

**What Remains of Vicarious Jurisdiction for  
Establishing General Jurisdiction Over Corporate  
Defendants After *Daimler AG v. Bauman*?**

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#### INTRODUCTION

When, if ever, should a corporation be subject to a court’s jurisdiction based solely on the activities of another entity? Commonly, injured plaintiffs pursue foreign<sup>1</sup> corporations to recover for injuries inflicted upon them by some activity of that corporation or its subsidiary. Where plaintiffs are unable to establish personal jurisdiction over the foreign corporation directly, plaintiffs may attempt to establish jurisdiction over the corporation indirectly by imputing to it the in-forum activities of a closely related subsidiary.<sup>2</sup> This form of jurisdictional blame shifting has been termed “vicarious jurisdiction,”<sup>3</sup> and it stems from the understanding that more than one entity may be responsible for the same events. Vicarious jurisdiction arguments are used to establish both specific and general adjudicative jurisdiction over foreign defendants.

Specific jurisdiction is available for claims that arise out of, or are related to, the defendant’s activity or contacts within the forum.<sup>4</sup> In contrast, general jurisdiction is available for claims that are unrelated to the defendant’s activities in the forum only if the defendant has a constitutionally sufficient relationship with the forum to be deemed “at

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<sup>1</sup> For the moment, “foreign” may refer to either a corporation domiciled outside the territory of the United States or a domestic corporation domiciled outside the territory of the state in which the Plaintiff files suit.

<sup>2</sup> See, e.g., *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) (citations omitted) (“Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there; the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent. It has long been recognized, however, that in some circumstances, a close relationship between a parent and its subsidiary may justify a finding that the parent ‘does business’ in a jurisdiction through the local activities of its subsidiaries.”).

<sup>3</sup> See generally Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004). Others have called the practice “jurisdictional veil piercing.” *Id.* at 1029–30.

<sup>4</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011) (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (“Specific jurisdiction, on the other hand, depends on an ‘affiliatio[n] between the forum and the underlying controversy,’ principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”)).

home” there.<sup>5</sup> Traditionally, corporations are “at home” in the state or states in which they are incorporated or maintain a principal place of business.<sup>6</sup> Once general jurisdiction is established, the court has authority to adjudicate any claim brought against that defendant in the forum, regardless of whether the claims relate to the defendant’s activities in the forum.<sup>7</sup>

The practice of imputing the contacts of a subsidiary to establish jurisdiction over the parent is historically more available in the context of specific jurisdiction. While a state’s regulatory interest in addressing harms caused by an absent defendant’s in-state activities is obvious, its regulatory interest in the out-of-state affairs of an in-state business is markedly lower.<sup>8</sup> Thus, imputation arguments to establish specific jurisdiction are more defensible as consistent with the state’s regulatory interest in addressing in-state activity related to the claims. In the same way, imputation arguments to establish general jurisdiction are met with caution due to the state’s tenuous regulatory interest in the out-of-state activity.<sup>9</sup> Accordingly, uncertainty remains as to the circumstances under which vicarious jurisdiction arguments will successfully establish general jurisdiction over the foreign parent corporation.

Recently, the Supreme Court affirmatively approved the use of vicarious jurisdiction arguments to establish general jurisdiction over foreign corporate defendants.<sup>10</sup> In *Daimler AG v. Bauman*, the Court held

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<sup>5</sup> *Id.* (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”).

<sup>6</sup> *Id.* at 2853–54 (citing Lea Brilmayer, Jennifer Haverkamp, & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

<sup>7</sup> *Id.* at 2851.

<sup>8</sup> See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 698 (1987) (“[T]he state sometimes must exercise authority over persons outside its borders to give effect to the legitimate regulatory authority within its borders . . . . Recognition of this kind of jurisdiction is implicit in . . . the Court’s articulation of what is now known as ‘specific jurisdiction,’ that is, the power of the state to assert jurisdiction to redress a legal wrong committed or suffered within the state.”).

<sup>9</sup> See Hoffman, *supra* note 3, at 1092 (“[T]he exercise of general jurisdiction in veil-piercing cases is uniquely problematic insofar as there will never be a regulatory interest to justify the exercise of jurisdiction when its sole basis is a reliance on veil piercing or some other artifice to merge otherwise separate entities.”).

<sup>10</sup> In so ruling, the Court declined an opportunity to define a rule to govern when and how a subsidiary’s contacts might be imputed to a parent corporation, an issue that has been the subject of much dispute. Because state law largely governs theories of imputation, a corporation could be at the mercy of a different state law in any given forum, and some laws of imputation are more pro-jurisdiction than others. The proper standard to govern imputation is beyond the scope of this paper. The interested reader should consult the writings of Lonny Sheinkopf Hoffman, which provide an overview of the various theories

that the Due Process Clause permits, in limited circumstances, the exercise of general jurisdiction over a nonresident parent corporation based on the activities and contacts of its in-forum subsidiary.<sup>11</sup> The Court determined that imputation of the subsidiary's in-forum contacts to the foreign parent is insufficient by itself to establish general jurisdiction over the parent;<sup>12</sup> instead, *after* successful imputation, a court must conduct an additional inquiry to determine whether the parent corporation has contacts with the forum independently sufficient to subject it to the court's general jurisdiction.<sup>13</sup>

Does the *Bauman* test raise an insurmountably high bar for exercising general jurisdiction over foreign corporate defendants based on imputed contacts? For example, under what circumstances would a foreign defendant ever be "at home"<sup>14</sup> in a forum wherein its own contacts with the forum were insufficient to establish general jurisdiction in the first place? In *Bauman*, the imputed contacts of a conceded "at home" subsidiary were *insufficient* to establish general jurisdiction over the foreign parent. According to the Court, a sufficient showing of activity or contacts in the forum *could* satisfy the ultimate "at home" inquiry as to the parent corporation if its subsidiary's contacts were also imputed to the parent. The Court left for future determination the quantity or quality of in-forum activities and contacts that would satisfy its standard.

Appropriately, the Court's decision in *Bauman* sharply confines the extent to which the imputation of a subsidiary's contacts will be sufficient

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of attribution and an argument against using substantive law in the determining imputation. *See generally* Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004); Lonny Sheinkopf Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler AG v. Bauman*, 34 U. PA. L. REV. 765 (2013). Notably, the third prong of the *Bauman* test creates a constitutional limit on the ability of state law imputation theories to establish general jurisdiction over foreign corporations, which perhaps eases many of the concerns Hoffman raises. *See infra* Parts I.C.2.–II.

<sup>11</sup> *Daimler AG v. Bauman*, 134 S.Ct. 746, 760 n.16 (2014). This case will be discussed in detail, *infra* Part I.C.

<sup>12</sup> *Id.* Prior to *Bauman*, the lower courts routinely exercised general jurisdiction over foreign corporate defendants upon the initial determination that a subsidiary's in-forum contacts could be imputed to the parent. *See, e.g.*, *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1362–63 (11th Cir. 2006); *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1268–69 (11th Cir. 2002).

<sup>13</sup> *Bauman*, 134 S.Ct. at 760 n.16 (citing Brief of *Amica Curiae* Professor Lea Brilmayer Supporting Petitioner at Part B.1, *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (“[T]his Court mandates that contacts be shown for every defendant over whom jurisdiction is sought.”)); *accord* *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (“[T]he requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction.”).

<sup>14</sup> The history of corporate domicile and the “at home” standard that has come to govern where corporations are subject to suit is discussed at length, *infra* Parts I.A–B.

to establish general jurisdiction over a foreign parent corporation. Nevertheless, vicarious jurisdiction arguments remain a viable means for establishing general jurisdiction over foreign corporate defendants. The aim of this paper is to ascertain the parameters and efficacy of utilizing vicarious jurisdiction theories to establish general jurisdiction over foreign corporate defendants in light of *Bauman*. Part I first observes the historical development of general jurisdiction in federal courts. Next, Part I concentrates on *Daimler AG v. Bauman*, the Court's recent landmark decision regarding general jurisdiction and imputation. Part II analyzes the continuing viability of vicarious jurisdiction after *Bauman*, arguing that several limited avenues remain open for using imputation theories to establish general jurisdiction over foreign corporate defendants.

### I. GENERAL PERSONAL JURISDICTION IN U.S. FEDERAL COURT

A court has general jurisdiction over any defendant who is “at home” in the forum.<sup>15</sup> While individuals are deemed “at home” in the singular location of their domicile,<sup>16</sup> a corporation is “at home” in both its state of incorporation and its principal place of business, if the two are distinct.<sup>17</sup> The state of incorporation is the state whose laws give the corporation its personhood. The location of a corporation's principal place in business is less formally determined. In *Hertz Corp. v. Friend*, the Supreme Court announced that a corporation's principal place of business is its “nerve center”—the singular locus in which its “officers direct, control, and coordinate the corporation's activities.”<sup>18</sup>

The “at home” inquiry, then, is an examination of the defendant's relationship to the forum and to the litigation. This general rule is the culmination of over a century of Supreme Court precedent delineating the constitutional boundaries of general jurisdiction over nonresident, corporate defendants. Those precedents are discussed below.

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<sup>15</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011).

<sup>16</sup> *Id.* at 2853.

<sup>17</sup> *Id.* at 2854–54 (citing Lea Brilmayer, Jennifer Haverkamp, & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988) (“Domicile, place of incorporation, and principal place of business are paradigms of bases for general jurisdiction.”)). As will be discussed below, the Court left open the possibility that general jurisdiction could lie where a corporation's contacts with the forum were so continuous and systematic that it could be rendered “essentially at home” in that forum. *Id.* at 2851 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). *Cf.* 28 U.S.C. § 1332(c) (statutorily restricting a corporation's citizenship for purposes of diversity jurisdiction to “every” state in which it is incorporated and “the” state in which it has its principal place of business).

<sup>18</sup> *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192–93 (2010).

## A. EARLY HISTORY

1. *Strict Territoriality of Pennoyer v. Neff*

In its infancy, personal jurisdiction was a function of the court's "power over the defendant's person."<sup>19</sup> Courts had adjudicatory power only over defendants who were physically present in the state or who had otherwise consented to the court's jurisdiction.<sup>20</sup> For individuals, physical presence equated to the person's domicile<sup>21</sup> or any state wherein the person was physically served with process.<sup>22</sup> For corporations, physical presence was largely understood to be the state of its incorporation,<sup>23</sup> and the court's "power" over a corporation was substantiated by in-state service of process upon its corporate officers.<sup>24</sup> The Supreme Court formalized this strict territoriality era of personal jurisdiction in *Pennoyer v. Neff* when it determined that principles of state sovereignty forbid a state court to "extend its process beyond that territory" and exercise jurisdiction over the "persons or property" of another state.<sup>25</sup>

Despite an apparently impenetrable rule of territorial personal jurisdiction, *Pennoyer* allowed two exceptions. The first exception permitted a court to exercise jurisdiction over absent defendants where the claims involved the forum state's regulatory interest in defining civil status, such as marriage.<sup>26</sup> The second exception preserved a state's right to require that a nonresident entering into "a partnership or association" within the state appoint some person on whom process may be served within the State.<sup>27</sup> The in-state presence of the agent on whom process

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<sup>19</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>20</sup> *McCormick v. Pennsylvania Cent. R. Co.*, 49 N.Y. 303, 309 (1872) (acknowledging that "voluntary appearance confers jurisdiction of the person" had been the accepted rule since 1819).

<sup>21</sup> *See Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("The jurisdiction of the United States over its absent citizen . . . is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them.").

<sup>22</sup> *See Hoffman*, *supra* note 3, at 1036 ("At one time, in-state service was necessary for jurisdiction because of the territorial limitations imposed by the power theory.").

<sup>23</sup> *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) ("[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created.").

<sup>24</sup> *M'Queen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819) ("The process against a corporation, must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists.").

<sup>25</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

<sup>26</sup> *Id.* at 734–35 ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

<sup>27</sup> *Id.* at 735. Historically, states often required nonresident corporations, in exchange for the "privilege" of doing business within the state, to appoint an in-state agent to receive process for suits arising from the in-state business activities. In this way, corporations "consented" to personal jurisdiction in the forum and could not insulate themselves from

could be served, then, became sufficient to exercise jurisdiction over the nonresident defendant.

Still, this extraterritorial exception for corporate agents was limited in two ways. First, the authority of the agent to act on behalf of a nonresident defendant dissolved at the border of the state in which it was appointed to receive process.<sup>28</sup> Second, a court's jurisdiction over such nonresident defendants was only available for claims related to business transactions in the state.<sup>29</sup> Thus, under *Pennoyer*, the adjudicatory authority of the courts was generally limited to the territorial borders of the forum state, and absent actual presence or consent, nonresident corporations could never be under the court's general jurisdiction, no matter how extensive its business transactions within the forum.

## 2. *A Looser Doctrine Approved in International Shoe Co. v. Washington*

*Pennoyer's* strict territoriality regime ended in 1945 when the Supreme Court announced the "minimum contacts" test of personal jurisdiction in *International Shoe Co. v. Washington*.<sup>30</sup> The Court determined that the Due Process Clause would support the exercise of personal jurisdiction over nonresident defendants if two requirements were met: first, the defendant must have "certain minimum contacts" with the forum state; and second, the "maintenance of the suit" against the defendant in the forum must not "offend traditional notions of fair play and substantial justice."<sup>31</sup> This new minimum contacts test ushered in the reigning contacts-based era of personal jurisdiction, wherein jurisdiction is a function of the defendant's relationship with the forum rather than the court's territorial "power" over the defendant.

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liability by virtue of residing outside of the state. *E.g.*, RESTATEMENT (FIRST) OF JUDGMENTS § 29 & cmt. a, b. (1942).

<sup>28</sup> *See, e.g.*, *St. Clair v. Cox*, 106 U.S. 350, 357 (1882) ("We do not, however, understand the laws as authorizing the service . . . upon an agent of a foreign corporation unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words 'agent of such corporation within this state.' They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there."); *M'Queen*, 16 Johns. at 7 ("If the president of a bank of another state, were to come within this state, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived this character . . .").

<sup>29</sup> *See, e.g.*, *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8, 22 (1907) ("Such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in [the forum].").

<sup>30</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>31</sup> *Id.* at 316.

Beyond loosening the strictly territorial rule of *Pennoyer*, the Court in *Int'l Shoe* recognized for the first time two distinct strands of personal jurisdiction. In announcing its “minimum contacts” test, the Court distinguished between claims that arise out of, or relate to, the defendant’s forum contacts—known as *specific* jurisdiction—and claims that are unrelated to defendant’s forum contacts—known as *general* jurisdiction. As to those claims arising out of a non-resident defendant’s in-forum contacts, the Court held that subjecting a nonresident corporation to suit “can . . . hardly be said to be undue” where it incurs state-law obligations in exchange for the privilege of conducting business in the state.<sup>32</sup> But regarding those claims arising “from dealings entirely distinct” from a nonresident corporation’s in-state activities, the Court was more reserved, holding that there may be some circumstances “in which the continuous corporate operations . . . were thought so substantial and of such a nature as to justify suit” against the defendant.<sup>33</sup> Accordingly, specific jurisdiction became more readily available over nonresident corporate defendants. The ambiguous “continuous corporate operations” basis for exercising general jurisdiction over a foreign corporation became known as the “doing business” test for general jurisdiction,<sup>34</sup> and it has been employed successfully on only one occasion.<sup>35</sup> For corporations then, *Int'l Shoe* superseded the strict “presence” test of *Pennoyer* and enabled courts, at least in theory, to assert general jurisdiction over nonresident corporations if the corporation had constitutionally sufficient in-forum contacts, however unrelated to the claim those contacts might be.

The trajectory of the two jurisdictional strands has been widely divergent since their pronouncement.<sup>36</sup> While specific jurisdiction remains broadly available over nonresident defendants,<sup>37</sup> the Court has “declined to stretch general jurisdiction beyond limits traditionally recognized.”<sup>38</sup> This more limited exercise of general jurisdiction over foreign defendants results from the Court’s determination that the Due Process Clause requires a greater showing of forum contacts to exercise

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<sup>32</sup> *Id.* at 319.

<sup>33</sup> *Id.* at 318.

<sup>34</sup> Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1147 (1966).

<sup>35</sup> See *infra* Part I.B. The standard has been successfully met in lower courts, but whether the Supreme Court would uphold many such applications is in serious doubt.

<sup>36</sup> *Daimler AG v. Bauman*, 134 S.Ct. 746, 757–58 (2014).

<sup>37</sup> After *Int'l Shoe*, even a *single* contact with the forum can satisfy the minimum contacts test for specific jurisdiction. See, e.g., *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis added) (holding that the exercise of personal jurisdiction over a foreign corporation was proper because “the suit was based on a contract which had substantial connection with [the forum state]”).

<sup>38</sup> *Bauman*, 134 S.Ct. at 757–58.



general jurisdiction over a nonresident defendant.<sup>39</sup> Where the claims do not arise out of or relate to the nonresident corporation's contacts with the forum, the Court has been hesitant to subject the corporation to suit in the forum.<sup>40</sup> Accordingly, the very contacts that might justify exercising specific jurisdiction over a nonresident corporate defendant could be insufficient to exercise general jurisdiction.<sup>41</sup>

B. THE DECLINE OF “DOING BUSINESS” IN GENERAL JURISDICTION:

*PERKINS, HELICOPTEROS, AND GOODYEAR*

After *Int'l Shoe* was decided, the Court handed down *Perkins v. Benguet Consolidated Mining Co.*<sup>42</sup> In *Perkins*, a Philippines-based mining company relocated to Ohio to continue business operations during World War II. Eventually, the company was sued in Ohio for conduct that occurred in the Philippines and which was unrelated to its business activities in Ohio. The corporation's Ohio-based business activity included “directors’ meetings, business correspondence, banking, stock transfers, payments of salaries, [and] purchasing of machinery.”<sup>43</sup> The Court determined that though the corporation was neither incorporated nor maintained its principal place of business in Ohio, its in-state activities were nevertheless “continuous and systematic” such that general

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<sup>39</sup> See *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 447 (1952) (“It remains only to consider . . . whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio.”).

<sup>40</sup> *Bauman*, 134 S. Ct. at 758 (noting that general jurisdiction has been “less dominant” in the court’s due process jurisprudence); see also Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 550 (2012) (“Goodyear Dunlop Tires, supported by a unanimous Court, predictably conformed to prior decisions that evidence the Court’s reluctance to permit general jurisdiction over corporations based upon claims unrelated to corporate activity in the forum state.”).

<sup>41</sup> See, e.g., *Bauman*, 134 S. Ct. at 757 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2849 (2011) (“Although the placement of a product into the stream of commerce ‘may bolster an affiliation germane to *specific* jurisdiction,’ we explained, such contacts ‘do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.”); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 (1984) (“In the instant case, respondent’s activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities. But respondent is carrying on a ‘part of its general business’ in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.”).

<sup>42</sup> 342 U.S. 437 (1952).

<sup>43</sup> *Id.* at 445.

jurisdiction was proper in Ohio for claims entirely unrelated to its activities in the forum.<sup>44</sup>

*Perkins* has been considered the outer-limits of general jurisdiction in that the Court permitted general jurisdiction over a foreign corporation for claims arising from overseas conduct unrelated to the defendant's activities in the forum. Accordingly, *Perkins* has also been considered the exemplary case for exercising general jurisdiction over a foreign corporation based on its "doing business" in the forum.<sup>45</sup> However, the assertion that the Supreme Court in *Perkins* affirmed "doing business" as a constitutionally sound means for establishing general jurisdiction over a foreign corporation is likely incorrect.<sup>46</sup> The Court in one breath explained its decision in *Perkins* as "permitting general jurisdiction where defendant's contacts with the forum were 'continuous and systematic,'"<sup>47</sup> and in another breath explained that jurisdiction was proper in *Perkins* because Ohio had become the corporation's "de facto principal place of business."<sup>48</sup>

After *Perkins* came *Helicopteros Nacionales de Colombia, S.A. v. Hall*, a case arising out of a helicopter crash in Peru that killed four United States citizens.<sup>49</sup> The victims' survivors filed suit in Texas against the manufacturer, a Colombian corporation, arguing that general jurisdiction lay because the defendant had negotiated a contract, purchased helicopter parts, and sent employees for training in Texas<sup>50</sup> and therefore had the "kind of continuous and systematic business contacts the Court found to exist in *Perkins*."<sup>51</sup> The Court held, however, that in-state purchases by a foreign defendant were insufficient to exercise general jurisdiction over it.<sup>52</sup> With its holding, the Court curtailed the reach of "doing business" as a means to establish general jurisdiction over non-resident defendants. After *Helicopteros*, "doing business" general jurisdiction over foreign defendants would require more robust business activities than consumer transactions within the forum.

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<sup>44</sup> *Id.* at 448–49.

<sup>45</sup> See, e.g., Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172–73 & n.7 (2001) (citing *Perkins* as the model of general jurisdiction based on a foreign corporation's 'continuous and systematic' business activities in the forum).

<sup>46</sup> See discussion *infra* pp. 20–21.

<sup>47</sup> *Calder v. Jones*, 465 U.S. 783, 787 (1984) (quoting *Perkins*, 342 U.S. at 448).

<sup>48</sup> E.g., *Bauman*, 134 S.Ct. at 756; *Goodyear*, 131 S. Ct. at 2856; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

<sup>49</sup> 466 U.S. 408 (1984).

<sup>50</sup> *Id.* at 408.

<sup>51</sup> *Id.* at 416.

<sup>52</sup> *Id.* at 418.

Lastly, following *Helicopteros* the Court decided *Goodyear Dunlop v. Brown* and unanimously determined that a foreign manufacturer's sales of goods within the forum state did not provide *Perkins*-like business activities for exercising general jurisdiction over the foreign corporation in that state.<sup>53</sup> In *Goodyear*, two American boys were killed in France as a result of a bus rollover accident.<sup>54</sup> The administrators of the boys' estates filed suit in North Carolina state court against Goodyear USA, Goodyear France, Goodyear Luxembourg, and Goodyear Turkey, alleging that a tire, defectively manufactured and sold by Goodyear Turkey, caused the fatal rollover.<sup>55</sup> The Court first held that the North Carolina court could not exercise specific personal jurisdiction because the deaths in France were unrelated to any corporate activity in the state.<sup>56</sup> Next, the Court held that where "sales of [defendants'] tires [were] sporadically made in North Carolina through intermediaries," the corporate activity in the forum was insufficient to support general personal jurisdiction.<sup>57</sup> Accordingly, the Court concluded, the corporate subsidiaries in *Goodyear* were "in no sense at home" in North Carolina.<sup>58</sup>

In reaching its conclusion, the Court confirmed that a corporation's place of incorporation and principal place of business, its "paradigmatic affiliations," are the strongest for establishing general jurisdiction over foreign corporations.<sup>59</sup> Nevertheless, the Court declined an opportunity to firmly limit general jurisdiction to a corporation's place of incorporation or principal place of business. In terms not unlike those of *Int'l Shoe*, Justice Ginsburg, writing for the Court, announced that a foreign corporation could have such continuous business activity to render it "essentially at home" in the forum for purposes of general jurisdiction.<sup>60</sup> In that case, however, Goodyear's "sporadic" sales to the forum were insufficient to render it "essentially at home" in the state.<sup>61</sup> The amount

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<sup>53</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); see also Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 459–50 (2012) ("The unanimous opinion categorically distinguished between general and specific personal jurisdiction, making clear that limited sales do not satisfy the 'substantial' activity or 'continuous and systematic' contacts required for general jurisdiction.").

<sup>54</sup> *Goodyear*, 131 S. Ct. at 2850.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2851.

<sup>57</sup> *Id.* at 2856.

<sup>58</sup> *Id.* at 2857.

<sup>59</sup> *Id.* at 2854 (citing Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEXAS L. REV. 721, 728 (1988) (identifying place of incorporation and principal place of business as "paradigm" bases for exercising general jurisdiction over corporations)).

<sup>60</sup> *Id.* at 2851.

<sup>61</sup> *Id.* at 2857.

or type of contacts that could satisfy *Goodyear*'s "essentially at home" standard remains as unclear as *Int'l Shoe*'s ambiguous "continuous business contacts" basis for general jurisdiction over nonresident defendants.

After *Goodyear*, the "doing business" theory of jurisdiction is likely abrogated as regards general jurisdiction because merely transacting business—via sales (*Goodyear*) or purchases (*Helicopteros*)—in the forum will be insufficient; rather, the Court requires that the business activities be so substantial that a foreign corporation could be fairly characterized as "at home" in the paradigmatic senses. Though *Perkins* gave a glimmer of hope for establishing general jurisdiction based on a foreign defendant's business activities in the state, the Court's pronouncements in *Goodyear* and *Helicopteros* prove the reluctance with which the Court authorizes general jurisdiction outside of the traditional paradigmatic affiliations. While it remains unclear just what type and extent of business activities could render a corporation "essentially at home" after *Goodyear*, that the standard is exceedingly high is clear.

### C. *DAIMLER AG V. BAUMAN*

#### 1. The Ninth Circuit Opinion

The suit in *Daimler AG v. Bauman* arose out of human rights violations committed entirely in Argentina by Mercedes-Benz Argentina (MBA), a wholly owned subsidiary of Daimler A.G. (Daimler), a German corporation.<sup>62</sup> The Plaintiffs, residents of Argentina, alleged that MBA conspired with Argentine security forces to effectuate acts of kidnapping, detention, torture, and murder.<sup>63</sup> The plaintiffs sued Daimler in California, alleging Daimler was vicariously liable for its subsidiary's actions.<sup>64</sup> Because all events giving rise to the lawsuit occurred in Argentina, personal jurisdiction in California would only lie if Daimler could be subject to general jurisdiction there. The plaintiffs argued that general jurisdiction over Daimler was proper because Mercedes-Benz U.S.A (MBUSA)—Daimler's indirect subsidiary—had sufficient business contacts to subject it to California's general jurisdiction and that those contacts could be imputed to Daimler.<sup>65</sup>

The Ninth Circuit first determined that MBUSA's business activities in the forum were so "extensive" that it could be considered "at home" in

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<sup>62</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 750–51 (2014).

<sup>63</sup> *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 911 (9th Cir. 2011) *rev'd sub nom.* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>64</sup> *Bauman*, 134 S. Ct. at 750–51.

<sup>65</sup> *Id.* at 751.

the forum and therefore subject to California's general jurisdiction.<sup>66</sup> Then, the Court applied California agency law and determined that the California contacts of MBUSA may be imputed to Daimler for the purpose of general jurisdiction.<sup>67</sup> After imputing to Daimler the contacts of its "at home" subsidiary, the Ninth Circuit held that exercising personal jurisdiction over Daimler "comport[ed] with fair play and substantial justice."<sup>68</sup>

The loose imputation framework employed by the Ninth Circuit for asserting general jurisdiction over foreign corporations was common among lower courts before *Bauman* reached the Supreme Court. Lower courts ended the jurisdictional inquiry over a foreign corporate defendant once it could be determined that a subsidiary's contacts could be imputed to the parent under the applicable substantive law of imputation.<sup>69</sup> If an "at home" subsidiary's contacts were successfully imputed to the foreign parent, the foreign parent was deemed subject to the court's general jurisdiction based on its relationship with its subsidiary. The approach of the lower courts pre-*Bauman* was flawed in at least two respects: First, the framework threatened an unprecedented expansion of jurisdiction over foreign corporations by making general jurisdiction a function of inconsistent state substantive rules of imputation rather than traditional paradigmatic affiliations.<sup>70</sup> Second, the approach implicitly rejected any need to establish sufficient jurisdictional contacts as to *each* individual defendant, as the Due Process Clause requires.<sup>71</sup>

## 2. *Bauman in the Supreme Court*

Though the Supreme Court had opportunity in *Bauman* to address the first issue of which substantive law would govern when and how a subsidiary's contacts could be imputed to a foreign parent, it turned instead to the constitutional due process issue of establishing general jurisdiction over foreign defendants based on their contacts with the forum. The Court rejected the current of lower courts exercising general jurisdiction over

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<sup>66</sup> *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 914 (9th Cir. 2011) *rev'd sub nom.* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Notably, whether MBUSA was appropriately subject to general jurisdiction in California based on its business activities was not disputed. *Id.* at 913.

<sup>67</sup> *Id.* at 921–24.

<sup>68</sup> *Id.* at 929–30.

<sup>69</sup> See *supra* note 12 and accompanying text.

<sup>70</sup> See *Bauman*, 134 S. Ct. at 759–60 ("The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' we rejected in *Goodyear*.").

<sup>71</sup> See *supra* note 13 and accompanying text.

foreign defendants based on imputation alone.<sup>72</sup> Instead, the Court announced a framework for using vicarious jurisdiction arguments to secure general jurisdiction over a foreign corporation. Though largely consistent with the framework applied in lower courts, the Court added a third prong to the analysis that serves as a constitutional limit on any substantive law of imputation that a court could use to find general jurisdiction based on attribution of contacts alone.<sup>73</sup> The *Bauman* framework is invoked when a plaintiff, seeking to sue a nonresident corporate defendant for claims unrelated to its in-forum business activities, looks to the corporation's relationship with some other entity in the chosen forum to determine whether the contacts of the related entity might be sufficient to hold the defendant responsible in that forum. In response to this typical "vicarious jurisdiction" argument, courts must:

First, determine whether the other entity—often a wholly or majority owned subsidiary<sup>74</sup>—is "at home" in the forum.<sup>75</sup> If it is not at home there, the general jurisdiction inquiry is decided against the plaintiff because imputation theories, even if available, would be unsuccessful under the test.

Second, determine whether the subsidiary's in-forum contacts may be imputed to the parent under the relevant law.<sup>76</sup> If imputation is unavailable, the general jurisdiction inquiry ends and will be decided against the plaintiff. For the purposes of this paper, the second step in the *Bauman* framework will be assumed satisfied under any standard a court could impose.

Third, determine whether the foreign parent is yet "at home" in the forum after the contacts of its "at home" subsidiary are imputed it.<sup>77</sup>

Moving through this framework, the Court assumed that MBUSA was "at home" in California, though it was neither incorporated nor had its principal place of business there.<sup>78</sup> The Court also assumed that imputation was satisfied under applicable law.<sup>79</sup> With the first two prongs of its framework presumptively satisfied, the Court moved to the third prong of its analysis and determined that Daimler could not be characterized as "at home" in California for purposes of general

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<sup>72</sup> *Bauman*, 132 S.Ct. at 760 n.16

<sup>73</sup> *Bauman*, 132 S.Ct. at 760.

<sup>74</sup> *See infra* pp. 24–26 and note 96.

<sup>75</sup> *Bauman*, 132 S. Ct. at 760.

<sup>76</sup> *Id.*; *see supra* note 10 and accompanying text.

<sup>77</sup> *Bauman*, 132 S. Ct. at 760.

<sup>78</sup> *Id.* at 751, 758, 760.

<sup>79</sup> *Id.* at 760.

jurisdiction even after being imputed with its “at home” subsidiary’s contacts.<sup>80</sup> This third prong of the *Bauman* framework is the platform from which this paper springs, attempting to ascertain the circumstances that could overcome prong three’s due process limit on the use of vicarious jurisdiction arguments for asserting general jurisdiction over foreign corporate defendants.

## II. TILTING THE SCALES: USING VICARIOUS JURISDICTION ARGUMENTS TO ESTABLISH GENERAL JURISDICTION OVER FOREIGN CORPORATE DEFENDANTS AFTER *BAUMAN*

At first blush, the test announced in *Bauman* appears circular, impossible to satisfy because it ends where it begins. Closer inspection, however, confirms that the Court did not deviously claim to merely limit jurisdictional veil piercing in general jurisdiction while abrogating it in practice. Instead, the Court adhered to its pervasive precedent of narrowly construing general jurisdiction over foreign corporations by requiring that the “at home” inquiry be individually satisfied as to the foreign defendant after imputation.<sup>81</sup> Certainly, the *Bauman* test raises a high bar, limiting the efficacy of vicarious jurisdiction arguments to assert general jurisdiction over foreign corporations, but its bar is not insurmountable. After *Bauman*, there remain several limited means by which a foreign corporation may be subject to a court’s general jurisdiction based on its relationship with another entity in the forum.

*Bauman* offers at least four distinct scenarios that, when weighed in a post-imputation “at home” analysis as to the parent corporation, could tilt the scales in a jurisdictional determination. First, *Bauman* indicates that courts faced with vicarious jurisdiction arguments must distinguish between cases in which a subsidiary is “at home” in the paradigmatic sense and cases in which the subsidiary is “essentially at home” by some measure of continuous and systematic business contacts.<sup>82</sup> Second, the Court suggests that in either circumstance, the theory of imputation used to attribute contacts may affect the judgment.<sup>83</sup> Third, if the subsidiary is joined as a defendant in the action, the Court may be more readily agreeable to a vicarious jurisdiction argument as to the parent.<sup>84</sup> Finally,

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<sup>80</sup> *Id.* (“Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA’s contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler’s slim contacts with the State hardly render it at home there.”).

<sup>81</sup> *See id.* at 757–58 (“[W]e have declined to stretch general jurisdiction beyond limits traditionally recognized.”).

<sup>82</sup> *See id.* at 760–62.

<sup>83</sup> *See id.* at 759.

<sup>84</sup> *See id.* at 758 & n.12.

whether the nonresident corporation is domestic or foreign could sway an “at home” analysis as to the parent.<sup>85</sup> The arguments for establishing vicarious, general jurisdiction after *Bauman* are analyzed below.

A. WHETHER THE SUBSIDIARY IS “PARADIGMATICALLY” AT HOME OR “ESSENTIALLY” AT HOME BY VIRTUE OF CONTINUOUS AND SYSTEMATIC BUSINESS OPERATIONS

Corporations are traditionally “at home” for purposes of general jurisdiction in their state of incorporation and the state in which they maintain a principal place of business, if the two are distinct.<sup>86</sup> One academic has termed these dual corporate homes the “paradigmatic affiliations” with the forum that justify the exercise of general jurisdiction.<sup>87</sup> Paradigmatic affiliations are the strongest but not exclusive affiliations that justify general jurisdiction. *Goodyear* confirmed that a corporate defendant’s subjection to general jurisdiction is not necessarily limited to those forums in which it is “incorporated or has its principal place of business.”<sup>88</sup> Rather, the “at home” inquiry retains an additional strand under which a foreign corporation could have “the kind of continuous and systematic general business contacts” to render it “essentially” at home in the forum such that a court could adjudicate a suit unrelated to the defendant’s contacts with the forum.<sup>89</sup>

If a corporate subsidiary is at home in one of the paradigmatic ways, and its contacts are imputed to the parent, the Court may be more inclined to find the parent at home in the forum under prong three of the *Bauman* test. To the contrary, where the subsidiary is “essentially at home” in the forum by virtue of its “continuous and systematic” business contacts, and its contacts are imputed to the parent, the Court may be less likely to find

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<sup>85</sup> *See id.* at 762–63.

<sup>86</sup> *Goodyear*, 131 S.Ct. at 2853–54 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”).

<sup>87</sup> Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEXAS L. REV. 721, 728 (1988).

<sup>88</sup> *Goodyear*, 131 S. Ct. at 2849. Other scholars have suggested that the Court had foreign corporations in mind when it left open “continuous business operations” as a means for establishing general jurisdiction. By default, foreign corporations would have no state of incorporation or principal place of business in the United States in which they could be deemed “at home.” Thus the slightly open doors could be to leave open room to argue that a foreign corporation should be subject to general jurisdiction in U.S. state in which most of their business is transacted. *See* Lindsey D. Blanchard, *Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865, 889 (2013).

<sup>89</sup> *Goodyear*, 131 S. Ct. at 2850.



the parent “at home” in the forum.<sup>90</sup> Though the Court did not go so far as to create such a per se rule, it provided strong direction.

In *Bauman*, the Court glossed over the first prong of its framework and assumed “for purposes of [that] decision only” that MBUSA was “at home” in California.<sup>91</sup> Because the Court later acknowledged that MBUSA is neither incorporated in California nor retains its principal place of business there, it must be presumed that the Court assumed MBUSA to be “essentially at home” by virtue of its continuous and systematic business contacts.<sup>92</sup> Indeed, MBUSA produced 2.4% of Daimler’s worldwide sales, generating billions of dollars in sales revenue for Daimler.<sup>93</sup> Nevertheless, the Court held that MBUSA’s sales in the forum—which were presumed sufficient to render MBUSA “essentially at home” in California—were insufficient once attributed to Daimler to render Daimler at home there.

Concluding that Daimler was not “at home” in the forum under prong three of its analysis, the Court’s first observation was that “neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there.”<sup>94</sup> The Court’s first matter of concern in going about its prong-three “at home” analysis as to the parent was to determine whether the subsidiary was paradigmatically at home in the forum. After observing that MBUSA was not paradigmatically at home but only—it must be presumed—“essentially at home,” the Court quickly determined that imputation of the subsidiary’s contacts to the parent would be insufficient to render the parent “at home” in the forum. Because the *Bauman* test in no way limits its first prong to subsidiaries that are paradigmatically at home, it confirms that both paradigmatic and “essentially at home” affiliations remain open avenues for accomplishing vicarious, general jurisdiction. The Court’s analysis indicates, however,

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<sup>90</sup> See *Bauman*, 134 S.Ct. at 761 (“[T]he inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense “continuous and systematic,” it is whether that corporation’s “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”). *But see* *Barriere v. Cap Juluca*, 12-23510-CIV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014) (finding a foreign parent corporation subject to general jurisdiction after imputing to it the contacts of its “essentially at home” subsidiary).

<sup>91</sup> *Bauman*, 134 S.Ct. at 758.

<sup>92</sup> Accord Suzanna Sherry, *Don’t Answer That! Why (and How) the Supreme Court Should Duck the Issue in DaimlerChrysler v. Bauman*, 66 VAND. L. REV. EN BANC 111, 117 (2013) (“The best option would be to revisit the question of MBUSA’s contacts with California, which DaimlerChrysler unwisely conceded were sufficient to satisfy the ‘continuous and systematic’ test for general jurisdiction. Under current doctrine, it is highly questionable that a federal court in California has general personal jurisdiction over MBUSA, and the Court could reverse the Ninth Circuit on that ground.”).

<sup>93</sup> *Bauman*, 134 S.Ct. at 766–67.

<sup>94</sup> *Id.* at 761.

that paradigmatic affiliations will provide the weightiest imputable contacts for vicarious jurisdiction and that the success of “essentially at home” affiliations may be more limited by comparison.

Such a conclusion is consistent with the Court’s history of largely restricting the exercise of general jurisdiction to a defendant’s principal place of business or the state of incorporation—its paradigmatic affiliations. In both *Helicopteros* and in *Goodyear*, the Court found the defendant corporations’ business transactions in the forum were not sufficiently continuous or systematic to render it “essentially at home” for purposes of general jurisdiction.<sup>95</sup> The only case in which the Court has found that a foreign corporation’s business activities in the forum were amply continuous and systematic to render it “at home” in the forum was *Perkins*.<sup>96</sup> Yet, whether *Perkins* is a case about a foreign corporation being rendered “at home” by virtue of continuous and systematic business transactions is questionable.

More likely, *Perkins* presents a case in which a foreign corporation was subject to a court’s general jurisdiction in its principal place of business—a true paradigmatic affiliation case.<sup>97</sup> Rather than deciding *Perkins* based on the corporation’s “continuous and systematic” business activities within the State, the Court looked to those activities to determine that Ohio had in fact become the company’s principal place of business during wartime. Indeed, the Court reiterated this understanding of *Perkins* in *Bauman* when it stated, “Ohio was the corporation’s principal, if temporary, place of business.”<sup>98</sup>

The notion that the Court in *Perkins* based its assertion of general jurisdiction on the quantity of the defendant’s business transactions within the forum is an unfortunate misnomer that may have given some plaintiffs false hope of a broader doctrine of general jurisdiction. Accordingly, for plaintiffs seeking to establish vicarious, general jurisdiction over a nonresident corporation where the subsidiary is not paradigmatically “at home” in the forum, such that the “continuous and systematic” standard is the sole remaining avenue for finding that subsidiary “at home,” *Perkins* may provide little hope of gain if in fact *Perkins* was decided on paradigmatic affiliations with the forum.

Thus, where a subsidiary is deemed “essentially at home” rather than paradigmatically at home in the forum, the Court may require something more to substantiate the parent’s contacts with the forum. What, exactly,

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<sup>95</sup> *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 418; *Goodyear Dunlop Tires Operations, S.A.*, 131 S. Ct. at 2856–57.

<sup>96</sup> *Perkins*, 342 U.S. at 447.

<sup>97</sup> See *supra* notes 46–48 and accompanying text.

<sup>98</sup> *Bauman*, 134 S. Ct. at 756; *Goodyear*, 131 S. Ct. at 2856; *Keeton*, 465 U.S. at 779.

that “something more” might be is uncertain, though three considerations remain relevant: 1) whether imputation was accomplished by agency or alter ego theories; 2) whether the subsidiary whose contacts the plaintiff seeks to impute to the parent is joined as a defendant; and 3) whether assertion of jurisdiction over the defendant corporation raises foreign relations or foreign commerce concerns. These concerns will be discussed in turn below.

#### B. WHETHER IMPUTATION IS ACCOMPLISHED BY AGENCY OR ALTER EGO THEORIES

Agency theories of imputation are available where the parent corporation does not have direct ownership of the subsidiary but maintains some level of control over it such that attribution of contacts would be appropriate.<sup>99</sup> Alter-ego theories of imputation are available where the relationship between the parent corporation and its subsidiary is such that corporate separateness should be disregarded. Generally, alter-ego theories are applied in one of two circumstances: 1) Where the subsidiary acts on behalf of the parent—doing what the parent itself would do;<sup>100</sup> or 2) Where the corporate structure of the parent and the subsidiary are so intertwined that the corporations appear to operate as part of the same entity, such as where the two entities have interlocking directorates, personnel, or document exchange.<sup>101</sup>

*Bauman* indicates that both agency and alter-ego theories of imputation are available to establish general jurisdiction over foreign corporate parents, but that alter-ego theories may be more readily available than agency theories, which will be subject to greater limitations in the context of general jurisdiction.<sup>102</sup> If an agency theory of imputation is employed to pierce the jurisdictional veil as to a foreign corporate parent,

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<sup>99</sup> See, e.g., *Frummer v. Hilton Hotels Int'l*, 281 N.Y.S.2d 41, 48–49 (N.Y. 1967) (finding that the localized, sister corporation performed services “on behalf of” the foreign corporation such that the foreign corporation itself performed the services locally); *Wiwa v. Royal Dutch Petroleum Co.*, 255 F.3d 88, 96–99 (2d Cir. 2000) (finding an investor relations office in New York acted on behalf of foreign corporate parent such that foreign parents subject to suit in New York based on business activities there); *Cartwright v. Fokker Aircraft U.S.A., Inc.*, 713 F. Supp. 389, 393 (N.D. Ga. 1988) (finding that the domestic subsidiary-distributor was an agent of the foreign corporate parent for purposes of establishing jurisdiction over the foreign parent).

<sup>100</sup> E.g., *In re Teletronics Paper Sys.*, 953 F. Supp. 909 (S.D. Ohio 1997), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000).

<sup>101</sup> *Compare Cannon Mfg. Co. v. Cudahy Packaging Co.*, 267 U.S. 333, 335 (1925), *with United States v. Scophony Corp. of America*, 333 U.S. 795, 816 (1948).

<sup>102</sup> See *Bauman*, 134 S. Ct. at 759 (“[W]e need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court’s analysis be sustained.”).

a plaintiff could be limited by the subsidiary-agent's relationship to the litigation—whether the subsidiary-agent's contacts with the forum relate to the underlying claims—given traditional principles of agency theory in general personal jurisdiction.<sup>103</sup> On the other hand, where an alter ego or merger theory of imputation is used, a plaintiff will not be hindered by the subsidiary's relationship with the litigation, but rather by the subsidiary's relationship with the parent corporation. If the subsidiary's relationship with the parent is too attenuated to satisfy an alter-ego theory, plaintiffs seeking to attribute contacts will be relegated to arguing agency theories of imputation.

Before the Court in *Bauman* was an attempt to employ an agency theory of imputation to render the foreign parent corporation liable in California for the activities of a direct subsidiary in Argentina, based on the imputed contacts of an indirect subsidiary in California.<sup>104</sup> Said another way, the plaintiffs in *Bauman* wanted to assert vicarious jurisdiction over the parent corporation by imputing to it the contacts of a California subsidiary-“agent” whose contacts with the forum were unrelated to the underlying, Argentina-based claim. Given MBUSA's relationship with the litigation and the forum, it could only be subject to general jurisdiction, and not specific personal jurisdiction, in California because the underlying action did not arise from MBUSA's contact in California.<sup>105</sup> Traditionally, a court could exercise jurisdiction on a foreign corporation if process was served on its appointed in-state agent.<sup>106</sup> Yet, service of process on the corporate agent would only subject the foreign corporation to the court's jurisdiction for claims related to the business it transacted in the state—its specific jurisdiction.<sup>107</sup> In *Bauman*, the Court recalled this limiting principle when it speculated that using agency theories of imputation to exercise general jurisdiction over a foreign defendant for claims unrelated to the *subsidiary's* activities in the forum may be inappropriate in the first instance: “A subsidiary . . . might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere.”<sup>108</sup> The Court made no further announcement as to the propriety of agency theories of imputation where the imputable contacts of the “agent” are unrelated to the underlying claims. The Court likewise made no announcement as to

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<sup>103</sup> See *supra* notes 28–29 and accompanying text.

<sup>104</sup> See generally *Bauman*, 134 S. Ct. at 750–51, 758–60.

<sup>105</sup> *Id.* at 750–51.

<sup>106</sup> See discussion, *supra* notes 27–29 and accompanying text.

<sup>107</sup> *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 22 (1907) (“[S]uch assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in [the forum].”).

<sup>108</sup> *Bauman*, 134 S. Ct. at 759.

the propriety of using an agency theory to impute the contacts of an *indirect* subsidiary to gain vicarious jurisdiction.<sup>109</sup> Instead, the Court simply held that under no circumstance could the Ninth Circuit’s agency theory be upheld.<sup>110</sup>

With this landscape in mind, where an agency theory is used to impute a subsidiary’s contacts to a foreign corporation, the due process analysis of whether the parent corporation is “at home” in the forum after imputation may be severely weakened if the imputed contacts of the “agent” are unrelated to the claims. In traditional terms, the agent whose contacts are being imputed will be sufficient to establish personal jurisdiction over the parent only when the claims relate to that agent’s activities in the forum.<sup>111</sup> In other words, an agency theory of imputation will likely only be successful if invoked where the subsidiary, if named as a defendant, would be subject to the court’s specific jurisdiction. Thus, if an agency theory of imputation is used, and the “at home” subsidiary’s contacts with the forum are unrelated to the underlying claims, the Court will likely find that the subsidiary’s contacts will not render the foreign parent “at home” in the forum for the purpose of general jurisdiction because the subsidiary would not be the parent’s agent for those unrelated

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<sup>109</sup> By way of comparison, the Foreign Sovereign Immunities Act (FSIA) immunizes from suit any “agency or instrumentality” of a foreign sovereign. 28 U.S.C. § 1603. Under the statute, “agency or instrumentality” includes corporate entities that are wholly or majority owned by the sovereign at the time of filing. *Id.* § 1603(b); *see also* *Dole Foods Co. v. Patrickson*, 538 U.S. 468 (2003). The Court has further determined that an entity that is merely *indirectly* owned by the sovereign is *not* an “agency or instrumentality” for purposes of the statute. *Dole Foods Co.*, 538 U.S. at 474. While MBUSA was an indirectly owned subsidiary of Daimler during the pendency of the litigation, it was wholly owned by Daimler “at times relevant to [the] suit” but not at the time of filing. *Bauman*, 134 S. Ct. at 753 n.3. Whether the FSIA’s approach or the *Dole Foods* rule are applicable in the context of non-sovereign, private corporate activity is to be determined. Litigations should keep *Dole Foods* at hand, however, when attempting to use agency theories of imputation to establish general jurisdiction over a foreign parent based on the contacts of an *indirect* subsidiary. It could be that the Court would find agency theory unavailable in such a context. Likely, the rule of thumb to take away is that a federal statute governing the cause of action may affect whether and to what extent an agency theory may be used under the circumstances. *See also* *United States v. Best Foods*, 524 U.S. 51, 70–71 (1998) (holding that a participation-and-control test looking to the parent corporation’s supervision over subsidiary cannot be used to identify operation of a facility resulting in direct parental liability under CERCLA).

<sup>110</sup> *Bauman*, 134 S. Ct. at 759–60 (citations omitted) (“The Ninth Circuit’s agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*.”).

<sup>111</sup> *Accord* Brief of *Amica Curiae* Professor Lea Brilmayer Supporting Petitioner at 17, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2013) (No. 11-965) (“[N]one of this Court’s cases have used ‘agency’ to impose *general* jurisdiction under circumstances remotely approaching this case’s.”).

claims. Any other holding would be an expansion of general jurisdiction—a doctrine that the Court continues to restrict—as well as agency law.

Further, the subsidiary at issue in *Bauman*—MBUSA—was an *indirect* subsidiary of Daimler.<sup>112</sup> That is, it was neither wholly nor majority owned by the parent. Accordingly, the plaintiffs could hardly hope to use an alter ego or merger theory to impute MBUSA’s contacts to Daimler because such theories are based on the notion of “like-identity.”<sup>113</sup> Without interlocking corporate structures between the two entities, the plaintiffs would have faced high hurdles to satisfy a merger theory, and with an agency theory available to them of so low a caliber that it would practically *always* be satisfied, the plaintiffs in *Bauman* took the path of least resistance and neglected to allege that MBUSA was an alter-ego of Daimler.<sup>114</sup>

Because the plaintiffs in *Bauman* did not allege an “alter ego” theory to impute MBUSA’s contacts to Daimler, the Court made no comment on the propriety or strength of invoking alter ego theories in the context of general jurisdiction.<sup>115</sup> Presumably, however, imputation by theories of merger or alter ego could supply imputed contacts weighty enough to tilt the scales to a finding that the parent corporation is at home in the forum, irrespective of whether the “at home” subsidiary’s contacts are related to the litigation.<sup>116</sup> Merger and alter ego theories of imputation, unlike agency theories, would not be limited to instances in which the subsidiary’s forum contacts are related to the claim because no such traditional principles apply to limit the boundaries of the relationship. Instead, such theories meet resistance based on the strength of the subsidiary’s relationship to the parent. Often, whether the subsidiary is wholly or majority owned by the parent is dispositive of whether the

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<sup>112</sup> *Bauman*, 134 S. Ct. at 752.

<sup>113</sup> *See supra* notes 100–01 and accompanying text.

<sup>114</sup> *Bauman*, 134 S. Ct. at 758.

<sup>115</sup> *Bauman*, 134 S. Ct. at 759 (“This Court has not yet addressed whether a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.”).

<sup>116</sup> *Accord* Brief of *Amica Curiae* Professor Lea Brilmayer Supporting Petitioner at 9, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2013) (No. 11-965) (“Absent a specific-jurisdiction basis, . . . nothing short of the “merger” or “alter ego” standard can satisfy the Due Process Clause’s requirement that jurisdiction over each defendant be shown individually.”); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 12 (1986) (“If merger is shown, however, all of the activities of the subsidiary are by definition activities of the parent. Merger requires a greater showing of interconnectedness than attribution, but once shown, its scope is broader.”).

entities are sufficiently intertwined to justify ignoring corporate separateness and applying an alter-ego theory to impute contacts and hold the parent responsible for the subsidiary's behavior.<sup>117</sup> Accordingly, where the subsidiary is a true alter ego of the parent, a court may be less hesitant to find the parent "at home" based on the subsidiary's imputed contacts because the relationship between the two entities is by definition more robust. Holding a parent responsible for acts of a subsidiary with which its relationship is so intertwined that corporate separateness may be appropriately disregarded is a justifiable basis for exercising general jurisdiction based on imputation because it would be akin to holding the parent corporation responsible for its own acts.

Thus, courts performing the third prong of the analysis may be more likely to find that imputed contacts render the foreign defendant "at home" where an alter ego theory of imputation is invoked. The Court leaves the door open for both theories to successfully invoke general jurisdiction over a foreign defendant, but in either circumstance, it is unclear from *Bauman* what sort of standard would supply a satisfactory test for imputation.<sup>118</sup>

#### C. WHETHER THE SUBSIDIARY IS JOINED AS A DEFENDANT

If the subsidiary whose contacts are to be imputed is joined as a defendant in the action, courts may find that the jurisdictional contacts imputed to the parent are weightier when conducting the final "at home" analysis as to the parent. As observed by a Florida District Court, where a plaintiff has joined the subsidiary as a co-defendant, and the subsidiary has not objected to jurisdiction, the Court necessarily has power over the subsidiary, and extending its jurisdiction to the parent—assuming a theory of imputation has been met—would be most proper.<sup>119</sup> First, this approach best observes due process limits because courts would not proceed to exercise jurisdiction over a foreign parent based on the contacts of a subsidiary as to whom no jurisdictional basis has been shown as a matter of law. Second, this approach best honors corporate separateness by better ensuring that parent corporations are held vicariously liable for a

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<sup>117</sup> See *supra* note 109.

<sup>118</sup> See *supra* note 10.

<sup>119</sup> See *Barriere v. Cap Juluca*, No.12-23510-CIV, 2014 WL 652831, slip op. at \*9 (S.D. Fla. Feb. 19, 2014) ("Additionally, in *Daimler*, the foreign Plaintiffs attempted to gain jurisdiction over the foreign defendant by piggybacking on the defendant's subsidiary's contacts and imputing them back to the defendant. The U.S.-based subsidiary, however, was not a defendant in that action. In the case at bar, the Plaintiff has alleged agency relationships among [the subsidiaries] and [the foreign parent]. Unlike in *Daimler*, the alleged agent is a co-defendant in the case, and it has not objected to jurisdiction. Thus, Defendant Cap Juluca is asking this Court to dismiss it even where the Court already properly exercises jurisdiction over the co-defendants. This, the court will not do.").

subsidiary's actions only where both the parent and the subsidiary may have collaborated in the wrongful conduct.

A court has power to adjudicate claims against defendants over whom it has personal jurisdiction.<sup>120</sup> Where a subsidiary is joined as a defendant in an action, a court can actually exercise personal jurisdiction over the subsidiary, and such jurisdiction is established as a matter of law. On the other hand, where the subsidiary is not joined, a court cannot actually exercise jurisdiction over the subsidiary even if jurisdiction would be proper, and jurisdiction over the non-joined subsidiary is merely theoretical. A court may be hesitant to use the subsidiary's contacts with the forum to exercise jurisdiction over the nonresident parent when it is unclear or otherwise unestablished that the court would have power to adjudicate the same claims against the subsidiary in the first instance.

In *Bauman*, the plaintiffs did not join MBUSA in the action, and the Court accordingly did not have power over it; instead, the Court "assumed" that MBUSA was at home in the forum for purposes of exercising general jurisdiction over Daimler.<sup>121</sup> The Court acknowledged that MBUSA held no "paradigmatic" affiliations with the forum and that whether it would be subject to general jurisdiction in California under *Goodyear* was uncertain.<sup>122</sup> As in *Bauman*, if the non-joined subsidiary has no paradigmatic affiliations with the forum and could be subject to general jurisdiction only by virtue of *Goodyear*'s "essentially at home" standard, a plaintiff could decline joining the subsidiary in the action, go after only the parent, and face less resistance establishing general jurisdiction over the parent because the subsidiary would be unable to contest jurisdiction as to itself.<sup>123</sup> A court exercising its jurisdictional power over the parent based on the jurisdiction it "could have" over the subsidiary creates a more attenuated link between the parent and the forum that does not justify the exercise of general jurisdiction. On the other hand, if the non-joined subsidiary is paradigmatically at home in the forum, the impropriety of using its jurisdictional contacts to sue the foreign parent is significantly less. In that case, whether the subsidiary is at home in the forum, though not litigated, is virtually assured such that the court would be able to litigate claims against that subsidiary.

Regardless of whether the non-joined subsidiary is paradigmatically at home, the basic theory of vicarious jurisdiction presupposes that the

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<sup>120</sup> See discussion *supra* Part I.A.

<sup>121</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 (2014).

<sup>122</sup> *Id.* at 752.

<sup>123</sup> *E.g.*, *Bauman*, 134 S. Ct. at 758 (noting that Daimler failed to object to plaintiff's assertion that MBUSA was subject to general jurisdiction in California because MBUSA was not a co-defendant).



foreign parent is responsible alongside the subsidiary for the wrongful conduct,<sup>124</sup> and where a plaintiff does not join the subsidiary as a co-defendant, suspicion should be raised that imputation is improper in the first instance. If the plaintiff's argument is that the parent corporation should be held *vicariously* liable—that is, liable as a joint actor—for the wrongful conduct, then the subsidiary should be joined as a reflection and confirmation of the subsidiary and parent's dual participation in the conduct. Where a plaintiff neglects to join the subsidiary, but goes after the parent, the concern is that the subsidiary may be the truly wrongful actor, but the parent has the deeper pockets. Disregard for corporate separateness where the parent did not collaborate with the subsidiary in wrongful conduct would run afoul of the basic concept justifying the responsibility-shifting function of vicarious jurisdiction.<sup>125</sup>

Accordingly, imputation theories to establish vicarious jurisdiction are best invoked where the subsidiary is named as a co-defendant. First, this approach ensures that the court predicates its power to adjudicate claims against the parent on an affirmation of its power to adjudicate claims against the subsidiary in the first place. Second, this approach reflects the joint responsibility concept implicit in the doctrine of vicarious jurisdiction. Any other rule would encourage foul play in litigation.

#### D. HAS THE COURT ADDED A “TRANSACTIONAL CONTEXT” INQUIRY TO THE PARENT’S “AT HOME” DETERMINATION?

After applying its three-part test to the facts in *Bauman*, the Court turned to an examination of the transaction's international context and determined that the Ninth Circuit's sweeping rule of vicarious, general jurisdiction would greatly burden U.S. relations with other sovereigns.<sup>126</sup> The progression of the Court's analysis indicates that whether the parent is a foreign corporation or a nonresident, a domestic corporation could tilt the scales for or against a finding of general jurisdiction.

The readiness of U.S. courts to hold foreign corporations liable for the conduct of their U.S. subsidiaries is often met with frustration by other countries that embrace a less expansive approach to general jurisdiction.<sup>127</sup> As a result, the United State's liberal exercise of general jurisdiction has

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<sup>124</sup> See, e.g., Brilmayer & Paisley, *supra* note 116, at 12 (recognizing that imputation theories disregard the separateness of corporate entities and shift responsibility from the subsidiary to the parent).

<sup>125</sup> See discussion *supra* Part II.B.

<sup>126</sup> *Bauman*, 134 S. Ct. at 762–63.

<sup>127</sup> *Id.* at 763. European countries, as an example, embrace a much narrower application of general jurisdiction, permitting suit against corporations for unrelated claims only in the country of their domicile. *Id.*

hampered negotiations of international treaties due to objections of foreign governments to the expansive exercise of general jurisdiction in U.S. district courts.<sup>128</sup> Unlike foreign corporations, subjecting domestic corporations to a court's general jurisdiction will almost never offend or intrude into the sovereignty of another country because the domestic corporation is, by definition, formed pursuant to the laws of a U.S. State. Recognizing that subjecting Daimler to suit could inflame foreign frustration with U.S. jurisprudence regarding foreign entities, the Court concluded that the transaction's international context weighed heavily against exercising jurisdiction over Daimler.<sup>129</sup>

In addition to creating tense relations with foreign sovereigns, broad and unpredictable applications of general jurisdiction could dissuade foreign entities from investing in business ventures within the United States.<sup>130</sup> State substantive laws that supply the theories of imputation vary from state to state.<sup>131</sup> Inconsistent state imputation laws present foreign corporations with great uncertainty and diminished predictability, making it difficult for foreign corporations "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>132</sup> Unpredictability and uncertainty as to where a foreign corporation may be subject to general jurisdiction creates an operational nightmare for foreign corporations whose conduct may satisfy the laws of one state yet violate the laws of another. Accordingly, foreign corporations may be deterred from business within the United States for fear of increased exposure to liability where general jurisdiction is so expansive as to reach a foreign corporation for claims unrelated to the business it transacts within a given forum.

Nonresident domestic corporations are not similarly burdened by unpredictability and uncertainty as to where they might be hailed into court to defend themselves. Large domestic corporations that do business nationally are subject to specific jurisdiction in all state forums under the minimum contacts test of *Int'l Shoe*.<sup>133</sup> In the context of general jurisdiction, at least one U.S. court can exercise jurisdiction over a domestic corporation based on its paradigmatic affiliations.<sup>134</sup> To the contrary, foreign corporations have no such paradigmatic affiliations, and no U.S. court may exercise general jurisdiction absent a showing that the

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See supra* note 10.

<sup>132</sup> *Bauman*, 134 S. Ct. at 761–62.

<sup>133</sup> *See discussion supra* Part I.A.2.

<sup>134</sup> *E.g., Goodyear*, 131 S. Ct. at 2854.

foreign corporation is “essentially at home” in that forum. Appropriately, the Court in *Bauman* foreclosed general, vicarious jurisdiction over Daimler and steered its jurisprudence toward a rule of greater predictability for corporations in order to encourage foreign business in the United States.

By limiting the extent to which a foreign corporation is subjected to a court’s general jurisdiction, the Court accounted for the federal interests in the “[g]overnment’s foreign relations policies”<sup>135</sup> as well as the potentially negative impact on foreign business investment. After *Bauman*, a court may be more likely to exercise general jurisdiction over a nonresident, domestic, as opposed to foreign, corporation that has been deemed “at home” under prong three of the *Bauman* analysis because the foreign comity inquiry will almost always be settled against a domestic corporation but in favor of a foreign corporation. Accordingly, whether a plaintiff can successfully use vicarious jurisdiction arguments to exercise general jurisdiction over a nonresident corporate defendant may depend upon whether the corporation is a domestic nonresident or a truly foreign corporation.

#### CONCLUSION

At times, a corporation may be held responsible for the wrongful conduct of a separate corporate entity with which it has some significant relationship. In *Daimler AG v. Bauman*, the Supreme Court addressed the boundaries of this sort of corporate, jurisdictional blame-shifting in the context general jurisdiction. The Court held that in limited circumstances, the Due Process Clause permits the exercise of general jurisdiction over a parent corporation based on its subsidiary’s relationship with the forum. While lower courts routinely exercised jurisdiction over foreign parents after a simple finding that an “at home” subsidiary’s contacts with the forum could be imputed to the parent, the Court in *Bauman* rejected that approach and announced a new test that requires a jurisdictional inquiry be independently conducted as to the parent after the subsidiary’s contacts have been imputed to it.

After *Bauman*, the question arises: Under what circumstances would a foreign corporation, imputed with its subsidiary’s contacts, be deemed “at home” in a forum wherein its own contacts with the forum were insufficient to establish general jurisdiction in the first instance? A close examination of the Court’s analysis in *Bauman* offers several insights into

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<sup>135</sup> *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987). It likewise cures any separation of powers concerns, reducing the risk that the judicial branch would, by its rulings, create tension between the United States and other sovereigns.

remaining avenues for using vicarious jurisdiction arguments to establish general jurisdiction over a foreign corporation.

First, a subsidiary that is paradigmatically at home in the forum, rather than “essentially at home” there, will have weightier jurisdictional contacts for imputation such that the “at home” inquiry as to the parent will be settled against the corporation. Second, if the imputation theory used to attribute contacts is an alter ego or merger theory, the jurisdictional contacts will be weightier and subject to fewer traditional limitations than an agency theory of imputation. Third, if the subsidiary is joined as a defendant in the matter, then its imputed contacts are more likely to weigh in favor of jurisdiction because the basic concept of vicarious jurisdiction is that two entities acted together or as one entity in some wrongful conduct. Failure to join the subsidiary also forces the court to make a jurisdictional finding as to the parent based on the presumed, but not established, jurisdiction it might have over the subsidiary. Without legal certainty that the court has power to adjudicate claims over the subsidiary in the first place, the jurisdictional contacts of the subsidiary are weaker when imputed to the parent. Fourth, suits against foreign corporations, unlike nonresident domestic corporations, burden U.S. foreign relations with other nations. Accordingly, a comity analysis will likely be settled against the exercise of general jurisdiction over the foreign corporations.

After *Bauman*, the availability of vicarious, general jurisdiction over a foreign corporation is limited to those places wherein it—and not simply its subsidiary—is deemed “at home.” When conducting an at home analysis as to the parent, each of the considerations identified above will be examined and weighed on a case-by-case basis. Whether any one factor is dispositive is uncertain. The Court set a high bar in *Bauman*, intentionally limiting the sweep of general, vicarious jurisdiction. Nevertheless, the Court did not foreclose its availability entirely, leaving a window of hope for plaintiffs and a shield of protection for foreign corporations.