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## Note

### The Shoe Doesn't Fit: General Jurisdiction Should Follow Corporate Structure

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Imagine a mining corporation—its corporate headquarters manages the day-to-day mining operations and focuses on the overall strategic direction of the corporation. It is both incorporated and maintains its headquarters in Michigan. After *Daimler AG v. Bauman*, a plaintiff looking to sue the corporation on an unrelated claim must bring a suit in Michigan.<sup>1</sup>

Now imagine that business is booming and the company seeks to diversify its assets and product lines.<sup>2</sup> It does what roughly eighty percent of Fortune 500 companies have already done<sup>3</sup>—it delegates the management of the day-to-day operation to divisional managers.<sup>4</sup> The corporation establishes a divisional office in Virginia, where a bulk of its mining activities take place. Although the Virginia office adopts part of the functions of a traditional corporate headquarters, a court would

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1. 134 S. Ct. 746, 760 (2014).

2. For further discussion on how the expansion of a corporation's business affects its structure, see Neil Fligstein, *The Spread of the Multidivisional Form Among Large Firms, 1919–1979*, 50 AM. SOC. REV. 377 (1985).

3. DUNCAN ANGWIN ET AL., THE STRATEGY PATHFINDER: CORE CONCEPTS AND LIVE CASES 108 (2011) (“By the late 1960s over 80% of the Fortune 500 companies were structured in [the multidivisional form] . . . . Now the M-form company is the most prevalent structure among large businesses.”).

4. See ROBERT E. HOSKISSON & MICHAEL A. HITT, DOWNSCOPING: HOW TO TAME THE DIVERSIFIED FIRM 7–8 (1994).

likely find that Virginia could not assert general jurisdiction over the corporation.<sup>5</sup>

This demonstrates that the current general jurisdiction doctrine is ill-formulated to confront the nuances of corporate organizational structure. The current doctrine only accounts for a centralized corporate structure.<sup>6</sup> This narrow doctrine exists, in part, because the Court adopted the *Hertz* test for the principal place of business as part of its general jurisdiction rule, and, with it, the inherent limitations of that test.<sup>7</sup> The principal place of business is a single location<sup>8</sup> and, thus, if a corporation divides the functions of its corporate headquarters between offices in multiple states, courts must choose between multiple locations.<sup>9</sup> That result is an imperfect answer because the general jurisdiction doctrine does not provide an explanation for why a court must make this forced choice.

The trend toward decentralized corporate functions raises the stakes of this mismatch between doctrine and corporate practice. The multidivisional form (M-form) is the “most prevalent structure” in corporate organization.<sup>10</sup> This structure separates its corporate headquarters from the management of its day-to-day operations, sometimes placing each in a different state.<sup>11</sup> Thus, when courts confront jurisdictional questions involving these corporations, they “shoehorn a corporation into an inappropriate description simply to apply a test.”<sup>12</sup> They simply do not consider that the corporation might be structured differently than a traditional centralized headquarters.<sup>13</sup> However, the courts are not the only ones that make this mistake.

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5. See, e.g., *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221, 225–26 (2d Cir. 2014) (identifying the principal place of business as a single location); *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (limiting the fora of general jurisdiction to the place of incorporation and principal place of business).

6. See *Daimler*, 134 S. Ct. at 772 (Sotomayor, J., concurring) (pointing out that the majority does not account for when “a corporation ‘divide[s] [its] command and coordinating functions among officers who work at several different locations’” (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 95–96 (2010))).

7. See *id.* at 760 (majority opinion).

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

9. *Id.* at 95–96.

10. ANGWIN ET AL., *supra* note 3.

11. See, e.g., *Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 105 (4th Cir. 2011).

12. See *Rautenstrauch v. Stern/Leach Co.*, No. Civ.A 03-10723-DPW, 2004 WL 42573, at \*2 (D. Mass. Jan. 8, 2004) (“[C]ourts must be careful to consider the fit of model to reality . . .”).

13. See, e.g., *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 126 (2d Cir.

While scholarship has focused on the theoretical basis of general jurisdiction, it does not consider how corporations structure their organizations.<sup>14</sup> This Note fills that gap. In the business world, a well-known organizational concept is that “structure follows strategy.”<sup>15</sup> If corporations change their structure in response to changes in their environment,<sup>16</sup> courts should behave in a similar manner and adjust their general jurisdiction doctrine. This Note proposes that the general jurisdiction doctrine should follow corporate structure. In particular, courts should exercise general jurisdiction in fora where a corporation maintains its corporate functions, such as management of the day-to-day business and direction of overall corporate goals.

Part I examines the corporate general jurisdiction doctrine, and discusses the theories that justify a state’s exercise of such jurisdiction. Next, it describes the principal place of business test from *Hertz Corp. v. Friend*<sup>17</sup> which serves as a “paradigm forum” of general jurisdiction.<sup>18</sup> Part II analyzes various corporate organizational structures that the general jurisdiction doctrine does not address. In particular, it highlights that the reliance on the definition of a principal place of business from *Hertz* infringes on state sovereignty. Part III introduces a defi-

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2014); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1065 (9th Cir. 2014).

14. See, e.g., Lindsey D. Blanchard, *Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865 (2013); Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119; Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010); Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81 (2013); Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012); Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161 (2015); Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 637 (1988).

15. ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE* 14 (1962) (“The thesis deduced from these several propositions is then that structure follows strategy . . .”).

16. See Julie Wulf, *The Flattened Firm—Not as Advertised* 3 (Harvard Bus. Sch., Working Paper No. 12-087, 2012), [http://www.hbs.edu/faculty/Publication%20Files/12-087\\_bc50bde2-3016-457a-9bee-dc988cb1056b.pdf](http://www.hbs.edu/faculty/Publication%20Files/12-087_bc50bde2-3016-457a-9bee-dc988cb1056b.pdf).

17. 559 U.S. 77 (2010).

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

nition of corporate function that would account for the variety of ways corporations organize their business. This Note ultimately proposes that activities that fall within this definition should confer general jurisdiction over a corporation and demonstrates that the activities have a strong theoretical and practical basis.

### I. A TALE OF TWO EVOLUTIONS IN CORPORATE GENERAL JURISDICTION: DOCTRINE AND ORGANIZATION

The development of the corporate general jurisdiction doctrine is a two-part story: (1) the evolution of the personal jurisdiction rule governing corporations, which will be explained in Section A; and (2) the progression of corporate organizational theory, which will be explained in Section B below. These two arcs take seemingly opposite paths. On one hand, general corporate jurisdiction evolved from a broad and encompassing doctrine to a significantly narrower version. On the other hand, corporate structure theory transitioned from a narrow theory of centralization to a sprawling and more decentralized scheme.

#### A. THE DEVELOPMENT OF CORPORATE GENERAL JURISDICTION

If a corporation maintains certain minimum contact with the forum state, a court may exercise general jurisdiction.<sup>19</sup> The basis of this authority is a state's sovereignty.<sup>20</sup> There are, however, limits on the state's ability to exercise its jurisdiction over a corporation: fairness considerations under the Due Process Clause of the Fourteenth Amendment and the federalist structure.<sup>21</sup> This Section begins by describing the inception of the fairness standard in *International Shoe*. Then, it proceeds by explaining the federalism limitation on personal jurisdiction. Finally, this Section concludes by discussing how these broad standards evolved into a more limited test in *Goodyear* and *Daimler*.

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19. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (“[W]hether a judicial judgment is lawful depends on whether the sovereign has authority to render it.”).

20. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (“[T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.”); see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18, at 19 (1834) (“[T]he laws of every state affect, and bind . . . all persons, who are resident within it . . .”).

21. See *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 373 (5th Cir. 1987).

### 1. *International Shoe*: Playing Fair with General Jurisdiction

The modern era of personal jurisdiction emerged with the canonical decision *International Shoe Co. v. Washington*.<sup>22</sup> The Supreme Court distinguished the types of contacts necessary to hold a corporation “amenable to suits unrelated to that activity,”<sup>23</sup> or general jurisdiction, from contacts that “give rise to the liabilities sued on,”<sup>24</sup> or specific jurisdiction. While “continuous and systematic” activity might justify a suit arising from that activity, only “continuous corporate operations” justifies general jurisdiction.<sup>25</sup> The difference between general and specific jurisdiction centers on the focus of the contacts analysis. For specific jurisdiction, the relationship between the dispute and the forum state drives a court’s analysis.<sup>26</sup> The court may only decide issues that are related to the controversy before it.<sup>27</sup> In contrast, general jurisdiction is “dispute blind” and concerns the relationship between the defendant and the forum state.<sup>28</sup> This all-purpose power allows courts to hear a dispute against the defendant regardless of the content or where the conflict originated.<sup>29</sup> Due to the expansive reach of this jurisdiction, courts view the threshold level of minimum contacts as “significantly higher” in general jurisdiction cases than in specific jurisdiction cases.<sup>30</sup>

The primary regulator of this threshold is fairness. The Due Process Clause “requires only that in order to subject a de-

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22. 326 U.S. 310, 316 (1945).

23. *Id.* at 318.

24. *Id.* at 317.

25. *Cf. id.* at 318 (distinguishing “continuous activity of some sorts” which does not confer general jurisdiction and “continuous *corporate* operations” which does (emphasis added)).

26. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (“[A]ffiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate.”).

27. For a discussion of the meaning of “related” in the minimum contacts analysis, see Robin J. Efron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867 (2012).

28. See Twitchell, *supra* note 14, at 627 (“General jurisdiction was dispute-blind—based on the relationship of either the plaintiff or the defendant to the forum—whereas specific jurisdiction was dispute-specific.”).

29. *Id.*

30. See, e.g., *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003).

fendant to a judgment . . . [that] 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.'"<sup>31</sup> Courts assess fairness to corporations in several ways. First, they consider whether there is a burden of litigating in a distant forum.<sup>32</sup> An extraordinary burden might be an indication of a violation of Due Process.<sup>33</sup> An example of such burdens is the inconvenience of travel for the defendant.<sup>34</sup> Modern transportation, however, and, in particular, discount airfare, makes travel within the United States much easier today than in previous years.<sup>35</sup> Additionally, the ease at which corporations can find in-state counsel in a foreign state is facilitated by the Internet.<sup>36</sup> As a result, the burdens of distant litigation are not as prevalent of a concern today as they might have been in the past.

Second, courts also consider the predictability of the forum for the defendant. Does the defendant have a reason to believe that its activities in the forum will subject it to the authority of the state's courts? A tenet of jurisdiction is that corporations should have an opportunity to structure their activities to avoid the sovereign power of the forum state.<sup>37</sup> Additionally, the predictability of a forum allows a corporation to "alleviate the risk of burdensome litigation by procuring insurance."<sup>38</sup> A corpora-

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

32. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

33. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115–16 (1987) (finding general jurisdiction unreasonable because of the burden placed on the defendant).

34. *See Int'l Shoe Co.*, 326 U.S. at 317 ("An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principle place of business is relevant . . ." (quoting *Hutchinson v. Chase & Gilbert* 45 F.2d 139, 141 (2d Cir. 1930))).

35. *See McGee v. Int'l Life Ins.*, 355 U.S. 220, 222–23 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").

36. *See Erbsen*, *supra* note 14, at 24–25 (describing resources available for finding out-of-state counsel); *id.* at 24 n.88.

37. *See Volkswagen*, 444 U.S. at 297 ("The Due Process Clause . . . allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (same).

38. *Volkswagen*, 444 U.S. at 297. For a further discussion on insurance and its relationship to litigation burdens, *see Erbsen*, *supra* note 14, at 22

tion, however, might only believe that it can reasonably be sued in the forum state because of its prior experience in court, not through some independent subjective belief.<sup>39</sup>

In assessing the predictability of the forum, courts also look to see if the corporation has “purposely avail[ed] itself of the privilege of conducting activities with the forum State.”<sup>40</sup> If a corporation has “invoke[ed] the benefits and protections of the forum’s law,” a suit against a corporation might be justified.<sup>41</sup> This is because a state can extract special responsibilities from its citizens even when they are absent from the state.<sup>42</sup> For example, a state can tax its citizens for income that they obtain from out-of-state activities. In essence, a state offers its protection and police powers in return for the authority to subject a corporation to its adjudicatory power. Reciprocal benefits and burdens offer a strong basis for the state’s exercise of adjudicatory authority.<sup>43</sup>

Over time, the *International Shoe* jurisdiction evolved and, despite this high bar for exercising general jurisdiction, courts began to treat general jurisdiction as “an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.”<sup>44</sup> They supported this broad scope of general jurisdiction by searching for the “approximate physical presence” of the corporation.<sup>45</sup> A corpora-

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n.79.

39. See Oral Argument at 4:18, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), <https://www.oyez.org/cases/2013/11-965> (describing Mercedes-Benz USA’s assumption that there was general jurisdiction over it).

40. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073 (8th Cir. 2004) (indicating that “both theories of personal jurisdiction” require purposeful availment).

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

42. See *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (“[T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.”).

43. See *Brilmayer et al.*, *supra* note 14, at 733 (“On balance, the reciprocal benefits and burdens rationale provides the most satisfactory basis for the state’s exercise of coercive power.”). *Contra* Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 537 (2012) (“[A]ssessing an appropriate level of reciprocal benefits to justify general jurisdiction seems particularly arbitrary.”).

44. *Borchers*, *supra* note 14, at 139; see also *Twitchell*, *supra* note 14, at 632–33 (suggesting that courts use general jurisdiction when specific jurisdiction is proper).

45. See, e.g., *King v. Am. Family Mutual Ins.*, 632 F.3d 570, 579 (9th Cir. 2011); *Mavrix Photo, Inc. v. Brand Techs.*, 647 F.3d 1218, 1224 (9th Cir. 2011);

tion, however, can only manifest its “presence” by “activities carried on in its behalf by those who are authorized to act for it.”<sup>46</sup> Accordingly, courts determined if a corporation was “present” by assessing its attributes such as: (1) an office or employees; (2) sales in the state; (3) solicitations of business in the state; (4) bank accounts; (5) the appointment of an agent for service of process; and (6) registration to do business in the state.<sup>47</sup> This expansive view of general jurisdiction, which dominated the courts for decades, would soon begin to be slowly clawed back.

## 2. *Volkswagen*: Our Federalist Limitation on General Jurisdiction

Several decades after *International Shoe*, the Supreme Court emphasized the limitation on the grasp of state sovereignty arising from the federalist structure.<sup>48</sup> Under the Constitution, the fifty states are coequals in dignity and authority.<sup>49</sup> The ability of a particular state to adjudicate a controversy implicates the interest of other states.<sup>50</sup> For example, if a plaintiff brings a suit in one state, other states might be precluded from hearing the case.<sup>51</sup> Therefore, a state’s inappropriate assertion

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*Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (“[General jurisdiction] contacts must be so extensive to be tantamount to SSBO France being constructively present in the state . . .”); *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (“Here the activities of the defendant corporations in South Carolina, although possibly sufficient to constitute ‘presence’ are nonetheless minimal.”).

46. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This common misunderstanding about corporate “presence” has led some plaintiffs to conflate a corporation’s “presence” with the presence of a high-level officer in the state. See *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1065 (9th Cir. 2014).

47. See, e.g., *Monge v. RG Petro-Mach. (Group) Co.*, 701 F.3d 598, 620 (10th Cir. 2012); *Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 228 (5th Cir. 2012); *King*, 632 F.3d at 579; *Mavrix Photo, Inc.*, 647 F.3d at 1225; *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 597–98 (8th Cir. 2011); *Negron-Torres v. Verizon Commc’ns, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007).

48. For further discussion of the limitations of state power set by federalism, see Erbsen, *supra* note 14.

49. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (“[Minimum contacts] act[] to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”).

50. See Erbsen, *supra* note 14, at 63.

51. See *id.* at 63 n.254 (describing the implications of modern preclusion law).



of jurisdiction “upset[s] the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>52</sup>

With these state sovereignty considerations in mind, personal jurisdiction cases present an allocation problem.<sup>53</sup> The relationship between the defendant and the forum state determines whether the allocation of personal jurisdiction in one state undermines the interest of other states. Consider, for example, the citizenship of the defendant. A state has a strong interest in regulating the activities of its citizens.<sup>54</sup> As a result, a state raises a federalism concern when it subjects a citizen of another state to the power of its tribunals.<sup>55</sup> This does not mean that all efforts by a state to exercise personal jurisdiction over another state’s citizen offend notions of federalism. States can exercise limited jurisdiction over causes of action related to activities within the state.<sup>56</sup>

### 3. *Goodyear* and *Daimler*: “Home” Is Where General Jurisdiction Is

Though the general jurisdiction doctrine was constrained by concerns of fairness and federalism, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>57</sup> the Supreme Court further confined the general jurisdiction doctrine. After *Goodyear*, a court may only exercise general jurisdiction over a corporation “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”<sup>58</sup> Recently, the Supreme Court solidified its rejection of the broad approach discussed above, describing it as “unaccept-

52. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011).

53. *See Erbsen, supra* note 14, at 66 (“To say that a given exercise of personal jurisdiction is unconstitutional is thus to say that a state has usurped authority that belongs elsewhere.”).

54. *See* STORY, *supra* note 20, § 21, at 22 (“[Y]et every nation has a right to bind its own subjects by its own laws in every other place.”).

55. *See* *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 373 (5th Cir. 1987) (“[T]here are the federalism concerns of state sovereignty—in which we inquire about the power of one state to subject to its process the citizen of another state.”).

56. *Id.* at 377 (“The concerns that injuries might occur in the state or might somehow implicate Texas component-part manufacturers are adequately protected. Beech is subject to the specific jurisdiction of Texas courts when its product causes injuries . . . in Texas.”).

57. 131 S. Ct. 2846 (2011).

58. *Id.* at 2851 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

ably grasping,”<sup>59</sup> and narrowed the scope of the doctrine. Instead, the Court made clear that “only a limited set of affiliations” can overcome the high threshold for general jurisdiction.<sup>60</sup> In doing so, the Court relied on developments in specific jurisdiction to fill the holes left by a narrower rule.<sup>61</sup> Under the current doctrine, general jurisdiction over corporate defendants is proper “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”<sup>62</sup> The place of incorporation and the principal place of business are “paradigm” examples of such affiliations.<sup>63</sup> Scholarship has addressed theories of general jurisdiction,<sup>64</sup> in particular, the meaning of “at home.”<sup>65</sup> This Part, however, does not recap those explanations. Instead, it explores the justifications behind the fora associated with being “at home”: the state of incorporation and the principal place of business.<sup>66</sup>

*a. The Basis for the State of Incorporation*

As a “creature[] of state law,” each corporation holds a special relationship with its place of incorporation.<sup>67</sup> A corporation can only possess the properties and powers that its charter con-

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

60. *Id.* at 760 (“*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amendable to all-purpose jurisdiction there.”).

61. *See id.* at 757–58 (“Specific jurisdiction has been cut loose from *Pennoyer’s* sway . . . . As this Court has increasingly trained on [specific jurisdiction], general jurisdiction has come to occupy a less dominant place in the contemporary scheme.” (citation omitted)); Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish for: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2003 (2014) (“Specific jurisdiction has received the lion’s share of the Court’s attention . . .”).

62. *Daimler*, 134 S. Ct. at 754 (citing *Goodyear*, 131 S. Ct. at 2851).

63. *Id.* at 754 (“With respect to a corporation, the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’” (quoting Brilmayer et al., *supra* note 14, at 735)).

64. *See supra* note 14.

65. *See, e.g.*, Erichson, *supra* note 14, at 86; Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 259–62 (2014); James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 987–91 (2012); Stein, *supra* note 43, at 528 (“This Article will attempt to . . . construe the ‘essentially at home’ standard . . .”).

66. *See Goodyear*, 131 S. Ct. at 2854.

67. *See Cort v. Ash*, 422 U.S. 66, 84 (1975) (“Corporations are creatures of state law . . . .”); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587–88 (1839) (“[A] corporation is the mere creature of a law of the state . . .”).

fers upon it.<sup>68</sup> This dependence upon state law subjects a corporation to the “most complete and penetrating regulation.”<sup>69</sup> The state of incorporation is the “only one State [that has] the authority to regulate a corporation’s internal affairs.”<sup>70</sup> Since a corporation incorporates in a single state, a corporation’s relationship with that state is unique. This relationship provides both the corporation and the state with several benefits.

When deciding where to incorporate, corporations base their decision on the benefits that each state provides them.<sup>71</sup> Some states, like Delaware, provide the corporations and shareholders “maximum flexibility in ordering their affairs.”<sup>72</sup> Corporate law in these states also differs on issues such as the voting rights of stockholders.<sup>73</sup> Empirical evidence demonstrates that these differences drive a corporation’s decision to incorporate in that state.<sup>74</sup> But the street goes both ways. States can create a lucrative industry.<sup>75</sup> Income received from corporation franchise taxes funds the state budget.<sup>76</sup> For example, a quarter of Delaware’s budget is generated from the incorporation industry.<sup>77</sup> As a result, the Delaware legislature

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68. See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844).

69. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949).

70. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (describing the internal affairs doctrine).

71. See ROBERT W. HAMILTON ET AL., *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 156 (11th ed. 2010) (“Selection of the state of incorporation involves an appraisal of two factors: (a) a dollars-and-cents analysis . . . and (b) a consideration of the advantages and disadvantages of the substantive corporation laws of these states.”).

72. See LEWIS S. BLACK, JR., *WHY CORPORATIONS CHOOSE DELAWARE* 2 (2007), [http://corp.delaware.gov/whycorporations\\_web.pdf](http://corp.delaware.gov/whycorporations_web.pdf).

73. Compare MINN. STAT. § 302A.471, subdiv. 1 (2015) (providing appraisal rights in a wide variety of circumstances), with DEL. CODE ANN. tit. 8, § 262 (2015) (providing dissenter rights only in mergers).

74. See generally Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (describing how corporate laws affect migration of corporations).

75. See Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html> (“Delaware’s tax laws are a bonanza for the state . . . Delaware collected roughly \$860 million in taxes and fees . . . in 2011.”).

76. BLACK, *supra* note 72, at 1.

77. Wayne, *supra* note 75 (“That money accounted for a quarter of the state’s total budget.”).

maintains the incorporation laws at “state-of-the-art” level.<sup>78</sup> In this sense, there is a vested interest by the general public of the state in the corporations incorporated in the state. This bolsters the notion that a corporation might be a political insider, and, therefore, properly subjected to jurisdiction.<sup>79</sup>

Furthermore, the benefits of a state of incorporation are far reaching. In a dispute against a corporation, the law of the state of incorporation governs the internal affairs of the corporation.<sup>80</sup> Even if a corporation operates in a foreign state, the laws of its state of incorporation still protect the corporation’s decisions.<sup>81</sup> Therefore, corporations cannot make decisions without extending the power of those decisions nationally.<sup>82</sup>

Incorporation provides convenience for the corporation. Given that the corporation based its incorporation decision, in part, on the state’s laws,<sup>83</sup> it is fair to assume that the corporation is familiar with those laws.<sup>84</sup> In combination with this familiarity, the courts of the state might provide the corporation with a considerable advantage. The Delaware courts, for example, are considered some of the most experienced and capable courts for adjudicating corporate issues.<sup>85</sup> In fact, a corporation might prefer to be sued in these courts.<sup>86</sup>

Familiarity with a state’s courts alone cannot justify all-purpose jurisdiction.<sup>87</sup> For instance, a hostile corporation or in-

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78. BLACK, *supra* note 72, at 1.

79. See Brilmayer et al., *supra* note 14, at 742–43.

80. See *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (“It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation’s internal affairs.”).

81. See Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 L. & CONTEMP. PROBS. 161, 164 (1985) (“The statute thus directs that Delaware law be applied to Delaware corporations, a directive presumably applicable not only to Delaware courts but to courts of other jurisdictions as well.”).

82. The Full Faith and Credit Clause also regulates the choice of law. U.S. CONST. art. IV, § 1.

83. See *supra* notes 71 and 74 and accompanying text.

84. See Brilmayer et al., *supra* note 14, at 734.

85. See BLACK, *supra* note 72, at 5.

86. *Id.* at 7 (“[A corporation’s general counsel] told me that, if his corporation is going to be sued anyway, he would far prefer to litigate in the Court of Chancery . . .”).

87. See Pl. AstraZeneca AB’s Opposition to Def. Mylan Pharm. Inc.’s Mot. to Dismiss for Lack of Personal Jurisdiction at 10, *AstraZeneca, AB v. Mylan Pharm. Inc.*, 72 F. Supp. 3d 549 (2014) (No. 14-00696-GMS), 2014 WL 4745281 (“Mylan has made itself at home in Delaware district court.”).

dividual can draw a corporation into a protracted battle requiring frequent litigation. Such a scenario is not so farfetched. Consider the patent dispute between Samsung and Apple, which spanned nineteen lawsuits in twelve courts in nine countries on four continents.<sup>88</sup> A large number of these suits take place in California.<sup>89</sup> Constant litigation is part of Apple's business strategy,<sup>90</sup> and, as a result, Samsung might find itself in court again and again.<sup>91</sup> If frequent litigation is sufficient to establish general jurisdiction, Apple's litigation would effectively bring Samsung under California's adjudicatory authority. The Supreme Court rejected this precise process of unilateral jurisdiction "creation."<sup>92</sup> Thus, a corporation must have a stronger relationship with a forum state than a mere use of the state's institutions.

*b. The Principal Place of Business*

One such relationship is the principal place of business. Traditionally, domicile provides a strong justification for a state's exercise of general jurisdiction.<sup>93</sup> Aside from the state of incorporation, the principal place of business is the closest incarnation of a corporation's domicile.<sup>94</sup> A court may exercise general jurisdiction even if a corporation only maintains its principal place of business in the state temporarily.<sup>95</sup> In identi-

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88. Chloe Albanesius, *Every Place Samsung and Apple Are Suing Each Other*, PC MAG. (Sept. 14, 2011), <http://www.pcmag.com/article2/0,2817,2392920,00.asp>.

89. *Id.*

90. See Jessica E. Vascellaro, *Apple Wins Big in Patent Case*, WALL ST. J. (Aug. 25, 2012), <http://www.wsj.com/articles/SB10000872396390444358404577609810658082898> ("Apple's legal campaign is partly aimed at trying to beat back the gangbuster growth of Android . . .").

91. See Josh Lowensohn, *Round Two: Apple and Samsung Suit Up for Another Billion Dollar Patent War*, VERGE (Mar. 31, 2014) <http://www.theverge.com/2014/3/31/5564134/round-two-apple-and-samsung-suit-up-for-another-billion-dollar-patent>.

92. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 314 (1980) (Marshall, J., dissenting) ("[T]he basis for the assertion of jurisdiction is not the happenstance that an individual over whom petitioner had no control made a unilateral decision to take a chattel with him to a distant State.").

93. See Brilmayer et al., *supra* note 14, at 730 ("Domicile is traditionally the strongest basis supporting general jurisdiction over a party.").

94. *Id.* at 733–34.

95. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984) ("Ohio was the corporation's principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State.").

fyng the principal places of business as a paradigm forum, the Court explicitly referenced *Hertz Corp. v. Friend*, the seminal case defining corporation citizenship.<sup>96</sup> To understand the rationale behind the principal place of business, it is important to examine the evolution of the *Hertz* test and its justifications.

From the inception of corporations, these entities presented a unique problem for jurisdictional questions because they are artificial creatures of law.<sup>97</sup> In its early encounters with the problem of corporate citizenship, the Supreme Court concluded that a corporation is a citizen of its state of incorporation.<sup>98</sup> Concerns, however, about corporation's ability to "manipulate federal-court jurisdiction" led Congress to modify the definition of corporate citizenship in the diversity statute.<sup>99</sup> As a result, Congress amended the diversity statute to include "the principal place of business."<sup>100</sup>

Prior to *Hertz*, the federal courts experimented with a variety of tests for determining the corporation's "principal place of business." The major difference between these tests is that some focus on the center of a corporation's business activity, while others focus on the corporation's center of its policymaking.<sup>101</sup> Courts have applied three tests to determine a corporation's principal place of business.<sup>102</sup>

First, utilizing the nerve center test, courts look for the corporation's nerve center from which "its officers direct, control and coordinate all activities without regard to locale, in the

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96. Compare *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)), with *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011) (lacking a reference to *Hertz*).

97. See, e.g., *Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law . . ."); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587–88 (1839) ("[A] corporation is the mere creature of a law of the state . . .").

98. See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844) ("[A] corporation created by and doing business in a particular state . . . for the purposes of its incorporation, [is] capable of being treated as a citizen of that state . . .").

99. *Hertz*, 559 U.S. at 86.

100. *Id.* at 88.

101. See *Capitol Indem. Corp. v. Russellville Steel Co.*, 367 F.3d 831, 835–36 (8th Cir. 2004) (focusing on the location of a corporation's business activities); *Bueth v. Britt Airlines, Inc.*, 787 F.2d 1194, 1196 (7th Cir. 1986) ("The principal place of business—under the law of this circuit anyway—is where the corporation's nerve center is."); *Lugo-Vina v. Pueblo Int'l, Inc.*, 574 F.2d 41, 43 (1st Cir. 1978) (focusing on the location of a corporation's policymaking activities).

102. See *Capitol Indem. Corp.*, 367 F.3d at 835.

furtherance of the corporate objective.”<sup>103</sup> In *Scot Typewriter Co. v. Underwood Corp.*, a plaintiff sued a manufacturer of typewriters in New York.<sup>104</sup> The corporation maintained three manufacturing plants, but none in New York.<sup>105</sup> The defendant, however, supervised and coordinated all of its activities out of an office in New York.<sup>106</sup> Therefore, the court concluded that the New York constituted the defendant’s principal place of business.<sup>107</sup>

Second, under the corporate activities test, a corporation’s principal place of business exists where there is “a substantial predominance of corporate activity.”<sup>108</sup> In *Inland Rubber Corp. v. Triple A Tire Service, Inc.*, the court focused on the corporation’s “day-to-day control of Inland’s sales operations” in New York.<sup>109</sup> Additionally, the court noted that officers in New York were “in general charge of Inland’s operations in New York and Florida.”<sup>110</sup> In other words, the corporate activities test looks for where the corporation’s day-to-day management takes place.<sup>111</sup>

Finally, the locus of the operations test focuses on where the majority of the corporation’s actual physical operations were located.<sup>112</sup> This test is comparative. It considers the location of the corporation’s employees, tangible property, production activities, sources of income, and where sales take place, and then compares the magnitude of those activities in the forum state with the corporation’s nationwide activities.<sup>113</sup> The corporation’s principal place of business is located in the state with the greatest amount of activity. The Supreme Court found

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103. *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959). For a further discussion of the nerve center test, see Lindsey D. Saunders, Note, *Determining a Corporation’s Principal Place of Business: A Uniform Approach to Diversity Jurisdiction*, 90 MINN. L. REV. 1475, 1479 (2006).

104. *Scot Typewriter Co.*, 170 F. Supp. at 864.

105. *Id.* (describing the locations of the manufacturing plants in Connecticut, New Jersey and California).

106. *Id.* (“[The corporation’s] executive activities [in New York include] over-all supervision and coordination of all functional operations.”).

107. *Id.* at 865.

108. *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 500 (9th Cir. 2001).

109. 220 F. Supp. 490, 491 (S.D.N.Y. 1963).

110. *Id.* at 492.

111. *See, e.g., de Walker v. Pueblo Int’l, Inc.*, 569 F.2d 1169, 1172 (1st Cir. 1978); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960).

112. *See, e.g., Inland Rubber Corp.*, 220 F. Supp. at 492.

113. *Id.*

this test “unusually difficult to apply” due to the diversity of factors.<sup>114</sup> Courts assigned each factor varying importance which resulted in unpredictable application of the test.<sup>115</sup>

Provided with these standards, the Supreme Court considered the “nerve center” test superior to the alternatives for three reasons.<sup>116</sup> First, the text of the diversity statute supported a narrow and singular approach to the principal place of business.<sup>117</sup> The word “place” is singular, not plural.<sup>118</sup> Additionally, “principal” denotes a location that is first in rank, and, therefore, must reside in a single location.<sup>119</sup> Second, the test promotes administrative simplicity.<sup>120</sup> The corporate headquarters is “easily ascertainable” and promotes greater predictability.<sup>121</sup> Predictability allows corporations to make better business and investment decisions.<sup>122</sup> Finally, the nerve center test prevents the comparative problem of the gross income test rejected by Congress.<sup>123</sup>

## B. DEVELOPMENT OF CORPORATE STRUCTURE

Even as the corporate general jurisdiction doctrine trended toward the simpler and narrower interpretation, corporate structure took the opposite journey—going from a straightforward era of centralization to the complex and multifaceted theory of diversification and decentralization. This Section describes the evolution of corporate structure, including a detailed look at the rationale behind each transition.

### 1. The Centralization of Corporate Authority

At the beginning of the twentieth century, the unitary form, or U-form, was the dominant configuration of corpora-

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114. *Hertz Corp. v. Friend*, 559 U.S. 77, 90 (2010).

115. *Cf. R. G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655–57 (2d Cir. 1979) (noting that courts emphasize different factors depending on whether the corporate operations span many states or are more centralized).

116. *Hertz*, 559 U.S. at 93 (“Three sets of considerations, taken together, convince us that this approach, while imperfect, is superior to other possibilities.”).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 94.

121. *Cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (explaining that clear jurisdictional rules provide greater certainty).

122. *Hertz*, 559 U.S. at 94.

123. *Id.* at 95.



tions.<sup>124</sup> U-form corporations rely on heavily centralized structures, often organized along functional lines (such as sales, finances, and manufacturing).<sup>125</sup> Power is extremely concentrated in a U-form corporation. High-level corporate officers make all of the long-term planning and daily operating decisions.<sup>126</sup> These officers are concerned with two activities: maintaining the long-run health of the company and the smooth and efficient day-to-day operation.<sup>127</sup> The next layer of management consists of the “functional areas of the firm” like “production, marketing, personnel and finance.”<sup>128</sup>

This corporate structure gained prominence in response to the need for a strong centralization in the manufacturing industry—by integrating and streamlining production and distribution, U-form companies benefited from the economies of scale.<sup>129</sup> This strategy made lots of sense for single product/industry companies like General Motors and DuPont Explosive Powder Company. The U-form structure provides these corporations with several advantages. First, it streamlines communication within the corporation along functional lines.<sup>130</sup> The production function of a corporation is handled entirely by a production manager rather than being dispersed among many officers. The second advantage is that the U-form allows for the specialization in a single functional area in each department.<sup>131</sup> As a result, the production department is only required to understand the details of production and no other field.<sup>132</sup> The advantages of the U-form, however, diminish as the business begins to grow.

When faced with entry into multiple markets and a requirement for various expertise, the corporate officers tend to

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124. See ANGWIN ET AL., *supra* note 3, at 107–08. For a discussion of a classic case study of the U-form, see CHANDLER, *supra* note 15, at 52–113.

125. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 133 (1975).

126. See ROBERT F. FREELAND, *THE STRUGGLE FOR CONTROL OF THE MODERN CORPORATION* 12 (2001); MARIA MOSCHANDREAS, *BUSINESS ECONOMICS* 54–55 (2d ed. 2000) (“The CEO is responsible for both long-term (strategic) decisions and the day-to-day running of the functions.”).

127. See CHANDLER, *supra* note 15, at 9.

128. MOSCHANDREAS, *supra* note 126, at 54.

129. See J. BARKLEY ROSSER, JR. & MARINA V. ROSSER, *COMPARATIVE ECONOMICS IN A TRANSFORMING WORLD ECONOMY* 127–28 (2d ed. 2004).

130. See MOSCHANDREAS, *supra* note 126, at 55.

131. *Id.*

132. *Id.*

be overburdened and overstretched by the U-form structure.<sup>133</sup> This process results in a coordination problem where the high-level officers must rely on imperfect information to command the business of the corporation.<sup>134</sup> Eventually for General Motors and DuPont, these difficulties led to the rise of a decentralized structure known as the multidivisional form.<sup>135</sup>

## 2. The Rise of Multidivisional Corporations

Faced with the limitations of the U-form structure, companies like DuPont and General Motors adapted their businesses by decentralizing the management and control functions of their businesses.<sup>136</sup> Today, the multidivisional form is “the preferred organizational form for the large firms that dominate the American economy”<sup>137</sup> and, to some, the “most important single innovation [for American capitalism] of the twentieth century.”<sup>138</sup> The M-form decentralized core managing operations into departments.<sup>139</sup> It separates the strategic decision-making from the day-to-day operating decisions handled by the corporate offices in a U-form structure by delegating the latter to divisions.<sup>140</sup>

133. See FREELAND, *supra* note 126; see also CHANDLER, *supra* note 15, at 299 (“[T]he problems of coordination, appraisal, and policy formulation [become] too intricate for a small number of top officers to handle both long-run, entrepreneurial, and short-run, operational administrative activities.”).

134. See Yingyi Qian & Gerard Roland, *Coordinating Tasks in M-Form and U-Form Organisations* 3 (Suntory Ctr., Discussion Paper No. TE/03/458, 2003), [http://eprints.lse.ac.uk/3746/1/Coordinating\\_Tasks\\_in\\_M-Form\\_and\\_U-Form\\_Organisations.pdf](http://eprints.lse.ac.uk/3746/1/Coordinating_Tasks_in_M-Form_and_U-Form_Organisations.pdf); see also CHANDLER, *supra* note 15, at 91 (“The essential difficulty was that diversification greatly increased the demands on [DuPont’s] administrative offices.”).

135. See CHANDLER, *supra* note 15, at 104–13 (describing how the strategy of diversification led to the formation of a “decentralized,” multidivisional corporate form).

136. *Id.* at 52–162 (describing the evolution of the multidivisional structure in DuPont and General Motors).

137. Fligstein, *supra* note 2, at 388.

138. Joseph T. Mahoney, *The Adoption of the Multidivisional Form of Organization: A Contingency Model*, 29 J. MGMT. STUD. 49, 49 (1992) (quoting Oliver E. Williamson, *Managerial Discretion, Organization Form, and the Multi-division Hypothesis*, in *THE CORPORATE ECONOMY* 382 (Robin Marris & Adrian Wood eds., 1971)).

139. See Alfred D. Chandler, Jr., *The Functions of the HQ Unit in the Multibusiness Firm*, 12 STRATEGIC MGMT. J. 31, 33 (1991) (“The M-form came into being when senior managers operating through existing centralized, functionally departmentalized U-Form structures realized that they had neither the time nor the necessary information to coordinate and monitor day-to-day operations . . .”).

140. See MOSCHANDREAS, *supra* note 126, at 56.

M-form corporations have three levels of autonomous planning and administrative offices: the corporate headquarters, the division, and the business unit.<sup>141</sup> The role of the corporation headquarters in an M-form corporation is the “coordinat[ion], apprais[al], and plan[ning of] goals and policies” and the “allocat[ion of] resources.”<sup>142</sup> Therefore, the general office maintains strategic decision-making and control of the operating divisions.<sup>143</sup>

The corporate office’s control is not absolute. The divisional offices function as “semi-autonomous” entities responsible for its own set of operating decisions.<sup>144</sup> In fact, the corporate office is not involved with “routine functional activities within these units.”<sup>145</sup> Each division is responsible for coordinating and managing the corporation’s business within its designation.<sup>146</sup> This function is handled by the division’s headquarters.<sup>147</sup> Finally, these divisions can be based on a geographical area<sup>148</sup> or be product related.<sup>149</sup>

The M-form structure provides three major advantages. First, it shifts the burden of day-to-day management from the general office to the divisional units.<sup>150</sup> This process allows the

141. See Chandler, *supra* note 139, at 34.

142. CHANDLER, *supra* note 15, at 9.

143. See MOSCHANDREAS, *supra* note 126, at 56 (“The general office is assigned responsibilities of strategic decision making and control of operating divisions.”).

144. See *id.*

145. Mahoney, *supra* note 138, at 50. *Contra* Laura Poppo, *The Visible Hands of Hierarchy Within the M-Form: An Empirical Test of Corporate Parenting of Internal Product Exchanges*, 40 J. MGMT. STUD. 403, 405 (2003) (“[W]e develop a theory of selective corporate involvement, which describes when corporate staff is most likely to involve itself in divisional matters . . .”).

146. Chandler, *supra* note 139 (“The divisional offices coordinated production and distribution (and often product development) using the U-form structure.”).

147. See CHANDLER, *supra* note 15, at 9–10 (“The *departmental headquarters* in its turn coordinates, appraises, and plans for a number of field units.”).

148. See GRANT FLEMING ET AL., *THE BIG END OF TOWN: BIG BUSINESS AND CORPORATE LEADERSHIP IN TWENTIETH-CENTURY AUSTRALIA* 163 (2004) (“Divisions may be organised by product, customers, geography or related business units (or a combination of these).”).

149. See *Company Structure*, JOHNSON & JOHNSON, <http://www.jnj.com/about-jnj/company-structure> (last visited Mar. 8, 2016) (describing Johnson & Johnson’s company structure as a division between consumer healthcare, medical devices, and pharmaceuticals).

150. See MOSCHANDREAS, *supra* note 126, at 56. For an example of why this burden-shifting is necessary, see Jay R. Galbraith, *The Evolution of Enterprise Organization Designs*, 1 J. ORG. DESIGN, no. 2, 2012, at 1, 4 (describ-

general office to focus on the strategic decisions that might make the corporation successful in the long run.<sup>151</sup> Second, the expertise and closer contact of the divisional managers with the day-to-day business promotes speed and efficiency.<sup>152</sup>

Finally, the M-form provides the corporation with growth potential and economic benefits. Although the extent of those benefits are debatable,<sup>153</sup> corporations view the shift to a multidivisional structure as “the best way for them to manage continuous growth and complexity.”<sup>154</sup> In fact, the multidivisional form is considered “American capitalism’s most important single innovation of the twentieth century.”<sup>155</sup> Studies confirm that the M-form provides corporations with innovative power and flexibility.<sup>156</sup>

### 3. The Final Evolution: Multisubsidiary Corporations

As *Daimler* demonstrates, corporations can also take the multisubsidiary form, dividing its products and operations between multiple different subsidiaries.<sup>157</sup> Changes in corporate

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ing the burdens of the cell-division model on the corporate headquarters); see also FREELAND, *supra* note 126 (“[Divisionalization] reduce[s] overload at the top by clarifying lines of authority and communication.”).

151. See Mahoney, *supra* note 138, at 50 (“The M-form is viewed from the efficiency perspective as in institutional response to problems of interdependence . . . .”); see also Poppo, *supra* note 145, at 404 (“[C]orporate staff cannot be overburdened with the specific information relevant to operating divisions and should instead focus on *long-term strategic decisions* that maximize the overall profit of the firm.”).

152. See MOSCHANDREAS, *supra* note 126, at 56; see also Donald A. Palmer et al., *Late Adoption of the Multidivisional Form by Large U.S. Corporations: Institutional, Political, and Economic Accounts*, 38 ADMIN. SCI. Q. 100, 102–03 (1993) (describing the economic rationale behind the M-form structure).

153. See, e.g., CHANDLER, *supra* note 15, at 119; Charles W. L. Hill, *Internal Organization and Enterprise Performance: Some UK Evidence*, 6 MANAGERIAL & DECISION ECON. 210, 214 (1985) (“The results significantly demonstrate the superior profitability of M-form firms.”). *Contra* Robert F. Freeland, *The Myth of the M-Form? Governance, Consent, and Organizational Change*, 102 AM. J. SOC. 483, 518 (1996) (“[The] mythical M-form offers a prescription for economic decline.”).

154. ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 324:25, Westlaw (database updated Feb. 2016).

155. Williamson, *supra* note 138.

156. See generally Robert E. Hoskisson et al., *The Multidivisional Structure: Organizational Fossil or Source of Value?*, 19 J. MGMT. 269 (1993) (evaluating the economic benefits of the M-form structure); Yingyi Qian et al., *Coordinating Changes in M-form and U-form Organizations* (Working Paper No. 284, 1999), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.116.7838&rep=rep1&type=pdf>.

157. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 750 (2014).

tax laws facilitated the transformation of multidivisional corporations to *multisubsidiary* (MSF) corporations.<sup>158</sup> The M-form usually consists of a parent firm that is organized as divisions based on product lines.<sup>159</sup> In contrast, the MSF is defined as “involving two or more levels of subsidiaries with a parent company at the top.”<sup>160</sup>

In order to understand the difference between the M-form and MSF, it is important to first understand the difference between a division and a subsidiary. A division is generally characterized as:

[Being] 100 percent owned by the parent firm and distinguished as holding its assets as operating units . . . under central office control . . . . [I]t does not have its own central office, nor does it have its own board and officers. Most importantly, it does not issue or hold stock.<sup>161</sup>

In contrast, a subsidiary is a “separate legal entity . . . . [and is] financially controlled to the extent that its ownership by the parent company is equal to or exceeds 51 percent.”<sup>162</sup> As a result, the subsidiary is decoupled from the parent company which protects the corporation’s assets.<sup>163</sup> The subsidiary has its own board and its own corporate office.<sup>164</sup>

Therefore, the critical characteristic that differentiates the M-form from the multisubsidiary form is control over the operating units. In an M-form corporation, the corporation maintains the authority to manage the day-to-day operations of the corporation. Instead of exercising that power, the corporation delegates that management to the divisional office. On the other hand, the subsidiary in a multisubsidiary corporation con-

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158. See John Boies & Harland Prechel, *Capital Dependence, Business Political Behavior, and Change to the Multilayered Subsidiary Form*, 49 SOC. PROBS. 301, 308 (2002) (“[Capitalists and managers] redefined corporations’ institutional arrangements by changing corporate tax laws in a way that facilitated the transformation of divisions into subsidiaries . . .”).

159. See Mary Zey & Tami Swenson, *The Transformation and Survival of Fortune 500 Industrial Corporations Through Mergers and Acquisitions, 1981–1995*, 42 SOC. Q. 461, 464–65 (2001) [hereinafter *Survival of Fortune 500 Industrial Corporations*].

160. Mary Zey & Tami Swenson, *The Transformation of the Dominant Corporate Form from Multidivisional to Multisubsidiary: The Role of the 1986 Tax Reform Act*, 40 SOC. Q. 241, 243 (1999).

161. *Id.* at 244.

162. *Id.*

163. *Id.*

164. See *Survival of Fortune 500 Industrial Corporations*, *supra* note 159, at 465.

trols its own day-to-day operations.<sup>165</sup> Although the subsidiary may be a separate legal entity, it is also financially dependent on its parent company.<sup>166</sup>

Berkshire Hathaway illustrates the complexity of the control issue. As a conglomerate, it fully owns its subsidiaries.<sup>167</sup> The basic function of the corporate headquarters in a conglomerate is a budgetary one.<sup>168</sup> In Berkshire Hathaway, for example, Warren Buffett makes “[i]nvestment decisions and all other capital allocation decisions” while operating decisions are left to the various Berkshire businesses.<sup>169</sup> The subsidiary’s corporate functions are technically independent from its parent company while, at the same time, the subsidiary is financially dependent on the parent company.

Given this complexity, whether a conglomerate can avail itself to general jurisdiction through the actions of its subsidiaries is a question of agency not personal jurisdiction.<sup>170</sup> Such a discussion is outside of the parameters of this Note. Instead, the key question is whether any corporate activity of the *parent company* is delegated to the subsidiaries. As with every jurisdictional assessment, the answer to this question is fact dependent. Generally, the conglomerate’s day-to-day operations is the purchase of and investment in its subsidiaries. On the other hand, the conglomerate functions similarly to an M-form structure, with various products and regional divisions.<sup>171</sup> If, however, the subsidiary exercises control over the parent company’s day-to-day business, the conglomerate would present a similar challenge that the multidivisional structure presents.<sup>172</sup>

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165. Asli M. Colpan & Takashi Hikino, *Foundations of Business Groups: Towards an Integrated Framework*, in THE OXFORD HANDBOOK OF BUSINESS GROUPS 15, 29 (Asli Colpan et al. eds., 2010), [https://books.google.com/books?id=RL2pWCa9Z24C&source=gbs\\_navlinks\\_s](https://books.google.com/books?id=RL2pWCa9Z24C&source=gbs_navlinks_s).

166. See JONATHAN W. FOWLER & KURT A. STRASSER, BLUMBERG ON CORPORATE GROUPS § 59.04[A] (2014) (“[When] the subsidiary has not accomplished its own financing but is funded by the parent or the group, the subsidiary is dependent on its parent for advances either for working capital or for continuing in business . . .” (footnotes omitted)).

167. Colpan & Hikino, *supra* note 165, at 29.

168. *Id.*

169. *Id.*

170. For a discussion on whether a wholly owned subsidiary can be attributed to the parent, see Burt Neuborne, *General Jurisdiction*, “*Corporate Separateness*,” and *the Rule of Law*, 66 VAND. L. REV. EN BANC 95 (2013).

171. See PETER G. KLEIN, THE CAPITALIST & THE ENTREPRENEUR 42 (2010) (“[T]he conglomerate could emerge only after the multidivisional structure had been diffused widely throughout the corporate sector.”).

172. See *supra* Part I.B.2.

## II. THE CURRENT GENERAL JURISDICTION DOCTRINE DOES NOT ACCOUNT FOR CORPORATE STRUCTURE

The corporate general jurisdiction doctrine does not account for the reality of corporate structure. Courts assume that corporations are monolithic creatures. The history of corporate organization shows, however, that corporations come in all shapes and sizes. Since the early 1900s, large corporations have transitioned away from a centralized headquarter towards a decentralized approach by delegating management authority to divisional offices.<sup>173</sup> This development presents a jurisdictional problem. Part A analyzes how the courts assess the principal place of business in the personal jurisdiction context. These courts assume that a corporation's principal place of business is the same as it is in the diversity context. Part A concludes that this assumption is improper. For personal jurisdiction cases, courts should not blindly adopt the *Hertz* test, which is meant to determine citizenship for diversity jurisdiction, because that approach imposes the diversity statute's limitations on personal jurisdiction. As Part B explains, the corporate general jurisdiction, which emphasizes the principal place of business, falls short when accounting for corporate structures other than the centralized U-form. Thus, this Part concludes that corporate organizational structure makes a limited definition of a principal place of business unworkable.

### A. THE LIMITATIONS OF THE PRINCIPAL PLACE OF BUSINESS

Despite the *Hertz* test's wide adoption by courts, it faces limitations. In fact, the Supreme Court agrees.<sup>174</sup> This Section analyzes how courts have adopted the principal place of business test in personal jurisdiction cases. After concluding that courts use the test no differently in diversity cases, this Section assesses the differences between the diversity cases and personal jurisdiction. It concludes that the principal place of business faces different constraints in the personal jurisdiction context than in the diversity context.

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173. See WILSON B. BROWN, *MARKETS, ORGANIZATIONS AND INFORMATION: BEYOND THE DICHOTOMIES OF INDUSTRIAL ORGANIZATION* 75–77 (1992) (describing the origins of the unitary form).

174. *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010) (describing the *Hertz* test as an “imperfect” approach).

## 1. The Principal Place of Business in the General Jurisdiction Context

The current general jurisdiction rule requires courts to determine the corporation's principal place of business.<sup>175</sup> Some courts explicitly adopted the *Hertz* test in order to locate a corporation's principal place of business.<sup>176</sup> Although other courts did not adopt the *Hertz* test, those courts identified the principal place of business as the corporate headquarters.<sup>177</sup> Courts did not consider whether the *Hertz* test is inappropriate for a personal jurisdiction analysis. As a result, courts currently treat the principal place of business in general jurisdiction cases in a similar manner as they assess it in diversity cases.<sup>178</sup>

## 2. Differences Between Diversity Jurisdiction and Personal Jurisdiction

There are substantial differences between diversity jurisdiction and personal jurisdiction. First and foremost, statutory limitations restrict the scope of diversity jurisdiction.<sup>179</sup> The Constitution provides the judiciary the power that "shall extend to . . . Controversies . . . between Citizens of different states."<sup>180</sup> It does not, however, "automatically confer diversity jurisdiction upon the federal courts."<sup>181</sup> Only Congress can authorize and determine the scope of the federal court jurisdiction.<sup>182</sup> The outer limit of the federal courts' diversity jurisdiction is set by the diversity statute.

In contrast, the Due Process Clause of the Fourteenth

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

176. See, e.g., *Allstate Ins. v. Electrolux Home Products, Inc.*, No. 1:14 CV 329, slip op. at 4 n.3 (N.D. Ohio July 19, 2014) ("The Supreme Court has defined a corporation's principal place of business as its 'nerve center' . . . . 'In practice it should normally be the place where the corporation maintains its headquarters . . . .'" (quoting *Hertz*, 559 U.S. at 92–93)); *Flynn v. Hovensa, LLC*, No. 3:14 Civ. 43, slip op. at 2 (W.D. Penn. July 3, 2014) ("A corporation's principal place of business is its 'nerve center.'").

177. See, e.g., *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 126 (2d Cir. 2014); *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221, 225–26 (2d Cir. 2014); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1065 (9th Cir. 2014).

178. Compare *Gucci*, 768 F.3d at 122 (personal jurisdiction case), with *Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101 (4th Cir. 2011) (diversity jurisdiction case).

179. See 28 U.S.C. § 1332(c) (2012).

180. U.S. CONST. art. III, § 2.

181. *Hertz*, 559 U.S. at 84.

182. See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233–34 (1922).



Amendment limits the power of personal jurisdiction.<sup>183</sup> Even if it is constitutionally permissible for a court to exercise personal jurisdiction over a corporation, that court might still lack the power to hear the case. The Due Process Clause only defines the outer boundary of permissible judicial power.<sup>184</sup> Similar to the diversity statute, the state legislature must authorize the courts to exercise that jurisdiction.<sup>185</sup> In most states, the long-arm statute is coextensive with the Due Process Clause.<sup>186</sup>

Additionally, the doctrines serve vastly different purposes. The primary purpose, for instance, of diversity jurisdiction is to open federal courts' doors to those who might suffer from local prejudice against out-of-state parties.<sup>187</sup> Congress believed that a corporation has a fair chance to avoid local prejudice if it has an established center of business within the state. Another impetus for Congress' modification of the diversity statute to include "principal place of business" was the increased size of the federal docket.<sup>188</sup> Corporations manipulated their state of incorporation to obtain diversity jurisdiction, and, as a result, these cases flooded the federal docket.<sup>189</sup> In light of this pressing concern, Congress widened the definition of corporate citizenship under the diversity statute in order to prevent clogging of the federal docket with corporation diversity cases.

As discussed earlier, the limitations of general jurisdiction

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183. See *supra* Part I.B.1.

184. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) ("The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant.").

185. See *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1258 (1st Cir. 1990) ("[T]he district court's personal jurisdiction over a non-resident defendant is governed by the forum's long-arm statute." (quoting *American Express Int'l Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989))); *Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir. 1990) ("[F]ederal courts must look to the forum state's long-arm statute to determine if personal jurisdiction may be obtained over a nonresident defendant.").

186. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 2004) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). For a broader discussion on the long-arm statutes of the fifty states, see VEDDER PRICE, LONG-ARM STATUTES: A FIFTY-STATE SURVEY (2003), <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf>.

187. See *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855).

188. See *Hertz Corp. v. Friend*, 559 U.S. 77, 86 (2010) ("At the same time as federal dockets increased in size, many judges began to believe those dockets contained too many diversity cases.").

189. *Id.*

are different than those of diversity jurisdiction.<sup>190</sup> States can exercise personal jurisdiction because of their sovereign authority.<sup>191</sup> The restrictions on the exercise of personal jurisdiction are a “matter of individual liberty.”<sup>192</sup> In other words, diversity jurisdiction asks which court, state or federal, is the proper adjudicator within a forum state. Personal jurisdiction asks if the forum state even has the power to adjudicate the issue.

To superimpose the restrictions of a statutory limitation, crafted by Congress for an entirely different purpose, upon a constitutionally defined doctrine constitutes judicial overreach. States could have chosen to create additional restrictions on the exercise of general jurisdiction. For example, Ohio state courts do not interpret the long-arm statute to extend to the limits of due process.<sup>193</sup> Instead, states have chosen to make their long-arm statutes coextensive with the Constitution. Restrictions on general jurisdiction that extend beyond the constitutional limit should be determined by the state legislatures, not the courts. The cost of such an arbitrary restriction is the infringement of the sovereign power of the states.<sup>194</sup>

## B. THE CHALLENGE PRESENTED BY CORPORATE STRUCTURE

Demonstrating that general jurisdiction could be more expansive is different from proving that it *should* be expanded.<sup>195</sup> This Section provides that justification. It argues that the variety of ways in which corporations organize their corporate functions presents a unique challenge to the current general jurisdiction doctrine.

### 1. The Federalism Problem: Unnecessary Restraints on State Sovereignty

On its face, the M-form corporation does not present any unique problem for the general jurisdiction doctrine. Even

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190. See *supra* Part I.B.

191. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011).

192. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest.”).

193. See *Hoover Co. v. Robeson Indus. Corp.*, 904 F. Supp. 671, 673 (N.D. Ohio 1995); see also OHIO REV. CODE ANN. § 2307.382 (West 2015).

194. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 772 (2014) (Sotomayor, J., concurring).

195. See Stein, *supra* note 43, at 548 (“Why *should* general jurisdiction be more expansive?”).

though the corporation delegates part of the corporate function to a divisional office, that office might still reside in the same state as the corporate headquarters. In that instance, the M-form corporation is no more difficult of a case than the U-form corporation.

The decentralization of the M-form, however, allows a corporation to disperse its corporate functions nationally. Take, for example, the prototypical M-form corporation: General Motors (GM).<sup>196</sup> GM maintains its corporate headquarters in Detroit, Michigan.<sup>197</sup> Recently, GM gave Cadillac, a divisional branch of the corporation, the authority to establish a headquarters in New York.<sup>198</sup> The Cadillac headquarters operates as a “separate business unit” that can “pursue growing opportunities in the luxury automotive market.”<sup>199</sup> Johan de Nysschen, who serves as the President of Cadillac and the General Motors Executive Vice President, manages the Cadillac office.<sup>200</sup> This GM set-up demonstrates the limitations of the current general jurisdiction doctrine.

Given that GM maintains its headquarters in Michigan, courts would likely view Michigan as GM’s principal place of business. By conflating the principal place of business with the *Hertz* test, courts restrict the general jurisdiction fora by assuming that only a single location qualifies as the principal place of business.<sup>201</sup> This approach implicates the balance of horizontal federalism.<sup>202</sup> If general jurisdiction is proper in Michigan because GM determines and directs its long-term

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196. See Haiwen Zhou, *Market Structure and Organizational Form*, 71 S. ECON. J. 705, 705 (2005) (“An example of an M-form firm is the General Motors Company.”); see also CHANDLER, *supra* note 15, at 158–60 (describing the organizational structure of General Motors).

197. *Company Profile for General Motors Co (GM)*, BLOOMBERG, <http://www.bloomberg.com/quote/GM:US> (last visited Mar. 8, 2016).

198. Dale Buss, *Cadillac Moves HQ to New York as New Chief De Nysschen Holds Sway*, FORBES (Sept. 23, 2014), <http://www.forbes.com/sites/dalebuss/2014/09/23/cadillac-moves-hq-to-new-york-as-new-chief-de-nysschen-holds-sway>.

199. *Id.*

200. *Leadership: Corporate Officers*, GEN. MOTORS, <http://www.gm.com/company/leadership/corporate-officers.html> (last visited Mar. 8, 2016).

201. See, e.g., *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221, 225–26 (2d Cir. 2014) (identifying the principal place of business as a single location); *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (limiting the fora of general jurisdiction to the place of incorporation and principal place of business).

202. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 772 (2014) (Sotomayor, J., concurring).

strategy,<sup>203</sup> why is New York precluded from exercising general jurisdiction? After all, the New York office serves a corporate function; it manages the day-to-day operations and direction of the Cadillac product.<sup>204</sup>

Absent a constitutional constraint, the current doctrine “unduly curtails” New York’s sovereign authority to adjudicate disputes against corporate defendants.<sup>205</sup> The requirement that the principal place of business exist in a single state is a creature of statutory limitation.<sup>206</sup> As discussed above, this limitation derives from both the text of the diversity statute and its legislative history.<sup>207</sup> In contrast, the Due Process Clause of the Fourteenth Amendment is the constitutional restriction on personal jurisdiction.<sup>208</sup> This Note argues that there is no Due Process consideration involved with expanding the general jurisdiction doctrine to include GM’s office in New York.<sup>209</sup> Therefore, the narrow scope of general jurisdiction for a infringes on the fifty States’ “status as coequal sovereigns in a federal system.”<sup>210</sup>

## 2. Asymmetric Consequences: Separating the Headquarters from the Control of Daily Operations

A common reorganization strategy of corporations is to separate the control of daily operations from the headquarters, placing the former function in another office, usually in another state. The separation of the corporate headquarters from other corporate functions, such as control of daily operations, creates a jurisdictional gap. *Mountain State Carbon* illustrates this point. In *Central West Virginia Energy Co. v. Mountain State Carbon, LLC*, Severstal Wheeling maintained a corporate office in Michigan where its officers “are responsible for significant oversight and strategic decision-making at Severstal Wheel-

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203. Cf. Chandler, *supra* note 139.

204. See *supra* note 198 and accompanying text.

205. See *Daimler*, 134 S. Ct. at 772 (Sotomayor, J., concurring); see also *supra* Part I.A.3.

206. See 28 U.S.C. § 1332(c) (2012).

207. See *supra* Part II.A.2.

208. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (“Since the adoption of the Fourteenth Amendment . . . the validity of [personal jurisdiction] may be directly questioned, and . . . resisted, on the grounds that proceedings . . . do not constitute due process of law.”).

209. See *infra* Part III.

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

ing.”<sup>211</sup> At the same time, the office did not manage the day-to-day operations.<sup>212</sup> That management occurred in Wheeling, West Virginia.<sup>213</sup> These activities included purchasing materials, selling products, managing environmental compliance, and administering human resources matters such as payroll.<sup>214</sup> In essence, Wheeling is where the corporation conducted its “daily management activities.”<sup>215</sup>

Following the *Hertz* rule, the Fourth Circuit determined that the corporation’s principal place of business was in Michigan, where “nearly all of the high-level officers work, make significant corporate decisions, and set corporate policy.”<sup>216</sup> This demonstrates that the *Hertz* rule is an inflexible test for the manner that corporations organize their operations. The *Hertz* Court recognized this problem,<sup>217</sup> but faced statutory limitations of the diversity statute.<sup>218</sup> Under the corporate general jurisdiction doctrine, only Michigan can exercise general jurisdiction over Severstal Wheeling because that is the state where Severstal Wheeling maintains its headquarters.<sup>219</sup>

Consider that a citizen of Michigan that does temporary steel work in West Virginia for Severstal Wheeling may sue in Michigan. For any court, this scenario is clear cut because Severstal Wheeling’s headquarters resides in Michigan. However, imagine a citizen of West Virginia, who is a steel worker for Severstal Wheeling, transports steel sheets to a client in Maryland. In Maryland, the truck malfunctions, causing a crash. The accident report details negligent maintenance of the truck as the primary cause of the accident. If a court concludes that the accident is unrelated to Severstal Wheeling’s activities

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211. 636 F.3d 101, 104–05 (4th Cir. 2011). Although the issue in *Mountain State Carbon* was ultimately one of diversity jurisdiction, the fact pattern demonstrates how different corporate structures may complicate the general jurisdiction analysis.

212. *Id.*

213. *See id.* at 105.

214. *Id.*

215. *See id.* at 106–07 (“[E]mployees in Wheeling, West Virginia ‘are engaged in nearly all facets of the company’s operations’ and . . . ‘managing [of] the company’s operations occur[s] in Wheeling.’” (last alteration in original)).

216. *Id.*

217. *Hertz Corp. v. Friend*, 559 U.S. 77, 95–96 (2010).

218. *Id.* at 93 (arguing that the words “place” and “principal” denote a singular location); *see also* 28 U.S.C. § 1332(c) (2012).

219. Again, the issues involved in *Mountain State Carbon*, namely a coal supply agreement with a West Virginian company, would likely give West Virginia specific personal jurisdiction over Severstal Wheeling.

in West Virginia, could the injured steel worker bring a suit against Severstal Wheeling in West Virginia? The answer is likely no. Although Severstal Wheeling directs its steel making operation out of its West Virginia office, that office is not the company's headquarters. Thus, the steel worker could only bring a suit in Michigan, where the headquarters is located.

Is it fair that only Michigan serves as a general jurisdiction forum for Severstal Wheeling? The West Virginia office has the authority to purchase materials, sell products, manage environmental compliance, and administer human resource matters.<sup>220</sup> In the injured steel worker's case, the corporate authority that pulled the proverbial trigger on the negligent maintenance of the truck resides in West Virginia. In fact, the West Virginia office directs the impact of Severstal Wheeling's daily operations, no matter where they occur in the United States. The availability of general jurisdiction in Michigan and its absence in West Virginia demonstrates the asymmetric nature of the corporate general jurisdiction doctrine. Severstal Wheeling exercises corporate functions in both states. However, only Michigan may exert general jurisdiction in response to Severstal Wheeling's activity. Thus, it offends traditional notions of justice that, despite the extensive reach from West Virginia, Severstal Wheeling is immune from suits on general matters in West Virginia.

### 3. The Problem Replicated in Branch Offices and Franchise Arrangements

As illustrated above, decentralized corporate structures present two challenges to the corporate general jurisdiction doctrine: (1) they restrict the states' exercise of their sovereignty through general jurisdiction; and (2) they produce asymmetric consequences for the exercise of corporate functions. Both of these challenges arise in two other common corporate arrangements: branch offices and franchise arrangements.

M-form corporations also delegate the command and control functions of the general office by creating regional offices.<sup>221</sup> A common form of this delegation is the branch office. The branch office manages part of the corporation's day-to-day operations.<sup>222</sup> This characteristic raises the question of what kind of management power confers general jurisdiction. The delega-

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220. See *Mountain State Carbon*, 636 F.3d at 105.

221. See *supra* note 165 and accompanying text.

222. See *Chandler*, *supra* note 139.

tion of authority to branch offices is a purposeful decision by the corporation. On one hand, the headquarters makes strategy decisions, such as product positioning and advertising.<sup>223</sup> On the other hand, the branches make the decisions about implementation and execution of those strategy decisions.<sup>224</sup> By diffusing the power to manage day-to-day operations to branches, a corporation prevents its headquarters from becoming overloaded with information and duties—the result is profitability and greater efficiency.<sup>225</sup>

Even though the branches in M-form corporations exercise traditional corporate functions, these offices escape the grasp of general jurisdiction. Prior to *Daimler*, courts often found that states had general jurisdiction over corporations through their branch offices.<sup>226</sup> The scope of general jurisdiction changed after that decision. Consider, for example, *Gucci America, Inc. v. Weixing Li*, in which the Second Circuit held that the Bank of China (BOC) was not subject to general jurisdiction in New York as a result of its New York branch.<sup>227</sup> Clearly, the BOC is neither incorporated nor holds its principal place of business in New York.<sup>228</sup> A critical characteristic of the New York branch of the BOC is that it does not have “possession or control over information located ‘in any other branch or office of the Bank of China.’”<sup>229</sup> The Second Circuit believed that *Daimler* “cast[s] doubt” on New York’s tradition of finding general jurisdiction over local branches “doing business” in the forum.<sup>230</sup> This gap further exemplifies the asymmetry of general jurisdiction—by ignoring how corporations delegate and restructure traditional corporate functions, the corporate general jurisdiction doctrine allows for the exercise of these functions without the risk of exposure to all-purpose jurisdiction.

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223. See David A. Garvin & Lynne C. Levesque, *The Multiunit Enterprise*, HARV. BUS. REV. (June 2008), <https://hbr.org/2008/06/the-multiunit-enterprise>.

224. *Id.*

225. See Chandler, *supra* note 139.

226. See *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 916–17 (N.Y. 1917); see also *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 136 (2d Cir. 2014) (“Prior to *Daimler*, controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York *was* properly subject to general personal jurisdiction here.”). For further examples of pre-*Daimler* cases, see *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93–95 (2d Cir. 2000); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57–58 (2d Cir. 1985).

227. 768 F.3d at 129.

228. *Id.* at 126.

229. *Id.* at 127.

230. *Id.* at 135.

A corporation arranged as a franchise presents a similar jurisdictional problem. Consider the facts of *Burger King Corp. v. Rudzewicz*.<sup>231</sup> Burger King oversees its franchise system through a two-tiered structure.<sup>232</sup> The contracts headquarters, based in Miami “sets policy and works directly with its franchisees in attempting to resolve major problems,”<sup>233</sup> while the day-to-day management of the franchisees is managed by a network of ten district offices, which report to the Miami office.<sup>234</sup> Burger King is a Florida corporation whose principal offices are in Miami.<sup>235</sup> The Florida courts clearly have general jurisdiction over any claim as Florida is both the state of incorporation and home to the principal place of business.

The asymmetry occurs, however, when considering the role of the franchises. Assume that Burger King enters a franchise agreement with a Missouri business. Burger King’s Chicago district office is responsible for managing all franchises in the Midwest, including Missouri. The Chicago office directs the business of the Missouri franchise, including product line-up, employment contracts, and financing. Imagine that a Chicago Cubs fan travels to St. Louis to observe the heated rivalry between the Cardinals and the Cubs. After eating at the Missouri franchise, the fan is infected with salmonella. The Chicago office directed the purchase of beef that is responsible for the salmonella infection. Again, the asymmetric nature of the general jurisdiction doctrine prevents the Cubs fan from suing Burger King in Chicago.

#### 4. The Principal Place of Business Test Gets It Right for Centralized Corporations

Despite these shortcomings, the search for the principal place of business, or its functional equivalent, makes sense when the corporation adopts a centralized structure. The *Hertz* test relies on a single center for direction, control, and coordination of the corporation’s activities.<sup>236</sup> Consequently, the centralized nature of the U-form structure is an ideal characteristic for this test because all the corporate functions are located in the general offices. The corporate headquarters is easily as-

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231. 471 U.S. 462 (1985).

232. *Id.* at 465.

233. *Id.* at 466.

234. *Id.* at 465–66.

235. *Id.* at 464.

236. *See supra* Part II.B.2.



certainable because many corporations openly provide their locations and list the corporate officers that work there on the company website.<sup>237</sup> Additionally, the single location avoids the possibility that a court must choose between two different states. Although there is a chance that a U-form corporation might maintain some of its high-level officers in another state,<sup>238</sup> its structure generally requires a central location of corporate control. Unfortunately, U-form corporations are not the only corporate structure, and, in fact, are less prevalent than the multidivisional structure.

### III. ADOPTING A BROADER DEFINITION OF CORPORATE ACTIVITIES

Showing that the current general jurisdiction doctrine does not account for the variety of corporate structures is, of course, not the endpoint of this Note. Courts should abandon the narrow limitations of the *Hertz* test, and should instead adapt the general jurisdiction doctrine to corporate structure. Section A introduces the notion of “corporate functions” and provides a definition of the concept. Section B explains the advantages of this definition. Section C concludes by describing how this definition is consistent with jurisdictional theory.

#### A. GENERAL JURISDICTION SHOULD FOLLOW CORPORATE STRUCTURE

The current general jurisdiction doctrine does not account for corporations that decentralize their organizational structure. In light of this deficiency, how can courts adjust the general corporate jurisdiction rule? The answer is simple: general jurisdiction must follow corporate structure. Courts can reach this ideal by finding a corporation subject to general jurisdiction in any state in which the corporation exercises a corporate function. Corporate functions are those that normally occur in the traditional headquarters.<sup>239</sup> There are two corporate func-

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237. See, e.g., *Global Locations*, A BULLSEYE VIEW, <https://corporate.target.com/careers/global-locations> (last visited Mar. 8, 2016); *Mailing Addresses*, WELLS FARGO, <https://www.wellsfargo.com/help/addresses> (last visited Mar. 8, 2016).

238. See *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010).

239. Cf. *Chandler*, *supra* note 139 (“[T]he executives at the new headquarters carried out two closely related functions. . . . [First,] determine strategies to maintain and then utilize for the long-term the firm’s organizational skills, facilities and capital and to allocate resources . . . . The second was more administrative or loss-preventive.”).

tions: (1) the direction of all activities in furtherance of the corporate objective; and (2) the command and control of day-to-day operations.<sup>240</sup> So, when a corporation decentralizes its operations by moving a corporate function (i.e., the command and control of day-to-day operations) to an office in another state, general jurisdiction would follow that corporation to that state.

To put it differently, the corporate functions test focuses on the corporation's structure rather than the corporation's activities. To illustrate this difference, recall the *Mountain State Carbon* case, in which Severstal Wheeling had two offices—a corporate headquarters in Michigan and an office in West Virginia to manage the day-to-day operations. Applying the *Hertz* test, a court would look for Severstal Wheeling's "center of direction, control, and coordination."<sup>241</sup> However, this analysis assumes that all of these functions occur in the same place and, therefore, Severstal Wheeling presented a difficult case. On one hand, the direction of Severstal Wheeling's activities happens in Michigan. On the other hand, the control and coordination of those activities takes place in West Virginia.

Direction and coordination refers to where a corporation plans, appraises, and determines the corporation's overall goals and policies.<sup>242</sup> These decisions occur on the macro level and are likely directed by high-level corporate officers including the chief executive officer, chief operating officer, and chief financial officer.<sup>243</sup> For example, a corporate headquarters where a CEO makes investment decisions and product line development plans is a place from which the corporation directs its activities. In contrast, a branch office that implements the decisions of the corporate headquarters does not direct the corporation's activities.

Control refers to where the corporation manages the day-to-day operations. Although Severstal Wheeling's steel operations happen in West Virginia, the defining feature of the corporate function inquiry is Severstal Wheeling's control over those operations. It is important to note that the corporate function is the *control* over the day-to-day operations and not the operations themselves. To illustrate this difference, *Moun-*

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240. *Id.*

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

242. See CHANDLER, *supra* note 15, at 9 (providing an overview of the tasks undertaken at different levels of administration).

243. See *Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 105 (4th Cir. 2011).

*tain State Carbon* is again useful. The West Virginia office managed the steel operation by purchasing materials, contracting to sell products, managing administrative compliance, and administering human resource matters.<sup>244</sup> The steel operation itself is the production of steel sheets. Because Severstal Wheeling manages the steel operation from the West Virginia office, general jurisdiction would be proper under the corporate functions test. However, if Severstal Wheeling consolidated the management of the steel operation to its office in Michigan, general jurisdiction would not be proper in West Virginia, even though Severstal Wheeling continued to make steel sheets in West Virginia. Thus, the command and control of daily operations does not include the actual day-to-day operations themselves.

The corporate function test unchains the general jurisdiction inquiry from the bounds of the *Hertz* principal place of business test. By doing so, the test eliminates an artificial constraint on state sovereignty, which the courts have superimposed on the states from Congress' diversity jurisdiction statute. Furthermore, the corporate functions test provides states with the flexibility to exercise jurisdiction over corporations when they exert corporate functions from within their borders. Recall the *Mountain State Carbon* case.<sup>245</sup> Because Severstal Wheeling delegated control over its day-to-day operations to the West Virginia office, West Virginia would be able to hold Severstal Wheeling accountable for its corporate actions.

The corporate functions test fills the gaping hole left by the mismatch between judicial doctrine and corporate structure. The exercise of corporate functions would no longer result in asymmetric consequences. If the branch of a corporation manages the day-to-day operations of the corporation's activities, then the corporation is subject to general jurisdiction in that state. This analysis holds true for the franchise arrangements as well. Recall the facts of *Burger King*.<sup>246</sup> Although the Miami office directs the strategic decision-making, the headquarters delegated the command and control of day-to-day operations to the district offices.<sup>247</sup> The regional offices serve as a divisional office in an M-form corporation. Under the corporate-business activities distinction, Burger King would be amenable to suit on

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244. *Id.*

245. *See supra* notes 211–15 and accompanying text.

246. *See supra* notes 231–35 and accompanying text.

247. *See supra* note 234 and accompanying text.

an unrelated cause of action in Chicago, the location of the franchise office, because it conducts corporate activity in the state.

#### B. ADVANTAGES OF THE CORPORATE FUNCTIONS DEFINITION

The corporate functions definition provides the best explanation for general jurisdiction, and offers several advantages. First, it is a narrow approach that emphasizes characteristics of corporations that tend to be limited by nature. The proliferation of high-level corporate activity is inefficient and runs counter to the current corporate trend.<sup>248</sup> A narrow approach is clearly favored after *Daimler*.<sup>249</sup> Although the *Daimler* inquiry is simpler, the corporate functions test does not substantially expand the reach of general jurisdiction. In order for a corporation to be subject to general jurisdiction under this Note's approach, a corporation must delegate corporate functions to an office. These functions are limited and finite.

Second, it creates a predictable and stable reasoning for courts to follow. The lower courts have had difficulty applying the Court's prior general jurisdiction rules in a consistent manner.<sup>250</sup> The most difficult cases arise when decentralized corporate structures are present.<sup>251</sup> The Supreme Court has already

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248. See HANS D. BAUMANN, BUILDING LEAN COMPANIES: HOW TO KEEP COMPANIES PROFITABLE AS THEY GROW 17 (2009) ("[Too many layers of management] can place a burden on support services analogous to the burden placed on the heart of an obese animal . . ."). *Contra* Michael Goold & S. David Young, *When Lean Isn't Mean*, HARV. BUS. REV. (Apr. 2005), <https://hbr.org/2005/04/when-lean-isnt-mean> (suggesting empirical evidence might not support the thesis that "a lean and mean headquarters is associated with superior financial performance").

249. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) ("[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction . . ."); Colin T. Kemp et al., *Daimler AG v. Bauman: Court Again Rejects a "Sprawling View of General Jurisdiction"*, PILLSBURY (Jan. 21, 2014), <http://www.pillsburylaw.com/publications/daimler-ag-v-bauman-court-again-rejects-a-sprawling-jurisdiction> ("[T]he circumstances [in which one can sue a corporation under general jurisdiction in a forum other than the state of incorporation or home of the principal place of business] are vanishingly narrow.").

250. See Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 829–34 (2004) (describing the various inconsistent applications of general jurisdiction).

251. See, e.g., *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 129 (2d Cir. 2014) (exemplifying the branch office problem); *Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 107 n.3 (4th Cir. 2011) ("We recognize that the proliferation of complex corporate structures among business enterprises may compel further attention to the issue of 'principal place of

acknowledged the “easily ascertainable” nature of high-level corporate activities.<sup>252</sup> By providing a doctrine which can be consistently applied, the corporate functions definition will help corporations structure their conduct<sup>253</sup> and make better business and investment decisions.<sup>254</sup>

Third, it avoids the problem of corporate “presence.” Courts have struggled to abandon the fiction of corporate “presence.”<sup>255</sup> This is in part due to a historical reliance on this concept<sup>256</sup> and the Supreme Court’s failure to reject traditional indicia of corporate “presence” in its general jurisdiction cases.<sup>257</sup> The corporate functions definition distinction involves factors that are distinct enough from the prior “presence” test.<sup>258</sup> Prior theories of general jurisdiction focus on the corporation’s activities rather than how the corporation is structured.<sup>259</sup> The corporate functions test removes corporate activities, such as sales, manufacturing, and production, from the analysis. Instead, the inquiry solely focuses on the corporation’s structure and how it delegates corporate functions. Therefore, it is unlikely that

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business’ . . .”).

252. See *Daimler*, 134 S. Ct. at 760 (“Those affiliations have the virtue of being . . . easily ascertainable.”); *Hertz Corp. v. Friend*, 559 U.S. 77, 95 (2010) (“A ‘nerve center’ approach . . . is simple to apply *comparatively speaking*.”).

253. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”).

254. See *Hertz*, 559 U.S. at 94.

255. See, e.g., *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067 (9th Cir. 2014).

256. See, e.g., *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917) (“All that is requisite [for jurisdiction] is that enough be done to enable us to say that the corporation is here.”).

257. The Supreme Court continues to list the factors of corporate “presence” in its general jurisdiction decisions. See, e.g., *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring) (“[T]he Court does not dispute . . . the presence of [Daimler’s] multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers . . .”); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984) (“Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there.”); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952) (“There [Benguet’s president] maintained an office in which he . . . did many things on behalf of the company.”).

258. Compare *supra* Part I.A (describing the factors of corporate presence), with *supra* Part III.A (describing the factors of corporate functions).

259. See, e.g., *Daimler*, 134 S. Ct. at 762 n.20; *Helicopteros*, 466 U.S. at 411–12.

courts will revert to a reliance on corporate “presence” in a “ritualistic application” of the proposed solution.<sup>260</sup>

One risk of the corporate functions definition is that it might cause corporations to shift from a multidivisional structure to a multisubsidiary one. Some corporations have already made a transition away from MDF to MSF because of incentives created by corporate tax reform.<sup>261</sup> The possibility that the former might incur more litigation liability than the latter might also incentivize corporations to switch.

This reaction, however, should not be considered a disadvantage of the distinction. A central tenet of general jurisdiction is that corporations should be afforded the opportunity “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>262</sup> If, following the adoption of the corporate functions definition, corporations choose to reorganize, it will be an indication that the doctrine of general jurisdiction is operating as it should.

### C. THE CORPORATE FUNCTIONS DEFINITION IS BASED ON A STRONG THEORETICAL RATIONALE

Showing that the corporate functions definition offers several advantages is, of course, only a necessary but not sufficient condition for its adoption. A desirable proposal must also rest on a strong theoretical rationale. Although the corporate functions definition might be an arbitrary line, as all lines tend to be, it is consistent with general jurisdiction theories. Given the lack of theoretical foundation of general jurisdiction,<sup>263</sup> in particular as applied to doing business jurisdiction, a strong consistency with jurisdiction theory sets this line apart from other approaches. This Section explores how the corporate-business activities distinction fits with various theories.

#### 1. The Corporate Functions Test Provides Reciprocal Consequences for Benefits

The corporate functions definition fits well with a theory of

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260. Edmond R. Anderson, Jr., *Personal Jurisdiction over Outsiders*, 28 MO. L. REV. 336, 383–84 (1963).

261. See Zey & Swenson, *supra* note 160, at 242.

262. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

263. See *supra* Part I.A.

reciprocity.<sup>264</sup> Corporate functions govern and control business activities.<sup>265</sup> Decisions made at the corporate level “encompass[] every phase of [a corporation’s]’ activities—production, sales, distribution, advertising, public relations and all other related facets.”<sup>266</sup> In other words, no aspect of the corporation’s activities escapes the management of high-level officers.

As a result, all of the corporate functions will have a connection to the policies and decisions made in states where there is corporate activity. Consider a mining corporation with its headquarters in Ohio but mining activities in another state or country. Even though the mining operations do not take place in Ohio, the headquarters directed those activities from that state. For instance, the corporate activity in Ohio sets production limits, determines payment rates of the miners, and ensures compliance with various mining regulations. In this sense, the corporate functions are connected with every state in which the corporation conducts mining activities.

To put this characteristic in contrast with the mining operations, imagine that a court provides general jurisdiction over the Ohio corporation because of its mining operations in Virginia. Unlike the corporate activities in Ohio, the mining operations only have a relationship to the state of Virginia. It is proper for Virginia to regulate the effects of those activities, and it can do so under specific jurisdiction.<sup>267</sup> It fails any commonplace sense of reciprocity that the local activity of mining operations gives Virginia authority over activities having no connection to those mining operations.<sup>268</sup> The burden of all-purpose jurisdiction in return for the corporation’s privileges and protection to mine in Virginia is likely to be “far more severe” and, therefore, be far from reciprocal.<sup>269</sup>

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264. See Brilmayer et al., *supra* note 14, at 728–29.

265. See *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959).

266. *Id.*

267. See generally von Mehren & Trautman, *supra* note 26, at 1144–63 (describing the applications of specific jurisdiction).

268. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014) (“Nothing in *International Shoe* and its progeny suggests that ‘a particular quantum of local activity’ should give a State authority over a ‘far larger quantum of . . . activity’ having no connection to any in-state activity.” (alteration in original) (quoting Feder, *supra* note 14, at 694)).

269. See Feder, *supra* note 14, at 694.

## 2. The Corporate Functions Test Aligns with State Sovereignty

Limiting general jurisdiction to a corporation's principal place of business is far too narrow of a view.<sup>270</sup> State sovereign authority to adjudicate disputes should only be limited by the Due Process Clause and the federalist structure.<sup>271</sup> The principal place of business is a creature of statute.<sup>272</sup> Imposing such a limitation, crafted by Congress for an entirely different purpose, upon a doctrine limited only by the Constitution constitutes judicial overreach. The cost of such an arbitrary restriction is the infringement of the sovereign power of the states.<sup>273</sup>

The corporate functions definition offers a slightly broader view of proper jurisdiction. Although the divisional offices of an M-form corporation might not make a corporation a citizen of the forum state, the relationship between the office and the forum state is no less potent. As discussed above, each of the corporate functions demonstrate a similar level of reciprocity and predictability.

## 3. The Corporate Functions Test Promotes Forum Certainty

The necessity of providing a plaintiff a certain forum in which it can sue a corporation offers a weak theoretical justification.<sup>274</sup> If this is the underlying basis for jurisdiction, then *Daimler*, and by extension *Goodyear*, has already exceeded this purpose by providing not one but two potential fora.<sup>275</sup> The current scope of general jurisdiction, as a result, might actually be an over-inclusive means to serve a plaintiff's convenience. In order to serve the purpose of providing a certain forum, only the state of incorporation is necessary because every corpora-

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270. See Blanchard, *supra* note 14, at 900 (“A corporation is ‘at home’ only in its state of incorporation and in the one state where its principal place of business, or nerve center, is located.”).

271. See Part I.A.

272. See discussion *supra* Part II.A.2.

273. See *Daimler*, 134 S. Ct. at 772 (Sotomayor, J., concurring) (“Yet [the majority] never explains why the State should lose [the power to adjudicate] when . . . a corporation ‘divide[s] [its] command and coordinating functions among officers who work at several different locations.’”).

274. See *id.* at 760 (majority opinion) (“These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”).

275. See *id.* (identifying the place of incorporation and the principal place of business as paradigm fora); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011) (making the same identification).



tion must be incorporated. As a result, every plaintiff would have some forum in which to pursue a corporate defendant. Therefore, forum certainty might be part of the reasoning behind the Supreme Court's general jurisdiction cases, but not a dispositive one. The other justifications offer a countervailing explanation that justifies the corporate functions definition.

To be sure, *Daimler* promotes greater forum certainty—a court only needs to look for the corporation's headquarters or the state of incorporation. In contrast, the corporate functions test requires courts to discern the internal organization of a corporation. Many of these functions might not be readily apparent to a court without intricate knowledge of the corporation's structure. Jurisdictional discovery mitigates the impact of any uncertainty.<sup>276</sup> If a defendant asserts a defense of lack of personal jurisdiction, a court may permit discovery of jurisdictional facts.<sup>277</sup> Thus, discovery and admissions of corporate structure would simplify the jurisdictional inquiry.

#### 4. The Corporate Functions Test Is More Predictable

The corporate function approach would also make the general jurisdiction doctrine more predictable and consistent. To be sure, the place of incorporation and principal place of business are excellent paradigm fora. Both tend to be clear and readily apparent.<sup>278</sup> When a corporation is sued in neither of the paradigm fora, the courts struggle to consistently rationalize their decisions.<sup>279</sup> Far more often, however, courts constrain their

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276. See generally S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 507–08 (2010) (describing the role of discovery in determining the existence of personal jurisdiction). Justice Ginsburg believes that the *Daimler* standard negates the need for jurisdictional discovery. *Daimler*, 134 S. Ct. at 762 n.20.

277. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (“[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.”); *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989). A court, however, is not required to grant jurisdictional discovery. See Strong, *supra* note 276, at 524–32 (explaining the highly discretionary process by which courts determine whether to order jurisdictional discovery).

278. See *supra* notes 116–21 and accompanying text.

279. See, e.g., *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014) (expressing that the existence of a local office is “clearly not ‘an exceptional case’” (quoting *Daimler*, 134 S. Ct. at 761 n.19)); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (rejecting both the plaintiff's tag jurisdiction argument and exceptional case argument for personal jurisdiction); *Presby Patent Tr. v. Infiltrator Sys., Inc.*, No. 14-cv-542-JL, 2015 WL 3506517, at \*6 (D.N.H. June 3, 2015) (equating the exceptional case require-

analysis to comparing the facts of the case before them with those of prior Supreme Court cases.<sup>280</sup> The problem is that the courts do not have a set of factors that help them identify “exceptional cases.”<sup>281</sup> Put differently, courts do not ask why a case is not “exceptional.” How then can a court properly identify when a case *is* exceptional?

It is possible that the courts are getting the right results, but doctrine without a clear rationale might be why *Daimler*’s clarification was necessary at all.<sup>282</sup> The corporate function approach make courts’ exercise of general jurisdiction more predictable. First, a test that reflects how corporations are actually structured should promote accuracy.<sup>283</sup> Courts do not substitute their own expertise for that of a corporation’s business rationale.<sup>284</sup> Similarly, courts should not ignore how corporations choose to organize their business. Second, much like the *Hertz* test, the corporate function approach does not require courts to assess a corporation’s business activities.<sup>285</sup> When courts look to those business activities, the doctrine “invites greater litigation and can lead to strange results.”<sup>286</sup> The most recent cases on general jurisdiction indicate that the courts may be headed down this path.<sup>287</sup> The corporate function approach eliminates that unpredictability.

##### 5. The Theoretical Support Is Similarly Strong for the Management of Day-to-Day Operations

It is possible that the totality of corporate functions aligns properly with the general jurisdiction theories, but each func-

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ment with a search for a “surrogate for [a corporation’s] principal place of business”); *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 388–89 (E.D.N.Y. 2015) (rejecting the existence of manufacturing plants as an exceptional case); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 104–05 (S.D.N.Y. 2015) (rejecting website activity as an exceptional case).

280. See, e.g., *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 39–40 (2d Cir. 2014); *Chatwal Hotels & Resorts*, 90 F. Supp. 3d at 104.

281. See *supra* note 279.

282. See generally Twitchell, *supra* note 14, at 629–30 (arguing that general jurisdiction’s difficult application results in confusion and unpredictability).

283. See *Rautenstrauch v. Stern/Leach Co.*, No. Civ.A 03-10723-DPW, 2004 WL 42573, at \*2 (D. Mass. Jan. 8, 2004) (“[C]ourts must be careful to consider the fit of model to reality . . .”).

284. See *Gimbel v. Signal Cos.*, 316 A.2d 599, 609 (Del. Ch. 1974) (explaining the “business judgment rule”).

285. See *Hertz Corp. v. Friend*, 559 U.S. 77, 93–94 (2010).

286. *Id.* at 94.

287. See *supra* notes 250–51 and accompanying text.

tion independently might not. Recall that there are two corporate functions: the direction of long-term strategy of the corporation and the management of the corporation's day-to-day operations. The former function is the least susceptible to this criticism for two reasons. First, the corporate headquarters, in any organization structure, directs its long-term strategy.<sup>288</sup> Courts have consistently viewed the corporate headquarters as the principal place of business, and, therefore, a proper forum for general jurisdiction.<sup>289</sup> Second, there is nothing inherently unfair about asserting jurisdiction in a state where a corporation keeps its corporate headquarters. A corporation expects to be sued in that state and structures its business accordingly with a legal support team and intricate knowledge of the state's laws.<sup>290</sup>

Courts might not believe that a corporation's management of day-to-day operations hold equal weight to the functions of a corporate headquarters, especially if these functions occur in an office in a different state. The management of day-to-day operations, however, is an important function that should confer general jurisdiction. This function is integral to the success of the corporation.<sup>291</sup> In fact, corporations choose to delegate the function to divisional offices because of the related economic benefits and managing advantages.<sup>292</sup> The divisional headquarters also have a national, rather than local, reach.<sup>293</sup> The corporation derives unique benefits from the divisional office, both through economic gains and organizational efficiency, and, as such, it avails itself of the benefits of the state in which it's located. Therefore, the management function of a corporation is equally weighty in the jurisdictional context and should justify the exercise of general jurisdiction.

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288. See *supra* Part II.B.

289. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 772 (2014) (Sotomayor, J., concurring) ("The majority does not dispute that a State can exercise general jurisdiction where a corporate defendant has its corporate headquarters . . .").

290. Interview with Eric Tostrud, Of Counsel, Lockridge Grindal Nauen P.L.L.P., in Minneapolis, Minn. (Mar. 6, 2015).

291. See Part II.B.2 (describing the economic benefits of the multidivisional form).

292. See *supra* notes 150–56 and accompanying text.

293. See CHANDLER, *supra* note 15, at 12 ("The executives in the departmental headquarters plan, administer, and coordinate the activities of one function on a . . . national scale rather than just locally.").

## 6. The Corporate Functions Definition Is Consistent with Precedent

Of course, courts should not adopt a different approach simply because the approach rests on sound theoretical grounds. Any change to the corporate general jurisdiction doctrine should be consistent with precedent. Nothing in *Daimler* suggests that the Supreme Court limited general jurisdiction over corporations to the forum where it is incorporated or has its principal place of business.<sup>294</sup> In fact, the Court left the door open.<sup>295</sup> To be sure, the place of incorporation and principal place of business are excellent paradigm fora.

The Court, however, did not limit the proper general jurisdiction to these two fora.<sup>296</sup> In “an exceptional case,” a corporation’s operations may be “so substantial and of such a nature as to render the corporation at home in that State.”<sup>297</sup> Courts have interpreted this standard to require the functional equivalent of incorporation or principal place of business.<sup>298</sup> Other courts have treated *Daimler*’s “exceptional case” as a search for a “surrogate for [a corporation’s] principal place of business.”<sup>299</sup>

As the history of corporate structure shows, determining the “functional equivalent” of the corporation’s principal place of business will vary based on the organizational structure. The corporate functions approach is consistent with the search for a “functional equivalent.” It provides a nuanced approach by recognizing that corporations can, and often do, separate their functions.<sup>300</sup> To put it differently, by looking for the offices from which a corporation directs its corporate strategy and manages its day-to-day operations test, a court is looking for the “functions” of a traditional corporate headquarters. In this way, the

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294. See *Presby Patent Tr. v. Infiltrator Sys., Inc.*, No. 14-cv-542-JL, 2015 WL 3506517, at \*5 (D.N.H. June 3, 2015).

295. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014) (“We do not foreclose the possibility that in an exceptional case . . . a forum other than its formal place of incorporation or principal place of business may . . . render the corporation at home in that State.”).

296. *Id.* at 760 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business . . . .” (emphasis in original)).

297. *Id.* at 761 n.19.

298. See, e.g., *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875, 2014 WL 5394310, at \*3 (E.D. Pa. Oct. 23, 2014). For an example of an “exceptional case,” see *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

299. *Presby Patent Tr.*, 2015 WL 3506517, at \*6.

300. See *supra* Part I.B.2 and accompanying text.

corporate functions test is consistent with the court's precedent on "exceptional cases."

#### CONCLUSION

Today, corporations come in all shapes and sizes. As this Note demonstrates, corporations divide their "center of direction, control, and coordination"<sup>301</sup> in a far more nuanced and variable manner than simply maintaining a centralized corporate headquarters. However, courts have given little thought to this prospect and, instead, have committed to a test that relies on the archaic assumption that every corporation structures itself in a centralized manner.<sup>302</sup> Instead, in *Daimler*, the Supreme Court superimposed the restrictions of the diversity statute onto the corporate general jurisdiction doctrine by harkening to the *Hertz* test. In doing so, the Supreme Court unnecessarily infringed on state sovereignty—general jurisdiction is unrestrained by congressional legislation, and bound only by the Due Process Clause. Furthermore, the *Daimler* test separates corporate general jurisdiction theory from the realities of corporate structure—creating a mismatch between theory and practice.

Therefore, courts should expand the corporate general jurisdiction doctrine, ever so slightly, by recognizing that a corporation's exercise of corporate functions (i.e., direction of corporate activities and management of day-to-day operations) subjects a corporation to general jurisdiction. By doing so, the courts can remove the artificial limitation on the exercise of state sovereignty and create a predictable and fair test for general jurisdiction. Changing the general jurisdiction test to adapt to how corporations organize their structures will not open the floodgates. Instead, courts will be able to handle tough jurisdictional cases with greater flexibility. When a corporation divides its strategic decision-making from its management of day-to-day operations, the general jurisdiction test should account for this structure. Thus, the corporate functions test is a step in the right direction.

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301. *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010).

302. *See id.*