

NOTE

HERTZ SO GOOD: AMAZON, GENERAL JURISDICTION'S PRINCIPAL PLACE OF BUSINESS, AND CONTACTS PLUS AS THE FUTURE OF THE EXCEPTIONAL CASE

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INTRODUCTION

One of the best ways for a corporation to win litigation is to make sure the courthouse doors never open for the plaintiff in the first place. Consequently, corporations favor the argument that a court lacks personal jurisdiction; this argument has proven a useful tool in achieving victory.¹ An inquiry whether a corporation was subject to a court's personal jurisdiction, traditionally, was complex and uncertain—great fodder for a law-school exam.² Luckily for corporations such as Amazon, Inc., the Supreme Court's recent decisions regarding personal jurisdiction transformed what was often a nightmare for law students into a relatively simple matter. The Court simplified and restricted personal jurisdiction.

First, the Court narrowed general jurisdiction.³ In 2014, with the Court's decision in *Daimler AG v. Bauman*,⁴ the Supreme Court put an end to the "doing business" test by essentially holding that a corporation is only subject to general jurisdiction in the corporation's principal place of business or the corporation's state of incorporation.⁵ A fact-intensive in-

¹ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–96 (1980) (holding that Oklahoma state courts did not have personal jurisdiction over corporate defendants when plaintiffs were involved in an automobile accident in Oklahoma while using defendants' product).

² Briefly, courts today treat personal jurisdiction as consisting of two categories: general and specific jurisdiction. General jurisdiction applies when a lawsuit is unrelated to a defendant's contacts (activities) to the forum state. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067.5 (4th ed. 2008) ("When the cause of action sued on does not arise from or relate to the defendant's contacts with the forum state, an assertion of general jurisdiction must be predicated on contacts that are sufficiently continuous and systematic to justify haling the defendant into a court in that state."). General jurisdiction is synonymous with all-purpose jurisdiction. See *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014). On the other hand, specific jurisdiction is predicated on a lawsuit relating directly to a defendant's contacts with the forum state; the lawsuit is specific to the relation between the defendant and the state. 4 WRIGHT & MILLER, *supra* note 2, § 1067.5. The Court hinted at this distinction in *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945), and Arthur T. von Mehren and Donald T. Trautman explicitly advocated for the distinction in *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). In 1986, the Court discussed the two types of personal jurisdiction as a legal reality for the first time in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984). 4 WRIGHT & MILLER, *supra* note 2, § 1067.5.

³ See *Hinrichs v. Gen. Motors of Can., Ltd.*, 222 So. 3d 1114, 1124 (Ala. 2016) ("The United States Supreme Court subsequently amplified its restriction of the scope of general jurisdiction in *Daimler AG v. Bauman*, 571 U.S. [117]"), *cert. denied*, 137 S. Ct. 2291 (2017).

⁴ 571 U.S. 117 (2014).

⁵ See *infra* subpart I.B.

quiry with few Supreme Court cases, a recipe for litigation,⁶ became “dead letter.”⁷ Second, the Court narrowed specific jurisdiction. In 2017, with the Court’s decision in *Bristol-Myers Squibb Co. v. Superior Court*,⁸ the Court ended a brand of plaintiff forum shopping that had been a thorn in corporations’ sides.⁹ Corporations are less likely to be in court in 2018 than they were in 2010.

There are, however, still battles to be fought. One of the next battlegrounds, on which the initial forays have already begun in the lower courts,¹⁰ returns to general jurisdiction. The foundation of the argument, however, begins with subject-matter jurisdiction. In 2010’s *Hertz Corp. v. Friend*,¹¹ the Supreme Court held that a corporation’s “principal place of business,” in regard to 28 U.S.C. § 1332, means the corporation’s “nerve center”: “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.”¹² The

⁶ The few Supreme Court holdings on general jurisdiction left the subject open to interpretation. See *infra* subpart I.B. *Daimler*, however, very likely made formerly common arguments unviable. See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (“At that time, the Court’s 2011 decision in *Goodyear* seemed to have left open the possibility that contacts of substance, deliberately undertaken and of some duration, could place a corporation ‘at home’ in many locations. But *Daimler*, decided in 2014, considerably altered the analytic landscape for general jurisdiction and left little room for these arguments.”).

⁷ Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 265 (2014) (“The message in *Daimler* has come through loud and clear: doing business jurisdiction is a dead letter.”). A “dead letter” is a “law or practice that, although not formally abolished, is no longer used, observed, or enforced.” *Dead Letter*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁸ 137 S. Ct. 1773 (2017).

⁹ As will be discussed below, the decision in *Bristol-Myers Squibb* dealt a blow to “litigation tourism.” See Richard A. Dean & Katya S. Cronin, *Bristol-Myers Squibb v. Superior Court: The Last Nail in the Coffin of Stream-of-Commerce Personal Jurisdiction*, 60 DRI FOR DEF. 22, 25 (2018) (“In essence, [*Bristol-Myers Squibb*] deals a fatal blow to the refrain that the new economic realities of globalization mean that a company with a national distribution network can be sued in any state of a plaintiff’s choosing.”).

¹⁰ *Compare Nespresso USA, Inc. v. Ethical Coffee Co. SA*, 263 F. Supp. 3d 498, 503 (D. Del. 2017) (applying the *Hertz* nerve center test), *with Barnett v. Surefire Med.*, No. JFM-17-1332, 2017 WL 4279497, at *2 (D. Md. Sept. 25, 2017) (assessing general jurisdiction without reference to *Hertz*). It is important to note that there are procedural mechanisms that externally affect this jurisdictional battle. For example, multidistrict litigation, by which hundreds of thousands of federal cases have been consolidated (based only on a single common question of fact), is exempt from the requirements of personal jurisdiction; plaintiffs can use this mechanism to their advantage. See Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. (forthcoming July 2020) (manuscript at 1–2, 6, 20) (on file with author).

¹¹ 559 U.S. 77 (2010).

¹² *Id.* at 92–93. The Court noted that it was adopting and expanding the traditional nerve center test as explained by Judge Edward Weinfeld of the South-

Court adopted the nerve center test to define a corporation's "principal place of business" for subject-matter jurisdiction for three reasons: Congress wrote the statute¹³ to define the place of business in the singular and the nerve center test easily identifies a single location;¹⁴ the nerve center test was the most simple option and simplicity is key for jurisdictional statutes;¹⁵ and, according to the legislative history, Congress intended for the test to be at least as simple as a gross-income test.¹⁶ While definitively settling the debate over how to determine a corporation's principal place of business for subject-matter jurisdiction, the *Hertz* opinion said nothing about personal jurisdiction.

In light of *Daimler's* restriction of general jurisdiction, in almost all cases, to a corporation's principal place of business and state of incorporation, the definition of principal place of business is now critical to general jurisdiction. Only the principal place of business and the third category—the exceptional case—provide potential doctrinal flexibility. Justice Ruth Bader Ginsburg, who authored the Court's decision in *Daimler*, noted that an exceptional case in which "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"¹⁷ is theoretically possible, but the exceptional case has proven quite elusive.¹⁸

ern District of New York in 1959. See *id.* at 89–90 (citing *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959)).

¹³ 28 U.S.C. § 1332(c)(1) (2012) ("[A] corporation shall be deemed to be a citizen of . . . the State . . . where it has its principal place of business . . .") (emphasis added).

¹⁴ *Hertz*, 559 U.S. at 93–94 (reasoning that the nerve center test is congruent with the singular statutory language of § 1332(c)(1) because "[a] corporation's 'nerve center,' usually its main headquarters, is a single place").

¹⁵ *Id.* at 94 ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

¹⁶ *Id.* at 95 ("That history suggests that the words 'principal place of business' should be interpreted to be no more complex than the initial 'half of gross income' test. A 'nerve center' test offers such a possibility. A general business activities test does not."). The gross-income test determined that a corporation was a citizen of any state in which "it received more than half of its gross income." *Id.* at 86–87. Thus, under a gross-income test corporations would argue that they had less than this threshold in order to attempt to defeat personal jurisdiction. Insofar as a traditional contacts test under general jurisdiction is similar to a gross-income test because of the nature of the contacts inquiry, it stands to reason that the nerve center test is similarly simpler than a contacts inquiry.

¹⁷ *Daimler AG v. Bauman*, 571 U.S. 117, 154 n.9 (2014).

¹⁸ See *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) ("It is, therefore, incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."); James J.

The question before the lower courts, then, is whether the nerve center test defines the principal place of business for general jurisdiction. While the Court clearly limited the scope of general jurisdiction with *Daimler*, the Court did not define “principal place of business.” Application of the nerve center test to general jurisdiction’s principal place of business inquiry would further restrict general jurisdiction in favor of corporations because large national and multinational corporations would be able to tailor their activities—to choose their nerve centers—to engage in ex ante forum shopping. Thus, to apply the nerve center test for general jurisdiction’s principal place of business in the wake of *Bristol-Myers Squibb* would be to give a forum-shopping tool to corporations after taking one away from plaintiffs. Moreover, the policy rationales that underlie subject-matter jurisdiction and personal jurisdiction are not identical, so it is not simple to map *Hertz’s* rationale onto general jurisdiction.¹⁹

Amazon’s plan to build a second headquarters, its HQ2, gives this doctrinal argument tangibility. Amazon, one of America’s largest corporations, is incorporated in Delaware, has its headquarters in Washington, and is arguably most active in California.²⁰ Should the nerve center test determine the principal place of business for general jurisdiction, then Amazon would be able to build their HQ2 in any state without considering general jurisdiction because it could choose a headquarters irrespective of actual corporate activity. Despite having activities that dwarf those of nearly every American bus-

Dries, *In Search of the Illusive Exceptional Case for the Exercise of General Jurisdiction*, BAKER MCKENZIE (May 23, 2017), <http://www.bakermckenzie.com/en/insight/publications/2017/05/exercise-of-general-jurisdiction/> [https://perma.cc/L8S9-6S4V]. For a recent survey of the exceptional case and its rarity in the lower courts, see Priscilla Heinz, Comment, *When Is It Necessary For Corporations to Be Essentially At Home?: An Exploration of Exceptional Cases*, 51 U. RICH. L. REV. 1179, 1195–98 (2017).

¹⁹ See *infra* Part IV.

²⁰ See *infra* notes 175, 193 and accompanying text.

iness²¹ in at least three states,²² Amazon could choose the least plaintiff-friendly state for its nerve center: its HQ1, its HQ2, the state where it has the highest quantum of activity, or even a different state where its only activity is corporate direction.

Since its inception, personal jurisdiction doctrine has evolved with the modern economy.²³ Applying the nerve center test to general jurisdiction would be a departure from the norm because modern corporations would escape jurisdiction despite historical trends pointing toward an opposite result. In search of clarity, the doctrine is now suspended between *Daimler*'s warning that a court cannot deem a corporation at home simply because it does business there and Justice Sonia Sotomayor's concurrent warning that a strict reading of *Daimler* renders corporations like Amazon "too big" for personal jurisdiction.²⁴ This Note identifies a middle ground, derived

²¹ Amazon is "the biggest corporate employer in Seattle, and it occupies 19 percent of the prime office space in the city, more than any other employer in a big American city." Nick Wingfield & Patricia Cohen, *Amazon Plans Second Headquarters, Opening Bidding War Among Cities*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/technology/amazon-headquarters-north-america.html> [<https://perma.cc/ZD8J-58DL>]. "Today, half of all U.S. households are subscribed to the membership program Amazon Prime, half of all online shopping searches start directly on Amazon, and Amazon captures nearly one in every two dollars that Americans spend online. Amazon sells more books, toys, and by next year, apparel and consumer electronics than any retailer online or off" Laura Heller, *Amazon's Growing Power in the U.S. Economy*, FORBES (Nov. 30, 2016, 1:49 PM) <https://www.forbes.com/sites/lauraheller/2016/11/30/amazons-growing-stranglehold-on-the-us-economy/#c2691deeb408> [<https://perma.cc/688A-B9ZG>].

²² Justice Sotomayor raised this concern, that the jurisdictional law will treat large businesses differently (and arguably more favorably) than small businesses, in her concurrence in *Daimler*—that opinion, however, was arguing against Justice Ginsburg's proportional contacts test (different, but not unrelated to, adopting the nerve center test for general jurisdiction). See *Daimler*, 571 U.S. at 145 (Sotomayor, J., concurring); see also *infra* note 109 and accompanying text (contrasting Justice Ginsburg's restricted understanding of general jurisdiction in *Daimler*, employing the proportional contacts test, with Howard M. Erichson's expanded definition of principal place of business for the purposes of general jurisdiction that takes into account absolute business conducted in several states and a variant of the nerve center test).

²³ See *infra* notes 178–182 and accompanying text; see also Meir Feder, Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L. REV. 671, 681–83 (2012) (discussing the evolving interpretation of personal jurisdiction in case law).

²⁴ See *infra* Parts V & VI. This proposal is not necessarily the only mechanism by which courts may maintain or expand the breadth of general jurisdiction. Most avenues, however, do not seem passable. See, e.g., *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 296 (M.D. Pa. 2018) ("Since *Daimler*, a majority of federal courts have held that general jurisdiction may not be based solely upon a corporation's compliance with a state's registration statute."); *First Franchise Capital Corp. v. Jack in the Box, Inc.*, No. 1:17-CV-397, 2017 WL 3269260, at *13

wholly from existing case law pre- and post-*Daimler*, aimed at closing the gap between the two poles: the contacts plus test. First, courts should apply the nerve center test for general jurisdiction's principal place of business, despite countervailing policy arguments, to simplify the inquiry by shifting all questions of contacts into the exceptional case. Second, courts should begin to explore the contours of *Daimler*'s exceptional case by assessing a corporation's absolute level of contacts, in accordance with historical precedent, in conjunction with an assessment of unique attributes that point in favor of subjecting the corporation to a State's jurisdiction.²⁵

This proposal would fall well inside Justice Ginsburg's directive that a company like Amazon should not be subject to suit in all fifty states while also remaining mindful of Justice Sotomayor's warning that to ossify general jurisdiction by effectively limiting it to two states would lead to the inequitable result of a corporation such as Amazon's insulation from suit in a state where it has a de facto headquarters.²⁶ General jurisdiction would evolve with the modern economy, currently populated by a small number of dominant corporations, without subjecting more traditional corporations to untraditional jurisdiction.²⁷ Otherwise, personal jurisdiction doctrine might tilt too far in favor of corporations, and individuals will be unable to hale economically dominant corporations into court despite the corporations' lounging comfortably at home in the individuals' state.

This Note proceeds in six parts. Part I describes the genesis of general jurisdiction jurisprudence from *Pennoyer v. Neff*²⁸ through *Daimler*. Part II briefly describes the curtailment of specific jurisdiction in *Bristol-Myers Squibb* and its effect on personal jurisdiction. In Part III, this Note details lower courts' treatment of general jurisdiction following *Daimler*, finding that many courts are applying the nerve center test to the principal place of business inquiry for general jurisdiction and tracing the jurisprudential roots of the contacts plus test. Part IV argues that precedent and policy point in

(S.D. Ohio Aug. 1, 2017) (noting that plaintiff's argument that a corporation can have more than one principal place of business was without support); *infra* note 148 and accompanying text (noting that *Daimler* and subsequent cases have refused to apply specific jurisdiction's second step, a reasonableness inquiry, to general jurisdiction).

²⁵ See *infra* Part VI.

²⁶ See *id.*

²⁷ See *infra* Part V.

²⁸ 95 U.S. 714 (1877).

favor of a contacts test for principal place of business in general jurisdiction rather than the nerve center test, but that adoption of the nerve center test for principal place of business and the contacts plus test for the exceptional case would generally simplify the inquiry and would avoid policy concerns. Part V explores the development of the modern economy with Amazon as a case study and demonstrates how Amazon's second headquarters creates an untenable problem for a general jurisdiction doctrine that limits each corporation to two home states. Part VI concludes by arguing that the simplest, most effective, and most precedent-deferential path forward is the contacts plus test.

I

THE GENESIS OF GENERAL JURISDICTION

The Supreme Court's personal jurisdiction jurisprudence, grounded in the sometimes-illusory "traditional notions of fair play and substantial justice,"²⁹ often struggles to translate underlying policy concerns into easily applicable tests. Each time the Supreme Court issues a landmark decision regarding personal jurisdiction, attempting to clarify the doctrine for judges and litigants alike, confusion abounds.³⁰ On the other hand, the Court's silence can be just as confounding. In fact, after failing to reach a majority decision in both 1987's *Asahi Metal Industry Co. v. Superior Court*³¹ and 1990's *Burnham v. Superior Court*,³² the Court did not take another personal jurisdiction case until 2011's *Goodyear Dunlop Tires Operations, S.A. v. Brown*³³—twenty-one years later.³⁴ After its recent pair of decisions in *Goodyear* and *Daimler*, the Court has again left aspects of personal jurisdiction jurisprudence open to interpretation. It is unclear whether *Hertz's* nerve center test applies to general jurisdiction's principal place of business, and it is unclear what role contacts play in light of *Daimler's* announcement of the two paradigmatic examples of general jurisdiction.

²⁹ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

³⁰ See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1268–1270 (2018) ("Over the . . . several decades [following *International Shoe*] the Supreme Court sporadically decided personal-jurisdiction cases in an attempt to put meat on the bones of the *International Shoe* test.").

³¹ 480 U.S. 102 (1987).

³² 495 U.S. 604 (1990).

³³ 564 U.S. 915 (2011).

³⁴ Bradt & Rave, *supra* note 30 at 1272.

A. *International Shoe* Eventually Leads to General and Specific Jurisdiction

In order for a court to hear a particular case, the court must have jurisdiction over the persons or property at issue—personal jurisdiction.³⁵ The outer bounds of a court’s personal jurisdiction are a constitutional limit; further statutory limitations can exist inside these bounds.³⁶ The constitutional limitations on personal jurisdiction stem from the Due Process Clause³⁷ and are based on international law, sovereignty, and fairness.³⁸ In the seminal *Pennoyer v. Neff*,³⁹ the Court gave “the territorial concept constitutional approval.”⁴⁰ The Court held that state courts had power over persons and property within their borders, and presence was paramount. As time passed, however, strict territoriality became inadequate as society became more mobile and interconnected, lessening the importance of state boundaries as goods and services travelled nationally. In response, the Court added the concept of reasonableness to personal jurisdiction, or at least to what would become specific jurisdiction; the Court asked whether it was “reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state”⁴¹ court to hear a case. Over time, the Supreme Court expanded and narrowed the contours of personal jurisdiction to ensure coextension with the limits of the Due Process Clause.⁴²

³⁵ JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 3.1 (5th ed. 2015). Personal jurisdiction and territorial jurisdiction are interchangeable terms; the Second Restatement of Judgments uses the term territorial jurisdiction. RESTATEMENT (SECOND) OF JUDGMENTS §§ 4–10 (1982).

³⁶ FRIEDENTHAL ET AL., *supra* note 35, § 3.1.

³⁷ U.S. CONST. amend. XIV.

³⁸ See *Pennoyer v. Neff*, 95 U.S. 714, 722–23, 729 (1877); KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 207–08 (3d ed. 2012); Earl M. Martz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U. L.Q. 671, 693 (1988) (“The Court’s approach [to general jurisdiction] is based on a subtle interaction between concepts of sovereignty and fairness.”); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769, 774 (2016) (“Because the contours of the individual right protected by Due Process were wholly defined by the power of the state, sovereignty occupied center stage under the *Pennoyer* framework.”).

³⁹ 95 U.S. at 714.

⁴⁰ FRIEDENTHAL ET AL., *supra* note 35, § 3.3.

⁴¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

⁴² U.S. CONST. amend. XIV. See *Int’l Shoe*, 326 U.S. at 320. While the Fourteenth Amendment’s Due Process Clause governs state courts’ personal jurisdiction, the Fifth Amendment’s Due Process Clause governs federal courts’ personal jurisdiction. See Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 427–28 (1981).

Of course, the introduction of reasonableness into personal jurisdiction made courts' determinations more complex than they had been under a simple territoriality inquiry. The Court clarified by developing a personal jurisdiction taxonomy split into two categories: specific and general jurisdiction.⁴³ The split traces back to *International Shoe Co. v. Washington*;⁴⁴ prior to *International Shoe*, exercise of personal jurisdiction looked similar to how general jurisdiction operates today.⁴⁵

In *International Shoe*, decided in 1945, the Court put forth the fundamental minimum contacts test⁴⁶ and delineated the boundary of personal jurisdiction over a corporate defendant.⁴⁷ Chief Justice Stone wrote that

due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁴⁸

One way to understand the ruling in *International Shoe* is that personal jurisdiction is proper against any defendant whose contacts with a state are sufficient to logically conclude that the defendant has benefitted from the laws of that state—the strict territoriality of *Pennoyer* was no longer a workable personal jurisdiction doctrine in the face of the modern economy because strict territoriality no longer comported with fairness.

To be clear, the *International Shoe* opinion did not actually reference the modern economy in its reasoning. It did, however, make the implication when discussing the importance of presence. The Court stated that a presence inquiry "beg[s] the question to be decided" in a personal jurisdiction inquiry because "'presence' [is] used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."⁴⁹

⁴³ While I will treat specific and general jurisdiction as two distinct categories for the purposes of this Note, some scholars argue that general and specific jurisdiction are simply two sides of the same coin. CLERMONT, *supra* note 38, at 221 ("In this way, the development of jurisdiction based on state-directed acts has brought into the open the absence of any clear distinction between specific and general jurisdiction—they just comprise the rules for the two ends of the unrelat- edness continuum.").

⁴⁴ *Int'l Shoe*, 326 U.S. at 310.

⁴⁵ See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 614–15 (1988).

⁴⁶ *Int'l Shoe*, 326 U.S. at 316.

⁴⁷ *Id.* at 317–19.

⁴⁸ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁴⁹ *Id.* at 316–17.

As corporations evolved with the modern economy, logically their physical presence might not expand while the types of contacts cognizable in 1945 certainly would. The inquiry is not “mechanical or quantitative.”⁵⁰ It is not whether a corporation’s activities are “a little more or a little less.”⁵¹ Instead, the test inquires about the “quality and nature” of the contacts while also considering the importance of “the fair and orderly administration of the laws.”⁵²

Two decades after *International Shoe*, preeminent civil procedure scholars Arthur T. von Mehren and Donald T. Trautman argued that traditional personal jurisdiction analysis was still mired in reliance on antiquated ideas such as territoriality—new modes of analysis and taxonomy were necessary, in their opinion, to modernize personal jurisdiction.⁵³ To that end, von Mehren and Trautman used Court precedent and contemporary legal thinking to crystallize the difference between general and specific jurisdiction as we know it today. General jurisdiction is exercised over “any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected,” whereas specific jurisdiction is exercised when “affiliations between the forum and the underlying controversy . . . support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate.”⁵⁴ The Court grappled implicitly with these concepts for two decades before explicitly recognizing them in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.⁵⁵ Eventually, the distinct bifurcation of personal jurisdiction into general and specific went from academic suggestion to accepted personal jurisdiction jurisprudence; in fact, Justice Ginsburg explicitly cited von Mehren and Trautman in both *Goodyear*⁵⁶ and *Daimler*.⁵⁷

Today, a claim wholly unrelated to a corporation’s in-state activity can be brought against a corporation if the corporation maintains “continuous corporate operations within a state

⁵⁰ *Id.* at 319.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Von Mehren & Trautman, *supra* note 2, at 1121 (“Old practices and concepts have become less significant and less understandable . . .”).

⁵⁴ *Id.* at 1136.

⁵⁵ 4 WRIGHT & MILLER, *supra* note 2, § 1067.5.

⁵⁶ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 923 (2011) (citing von Mehren & Trautman, *supra* note 2, at 1136).

⁵⁷ *Daimler AG v. Bauman*, 571 U.S. 117, 127–28 (2014) (citing von Mehren & Trautman, *supra* note 2, at 1164).

[that are] so substantial and of such a nature as to justify suit” (general jurisdiction),⁵⁸ or a claim can be brought based only on “single or occasional acts” as long as the claim has a certain quantum of relatedness to the acts (specific jurisdiction).⁵⁹ After *International Shoe*, the Court continued to refine specific jurisdiction⁶⁰ but, until recently, only issued two opinions on general jurisdiction: *Perkins v. Benguet Consolidated Mining Co.*⁶¹ and *Helicopteros*.⁶² The Court’s decision in *Perkins* would thus figure prominently in Justice Ginsburg’s analysis of modern general jurisdiction in *Daimler* and lies at the heart of the debate discussed below between Justices Ginsburg and Sotomayor about the current and future viability of general jurisdiction.

B. Doing Business: General Jurisdiction Before *Goodyear* and *Daimler*

The dearth of Supreme Court opinions about general jurisdiction naturally left the subject open for some degree of interpretation, and the general consensus among judges and academics before *Daimler* was that “doing business” jurisdiction remained a proper basis for general jurisdiction. After all, “what later was referred to as ‘general jurisdiction’ was the basis on which *all* jurisdiction was justified.”⁶³ Doing business jurisdiction developed as a logical outgrowth of two preceding

⁵⁸ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Importantly, Justice Ginsburg notes that general jurisdiction requires more than “continuous and systematic” contacts—the key inquiry is whether the contacts are so substantial as to allow the logical conclusion that the corporation is at home in the state. See *Daimler*, 571 U.S. at 127–128.

⁵⁹ *Int’l Shoe*, 326 U.S. at 318–19.

⁶⁰ See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (providing two complex, competing theories for a stream-of-commerce analysis of specific jurisdiction, evidencing the Court’s desire to delicately shape the contours of the doctrine); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985) (refining the “purposeful availment” analysis of specific jurisdiction); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773–74 (1984) (holding that continuous and deliberate distribution of a publication in a state is sufficient to establish specific jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 299 (1980) (holding that the mere foreseeability that a product would enter the forum state and cause injury in that state is not sufficient to establish specific jurisdiction).

⁶¹ 342 U.S. 437 (1952).

⁶² 466 U.S. 408 (1984). Von Mehren and Trautman correctly predicted that specific jurisdiction would become more common and therefore more important than general jurisdiction, writing that “specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene.” Von Mehren & Trautman, *supra* note 2, at 1164.

⁶³ See *Barrett v. Union Pac. R.R. Co.*, 390 P.3d 1031, 1042 (Or. 2017) (Walters, J., dissenting) (emphasis added) (citing Twitchell, *supra* note 45, at 614–15).

theories of personal jurisdiction over corporations: presence and consent.⁶⁴ Before *Pennoyer*, corporations were only subject to suit in the state in which they were incorporated.⁶⁵ After *Pennoyer*, which grounded personal jurisdiction in a state's territory, courts needed a workable method to determine whether a corporation was, hypothetically, physically present within a state exclusive of its state of incorporation.⁶⁶ Doing business jurisdiction satisfied this need. The test dictated that "a . . . corporation should be [subject to general jurisdiction] only if it was doing enough business within the state to justify the inference that it was present there."⁶⁷ If a court found that a corporation's activities in a state passed a certain absolute threshold of contacts, then the corporation was subject to the general jurisdiction of that state's courts and thus could be sued on any cause of action.⁶⁸ Examples of corporate activity which may have constituted doing business included soliciting business from a local office, maintaining distributors in a state, and employing agents who wielded the power to act on behalf of a corporation.⁶⁹ Until *Goodyear* and *Daimler*, this absolute threshold contacts test meant that a corporation could theoretically be subject to general jurisdiction in however many states the corporation maintained a certain level of contacts.

Doing business jurisdiction, however, does not survive today, per the most common readings of *Goodyear* and *Daimler*;⁷⁰ it is, nevertheless, critically important conceptually as a logical antecedent to modern general jurisdiction jurisprudence. In fact, doing business jurisdiction has been out of favor with the Supreme Court for at least half a century; in 1957, Justice Black wrote that "[i]n a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring

⁶⁴ FRIEDENTHAL ET AL., *supra* note 35, § 3.7.

⁶⁵ See, e.g., *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 520 (1839) (containing dicta stating that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . It must dwell in the place of its creation, and cannot migrate to another sovereignty.").

⁶⁶ FRIEDENTHAL ET AL., *supra* note 35 § 3.7.

⁶⁷ *Id.*; see also 4A WRIGHT & MILLER, *supra* note 2, § 1069.2 ("Traditionally, a finding that a defendant was 'doing business' in the forum state was equivalent to the pre-International Shoe fiction of finding a defendant corporation 'present' in the forum."). Note the similarity between this definition of personal jurisdiction over corporations, the definition provided above from *International Shoe*, and Justice Ginsburg's refinement in *Goodyear* and *Daimler*, below. See *supra* note 58 and accompanying text.

⁶⁸ 4 WRIGHT & MILLER, *supra* note 2, § 1069.2.

⁶⁹ *Id.*

⁷⁰ *Id.*

the extent of state judicial power over such corporations.”⁷¹ Professor Kevin M. Clermont argued that the doing business brand of general jurisdiction “arose to provide appropriate jurisdiction when specific jurisdiction was not yet fully available.”⁷² In conjunction with von Mehren and Trautman’s assertion that specific jurisdiction would become the dominant form of personal jurisdiction,⁷³ reading *Goodyear* and *Daimler* as the death knells of doing business jurisdiction makes sense.

C. *Goodyear* and *Daimler*: Specific Jurisdiction Comes of Age and General Jurisdiction Limited to Two (or Three) Circumstances.

When the Court returned from its twenty-year personal jurisdiction hiatus in 2011, first with *Goodyear* and then with *Daimler*, the Court laid the doing business test to rest and replaced it with the more narrow “at home” test for general jurisdiction.⁷⁴ According to Justice Ginsburg, author of both opinions, general jurisdiction only lies when a corporation is “essentially at home in the forum State.”⁷⁵ In practice, this means that general jurisdiction only lies when the forum state is the corporation’s state of incorporation or the corporation’s principal place of business. These two bases constitute the paradigmatic examples for general jurisdiction, serving as proxies for an individual’s domicile (hypothetical presence).⁷⁶ Existing outside these paradigmatic examples is the exceptional case, when “a corporation’s operations in a forum other than its formal place of incorporation or principal place of busi-

⁷¹ *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

⁷² CLERMONT, *supra* note 38, at 221 (“Today, courts resort to [general jurisdiction], albeit usually inappropriately, only when all appropriate bases of personal jurisdiction fail to reach the defendant.”).

⁷³ Von Mehren & Trautman, *supra* note 2, at 1164. The idea that specific jurisdiction has expanded and effectively displaced any utility general jurisdiction once had is the dominant opinion of the contemporary Supreme Court. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011) (“[S]pecific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role.” (quoting Twitchell, *supra* note 45, at 628)); Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 125 (2015) (“[Justice Ginsburg’s] survey suggests that specific jurisdiction, liberated from traditional limits, has expanded to fill most of the jurisdictional gaps created by *Pennoyer*’s restrictions. In contrast, general jurisdiction remains captive in *Pennoyer*’s corral, an archaic doctrine rarely useful in the modern world.”).

⁷⁴ *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014) (citing *Goodyear*, 564 U.S. at 919).

⁷⁵ *Goodyear*, 564 U.S. at 919.

⁷⁶ *Daimler*, 571 U.S. at 136–37.

ness may be so substantial and of such a nature as to render the corporation at home in that State.”⁷⁷

In adopting this simplified understanding of general jurisdiction, Justice Ginsburg acknowledged that the law was reflecting von Mehren and Trautman’s prophecy that specific jurisdiction would come to dominate personal jurisdiction.⁷⁸ In fact, Justice Ginsburg stated that the at home test for general jurisdiction was definitively not “synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States,”⁷⁹ ensuring that lower courts were aware of the sea change.⁸⁰ This is important because if modern general jurisdiction followed traditional doing business jurisdiction, then national corporations that have contacts in each state would likely be subject to suit in each state.⁸¹ *Daimler* expressly forbids this result.⁸²

D. Justices Ginsburg and Sotomayor Split Over General Jurisdiction

Justice Ginsburg and Justice Sotomayor disagree on whether *Daimler* should signal the formal demise of the doing business test. Justice Ginsburg authored the majority opinion in *Goodyear* and *Daimler*; Justice Sotomayor joined the (unanimous) majority in *Goodyear* but wrote a separate concurrence

⁷⁷ *Id.* at 139 n.19; *see also id.* at 130 n.8 (citing one of the very few examples of such general jurisdiction, at least according to Justice Ginsburg, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

⁷⁸ *Id.* at 139–40 n.20.

⁷⁹ *Id.*

⁸⁰ *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (“[T]he Court’s 2011 decision in *Goodyear* seemed to have left open the possibility that contacts of substance, deliberately undertaken and of some duration, could place a corporation ‘at home’ in many locations. But *Daimler*, decided in 2014, considerably altered the analytic landscape for general jurisdiction and left little room for these arguments.”); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014) (holding that *Daimler* foreclosed any argument under the doing business test); *Reich v. Lopez*, 38 F. Supp. 3d 436, 454–55 (S.D.N.Y. 2014) (“The Supreme Court’s recent decision in *Daimler AG v. Bauman* has brought uncertainty to application of New York’s ‘doing business’ rule. As a result, it is unclear whether existing New York general jurisdiction jurisprudence remains viable.”), *aff’d*, 858 F.3d 55 (2d Cir. 2017).

⁸¹ *See Feder*, *supra* note 23, at 680 (“Nonetheless, *Goodyear*’s limitation of general jurisdiction to the state or states in which the corporation is at home seems inconsistent with the far more expansive notion embodied by the doing business standard—that general jurisdiction is available in any state in which the defendant has regular and consistent commercial activities.” (internal quotation marks omitted)).

⁸² *See Daimler*, 571 U.S. at 139–40 n.20 (stating that a corporation “that operates in many places can scarcely be deemed at home in all of them”).

in *Daimler*.⁸³ The key disagreement is whether general jurisdiction should be static, keyed to the paradigmatic examples, or dynamic, keyed to reasonableness.

In an Article following *Goodyear* and anticipating *Daimler*, Howard M. Erichson described the situation that led to the schism.⁸⁴ To Erichson, general jurisdiction's exercise had become too broad in application as doing business matured, and courts had consequently fashioned new, restrictive tools in response to "an overenthusiastic embrace of 'doing business' jurisdiction."⁸⁵ Erichson argued that the correct response would be to restrict general jurisdiction to a pure domicile analogy, just as Justice Ginsburg would in *Daimler*.⁸⁶ His article, however, also demonstrated why Justice Sotomayor would consider *Daimler*'s doctrinal solution an overcorrection: Erichson advocated for an expansive definition of principal place of business in the context of general jurisdiction, including the possibility of multiple states, contacts tests, and nerve center tests⁸⁷—Justice Ginsburg's decision in *Daimler* is not so forgiving.

In *Daimler*, the Court held that general jurisdiction, unlike specific jurisdiction, had not been "cut loose from *Pennoyer*'s sway," arguably restricting modern general jurisdiction to a territorial, sovereignty-based rationale from nearly 150 years prior.⁸⁸ The product of Justice Ginsburg's opinion is likely a curtailment of general jurisdiction to two states per corporation: the state of incorporation and the principal place of business. Justice Ginsburg clarified a comparative contacts analysis, in which a corporation can only be regarded to be at home in a state if their contacts with that state represent a large proportion of their contacts in total. The test seems to require a large plurality or a majority of a corporation's contacts to occur in a state to render a corporation at home in that

⁸³ Justice Sotomayor was the only justice to write separately in either opinion. See *id.* at 119; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 915 (2011).

⁸⁴ Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 90 (2013).

⁸⁵ *Id.* at 93. Of note, one tool explicitly rejected by Erichson was the importation of specific jurisdiction's reasonableness prong into general jurisdiction doctrine to create a similar two-step analysis. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Daimler AG v. Bauman*, 571 U.S. 117, 132–33 (2014) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)). Again reiterating the notion that vonMehren and Trautman were correct in asserting that general jurisdiction would wane in importance, Justice Ginsburg wrote that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id.* at 133.

state. Therefore, the type of national corporations to which we have become accustomed will hardly, if ever, centralize their contacts in a state, other than their state of incorporation and principal place of business, to such a degree that the courts consider them a native of that state.⁸⁹ This seems to be Justice Ginsburg's desired result: "A corporation that operates in many places can scarcely be deemed to be at home in all of them."⁹⁰

Notably, Justice Ginsburg does not foreclose the possibility that a corporation may be deemed to be at home in a state outside its two paradigmatic homes, and her discussion of *Perkins* as an example of the elusive exceptional case of general jurisdiction is an entry point into the fundamental differences between Justices Ginsburg's and Sotomayor's differing views of modern general jurisdiction. First, it is important to remember that *Perkins* is often cited as the "roots of the contemporary doctrine of 'general jurisdiction.'"⁹¹ Justice Ginsburg relied heavily upon *Perkins* in *Daimler*, writing "[The Court's] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum."⁹² Later in the opinion Justice Ginsburg revisits *Perkins* and states that *Perkins* is the fundamental example of the "exceptional case," where a corporation is at home in a state that is neither its state of incorporation nor its principal place of business.⁹³ Thus, *Perkins* is both a textbook case of general jurisdiction (at least over foreign, nonconsenting corporations) and the example of the exceptional case—implying that general jurisdiction over a nonconsenting foreign corporation is a rarity.

A brief review of the facts in *Perkins* is necessary. In *Perkins*, the Court held that a Philippine corporation was subject to general jurisdiction in Ohio despite the claim's complete unrelatedness to the corporation's contacts with Ohio—in fact, the corporation in question was only in Ohio at all because of

⁸⁹ *Id.* at 143–44.

⁹⁰ *Id.* at 140 n.20.

⁹¹ 4 WRIGHT & MILLER, *supra* note 2, § 1067.5.

⁹² *Daimler*, 571 U.S. at 129 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927–28 (2011)).

⁹³ *Id.* at 139 n.19. These two nominations for textbook examples of different branches of general jurisdiction are in concert with each other because logically a foreign corporation is not incorporated in and does not have a principal place of business in any state. Accordingly, foreign corporations would likely mightily struggle to meet *Daimler*'s principal place of business test, confined only to the exceptional case.

war-time conditions in the Philippines.⁹⁴ The mining operations of the corporation in the Philippines had ceased due to World War II and the corporation's president was performing what little corporate activity was ongoing from an office in Ohio.⁹⁵ Thus, under Justice Ginsburg's comparative contacts test announced in *Daimler*, general jurisdiction would be appropriate because nearly all of the corporation's contacts, nationwide—in fact, worldwide—took place in Ohio. Proportionally, Ohio was the corporation's home.⁹⁶

Justice Sotomayor, writing for herself only, argued that general jurisdiction should not overcorrect, but should rather embrace the adoption of a reasonableness prong in general jurisdiction and maintain an absolute threshold for a contacts test. She considered Justice Ginsburg's opinion to essentially hold that contemporary multinational corporations are “too big for general jurisdiction” by inventing the comparative contacts test.⁹⁷ No multinational (or national) corporation, in the Justice's opinion, would ever have enough contacts in any one state, comparatively, to hurdle the jurisdictional bar; thus, *Daimler* would essentially immunize all large corporations from general jurisdiction outside the paradigms.

Justice Sotomayor grappled with Justice Ginsburg's treatment of *Perkins* in order to prove her point. Justice Sotomayor noted that, in *Perkins*, the Court focused on facts like the corporation's maintenance of an office, supervision of properties, and directors' meetings.⁹⁸ Those are all traditional factors in a doing business contacts inquiry. Moreover, Justice Sotomayor argued, the Court in *Perkins* never compared contacts inside Ohio with those outside Ohio, ignoring their proportionality to

⁹⁴ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

⁹⁵ *Id.*

⁹⁶ Critically, however, it is unclear whether Justice Ginsburg was ascribing her comparative contacts test to a principal place of business inquiry or an exceptional case inquiry. This is a critical doctrinal omission because it opens the door for courts to adopt the nerve center test for principal place of business in general jurisdiction and adopt *Daimler*'s comparative contacts test for the exceptional case inquiry. As discussed below, *infra* Part II, there are also clues that Justice Ginsburg interprets *Perkins*' exercise of general jurisdiction to rest on the fact that Ohio was the Philippine corporation's nerve center. See *Daimler*, 130 n.8 (“All of [defendant]'s activities were directed by the company's president from within Ohio.”); *id.* at 157 (Sotomayor, J., concurring) (“The majority does not dispute that a State can exercise general jurisdiction where a corporate defendant has its corporate headquarters, and hence its principal place of business within the State. Cf. *Hertz Corp.*, 559 U.S. at 93 . . .”).

⁹⁷ *Id.* at 143.

⁹⁸ *Id.* at 150 (citing *Perkins*, 342 U.S. at 447–48).

total corporate activity.⁹⁹ Finally, Justice Sotomayor wrote, the Court in *Perkins* literally reasoned that the corporation's contacts to Ohio were a "limited . . . part of its general business."¹⁰⁰ As such, Justice Sotomayor's logic concluded, *Perkins* must have employed an absolute contacts test rather than a comparative one.

Justice Sotomayor concurred in *Daimler* because she would have held the defendant's contacts to be sufficient for general jurisdiction. Relying on analogous precedent in the Court's specific jurisdiction jurisprudence such as *Asahi*,¹⁰¹ Justice Sotomayor would have held that California had the power to hale *Daimler* into court but that it would have been unreasonable to do so.¹⁰² Rather than leaving general jurisdiction tethered to *Pennoyer* and letting it fade into irrelevancy, Justice Sotomayor argued that general jurisdiction should be brought into modernity by applying the same reasonableness prong currently used for specific jurisdiction inquiries.¹⁰³

Daimler, however, likely disposed of the reasonableness prong when a corporation is "at home." Despite Justice Sotomayor's note that "[t]he Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context,"¹⁰⁴ Justice Ginsburg wrote that "[w]hen a corporation is genuinely at home in the forum State, however, any second-step [reasonableness] inquiry would be superfluous."¹⁰⁵ If being "genuinely at home" encompasses the two "essentially at home" general jurisdiction categories (incorporation, principal place of business) and the exceptional case, then this statement ends the argument that general jurisdiction has a reasonableness prong.¹⁰⁶

⁹⁹ *Id.*

¹⁰⁰ *Id.* (quoting *Perkins*, 342 U.S. at 438).

¹⁰¹ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

¹⁰² *Daimler*, 571 U.S. at 145 (Sotomayor, J., concurring) ("As a result, I would decide this case under the reasonableness prong without foreclosing future consideration of whether that prong should be limited to the specific jurisdiction context."). Factors that bear on whether suit is reasonable include potential burdens to the defendant, the interests of the forum state, and the interests of foreign sovereigns, among others. *Id.*

¹⁰³ *Id.* at 144–45.

¹⁰⁴ *Id.* at 144 n.1.

¹⁰⁵ *Id.* at 140 n.20 (majority opinion).

¹⁰⁶ See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630 (2d Cir. 2016). At the risk of hair-splitting, there is still a potential argument to make. Justice Ginsburg's statement—that a reasonableness inquiry would be superfluous if a corporation was already held to be at home—could apply only to the two paradigmatic bases for general jurisdiction, leaving a reasonableness inquiry applicable to questions of the exceptional case.

If the doing business test had lurched too far to one side and *Daimler* lurched back the other way, then Justice Sotomayor's concurrence would represent a middle ground in which reasonableness provided flexibility. Similar to the majority's opinion, however, it is unclear how Justice Sotomayor would categorize her absolute contacts and reasonableness test, whether they determine the principal place of business test or the exceptional case. Certainly, at least, Justice Sotomayor argued that general jurisdiction doctrine should allow exercise in more than two states: "[The majority in *Daimler*] never explains why the State should lose [general jurisdiction] when, as is increasingly common, a corporation 'divide[s] [its] command and coordinating functions among officers who work in several different locations.'"¹⁰⁷ The additional states could then fall into multiple principal places of business or multiple exceptional cases.

In essence, Justice Sotomayor argued that holding a corporation to be at home in more than two states is an "inevitable consequence of the rule of due process we set forth [in *International Shoe*]." ¹⁰⁸ Otherwise, Justice Sotomayor wrote, "a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum," and "the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions."¹⁰⁹ To immunize corporations from suit under general jurisdiction ultimately harms consumers because meritorious claims will fail to get through the courthouse door. "What has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy."¹¹⁰

II

BRISTOL-MYERS SQUIBB'S RESTRICTION OF SPECIFIC JURISDICTION CREATES NEW IMPORTANCE FOR GENERAL JURISDICTION

The final piece of recent personal jurisdiction jurisprudence arrived in the summer of 2017 with the Court's decision in *Bristol-Myers Squibb*.¹¹¹ In that case, the Court, by an eight-

¹⁰⁷ *Daimler*, 571 U.S. at 157 (Sotomayor, J., concurring) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 95–96 (2010)).

¹⁰⁸ *Id.* at 155.

¹⁰⁹ *Id.* at 158–59.

¹¹⁰ *Id.* at 155–56.

¹¹¹ *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). *Bristol-Myers Squibb* is not the only recent case to narrow specific jurisdiction. As

to-one margin,¹¹² restricted specific jurisdiction by holding that California state courts could not exercise specific jurisdiction over a corporate defendant with regard to claims of nonresidents unrelated to the forum.¹¹³ To many, *Bristol-Myers Squibb* represents the Court's decision to "cast aside the notion that globalization could justify 50-state forum shopping."¹¹⁴

Bristol-Myers Squibb illustrates just how restrictive personal jurisdiction jurisprudence has become. First, before *Goodyear* and *Daimler*, the California state court would have almost certainly had general jurisdiction over Bristol-Myers Squibb by virtue of the volume of its sales in California—these contacts would have likely met the criteria for traditional doing business jurisdiction.¹¹⁵ In fact, the California state court in *Bristol-Myers Squibb* originally held that Bristol-Myers Squibb was subject to general jurisdiction in California—only after the issuance of *Daimler* did the court hold that Bristol-Myers Squibb was not subject to general jurisdiction and was instead subject to specific jurisdiction.¹¹⁶ Second, before *Bristol-Myers Squibb*, many would have expected the state court to have specific jurisdiction over Bristol-Myers Squibb.¹¹⁷

Erwin Chemerinsky noted, the Court in the 2014 case *Walden v. Fiore*, 571 U.S. 277 (2014), authored by Justice Clarence Thomas, held that the minimum contacts inquiry for specific jurisdiction related only to direct contacts with the state in question, not contacts with citizens thereof. Effectively, only a defendant's, not a plaintiff's, contacts are taken into consideration. Erwin Chemerinsky, *SCOTUS Takes on When State Courts Can Assert Jurisdiction over Out-of-State Parties*, ABA JOURNAL (Apr. 25, 2017, 6:54 AM), http://www.abajournal.com/news/article/clarifying_personal_jurisdiction_chemerinsky_supreme_court/ [https://perma.cc/8PFB-9YZX]. For a discussion of the dangers of limiting both specific and personal jurisdiction simultaneously, see Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1178–80 (2015).

¹¹² Justice Sotomayor, as in *Daimler*, was the only justice not to join the majority opinion. *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

¹¹³ Bradt & Rave, *supra* note 30, at 1279–83.

¹¹⁴ Dean & Cronin, *supra* note 9 at 23. Nevertheless, some courts continue to follow earlier Supreme Court jurisprudence regarding specific jurisdiction (and particularly the stream of commerce doctrine). See *id.*

¹¹⁵ See Erichson, *supra* note 84, at 90 (stating, while answering a hypothetical similar to *Bristol-Myers Squibb*, “[p]rior to 2011, many courts and commentators would have said [the court has general jurisdiction]. Based on [a corporation’s] continuous and systematic contacts, many would have said that [the state] courts could assert general jurisdiction even though the company is headquartered and incorporated [elsewhere].”).

¹¹⁶ *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 424 (Cal. Ct. App. 2014), *review granted and opinion superseded sub nom.* *Bristol-Myers Squibb Co. v. S.C.*, 337 P.3d 1158 (Cal. 2014), *and aff’d*, 1 Cal. 5th 783 (2016), *rev’d sub nom.* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

¹¹⁷ See Bradt & Rave, *supra* note 30, at 1271–1273.

Instead, the Court held that neither applied. Naturally, the recent restriction of specific jurisdiction over corporations will lead plaintiffs to pursue new avenues of personal jurisdiction. General jurisdiction seems like the next battlefield because plaintiffs can try to expand general jurisdiction's application by stretching the exceptional case while corporations can try to narrow general jurisdiction by arguing that the *Hertz* nerve center test applies to general jurisdiction and argue that *Daimler* effectively forecloses the exceptional case for good. Early returns indicate that the expansion of the exceptional case is generally a losing argument.¹¹⁸

III

GENERAL JURISDICTION AFTER *DAIMLER*: THE LOWER COURTS HAVE OFTEN APPLIED THE NERVE CENTER TEST AND HAVE LAID THE GROUNDWORK FOR THE CONTACTS PLUS TEST

A. The Nerve Center Test

Whether the nerve center test applies to general jurisdiction matters because corporations will be able to manipulate their nerve centers more easily than a principal place of business test based on either absolute or comparative contacts. As Cornett and Hoffheimer predicted,¹¹⁹ corporations have already begun to advocate for the nerve center test in order to locate themselves outside courts' reaches.¹²⁰ For example, the defendants in *MG Design Associates, Corp. v. CoStar Realty Information, Inc.* asserted that Illinois did not have general jurisdiction over them because, while their "primary office" is in Illinois, their nerve center is in Washington, D.C.¹²¹ The court noted that "[the defendants] point to the Supreme Court's nerve center test used to establish diversity jurisdiction," but did not clearly accept or reject this argument.¹²² Other courts note that plaintiffs are trying to simply ignore *Daimler*, demonstrating plaintiffs' dislike of the doctrinal change and its uneven

¹¹⁸ See, e.g., *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (suggesting that contacts are irrelevant to whether a case is "exceptional" and effectively reducing *Perkins* to its facts).

¹¹⁹ See *infra* note 171 and accompanying text.

¹²⁰ See, e.g., *Cucuz v. Rosta Int'l Ltd.*, No. 2:15-cv-10479, 2017 WL 2213572, at *5-6 (E.D. Mich. May 19, 2017) (stating that defendant argued that "the Supreme Court has rejected the 'business activities' test for determining a corporation's principal place of business in favor of the 'nerve center' test" before applying the nerve center test to general jurisdiction).

¹²¹ 267 F. Supp. 3d 1000, 1014 (N.D. Ill. 2017).

¹²² *Id.*

effect on litigants.¹²³ Lower courts are already deciding cases in which corporate defendants are using *Hertz's* nerve center test as a shield against general jurisdiction and in which *Daimler's* restriction of general jurisdiction to two states is limiting in practice.¹²⁴

A survey of recent case law shows that lower courts are split on this issue on a number of axes. Before *Goodyear* and *Daimler*, general jurisdiction was an absolute, threshold contacts test, asking whether a corporation's activities were so "continuous and systematic" as to "approximate physical presence."¹²⁵ After *Daimler*, lower courts have recognized that corporations are effectively only subject to general jurisdiction in their state of incorporation and their principal place of business.¹²⁶ The role of contacts is unclear. On the one hand, some courts have explicitly embraced the nerve center test for principal place of business, holding contacts irrelevant for a general jurisdiction inquiry.¹²⁷ On the other hand, some courts continue to assess contacts, treating general jurisdiction's principal place of business as Justice Ginsburg's comparative contacts test.¹²⁸ Complicating this genre of general jurisdiction is the question whether the contacts inquiry determines the sole principal place of business, determines a possi-

¹²³ *Hood v. Ascent Med. Corp.*, No. 13cv0628 (RWS) (DF), 2016 WL 1366920, at *9 n.12 (S.D.N.Y. Mar. 3, 2016) ("Incredibly, Plaintiff's supplemental submission on the issue of personal jurisdiction does not cite *Daimler* or *Goodyear* (or even a single case from this Circuit issued after those decisions), let alone address how those cases should impact this Court's jurisdictional analysis."), *report and recommendation adopted*, No. 13 Civ. 628 (RWS), 2016 WL 3453656 (S.D.N.Y. June 20, 2016), *aff'd*, 691 F. App'x 8 (2d Cir. 2017).

¹²⁴ *See McGill v. Conwed Corp.*, No. 17-01047 (SRN/HB), 2017 WL 4534827, at *4 (D. Minn. Oct. 10, 2017) ("Plaintiffs also accuse Conwed historically of identifying *whatever location is most beneficial* to the corporation in a given case as its principal place of business." (emphasis added)).

¹²⁵ *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), *holding modified by Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

¹²⁶ *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) ("[T]he Court's 2011 decision in *Goodyear* seemed to have left open the possibility that contacts of substance, deliberately undertaken and of some duration, could place a corporation 'at home' in many locations. But *Daimler*, decided in 2014, considerably altered the analytic landscape for general jurisdiction and left little room for these arguments.")

¹²⁷ *See id.*

¹²⁸ *See infra* Part IV. Some courts have instead sidestepped the issue entirely because there are a large number of cases in which the nerve center test and any type of contacts test would have the same result. *See, e.g., Livnat v. Palestinian Auth.*, 851 F.3d 45, 56 (D.C. Cir. 2017) ("The appellants do not argue that the Palestinian Authority may be 'fairly regarded as at home' in the United States, and for good reason. Its headquarters, officials, and primary activities are all in the West Bank.")

ble additional principal place of business (in addition to a nerve center), or determines whether a case falls into the exceptional case.

Opinions in which federal district courts explicitly apply the nerve center test for general jurisdiction, with explicit reference to *Hertz*, are many.¹²⁹ This seems to be the dominant

¹²⁹ See, e.g., *Fox v. Michael Berenis, Bootaholics, Inc.*, No. 3:17-CV-2066-SI, 2018 WL 6313003, at *2 (D. Or. Dec. 3, 2018); *Hegemann v. M & M Am., Inc.*, No. 2:18-CV-00064, 2018 WL 4502181, at *3 (D. Vt. Sept. 20, 2018); *Bd. of Trustees of Glazing Health & Welfare Fund v. Z-Glass, Inc.*, No. 217-CV-01638-JAD-NJK, 2018 WL 4053320, at *5 n.37 (D. Nev. Aug. 24, 2018) (explicitly applying *Hertz* to general jurisdiction); *Storms v. Haugland Energy Grp., LLC*, No. 18-CV-80334, 2018 WL 4347603, at *6 (S.D. Fla. Aug. 17, 2018), *report and recommendation adopted*, No. 18-CV-80334-BB, 2018 WL 4347604 (S.D. Fla. Sept. 4, 2018); *Ross v. Jenkins*, 325 F. Supp. 3d 1141, 1162 n.3 (D. Kan. 2018), *motion for relief from judgment denied*, No. 17-2547-DDC-TJJ, 2018 WL 4749375 (D. Kan. Oct. 2, 2018); *Retail Pipeline, LLC v. JDA Software Grp.*, No. 2:17-cv-00067, 2018 WL 1621508, at *9 (D. Vt. Mar. 30, 2018); *Thunderbird Resorts, Inc. v. Zimmer*, No. 15CV1304-JAH (BGS), 2018 WL 1542044, at *8 (S.D. Cal. Mar. 29, 2018); *Live Face on Web, LLC v. Archevos Corp.*, No. 17-CV-1487-WQH-NLS, 2018 WL 1035209, at *4 (S.D. Cal. Feb. 23, 2018) (finding that the plaintiff did not establish that the defendant “direct[s], control[s], and coordinate[s]” its operations from California); *Portillo v. Chipotle Mexican Grill, Inc.*, No. ED CV 17-01497-AB (JCx), 2018 WL 637386, at *2 (C.D. Cal. Jan. 31, 2018); *McGill v. Conwed Corp.*, No. 17-01047 (SRN/HB), 2017 WL 4534827, at *4, *9 (D. Minn. Oct. 10, 2017) (explaining that *Hertz* can be marshaled for or against general jurisdiction: “Here, although both parties apply *Hertz*, they argue for different results.”); *Nespresso USA, Inc. v. Ethical Coffee Co. SA*, 263 F. Supp. 3d 498, 503 (D. Del. 2017); *Gallagher v. Roberts*, No. 3:16-cv-01437-BEN-DHB, 2017 WL 1365792, at *3 (S.D. Cal. Apr. 14, 2017); *Int’l Union v. Consol Energy, Inc.*, 243 F. Supp. 3d 755, 761 (S.D.W. Va. 2017); *Maxchief Investments Ltd. v. Plastic Dev. Grp., LLC*, No. 3:16-CV-63, 2016 WL 7209553, at *3 (E.D. Tenn. Dec. 12, 2016); *Rullan v. Goden*, No. CCB-12-2412, 2016 WL 1159112, at *8 (D. Md. Mar. 24, 2016); *Hood v. Ascent Med. Corp.*, No. 13cv0628 (RWS) (DF), 2016 WL 1366920, at *9 (S.D.N.Y. Mar. 3, 2016), (finding that the fact that the defendant’s former CEO and Vice President worked out of Minneapolis suggested that Minnesota was the defendant’s nerve center), *report and recommendation adopted*, No. 13 Civ. 628 (RWS), 2016 WL 3453656 (S.D.N.Y. June 20, 2016), *aff’d*, 691 F. App’x 8 (2d Cir. 2017); *Duncanson v. Wine & Canvas Dev., LLC*, No. 614-CV-704-Orl-40KRS, 2015 WL 12838359, at *22 (M.D. Fla. June 24, 2015); *Allstate Ins. Co. v. Electrolux Home Prod., Inc.*, No. 1:14 CV 329, 2014 WL 3615382, at *4 n.3 (N.D. Ohio July 18, 2014); *Flynn v. Hovensa, LLC*, No. 3:14-43, 2014 WL 3375238, at *2 (W.D. Pa. July 3, 2014); *Google Inc. v. Rockstar Consortium U.S. LP*, No. C 13-5933 CW, 2014 WL 1571807, at *1 n.1 (N.D. Cal. Apr. 17, 2014); *In re Pursuit Capital Mgmt., LLC*, 595 B.R. 631, 648–49 (Bankr. D. Del. Nov. 2, 2018) (“While it is not altogether clear that the ‘nerve center’ standard enunciated in *Hertz* should be extended to the Rule 12(b)(2) context, because Defendants argued this standard and Plaintiffs did not take issue with that suggestion, I will apply it here.”). *But cf.* *Louis Dreyfus Co. Freight Asia Pte. Ltd. v. Uttam Galva Steels Ltd.*, No. 17-CV-2476 (JSR), 2017 WL 5126067, at *3 (S.D.N.Y. Oct. 16, 2017) (“Indeed, in the instant case, plaintiff’s complaint does not, in fact, establish that UGNA’s principal place of business is in New York. It only pleads that UGNA’s ‘principal executive office’ is in New York—which is not the same thing.”). Interestingly, the court in *Rullan v. Goden* cites a Fourth Circuit case for their application of the nerve center test even though the cited case only talks about the “principal place of

approach. At least one state court of last resort has similarly adopted *Hertz's* nerve center test for general jurisdiction's principal place of business.¹³⁰ Despite the lack of explicit guidance on whether the nerve center test applies to general jurisdiction, courts that apply the nerve center test to general jurisdiction do so without much fanfare. For example, in a case decided during the same year as *Daimler*, one court wrote simply: "A corporate defendant is 'at home' where it is incorporated and where it has its principal place of business. A corporation's principal place of business is its 'nerve center.'"¹³¹ Another simply stated, in a footnote referencing general jurisdiction doctrine, "[a] corporation's 'principal place of business' has been determined to be its 'nerve center'—the administrative and/or operational headquarters that serves as the seat of control for the corporation."¹³²

Other courts have continued to determine a corporation's principal place of business, and thus whether a corporation is at home for purposes of general jurisdiction, without any mention of *Hertz*.¹³³ These courts' holdings, however, do not explic-

business" within the context of diversity jurisdiction. *Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 174 (4th Cir. 2014).

¹³⁰ See, e.g., *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 48 (Mo. 2017), *reh'g denied* (Apr. 4, 2017) ("The nature of Norfolk's activities in Missouri are quite distinct from the 'nerve-center' of activities that the Supreme Court has said might be sufficient to make a 'home' state." (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010))).

¹³¹ *Flynn*, 2014 WL 3375238 at *2 (first citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)); then citing *Hertz*, 559 U.S. at 92–93).

¹³² *Campbell v. Fast Retailing USA, Inc.*, No. 14-6752, 2015 WL 9302847, at *2 n.3 (E.D. Pa. Dec. 22, 2015); see also *Cucuz v. Rosta Int'l Ltd.*, No. 2:15-cv-10479, 2017 WL 2213572, at *5–6 (E.D. Mich. May 19, 2017) (explicitly applying *Hertz's* nerve center test to general jurisdiction's principal place of business inquiry); *McGill v. Conwed Corp.*, No. 17-01047 (SRN/HB), 2017 WL 4534827, at *5, *9 (D. Minn. Oct. 10, 2017) (applying the nerve center test to a subject-matter jurisdiction inquiry and then taking the same principal place of business as legal fact for a general jurisdiction inquiry); *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, No. CV 08-635 CAS (AJWx), 2010 WL 11508360, at *5 n.3 (C.D. Cal. Apr. 5, 2010) (applying the nerve center test, holding the plaintiff's principal place of business was the state in which the CEO lived and worked, where the vast majority of plaintiff's business took place, and where the majority of plaintiff's employees lived and worked).

¹³³ See *Hernandez v. Chevron U.S.A., Inc.*, 347 F. Supp. 3d 921, 965 (D.N.M. 2018) ("Accordingly, [defendant] does not have minimum contacts with New Mexico via the general personal jurisdiction avenue."); *Gallagher v. Roberts*, No. 3:16-cv-01437-BEN-DHB, 2017 WL 1365792, at *3 (S.D. Cal. Apr. 14, 2017) (implicitly applying the nerve center test and holding that California does not have general jurisdiction over a corporation with its place of incorporation and principal place of business outside the state and that its contacts do not justify an expansion of the "exceptional case"); *Barnett v. Surefire Med., Inc.*, No. JFM-17-1332, 2017 WL 4279497, at *2 (D. Md. Sept. 25, 2017); *In re Asbestos Litig.*, No. 17-00251-VAC-

itly state that *Hertz* does not govern general jurisdiction's principal place of business inquiry. Nonetheless, it seems that these courts are continuing to apply a traditional, context-specific contacts test as modified by *Daimler*—a comparative contacts test rather than an absolute contacts test.¹³⁴ For example, one recent opinion concerning general jurisdiction neither cited *Hertz* nor discussed the term principal place of business within the context of general jurisdiction.¹³⁵ In that case, the court employed Justice Ginsburg's comparative contacts test: "[Defendant]'s nationwide sales, of which Maryland contributes between 2% and 4%, would be insufficient to render Maryland akin to a 'home state' for general jurisdiction purposes."¹³⁶

As such, this brand of general jurisdiction inquiry essentially asks first about state incorporation and principal place of business, and, if an easy answer does not emerge, then proceeds to a contacts test that looks a lot like a doing business test but incorporating Justice Ginsburg's directive for comparative contacts. The Southern District of New York recently stated the standard simply:

[Because neither paradigmatic example applies,] the exercise of general jurisdiction in this forum is constitutionally permissible only if AMC's contacts with the State of New York were of such a nature that New York was essentially AMC's home state. This standard requires a court to judge a corpo-

SRF, 2017 WL 4062249, at *2 (D. Del. Sept. 14, 2017); *Spratley v. F.C.A. U.S. L.L.C.*, No. 3:17-CV-0062, 2017 WL 4023348, at *3 (N.D.N.Y. Sept. 12, 2017); *Lemon v. Kramer*, No. 16-2025 (RC), 2017 WL 4060532, at *4 (D.D.C. Sept. 11, 2017); *Allstate Ins. Co. v. Electrolux Home Prod., Inc.*, No. 1:14 CV 329, 2014 WL 3615382, at *4 n.3 (N.D. Ohio July 18, 2014).

¹³⁴ *Minholz v. Lockheed Martin Corp.*, 227 F. Supp. 3d 249, 262 (N.D.N.Y. 2016) (holding that the defendant's comparative contacts did not render the defendant essentially at home, and then implying that the test for principal place of business is the nerve center test: "Thus, the facts neither establish that Lockheed Martin is 'essentially at home' in New York, nor provide a basis to conclude that New York is Lockheed Martin's surrogate for its place of incorporation or head office").

¹³⁵ See *Barnett*, 2017 WL 4279497 at *2 ("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." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 180 L. Ed.2d 796 (2011)). In the context of a corporation, the paradigm bases for general jurisdiction are 'the place of incorporation and principal place of business.' *Daimler AG v. Bauman*, — U.S. —, 134 S. Ct. 746, 759, 187 L. Ed.2d 624 (2014).").

¹³⁶ *Barnett*, 2017 WL 4279497 at *2; see also *DeGregorio v. Marriott Int'l, Inc.*, No. 17-3867, 2017 WL 6367894, at *4 (E.D. Pa. Dec. 13, 2017) (holding that the corporate defendant was not subject to general jurisdiction by applying *Daimler's* proportional contact test without mention of *Hertz*).

ration's contacts with the forum state against all of its national and global activities, and to exercise general jurisdiction only if a corporation's affiliation with the forum state is so strong that the entity is "comparable to a domestic enterprise in that State."¹³⁷

It is important to note, however, that it not always clear if the courts applying Justice Ginsburg's comparative contacts test are assessing the corporations' contacts in order to determine if they are in the exceptional case of general jurisdiction or if they are using the contacts inquiry to determine the (or a) principal place of business.¹³⁸ With the opinions lacking explicit discussion, it is unknown whether the courts are adopting the logic of *Hertz*—that corporations have only one principal place of business, a simple rule¹³⁹—or adopting the logic of *Erichson*, that a corporation can have multiple principal places of business in special circumstances, just as citizens can be dual nationals.¹⁴⁰

Other courts indicate that the exceptional case is simply an absolute quantum-of-contacts test.¹⁴¹ In this brand, *Daimler*

¹³⁷ *Hood v. Ascent Med. Corp.*, No. 13cv0628 (RWS) (DF), 2016 WL 1366920, at *9 (S.D.N.Y. Mar. 3, 2016) (citations omitted), *report and recommendation adopted*, No. 13 Civ. 628 (RWS), 2016 WL 3453656 (S.D.N.Y. June 20, 2016), *aff'd*, 691 F. App'x 8 (2d Cir. 2017).

¹³⁸ *See Barnett*, 2017 WL 4279497 at *2; *DeGregorio*, 2017 WL 6367894 at *4; *Google Inc. v. Rockstar Consortium U.S. LP*, No. C 13-5933 CW, 2014 WL 1571807, at *5 (N.D. Cal. Apr. 17, 2014) (stating that the defendants "claim to have principal places of business in Plano, Texas" before assessing the defendants' contacts with California and concluding that defendants were not at home in California without explicitly saying whether the inquiry was about principal place of business or the exceptional case).

¹³⁹ *Infra* note 197.

¹⁴⁰ *Erichson*, *supra* note 84, at 86 ("Unlike the definition of principal place of business under the diversity jurisdiction statute, there is no reason why general jurisdiction cannot encompass multiple home states in special cases." (footnote omitted)).

¹⁴¹ *See Congdon v. Cheapcaribbean.com, Inc.*, No. 17 C 5502, 2017 WL 5069960, at *7 (N.D. Ill. Nov. 3, 2017) ("Accordingly, to show that this is an exceptional case under *Daimler*, Plaintiffs must show that each of the Defendants' affiliations with Illinois are so continuous and systematic as to render them essentially at home in Illinois, which is more than the 'substantial, continuous, and systematic course of business' that was once thought to suffice." (quoting *Daimler*, 571 U.S. at 138)); *Hinrichs v. Gen. Motors of Canada, Ltd.*, 222 So. 3d 1114, 1122 (Ala. 2016) ("[T]he United States Supreme Court in *Goodyear* recently restricted the scope of general jurisdiction by requiring that the foreign corporation have such contacts with the forum state as to be 'at home' there, such as being incorporated there, having its principal place of business there, or having some other comparable level of intensity of contact."), *cert. denied*, 137 S. Ct. 2291 (2017).

simply took a “fairly high” bar¹⁴² and set it higher.¹⁴³ Finally, some courts cite to *Daimler* regarding general jurisdiction but only ask whether a corporation’s activities were continuous and systematic (and do not mention the two paradigms of modern general jurisdiction), seemingly applying the doing business test from before *Daimler*.¹⁴⁴

For the purposes of this Note, the Second Circuit’s treatment of general jurisdiction after *Daimler* is particularly instructive because its recent decisions discard any pure contacts inquiry and instead only assess contacts in conjunction with a uniqueness factor. The Second Circuit indicated that an “exceptional case” inquiry is necessarily more than an absolute or a comparative contacts test because “mere contacts” cannot establish general jurisdiction.¹⁴⁵ Accordingly, one could argue that the Second Circuit has effectively reduced the exceptional case to the facts of *Perkins* because of recent language focusing on *Perkins*’ “surrogate principal place of business.”¹⁴⁶ The logical implication may be that the exceptional case only exists when a corporation’s paradigmatic principal place of business has been temporarily invalidated, such as the wartime consequences of the corporation in *Perkins*. That directive, however, has not led all district courts in the Second Circuit to ignore contacts, implying that some Second Circuit courts still find contacts instructive regarding a principal place of business inquiry (in a comparative contacts

¹⁴² *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), *holding modified by* *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

¹⁴³ See *Congdon*, 2017 WL 5069960, at *7.

¹⁴⁴ See *Lamont v. Pilkington*, No. 17-cv-5942-JSC, 2018 WL 2176100, at *3 (N.D. Cal. Apr. 23, 2018), (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (citing numerous “doing business” cases)), *report and recommendation adopted sub nom. Lamont v. Edwards*, No. 17-cv-05942-WHO, 2018 WL 2151701 (N.D. Cal. May 10, 2018); *Return on Intelligence, Ltd. v. Shenkman*, No. 16-0317, 2017 WL 3310684, at *2 (E.D. Pa. Aug. 3, 2017); *New Asia Enters. Ltd. v. Fabrique, Ltd.*, No. 13 Civ. 5271 (JFK), 2014 WL 3950901, at *2 (S.D.N.Y. Aug. 13, 2014) (“A non-domiciliary is subject to general jurisdiction if it is ‘doing business’ in New York, meaning it is engaged in continuous, permanent, and substantial activity in New York. Relevant considerations include whether the defendant (1) maintains a New York office; (2) solicits business in New York; (3) owns property or bank accounts in New York; or (4) has employees present within New York.” (citations and quotations omitted)).

¹⁴⁵ *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (“And so, when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how ‘systematic and continuous,’ are extraordinarily unlikely to add up to an ‘exceptional case.’”).

¹⁴⁶ See *id.* (“Lockheed’s contacts with Connecticut fall far short of establishing a ‘surrogate principal place of business’ such as the Court found in *Perkins*.”).

scheme).¹⁴⁷ Framing the Second Circuit’s logic differently, the “uniqueness factor” inquiry—distinct from a full-blown reasonableness inquiry rejected in *Daimler*—simply asks whether a corporation’s contacts, plus a hint of something intangible, render a corporation at home: contacts plus.

B. The Contacts Plus Test

Under a contacts plus test, the exceptional case could be a conjunctive test requiring a certain (absolute) quantum of contacts and facts similar to *Perkins*, but not rising to the level of requiring a “surrogate” principal place of business where the paradigmatic principal place of business has been temporarily invalidated.¹⁴⁸ A corporation could be “at home” in its state of incorporation, its principal place of business, and in the state or states in which the corporation’s contacts satisfy the requirements of the exceptional case, an absolute contacts plus uniqueness inquiry. The contacts plus test would be useful because it would shift all contacts inquiries to the exceptional case, leaving the principal place of business inquiry for the nerve center test—simplifying the majority of general jurisdiction inquiries. The contacts plus test would also be particularly useful when a court assesses jurisdiction over a foreign corporation with substantial operations within the United States but with a foreign headquarters. A hypothetical corporation incorporated outside the United States, with a headquarters outside the United States, could still be within the scope of general jurisdiction if the corporation’s unique interactions with a forum state render the corporation fairly at home in the state.

The contacts plus test uses a uniqueness inquiry, rather than a reasonableness inquiry, to demonstrate its distance from the five-factor *Asahi* reasonableness test for specific jurisdiction that Justice Sotomayor advocated to be incorporated

¹⁴⁷ See, e.g., *Retail Pipeline, LLC v. JDA Software Grp., Inc.*, No. 2:17-cv-00067, 2018 WL 1621508, at *10 (D. Vt. Mar. 30, 2018) (“The income Defendant derived from these Vermont clients in fiscal year 2016 totaled \$352,508.48, less than 0.04% of its total annual revenue of approximately \$900 million. For fiscal years 2013 through 2015, less than one-tenth of one percent of Defendant’s revenue came from business in Vermont.”).

¹⁴⁸ This brings the logic to the brink of a third route: the imposition of a reasonableness requirement on general jurisdiction similar to that of specific jurisdiction under *Asahi*. This, however, is a route often argued but seemingly never successful. See *Brown*, 814 F.3d at 630 (“As the *Daimler* Court observed in rejecting the same argument, ‘[w]hen a corporation is genuinely at home in the forum State . . . [the *Asahi*] second-step inquiry would be superfluous.’” (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014))).

into general jurisdiction in *Daimler*. Accordingly, the contacts plus test sits between the expansive possibilities for general jurisdiction under the doing business test and a true reasonableness inquiry on the one end and the confinement of general jurisdiction to the two paradigmatic examples on the other. The contacts plus test is distinct from the traditional reasonableness inquiry because it looks only at the defendant's relationship to the forum, whereas the reasonableness inquiry considers a plaintiff's interest in litigating in the particular forum (among other factors). While Justice Ginsburg did describe the application of a reasonableness step to general jurisdiction's paradigmatic examples as "superfluous," it is unclear if this statement applied to the exceptional case.¹⁴⁹ Arguably, Justice Ginsburg's favorable citation of the "surrogate place of business" language from von Mehren and Trautman when discussing *Perkins*' unique wartime circumstances indicates her acceptance of some form of inquiry akin to the proposed uniqueness inquiry. Following this logic, a corporation that undertakes substantial corporate direction in two states could have a principal place of business under the nerve center test and an exceptional case under the contacts plus test because of the unique nerve-center activities in the second state. As described in Parts IV and V, the contacts plus test is in line with the history of general jurisdiction, draws support from at least a few jurists, and would ensure national corporations such as Amazon are not "too big" for general jurisdiction.¹⁵⁰

IV

POLICY POINTS IN FAVOR OF DISTINCT TREATMENT OF PRINCIPAL PLACE OF BUSINESS INQUIRIES FOR SUBJECT-MATTER JURISDICTION AND GENERAL JURISDICTION, BUT THE CONTACTS PLUS TEST ALLAYS THE CONCERNS

The application of the nerve center test to general jurisdiction's principal place of business derives support from *Daimler*.¹⁵¹ There are, however, compelling reasons that the jurisdictional inquiries for principal place of business of sub-

¹⁴⁹ *Daimler*, 571 U.S. at 139 n.20. See also *supra* notes 105–06 and accompanying text.

¹⁵⁰ *Id.*

¹⁵¹ See *infra* notes 158–63; see, e.g., *Daimler*, 571 U.S. at 130 n.8 (noting that *Perkins* "turned" on the fact that "[a]ll of Benguet's activities were directed by the company's president from within Ohio" (emphasis added)); *id.* at 157 (Sotomayor, J., concurring) ("The majority does not dispute that a State can exercise general jurisdiction where a corporate defendant has its corporate headquarters, and hence its principal place of business within the State.").

ject-matter jurisdiction and general jurisdiction should be different because underlying policy rationales do not align.¹⁵² On balance, this Note argues that the lower courts' adoption of the nerve center test for general jurisdiction's principal place of business inquiry is useful because it simplifies the principal place of business inquiry in most cases. Should the nerve center test for general jurisdiction's principal place of business become settled law, the doctrine can still achieve the survival of a contacts test and assuage any policy concerns by leaving open the door for courts to explore general jurisdiction's exceptional case as a contacts plus test.

For subject-matter jurisdiction, the federal diversity jurisdiction statute states "a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business."¹⁵³ In 2010, the Court granted certiorari for *Hertz Corp. v. Friend* to resolve a circuit split over the interpretation of the phrase "principal place of business" in that statute.¹⁵⁴ The Court decided that the nerve center test, "where the corporation's high level officers direct, control, and coordinate the corporation's activities,"¹⁵⁵ was the proper test—at least for the purposes of diversity jurisdiction.

Hertz said nothing about personal jurisdiction and *Daimler* said nothing about nerve centers. The *Daimler* majority does mention headquarters, but only in conjunction with reference to corporate activities such as manufacturing, indicating a contacts inquiry.¹⁵⁶ Justice Sotomayor's concurrence also mentions headquarters using language that implies that a headquarters is a flavor of contacts.¹⁵⁷

Nevertheless, common readings of Justices Ginsburg's and Sotomayor's opinions in *Daimler* endorse applying the nerve center test to general jurisdiction.¹⁵⁸ First, Justice Ginsburg cites to *Hertz* for the proposition that jurisdictional rules

¹⁵² See *id.* at 147–48.

¹⁵³ 28 U.S.C. § 1332(c)(1).

¹⁵⁴ *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

¹⁵⁵ *Id.*

¹⁵⁶ *Daimler AG v. Bauman*, 571 U.S. 117, 123 (2014) ("Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes-Benz vehicles primarily in Germany and has its headquarters in Stuttgart.").

¹⁵⁷ *Id.* at 142 (Sotomayor, J., concurring) ("The Court acknowledges that Mercedes-Benz USA, LLC (MBUSA), Daimler's wholly owned subsidiary, has considerable contacts with California. It has multiple facilities in the State, including a regional headquarters. Each year, it distributes in California tens of thousands of cars").

¹⁵⁸ See Cornett & Hoffheimer, *supra* note 73, 148–49.

should be easily ascertainable.¹⁵⁹ Justice Sotomayor seems to recognize this as an endorsement, writing that “[t]he majority does not dispute that a [s]tate can exercise general jurisdiction where a corporate defendant has its corporate headquarters, and hence its principal place of business within the state,” before citing *Hertz* herself.¹⁶⁰ Moreover, Justice Ginsburg writes that general jurisdiction was proper in *Perkins* because the defendant had “maintained the company’s files, and oversaw the company’s activities”¹⁶¹ from Ohio even though the Court in *Perkins* explicitly stated that the defendant’s activities in Ohio were a “continuous and systematic, *but limited*, part of its general business.”¹⁶² Most notably, while sparring with Justice Sotomayor’s interpretation of *Perkins*, Justice Ginsburg states “the point on which [*Perkins*] turned: All of Benguet’s activities were *directed* by the company’s president from within Ohio.”¹⁶³ These data point to the Supreme Court’s tacit approval of the nerve center test for general jurisdiction because they imply that a corporation’s principal place of business is the location from which a corporation’s activities are directed.

The policy rationale for adoption of the nerve center test for principal place of business is less clear. There is, however indirect, Supreme Court support for the idea that principal place of business inquiries for general jurisdiction and subject matter jurisdiction are distinct. For example, in *RJR Nabisco, Inc. v. European Community*,¹⁶⁴ the Court cited to *Hertz* in stat-

¹⁵⁹ *Daimler*, 571 U.S. at 137 (Ginsburg, J., majority). Justice Stephen Breyer, looking at both the legislative history of the federal diversity statute and the goal of having easily-solved jurisdictional questions, decided that the nerve center test would be more simply applied than both the gross income test, in which a court must find whether more than half a corporation’s income is derived from a state, and the general business activities test, in which a court must find whether a corporation’s activities in a state are “‘significantly larger’ than in the next-ranking state.” *Hertz*, 559 U.S. at 87, 93 (quoting *Friend v. Hertz Corp.*, 297 F. App’x 690, 691 (9th Cir. 2008), *vacated and remanded*, 559 U.S. 77 (2010)).

¹⁶⁰ *Daimler*, 571 U.S. at 157–58 (Sotomayor, J., concurring).

¹⁶¹ *Id.* at 129 (Ginsburg, J., majority).

¹⁶² *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 438, 438 (1952) (emphasis added).

¹⁶³ *Daimler*, 571 U.S. at 130 n.8. It could be argued that Justice Sotomayor’s concurrence also hints at an endorsement of the nerve center test. *Id.* at 148 (Sotomayor, J., concurring) (arguing that, for jurisdictional purposes, an important, unanswered question in the record remains: “Do [*Daimler*’s California employees] make important strategic decisions or oversee in any manner *Daimler*’s activities?”). If the direction of activities is critical to a general jurisdiction inquiry, perhaps an important factor in a uniqueness inquiry is whether substantial corporate direction occurs in more than one state.

¹⁶⁴ 136 S. Ct. 2090 (2016).

ing “courts can apply the ‘nerve center’ test that we use to determine a corporation’s principal place of business for purposes of federal diversity jurisdiction.”¹⁶⁵ If the Court believed each principal place of business inquiry were the same, the qualifier “for purposes of federal diversity jurisdiction” would be meaningless.

Disparate treatment of the two inquiries would make sense because personal jurisdiction and subject-matter jurisdiction stand on different foundations. As Cornett and Hoffheimer assert, the Court in *Hertz* adopted the nerve center test for reasons that do not apply to general jurisdiction.¹⁶⁶ First, the Court relied on legislative history specific to the federal diversity statute, history that advocated for simplicity, and with the knowledge that Congress could return to the subject should Congress disagree with the nerve center test interpretation.¹⁶⁷ For general jurisdiction, this logic does not apply. Justice Ginsburg, elucidating previous general jurisdiction precedent, wrote the principal place of business language in *Daimler* to build on earlier federal precedent rather than to clarify a federal statute.¹⁶⁸ Simplicity was not the goal of previous contacts inquiries, or at least such a goal was not clear from the few general jurisdiction Supreme Court cases. Moreover, unlike for subject-matter jurisdiction, the language appears in no federal statute. Congress is thus not afforded the same opportunity to rectify any jurisdictional changes they disagree with.

Second, the inclusion of principal place of business in the subject matter jurisdiction inquiry serves to narrow the scope of federal jurisdiction while inclusion of principal place of business in general jurisdiction does not.¹⁶⁹ Diversity jurisdiction is a carefully calibrated cog in contemporary federalism, and if a litigant does not meet the test, a state court will still be available because of state courts’ general jurisdiction. Restricting personal jurisdiction by adopting the nerve center test would effectively narrow both federal and state courts’ jurisdiction, narrowing the breadth of litigants who could be haled into

¹⁶⁵ *Id.* at 2104.

¹⁶⁶ See Cornett & Hoffheimer, *supra* note 73, at 147–48.

¹⁶⁷ *Id.* at 148 n.226.

¹⁶⁸ See *Daimler*, 571 U.S. at 125–39.

¹⁶⁹ See Cornett & Hoffheimer, *supra* note 73, at 148 n.228. For further discussion on why subject-matter jurisdiction and personal jurisdiction should receive different treatment, including discussion of potential infringement on state sovereignty, see Seungwon Chung, Note, *The Shoe Doesn’t Fit: General Jurisdiction Should Follow Corporate Structure*, 100 MINN. L. REV. 1599, 1624 (2016).

either court. Simplicity and ease of application should be less important when the stakes are higher.

Finally, at its core, general jurisdiction is about what Due Process requires—simplicity likewise seems less important when answering a constitutional rather than a statutory question. The federal diversity statute is a directive from Congress to narrow the span of cases beyond what the Constitution allows; to treat an inquiry about the outer bounds of Due Process in the personal jurisdiction context identically would be counterintuitive.

If a corporation is able to use the definition of principal place of business to structure their corporate activities in order to avoid suit in a state completely, then a plaintiff's practical opportunity to sue the corporation will be substantially affected.¹⁷⁰ In 2015, Cornett and Hoffheimer wrote "it is a safe prediction that corporations will aggressively argue that the test applies to general personal jurisdiction in cases where it benefits them,"¹⁷¹ and they were not wrong.¹⁷²

Nevertheless, this Note argues that the adoption of the nerve center test for general jurisdiction's principal place of business is desirable as long as a contacts inquiry survives in general jurisdiction's exceptional case. If the exceptional case is effectively limited to the facts of *Perkins*, then the nerve center test would be inappropriate because it would narrow general jurisdiction well beyond its precedential roots. On the other hand, if the exceptional case morphs into a contacts plus test that falls in between the "overexpansion" of the doing business test and the over-restriction of a general jurisdiction limited to the two paradigms, then the problems related to the adoption of the nerve center would be mollified.

V

AMAZON'S HQ2: A THIRD HOME?

Amazon's recent announcement of its plan to build a second headquarters, a project it calls HQ2,¹⁷³ crystallizes the current problem with general jurisdiction. With one of America's largest corporations soon to have an HQ1 in Wash-

¹⁷⁰ See Cornett & Hoffheimer, *supra* note 73, at 149 ("In contrast, corporations will certainly seek to structure their activity, including the location of their corporate headquarters, so as to avoid being subject to general personal jurisdiction.")

¹⁷¹ *Id.*

¹⁷² See, e.g., *supra* notes 120, 124 and accompanying text.

¹⁷³ Wingfield & Cohen, *supra* note 21.

ington,¹⁷⁴ over 30,000 employees in California,¹⁷⁵ and up to 50,000 employees in a third, HQ2 state,¹⁷⁶ the question of how the law of personal jurisdiction will respond to our ever-nation-alizing corporate economy is ripe.

Personal jurisdiction has evolved over time to match the evolution of society and the economy. Professor Kevin M. Clermont asserts that the “evolution of the common law of territorial jurisdiction has come largely in response to socio-economic-political pressures, as well as changes in technology and even philosophy.”¹⁷⁷ Over the last century, personal jurisdiction has had to respond to the genesis of car accidents,¹⁷⁸ to the nuanced realities of modern finance,¹⁷⁹ and to the development of a modern international economy.¹⁸⁰ Meanwhile, American social thought has largely shifted from a “laissez-faire [philosophy] to a social-welfare philosophy.”¹⁸¹ As evidenced by *Goodyear*, *Daimler*, and *Bristol-Myers Squibb*, however, the Supreme Court has recently stymied the general trend matching the reach of personal jurisdiction with these societal changes. This need not be the case; as shown by Justice Sotomayor’s concurrence in *Daimler*, general jurisdiction jurisprudence can continue to naturally transform in response to the modernization of the economy.¹⁸² The contacts plus test

¹⁷⁴ *Id.*

¹⁷⁵ Clare McGrane, *United States of Amazon in 2017: Interactive Graphic Shows Where the Tech Giant is Growing Now*, GEEKWIRE (Feb. 2, 2017, 11:15 AM), <https://www.geekwire.com/2017/united-states-amazon-2017-interactive-graphic-shows-tech-giant-growing-now/> [<https://perma.cc/9KXT-X2WP>].

¹⁷⁶ Wingfield & Cohen, *supra* note 21. It looked as though Amazon’s HQ2 would actually build its HQ2 and HQ3, with Amazon choosing both New York City and Arlington County, Virginia for its HQ2 expansion. See Laura Stevens, Keiko Morris & Katie Honan, *Amazon Picks New York City, Northern Virginia for Its HQ2 Locations*, WALL ST. J. (Nov. 13, 2018, 12:16 AM), <https://www.wsj.com/articles/amazon-chooses-new-york-city-and-northern-virginia-for-additional-headquarters-1542075336?ns=prod/accounts-wsj> [<https://perma.cc/L53U-JTBC>]. Amazon, however, later withdrew its plans for expansion into New York City. J. David Goodman, *Amazon Pulls Out of Planned New York City Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens.html> [<https://perma.cc/PMU6-KQ36>].

¹⁷⁷ CLERMONT, *supra* note 38 at 250.

¹⁷⁸ See *Hess v. Pawloski*, 274 U.S. 352, 353 (1927).

¹⁷⁹ See *Shaffer v. Heitner*, 433 U.S. 186, 214 (1977) (holding that Delaware did not have personal jurisdiction over defendants solely by virtue of defendants owning stock in company incorporated in Delaware).

¹⁸⁰ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 312–13. (1945).

¹⁸¹ CLERMONT, *supra* note 38, at 250.

¹⁸² See *Daimler AG v. Bauman*, 571 U.S. 117, 155–57 (Sotomayor, J., concurring) (2014) (“In the era of *International Shoe*, it was rare for a corporation to have such substantial nationwide contacts that it would be subject to general jurisdiction in a large number of States. Today, that circumstance is less rare. But that

would likewise provide the necessary flexibility without contravening *Daimler*. If a new path is not explored, these recent decisions may allow national and international corporations to insulate themselves from lawsuits by choosing where plaintiffs can sue them.

Such a result would be troubling, especially in an era when technology companies—offering increasingly intangible goods and services—are currently in unprecedented control of the American economy. For example, five American companies—Apple, Google, Microsoft, Cisco, and Oracle—control over one-third of all money in the nation.¹⁸³ Amazon, not to be outdone, has the fifth highest market capitalization of any American corporation¹⁸⁴ and recently stoked antitrust fears on Capitol Hill with its purchase of Whole Foods.¹⁸⁵

Amazon's announcement of its search for a new state for its HQ2, and the accompanying five billion dollar investment that will come with it, has led to a very public auction for Amazon's favor.¹⁸⁶ Amazon had 238 applications from cities

is as it should be. What has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy.”)

¹⁸³ Matt Krantz, *A Third of Cash Is Held by 5 U.S. Companies*, USA TODAY (May 22, 2016, 4:47 PM), <https://www.usatoday.com/story/money/markets/2016/05/20/third-cash-owned-5-us-companies/84640704/> [<https://perma.cc/A4FH-JP22>].

¹⁸⁴ Kenneth Kiesnoski, *The Top 10 US Companies by Market Capitalization*, CNBC (Mar. 8, 2017, 7:53 AM), <https://www.cnbc.com/2017/03/08/the-top-10-us-companies-by-market-capitalization.html#slide=6/> [<https://perma.cc/HXN2-PL74>]; see also Max A. Cherney, *Amazon Headed for \$1.6 Trillion Market Cap, Analyst Suggests*, MARKETWATCH (Sept. 8, 2017, 6:48 AM), <https://www.marketwatch.com/story/amazon-headed-for-16-trillion-market-cap-analyst-suggests-2017-09-07/> [<https://perma.cc/DLV3-SEPA>] (predicting that Amazon will have a \$1.6 trillion dollar market capitalization by 2025).

¹⁸⁵ See Lucinda Shen, *This Congressman Is Worried About What Amazon Will Do with Whole Foods*, FORTUNE (July 14, 2017), <http://fortune.com/2017/07/14/amazon-whole-foods-antitrust-stock/> [<https://perma.cc/EZ8N-LHUZ>] (“[House Judiciary Committee Chairman David Cicilline] noted that the deal raised concerns about Amazon’s dominance in general in e-commerce.”). But see Nitasha Tiku, *Ready for a Monopoly Fight? Amazon and Whole Foods Isn’t It*, WIRED (June 20, 2017, 11:22 AM), <https://www.wired.com/story/amazon-whole-foods-monopoly-antitrust/> [<https://perma.cc/ZV5F-2H2L>] (“Regulators believe that the lower prices and increased efficiency that comes from using economies of scale and scope are a net positive for consumers.”). For an argument that antitrust law needs restructuring in order to properly regulate Amazon, see Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 712–17 (2017).

¹⁸⁶ See Nick Wingfield, *Amazon Chooses 20 Finalists for Second Headquarters*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html> [<https://perma.cc/7XJU-4J8C>]; Nellie Bowles, *For Cities Wooing Amazon’s New Headquarters, Nothing Is Too Strange*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/technology/wooing-amazon-second-headquarters.html> [<https://perma.cc/S2LD-4TSK>].

wishing to be the location of Amazon's HQ2 and the accompanying economic vitalization.¹⁸⁷ Amazon has said that it needs to expand to a second headquarters because it has outgrown its original home in Seattle, promising levels of investment that would forever transform any metropolitan area.¹⁸⁸ States have put forth various economic plans to lure Amazon, such as New Jersey's proposal to give up to seven billion dollars in tax incentives to have Amazon come to Newark.¹⁸⁹ State officials like Governor Terry McAuliffe of Virginia have openly campaigned for Amazon's HQ2,¹⁹⁰ and the New York Times reported courting tactics that included "[b]usiness leaders in Tucson . . . mail[ing] Amazon's chief executive, Jeff Bezos, a 21-foot cactus."¹⁹¹ It is clear that Amazon will derive a lot of benefit from moving its operations into a new state; the underlying policy rationales of personal jurisdiction dictate that Amazon's receipt of benefits from a state should have the reciprocal effect of subjecting it to suit in that state.¹⁹²

Despite Amazon's broad reach into millions of Americans' daily lives, current general jurisdiction jurisprudence dictates that plaintiffs can only sue Amazon by invoking specific jurisdiction or suing where Amazon is at home: its state of incorporation and its principal place of business. Amazon is incorporated in Delaware,¹⁹³ far from a plaintiff-friendly jurisdiction like California.¹⁹⁴ Thus, how a court decides where Amazon's principal place of business is—and whether Amazon has an exceptional third home—is critical.

¹⁸⁷ Wingfield, *supra* note 186.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Terry McAuliffe (@TerryMcAuliffe), TWITTER (Jan. 18, 2018, 6:53 AM), [https://twitter.com/TerryMcAuliffe/status/954003943218171906/ \[https://perma.cc/SJ96-DML7\]](https://twitter.com/TerryMcAuliffe/status/954003943218171906/[https://perma.cc/SJ96-DML7]) ("BIG: Northern VA is finalist for @Amazon HQ2! Thx to all who put in hard work to get us here. Let's close the deal and bring it home!").

¹⁹¹ Bowles, *supra* note 186 ("It's like 'The Amazing Race,'" said Jim Watson, the mayor of Ottawa. "You've got this cast of characters running toward the Holy Grail.").

¹⁹² *Daimler AG v. Bauman*, 571 U.S. 117, 156 (2014) (Sotomayor, J., concurring) ("Just as it was fair to say in the 1940s that an out-of-state company could enjoy the benefits of a forum State enough to make it 'essentially at home' in the State, it is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is 'essentially at home' in each one.").

¹⁹³ Amazon.com, Inc., Annual Report (Form 10-K) (Feb. 17, 2003).

¹⁹⁴ The American Tort Reform Foundation currently has California listed as number two on its list of "judicial hellholes," while Delaware is listed as a "point of light." AM. TORT REFORM FOUND., JUDICIAL HELLHOLES: 2016–2017, 9, 54 (2016) www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf [www.perma.cc/NS6N-DULK].

Before Amazon builds its HQ2, the personal jurisdiction hypothetical is relatively simple. If courts apply the traditional, absolute contacts test,¹⁹⁵ then Amazon's principal place of business would likely be California.¹⁹⁶ Justice Ginsburg's opinion in *Daimler* essentially states that a corporation can only have one principal place of business,¹⁹⁷ so there could be a debate between California and Washington depending on the type of in-state activity the court looks to, but the choice would be binary.¹⁹⁸ Whichever state a court did not deem Amazon's principal place of business would have an argument to fall into the exceptional case, but the argument would almost certainly be a losing one (under current exceptional case jurisprudence). *Hertz* similarly forecloses the option of having more than one nerve center.¹⁹⁹ Thus, should courts currently apply the nerve center test to Amazon pre-HQ2, plaintiffs could almost certainly sue Amazon in Washington, but Amazon would be insulated from suit in California despite employing over 30,000 in-state employees.²⁰⁰

After Amazon completes HQ2, the personal jurisdiction hypothetical becomes more complex and less equitable when considering general jurisdiction's history of expansion. Should courts apply an absolute contacts test, Amazon's principal

¹⁹⁵ See *Daimler*, 571 U.S. at 139 n.20 (2014) (clarifying that the new "at home" test is more restrictive than the "doing business" test in that it takes a corporation's contacts with a state in relation to its "activities in their entirety, nationwide and worldwide," such that a corporation will almost always be at home in only one or two states). Even after *Daimler* lessened the breadth of the doing business test courts could still use the operations test to come to this result, though the particular differences between the traditional doing business test and the modern operations (business activity test) would likely need to be explained and refined. The most relevant difference after *Daimler* is that there can (almost certainly) only be one solution to the question of principal place of business, whereas before *Daimler* (and *Goodyear*) it was an open question whether the question allowed multiple solutions.

¹⁹⁶ For the sake of this analysis, I will assume that courts would find California to be Amazon's principal place of business under the operations test.

¹⁹⁷ Moreover, *Hertz* held that a corporation could have only one principal place of business and so courts that apply *Hertz* to principal place of business for personal jurisdiction agree that the term is necessarily singular. See *McCullough v. Royal Caribbean Cruises, Ltd.*, 268 F. Supp. 3d 1336, 1346 n.5 (S.D. Fla. 2017) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010)), *appeal dismissed*, No. 18-10327-DD, 2018 WL 2047457 (11th Cir. Feb. 21, 2018); cf. *Smith v. Kansas City S. Ry. Co.*, 214 So. 3d 272, 276 (Miss. 2017) ("We now find that a corporation may have only one principal place of business [for purposes of venue]."). But see *Daimler*, 571 U.S. at 137 ("[State of incorporation and principal place of business] have the virtue of being unique—that is, each *ordinarily* indicates only one place" (emphasis added)).

¹⁹⁸ See *Daimler*, 571 U.S. at 138–39.

¹⁹⁹ See *Hertz Corp. v. Friend*, 559 U.S. 77, 93–95 (2010).

²⁰⁰ *McGrane*, *supra* note 175.

place of business would be California. Thus, Delaware and California could assert personal jurisdiction over Amazon, but neither Washington nor the state in which HQ2 is built could. Should courts apply the nerve center test, Amazon's principal place of business would likely be Washington (or perhaps the location of HQ2). Delaware and Washington could assert personal jurisdiction over Amazon, but neither California nor the state in which HQ2 is built could.

Under either test, the problem is that Amazon would be insulated from suit in two states that would have very likely had general jurisdiction over Amazon prior to *Daimler*. Additionally, under either test, Justice Ginsburg's comparative contacts test will likely yield the same results while only making the possibility of an exceptional case (or second principal place of business) less likely. Amazon would become a demonstration of Justice Sotomayor's argument in *Daimler*, that the comparative contacts test and limitation to two at-home states essentially insulates national corporations from general jurisdiction.²⁰¹

Moreover, the application of the nerve center test will allow corporations to select a nerve center in anticipation of litigation, engaging in a brand of ex ante forum shopping. Justice Sotomayor recognized just such a problem in her *Daimler* concurrence, writing that "the majority's approach unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries."²⁰² Justice Sotomayor hypothesized that the *Daimler* opinion would allow a corporation to split its managerial functions across three states, deem one state its nominal corporate headquarters, and avoid general jurisdiction in two states with which it is in continuous and systematic contact.²⁰³ This is very similar to the situation we will soon face with Amazon. Logically, Amazon will attempt to structure its corporate activ-

²⁰¹ See *supra* note 97 and accompanying text.

²⁰² *Daimler*, 571 U.S. at 157 (Sotomayor, J., concurring).

²⁰³ *Id.* at 157–58 ("If the State where the headquarters is located can exercise general jurisdiction, why should the other two States be constitutionally forbidden to do the same? Indeed, under the majority's approach, the result would be unchanged even if the company has substantial operations within the latter two States (and even if the company has no sales or other business operations in the first State). Put simply, the majority's rule defines the Due Process Clause so narrowly and arbitrarily as to contravene the States' sovereign prerogative to subject to judgment defendants who have manifested an unqualified 'intention to benefit from and thus an intention to submit to the[ir] laws.'" (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion))).

ity as to choose the most defense-friendly state for its nerve center and thus insulate itself from suit in states that should be able to exert general jurisdiction.²⁰⁴

VI

A POTENTIAL PATH FORWARD: THE EXCEPTIONAL CASE AS CONTACTS PLUS

This Note identifies the contacts plus test in order to follow Justice Sotomayor's suggestion in *Daimler* of expanding the exceptional case in which a corporation is at home in more than its state of incorporation and its principal place of business while remaining mindful of Justice Ginsburg's warning that a corporation cannot be deemed at home in all states in which it conducts business. This solution would be possible without "stretch[ing] general jurisdiction beyond limits traditionally recognized"²⁰⁵ and without preventing corporations "[from] structur[ing] their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."²⁰⁶ Plaintiffs would be able to sue Amazon in their HQ2 state, but not in all fifty states. This Part examines the jurisprudential foundation for such a test, both by analogy to recent Supreme Court precedent discussing physical presence and internet sales tax and by reference to current support such a test has among jurists. The Part then applies the contacts plus test to Amazon's HQ2 as a demonstration of the test's utility.

The contacts plus test would be in line with pre-*Daimler* general (and personal) jurisdiction precedent. Justice Sotomayor's reasoning adheres closest to pre-*Daimler* precedent, which is characterized by a much more forgiving contacts test. The test simply looked at whether contacts were "of the sort that approximate physical presence."²⁰⁷ Factors that pointed in the direction of the exercise of general jurisdiction included, among others, "whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a

²⁰⁴ Cornett & Hoffheimer, *supra* note 73, at 149 ("In contrast, corporations will certainly seek to structure their activity, including the location of their corporate headquarters, so as to avoid being subject to general personal jurisdiction.")

²⁰⁵ *Daimler*, 571 U.S. at 132.

²⁰⁶ *Id.* at 139 (Sotomayor, J., concurring) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

²⁰⁷ *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), *holding modified by* *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

license, or is incorporated there.”²⁰⁸ As such, Justice Ginsburg’s announcement of the two paradigmatic examples of general jurisdiction in *Daimler* comports with previous precedent, but the raising of the jurisdictional bar to nearly insurmountable heights does not.²⁰⁹

The contacts plus test’s flexibility to permit the expansion of general jurisdiction alongside the modern economy is in line with the doctrine’s roots in *International Shoe*. As the economy continues to modernize, personal jurisdiction would remain tethered to traditional notions of fair play and substantial justice—national and multinational corporations who derive unique benefit from doing business in more than two states would be subject to suit in more than two states. Corporations this expansive were simply much more rare in the age of *Pennoyer*; the doctrine should not remain static or reverse while the entities it governs evolve.

Ironically,²¹⁰ one of the most recent enunciations of advocacy for this position comes from a state supreme court dissenting opinion on a topic straight out of the age of *Pennoyer*: railroads. In 2017, Justice Martha Lee Walters of the Oregon Supreme Court wrote a dissent in *Barrett v. Union Pacific Railroad Co.* arguing that exercise of general jurisdiction over a railroad in more than twenty states was well in line with traditional, *Pennoyer*-ian understandings of general jurisdiction.²¹¹ That case involved a negligence claim by a railroad employee, stemming from a personal injury, under the Federal Employers’ Liability Act.²¹² The court held that Oregon courts could not exercise general jurisdiction over Union Pacific because *Daimler* dictated a comparative contacts test that requires more than substantial contacts.²¹³ This was despite the fact that Union Pacific “employs 1,700 persons in Oregon, has an

²⁰⁸ *Id.*

²⁰⁹ See *Air Tropiques, Sprl v. N. & W. Ins. Co.*, No. H-13-1438, 2014 WL 1323046, at *10 (S.D. Tex. Mar. 31, 2014) (“Before *Daimler*, NWIC might have been subject to general jurisdiction in this forum.”).

²¹⁰ The Union Pacific Railroad, a corporation derivative of the very same that President Abraham Lincoln directed to help build the transcontinental railroad in 1862—sixteen years before the Court decided *Pennoyer*—was a party in the recent, important personal jurisdiction case *Barrett v. Union Pacific Railroad Co.*, 390 P.3d 1031, 1041–42 (Or. 2017). *Chronological History*, UNION PACIFIC, <https://www.up.com/aboutup/history/chronology/index.htm/> [https://perma.cc/24S7-47AG].

²¹¹ *Barrett*, 390 P.3d at 1041–42 (Walters, J., dissenting).

²¹² *Id.* at 1032–33 (Kistler, J., majority opinion).

²¹³ *Id.* at 1036 (“To paraphrase the Court’s reasoning in *Daimler*, if Oregon can exercise general jurisdiction over Union Pacific because that company’s activities in this state are substantial and continuous, then every state in which Union

annual Oregon payroll of \$144.6 million, owns and operates almost 1,100 miles of track throughout the state, and generates over \$645 million annually in revenue from its Oregon operations.”²¹⁴

Justice Walters, in dissent, reasoned that, at least from *Pennoyer* to *Daimler*, state courts “had undisputed jurisdiction to protect their residents from injuries inflicted by railroads that owned tracks and conducted substantial business within their borders” regardless of states of incorporation or principal places of business.²¹⁵ Looking then at *Daimler*, Justice Walters concluded that the case was an example of the exceptional case.²¹⁶ The case, then, is a roadmap to the potential expansion of general jurisdiction via contacts plus and the exploration of the exceptional case.

Justice Walters’ reasoning is worth examination. She begins by isolating four rationales underlying *Daimler*: general jurisdiction should not stretch beyond traditional limits;²¹⁷ there are two paradigmatic examples because they are “unique and easily ascertainable”;²¹⁸ simply substantial contacts is an insufficient basis for jurisdiction because corporations necessarily must retain the ability to predict liability to suit with “some minimum assurance”;²¹⁹ and courts cannot expand personal jurisdiction to the detriment of international comity.²²⁰ Justice Walters’ dispositions of the first and last rationales are simple. First, she reasons that *Daimler* did not hold that *Pennoyer*’s territorial approach was completely incorrect today, but only that it was not determinative—such a ruling would not expand traditional general jurisdiction.²²¹ Second, the international comity rationale is certainly less applicable in the context of a suit against a domestic railroad than it was in *Daimler*,

Pacific has engaged in similar activities can assert general jurisdiction over it [and *Daimler* forbids this result].”).

²¹⁴ *Id.* at 1036.

²¹⁵ *Id.* at 1043 (Walters, J., dissenting).

²¹⁶ *Id.* at 1045 (“The general jurisdictional opening that the Court preserved in *Daimler* may be slim, but the principles of dual sovereignty at play here should permit these plaintiffs to step through.”).

²¹⁷ *Id.* at 1043 (citing *Daimler AG v. Bauman*, 571 U.S. 117, 131 (2014)).

²¹⁸ *Id.* (citing *Daimler*, 571 U.S. at 136).

²¹⁹ *Id.* at 1043–44 (citing *Daimler*, 571 U.S. at 139 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985))).

²²⁰ *Id.* at 1044.

²²¹ *See id.* at 1044 (“It would be far more novel to *preclude* Oregon from exercising jurisdiction in this case than it would be to *permit* it.”).

a suit against a foreign corporation.²²² Both arguments would apply with equal force to the case of Amazon.

Justice Walters' approaches to the second and third rationales, however, are more complex; they effectively turn the common reading of *Daimler* on its head. She advocates for the adoption of a threshold contacts test for the exceptional case, points out that corporations are not logically "at home" in their states of incorporation because they do no business there, and argues that a contacts test for principal place of business would be too complex.²²³ In *Barrett*, for example, the defendant had the highest number of employees and greatest length of track in Texas but the defendant argued that its principal place of business was Nebraska.²²⁴ At the core of Justice Walters' reasoning is *International Shoe* and the idea that Due Process is about fairness and a state's authority. Rather than focusing on contacts, "[she] rel[ies], instead, on Oregon's right to protect one of its residents from harm done by a corporation with a permanent, physical presence here, that is, by its nature, unique."²²⁵ Railroads are unique because in order to do business in a state they must physically, and therefore consciously, enter that state—to say that they cannot reasonably gain awareness of or plan for liability to suit would be counter-intuitive, she argues.²²⁶

These arguments also apply to the case of Amazon and show why a reconsideration of general jurisdiction jurisprudence is in order. A contacts test for principal place of business would be counter to the simplicity sought—to hold, however, that the exceptional case was dictated by a threshold contacts test with an inquiry for that "something more" would recreate the simplicity desired. *Barrett* would come out the other way, and all railroad corporations would know that they are liable to suit in states in which they lay tracks. Domestic companies such as Amazon would argue that the "something more" inquiry would create uncertainty, but that should be a losing argument because a few court decisions would signal to Amazon that it was subject to more than two states' personal jurisdiction.

²²² See *id.* at 1045 ("It would be rare for a multinational corporation to own tracks or operate railroads in the United States or in Oregon, and if it did, it would do so with notice of FELA's jurisdictional reach.").

²²³ See *id.* at 1044.

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.* at 1044–45.

Amazon's presence is permanent, physical, and unique—a state should have the power to protect its citizens from harms the corporation commits. In 2017, the corporation accounted for 44% of all U.S. e-commerce²²⁷ and pulled in over 50 billion dollars of revenue.²²⁸ Assessing it based on the pre-*Daimler* factors, Amazon makes sales, engages in business in the state, and serves the state's markets. Amazon would have likely passed the pre-*Daimler* test, so *Daimler* should be understood in a way that Amazon still passes.

Moreover, recent factual and legal developments also point to the propriety of general jurisdiction over Amazon. First, Amazon's expansion into new markets demonstrates its inextricable link to states' markets. Before *Daimler*, the Ninth Circuit wrote that “engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state's borders.”²²⁹ Amazon's expansion, however, demonstrates that they do more than simply engaging in basic commerce. Amazon now owns the grocer Whole Foods,²³⁰ is in the process of becoming a major player in the pharmaceutical industry,²³¹ and has physical fulfillment centers in thirty states.²³² It has physical offices in fifty-two locations in the United States, in twenty-eight states.²³³ According to Justice Walsh's logic in *Barrett*, Amazon's physical presence in these states could be treated as

²²⁷ Lauren Thomas, *Amazon Grabbed 4 Percent of All U.S. Retail Sales in 2017, New Study Says*, CNBC (Jan. 3, 2018, 9:05 AM), <https://www.cnbc.com/2018/01/03/amazon-grabbed-4-percent-of-all-us-retail-sales-in-2017-new-study.html> [<https://perma.cc/4HF4-687S>].

²²⁸ Eugene Kim, *Amazon Misses on Revenue but Earnings Came in More Than Double What the Street Expected*, CNBC (July 26, 2018, 9:16 PM), <https://www.cnbc.com/2018/07/26/amazon-earnings-q2-2018.html> [<https://perma.cc/6F7U-J3TV>].

²²⁹ *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), *holding modified by* *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

²³⁰ See Lauren Hirsch, *A Year After Amazon Announced Its Acquisition of Whole Foods, Here's Where We Stand*, CNBC (June 15, 2018, 6:56 PM), <https://www.cnbc.com/2018/06/15/a-year-after-amazon-announced-whole-foods-deal-heres-where-we-stand.html> [<https://perma.cc/4WQH-CQB2>].

²³¹ See Anthony Mirhaydari, *Here's the Reason Why Amazon Is Diving into Health Care*, CBS: MONEYWATCH (July 2, 2018, 5:30 AM), <https://www.cbsnews.com/news/why-amazon-is-diving-into-healthcare/> [<https://perma.cc/F93W-HPKH>].

²³² Dennis Green & Anaele Pelisson, *This Map of Amazon's Warehouse Locations Shows How It's Taking Over America*, BUS. INSIDER (Sep. 27, 2017, 12:16 PM), <https://www.businessinsider.com/amazon-warehouse-locations-in-us-2017-9/> [<https://perma.cc/Y2H6-CGDA>].

²³³ *Find Jobs by Location*, AMAZON, https://www.amazon.jobs/locations/?&continent=north_america&cache/ [<https://perma.cc/SL23-7J34>].

Justice Walsh treats the rail lines' physical presence. In terms of the contacts plus test, Amazon's contacts would surely be substantial enough and their "something more" could be their participation in vast and disparate areas of the modern economy or the pervasiveness of their enterprise.

Since *Daimler*, the legal argument that a corporation such as Amazon, functioning primarily as an online retailer, would be subject to pre-*Daimler* general jurisdiction has strengthened. Before *Daimler*, the Ninth Circuit noted that a corporation was not subject to general jurisdiction because the corporation "pa[id] no taxes," had no advertising, and its website was "'passive,' i.e., consumers [could] not use it to make purchases."²³⁴ Certainly Amazon has advertisements²³⁵ and its website is an active marketplace.²³⁶

The taxation argument has moved recently to point even more strongly towards the exercise of personal jurisdiction. In *South Dakota v. Wayfair, Inc.*, the Court overruled over fifty years of precedent in holding that a retailer need not maintain a physical presence in a state in order for their sales to be subject to a state's sales tax.²³⁷ The physical presence rule dictated that "[u]nless the retailer maintained a physical presence such as 'retail outlets, solicitors, or property within a State,' the State lacked the power to require that retailer to collect a local use tax."²³⁸ In fact, such a rule had once been based on the Due Process Clause, similar to personal jurisdiction doctrine.²³⁹ In *Wayfair*, the Court recognized that a rule linking taxation to physical presence was antiquated, given the development of the modern economy.²⁴⁰ The Court was not equivocal: "The Internet's prevalence and power have changed the dynamics of the national economy."²⁴¹ In addition, the

²³⁴ *Bancroft & Masters*, 223 F.3d at 1086.

²³⁵ See, e.g., *Alexa Loses Her Voice – Amazon Super Bowl LII Commercial*, YOU TUBE (Jan. 31, 2018), [https://www.youtube.com/watch?v=J6-8DQALGt4/\[https://perma.cc/22A6-DKTK\]](https://www.youtube.com/watch?v=J6-8DQALGt4/[https://perma.cc/22A6-DKTK]).

²³⁶ AMAZON, [https://amazon.com/\[https://perma.cc/CBU3-NCYV\]](https://amazon.com/[https://perma.cc/CBU3-NCYV]) (last visited Jan. 31, 2019).

²³⁷ 138 S. Ct. 2080, 2099 (2018).

²³⁸ *Id.* at 2091.

²³⁹ *Id.* at 2091–92 ("Despite the fact that [*National Bellas Hess, Inc. v. Department of Rev.*, 386 U.S. 753 (1967)] linked due process and the Commerce Clause together, the Court in [*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)] overruled the due process holding, but not the Commerce Clause holding; and it thus reaffirmed the physical presence rule.").

²⁴⁰ *Wayfair*, 138 S. Ct. at 2092 ("Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States.").

²⁴¹ *Id.* at 2097.

Justices of the Supreme Court have been contemplating the “far-reaching systemic and structural changes in the economy” the Internet has had for some time.²⁴²

The same logic should apply to personal jurisdiction because the same changes have likewise made personal jurisdiction antiquated in the context of the Internet. Both doctrines were once based on physical presence, and actual physical presence should likewise be stricken from each. In fact, *International Shoe* itself equated the two doctrines’ foundational underpinnings when the Court stated “[t]o say that the corporation is so far ‘present’ there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided.”²⁴³ This outcome would be in line with pre-*Daimler* general jurisdiction because courts treated presence for jurisdictional purposes equivalently to presence for other purposes: “Unless a defendant’s contacts with a forum are so substantial, continuous, and systematic that the defendant can be deemed to be ‘present’ in that forum for all purposes [general jurisdiction does not lie]”²⁴⁴

Even if the Court did not wish to move away from *Daimler*’s declaration that “[a] corporation that operates in many places can scarcely be deemed at home in all of them,”²⁴⁵ the construction of Amazon’s HQ2 exemplifies the need to explore general jurisdiction’s exceptional case. It would be hard to argue that Amazon’s HQ2 would not pass the contacts plus test. Taking *Perkins* as the textbook example of the exceptional case,²⁴⁶ the corporation in *Perkins* had sufficient contacts plus the fact that it needed to hold a makeshift headquarters in Ohio because of World War II.²⁴⁷ Amazon’s HQ2 should pass the contacts threshold because its contacts dwarf those of the

²⁴² Direct Mktg. Ass’n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

²⁴³ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added). Allan Erbsen recently noted this same internal inconsistency between the Court’s decision in *Wayfair* and its specific jurisdiction decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). See Allan Erbsen, *Wayfair Undermines Nicastro: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 YALE L.J. FORUM 724, 724–27 (2019). Put simply, “*Wayfair* warrants rethinking the Court’s excessively restrictive approach to personal jurisdiction.” *Id.* at 727.

²⁴⁴ *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006) (emphasis added).

²⁴⁵ *Daimler AG v. Bauman*, 571 U.S. 117, 140 n.20 (2014).

²⁴⁶ *Id.* at 139 n.19.

²⁴⁷ See *id.* at 129 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952)).

corporation in *Perkins* and because Amazon is a uniquely ubiquitous corporation that has a (potentially injurious) profound effect upon a state's citizens. The contacts plus test could also take into account the fact that much of Amazon's corporate direction will be bifurcated; both headquarters will undertake substantial nerve-center activities and so both may merit general jurisdiction.

Under the contacts plus test, Amazon would be subject to general jurisdiction in Delaware, its state of incorporation, and in Washington, its nerve center. Amazon would also be subject to general jurisdiction in its HQ2 state, meeting the contacts plus test under the exceptional case. Beyond that, it might be subject to jurisdiction in additional states, but not in all states. For example, Amazon's activities in California are substantial, but are perhaps not unique. This doctrinal middle ground would ensure that general jurisdiction evolves with the modern economy, would provide general predictability, and would not expand general jurisdiction to the point where the average corporation would have more than two general jurisdiction states.

CONCLUSION

With the Court's increased skepticism of the links between claims and in-state activities for the purposes of specific jurisdiction, as evidenced by *Bristol-Myers Squibb*, it is more likely that plaintiffs will attempt to hale corporations into court under general rather than specific jurisdiction. Such a strategy, however, may be foreclosed by the Court's reluctance to expand general jurisdiction beyond the current two paradigmatic examples—the only states with general jurisdiction over corporations are the corporations' states of incorporation and their principal places of business. If the courts adhere to the idea that corporations only have one principal place of business—whether under a contacts test or the *Hertz* nerve center test—then it is arguably time for the Court to flesh out the elusive exceptional circumstances in which corporations can be “at home” in more than two states. While courts should not abandon the idea that corporations should be able to reasonably anticipate the courts in which they might be sued, general jurisdiction jurisprudence should not be a shield that insulates national and multinational corporations from general jurisdiction in all states but the two that the corporation chooses. Amazon's development of HQ2 demonstrates the utility of this principle. Amazon will be at home in at least three states after building HQ2, and thus Amazon should reasonably expect to

be subject to suit in all three states. In order to strike the right balance while adhering to historical and modern precedent, this Note argued that the contacts plus test would be the most useful path forward. The Court must periodically intervene in the perpetual battle between plaintiffs and corporations over personal jurisdiction, especially when one side has secured a competitive advantage. The time for such intervention has likely arrived.