Tennessee Law Review

Volume 82
Issue 4 *Summer 2015*

Article 4

2015

DAIMLER AND THE JURISDICTIONAL TRISKELION

Zoe Niesel

DAIMLER AND THE JURISDICTIONAL TRISKELION

ZOE NIESEL*

Twice in the past three years, in Goodyear Dunlop Tires Operations, S.A. v. Brown *and* Daimler AG v. Bauman, *the Supreme Court articulated a new landscape of general personal jurisdiction; namely, exercises of dispute-blind jurisdiction will be based on a determination of whether a corporation is "at home" in the jurisdiction, not on whether the corporation had continuous and systematic contacts in the forum state. The Court's test was further explained in terms of three different fora: where the corporation is incorporated, where it maintains its principal place of business, and where there are unique circumstances suggesting that the corporation is truly "at home." Unfortunately, the Court failed to articulate an underlying policy that bound together the three bases of general jurisdiction, and it refused to clarify what types of unique situations might give rise to general personal jurisdiction outside the state of incorporation and principal place of business. Thus, although a new test was articulated, its boundaries and theoretical foundations remain woefully unclear.*

This Article seeks to elucidate general jurisdiction's new normal by exploring the jurisdictional triskelion—three interconnected bases of general jurisdiction united by a core underlying policy. While the state of incorporation and principal place of business form the first two bases, this Article suggests that the third basis, now designated only as "unique circumstances," should be defined by fora in which the corporation maintains (1) a physical office, (2) employees, and (3) corporate decision makers or executives. These considerations have long appeared in the Court's jurisprudence on general jurisdiction and have the added benefit of being easy to ascertain without significant resource expenditure. Further, defining the third basis in this way lends clarity to the purpose and policy of general jurisdiction. While the Court has never addressed what policy supports the exercise of general jurisdiction, the Daimler *Court noted that principles of general jurisdiction stem from traditional conceptions of jurisdictional power. Since pre-*International Shoe *personal jurisdiction was rooted in the link between sovereign states*

---

* Visiting Assistant Professor of Law, Wake Forest University, 2013-2015; Adjunct Professor, Wake Forest University, 2015-; Associate, Kilpatrick, Townsend, & Stockton, LLP, 2015-. The views expressed in this Article are the author's own. The author would like to thank her colleagues on the Wake Forest faculty for their thoughtful comments on this paper, and the editors of the *Tennessee Law Review* for their diligent work and exceptional editing.

and their citizens, the three modern bases of general jurisdiction must now emanate from state citizenship.

This Article suggests that a corporation should be considered a citizen in fora that help it further its own corporate existence and overarching directives. The state of incorporation, the principal place of business, and fora, where there is an office, employees, and executives in the state, all illustrate this policy–they all promote the corporation's direction and control of its own existence. Accordingly, all three bases are paradigmatic of general jurisdiction and emanate from a core policy rooted in state sovereignty. Re-conceptualizing general jurisdiction in this way not only clarifies the "at home" standard adopted in Daimler, *but clearly establishes the situations in which an exercise of dispute-blind jurisdiction will comport with due process standards.*

INTRODUCTION 834
I. THE DEVELOPMENT OF GENERAL JURISDICTION 839
II. THE FACTORS-BASED ANALYSIS OF "CONTINUOUS AND SYSTEMATIC" CONTACTS 848
A. Contacts Based on Physical and Quantitative Factors 849
B. Reasonableness Factors 855
III. THE ADOPTION OF THE "AT HOME" STANDARD 857
A. Goodyear Dunlop Tires Operations S.A. v. Brown 857
B. Daimler A.G. v. Bauman 862
IV. THE JURISDICTIONAL TRISKELION 869
A. Defining the Triskelion 869
B. The Missing Third Basis 870
V. ROUNDING OUT THE TRISKELION 874
A. A Proposed Solution 874
B. Utilizing the New Approach 880
1. Practical Advantages 880
2. A Marriage of Function and Policy 884
3. The Test at Work 887
CONCLUSION 890

INTRODUCTION

Dispute-blind, or general, jurisdiction has long been a hallmark of American jurisdictional power.[1] Pre-dating modern notions of a

1. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 614 (1988) (noting that prior to the twentieth century, jurisdiction was predicated on the relationship between the sovereign state and the defendant, and not the

contacts-based jurisdictional inquiry,[2] general jurisdiction has existed to ensure jurisdiction over a defendant in a particular forum despite the cause of action having arisen elsewhere.[3] While the theoretical undertones of general jurisdiction have oscillated from notions of territorial power to considerations of fundamental fairness,[4] the doctrine has always operated to ensure jurisdictional access to defendants who have some heightened relationship in a particular forum.

The Supreme Court has only addressed general jurisdiction a few times, and never in a manner that clarified the doctrine's touchstone factors or fundamental basis. In the absence of guidance, the lower

---

character or facts of the underlying dispute).

2. Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 812-13 (2004) (noting that a contacts-based analysis arose from the Supreme Court's decision in *International Shoe*, which articulated specific and general jurisdiction as separate bases for *in personam* jurisdiction).

3. General jurisdiction is also known as dispute-blind jurisdiction, meaning that the jurisdictional power of the court is literally "blind" to the facts of the dispute. Twitchell, *supra* note 1, at 613. Instead, jurisdiction exists over the defendant for a dispute that arose anywhere. *Id.* In contrast, dispute-specific jurisdiction utilizes the underlying facts of the dispute to create jurisdiction over a defendant in a forum where the dispute arose. *Id.*

4. Rhodes, *supra* note 2, at 902-03 (noting that concerns of sovereignty and fairness have characterized the search for a theoretical basis for general jurisdiction, but characterizing the search for a theoretical basis as "quixotic"); *compare* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (noting that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); Sarah R. Cebik, *"A Riddle Wrapped in A Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 14 (1998) (stating that fairness concerns of convenience and predictability seem relatively straightforward in the context of general jurisdiction); Emily Eng, *A New Paradigm: Domicile as the Exclusive Basis for the Exercise of General Jurisdiction over Individual Defendants*, 34 CARDOZO L. REV. 845, 871 (2012) (noting that courts have embraced fairness as a rationale by utilizing reasonableness and fairness factors to assess general jurisdiction), *and* B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1130 (1990) (noting that the "essence of the issue here, at the constitutional level, is . . . one of general fairness") (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952) (quotations omitted)), *with* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1069 (2012) (discussing the sovereignty rationale for general jurisdiction in the context of the heightened relationship between the state and its citizen), *and* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987) (noting that sovereignty considerations must be at work to ensure that state boundaries do not lose jurisdictional power).

courts employed a test for general jurisdiction that focused on the "continuous," "systematic," or "substantial" contacts of a defendant in the forum.[5] While results varied widely, courts universally recognized that, at some point, a defendant had enough ties to the forum that the exercise of dispute-blind jurisdiction was appropriate. Since applications here could lead to unpredictable and seemingly incompatible results, commentators eventually began to propose curtailing the exercise of general jurisdiction in a number of ways. The most prominent suggestions included limiting general jurisdiction to the principal place of business and state of incorporation,[6] where the corporation had a "branch" facility,[7] where the corporation was acting like the equivalent of a local business,[8] where the corporation had a local office,[9] or where the corporation made corporate policy or conducted core activities.[10] These proposals

---

5. *See, e.g.*, Johnston v. Multidata Sys. Int'l Corp., 523 F.3d 602, 609 (5th Cir. 2008) (general jurisdiction "exists when a non-resident defendant's contacts with the forum state are substantial, continuous, and systematic"); Lakin v. Prudential Sec., Inc., 348 F.3d 704, 712 (8th Cir. 2003) (noting that "substantial, continuous and systematic contacts [are] required for a finding of general jurisdiction") (quoting Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002)); Youn v. Track, Inc., 324 F.3d 409, 417-18 (6th Cir. 2003) ("A federal court has general jurisdiction when the defendant's contacts with the forum state are 'substantial' and 'continuous and systematic,' so that the state may exercise personal jurisdiction over the defendant even if the action does not relate to the defendant's contacts with the state."); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) ("A defendant whose contacts with a state are 'substantial' or 'continuous and systematic' can be haled into court in that state in any action, even if the action is unrelated to those contacts."); Red Wing Shoe Co. v. Hockerson–Halberstadt, Inc., 148 F.3d 1355, 1359 (Fed. Cir. 1998) ("[A] defendant whose contacts with a forum are 'continuous and systematic' may be subject to jurisdiction even when the cause of action has no relation to those contacts.").

6. *See* Twitchell, *supra* note 1, at 676 (arguing that general jurisdiction is appropriately limited to state of incorporation and principal place of business).

7. Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 137 (2001) (arguing that having a branch in the forum is more tangible than advertisements or customers, but recognizing that the definition of a "branch" is not self-evident).

8. Rhodes, *supra* note 2, at 811 (proposing a "commercial domiciliary" test that assesses whether "the nonresident defendant is engaging in continuous activities in the forum similar in nature and volume to the in-state activities of an enterprise domiciled or based in the forum").

9. George, *supra* note 4, at 1129 (utilizing an office within the state as a benchmark for corporate jurisdiction because it signifies a commitment to the forum).

10. Cebik, *supra* note 4, at 36-40 (arguing that general jurisdiction is appropriate where the corporation is incorporated, conducts core activities, or makes

were aimed at what commentators agreed were exorbitant exercises of general jurisdiction in the lower courts based on scant or underdeveloped contacts. Indeed, every federal circuit had at some point upheld general jurisdiction based on "continuous and systematic" contacts even in the absence of a corporate headquarters, branch office, or place of incorporation in the forum.

But that all changed. Twice in the past five years, the Supreme Court chose to clarify and narrow the boundaries of general jurisdiction. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*[11] and *Daimler AG v. Bauman*,[12] the Court introduced a new test for general jurisdiction that assessed whether contacts in the state were such that they rendered the corporation "essentially at home."[13] In doing so, the Court structured general jurisdiction by reference to three separate, but interrelated, bases. This "jurisdictional triskelion" embraces three locations: (1) state of incorporation, (2) principal place of business, and (3) unique situations in which contacts are such that the corporation is essentially at home.[14] The Court failed, however, to elaborate on the third basis and did not address what factors, if any, could be used to determine its standard. Further, the Court did not identify what, if any, underlying policy bound the three different bases of general jurisdiction together.

This Article explores general jurisdiction's new normal and the remaining ambiguities that plague recent attempts at clarification. Central to this purpose is to identify what factors should be used to articulate the third basis of jurisdiction and what policy can be used to illuminate a fundamental theoretical structure. Part I traces the development of modern general jurisdiction from the era of territorial power to a contacts-based inquiry. Especially noteworthy here is the mixed-use language employed by the Supreme Court to conflate principles of specific jurisdiction with general jurisdiction. An analysis of cases reveals that the continuous and systematic language that would come to dominate lower court jurisprudence

---

"top-level" corporate policy).

11. 131 S. Ct. 2846 (2011).

12. 134 S. Ct. 746 (2014).

13. *Id.* at 749 (citing *Goodyear*, 131 S. Ct. at 2851); *Goodyear*, 131 S. Ct. at 2851 ("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.") (emphasis added). *Goodyear* represented the first use of the "at home" standard by the Supreme Court. Such a standard had never previously been cited as the test for general jurisdiction. Richard D. Freer, *Four Specific Problems with the New General Jurisdiction*, 15 NEV. L. J. (forthcoming 2015).

14. *Daimler*, 134 S. Ct. at 761-62.

was appropriated from notions of specific jurisdiction and referenced in a way that confused the two jurisdictional doctrines.[15] Part II explores those consequences by examining the lower courts' use of the continuous and systematic language to create different touchstone factors for general jurisdiction. A factors-based analysis proved to be somewhat confusing, as the weight given to different factors varied by court and situation. Further, a lack of clarity regarding the underlying policy of general jurisdiction meant that the factors were assessed in isolation from an overarching theoretical purpose. Part III then examines the development of the "at home" standard in *Goodyear* and *Daimler*, while Part IV proposes conceptualizing the current model of general jurisdiction as three different bases emanating from a core policy. In conducting such an analysis, it becomes clear that the third basis for general jurisdiction, defined as "unique situations," has yet to be explored by the Supreme Court. Accordingly, this Article proposes defining such unique circumstances by the presence of a corporate office, employees, and corporate decision makers in the forum state.

The point of the proposed test is not merely to suggest a practical way to think about the third basis of general jurisdiction, although that is indeed one of the goals. Instead, the proposed test seeks ultimately to answer a more difficult question: what theoretical foundation creates the bases for general jurisdiction? Or, put another way, what makes state of incorporation and principal place of business archetypes of general jurisdiction, and how does that underlying policy help us formulate the third basis for general jurisdiction? In Part VI this Article answers those questions by looking primarily to state sovereignty. If it is appropriate for a defendant to submit to general jurisdiction based on its heightened relationship with the forum, the relationship must be one between a sovereign and its citizen–the state may extract its jurisdictional pound of flesh in the form of dispute-blind jurisdiction when a corporation has acted in ways that can be said to mimic the equivalent of citizenship. This Article suggests that a corporation should be considered a citizen in fora that help it further its own corporate existence and overarching directives. The state of incorporation, the principal place of business, and fora where there

---

15. Specifically, the Court in *International Shoe Co. v. Washington* used "continuous and systematic" to describe situations in which specific jurisdiction existed over the defendant. 326 U.S. 310, 317 (1945). However, the Court later appropriated this language to describe two factual situations relating to the applicability of general jurisdiction. *See infra* Part II and accompanying notes. Unsurprisingly, the lower courts thought it appropriate to use this language as a yardstick for general jurisdiction.

is an office and managers in the state all illustrate this policy–they are all paradigmatic of general jurisdiction because these fora further the corporate existence. It is this underlying, cohesive policy that makes the proposed test theoretically sound in addition to being practically useful.

I. THE DEVELOPMENT OF GENERAL JURISDICTION

American courts have always recognized some theory of general jurisdiction. Prior to the twentieth century, courts based their exercise of jurisdictional power entirely on the relationship between the forum and the defendant, and never on the circumstances of the dispute.[16] As such, all exercises of jurisdiction by the court were dispute-blind in that the underlying facts played no role in determining the ability of the court to exercise power over the defendant.[17] But courts rarely went so far as to assert power over individuals or entities located outside the boundaries of the forum state, simply because defendants at this time were almost always located in the forum regardless.[18] Further, the focus on territory as the root of the court's power meant that courts were divested of jurisdiction when the underlying dispute occurred in the forum state, but the defendant was no longer physically present within the state's territory. As such, Professor Juenger accurately describes jurisdiction during this time both as "too broad" and "too narrow"—a court had the power to exercise jurisdiction over defendants present within the forum's borders when the cause of action arose elsewhere, but it could not force a defendant to return to the forum if he left after the cause of action arose.[19]

The focus on territorial power guided the Supreme Court's first attempt to establish the parameters of modern personal jurisdiction in *Pennoyer v. Neff*.[20] Basing its decision on considerations of state sovereignty, the Court used notions of territoriality, sovereignty,

---

16. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 569-74 (1958); Twitchell, *supra* note 1, at 614.

17. Twitchell, *supra* note 1, at 614.

18. Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 908 (1981); Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1157 (1978).

19. Juenger, *supra* note 18, at 908.

20. 95 U.S. 714 (1877).

presence, and consent to establish three approaches to jurisdiction.[21] Specifically, jurisdiction could be exercised (1) when service of process was made in the state, thus establishing the defendant's physical presence in the territory; (2) where an individual was domiciled in the state; or (3) where the defendant consented to the exercise of jurisdiction.[22]

Central to the Court's approach in *Pennoyer* was that the presence of the defendant within the territorial bounds of a state at the time of service would be considered sufficient for the exercise of personal jurisdiction; as such, it did not matter if the defendant was just passing through at the time of service.[23] However, the archetype of this territorial power theory—an individual who is served with process while physically present in the state—could not help courts determine when an intangible entity like a corporation would be subject to personal jurisdiction. This became particularly problematic during the late nineteenth century as the private corporate form rose in popularity, resulting in modern corporations that conducted business in multiple states. Such entities, which were incorporated in one state but might be operating in several, challenged the centrality of physical presence in the doctrine of personal jurisdiction. As such, to assess the presence or absence of personal jurisdiction over these entities, courts utilized two mechanisms—consent and presence based on "doing business."[24]

The consent-based theory of corporate jurisdiction operated on the notion that states could require an out-of-state or foreign corporation's consent to personal jurisdiction in exchange for allowing the corporation to do business within the state.[25] To this end, states enacted statutes that mandated a corporation's consent to jurisdiction in exchange for the corporation's ability to do business within the state's boundaries. This approach was based in part on courts' attempts to appropriate the personal service requirement for

---

21. *Id.* at 722.

22. *Id.*

23. *Id.*

24. *See generally* William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676 (1917) (noting that a court may obtain jurisdiction over a corporation by its consent or its presence, and presence can be based on the corporation engaged in and "doing business" in the state); Kurland, *supra* note 16, at 577-78 (noting that two different theories developed as principles of personal jurisdiction: consent- and presence-based jurisdiction, both of which were evaluated based on the entities "doing business" in the state).

25. Kurland, *supra* note 16, at 578.

individuals in the context of corporate jurisdiction.[26] As such, forced-consent statutes[27] usually required that foreign corporations designate an agent within the state for service of process and file a written consent to jurisdiction.[28] But forcing corporations to consent to jurisdiction ultimately raised constitutional concerns. In *International Textbook Co. v. Pigg*,[29] the Supreme Court struck a forced consent statute because it unduly burdened interstate commerce.[30] Specifically, the Court noted that the statute required a corporation to file a written statement consenting to jurisdiction when entering the forum, which ultimately functioned as an illegal condition precedent to doing business that was borne only by out-of-state or foreign corporations.[31] The Court also questioned the power of the state to actually deny a business the right to operate in the state if consent to jurisdiction was not given.[32] In *Flexner v. Farson*,[33] the Court rejected consent as a basis for jurisdiction over a partnership, noting that there was no basis by which the state court could actually exclude the partnership from operating within the state.[34] These issues suggested that forced-consent statutes such as

---

26. ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 636 (1965).

27. The most common statute expressly forbid a corporation from doing business in the state before filing a written consent to jurisdiction and designating an agent for service of process. *See, e.g.*, JAMES C. CAHILL & BASIL JONES, CALLAGHAN'S ILLINOIS STATUTES ANNOTATED 1917-1920 ¶ 2446(87) (1920).

28. *See* Simon v. S. Ry. Co., 236 U.S. 115, 130 (1915) (citing an example of such an act in Louisiana: "Whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Sec. 1 of this act, it may be sued for any legal cause of action in any Parish of the State where it may do business, and such service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served."). "Doing business" as a basis for corporate jurisdiction was far from a clear concept, but, as Justice Learned Hand wrote, "at least it puts the real question, and that is something." Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930). *See also* St. Clair v. Cox, 106 U.S. 350, 359 (1882) (requiring for the exercise of jurisdiction "that the corporation was engaged in business in the State").

29. 217 U.S. 91 (1910).

30. *Id.* at 102 (quoting the Kansas statute in question "as a condition precedent to obtaining authority to transact business in the state, a corporation of another state was required to file in the office of the secretary of state its written consent, irrevocable, that process against it might be served upon [the appointed] officer").

31. *Id.* at 111.

32. *Id.*

33. 248 U.S. 289 (1919).

34. *Id.* at 293.

these could not operate as a basis for achieving jurisdiction over out-of-state corporations.

In addition to forced-consent provisions, courts also achieved jurisdiction over foreign or out-of-state corporations by characterizing them as physically present in the state. Specifically, corporations that were "doing business" in the state could be subject to jurisdiction, since doing business was the functional equivalent of an individual's tangible presence within the state's borders. A number of cases suggested that factors, such as an office, employees, or transactions, would be used to determine if a corporation was doing business in the forum.[35] However, it was unclear at what point activities crossed from mere solicitation in the forum into the equivalent of physical presence.

Constitutional infirmities, lack of doctrinal clarity, the growth of national commerce, and the changing nature of modern business eventually dictated the need for a shift in the jurisdictional narrative away from *Pennoyer*.[36] Accordingly, the Court in *International Shoe v. Washington*[37] supplemented traditional notions of territorial power[38] with an analysis concerned with the conduct of the

---

35. *See, e.g.*, People's Tobacco Co. v. Am. Tobacco Co., 246 U.S. 79, 87 (1918) (holding that the corporation was not doing business because its authorized agents located within the state did not have authority beyond mere solicitation); Phila. & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 268 (1917) (holding that the sale of railroad tickets on behalf of the corporation by the connecting carried located within the state did not constitute as doing business); Int'l Harvester Co. of Am. v. Ky., 234 U.S. 579, 586 (1914) (holding that the corporation was doing business in the state of Kentucky because of the "course of conduct of [its] authorized agents within the State"); St. Louis Sw. Ry. Co. of Tex. v. Alexander, 227 U.S. 218, 228 (1913) (holding that the corporation was doing business in the state of New York because it had an office and agent located within the state); Green v. Chicago, Burlington & Quincy Ry. Co., 205 U.S. 530, 531 (1907) (holding that the "establishment of a permanent office" and the "employment of an agent located within the State" indicate that the corporation is doing business in the state).

36. Kurland, *supra* note at 16, at 577-86.

37. 326 U.S. 310 (1945).

38. *Id.* at 316. This is not to suggest that *International Shoe*'s de-emphasis of physical presence in the jurisdictional equation removed transient jurisdiction entirely. Professor Mary Twitchell noted in 1988 that the language of *International Shoe* left the door open for transient presence in the forum to remain a valid basis for jurisdiction. Twitchell, *supra* note 1, at 624 n.66. Specifically, Professor Twitchell identified this language from the opinion in *International Shoe*:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam, if he be not present within the territory of the forum,*

defendant. Pursuant to this conduct-oriented test, a defendant corporation is subject to personal jurisdiction where it has sufficient contacts with the forum state and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice.[39] In establishing this inquiry, the Court drew a distinction between two different situations: First, where the defendant's contacts with the state gave rise to the liability in question, and second, where the defendant had such strong contacts with the state that it would be appropriate to force the defendant to appear and defend actions unrelated to its in-state activities.[40] The first category established a mechanism of dispute-specific jurisdiction based on contacts that were "continuous and systematic, but also give rise to the liabilities sued on."[41] In contrast, dispute-blind jurisdiction existed where "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."[42] Although this language identified dispute-specific and dispute-blind jurisdiction as two separate bases for jurisdiction, the concepts were often conflated

---

> he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Id. (quoting *Int'l Shoe*, 326 U.S. at 316) (emphasis added). Other commentators agreed that this language revealed that *International Shoe*'s conduct-oriented test was a supplement to the territorial power theory and that transient presence in the forum could still confer jurisdiction. *See, e.g.*, Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 14 (1982) (stating that "the relationship between *Pennoyer* and *International Shoe* is that they are highly similar tests of the sovereign's authority to bind a nonconsenting defendant to the judgment of its courts"); Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 287-90, 300-07 (1983) (stating that "*International Shoe* announced a new theory of jurisdiction but did not declare the power theory unacceptable"). These predictions have borne out with time. In *Burnham v. Superior Court of California, Cty. of Marin*, a divided Court agreed that, for individuals, transient presence jurisdiction remained a valid basis for personal jurisdiction. 495 U.S. 604, 637 (1990). Of course, transient presence is not a valid basis for the exercise of jurisdiction over corporations. *See* James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S. 119, 122 (1927) (holding that service on an executive officer of a corporation while he is temporarily present in the forum does not confer jurisdiction over the corporation); Martinez v. Aero Caribbean, 764 F.3d 1062, 1067 (9th Cir. 2014) (service on executive vice president for marketing in California did not confer general jurisdiction over French corporation).

39. *Int'l Shoe*, 326 U.S. at 316.

40. *Id.* at 317.

41. *Id.*

42. *Id.* at 318.

by the lower courts in the wake of *International Shoe*. For example, in *Kendrick v. Seaboard Air Line R.R.*,[43] a Pennsylvania resident brought an action in Pennsylvania against Seaboard Air Line Railroad ("Seaboard") for injuries sustained in South Carolina due to the defendant's negligence.[44] Seaboard was incorporated in Virginia and had its main office in Norfolk.[45] As such, the plaintiff's choice to sue in Pennsylvania was bold—Seaboard had no contacts with Pennsylvania other than an office in Philadelphia that was used to solicit business.[46] The court, however, was only concerned with whether the defendant had sufficient contacts with the forum in general to make an exercise of personal jurisdiction appropriate.[47] Assessing the sales office present in Philadelphia, the court found that

> [T]hese activities, which may best be characterized as the selling of service, evidence sufficient contacts with the State of Pennsylvania as to render Seaboard amenable to the process of this court. . . . The fact that the lease for the office was executed at Seaboard's main office, the rent and expenses therefor, and the pay of the local employees are paid by checks sent from Norfolk, Virginia, and that the office supplies and advertisements are sent from the same place, can have no effect on our conclusion that the defendant Seaboard is present here. Once the contacts with the state of the forum have been established, other transactions of a defendant, by comparison or otherwise, may not wipe out or outweigh those contacts.[48]

The court makes no mention of whether the plaintiff purchased his ticket through the Pennsylvania office, leaving the defendant's solicitation of sales in Pennsylvania as the only possible basis for personal jurisdiction. The court thus reads *International Shoe* to establish some sort of jurisdiction when the defendant has sufficient contacts with the forum, regardless of whether they are continuous or systematic, and regardless of whether the cause of action arose in the forum or not.[49] Other courts rejected this liberalized standard. In

---

43. 98 F. Supp. 372 (E.D. Pa. 1949).

44. *Id.* at 372.

45. *Id.*

46. *Id.* at 373.

47. *Id.* at 374.

48. *Id.* at 374-75 (citation omitted).

49. *Id.* at 373. In fact, the court went so far as to say "the disconnection between the alleged obligation or liability with a defendant's local activities . . . no longer [has] any bearing on the question of jurisdiction." *Id.*

Murray v. Great Northern Railway,[50] a federal district court in Pennsylvania declined to find jurisdiction in a cause of action against a Minnesota corporation arising entirely out of its business in Minnesota.[51] In a decision that seemingly contradicts the reasoning in *Kendrick*, the court noted that the defendant's corporate activities in Pennsylvania consisted only of a solicitation office, which could not justify an exercise of personal jurisdiction for a cause of action unrelated to activities in the forum.[52]

To address post-*International Shoe* confusion, the Supreme Court took steps to clarify the bifurcation of dispute-specific and dispute-blind jurisdiction. The first of two corporate jurisdiction cases, *Perkins v. Benguet Consolidated Mining Co.*[53] dealt with the distinction between specific and general jurisdiction in the context of a foreign corporation. In *Perkins*, a Filipino mining corporation ceased operations in the Philippines during the hostilities of World War II, and the president, also the principal stockholder, returned to his residence in Ohio.[54] While in Ohio, the president opened an office for the mining company, which was staffed by himself and two secretaries.[55] Activities that were carried out from the office included opening two bank accounts for the company, paying salaries and other expenses, holding directors' meetings, and supervising rehabilitation of corporate properties in the Philippines.[56]

While the mining company was operating in Ohio, the plaintiff, a nonresident of Ohio, filed suit in an Ohio state court against the company for dividends allegedly due to her as a stockholder and damages for the company's failure to issue her certificates for shares of its stock she allegedly owned.[57] The Ohio Supreme Court determined that Ohio did not have personal jurisdiction over the company as it was a foreign corporation, and the activities underlying the suit did not relate to any actions taken by the company in Ohio.[58] Such reasoning was entirely consistent with the

---

50. 67 F. Supp. 944 (E.D. Pa. 1946).

51. *Id.* at 944.

52. *Id.* Further illustrating confusion regarding *International Shoe*, the court attempted to distinguish *International Shoe* on its facts. *Id.* It also noted that, unlike in *Murray*, *International Shoe* "dealt with the power of a state to regulate the activities of a foreign corporation within its borders and its power to enforce such regulation through its courts." *Id.*

53. 342 U.S. 437 (1952).

54. *Id.* at 447.

55. *Id.* at 447-48.

56. *Id.* at 448.

57. *Id.* at 438-39.

58. *Id.* at 439, 441.

approach to dispute-specific jurisdiction announced in *International Shoe*.[59]

The Supreme Court reversed.[60] It determined that Ohio could "enforce a cause of action not arising out of the [defendant's] activities in the state of the forum"[61] because of the president's "continuous and systematic supervision of the necessarily limited wartime activities of the company."[62] The crux of the court's reasoning was that principles of general fairness dictated allowing courts to exercise personal jurisdiction when a corporation engages in continuous activities in a forum state such that it would not be unfair to subject it to suit on unrelated causes of action.[63] Pursuant to the factual situation, the Court found general jurisdiction to be appropriate since the president of the company was carrying on in Ohio "a *continuous and systematic* supervision of the necessarily limited wartime activities of the company."[64] The use of the "continuous and systematic" language here is particularly noteworthy, as this was the language used in *International Shoe* to describe the doctrine of specific, not general, jurisdiction.[65]

Use of the "continuous and systematic" language in the context of general jurisdiction was also seen in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[66] a personal jurisdiction case involving another foreign corporation. Helicopteros Nacionales de Colombia ("Helicol") was incorporated in Colombia and provided helicopter transportation for oil and construction companies operating in South America.[67] After a Helicol helicopter crashed in Peru, the representatives and survivors of four American citizens killed in the crash attempted to sue Helicol in Texas state court.[68] The plaintiffs' claims had no relationship to any activities carried on by Helicol in Texas, and the Court turned its attention to the doctrine of general jurisdiction.[69] The plaintiffs pointed to Helicol's continuous contacts in the forum: Helicol had purchased a majority of its helicopters in Texas from Bell Helicopter Company; it had trained its pilots, management personnel, and maintenance employees in Texas; it had

---

59. Int'l Shoe Co. v. Wash., 326 U.S. 310, 316, 320 (1945).
60. *Perkins*, 342 U.S. at 449.
61. *Id.* at 446.
62. *Id.* at 448.
63. *Id.* at 445.
64. *Id.* at 448 (emphasis added).
65. Int'l Shoe Co. v. Wash., 326 U.S. 310, 320 (1945).
66. 466 U.S. 408, 416 (1984).
67. *Id.* at 409.
68. *Id.* at 410, 412.
69. *Id.* at 415-16.

conducted negotiations in Texas that led to the service agreement to transport employees of American companies in Peru; and it had received over $5 million in payments drawn on a Texas bank.[70] But the Court was not impressed, finding that such contacts were not akin to "the kind of *continuous and systematic general business contacts*" that had been found in *Perkins*.[71] The Court went on to note that in the absence of such contacts, general jurisdiction would be inappropriate.[72]

Through *Perkins* and *Helicopteros*, the Court fixed two factual endpoints for general jurisdiction. On one end was the exemplar of a corporation subject to general jurisdiction in the forum—a corporation that was conducting all operations in the forum, the president and majority shareholder of which were present in the forum, and which maintained a corporate office, bank accounts, and employees in the forum.[73] On the other end was the exemplar of a corporation not subject to general jurisdiction in the forum—a corporation that was entering into transactions and negotiations in the forum but did not have any permanent physical presence in the forum state.[74] But the standard that should be applied to chart the middle ground was unclear. In both cases the Court had made reference to "continuous and systematic" activities, or the lack thereof, in the applicable fora.[75] But the use of this language conflated ideas about specific jurisdiction with general jurisdiction. *International Shoe* had suggested that general jurisdiction was appropriate where there were "continuous" contacts that were "so substantial and of such a nature" that suits based on activities unrelated to the forum would be considered just and fair.[76] Professor Twitchell suggests that this was indeed the standard applied in both *Perkins* and *Helicopteros*, despite the lip service paid to "continuous and systematic" contacts.[77] Specifically, she argues that the contacts

---

70. *Id.* at 410-11.

71. *Id.* at 416 (emphasis added).

72. *Id.* at 421-22 (Brennan, J., dissenting). The court's use of the terminology, "general jurisdiction," was a result of the popularization of the distinction first made by Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). Thus, *Helicopteros* represented the first time the Supreme Court utilized "general" and "specific" to define the dual bases of contacts-based jurisdiction. *Id.*

73. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952).

74. *See Helicopteros*, 466 U.S. at 410-11.

75. *See id.* at 415-16; *Perkins*, 342 U.S. at 438, 445, 448.

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

77. Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 184 (2001).

at issue in *Helicopteros* were arguably both continuous and systematic, and yet the Court denied general jurisdiction based on the nature of those contacts.[78] Ultimately, however, it was up to the lower courts to parse the language of these opinions and determine the factors at issue.

II. THE FACTORS-BASED ANALYSIS OF "CONTINUOUS AND SYSTEMATIC" CONTACTS

When assessing jurisdiction over foreign corporations, the approach taken by the lower courts was primarily to reason by analogy[79] and compare cases to the facts of *Perkins* and *Helicopteros*.[80] However, the standard cited during this time was whether "continuous and systematic" contacts existed in the forum state.[81]

---

78. *Id.* at 185.

79. That is not to say that all courts took that approach—others took a more categorical approach to the problem. For example, in *Follette v. Clairol, Inc.*, the Fifth Circuit affirmed a district court's refusal to exercise general jurisdiction over a corporation with what appeared to be systematic and continuous contacts with the forum. 829 F. Supp. 840 (W.D. La. 1993), *aff'd*, 998 F.2d 1014 (5th Cir. 1993). The district court instead chose to limit the exercise of general jurisdiction over a corporation to the place of incorporation and principal place of business "under the circumstances presented in this case." *Id.* at 846 (emphasis omitted). The district court had noted the argument that general jurisdiction should always be confined to principal place of business and state of incorporation. *Id.* A petition for certiorari to the Supreme Court was denied. *Follette*, 829 F. Supp. 840 (W.D. La. 1993), *cert. denied*, 510 U.S. 1163 (1994). Commentators also argued for taking a categorical approach. *See* Twitchell, *supra* note 1, at 669-70 (arguing that general jurisdiction should always be limited to the state of incorporation and the principal place of business).

80. *See, e.g.*, Johnston v. Foster-Wheeler Constructors, Inc., 158 F.R.D. 496, 501-03 (M.D. Ala. 1994) (finding that defendant corporation with sufficient contacts to Alabama was subject to personal jurisdiction); Bechard v. Constanzo, 810 F. Supp. 579, 584-85 (D. Vt. 1992) (finding that a physician from New York was not subject to personal jurisdiction in Vermont when providing unsolicited treatment on Vermont resident in New York); Newport Components, Inc. v. NEC Home Elec. (U.S.A.), Inc., 671 F. Supp. 1525, 1533 (C.D. Cal. 1987) (finding that defendant Japanese corporation had sufficient contacts with and was subject to personal jurisdiction in California); Colon v. Gulf Trading Co., 609 F. Supp. 1469, 1479-80 (D.P.R. 1985) (finding that defendant sea vessel owner was not subject to personal jurisdiction in Puerto Rico when plaintiff seaman developed symptoms in Puerto Rico from asbestos condition following his exposure to asbestos while working aboard defendant's vessel at sea).

81. *See, e.g.*, Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 510 (D.C. Cir. 2002) (stating the standard as "general jurisdiction over a foreign corporation is . . .

Further, although *Perkins* and *Helicopteros* provided useful bookends, they did not affirmatively identify factors that should be used in assessing the presence or absence of general jurisdiction. As such, it was necessary to determine the type, number, and strength of contacts that would support the existence of dispute-blind jurisdiction. Lower courts explored this territory by balancing several factual considerations, including a company's physical presence in the forum, the revenue produced in the forum, or whether the company entered into deals in or visited the forum. Additionally, principles of reasonableness and substantial justice served to limit the exercise of general jurisdiction even when continuous and systematic contacts were located in the forum state.

A. Contacts Based on Physical and Quantitative Factors

Perhaps the main consideration utilized by courts to determine whether continuous and systematic contacts existed is the presence of physical assets in a forum, such as employees or facilities. Courts have long been persuaded that a physical office in the forum is a good indicator of general jurisdiction.[82] In *Wiwa v. Royal Dutch Petroleum Co.*,[83] the Second Circuit found that two parent holding companies, incorporated in the United Kingdom and the Netherlands, were subject to general jurisdiction in New York because they maintained an investor relations office in New York City through which they engaged American capital markets.[84] The activities of the New York office were minimal in comparison to the

---

permissible if the defendant's business contacts with the forum district are 'continuous and systematic'") (citation omitted); Grand Entm't Grp, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 481 n.3 (3d Cir. 1993) ("General jurisdiction exists where the defendant 'has maintained continuous and substantial' forum affiliations.") (citation omitted); Crane v. Carr, 814 F.2d 758, 763 (D.C. Cir. 1987) ("An enterprise incorporated and even headquartered elsewhere may operate so continuously and substantially within a state that it is fair to allow anyone to sue the enterprise in that state on any claim, without regard to where the claim arose."); Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1396 (9th Cir. 1986) ("If the defendant's activities in the state are 'substantial' or 'continuous and systematic,' general jurisdiction may be asserted even if the cause of action is unrelated to those activities.") (citation omitted).

82. *See, e.g.*, Rittenhouse v. Mabry, 832 F.2d 1380, 1382, 1390 (5th Cir. 1987) (finding that defendant physician with office in Tennessee was not subject to general jurisdiction in Mississippi); Schreiber v. Allis-Chalmers Corp., 611 F.2d 790, 793 (10th Cir. 1979) (finding that defendant corporation was subject to general jurisdiction in Mississippi where it had a manufacturing plant).

83. 226 F.3d 88 (2d Cir. 2000).

84. *Id.* at 92, 97-98.

companies' world-wide operations, but the court was impressed with the activities carried on by this office, including fielding inquiries from investors and potential investors and organizing meetings between defendants' officials and investors or financial analysts.[85] In other cases, courts have found a combination of an office plus employees to be sufficient contacts to give rise to general jurisdiction.[86] For example, in *Hein v. Taco Bell, Inc.*, the court sustained a finding of jurisdiction based on the presence of sixteen Taco Bell locations within the state of Washington.[87] The court noted specifically that the presence of these locations meant that Taco Bell was employing hundreds of people within the state, which supported the existence of general jurisdiction.[88]

The weight given to the presence of a physical office during the era of continuous and systematic contacts is likely an outgrowth of *International Shoe*. There, the Court cited *Missouri, Kansas & Texas Railway Co. v. Reynolds*,[89] and *Tauza v. Susquehanna Coal Co.*[90] to support the notion that courts could exercise jurisdiction in situations where the underlying events occurred outside the forum.[91] In both *Reynolds* and *Tauza*, the presence of an office or employees was an important component of determining that dispute-blind jurisdiction was appropriate.[92] Specifically, *Reynolds* upheld the exercise of dispute-blind jurisdiction over an out-of-state corporation that maintained an office and an agent in the forum for the purpose of soliciting and taking reservations.[93] Similarly, in *Tauza*, the court upheld the exercise of dispute-blind jurisdiction over an out-of-state corporation that was operating a branch in the forum that employed nine employees.[94] Although these cases were decided under the pre-*International Shoe* "doing business" standard, they suggested that

---

85. *Id.* at 97.

86. *See, e.g.*, Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1042-43 (2d Cir.1990) (finding that defendant corporation had no office in New York and, therefore, was not subject to personal jurisdiction); Lane v. Vacation Charters, Ltd., 750 F. Supp. 120, 125 (S.D.N.Y. 1990) (finding that defendant corporation had no office in New York, and employees' attendance of two trade shows in New York was not enough to subject corporation to general jurisdiction); Bryant v. Finnish Nat'l Airline, 208 N.E.2d 439 (N.Y. 1965) (finding that defendant corporation had no office in New York and, therefore, was not subject to personal jurisdiction).

87. 803 P.2d 329, 332-33 (Wash. Ct. App. 1991).

88. *Id.* at 332.

89. 255 U.S. 565 (1921).

90. 115 N.E. 915 (N.Y. 1917).

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

92. *See Reynolds*, 255 U.S. at 565; *Tauza*, 115 N.E. at 916, 918.

93. *Reynolds*, 255 U.S. at 565, *aff'g* 117 N.E. 913 (1917).

94. *Tauza*, 115 N.E. at 916, 918.

an office and employees were highly relevant in the context of dispute-blind jurisdiction.[95]

It is also worth noting that an office, facilities, or employees in the forum state are not always dispositive of continuous and systematic contacts. For example, in *MacInnes v. Fontainebleau Hotel Corp.*, the Second Circuit determined that a corporation was not subject to general jurisdiction in the forum based merely on the presence of a sales office in the state because the office was not related to the core business of the defendant.[96] But even if the presence of an office did not guarantee general jurisdiction, the lack of an office was a frequently cited reason for refusing to exercise dispute-blind jurisdiction.[97]

Another touchstone of continuous and systematic contacts was the quantity of revenue generated or sales made in the jurisdiction. Few courts have found the presence of general jurisdiction based only on a large number of sales in the forum. Instead, most courts have embraced the notion that large dollar value sales, especially when they represent only a small percentage of a company's overall sales, are insufficient to create general jurisdiction without other contacts.[98] For example, in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, [99] the Second Circuit determined that an out-of-state corporation could not be subject to general jurisdiction in Vermont based solely on the fact that it had made $4 million in sales in the jurisdiction over a five-year period.[100] The court went on to

---

95. Despite the citation in *Perkins*, the Court later distanced itself from *Tauza* and *Barrows* in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Specifically, the Court noted that those cases were the products of *Pennoyer*'s rigid focus on territoriality and lacked relevance in the modern era. *Id.* at 761 n.18. Prior to *Daimler*, however, the relevance of these cases was never questioned.

96. 257 F.2d 832, 833-35 (2d Cir. 1958).

97. *See, e.g.*, Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1198 (4th Cir. 1993) (pointing out that defendant corporation never maintained an office in Maryland); Glater v. Eli Lilly & Co., 744 F.2d 213, 214-15, 217 (1st Cir. 1984) (pointing out that defendant corporation never maintained an office in New Hampshire).

98. *See* Injen Tech. Co. v. Advanced Engine Mgmt., Inc., 270 F. Supp. 2d 1189, 1194 (S.D. Cal. 2003) (stating that 2% of sales in the forum insufficient contact for general jurisdiction); Amana Refrigeration, Inc. v. Quadlux, Inc., 172 F.3d 852, 857-58 (Fed. Cir. 1999) (stating that limited sales numbers in the forum did not generate general jurisdiction); Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp., 916 F. Supp. 1049, 1053 (W.D. Wash. 1994), *aff'd*, 78 F.3d 602 (Fed. Cir. 1996) (3% of sales not enough); *see also* Bearry v. Beech Aircraft Corp., 818 F.2d 370, 373-77 (5th Cir. 1987) (finding contracts exceeding $72 million and purchases exceeding $195 million in the forum not sufficient to create general jurisdiction).

99. 84 F.3d 560 (2d Cir. 1996).

100. *Id.* at 573.

find, however, that the company's relationships with independent dealers, visits by company personnel to those dealers, and advertising and support lines available to Vermont residents suggested that the defendant had sufficient contacts *in toto* to create general jurisdiction.[101] A similar analysis was employed by the Eighth Circuit in *Lakin v. Prudential Securities, Inc.*[102] In that case, the court determined that, although a high volume of sales does not automatically create dispute-blind jurisdiction, Prudential Securities was subject to general jurisdiction in Missouri based on its $10 million loan portfolio in that state.[103] The court reasoned that advertising in the forum and the nature of the loans established that the company had entered into ongoing lending relationships with thousands of Missouri residents in a manner suggesting continuous and systematic contacts.[104]

The approach of courts in considering revenue or sales as only a factor supporting jurisdiction seems appropriately measured in light of Supreme Court guidance suggesting that the number of sales alone should not determine general jurisdiction. In *Keeton v. Hustler Magazine*,[105] the Court determined whether Hustler Magazine would be subject to specific jurisdiction in New Hampshire for purported libel of a public figure. The court noted that the magazine sold ten to fifteen thousand copies in New Hampshire each month, putting yearly numbers at somewhere between 120,000 and 180,000.[106] Although it did not elaborate on the question of general jurisdiction, the Court noted that that the number of subscriptions alone "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities."[107] The First and Fifth Circuits subsequently cited *Keeton* in connection with the proposition that a large number of sales was insufficient in isolation for purposes of general jurisdiction.[108]

---

101. *Id.* at 576.

102. 348 F.3d 704 (8th Cir. 2003).

103. *Id.* at 709.

104. *Id.* at 710.

105. 465 U.S. 770 (1984).

106. *Id.* at 772.

107. *Id.* at 779.

108. Wilson v. Belin, 20 F.3d 644, 650 n.5 (5th Cir. 1994) ("The Supreme Court reasoned that if . . . sales were unrelated to the cause of action, they would be insufficient to warrant the exercise of personal jurisdiction."); Glater v. Eli Lilly & Co., 744 F.2d 213, 216-17 (1st Cir. 1984) ("Lilly's sales . . . in New Hampshire [are not] related to [plaintiff's] injury in the sense that the circulation of magazines in New Hampshire was related to the injury in *Keeton*.").

But despite cutting the potency of a quantitative analysis with other qualitative factors, the lower courts still achieved inconsistent results when assessing general jurisdiction. Volume of sales or revenue cited as supporting general jurisdiction (when combined with other factors) ranged from hundreds of millions of dollars to just a few hundred thousand dollars, with the types of supporting factors varying widely. The Ninth Circuit found general jurisdiction where a company generated hundreds of millions of dollars in the forum, was licensed to do business in the forum, and had engaged in political activity in the forum to protect its market and products.[109] The Federal Circuit supported a finding of general jurisdiction where a company generated millions of dollars of sales in the forum and employed independent distributors.[110] Finally, the Sixth Circuit found general jurisdiction on a company with one sales solicitor in the state and sales in the amount $279,557 in one year.[111] With such disparate results, it is not surprising that commentators criticized the use of quantitative factors in the jurisdictional inquiry as leading to uncertainty for businesses and confusion for courts.[112]

Lower courts also assessed where negotiations, meetings, or visits took place, or where contracts were executed, to determine if general jurisdiction was appropriate. For example, in *Bearry v. Beech Aircraft Corp.*,[113] the out-of-state defendant was not subject to general jurisdiction in the forum despite millions of dollars of sales in the state because the sales contracts had been carefully negotiated and executed outside of the forum.[114] This suggests that companies had the option of structuring transactions to insulate themselves from jurisdiction in the forum state. Additionally, such reasoning dictates that payment tendered in the forum state for services performed elsewhere would not provide general jurisdiction. The Third Circuit explored this conclusion in *Gehling v. St. George's School of Medicine*.[115] In that case, the court determined that a

---

109. Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1173-74 (9th Cir. 2006).

110. LSI Indus. Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir. 2000).

111. Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 463, 467 (6th Cir. 1989).

112. *See, e.g.*, Danielle Tarin & Christopher Macchiaroli, *Refining the Due-Process Contours of General Jurisdiction over Foreign Corporations*, 11 J. INT'L BUS. & L. 49, 61 (2012) ("The inconsistent results quantitative analyses produce stymie the very protections the Due Process Clause was intended to protect.").

113. 818 F.2d 370 (5th Cir. 1987).

114. *Id.* at 375-76.

115. 773 F.2d 539 (3d Cir. 1985).

foreign medical school was not subject to general jurisdiction in Pennsylvania because the income derived from Pennsylvania residents who attended the school was not related to in-state activities, but instead was related to services performed in Grenada.[116] Other cases have similarly allowed defendants to shield themselves from the exercise of general jurisdiction when contracts were either negotiated or performed outside of the forum.[117]

Lower courts have also considered the presence of agents of the defendant in the forum state.[118] Frequent visits to the forum state by officers or agents of a defendant were often held to subject a defendant to general jurisdiction in the forum if other factors were present.[119] But much like the quantitative analysis described above, this added an element of uncertainty to the analysis. *Helicopteros* suggested that a few visits by employees to engage in training or enter into transactions would not be enough to subject the defendant to jurisdiction in the absence of other factors.[120] Thus, the lower courts tended to deny jurisdiction when there were only sporadic visits to the state,[121] and would uphold jurisdiction only if visits suggested a continued presence in the forum.[122]

---

116. *Id.* at 542.43.

117. *See* J & J Marine, Inc. v. Le, 982 S.W.2d 918, 926-27 (Tex. Ct. App. 1998) (holding that defendant corporation was not subject to general jurisdiction in Texas when negotiations, payment, and performance of contract took place in Alabama); Babcock & Wilcox Co. v. Babcock Mex., S.A. de C.V., 597 So. 2d 110, 112-13 (La. Ct. App. 1992) (holding that defendant corporation was not subject to general jurisdiction in Louisiana when all sales and deliveries took place in Mexico).

118. Pathman v. Grey Flannel Auctions, Inc., 741 F. Supp. 2d 1318, 1323 (S.D. Fla. 2010) (defendant's "two to three" business trips to Florida every year were insufficient to establish general jurisdiction); Bluewater Trading, LLC v. Fountaine Pajot, S.A., No. 07–61284–CIV-COHN/SELTZER, slip op. at 6-7 (S.D. Fla. July 9, 2008) (defendant's annual attendance at the Miami International Boat Show did not support general jurisdiction).

119. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 570, 572-73 (2d Cir. 1996) (over 150 visits in six years considered; general jurisdiction sustained based on visits, relationships with dealers, and millions of dollars in sales in the forum); Mass. Inst. of Tech. v. Micron Tech., Inc., 508 F. Supp. 2d 112, 118, 122 (D. Mass. 2007) (visits every week to the forum supported general jurisdiction); 3M Innovative Props. Co. v. InFocus Corp., No. CIV.04-0009 (JNE/JGL), slip op. at 4 (D. Minn. Feb. 9, 2005) (finding that visits every other week to the forum supported a finding of general jurisdiction when combined with millions in sales in the forum).

120. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416-18 (1984).

121. Jackson v. Tanfoglio Giuseppe, S.R.L., 615 F.3d 579, 584 (5th Cir. 2010) ("isolated visits to a forum" are not enough); Tamburo v. Dworkin, 601 F.3d 693, 701 (7th Cir. 2010) (two visits to the state in ten years not enough); Fisher v. Teva PFC

B. Reasonableness Factors

While the courts have utilized the above factors in assessing contacts for the purposes of general jurisdiction, contacts alone have not ended the inquiry. The lower courts have consistently utilized "reasonableness factors" to determine whether an exercise of general jurisdiction would comport with Due Process notions of fair play and substantial justice. These factors were announced in *Asahi Metal Industry Co.*,[123] which involved the application of the specific jurisdiction doctrine to an indemnity action between two foreign corporations. The *Asahi* Court determined that, regardless of contacts, an exercise of jurisdiction over the defendant would be inappropriate in light of five reasonableness factors: the burden on the defendant, the state's interest in adjudicating the dispute, the plaintiff's interest in a convenient forum, the judicial system's interest in efficiency, and the shared interests of the several states in furthering substantive social policies.[124] The Court did not specifically state whether this reasonableness analysis was limited to specific jurisdiction or if it also applied in cases of general jurisdiction.

Despite this ambiguity, the lower courts seemed willing to embrace a reasonableness inquiry in both dispute-blind and specific jurisdiction. For example, in *de Reyes v. Marine Management and Consulting, Ltd.*,[125] the survivors of a Honduran sailor killed in international waters off the coast of Oregon brought suit against Wallem Shipmanagement, Ltd. ("Wallem"), a Hong Kong ship management corporation with its principal place of business in Hong Kong.[126] Wallem electronically directed performance of its ship management services from offices in Hong Kong.[127] However, it also stationed employees in regional corporate offices around the globe to

---

SRL, 212 F. App'x 72, 76 (3d Cir. 2006) (visits just a few times a year not persuasive for finding general jurisdiction); Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995) (few visits to the state not enough); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (few visits to the state not enough).

122. *C.f. Omeluk*, 52 F.3d at 270 (noting that a "[defendant's] lack of a regular place of business in [the forum state] is significant, and is not overcome by a few visits").

123. Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102 (1987).

124. *Id.* at 113-16.

125. 586 So. 2d 103 (La. 1991).

126. *Id.* at 104.

127. *Id.*

engage in on-site inspection, analysis, and transaction negotiation.[128] The plaintiffs initiated suit in Louisiana, the location of one of these regional offices.[129] In determining if general jurisdiction existed over the defendant, the Supreme Court of Louisiana explicitly adopted a two-part test for general jurisdiction: (1) minimum contacts, and (2) application of the reasonableness factors.[130] The court noted that although the Supreme Court had not adopted the fairness factors in the context of general jurisdiction, *International Shoe* had eschewed a "simply mechanical or quantitative" analysis in favor of an approach that linked minimum contacts with traditional notions of fair play and substantial justice.[131] The approach of the *de Reyes* court was not uncommon in the post-*Asahi* world.[132] Indeed, several federal circuits affirmatively declared that general jurisdiction was subject to a reasonableness inquiry, despite a lack of guidance from the Supreme Court.[133]

---

128. *Id.*

129. *Id.*

130. *Id.* at 109.

131. *Id.*

132. *See* Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361-62 (5th Cir. 1990) (applying a minimum contacts and fairness test); Williams Elec. Co. v. Honeywell, Inc., 854 F.2d 389, 393 (11th Cir. 1988) (applying a minimum contacts and fairness test); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987) (applying a continuous and systematic contacts and fairness test); Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 777 (5th Cir. 1986) (applying a continuous and systematic contacts test); Abuan v. General Elec. Co., 735 F. Supp. 1479, 1482 (D. Guam 1990) (applying a three-part test that looks at the contacts with the forum state and reasonableness of asserting jurisdiction); Kervin v. Red River Ski Area, Inc., 711 F. Supp. 1383, 1389 (E.D. Tex. 1989) (applying a minimum contacts and fairness test); Simmons v. SeaTide Int'l, Inc., 693 F. Supp. 510, 513-14 (E.D. La. 1988) (applying a two-part minimum contacts and fairness test); Palmer v. Kawaguchi Iron Works, Ltd., 644 F. Supp. 327, 329-30 (N.D. Ill. 1986) (applying a two-part test that looks at the fairness of asserting jurisdiction and whether the assertion of jurisdiction has a basis in the laws of Illinois).

133. *See* Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851 n.2 (9th Cir. 1993) ("*Asahi*'s interpretation of *International Shoe* as entailing separate contacts and reasonableness inquiries is not limited to the specific jurisdiction context."); *see also* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 464-65 (1st Cir. 1990) (listing the general jurisdiction analysis as (1) minimum contacts and (2) the five "fair play and substantial justice" factors). *But see* Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733-34 (10th Cir. 1984) (disagreeing that the reasonableness factors apply).

III. THE ADOPTION OF THE "AT HOME" STANDARD

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

A factors-based analysis for general jurisdiction ultimately proved messy–it was difficult for courts to apply and was consistently criticized by commentators. But it also appeared that general jurisdiction was not going away any time soon, as courts consistently used the doctrine as a basis for adjudicative power, even in the absence of additional Supreme Court guidance. An attempt at further clarification from the Court finally came in *Goodyear Dunlop Tires Operations S.A. v. Brown*.[134] Coming from a case heard in the North Carolina Court of Appeals, *Goodyear* arose out of a wrongful death action involving two American teenagers who died following a bus accident in France.[135] After competing in an international soccer tournament, Julian Brown and Matthew Helms, thirteen-year old boys from the state of North Carolina, were killed when the bus they were riding in with their teammates and coaches veered off the road and overturned near Paris, France.[136] Both boys sustained serious injuries that ultimately proved fatal, and it was alleged that failure of one of the bus's tires was the cause of the accident.[137] The tire in question was manufactured by Goodyear Lastikleri T. A. S. ("Goodyear Turkey"), a wholly owned Turkish subsidiary of its American parent, Goodyear Tire & Rubber Company ("Goodyear USA").[138]

The parents of the victims, serving as the administrators of the estates, commenced an action for damages in North Carolina state court.[139] They named Goodyear USA, an Ohio corporation, as a defendant, along with Goodyear Turkey and two other wholly owned foreign subsidiaries, Goodyear Dunlop Tires France SA ("Goodyear France") and Goodyear Luxembourg Tires SA ("Goodyear Luxembourg").[140] Goodyear USA had plants in North Carolina and did not contest the exercise of the North Carolina court's jurisdiction over it; however, the foreign subsidiaries claimed that a North Carolina court could not exercise personal jurisdiction over them.[141] They initially supported their motions to dismiss with affidavits

---

134. 131 S. Ct. 2846 (2011).
135. *Id.* at 2850.
136. *Id.*
137. *Id.*
138. *Id.* at 2850-52.
139. *Id.* at 2850.
140. *Id.*
141. *Id.*

stating that each company did not maintain offices in North Carolina and did no business at all in North Carolina.[142] However, additional evidence showed that from 2004 to 2007, tires manufactured by Goodyear USA's foreign subsidiaries had, in fact, been shipped to North Carolina.[143] The tires in question had not been shipped by their original manufacturer—they had reached the state through the operation of a continuous and "highly-organized distribution process" carried on by the foreign subsidiaries' parent company.[144] The foreign subsidiaries did not maintain their own distribution systems in the United States but would instead rely on their parent company and its affiliates to distribute the subsidiaries products.[145] Indicative of this process was the very tire at issue in the bus accident—it had been manufactured for sale in the United States and had instructions written on it in English.[146]

On review, the Supreme Court determined that general jurisdiction does not flow from a foreign subsidiary participating in its parent company's distribution scheme in the United States.[147] Accordingly, the fact that some tires manufactured by the defendants did in fact end up in North Carolina was inadequate for a finding of general jurisdiction.[148] The Court referred back to *Perkins* as a textbook example of the exercise of general jurisdiction and declined to find that foreign subsidiaries were subject to general jurisdiction in a forum merely because their products traveled in the stream of commerce to the forum state.[149] Quoting *International Shoe*, the court noted that: "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[150]

The prominent addition of the "at home" language in *Goodyear* seemed to add something to the jurisdictional equation, but it left many questions unanswered.[151] Although on the facts of *Goodyear* it was apparent that the foreign subsidiaries were not at home in

---

142. Joint Appendix at 154-56, 164-66, 183-86, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011), (No. 10-76), 2010 WL 4628575.

143. *Goodyear*, 131 S. Ct. at 2852.

144. *Id.*

145. *Id.* at 2852.

146. *Id.*

147. *Id.* at 2855.

148. *Id.* at 2857.

149. *Id.* at 2856.

150. *Id.* at 2851 (citing Int'l Shoe Co. v. Wash., 326 U.S. 310, 317 (1945)).

151. *Id.* at 2851, 2853-54.

North Carolina, it was still unclear how this standard would be applied in the future.[152] For example, would the presence of employees or offices in the state be enough to render a corporation "at home"? Under the new standard, would Goodyear USA have been subject to general jurisdiction in North Carolina, a state where it maintained facilities and employees? Further, by referencing *Perkins*, did the Court intend to limit the exercise of general jurisdiction only to situations where a company's principal place of business was in the forum state?

The unanswered questions raised by enigmatic *Goodyear* led to a reaction that was both swift and severe. The case was criticized for refusing to accept the changing nature of transnational business practices and create workable standards for modern realities.[153] To some, *Goodyear* suggested that subsidiaries would not lose the benefits of the American market while insulating themselves from general jurisdiction by having their products distributed through an American parent company.[154] It was believed this standard would encourage shoddy production in wholly owned foreign companies who would cloak themselves in the protection of the very distribution scheme sanctioned in *Goodyear*.[155] In this way, *Goodyear* could be read as a blueprint for foreign subsidiaries wishing to ensure that a U.S. court cannot exercise jurisdiction over them.

Concerns about the implications of *Goodyear* were also fueled by the Supreme Court's reference only to the place of incorporation and the principal place of business of a corporation as the "paradigm" forums able to exercise general jurisdiction over a corporation.[156] Scholars questioned whether the "at home" language and the identification of these paradigms limited jurisdiction entirely to those two places.[157] However, if the Court had wished to limit

---

152. *Id.* at 2857.

153. *See, e.g.*, Taylor Simpson-Wood, *In the Aftermath of* Goodyear Dunlop*: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 143 (2012) (arguing instead that a stream-of-distribution theory or jurisdiction would be more appropriate with the changing times).

154. *Id.* at 131.

155. Stephanie Glynn, *Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products—The Fund Concept*, 26 EMORY INT'L L. REV. 317, 342 (2012) (arguing that the Court has allowed foreign manufacturers to insulate themselves by targeting U.S. market through distribution chains while claiming ignorance as to where their products are sold).

156. *Goodyear*, 131 S. Ct. at 2853-54.

157. *See, e.g.*, Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 677 (2012) ("[T]he *Goodyear* opinion did include several clues suggesting that the Court may have intended the at home

general jurisdiction in such a categorical way, it likely would have adopted a bright line rule enunciating this standard like it did in the context of corporate citizenship for purposes of diversity jurisdiction.[158] Thus, the better view would prove to be that the "at home" language used in *Goodyear* can also permit general jurisdiction to be exercised when a company engages in some type of "continuous and systematic" contacts in a state that met the "at home" threshold.[159] What those contacts would be, however, was left unclear.

In navigating the waters post-*Goodyear*, a number of lower courts saw *Goodyear* for what it was intended to be: a narrowing of general jurisdiction to reach only situations where the corporation had substantial contacts *and* was truly at home in the forum. For example, in *Abelesz v. OTP Bank*, the Seventh Circuit found that the U.S. contacts of two Hungarian banks were insufficient to confer general jurisdiction over the defendants, even when those contacts included thousands of accounts in the United States valued at over $250 million dollars.[160] The court reasoned that such contacts did not mean that the banks were "at home" in the forum as mere continuous forum contacts were no longer enough to sustain a finding of general jurisdiction.[161] Additionally, other courts recognized that *Goodyear* limited the scope of general jurisdiction, especially when applied to large national or international corporations.[162] In *Chavez v. Dole Food Co.*, the court found that

---

standard as a narrow one, perhaps extending no further than a corporation's state of incorporation and principal place of business.").

158. *See* 28 U.S.C. § 1332(c)(1) (2005) ("[A] corporation shall be deemed to be a citizen of [every] State [and foreign state] by which it has been incorporated and of the State [or foreign state] where it has its principal place of business."); Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192-94 (2010) (favoring simple jurisdictional rules in this context).

159. Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on* Goodyear v. Brown *and Looking Ahead to* Daimler AG v. Bauman, 34 U. PA. J. INT'L L. 765, 778 (2013).

160. 692 F.3d 638, 656 (7th Cir. 2012) (identifying the contacts as (1) 4,884 accounts worth over $93 million and 1,500 accounts worth around $147 million, (2) contracts and negotiations with United States banks, and (3) frequent business trips by bank personnel to the United States).

161. *Id.* ("The proper inquiry is not, as plaintiff's suggest, whether a defendant's contacts 'in the aggregate are extensive.' The issue under the Due Process Clauses of the Fifth and Fourteenth Amendments is whether the contacts are so 'continuous and systematic' as to render [defendants] essentially at home in the forum.") (quoting *Goodyear*, 131 S. Ct. at 2851).

162. *See* Bowles v. Ranger Land Sys., Inc., 527 F. App'x 319, 322 (5th Cir. 2013) (holding that defendant corporation's contacts with forum state were not sufficient to

although the defendant corporation owned property in Delaware and sold a large number of products in Delaware, the corporation operated nationwide, and Delaware was no more a corporate home than any other state.[163] The court noted that the "at home" language in *Goodyear* rejected the idea that national or international corporations were subject to general jurisdiction throughout the United States, as such entities are presumably doing a good deal of business in every state.[164]

In contrast, other courts did not recognize the significance of the "at home" language in *Goodyear* and continued with business as usual. These courts ignored the substantive contribution of this language and continued to focus on the presence, or absence, of what they deemed "continuous and systematic" contacts. For example, in *Ruben v. United States*, [165] the court found general jurisdiction over a foreign architecture firm that had completed several projects in Pennsylvania, but did not have an office, bank account, or property in Pennsylvania.[166] Further, the architecture firm derived only 1% of its U.S. revenue from Pennsylvania.[167] Applying the "continuous and systematic" standard, the court reasoned that while the percentage of revenue the firm earned in Pennsylvania was small, the services performed for its Pennsylvania clients were central to its core business and involved high-profile institutions or sites.[168] Other courts cited *Goodyear*'s "at home" standard in name, but did nothing to change their analysis. In *U.S. ex rel. Barko v. Halliburton Co.*,[169] the District of Columbia Circuit assessed the presence of general jurisdiction over a company located in Jordan that did business primarily in the Middle East.[170] Applying *Goodyear*'s "at home" standard, the court found that the defendant was subject to general jurisdiction in Washington, D.C., because it had entered into $159

---

constitute systematic contacts as required by *Goodyear*); Sides v. Harley-Davidson, No. Civ. A. 12-6330, slip op. at 6-7 (E.D. Pa. May 15, 2013) (hold that placing a product in the stream of commerce did not constitute continuous and systematic contacts necessary to subject general jurisdiction over corporation); Lester v. Presto Lifts, Inc., No. CV 12-398-PHX-PGR, slip op. at 6 (D. Ariz. June 19, 2012) (holding that defendant was not subject to general jurisdiction because it did not have continuous and systematic contacts as described in *Goodyear*).

163. 947 F. Supp. 2d 438, 443 (D. Del. 2013).

164. *Id.*

165. 918 F. Supp. 2d 358 (E.D. Pa. 2013).

166. *Id.* at 359-60.

167. *Id.* at 359.

168. *Id.* at 360.

169. 952 F. Supp. 2d 108 (D.D.C. 2013).

170. *Id.* at 115.

million worth of government subcontracts in the United States, worked with numerous American companies, and operated an English-language website.[171] Such considerations fly in the face of *Goodyear*, which suggests that a true corporate home, at the level of the state of incorporation or the principal place of business, is necessary for general jurisdiction, and that continuous presence in the jurisdiction is not enough.[172] Regardless, many courts did not recognize the significance of the Court's new approach.[173]

B. Daimler A.G. v. Bauman

In 2014, the Supreme Court added yet another decision to the mix—*Daimler A.G. v. Bauman*.[174] The facts of *Daimler* arose from Argentina's "Dirty War," a period of state-sanctioned terrorism that involved the use of military and security forces to conduct guerilla-style violence against individuals allegedly associated with socialism.[175] The plaintiffs in *Daimler* were former employees, or relatives of employees, of Mercedes-Benz Argentina during 1976-

---

171. *Id.* at 116.

172. Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 226 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014) (stating that *Goodyear* makes clear that even a company's substantial, continuous, and systematic contacts in the forum are now insufficient for the exercise of general jurisdiction).

173. *See* Neeley v. Wolters Kluwer Health, Inc., No. 4:11-CV-325 JAR, slip op. at 8-12 (E.D. Mo. July 29, 2013) (finding general jurisdiction based on substantial sales in the forum); Hess v. Bumbo Int'l Tr., 954 F. Supp. 2d 590, 594 (S.D. Tex. 2013) (finding general jurisdiction based on relationship with distributor in Texas and large volume of sales); Ashbury Int'l Grp., Inc. v. Cadex Def., Inc., No. 3:11CV00079, slip op. at 12 (W.D. Va. Sept. 20, 2012) (finding general jurisdiction based on solicitation of Virginia customers); McFadden v. Fuyao N. Am., Inc., No. 10–CV–14457, slip op. at 4-9 (E.D. Mich. Apr. 12, 2012) (finding general jurisdiction over foreign manufacturer in Michigan based on history of contracts with General Motors).

174. 134 S. Ct. 746 (2014). The timing of this case speaks to the growing importance of the issue. *Perkins* was issued in 1952, *Helicopteros* was issued in 1984, *Goodyear* was issued in 2011, and *Daimler* was issued in 2014. *Daimler*, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 445 (1952). Thus, there were 32 years between *Helicopteros* and *Perkins*, 27 years between *Goodyear* and *Helicopteros*, but only three years between *Goodyear* and *Daimler*.

175. *Daimler*, 134 S. Ct. at 751. *See generally* IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS (2000) (describing the various human rights abuses that occurred during this time).

1983.[176] These plaintiffs alleged that Mercedes-Benz Argentina collaborated with Argentina's state police to kidnap, torture, and kill workers who were targeted by the state.[177] During this period of time, Mercedes-Benz Argentina was the wholly owned Argentinean subsidiary of DaimlerChrysler Aktiengesellschaft ("Daimler"), a German public stock company that manufactures Mercedes-Benz vehicles.[178] In 2004, twenty-two Argentinian residents filed suit against Daimler's predecessor in interest in the Northern District of California, alleging claims under the Alien Tort Statute and the Torture Victim Protection Act, as well as wrongful death and intentional infliction of emotional distress under the laws of California and Argentina.[179] These plaintiffs sought to hold Daimler vicariously liable for the actions of Mercedes-Benz Argentina during the period in question.[180]

The incidents complained of by plaintiffs centered on Mercedes-Benz Argentina's plant in Gonzalez Catan, Argentina; thus, no part of the alleged collaboration with Argentina's state police took place outside of Argentina.[181] As such, Daimler questioned the choice of the American forum, and filed a motion to dismiss for lack of personal jurisdiction.[182] The plaintiffs, in turn, maintained that jurisdiction over Daimler could be founded on the California contacts of Mercedes-Benz USA, an indirect subsidiary of Daimler that served as Daimler's exclusive importer and distributor in the United States.[183] Mercedes-Benz USA had multiple contacts with California—it had a regional office, vehicle preparation center, and classic car center in the state.[184] In addition, California was a significant market for both Mercedes-Benz USA and Daimler.[185] Because of the high number of luxury vehicle sales in the state, Mercedes-Benz USA's California sales accounted for 2.4% of Daimler's total worldwide sales.[186]

---

176. *Daimler*, 134 S. Ct. at 748.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 752.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* Because Daimler conceded that Mercedes-Benz USA was subject to general jurisdiction in the forum, the exact nature of the subsidiary's activities in California was not developed. However, at least this much is known: Daimler's worldwide sales in 2004 were $192 billion. *Id.* at 766-67 (Sotomayor, J., concurring).

Based on Mercedes-Benz USA's contacts with California, plaintiffs alleged that jurisdiction over Daimler was appropriate, since Mercedes-Benz USA could be considered the "jurisdictional agent" of Daimler.[187] The Ninth Circuit agreed, finding that agency was established by considering the importance of the activities performed by Mercedes-Benz USA to Daimler and that "reasonableness" did not bar the exercise of jurisdiction.[188] Specifically, considering "the extensive business operations of that subsidiary, the interest of California in adjudicating important questions of human rights, [and] our substantial doubt as to the adequacy of Argentina as an alternative forum," the Ninth Circuit determined that Daimler had not presented a compelling case showing that an exercise of jurisdiction, achieved by extending the contacts of Mercedes-Benz USA to Daimler, would be inappropriate in light of fair play and substantial justice.[189]

Accordingly, 2.4% of this figure would mean that Mercedes-Benz USA's California sales would equal approximately $4.6 billion. *Id.*

187. *Id.* at 752.

188. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 912 (9th Cir. 2011), *rev'd*, 134 S. Ct. 746 (2014).

189. *Id.* at 930. The Ninth Circuit's agency test looks to whether the subsidiary functions as the parent's representative "in that it performs services that are sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services." *Id.* at 920 (quoting Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994)). At the time of this decision, six other circuits had rejected the logic utilized by the Ninth Circuit. Jeffrey A. Van Detta, *Some Legal Considerations for E.U.-Based MNEs Contemplating High-Risk Foreign Direct Investments in the Energy Sector After* Kiobel v. Royal Dutch Petroleum *and* Chevron Corporation v. Naranjo, 9 S.C. J. INT'L L. & BUS. 161, 261-62 n.311 (2013) (identifying the 8th Circuit, 5th Circuit, 6th Circuit, 7th Circuit, 4th Circuit, and 11th Circuit). Unlike the Ninth Circuit, these Circuits use an "alter ego" test for determining when a subsidiary's contacts should be attributed to the parent. *See, e.g.*, Estate of Thomson v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362-63 (6th Cir. 2008) (applying the alter ego theory of personal jurisdiction in a diversity action); Epps v. Stewart Info. Servs. Corps., 327 F.3d 642, 648-49 (8th Cir. 2003) (applying an alter ego test for determining when a subsidy's contacts should be attributed to the parent corporation); Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1293-94 (11th Cir. 2000) (examining a corporation's subsidy's contacts to the forum to determine if corporation is subject to personal jurisdiction); IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir. 1998) (holding that a parent corporation can be liable for a subsidy's torts if there is reason for piercing the corporate veil and attributing subsidy's acts to the parent); Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 62-63 (4th Cir. 1993) (examining the parent-subsidy relationship of the defendant and its subsidy corporation for the purposes of asserting personal jurisdiction); Dalton v. R&W Marine, Inc., 897 F.2d 1359, 1363

The Supreme Court addressed the question of whether the Due Process Clause precluded the District Court from exercising general jurisdiction over *Daimler* in California, "given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."[190] Thus, while *Goodyear* had answered the question of whether "foreign subsidiaries of a United States parent corporation [could be] amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State," *Daimler* addressed when a subsidiary's United States contacts provide the basis for the exercise of dispute-blind jurisdiction over a foreign parent corporation.[191]

Because jurisdiction in *Daimler* was predicated on general jurisdiction, the Court addressed the historical development of the doctrine since *International Shoe*.[192] Specifically, the Court noted that the "continuous and systematic" language in *International Shoe* had been divorced from its original application in the context of specific jurisdiction—pursuant to *International Shoe*, exercises of case-specific jurisdiction would be when "activities of the corporation

---

(5th Cir. 1990) (applying the alter ego theory of personal jurisdiction). This alter ego test looks to whether the parent controls the subsidiary to such a degree that the latter can be considered the mere instrument of the former and if a failure to disregard their separate entities would result in fraud or injustice. *See* Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001) (describing the alter ego exception). It seems likely that had an alter ego test been employed, Mercedes-Benz USA would not have been considered the jurisdictional agent for Daimler. *See* Justin Kesselman, *Multinational Corporate Jurisdiction & The Agency Test: Should the United States be a Forum for the World's Disputes?*, 47 NEW ENG. L. REV. 361, 372-73 (2012) ("In *Bauman v. DaimlerChrysler Corp.*, jurisdiction would not have attached under the alter-ego test.").

190. *Daimler*, 134 S. Ct. at 751. Specifically, the question was as follows: "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." *Id.* at 760 n.16.

191. *Id.* at 757 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850 (2011)). Interestingly, the Court had previously decided that service effected on an American subsidiary of a foreign parent company can satisfy the notice requirement for personal jurisdiction in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988). The Court found that when "service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends." *Id.* at 707. The requirements for service and a valid exercise of personal jurisdiction are, of course, incredibly different, but at least in some situations the Court seemed willing to find due process was satisfied based on activities involving an American subsidiary.

192. *Daimler*, 134 S. Ct. at 754-58.

there have . . . been continuous and systematic, but also give rise to the liabilities sued on."[193] The Court also noted that specific jurisdiction had become the crown jewel of the personal jurisdiction analysis and was now in sharper focus than its sibling.[194] The Court thus suggested that general jurisdiction was confined to situations "traditionally recognized" for the exercise of dispute-blind jurisdiction.[195] As such, the Court noted that continuous activities in the forum did not support dispute-blind jurisdiction; instead, the contacts must be such that the defendant is "at home" in the forum state.[196]

Against this backdrop, the court went on to assess the viability of utilizing general jurisdiction to find personal jurisdiction over Daimler based on Mercedes-Benz USA's contacts in California. Assuming that Mercedes-Benz USA was at home in California[197] and that its contacts were imputable to Daimler,[198] the Court still

---

193. Int'l Shoe Co. v. Wash., 326 U.S. 310, 317 (1945); *see Daimler*, 134 S. Ct. at 754.

194. *Daimler*, 134 S. Ct. at 755.

195. *Id.* at 757-58.

196. *Id.* at 751.

197. This is a big (and unhelpful) assumption. Mercedes-Benz USA had offices, employees, and significant transactions in California. *Id.* at 752. It is unclear whether the "at home" test would still provide general jurisdiction based on these factors. The Court's refusal to clarify when a corporation is at home outside of the state of incorporation and principal place of business leaves this question unclear.

198. *Id.* at 760. The Supreme Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. As noted above, at least six Circuits have held that a subsidiary's contacts with the forum can be imputed to the parent when the subsidiary is so dominated by the parent as to be considered its alter ego. *See supra* text accompanying note 189. The Ninth Circuit in *Daimler* had utilized an "agency test," which looked to see whether the subsidiary performed services for the parent of special importance such that the parent would have had to perform those services itself if the subsidiary did not exist, plus the parent retained some right of control over the subsidiary. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920-22 (9th Cir. 2011). Under the facts of *Daimler* specifically, the Ninth Circuit had found that Mercedes-Benz USA's services were important to Daimler since Daimler would be ready to perform those services itself even if Mercedes-Benz USA did not exist or would have found a new entity to do so. *Id.* at 922. The Court criticized this approach as being too pro-jurisdiction in focus, as surely anything a corporation did through a distributor the corporation would still need to do by other means if the subsidiary did not exist. *Daimler*, 134 S. Ct. at 759. However, the Court did not utilize this opportunity to establish a test for determining when a subsidiary's contacts would be imputed to its parent.

But it now seems clear that the agency test is moving towards becoming a disfavored doctrine. Utilized only by the Ninth Circuit and Second Circuit, a large

determined that general jurisdiction would be inappropriate.[199] Daimler's activities would need to be assessed in their entirety, at both the national and international level, to determine where it could truly be said to be "at home."[200] Harking back to *Goodyear*, the Court noted that the fora in which general jurisdiction would certainly be satisfied were the state of incorporation and principal place of business and that neither of those bases were satisfied on the facts of the case.[201] The court, however, went on to further clarify that these two paradigmatic fora were not the only two places where general jurisdiction might be appropriate.[202] Instead, the court specifically noted that it did not

> [F]oreclose the possibility that in an exceptional case, see, *e.g.*, *Perkins* . . ., a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because

---

majority of circuits instead employ the alter ego test. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000); *see, e.g.*, Estate of Thomson v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008) ("Courts in this Circuit . . . have endorsed the use of the alter-ego theory to exercise personal jurisdiction."); Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 648-49 (8th Cir. 2003) (noting that "personal jurisdiction can be based on . . . the residential corporation . . . act[ing] as the nonresidential corporate defendant's alter ego"); Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1363 (5th Cir. 1990) (stating that "[a]lthough the mere existence of a parent-subsidiary relationship will not support the assertion of jurisdiction over a foreign parent," jurisdiction is warranted when the subsidiary is the alter-ego of the parent); *see also* Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT'L & COMP. L. 1, 13-14 (2014) (noting that "a majority of U.S. lower courts . . . require that the corporations be . . . the 'alter ego' of each other"). Further, the Court's criticism of the agency test in *Daimler* will surely only hasten its demise.

199. *Daimler*, 134 S. Ct. at 760.

200. *Id.* at 762 n.20. The court noted that failing to do so would reduce the "at home" inquiry to a mere synonym of the "doing business" approach utilized before *International Shoe*. *Id.* Accordingly, under such an approach, Daimler would not have the opportunity to structure its conduct in a way that would provide assurances as to where it could and could not be subject to suit, a result the Court found unacceptable. *Id.* at 761-62.

201. *Id.* at 760-61.

202. *Id.* at 761.

> Daimler's activities in California plainly do not approach that level.[203]

The Court also refused to consider the *Asahi* reasonableness factors in its analysis.[204] The Court reasoned that a two-step approach would be "superfluous" in cases of general jurisdiction—if the corporation was truly at home in the forum, an exercise of general jurisdiction would always be reasonable.[205] Pursuant to this reasoning, the Court believed that a two-step analysis would be inefficient and compound an "issue that should be resolved expeditiously at the outset of litigation."[206]

The result from *Daimler* enshrines the test first put forth in *Goodyear*—a general jurisdiction exists where defendants have contacts in the forum such that the corporation is essentially at home in the forum.[207] Such a standard is certainly met where the corporation is incorporated and where it has its principal place of business.[208] For the second time in five years, the Court referred to these fora as the paradigmatic examples for the exercise of general jurisdiction.[209] The Court also, however, referred to rare situations where the defendant corporation might still be at home in the forum, even if that forum was not the principal place of business or the state of incorporation.[210] Continuing to use *Perkins* as the prime example of this situation, the Court did not foreclose finding some situations where operations in the forum state are so substantial and of such a nature to render the corporation at home.[211] The Court did nothing, however, to explain what facts outside of those present in *Perkins* would satisfy this standard.

---

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

204. *Id.* at 762 n.20.

205. *Id.*

206. *Id.*

207. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011). As correctly noted by some lower courts, the standard utilized in *Daimler* was simply a clarification of the standard adopted for the first time in *Goodyear*. *See, e.g.*, Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 223 (2d Cir. 2014) (noting that *Daimler* "*reaffirms* that general jurisdiction extends beyond an entity's state of incorporation and principal place of business only in the exceptional case where its contacts with another forum are so substantial as to render it 'at home' in that state") (emphasis added).

208. *Daimler*, 134 S. Ct. at 760.

209. *Id.*

210. *Id.* at 761 n.19.

211. *Id.*

IV. THE JURISDICTIONAL TRISKELION

A. Defining the Triskelion

The language and analysis controlling our conceptions of general jurisdiction have shifted radically in just a five-year period. Prior to *Goodyear*, no courts and only a few commentators questioned that continuous and systematic contacts sufficed for the exercise of general jurisdiction. It seems clear now, however, that an appropriate exercise of dispute-blind jurisdiction requires contacts far beyond those that are merely continuous, substantial, or systematic. Indeed, *Daimler* and *Goodyear* now state that general jurisdiction exists where a "corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially *at home* in the forum State.'"[212]

Of course, a major goal of the "at home" standard is to remove uncertainty in jurisdictional analyses. A progressive view of general jurisdiction would thus be to reject a loose balancing test and move toward more categorical application. The *Daimler* Court in particular suggests thinking about jurisdiction in categorical terms by establishing principal place of business and state of incorporation as exemplar bases of general jurisdiction.[213] The Court suggests that no factors need be weighed to determine if general jurisdiction is appropriate in those two fora—they are simply paradigmatic of a corporate home.[214]

The *Daimler* Court's interest in a categorical approach likely stems from its concern about a corporation's ability "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[215] Principal place of business and state of incorporation have long been advocated as models of general jurisdiction,[216] and these fora are easy to identify. However, the Court did not limit general jurisdiction to a wholly categorical analysis. Although the Court had

---

212. Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (emphasis added) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

213. *Daimler*, 134 S. Ct. at 761 n.19; Twitchell, *supra* note 1, at 669-70 (noting that principal place of business, or the company's headquarters, is equivalent to an individual's domicile, and that the state of incorporation provides an additional "uniform home base").

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

215. *Id.* at 762 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1984)).

216. Twitchell, *supra* note 1, at 669.

the opportunity to constrict general jurisdiction to state of incorporation and principal place of business entirely, it specifically created a third opportunity for general jurisdiction that does not lend itself to rote application. The Court noted that it would exercise general jurisdiction in unique situations, like *Perkins*, in which contacts are "so substantial and of such a nature as to render the corporation at home."[217]

The Court's language suggests that a factor-based analysis remains a third possibility for the exercise of general jurisdiction, but that this is separate from principal place of business and state of incorporation. Thus, in re-conceptualizing general jurisdiction, it may be helpful to think about dispute-blind jurisdiction as a triskelion, possessing three separate but interrelated bases: state of incorporation, principal place of business, and where, because of unique circumstances, the defendant has so many contacts that it is essentially "at home" in the style of *Perkins*. However, two things remain missing. First, what factors are used to assess the third basis for general jurisdiction? This basis is obviously not categorical, and thus it must be determined how to assess its presence within unique fact patterns. Additionally, what underlying theory makes the three bases appropriate? If general jurisdiction is present in these fora, the reason for its existence there must be explored.

B. The Missing Third Basis

In attempting to clarify the third basis of general jurisdiction, the only guidance provided by *Daimler* comes from a bare reference to *Perkins*.[218] This, however, is wholly unhelpful. *Perkins* involved a situation in which all of the foreign defendant's corporate activities were being actively directed solely by the company's president from within Ohio.[219] Specifically, the president supervised policies dealing with the company's properties in the Philippines, dispatched funds to cover the costs of rehabilitation, and made all corporate decisions from Ohio.[220] As such, "[t]o the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio."[221] Thus, it appears that in such a case, where all corporate management and directives were centered in Ohio, that Ohio was, in fact, the principal

---

217. *Daimler*, 134 S. Ct. at 761 n.19.

218. Daimler AG v. Bauman, 134 S. Ct. 746, 761 n.19 (2014).

219. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952).

220. *Id.*

221. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011) (citing *Perkins*, 342 U.S. at 447-48).

place of business.[222] Indeed, the Supreme Court itself stated in *Keeton v. Hustler Magazine* that Ohio constituted the "principal, if temporary, place of business" of the defendant in *Perkins*.[223] As such, *Perkins* alone does not, and should not, define the third aspect of general jurisdiction.

With *Perkins* providing relatively little guidance, the third basis for general jurisdiction leaves unclear the nature of contacts that will contribute to a finding of general jurisdiction. To explore this issue, let us consider a fantasy fast food company, International Fancy Eats.[224] It has its principal place of business and place of incorporation in France, although it operates in seventeen countries, including the United States. An American family is dining at an International Fancy Eats at an airport in Mexico when the youngest child slips, falls, and suffers a head injury due to the restaurant's negligence. The child is severely injured and transported back to her home in Texas. There are fifteen International Fancy Eats locations in Texas, and the company maintains an office in Dallas to direct its American operations. The company has hundreds, if not thousands, of employees in Texas, and it derives substantial revenue from Texas.

The question is now whether under an "at home" model of general jurisdiction, the American victim in this accident can litigate her claim in a domestic forum. Obtaining specific jurisdiction in the United States is out of the question as the injury occurred abroad. As such, general jurisdiction must be considered. Under a pre-*Daimler*, or really pre-*Goodyear*,[225] model, it seems relatively clear

---

222. *Perkins*, 342 U.S. at 447-48. *See*, Hertz Corp. v. Friend, 130 S. Ct. 1181, 1184 (2010) (defining principal place of business as "where a corporation's officers direct, control, and coordinate the corporation's activities").

223. 465 U.S. 770, 780 n.11 (1984).

224. A similar situation to the hypothetical can be found in *Meier v. Sun Int'l Hotels, Ltd.* 288 F.3d 1264 (11th Cir. 2002). In that case, a minor was injured while snorkeling in the Bahamas after being struck by a commercial speedboat. *Id.* at 1267. The victim and his family brought suit in Florida against Bahamian corporations affiliated with the hotel where the motorboat owner conducted business. *Id.* at 1268. The defendants had their principal place of business and place of incorporation in the Bahamas. *Id.* The Eleventh Circuit sustained a finding of general jurisdiction because the defendants had bank accounts in the forum that were handled by individuals in the Bahamas and engaged in extensive marketing and booking services in the forum. *Id.* at 1268-74. This case was decided pre-*Daimler*; now, it seems clear that general jurisdiction would not have been appropriate in Florida.

225. *See* Gilmore v. Palestinian Interim Self-Gov't Auth., 8 F. Supp. 3d 9, 15 (D.D.C. 2014) (noting that the "at home" standard was announced in the *Goodyear* case, not *Daimler*).

that general jurisdiction over International Fancy Eats would have been sustained in Texas—the company has physical offices in the states, maintained employees there, and presumably conducted a good deal of business in the state. This level of operations could fairly be considered "continuous and systematic" contacts.[226]

But applying the "at home" standard for general jurisdiction to the above facts proves more complicated. The principal place of business and place of incorporation for International Fancy Eats are abroad; as such, these cannot serve as domestic bases for general jurisdiction. The only possible way to sustain domestic jurisdiction is thus to find that the contacts in this case fall within the third aspect of the jurisdictional triskelion—namely, they illustrate a corporate home in the vein of *Perkins*. Since *Daimler*, only one case has sustained a finding of general jurisdiction despite the fact that the principal place of business and state of incorporation were not in the forum state. In *Barriere v. Juluca*,[227] the court found that an Anguillan corporation with its principal place of business in Anguilla was subject to general jurisdiction in Florida under the third basis of the jurisdictional triskelion—the corporation had *Perkins*-like contacts suggesting that it was "at home" in the forum.[228] Specifically, the court found that the defendant maintained a sales office in Florida, had an agent that managed its assets in Florida, and promoted and made reservations in Florida, and thus could fairly be characterized as "at home" in the forum.[229] The court noted the undesirable result that the opposite conclusion would mandate—American citizens injured while vacationing in the Caribbean could not bring suit in a domestic court against resorts having offices, employees, bank accounts, and sales agents in the United States.[230]

The *Barriere* court further explained that while *Daimler* undoubtedly sought to limit the doctrine of general jurisdiction, the court could not conceive that it was intended to "effectively deprive

---

226. *See, e.g.*, Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357 (11th Cir. 2006). In *Stubbs*, the plaintiff, a Mississippi resident, was injured at the Nassau Resort, a Nassau, Bahamas company. *Id.* at 1359. The plaintiffs submitted evidence that Nassau Resort had been utilizing a corporate office in Ft. Lauderdale, Florida, and that it conducted significant business in Florida. *Id.* at 1364. The court found that general jurisdiction was appropriate based on these facts. *Id.* Now, it seems relatively clear that Nassau Resort would not be subject to general jurisdiction in Florida—these contacts would not rise to the level of the corporation being "at home" in the forum.

227. No. 12-23510-CIV-MORENO (S.D. Fla. Feb. 19, 2014).

228. *Id.* at 1-2.

229. *Id.* at 12.

230. *Id.* at 12-13.

American citizens from litigating in the United States for virtually all injuries that occur at foreign resorts maintained by foreign defendants even where, as here, the corporations themselves maintain an American sales office in Florida and heavily market in the jurisdiction."[231] Other courts have not been as generous in the post-*Daimler* wake. For example, in *Air Tropiques, Sprl v. Northern & Western Insurance Co.*, the court declined to find general jurisdiction when a company maintained an administrative office and employees in the forum.[232] The court specifically noted that under a pre-*Daimler* approach, there most certainly would have been general jurisdiction in the forum.[233] However, the court refused to extend general jurisdiction based on the narrowed scope of the "at home" standard.[234] Other cases have also refused to extend general jurisdiction after *Daimler* when there were only employees and offices in the forum, finding that such factors did not suggest that the defendant was "at home."[235]

The International Fancy Eats hypothetical implicates the same concerns raised in *Barriere*.[236] If courts interpret the third aspect of the jurisdictional triskelion too narrowly, the victim's only recourse would be to bring suit against the company in Mexico or France, resulting in massive expense and inconvenience to the victim and her family, plus the uncertainty of navigating foreign law. The failure to leave some basis for the exercise of general jurisdiction in the United States will thus leave a jurisdictional gap and require injured plaintiffs to litigate in a foreign forum despite a multinational corporation's extensive and sophisticated U.S. contacts.[237] Such a result is not only undesirable, but it also shields

---

231. *Id.* at 13.

232. No. CIV.A. H-13-1438 (S.D. Tex. Mar. 31, 2014).

233. *Id.* at 19.

234. *Id.* at 20.

235. *See, e.g.*, Brown v. CBS Corp., 19 F. Supp. 3d 390, 397-98 (D. Conn. 2014) (stating that the defendant was not at home in the forum when it had 28 employees in the forum, leased property with its name on the building, and had derived about $160 million in revenue from the forum since 2008); *cf.* Gonzales v. Seadrill Americas, Inc., 3:12-CV-00308, slip op. at 9 (S.D. Tex. June 27, 2014) (stating that the Mexican defendant was not at home in Texas when it did not have employees or offices in the forum).

236. *Barriere*, No. 12-23510-CIV-MORENO (S.D. Fla. Feb. 19, 2014).

237. In her concurrence in *Daimler*, Justice Sotomayer points out that this result is especially strange when contrasted to how individuals are treated for jurisdictional purposes. Daimler AG v. Brown, 134 S. Ct. 746, 772-73 (2014) (Sotomayor, J., concurring). Pursuant to *Burnham v. Superior Court of California, Cty. of Marin*, an individual defendant whose only contact with a State is a one-time visit could be subjected to the equivalent of general jurisdiction if the individual is served with

multinational corporations from liability in the United States at the same time that such companies are taking increasing advantage of American markets.

V. ROUNDING OUT THE TRISKELION

A. A Proposed Solution

"Simple jurisdictional rules . . . promote greater predictability. Predictability is valuable to corporations making business and investment decisions."[238] This sentiment, expressed by the Court in *Hertz Corp. v. Friend,* was surely the reason for the adoption of the jurisdictional triskelion and what might be categorized as an effective restriction of dispute-blind jurisdiction to principal place of business and place of incorporation. The desire for simple jurisdictional rules, however, does not ultimately mandate such a limitation. The answer here is for the Court to identify the factors that represent the third aspect of the jurisdictional triskelion beyond a bare recitation to *Perkins*.

To marry the concerns of modern reality with traditional conceptions about the limits of general jurisdiction present in *Perkins*, a simple three-part test can be used to round out the third aspect of the jurisdictional triskelion. Pursuant to this test, general jurisdiction should be found to exist where (1) the company has physical offices in the forum, (2) the company has employees in the forum, and (3) those employees participate in the control and direction of the corporation as a whole. Such a test comports with considerations of simplicity and predictability while still assuring jurisdiction in situations where sophisticated operations in the United States or a particular state suggest that dispute-blind jurisdiction would be appropriate.

First, the requirement of a company maintaining a physical office in the desired forum has long been a hallmark of general jurisdiction.[239] Even the Court in *Perkins* noted that the defendant

---

process during that visit. 495 U.S. 604, 615 (1990). Strangely, a multinational corporation like International Fancy Eats that owns property, employs workers, and does billions of dollars' worth of business in the State will not be subject to general jurisdiction if that state is not its principal place of business or its place of incorporation.

238. Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010).

239. There are many cases in which physical presence in the forum is discussed in the context of general jurisdiction. *See, e.g.*, Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1075 (8th Cir. 2004) (looking at the presence of retail stores in the jurisdiction); *In re* Rationis Enters. Inc. of Pan., 261 F.3d 264, 270 (2d Cir. 2001)

"maintained an office" in the forum,[240] and a lack of similar physical facilities was at issue in *Helicopteros*.[241] A physical office in the state also communicates something about a corporation's intent to engage with the forum—by establishing an office, the corporation has voluntarily established a close connection with the state. The corporation is now subject to additional taxes and state laws that it would not be if it just entered into transactions in the forum. Additionally, practical considerations are at play. The presence or absence of a physical office can be determined and presented to the court fairly easily and would not require significant fact-finding. Further, the requirement of physical presence would ensure companies have some reasonable assurance about where they could be subject to dispute-blind jurisdiction. Since foreseeability was a critical concern in *Daimler*,[242] this advantage is particularly relevant.

Concerns regarding the relationship between Internet-based presence and general jurisdiction also mandate that physical operations or offices in the forum be considered. In 2002, the District of Columbia Circuit applied the "continuous and systematic" test to determine that Ameritrade Holding Corporation could be subject to general jurisdiction in Washington, D.C., despite the company having no physical facilities or employees in the forum.[243] The court based its reasoning on Ameritrade's ability to conduct online business with its D.C.-based customers, including transferring funds to their accounts, entering binding contracts, and using accounts to buy and sell securities.[244] Similarly, the Ninth Circuit found general

---

(considering presence of local office in New Jersey).

240. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952).

241. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 411 (1984).

242. Daimler AG v. Bauman, 134 S. Ct. 746, 761-62 (2014).

243. Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002).

244. *Id.* at 512-13. The Fifth and Tenth Circuits had also previously accepted that Internet-based contacts could give rise to general jurisdiction. Even though those Circuits rejected jurisdiction based on the "passive" nature of the websites in question, they readily accepted that Internet activity could give rise to dispute-blind jurisdiction if the transactions and contacts in question were sufficient. *See* Mink v. AAAA Dev. LLC, 190 F.3d 333, 337 (5th Cir. 1999) (finding that "the presence of an electronic mail access, a printable order form, and a toll-free phone number on a website, without more, is insufficient to establish [general] jurisdiction"); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999) (finding that maintaining a website that simply conveys information does not subject corporation to general jurisdiction in a forum). Although these cases seem to accept the notion that Internet contacts alone can serve as the basis for general jurisdiction, this Article believes that considerations of international comity require limiting dispute-blind jurisdiction to situations where there is a physical office. Such an approach is

jurisdiction over a company that operated a sophisticated virtual store in the forum but did not have employees or physical facilities in the state.[245] Continuing in this vein would surely subject far too many companies to general jurisdiction, as the proliferation of web-based commerce has resulted in more marketplaces being moved online and more companies operating "globally" through the Internet.[246] Further, extending general jurisdiction to situations without a physical office in the forum may also implicate concerns of international comity and relationships if foreign businesses fear that maintenance of an Internet website alone will subject them to dispute-blind jurisdiction in American courts. Indeed, a major issue raised in *Daimler* was that an expansion of general jurisdiction by the United States would threaten agreements with other nations regarding the enforcement of U.S. judgments.[247] As such, the requirement of a physical office in the forum works to ensure that dispute-blind jurisdiction is limited to situations where companies have purposefully and specifically encroached into the forum in the same manner as other forum insiders.

In addition to considering physical facilities in the forum, the presence or absence of employees should also be utilized to assess general jurisdiction. The existence of employees in a jurisdiction has long been a factor seriously considered by the Supreme Court and lower courts in assessing the presence of general jurisdiction.[248] Courts have, however, rejected the notion that the mere presence of employees in the forum state alone, especially if they serve as sales

---

consistent with the more careful application of general jurisdiction suggested by the "at home" standard. *See* Megan M. La Belle, *The Future of Internet-Related Personal Jurisdiction After* Goodyear Dunlap Tires v. Brown *and* J. McIntyre v. Nicastro, 15 J. INTERNET L. 3, 8 (2012) (stating that *Goodyear* was meant to narrow the doctrine of general jurisdiction and that the reasoning of *Ameritrade* likely did not survive that case); *see also* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 545 (2012) (stating that *Goodyear* should foreclose finding general jurisdiction based on Internet activities).

245. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1079 (9th Cir. 2003), *reh'g en banc*, 398 F.3d 1125 (9th Cir. 2005) (noting that the website in question was highly interactive, very extensive, and generated millions in revenue).

246. *See* James R. Pielemeier, *Why General Personal Jurisdiction over "Virtual Stores" Is a Bad Idea*, 27 QUINNIPIAC L. REV. 625, 667 (2009) (arguing that allowing general jurisdiction over companies based on Internet websites will drastically increase forum shopping and increasingly raise complicated choice of law issues).

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

248. *Id.* ("The Solicitor General informs us, in this regard, that foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." (citation omitted)).

representatives, can mandate the exercise of general jurisdiction.[249] For example, the First Circuit twice rejected general jurisdiction in situations where the defendant was employing either six or eight employees in the forum and whose only job was to solicit and accept orders.[250] The Ninth Circuit went so far as to state that "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert [general] jurisdiction."[251]

Although the presence of employees alone has never been enough to confer general jurisdiction, the combination of employees and a local office has historically proven more potent. The Supreme Court has long considered that employees working in a company's physical office in the forum contribute substantially to the jurisdictional analysis. For example, a hallmark characteristic of *Perkins* is that the company's President and two secretaries were employed at the defendant's Ohio office.[252] Years later, in declining to find general jurisdiction, the Court noted in *Helicopteros* that the defendant never maintained employees in Texas, nor did it maintain an office.[253] Such considerations make good sense. Much like a physical office, the existence of employees stationed in a forum is a simple matter of corporate record and will not require extensive fact-finding or subject a corporation to uncertainty—either there are employees in the forum or there are not. Further, the presence of employees working at an office in the forum suggests that the corporation is purposefully engaging with the economic, regulatory, and political power of the forum state. Maintaining employees[254] in the forum

---

249. This includes the Supreme Court in *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918) (holding, prior to *International Shoe*, that the presence of sales agents in the forum alone did not result in personal jurisdiction).

250. *See* Glater v. Eli Lilly & Co., 744 F.2d 213, 217 (1st Cir. 1984) (denying personal jurisdiction when defendant's only contacts with the state were its eight sales representatives); Seymour v. Parke, Davis & Co., 423 F.2d 584, 587 (1st Cir. 1970) ("When, however, defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume jurisdiction."). Similarly, the Fourth Circuit rejected general jurisdiction when the defendant employed twenty-one employees in the forum but did not have a physical office. Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1200 (4th Cir. 1993).

251. Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242 (9th Cir. 1984).

252. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952).

253. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 411 (1984).

254. It is also worth noting that the term "employees" should not be construed to extend beyond its generally accepted meaning—individuals directly employed by the company in question, not independent distributors. At least one circuit has previously predicated general jurisdiction on distribution networks, as opposed to

means that the corporation is subject to state laws regarding working conditions, minimum wage, diversity, and insurance, among other things. The corporation's voluntary submission to the power of the state in this way, and its choice to maintain the state's legal standards, are valid considerations in determining whether the state is a corporate "home."

Finally, the last critical step of determining whether a corporation is at home in the forum should be whether the employees in the forum participate in the control and management of the corporation as a whole. This factor is drawn directly from *Perkins*. In that case, the Court explicitly mentioned that the company's President was acting as general manager in the forum and engaging in traditional management functions, including corresponding on behalf of the company, overseeing operations, hosting board meetings, and, most importantly, directing company policy.[255] The Court's recitation of these management activities suggests that the *type* of work being done in the forum is a critical component of general jurisdiction, which is in keeping with a qualitative, as opposed to revenue-based or quantitative, approach to the inquiry.

Surprisingly, few lower courts or commentators have explicitly considered the importance of management or supervisory direction in the jurisdictional inquiry. When the presence of management has been discussed, it has been done primarily by factually analogizing to *Perkins*. For example, in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, the Second Circuit compared the facts of the case to *Perkins* in the following way: "Many cases, including this one,

---

actual employees. For example, in *LSI Indus. Inc. v. Hubbell Lighting, Inc.*, the defendant employed multiple distributors in Ohio to move its goods. 232 F.3d 1369, 1370 (Fed. Cir. 2000). The Federal Circuit found that the presence of these distributors created general jurisdiction in the forum. *Id.* at 1375. However, employing independent distributors in a forum should not subject a company to general jurisdiction. Such an action is akin only to doing business with forum residents and does not suggest that the corporation has attempted to make itself at home in the forum. Additionally, independent distributors do not have the ability to contract on behalf of the company or represent the company's interest. *See* Jayne v. Royal Jordanian Airlines Corp., 502 F. Supp. 848, 857 (S.D.N.Y. 1980) (noting that a company's in-state agents must have authority to enter into agreements on behalf of the corporation for general jurisdiction to exist). As such, they do not represent the kind of activities in the state that would lead to a finding of general jurisdiction. *See* Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1125 (9th Cir. 2002) (finding that when a foreign company has an independent distributor in the forum, "it is clear that [the company] has stepped through the door, [but] there is no indication that it has sat down and made itself at home").

255. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952).

fall between *Perkins* and *Helicopteros*. [U]nlike the defendant in *Perkins*, Robertson certainly did not use Vermont as a central office location for supervisory activities."[256] This statement suggests that the court recognized the importance of a supervisory function in the forum in *Perkins*. In *In re Roman Catholic Diocese of Albany, New York, Inc.*, the Second Circuit again referenced *Perkins* by noting that, unlike in *Perkins*, the defendant did not have management in the forum.[257] Only a few other courts also referred to *Perkins* as involving "managerial" or "board" action in the forum.[258]

Despite the dearth of previous authority on this subject, requiring the presence of corporate management in the forum makes good sense. Of course, corporate management should be read to involve high-level corporate decision making, i.e., shaping the corporation's policy, mission, and directives. Making these high-level decisions in the forum suggests that the corporation has made itself "at home" by relying on the forum to further the existence of its corporate objectives and policies.[259]

Further, the management requirement works to separate the forum from others where the defendant has mere continuous contacts. The *Daimler* Court noted that extending general jurisdiction in fora where there are sizable sales or facilities led to exorbitant exercises of dispute-blind jurisdiction, well beyond what other nations considered appropriate.[260] The Court appeared particularly interested in preventing large corporations from being subject to dispute-blind jurisdiction in every state because of the presence of at least some contacts in each forum. Previous cases cast light on this concern. For example, in *Bryant v. Finnish National Airline*,[261] the court sustained a finding of general jurisdiction over a large foreign airline based on a one-and-a-half room office that

256. 84 F.3d 560, 571 (2d Cir. 1996).

257. 745 F.3d 30, 40 (2d Cir. 2014).

258. Similarly, the court in *Construcciones Integrales del Carmen, SA.A de C.V. v. Goodcrane Corp.*, analogized to *Perkins* by noting that, unlike in *Perkins* "board business" was not conducted in the forum. No. CIV A H-08-3427, slip op. at 10 (S.D. Tex. June 30, 2009); *see also* Gossett v. HBL, LLC, No. CIV.A.2:06-123-CWH, slip op. at 5 (D.S.C. May 11, 2006) (noting that the *Perkins* Court held general jurisdiction applied over a company that carried on "managerial decisions" in forum state).

259. *See* Cebik, *supra* note 4, at 38 (stating that when a corporation makes policy in a forum, the "corporation has accepted the privilege of maintaining its existence within a particular state and looks to the state to . . . define its rights and duties in terms of the kinds of decisions it can make within the state, the laws which govern the activities of its agents, and other rights and duties central to the functioning of the corporation").

260. Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014).

261. 208 N.E.2d 439 (N.Y. 1965).

employed three full-time employees.[262] Such contacts were apparently very minor when compared with the global operations of the defendant, and yet were sufficient for continuous and systematic contacts.[263] Under this reasoning, any physical office with employees, no matter how insignificant in comparison to the corporate whole, could create general jurisdiction.

But utilizing management as a proxy for high-quality corporate contacts meets the *Daimler* Court's goal of ensuring that a corporate home is distinct from other locations where the corporation is merely doing business[264]—i.e., entering into transactions, maintaining bank accounts, or negotiating contracts. If a corporation makes high-level policy or management decisions in the forum, this serves to differentiate that forum from others where there are merely offices or large volumes of sales. The quality of the contacts in such a situation is thus quite high. Instead of focusing on normal corporate activities in a forum, like sales or bank accounts, the analysis shifts to address situations where the corporation is taking steps to further its own unique existence and objectives. Further, it is unlikely that even large multinational corporations will keep executive decision makers in more than a few fora, thus preventing dispute-blind jurisdiction from spreading across the nation. But if a corporation chooses to station its decision makers within a state, plus maintain an office with employees in that location, it should be said to be at home.

B. Utilizing the New Approach

1. Practical Advantages

The approach to the third basis of general jurisdiction outlined above has several distinct advantages, but it gains its first advantage simply by leaving something out—a quantitative approach to jurisdiction. Courts have long assessed general jurisdiction by looking in part at quantity: quantity of sales, quantity of revenue, or quantity of transactions. Such an analysis was critical in the era of continuous and systematic contacts, but this approach can confuse a corporation's decision to do business *in* the forum with its decision to do business *with* residents of the forum. Or, as the Fifth Circuit put it, "in order to confer general jurisdiction a defendant must have a business presence *in* Texas. It is not enough

---

262. *Id.* at 440.
263. *Id.* at 441.
264. *Daimler*, 134 S. Ct. at 761-62.

that a corporation do business *with* Texas."[265] A quantitative analysis focusing on large dollars of revenue can conflate doing business with individuals within a forum with meaningful contacts with the forum itself.[266] Indeed, a solely quantitative analysis has been criticized as producing inconsistent results based on methods of calculating revenue and subjecting corporations to uncertainties as to what level of revenue will create general jurisdiction.[267] An approach to jurisdiction that considers the quality of contacts, instead of the sheer quantity, avoids such problems and provides clarity for both courts and corporations.

Additionally, the approach outlined above has less impact on international relationships than the previous "continuous and systematic" approach, yet does not completely abandon the possibility of a domestic forum. Scholars have consistently argued that American conceptions about the availability of jurisdiction are out of line with those of other nations and that general jurisdiction should be constricted to simply the principal place of business and the state of incorporation, or abolished completely.[268] The word "exorbitant" has been closely associated with "doing business" or general jurisdiction. A report prepared in conjunction with the Hague Judgment Convention listed "doing business" jurisdiction on its blacklist of "exorbitant" exercises of jurisdiction, and dozens of scholars have used the term to disparage American conceptions of general jurisdiction.[269] Objections center on the ability of the doctrine to create jurisdictional power in fora that do not bear a sufficient relationship with the circumstances of the case and to operate as a fail-safe to ensure that American courts can always exercise some sort of jurisdiction over a foreign defendant.

---

265. Johnston v. Multidata Sys. Int'l Corp., 523 F.3d 602, 611 (5th Cir. 2008) (citation omitted).

266. *See, e.g.*, Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1125 (9th Cir. 2002) (stating that "engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state's borders"); Kadala v. Cunard Lines, Ltd., 589 N.E. 2d 802, 807-11 (Ill. App. Ct. 1992) (denying jurisdiction when defendant spent $500,000 on newspaper advertisements in forum state because this failed the "transaction of business" test under the Illinois long-arm statute).

267. Tarin & Macchiaroli, *supra* note 112, at 61.

268. Kevin M. Clermont & John R. B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 481-82 (2006); 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, 351 (2004).

269. Catherine Kessedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Preliminary Document No. 7, at 41, http://www.hcch.net/upload/wop/jdgm_pd7.pdf.

Additionally, the operation of dispute-blind jurisdiction in American courts has been blamed for the United States' inability to negotiate a multi-lateral treaty on the recognition of judgments at the Hague Conference on Private International Law.[270]

The *Daimler* Court was particularly concerned with international repercussions emanating from its decision and specifically cited the European Union's approach to dispute-blind jurisdiction contained in Regulation 1215/2012 for the proposition that general jurisdiction under the "continuous and systematic" standard had exceeded appropriate bounds.[271] The E.U. model of general jurisdiction states that a company is subject to general jurisdiction in the nations of the European Union where it is incorporated, has its principal place of business, or has its central administration.[272] The *Daimler* Court suggested that such a provision displayed appropriate constraint in the exercise of general jurisdiction over foreign corporations.[273]

Oddly enough, the European Union's approach actually fails to limit European nations in their exercise of general jurisdiction over non-E.U. defendants. Regulation 1215/2012 maintains that jurisdiction over non-E.U. defendants will still be determined by individual national laws, which in some cases allow for exercises of general jurisdiction in situations that require few contacts on the

---

270. *Proposed Hague Treaty Said to Be Burdened by New Language Needed to Attract Support*, 72 U.S. L. WK. 2719, 2719 (2004); *see also* Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 642 (2000) (noting that the United States' "doing business" jurisdiction may be a deal-breaker at the Hague). Other commentators suggested that it was actually differing approaches to dispute-specific jurisdiction that resulted in the treaty's failure. *See, e.g.*, Ronald A. Brand, *Jurisdictional Developments and the New Hague Judgments Project*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 89, 99 (2013) ("While the direction of the Brussels I Regulation and Recast Regulation has focused on the rights of the plaintiff, . . . the United States Supreme Court has focused on the interests of the defendant."). But even if that is the case, general jurisdiction has long been blamed for the refusal of other nations to recognize U.S. judgments.

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

272. Council Regulation 1215/2012, arts. 4(1) and 63(1), 2012 O.J. (L351). Specifically, the European Union allows dispute-blind jurisdiction where a company is domiciled. *Id.* at art. 4(1). Domicile is then defined as the statutory seat, principal place of business, and central administration. *Id.* at art. 63(1). These provisions were the result of compromises that supported narrower jurisdictional rules in favor of widespread recognition of judgments across the E.U. Borchers, *supra* note 198, at 16. The provisions of this regulation will go into effect in 2015. *Id.* at 5.

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

part of the defendant.[274] Accordingly, it is not clear that Regulation 1215/2012 actually represents a limited and more predictable model of general jurisdiction—foreign corporations could be subject to fairly liberal exercises of general jurisdiction in the European Union despite Regulation 1215/2012. For example, Article 23 of the German Code of Civil Procedure allows for the exercise of general jurisdiction over any company that owns assets in Germany, regardless of the value of those assets, as long as there is some kind of additional contact with Germany.[275] Thus, a United States company with a manufacturing plant, office, bank account, or any asset in Germany might be subject to jurisdiction in Germany for a dispute that arose anywhere. This would suggest that the American model of general jurisdiction post-*Daimler* and *Goodyear* is far narrower in the context of foreign corporations than the approach employed by the European Union. Maintaining a third basis of general jurisdiction should thus not implicate international comity as limiting general jurisdiction to states with offices, employees, and management is narrow, predictable, and should comport with defendants' reasonable expectations.

Finally, even if one limits their inquiry to only intra-E.U. jurisdictional decisions, the suggested third basis for general jurisdiction is still on par with the European approach. Regulation 1215/2012 suggests that dispute-blind jurisdiction is appropriate in unique fora related to the central management or existence of the corporation.[276] This analysis recognizes that fora containing corporate decision makers represent the equivalent of a domicile. Accordingly, the quality of the defendant's relationship with the forum is central to the exercise of general jurisdiction in the European Union. Allowing American courts to exercise general jurisdiction where the company maintains an office, employees, and policy-makers incorporates the same limitations by insisting that the presence of corporate policy or management is the crux of the analysis. This ensures that only the few fora from which the corporation directs its existence serve as additional corporate "homes."

---

274. Borchers, *supra* note 198, at 17; Peter Hay, *Notes on the European Union's Brussels-I "Recast" Regulation: An American Perspective*, 2013 EUR. LEGAL F. 1, 2 (2013).

275. Brand, *supra* note 270, at 97. *See also* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23, *translation at* http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.) (last visited Dec. 15, 2015).

276. Council Regulation 1215/2012, arts. 4(1) and 63(1), 2012 O.J. (L351).

2. A Marriage of Function and Policy

Defining the third basis for general jurisdiction as fora that contain an office, employees, and corporate policy or management also comports with theoretical considerations guiding general jurisdiction. Scholars have traditionally identified fairness and territoriality as fundamental theoretical principles that support a doctrine of dispute-blind jurisdiction.[277] While to date the Court has failed to clarify which policy[278] actually sustains dispute-blind jurisdiction, some general observations can be made.

First, considerations of fairness have long been discussed in connection with general jurisdiction. The language of *International Shoe* suggested that all exercises of personal jurisdiction were based on notions of fairness and fundamental justice arising from the Due Process Clause.[279] The Court went on to adopt relatively bold language in a number of specific jurisdiction cases espousing notions of fairness in connection with the exercise of personal jurisdiction generally. For example, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[280] the Court noted that the "personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[281] Of course, the Court refused to find that fairness overcame sovereignty in its totality.[282] Instead, the Court suggested that sovereignty was

---

277. Rhodes, *supra* note 2, at 902-03 (noting that concerns of sovereignty and fairness have characterized the search for a theoretical basis for general jurisdiction, but characterizing the search for a theoretical basis as "quixotic"); *see also* Cebik, *supra* note 4, at 14 (identifying fairness and sovereignty as competing rationales for general jurisdiction).

278. Andrews, *supra* note 4, at 1012 (discussing the Supreme Court's failure to identify a cohesive policy for personal jurisdiction and identifying a wide range of factors previously cited, including "sovereignty, convenience, predictability, a balance of benefits and burdens, plaintiffs' interests, judicial efficiency, and substantive policies").

279. Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (noting that although personal jurisdiction was traditionally grounded in notions of territoriality, "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'").

280. 456 U.S. 694 (1982).

281. *Id.* at 702.

282. *Id.* at 703 ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

an element of the due process analysis, not an independent restriction on jurisdiction.[283]

The fairness rationale applied in the context of general jurisdiction is seen in the lower court's use of fundamental fairness factors. This was accomplished through the *Asahi* analysis, which balanced the interests of the parties and the forum with wider social and judicial inquiry.[284] Structuring general jurisdiction as a two-part analysis, i.e., continuous and systematic contacts plus reasonableness factors, meant that even fora that contained sufficient contacts might not be able to exercise general jurisdiction if it would work extreme hardship on the defendant.[285] Unless the appropriate relationship and allocation of burdens existed between the defendant, the forum, and the litigation, many lower courts would have thus declined jurisdiction.

This focus on fairness and reasonableness made good sense. However, the Court in *Daimler* dispelled this notion by determining that the reasonableness factors were inapplicable in the context of general jurisdiction.[286] The *Daimler* Court noted that, unlike specific jurisdiction, general jurisdiction "has not been stretched beyond limits traditionally recognized."[287] This suggests that while specific jurisdiction has developed in light of considerations of fairness, reasonableness, and relationship with the forum, general jurisdiction is premised on traditional considerations of presence and the power of the state.[288] Such an approach is already seen in the context of general jurisdiction over individuals. Pursuant to *Milliken v. Meyer*, an individual is subject to the equivalent of general

---

283. *Id.* at 702-03 n.10.

284. Eng, *supra* note 4, at 873 (noting the importance and widespread use of the reasonableness and fairness factors to assess general jurisdiction).

285. *See, e.g.*, Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 853 (9th Cir. 1993) (not reaching the issue of contacts necessary to sustain general jurisdiction because application of reasonableness factors showed jurisdiction in the forum to be inappropriate); United States v. M/V MANDAN, 774 F. Supp. 410, 418 (E.D. La. 1991) (noting that even if contacts were continuous and systematic, general jurisdiction would still be unreasonable); Neilson v. Budget Rent A Car Int'l, Inc., (E.D. La. Nov. 17, 1988) (finding contacts satisfied but noting the need to address reasonableness factors).

286. Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) ("When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous."). The Court here seemed to suggest that a corporation that was truly at home in the forum would have no need for a reasonableness inquiry. *Id.*

287. *Id.* at 749.

288. *Id.* at 763.

jurisdiction in the state of his domicile.[289] This exercise of power is based on the rights, duties, and privileges an individual receives from his domicile—he is afforded privileges of state citizenship and protections to his property, leaving the state free to exact reciprocal duties over that individual.[290] Additionally, the individual has made himself a member of the state community that must abide by state law and looks to the state for organization and enforcement of his rights.[291] This interplay between duty, participation, and rights gives the state and individual a heightened relationship that cannot be matched by other fora, thus making dispute-blind jurisdiction appropriate. Surely if such rationales are accepted in the context of individuals, they can be appropriated for determining general jurisdiction over corporations. Thus, corporations that have formed the equivalent of a domicile in a forum should be subject to general jurisdiction in the courts of that state.

The *Daimler* Court's choice of paradigmatic fora is also indicative of a state citizenship approach. The state of incorporation and principal place of business have been previously defined by the Court as corporate domiciles.[292] Naming these two fora as locations where dispute-blind jurisdiction is appropriate communicates that the Court considers citizenship critical to the analysis.[293] But by leaving open a third basis for general jurisdiction, the Court further suggests that state of incorporation and principal place of business are not the only locations in which the corporation is a citizen.[294] Determining how to calculate corporate citizenship for the purposes of general jurisdiction is critical to ascertaining in what situations such jurisdiction will be appropriate.

In the context of general jurisdiction, corporate citizenship should be based on where the corporation chooses to engage in activities that direct the corporate existence. State of incorporation is illustrative of this reasoning. The laws of the state of incorporation define the rights and responsibilities of the corporation. By choosing to incorporate in a particular state, the corporation has decided to allow the laws of that state to further and direct its existence—the activities and governance of the corporation will always be dependent on the law of the state of incorporation.[295] Similarly, the principal place of business is the location from which

289. 311 U.S. 457, 463 (1940).
290. *Id.*
291. *Id.* at 463-64.
292. *See* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1188-90 (2010).
293. *See id.*
294. Daimler AG v. Bauman, 134 S. Ct. 746, 761 n.19 (2014).
295. *See Milliken*, 311 U.S. at 463.

the corporate objective and directives emanate.[296] The corporation has chosen to place its "nerve center" in the forum and has subjected its principal office and decision makers to the laws of the state.[297] This represents a voluntary choice to direct the corporation from this forum while being subject to the laws, obligations, and benefits of the forum.

Further, the Court's identified paradigms suggest that quality of contacts is truly at issue in the general jurisdiction analysis. The quantity of corporate involvement in the state is irrelevant for determining citizenship.[298] A corporation might have $100 million in transactions in one state plus several bank accounts, and yet such contacts do not signify that the corporation is a citizen there. The corporation has not subjected its existence or overall direction to a state in which it merely enters transactions or maintains bank accounts. However, a corporation has subjected its existence to a state that meets the proposed third basis for general jurisdiction. A forum that contains an office, employees, and corporate decision makers is a location from which the corporation is directing key activities and furthering the corporate existence.[299] These are high quality contacts that signify a substantial commitment to the forum in the form of corporate citizenship.

3. The Test at Work

For all of its advantages, there is, of course, no point defining the third basis of general jurisdiction in such a way that makes its application merely theoretical. The test must be able to be applied in situations that actually occur and make sense. The question is as follows: When does the third basis of general jurisdiction produce acceptable results?

It's easier to start with the negative. Applying the third basis for general jurisdiction eliminates a great number of cases that produce undesirable results under the continuous and systematic standard. For example, in *United Rope Distributors, Inc. v. Kimberly Line*, the court determined that a foreign corporation could be subject to general jurisdiction in New York because its agent there maintained a corporate bank account that the corporation could access.[300] The court reasoned that the maintenance of this bank account

---

296. *See Hertz*, 130 S. Ct. at 1192.

297. *See id.* at 1193; Cebik, *supra* note 4, at 38.

298. *See supra* note 112 and accompanying text.

299. Cebik, *supra* note 4, at 37.

300. United Rope Distribs., Inc. v. Kimberly Line, 770 F. Supp. 128, 132-33 (S.D.N.Y. 1991).

constituted continuous and systematic contacts with New York because the bank account constituted all of the company's profits.[301] Additional cases assessed factors like the presence of bank accounts,[302] part-time sales solicitors,[303] telephone listings, and websites[304] to sustain general jurisdiction. Such cases were criticized for subjecting foreign companies to general jurisdiction based on relatively mundane activities within the forum.[305]

The jurisdictional triskelion will no longer allow results like these. Limiting general jurisdiction to state of incorporation, principal place of business, and situations where there is an office, employees, and management in the forum prevents exercises of general jurisdiction based on insignificant or uncertain forum contacts. For example, situations in which executive officers are in residence at a forum office should sustain a finding that the corporation is at home in the forum.[306] The presence of an American headquarters or division office may also indicate that the corporation is performing policy-making or high-level decision making in the forum.[307] Courts have previously been comfortable considering such

---

301. *Id. But see* Nat'l Am. Corp. v. Nigeria, 425 F. Supp. 1365, 1369 (S.D.N.Y. 1977) (stating that "isolated act of maintaining bank accounts [in New York] has been held not to constitute doing business"); Fremay, Inc. v. Modern Plastic Mach. Corp., 222 N.Y.S.2d 694, 700 (N.Y. App. Div. 1961) (stating that "existence of a bank account in New York by itself is not sufficient").

302. *See United Rope Distribs., Inc.*, 770 F. Supp at 132-33.

303. *See* Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 465 (6th Cir. 1989).

304. *See* U.S. *ex rel.* Barko v. Halliburton Co., 952 F. Supp. 2d 108, 116 (D.D.C. 2013).

305. Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1295 (1998). The court in *Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851, 853-4 (N.Y. 1967), was similarly criticized for finding general jurisdiction in New York over a U.K. company that had a bank account in the forum and utilized an agent to take hotel reservations. *Zekoll*, *supra* note 306, at 1294.

306. *See, e.g.*, I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc., 699 F.2d 1254, 1259 (D.C. Cir. 1983) (holding that general jurisdiction was appropriate when corporate officer responsible for key corporate decisions had an office in the forum); Orefice v. Laurelview Convalescent Ctr., Inc., 66 F.R.D. 136, 139-41 (E.D. Pa. 1975) (foreign corporation whose agent was performing managerial duties in the forum amenable to general jurisdiction).

307. *See* Swiss Marine Servs. S.A. v. Louis Dreyfus Energy Servs. L.P., 598 F. Supp. 2d 414, 417 (S.D.N.Y. 2008) (finding that general jurisdiction existed over the defendant in Connecticut, where it had its principal North American office); *In re* Parmalat Secs. Litig., 381 F. Supp. 2d 283, 290 (S.D.N.Y. 2005) (finding general jurisdiction over foreign company in North Carolina because it was being managed and supervised from there).

issues under the continuous and systematic standard and should be prepared to do so under the "at home" standard as well.[308]

Returning to the International Fancy Eats hypothetical posed above brings the third basis for general jurisdiction into clear focus.[309] In that situation, an American victim of an injury, which occurred abroad in Mexico, was attempting to gain general jurisdiction in Texas over the defendant, which was incorporated and maintained its principal place of business in France. Texas is home to fifteen retail locations operated by the corporation, an office directing American operations, and hundreds of corporate employees. Applying the jurisdictional triskelion is fairly easy here. The corporation will be subject to general jurisdiction where its contacts suggest that it is at home in the forum. The first two bases of at home jurisdiction are not at issue—the company is neither incorporated nor has a principal place of business in Texas. But application of the third basis reveals that the company is subject to general jurisdiction in the forum. It maintains offices and employees in the forum. Most importantly, it probably also maintains corporate decision makers in Texas. Its principal American office likely contains officers or executives who help designate corporate objectives and set corporate policy. The American victim now has a domestic forum for her litigation.[310]

---

308. *See, e.g.*, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, No. 05 CIV. 9016(SAS), 2006 WL 708470, at *5 (S.D.N.Y. Mar. 20, 2006) (Cayman Islands company subject to general jurisdiction in New York where it maintained a managing director and the Director of International Fund Services); Romero v. Argentinas, 834 F. Supp. 673, 680 (D.N.J. 1993) (foreign company not subject to dispute-blind jurisdiction in New Jersey when American headquarters was located in New York).

309. *See infra* Part IV, B.

310. Remember the hypothetical that Justice Sotomayor posed in *Daimler*? She asked: "Suppose a company divides its management functions equally among three offices in different States, with one office nominally deemed the company's corporate headquarters. If the State where the headquarters is located can exercise general jurisdiction, why should the other two States be constitutionally forbidden to do the same?" Daimler AG v. Bauman, 134 S. Ct. 746, 772 (2014) (Sotomayor, J., concurring).

The answer is: they should not be. Under the proposed test for the third basis of general jurisdiction, the states that contained corporate management would have the power to exercise general jurisdiction regardless of which one was labeled the "headquarters." The proposed test thus prevents a corporation from utilizing mere nomenclature to avoid jurisdiction. If the corporation is truly conducting high-level decision making in multiple fora, it should be subject to general jurisdiction in those fora.

While it is certainly time to put aside inflated applications of general jurisdiction *a la* continuous and systematic contacts, the result described above is a good one. General jurisdiction has long been predicated on availability and the notion that individuals and entities should not be able to escape dispute-blind jurisdiction in fora with which they have heightened relationships.[311] In the context of domestic corporations, the growth of specific jurisdiction has provided a plethora of jurisdictional options—a plaintiff may litigate where the injury occurred, or, pursuant to general jurisdiction, at the principal place of business or state of incorporation, without leaving the comfort of the American judicial system.[312] But refusing to recognize dispute-blind jurisdiction in states where corporations are ultimately operating as state citizens would destroy jurisdictional availability in the context of transnational corporations. Such a result would serve particular injustice as more companies choose to incorporate and maintain their headquarters abroad while retaining significant U.S. operations.[313] Allowing corporations to wholly shield themselves behind national borders while maintaining the ability to engage in the U.S. market and station critical managers in the United States does not promote any useful end. But a fully-formed third basis for general jurisdiction helps preserve jurisdictional availability and refuses to shield corporations from general jurisdiction in all domestic fora even when critical decision makers are stationed in the U.S.

CONCLUSION

The post-*Goodyear* and *Daimler* "at home" approach to general jurisdiction signifies the Court's apparent attempt to constrain

---

311. *See* Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1200 (4th Cir. 1993) (stating that general jurisdiction "functioned primarily to ensure that a forum was available for plaintiffs to bring their claims").

312. Von Mehren & Trautman, *supra* note 72, at 1178-79.

313. Indeed, it appears more companies are attempting to move operations overseas in order to avoid U.S. taxes. Robert Weisman et al, *More US Firms Chase Mergers that Yield Overseas Address*, BOSTON GLOBE, July 13, 2014, *available at* http://www.bostonglobe.com/business/2014/07/12/resistance-growing-practice-companies-switching-headquarters-abroad-for-tax-purposes/Ew7SterXgo9LEvSzy7UgTJ/story.html (noting a think tank's comment that it is becoming increasingly disadvantageous to be a U.S.-based multinational corporation; the solution is thus to "stop being a U.S.-based multinational"). Many of these corporations still maintain U.S. offices that host high-level corporate executives. *Id.* It would seem unwise to allow corporations to move their global headquarters or incorporate abroad and retain high-level officers in the U.S. without being subject to general jurisdiction.

unpredictable applications of the doctrine under the "continuous and systematic" model employed in the lower courts. To think about applications of general jurisdiction in the new era, it is helpful to ascertain three bases for the exercise of general jurisdiction. The first two, state of incorporation and principal place of business, have long been paradigmatic of dispute-blind jurisdiction in the corporate context. Indeed, it has been widely accepted that the corporation is a citizen or domiciliary of the states in which it is incorporated and maintains its headquarters. However, the Court has not foreclosed the possibility that general jurisdiction still exists where the quality of contacts suggest that the corporation is at home. While continuous, systematic, and substantial contacts with a forum will no longer impart dispute-blind jurisdiction, some level of corporate involvement in the forum will still confer general jurisdiction outside the state of incorporation and principal place of business. The challenge now is to determine how to analyze such situations and why they comport with notions of state citizenship.

This Article first suggests formulating the third basis for general jurisdiction through a three-part test. The first two components, the presence of an office and employees in the forum, are traditional considerations suggesting dispute-blind jurisdiction through substantial commitment to the forum. The final component assesses the quality of activities occurring in the forum; namely, is the forum one from which the corporation makes corporate policy or management decisions? The decision to engage in such activities in the forum suggests that the corporation is taking advantage of the state to help further its existence and directives. Such an approach furthers conventional notions of state territorial power by ascertaining the types of relationships that would equate to state citizenship, while also respecting notions of predictability and jurisdictional availability.