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Mi Casa es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations after Goodyear Dunlop Tires Operations, S.A. v. Brown

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MI CASA ES SU CASA:* ENTERPRISE THEORY AND GENERAL JURISDICTION OVER FOREIGN CORPORATIONS AFTER *GOODYEAR DUNLOP TIRES OPERATIONS, S.A. V. BROWN*

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In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[1] the United States Supreme Court unanimously held that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[2] Rejecting

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*Translated roughly, the phrase means "my house is your house."

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1. 131 S. Ct. 2846 (2011).

2. *Id.* at 2851. "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) (citing Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81 (1980); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–44 (1966); Calder v. Jones, 465 U.S. 783, 786 (1984)).

the *Goodyear* petitioners' call to announce a bright line rule that would have restricted general jurisdiction over foreign corporations to places where they are "present,"[3] ordinarily only a corporation's principal place of business and state of incorporation, the Court nevertheless failed to define, for future cases, what it meant by "essentially at home,"[4] a phrase it has used in no other context.

This Article explores the possible reasons why the Court utilized this novel standard and its implications. It posits that, by understanding the origins of the "essentially at home" standard and why the Court did what it did and did *not* do what it had the opportunity to do, it may be possible to discover how that standard may be satisfied in future cases. In particular, this Article focuses on a question the Court left on the cutting-room floor—whether wholly owned subsidiaries, when serving as part of a single, highly-integrated business enterprise orchestrated by their co-defendant parent corporation, may "fairly be regarded as at home" in their corporate parent's "home" state.[5]

In concluding that they may, this Article first explores the *Goodyear* case in considerable depth, focusing on Goodyear's highly-integrated supply and distribution system, and identifies the facts and circumstances that may have led the Supreme Court to refine its traditional test for the exercise of general jurisdiction to allow for flexibility when courts are faced with new and novel corporate structures. Second, it provides a primer on enterprise theory as it applies to jurisdictional analysis after *Goodyear*. Finally, this Article examines Supreme Court jurisprudence, including the *Goodyear* opinion itself, the Court's parallel decision in *J. McIntyre Machinery, Ltd. v. Nicastro*,[6] as well as circuit court cases decided after *Goodyear*, in an attempt to identify the origins of the essentially at home standard and to assess whether the Court will hold in some future case that enterprise theories provide a means to find foreign corporations essentially at home where their corporate relatives reside.

Against this backdrop, the *Goodyear* decision can fairly be read as what it is—a new marker at the jurisdictional trailhead, portending more twists and turns in future cases—and not, as portrayed by some commentators, a "very easy case,"[7] the obituary for general jurisdiction, or merely the stuff of which bad law school exam questions are made.

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3. *See* Brief for Petitioners at 14, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (No. 10-76), 2010 WL 4624153 at *14.

4. *Goodyear*, 131 S. Ct. at 2851.

5. *See id.* at 2854, 2857.

6. 131 S. Ct. 2780 (2011).

7. Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 527 (2012). A total of twelve North Carolina judges found that there was no constitutional impediment to that state's exercise of general jurisdiction over Goodyear's foreign subsidiaries. Two trial judges heard the jurisdictional motions. *See, e.g.*, Brown v. Meter, 681 S.E.2d 382, 382 (N.C. Ct. App. 2009), *discretionary appeal not allowed*, 695 S.E.2d 756 (N.C. 2010), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011). It was then reviewed by a three-judge panel of the North Carolina Court of Appeals, *id.*, and then

I. *GOODYEAR DUNLOP TIRES OPERATIONS, S.A. V. BROWN*

A. Jurisdictional Facts

There is scant discussion in the Court's opinion in *Goodyear* of the facts in that case.[8] This is due, in part, to the fact that the record in the case can only generously be described as skeletal. There was but one deposition taken in the case and very few documents produced.[9] The lack of factual discussion may also be the result of the strategically-superficial question the *Goodyear* petitioners presented to the Supreme Court, which required little detailed factual analysis and focused primarily on the court of appeals' imprecise use of "stream of commerce" analysis.[10] It may also be the result of the parsimonious use of such facts in the briefs of the *Goodyear* petitioners and their supporting amici. Nevertheless, as argued below, the facts of the case may have had an impact on the standard that the Court chose to impose and on its decision to leave for another day the question of the circumstances under which a foreign subsidiary may be found to be essentially at home in the corporate home of its parent. For these reasons, it is important to understand what was before the Court when it ruled.

On April 18, 2004, thirteen-year-olds Julian Brown, Matt Helms, and their youth soccer teammates rode on a bus to Charles de Gaulle Airport to begin their journey home to North Carolina.[11] Outside Paris, a tire on that bus blew out

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"reviewed" again by the seven-judge Supreme Court of North Carolina which declined discretionary review, Brown v. Meter, 695 S.E.2d 756 (N.C. 2010).

8. *See Goodyear*, 131 S. Ct. at 2850.

9. *See* Joint Appendix at 221, *Goodyear*, 131 S. Ct. 2846 (No. 10-76). Nevertheless, as demonstrated below, that deposition contained some key admissions. *See infra* text accompanying notes 21–23.

10. The Goodyear petitioners' "Question Presented," to the Supreme Court, and the one on which the Court granted certiorari, is as follows: "Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products initially placed in the stream of commerce by the corporation." Brief for Petitioners, *supra* note 3, at i. By contrast, and mindful of Supreme Court Rule 24(1)(a), the *Goodyear* respondents restated the question in their merits brief as follows: "Whether foreign-based subsidiaries of an American corporation that choose to become part of an ongoing and highly-integrated business enterprise operating within the forum may evade that state's general personal jurisdiction even though they regularly sell tens of thousands of their products through that enterprise in the forum state?" Brief for Respondents at i, *Goodyear*, 131 S. Ct. 2846 (No. 10-76), 2010 WL5125441 at *i.

11. These facts and some that follow are set forth in the trial court's order, which is unreported. The trial court's order, along with the opinion of the North Carolina Court of Appeals, was, however, attached to the Petition for Writ of Certiorari in *Goodyear* as part of the Petitioners' Appendix. Petition for Writ of Certiorari at iv, app. B at 31a Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (No. 10-76) [hereinafter Petitioners' Appendix], *available at* http://www.jonesdayappellate.com/files/CaseStudy/941ebb9e-9853-45cd-a19a-81e1e0bbd601/Presentation/CaseStudyFile/b27f86b4-93c8-4365-9d53-824f475e0642/GoodyearBrown10TermCERT.pdf; *see also*, Brown v. Meter, No. 05 CVS 1922, 2008 WL 8187601 (N.C. Gen. Ct. J. Super Ct. Div. Apr. 25, 2008).

when its plies allegedly improperly separated.[12] The speeding bus left the highway, hit a concrete wall, and overturned, killing Matt Helms and Julian Brown.[13]

The tire that led to Julian's and Matt's deaths was manufactured in Turkey by Goodyear Lastikleri T.A.S. (Goodyear Lastikleri), designed in Luxembourg by Goodyear Luxembourg Tires, S.A. (Goodyear Luxembourg), and sold in France through Goodyear Dunlop Tires Operations, S.A. (Goodyear Operations).[14]

Goodyear Tire & Rubber Company (Goodyear) owned 100% of the stock of all three petitioner corporations at the time of the accident.[15] Goodyear also had deep ties to North Carolina[16]: it had been registered to do business in North Carolina since 1956, long maintained a registered agent in Raleigh, North Carolina, and owned and operated three large tire and tire-mold manufacturing plants in Fayetteville, Statesville, and Asheboro, North Carolina.[17]

Both families sought relief from Goodyear's foreign subsidiaries and Goodyear itself "on a number of theories arising from [the] alleged negligent design, construction, testing, and inspection of and a failure to warn about alleged latent defects in the . . . tire in question."[18] Goodyear did not contest the North Carolina trial court's assertion of general personal jurisdiction over it.[19]

The evidence in the case revealed that the Goodyear subsidiaries did not conduct their global tire business as autonomous and free-standing businesses. Instead, the trial court found that the Goodyear parent controlled and performed key portions of their business:

> The defendants, as manufacturers, did not have their own distribution system for the sale of their tires, but instead used their Goodyear parent and affiliated companies to distribute the tires they manufactured to the United States and North Carolina.[20]

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12. *Id.*

13. *Id.*

14. Brown v. Meter, 681 S.E.2d 382, 384, 387–88 (N.C. Ct. App. 2009), *discretionary appeal not allowed*, 695 S.E.2d 756 (N.C. 2010), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); Joint Appendix, *supra* note 9, at 202, 236; Petitioners' Appendix, *supra* note 11, at 32a.

15. *See* Petitioners' Appendix, *supra* note 11, at 34a.

16. Joint Appendix, *supra* note 9, at 121.

17. See Brief for Respondents, *supra* note 10, at 5 & n.2 (citing NORTH CAROLINA DEPARTMENT OF THE SECRETARY OF STATE, http://www.secretary.state.nc.us/corporations/Corp.aspx?PitemId=5030445 (last visited Feb. 2, 2012) (listing for "Goodyear Tire & Rubber Company")); *id.* at n.3 (referencing North Carolina property tax records).

18. *Brown*, 681 S.E.2d at 384.

19. *See id.* at 382.

20. Petitioners' Appendix, *supra* note 11, at 33a.

As one witness explained: "Their job is to be given a forecast or a ticket and they just build widgets."[21] Thus, the *Goodyear* petitioners "would not deal directly with customers or bring tires into the United States without [Goodyear's] approval or sanction."[22] As a result, when Goodyear Lastikleri shipped tires to North Carolina, it shipped them solely through Goodyear's "internal distribution" network and only at its corporate parent's request.[23] The distribution process was the same for Goodyear Luxembourg's and Goodyear Operations' products.[24] In sum, none of the *Goodyear* petitioners' products ever left the Goodyear "internal distribution" system until *after* they reached North Carolina.

During the relevant period, the *Goodyear* petitioners manufactured more than 44,000 tires which they sold in North Carolina through the Goodyear "internal distribution" process enterprise described above.[25] However, the trial court concluded that the number of tires shipped to and sold in North Carolina by the *Goodyear* petitioners was actually "substantially higher."[26]

What becomes clear from this quick review of the jurisdictional evidence in *Goodyear*, is that the foreign subsidiaries did not of their own free will merely place tires they manufactured in the "unpredictable currents or eddies"[27] of the "stream of commerce," resulting in those products' serendipitous arrival in the North Carolina forum, as the petitioners in *Goodyear* and their supporting amici argued.[28] Nor did they merely turn their products over to Goodyear distributors, independent or otherwise, with whom they had contracted to perform that service. Instead, the *Goodyear* petitioners acted as functionaries of their corporate parent who fulfilled the design and manufacturing parts of the overall Goodyear production and distribution process for products delivered in North Carolina only pursuant to orders from their corporate parent emanating from North Carolina, based on solicitations made by the parent in North Carolina. At the express direction of the parent, and according to the established Goodyear "internal" distribution scheme, these subsidiaries placed their products, stamped only as "Goodyear" tires, in what amounts to a fixed distribution pipeline, with

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21. Joint Appendix, *supra* note 9, at 256.
22. *Id.* at 279.
23. *Id.* at 255.
24. *Id.* at 269–70, 294.
25. *Id.* at 293–94.
26. The trial court found:

> The number of tires shipped into North Carolina from each of these manufacturers may actually be substantially higher, in that [t]he Goodyear Tire and Rubber Company . . . after being noticed for a 30(b)(6) deposition, failed to determine how many vehicles equipped with tires from these foreign defendant manufacturers are imported into the U.S. and shipped into North Carolina for sale each year.

Petitioners' Appendix, *supra* note 11, at 33a.

27. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

28. *See, e.g.*, Brief for Petitioners, *supra* note 3, at 6, 58 (stating that the petitioners did not target North Carolina or even have knowledge that their products were being sold there).

fixed entry points at their respective plants and a fixed endpoint in North Carolina.

B. The Trial Court's Order

The trial court, in its order exercising general personal jurisdiction over [the *Goodyear* petitioners], never used the term "stream of commerce." Not once. Instead, using the traditional test for the exercise of general jurisdiction, it made four key conclusions of law: 1) "defendants have continuous and systematic ties with the State of North Carolina;" 2) "[d]efendants activities in North Carolina are substantial;" 3) the quantity, nature, and quality of their contacts as well as North Carolina's interest in the case, and convenience of the parties all "weigh in favor of the exercise of general jurisdiction over the defendants;" and 4) the "exercise of general jurisdiction over the defendants comports with due process and does not offend traditional notions of fair play and substantial justice."[29]

In support of these conclusions, the trial court highlighted Goodyear's highly-integrated business model.[30] The court found that the *Goodyear* petitioners' substantial tire sales in North Carolina through the Goodyear enterprise, the revenue the *Goodyear* petitioners derived from them, the "quality of those contacts, which include systematic and repeated contacts with the state of North Carolina for the purpose of commerce, along with the [*Goodyear* petitioners] ownership by [a] U.S. corporation[] doing substantial business in North Carolina, weigh[ed] in favor of a finding of general jurisdiction over the [*Goodyear* petitioners]."[31]

C. The North Carolina Court of Appeals' Opinion

In reviewing the trial court's order, the North Carolina Court of Appeals asked "whether the trial court's findings of fact support its legal conclusions that Defendants had 'continuous and systematic contacts with North Carolina' thereby justifying the exercise of general personal jurisdiction over Defendants."[32] It then discussed the factors the North Carolina courts have traditionally considered in determining whether such contacts exist.

The court stated that, in assessing the *Goodyear* petitioners' contacts with North Carolina, it was required to insure that those contacts resulted from "actions by Defendant[s] rather than from mere happenstance or coincidence or

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29. Petitioners' Appendix, *supra* note 11, at 35a–36a.

30. *Id.* at 33a–35a.

31. *Id.* at 34a–35a.

32. Brown v. Meter, 681 S.E.2d 382, 388 (N.C. Ct. App. 2009), *discretionary appeal not allowed*, 695 S.E.2d 756 (N.C. 2010), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

the actions of others."[33] Unfortunately, in evaluating those contacts, the court took a mystifying detour.

The court apparently responded to language, adopted by North Carolina's courts from *Hanson v. Denckla*,[34] utilizing the "purposeful availment" concept for the limited purpose of assessing whether, in the general jurisdiction context, contacts could be attributed to a foreign defendant or were, instead, the "unilateral" acts of someone else.[35] It then engaged in what can be characterized as extended dicta in discussing that standard as used in *World-Wide Volkswagen Corp. v. Woodson*,[36] for assessing whether the exercise of specific jurisdiction over a foreign defendant offends due process. It may have been in the more limited, *Hanson* context, however, that the court asked whether the *Goodyear* petitioners had "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina."[37]

The court's apparent concern for attribution of contacts becomes clear when it questions certain trial court findings and concludes that the *Goodyear* petitioners were not "directly" responsible for their tires' presence in North Carolina because they were not "directly" responsible for the distribution and sale of any of their own products anywhere in the United States.[38] Instead, those core corporate functions fell exclusively to Goodyear.

In finding that the evidence supported the trial court's findings, the court explained: "[T]hrough a regular process employed within the Goodyear organization, a substantial number of tires manufactured by the Defendants were imported into the United States and distributed to various entities in North Carolina."[39] The court, therefore, found that the *Goodyear* petitioners "purposefully and intentionally" placed their products *in the Goodyear*

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33. *Id.* at 388–89.

34. Hanson v. Denckla, 357 U.S. 235 (1958). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . ." *Id.* at 253 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

35. *Brown*, 681 S.E.2d at 389 (citing and quoting Lulla v. Effective Minds, LLC, 646 S.E.2d 129, 133 (N.C. Ct. App. 2007) (internal quotation marks omitted); Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs, 581 S.E.2d 798, 802, (N.C. Ct. App. 2003), *rev'd on other grounds*, 588 S.E.2d 465 (N.C. 2003)).

36. 444 U.S. 286 (1980).

37. *Brown*, 681 S.E.2d at 391 (alterations in original) (quoting Bush v. BASF Wyandotte Corp., 306 S.E.2d 562, 568 (N.C. Ct. App. 1983) (internal quotation marks omitted)). That limitation becomes apparent when the court states, at the end of the same paragraph:

> Thus, we must evaluate the validity of the trial court's decision that [Petitioners] were subject to the jurisdiction of the Onslow County Superior Court by examining whether the trial court's findings of fact, considered in their entirety, provide an adequate basis for a conclusion that Defendants had "continuous and systematic contacts with North Carolina" in light of the well-established legal principle outlined above.

Id. at 392.

38. *Id.* at 394; Joint Appendix, *supra* note 9, at 223–28, 256, 279

39. *Brown*, 681 S.E.2d at 394.

distribution enterprise, knew or should have known that "a Goodyear affiliate obtained tires manufactured by Defendants and sold them in the United States in the regular course of business," and "that several thousand tires manufactured by each of the Defendants eventually found their way into North Carolina markets through *the operation of a continuous and highly-organized distribution process.*"[40]

The North Carolina Court of Appeals could have made clear that this "stream of commerce" discussion was limited to whether tire sales in North Carolina could be charged to the *Goodyear* petitioners for jurisdictional purposes. Although it apparently tried to do so, it did not succeed. Instead, in a muddled paragraph that likely condemned its decision to review by the Supreme Court, it stated:

> Instead of adopting a general rule precluding the use of stream of commerce analysis to support a finding of general personal jurisdiction, we believe that the real issue is the extent to which Defendants' products were, in fact, distributed in North Carolina markets. . . . [T]he trial court's findings reflect that thousands of tires manufactured by each of the Defendants were distributed in North Carolina *as the result of a highly organized distribution process that involved Defendants and other Goodyear affiliates.*[41]

On *that* basis, the court found "competent evidence" that the exercise of general jurisdiction over the *Goodyear* petitioners in North Carolina was proper and did not offend due process.[42]

Against this backdrop, the North Carolina Supreme Court unanimously refused to review the court of appeals' decision.[43]

It should be clear that the court of appeals' decision was not, as some commentators suggest,[44] based solely upon the number of regular sales in North Carolina, which the lower courts admitted they did not and could not know for sure.[45] Instead, both courts below focused on the *manner* in which those sales occurred and the highly integrated nature of the Goodyear sales and distribution system.[46]

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40. *Id.* (emphasis added).

41. *Id.* at 394–95 (emphasis added).

42. The previous discussion reflects substantially the respondent's merits brief. *See* Brief for Respondents, *supra* note 10, at 12–15.

43. *See* Brown v. Meter, 695 S.E.2d 756 (N.C. 2010).

44. *See, e.g.*, Stein, *supra* note 7, at 529–30 (citing Brown, 681 S.E.2d at 390).

45. *See Brown*, 681 S.E.2d at 385–86.

46. *See id.* at 394–95; Petitioners' Appendix, *supra* note 11, at 33a–35a.

II. ENTERPRISE THEORY AND GENERAL JURISDICTION

For decades, courts across the country have found that participation in certain highly-integrated business enterprises operating within the forum state may subject each member, parent, or subsidiary, no matter where it is located, to general jurisdiction in the forum.[47] In finding general jurisdiction based on enterprise and agency theories, these courts have ordinarily looked to the level of economic integration between parent and subsidiary, instead of the legal boundaries between them, in evaluating a corporation's contacts with the forum.[48] Some commentators have called this principle "jurisdictional merger."[49]

"[M]erger occurs when the parent and subsidiary are part of a common enterprise that relies on the efforts of both entities to carry out a common plan."[50] Among the factors these courts have considered as significant to whether a common enterprise exists are: "whether the subsidiary is not an independent decision making body; whether [its] administrative organization is incomplete; whether the parent and subsidiary project an integrated posture to the public; [and whether they exchange] information, personnel, and group resources."[51] One court described these as "plus" factors, "something beyond the subsidiary's mere presence within the bosom of the corporate family."[52]

Such holdings are not the rarity that they are in the Supreme Court.[53] The Fifth Circuit, for example, has upheld Texas' "single business enterprise"

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47. *See, e.g.*, Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 912, 920–21 (9th Cir. 2011) (finding general jurisdiction over the foreign parent under an agency theory); Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357, 1363 (11th Cir. 2006); Ames v. Whitman's Chocolates, No. 91-3271, 1991 WL 281798, at *3 (E.D. Pa. Dec. 30, 1991) ("General jurisdiction does exist, however, when the parent corporation exercises such a degree of control that . . . the corporations function as one integrated enterprise.").

48. *See generally* PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS §§ 24.09, 29.03–04 (2d ed. 2004) (discussing enterprise theory); *see also* Kurt A. Strasser & Phillip Blumberg, *Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy*, 1 ACCOUNTING ECONOMICS & LAW: A CONVIVIUM 1, 11 (2011), *available at* http://www.bepress.com/ael/vol1/iss1/4 (providing a summary of enterprise theory).

49. *See* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 14 (1986).

50. *Id.* at 30 (citing PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS 67 (1983)). Although typical merger cases arise from efforts to hold corporate parents responsible for their subsidiaries' activities, because the doctrine merges rather than attributes their conduct, it should also apply equally to subject subsidiaries with local parents to jurisdiction in the forum. *Id.* at 13–14.

51. *Id.* at 30 (citations omitted) (citing cases).

52. Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465–66 (1st Cir. 1990).

53. A case such as *Berry v. Lee*, 428 F. Supp. 2d 546 (N.D. Tex. 2006), is typical. A Texas resident sued Chinese and Korean subsidiaries in Texas, complaining of sexual harassment and attempted rape that took place on a foreign business trip. *Id.* at 549–50. The plaintiff successfully contended that the exercise of general jurisdiction over these corporations was appropriate because, together with their Texas-based affiliates and president, they formed a "single business enterprise" with sufficient contacts with Texas to warrant the exercise of general jurisdiction over them. *Id.* at

doctrine in both the jurisdictional and liability contexts.[54] Courts in the Third and Seventh Circuits have also approved similar doctrines.[55] In the Third Circuit, numerous courts have held that "[g]eneral jurisdiction does exist when the parent corporation exercises such a degree of control that . . . the corporations function as one integrated enterprise."[56] In the Seventh Circuit, courts may disregard the corporate form for jurisdictional purposes under "unity of purpose" and "alter ego" doctrines.[57] Similarly, a Ninth Circuit panel, in *Torres v. Goodyear Tire & Rubber Co.*,[58] a liability case involving facts virtually identical

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555–56. The court noted first that "Berry's burden of demonstrating a prima facie case of personal jurisdiction through alter ego and single business enterprise theories is 'less stringent' than the standard she must meet at trial to" prove *liability*. *Id.* at 556. It then listed a number of "factors weighing in favor of fusing the corporations" for jurisdictional purposes. *Id.* at 554. In doing so, the court stated that "[n]o single factor is determinative, and the ultimate question is one of control." *Id.* Judging by these standards, the court found that the local parent's ownership, control, and portrayal to the public that all of the companies were part of a common enterprise warranted the exercise of general jurisdiction over the foreign subsidiaries. *Id.* at 555–56.

54. *See* Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 428 (5th Cir. 2005) ("A district court may exercise general jurisdiction over an out-of-state corporation under the single business enterprise doctrine when a subsidiary of the out-of-state corporation is subject to the court's general jurisdiction. Typically used in the context of liability, the doctrine applies 'when corporations are not operated as separate entities, but integrate their resources to achieve a common business purpose.'") (citing El Puerto de Liverpool v. Servi Mundo Llantero, 82 S.W.3d 622, 636 (Tex. Ct. App. 2002)) (quoting Gardemal v. Westin Hotel Company, 186 F.3d 588, 594 (5th Cir. 1999)); Hollowell v. Orleans Reg'l Hosp. L.L.C., 217 F.3d 379, 390 (5th Cir. 2000). While Texas recognizes the doctrine for both jurisdictional and liability purposes, *see Fielding*, *supra*, the use of enterprise theory for jurisdictional and liability purposes are two different things. The standards and policy considerations for determining when a court will disregard the corporate form are usually less when the only question is whether corporations are amenable to suit in the forum. *See, e.g.*, Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 903 (2d Cir. 1981) (citing Walkovszky v. Carlton, 223 N.E.2d 6, 7 (N.Y. 1966)) (stating that the jurisdictional inquiry for piercing the corporate veil should not require fraud, even if the test for liability does); *Berry*, 428 F. Supp. 2d at 556. Thus, the Texas Supreme Court recently added a fraud element to impose *liability*. *See* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008).

55. The Fifth, Third, and Seventh Circuit Courts of Appeals rules were relevant in *Goodyear* because the *Goodyear* petitioners alleged that it was the conflict between the decision of the North Carolina Court of Appeals and the decisions in those circuits that warranted granting the writ of certiorari in the *Goodyear* case. Petition for Writ of Certiorari at 8, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76), 2010 WL 2786988 at *8.

56. Heinrich v. Serv. Corp. Int'l, No. 09cv0524, 2009 U.S. Dist. LEXIS 62832, at *7 (W.D. Pa. July 22, 2009) (citing Gaul v. Zep Mfg. Co., No. 03-2439, 2004 U.S. Dist. LEXIS 9689, at *15 (E.D. Pa. May 26, 2004)); Ames v. Whitman's Chocolates, No. 91-3271, 1991 U.S. Dist. LEXIS 18389, at *8 (E.D. Pa. Dec. 30, 1991).

57. *See, e.g.*, Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 379 (7th Cir. 2008) (unity of purpose); Van Dorn Co. v. Future Chemical & Oil Corp., 753 F.2d 565, 571 & n.1 (7th Cir. 1985) (alter ego); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1336 (E.D.N.Y. 1981) (exercise of both general and specific jurisdiction permissible over Japanese corporation based on "common sense" appraisal of the business relationship); Roorda v. Volkswagenwerk, A.G., 481 F. Supp. 868, 870–71 (D.S.C. 1979).

58. 901 F.2d 750 (9th Cir. 1990). The appellants in *Torres* sued to recover for injuries suffered as a result of an automobile accident involving a Goodyear tire. *Id.* at 751. They asserted four theories of liability, including an enterprise theory of strict products liability. *Id.* Goodyear

to those in *Goodyear*, reversed a summary judgment order denying liability under an enterprise theory.[59] In doing so, one of the judges observed that:

> [W]e do not believe it is good law to allow multinational firms the freedom to compartmentalize strict liability by choosing organizational forms that will require actions for defective design of a product such as this to be brought in Luxembourg, those for defective manufacture in Great Britain, those for defective labeling in a third, and the like.[60]

In fact, North Carolina had a well-established single business enterprise rule. In that state, "general personal jurisdiction exists over a foreign corporation where it 'controls . . . an in-forum affiliate to such a degree that the two corporations operate as a single, amalgamated entity.'"[61] Quoting a leading treatise, the Eastern District of North Carolina has stated the following:

> [I]f the [affiliate] is merely an agent through which the [foreign] company conducts business in a particular jurisdiction or its separate corporate status is formal only and without any semblance of individual identity, then the [in-forum affiliate's] business will be viewed as that of the [foreign corporation] and the latter will be said to be doing business in the jurisdiction through the [affiliate] for purposes of asserting personal jurisdiction.[62]

Thus, where, as in *Goodyear*, a foreign corporation is part of a single business enterprise operating in the forum, the jurisdictional analysis changes.[63]

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moved for summary judgment, which was granted. *See id.* The Ninth Circuit affirmed on the other theories of liability but certified to the Arizona Supreme Court the issue of whether appellants could rely on an "enterprise theory" to hold the appellee strictly liable for the appellants' injuries. *Id.* (citing Torres v. Goodyear Tire & Rubber Co., 867 F.2d 1234, 1236–37, 1239 (9th Cir. 1989)). The Arizona Supreme Court concluded that Arizona would allow the imposition of strict liability on trademark licensors significantly involved in Goodyear's integrated distribution process under such a theory; therefore, following certification and the Arizona court's decision, the Ninth Circuit reversed and remanded the case. *Id.* (citing Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939, 945 (Ariz. 1990) (en banc)).

59. *See id.*

60. *Id.* at 754 (Noonan, J., concurring).

61. Manley v. Air Can., 753 F. Supp. 2d 551, 559 (E.D.N.C. 2010) (omission in original) (quoting with approval *In re* Chocolate Confectionary Antitrust Litig., 641 F. Supp. 2d 367, 382–83 (M.D. Pa. 2009)); *see also* Wyatt v. Walt Disney World, Co., 565 S.E.2d 705, 711 (N.C. Ct. App. 2002) (refusing to treat affiliated companies as a single entity "absent proof that the businesses are parts of the same whole").

62. *Manley*, 753 F. Supp. 2d at 559 (alterations in original) (quoting 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1069.4, at 174 (3d ed. 2002)) (internal quotation marks omitted).

63. For example, North Carolina has an identity caveat to its alter ego rule that would allow controlling corporations to be held liable. *See* Holcomb v. Pilot Freight Carriers, Inc., 120 B.R. 35, 41 (M.D.N.C. 1990) ("[T]he North Carolina *alter ego* doctrine is a flexible one. Where domination

In fact, even the Government admitted in its amicus brief in *Goodyear* that "a different analysis may be warranted by the case specific interactions between particular affiliated corporations, as when a subsidiary acts as the agent or alter ego of the parent corporation, or vice-versa."[64] Thus, in *Donatelli v. National Hockey League*,[65] which the Government cited for this notion,[66] the panel explained when this shift occurs:

> Sometimes, the parent has utilized the subsidiary in such a way that an agency relationship between the two corporations can be perceived—and that is enough. On other occasions, jurisdiction has been premised on a finding of control—not merely the degree of control innately inherent in the family relationship, but the exercise of control by the parent "greater than that normally associated with common ownership and directorship." The same result obtains when the subsidiary is merely an empty shell.[67]

Even the Supreme Court has recognized that the analysis shifts when a single, highly-integrated business enterprise is involved. In *United States v. Scophony Corporation of America*, for example, the Court held that a foreign

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and control are complete, then in that 'rare' case, the court will simply disregard the corporate fiction and treat the individuals and corporations as one party. Thus, in North Carolina an alter ego and its subsidiary may be treated as one company."); *see also* Greenville Buyers Market Assocs. v. St. Petersburg Fashions, Inc., 387 S.E.2d 234, 235 (N.C. Ct. App. 1990) (citing Copley Triangle Assocs. v. Apparel Am., Inc., 385 S.E.2d 201, 203 (N.C. Ct. App. 1989)) (noting that the acts of a sham corporation are those of its masters for jurisdictional purposes).

64. Brief for the United Status as Amicus Curiae Supporting Petitioners at 26 n.9, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76) [hereinafter Brief for the United States], 2010 WL 4735597 at *27 n.9. Other commentators have supported this notion. *See supra* text accompanying note 62, quoting WRIGHT & MILLER, *supra* note 62, § 1069.4, at 174; GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 144 (2d ed. 1992) ("Some courts have considered whether jurisdiction over a U.S. parent company also permits a U.S. court to exercise jurisdiction over foreign subsidiaries of the parent. Lower courts have generally applied the same sort of alter ego analysis that governs the reverse situation."); *cf.* United States v. Scophony Corp. of Am., 333 U.S. 795, 814–15, 818 (1948) (permitting a corporation to be "found" for venue purposes where the corporation supervises over and intervenes in its subsidiaries operations). Had the Court applied the appropriate jurisdictional analysis in *Goodyear*, it would not have found a conflict warranting certiorari, as with the case *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 109 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 2340 (2010). In this case, the court found that the exercise of general jurisdiction was improper in Pennsylvania but appropriate in Colorado based on the relationship between parent and subsidiary. *Id.* at 106, 109. The court explained: "[The subsidiary] exists to conduct [the parent's] business in North and South America. Moreover, as the exclusive . . . subsidiary in the Americas . . . [it] fairly could be described as the 'source of life' to [the parent's] operations." *Id.* at 109.

65. 893 F.2d 459 (1st Cir. 1990).

66. Brief for the United States, *supra* note 64, at 26 n.9.

67. *Donatelli*, 893 F.2d at 466 (citations omitted) (quoting Hargrave v. Fibreboard, Corp., 710 F.2d 1154, 1160 (5th Cir. 1983)).

parent corporation was "found," for venue purposes under the Clayton Act, in the United States due to its "constant supervision and intervention" in the activities of its United States subsidiaries going well "beyond normal exercise of shareholders' rights."[68]

It should be clear then that the use of enterprise theories as a basis for the exercise of general jurisdiction is neither a radical notion nor one with which the Court was unfamiliar when it decided *Goodyear*.

III. DOES ENTERPRISE THEORY PROVIDE FOREIGN CORPORATIONS WITH A JURISDICTIONAL "HOME" IN THE FORUM AFTER *GOODYEAR*?

When the *Goodyear* opinion is viewed as holding only that "[i]njecting a product, even in substantial volume, into a forum's 'stream of commerce,' *without more*, does not support general jurisdiction,"[69] Justice Ginsburg's opinion for the Court offers little new insight and, therefore, can be read as containing a confounding amount of dicta, as one commentator has suggested.[70] The opinion for the Court begins to come into sharper focus only when the case is read in its proper context against the backdrop of its skeletal facts, of all of the actual issues raised both by the courts below and by the *Goodyear* respondents, of related Supreme Court jurisprudence, of the opinion in its sister case, *Nicastro*, and of the Government's influence in the case.

A. The Ginsburg Opinion

In the opening paragraphs of her opinion for the Court, Justice Ginsburg, without explanation, announced as the traditional test for the exercise of general or "all-purpose"[71] jurisdiction over a foreign corporation what is, at the same time, a more exacting yet potentially more broadly-applicable standard: "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*."[72] A quick Westlaw search reveals no other similar use of the phrase "essentially at home" in American jurisprudence before *Goodyear*.

Armed with that standard and an analysis of the few general jurisdiction cases previously decided by the Court—*Perkins v. Benguet Consolidated Mining*

68. *Scophony*, 333 U.S. at 815–16, 818 (internal quotation marks omitted).

69. Brief for Petitioners, *supra* note 3, at 37 (first alteration in original) (emphasis added) (quoting Jackson v. Tanfoglio Giuseppe, S.R.L., 615 F.3d 579, 584 (5th Cir. 2010)) (internal quotation marks omitted).

70. Stein, *supra* note 7, at 528.

71. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

72. *Id.* (emphasis added).

Co.[73] and *Helicopteros Nacionales de Colombia, S.A. v. Hall*[74]—the majority held that:

> [P]etitioners are in no sense at home in North Carolina. Their attenuated connections to the State . . . fall far short of "the continuous and systematic general business contacts" necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.[75]

Some commentators have argued that everything after this portion of the opinion is dicta.[76] As demonstrated below, it is not.

Instead, later in the opinion, the majority addresses the *Goodyear* respondents' primary argument[77]—that the North Carolina court's reliance on the *Goodyear* petitioners' participation in an ongoing, highly-integrated supply and distribution enterprise with their corporate parent, which was based, in part, in North Carolina—shifted the jurisdictional analysis and provided sufficient evidence of the petitioners' substantial, continuous, and systematic activity in North Carolina to support the exercise of general jurisdiction over the *Goodyear* petitioners.[78] In their Brief in Opposition to the Petition for Writ of Certiorari, the *Goodyear* respondents had argued that:

> Plaintiffs are not asserting there are minimum contacts with defendants on a 'stream of commerce' claim, in which the defendants had nothing to do with where their product eventually ended up. Instead, plaintiffs are alleging that the defendants are part of a highly targeted, integrated world-wide effort to design, manufacture, market and sell their tires in the United States, including North Carolina. Those thousands of tires sold here are not incidental contacts, but instead are calculated and deliberate efforts to take advantage of the North Carolina market for tires.[79]

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73. 342 U.S. 437 (1952).

74. 466 U.S. 408 (1984).

75. *Goodyear*, 131 S. Ct. at 2857 (quoting *Helicopteros*, 466 U.S. at 416).

76. *See supra* note 70 and accompanying text.

77. *Goodyear*, 131 S. Ct. at 2857.

78. *See* Brief for Respondents, *supra* note 10, at 17.

79. Brief in Opposition at 4, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76) (quoting Joint Appendix, *supra* note 9, at 541) (internal quotation marks omitted). *See also Goodyear*, 131 S. Ct. at 2857 n.6 (quoting Joint Appendix, *supra* note 9, at 485) (addressing the respondents' argument). In fact, as set forth in their Brief in Opposition to the Petition for Writ of Certiorari, the *Goodyear* respondents noted that "[f]ar from attempting to apply the stream of commerce notion to this case, one of the headings of plaintiffs' brief to the N.C. Court of Appeals was: 'Defendants' "Stream of Commerce" Arguments Are Misdirected In That They Refer To A Doctrine That Does Not Apply In This Case.'" Brief in Opposition, *supra*, at 5 (quoting Joint Appendix, *supra* note 9, at 481).

In rejecting the argument, the Court acknowledged that even if the *Goodyear* petitioners' participation in such an enterprise *did* establish their substantial, continuous, and systematic activity in the forum, "[a]s already explained . . . even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."[80]

Justice Ginsburg makes clear then that, even if a foreign corporation makes a substantial number of sales to the forum state on a very continuous and systematic basis, as the *Goodyear* petitioners did here, those facts alone would not support the exercise of general jurisdiction over such a corporation.[81] Something more was now required. And that is where the essentially at home standard comes into play. Without it, the Court would arguably have been hard-pressed to deny that Goodyear's integrated, ongoing supply and distribution scheme operating in the forum, of which the *Goodyear* petitioners were an integral part, was continuous and highly systematic.[82]

The Court's opinion is also noteworthy for what it did *not* do. Inexplicably, the Court expressly refused to consider an argument that the *Goodyear* respondents never actually made, that is, because of the *Goodyear* petitioners' participation in the Goodyear supply and distribution enterprise, the Court *itself*

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80. *Goodyear*, 131 S. Ct. at 2857 n.6. *See also id.* at 2856 ("A corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945))).

81. Justice Ginsburg's conclusion that the more than 44,000 tires sold in North Carolina during the relevant period were insignificant for jurisdictional purposes stands in stark contrast to her statement, in dissent, in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), that: "The plurality notes the low volume of sales in New Jersey. . . . Had a manufacturer sold in New Jersey $24,900 worth of flannel shirts, cigarette lighters, or wire-rope splices, the Court would presumably find the defendant amendable to suit in that State." *Id.* at 2803 n.15 (citations omitted).

82. This is particularly true if the Court had used the definitions supplied by the Government in *Goodyear*. The Government posited:

> Taken together, *Perkins* and *Helicopteros* establish that the relevant inquiry is whether "the foreign corporation, through its [agent] 'ha[s] been carrying on in [the forum State] a continuous and systematic . . . part of its general business,'" typified by the Ohio activities of the foreign corporation in *Perkins*. That test is demanding. In particular:
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> . . . .
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> - "Continuous" refers to a practice "[o]perated without interruption." Thus, the "one trip to Houston by Helicol's chief executive officer" could not "be described or regarded as a contact of a 'continuous and systematic' nature."
> - "Systematic" refers to conduct "that forms a system," which is an "aggregation . . . of objects united by some form of regular action or interdependence." Thus, in *Perkins* . . . . what mattered was that the corporation's contacts with Ohio—banking, employment, recordkeeping, holding office space, conducting corporate affairs, etc.,—together formed the very embodiment of the defendant's corporate control structure.

Brief for the United States, *supra* note 64, at 22–23 (alterations in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 577, 2562 (2d. ed. 1958); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415, 416 (1984)).

should pierce the corporate veil or declare that the scheme constituted a single business enterprise for jurisdictional purposes.[83] The Court, however, did not need to go so far and was not asked to do so, in large part because the lower courts had already essentially made such a finding.[84] By characterizing the

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83. *Goodyear*, 131 S. Ct. at 2857 (citing SUP. CT. R. 15.2; Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2861 (2010); Brief for Respondents, *supra* note 10, at 44). In holding that any question regarding the existence of a single business enterprise had somehow been waived, the Court seemingly ignored the well-established rule that a judgment may be affirmed on any ground supported by the law and record and the record in the trial and appellate courts below. *See* Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982) (citing United States v. N.Y. Tel. Co., 434 U.S. 159, 166 n.8 (1977); Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970); Ryerson v. United States, 312 U.S. 405, 408 (1941)). Even the Government admitted in its amicus brief that the North Carolina Court of Appeals had "effectively treat[ed] the parent and subsidiary corporations as an undifferentiated entity for distribution of petitioners' products." Brief for the United States, *supra* note 64, at 27. In fact, as demonstrated above, both North Carolina courts repeatedly raised and relied upon the Goodyear integrated business structure as a basis for jurisdiction. *See supra* Part I.B–C.

In finding waiver, the Court also stated that the issue of consideration of the parents' contacts as part of the Goodyear distribution system had been raised only in respondents' Brief to the North Carolina Court of Appeals. *Goodyear*, 131 S. Ct. at 2857 n.6 (citing Joint Appendix, *supra* note 9, at 485). That is incorrect. Aside from the many references in the court of appeals' decision, the same argument was included in the Brief in Opposition, *supra* note 79, at 4 (citing Joint Appendix, *supra* note 9), which arguably preserved the issue. Supreme Court Rule 15.2, cited by the Court as warranting waiver, *Goodyear*, 131 S. Ct. at 2857 (citing SUP. CT. R. 15.2), addresses only the need to correct misstatements of fact or law in the petition for certiorari. *See* SUP. CT. R. 15.2. As a result, the rule is either irrelevant to this issue or was satisfied by the statement cited in the text above.

84. Brown v. Meter, 681 S.E.2d 382, 395 (N.C. Ct. App. 2009), *discretionary appeal not allowed*, 695 S.E.2d 756 (N.C. 2010), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011). This is true despite the language, quoted in the opinion, that the Court interpreted as meaning that the North Carolina Court of Appeals somehow found that the *Goodyear* petitioners and their corporate parent were separate corporate entities. *Goodyear*, 131 S. Ct. at 2857 (citing *Brown*, 681 S.E.2d at 392). It did not. To the contrary, the actual quote refers only to the court's reading of the evidence supporting the trial court's decision and notes that the *Goodyear subsidiaries as among themselves* were "separate corporate entities" that did not themselves ship or sell products in North Carolina. *Brown*, 681 S.E. 2d at 392. It said nothing about their joint involvement with their corporate parent. *See id.* A few paragraphs down in the opinion, however, the North Carolina court put such evidence in context:

> According to the trial court's findings, the distribution chain through which tires manufactured by Defendants were shipped into the United States and, eventually, into North Carolina, was "a continuous and systematic" process rather than a sporadic or episodic one. As a result, the trial court's findings indicated that, through a *regular process employed within the Goodyear organization*, a substantial number of tires manufactured by the Defendants were imported into the United States and distributed to various entities in North Carolina.

Id. at 394 (emphasis added). Finally, as the Government recognized, when the court of appeals made its holding, it found that:

> Although we might agree with Defendants' contention in the event that the record demonstrated that only a few tires reached North Carolina through a limited distribution process, that is not the situation present here. Instead, the trial court's findings reflect that thousands of tires manufactured by each of the Defendants were distributed in North Carolina as the result of *a highly organized distribution process that involved Defendants*

argument as it did and by finding *that* argument waived, however, the Court was able to avoid deciding it.

Consideration of that argument or one like it, however, would have permitted the Court to determine whether a corporate subsidiary would be considered essentially at home in a jurisdiction that had general jurisdiction over its corporate parent where the two were participants in a single business enterprise, a determination the Court was not apparently prepared to make in the *Goodyear* case. This is likely due to the fact that the issue had not been fully briefed by petitioners or any amici and was only discussed in a footnote in the Government's brief.[85] Second, unlike a case such as *Torres,* the record below was sparse, at best, even though it contained critical admissions.[86] Third, as demonstrated below, the parallel decision in *Nicastro* colored any decision the Court made and even the standard it used. As a result, it may simply be that the Court preferred to save resolution of that question for another day and another case where the issue was more directly and fully addressed.

The *Goodyear* petitioners and the Government had also asked the Court essentially to require that a foreign corporation be somehow physically present in the forum before its courts would be permitted to exercise general jurisdiction over that corporation.[87] The Court declined to do so. It could easily have restricted the place in which a court could exercise general jurisdiction over a foreign corporation to the state of the corporation's principal place of business or incorporation. Indeed, it discussed just such limitations.[88] Yet, it did not impose them. As set forth below, there are good reasons why the Court imposed a broader, more ambiguous standard instead.

B. Origins of the "Essentially at Home" Standard

Historically, courts announcing the test for general jurisdiction have eschewed any requirement of physical, virtual, or de facto presence of a foreign corporation in the forum state and focused instead on whether the foreign corporations' contacts with the forum were sufficiently continuous, systematic, and substantial such that the exercise of general jurisdiction over that corporation comported with due process. In *International Shoe Co. v. Washington,*[89] for

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> *and other Goodyear affiliates.* Thus, we believe that, on the facts of this case, sufficient basis exists to support a finding of general personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1)d and the Due Process Clause.

Id. at 394–95 (emphasis added). Nothing in the North Carolina Court of Appeals' opinion then, can fairly be construed as concluding that the parent and Goodyear subsidiaries were separate corporate entities for jurisdictional purposes.

85. *See* Brief for the United States, *supra* note 64, at 26 n.9.

86. *See supra* text accompanying note 9.

87. *See* Brief for Petitioners, *supra* note 3, at 28; Brief for the United States, *supra* note 64, at 11.

88. *Goodyear,* 131 S. Ct. at 2853–54.

89. 326 U.S. 310 (1945).

example, the Court abandoned the traditional jurisdictional requirement of physical presence in the forum state and concluded that jurisdiction over foreign corporations in the forum was appropriate "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on."[90] Although *International Shoe* arose out of attempts by the State of Washington to collect deficiencies in payments to its unemployment compensation fund for salesmen employed by the Missouri-based company in Washington,[91] the Court also announced the jurisdictional yardstick to be used when claims arise *outside* the forum. The Court stated:

> While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amendable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought *so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.*[92]

The Court reaffirmed and extended these principles in *Perkins v. Benguet Consolidated. Mining Co.*[93] A nonresident brought suit in Ohio against a Philippine corporation that had been "carrying on in Ohio a continuous and systematic, but limited, part of its general business" during World War II, for claims arising from its activities unrelated to Ohio.[94] Although the corporation had never been licensed to do business in Ohio or appointed an agent for service there,[95] produced nothing there, and never sold any products there, the Court did not find those markers "a conclusive test."[96] Instead, the question was "whether, as a matter of federal due process, the business done in Ohio by the . . . mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation."[97]

In *Perkins*, the corporation had no office or ongoing mining operations in Ohio.[98] Instead, the company's president and principal shareholder had a personal office in which he conducted his personal affairs, some activities on the company's behalf, and kept the company's files.[99] He conducted some company correspondence and drew salary checks in Ohio, using two local banks that held company funds.[100] An Ohio bank acted as transfer agent for Benguet's stock and

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90. *Id.* at 317 (citations omitted).
91. *Id.* at 311, 313–14.
92. *Id.* at 318 (emphasis added) (citations omitted).
93. 342 U.S. 437 (1952).
94. *Id.* at 438–39.
95. *See id.* at 439 & n.2, 448.
96. *Id.* at 445.
97. *Id.* at 447.
98. *Id.* at 448.
99. *Id.* at 447–48.
100. *Id.* at 448.

the president held a few board meetings at his home or office in Ohio.[101] Finally, the president oversaw the rehabilitation of the company's mining operations in the Philippines from his office in Ohio.[102] On these facts, the Court found that "he carried on in Ohio a continuous and systematic *supervision* of the necessarily limited wartime activities of the company" such that "it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding."[103]

In *Helicopteros Nacionales de Colombia v. Hall*,[104] the only other general jurisdiction case decided by the Court, it evaluated whether Helicol had the "continuous and systematic general business contacts [with the forum] that the Court found to exist in *Perkins*."[105]

Although business practices have grown more complex since *Perkins* was decided in 1952, its principle—that supervision of business activities from the forum may be sufficient alone to warrant the exercise of general jurisdiction over foreign corporations[106]—has remained intact. Justices Brennan and Marshall, in their dissenting and concurring opinions in *Helicopteros*, *World-Wide Volkswagen*,[107] and *Asahi Metal Industry Co. v. Superior Court*,[108] anticipated that the Court would examine the business context in which a defendant's contacts with the forum arise.[109] In *Burger King*,[110] the majority did just that. "We have previously noted that when commercial activities are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party, at least where he is a 'primary participant[t]' in the enterprise and has acted purposefully in directing those activities."[111] Because the case could be decided on other issues, however, the Court declined to "resolve the permissible bounds of such attribution."[112]

These cases demonstrate what had been the Court's increasing understanding that the nature and complexity of the businesses in which purported contacts arise is critical to its jurisdictional inquiry, particularly where multinational corporations are concerned. In fact, the Court's recent jurisprudence had reflected the Court's apparent conclusion that traditional

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101. *Id.*
102. *Id.*
103. *Id.* (emphasis added).
104. 466 U.S. 408 (1984).
105. *Id.* at 416.
106. *Perkins*, 342 U.S. at 448.
107. 444 U.S. 286 (1980).
108. 480 U.S. 102 (1987).
109. *See, e.g.*, *World-Wide Volkswagen*, 480 U.S. at 314 (Marshall, J., dissenting) (discussing how jurisdiction should not take for granted the defendants' decision to participate in a global automobile enterprise).
110. 471 U.S. 462 (1985).
111. *Id.* at 479 n.22 (alteration in original) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); Calder v. Jones, 465 U.S. 783, 790 (1984)).
112. *Id.*

notions of jurisdiction may sometimes have limited application to modern transnational commerce.

In *Hertz Corp. v. Friend*,[113] for example, the Court recognized that even a term such as "principal place of business,"[114] a staple of traditional jurisdictional inquiries, may have a very different meaning in the context of modern corporate governance. In *Hertz*, consistent with the *Perkins*' holding that supervision may give rise to jurisdiction,[115] the Court stated:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).[116]

This test, and its exception, also seem to vindicate Justice Breyer's conclusion that "[i]f *International Shoe* stands for anything . . . it is that a truly interstate [or international] business may not shield itself from suit by a careful but formalistic structuring of its business dealings."[117]

Similarly, in the plurality decision in *Nicastro*, which was argued along with *Goodyear* and decided the same day, Justices Breyer and Alito, in concurrence, also warned the Court against announcing broad, immutable rules in the face of rapidly changing commercial realities. They explained:

> The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the

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113. 130 S. Ct. 1181 (2010).

114. *Id.* at 1192 (internal quotation marks omitted).

115. *See supra* text accompanying note 103.

116. *Hertz*, 130 S. Ct. at 1193. The Court explained that "[a] 'nerve center' approach, which ordinarily equates that 'center' with a corporation's headquarters, is simple to apply *comparatively speaking*. The metaphor of a corporate 'brain,' while not precise, suggests a single location." *Id.* at 1193.

117. Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 30 (1st Cir. 1988) (first alteration in original) (quoting Vencedor Mfg. Co. v. Gougler Indus., Inc., 557 F.2d 886, 891 (1st Cir. 1977)) (internal quotation marks omitted).

> orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.[118]

It is, therefore, not surprising that Justice Ginsburg, in crafting the "essentially at home" language in *Goodyear,* allowed for considerable flexibility to permit the Court, in the future, to apply the standard as corporate structures and means of commerce evolve. It would have made no sense for the Court to have applied the rigid standard urged by the petitioners in *Goodyear*, restricting general jurisdiction to principal place of business or state of incorporation,[119] only to have that rigid standard completely undercut by the flexible definition of the term "principal place of business" in *Hertz.*[120] Moreover, the concurrence could hardly announce in *Nicastro* that a rigid rule is improper because of evolving corporate structures and then impose just such a rigid rule in *Goodyear* the same day.

It is also not surprising that in announcing the essentially at home standard not as something new but as the traditional standard employed to determine general jurisdiction, the Court apparently focused on the supervisory aspect of *Perkins*, which, in modern parlance, would have allowed a court to exercise general jurisdiction where the corporate "brain" resides.[121] Justice Ginsburg's opinion for the Court, then, can fairly be read as an effort to reconcile *Goodyear* and the *Hertz* line of decisions.

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118. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring) (alteration in original).

119. *See supra* text accompanying note 3.

120. *See Hertz*, 130 S. Ct. at 1192. As the Court noted in *Burnham v. Superior Court*, 495 U.S. 604 (1990), a case involving "tag" jurisdiction over a nonresident individual, physical presence in the forum has never been an effective yardstick to determine personal jurisdiction over corporations:

> It may be that whatever special rule exists permitting "continuous and systematic" contacts to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations, *which have never fitted comfortably in a jurisdictional regime based primarily upon "de facto power over the defendant's person."*

Id. at 610 n.1 (second emphasis added) (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). *See also* Shaffer v. Heitner, 433 U.S. 186, 203 (1977) (citing *Int'l Shoe*, 326 U.S. at 317) (stating that "the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was 'present,'" but whether there were sufficient contacts such that it was reasonable for the defendant to be haled into the forum state).

121. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011) (citing *Perkins*, 342 U.S. at 447–48); *supra* note 116.

C. *The* Nicastro *Opinion*

The Court granted certiorari in *Goodyear* and *Nicastro* on the same day and ordered that they be argued on the same day.[122] The opinions in the two cases were also issued at the same time, the very last day of the Court's 2010–2011 Term.[123] Justice Ginsburg wrote the majority opinion in *Goodyear* and a lengthy dissent in *Nicastro*.[124] As a result, as demonstrated below, the outcome in *Goodyear*, while not technically a companion case to *Nicastro*, was nevertheless always dependent in very large part on the latter's outcome. It would, therefore, be a grievous mistake to read and attempt to interpret the *Goodyear* decision without reference to the plurality decision in *Nicastro*.

In *Nicastro*, "[a] foreign industrialist [sought] to develop a market in the United States for the [large metal shearing] machines it manufacture[d]."[125] Targeting the entire United States with the goal of selling as many machines as it could, wherever it could, irrespective of where in the United States its buyers resided, it "excluded no region or State from the market it wishe[d] to reach. But, all things considered, it prefer[red] to avoid products liability litigation in the United States. To that end, it engage[d] a U.S. distributor to ship its machines stateside."[126] By that action, a fractured plurality of the Supreme Court held that it had succeeded in escaping personal jurisdiction in New Jersey, where one of its products was sold and caused serious injury to a local user.[127]

As discussed above, while agreeing with the majority's conclusion that the New Jersey court's decision should be reversed, Justices Breyer and Alito refused to embrace the sweeping rule announced by the plurality.[128] Three Justices, led by Justice Ginsburg, dissented, contending that the Court's prior precedents forbid the plurality's decision.[129]

Had the Court in *Nicastro* held that the New Jersey courts properly exercised jurisdiction over McIntyre, even though it utilized a U.S. distributor, it might have been possible for the Court in *Goodyear* to have held that the *Goodyear* petitioners' participation in an on-going, highly integrated sales and distribution scheme commanded by their corporate parent in the forum also supported general jurisdiction. In that event, the Court could also have simply adhered to the traditional incarnation of the general jurisdiction test of continuous, systematic, and substantial contacts comporting with due process.[130]

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122. Goodyear Lux. Tires, S.A. v. Brown, 131 S. Ct. 63 (2010) (granting certiorari and referencing argument in tandem with *Nicastro*).

123. *Goodyear*, 131 S. Ct. at 2846; *J. McIntyre*, 131 S. Ct. at 2780.

124. *Goodyear*, 131 S. Ct. at 2850; *J. McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

125. *J. McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

126. *Id.*

127. *See id.* at 2795.

128. *See id.* at 2792 (Breyer, J., concurring).

129. *See id.* at 2794–95 (Ginsburg, J., dissenting) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).

130. *See Int'l Shoe*, 326 U.S. at 317 (citations omitted).

When the *Nicastro* Court's plurality decided that specific jurisdiction over McIntyre was improper, however, it would have been virtually impossible for the Court to have explained how general jurisdiction was appropriate over Goodyear subsidiaries when specific jurisdiction was not proper under a paler version of similar facts. Moreover, when the plurality in *Nicastro* restricted the test for specific jurisdiction, it was virtually inevitable that the test for general jurisdiction would also have to give way lest the two begin to merge. This restriction is arguably a reason for the addition of the essentially at home language in the general jurisdiction test.

D. The Government's Position

Even the Justices of the Court were curious as to why the U.S. Government chose to participate in *Goodyear*, a case involving the relatively rare exercise of general jurisdiction,[131] and not *in Nicastro*, which potentially involved trillions of dollars in international trade.[132] The real answer may be found in the last section of the Government's brief in *Goodyear*. The Government first explained:

> [F]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. The conclusion of such international compacts is an important foreign policy objective of the United States because such agreements serve the United States' interest in providing its residents a fair, predictable, and stable system for the resolution of disputes that cross national boundaries. *Reversal of the state court's judgment, in accordance with this Court's precedents, would thus serve the diplomatic interests of the United States.*[133]

In a footnote, however, the Government may have revealed the true problem and its true interest in the case. It observed:

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131. The number of actual cases in which courts have exercised general personal jurisdiction over nonresident defendants is quite small. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630 (1988) (counting actual cases).

132. *J. McIntyre*, 131 S. Ct. at 2799 n.6 (Ginsburg, J., dissenting) (citing U.S. CENSUS BUREAU, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES 1, 6 (Apr. 2011), *available at* http://www.census.gov/foreign-trade/Press-Release/2011pr/04/ft900.pdf) ("Last year, the United States imported nearly 2 trillion dollars in foreign goods. Capital goods, such as the metal shear machine that injured Nicastro, accounted for almost 450 billion dollars in imports for 2010. New Jersey is the fourth-largest destination for manufactured commodities imported into the United States, after California, Texas, and New York.").

133. Brief for the United States, *supra* note 64, at 33–34 (emphasis added) (footnote omitted) (citation omitted).

> One commentator traced the prominent and contentious role that United States assertions of general jurisdiction played in the Hague Conference: "Most delegations focused on jurisdictional rules they believed went too far, were 'exorbitant,' and thus should be placed on the prohibited list of Article 18(e) . . . [G]eneral doing business jurisdiction w[as] quickly voted onto that list." Indeed, [t]he most debated issue of allocation of jurisdiction was what to do with "doing business" jurisdiction in U.S. law. Brussels States, in particular, wanted it clearly ensconced on the prohibited list of Article 18(2), and that happened in the Preliminary Draft Convention Text with the language of Article 18(2) lit. *e*, which prohibits jurisdiction based solely on "the carrying on of commercial or other activities by the defendant in [the forum State], except where the dispute is directly related to those activities." *This would have placed U.S. general doing business jurisdiction on the prohibited list in all circumstances, something the U.S. delegation had almost no hope of selling to the U.S. Senate upon efforts for ratification* if the Preliminary Draft Convention Text had been adopted by the Hague Conference.[134]

Thus, the Government faced an almost insurmountable problem: how to satisfy its European partners who considered general "doing business" jurisdiction exorbitant and, at the same time, maintain any hope of ratification by U.S. Senators who were very protective of their respective state's right to assert jurisdiction over those who do business within its borders.[135] One means of escape was to ask the Court to find that the exercise of such jurisdiction violated the *Goodyear* petitioners' due process rights, which is precisely what the Government did.[136]

Yet, while the Court essentially did the Government's bidding in this regard, it stopped short of acceding to its request to restrict general jurisdiction to the state of incorporation or principal place of business.[137] As suggested above, the Court may have stopped short in order to provide itself with the flexibility to address new corporate structures in the future. Yet it may also have been saving the Government from itself. If the exercise of general jurisdiction over foreign corporations by state courts under the circumstances in *Goodyear* had been held to violate *due process*, except in a state where the corporation is incorporated or has its principal place of business, then the Court would necessarily have

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134. *Id.* at 33–34 n.14 (alterations in original) (emphasis added) (quoting Ronald A. Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View from the United States*, *in* 61 THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS 3, 8–9, 12 (Fausto Pocar & Costanza Honorati eds. 2005)) (internal quotation marks omitted).

135. *See* Brand, *supra* note 134, at 9.

136. *See* Brief for the United States, *supra* note 64, at 10–12.

137. *See supra* text accompanying notes 87–90.

restricted the jurisdiction of the *federal courts* as well under the Fifth Amendment's Due Process protections.[138] By using the more open-ended and flexible essentially at home standard, the Court may also have afforded the federal government more jurisdictional flexibility as well.

E. Will the Supreme Court Find General Jurisdiction Under an Enterprise Theory After Goodyear*?*

In *Goodyear*, the Court expressly left open the question of whether an enterprise theory would satisfy the requirements of its essentially at home general jurisdiction standard. A review of the Court's prior jurisprudence, however, reveals that when it addresses this issue in the future—and it almost certainly will do so—it will likely find that such theories do satisfy the *Goodyear* test.

As discussed above, starting with *International Shoe*, the Supreme Court embraced the idea of attribution or merger for jurisdictional purposes of local corporate activities and those of foreign corporations or subsidiaries.[139] In *Perkins*, as in *Goodyear*, the Philippine mining company engaged in no manufacturing or actual production in the forum state.[140] Instead, the Court upheld the assertion of general jurisdiction over Benguet because its president

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138. Due process and "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam) (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–18 (1995) (citations omitted) (discussing the "general rule" that the equal protection analysis of the Fifth and Fourteenth Amendments are the same). Nevertheless, in attempting to insulate its own ability to seek general jurisdiction over foreign corporations, the Government argued that:

> The United States also has an interest in ensuring that claims under federal law, brought in courts of the United States, are not unduly constrained by a minimum contacts analysis that is narrowly focused on a particular State instead of the Nation as a whole. Such interests are not directly implicated by this Court's interpretation of the Due Process Clause of the Fourteenth Amendment, however, because that constitutional provision applies only to the conduct of *state* governments and officials. In prior cases, this Court has appropriately reserved the question whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits."

Brief for the United States, *supra* note 64, at 28–29 (citation omitted) (quoting Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987)). It is unclear whether this distinction would protect federal jurisdiction in non-commercial areas, such as certain anti-terrorism and money-laundering cases, or others outside areas of unique federal interest.

139. *See* Brilmayer & Paisley, *supra* note 49, at 2. The Court has never allowed the so-called *Cannon* principle to stand in the way of the assertion of general jurisdiction in the face of highly-integrated business enterprises. *See id.* at 3–4. In *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), the Court held that a subsidiary's business in the forum, *without more*, did not automatically constitute its parent's "doing business" there so as to warrant an inference that the parent was present there. *Id.* at 336–37.

140. *See supra* text accompanying notes 98–102.

had engaged in "continuous and systematic *supervision*" of the company's activities from the forum.[141]

Moreover, the Court has repeatedly held that it does not offend due process considerations to impose liability on or exercise jurisdiction over corporations that are part of functionally-integrated business enterprises. The Court has long employed the "'unitary-business'" doctrine to find that it is acceptable to tax local affiliates of American multinational corporations.[142] Similarly, the National Labor Relations Board has developed, and this Court has upheld use of, an "integrated enterprise" or "single employer" doctrine in labor and employment discrimination cases.[143] In fact, one Third Circuit panel recently observed that:

> Since its initial formulation, the [integrated enterprise] test has been applied by courts in other employment contexts, including the Labor Management Relations Act; Title VII and the Age Discrimination in Employment Act; the Americans with Disabilities Act, and the Fair Labor Standards Act. Department of Labor regulations have also adopted the integrated enterprise test for the Family Medical Leave Act.[144]

While there are sound policy reasons in these areas of the law that may have led to these decisions, the Court's overriding determination that holding foreign corporations accountable under such circumstances does not offend due process considerations augurs well for a decision that would allow the exercise of general jurisdiction under an enterprise theory.

For all of these reasons, it is not surprising that, in numerous cases decided after *Goodyear*, circuit and trial courts have discussed variations on enterprise and agency theories in determining whether the exercise of general jurisdiction

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141. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952) (emphasis added).

142. *See* Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207, 223 (1980) (quoting and citing Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 438 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978)); *see also* Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 354 (1990).

143. *See* Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam) (citing 21 NLRB ANN. REP. 14–15 (1956)); Int'l Bhd. of Teamsters Local 952 v. Am. Delivery Serv. Co., 50 F.3d 770, 776 (9th Cir. 1995); Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WIS. L. REV. 67, 75; Blumberg, *supra* note 142, at 355–58 (citations omitted).

144. Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3rd Cir. 2001) (citations omitted). The Fair Labor Standards Act defines an "enterprise" as "the related activities performed (either through unified operation or common control) by any person or persons for the common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units." Blumberg, *supra* note 142, at 358 (quoting 29 U.S.C. § 203(r) (1982)) (internal quotation marks omitted).

over foreign corporations was proper. On that basis, some courts have permitted the exercise of general jurisdiction.

In *Colo'n v. Akil*,[145] for example, Ms. Colo'n argued that the presence of CBS Corporation in Indiana conferred jurisdiction over CBS Studios, a corporate affiliate.[146] The court rejected her argument only "because personal jurisdiction cannot be premised on corporate affiliation *alone* when, as Judge Hamilton found, CBS Studios and CBS Corporation exist as separate entities."[147]

In *Bauman v. DaimlerChrysler Corp.*,[148] the panel found that general jurisdiction over Daimler could be asserted under an agency test.[149] That test has two requirements:

> First, the subsidiary's services must be "sufficiently important to [the parent] that they would almost certainly be performed by other means if [the subsidiary] did not exist, whether by [the parent] performing those services itself or by [the parent] entering into an agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." Second, it must be shown that the parent has "the right to substantially control" the subsidiary's activities.[150]

Finally, in *Francis v. Bridgestone Corp.*,[151] the court analyzed in detail the evidence allegedly supporting the exercise of general jurisdiction over the defendant in the U.S. Virgin Islands under a theory of control by its corporate parent.[152] The court ultimately found, however, that the plaintiff had not "plausibly alleged" nor proved such control.[153]

It should be clear then, that there does not appear to be a significant legal impediment to the use of an enterprise theory to satisfy the jurisdictional requirements set forth in *Goodyear*, and many reasons exist as to why the use of such a theory would be consistent with prior Supreme Court jurisprudence.

Nor are there any sound policy reasons to avoid its use. There is no apparent foreign policy impediment to the Court's allowing the assertion of general jurisdiction on some sort of enterprise theory. An expert group at the Hague negotiations proposed that the rules for disregarding the independent legal personality of a subsidiary or parent be left to the national law of each

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145. 449 F. App'x 511 (7th Cir. 2011).

146. *Id.* at 514.

147. *Id.* (emphasis added).

148. 644 F.3d 909 (9th Cir. 2011).

149. *Id.* at 912, 920–21.

150. Order Denying Petition for Rehearing En Banc, Bauman v. DaimlerChrysler Corp., (No. 07-15386), 2011 WL 5402020, at *2 (9th Cir. Nov. 9, 2011) (O'Scannlain, J. dissenting) (alterations in original) (quoting *Bauman*, 644 F.3d at 922, 924) (internal quotation marks omitted).

151. No. 2010/30, 2011 U.S. Dist. LEXIS 72804 (D.V.I. July 12, 2011).

152. *Id.* at *29–43 (citations omitted).

153. *Id.* at *45.

contracting state.[154] Likewise, nothing in *Nicastro* seems to prevent the use of some variation on enterprise theory to establish general jurisdiction, in part because, as the Government admitted in *Goodyear*, the jurisdictional analysis changes under such circumstances.[155]

Moreover, permitting the exercise of general jurisdiction under such a theory is unlikely to cause the ills the *Goodyear* petitioners threatened would occur if the decision in *Goodyear* was not reversed.[156] This is, in large part, because "the 'unitary business' standard turning on 'functional integration' imposes relatively *tight boundaries to define the type of multinational enterprise that are included*, and is *limited* to particular models of managerial direction and of economic integration."[157] Thus, its use is unlikely to cause a feared flood of cases.

Trial courts also have adequate tools to prevent threatened forum-shopping. In *Sinochem International Co. v. Malaysia International Shipping Corp.*,[158] the Court held that courts may dispose of actions by forum non conveniens dismissal first, "bypassing questions of . . . personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."[159] The Supreme Court has also held that a foreign plaintiff's choice of forum deserves much less deference in deciding such motions.[160]

Most states also have venue rules that restrict suits against outsiders.[161] Choice-of-law principles also strongly influence where and whether certain claims may be pursued.[162] As one commentator noted, if one forum attempts to use "an idiosyncratic and expansive attribution or merger rule in the context of the jurisdictional determination, it involves a choice of law decision that must pass muster like any other."[163]

The purported advantages of restricting general jurisdiction even over single business enterprises may also be overstated. While corporate fragmentation may provide corporations themselves with certain other advantages,[164] viewed in broader economic terms, limiting corporate tort liability is not necessarily a universal good. By creating small and relatively judgment-proof subsidiaries, corporations externalize the risks associated with producing defective or

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154. *See* CATHERINE KESSEDJIAN, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 37 n.151 (1997) (Prelim. Doc. No. 7), *available at* http://www.hcch.net/upload/wop/jdgm_pd7.pdf.

155. *See* Brief for the United States, *supra* note 64, at 26 n.9.

156. Brief for Petitioners, *supra* note 3, at 41–45.

157. Blumberg, *supra* note 142, at 355 (emphasis added).

158. 549 U.S. 422 (2007).

159. *Id.* at 432.

160. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981).

161. *See, e.g.*, N.C. GEN. STAT. § 1-80 (2011).

162. *See, e.g.*, Lindsay Traylor Braunig, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. REV. 1050, 1050 (2005) ("[C]hoice of law affects forum shopping and class action strategy.").

163. Brilmayer & Paisley, *supra* note 49, at 36–37.

164. *See* Blumberg, *supra* note 142, at 328 n.181

dangerous products.[165] All corporate benefits thus come at the expense of victims, taxpayers (through social insurance programs), and third-party insurers. In fact, "[s]uch externalization of costs is almost universally regarded as highly undesirable."[166]

Because risk-shifting lowers or eliminates the actual cost of negligent behavior, eliminating or shifting tort liability may also cause corporations to lose powerful economic incentives to produce safer products.[167] Thus, dangerous behavior is not sufficiently deterred. In fact, one commentator has suggested that the loss of limited tort liability resulting from merging one corporation's activities with those of a constituent corporation would be advantageous.

> [T]here is widespread agreement that just such an elimination of limited liability would be an advantageous development. The group would then be responsible for all costs of the enterprise being conducted by it and the group would lose its present capacity to externalize some of its costs by limiting its liability for torts of constituent companies. Such a change would dispose of one of the principal criticisms of the economists with respect to limited liability. Further, the availability of insurance for such increased tort exposure provides a ready means for the group to restrict its exposure.[168]

For all of these reasons, it appears that, should the Supreme Court have the opportunity to decide the issue,[169] the Court will find that enterprise theories can be used to satisfy its newly announced essentially at home test for general jurisdiction over foreign corporations and afford such corporations a

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165. *See id.* at 370.

166. *Id.*

167. *See, e.g.*, Schafer v. Am. Cyanamid Co., 20 F.3d 1, 3 (1st Cir. 1994) (Breyer, J.) ("[T]he [National Childhood Vaccine Injury] Act modifies, but does not eliminate, the traditional tort system, which Congress understood to provide important incentives for the safe manufacture and distribution of [products].").

168. Blumberg, *supra* note 142, at 342 (citation omitted).

169. Congress could also render the *Goodyear* decision essentially moot. There is pending in Congress legislation that would require foreign corporations that do business in states to submit to the general jurisdiction of such states. Senate Bill 1946, the Foreign Manufacturers Legal Accountability Act of 2011, was introduced in December 2011 and enjoys rare bipartisan support. 157 CONG. REC. S8186–87 (daily ed. Dec. 5, 2011) (introduction of the bill). According to its official summary, the bill directs the Food and Drug Administration (with respect to drugs, devices, cosmetics, and biological products), the Consumer Product Safety Commission (with respect to consumer products), and the Environmental Protection Agency (with respect to chemical substances, new chemical substances, and pesticides) to require foreign manufacturers and producers of such products (or components used to manufacture them), in excess of a minimum value or quantity, to establish a registered agent in the United States authorized to accept service of process on their behalf for the purpose of any state or federal regulatory proceeding or civil action in state or federal court. It then deems a foreign manufacturer or producer of products covered under the Act that registers an agent to consent to the personal jurisdiction of the state or federal courts of the state in which the agent is located for the purpose of any civil or regulatory proceeding.

jurisdictional "home" in the forum. It may well get that chance quite soon. A petition for writ of certiorari was filed in *Bauman v. DaimlerChrysler Corp.*, in which the Ninth Circuit panel found general jurisdiction over a German corporation in California through its California-based subsidiary based on an agency theory.[170]

IV. CONCLUSION

Viewed against the backdrop of its facts, Supreme Court jurisprudence, the parallel decision in *Nicastro*, and the Government's influence, the Supreme Court's decision in *Goodyear* represents a predictable, necessary, and incremental step in the Court's continuing efforts to keep jurisdictional rules in line with the realities of modern transnational commerce, and not merely a rehash of a fairly straight-forward rule prohibiting the exercise of general jurisdiction based upon stream-of-commerce analysis.

Choosing an open-ended and amorphous standard for the exercise of such jurisdiction instead of the rigid one urged by the *Goodyear* petitioners, the Court's ruling permits the exercise of general jurisdiction over evolving and ever-more-complex corporate forms on a variety of grounds, using a variety of plus factors, the sum of which would lead the Court to conclude that a foreign corporation is essentially at home in the forum, without the need to rewrite the standard every time the Court is faced with a new corporate creation. It also allows the Court to take into account a host of plus factors, far too lengthy to list, and to give them different weight in different circumstances in making jurisdictional determinations. In this regard, the standard is much like the intentionally vague definition of "obscenity" in *Jacobellis v. Ohio*—"I know it when I see it."[171] What the standard lacks in predictability, it more than makes up for in flexibility. Ultimately, the latter concern apparently carried the day in *Goodyear*.

Moreover, by expressly reserving the question of whether enterprise theories would support general jurisdiction under this standard, the Court may have signaled that such theories are one means to satisfy the essentially at home test and that it awaits another case, with a more fully developed record and no companion case to complicate or restrict its ruling, in which to make that determination. As demonstrated above, finding general jurisdiction on such

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170. *See* Petition for Writ of Certiorari, DaimlerChrysler AG v. Bauman, (No. 11-965), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/02/Bauman-Final-Petition-for-Certiorari.pdf; *supra* text accompanying notes 148–149. Apparently recognizing the opening the Court left in Goodyear, *in his question presented*, former Solicitor General Ted Olson took pains to mention that "[i]t is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities." Petition for Writ of Certiorari, *supra*, at i.

171. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

grounds is consistent with past Supreme Court precedent. Indeed, there are no sound policy reasons not to permit it.

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