intended to be seen as "exceptional." On the contrary, *Helicopteros*, the Court's only other general jurisdiction case pre-*Goodyear*/*Daimler*, referred to *Perkins* as the "textbook case" for general jurisdiction. Perhaps fairness would help shift *Perkins* back to its original status as a textbook case.[201]

C. General v. Specific: The Need for Different Fairness Analyses

General jurisdiction needs a fairness analysis, but it should not just borrow wholesale from specific jurisdiction's five fairness factors.[202] General jurisdiction needs its own independent fairness process because general and specific grants of personal jurisdiction are meaningfully distinguishable in two key respects: The two jurisdictional types differ in (1) kind and in (2) scope or scale.

First, general and specific jurisdiction are different *kinds* of personal jurisdiction. On the one hand, general grants a sweeping authority for courts to hear, as Professor Twitchell calls it, dispute-blind cases—cases that have nothing to do with the relationship between the case and the defendant's forum contacts.[203] On the other hand, specific grants a court jurisdiction only over disputes that bear a sufficient relationship to the defendant's contacts with the forum.[204] Because courts grant different types of personal jurisdiction, specific or general, these two separate types need two separate tests for whether or not jurisdiction is fair.

Relatedly, the *scope* and *scale* of the jurisdictional grant differs drastically between specific and general jurisdiction. While a grant of general jurisdiction is sweeping and can encompass all cases regardless of subject matter, a grant of specific jurisdiction is a case-by-case determination and is a much narrower grant. For example, a court granting *specific* jurisdiction over defendant Widget Corp. is exercising personal jurisdiction only because the plaintiff's claims against Widget in that case are sufficiently related to Widget's contacts with the forum state. But a court granting *general* jurisdiction over Widget is

201 Cornett, *supra* note 22, at 588 ("The only example of such an exceptional case given by the Court was *Perkins*, which the Court termed the 'textbook case' of general jurisdiction. Thus, through rulification, the 'textbook case' of the 'continuous and systematic contacts' standard has become the exception to the new rule.").

202 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

203 Twitchell, *supra* note 39, at 614–15.

204 *Id.*

exercising personal jurisdiction over Widget regardless of the subject of the plaintiff's claims or their relatedness to Widget's forum contacts.

Due to general jurisdiction's sweeping scale, a court's grant in one case of general jurisdiction over a defendant may have an informal collateral estoppel effect over all other cases against that defendant in that forum.[205] This can be observed with our Widget Corp. example: Once a court has determined in one case that Widget is "at home" in the forum such that it can exercise general jurisdiction over Widget, then, at least arguably, plaintiffs in all future cases against Widget can cite that first case as persuasive authority for haling Widget into court in the forum where Widget has been deemed "at home" already. In contrast, this potential collateral estoppel effect would not occur with a mere grant of specific personal jurisdiction because of the case-by-case and even claim-by-claim nature of that type of personal jurisdiction.

D. Separating Specific Jurisdiction Fairness from General Jurisdiction Fairness

To understand how fairness should operate within general jurisdiction, it is important to first observe how fairness works in specific personal jurisdiction. With that established as a backdrop, the next point to clarify is the contours of the fairness query in a general jurisdiction context. Understanding the differing questions involved in the two types of personal jurisdiction indicates why general jurisdiction cannot just copy, paste, and apply the specific personal jurisdiction fairness factors.

1. Specific Personal Jurisdiction Fairness Factors

In specific personal jurisdiction cases, courts typically determine whether or not the defendant has minimum contacts with the forum. Then, courts turn to the fairness question by analyzing five factors to determine whether a court can exercise specific personal jurisdiction

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205 *See* Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 381 n.158 (1992) ("If one court finds that a particular defendant's forum activities are sufficient to impose general jurisdiction, that defendant may be precluded from contesting general jurisdiction in subsequent cases. Principles of collateral estoppel prevent parties from relitigating factual determinations actually litigated in a prior suit.").

without offending traditional notions of fair play and substantial justice.[206]

The five factors include the following:

(1) the "burden on the defendant,"

(2) "the forum State's interest in adjudicating the dispute,"

(3) "the plaintiff's interest in obtaining convenient and effective relief,"

(4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and

(5) "the shared interest of the several States in furthering fundamental substantive social policies."[207]

Although these fairness factors may sound like a series of unique and different considerations, courts essentially ask, "how does everyone in the world feel about how fair it is for this court to exercise personal jurisdiction over this defendant in this case? Defendant? Forum state? Plaintiff? Interstate judicial system? States?" In *Daimler*, the Court acknowledged an additional international component that considers interests of international forums.[208] So, the specific personal jurisdiction fairness component is just a series of factors asking how everyone in the world feels about whether this exercise of personal jurisdiction over this defendant and in this particular case is fair.

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206 *E.g.*, Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 113–14 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 470 (1985); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 880 (2011); *see also* Edward D. Cavanagh, *General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 ME. L. REV. 287, 318 (2016) ("[C]ourts have traditionally analyzed contacts before reaching the fairness issue simply because it is more efficient to do so. In *Burger King v. Rudzewicz*, the Court held that where the minimum contacts prong of the *International Shoe* test has been met, the exercise of personal jurisdiction is presumptively fair.").

207 *World-Wide Volkswagen*, 444 U.S. at 292. In addition to these well-known five, *Daimler*'s footnote 20 acknowledged a sixth factor ostensibly originating from *Asahi*'s consideration of the "procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." Daimler AG v. Bauman, 571 U.S. 117, 139–40 n.20 (2014) (quoting Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 115 (1987) (internal quotation marks omitted)).

208 Daimler, 571 U.S. at 139 n.20; *see supra* note 207; *see also* Concepts NREC, LLC v. Xuwen Qiu, 662 F. Supp. 3d 496, 519 (D. Vt. 2023) ("When the entity that may be subject to personal jurisdiction is a foreign one, courts consider the international judicial system's interest in efficiency and the shared interests of the *nations* in advancing substantive policies." (quoting Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 99 (S.D.N.Y. 2015)); *e.g.*, Pro Axess, Inc. v. Orlux Distrib., Inc., 428 F.3d 1270, 1281 (10th Cir. 2005) (considering the "extent to which an exercise of personal jurisdiction by" the forum state over a French defendant would interfere "with France's sovereignty").

Over the years, the specific personal jurisdiction fairness component has gotten the short end of the stick.[209] To the extent that the fairness consideration ever played a crucial role in determining specific personal jurisdiction, that reign proved short.[210] The Supreme Court's specific personal jurisdiction cases from the 1980s instigated a clear focus on the minimum contacts portion of *International Shoe*'s test, relegating fairness to an afterthought.[211] *Burger King Corp. v. Rudzewicz* is the prime example of the Supreme Court's gradual retreat from the fairness aspect of specific personal jurisdiction.[212] The lower court in *Burger King* had held that "fairness" was the touchstone,[213] but the Supreme Court held to the contrary that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."[214] Only after a court decides whether "a defendant purposefully established minimum contacts," will it then consider those contacts "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[215] The high priority and preference of minimum contacts compared to the fairness factors was so pronounced, that the *Burger King* Court effectively created a presumption in favor of finding specific personal jurisdiction whenever sufficient minimum contacts existed.[216]

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209 In other words, while minimum contacts, like "Barbie," are "Everything," the fairness factors are "just Ken." *See* BARBIE (Warner Bros. Pictures 2023).

210 The height of this personal jurisdiction version where fairness dominated manifested in only one Supreme Court case: *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957). *See also* Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 217–19, 230–32, 241–42 (2015).

211 Vitiello, *supra* note 210, at 229–35, 241–43 (noting that the specific personal jurisdiction version that emerged from its 1980s cases cited "the contacts part of the due process test as a threshold question to the assessment of reasonableness").

212 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

213 *Id.* at 470.

214 *Id.* at 474.

215 *Id.* at 476.

216 *Id.* (noting that defendant "manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well"); *see* Cavanagh, *supra* note 206, at 318.

Still, fairness limped along, never dropping off entirely. Justices Brennan,[217] O'Connor,[218] Sotomayor,[219] and Kagan[220] have expressed a clear commitment to revive the fairness piece of personal jurisdiction. Perhaps fairness has been quietly "central" all along.[221] And recent specific personal jurisdiction cases continue to breathe new life into the role of fairness.[222]

2. The Right Question for General Jurisdiction Fairness

While all the highs and lows of the fairness factors were playing out on the specific jurisdiction stage, fairness in the general jurisdiction context stayed radio silent. Presupposing that fairness needs to be injected into all personal jurisdiction contexts, including general jurisdiction,[223] this section takes the next step and proposes a solution for *what* the general jurisdiction fairness process should look like.

As discussed previously, the general personal jurisdiction fairness process should be narrower than its specific jurisdiction counterpart because deeming jurisdiction fair would permit a much broader grant

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217 Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 570 (2012) (noting that Justice Brennan proffered a sliding scale to keep fair play relevant so long as some contacts existed, even if those were minimal. If the Court allows strong fair play to make up for weak contacts, this makes it "impossible to dismiss a case without at least glancing at the fairness factors.").

218 Justice O'Connor's plurality decision in *Asahi* indicates her continued commitment to fairness: The Due Process Clause, Justice O'Connor writes, precludes jurisdiction in "circumstances that would offend 'traditional notions of fair play and substantial justice.' . . . A consideration of these factors . . . clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce." Asahi Metal Indus. Co. v. Superior Ct. of California, 480 U.S. 102, 113–14 (1987).

219 BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 417 (2017) (Sotomayor, J., concurring); Daimler AG v. Bauman, 571 U.S. 117, 151 (2014) (Sotomayor, J., concurring).

220 Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 360, 363–65, 367–68 (2021) (holding that specific personal jurisdiction exists and focusing on overall fairness considerations rather than minimum contacts in reaching this conclusion).

221 Jeffrey L. Rensberger, *The Elements of* International Shoe*: Reuniting Contacts and Fair Play in Personal Jurisdiction*, DRAKE L. REV. (forthcoming), (reading Justice Scalia's opinion in *Burnam* as suggesting "that fair play is the central question under *Shoe*, occupying a more fundamental position than the question of contacts").

222 J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 903 (2011) (Ginsburg, J., dissenting) (noting that a "modern approach to jurisdiction" gives "prime place to reason and fairness"); Rensberger, *supra* note 221 (noting the gradual fusion of fairness with minimum contacts in determining specific personal jurisdiction).

223 *See supra* Section II.B; La Belle, *supra* note 193. *See also* Allan Stein, *The Meaning of Essentially at Home in* Goodyear Dunlop, 63 S.C. L. REV. 527, 536–37 (2012) (discussing the application of fairness to the general jurisdiction context).

of jurisdiction for these "essentially at home" cases.[224] Still, there will be some carryover of fairness themes across both variations of personal jurisdiction.

Accordingly, specific jurisdiction's fairness factors cannot just be transplanted onto general personal jurisdiction. The main reason why some specific personal jurisdiction factors will not work well in the general personal jurisdiction world is that a defendant who passes the Step 1 test of finding a "home" in the forum state will most likely pass specific personal jurisdiction's fairness test because it is primarily centered around a consideration of whether exercising personal jurisdiction is too burdensome on the defendant. In contrast, for general jurisdiction this question is not the most significant factor. Generally, once a defendant is home in a forum state, it is not burdensome to exercise personal jurisdiction over that defendant.[225] So, the general personal jurisdiction fairness test should not focus on the question, "is it too burdensome for the defendant?" like in specific personal jurisdiction. But it instead should ask, "would it be fair overall for the forum state to exercise this sweeping level of personal jurisdiction over this defendant?"

At the outset, it is important to identify the real question posed by considering fairness in the general personal jurisdiction context: Would a forum state's exercise of general personal jurisdiction over a defendant who is "at home" (incorporated or has a principal place of business in the forum)[226] or is "essentially at home" (for exceptional cases where the defendant can be "home" somewhere other than *Daimler*'s paradigm two examples)[227] "offend traditional notions of fair play and substantial justice"[228] and thereby violate the defendant's Due Process rights?

This question is rooted in *International Shoe*'s foundational language identifying "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."[229] This language in *International Shoe*—a case later labeled as a specific personal

[224] *See supra* Sections II.C and II.D and accompanying text.

[225] Daimler AG v. Bauman, 571 U.S. 117, 139 n.20 (2014).

[226] *Id.* at 137–38; Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).

[227] *Daimler*, 571 U.S. at 127; *Goodyear*, 564 U.S. at 919.

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

[229] *Id.* at 318.

jurisdiction case—identified the contours for general personal jurisdiction. For general personal jurisdiction to exist and be fair, a defendant's contacts with the forum must be so continuous and systematic that they justify permitting dispute-blind/general jurisdiction.

III
GENERAL JURISDICTION TWO-STEP TEST: HOME AND FAIRNESS

This final section proposes the General Jurisdiction Two-Step as a solution both (1) for finding the middle ground between the old "doing business" general jurisdiction test and the new paradigm-only application of *Goodyear*/*Daimler*'s "at home" test, and (2) for incorporating a fairness consideration into the general jurisdiction process.[230]

1. STEP ONE: Is the Forum State Also the Location of Any of the Corporate Defendant's "Homes"?

Goodyear gives good guidance on how to answer this question: "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."[231] *Daimler* confirms that the "paradigm" home for a corporate defendant is its "place of incorporation and principal place of business."[232] However, *Daimler* expressly notes that these are not the "*only*" forums where "a corporation may be subject to general jurisdiction."[233] Its holding does "not foreclose the possibility that in an exceptional case . . . 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."[234]

So, is the corporate defendant "home" in the forum because that is where the defendant's principal place of business and/or its place of incorporation is located (the two paradigm homes)? Or is the corporate defendant "essentially at home" in the forum because its operations

230 Further research is warranted to test this General Jurisdiction Two-Step in practice. Practitioners are best positioned to conduct this by using the Two-Step as the structure for asserting general jurisdiction over defendants in non-paradigm forum states.

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

232 *Daimler*, 571 U.S. at 137.

233 *Id.*

234 *Id.* at 137, 139 n.19.

there are "so substantial and of such a nature as to render the corporation at home in that State"?

If the court attempting to exercise general jurisdiction shares the same forum with one of the two paradigm "homes" for that corporate defendant, *Daimler* holds that this court can exercise general jurisdiction. But if the court is not in the same forum as those two paradigms, it should consider measurable data to determine whether the defendant has taken sufficient steps such that it has *made itself at home* within that forum.[235] For example, courts should consider the following metrics:

(1) *Physical Footprint/and Main Assets*—Does the forum state contain most of the defendant's real property or the most brick-and-mortar facilities? Where does the company keep its most expensive stuff most of the time?

(2) *Employees' Home*—Where are the employees domiciled (both leadership and the general work force)?

(3) *Manufacturing Home*—Is the forum state where the company's products are built and are imported from?

(4) *Defendant's Public Image*—How does the company characterize itself?[236]

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[235] Note that all the following metrics resonate with the purposeful availment consideration in specific personal jurisdiction. If a defendant is subject to the benefits of operating within a forum state, it should likewise be subject to the accompanying burdens. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). The idea for general jurisdiction is that, if a corporate defendant is making itself at home in the forum, that forum, respectively, should be able to exercise general jurisdiction over that corporation. *See* Brilmayer et al., *supra* note 51, at 732–33, 780–81. The Court captured this well in *Milliken v. Meyer*:

> The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. 'Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable' from the various incidences of state citizenship. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates.

Milliken v. Meyer, 311 U.S. 457, 463–64 (1940) (citations omitted).

[236] To be clear, the defendants characterizing themselves as home somewhere (*i.e.*, Apple proclaiming that it's a Silicon Valley corporation), would not shield them from liability from other places where they are actually at home—principal place of business or other places where they have the greatest physical footprint, etc.—but it operates as a factor that could lead to them being haled into court under a general jurisdiction theory in *another* place, beyond the paradigm examples from *Daimler*. *But see* Sarkisian v. OpenLocker Holdings, Inc., 700 F. Supp. 3d 105, 109 (S.D.N.Y. 2023) (rejecting a plaintiff's argument that a CEO's social media statements claiming New York as his home provide sufficient evidence of that fact for general jurisdiction). Another consideration that could fit within this metric is whether and to what extent the corporate defendant participates in the political

(5) *Taxes*—Does the corporate defendant pay a significant tax sum to the forum state? Taxpayer status for individuals is an indicator of where they are at home, so it seems fair to use this for corporations as well.[237]

(6) *Money*—Are most of the corporate defendant's expenditures being spent in the forum state? And where does the corporate defendant store most of its money?[238]

A key benefit of these considerations is that they are measurable and can be ascertained from accessible, public sources. Indeed, all you need is internet access and a library card to access most of the key information.[239] Courts can consider these data points when determining a defendant's home—that alleviates some discretionary and predictability concerns because the data will either show that the corporate defendant has engaged in these substantial contacts, or it will not.[240]

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process within the forum state. *See* Brilmayer et al., *supra* note 51, at 742–43 (noting that a corporation "may lobby, advertise, make campaign contributions, and exert other types of political pressure where they have a substantial enough stake in the political process to justify such activity" and suggesting that a forum state may be justified in exercising general jurisdiction over a corporate defendant if their "level of activity rises to the level of activity of an insider").

237 Similar to personal jurisdiction, the power to tax has a "nexus" requirement. United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998). In fact, early personal jurisdiction cases cited tax cases to support the premise underlying both the taxing power and personal jurisdiction that the "state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties." *Milliken*, 311 U.S. at 463 (citing Lawrence v. State Tax Comm'n, 286 U.S. 276, 279 (1932)).

238 Admittedly, significant research must still be undertaken to consider the details and contours of each of these factors and to analyze potential implications that their implementation may raise, including the scope of judicial resources that could be required to litigate a more fairness-based, wholistic general jurisdiction test. But such research is beyond the scope of this Article. A comprehensive picture—including the evidentiary, practical details necessary for each category and a depiction of how the Two-Step test would play out in a variety of sample cases—is reserved for a future piece.

239 The Tesla example discussed in the Introduction and Conclusion illustrate how Tesla as a defendant could use public information to determine whether it was sufficiently present or "home" in a forum state for that forum to exercise general jurisdiction and whether the exercise of such jurisdiction would be fair. *See, e.g.*, *infra* CONCLUSION (Tesla example). For an example of how a library card would enable defendants and courts to discern this information, the Houston Public Library's Research tool includes a link to A-Z Databases, which includes access to a database entitled Data Axle Reference Solutions, which provides information for most companies regarding their activities throughout the United States. *A-Z Databases*, HOUS. PUB. LIBR., https://houstonlibrary.org/az/databases?a=d [https://perma.cc/9ARB-LHCV] (last visited Feb. 22, 2024).

240 Here too, further analysis and examination of my test is warranted to study the real-world impact on the predictability question. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (noting that "[s]imple jurisdictional rules . . . promote greater predictability"). Future

In looking to these metrics to see if the defendant is "essentially at home" in the forum state, courts would identify the corporation's "hubs" that emerge from the data. For example, if a company spreads out its expenditures evenly among most states, but only manufactures its products in one or two states, those "manufacturing hubs" could indicate that the company is "essentially home" in those states. Or if a company is touting one state as its "home" on social media or on its website, even though that state is not one of its paradigm homes, this could show that the corporation itself believes it is "essentially at home" in this state. The theory of labeling any of these "hubs" as "homes" is that if the defendants are using the benefits of the forum state such that they are making themselves at home there,[241] they should be subject to the burdens that come along with "moving in" there, including general jurisdiction.[242]

Another key feature of searching for these hubs is that the general jurisdiction reach within a defendant's hubs will be smaller than its reach under "doing business." The test is still relative to defendants' contacts in other states and elsewhere as discussed in *Daimler* and *BNSF* because it allows jurisdiction only in the "hubs" that emerge as essential homes for the defendants, not everywhere that the defendant is doing business.[243] In the same vein, this "hub" check also aligns with sovereignty concerns and permits general jurisdiction only in states where defendants are the most connected.[244]

If the answer to Step One is "yes," meaning the forum state serves as a potential "home" or "essential home" for the corporate defendant, then the court would proceed to Step Two.

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work could examine these implications as well. But to that end, "[i]f the goal of the Court was to ensconce rule-like tests so as to maximize jurisdictional predictability and minimize jurisdictional disputes, then in this sense *Goodyear* and *Daimler* ran counter to that goal." Nash, *supra* note 25, at 502.

241 For example, a corporation should be subject to general jurisdiction in a forum state even if that state is not where it was incorporated or where it has its headquarters when that corporation does some combination of the following: owns most of their real property in the forum, stores most of their assets there, keeps their profits in the forum state's banks and uses that forum as a "home" for their money, manufactures a majority of their goods for sale in the forum state, and claims the forum state as their "home" for advertising or image purposes.

242 *See Milliken*, 311 U.S. at 463.

243 BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 414 (2017) ("[A] corporation that operates in many places can scarcely be deemed at home in all of them." (quoting *Daimler*, 571 U.S. at 137, 140 n.20)).

244 Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) ("One State's 'sovereign power to try' a suit, we have recognized, may prevent 'sister States' from exercising their like authority.").

2. STEP TWO: Is the Court's Exercise of General Jurisdiction Fair, or Would it Offend Traditional Notions of Fair Play and Substantial Justice?

Step Two is a "fairness check." To be clear, courts answering "yes" to Step One should *always* proceed to Step Two regardless of how Step One arrived at a "yes." So, whether the forum is one of the *paradigm homes* where the defendant is incorporated or has its principal place of business, or the forum is where the defendant has *made itself at home* according to the metrics outlined above in Step One, the court would proceed to Step Two's fairness question.

Fairness in general jurisdiction is similar but not identical to the fairness question posed in the specific personal jurisdiction context.[245] Accordingly, a general jurisdiction fairness analysis should examine the following three questions:

(1) First and foremost, does the forum state have an interest in hosting cases against this defendant such that it makes sense and is fair to exercise general jurisdiction?

(2) Second, is the forum's exercise of general jurisdiction fair for the defendant?[246]

(3) Finally, are there any other judicial efficiency or social utility considerations that would make the exercise of general jurisdiction over this defendant impermissibly unfair?

The first general jurisdiction fairness question asks whether the forum state has an interest in hosting the case. The concept of general jurisdiction is that courts can hear cases about any claims, regardless of if those claims are related to a defendant's contacts with the state. But just because that is the full extent of general jurisdiction's potential scope, it does not mean that this expansive exercise is always fair. This consideration in Step Two posits that, if a forum state cannot demonstrate any interest in a case, this fact weighs against the exercise

245 *See supra* Section II.C and accompanying text.

246 While consideration of the defendant's burden is widely considered to be the most important of the five specific fairness factors, with general jurisdiction, this takes a back seat to the first factor regarding the forum state's interest. *See Ford Motor Co*., 592 U.S. at 360. Also, note that the first factor here asks whether the forum state has an interest in the defendant itself not just an interest in that particular case, so although it may look the same as the second specific jurisdiction fairness factor, it poses a different question. *See supra* Section II.D.1 and accompanying text.

of general jurisdiction as unfair even if a defendant is "home" within its borders.[247]

The second question asks whether haling the defendant into the forum state for this expansive all-purpose, dispute-blind general jurisdiction is fair. Significantly, this question is not posed in the negative: It asks not whether exercising general jurisdiction is *unfair* but asks whether it *is fair*. This is because this fairness component is meant to act as a boost for potential homes, especially any homes that fall outside the *Daimler*'s paradigms. In *Daimler*, Justice Ginsburg notes that where "a corporation is genuinely at home," a fairness "inquiry would be superfluous."[248] This is a half-truth, in that it would not be unfair to defendants for courts to exercise general jurisdiction over them in their paradigm "homes." But when the question is asked in the positive—"is it fair?"—the answer could tip the balance in favor of exercising general jurisdiction in "exceptional cases" where the defendant is "essentially home" somewhere other than their paradigm homes. This "concept of reciprocal fairness" is already a "touchstone principle of due process in this field."[249] Asking whether exercising general jurisdiction would be fair to the defendant serves both to expand the paradigm-only version of general jurisdiction (when considering whether a defendant can be deemed "essentially home" somewhere other than the paradigm examples) and to limit general jurisdiction to make sure a defendant is not merely "doing business" in a forum state but that it is doing *enough* business such that its contacts are so systematic and continuous to make defendant "at home" in the forum.[250]

The third and final factor gives courts the opportunity to voice any other fairness concerns with exercising general jurisdiction. It is intended to serve as a "catch-all" question similar to the public and

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247 This fairness consideration involving the forum state's interest applies only to federal courts exercising general jurisdiction under a Rule 4(k)(1)(A) basis.

248 *Daimler*, 571 U.S. at 139 n.20.

249 *Id.* at 151 (Sotomayor, J., concurring).

250 Notably, the Two-Step test makes it more difficult for plaintiffs to establish a court's general jurisdiction than the "doing business" test in both steps: Step One looks to measurable components to observe which central "hubs" emerge as potential "homes," and again in Step Two, the fairness check ensures that defendants are doing *enough* business consisting of contacts so continuous and systematic to justify general jurisdiction. *See supra* Part III; *see also* Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 263–64 (2014).

private considerations in common law venue or *forum non conveniens*.[251]

Integrating a fairness component into the test for general jurisdiction is consistent with the Court's opinions in *Goodyear* and *Daimler* because it applies the central, theoretical theme underlying all jurisdictional opinions since *International Shoe*: Courts may exercise personal jurisdiction so long as this exercise of authority "be found reasonable and just according to our traditional conception of fair play and substantial justice."[252] The Supreme Court's most recent general jurisdiction decision, *Mallory v. Norfolk S. Ry. Co.*, underscores this commitment to fairness: "*International Shoe* itself eschewed any mechanical or quantitative test and instead endorsed a flexible approach focused on the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[253]

CONCLUSION

Like Inigo Montoya,[254] we conclude by going back to the beginning to ask whether California courts applying the General Jurisdiction Two-Step can exercise general jurisdiction over Tesla Inc. Recall that California courts using the paradigm-only version of *Goodyear/ Daimler* would likely decline to exercise general jurisdiction over Tesla because Tesla is neither incorporated nor has its principal place of business in California.[255] But neither *Daimler* nor due process dictates a result so automatic.

California courts should assert general jurisdiction over Tesla, Inc., despite the absence of a paradigm-home there because California stands out as a major "hub" and a natural "home" for Tesla. First, Tesla owns and operates far more Superchargers, stores, and galleries in

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251 *See* FREER, *supra* note 165, at 310 n.55, 321–22 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509–11 (1947)).

252 Int'l Shoe Co. v. Washington, 326 U.S. 310, 324 (1945) (citations and internal quotation marks omitted).

253 Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 139 (2023) (citations and internal quotation marks omitted). *Mallory* also endorsed the overall effect that a fairness consideration would have on general jurisdiction in that it would broaden the current paradigm-only approach: "Unquestionably, too, *International Shoe* saw this flexible standard as expanding—not contracting—state court jurisdiction . . . . The immediate effect of [*International Shoe*] was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants." *Id.* (citations and internal quotation marks omitted).

254 THE PRINCESS BRIDE (20th Century Fox 1987).

255 *See supra* note 21 and accompanying text.

California than in any other U.S. state.[256] Second, Tesla has more than 47,000 employees in California and has created more than 80,000 California jobs—thousands of these stemming from "$1.6 billion in expenditures with California suppliers."[257] Third, while Texas might be listed as the location of the principal executive office,[258] Tesla's California factory produces 400,000 more cars every year than Tesla's Texas factory.[259] Fourth, Tesla proudly touts its California footprint.[260] Fifth, in one year alone, Tesla paid "approximately $400 million" in California "state and local taxes."[261] Sixth, Tesla sells far more inventory in California than in any other state with total annual California sales exceeding sales in *all* other U.S. states by more than 303,000.[262]

Tesla's California presence goes far beyond merely "doing business" there, yet a strict, paradigm-only interpretation of *Goodyear*/*Daimler*'s "at home" test would find no general jurisdiction for California courts over Tesla absent "exceptional" circumstances. Still, because California serves as a potential "home" for Tesla based on an application of Step One's metrics, the court should move to Step Two and determine whether a California court's exercise of general jurisdiction is fair. This question should be answered in the affirmative

256 Tesla has sixty-two store locations in California, more than twice as many stores as it has in its second-place states, Texas and Florida, with twenty-six and twenty-five Tesla stores respectively. *U.S. Tesla Stores & Galleries*, TESLA, https://www.tesla.com/findus/list/stores/United%20States (last visited Feb. 22, 2024) (showing store and gallery locations). Of the 2,128 Tesla Superchargers in the United States as of January 15, 2024, the state "with the most . . . Supercharger[] locations in the US is California, with 426 locations, which is about 20% of all Tesla Superchargers" in the United States. *Number of Tesla Superchargers Locations in the United States in 2024*, SCRAPEHERO (Jan. 15, 2024), https://www.scrapehero.com/location-reports/Tesla%20Superchargers-USA/ [https://perma.cc/5J7B-LHFP]; *Superchargers - United States*, TESLA, https://www.tesla.com/findus/list/superchargers/United%20States (last visited Feb. 22, 2024) (listing Supercharger locations).

257 *Tesla's California Footprint*, TESLA (Jan. 3, 2023), https://www.tesla.com/blog/teslas-california-footprint.

258 Tesla, Inc., Annual Report (Form 10-K), *supra* note 21, at 1.

259 Mark Kane, *Tesla Production Sites by Model Assignment, Capacity: January 2023*, INSIDEEVS (Jan. 28, 2023, 10:27 AM), https://insideevs.com/news/634391/tesla-production-sites-model-assignment-january2023/ [https://perma.cc/7VXL-H72F] ("Tesla's Fremont factory has the potential to produce up to 550,000 Model 3/Model Y a year, plus up to 100,000 refreshed Model S/Model X.," and "Fremont is running at its peak." Tesla Gigafactory in Austin, Texas has the "capacity" to produce "over 250,000 [Model Y cars] annually.")

260 *Tesla's California Footprint*, *supra* note 257.

261 *Id.*

262 *Tesla Sales by State*, *supra* note 8.

because (1) California has a significant interest in hosting cases against Tesla, given Tesla's giant California footprint; (2) this exercise of all-purpose jurisdiction would be fair for Tesla, again, considering Tesla's pervasive involvement in California from its inception; and (3) no judicial efficiency or social utility considerations would bar the exercise of general jurisdiction here.[263]

Disagreements abound regarding personal jurisdiction, but all seem to agree that the law in this area is a mess. First-year law students finishing their personal jurisdiction sections in Civil Procedure are, like Justice Gorsuch, left "with even more questions than [they] had at the start."[264] The General Jurisdiction Two-Step represents an attempt to "mak[e] sense of [the Court's] personal jurisdiction jurisprudence" and to help litigants and courts "sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history."[265]

263 *Tesla's California Footprint*, *supra* note 257.

264 Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 384 (2021) (Gorsuch, J., concurring).

265 *Id.*