

THE RULIFICATION OF GENERAL PERSONAL JURISDICTION AND THE SEARCH FOR THE EXCEPTIONAL CASE

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INTRODUCTION

In *Daimler AG v. Bauman*,¹ the Supreme Court drastically curtailed the scope of general jurisdiction over corporations. Although the Court purported to apply the “essentially at home” standard from *Goodyear*,² the Court actually established a bright-line rule. A corporation is subject to general jurisdiction in only two states: its state of incorporation and the state in which its principal place of business is located.³ Realizing, perhaps, that its bright-line rule was too great a departure from its prior precedents, the Court dropped a footnote in which it described a potential exception: “We do not foreclose the possibility that in an exceptional case, see, e.g., *Perkins [v. Benguet Consol. Mining Co.]*, 342 U.S. 437 (1952)], 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

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1. 571 U.S. 117 (2014).

2. *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

3. *Daimler AG*, 571 U.S. at 137.

as to render the corporation at home in that State.”⁴ The Court also clarified that, in determining whether a corporation is “at home” in a state, the company’s worldwide contacts, not just its forum contacts, should be considered:

[T]he general jurisdiction inquiry does not “focu[s] solely on the magnitude of the defendant’s in-state contacts.” General jurisdiction instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, “at home” would be synonymous with “doing business” tests framed before specific jurisdiction evolved in the United States.⁵

Thus, to qualify for treatment as an exceptional case, a corporation’s contacts with the forum must approximate the defendant’s contacts with Ohio in *Perkins*, and those contacts must be disproportionately extensive when its nationwide and worldwide contacts are compared to its forum-state contacts.⁶

The change wrought by *Daimler* to the law of general personal jurisdiction exemplifies “rulification.” Rulification is the process by which a standard becomes a rule.⁷ A standard is contextual, malleable, and case-specific.⁸ A rule is definite and static.⁹ From the “continuous and systematic contacts” standard established in *Perkins*¹⁰ and *Helicopteros*¹¹ to the rule established in *Daimler AG*, the law governing general personal jurisdiction has become more definite, more formal, and less contextual. Rulification has pros and cons, and those can be seen clearly in the context of general personal jurisdiction. This Article will describe the rulification of general jurisdiction and will evaluate the costs and benefits accruing to the civil litigation system as a result of rulification.

Part I introduces the concept of rulification. Part II describes the state of general personal jurisdiction pre-*Daimler*, demonstrating how the well-established continuous and systematic contacts standard was

4. *Id.* at 139 n.19.

5. *Id.* at n.20 (internal citations omitted).

6. *Id.*

7. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*,

14 J. CONTEMP. LEGAL ISSUES 803, 805–06 (2005).

8. *See id.* at 804.

9. *Id.* at 803–04.

10. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

11. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 415–16 (1984).

applied. Part III analyzes the *Daimler* Court's creation of the new rule, the process of rulification, and the definition of the "exceptional case."¹² Part IV examines the consequences of rulification for general personal jurisdiction by surveying and analyzing the body of case law that has developed in response to arguments around the exceptional case. Part V speculates on the Court's possible reasons for articulating the exception and the future role of the exceptional case in civil litigation.

I. RULES, STANDARDS, AND RULIFICATION

The distinction between rules and standards is well established in legal scholarship.¹³ Rules are fixed; standards are flexible.¹⁴ "[R]ules are blunt and bright and standards are soft and opaque."¹⁵ Rules "are comparatively precise, with most of the substantive choices being made by the crafter of the directive at the time of the drafting," leaving those applying the rules to "mak[e] largely mechanical decisions by applying easily ascertainable facts to crisply formulated directives."¹⁶ Thus rules empower decisionmakers who originate them, while giving less interpretive power to the decisionmaker faced with enforcing the rule. Because they are general and crafted *ex ante*, rules are inevitably over- or underinclusive. The famous directive "no vehicles in the park" will exclude loud, exhaust-spewing hot rods out for a cruise, but will also exclude ambulances racing to an accident in the park. The rule "Speed Limit 55" proscribes driving at 56 miles per hour but does not proscribe driving at 54 miles per hour while recklessly weaving in and out of slower traffic.

Both rules and standards are intended to effectuate an underlying goal or purpose. They can be said to be different means to the same end, although neither will achieve its end perfectly. And there can be multiple purposes intended to be served by the same rule or standard. To adapt an example from Schauer, the purpose of the "no vehicles in the park" rule might be to enhance the peace and quiet of the park,¹⁷ in which case the overinclusive nature of the rule won't impede the

12. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014).

13. See, e.g., Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 652 (2014); Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465, 471 (2020); Schauer, *supra* note 7, at 803–04; James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 773–76 (1995).

14. See, e.g., Schauer, *supra* note 7, at 803–04.

15. Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 450 (2016).

16. Schauer, *supra* note 7, at 803.

17. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 533 (1988).

purpose: both hot rods and ambulances have loud engines, and ambulances have sirens. But if an additional purpose is to enhance the safety of park visitors, the overinclusiveness of the rule does matter because it would prohibit life-saving aid from getting to a visitor injured in the park.¹⁸

Rules imperfectly serve their purposes. A frequent dilemma in American law is the conflict between a rule and its purpose.¹⁹ In statutory construction, this dilemma can result in a court following the spirit rather than the letter of the statute.²⁰ For example, in *Holy Trinity Church*, the Supreme Court refused to follow the statutory rule prohibiting any person from importing any alien into the U.S. for the purpose of performing labor when New York's Holy Trinity Church imported an English pastor.²¹ The Court reasoned that Congress could not have had the purpose of excluding "brain toilers" like ministers, and therefore it was not a crime for a congregation to import a minister.²²

However, as Schauer points out, "[t]he view that rules should be interpreted to allow their purposes to trump their language in fact collapses the distinction between a rule and a reason, and thus loses the very concept of a rule A rule's acontextual rigidity is what makes it a rule."²³ The imperfect fit resulting from the rule's rigidity is tolerated because the rule brings other benefits: efficiency, consistency, and predictability. In some situations, however, the imperfect fit between the language of the rule and the rule's purpose becomes intolerable.²⁴ When this happens, "it then becomes necessary to create an exception."²⁵ Exceptions usually signal that the rule is overinclusive.²⁶ For example, the "no vehicles in the park" rule is overinclusive because it excludes ambulances; therefore, an exception for "emergency vehicles" must be created to address the intolerably imperfect fit. Thus, rulification embodies a tension between efficiency, consistency, and predictability and the kind of flexibility that is necessary to take into account real-world circumstances in which the

18. See, e.g., *id.* at 534 ("[T]he same logic that requires the formulation of a rule to be defeasible in the service of its purpose would also require that purpose to be defeasible in the service of the purpose behind it.").

19. See *id.* at 532-35.

20. *Id.* at 533.

21. *Holy Trinity Church v. United States*, 143 U.S. 457, 457-58, 464 (1892).

22. *Id.* at 464 ("It was never suggested that we had in this country a surplus of brain toilers . . .").

23. Schauer, *supra* note 17, at 534-35.

24. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 874-75 (1991).

25. *Id.* at 875.

26. *Id.*

rule does not serve its purpose.

But even creating an exception to a rule does not necessarily cure the overinclusiveness of the rule because the exception itself can be underinclusive. That is, the exception may be inadequate to align real-world circumstances with desired results in any given case. Professor James G. Wilson has identified the "bright line escape hatch," which is a "tiny opening[,] . . . a minute, normally inaccessible possibility, available only in extreme situations."²⁷ For example, Wilson notes the Court's holding in *Nixon v. United States* that "all claims surrounding impeachment were nonjusticiable."²⁸ To this rule, however, Justice Souter suggested a bright line escape hatch, contending that "at some outrageous point, the Court could and should review certain Senate impeachment procedures, such as deciding an impeachment by a flip of a coin."²⁹ Bright line escape hatches "let off steam that otherwise might rupture a rigid rule."³⁰ Ironically, perhaps, the creation of an escape hatch actually "strengthens [the underlying] rule" by appearing to honor the need for flexibility in the face of future unknown circumstances.³¹ By providing an outlet for the extreme case, "[e]scape hatches permit the courts to formulate rigid doctrine, even though the judges cannot envision all possible issues and all potential abuses that might arise."³²

Despite the recognition that rules are imperfect and necessitate exceptions, there is, as Schauer has noted, a drive toward rulification.³³ Just as courts create exceptions to "round[] off the crisp corners of rules," they have "sharpen[ed] the soft edges of standards."³⁴ At the appellate level, this process of rulification involves a tension between the willingness of the deciding court to tie its own hands in exchange for constraining the choices that other, future courts can make.³⁵ A court's willingness to tie its own hands in future decisions can be understood as a form of choice fatigue.³⁶ Too many choices, whether on the grocery store shelf or in decisional outcomes, can lead to fatigue, frustration, and even "anguish."³⁷ In the

27. Wilson, *supra* note 13, at 788.

28. *Id.* (citing *Nixon v. United States*, 506 U.S. 224, 226–38 (1993)).

29. *Id.* at 788–89 (citing *Nixon*, 506 U.S. at 253–54).

30. *Id.* at 788.

31. *Id.*

32. *Id.*

33. See Schauer, *supra* note 7, at 805–06.

34. *Id.* at 805.

35. *Id.* at 811.

36. *Id.* ("And this is simply the fact that having a great deal of choice—having few constraints on making an all-things-considered decision with as many decisional options as possible—is arguabl[y] less desirable to decision-makers themselves . . .").

37. *Id.* at 813.

face of too many choices, “[w]e want decisional guidance, we want a smaller number of options, and we want to have our decisional processes structured.”³⁸ Decisional limits lead to more efficient and predictable decisions.

The process of rulification has been identified in fields as diverse as securities law,³⁹ domestic relations law,⁴⁰ administrative law,⁴¹ tax law,⁴² and sentencing law.⁴³ However, the process of rulification is most robust in constitutional law because the U.S. Constitution “contains numerous standards.”⁴⁴ Among these standards are “unreasonable search and seizures,” “equal protection of the laws,” “cruel and unusual punishments,” “unreasonable search and seizures,” and, most saliently for this Article, “due process of law.”⁴⁵ These standards, and the goals they seek to achieve, are “unworkably abstract,”⁴⁶ too vague for a court to apply directly to a specific fact situation. In order to give guidance to lower courts, the Supreme Court must develop more concrete standards or tests with which courts can determine whether the constitutional standard is met.⁴⁷ For example, the constitutional standard of “equal protection of the laws” is determined by applying the more concrete standard of varying levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review.⁴⁸ To adjudicate the constitutional standard “due process of law” in determining whether a defendant in a civil case has received adequate notice of the suit, the Court developed the more concrete *Mullane* standard: “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁴⁹ In the context of personal jurisdiction, the Court has articulated the standard for determining “due process of law” in more than a half century of cases.

38. *Id.* at 812.

39. Reilly S. Steel, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1549–50 (2016).

40. Sean Hannon Williams, *Divorce All the Way Down: Local Voice and Family Law’s Democratic Deficit*, 98 B.U. L. REV. 579, 580–82 (2018).

41. Coenen, *supra* note 13, at 677.

42. Philip T. Hackney, *Charitable Organization Oversight: Rules v. Standards*, 13 PITT. TAX REV. 83, 84–85 (2015).

43. Covey, *supra* note 15, at 450–51.

44. Schauer, *supra* note 7, at 807; accord Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691, 694 (2005).

45. See Schauer, *supra* note 7, at 807.

46. Rosen, *supra* note 46, at 695.

47. See *id.* at 695–96.

48. *Id.*

49. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

II. THE "CONTINUOUS AND SYSTEMATIC CONTACTS" STANDARD

Like most personal jurisdiction stories, this one begins with *International Shoe*.⁵⁰ Although the holding in that case was simply that the state of Washington had personal jurisdiction over a Delaware corporation headquartered in Missouri,⁵¹ the Court's rationale gave rise to the distinction between specific and general personal jurisdiction and established the standard for both.

The International Shoe Corporation sent its salesmen into Washington to solicit orders for its shoes.⁵² These salesmen set up displays of shoes, accepted orders from retailers, and submitted the orders to the company's headquarters in St. Louis, where the orders were accepted and fulfilled.⁵³ Between 1937 and 1940, the company employed between eleven and thirteen salesmen in Washington, who were paid sales commissions of more than \$31,000 per year.⁵⁴ When the State of Washington sent the company an assessment for unemployment insurance, the company resisted on the ground that the state had no personal jurisdiction over it.⁵⁵

The Court held that Washington could exercise jurisdiction over International Shoe.⁵⁶ Rejecting the legal fiction of "presence" within the jurisdiction, the Court instead adopted a functional test: "[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, 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.'"⁵⁷ In evaluating whether the exercise of jurisdiction offends these traditional notions, the Court noted that corporations may incur "obligations" by exercising the "privilege" of conducting activities within the forum state.⁵⁸ Hence the relevance of the link between the nature of the suit and the nature of the defendant's forum activities. Because the company's activities in Washington were "systematic and continuous," and the unemployment insurance assessment "arose out of those very activities," it did not offend due process for Washington to exercise

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

51. *Id.* at 321.

52. *Id.* at 313-14.

53. *Id.*

54. *Id.* at 313.

55. *Id.* at 312.

56. *Id.* at 321.

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

58. *Id.* at 319.

jurisdiction over the Missouri corporation.⁵⁹

Because the Court's rationale required it to assess the "nature and quality" of the corporation's contacts with Washington, the Court ruminated about how to assess and describe the type of contacts that would justify the exercise of jurisdiction over a foreign corporation. This portion of the opinion has formed the basis for personal jurisdiction doctrine for the past seventy-five years and has even led to internecine interpretative battles on the current Supreme Court. In its ruminations, the *International Shoe* Court juggled two variables: the nature and quality of the contacts and the relatedness of those contacts to the cause of action sued upon.⁶⁰ Initially, the Court establishes a grid: from "continuous and systematic" contacts that "give rise to the liabilities sued on"—where jurisdiction has "never been doubted,"—to "single or isolated" contacts "unconnected" to the cause of action—which have "generally [been] recognized" as insufficient to confer jurisdiction.⁶¹

These two points on the grid express the extremes of both variables: the high end of both contacts and relatedness vs. the low end of both contacts and relatedness.⁶² The problem is that the Court did not express an opinion on the middle values of the continuum. For example, the Court did not discuss the situation in which the contacts are single and isolated but give rise to the cause of action, although the Court seemed to exclude jurisdiction over a defendant having "no contacts, ties, or relations"⁶³ with the forum state, since, logically, no cause of action could arise from or be connected with a defendant's forum-state activities if it had none.

The Court also did not fully explicate the situation encompassed by the doctrine of general jurisdiction, in which a defendant has some contacts with a state, but those contacts do not give rise to the cause of action sued upon. The Court described the state of precedent on this issue as in a state of equipoise:

While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that

59. *Id.* at 320.

60. *Id.* at 318-19.

61. See Nash, *supra* note 13, at 479 (presenting tables illustrating the relationship between contacts and relatedness drawn by the *International Shoe* Court).

62. See *id.*

63. *Int'l Shoe*, 326 U.S. at 319.

activity, . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.⁶⁴

Of course, the Court did not have to take a position on this issue, since International Shoe's forum activities gave rise to the unemployment insurance claim sued upon.⁶⁵ Less than a decade later, the Court was forced to confront the situation in which the defendant's forum contacts did not give rise to the cause of action sued upon. In *Perkins v. Benguet Consolidated Mining Co.*,⁶⁶ the plaintiff shareholder filed two suits in Ohio state court against the corporation, one for unpaid dividends and one for damages resulting from the corporation's failure to issue stock certificates.⁶⁷ The Benguet Mining Company carried on its business in the Philippines.⁶⁸ It was not incorporated in Ohio, nor did it carry on any mining activities there.⁶⁹ However, during World War II, its Philippines operations were shut down, and its president, general manager, and principal shareholder ran the corporation out of his home.⁷⁰ According to the Court, from his home office he "did many things"⁷¹ on behalf of the company:

He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover

64. *Id.* at 318 (internal citations omitted).

65. *Id.* at 320.

66. 342 U.S. 437 (1952).

67. *Id.* at 439.

68. *Id.*

69. *Id.* at 447.

70. *Id.* at 447-48.

71. *Id.* at 448.

purchases of machinery for such rehabilitation.⁷²

In short, said the Court, "he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."⁷³ Because the "cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there,"⁷⁴ the case presented the question not presented in *International Shoe*: what type of contacts with the forum state are necessary to satisfy the Due Process Clause when seeking to subject a corporation to personal jurisdiction in a forum in which the cause of action neither arises from nor relates to the corporation's forum activities?⁷⁵

The *Perkins* Court held that the defendant's "continuous and systematic" activities in Ohio were sufficient to satisfy the Due Process Clause.⁷⁶ The Court characterized its duty as determining a standard ensuring "general fairness to the corporation."⁷⁷ The Court disclaimed any reliance on a bright-line rule, noting that "[t]he amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case."⁷⁸ The Court hearkened back to the directive of *International Shoe* that what matters is not the quantity of contacts, but the "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."⁷⁹ Without much analysis, the Court held that "under the circumstances,"⁸⁰ given the extent of the president's activities on behalf of the corporation from his home office, the corporation's activities were "sufficiently substantial and of such a nature"⁸¹ that it would not violate the Due Process Clause for Ohio to exercise personal jurisdiction over Benguet.⁸²

Three decades later, the "continuous and systematic" contacts standard established in *Perkins* provided the standard in the next general jurisdiction case decided by the Supreme Court, *Helicopteros*

72. *Id.* The Court's analysis in *Perkins* is particularly salient in light of the use Justice Ginsburg makes of the opinion in *Daimler AG v. Bauman*, discussed *infra*.

73. *Id.*

74. *Id.* at 438.

75. *Id.*

76. *Id.* at 448.

77. *Id.* at 445.

78. *Id.*

79. *Id.* at 447.

80. *Id.* at 448.

81. *Id.* at 447.

82. *Id.* at 447-48.

Nacionales de Colombia, S.A. v. Hall.⁸³ In an 8-1 decision, with Justice Brennan dissenting, the Court held that the forum state activities of Helicopteros (Helicol) were insufficiently continuous and systematic to permit the exercise of general jurisdiction.⁸⁴ The case arose from a helicopter crash in Peru, which killed four Americans.⁸⁵ The helicopter was owned by Helicol and was leased to the Americans' employer, a Peruvian consortium.⁸⁶ The widow of one of the deceased Americans sued Helicol in Texas state court for the wrongful death of her husband.⁸⁷ None of the four victims was a citizen of Texas.⁸⁸ Helicol moved to dismiss for lack of personal jurisdiction.⁸⁹

Using *Perkins* as its touchstone, the Supreme Court held that Helicol was not subject to personal jurisdiction in Texas because its forum contacts were not "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*."⁹⁰ Noting that Helicol did not have a "place of business in Texas" and was not "licensed to do business in the state," the Court summarized the defendant's forum contacts as follows:

Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.⁹¹

Analyzing each of these contacts in turn, the Court held that none constituted "continuous and systematic" activity that would justify general jurisdiction.⁹²

83. 466 U.S. 408 (1984).

84. *Id.* at 418-19.

85. *Id.* at 409-11.

86. *Id.* at 410-11.

87. *Id.* at 412.

88. *Id.* at 411-12.

89. *Id.* at 412.

90. *Id.* at 416.

91. *Id.*

92. *Id.* Justice Blackmun's opinion has been criticized for treating each of the defendant's forum contacts in isolation from the others; he does not consider whether the cumulative contacts of Helicol with Texas can be considered "continuous and systematic." Cf. Kristina L. August, Note, *The Demise of General Jurisdiction: Why the Supreme Court Must Define the Parameters of General Jurisdiction*, 36 SUFFOLK L. REV. 63, 71 n.54 (2002) ("The majority dissected the defendant's contacts with Texas, taking them separately, and rejecting them individually.").

Ultimately, according to the Court, the case boiled down to a claim that Helicol's purchase of helicopters and a service and training package from a Texas-based company was sufficient to satisfy the "continuous and systematic" contacts standard.⁹³ Relying on a pre-*International Shoe* case, *Rosenberg Bros. & Co., v. Curtis Brown Co.*,⁹⁴ the Court applied its holding as follows: "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."⁹⁵ Although *Rosenberg* would be classified as a specific jurisdiction case, since the cause of action arose from the defendant's contact with the forum state,⁹⁶ Justice Blackmun reasoned that if the corporation's contacts were not sufficient for specific jurisdiction, they certainly were not sufficient for general jurisdiction.⁹⁷

Thus, by the time the Supreme Court again faced a general jurisdiction case in 2011, the standard for evaluating general personal jurisdiction over a corporation was well established: Did the corporation have "continuous and systematic" contacts with the forum state? If so, the Due Process Clause was satisfied and the defendant was subject to jurisdiction. If not, asserting jurisdiction over the corporation would violate the Due Process Clause. The existing precedents on general jurisdiction could be placed on a continuum, with *Perkins* at the end signifying sufficient contacts, and *Helicopteros* on the other end, signifying insufficient contacts.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁹⁸ the Supreme Court held that three foreign corporations' contacts with North Carolina were insufficient to justify the state's exercise of general jurisdiction.⁹⁹ The plaintiffs' sons were killed when a bus carrying their soccer team crashed outside of Paris, France.¹⁰⁰ The plaintiffs filed suit in a North Carolina state court, alleging that defects in a bus tire manufactured by a subsidiary of Goodyear USA had caused the crash.¹⁰¹ In addition to Goodyear USA, a Ohio corporation, the complaint named as defendants three of the company's indirect subsidiaries located in Luxembourg, Turkey, and

93. *Helicopteros*, 466 U.S. at 417.

94. 260 U.S. 516 (1923).

95. *Helicopteros*, 466 U.S. at 418.

96. *Rosenberg Bros.*, 260 U.S. at 518.

97. *Helicopteros*, 466 U.S. at 418 n.12.

98. 564 U.S. 915 (2011).

99. *Id.* at 920.

100. *Id.*

101. *Id.* at 918.

France.¹⁰² Goodyear USA, “which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court’s jurisdiction over it,”¹⁰³ but the three subsidiaries moved to dismiss for lack of personal jurisdiction.¹⁰⁴

In a unanimous opinion authored by Justice Ginsburg, the Court held that the subsidiaries were not subject to general personal jurisdiction in North Carolina.¹⁰⁵ The Court set forth the facts relevant to general jurisdiction as follows:

[P]etitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.¹⁰⁶

The only contact between the subsidiaries and North Carolina was that

[A] small percentage of petitioners’ tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers.¹⁰⁷

No tires like the allegedly defective tires on the bus were distributed in North Carolina.¹⁰⁸

Although the Court used the “continuous and systematic” contacts standard to evaluate the defendants’ contacts, Justice Ginsburg added a gloss to the standard: “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and

102. *Id.*

103. *Id.* Post-*Daimler*, Goodyear USA would have successfully challenged personal jurisdiction in this case.

104. *Id.* at 921.

105. *Id.* at 920. The case involved general, rather than specific, jurisdiction because “the bus accident[] occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad” *Id.* at 919.

106. *Id.* at 921.

107. *Id.*

108. *Id.* (“Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.”).

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.”¹⁰⁹ This addition of the “essentially at home” parameter to the continuous and systematic contacts standard apparently resulted from the Court’s impulse to equate a corporation’s amenability to general jurisdiction with an individual’s amenability to general jurisdiction. Because individuals are subject to general jurisdiction in their states of domicile, Justice Ginsburg seized on the concept of “domicile” or “home” to refine the standard for a corporation’s amenability to general jurisdiction: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”¹¹⁰ Because of their “attenuated connections” to the forum state, the Court concluded that “petitioners are in no sense at home in North Carolina.”¹¹¹

While the “essentially at home” gloss on the “continuous and systematic” contacts standard might seem insignificant, the gloss signaled a conceptual shift from an emphasis on activities (contacts) to an emphasis on status (at home).¹¹² This shift, from contextual and contingent to static and definite, sets the stage for the rulification of the “continuous and systematic contacts” standard in *Daimler AG v. Bauman*.

III. DAIMLER’S RULE AND THE “EXCEPTIONAL CASE”

A. The Rule

In *Daimler AG v. Bauman*,¹¹³ the U.S. Supreme Court faced a

109. *Id.* at 919 (emphasis added) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

110. *Id.* at 924. For this proposition, the Court cited a law review article that “identif[ied] domicile, place of incorporation, and principal place of business as ‘paradigm[m]’ bases for the exercise of general jurisdiction.” *Id.* (alteration in original) (citing Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

111. *Id.* at 929 (citing *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

112. The “at home” test has other conceptual problems that have been analyzed elsewhere. One such problem is the dichotomy between where a human individual may be regarded as “at home,” and where a corporation may be regarded as such. Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1167–68 (2015) (comparing a corporation’s state of incorporation and principal place of business to an individual’s domicile).

113. 571 U.S. 117 (2014).

lawsuit by twenty-two Argentine residents¹¹⁴ against Daimler AG, a German corporation having its principal place of business in Stuttgart, Germany.¹¹⁵ The lawsuit was brought in the U.S. District Court for the Northern District of California, pursuant to the federal Alien Tort Claims Act, the federal Torture Victims Protection Act of 1991, and the laws of California and Argentina.¹¹⁶ The plaintiffs sought compensation for the actions of Daimler AG's wholly owned subsidiary, Mercedes-Benz Argentina, which allegedly "collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs."¹¹⁷ These acts occurred during Argentina's "Dirty War" of 1976 to 1983.¹¹⁸ None of the parties resided in California, nor did any of the acts giving rise to the cause of action occur in California.¹¹⁹ However, as the Court noted "[j]urisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California."¹²⁰

Daimler AG moved to dismiss for lack of personal jurisdiction.¹²¹ The district court allowed jurisdictional discovery and granted the motion.¹²² The court held that Daimler AG's contacts with California alone were insufficient to support general jurisdiction, and that MBUSA's California contacts could not be attributed to Daimler AG on an agency theory.¹²³ The Ninth Circuit Court of Appeals panel initially affirmed with Judge Reinhardt dissenting.¹²⁴ On plaintiffs' petition for rehearing, the panel reversed its ruling in an opinion written by Judge Reinhardt.¹²⁵ The court held that California could exercise general jurisdiction over Daimler AG based upon the contacts of its agent, MBUSA.¹²⁶ When Daimler petitioned for rehearing en banc, the Ninth Circuit denied rehearing, with eight judges

114. The Argentine residents were joined by one resident of both Argentina and Chile. *Id.* at 120 n.1.

115. *Id.* at 120-21.

116. *Id.* at 122.

117. *Id.* at 121.

118. *Id.*

119. *Id.* at 120.

120. *Id.* at 121.

121. *Id.* at 123.

122. *Id.* at 124.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

dissenting.¹²⁷

The U.S. Supreme Court held that the district court lacked personal jurisdiction over the German corporation.¹²⁸ In holding so, the Court jettisoned the traditional "continuous and systematic" contacts standard, which had held sway from *International Shoe Co.*¹²⁹ to *Perkins v. Benguet Consolidated Mining Co.*¹³⁰ to *Helicopteros*.¹³¹ Instead, the Court applied the "essentially at home" gloss that originated in *Goodyear* and determined that a corporation is essentially at home—and therefore subject to general jurisdiction—in only two states: its state of incorporation and the state of its principal place of business.¹³²

However, in a footnote, the Court suggested that, in an "exceptional case," a corporation might be subject to general jurisdiction in a state other than its state of incorporation or a state in which it has its principal place of business:

We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, . . . quite another to expose it to suit on claims having no connection whatever to the forum State.¹³³

The first thing this footnote clearly shows is that the test for general jurisdiction over corporations is not the "at home" standard. If it were, then there would be no need for an "exceptional case." Only rules, not standards, have exceptions.¹³⁴ A true "at home" standard would require a nuanced case-by-case analysis, but that kind of analysis is

¹²⁷ *Id.* at 125.

¹²⁸ *Id.* at 121–22.

¹²⁹ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

¹³⁰ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

¹³¹ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984).

¹³² *Daimler AG*, 571 U.S. at 137–39.

¹³³ *Id.* at 139 n.19 (internal citations omitted).

¹³⁴ See generally Schauer, *supra* note 26 (discussing exceptions in the law).

required only for the “exceptional case.”¹³⁵ Thus, the standard has become a rule, as a corporation is at home (i.e., subject to general jurisdiction) in only two states: (1) its state of incorporation and (2) the state in which it has its principal place of business.¹³⁶ Although the Court disclaimed an intention to create such a rule,¹³⁷ the logic of the Court’s reasoning undermines its disclaimer.¹³⁸ After *Daimler*, the “at home” standard for evaluating the defendant’s forum-state contacts is legally relevant only in the exceptional case.¹³⁹

The Court did not elaborate on what it would take to meet the “so substantial and of such a nature” test.¹⁴⁰ Pre-*Daimler*, of course, the Court had applied the “systematic and continuous contacts” standard to determine whether general jurisdiction over a corporation was warranted.¹⁴¹ However, having repudiated that standard, the Court in *Daimler* did suggest the analysis to be used in evaluating the exceptional case:

135. *Daimler AG*, 571 U.S. at 139 n.19.

136. See Nash, *supra* note 13, at 470. Jonathan Remy Nash characterizes the *Daimler* test as “rule-like,” but it actually corresponds to his “explicit rule regime,” which is characterized by a “bright-line rule” that engenders “no division among the courts below.” *Id.* at 470, 475. As will be shown in Part V, the *Daimler* rule and its exception are followed unanimously by lower courts. *Infra* Part V. Another indication that the Court established a rule in *Daimler* is the Court’s evident distrust of lower courts’ decision-making on personal jurisdiction issues. Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 543 (2018). When higher courts wish to constrain the scope of lower court decision-making, they create rules, not standards. Schauer, *supra* note 7, at 809–10.

137. *Daimler AG*, 571 U.S. at 137 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

138. See generally Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015). Actually, the entire opinion is based on a logical flaw. The Court assumed that MBUSA was “at home” in California—i.e., that it had sufficient contacts to yield general jurisdiction. *Daimler AG*, 571 U.S. at 134. The Court then assumed that MBUSA’s contacts “are imputable to Daimler,” which should have made *Daimler AG* “at home” in California as well. *Id.* at 136. However, the Court instead held that Daimler’s separate contacts with California were insufficient to support general jurisdiction. *Id.*; see also Cornett & Hoffheimer, *supra* note 140, at 127 (“Justice Ginsburg’s declaration that general jurisdiction over Daimler AG would not exist even counting MBUSA’s in-state contacts makes clear that in-state contacts are no longer the essential ingredient of general jurisdiction.”).

139. *Daimler AG*, 571 U.S. at 139 n.19.

140. *Id.*

141. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

To clarify in light of Justice Sotomayor's opinion concurring in the judgment, the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of . . . activity" having no connection to any in-state activity.¹⁴²

Again, utilizing the "at home" language from *Goodyear*, the Court mandated "an appraisal of a corporation's activities in their entirety, nationwide and worldwide."¹⁴³ Thus, there is no absolute level of forum-state contacts that will yield general jurisdiction. No matter the magnitude of the defendant's forum-state contacts, they must be compared to the defendant's nationwide and worldwide contacts.¹⁴⁴ The only example of such an exceptional case given by the Court was *Perkins*, which the Court termed the "textbook case" of general jurisdiction.¹⁴⁵ Thus, through rulification, the "textbook case" of the "continuous and systematic contacts" standard has become the exception to the new rule.¹⁴⁶

Apart from providing the example of *Perkins*, the Court failed to indicate how substantial and of what nature the corporation's activities within the forum must be to "count" for general jurisdiction.¹⁴⁷ The Court did indicate that simply "doing business" in the forum will not suffice, and it declared, without supporting reasoning, that a corporation operating "in many places can scarcely

142. *Daimler AG*, 571 U.S. at 139 n.20 (alterations in original) (internal citations omitted) (quoting Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 694 (2012)).

143. *Id.*

144. *Id.*

145. *Id.* at 129 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011)).

146. *Id.*

147. *Id.* at 139 n.19.

be deemed at home in all of them.”¹⁴⁸ The Court’s use of the “at home” metaphor is troubling for many reasons because it draws on cultural assumptions that are outmoded and irrelevant to the question of where a corporation should be subject to suit.¹⁴⁹ The Court almost seems to have been misled by its own rhetoric. “Home” is a special, unique place;¹⁵⁰ therefore, the corporation cannot be at home “in many places.”¹⁵¹ As Justice Kagan responded when plaintiffs counsel advocated the “continuous and systematic contacts” test: “If [Daimler] were subject . . . to general jurisdiction in California, so, too, it would be subject to general jurisdiction in every State in the United States, and all of that has got to be wrong.”¹⁵² But instead of being “wrong,” this proposition had been “right”—at least for domestic corporations—during the decades of practice pre-*Daimler*. As Professor Jonathan Remy Nash has shown, large corporations with a significant national presence understood themselves to be subject to general jurisdiction in all states and did not challenge any state’s exercise of general jurisdiction over them.¹⁵³

Because rules should be linked to goals, it is important to identify the Court’s goals in rulifying the general jurisdiction standard. The Court explicitly articulates only one goal: “permit[ting] [corporations] ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’”¹⁵⁴ This goal assumes that the continuous and systematic contacts standard was deficient in affording corporations this kind of predictability. Yet, before *Daimler*, “litigants and lawyers were not

148. *Id.* at 139 n.20.

149. See David Crump, *The Essentially-at-Home Requirement for General Jurisdiction: Some Embarrassing Cases*, 70 CATH. U. L. REV. 273, 278 (2021) (“[T]he Supreme Court’s metaphor about a corporation ‘essentially at home’ is not helpful to someone seriously trying to guess at its meaning. One can picture a corporation as a kind of living being that has a home . . . however, this word picture is not very helpful.”).

150. *Daimler AG*, 571 U.S. at 137 (“Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.”).

151. *Id.* at 139 n.20.

152. Transcript of Oral Argument at 31, *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (No. 11-965).

153. See Nash, *supra* note 13, at 498; see also Cornett & Hoffheimer, *supra* note 140, at 111, 129; Phillip S. Sykes & Laura McCarthy, *Are You Defending Your Clients Where They Don’t Belong? Corporate Defendants’ New Potent Defense Is Personal Jurisdiction, That Is*, 82 DEF. COUNS. J. 282, 283 (2015) (“[Before *Daimler*], general jurisdiction played little or no role in the defense strategy of large companies conducting business on a national scale.”).

154. *Daimler AG*, 571 U.S. at 139 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

clamoring for clarification of the test for general jurisdiction.”¹⁵⁵ The absence of challenges to general jurisdiction by large national corporations indicates that they had been structuring their primary conduct for decades in accordance with the continuous and systematic contacts test.¹⁵⁶ Whatever the costs of that expansive (Justice Ginsburg would say “sprawling”) jurisdiction, corporations had found a way to live with it, presumably by taking it into account in their risk-management calculations. Thus, the Court’s explicit goal of predictability seems not to be better served by the rule than by the standard it replaced.¹⁵⁷

A second, implicit goal of the Court was to “afford plaintiffs recourse in at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”¹⁵⁸ This cruelly ironic goal suggests that the continuous and systematic contacts standard was somehow constraining plaintiffs’ choice of forum or, at least, making it difficult for plaintiffs to ascertain a forum that could exercise general jurisdiction over a corporation. But there is absolutely no support in the opinion or in scholarly commentary for the idea that plaintiffs needed help with general jurisdiction before *Daimler*, as the “low level of active litigation over general jurisdiction is best explained as an absence of confusion over the contours of general jurisdiction.”¹⁵⁹ Because the *Daimler* rule massively narrows the scope of general jurisdiction over corporations, plaintiffs have been obstructed, not aided, by rulification.¹⁶⁰ The Court’s vaunted,

155. Nash, *supra* note 13, at 488; see also Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 782 (2017) (“[After *Daimler*], [i]n cases all over the country, where defendants who engaged in nationwide activity had previously not even bothered to contest jurisdiction, defendants were suddenly raising personal jurisdiction defenses, even in long-running cases.”).

156. Cornett & Hoffheimer, *supra* note 140, at 129; see Nash, *supra* note 13, at 468–69.

157. Nash, *supra* note 13, at 500 (noting that plaintiffs who are now unable to rely on general jurisdiction are “relegated . . . to the standard-like whims of specific jurisdiction”).

158. *Daimler AG*, 571 U.S. at 137.

159. Nash, *supra* note 13, at 499.

160. Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1418, 1421, 1429 (2018) (highlighting three areas in which strict general jurisdiction doctrine may harm access to justice: where a plaintiff wishes to sue in their home state, where a plaintiff sues in a particular jurisdiction in which the defendant has contacts though there is no connection to the plaintiff or the events (*Daimler* is an example), and where multiple plaintiffs seek to aggregate their claims). This commentator argues that these may be solved by a “sensible approach to [the] minimum contacts [standard]” and utilizing specific jurisdiction “when it would be rational for the forum state to adjudicate the availability of the requested judicial

“unique” place where corporations are subject to general jurisdiction is too often a distant, inconvenient forum for plaintiffs.¹⁶¹

A third goal of the rule, akin to predictability, is efficiency. The *Daimler* Court crafted a rule that is highly efficient because it is almost entirely formal.¹⁶² A corporation’s state of incorporation is easily ascertainable because it is documented. There have been few, if any, controversies post-*Daimler* about where a corporation is incorporated.¹⁶³ A corporation’s principal place of business has likewise proved to be noncontroversial.¹⁶⁴ Although the Supreme Court in *Daimler* did not explicitly adopt a test for determining a corporation’s principal place of business in the context of general jurisdiction, the Court cited with approval the “nerve center” test adopted in *Hertz Corp. v. Friend* for purposes of subject matter jurisdiction.¹⁶⁵ District courts have followed the test with little contest from plaintiffs.¹⁶⁶ In district court opinions applying the *Daimler* rule, the corporation’s own identification of its principal place of business is accepted without question by the plaintiff and the court.¹⁶⁷

To the extent that efficiency was one of the Court’s goals in crafting the *Daimler* rule, it has been spectacularly successful. As shown in Part IV, the district courts typically apply the *Daimler* rule in three sentences: first, identifying the corporation’s states of incorporation and principal place of business; second, reciting the location of the district court, which is not in either of those states; and third, concluding that there is no general jurisdiction.¹⁶⁸ Post-*Daimler*, the only analysis required in determining general jurisdiction comes as a result of the plaintiff’s claim that the case presents an “exceptional case” within the meaning of footnote 19.¹⁶⁹ Only when analyzing the corporation’s forum contacts in relation to

remedies.” *Id.* at 1406, 1446.

161. *Daimler AG*, 571 U.S. at 137.

162. Stanley E. Cox, *The Missing “Why” of General Jurisdiction*, 76 U. PITT. L. REV. 153, 156 (2014). One commentator states that the *Daimler* rule is correct and notes its benefits with respect to efficiency. *Id.* (“Such a relatively clear rule is, of course, helpful to disposing of litigation, and it provides practical guidance to litigants about where they can sue and be sued.”).

163. *Infra* Part IV (finding no controversies in the database but using “few” prudentially).

164. *Infra* Part IV. This finding fails to support Professor Nash’s suggestion that the *Daimler* rule might “invite litigants to contest, and task lower courts with deciding, where a corporation’s principal place of business actually is.” Nash, *supra* note 13, at 493.

165. *Daimler AG*, 571 U.S. at 137.

166. *Infra* Part IV.

167. *Infra* Part IV.

168. *Infra* Part IV.

169. *Daimler AG*, 571 U.S. at 139 n.19.

its nationwide and worldwide contacts does the district court use a standard, but, as will be shown in Part IV, even this analysis has become mechanical.¹⁷⁰

Perhaps the most urgent goal of the *Daimler* rule was to rein in forum-shopping by plaintiffs. The *Daimler* Court seemed distressed that the non-U.S. residents chose a U.S. court in which to sue a non-U.S. corporation on a cause of action arising from acts occurring outside the United States.¹⁷¹ At oral argument, Justice Ginsburg posed a hypothetical to plaintiffs' counsel that similarly posed the possibility that a foreign plaintiff could sue a foreign defendant on a cause of action arising outside the United States, suggesting that forum-shopping by foreign corporations influenced her opinion.¹⁷² Justice Kagan's remark at oral argument that the continuous and systematic contacts standard was "wrong" because it subjected large corporations to general jurisdiction in all 50 states hints at this goal.¹⁷³ Justice Ginsburg's use of derogatory adjectives such as "grasping," "sprawling," and "exorbitant" to describe the reach of general jurisdiction advocated by the *Daimler* plaintiffs also hints at this goal.¹⁷⁴ However, the Court has tolerated forum-shopping when necessary to utilize a longer statute of limitations.¹⁷⁵ The Court has also recognized that the *Erie* doctrine will result in forum-shopping as between federal and state courts.¹⁷⁶ Nevertheless, it seems clear that the result in *Daimler* bespeaks the goal of restricting plaintiffs' choice of forums where longer statutes of limitations or more favorable choice of law rules might allow them to "gain a large benefit by selecting a very favorable forum."¹⁷⁷

170. *Infra* Part IV.

171. *Daimler AG*, 571 U.S. at 120 ("This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.").

172. Transcript of Oral Argument at 29, *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (No. 11-965). Justice Ginsburg reiterated this hypothetical in the *Daimler* opinion. *Daimler AG*, 571 U.S. at 127 n.5.

173. Transcript of Oral Argument at 31, *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (No. 11-965).

174. See Cornett & Hoffheimer, *supra* note 140, at 129-30.

175. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772-75 (1984).

176. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406, 416 (2010) ("But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.").

177. Nash, *supra* note 13, at 505; accord Philip S. Goldberg, et al., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51, 72-73 (2019); Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*,

A final goal of the rule might be fairness and reasonableness, since the constitutionality of personal jurisdiction since *International Shoe* has been measured by fairness and reasonableness.¹⁷⁸ However, the *Daimler* Court does not explicitly consider whether its rule is fair or reasonable.¹⁷⁹ Lurking beneath Justice Ginsburg's inflammatory rhetoric and Justice Kagan's shocked reaction to the thought that a large national corporation could be sued in any state is the fear of forum-shopping by plaintiffs.¹⁸⁰ The implicit assertion is that the continuous and systematic contacts standard was unfair to defendants because it left them open to suit in inconvenient forums with unfavorable laws chosen by marauding plaintiffs. Thus, fairness and reasonableness to defendants demanded that these litigious brigands be corralled into forums favorable to defendants, no matter how unfair or unreasonable to plaintiffs.¹⁸¹ In her concurrence, Justice Sotomayor addressed this asymmetry:

[T]he touchstone principle of due process in this field[] [is] the concept of reciprocal fairness. When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts. The majority's focus on the extent of a corporate defendant's out-of-forum contacts is untethered from this rationale.¹⁸²

Justice Sotomayor's approach—finding that *Daimler* had continuous and systematic contacts with California, but finding that the exercise of general jurisdiction would be unreasonable—was skewered by Justice Ginsburg in a footnote: “[S]he favors a resolution

53 Hous. L. Rev. 631, 654–55 (2016). Concomitant with its desire to limit forum-shopping by plaintiff might be the Court's desire to limit forum-selling by states. See generally Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241 (2016).

178. See *Daimler AG v. Bauman*, 571 U.S. 117, 151 (2014) (Sotomayor, J., concurring) (“[T]he touchstone principle of due process in this field[] [is] the concept of reciprocal fairness.”); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (Black, J., concurring) (“There is a strong emotional appeal in the words ‘fair play’, ‘justice’, and ‘reasonableness.’”).

179. See generally *Daimler AG*, 571 U.S.

180. See generally *id.*

181. See Freer, *supra* note 114, at 1164 (“Given MBUSA's significant level of activity in California, why would general jurisdiction there be unfair or even inconvenient for the defendant? Why [doesn't] the plaintiffs' interest in litigating at home . . . augur in favor of jurisdiction?”).

182. *Daimler AG*, 571 U.S. at 151 (Sotomayor, J., concurring) (internal citations omitted).

fit for this day and case only.”¹⁸³ This criticism is difficult to understand, since the Court had previously applied the reasonableness standard in *Asahi* to deny specific jurisdiction.¹⁸⁴ But reasonableness is a standard, and Justice Sotomayor opined that jurisdiction was unreasonable “in light of the unique circumstances of this case.”¹⁸⁵ Clearly, Justice Ginsburg favored a resolution that would outlast this one case, would not require consideration of circumstances, and would constrain future decisionmakers.¹⁸⁶ In other words, she favored a rule.

B. BNSF v. Tyrrell

If there were any doubt that *Daimler* ruled general jurisdiction,¹⁸⁷ that doubt was removed by the Court’s holding in *BNSF Railway Co. v. Tyrrell*.¹⁸⁸ There, a railway worker and the estate of a deceased railway worker, neither of whom resided in Montana, sued BNSF in Montana pursuant to the Federal Employees Liability Act for injuries he suffered outside Montana.¹⁸⁹ BNSF is incorporated in Delaware and has its principal place of business in Texas.¹⁹⁰ The plaintiff argued that BNSF was subject to general jurisdiction in Montana.¹⁹¹ The Supreme Court rejected that argument, holding that BNSF’s contacts with Montana did not qualify for “exceptional case” treatment.¹⁹² Unfortunately, however, the Court’s reasoning on why the “exceptional case” did not apply was less than pellucid. First, the Court cited *Daimler*’s footnote 19 for the proposition that:

The exercise of general jurisdiction is not limited to [the state of incorporation and the state in which the corporation has its principal place of business]; in an “exceptional case,” a corporate defendant’s operations

183. *Id.* at 139 n.20 (majority opinion).

184. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 113–16 (1987).

185. *Daimler AG*, 571 U.S. at 142 (Sotomayor, J., concurring).

186. *See id.* at 139 n.20 (majority opinion) (criticizing Justice Sotomayor for “favor[ing] a resolution fit for this day and case only” as opposed to a bright-line rule).

187. Some commentators had held out hope that *Daimler*’s holding would permit consideration of corporate activities in the forum state, but that proved to be a forlorn and naïve hope. *See, e.g.*, Cornett & Hoffheimer, *supra* note 140, at 104, 147–54.

188. 137 S. Ct. 1549 (2017).

189. *Id.* at 1554.

190. *Id.*

191. *Id.* at 1555–56.

192. *Id.* at 1558–59.

in another forum “may be so substantial and of such a nature as to render the corporation at home in that State.”¹⁹³

The Court then noted its previous “suggestion” in *Daimler*’s footnote 19 that *Perkins v. Benguet Consolidated Mining Co.* “exemplified such a case.”¹⁹⁴ Reiterating its reading of *Perkins* from *Daimler*, the Court maintained that general jurisdiction was proper over the corporate defendant in Ohio only because Ohio had become its de facto principal place of business: “In *Perkins*, war had forced the defendant corporation’s owner to temporarily relocate the enterprise from the Philippines to Ohio. Because Ohio then became ‘the center of the corporation’s wartime activities,’ suit was proper there.”¹⁹⁵ The textbook case is also the exceptional case. Thus, the Court’s reading of the “exceptional case” seems circular. A corporation is subject to general jurisdiction in a state other than its state of incorporation or principal place of business only if that state is its de facto principal place of business. To qualify as the corporation’s principal place of business for purposes of the exceptional case, the corporation’s forum-state contacts must outweigh its nationwide and worldwide contacts.

This is shown by the Court’s application of the test to BNSF. The Court found as a fact that

BNSF has 2,061 miles of railroad track in Montana (about 6% of its total track mileage of 32,500), employs some 2,100 workers there (less than 5% of its total work force of 43,000), generates less than 10% of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4%).¹⁹⁶

Thus, for purposes of the exceptional case analysis, BNSF’s contacts with Montana were compared to its “total” contacts with all other states (and, presumably, all other foreign countries in which it operates), rather than being compared to its contacts with any other specific state.¹⁹⁷ Comparing a defendant’s contacts with the forum state against its contacts with all other states and countries means that the exceptional case test would be satisfied only if the defendant’s forum state contacts exceeded 50% of its total contacts. Thus, a

193. *Id.* at 1558 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)).

194. *Id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952)).

195. *Id.* (internal citations omitted).

196. *Id.* at 1554.

197. *See id.*

defendant having 49% of its contacts in the forum state but 1% of its contacts in each of the other forty-nine states plus the District of Columbia and Puerto Rico would not qualify for the exceptional case: its forum state contacts would not predominate over its out-of-state contacts. Similarly, a corporation having 49% of its contacts with the forum state, but 51% of its contacts with one other state would not satisfy the exceptional case standard.

In its analysis of general jurisdiction over BNSF, the Court began with the bright-line rule from *Daimler*, noting that "BNSF, we repeat, is not incorporated in Montana and does not maintain its principal place of business there."¹⁹⁸ Moving to the exceptional case analysis, the Court noted that BNSF has "over 2,000 miles of railroad track and more than 2,000 employees in Montana," but this "in-state business," according to the Court, "does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana."¹⁹⁹ The magnitude of BNSF's contacts with Montana was insufficient to confer general jurisdiction because of the Court's belief that "[a] corporation that operates in many places can scarcely be deemed at home in all of them."²⁰⁰ So, to determine whether a corporation is "at home" in the forum state requires a comparison of the corporation's in-state contacts to its "operations in their entirety."²⁰¹ Interestingly, the Court did not recount what BNSF's out-of-state contacts were. Presumably, it operates in "many places,"²⁰² but how many? And how many contacts did it have in each of those other places? These questions must be legally irrelevant to the exceptional case inquiry, because the only information the Court gives about BNSF's proportional contacts is its statement of BNSF's operations in Montana relative to its overall operations.²⁰³ But, of course, depending on how many other states and countries it operates in, these percentages may represent the majority of BNSF's contacts with any one state.²⁰⁴

198. *Id.* at 1559; see generally *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

199. *BNSF*, 137 S. Ct. at 1559.

200. *Id.* (alteration in original) (quoting *Daimler AG*, 571 U.S. at 139 n.20).

201. *Id.* (quoting *Daimler AG*, 571 U.S. at 139 n.20).

202. *Id.*

203. *Id.* at 1554.

204. The flurry of statistics required to analyze general jurisdiction in *BNSF* flies in the face of *International Shoe*'s injunction that it is the "quality and nature" of the defendant's forum-state contacts, not their quantity, that should determine jurisdiction. For example, in *International Shoe*, the Court reasoned:

It is evident that the criteria by which we mark the boundary line

Because the standard for the exceptional case is entirely numerical, and comparative only to the corporation's contacts with other states and nations, the test fails to assess how significant the corporation is to the state in which it is sued.²⁰⁵ From that state's perspective, the corporation might be the most important employer or the most important contributor to the state's economy.²⁰⁶ But even if a state considers a corporation its most important citizen, the exceptional case test will result in jurisdiction over the corporation only if, from the corporation's standpoint, the state is the site of its majority contacts.²⁰⁷

BNSF v. Tyrrell demonstrates that Justice Sotomayor was correct when she predicted in her *Daimler* concurrence that the exception would prove to be a chimera, a mere illusion: "[T]he majority does not even try to explain just how extensive the company's in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper."²⁰⁸ Concurring in part and dissenting in part in *BNSF*, Justice Sotomayor lamented the abolition of the "continuous and systematic contacts" standard and its replacement by the *Daimler* rule: "What was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation's principal place of business or place of incorporation."²⁰⁹ The purportedly ameliorative exception to this rule, according to Justice Sotomayor, has now been limited to the "exact facts" of *Perkins v. Benguet Consolidated Mining Co.*:

between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

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

205. See *BNSF*, 137 S. Ct. at 1559.

206. See Cornett & Hoffheimer, *supra* note 140, at 153–54; Michael H. Hoffheimer, *End of the Line for General Territorial Jurisdiction*, 87 TENN. L. REV. 419, 420–23 (2020).

207. See generally Eric J. Muñoz, *GE May Bring Good Things to Life, but It Does Not Bring Personal Jurisdiction in Illinois*, 107 ILL. BAR J. 40 (2019) (discussing a holding that GE is not subject to general jurisdiction in Illinois, where it employs 3,000 individuals and has an "economic impact" of \$4.8 billion (citing *Campbell v. Acme Insulations, Inc.*, 105 N.E.3d 984, 989–96 (Ill. App. Ct. 2018))).

208. *Daimler AG v. Bauman*, 571 U.S. 117, 155 (2014) (Sotomayor, J., concurring).

209. *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part).

That reading is so narrow as to read the exception out of existence entirely; certainly a defendant with significant contacts with more than one State falls outside its ambit This result is perverse. Despite having reserved the possibility of an “exceptional case” in *Daimler*, the majority here has rejected that possibility out of hand.²¹⁰

IV. THE EXCEPTIONAL CASE

Post-*Daimler*, in virtually every case in which general personal jurisdiction over a corporation was at issue, the plaintiff has argued the exceptional case. And in virtually every case, the district court has rejected it. As an immediate result of *Daimler*’s exceptional case footnote, plaintiffs began to argue that their cases were “exceptional” when they sought to sue corporations using general jurisdiction in states other than their states of incorporation or where they have their principal place of business. This strategy was promoted in bar journals and was taken seriously by some scholars, who typically took the Court at its word that the standard for general jurisdiction was still the “at home” gloss from *Goodyear*.²¹¹ A Westlaw search reveals that between January 2014, when *Daimler* was decided, and March 3, 2021, *Daimler*’s “exceptional case” was addressed in 950 federal cases.²¹²

In *U.S. Bank National Ass’n v. Bank of America, N.A.*, the court found specifically that the defendant’s contacts with Indiana could meet the “continuous and systematic” contacts test but failed the “exceptional case” test.²¹³ The court found that Bank of America’s Indiana contacts consisted of the following:

210. *Id.* at 1561–62. See generally *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

211. See, e.g., Natia Daviti, *Daimler AG v. Bauman: A Change in the Climate of General Jurisdiction over Foreign Corporations*, 40 WESTCHESTER BAR J. 7, 12–13 (2015). But see Muñoz, *supra* note 209, at 43 (stating that plaintiffs should assert a “good-faith basis” for arguing that a defendant based outside of the forum is amenable to general jurisdiction “despite having a *quantum* of undisputed continuous business and economic contacts” there).

212. See WESTLAW, <https://1.next.westlaw.com> (search “Daimler” & “exceptional case” & “da(after 2013)” and change date range to January 14, 2014 to March 3, 2021).

213. No. 1:14-cv-01492-TWP-DKL, 2015 WL 5971126, at *8 (S.D. Ind. Oct. 14, 2015) (finding specific jurisdiction in Indiana), *rev’d on other grounds*, 916 F.3d 143 (2d Cir. 2019); accord *Valley View Agric., LLC v. Producers Coop. Oil Mill*, No. 3:14CV00307 JLH, 2015 WL 6459981, at *4–5 (E.D. Ark. Oct. 26, 2015).

[M]aintaining ten Merrill Lynch offices, operating at the University of Notre Dame, offering online banking service to Indiana account holders, owning over 2,000 properties in Indiana, originating 929 home mortgage loans and 163 small business loans between 2009 and 2011 to Indiana residents, recording 29,702 mortgages in Indiana between 2006 and 2015, and holding \$1.25 billion in deposits from account holders in its Indiana branches.²¹⁴

However extensive these contacts might be, they were merely “similar to the numerous other states in which Bank of America operates.”²¹⁵ Because the defendant’s forum state contacts were not disproportionate to its contacts in other states, this did not constitute an exceptional case.²¹⁶

In case after case, courts addressing the exceptional case engage in the following sequence of analysis of general jurisdiction. First, the court acknowledges that *Daimler* changed the applicable test and summarizes *Daimler*’s facts, holding, and rule.²¹⁷ Next, the court notes that the defendant is not incorporated in the forum state, nor does it have its principal place of business there.²¹⁸ Then it addresses the exceptional case by enumerating the defendant’s forum-state contacts.²¹⁹ The court next compares the defendant’s forum-state contacts to the defendant’s contacts in either *Daimler*²²⁰ or *Perkins*,²²¹ and notes that whatever the defendant’s forum-state contacts, they are not disproportionate to its nationwide or worldwide contacts.

214. *U.S. Bank Nat’l Ass’n*, 2015 WL 5971126, at *8.

215. *Id.*

216. Similarly, GE’s contacts with Illinois were not sufficient to constitute an exceptional case where only 2% of its income in the U.S. came from the forum and only 2.4% of its workforce was employed there. Muñoz, *supra* note 209, at 42.

217. See, e.g., *In re Roman Cath. Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 38–39 (2d Cir. 2014).

218. See, e.g., *id.* at 40.

219. See, e.g., *id.*

220. See, e.g., *id.* at 38–41; *Duncanson v. Wine & Canvas Dev., LLC*, No. 6:14-cv-704-Orl-40KRS, 2015 WL 12838359, at *10 (M.D. Fla. June 24, 2015) (“Indeed, the contacts presented here are even less substantial than those deemed ‘slim’ in *Daimler*.”); *Presby Pat. Tr. v. Infiltrator Sys., Inc.*, No. 14-cv-542-JL, 2015 WL 3506517, at *4–6 (D.N.H. June 3, 2015) (“[The defendant’s] activities do not appear to surpass the level of activity that the Supreme Court rejected as insufficient to confer on California general jurisdiction over MBUSA.”); *Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 396–400 (D. Conn. 2014).

221. See *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *27 (S.D.N.Y. Oct. 20, 2015) (finding no exceptional case because defendant’s forum contacts were more than those in *Daimler* but fewer than those in *Perkins*).

Finally, the court concludes that the case does not constitute an exceptional case because the defendant is not “essentially at home” in the forum state.

The existence of the exceptional case has tempted plaintiffs to argue the exception with very slim support.²²² Conversely, plaintiffs have failed to persuade courts that some of the world’s largest corporations do not fit the exceptional case standard. For example, UBS AG is not subject to general jurisdiction in New York.²²³ Costco is not subject to general jurisdiction in New York.²²⁴ JPMorgan Chase is not subject to general jurisdiction in Pennsylvania.²²⁵ Ford Motor Company is not subject to general jurisdiction in California.²²⁶ Facebook is not subject to general jurisdiction in the Southern District

222. See, e.g., *Williams v. Preeminent Protective Servs., Inc.*, 81 F. Supp. 3d 265, 270 (E.D.N.Y. 2015) (“Plaintiff does not identify anyone in New York who worked for Preeminent besides herself, and points to only one client in the state, who defendants allege hired Preeminent solely to work at an event they held in Washington, D.C.”); *Covanex, Inc. v. Duvvada*, No. 14-CV-6050-FPG, 2015 WL 8375211, at *4–5 (W.D.N.Y. Dec. 8, 2015) (“The only evidence Covanex cites is a pair of sworn Labor Conditions Application (“LCA”) forms filed by RAIT with the U.S. Department of Labor. These forms simply indicate that RAIT planned to place two employees in New York for three-year periods beginning in 2013.” (citation omitted)); *KMLLC Media, LLC v. Telemetry, Inc.*, No. 1:15cv432 (JCC/JFA), 2015 WL 6506308, at *5 (E.D. Va. Oct. 27, 2015) (finding defendants’ management of 4 accounts in Virginia and filing of 8 patent applications in U.S. Patent and Trademark Office in Alexandria, Virginia insufficient to constitute exceptional case).

223. *SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 168 n.7 (S.D.N.Y. 2015) (“UBS AG is not subject to general jurisdiction in this District (or anywhere in the United States) because it is incorporated in Switzerland and its principal place of business is in Switzerland.”) (quoting *AM Tr. v. UBS AG*, 78 F. Supp. 3d 977, 985 (N.D. Cal. 2015)).

224. *Ritchie Capital Mgmt., L.L.C. v. Costco Wholesale Corp.*, 14-CV-4819 (VSB), 2015 WL 13019620, at *5 (S.D.N.Y. Sept. 21, 2015) (noting that Costco’s annual New York revenue of \$2.8 billion is only 2.49% of its aggregate annual revenues; its 17 New York warehouses are only 2.53% of their total warehouses; and its 3400 New York employees are only “2.64% of [its] nationwide workforce and 1.80% of [its] worldwide workforce”).

225. *First Nat’l Bank of Penn. v. Transamerica Life Ins. Co.*, No. 14-1007, 2016 WL 520965, at *4 (W.D. Pa. Feb. 10, 2016) (finding no general jurisdiction where “at the end of 2012, [defendant] had a \$959,000,000 portfolio of credit card loans in Pennsylvania and each year it derives millions of dollars in revenue from its business activities in Pennsylvania”; “[it] has filed hundreds of civil actions in federal and state courts in Pennsylvania”; and “[it] maintains an office in Pennsylvania”).

226. *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 963 (N.D. Cal. 2015) (“103,467 new Ford vehicles have been registered this year already, accounting for 10.5% of the new vehicle market in California [O]f sixteen categories of cars and trucks tracked in California, Ford has a top five selling vehicle in nine of those categories Ford operates a research center in Palo, Alto, California” (internal citations and quotation marks omitted)).

of Texas, considered as a separate state.²²⁷

In only three cases decided between 2014 and May 2018, the trial court found an “exceptional case” under *Daimler*.²²⁸ The most noteworthy is *Sokolow v. Palestine Liberation Organization*,²²⁹ which the district court squarely held to be an “exceptional case” under *Daimler*. The plaintiff sued the Palestine Liberation Organization (PLO) and the Palestinian Authority under the federal Antiterrorism Act.²³⁰ The defendants made a motion to dismiss for lack of personal jurisdiction pre-*Daimler*, which the district court denied.²³¹ Post-*Daimler*, the defendants moved for summary judgment on the ground that the court lacked personal jurisdiction, emphasizing that the Supreme Court in *Daimler* “expressly warned against the ‘risks to international comity’ of an overly expansive view of general jurisdiction inconsistent with ‘the fair play and substantial justice’ due process demands.”²³² However, the district court denied the motion, first noting that because neither defendant is a corporation, they do not have the traditional corporate “homes.”²³³ The court then placed the burden on the defendants to demonstrate where their alternative home is.²³⁴ The PLO noted that it had “several” embassies and legations around the world larger than the one in the United States.²³⁵ However, as the court noted:

Defendant PLO does not specify the nature or extent of its contacts or activities in other countries; it relies on the collective number of personnel in foreign embassies, missions and delegations around the world, but does not identify any one of those countries as a place where the PLO is “at home” based on greater business and commercial activities than are conducted in the United States.²³⁶

227. *In re: DMCA Section 512(h) Subpoena to Facebook, Inc.*, No. CV 4:15-MC-0654, 2015 WL 12805630, at *5 (S.D. Tex. Nov. 18, 2015) (noting that only 12.5% of the district’s 8 million resident are daily Facebook users).

228. See *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 322 (2d Cir. 2016); *Hendricks v. New Video Channel Am., LLC*, No. 2:14-cv-02989-RSWL-SSx, 2015 WL 3616983, at *3 (C.D. Cal. June 8, 2015); *Sokolow v. Palestine Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395 (S.D.N.Y. Dec. 1, 2014).

229. 2014 WL 6811395.

230. *Id.* at *2; see 18 U.S.C. §§ 2331–2339D (2018).

231. *Sokolow*, 2014 WL 6811395 at *1.

232. *Id.* (quoting *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014)).

233. *Id.* at *2.

234. *Id.*

235. *Id.*

236. *Id.*

Likewise, with respect to the Palestinian Authority, the court found that it failed to prove that it had a “home” other than the United States: “Defendant PA estimates that it had over 100,000 employees in 2002, but it does not identify which, if any, of those employees engaged in activities in any country outside of the ‘Palestinian Territories in the West Bank and Gaza Strip.’”²³⁷

V. WHY AN “EXCEPTIONAL CASE”? THE FUTURE OF GENERAL JURISDICTION

Scholars have criticized *Daimler*, pointing out that the opinion departs from precedent and reflects an archaic formalism.²³⁸ Likewise, some commentators have noted that the exceptional case test would be difficult to meet.²³⁹ A few commentators have taken the exception seriously, suggesting that the test could be met under circumstances not entirely identical to those in *Perkins*.²⁴⁰ Post-*Daimler*, virtually every case in which personal jurisdiction over a

237. *Id.*

238. MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* 56–57 (2017); Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 21, 21 (2018); Cornett & Hoffheimer, *supra* note 140, at 104; Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 76 (2018); Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 747 (2018); Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 722–23 (2019). For an analysis of the development of American formalism, see generally William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 566 (1974) (“The new jurisprudence of ‘logical method and form flatter[ed] that longing for certainty and for repose’ that arose out of the fratricidal strife of the middle and the seeming social chaos of the end of the century.” (alteration in original) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897))).

239. See, e.g., Cynthia L. Fountaine, *“Don’t Come Around Here No More”: Narrowing Personal Jurisdiction over Non-Resident Corporations in Illinois*, 42 S. ILL. U. L.J. 593, 637 (2018); Goldberg, *supra* note 179, at 73; Lauren V. Humphries, *Daimler: A Litigator’s Road Map to Personal Jurisdiction*, 35 TRIAL ADVOC. Q. 11, 14 (2016); Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 8 (2018); D.E. Wagner, Note, *Hertz So Good: Amazon, General Jurisdiction’s Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case*, 104 CORNELL L. REV. 1085, 1088–89 (2019).

240. Donald Earl Childress III, *General Jurisdiction after Bauman*, 66 VAND. L. REV. EN BANC 203, 206 (2014); Zoe Niesel, *Daimler and the Jurisdictional Triskelion*, 82 TENN. L. REV. 833, 868 (2015); see also Cornett & Hoffheimer, *supra* note 140, at 151–55 (noting *Daimler*’s suggestion “that contacts-based general jurisdiction may still be permissible in exceptional cases” and advocating “five situations that remain viable candidates for general jurisdiction”).

corporation is at issue, the plaintiff has argued the exceptional case. And in virtually every case, the district court has rejected it. As predicted by Justice Sotomayor in her *Daimler* concurrence, the exception is a chimera, a mere illusion: “[T]he majority does not even try to explain just how extensive the company’s in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.”²⁴¹

BNSF v. Tyrrell left no doubt that *Daimler*’s “exceptional case” is indeed narrow.²⁴² In fact, as recognized by Justice Sotomayor, subsequent to *BNSF*, it could be argued that the exception defines a universe of only one case: *Perkins*.²⁴³ This recognition begs the question of why the Supreme Court felt it necessary to write the exception into the otherwise bright-line rule of *Daimler*.

The tone of *Daimler* is rigid and formalistic. Justice Ginsburg’s drive for symmetry treats personal jurisdiction as a pie that must be divided up between specific and general jurisdiction and which must achieve parallelism between individuals (“domicile”) and corporations (states of incorporation and principal place of business).²⁴⁴ This rigid formalism, combined with the proliferation of neologisms (“case-specific,” “all-purpose”), makes the reader feel unmoored, almost dizzy. Other scholars have examined how Justice Ginsburg’s reliance on old law review articles skew her analysis away from the standards articulated in *International Shoe* and toward an almost-geometric view of personal jurisdiction.²⁴⁵ But within this geometric diagram of personal jurisdiction, Justice Ginsburg apparently wanted to avoid overruling *Perkins*. The Court’s decision in *Perkins* rested on the corporation’s continuous and systematic contacts standard, but that does not fit with the schema.²⁴⁶ Therefore, Justice Ginsburg must treat *Perkins* as an example of general jurisdiction in the corporation’s principal place of business. Otherwise, it will not fit. This desire to plug *Perkins*’ round peg into the square hole of the *Daimler* rule explains the battle between Justices Ginsburg and Sotomayor over the exact quantum of the Benguet Consolidated Mining Company’s business that took place in Ohio.²⁴⁷ For Justice Ginsburg, that

241. *Daimler AG v. Bauman*, 571 U.S. 117, 155 (2014) (Sotomayor, J., concurring).

242. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017).

243. See, e.g., Peterson, *supra* note 240, at 741 (“[T]he [*BNSF*] Court limited the possibility of an exception to the facts of *Perkins* . . .”).

244. *Daimler AG*, 571 U.S. at 137.

245. Cornett & Hoffheimer, *supra* note 140, at 128.

246. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444–45 (1952).

247. Justice Ginsburg wrote:

Selectively referring to the trial court record in *Perkins* (as summarized in an opinion of the intermediate appellate court, Justice

quantum had to render Ohio the company's principal place of business.²⁴⁸ For Justice Sotomayor, that quantum merely had to be continuous and systematic.²⁴⁹ The exception in *Daimler*'s footnote 19 makes the surface of personal jurisdiction smooth and seamless—no messy weighing of contacts, just a finding that Ohio was Benguet's principal place of business.²⁵⁰

Because *Perkins* is the only Supreme Court opinion recognizing general jurisdiction over a corporation,²⁵¹ the Court may have been unwilling to overrule the decision anchoring general jurisdiction. This reason may be linked to the Court's apparent desire to portray *Daimler* as consistent with its prior cases.²⁵² The most commonly cited source of constitutional meaning is the Supreme Court's prior decisions on questions of constitutional law.²⁵³ However, "although the Supreme Court routinely purports to rely upon precedent, it is difficult to determine precisely how often precedent has actually constrained the Court's decisions" ²⁵⁴ Under a skeptical analysis of precedent,²⁵⁵ it seems clear that the *Daimler* exception constitutes a vehicle for appearing to comply with precedent without actually doing so.²⁵⁶ Because the exception is the only mechanism by which the "essentially at home" gloss announced in *Goodyear* can be applied, it is the only remnant of the "continuous and systematic contacts" standard that had been the law for fifty years. Despite the Court's assurances that a corporation's states of incorporation and principal place of business are *not* the only states in which it is subject to

Sotomayor posits that Benguet may have had extensive operations in places other than Ohio Justice Sotomayor's account overlooks this Court's opinion in *Perkins* and the point on which that opinion turned: All of Benguet's activities were directed by the company's president from within Ohio Given the wartime circumstances, Ohio could be considered 'a surrogate for the place of incorporation or head office' No fair reader of the full opinion in *Perkins* could conclude that the Court meant to convey anything other than that Ohio was the center of the corporation's wartime activities.

Daimler AG, 571 U.S. at 130 n.8 (internal citations omitted).

248. *Id.* at 129–30.

249. *Id.* at 150.

250. *Id.* at 139 n.19.

251. *See Perkins*, 342 U.S. at 448.

252. Cox, *supra* note 164, at 172 (stating that the Court used *Perkins* as an example of the consistency between *Daimler* and its prior decisions).

253. BRANDON J. MORRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 1 n.3 (2018).

254. *Id.*

255. *See id.* at 10.

256. *See, e.g., Hoffheimer, supra* note 138, at 504–05.

general jurisdiction, the lower courts have correctly perceived that the rule will always govern.²⁵⁷ For the exception to apply, the forum state must be more than a substitute principal place of business; it must be a super-principal place of business because the corporation's contacts with that state must be disproportionate to its contacts with all other states and nations.²⁵⁸

As Schauer points out, an exception to a rule merely defines the scope of the rule.²⁵⁹ Thus, we could say that the *Daimler* rule is no different from the standard announced in *Goodyear*: a corporation is subject to general jurisdiction only in a state in which it is "essentially at home."²⁶⁰ This conclusion might be justified by plaintiffs' proclivity to argue the exceptional case even when support is slim. The problem, though, is that the exception does not permit the analysis to advance any further on the *Perkins-Helicopteros* continuum than *Perkins*. The exception—or the "essentially at home" standard articulated in footnotes 19 and 20—yields no cases that occupy the middle ground between *Perkins* and *Helicopteros*. An exception that does not yield more examples than the rule itself neither supplements nor restricts the scope of the rule—it just reiterates the rule.

The reiteration of the rule by the exception is both cruel and inefficient. It is cruel because it holds out hope to plaintiffs that they might persuade a court to exercise general jurisdiction over a corporation somewhere other than its states of incorporation or principal place of business. It is inefficient because it induces plaintiffs to argue the exception and present evidence about the corporation's proportional contacts with the forum state, requiring defendants to rebut the plaintiff's argument with yet more facts and statistics, and requiring the court to review those facts and statistics to conclude that they are insufficient to meet the exceptional case. In reality, to precisely comply with the exceptional case standard for a multinational defendant like Walmart, a plaintiff would have to gather statistics on Walmart's separate contacts with at least forty-eight U.S. jurisdictions²⁶¹ and, depending on the definition of

257. See Wagner, *supra* note 241, at 1106–07.

258. See *id.* at 1092 ("Each time the Supreme Court issues a landmark decision regarding personal jurisdiction, attempting to clarify the doctrine for judges and litigants alike, confusion abounds.").

259. Schauer, *supra* note 26, at 874.

260. *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

261. The number of relevant forums depends upon the meaning of "nationwide" in footnote 20 of the *Daimler* opinion. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014). It probably includes the 50 states plus the District of Columbia (51), minus Delaware, Arkansas, and the state where specific jurisdiction would lie. The plaintiff might also be required to gather facts and statistics on Walmart's contacts with Puerto Rico and perhaps the U.S. territories of the Virgin Islands, Guam, and the Northern

“worldwide” in *Daimler*’s footnote 20, its separate contacts with every country in which it operates.²⁶² Such comprehensive information might not be that hard to come by in today’s wired world, but even so, the process of making and deciding the “exceptional case” argument is not cost-free.

Whatever the explanation for the exception to the *Daimler* rule, the exception has done nothing to ameliorate the rule’s harsh results. The effect of the rule has been to limit plaintiffs to a maximum of three forums for any claim against a corporation: its state of incorporation; the state in which it has its principal place of business; and the state in which the defendant’s minimum contacts give rise to or relate to the plaintiff’s cause of action. Scholars have suggested two main ways to avoid the result in *Daimler*: (1) rely on consent deriving from a corporation’s registration to do business in a forum, and (2) rely on a theory of specific jurisdiction emphasizing the “relate to” prong of the *International Shoe* standard.²⁶³ The former theory has achieved some success; courts in a number of states have held that compliance with the state’s registration statute constitutes consent to general jurisdiction in that state.²⁶⁴ However, this theory depends upon a state court’s interpretation of its own registration statute and therefore does not present uniform opportunities for plaintiffs.²⁶⁵

Mariana Islands.

262. According to its website, Walmart operates in 24 countries including the United States. *About*, WALMART, <https://corporate.walmart.com/our-story/our-business> (last visited March 22, 2021). In total, Walmart operates approximately 10,500 stores and employs “2.3 million associates around the world – nearly 1.6 million in the U.S. alone.” *Id.*

263. See, e.g., Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228–29 (2014).

264. *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021); *Scott v. Milosevic*, No. C17-4004-LTS, 2018 WL 11304191 (N.D. Iowa May 2, 2018) (citing *Spanier v. Am. Pop Corn Co.*, No. C15-4071-MWB, 2016 WL 1465400 (N.D. Iowa April 14, 2016)); *Greenstate Credit Union v. Hy-Vee, Inc.*, 500 F. Supp. 3d 799 (D. Minn. 2020). *Contra*, e.g., *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440 (Ill. 2017); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017); *Chavez v. Bridgestone Ams. Tire Operations, LLC*, 503 P.3d 332 (N.M. 2021); *Aybar v. Aybar*, 177 N.E.3d 1257 (N.Y. 2021). See generally Matthew D. Kaminer, *The Cost of Doing Business? Corporate Registration as Valid Consent to General Personal Jurisdiction*, 78 WASH. & LEE L. REV. ONLINE 55 (Oct. 8, 2021). The United States Supreme Court has granted cert in a Pennsylvania case holding that compliance with the state’s corporate registration statute does not constitute consent to general jurisdiction. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542 (Pa. 2021), *cert. granted*, 2022 WL 1205835 (U.S. Apr. 25 2022).

265. Considering this obstacle, commentators have drafted a proposal for an “explicit, defined-consent” registration statute which they argue would be suitable as a Uniform Law Commission Model Act, which states could then adopt. Charles W.

The latter theory has, in a sense, backfired; rather than plaintiffs persuading courts to adopt a broader theory of specific jurisdiction, defendants have succeeded in persuading courts to adopt a narrower view. Once *Daimler* knocked the general jurisdiction leg out from under the personal jurisdiction stool, corporations felt emboldened to challenge the specific jurisdiction leg by arguing that a plaintiff's cause of action does not arise out of or relate to the defendant's forum contacts unless the defendant's forum contacts are the "but for" cause of the plaintiff's injury. Lower courts sometimes accepted this argument, as exemplified by *Erwin v. Ford Motor Co.*,²⁶⁶ in which a widower filed a products liability suit against Ford, alleging that a defective airbag caused the death of his wife when her 2010 Ford Edge was involved in a crash.²⁶⁷ The suit was filed in the federal district encompassing the location of the crash, Hillsborough County, Florida.²⁶⁸ Pre-*Daimler*, the court would have had general jurisdiction over Ford, given these undisputed contacts: "Ford maintains at least 110 Ford dealerships in Florida, sends thousands of vehicles to Florida each year to be sold in Florida, maintains an agent for service of legal process in Florida, and maintains a Regional Headquarters in Maitland, Florida."²⁶⁹ However, applying the *Daimler* rule, the court held that there was no general jurisdiction because Ford is incorporated in Delaware and has its principal place of business in Michigan.²⁷⁰ This did not qualify as an "exceptional case" because Ford's comparative contacts were insufficient.²⁷¹

Even post-*Daimler*, the court should have had specific jurisdiction over Ford since the cause of action, products liability, arose when the wreck occurred in Hillsborough County.²⁷² But the district court granted Ford's motion to dismiss for lack of personal jurisdiction, accepting its argument that specific jurisdiction requires a "but for" causal connection between the defendant's forum contacts and the cause of action.²⁷³ There was no specific jurisdiction over Ford because

"Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 408 (2020).

266. *Erwin v. Ford Motor Co.*, No. 8:16-CV-01322-T-24 AEP, 2016 WL 7655398, at *8 (M.D. Fla. Aug. 31, 2016). An earlier version of this discussion appeared in the *Florida Law Review Forum*. See Judy M. Cornett, *The Not-So-Stealthy Revolutoon in Personal Jurisdiction*, 70 FLA. L. REV. F. 61 (2018).

267. *Erwin*, 2016 WL 7655398, at *1.

268. *Id.* at *1.

269. *Id.* at *2.

270. *Id.* at *12.

271. *Id.*

272. *Id.* at *1.

273. *Id.* at *8.

"the 2010 Ford Edge at issue was not designed in Florida, was not originally sold by Ford in Florida or to a customer in Florida, and . . . the 2010 Ford Edge entered Florida without Ford's involvement."²⁷⁴ Therefore, the claim did not arise out of or relate to Ford's contacts with Florida.²⁷⁵ The plaintiff could sue in Delaware or Michigan utilizing general jurisdiction, but specific jurisdiction would lie only where the car was sold to the plaintiff, presumably in Ohio, or perhaps in Ontario, Canada, where the car was assembled.²⁷⁶

The district court eventually transferred the case to the District of Delaware, Ford's state of incorporation, where Ford argued that Michigan law, rather than Florida law, should apply to the case.²⁷⁷ The Delaware judge expressed surprise at seeing a Florida car wreck case on the docket but recognized that this apparition resulted naturally from *Daimler*.²⁷⁸ It is unclear how the litigation of a Florida car wreck in Delaware serves the interests of anyone other than Ford, and it may not even serve the interests of Ford if their proof involves more than mere document production.²⁷⁹

Fortunately, Ford's argument that specific jurisdiction requires "but for" causation was rejected by a unanimous U.S. Supreme Court in *Ford Motor Co. v. Montana Eighth Judicial District Court*.²⁸⁰ Interestingly, Ford's argument provoked introspection by several of the Justices about the current state of personal jurisdiction doctrine. Justice Alito observed that "there are . . . reasons to wonder whether the case law we have developed since [*International Shoe*] is well suited for the way in which business is now conducted."²⁸¹ Similarly, Justice Gorsuch, joined by Justice Thomas, ruminated on the state of the Court's personal jurisdiction jurisprudence: "[I]t's hard not to ask how we got here and where we might be headed."²⁸² Perhaps surprisingly, Justice Gorsuch articulated concerns that preoccupied Justice Sotomayor in *Daimler* and *BNSF*:

274. *Id.* at *2.

275. *Id.* at *8.

276. *See id.* at *2.

277. *Erwin v. Ford Motor Co.*, 309 F. Supp. 3d 229, 240 (D. Del. 2018) (rejecting Ford's argument and holding that Florida law should apply).

278. *See id.*

279. *Cf. J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) ("Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.").

280. 141 S. Ct. 1017, 1022 (2021).

281. *Id.* at 1032 (Alito, J., concurring).

282. *Id.* at 1036 (Gorsuch, J., concurring).

[I]f it made sense to speak of a corporation having one or two “homes” in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple States

[In *International Shoe*,] [i]n place of nearly everything that had come before, the Court sought to build a new test focused on “traditional notions of fair play and substantial justice”

It was a heady promise. But it is unclear how far it has really taken us. Even today, this Court usually considers corporations “at home” and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many “headquarters.” The Court has issued these restrictive rulings, too, even though *individual* defendants remain subject to the old “tag” rule, allowing them to be sued on any claim anywhere they can be found Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.²⁸³

Why, indeed? Here—in Justice Gorsuch’s recognition of the connection between *Daimler*’s evisceration of general jurisdiction and the conceptual struggles newly attendant on specific jurisdiction—we see an embryonic argument for a more realistic approach to jurisdiction over corporations. Whether that revision is forward-looking or backward-looking, it seems clear that the *Daimler* rule and its “exception” do not deserve a role in the new regime.

CONCLUSION

If the goal of the Supreme Court in *Daimler* was, as it claimed, to make personal jurisdiction more predictable for corporations, the rulification of general jurisdiction has been a rousing success. The lower federal courts have heeded the message that corporations are subject to general jurisdiction only in their states of incorporation and principal place of business. They have correctly treated the “exceptional case” as an illusion, fending off efforts by plaintiffs to hold even the largest and wealthiest corporations to jurisdiction in states where their contacts are merely continuous and systematic.

283. *Id.* at 1034, 1037–38 (footnote and internal citations omitted).

The *Daimler* rule itself has proved easy to apply, since the state of incorporation is easy to ascertain, and determining the corporation's principal place of business has not generated controversy. Even the exception, which requires an assessment of the corporation's forum-state contacts in comparison to its nationwide and worldwide contacts, has not diminished the efficiency of the rule. Courts have found it easy to conclude that a corporation's forum-state contacts do not approximate those of the defendants in *Daimler* or *Perkins*. And even cursory analysis of the corporation's nationwide and worldwide contacts has been sufficient to show that its forum-state contacts do not predominate.

However, the *Daimler* rule has distorted the landscape of personal jurisdiction by putting pressure on the scope of specific jurisdiction. With the loss of general jurisdiction to underpin jurisdiction against big corporations in products liability cases in the state where an injury occurs, those corporations have successfully argued that their forum-state contacts are not related enough to the cause of action to yield specific jurisdiction. Even though the Supreme Court rightly rejected this argument, the unduly restrictive landscape of general jurisdiction challenges the validity of the rule if the goal of jurisdictional rules should be "reciprocal fairness," as argued by Justice Sotomayor.²⁸⁴ Because the purported exception to the *Daimler* rule does nothing to ameliorate it, the goal of reciprocal fairness goes entirely unserved by the current law of general jurisdiction. To the extent that rulification of general jurisdiction has undermined the goal of reciprocal fairness, it has failed. To restore congruence between the rule and the goals of personal jurisdiction, the *Daimler* regime must be reevaluated, and either the exception broadened, or the rule made less stringent.

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