

# REGISTRATION STATUTES, GENERAL JURISDICTION, AND THE FALLACY OF CONSENT

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## INTRODUCTION

An Italian clothing company, Moda, would like to expand its business into the United States. In particular, it sees New York as a potential lucrative market for the sale of its products. It researches the legal requirements for doing business in New York and learns that it must register pursuant to New York Business Corporation Law section 1301.<sup>1</sup> The section provides that “[a] foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article.”<sup>2</sup> Moda’s lawyer registers the company to do business in New York and appoints an agent for service of process.<sup>3</sup> Six months later, Moda has still not done any business in New York, though its registration is still active. Moda is sued in New York by a French clothing designer who claims that Moda stole the designer’s intellectual property. The dispute has nothing to do with New York. Do New York courts have jurisdiction to hear the dispute? The surprising answer is “yes.” New York courts have general jurisdiction over any and all

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<sup>1</sup> N.Y. BUS. CORP. LAW § 1301 (McKinney 2003).

<sup>2</sup> *Id.* § 1301(a). Last year, the New York General Assembly introduced a bill to amend New York Business Corporation Law section 1301 to make the consequences of registering to do business in New York more explicit. See generally S. 7078, 200th S., Reg. Sess. (N.Y. 2014), available at <http://open.nysenate.gov/legislation/bill/S7078-2013>; A. 9576, 200th Gen. Assemb., Reg. Sess. (N.Y. 2014). The proposed amendment provides that “[a] foreign corporation’s application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation.” N.Y. S. 7078; see also S. 200-9576, 237th Sess. (N.Y. 2014), available at <http://open.nysenate.gov/legislation/bill/S7078-2013> (“The addition of the proposed new subdivision (e) to BCL § 1301 would codify the caselaw and provide a forceful legislative declaration of the effect of a foreign corporation’s registration to do business in New York.”). While the bill passed the Assembly floor on June 2, 2014, its support waned in the Senate, with opposition from banks and other large corporations. See, e.g., Letter from John J. Clarke, Jr., Chairman, Comm. on Banking Law, N.Y. City Bar, to Hon. John J. Bonacic, Sen., N.Y. & Hon. Helene E. Weinstein, Assemb., N.Y. (June 9, 2014), available at <http://www2.nycbar.org/pdf/report/uploads/20072741-GeneralJurisdictionForeignBusiness.pdf>; Memorandum from Lawsuit Reform Alliance of N.Y. in Opposition of N.Y. S. 7078 & A. 9576 (June 4, 2014), available at <http://blogs.reuters.com/alison-frankel/files/2014/06/prudenti-lawsuitreformopposition.pdf>; Memorandum from Wilson, Elser, Moskowitz, Eldelman & Dicker LLP in Opposition of N.Y. S. 7078 & A. 9576 (June 9, 2014), available at <http://www.nyba.com/wp-content/uploads/2014/06/Foreign-Business-Jurisdiction.pdf>. It remains to be seen whether the bill will be revived in the 2015 session. See Brian J. Farrar, *Jurisdiction in New York Courts*, FED. B. COUNCIL Q. (Aug. 21, 2014), <http://federalbarcouncilquarterly.org/?p=311>; Alison Frankel, *New York’s (stalled) grab for jurisdiction over foreign businesses*, REUTERS (June 30, 2014), <http://blogs.reuters.com/alison-frankel/2014/06/30/new-yorks-stalled-grab-for-jurisdiction-over-foreign-businesses>. If the bill passes, New York will be one of only two states to explicitly codify that registration to do business confers general jurisdiction over a corporation. See also 42 PA. CONS. STAT. ANN. § 5301(a)(2)(i)–(ii) (West 2013).

<sup>3</sup> Foreign corporations registered to do business in New York may appoint an agent for service of process or may rely on the secretary of state to accept process. See N.Y. BUS. CORP. LAW § 305(a) (McKinney 2003) (“In addition to such designation of the secretary of state, every domestic corporation or authorized foreign corporation may designate a registered agent in this state upon whom process against such corporation may be served.”).

disputes involving corporations that have registered to do business pursuant to the New York registration statute—regardless of whether the corporation actually did business in New York, or whether the underlying cause of action had anything to do with New York.<sup>4</sup>

Each of the fifty states has a registration statute<sup>5</sup> that requires a corporation doing business in the state to register with the state and appoint an agent for service of process.<sup>6</sup> If a corporation does business in the state without registering pursuant to the operative state statute, it risks fines and other penalties.<sup>7</sup> A considerable number of states interpret their registration statutes as conferring general, or all-purpose, jurisdiction over any corporation that has registered to do business under the state statute.<sup>8</sup> General jurisdiction gives courts the power to adjudicate any and all disputes involving a corporation, including those without any connection to the state in which the corporation has registered to do business.<sup>9</sup> Those states that regard registration as permitting the exercise of general jurisdiction usually justify the assertion of jurisdiction on the basis of consent.<sup>10</sup> That is, by knowingly

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<sup>4</sup> See *Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 464–67 (S.D.N.Y. 2008); *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983). In New York, courts can assert general jurisdiction over a corporation that has registered to do business regardless of whether it has appointed its own agent for service of process or has relied on the statutorily appointed agent. See *Steuben Foods, Inc. v. Oystar Grp.*, No. 10-CV-780S, 2013 WL 2105894, at \*3 (W.D.N.Y. May 14, 2013) (“For more than sixty years, New York courts have determined that general jurisdiction may be asserted over a corporation solely on the basis that it has registered to do business in the forum. Thus, ‘[t]he privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction.’ Further, because the designation of the Secretary of State is required by § 1304(6), the fact that [the defendant] has not designated an optional *additional* registered agent pursuant to § 1304(7) is of no moment.” (first alteration in original) (citations omitted) (quoting *Augsbury*, 470 N.Y.S.2d at 789)).

<sup>5</sup> Some commentators refer to these statutes as “registration and appointment” statutes. See, e.g., Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436 (2012); Mark Schuck, Comment, *Foreign Corporations and the Issue of Consent to Jurisdiction Through Registration to Do Business in Texas: Analysis and Proposal*, 40 HOUS. L. REV. 1455, 1482 (2004). They are also sometimes referred to as “qualification” statutes, see generally Conna Bond, Note, *Florida’s Corporate Qualification Statute: Implications for Foreign Lenders*, 49 FLA. L. REV. 139 (1997), or “domestication” statutes, see generally Note, *The Legal Consequences of Failure to Comply with Domestication Statutes*, 110 U. PA. L. REV. 241 (1961). Additionally, even though these are known as registration, qualification, or appointment statutes, they are not freestanding statutes; rather, they usually form part of the state’s general law on corporations.

<sup>6</sup> See *infra* Part II. In certain states, such as New York, a corporation can opt to have the secretary of state act as its designated agent, instead of appointing its own agent. See *supra* note 3; see also CONN. GEN. STAT. ANN. § 33-926(b) (West 2005).

<sup>7</sup> See *infra* notes 116–17 and accompanying text. See also Carol Andrews, *Another Look at General Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1074–75 (2012) (“Registration statutes . . . remain coercive and punish nonregistration through fines and forfeiture of the right to bring suit in local courts.”).

<sup>8</sup> See *infra* note 125 and accompanying text.

<sup>9</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

<sup>10</sup> See *infra* Part III.C.

and voluntarily registering to do business in a state, a corporation has consented to the exercise of all-purpose jurisdiction over it.

Registration to do business (also known as corporate registration) has always lurked in the background of the jurisdictional discourse. In the past, it was often not necessary to resort to registration as a basis for jurisdiction given the availability of both specific jurisdiction as well as general jurisdiction based on the defendant's continuous and systematic general business contacts with the forum. In early 2014, however, the Supreme Court issued a game-changing decision that will likely put corporate registration as a basis for jurisdiction center stage in the years to come. In *Daimler AG v. Bauman*, the Court dramatically reined in general jurisdiction for corporations.<sup>11</sup> The Court in *Daimler* held that a corporation is subject to general jurisdiction only in situations where it has continuous and systematic general business contacts with the forum such that it is "at home" there.<sup>12</sup> Except in rare circumstances, a corporation is "at home" only in its state of incorporation and the state of its principal place of business.<sup>13</sup> In the aftermath of *Daimler*, it is unlikely that any state other than these will be able to assert general jurisdiction over a corporation based on the corporation's continuous and systematic business contacts with the forum.

What this means, in practical terms, is that plaintiffs looking to sue corporate defendants will be severely circumscribed in their choice of forums. No longer will they be able to argue for general jurisdiction in a forum based on a corporation's volume of business activity there. Plaintiffs who are now foreclosed from arguing continuous and systematic contacts with the forum as a basis for jurisdiction will most likely look to registration statutes to provide the relevant hook to ground personal jurisdiction over corporations. Professors Rhodes and Robertson, for instance, predict that "[g]iven the constriction of general jurisdiction in [*Daimler*], the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look . . . is in a state registration filing that designates a corporate agent for service of process."<sup>14</sup>

Registration to do business as a basis for general jurisdiction, however, rests on dubious constitutional footing. One author, in fact, declared that registration-based jurisdiction is "ripe for invalidation by the Supreme Court."<sup>15</sup> Commentators have approached the analysis

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<sup>11</sup> See 134 S. Ct. 746.

<sup>12</sup> *Id.* at 760–61.

<sup>13</sup> See *id.* at 760–62.

<sup>14</sup> Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 259–60 (2014); accord Tanya J. Monestier, *Where is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 279–82 (2014).

<sup>15</sup> Rhodes, *supra* note 5, at 444.

from a variety of perspectives over the years.<sup>16</sup> Most are in agreement<sup>17</sup> that jurisdiction based on registration to do business violates the Due Process Clause.<sup>18</sup> The analysis tends to focus on how courts have misread historical precedent and failed to account for the modernization of jurisdictional theory post-*International Shoe Co. v. Washington*.<sup>19</sup>

Largely unexplored, however, is the premise underlying registration-based general jurisdiction: that registration equals consent. Courts routinely use the following logic to assert general jurisdiction over a corporation: Premise 1: A corporation can consent to personal jurisdiction; Premise 2: Registration to do business amounts to consent; and Conclusion: Because a corporation has consented to personal jurisdiction via its registration to do business, the exercise of personal jurisdiction comports with due process. However, while Premise 1 is true (a corporation can consent to personal jurisdiction), it is not clear that Premise 2 is true (a corporation's act of registering amounts to consent). Without Premise 2 being correct, the conclusion that personal jurisdiction is constitutionally permissible does not necessarily follow. In this Article, I argue that general jurisdiction based on registration to do business violates the Due Process Clause because such registration does not actually amount to "consent" as that term is understood in personal jurisdiction jurisprudence. This Article is the first to comprehensively explore why it is that registration cannot fairly be regarded as express—or even implied—consent to personal jurisdiction.

This Article proceeds as follows. In Part I, I discuss briefly the evolution of general jurisdiction based on a corporation doing business in the forum. The section concludes with a discussion of the groundbreaking decision in *Daimler* and the consequences that flow

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<sup>16</sup> See, e.g., D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 3 (1990) (arguing that treating a corporation's appointment of an agent for service or process as a basis for general jurisdiction imposes an unconstitutional condition on a foreign corporation's ability to transact business in the state); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1163 (2003) (arguing that while the Due Process Clause does not prohibit the assertion of general jurisdiction based on registration, the unpredictability that registration statutes produce "invalidates the consent theory upon which . . . personal jurisdiction is premised").

<sup>17</sup> But see Taylor, *supra* note 16, at 1175–92.

<sup>18</sup> See, e.g., Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 755–59 (1988); Rhodes, *supra* note 5, at 436–44; see also Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1 (1990); Pierre Riou, Note, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741 (1995).

<sup>19</sup> See, e.g., Kipp, *supra* note 18, at 47 ("Pennsylvania Fire Insurance should not be read as a component of contemporary jurisdictional doctrine, but as a deviation from it. Justice Holmes's invocation of a process whereby the scope of a foreign corporation's consent is determined after that consent has been given should have been discarded long ago and certainly should not be tolerated now.").

from it. In Part II, I introduce the idea of registration as a basis for personal jurisdiction, discussing the nature of registration statutes in general and the split of authority on their jurisdictional consequences. Part III looks at the rationales in support of registration-based general jurisdiction: presence, minimum contacts, and consent. Most of the analysis is focused on consent, the most viable basis for justifying general jurisdiction based on registration to do business. I argue in this Part that a corporation's act of registering to do business and appointing an agent for service of process cannot meaningfully be regarded as consent. I do so by looking at other forms of consent in the jurisdictional context—forum selection clauses and submission—and analyzing the salient differences between these and registration. I also look at the nature of the consent that is said to form the basis for general jurisdiction and argue that it is essentially coercive or extorted. Coerced consent, an oxymoron, cannot legitimately form the basis for the assertion of general jurisdiction over a corporation. At the end of this section, I examine how registration statutes should be interpreted: either as being procedural only, or as involving a limited consent to jurisdiction in respect of causes of action arising from the corporation's business contacts in the forum. In the final substantive section, Part IV, I situate the discussion about registration in the larger conversation about general jurisdiction and explore three additional problems that arise when registration statutes are read as conferring general jurisdiction on courts.

## I. GENERAL JURISDICTION OVER CORPORATIONS

Much of the jurisprudence on jurisdiction over corporations in the modern era stems from the seminal case of *International Shoe Co. v. Washington*,<sup>20</sup> which dealt with the exercise of specific jurisdiction over a corporation—i.e., jurisdiction premised on the relationship between the forum and the cause of action.<sup>21</sup> Much less celebrated is the concept of general jurisdiction—i.e., jurisdiction premised on the relationship between the forum and the defendant.<sup>22</sup> One author notes that since *International Shoe* “specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced

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<sup>20</sup> 326 U.S. 310 (1945).

<sup>21</sup> See generally *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>22</sup> See generally *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

role.”<sup>23</sup> That is not to say, however, that general jurisdiction is unimportant in the jurisdictional discourse. Indeed, general jurisdiction often provides the only means of establishing jurisdiction where a case is brought in a forum with little to no connection with the underlying dispute.

In order to understand corporate registration as a basis for general jurisdiction, it is necessary to examine in some detail the difference between specific and general jurisdiction, as well as the rise (and fall) of doing business as a ground for general jurisdiction. It is only with the benefit of a fulsome picture of the jurisdiction terrain that one can appreciate how registration to do business fits into the jurisdictional mix. Accordingly, below I examine the distinction between general and specific jurisdiction, the notion of doing business jurisdiction, and the subsequent demise of doing business jurisdiction in the recent Supreme Court decision of *Daimler AG v. Bauman*. This, in turn, will set the stage for an introduction to registration as a basis for general jurisdiction.

#### A. *The Distinction Between General Jurisdiction and Specific Jurisdiction*

In 1945, the Supreme Court decided the landmark case of *International Shoe*.<sup>24</sup> Most law students and practicing lawyers will recall that the case marked a shift away from the territoriality approach to jurisdiction that prevailed under *Pennoyer v. Neff*<sup>25</sup> and ushered in a new era whereby minimum contacts became the touchstone of personal jurisdiction.<sup>26</sup> More specifically, *International Shoe* held that a state could exercise personal jurisdiction over a nonresident defendant where the defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>27</sup> *International Shoe* is also credited with first introducing the distinction between (what has become known as) “specific jurisdiction” and “general jurisdiction.”<sup>28</sup> Specific

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<sup>23</sup> Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988); accord *Daimler*, 134 S. Ct. at 749.

<sup>24</sup> 326 U.S. 310.

<sup>25</sup> 95 U.S. 714 (1877).

<sup>26</sup> See *Int'l Shoe*, 326 U.S. at 316.

<sup>27</sup> *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>28</sup> *International Shoe* itself was a specific jurisdiction case. Jurisdiction was proper because the defendant had minimum contacts with the forum state; it conducted activities in Washington that were “systematic and continuous throughout the years in question,” and the “obligation . . . sued upon arose out of those very activities.” *Id.* at 320. Although general jurisdiction was not implicated on the facts of *International Shoe*, the Court nonetheless noted that general jurisdiction could be appropriate where a corporation’s activities were “so substantial and of such

jurisdiction refers to a court exercising personal jurisdiction over a defendant “in a suit arising out of or related to the defendant’s contacts with the forum.”<sup>29</sup> In other words, specific jurisdiction focuses on the relationship between the defendant, the forum, and the underlying cause of action.<sup>30</sup> General jurisdiction, by contrast, refers to a court exercising personal jurisdiction over a defendant “in a suit not arising out of or related to the defendant’s contacts with the forum.”<sup>31</sup> In this respect, general jurisdiction is sometimes referred to “dispute blind” or “all-purpose” jurisdiction because it does not require that there be a nexus between the forum and the underlying cause of action, but rather simply a nexus between the forum and the defendant.<sup>32</sup>

It is important to understand the difference between specific and general jurisdiction in order to fully appreciate the power of the latter. Assume, for instance, that a manufacturer actively markets and sells a defective product in Connecticut and a resident is injured by the product in Connecticut. In such circumstances, Connecticut will likely have specific jurisdiction over the defendant. Jurisdiction is appropriate because the defendant purposely availed itself of the benefits and protections of the laws of Connecticut, caused injury in Connecticut, and it seems fair and reasonable for the defendant to be held accountable in Connecticut. Assume, now, that a manufacturer is incorporated in the state of Delaware, as many corporations are. That manufacturer employs workers in Guatemala who allege oppressive and unfair employment conditions in the manufacturer’s factories in Guatemala. Delaware courts will have general jurisdiction over the defendant manufacturer and can adjudicate the Guatemalan workers’ claims despite the lack of any connection between the cause of action and Delaware.<sup>33</sup>

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a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” *Id.* at 318.

<sup>29</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)) (internal quotation marks omitted).

<sup>30</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“[T]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into [specific] jurisdiction.”).

<sup>31</sup> *Helicopteros*, 466 U.S. at 414 n.9.

<sup>32</sup> See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115, 1121 n.6 (2014) (all-purpose); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (same); *J. McIntyre Mach.*, 131 S. Ct. at 2797 (same); *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999) (dispute blind); *Tom’s of Me. v. Acme-Hardesty Co.*, 565 F. Supp. 2d 171, 175 (D. Me. 2008) (same); *PPD Ship, L.L.C. v. Enos*, No. Civ.A.03-0976, 2003 WL 22038517, at \*4 (E.D. La. Aug. 28, 2003) (same).

<sup>33</sup> The defendant can, of course, move under the doctrine of *forum non conveniens* to have the action dismissed on the basis that there is a more appropriate forum somewhere else. See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).



There are two bright-line rules concerning general jurisdiction over corporations that have caused little controversy or consternation. First, a corporate defendant is subject to general jurisdiction in its state of incorporation.<sup>34</sup> Second, a corporate defendant is subject to general jurisdiction in the state of its principal place of business.<sup>35</sup> The rationale supporting general jurisdiction in these circumstances is that the nexus between the defendant and the forum state (whether it be the state of incorporation or the state of the corporation's principal place of business) is so significant that it is per se fair and reasonable to require that the defendant answer to suit there.<sup>36</sup> Other grounds for general personal jurisdiction over corporations—in particular, doing business and registering to do business<sup>37</sup>—have not been as uncontroversial.

#### B. *Helicopteros, Perkins, and the Rise of Doing Business Jurisdiction*

The Supreme Court in *International Shoe* held that general jurisdiction over a corporation could be appropriate where the corporation engaged in activities in the forum that were “so substantial and of such a nature” as to justify suit in an action wholly unrelated to the corporation's in-state activities.<sup>38</sup> The Court in *International Shoe* did not elaborate on what specific connections or contacts were sufficient to ground general jurisdiction.<sup>39</sup> The principle, at least, was

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<sup>34</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

<sup>35</sup> See *id.* These two bases are considered “paradig[m] . . . bases for general jurisdiction.” *Id.* (alterations in original) (quoting Brilmayer et al., *supra* note 18, at 735) (internal quotation marks omitted).

<sup>36</sup> See Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 84 (2013) (“General jurisdiction is justified by the relationship between a state and those who make the state their home.”).

<sup>37</sup> There is also a third ground of jurisdiction that is sometimes confused with the above: “transacting business.” Many long-arm statutes provide that a corporation is subject to jurisdiction in a state if it is transacting business there. For instance, the Massachusetts long-arm statute provides, in pertinent part: “A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's . . . transacting any business in this commonwealth.” MASS. GEN. LAWS ANN. ch. 223A, § 3(a) (West 2000); see also DEL. CODE ANN. tit. 10, § 3104(c)(1) (2014); N.Y. C.P.L.R. § 302(a)(1) (McKinney 2010). This basis of jurisdiction is a form of *specific* jurisdiction in that it relies on the defendant's connections with the forum to ground jurisdiction.

<sup>38</sup> 326 U.S. 310, 318 (1945).

<sup>39</sup> See *generally id.* Most of the jurisprudence in the post-*International Shoe* era focused on defining the scope of specific jurisdiction in various contexts. Cases such as *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), *Calder v. Jones*, 465 U.S. 783 (1984), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), more precisely defined and refined the contours of the minimum contacts doctrine. General jurisdiction, by contrast, has been largely neglected by the Supreme Court—until very recently. See *Daimler*, 134 S. Ct. at 755, 758 (modifying the test for general jurisdiction, but acknowledging that “[s]ince

clear: in order for a court to assert general jurisdiction over an out-of-state corporation, the corporation must have connections of some significance and permanence such that it would be appropriate to assert jurisdiction over the corporation in respect of its out-of-state activities.<sup>40</sup> Subsequent Supreme Court cases, namely *Perkins v. Benguet Consolidated Mining Co.*<sup>41</sup> and *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>42</sup> provided more guidance on the scope of general jurisdiction over corporations. Collectively, they were read to stand for the proposition that a corporation was subject to general jurisdiction in cases where it had “continuous and systematic general business contacts” with the forum state.<sup>43</sup> This form of general jurisdiction morphed with what had often been referred to as “doing business” jurisdiction. It was thought that if a corporation was doing business in the forum, in the sense of having continuous and systematic contacts with the forum, it would be subject to general jurisdiction there.<sup>44</sup>

Over the years, courts identified salient factors to consider in assessing whether a corporation had continuous and systematic business contacts with the forum—or, otherwise stated, whether a corporation was doing business in the forum for the purposes of general jurisdiction. Courts would consider, for instance, whether a corporation had a place of business in the forum, whether it had employees in the forum, whether it advertised to residents in the forum, its volume of sales in the forum, and so on.<sup>45</sup> Not surprisingly, the balancing of all of these factors

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*International Shoe*, ‘specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.’” (second alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011))).

<sup>40</sup> Conceptually, jurisdiction based on a corporation “doing business” in a forum was justified based on either an implied consent theory or a corporate presence theory. See Andrews, *supra* note 7, at 1005 (“Courts and regulators tended to use the term ‘doing business’ to describe the level of in-state activity that would trigger jurisdiction under either the presence or the implied consent theory. No single theory predominated. Particular states and courts typically chose to use only one theory—implied consent or presence—but the Supreme Court treated both as proper.” (footnote omitted)).

<sup>41</sup> 342 U.S. 437 (1952).

<sup>42</sup> 466 U.S. 408 (1984).

<sup>43</sup> See, e.g., Victor N. Metallo, “Arise Out Of” or “Related To”: *Textualism and Understanding Precedent Through Interpretatio Objectificata*, “Objectified Interpretation” – A Four Step Process to Resolve Jurisdiction Questions Utilizing the Third Circuit Test in *O’Connor* as a Uniform Standard, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 415, 453 (2011) (“If continuous and systematic contacts are *greater than or equal to Perkins*, then [general] jurisdiction should be found. If continuous and systematic contacts are *less than or equal to Helicopteros*, then no [general] jurisdiction should be found.” (footnotes omitted)).

<sup>44</sup> See, e.g., Mary Twitchell, *Why We Keep Doing-Business with Doing Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172–73 (2001) (“Courts seem to have articulated a fairly straightforward standard for doing-business jurisdiction: states have general jurisdiction over corporations doing continuous and systematic business in the forum.”).

<sup>45</sup> See, e.g., *Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 464 (S.D.N.Y. 2008) (“There are, however, several traditional factors that courts consider when undertaking this analysis, and they are ‘whether the company has an office in the state, whether it has any bank

meant that courts would come to different conclusions on whether they had general jurisdiction over defendants.<sup>46</sup> Consequently, some defendants were unable to predict with any degree of certainty where they would be subject to general jurisdiction. This was particularly problematic for foreign country defendants who were wary of the jurisdictional consequences that could conceivably attach if an American court held that they were doing business somewhere in the United States.<sup>47</sup> In these circumstances, foreign defendants could be

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accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests.” (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 98 (2d Cir. 2000))). A corporation’s registration and appointment of an agent for service of process in a state were also sometimes considered factors in assessing whether a court had general jurisdiction based on a corporation’s continuous and systematic general business contacts with a forum. *See, e.g., CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1074 (9th Cir. 2011) (“AcademyOne has no offices or staff in California; is not registered to do business in the state; has no registered agent for service of process; and pays no state taxes.” (emphasis added)); *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (“Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state’s markets, designates an agent for service of process, holds a license, or is incorporated there.” (emphasis added)).

<sup>46</sup> See Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 810 (2004) (“The decisions continue to ‘evinces a bewildering array of seemingly inconsistent results,’ as the courts ‘appear to summon one line of decisions and then another to support the varying moods of their opinions.’” (quoting *Severinsen v. Widener Univ.*, 768 A.2d 200, 203 (N.J. Super. Ct. App. Div. 2001))).

<sup>47</sup> See, e.g., Danielle Tarin & Christopher Macchiaroli, *Refining the Due-Process Contours of General Jurisdiction over Foreign Corporations*, 11 J. INT’L BUS. & L. 49, 61 (2012) (“By ensuring the orderly administration of the laws, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with minimum assurance as to where the conduct will and will not render them liable to suit. With adequate notice, a foreign corporation can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. But foreign corporations cannot effectively structure their conduct when courts’ divergent quantitative analyses produce inconsistent and thus unpredictable results.” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (internal quotation marks omitted)). See also generally Brief for Petitioner, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3362080; Reply Brief for Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 5290566; Brief of the Alliance of Auto. Mfrs., Inc. & Ass’n of Global Automakers as Amici Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3728810; Brief Amicus Curiae Atl. Legal Found. in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3421895; Brief of the Chamber of Commerce of the U.S. et al. as Amici Curiae in Support of the Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3421897; Brief of Economiesuisse et al. as Amici Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3421893; Brief of Amici Curiae New England Legal Found. & Associated Indus. of Mass. in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3421896; Brief of the Prod. Liab. Advisory Council, Inc. as Amicus Curiae in Support of Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3377319; Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3377320; Brief for the United States as Amicus Curiae Supporting Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3377321; Brief of Amici Curiae Viega GmbH & Co. KG & Viega Int’l GmbH in Support of Petitioner *DaimlerChrysler AG*, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3421894.

sued by foreign plaintiffs in respect of a cause of action that arose on foreign soil simply because the defendant was considered to be doing business in a U.S. forum.<sup>48</sup>

For other defendants, however, the problem was different. They could quite readily predict where they would be subject to general jurisdiction: anywhere and everywhere in the United States. Large multinational corporations, such as Ford, McDonald's, and Exxon, would likely be regarded as having continuous and systematic general business contacts in all fifty states. This would mean that corporations with a substantial presence in every state would be subject to general jurisdiction in fifty different forums.<sup>49</sup>

### C. *Goodyear, Daimler, and the Demise of Doing Business Jurisdiction*

In 2011, the Supreme Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>50</sup> a case that ultimately marked the beginning of the end for doing business jurisdiction. In *Goodyear*, the plaintiffs sued Goodyear U.S.A. and several of its foreign subsidiaries in North Carolina with respect to an accident that took place in France involving its tires.<sup>51</sup> Goodyear U.S.A. conceded that North Carolina had general jurisdiction over it (presumably because it was doing business in North Carolina).<sup>52</sup> Goodyear's foreign subsidiaries opposed jurisdiction, arguing that they did not have continuous and systematic general business contacts with North Carolina and, therefore, were not subject to suit there.<sup>53</sup> The North Carolina Court of Appeals had held that the defendants were, in fact, subject to general jurisdiction in North Carolina because they placed their products into the stream of commerce and some of these products ended up in North Carolina.<sup>54</sup> The Supreme Court rejected the North Carolina Court of Appeals' reasoning, saying that the court's "stream-of-commerce analysis elided

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<sup>48</sup> These are the facts of *Daimler*. See *Daimler*, 134 S. Ct. at 750 ("This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.").

<sup>49</sup> Thus, a Canadian plaintiff who spilled hot coffee on himself at a McDonald's in Buffalo, New York could sue McDonald's in Texas in the hopes that a potential jury award would be super-sized. Even though the action has nothing to do with Texas, Texas courts would nonetheless have jurisdiction. Intuitively, jurisdiction does not seem appropriate in these circumstances: what gives Texas the right to assume jurisdiction over McDonald's in respect of a personal injury action involving a Canadian suffering personal injury in New York?

<sup>50</sup> 131 S. Ct. 2846 (2011).

<sup>51</sup> *Id.* at 2850.

<sup>52</sup> *Id.* Justice Ginsburg indicated, "Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it." *Id.*

<sup>53</sup> *Id.* at 2852.

<sup>54</sup> *Brown v. Meter*, 681 S.E.2d 382, 395 (N.C. Ct. App. 2009).

the essential difference between case-specific and all-purpose (general) jurisdiction.”<sup>55</sup> Justice Ginsburg then clarified the distinction between specific and general jurisdiction.<sup>56</sup> With respect to the latter, she noted that “[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”<sup>57</sup>

Justice Ginsburg laid out the lack of contacts between the defendants and North Carolina<sup>58</sup> and ultimately concluded that the defendant’s “attenuated connections to the State fall far short of the ‘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.”<sup>59</sup> She also observed that, “[u]nlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina.”<sup>60</sup>

On the facts, *Goodyear* was an easy call. The foreign defendants barely had any contacts with North Carolina, much less continuous and systematic contacts sufficient to ground general jurisdiction. With that said, the significance of *Goodyear* lies in two words: “at home.” Justice Ginsburg used this expression three separate times in *Goodyear* and once in *J. McIntyre Machinery, Ltd. v. Nicastro*, a case decided the same day as *Goodyear*.<sup>61</sup> Clearly, the “at home” language was intended to mean something, but what? Could the Supreme Court have intended to make a sweeping change to general jurisdiction with just two words?<sup>62</sup>

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<sup>55</sup> *Goodyear*, 131 S. Ct. at 2855.

<sup>56</sup> *Id.* at 2853–54.

<sup>57</sup> *Id.* (citing Brilmayer et al., *supra* note 18, at 728).

<sup>58</sup> *Id.* at 2852 (“[P]etitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.”). She also noted:

Even so, a small percentage of petitioners’ tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.

*Id.*

<sup>59</sup> *Id.* at 2857 (citations omitted) (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

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

<sup>61</sup> *Id.* at 2851, 2854, 2857; *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2797 (2011).

<sup>62</sup> After the decision, commentators debated the meaning of the new “at home” language. See, e.g., Lindsey D. Blanchard, *Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865, 875–78 (2013) (discussing a variety of different scholarly interpretations of the “at home” language). In the words of one author:

In *Daimler v. Bauman*, the Supreme Court confirmed that it meant what it said in *Goodyear*: general jurisdiction over a corporation is appropriate only when the corporation's contacts are sufficiently continuous and systematic as to render it essentially "at home" in the forum.<sup>63</sup> *Daimler* was an unusual case for delivering this message because it involved the complicating issue of whether a subsidiary's contacts with the forum could be imputed to the parent so as to ground general jurisdiction over the latter.<sup>64</sup> In *Daimler*, foreign plaintiffs sued Daimler, a German company, in California alleging that the defendant aided and abetted war crimes in Argentina's dirty war.<sup>65</sup> Daimler's subsidiary, Mercedes-Benz USA, had significant contacts with California and conceded that California had general jurisdiction over it.<sup>66</sup> The Court was asked to decide whether these contacts with California could be imputed to the defendant parent company and, if so, what jurisdictional consequences would attach.<sup>67</sup>

The Court sidestepped the thorny issue of when a subsidiary's contacts are imputable to a parent.<sup>68</sup> Instead, Justice Ginsburg, writing for the Court, concluded that *even if* one were to assume that Mercedes-Benz USA were "at home" in California, *and* that its contacts were imputable to Daimler, jurisdiction over Daimler would still not be appropriate "for Daimler's slim contacts with the State hardly render it at home there."<sup>69</sup> Justice Ginsburg never directly explained *why*, if a subsidiary is "at home" in California, and those contacts are imputed to the parent, the parent is also not "at home" in California.<sup>70</sup> An astute reader will find the answer in footnote 20.<sup>71</sup> There, the Court stated that "the general jurisdiction inquiry does not focu[s] solely on the magnitude of the defendant's in-state contacts. General jurisdiction instead calls for an appraisal of a corporation's activities in their

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[T]he "essentially at home" standard articulated by the Court casts doubt on a large body of lower court case law. Indeed, it has even been suggested that the apparent implications of *Goodyear* are so significant that they cannot have been intended—that the Court's apparent restriction of general jurisdiction to corporations that are "essentially at home" should be dismissed as "loose language," and that *Goodyear* should be limited to its "particular facts."

Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 672 (2012) (footnote omitted).

<sup>63</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–61 (2014); *see also Goodyear*, 131 S. Ct. at 2851, 2854, 2857.

<sup>64</sup> *See* Petition for Writ of Certiorari, *Daimler*, 134 S. Ct. 746 (No. 11-965), 2012 WL 379768.

<sup>65</sup> *Daimler*, 134 S. Ct. at 750–51.

<sup>66</sup> *See id.* at 763. This concession was likely erroneous in light of *Goodyear's* "at home" language and the holding in *Daimler* itself.

<sup>67</sup> *See* Petition for Writ of Certiorari, *supra* note 64.

<sup>68</sup> *See Daimler*, 134 S. Ct. at 760.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 760–62.

<sup>71</sup> *Id.* at 762 n.20.

entirety, nationwide and worldwide.”<sup>72</sup> The Court was of the view that “[a] corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”<sup>73</sup> Although not fully articulated, it is clear that the Court believed that general jurisdiction over Daimler was not appropriate because Daimler’s contacts with California, while seemingly significant in isolation, were not particularly significant when viewed in relation to its worldwide contacts.<sup>74</sup>

Moreover, the Court in *Daimler* took the opportunity to reiterate its holding in *Goodyear*: “the inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”<sup>75</sup> “At home,” in turn, meant “comparable to a domestic enterprise in that State.”<sup>76</sup> In another significant footnote, the Court stressed the exceptionality of the “at home” test, stating “[w]e do not foreclose the possibility that in an exceptional case[,] a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”<sup>77</sup>

Whatever lingering doubts one may have had about general jurisdiction after *Goodyear* have certainly been clarified in *Daimler*. The cases signal a new direction for general jurisdiction—and one where it will be exceedingly difficult to establish general jurisdiction in circumstances other than the two traditional bases: place of incorporation and principal place of business.<sup>78</sup> In short, *Goodyear* and

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<sup>72</sup> *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 761–62.

<sup>75</sup> *Id.* at 761 (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)). Between the majority and the concurrence, the phrase “at home” was referenced a total of thirty times. *See generally id.*

<sup>76</sup> *Id.* at 758 n.11.

<sup>77</sup> *Id.* at 761 n.19 (citations omitted). Justice Ginsburg used *Perkins* to exemplify such an exceptional case. *Id.*

<sup>78</sup> *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. (forthcoming 2015) (manuscript at 21) (“[*Daimler*] thus confirmed the most ambitious reading of *Goodyear*. A corporation likely is subject to general jurisdiction only in a state where it has incorporated or maintains its principal place of business. The Court has left open only the slimmest possibility that general jurisdiction might be permissible in a state that is the functional equivalent of one of those paradigm examples. While such an exception is theoretically possible, the Court suggests that it will be the rarest of rarities. Just as first-year medical students learn not to privilege bizarre diagnoses, lawyers and scholars would do well to heed the same adage: ‘When you hear hoofbeats, think of horses, not zebras.’”).

*Daimler* sound the death knell for doing business as a basis for general jurisdiction.<sup>79</sup>

D. *The New Issue on the Horizon: Registering to Do Business as a Basis for General Jurisdiction*

Now that plaintiffs will have a much harder time<sup>80</sup> establishing general jurisdiction over defendants in all but the most obvious of cases, a different ground of jurisdiction will most certainly take center stage: that of corporate registration.<sup>81</sup> Plaintiffs who are foreclosed from arguing that general jurisdiction is appropriate under the *Daimler* “at home” standard will recast their jurisdictional analysis and attempt to premise general jurisdiction on a corporation’s act of registering to do business pursuant to the operative state statute.<sup>82</sup>

In fact, during oral argument in *Goodyear*, Justice Ginsburg telegraphed interest in registering to do business as a basis for general jurisdiction, asking counsel on behalf of the United States<sup>83</sup> whether a corporation that registered to do business in North Carolina, without any other connections to the state, would be subject to general jurisdiction there.<sup>84</sup> Counsel noted that there was “a division in the lower courts” as to whether such registration would be effective to permit the state to exercise general jurisdiction over the corporation.<sup>85</sup>

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<sup>79</sup> For a more detailed analysis of doing business jurisdiction after *Daimler*, see generally Monestier, *supra* note 14.

<sup>80</sup> See, e.g., *Snodgrass v. Berklee Coll. of Music*, 559 F. App’x 541 (7th Cir. 2014) (mem.); *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30 (2d Cir. 2014); *Brown v. CBS Corp.*, 19 F. Supp. 3d 390 (D. Conn. 2014); *Rocke v. Pebble Beach Co.*, Civil Action No. 12-3372, 2014 WL 1725366 (E.D. Pa. Apr. 29, 2014); *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13 (D.D.C. 2014).

<sup>81</sup> See Monestier, *supra* note 14, at 279–82; Rhodes & Robertson, *supra* note 14, at 258–63.

<sup>82</sup> See, e.g., *AstraZeneca AB v. Mylan Pharm., Inc.*, Civil Action No. 14-696-GMS, 2014 WL 5778016, at \*3–5 (D. Del. Nov. 5, 2014) (arguing that the defendant was subject to general jurisdiction in Delaware because it was “at home” there and, in the alternative, that the defendant was subject to general jurisdiction in Delaware because it had registered to do business there).

<sup>83</sup> The United States filed a brief, as amicus curiae, supporting the Petitioner, *Goodyear*, in that case. See generally Brief for the United States as Amicus Curiae Supporting Petitioners, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (No. 10-76), 2010 WL 4735597. Assistant to the Solicitor General, Benjamin J. Horwich, appeared on behalf of the United States. See *id.*

<sup>84</sup> Oral Argument at 15–16, *Goodyear*, 131 S. Ct. 2846 (No. 10-76), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-76.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-76.pdf).

<sup>85</sup> *Id.* at 15. The exact exchange reads:

JUSTICE GINSBURG: Well, suppose it’s just a corporation that’s registered to do business in North Carolina, and the [sic] connection with that registration—it says: I appoint so-and-so my agent to receive process for any and all claims.

MR. HORWICH: Well, . . . there is a division in the lower courts on whether that sort of a consent is effective to permit the State general jurisdiction over—over the consenting party. That—but the Court has, I—I think, been—been fairly clear in—in



Many state and federal courts hold that registering to do business in a state and appointing an agent for service of process subjects a corporation to general jurisdiction, such that it can be sued in that state in respect of any and all claims, including those without any connection to the state.<sup>86</sup> Although the reasoning differs, courts generally hold that by registering under the relevant state statute and appointing an agent for service of process, a corporation has expressly consented to the jurisdiction of the state's courts—period.<sup>87</sup> Consent to jurisdiction is a separate and independent basis for jurisdiction that is not subject to the minimum contacts test.<sup>88</sup> Instead, due process is satisfied by virtue of the defendant corporation's knowing and voluntary consent in registering to do business and appointing an agent for service of process.

It is important to understand the far-reaching implications of this basis of general jurisdiction. Consider the case of New York: New York courts regard registration to do business as amounting to consent to general jurisdiction in New York.<sup>89</sup> One would assume that many thousands (if not millions) of businesses are registered to do business pursuant to New York's statute. This means that New York has unfettered jurisdictional power over all of these businesses based simply on the fact that these businesses have filled out and filed paperwork in

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setting notions of—of formal consent to one side when considering contacts-based cases. And so, in part, this case, therefore, doesn't present that question, and we don't have a position, as the Government, on that today with respect to whether that's effective.

*Id.* at 15–16.

<sup>86</sup> See, e.g., *Bane v. Netlink, Inc.*, 925 F.2d 637, 640–41 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1198–1200 (8th Cir. 1990). Note that courts differ on whether it is the act of registering to do business or the act of appointing an agent for service of process that constitutes consent to personal jurisdiction. See, e.g., *Sadler v. Hallsmith SYSCO Food Servs.*, Civil No. 08-4423 (RBK/JS), 2009 WL 1096309, at \*2 (D.N.J. Apr. 21, 2009) (“Finally, the Court finds that even if, as Defendants maintain, Plaintiffs did not serve Hallsmith's registered agent in New Jersey, the Court would still have jurisdiction. While the language of *Allied Signal* suggests that the act of serving a corporation's registered agent confers jurisdiction on the courts of a state, the Third Circuit Court of Appeals has instead stated that the act of registering to do business constitutes consent to be sued.” (citations omitted)).

<sup>87</sup> See, e.g., *Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 466–67 (S.D.N.Y. 2008) (“[T]he designation of an agent for service of process is not merely a mechanism for transmitting process but a ‘real consent’ to jurisdiction. A respected commentator has observed that foreign corporations ‘have no one to blame but themselves if they do not actually do business in New York or fail to surrender their license when they stop doing business here.’” (quoting V. Alexander, *Practice Commentaries*, N.Y. BUS. CORP. LAW § 301 (West 2001))); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1075 (N.Y. 1916) (“The person designated is a true agent. The consent that he shall represent the corporation is a real consent.”).

<sup>88</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (“[B]ecause the personal jurisdiction requirement is a waivable right, there are a ‘variety of legal arrangements’ by which a litigant may give ‘express or implied consent to the personal jurisdiction of the court.’” (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982))).

<sup>89</sup> See N.Y. BUS. CORP. LAW §§ 1301, 1304 (McKinney 2003); *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983); see also N.Y. BUS. CORP. LAW § 305(a) (McKinney 2003) (appointment of agent and service of process).

New York.<sup>90</sup> Some courts even regard their registration statutes as permitting the assertion of general jurisdiction over a corporation for causes of action that *predate* its registration and appointment of an agent for service of process.<sup>91</sup>

The United States Supreme Court has made a pronouncement on the issue of whether corporate registration is sufficient to ground general jurisdiction—but that was nearly one hundred years ago.<sup>92</sup> In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, the Supreme Court held that registering to do business in a state and appointing an agent for service of process was sufficient to confer general jurisdiction over the defendant corporation.<sup>93</sup> In *Pennsylvania Fire*, the defendant (a Pennsylvania insurance corporation) had contracted to insure buildings belonging to the plaintiff (an Arizona corporation).<sup>94</sup> The buildings that were the subject matter of the insurance policy were located in Colorado and the policy was issued there.<sup>95</sup> The defendant had registered to do business in Missouri pursuant to a Missouri registration statute, which required it to appoint the superintendent of the insurance department as its agent for service.<sup>96</sup> The plaintiff initiated suit on the insurance policy in Missouri by serving the superintendent.<sup>97</sup> The defendant argued that Missouri courts did not have jurisdiction over the defendant since the contracts at issue were not made in Missouri.<sup>98</sup> The Supreme Court cursorily disposed of the issue, stating that “[t]he construction of the Missouri statute thus adopted hardly leaves a constitutional question open.”<sup>99</sup> The Court was of the view that by registering to do business

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<sup>90</sup> See *Application for Authority*, N.Y. ST. DEP’T OF ST., DIV. OF CORPS., ST. REC. & U. COM. CODE, <http://www.dos.ny.gov/forms/corporations/1335-f-l.pdf> (last visited Mar. 14, 2015) [hereinafter *N.Y. Application for Authority*].

<sup>91</sup> See, e.g., *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1393 (8th Cir. 1993) (“We believe that the South Dakota legislature intended the authority of a foreign corporation’s registered agent to accept process to extend to causes of action arising outside the state prior to the appointment of the agent.”).

<sup>92</sup> See *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

<sup>93</sup> *Id.* at 95.

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

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 94–95.

<sup>99</sup> *Id.* at 95. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. *Id.* at 94. The Court stated:

If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert. . . .

and voluntarily appointing an agent for service of process in Missouri, the corporation subjected itself to suit in Missouri.<sup>100</sup>

Much of the academic and judicial commentary on general jurisdiction based on corporate registration tackle the issue from a historical perspective.<sup>101</sup> There is ample scholarly work to suggest that courts have misread precedent concerning registration statutes and that *Pennsylvania Fire* does not stand for the proposition that registration to do business amounts to consent to general jurisdiction.<sup>102</sup> For instance, one commentator argues:

As the *Gold Issue Mining* tale is often (and incorrectly) told, Justice Holmes held that a state's assertion of general jurisdiction over a foreign corporation did not offend due process, even though the corporation's only contact with the forum state was its appointment of an agent for service of process. Many of the commentators who believe and recite this tale decry it, criticizing Justice Holmes' purported *Gold Issue Mining* holding as obnoxious to the Commerce Clause, the Due Process Clause, or both. These commentators have

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In the above-mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other states. The case of service upon an agent voluntarily appointed was left untouched. . . . But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act.

*Id.* at 94–95 (citations omitted).

<sup>100</sup> *Id.* at 95.

<sup>101</sup> See generally, e.g., Kipp, *supra* note 18; Riou, *supra* note 18; T. Griffin Vincent, Comment, *Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461 (1989).

<sup>102</sup> See, e.g., Kipp, *supra* note 18, at 35 (“This interpretation of *Pennsylvania Fire Insurance*, however, reflected the *Pennoyer* era's requirement of a foreign corporation's local presence, as opposed to the *International Shoe* evaluation of the ‘quality and nature’ of the defendant's affiliation with the state. *Shaffer's* repudiation of the ‘legal and factual fictions’ generated by *Pennoyer* strongly suggests that the *Perkins* view of *Pennsylvania Fire Insurance* did not survive this refutation of *Pennoyer*.” (footnote omitted) (citing *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Brennan, J., concurring in part and dissenting in part)); Rhodes, *supra* note 5, at 438 (“*Pennsylvania Fire* is often cited as establishing that qualifying to do business and appointing an agent constitutes consent to the forum's jurisdiction for all causes of action, but two considerations caution against this conclusion. First, *Pennsylvania Fire* and similar cases depended on state law. Jurisdiction was authorized only if the forum state interpreted its registration statute to allow service on the agent for causes of action unrelated to the defendant's forum activities; otherwise, the defendant was not amenable to suit. Second, *Pennsylvania Fire* was linked to the then-prevailing ‘presence’ by ‘doing business’ construct, a construct which has since been discarded.” (footnotes omitted)); Taylor, *supra* note 16, at 1184 (“It has been suggested, for example, that the entire line of authority that includes both *Knowlton* and the Restatement (Second) of Conflict of Laws is premised on a misunderstanding of the Supreme Court's decision in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*”).

made an unwarranted concession of precedent, however, because the *Gold Issue Mining* tale is a myth born of misconstruction.<sup>103</sup>

Others have focused instead on whether *Pennsylvania Fire*—to the extent that it does stand for the proposition most frequently associated with it—survived *International Shoe*.<sup>104</sup> One court, for instance, observed:

Although the Supreme Court affirmed th[e *Pennsylvania Fire*] principle in 1939, the Court’s decision in [*International Shoe*], cast doubt on the continued viability of these cases. After *International Shoe*, the focus shifted from whether the defendant had been served within the state to whether the defendant’s contacts with the state justified the state’s assertion of jurisdiction.<sup>105</sup>

Thus, these commentators and courts see the rise of general jurisdiction based on registration to do business as an outgrowth of an improper reading of precedent or a failure to account for modern developments in the law of jurisdiction. I do not approach the inquiry from either of these perspectives.<sup>106</sup> Instead, I focus on the rationales

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<sup>103</sup> Riou, *supra* note 18, at 748–49 (footnotes omitted); *see also* Viko v. World Vision, Inc., No. 2:08-CV-221, 2009 WL 2230919, at \*10 (D. Vt. July 24, 2009) (“Thus, there is substantial evidence to suggest that those jurisdictions holding onto the notion of registration as consent to general jurisdiction do so based on a complete misinterpretation of prior law. Further, to the extent that early cases such as *Bagdon* and *Gold Issue* hold that compliance with a registration requirement alone establishes personal jurisdiction—whether based on ‘consent,’ ‘presence,’ or some other theory—the viability of such holdings is cast in doubt by the Supreme Court’s adoption of the ‘minimum contacts’ approach to jurisdiction and due process in *International Shoe*.”).

<sup>104</sup> *See, e.g.*, *Cognitronics Imaging Sys. v. Recognition Research Inc.*, 83 F. Supp. 2d 689, 692 (E.D. Va. 2000) (“The Supreme Court’s decision in [*Pennsylvania Fire*], is frequently cited for the proposition that a state may exercise general jurisdiction over any foreign corporation that registers to do business in that state and thereby consents to service of process upon a designated agent within the state, even where the cause of action arises outside the forum. Although the Supreme Court affirmed this principle in 1939, the Court’s decision in [*International Shoe*], cast doubt on the continued viability of these cases. After *International Shoe*, the focus shifted from whether the defendant had been served within the state to whether the defendant’s contacts with the state justified the state’s assertion of jurisdiction.” (footnote omitted) (citations omitted)).

<sup>105</sup> *Id.* at 692 (citations omitted).

<sup>106</sup> I also do not address any constitutional issues presented by the Commerce Clause. Some commentators have argued that even if there were no due process problem associated with asserting general jurisdiction over a corporation based on registration, there could be other constitutional problems. For instance, Professor Andrews argues, “[e]ven if consent through registration were to survive due process scrutiny, it would face problems under the Dormant Commerce Clause.” Andrews, *supra* note 7, at 1073. *See also* *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 894 (1988) (holding that an Ohio statute requiring the corporate defendant to appoint an agent for service and be subject to general jurisdiction or face a tolling of the statute of limitations violated the Commerce Clause); Vincent, *supra* note 101, at 485 (“Predicating jurisdiction solely on a corporate defendant’s designation of a resident agent for receipt of service may be an impermissible burden on interstate commerce. Although such an exercise of judicial jurisdiction is not directly discriminatory, there is no compelling state interest justifying general jurisdiction based on such tenuous corporate contacts. The absence of any cognizable state interest in the adjudication of a *Cowan*-type case justifies a court’s denial of jurisdiction on the grounds of any potential adverse effect on interstate commerce.”).

advanced in support of registration-based jurisdiction with a view to determining whether they survive constitutional scrutiny.<sup>107</sup> In particular, I focus on whether the primary rationale advanced in support of the view that registration amounts to general jurisdiction—that of consent—is a persuasive one from a due process perspective. I argue that those courts accepting the premise that registration amounts to consent to general jurisdiction do so uncritically. While it is true that jurisdiction can be based on consent, it is not necessarily true that registration to do business amounts to consent. From there, I situate registration statutes in a larger discussion about general jurisdiction.

## II. THE JURISDICTIONAL EFFECT OF REGISTERING TO DO BUSINESS

Every state has a registration statute that requires corporations<sup>108</sup> doing business in the state to register with the state and appoint an agent for service of process.<sup>109</sup> These statutes are designed to ensure that

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<sup>107</sup> Taylor argues that “it is clear that to focus on issues such as the reach of the *Gold Issue Mining* precedent, or on questions of the interpretation of particular registration statutes, is to overlook the larger, and more troubling, implications of registration statutes.” Taylor, *supra* note 16, at 1185–86 (footnotes omitted).

<sup>108</sup> Some of the statutes are not limited to corporations, but rather apply equally to other types of business organizations. See, e.g., “*Doing Business*” in *New York: An Introduction to Qualification*, DEP’T OF ST., OFF. OF GEN. COUNS., [http://www.dos.ny.gov/cnsl/do\\_bus.html](http://www.dos.ny.gov/cnsl/do_bus.html) (last visited Mar. 14, 2015) [hereinafter “*Doing Business*” in *N.Y.*] (“Certain organizations formed outside New York may not do business in New York until authorized to do so. Called ‘foreign,’ whether formed in another state of the United States or in another country, such organizations include for-profit and not-for-profit corporations, limited liability companies, and limited partnerships.”). See also N.Y. BUS. CORP. LAW §§ 1301–1320 (McKinney 2003) (for-profit corporations); N.Y. LTD. LIAB. CO. LAW §§ 801–809 (McKinney 2007) (limited liability companies); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 1301–1321 (McKinney 2015) (not-for-profit corporations); N.Y. P’SHP LAW §§ 121-901 to -908 (McKinney 2006 & Supp. 2015) (partnerships).

<sup>109</sup> ALA. CODE § 10A-1-7.01 (LexisNexis Supp. 2011); ALASKA STAT. § 10.06.705 (2014); ARIZ. REV. STAT. ANN. § 10-1501(A) (2013); ARK. CODE ANN. § 4-27-1501(a) (2001); CAL. CORP. CODE § 2105(a) (West Supp. 2015); COLO. REV. STAT. § 7-90-801(1) (2014); CONN. GEN. STAT. ANN. § 33-920(a) (West 2005); DEL. CODE ANN. tit. 8, § 371(b) (2011); FLA. STAT. ANN. § 607.1501(1) (West 2007); GA. CODE ANN. § 14-2-1501(a) (2003); HAW. REV. STAT. ANN. § 414-431(a) (LexisNexis 2008); IDAHO CODE ANN. § 30-1-1501(1) (2013); 805 ILL. COMP. STAT. ANN. 5/13.05 (West 2010); IND. CODE ANN. § 23-1-49-1(a) (West 2010); IOWA CODE ANN. § 490.1501(1) (West 1999); KAN. STAT. ANN. § 17-7931(a) (Supp. 2014); KY. REV. STAT. ANN. § 14A.9-010(1) (LexisNexis Supp. 2014); LA. REV. STAT. ANN. § 12:301 (2010); ME. REV. STAT. ANN. tit. 13-C, § 1501(1) (2013); MD. CODE ANN., CORPS & ASS’NS § 7-203(a) (LexisNexis 2014); MASS. GEN. LAWS ANN. ch. 156D, § 15.01(a) (West Supp. 2014); MICH. COMP. LAWS ANN. § 450.2011 (West 2002); MINN. STAT. ANN. § 303.03 (West 2011); MISS. CODE ANN. § 79-4-15.01(a) (2013); MO. ANN. STAT. § 351.572(1) (West 2001); MONT. CODE ANN. § 35-1-1026(1) (2013); NEB. REV. STAT. § 21-20, 168(1) (2012), *repealed by* NEB. REV. STAT. § 21-2,203(a) (effective Jan. 1, 2016); NEV. REV. STAT. ANN. § 80.010(1) (LexisNexis Supp. 2013); N.H. REV. STAT. ANN. § 293-A:15.01(a) (LexisNexis 2014); N.J. STAT. ANN. § 14A:13-3(1) (West 2003); N.M. STAT. ANN. § 53-17-1 (LexisNexis 2004); N.Y. BUS. CORP. LAW § 1301(a) (McKinney 2003); N.C. GEN. STAT. § 55-15-01(a) (2013); N.D. CENT. CODE § 10-19.1-134 (2012); OHIO REV. CODE ANN. § 1703.03 (West

nonresident corporations are accountable for their actions within the state.<sup>110</sup> Most statutes provide something to the effect that, “[a] foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.”<sup>111</sup> The statutes then mandate that the corporation appoint an agent for service of process in the state.<sup>112</sup> For instance, a typical statute reads:

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2009); OKLA. STAT. ANN. tit. 18, § 1130(B) (West 2012); OR. REV. STAT. § 60.701(1) (2013); 15 PA. CONS. STAT. ANN. § 4121(a) (West 2013), *repealed by* 15 PA. CONS. STAT. ANN. § 411(a) (effective July 15, 2015); R.I. GEN. LAWS § 7-1.2-1401(a) (Supp. 2014); S.C. CODE ANN. § 33-15-101(a) (2006); S.D. CODIFIED LAWS § 47-1A-1501 (2007); TENN. CODE ANN. § 48-25-101(a) (2012); TEX. BUS. ORGS. CODE ANN. § 9.001 (West 2012); UTAH CODE ANN. § 16-10a-1501(1) (LexisNexis 2013); VT. STAT. ANN. tit. 11A, § 15.01(a) (2010); VA. CODE ANN. § 13.1-757(A) (2011); WASH. REV. CODE ANN. § 23B.15.010(1) (West 2013); W. VA. CODE ANN. § 31D-15-1501(a) (LexisNexis 2009); WIS. STAT. ANN. § 180.1501(1) (West 2002); WYO. STAT. ANN. § 17-16-1501(a) (2013); *see also* D.C. CODE § 29-105.02(a) (LexisNexis 2013).

<sup>110</sup> *See* Taylor, *supra* note 16, at 1164 (“Certainly, the increasing complexity of legal relationships makes clear the need for states to develop some regime of regulatory jurisdiction in order to ensure domestic accountability, and so renders registration or ‘qualification’ statutes generally unexceptionable.”).

<sup>111</sup> ARK. CODE ANN. § 4-27-1501(a); GA. CODE ANN. § 14-2-1501(a); IDAHO CODE ANN. § 30-1-1501(1); MISS. CODE ANN. § 79-4-15.01(a); MO. ANN. STAT. § 351.572(1); MONT. CODE ANN. § 35-1-1026(1); NEB. REV. STAT. § 21-20, 168(1); N.C. GEN. STAT. § 55-15-01(a); S.C. CODE ANN. § 33-15-101(a); VT. STAT. ANN. tit. 11A, § 15.01(a); WASH. REV. CODE ANN. § 23B.15.010(1). Other states use slightly different language, but the idea is the same. *See, e.g.*, ALA. CODE § 10A-1-7.01(a) (“To transact business in this state, a foreign entity must register under this chapter.”); COLO. REV. STAT. § 7-90-801(1) (“A foreign entity shall not transact business or conduct activities in this state except in compliance with part 8 and not until its statement of foreign entity authority is filed in the record of the secretary of state.”); KAN. STAT. ANN. § 17-7931(a) (“Before doing business in the state of Kansas, a foreign covered entity shall register with the secretary of state. In order to register, a foreign covered entity shall submit to the secretary of state . . . an application for registration as a foreign covered entity.”); MD. CODE ANN., CORPS & ASS’NS § 7-203(a) (“Before doing any intrastate business in this State, a foreign corporation shall qualify with the Department.”); MINN. STAT. ANN. § 303.03 (“No foreign corporation shall transact business in this state unless it holds a certificate of authority so to do.”); NEV. REV. STAT. § 80.010(1) (“Before commencing or doing any business in this State, each corporation organized pursuant to the laws of another state, territory, the District of Columbia, a possession of the United States or a foreign country that enters this State to do business must: [f]ile in the Office of the Secretary of State: [list of items to file].”).

<sup>112</sup> ALA. CODE § 10A-1-5.31(a)(1), (b)(1) (LexisNexis 2011); ALASKA STAT. §§ 10.06.753(2), .763 (2014); ARIZ. REV. STAT. ANN. §§ 10-1507(2), -1510(A) (2013); ARK. CODE ANN. §§ 4-20-105(a), 4-27-1503(a)(5), -1510(a) (2001 & Supp. 2013); CAL. CORP. CODE § 2105(a)(5) (West Supp. 2015); COLO. REV. STAT. §§ 7-90-701(1), -704(1) (2014); CONN. GEN. STAT. ANN. §§ 33-926(a)(2), -929(a) (West 2005); DEL. CODE ANN. tit. 8, §§ 132(a), 376(a) (2011); FLA. STAT. ANN. §§ 607.1507(1)(b), .1510(1) (West 2007); GA. CODE ANN. §§ 14-2-1507(2), -1510(a) (2003); HAW. REV. STAT. ANN. §§ 414-437, -440(a) (LexisNexis 2008 & Supp. 2014); IDAHO CODE ANN. §§ 30-405(1), 30-1-1503(1)(e), -1510(1) (2013); 805 ILL. COMP. STAT. ANN. 5/5.05(b), /5.25(a) (West Supp. 2014); IND. CODE ANN. §§ 23-1-49-7(a)(2), -10(a) (West 2010 & Supp. 2014); IOWA CODE ANN. §§ 490.1507(2), .1510(1) (West 1999 & Supp. 2014); KAN. STAT. ANN. § 17-7934(a)(2) (Supp. 2014); KY. REV. STAT. ANN. §§ 14A.4-010(1)(b), -040(1) (LexisNexis 2013); LA. REV. STAT. ANN. § 12:308(A)(1) (2010); ME. REV. STAT. ANN. tit. 5, § 113(1) (2013); ME. REV. STAT. ANN. 13-C, § 1507-A (Supp. 2014); MD. CODE ANN., CORPS & ASS’NS §§ 1-401(a), 7-205(a)(1) (LexisNexis 2014); MASS. GEN. LAWS ANN. ch. 156D, §§ 5.04(a), 15.07(2) (West 2005); MICH. COMP. LAWS ANN. §§ 450.1241(1)(b), .1246(1) (West 2002 & Supp. 2014); MINN. STAT. ANN. §§ 303.10, .13(1) (West 2011); MISS. CODE ANN. §§ 79-35-5(a), -13(a) (2013); MO. ANN. STAT. §§ 351.586(2),

Each foreign corporation authorized to transact business in this state shall continuously maintain in this state: . . . [a] registered agent.

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The registered agent of a foreign corporation authorized to transact business in this state shall be the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.<sup>113</sup>

Of course, there are variations from state to state, with some states providing more detailed direction on the parameters of registration<sup>114</sup> and the nature and/or function of the registered agent.<sup>115</sup> Each of the states also codifies the penalties for non-registration in circumstances

.594(1) (West 2001 & Supp. 2015); MONT. CODE ANN. §§ 35-1-1028(1)(e), 35-7-105(1), -113(1) (2013); NEB. REV. STAT. §§ 21-20, 174(2), 21-20, 177(1) (2012), *repealed by* NEB. REV. STAT. §§ 21-2,209(2), -2,212(a) (effective Jan. 1, 2016); NEV. REV. STAT. ANN. §§ 14.020(1), 80.060 (LexisNexis 2008, 2010); N.H. REV. STAT. ANN. §§ 293-A:15.07(a)(2), .10(a) (LexisNexis 2014); N.J. STAT. ANN. §§ 14A:4-1(1), -2(1) (West 2003); N.M. STAT. ANN. §§ 53-17-9(B), -11 (LexisNexis 2004); N.Y. BUS. CORP. LAW §§ 304(b), 305(a) (McKinney 2003); N.C. GEN. STAT. §§ 55-15-07, 55D-33(a) (2013); N.D. CENT. CODE §§ 10-01.1-13(1)(a), 10-19.1-138 (2012); OHIO REV. CODE ANN. § 1703.041(A) (West 2009); OKLA. STAT. ANN. tit. 18, § 1022(B) (West 2012); OR. REV. STAT. §§ 60.721(2), .731(1) (2013); 15 PA. CONS. STAT. ANN. § 4144(a) (West 2013) (registered office), *repealed by* 15 PA. CONS. STAT. ANN. § 411(f) (effective July 15, 2015); R.I. GEN. LAWS §§ 7-1.2-1408(a), -1410(a) (Supp. 2014); S.C. CODE ANN. §§ 15-9-210(a), 33-15-107(2) (2005, 2006); S.D. CODIFIED LAWS §§ 47-1A-1503(5), 59-11-6, -16 (2007, 2009 & Supp. 2014); TENN. CODE ANN. §§ 48-25-107(2), -110(a) (2012); TEX. BUS. ORGS. CODE ANN. § 5.201(a)(1), (b)(1) (West 2012); UTAH CODE ANN. §§ 16-10a-1503(1)(e), -1511(2), 16-17-203(1) (LexisNexis 2013); VT. STAT. ANN. tit. 11A, § 15.07(2) (2010); VT. STAT. ANN. tit. 12, § 856 (Supp. 2014); VA. CODE ANN. §§ 13.1-763(A)(2), -766(A) (2011); WASH. REV. CODE ANN. §§ 23B.15.070(1)(b), .100(1) (West 2013); W. VA. CODE ANN. §§ 31D-15-1507(2), -1510(a) (LexisNexis 2009); WIS. STAT. ANN. §§ 180.1507, .1510(1) (West 2002 & Supp. 2014); WYO. STAT. ANN. §§ 17-16-1507(a)(ii), 17-28-104(a) (2013); *see also* D.C. CODE §§ 29-104.02(3), .12(a) (LexisNexis 2013).

<sup>113</sup> NEB. REV. STAT. § 21-20, 174(2); *id.* § 21-20, 177(1).

<sup>114</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 33-920(a) ("A foreign corporation, other than an insurance, surety or indemnity corporation, may not transact business in this state until it obtains a certificate from the Secretary of the State. No foreign corporation engaged in the business of a gas, electric distribution or water company, or cemetery corporation, or of any company requiring the right to take and condemn lands or to occupy the public highways of this state, and no foreign telephone company, shall transact in this state the business authorized by its certificate of incorporation or by the laws of the state under which it was organized, unless empowered to do so by some general or special act of this state, except for the purpose of carrying out and renewing contracts existing upon August 1, 1903. No insurance, surety or indemnity company shall transact business in this state until it has procured a license from the Insurance Commissioner in accordance with the provisions of section 38a-41.").

<sup>115</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1510(A) ("The statutory agent appointed by a foreign corporation is an agent of the foreign corporation on whom process, notice or demand that is required or permitted by law to be served on the foreign corporation may be served and that, when so served, is lawful personal service on the foreign corporation."); COLO. REV. STAT. § 7-90-704(1) ("The registered agent of an entity is an agent of the entity authorized to receive service of any process, notice, or demand required or permitted by law to be served on the entity. The registered agent of an entity is an agent of the entity to whom the secretary of state may deliver any form, notice, or other document with respect to the entity under this title, unless otherwise specified by an organic statute.").

where a corporation should have registered pursuant to the statute.<sup>116</sup> These generally include an inability of the defendant to sue in the state's courts, the payment of a fine, and the tolling of the statute of limitations against the corporation.<sup>117</sup>

Only one state, Pennsylvania, actually purports to directly address the jurisdictional consequences of registering to do business.<sup>118</sup> The Pennsylvania long-arm statute provides:

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<sup>116</sup> ALA. CODE §§ 10A-1-7.21 to -.24 (LexisNexis 2011); ALASKA STAT. §§ 10.06.710, .713, .715 (2014); ARIZ. REV. STAT. ANN. § 10-1502 (2013); ARK. CODE ANN. § 4-27-1502 (Supp. 2013); CAL. CORP. CODE §§ 2203, 2258–2259 (West 2014); COLO. REV. STAT. § 7-90-802 (2014); CONN. GEN. STAT. ANN. § 33-921 (West Supp. 2014); DEL. CODE ANN. tit. 8, §§ 378, 383–384 (2011); FLA. STAT. ANN. § 607.1502 (West 2007); GA. CODE ANN. § 14-2-1502 (2003); HAW. REV. STAT. ANN. § 414–432 (LexisNexis 2008); IDAHO CODE ANN. § 30-1-1502 (2013); 805 ILL. COMP. STAT. ANN. 5/13.70 (West 2010); IND. CODE ANN. § 23-1-49-2 (West 2010); IOWA CODE ANN. § 490.1502 (West 1999); KAN. STAT. ANN. §§ 17-7307 to -7308 (2007); KY. REV. STAT. ANN. § 14A.9-020 (LexisNexis 2013); LA. REV. STAT. ANN. §§ 12:314–:314.1 (2010); ME. REV. STAT. ANN. tit. 13-C § 1502 (2013); MD. CODE ANN., CORPS & ASS'NS §§ 7-301 to -302, -305 (LexisNexis 2014); MASS. GEN. LAWS ANN. ch. 156D, § 15.02 (West 2005); MICH. COMP. LAWS ANN. §§ 450.2003, .2051, .2055 (West 2002); MINN. STAT. ANN. § 303.20 (West 2011); MISS. CODE ANN. § 79-4-15.02 (2013); MO. ANN. STAT. § 351.574 (West 2001); MONT. CODE ANN. § 35-1-1027 (2013); NEB. REV. STAT. § 21-20, 169 (2012), *repealed by* NEB. REV. STAT. § 21-2,204 (effective Jan. 1, 2016); NEV. REV. STAT. ANN. §§ 80.055, .095 (LexisNexis 2010 & Supp. 2013); N.H. REV. STAT. ANN. § 293-A:15.02 (LexisNexis 2014); N.J. STAT. ANN. §§ 14A:13-11 to -12 (West 2003); N.M. STAT. ANN. § 53-17-20 (LexisNexis 2004); N.Y. BUS. CORP. LAW §§ 1303, 1312 (McKinney 2003); N.C. GEN. STAT. § 55-15-02 (2013); N.D. CENT. CODE §§ 10-19.1-142, -144, -148 (2012); OHIO REV. CODE ANN. §§ 1703.28-.30, .99 (West 2009 & Supp. 2014); OKLA. STAT. ANN. tit. 18, §§ 1134, 1137–1138 (West 2012); OR. REV. STAT. § 60.704 (2013); 15 PA. CONS. STAT. ANN. § 4141 (West 2013), *repealed by* 15 PA. CONS. STAT. ANN. § 411(b)–(e) (effective July 15, 2015); R.I. GEN. LAWS § 7-1.2-1418 (Supp. 2014); S.C. CODE ANN. § 33-15-102 (2006); S.D. CODIFIED LAWS §§ 47-1A-1502 to -1502.2 (2007); TENN. CODE ANN. § 48-25-102 (2012); TEX. BUS. ORGS. CODE ANN. §§ 9.051–.052 (West 2012); UTAH CODE ANN. § 16-10a-1502 (LexisNexis 2013); VT. STAT. ANN. tit. 11A, § 15.02 (2010); VA. CODE ANN. § 13.1-758 (2011); WASH. REV. CODE ANN. § 23B.15.020 (West 2013); W. VA. CODE ANN. § 31D-15-1502 (LexisNexis 2009); WIS. STAT. ANN. § 180.1502 (West 2002); WYO. STAT. ANN. § 17-16-1502 (2013); *see also* D.C. CODE §§ 29-105.02(b)–(c),(f), .12 (LexisNexis 2013).

<sup>117</sup> *See, e.g.*, IND. CODE ANN. § 23-1-49-2(a) (“A foreign corporation transacting business in Indiana without a certificate of authority may not maintain a proceeding in any court in Indiana until it obtains a certificate of authority.”); NEV. REV. STAT. § 80.095 (“The benefit of [the statute of limitations] shall be suspended during any period or periods when the corporation is in default in complying with the requirements of NRS 80.090; and no such corporation can maintain any action or proceeding in any court of this State while so in default.”); OHIO REV. CODE ANN. § 1703.99 (“Whoever violates section 1703.30 of the Revised Code is guilty of a misdemeanor of the fourth degree.”); S.C. CODE ANN. § 33-15-102(d) (“A foreign corporation is liable for a civil penalty of ten dollars for each day but not to exceed a total of one thousand dollars for each year it transacts business in this State without a certificate of authority.”). *See also* Riou, *supra* note 18, at 744 (“In all states, unqualified foreign corporations doing intrastate business are denied access to state courts and subject to fines; in some states, a corporation’s directors, officers, or agents may be fined as well.”).

<sup>118</sup> Several academic articles suggest that multiple state statutes explicitly provide for general jurisdiction in circumstances where a corporation has registered to do business in the state. For instance, Kipp argues, “[t]oday, only a few states have registration statutes that expressly provide for the assertion of general jurisdiction.” Kipp, *supra* note 18, at 44. He cites statutes from Connecticut, New York, and North Carolina as supporting this proposition. *Id. Accord* Andrews, *supra* note 7, at 1070 (“First, most corporate registration statutes do not state the jurisdictional



(a) General rule.—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction . . .

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repercussions of registration.” (citing Kipp, *supra* note 18, at 2)); Rhodes & Robertson, *supra* note 14, at 260 (“First, although some states explicitly provide that appointment of a registered agent will give rise to general jurisdiction, most state statutes are less clear (or, in some cases, explicitly provide that such registration does *not* give rise to general jurisdiction).” (citing Andrews, *supra* note 7, at 1070–71; Kipp, *supra* note 18, at 44)). None of the state statutes that Kipp cites explicitly provide for general jurisdiction over foreign corporations that have registered to do business in the state. Connecticut General Statutes section 33-400, referenced by Kipp and since repealed, did not expressly provide for general jurisdiction based on registration. Section 33-400 dealt with the “Appointment of an Attorney for Process” and spoke to the issue of service of process, not general jurisdiction. Nor does Connecticut’s successor statutory scheme, the Connecticut Business Corporation Act, expressly provide for general jurisdiction over corporations that have registered pursuant to the Act. *See generally* CONN. GEN. STAT. ANN. §§ 33-920 to -944 (West 2005 & Supp. 2014); *see also* CONN. GEN. STAT. ANN. § 33-929(e)–(f) (West 2005) (listing grounds for jurisdiction for registered and non-registered corporations based on specific contacts with Connecticut). Similarly, North Carolina General Statutes section 55-145 (also repealed) did not expressly allow for general jurisdiction based on registration. Instead, the section provided for jurisdiction over foreign corporations in four specifically delineated circumstances with connections to North Carolina. Its replacement, the North Carolina Business Corporation Act, also does not spell out the jurisdictional consequences of registering to do business in North Carolina. *See generally* N.C. GEN. STAT. §§ 55-15-01 to -33 (West 2013). Finally, New York Business Corporation Law section 1314 could be read as supporting the proposition that New York courts have general jurisdiction over foreign corporations that have registered to do business in New York. *See* N.Y. BUS. CORP. LAW § 1314(b)(5) (McKinney 2003). However, many courts and commentators have read that section as referring to subject-matter jurisdiction, not personal jurisdiction. *See, e.g.*, 8A CLIFFORD R. ENNICO, WEST’S MCKINNEY’S FORMS BUSINESS CORPORATION LAW § 13:33 (2008) (“Under N.Y. Bus. Corp. Law § 1314(b), a nonresident or a foreign corporation of any type or kind, except as otherwise provided in N.Y. Bus. Corp. Law Art. 13, may maintain an action or special proceeding against a foreign corporation only in the following cases of subject matter jurisdiction . . .”); *Calzaturificio Giuseppe Garbuio S. A. S. v. Dartmouth Outdoor Sports, Inc.*, 435 F. Supp. 1209, 1211 (S.D.N.Y. 1977) (“Since this is an action between an Italian partnership and a foreign corporation, and fits within no subdivision of s 1314(b), we lack subject matter jurisdiction.”). Further support for reading section 1314(b) as referring to subject matter jurisdiction derives from looking at section 1314(a), which contemplates subject matter (and not personal) jurisdiction. N.Y. BUS. CORP. LAW § 1314(a) (“An action or special proceeding against a foreign corporation may be maintained by a resident of this state or by a domestic corporation of any type or kind for any cause of action.”). Clearly, section 1314(a) does not obviate the need to also establish personal jurisdiction over the foreign corporation. Moreover, the cases holding that registration to do business under New York Business Corporation Law section 1301 confers general jurisdiction tend not to rely on the wording of section 1314, lending further support to the proposition that the section does not explicitly confer general jurisdiction. *See, e.g.*, *Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 464–67 (S.D.N.Y. 2008); *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983). Finally, the most compelling evidence that section 1314 does not explicitly confer general jurisdiction over corporations registered to do business in New York is that lawmakers in New York have proposed bill S. 7078 (mirrored in the Assembly as A. 9676), which would plainly provide that “[a] foreign corporation’s application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporations.” S. 7078, 200th S., Reg. Sess. (N.Y. 2014); A. 9576, 200th Gen. Assemb., Reg. Sess. (N.Y. 2014). If section 1314 explicitly conferred general jurisdiction over corporations registered to do business in New York, the proposed bill would be redundant.

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(2) Corporations. (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.<sup>119</sup>

Not surprisingly, Pennsylvania courts have interpreted this section as meaning exactly what it says: that Pennsylvania courts have general jurisdiction over a corporation that has “qualif[ied] as a foreign corporation” under the state registration statute.<sup>120</sup> No other state directly spells out the jurisdictional consequences associated with registering to do business.<sup>121</sup> Consequently, the interpretation placed on the act of registering is left entirely to the courts,<sup>122</sup> constrained only by the dictates of the Constitution.<sup>123</sup>

<sup>119</sup> 42 PA. CONS. STAT. ANN. § 5301(a)(2)(i)–(ii) (West 2013). Notably, the jurisdictional effect of registering to do business is not spelled out in Pennsylvania’s registration statute, but rather in its long-arm statute.

<sup>120</sup> See, e.g., *Eagle Traffic Control, Inc. v. James Julian, Inc.*, 933 F. Supp. 1251, 1256 (E.D. Pa. 1996) (“[Plaintiff] bases general personal jurisdiction over [the defendant] on the ground that it is qualified to do business within this state as a foreign corporation. Pennsylvania’s personal jurisdiction statute expressly grants jurisdiction in such an instance. . . . The bottom line is that Pennsylvania’s long-arm statute provides for personal jurisdiction when a foreign corporation takes the particular action of becoming authorized to do business in Pennsylvania.”); see also *Bane v. Netlink, Inc.*, 925 F.2d 637, 640–41 (3d Cir. 1991).

<sup>121</sup> The Kansas Supreme Court has held that the Kansas registration statute expressly provides for personal jurisdiction over corporations based on consent. See *Merriman v. Crompton Corp.*, 146 P.3d 162, 171–77 (Kan. 2006). The Kansas statute in effect in *Merriman* (since repealed) stated that a foreign corporation applying for authority to transact business in Kansas must provide:

an irrevocable written consent . . . that actions may be commenced against it in the proper court of any county where there is proper venue by service of process on the secretary of state . . . and stipulating and agreeing that such service shall be taken and held, in all courts, to be as valid and binding as if due service had been made upon an officer of the corporation.

KAN. STAT. ANN. § 17-7301(f) (Supp. 2005). The corporate defendants had argued that the section did not contain any jurisdictional language and dealt only with consent to service of process, not consent to jurisdiction. 146 P.3d at 171. The court disagreed, stating that:

Read together, these statutory provisions make clear that K.S.A.2005 Supp. 17-7301(b)(7) requires, as plaintiff suggests, a consent to personal jurisdiction. Thus, a foreign corporation applying for authority to do business in Kansas under K.S.A.2005 Supp. 17-7301(b)(7) expressly consents to personal jurisdiction and K.S.A.2005 Supp. 17-7301(b)(7) provides a statutory basis for jurisdiction.

*Id.* The court concluded that “Kansas does not merely *infer* consent to jurisdiction from a foreign corporation’s registration to do business and appointment of a resident agent; Kansas requires *express* written consent to jurisdiction.” *Id.* at 177. It is certainly possible to read the Kansas statute as the Kansas Supreme Court did; but it is also possible to read it as referring to consent to service of process, consent to specific jurisdiction, or consent to jurisdiction where jurisdiction is constitutionally permissible. The Kansas statute at issue in *Merriman* has since been repealed and replaced by section 17-7931(a)(7). This statute also does not explicitly state the jurisdictional consequences associated with registering to do business in Kansas.

<sup>122</sup> Many courts engage in detailed statutory interpretation to ascertain the effect of registering to do business under a state statute. For instance, most statutes contain a provision to the effect

Courts generally fall within three broad camps<sup>124</sup> in interpreting the jurisdictional reach of corporate registration statutes: (i) corporate registration confers general jurisdiction over a defendant; (ii) corporate registration confers specific jurisdiction over a defendant in respect of its in-state business activities; or (iii) corporate registration is a procedural mechanism for ensuring service of process but has no independent jurisdictional effect. For those courts that subscribe to the view that corporate registration amounts to general jurisdiction,<sup>125</sup> the reasoning usually focuses on the issue of consent—that by registering to do business pursuant to the state registration statute, a corporation has expressly consented to jurisdiction.<sup>126</sup> Since consent is an independent basis for jurisdiction, separate and apart from minimum contacts, no additional due process analysis is necessary.<sup>127</sup> The corporation's consent, in itself, satisfies due process.<sup>128</sup>

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that a foreign corporation that has been granted a certificate of authority issued by the state “is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.” See, e.g., FLA. STAT. ANN. § 607.1505(2) (West 2007); N.M. STAT. ANN. § 53-17-2 (LexisNexis 2004); N.C. GEN. STAT. § 55-15-05(b) (2013). Some courts read this sort of provision as meaning that a foreign corporation is subject to general jurisdiction in a state because general jurisdiction is a “restriction[,], penal[t], or] liabilit[y]” placed on a domestic corporation. *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 272 (N.M. Ct. App. 1993) (internal quotation marks omitted). In *Werner*, for example, the court stated that “Section 53-17-2 defines the power of a registered foreign corporation as the same but no greater than that of a domestic corporation. Thus, the legislative intent expressed in Section 53-17-2 appears to have been to equalize foreign and domestic corporations operating within New Mexico.” *Id.*; see also *Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991).

<sup>123</sup> See *Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at \*4 (D. Vt. July 24, 2009) (“After all, the extent of Vermont’s reach over nonresident defendants is controlled by its legislature, with only constitutional ceilings, and not floors, by which to abide.”).

<sup>124</sup> Note that many courts attempt to avoid the issue altogether by finding an alternative basis for jurisdiction. See, e.g., *Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F. Supp. 2d 689, 693–94 (E.D. Va. 2000) (dodging the jurisdiction by corporate registration issue and finding specific jurisdiction over the defendant).

<sup>125</sup> See, e.g., *Bane*, 925 F.2d at 640–41; *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199–2000 (8th Cir. 1990); *Bohreer v. Erie Ins. Exch.*, 165 P.3d 186, 191–94 (Ariz. Ct. App. 2007); *Sternberg v. O’Neil*, 550 A.2d 1105, 1109–16 (Del. 1988); *Confederation of Can. Life Ins. Co. v. Vega y Arminan*, 144 So. 2d 805, 808–10 (Fla. 1962); *Allstate Ins. Co. v. Klein*, 422 S.E.2d 863, 864–65 (Ga. 1992); *Merriman*, 146 P.3d at 170–77; *Rykoff-Sexton*, 469 N.W.2d at 89–91; *Read v. Sonat Offshore Drilling, Inc.*, 515 So. 2d 1229, 1230–31 (Miss. 1987); *Allied-Signal Inc. v. Purex Indus., Inc.*, 576 A.2d 942, 943–45 (N.J. Super. Ct. App. Div. 1990); *Werner*, 861 P.2d at 272–74; *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983); *Simmers v. Am. Cyanamid Corp.*, 576 A.2d 376, 382 (Pa. Super. Ct. 1990); *Green Mountain Coll. v. Levine*, 139 A.2d 822, 824–25 (Vt. 1958).

<sup>126</sup> See *Bohreer*, 165 P.3d at 192 (“[B]y agreeing to appoint an agent for service of process to do business in a state, a foreign corporation expressly consents to general personal jurisdiction without any need for minimum contacts analysis.”).

<sup>127</sup> See *id.* at 194 (“To read in a minimum contacts/due process requirement would essentially nullify consent to jurisdiction when the out-of-state party has no such contacts. This would fly in the face of *Pennsylvania Fire Ins. Co.* and its progeny and conflate the concepts of express consent and presence or implied consent by minimum contacts.”); *Sternberg*, 550 A.2d at 1113 (“If a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of ‘minimum contacts’ to find implied consent is

Other courts hold that a corporation's act of registering to do business amounts to its consent to jurisdiction for causes of action arising from the business that it actually conducts in the state.<sup>129</sup> In effect, these courts view the act of registration as a form of consent to *specific* (rather than general) jurisdiction.<sup>130</sup> Under this view, the consent would essentially be co-extensive with the minimum contacts standard for jurisdiction.

Finally, some courts do not ascribe any particular substantive jurisdictional significance to the act of registering to do business or appointing an agent for service of process.<sup>131</sup> Under this view, the appointment of an agent is simply a way to effectuate service of process and thereby perfect jurisdiction.<sup>132</sup> The appointment of an agent does not in any way obviate the need to independently establish a constitutionally acceptable basis for jurisdiction.<sup>133</sup>

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unnecessary.”).

<sup>128</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 43 & cmt. b. (1971) (“A state has power to exercise judicial jurisdiction over a foreign corporation which has consented to the exercise of such jurisdiction. . . . *b. Extent of jurisdiction.* By its consent a foreign corporation subjects itself to the judicial jurisdiction of a state to the same extent as would an individual (see § 32). This consent is effective even in the absence of any other basis for the exercise of jurisdiction over the corporation. . . . Most commonly, however, consent by a corporation takes the form of the appointment of a statutory agent to receive service of process in compliance with the statutory requirements of a state in which the corporation desires to do business. This particular form of consent is dealt with in the following section (§ 44).”).

<sup>129</sup> See, e.g., *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 696–99 (1st Cir. 1984); *Grey Line Tours v. Reynolds Elec. & Eng'g Co.*, 238 Cal. Rptr. 419, 421–22 (Cal. Ct. App. 1987); *Staley-Wynne Oil Corp. v. Loring Oil Co.*, 162 So. 756, 757–59 (La. 1935); *Springle v. Cottrell Eng'g Corp.*, 391 A.2d 456, 459–69 (Md. Ct. Spec. App. 1978); *Mittelstadt v. Rouzer*, 328 N.W.2d 467, 469–70 (Neb. 1982); *Osage Oil & Ref. Co. v. Interstate Pipe Co.*, 253 P. 66, 69 (Okla. 1926); *Eure v. Morgan Jones & Co.*, 79 S.E.2d 862, 863–68 (Va. 1954).

<sup>130</sup> See *Staley-Wynne*, 162 So. at 757 (“As a condition precedent to their entering into business in this state, foreign corporations are not required to consent, and by complying with those conditions they do not consent, that the courts of this state shall have jurisdiction over them in all cases, but only in those cases where the cause of action grows out of or is connected with business done by them in this state.”).

<sup>131</sup> See, e.g., *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 180–84 (5th Cir. 1992); *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1277–78 (D. Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983); *Freeman v. Second Jud. Dist. Court ex rel. Cnty. of Washoe*, 1 P.3d 963, 965–68 (Nev. 2000); *Byham v. Nat'l Cibo House Corp.*, 143 S.E.2d 225, 231 (N.C. 1965); *Wash. Equip. Mfg. Co., Inc. v. Concrete Placing Co., Inc.*, 931 P.2d 170, 172–73 (Wash. Ct. App. 1997).

<sup>132</sup> See *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 888–89 (S.D. Tex. 1993) (“The designation of an agent simply gives the company more efficient notice than service through the secretary of state, when service is otherwise proper. In complying with the Texas registration statute, USA Petroleum consented to personal jurisdiction in Texas only if the jurisdiction were constitutional.”). See also D.C. CODE § 29-104.14 (2011) (“The designation or maintenance in the District of a registered agent shall not by itself create the basis for personal jurisdiction over the represented entity in the District.”).

<sup>133</sup> See *Wenche Siemer*, 966 F.2d at 183 (“In short, a foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible. Due process, as this court often has said, is a flexible concept that varies with the particular situation.”).

Not only are courts divided on *whether* registration confers general jurisdiction over a corporation, but they are also divided on *why* registration confers general jurisdiction over a corporation.<sup>134</sup> The overwhelming majority of courts that view registration as conferring general jurisdiction justify their conclusion on the basis of consent—i.e., by taking steps to register under a state statute, the corporation has manifested its express consent to general jurisdiction. Some courts, however, justify the assertion of general jurisdiction on the basis of either “presence” or “minimum contacts.”<sup>135</sup> Moreover, it is important to note that these three rationales—consent, presence, and minimum contacts—are often advanced in concert with one another to support the exercise of general jurisdiction over a corporation.

Below, I examine each of these rationales separately, with the caveat that to examine any one in isolation is admittedly arbitrary, but necessary to making some sense of the confusing and contradictory case law. I start with presence and minimum contacts and argue that neither provides a compelling rationale for the assertion of general jurisdiction over a corporation based on its registration to do business and appointment of an agent for service of process. I then turn to the most plausible rationale for general jurisdiction based on registration: consent. Although courts routinely state that registration amounts to express consent to jurisdiction as though it were an indisputable truism, I argue that registration does not actually amount to consent. Accordingly, the assertion of general jurisdiction over corporations based on their registration to do business and appointment of an agent for service of process offends the Due Process Clause and cannot be sustained as a jurisdictional practice.

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<sup>134</sup> The analysis is even more complicated because federal district and circuit courts sometimes follow state law and sometimes follow federal law. For instance, say that California state courts subscribed to the view that registration amounted to general jurisdiction. California federal courts could follow state law or could instead adopt a different approach under federal law or Ninth Circuit law (that registration does not amount to general jurisdiction). Thus, state and federal cases, even when considering the same underlying statute, are not necessarily consistent in their interpretation. *Compare* *Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 393–96 (D. Conn. 2014) (rejecting registering to do business as a basis of personal jurisdiction), *and* *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 354–57 (D. Conn. 2011) (same), *with* *Talenti v. Morgan & Bro. Manhattan Storage Co., Inc.*, 968 A.2d 933, 940–41 (Conn. App. Ct. 2009) (holding that by registering to do business in Connecticut a defendant voluntarily consents to personal jurisdiction and a due process analysis is unnecessary), *with* *Wallenta v. Avis Rent A Car Sys., Inc.*, 522 A.2d 820, 824 (Conn. App. Ct. 1987) (continuing to engage in a due process analysis after acknowledging that the defendant consented to suit in the forum by registering to do business).

<sup>135</sup> There are also cases that instead focus purely on statutory interpretation. *See, e.g.*, *Allstate Ins. Co. v. Klein*, 422 S.E.2d 863, 864–65 (Ga. 1992); *Wash. Equip. Mfg.*, 931 P.2d at 172–73.

III. EXAMINING THE RATIONALES IN SUPPORT OF GENERAL JURISDICTION  
BASED ON REGISTRATION

A. *Presence*

A very small minority of courts find that registration statutes confer general jurisdiction over corporations based on a “presence” theory of jurisdiction. Under this view, a corporation that registers to do business in a state and appoints an agent for service of process is functionally “present” in that state and thus, once properly served, is subject to general jurisdiction there.<sup>136</sup> This was the reasoning used by the Superior Court of New Jersey in *Allied-Signal Inc. v. Purex Industries, Inc.*<sup>137</sup> The *Allied-Signal* court held that because service on the defendant’s registered agent conferred general jurisdiction, it did not need to explore whether the defendant had other minimum contacts with New Jersey.<sup>138</sup> The court in *Allied-Signal* cited extensively to the Supreme Court’s decision in *Burnham v. Superior Court of California*.<sup>139</sup> *Burnham* raised the issue of whether service on the defendant while he was temporarily in California visiting his children was sufficient to establish jurisdiction over him even in the absence of minimum contacts with the state.<sup>140</sup> In that case, the Supreme Court held that service of process on an individual, even if only temporarily present in the forum, conferred general personal jurisdiction over him.<sup>141</sup> Although the defendant corporation in *Allied-Signal* had argued that *Burnham* did not apply, the *Allied-Signal* court disagreed, noting that “[a]lthough

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<sup>136</sup> It is worth noting that there is another way that the concept of “presence” has been used in this context. Where a corporation was doing business in a state with a degree of regularity and continuity, it was said to be sufficiently “present” to justify the assertion of general jurisdiction over it. See *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (“The standard for establishing general jurisdiction is ‘fairly high,’ and requires that the defendant’s contacts be of the sort that approximate physical presence.” (citation omitted) (quoting *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986))). This form of presence-based jurisdiction did not rely on the act of registration as a jurisdictional hook; rather, it relied on the acts of the corporation in doing business to supply the jurisdictional hook on which general jurisdiction rested. Thus, even in the absence of registration to do business, corporations could be held subject to general jurisdiction in a forum if they were doing business there (or, otherwise stated, were “present” there). This form of presence-based jurisdiction was also sometimes justified on the basis of implied consent: where a corporation’s activities rose to the level of doing business in the forum, then it impliedly consented to jurisdiction in respect of those in-state activities. See also *supra* note 40.

<sup>137</sup> 576 A.2d 942 (N.J. Super. Ct. App. Div. 1990).

<sup>138</sup> *Id.* at 945.

<sup>139</sup> See *id.* at 944–45; see also *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

<sup>140</sup> 495 U.S. at 607.

<sup>141</sup> *Id.* at 628.

[*Burnham*] concerns jurisdiction over an individual defendant . . . the principle applies to defendant corporation[s].”<sup>142</sup>

Another case adopting this presence-based reasoning was *Read v. Sonat Offshore Drilling, Inc.*<sup>143</sup> There, the plaintiff driver brought a personal injury action in Mississippi against a foreign corporation that was the employer of the other driver.<sup>144</sup> The defendant corporation resisted jurisdiction, arguing that it was not doing business in the state of Mississippi such that personal jurisdiction could be constitutionally asserted over it.<sup>145</sup> The Supreme Court of Mississippi disagreed, stating that the defendant was confusing corporate registration with the requirements of obtaining personal jurisdiction under Mississippi’s long-arm statute, where minimum contacts are required.<sup>146</sup> The court in *Read* adopted very similar reasoning to the court in *Allied-Signal*, analogizing personal service on an appointed agent to personal service on an individual.<sup>147</sup> In this respect, the *Read* court stated:

A corporation qualifying to do business in Mississippi, under the appropriate statutes, for all purposes, becomes like an individual as far as suit is concerned. The corporation qualifies to do business, it designates a registered agent whereby that corporation is easily found and served with process . . .

In the event any plaintiff has a claim against an individual in a state outside Mississippi, and that individual, passing through Mississippi, is served on his way in and out, the Mississippi court has personal jurisdiction of his person. Likewise, if a foreign corporation is qualified to do business in the State of Mississippi, even though it may not be doing any business, its agent for process may be served, and the courts have personal jurisdiction of that corporation. Actually doing business in the State of Mississippi has nothing to do with personal jurisdiction such as is involved in this case.<sup>148</sup>

*Allied-Signal* and *Read* represent the minority view on why registration to do business and the appointment of an agent for service of process confer general jurisdiction on a state. In short, these cases, and others like them, hold that general jurisdiction over a corporation is justified on the basis that an agent of the corporation was validly served while “present” in the state.<sup>149</sup>

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<sup>142</sup> *Allied-Signal*, 576 A.2d at 944.

<sup>143</sup> 515 So. 2d 1229 (Miss. 1987). Note that this case was decided before *Burnham*.

<sup>144</sup> *Id.* at 1229–30.

<sup>145</sup> *Id.* at 1230.

<sup>146</sup> *Id.* at 1230–31.

<sup>147</sup> *See id.*

<sup>148</sup> *Id.*

<sup>149</sup> Most courts have explicitly rejected the idea that service on a corporate agent is sufficient to ground general jurisdiction. *See, e.g.,* *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067 (9th Cir. 2014) (“Relying on *Burnham*, plaintiffs argue that in-state service of process on a corporate officer

Commentators are generally in agreement that this presence-based rationale for general jurisdiction over corporations is not justifiable.<sup>150</sup> Professor Andrews, for instance, argues that the use of a theory of tag jurisdiction over corporations “almost certainly is not a proper view.”<sup>151</sup> *Burnham* held that a natural person is subject to general jurisdiction if served with process while in the state.<sup>152</sup> Justice Scalia, who wrote the plurality opinion in *Burnham*, justified the rule based on its longstanding history.<sup>153</sup> None of the four justices who wrote opinions in that case, however, decided anything about personal service as applied to corporations.<sup>154</sup> Indeed, Justice Scalia specifically noted that corporations “have never fitted comfortably in a jurisdictional regime based primarily upon de facto power over the defendant’s person.”<sup>155</sup>

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who is acting on behalf of the corporation at the time of service creates tag jurisdiction over the corporation. That is, they contend that their service on ATR’s vice president of marketing while he was in California gave the district court general personal jurisdiction over ATR. We disagree.”); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182 (5th Cir. 1992) (rejecting the argument that *Burnham* establishes that service on an in-state agent “automatically subjects the corporation to jurisdiction” (internal quotation marks omitted)); *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 352 (D. Conn. 2011) (“Where there was no majority opinion in *Burnham*, no complete consensus on the rationale behind upholding personal jurisdiction, and no foreign corporation involved, it would be remiss of this Court to rely on *Burnham* to cursorily discard ‘minimum contacts’ due process analysis to evaluate personal jurisdiction over foreign corporations.”); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 804 P.2d 627, 631 (Wash. Ct. App. 1991) (distinguishing *Burnham* and holding that in-state service on a corporate officer “cannot alone confer general jurisdiction”).

<sup>150</sup> *But see* Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 601 (2012) (“In describing the places where corporations are ‘at home’ as analogous to an individual’s domicile, the Court leaves open the possibility that traditional methods of service on corporate agents may also support general jurisdiction analogous to service on an individual.” (footnote omitted)).

<sup>151</sup> Andrews, *supra* note 7, at 1072. *Accord* Riou, *supra* note 18, at 813–14 (“Indeed, the notion of a state asserting physical power over an artificial person found or present within its jurisdiction fails as a satisfactory theory of general jurisdiction over foreign corporations.”).

<sup>152</sup> 495 U.S. 604, 619 (1990).

<sup>153</sup> *Id.* at 611–16. Justice White concurred in the decision on the basis that presence-based jurisdiction was “so widely accepted throughout this country” that it could not be regarded as violative of due process in every case. *Id.* at 628. Justices Brennan, Marshall, and Blackmun supported transient jurisdiction based on predictability and reciprocity. *See id.* at 637–38. Justice Brennan stated that a defendant “avail[s] himself” of the privileges and protections of the state when visiting the forum, thus invoking the burdens of liability. *Id.* Finally, Justice Stevens concurred in order to show support for all of the stated rationales. *Id.* at 640.

<sup>154</sup> *See generally id.*; *see also* *Martinez*, 764 F.3d at 1067–68 (“None of the various opinions in *Burnham* discussed tag jurisdiction with respect to artificial persons. Physical presence is a simple concept for natural persons, who are present in a single, ascertainable place. This is not so for corporations, which can only act through their agents and can do so in many places simultaneously. Natural persons can be present in a state both physically and through their contacts with the state. Corporations, on the other hand, can be present only through their contacts . . . While a corporation may in some abstract sense be ‘present’ wherever its officers do business, such presence is not physical in the way contemplated by *Burnham*.” (citations omitted)).

<sup>155</sup> 495 U.S. at 610 n.1 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted). Justice Scalia made this statement in reference to whether the



Moreover, an analysis of case law does not bear out the proposition that serving an agent of the corporation confers general jurisdiction on the basis of the agent's (and therefore the corporation's) presence in the state. As Professor Andrews points out, in *International Shoe*, although the defendant's salesman was served in the forum, the Court premised jurisdiction on minimum contacts, not in-state service.<sup>156</sup> Also, in *Perkins*, the defendant's president was served in Ohio while acting in his corporate capacity, but the Court nonetheless based its assertion of general jurisdiction on the corporation's continuous and systematic contacts, not on in-state service.<sup>157</sup> These cases implicitly suggest that service on a corporate agent is not sufficient to confer personal jurisdiction over a corporation in the same way that service on an individual confers personal jurisdiction over an individual. Otherwise, the Supreme Court would not have had to resort to "minimum contacts" (*International Shoe*) or "continuous and systematic general business contacts" (*Perkins*) in order to ground jurisdiction.

#### B. *Minimum Contacts*

A few courts have rationalized general jurisdiction based on registration to do business in another way, positing that the act of registration itself provides sufficient minimum contacts within the meaning of *International Shoe* to ground personal jurisdiction. In other words, a corporation's deliberate actions in registering to do business and appointing an agent for service of process constitute *per se* minimum contacts with the state to justify the assertion of jurisdiction over the corporation.<sup>158</sup> For instance, the court in *Price v. Wheeling*

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continuous and systematic inquiry applied only to corporations—or extended as well to natural persons (an issue he did not decide). *See id.*

<sup>156</sup> Andrews, *supra* note 7, at 1072. *See generally* *Int'l Shoe*, 326 U.S. 310.

<sup>157</sup> *See* Andrews, *supra* note 7, at 1072. *See generally* *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). *See also* *Martinez*, 764 F.3d at 1068–69 (“In *Perkins v. Benguet Consolidated Mining Co.*, the Court held that Ohio could exercise general jurisdiction over a Philippines company that, during World War II, directed the bulk of its operations from Ohio. The plaintiffs personally served the company's president in Ohio. If tag jurisdiction had been available, that alone would have resolved the case. But the Court upheld jurisdiction only after deciding whether ‘the business done in Ohio . . . was sufficiently substantial’ to allow jurisdiction over claims unrelated to the company's Ohio contacts. Cases decided after *Burnham* have consistently understood *Perkins* as relying on the extent of the company's contacts with Ohio, not on the in-state service on the company's president.” (alteration in original) (citations omitted) (quoting *Perkins*, 342 U.S. at 447)).

<sup>158</sup> *See, e.g.,* *Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F. Supp. 2d 689, 693 (E.D. Va. 2000) (“Other courts, however, have exercised general jurisdiction on the basis that . . . registration to do business is *per se* sufficient evidence upon which to conclude that the corporation has the necessary ‘minimum contacts’ to satisfy due process.” (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 640–41 (3d Cir.1991); *Cont'l Cas. Co. v. Am. Home Assurance Co.*, 61 F. Supp. 2d 128, 129–30 (D. Del. 1999))).

*Dollar Savings & Trust Co.* stated that “having a license to do business in Ohio is, *per se*, sufficient evidence upon which to conclude that appellee had the necessary minimum contacts with Ohio.”<sup>159</sup> Similarly, in *Junction Bit & Tool Co. v. Institutional Mortgage Co.*, a Florida court concluded that “minimum contacts would seem patently established where . . . the foreign corporation has actually qualified under Florida law to transact business in this state and has appointed a resident agent for service of process as required by [statute].”<sup>160</sup> In the view of these courts, registration constitutes *per se* minimum contacts, and consequently, there is no due process issue involved in asserting jurisdiction.<sup>161</sup>

“Minimum contacts” is not a plausible justification for the assertion of general jurisdiction where the only contact between the state and the corporation is its registration pursuant to state law. There are several related reasons why registration does not satisfy the minimum contacts test so as to justify the assertion of jurisdiction. First, deeming something (in this case, registration) to be minimum contacts does not actually make it so. This is the same sketchy logic that has prevailed in the context of consent as a basis for registration-based jurisdiction.<sup>162</sup>

Second, minimum contacts grounds *specific* jurisdiction, such that the underlying cause of action arises out of, or relates to, the minimum contacts between the defendant and the forum.<sup>163</sup> In *International Shoe*

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<sup>159</sup> 460 N.E.2d 264, 269 (Ohio Ct. App. 1983).

<sup>160</sup> 240 So. 2d 879, 882 (Fla. Dist. Ct. App. 1970).

<sup>161</sup> Even those courts that employ a consent theory (rather than a minimum contacts theory) to justify general jurisdiction based on registration use the fact of registration as a critical, if not determinative, factor in their alternative minimum contact analysis. For instance, in *Kropschot Financial Services, Inc. v. Balboa Capital Corp.*, No. 11 Civ. 8609 SAS, 2012 WL 1870697, at \*4 (S.D.N.Y. May 21, 2012), the court for the Southern District of New York concluded that, pursuant to New York law, there was general jurisdiction based solely on the fact that the corporation consented to jurisdiction when it registered to do business in New York. In case it was wrong on this point, the court looked to whether the corporation had sufficient minimum contacts with New York to satisfy due process. *Id.* In conducting this inquiry, the court focused almost exclusively on the fact of registration. *See id.* It stated:

Even if due process considerations come into play, they are satisfied here. The burden on [the defendant] is minimal considering its decision to maintain an active authorization to do business in the state and its entry into a voluntary agreement with [a third party], a New York-based company. New York also has an interest in regulating corporations authorized to do business within its borders. [The defendant] is subject to personal jurisdiction in this court.

*Id.* (footnote omitted). The court in *Kropschot* did not engage in a traditional minimum contacts analysis—i.e., looking at the defendant’s contacts with the forum and determining whether the cause of action was related to, or arose from, those contacts. Rather, the fact of registration itself was the determinative “contact” that the *Kropschot* court believed was sufficient to find the necessary minimum contacts between New York and the defendant.

<sup>162</sup> *See infra* Part III.C.

<sup>163</sup> *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

itself, the Court listed the contacts between the state of Washington and the defendant and expressly noted that “[t]he obligation . . . sued upon arose out of those very activities.”<sup>164</sup> To say that registration and appointment of an agent for service of process constitutes per se minimum contacts confounds general and specific jurisdiction. Many courts that rely on minimum contacts as a rationale for asserting jurisdiction over a corporate defendant hold that minimum contacts grounds *general jurisdiction*. Yet, these courts rely on a test (minimum contacts) that applies only to *specific jurisdiction*.<sup>165</sup> Thus, by holding that registration and the appointment of an agent for service of process constitute minimum contacts—which thereby confers general jurisdiction—courts have completely misunderstood the scope of the minimum contacts test.<sup>166</sup>

In addition, if registration were to establish minimum contacts, then functionally a court is really resting its analysis on consent, not contacts. In the words of one author:

[I]t is artificial for a court to stop analyzing minimum contacts once it has determined that a foreign corporation has complied with a registration statute. Analyzing minimum contacts implies that the court has rejected the theory that registration establishes consent to jurisdiction; if the court then bases jurisdiction on the same lone factor that would have justified it under the consent theory, the court undermines the comprehensive scope of the [minimum] contacts analysis.<sup>167</sup>

In short, “basing general jurisdiction on the contact of registration would merely constitute the dressing of consent in contact’s clothing.”<sup>168</sup>

### C. Consent

Most courts that view registration as conferring general jurisdiction over a corporation do so under the theory of consent.<sup>169</sup> The theory is straightforward: by taking voluntary and proactive steps to

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<sup>164</sup> *Id.* at 320.

<sup>165</sup> See also Riou, *supra* note 18, at 783 (“In effect, this sophistic theory would assert general jurisdiction under the guise of specific jurisdiction.”).

<sup>166</sup> Should a court wish to use contacts as a basis for general jurisdiction, it would have to do so under a continuous and systematic general business contacts test (now, with the “at home” qualifier). Registration and the appointment of an agent for service of process, by itself, does not come close to satisfying this test.

<sup>167</sup> Kipp, *supra* note 18, at 35.

<sup>168</sup> *Id.*

<sup>169</sup> See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1362 (2005) (“Most courts that rely on corporate registration to confer [general] jurisdiction do so on a [second theory of] consent [rather than minimum contacts].”).

register and appoint an agent for service of process under the relevant state statute, a corporation has expressly consented to the state's authority over it.<sup>170</sup> This consent extends to the state being able to adjudicate claims that are unrelated to the corporation's presence or activities in the state. Since consent is an independent basis for jurisdiction, no due process/minimum contacts analysis is required. In other words, consent operates as a corporation's voluntary waiver of any protections that the Due Process Clause might otherwise afford.<sup>171</sup>

The cases are remarkably uniform in their statement of the law and its application to registration statutes. In the leading case of *Sternberg v. O'Neil*, the Supreme Court of Delaware stated, "[i]f a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of 'minimum contacts' to find implied consent is unnecessary."<sup>172</sup> In *Knowlton v. Allied Van Lines, Inc.*, the Eighth Circuit Court of Appeals held that "[a] defendant may voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it. One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State."<sup>173</sup> In *Rockefeller University v. Ligand Pharmaceuticals Inc.*, the Southern District of New York concluded that:

[The defendant's] unrevoked authorization to do business and its designation of a registered agent for service of process amount to consent to personal jurisdiction in New York. Because jurisdiction is premised upon consent, it is doubtful that the minimum contacts test under the due process clause presents an impediment to the exercise of jurisdiction.<sup>174</sup>

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<sup>170</sup> See Kipp, *supra* note 18, at 5 ("[The *Pennsylvania Fire* decision] reflected the prevailing legal fiction of the time: by designating an agent, a foreign corporation expressly consented to the state's exercise of jurisdiction over it for any cause of action.").

<sup>171</sup> See Andrews, *supra* note 7, at 1072–73 ("A consent theory changes the constitutional inquiry. First, it shifts any due process analysis from minimum contacts to the validity of the consent. Under *Bauxites*, consent is a proper basis for jurisdiction, independent of *International Shoe* minimum contacts analysis. This raises the question whether registration is a valid form of consent.").

<sup>172</sup> 550 A.2d 1105, 1113 (Del. 1988). Note that a federal district court in Delaware recently declared that *Sternberg* is no longer good law. See *AstraZeneca AB v. Mylan Pharm., Inc.*, Civil Action No. 14-696-GMS, 2014 WL 5778016, at \*5 (D. Del. Nov. 5, 2014) ("In light of the holding in *Daimler*, the court finds that . . . the Delaware Supreme Court's decision in *Sternberg* can no longer be said to comport with federal due process."). *Contra* *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, Civil Action No. 14-935-LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015) (affirming the constitutionality and continued applicability of the *Sternberg* precedent); *Forest Labs., Inc. v. Amneal Pharm. LLC*, Civil Action No. 14-508-LPS, 2015 WL 880599, at \*12–15 (D. Del. Feb. 26, 2015) (report and recommendation) (same). For further discussion, see *infra* note 245.

<sup>173</sup> 900 F.2d 1196, 1199 (8th Cir. 1990) (citation omitted).

<sup>174</sup> 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (stating that "[w]here a forum seeks to assert specific jurisdiction over an

In short, the logic of these cases amounts to the following: registration *equals* consent *equals* personal jurisdiction.<sup>175</sup>

It is black letter law that one can consent to personal jurisdiction and thereby waive any protection afforded by the Due Process Clause.<sup>176</sup> In the words of the Supreme Court, “the requirement that a court have personal jurisdiction flows from the Due Process Clause and protects an individual liberty interest. Because it protects an individual interest, it may be intentionally waived.”<sup>177</sup> Thus, the “consent equals personal jurisdiction” part of the equation mentioned above clearly holds true. But what about the “registration equals consent” part of the equation? Does registration actually equal consent?<sup>178</sup>

Courts that find general jurisdiction based on registration uncritically assume that a corporation’s registration under a state statute means that the corporation has expressly consented to the court’s jurisdiction.<sup>179</sup> But these courts rely on little more than *ipse dixit*. Calling registration consent does not *actually make* it consent. Ultimately, the question that must be answered is whether registration under a state statute amounts to consent, as that term is understood in personal jurisdiction jurisprudence, such that the assertion of general jurisdiction is constitutionally permissible.<sup>180</sup> I argue that corporate

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out-of-state defendant *who has not consented* to suit there,” due process is satisfied if the defendant has minimum contacts with the forum (emphasis added)).

<sup>175</sup> Some commentators have equally failed to query whether registration amounts to consent. For instance, Taylor argues that “[i]f registration is considered an established species of consent then it might attract the same kind of deference afforded actual physical presence. As a traditional ground of jurisdiction, it might, like in-state service, be insulated from any independent due process analysis.” Taylor, *supra* note 16, at 1188. However, he fails to explore the issue he poses: *is* registration “a species of consent”?

<sup>176</sup> See, e.g., *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982).

<sup>177</sup> *Id.* at 694.

<sup>178</sup> The court in *Viko v. World Vision, Inc.* identified this as the critical issue:

Since *Insurance Corp. of Ireland*, there is little doubt that due process permits defendants to consent to jurisdiction. But it is a separate question whether due process will allow the inference of jurisdictional consent from compliance with a state registration statute, especially one, like Vermont’s, from which the inference is less than obvious.

No. 2:08-CV-221, 2009 WL 2230919, at \*10 n.17 (D. Vt. July 24, 2009) (citation omitted).

<sup>179</sup> See, e.g., *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 888 (S.D. Tex. 1993) (“Two cases announce, with little reason or authority, that a corporation’s registration to do business is an automatic consent to personal jurisdiction in Texas courts.” (citing *Acacia Pipeline Corp. v. Champlin Exploration, Inc.*, 769 S.W.2d 719, 720 (Tex. Ct. App. 1989); *Goldman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 598 (Tex. Civ. App. 1975))); see also *Lake Road Trust, Ltd. v. ABB, Inc.*, No. HHDX04CV106016502S, 2011 WL 1734458, at \*6 (Conn. Super. Ct. Apr. 11, 2011) (“It is undisputed that Nynas USA registered to do business in Connecticut in 2010 and appointed an agent for service in Connecticut. Accordingly, by operation of law, it has consented to the exercise of jurisdiction over it by Connecticut’s courts.”).

<sup>180</sup> See Rhodes, *supra* note 5, at 443 (“The potential constitutional difficulty is employing a statutory consent scheme to establish amenability for claims wholly unrelated to the defendant’s

registration and the appointment of an agent for service of process does not amount to consent, either express or implied, to general jurisdiction. I do so by examining, first, the differences between traditional forms of consent (forum selection clauses and the doctrine of submission) and registration, concluding that the latter does not have any of the same hallmarks of the former. Second, I argue that registration and the appointment of an agent for service of process are coercive and accordingly cannot amount to consent, which by definition is a voluntary act.

### 1. Traditional Forms of Consent-Based Jurisdiction Versus Registration to Do Business

Leaving aside registration statutes, there are two main ways that a defendant can consent to personal jurisdiction.<sup>181</sup> The most explicit form of consent comes in the form of a forum selection clause<sup>182</sup> in a contract. A party will expressly agree *ex ante* that any disputes related to or arising from a specific relationship will be adjudicated in a certain court.<sup>183</sup> The clause may be mandatory (requiring the parties to submit their disputes to a named court and no other court) or permissive (allowing the parties to submit their disputes to a named court, but not precluding parties from bringing the action in another court).<sup>184</sup> A party may agree to a forum selection clause in favor of any forum, not just a forum to which it has a pre-existing connection.<sup>185</sup> Where a party has agreed via a forum selection clause that disputes may be submitted to a

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forum activities when the defendant is not conducting business in such a manner as to subject it to general jurisdiction.”).

<sup>181</sup> In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. at 703–04, the Supreme Court actually identified six different ways that a defendant could consent to personal jurisdiction. Most of these, however, are simply slight variations of the two forms of consent-based jurisdiction discussed herein: forum selection clauses and submission. *See id.*

<sup>182</sup> A forum selection clause is also sometimes referred to as a jurisdiction clause. *See, e.g.*, Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51, 51 n.4 (1992) (“Forum-selection clauses are also referred to as choice-of-forum clauses, forum clauses, jurisdiction agreements, etc.”).

<sup>183</sup> *See Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (“[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.”). A defendant can also stipulate to personal jurisdiction after a dispute arises. *See, e.g.*, *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 495–96 (1956).

<sup>184</sup> *See* I VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 7:13 (2d ed. 2012) (“Stated simply, a mandatory clause *requires* venue to be in one or more designated locations. A permissive clause *permits* jurisdiction in the designated locations but allows venue elsewhere. . . . On the whole, clauses will be interpreted as mandatory the greater the extent to which they refer to venue instead of just jurisdiction, ‘shall’ instead of ‘is,’ and contains language specifically negating alternatives.” (emphasis added)).

<sup>185</sup> *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13, 17 (1972) (acknowledging the neutrality of the selected forum).

certain court, consent provides the underlying basis of jurisdiction, and no further due process analysis is necessary.<sup>186</sup>

The second form of consent-based jurisdiction is commonly referred to as submission. This is a form of implied consent where a defendant, by its actions, signals that it has consented to the jurisdiction of the court.<sup>187</sup> Broadly speaking, submission involves a defendant appearing in court and in some way arguing the merits of the case. Every forum has different rules on what actions constitute submitting to a court's jurisdiction.<sup>188</sup> For instance, some states provide that a party may file a special appearance and argue preliminary or jurisdictional matters without being held to have submitted to a court's jurisdiction.<sup>189</sup> The theory behind submission as a form of consent-based jurisdiction is that a defendant cannot participate in proceedings, an action that presupposes the court's legitimate exercise of authority, while simultaneously maintaining that the court has no authority over it.<sup>190</sup>

The consent given by a defendant through a forum selection clause or through submission is fundamentally different than the "consent" given by a defendant that registers to do business in a state and appoints an agent for service of process.<sup>191</sup> Indeed, in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, the case most often cited for the proposition that consent is a permissible basis of personal jurisdiction, the Supreme Court does not reference registration to do business as a form of consent.<sup>192</sup> After noting that personal jurisdiction represents an individual right that can be waived, the Court observed

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<sup>186</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process." (citations omitted) (quoting *Bremen*, 407 U.S. at 15)).

<sup>187</sup> See 35A C.J.S. *Federal Civil Procedure* § 513 (2014) ("The court will obtain, through implied consent, personal jurisdiction over a defendant if the actions of the defendant during litigation amount to legal submission to the jurisdiction of the court, whether voluntary or not."); see also *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("[A]n individual may submit to the jurisdiction of the court by appearance.").

<sup>188</sup> See *Chi. Life Ins. Co. v. Cherry*, 244 U.S. 25, 29–30 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which states may differ.").

<sup>189</sup> See, e.g., 735 ILL. COMP. STAT. 5/2-301 (LexisNexis 2009); TEX. R. CIV. P. 120a.

<sup>190</sup> A related form of consent-based jurisdiction stems from a defendant's failure to follow certain procedural rules regarding pleading requirements and personal jurisdiction. In *Insurance Corp. of Ireland*, the Supreme Court stated that, "unlike subject-matter jurisdiction, which even an appellate court may review *sua sponte*, under Rule 12(h), Federal Rules of Civil Procedure, '[a] defense of lack of jurisdiction over the person . . . is waived' if not timely raised in the answer or a responsive pleading." 456 U.S. at 704 (alterations in original) (quoting FED. R. CIV. P. 12(h)). This is probably more aptly called "waiver" or "estoppel" than it is consent.

<sup>191</sup> See *Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at \*6 (D. Vt. July 24, 2009) ("[A] finding of general jurisdiction on a consent-based theory in this case would require the Court to adopt a unique conception of consent relative to all other legal contexts. In this case, there is no contract between Viko and World Vision to litigate in Vermont, no agreement to arbitrate, and no stipulation to jurisdiction by the Defendants.").

<sup>192</sup> 456 U.S. 694.

that “[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court.”<sup>193</sup> It then identified the following as falling under either express or implied consent: (i) parties agreeing in advance to submit to the jurisdiction of a given court; (ii) parties stipulating to jurisdiction; (iii) parties agreeing to arbitrate; (iv) parties voluntarily using certain state procedures; (v) parties waiving jurisdiction through a failure to timely raise the issue in an answer or responsive pleading; and (vi) parties submitting to a court’s jurisdiction.<sup>194</sup> Notably absent from this seemingly exhaustive list is any mention of registration to do business as a basis for jurisdiction.

Courts and commentators have debated why “consent via registration” might have been left off the Supreme Court’s list in *Bauxites*.<sup>195</sup> Some have surmised that it was not included because it was so obvious a basis for jurisdiction that it essentially did not need to be included. For instance, the court in *Knowlton* was of the view that appointment of an agent for service of process is a “traditionally recognized and well-accepted species of general consent, possibly omitted from the Supreme Court’s list because it is of such long standing as to be taken for granted.”<sup>196</sup> The *Knowlton* court’s reasoning is not persuasive. The Supreme Court in *Bauxites* mentioned every iteration of consent as it pertains to personal jurisdiction. Why would it omit one particular form of consent—indeed, one that is so “long standing”? And, as the district court of Vermont points out in *Viko v. World Vision, Inc.*, this reading of *Bauxites* seems improbable “unless one also assumes that providing consent via a contractual arrangement—which *is* listed—is somehow unobvious.”<sup>197</sup> At the very least, it appears that even the Supreme Court did not intuitively regard the consent that forms the basis for most assertions of consent-based jurisdiction as similar in kind to the “consent” that forms the basis for

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<sup>193</sup> *Id.* at 703.

<sup>194</sup> *Id.* at 703–04. The Court appears to treat “submission” separately:

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff’s demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i.e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

*Id.* at 704–05.

<sup>195</sup> See Riou, *supra* note 18, at 780; Taylor, *supra* note 16, at 1187–88.

<sup>196</sup> 900 F.2d 1196, 1200 (8th Cir. 1990).

<sup>197</sup> No. 2:08-CV-221, 2009 WL 2230919, at \*6 n.14 (D. Vt. July 24, 2009). In other words, the *Viko* court suggests that consent via a forum selection clause is at least as obvious as consent via registration—and yet, the former was placed on the list, but not the latter.



assertions of jurisdiction based on registration to do business. So what is different about the consent that undergirds each form of jurisdiction?

First, and most importantly, a defendant who signs a contract containing a forum selection clause or who enters a voluntary appearance in a case does so with respect to *a particular dispute* involving *a particular plaintiff*. For example, a buyer and seller may agree that “any and all disputes arising out of the purchase of the product shall be settled by the courts of New York.” If the buyer sues the seller in New York because the product is allegedly defective, New York courts will have jurisdiction. However, the court will only have jurisdiction consistent with the scope of the clause. In other words, the consent given by the defendant seller in this hypothetical extends only to: (i) lawsuits brought by the buyer and (ii) arising out of the purchase of the product. Another way of looking at it is that the defendant seller consents to a form of specific jurisdiction; it agrees that the courts of New York will have jurisdiction with respect to *this buyer* involving issues arising from the purchase of *this product*. In signing a forum selection clause, the seller does not consent to New York’s jurisdiction for the resolution of all legal issues with respect to this buyer (for instance, completely unrelated patent or trademark issues). Nor does it consent to New York’s jurisdiction for all issues involving this product (for instance, a lawsuit brought by a different buyer whose contract does not contain a forum selection clause).<sup>198</sup> In short, the defendant does not agree to vest New York with all-purpose (or general) jurisdiction.<sup>199</sup> The same is true if one considers submission. When a defendant submits to the jurisdiction of a court (whether deliberately or inadvertently), it does so in a limited manner—i.e., with respect to the particular dispute at hand, and with respect to the particular plaintiff at hand. Submission to New York courts’ jurisdiction for one case does not mean submission to

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<sup>198</sup> See *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 201 (E.D.N.Y. 2012) (“Lastly, plaintiff points to GTEC’s consent to service of process in New York in its contracts with Cowen & Company and SunTrust Bank and argues that ‘just agreeing to accept jurisdiction in New York is sufficient as a basis for in personam jurisdiction.’ This argument is entirely unpersuasive and misstates the law. Both contracts explicitly limit GTEC’s submission to jurisdiction in New York to ‘action[s] or other proceeding[s] arising out of *this agreement*.’ A company’s submission to jurisdiction and service of process in New York pursuant only to isolated contracts does not thereby signal its unrestricted consent to personal jurisdiction in New York for all future claims brought against it.” (alterations in original) (citations omitted)).

<sup>199</sup> *But see* Brilmayer et al., *supra* note 18, at 756 (“[B]ut parties conceivably might provide for jurisdiction that is general in all respects. In other words, they might agree to jurisdiction for suits that bear no relationship to the instrument in which they express consent and that have no relationship to the chosen forum. Parties could draft an agreement that subjects a defendant to the forum’s general jurisdiction, which would permit any individual, even one not a party to the agreement, to sue on any subject matter, even one with no connection to the forum. This kind of consent clause would rarely appear in a private contract because one party would have little reason to extract such consent from another.” (footnote omitted)). The author has never seen, and is not aware of, an agreement of this nature in practice.

New York courts' jurisdiction forevermore. Accordingly, it too is a form of specific jurisdiction.

"Consent" by registration, on the other hand, is quite different. Those courts that view registering to do business as a form of consent hold that registration and/or the appointment of an agent for service of process confers general jurisdiction on a court.<sup>200</sup> This means that by filing some paperwork—paperwork that the state mandates as necessary if a corporation is doing business in the state—the corporation agrees to give the state plenary authority over it. Unlike forum selection clauses or submission, this consent is not limited to a particular plaintiff and a particular dispute. Instead, it extends to any and all disputes involving any and all plaintiffs. Thus, it is difficult to conceive of consent via a forum selection clause or submission in the same way as "consent" via registration to do business. In the former scenario, a defendant *consents to something* (that a court will have jurisdiction in a matter involving a particular plaintiff and a particular dispute); in the latter, a defendant *consents to everything* (that a court will have jurisdiction in any matter involving any plaintiff).<sup>201</sup>

Second, and related to the point discussed above, the nature of the relationships between the entities involved differs considerably. With the traditional forms of consent, forum selection clauses and submission, the relationship that forms the basis for the consent is that between the plaintiff and defendant. In other words, it is the contractual relationship between the parties that underpins the defendant's consent. In turn, the beneficiary of the defendant's consent is the plaintiff, and vice versa. The state, and the court system, is a disinterested entity and relevant only for the purpose of effectuating the consent given by either party. In contrast, with registration as a basis for jurisdiction, it is the relationship between the state and the defendant corporation that forms the basis for the defendant's consent. The defendant has, in essence, contracted with the state, as a precondition to doing business there, to give the state all-purpose jurisdiction over it. However, the beneficiary of the defendant corporation's consent is a third party plaintiff who has no pre-existing nexus to the consent given by the defendant.<sup>202</sup>

Third, consent in the form of a forum selection clause is subject to various contractual policing doctrines.<sup>203</sup> According, there is a built-in

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<sup>200</sup> See, e.g., *Sternberg v. O'Neil*, 550 A.2d 1105, 1107 (Del. 1988) ("[W]hen GenCorp registered to do business in Delaware and appointed an agent in Delaware to receive service of process, it consented to the general jurisdiction of Delaware courts.").

<sup>201</sup> Consent, according to one court "is meaningless unless its scope is defined." *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011).

<sup>202</sup> In the words of one author, "the notion of a contract generally implies that it only regulates activity between the contracting parties." Kipp, *supra* note 18, at 19.

<sup>203</sup> See *Brilmayer et al.*, *supra* note 18, at 756 ("Contractual consent to jurisdiction is subject to standard contract law doctrine and may be unenforceable when the consent results from

system of checks and balances that ensure that the consent given by a party via a forum selection clause is genuine such that the clause should be enforced.<sup>204</sup> The Supreme Court has had occasion to address the enforceability of forum selection clauses in three separate cases: *M/S Bremen v. Zapata Off-Shore Co.*, *Carnival Cruise Lines, Inc. v. Shute*, and *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*.<sup>205</sup> In each of these cases, the Court generally affirmed the validity of forum selection clauses, holding that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.<sup>206</sup> Thus, a party who has agreed to a forum selection clause, and thereby consented to the jurisdiction of a certain court, may be able to escape the clause's effect by demonstrating that enforcement would be unreasonable. Although claims that a forum selection clause is unreasonable are not often successful, the rule nonetheless provides an important escape hatch for a party resisting enforcement of a forum selection clause.<sup>207</sup>

Additionally, the Supreme Court in *Bremen* reaffirmed that traditional contract doctrines such as "fraud, undue influence, or

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adhesion, overreaching, or unequal bargaining positions."). These policing doctrines do not apply to submission since the timing and context differs. With submission, the defendant impliedly agrees to the court's jurisdiction through its conduct at the time that litigation has begun. For instance, by proceeding to argue the merits of the case, the defendant concedes that a court has legitimate jurisdictional authority over him. In such a scenario, the nature of the conduct is such that there is no additional need to ensure knowing assent, mitigate unfairness, or protect the defendant from himself.

<sup>204</sup> See Kristen Hudson Clayton, Comment, *The Draft Hague Convention on Jurisdiction and Enforcement of Judgments and the Internet—A New Jurisdictional Framework*, 36 J. MARSHALL L. REV. 223, 237 (2002) ("[F]orum selection clauses are subject to the traditional safeguards of contract law.").

<sup>205</sup> *Atl. Marine Constr. Co., Inc. v. U.S. District Court for the W.D of Tex.*, 134 S. Ct. 568 (2013); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Each of these cases arose in the context of a plaintiff initiating litigation outside of the contractually-specified forum and the defendant seeking to dismiss or transfer the action pursuant to the doctrine of forum non conveniens, arguing that the plaintiff should be required to litigate in his chosen forum. A different, but related scenario, arises when a plaintiff sues in the contractually-specified forum, but the defendant resists enforcement on the basis that the forum selection clause is unenforceable.

<sup>206</sup> *Atl. Marine*, 134 S. Ct. at 579; *Carnival Cruise*, 499 U.S. at 591–96; *Bremen*, 407 U.S. at 10. *Atlantic Marine* was somewhat different than *Bremen* and *Carnival Cruise* in that it looked at a forum selection clause in the context of a transfer under 28 U.S.C. § 1404(a) (2012). *Atl. Marine*, 134 S. Ct. at 579. The Court in *Atlantic Marine* held that where a defendant files a section 1404(a) motion on the basis that the plaintiff has agreed to exclusive jurisdiction in another state, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer. *Id.*

<sup>207</sup> See *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1082–84 (9th Cir. 2009) (against public policy); *Rodriguez v. Ryder Mem'l Hosp., Inc.*, 964 F. Supp. 2d 208, 211–13 (D.P.R. 2013) (against public policy); *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688, 690–91 (W.D. Tex. 2006) (unreasonable); *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 234–36 (Tex. Ct. App. 1999) (fundamentally unfair).

overweening bargaining power” are also available to a party seeking to avoid a forum selection clause.<sup>208</sup> Other contract doctrines such as mistake, public policy, and unconscionability could also be used by litigants to avoid the effects of a forum selection clause.<sup>209</sup> In cases where a corporation “consents” to jurisdiction by the act of registering to do business, there are no escape hatches. A corporation does not have the ability to argue that the assertion of jurisdiction would be unfair or unreasonable, or that the consent was the product of mistake, undue influence, duress, or the like. The corporation is essentially stuck with the consequences of its actions in registering to do business.

Finally, it is important to compare the actions that are deemed to constitute consent to personal jurisdiction in the traditional setting and in the context of registration statutes. With forum selection clauses, the action that forms the basis for consent is signing a contract that contains the clause. The clause will usually be worded in such a way that a party understands exactly what it is agreeing to. With submission, the action that forms the basis for consent is taking deliberate steps that recognize the court’s authority over the corporation. For instance, the corporation might file an answer or other responsive pleading, actions that the law considers inconsistent with a corporation maintaining that the court does not have jurisdiction. The former is regarded as a form of express consent, while the latter is regarded as a form of implied consent.<sup>210</sup> With registration, the act that is deemed to constitute consent is filing state-mandated paperwork that does not in any way spell out the consequences of filing that paperwork.<sup>211</sup> The degree of deliberateness involved in “consenting” to jurisdiction via registration clearly differs from that involved in consenting to jurisdiction by way of a forum selection clause or submission.

Taken in the aggregate, it appears that traditional forms of consent to personal jurisdiction are so different from registration that it begs the question of whether it is appropriate to lump them all under the category of “consent.” On the popular children’s television show Sesame

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<sup>208</sup> 407 U.S. at 12; *see, e.g.*, *Overseas Partners, Inc. v. Progen Musavirlik ve Yonetim Hizmetleri, Ltd. Sikerti*, 15 F. Supp. 2d 47, 53–54 (D.D.C. 1998) (duress); *M.G.J. Indus., Inc. v. Greyhound Fin. Corp., Inc.*, 826 F. Supp. 430, 432 (M.D. Fla. 1993) (fraud); *Ex parte Rymer*, 860 So. 2d 339, 342 (Ala. 2003) (undue influence); *DeSola Grp., Inc. v. Coors Brewing Co.*, 605 N.Y.S.2d 83, 83–84 (N.Y. App. Div. 1993) (fraud).

<sup>209</sup> *See Contraves Inc. v. McDonnell Douglas Corp.*, 889 F. Supp. 470, 472 (M.D. Fla. 1995) (“[A] forum selection clause is valid absent fraud, undue duress, frustration of purpose, or some other common law doctrine that allows avoidance of an agreement.”); *see, e.g.*, *Shoremaster, Inc. v. Hanson Marine Props.*, No. 09-1099-CV-W-FJG, 2010 WL 1752160, at \*3 (W.D. Mo. May 3, 2010) (mutual mistake); *Copelco Capital, Inc. v. Shapiro*, 750 A.2d 773, 776–77 (N.J. Super. Ct. App. Div. 2000) (insufficient notice and public policy); *Falk & Fish, L.L.P. v. Pinkston’s Lawnmower & Equip., Inc.*, 317 S.W.3d 523, 527–29 (Tex. Ct. App. 2010) (unconscionable).

<sup>210</sup> *See generally* BLACK’S LAW DICTIONARY 368 (10th ed. 2014).

<sup>211</sup> *See infra* pp. 1393–97.

Street, a recurring vignette asks children: “Which of these things is not like the other?”<sup>212</sup> The game is intended to teach children to identify salient differences and similarities in order to identify the outlier. Here, registration is the outlier. It does not share the same characteristics as the other forms of consent: it is not a limited form of consent; it does not have its basis in a relationship with a specific party; it is not subject to any sort of contractual analysis to discern the voluntary nature of the consent; and it is not deliberate in the same way as signing a forum selection clause or submitting to the jurisdiction of a court. Accordingly, for these reasons, as well as the reasons explored in more detail below, it is difficult to accept at face value the oft-repeated justification for finding general jurisdiction based on registration: that registration amounts to the defendant corporation’s express and voluntary consent to personal jurisdiction.

## 2. Registration to Do Business as a Form of Coerced Consent

Most courts holding that registration to do business confers general jurisdiction do so on the theory that by taking steps to register and appoint an agent for service of process, the corporation has manifested its express consent to be subject to general jurisdiction. These courts emphasize the voluntary and true nature of the “consent.” As far back as 1916, Justice Cardozo in *Bagdon v. Philadelphia & Reading Coal & Iron Co.* stressed that registering with the state constituted “a real consent.”<sup>213</sup> It is not entirely clear, however, that the “consent” given by a corporation is actually a “real consent” as Justice Cardozo suggested.

In the vast majority of circumstances, a corporation does not know in advance what it is consenting to in registering to do business. As discussed, all but one of the fifty statutory schemes is silent on the jurisdictional effects of registering to do business.<sup>214</sup> Thus, the statutory

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<sup>212</sup> For instance, the television show might put up a picture of an apple, a banana, an orange, and a carrot and ask children to identify which of the four does not belong.

<sup>213</sup> 111 N.E. 1075, 1076 (N.Y. 1916) (“The state of New York has said that a foreign stock corporation, other than a moneyed corporation, shall not do business here until it has obtained a certificate from the secretary of state. . . . To obtain such a certificate, however, there are conditions that must be fulfilled. One of them is a stipulation, to be filed in the office of the secretary of state, ‘designating a person upon whom process may be served within this state.’ . . . The person designated is a true agent. *The consent that he shall represent the corporation is a real consent.*” (emphasis added) (citation omitted)).

<sup>214</sup> Technically, every one of the fifty registration statutes is silent on the jurisdictional effects of registering to do business since Pennsylvania’s law that registration confers general jurisdiction actually appears in its long-arm statute, not its registration statute. I submit, for all the reasons discussed in this Article, that *even if* state registration statutes clearly spelled out the jurisdictional consequences of registering to do business, the assertion of general jurisdiction would still be inconsistent with due process.

source upon which courts pin their jurisdictional power does not provide any notice to corporations that by registering to do business and appointing an agent for service of process they are relinquishing due process protections. As Professor Rhodes argues:

[E]ven assuming the somewhat doubtful proposition that a state may constitutionally exact consent from a nonresident corporation to suit for any and all causes of action as a condition to registering to do business in the state, the nonresident would, at a constitutional minimum, have to be aware that its registration would result in its amenability to the state's plenary authority.<sup>215</sup>

In the leading Supreme Court case on registration statutes, *Pennsylvania Fire*, the Court appears to reject the view that a corporation must have notice of the consequences of registration in order for due process to be satisfied.<sup>216</sup> In that case, the Court indicated that a corporation that registers with the state “takes the risk of the interpretation that may be put upon it by the courts. The execution [of the registration documents] was the defendant's voluntary act.”<sup>217</sup> The idea that a corporation can fill out certain state-mandated forms that a court may deem to constitute consent to all-purpose jurisdiction, without the corporation knowing about that consequence in advance, is repugnant to any basic understanding of consent.<sup>218</sup> As Kipp argues:

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<sup>215</sup> Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a “Generally” Too Broad, But “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 235 (2005) (footnote omitted). Professor Rhodes also argues that “registration and appointment of an agent is not enough to establish consent, except perhaps in those situations in which the state registration statute is considered explicit enough to constitute actual, rather than fictional, consent.” *Id.* at 236. Accord Kipp, *supra* note 18, at 42–43 (“[I]t is contradictory to infer from a statute an express consent to general jurisdiction when that statute does not explicitly mention the consequences that compliance will have on jurisdiction.”).

<sup>216</sup> 243 U.S. 93, 96 (1917).

<sup>217</sup> *Id.* This position is also reflected in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44 cmt. c. (1971) (“*c. Extent of consent thus given.* If a corporation has authorized an agent or a public official to accept service of process in actions brought against it in the state, the extent of the authority thereby conferred is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given. It is a question of interpretation whether the authority extends to all causes of action or is limited to causes of action arising from business done in the state, or whether the authority is revocable at any time or is irrevocable as to causes of action arising within the state prior to an attempt to revoke it. By qualifying under one of these statutes, the corporation renders itself subject to whatever suits may be brought against it within the terms of the statutory consent as interpreted by the local courts provided that this interpretation is one that may fairly be drawn from the language of the enactment.”).

<sup>218</sup> See *Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at \*6 (D. Vt. July 24, 2009) (“Instead, Viko claims consent based on compliance with a statute that says nothing on its face about either jurisdiction or consent, and in a state in which the limited case law on the issue, if anything, points in the opposite direction. Under these conditions it is impossible to see how World Vision gave its express and considered ‘consent to be hauled into [Vermont] courts on any dispute with any party anywhere concerning any matter’ when it submitted an application to

Justice Holmes saw consent as an agreement to expose oneself to the “risk” of expansive statutory construction. Yet this notion of consent is contradictory, because it premises jurisdiction on the corporation’s prior consent, but then holds that the scope of this consent will not be established until the state court has interpreted the registration statute. In other words, this conception forces a foreign corporation to agree to a condition before that condition has been established.<sup>219</sup>

Consent must mean that one knows what one is consenting to. This is especially the case when one’s actions are retroactively deemed to constitute consent to something.<sup>220</sup>

With that said, even if the relevant statute provided ample notice that registration and the appointment of an agent for service of process would be deemed consent to all-purpose jurisdiction, this would still not be consistent with due process.<sup>221</sup> The notion of consent implies that a party has alternatives—in particular, the alternative not to consent. In the context of registration statutes, the idea that a corporation had the choice to register (and thereby consent to jurisdiction) suggests that there was also a legitimate choice to not register (and therefore not consent to jurisdiction). Aside from registering to do business in the state and thereby consenting to general jurisdiction, a corporation really only has one of two choices: not do business in the state or do business in the state without registering and face whatever penalties the law ascribes.<sup>222</sup>

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transact business within Vermont.” (alteration in original) (quoting *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992))).

<sup>219</sup> Kipp, *supra* note 18, at 21 (footnote omitted).

<sup>220</sup> Consider the following example, in a wholly unrelated context: assume that a patient is asked to provide a urine sample in order for the doctor to determine whether a certain medication is being properly absorbed into the patient’s body. The patient provides the urine sample and the doctor runs a series of drug screens on the urine, arguing that by providing the urine sample, the patient consented to the doctor’s use of the urine for drug testing. In other words, the patient’s actions in providing the urine sample amounted to express consent to certain consequences (here, drug screening). Nowhere could the patient have found out in advance that by providing the urine sample, he would be “consenting” to the use of the urine for other purposes. Surely, this form of “consent” would not be tolerated in a medical context. Why would it be tolerated in the jurisdictional context? Granted, the two contexts differ and the medical example provides only a rough parallel. But the point is that we would not likely consider certain acts (providing a urine sample to determine absorption of medication) to amount to express consent for something else (drug testing) when the patient had no way of knowing that his actions would be taken to amount to express consent. Likewise, we cannot regard registration to do business and the appointment of an agent for service of process to mean consent to something else (i.e., general jurisdiction over any and all causes of action) when the corporation had no notice that its actions would be interpreted to have that result.

<sup>221</sup> See Taylor, *supra* note 16, at 1165 (“However, the objections raised to registration-based general jurisdiction are typically questions of interpretation, rather than constitutional doctrine; where a statute is sufficiently clear in purporting to establish general jurisdiction over registered corporations, such interpretive objections are not adequate.”).

<sup>222</sup> See Lewis, *supra* note 16, at 17 (“According to Holmes, the controlling feature of *Gold Issue* was the existence of the foreign corporation’s actual and voluntary, rather than fictional,

The option of refraining from doing business in the state is not really a viable one for most corporations. Since all fifty states have the same laws requiring registration, this “option” really amounts to a corporation simply not doing business *at all* in the United States. Thus, the choice appears to be that a corporation can register to do business in a state and therefore consent to being sued on any and all causes of action or it can simply refrain from doing business at all, thereby abandoning its *raison d’être*. One might argue, however, that the choice is not actually between registering and not doing business—since the corporation also has the option of registering to do business in states that do not regard the act of registration as consent to all-purpose jurisdiction. In other words, the corporation can choose not to do business in those states that view registration as conferring general jurisdiction over a corporation. This is not the correct comparator. If consent is a legitimate rationale for registration-based general jurisdiction, then all fifty states could constitutionally exercise it. The fact that some may choose not to assert registration-based general jurisdiction does not provide a basis for concluding that a corporation actually has a legitimate choice in the matter.

A corporation does, however, have an option aside from not doing business: it can actually do business, but deliberately choose not to register to do business in the state. It is not clear that this is really a legitimate choice either. If a corporation fails to register, it has broken the law and it will face penalties for so doing.<sup>223</sup> It appears, then, that a corporation’s choices—other than consenting to general jurisdiction—are limited. It can simply not do business in the United States or it can deliberately break the law. Neither seems to be a genuine option for a corporation. As one district court in Texas elegantly put it:

The idea that a foreign corporation consents to jurisdiction in Texas by completing a state-required form, without having contact with

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appointment of the agent. The appointment was not, however, truly ‘voluntary;’ it was demanded by the state as a condition of entry into the state to do business. At the time of *Gold Issue*, the Court’s unconstitutional conditions doctrine was in full bloom. That gives rise to the question, as put by one commentator, ‘Why, if it is the Due Process Clause—or a ‘principle of natural justice’—which denied the power of the state to imply consent to suit on claims arising out of the transactions occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing.’” (footnote omitted) (quoting Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts – from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 580 (1958)); see also *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988) (“The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity.”).

<sup>223</sup> See *supra* notes 116–17 and accompanying text; see also *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 887 (S.D. Tex. 1993) (“Under Texas law, a foreign corporation runs a risk if it accidentally should engage in local commerce because a foreign corporation *must* get a certificate of authority to do business and *must* appoint an agent for service; it has no choice. If it does not, it cannot sue in Texas courts, and the state may fine it.”).



Texas, is entirely fictional. Due process is central to consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. “Extorted actual consent” and “equally unwilling implied consent” are not the stuff of due process.<sup>224</sup>

As the Texas district court suggests, a corporation that registers to do business does not actually voluntarily consent to jurisdiction. It simply has no choice in the matter.<sup>225</sup>

There are at least two rough contract law analogues to the “choice” presented to a corporation in registering to do business or not: contracts that are the product of economic duress and contracts of adhesion. Examining the issue of choice presented in each of these contractual settings is useful in elucidating the choice presented to a corporation in registering to do business. First, there is the doctrine of economic duress. Where a party to a contract lacks reasonable alternatives but to accede to the bargain presented, it may seek to avoid the contract on the basis of economic duress.<sup>226</sup> Essentially, the doctrine requires that Party A make an improper or wrongful threat in circumstances where Party B has no reasonable alternatives but to agree Party A’s demands. The doctrine of economic duress focuses on the legitimacy or reasonableness of Party B’s alternative choices aside from entering into the bargain proposed by Party A. Where Party B essentially had no real choices available to it, a court is likely to invalidate a bargain on the basis of economic duress. The notion of genuine and free consent underpins the doctrine of economic duress.<sup>227</sup> The choices presented to a corporation in deciding whether to register to do business in a state are similar to those involved in economic duress cases—i.e., there are no good ones, only less bad ones. The fact that courts essentially invalidate consent when not freely given speaks to the nature of consent: consent must be free and genuine, and not forced.<sup>228</sup> Considering the “choices” presented

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<sup>224</sup> *Leonard*, 829 F. Supp. at 889.

<sup>225</sup> See *Lewis*, *supra* note 16, at 37–38 (“Whatever the validity of a respect for individual choice in circumstances where the individual and state have equivalent bargaining power, a substantively different question is presented when the consent or waiver in question is extracted by a state as a precondition of a benefit over which the state has monopolistic control. There the recipient’s weak bargaining position, the result of a lack of alternative sources of the benefit, means that the recipient’s power to forego the benefit serves as an illusory check on abuse of the conditioning power by the state. Honoring the recipient’s election to relinquish rights in exchange for the benefit in such transactions will accord false dignity to the recipient’s position and may tolerate unconscionable governmental conduct. In such circumstances, the unconstitutional conditions doctrine properly steps in to prohibit the state from taking unfair advantage of its superior bargaining position.” (footnote omitted)).

<sup>226</sup> See generally 17A C.J.S. *Contracts* § 239 (1999).

<sup>227</sup> See, e.g., *Abbadessa v. Moore Bus. Forms, Inc.*, 987 F.2d 18, 23 (1st Cir. 1993) (“It must appear that consent was actually induced by the pressure applied and would not have been given otherwise.” (quoting *Cheshire Oil Co., Inc. v. Springfield Realty Corp.*, 385 A.2d 835, 839 (N.H. 1978)) (internal quotation marks omitted)).

<sup>228</sup> See *Leonard*, 829 F. Supp. at 886 (“Consent requires a voluntary, reasoned act.”).

by registration statutes, it is fair to say that the consent given is not free and genuine, but rather the product of choosing between equally distasteful alternatives.

The choices presented by registration statutes can also be compared to those offered to a party in a standard contract of adhesion. For instance, a customer who contracts with a cell phone provider such as Verizon will likely not have much say in the terms that govern the contract. The customer does technically have a choice not to contract with Verizon, but to contract instead with a different company like AT&T or T-Mobile. However, it is very likely that all these companies have similar standard terms that are presented to the customer on a take-it-or-leave-it basis. The customer also has another choice: he can forego purchasing a cell phone plan altogether. Contracts of adhesion suffer from a similar “lack of choice” problem that presents itself in cases of registration statutes. Consequently, parties often challenge the enforceability of such contracts, or at least certain provisions contained in them, as being unconscionable.<sup>229</sup> The doctrine of unconscionability has “generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>230</sup> Arbitration clauses, class action waivers, forum selection clauses, disclaimers, and limitation of liability clauses are examples of provisions that parties frequently challenge as being unconscionable.<sup>231</sup> Courts will scrutinize these clauses carefully to ensure that the bargain struck by the party challenging the clause is one that is not grossly unfair.<sup>232</sup> Much like cases of economic duress, the lack of choice problem in contracts of adhesion roughly parallels the lack of choice problem a corporation faces in determining whether it should register to do business and subject itself to general jurisdiction in a state. The difference, of course, is that with contracts of adhesion, a party has the ability to challenge the fairness of the bargain by arguing that he had no choice but to consent to the contract. Corporations that register pursuant to state statute have no

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<sup>229</sup> See, e.g., *Gatton v. T-Mobile, USA, Inc.*, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007) (challenging agreement to arbitrate in standard cell phone contract as unconscionable).

<sup>230</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

<sup>231</sup> See, e.g., *Davis v. Chase Bank USA, N.A.*, 299 F. App'x 662 (9th Cir. 2008) (class action waiver); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc) (arbitration clause); *Hunter v. Tex. Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986) (disclaimers); *Star-Shadow Prods., Inc. v. Super 8 Sync Sound Sys.*, 730 A.2d 1081 (R.I. 1999) (limitation of liability clause); *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884 (Wis. Ct. App. 2004) (forum selection clause).

<sup>232</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (“A finding of unconscionability requires a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.” (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)) (internal quotation marks omitted)).

way to challenge the consent given or to argue that the bargain struck with the state is unfair or unreasonable.

The point of this slight digression was to illustrate that the sine qua non of consent—that a party have the genuine choice not to consent—is missing in the registration context. In other contract law scenarios where choice is absent for one reason or another (such as where there are no reasonable alternatives but to accede to a threat or where the contract is provided on a take-it-or-leave-it basis), courts have developed doctrines that allow a party out of the contract. They allow, in other words, for the party to “take back” his consent. In the context of registration to do business, the choices available to a corporation are not many: it can either not do business or it can do business, deliberately refrain from registering, and face some sort of sanction. Where these are the only options available, it is difficult to claim that a corporation has expressly consented to the assertion of general jurisdiction over it by virtue of its decision to register to do business.

Leaving aside the lack of meaningful choice, it is questionable whether a corporation’s actions in registering to do business can logically support the conclusion that a corporation has expressly consented to general jurisdiction. In those states that regard registration as conferring general jurisdiction over a corporation, the corporation’s actions in filing required state paperwork and/or appointing an agent for service of process are said to amount to express consent. Neither the paperwork nor the governing statutory scheme<sup>233</sup> spells out the jurisdictional consequences for the corporation. Nowhere does an agent for a corporation tick a box or sign a document stating, “I understand that by registering under this statute, I am agreeing that the corporation will be subject to general jurisdiction in the courts of this State.” In short, nothing puts the corporation on notice that by taking certain actions—actions that are quintessentially administrative in nature—it is agreeing to submit itself to a court’s jurisdiction.<sup>234</sup> Black’s Law Dictionary defines express consent as “[c]onsent that is clearly and unmistakably stated.”<sup>235</sup> It is difficult to conceive of how the consent

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<sup>233</sup> With the exception of Pennsylvania, see *supra* notes 118–20 and accompanying text. See also S. 7078, 200th S., Reg. Sess. (N.Y. 2014); A. 9576, 200th Gen. Assemb., Reg. Sess. (N.Y. 2014).

<sup>234</sup> See *AstraZeneca AB v. Mylan Pharm., Inc.*, Civil Action No. 14-696-GMS, 2014 WL 5778016, at \*5 (D. Del. Nov. 5, 2014) (“Administrative statutes like Delaware’s sections 371 and 376 merely outline procedures for doing business in the state; compliance does not amount to consent to jurisdiction or waiver of due process.”).

<sup>235</sup> BLACK’S LAW DICTIONARY, *supra* note 210, at 368. The term “express consent” is also sometimes used in the case law to mean something slightly different than “consent that is clearly and unmistakably stated.” “Express consent” via registration and the appointment of an agent for service of process is frequently juxtaposed with the notion of “implied consent” via corporate presence/minimum contacts. In the former scenario, a corporation has “expressly” consented to jurisdiction because it has registered and appointed its own agent for service of process. In the latter scenario, the state has designated an agent for service of process. It is implied through the

given by a corporation by virtue of its actions in filing certain state-mandated forms amounts to consent that is “clear[] and unmistakabl[e].”<sup>236</sup>

At most, a corporation’s actions in registering to do business could amount to implied consent, that is, “[c]onsent inferred from one’s conduct rather than from one’s direct expression.”<sup>237</sup> The argument for implied consent is that by voluntarily using state procedures in order to reap the benefits doing business in the state, the corporation has impliedly agreed to be subject to the jurisdiction of the court. The problem, however, is that the corporation’s actions must still logically support the inference of consent to jurisdiction—and it is not clear that they do. In the words of one court, “[g]ranted, consent may be implied under certain circumstances, but the implication must be predictable to be fair.”<sup>238</sup> Consider a simple example illustrating the distinction between an express and implied contract for a restaurant meal. In Scenario #1, a patron goes to a restaurant and asks how much a certain meal will cost. The server informs the patron of the cost and the patron agrees to pay prior to ordering the meal. There is an express contract: the restaurant will provide a meal, and the patron will pay for it. In Scenario #2, a far more common scenario, a restaurant patron orders a meal after looking through the menu and then proceeds to eat it. It is

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corporation’s presence in the state that the corporation would have consented to suit and service on the state-designated agent. See *Andrews*, *supra* note 7, at 1004 (“By the mid-nineteenth century, courts permitted a corporation to act in another state, outside of its state of incorporation, but only with the other state’s permission. Most states conditioned this permission on the corporation’s affirmative consent to jurisdiction in the state, usually as part of the formal registration process, through appointment of an in-state agent for service of process. The Court soon expanded this doctrine to hold that even when a corporation failed to affirmatively consent to jurisdiction, the state could imply consent from the corporation’s act of doing business in the state. In *Pennoyer*, the Court recognized this scheme and explained that both express and implied consent provide a basis for jurisdiction over corporations.” (footnotes omitted)); Kipp, *supra* note 18, at 17 (“Judge Learned Hand distinguished the jurisdiction conferred by implied consent from that conferred by express consent. . . . Judge Hand stated that ‘the jurisdiction of this court . . . depends upon the interpretation of the consent actually given.’ Judge Hand then acknowledged that in situations involving implied consent—that is, where a statutory agent had been appointed by the state on the foreign corporation’s behalf—the court could only exercise specific jurisdiction. This result was dictated by the legal fiction that consent was implied from the corporation’s activities within the state. However, courts could exercise general jurisdiction when the consent was actual; that is, when the corporation itself appointed an agent for service of process.” (second alteration in original) (footnotes omitted) (quoting *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150 (S.D.N.Y. 1915))).

<sup>236</sup> BLACK’S LAW DICTIONARY, *supra* note 210, at 368.

<sup>237</sup> *Id.* As discussed *supra* in notes 40, 136, and 235, the notion of implied consent is often used to refer to jurisdiction based on a corporation doing business the forum. The term is also sometimes used to refer to jurisdiction based on a corporation’s minimum contacts with the forum. See *Sternberg v. O’Neil*, 550 A.2d 1105, 1112 (Del. 1988) (“[I]n the absence of express consent, due process requires minimum contacts for a finding of implied consent to a forum’s jurisdiction.”).

<sup>238</sup> *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011).

implied from the patron's conduct (ordering a meal and eating it) that the patron will pay for the meal. In other words, the actions of the patron imply only one logical conclusion: that by ordering the meal and consuming it, the patron consents to paying for the meal. Scenario #2 is, of course, an implied contract. The patron's consent to paying for the meal is implied from certain actions that are not reasonably open to interpretation.

In the context of registration statutes, a corporation's actions are indeed reasonably open to interpretation. The predicate acts that are thought to amount to consent—registering and appointing an agent for service of process—do not lead inexorably to the conclusion that a corporation has consented to jurisdiction. The fact that half the courts in the country do not see these acts as amounting to consent suggests, at the very least, that there are different ways to interpret the actions of a corporation that has registered to do business. Unlike the restaurant patron who orders and eats with the intention of paying, it is doubtful that a corporation that fills out some basic paperwork intends to give itself over to the state for personal jurisdiction purposes. It is a safe bet that a corporation that registers pursuant to state statute is doing so because it regards registration as an administrative technicality—i.e., something that it has to do in order to legally do business in the state. In the words of one court, “[c]onsent requires more than legislatively mandated compliance with state laws. Routine paperwork to *avoid* problems with a state's procedures is not a wholesale submission to its power.”<sup>239</sup>

It is helpful to look at an example of this paperwork in order to further explore the limits of the argument that registration amounts to consent, whether express or implied. Delaware, for instance, has a one-page form that must be filled out in order for an out-of-state corporation to register to do business in that state. The form, in its entirety, is replicated below:

The foreign corporation hereby certifies as follows:

1. The name of the foreign corporation is \_\_\_\_\_.
2. The foreign corporation is formed under the laws of \_\_\_\_\_ and is filing herewith a certificate evidencing its corporate existence.
3. The business which it proposes to do in the State of Delaware is as follows:
4. The Registered Office of the foreign corporation in the State of Delaware is located at \_\_\_\_\_ (street), in the City of \_\_\_\_\_, Zip Code \_\_\_\_\_. The name of the

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<sup>239</sup> Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 891 (S.D. Tex. 1993).

Registered Agent at such address upon whom process against this foreign corporation may be served is \_\_\_\_\_.

5. The assets of said foreign corporation are \$\_\_\_\_\_ and the liabilities thereof are \$\_\_\_\_\_. The assets and liabilities indicated are as of a date within six months prior to the filing date of this Certificate.

6. The business which it proposes to do in the State of Delaware is the business it is authorized to do in the jurisdiction of its incorporation.<sup>240</sup>

Nowhere in this form, or in the accompanying instructions, is there any indication that the form is anything other than a routine administrative filing. There is no mention of “jurisdiction”<sup>241</sup> or that there are any additional legal consequences associated with registering to do business. Indeed, no Delaware government website contains any information on the topic of registering to do business and personal jurisdiction.<sup>242</sup> Furthermore, representatives from the Delaware Division of Corporations are unable to answer questions regarding whether registering under the state statute carries with it any jurisdictional consequences.<sup>243</sup> One representative emphasized that the

<sup>240</sup> *Qualification of Foreign Corporation Form*, DEL. DIV. OF CORPS., <http://corp.delaware.gov/forqual09.pdf> (last visited Mar. 14, 2015) (title and signature line omitted). For similar forms in states that regard registration as conferring general jurisdiction, see *Application for Certificate of Authority*, SEC’Y OF ST. OF CONN., [http://www.ct.gov/sots/lib/sots/commercialrecording/allforms/app\\_for\\_cert\\_of\\_auth\\_-\\_foreign\\_corp.pdf](http://www.ct.gov/sots/lib/sots/commercialrecording/allforms/app_for_cert_of_auth_-_foreign_corp.pdf) (last visited Mar. 14, 2015); *N.Y. Application for Authority*, *supra* note 90.

<sup>241</sup> Except as a synonym for “forum.”

<sup>242</sup> See generally ST. OF DEL., <http://www.delaware.gov> (last visited Mar. 14, 2015); ST. OF DEL. DIV. OF CORPS., <http://corp.delaware.gov> (last visited Mar. 14, 2015).

<sup>243</sup> I contacted the Delaware Division of Corporations, using its “LiveChat” service, in order to determine whether the state entity could provide me with information on the jurisdictional consequences of registering to do business. The following is a transcription of the electronic conversation that took place:

You: I was wondering whether there are any jurisdictional consequences associated with qualifying to do business in Delaware? In other words, if I have an out-of-state corporation and I register in Delaware, does that subject me to the jurisdiction of Delaware courts? Thanks.

Lora: Yes, any processes served on the Corporation would have to be done through the Delaware Court System

You: Sorry, that’s not really my question. Let me give you an example—let’s say I’m a business that’s incorporated in New York but I want to expand to Delaware. Can I be sued in Delaware based on my New York business contracts?

Lora: That is more of a Legal question, our office is Administrative only, you would need to seek the advice of a Corporate Attorney

You: Is there an attorney in your office I could contact?

Lora: We do not have any attorneys on staff

You: So there is no way for me to find out what the legal consequences are of registering to do business in Delaware without hiring an attorney?

state office was “administrative only” and that one would need to “seek the advice of a corporate attorney” to determine what the jurisdictional implications were for a corporation registering to do business in Delaware.<sup>244</sup> Essentially, short of hiring a private attorney, there is no way for a corporation to discern whether registering to do business in Delaware subjects a corporation to jurisdiction in Delaware. It is clear that there is a dearth of information on the legal implications of registering to do business for all but the most legally savvy of corporations. In light of this void, it would be disingenuous to assert that a corporation “knowingly” or “voluntarily” consents to the jurisdiction of Delaware courts when it chooses to register to do business in Delaware.<sup>245</sup>

Additionally, it is simply unfair to assert general jurisdiction over a corporation solely because it has registered to do business in a state and appointed an agent for service of process. *International Shoe* heralded in a model of jurisdiction that focused less on territoriality and more on fundamental fairness as the barometer of due process.<sup>246</sup> What makes it

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Lora: Other than looking at the laws on our website, that is correct

You: I've already done that. The laws don't indicate if there are any legal consequences associated with registering to do business. It seems odd to me that there is no way to find out if I'm taking any legal risks by registering under the Delaware statute.

Lora: I apologize however, you would need to speak to an Attorney for further clarification

You: Ok, thanks anyway.

LiveChat Conversation with “Lora,” Representative, Del. Div. of Corps. (June 9, 2014) (conversation on file with author).

<sup>244</sup> *Id.*

<sup>245</sup> The law in Delaware on registration to do business is currently in a state of flux. For decades, Delaware courts faithfully followed *Sternberg*, which decisively held that registration to do business constituted consent to general personal jurisdiction. *Sternberg v. O'Neil*, 550 A.2d 1105, 1113 (Del. 1988) (“If a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of ‘minimum contacts’ to find implied consent is unnecessary.”). Recently, however, a federal district court in Delaware held that *Sternberg* is no longer good law. See *AstraZeneca AB v. Mylan Pharm., Inc.*, Civil Action No. 14-696-GMS, 2014 WL 5778016, at \*5 (D. Del. Nov. 5, 2014) (“In light of the holding in *Daimler*, the court finds that . . . the Delaware Supreme Court’s decision in *Sternberg* can no longer be said to comport with federal due process.”). Just two months after *AstraZeneca* was decided, a different federal judge in Delaware held that *Sternberg*, in fact, remains good law. See *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, Civil Action No. 14-935-LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015). The court indicated that “*Daimler* does not eliminate consent as a basis for a state to establish general jurisdiction over a corporation which has appointed an agent for service of process in that state, as is required as part of registering to do business in that state.” *Id.* at \*12. See also *Forest Labs, Inc. v. Amneal Pharm. LLC*, Civil Action No. 14-508-LPS, 2015 WL 880599, at \*12–15 (D. Del. Feb. 26, 2015) (report and recommendation).

<sup>246</sup> See Andrews, *supra* note 7, at 1013 (“The Court has advanced different rationales for the due process limits on personal jurisdiction. In the *Pennoyer* era, the emphasis primarily was state power, or sovereignty. . . . In *International Shoe*, the Court spoke foremost in terms of fairness: jurisdiction must comport with ‘traditional notions of fair play and substantial justice.’” (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

fair for courts to assume general jurisdiction over a corporation that has registered to do business in a state? Is it fair to assert general jurisdiction simply because the corporation has (apparently) “agreed” to general jurisdiction? Something is not fair just because one has agreed to it. In the context of contracts of adhesion, for instance, terms are not fair by virtue of the fact that they are agreed to.<sup>247</sup> People, and corporations, can certainly agree to unfair deals. And consent to general jurisdiction in exchange for the privilege of being able to do business in the state is most certainly an unfair deal.<sup>248</sup>

A state has no conceivable interest in adjudicating a dispute that does not involve the state in any way or does not involve a defendant who has made the state its home. The bargain, in other words, is wholly lopsided. The state permits a corporation to carry on business in the state, but then conditions that permission on the corporation’s amenability to jurisdiction for any cause of action involving any plaintiff anywhere in the world. What gives the state the right to insist on all-purpose jurisdiction as the proverbial price of admission to carry on business in the state?<sup>249</sup> Professor Rhodes argues that a state does not have a sovereign interest in adjudicating claims without any connection to the corporation’s activities in the state.<sup>250</sup> He asserts that “[t]he state . . . attempts to extract the corporation’s consent to all-purpose adjudicative authority, but without relinquishing anything additional in return . . . Such an ‘exchange’ has lost its connection to the state’s appropriate regulatory power.”<sup>251</sup> Thus, where a state takes more than it gives, the foundational “bargain” between the state and the corporation is called into question.<sup>252</sup> This does not comport with the fair play and

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<sup>247</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 reporter’s note cmt. a (1981) (“[A] contract of adhesion is not unconscionable per se . . . Nonetheless, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or term will be to a claim of unconscionability.”).

<sup>248</sup> See *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (“Expansive, non-explicit consent to being haled into court on *any claim whatsoever* in a state in which one lacks minimum contacts goes against the longstanding notion that personal jurisdiction is primarily concerned with *fairness*.”).

<sup>249</sup> In *Daimler*, the Court perceived a similar disconnect in the context of general jurisdiction based on continuous and systematic general business contacts. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014). There, the Court stated, “[n]othing in *International Shoe* and its progeny suggests that ‘a particular quantum of local activity’ should give a State authority over a ‘far larger quantum of . . . activity’ having no connection to any in-state activity.” *Id.* (second alteration in original) (quoting *Feder*, *supra* note 62, at 694).

<sup>250</sup> Rhodes, *supra* note 5, at 443.

<sup>251</sup> *Id.*

<sup>252</sup> See *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1278 (D. Md. 1981) (“When a corporation, as part of its registration to do business in a state, consents to jurisdiction, that consent is part of a bargain, by which the corporation agrees to accept certain obligations in return for the right to do business in the state. Consent by itself is meaningless—it is significant only as a manifestation of the corporation’s recognition that it has availed itself of ‘the benefits and protections of the laws’ of the forum by virtue of conducting business activities there. If the



substantial justice that is at the heart of modern jurisdictional law.

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Courts holding that registration to do business confers general personal jurisdiction over a corporation rest their analysis on a faulty premise: that registration amounts to consent. As discussed, it is doubtful that registration to do business under a state statute (particularly one that is silent on the jurisdictional implications of registration) can meaningfully be regarded as consent. First, registration does not look like any other form of consent recognized in law; in particular, it does not look like the consent involved in agreeing to a forum selection clause or in submitting to a court's jurisdiction. And second, registration is essentially coercive in nature. A corporation has no choice but to register if it wishes to be on the right side of the law. In these circumstances, it cannot be the case that registration to do business amounts to a corporation's consent and waiver of its constitutional due process protections.

What, then, is the jurisdictional effect—if any—of a corporation registering to do business and appointing an agent for service of process in a state? I submit that due process permits two possible alternatives. First, registration to do business can amount to a limited form of consent to be sued based on causes of actions that are related to or arising from the business that the corporation actually conducts in the state. For instance, say a pharmaceutical manufacturer registers to do business in West Virginia; it then sells its product in West Virginia and someone is injured by its product in West Virginia. In such a case, the pharmaceutical company has consented to suit in West Virginia based on its transaction of business (selling pharmaceutical products) in West Virginia. It does not, however, consent to jurisdiction in West Virginia based on the business it conducted elsewhere. Thus, a California plaintiff injured by the corporation's product in California could not sue in West Virginia under the limited consent theory. This ground of jurisdiction is functionally very similar to jurisdiction based on the defendant's minimum contacts with the forum.<sup>253</sup> Thus, even if the

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corporation conducts no business in the forum, it has not availed itself of 'benefits and protections of the laws' of the forum and there is no bargain between the corporation and the forum state and there is no meaning to the corporation's consent to jurisdiction. In such a situation, it would not be 'reasonable and just, according to our traditional conception of fair play and substantial justice' to subject the corporation to jurisdiction in that forum. In short, a consent statute such as W.Va. Code § 31-1-15 necessarily incorporates the Due Process 'minimum contacts' requirement." (citations omitted)).

<sup>253</sup> See, e.g., *Eure v. Morgan Jones & Co.*, 79 S.E. 2d 862, 868 (Va. 1954) (using language reminiscent of specific jurisdiction and stating that "[w]hen a foreign corporation engages in the privilege of doing business in Virginia, it enjoys the benefits and protection of the laws of this Commonwealth. It thereby subjects itself to the jurisdiction of the courts of this State for the

pharmaceutical company had not registered to do business in the state, it would nonetheless have been subject to jurisdiction on the basis that it was transacting business under the state's long-arm statute.

Premising jurisdiction on consent, however, obviates the need for a detailed minimum contacts analysis. Although the results would likely be the same under both inquiries, it is possible that limited consent provides a lower threshold to meet than minimum contacts. For instance, it is not clear that the *Asahi* reasonableness factors, which are used to circumscribe specific jurisdiction, would be applicable in the limited consent registration context.<sup>254</sup> Moreover, the defendant would be unable to argue that it did not purposefully avail itself of the benefits and protections of the forum state (an argument that is available under a traditional minimum contacts analysis). The fact that the corporation registered in the state and that the cause of action relates to the corporation's business in the state is de facto evidence of purposeful availment.

A second interpretation is that registering to do business and appointing an agent for service of process is procedural only and carries with it no substantive jurisdictional consequences. Under this view, it is important to distinguish between service of process, on the one hand, and amenability to judgment, on the other. While effective service on an appointed agent provides constitutionally sufficient notice, it does not establish that a corporation is amenable to judgment. Thus, registration and the appointment of an agent for service of process is nothing more than an administrative act done for the purpose of perfecting jurisdiction.<sup>255</sup> The plaintiff would still need to independently establish a basis of jurisdiction. It would argue either that there is specific jurisdiction over the corporation because the corporation has minimum contacts with the state so as to render it fair and reasonable to assert jurisdiction or it would argue that there is general jurisdiction because the corporation is "at home" in the forum state.

These alternatives, while different, are functionally very similar in that they both limit jurisdiction to the extent of the defendant corporation's contacts with the state. Conceptually, however, they do differ. In the first scenario, registration to do business provides the conceptual *basis* for jurisdiction (limited consent); in the second scenario, registration to do business merely provides the *notice*

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purpose of litigating liabilities created during its stay here.").

<sup>254</sup> The Court in *Daimler* confirmed that the second step of the specific jurisdiction inquiry (the *Asahi* reasonableness factors) is alive and well. See *Daimler*, 134 S. Ct. at 762 n.20.

<sup>255</sup> See, e.g., *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992) ("Whether jurisdiction in the sense of due process exists depends upon concepts of 'fairness' and 'convenience' and not upon mere compliance with procedural requirements of notice, nor even corporate 'presence' within this state.").

necessary for jurisdiction. Either of these interpretations is plausible and would be consistent with due process.

#### IV. SITUATING REGISTRATION STATUTES IN THE LARGER LANDSCAPE OF GENERAL JURISDICTION

It is important to situate the discussion of state registration statutes in a larger conversation about general jurisdiction. That is, aside from the constitutional argument explored above, there are several other problems associated with courts asserting general jurisdiction over a corporation based on its registration to do business and appointment of an agent for service of process. This Part explores three facets of the larger jurisdictional landscape that are problematic if courts continue to regard registration to do business as conferring general jurisdiction. To be sure, none of these presents a constitutional obstacle to asserting jurisdiction based on consent;<sup>256</sup> however, they provide additional support against interpreting registration statutes to confer general jurisdiction.

First, if the assertion of registration-based general jurisdiction were constitutionally permissible, this would largely swallow the minimum contacts test that has become the epicenter of modern jurisdictional practice and would result in the type of universal jurisdiction that has been condemned in other contexts. Second, given the *Daimler* decision and the dramatic contraction of general jurisdiction based on continuous and systematic general business contacts, continuing to interpret registration statutes to support the exercise of general jurisdiction results in a profound gap between doing business as a basis for jurisdiction and registering to do business as a basis for jurisdiction. Third, interpreting state registration statutes to permit the exercise of general jurisdiction will promote forum shopping, with litigants seeking out forums with liberal jurisdiction rules and no connection to the underlying dispute. Where a litigant is unable to bring his cause of action in an appropriate forum (perhaps because the statute of limitations has expired), he will have every incentive to file suit in any forum that regards registration to do business as supporting the exercise of general jurisdiction.

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<sup>256</sup> See Taylor, *supra* note 16, at 1175 (“On the other hand, as jurisdiction is a constitutional question, protection against exorbitant exercises of jurisdiction must similarly be cast in constitutional terms. That is, as compelling as the prudential objections to general jurisdiction might be, without a recognized constitutional objection, they are generally insufficient to implement a change in jurisdictional doctrine.” (footnote omitted)).

A. *Registration, Minimum Contacts, and Universal Jurisdiction*

Allowing for registration to confer general jurisdiction over corporations does not pass the “common sense” test. This, in itself, does not mean that asserting general jurisdiction over a corporation based on its registration and appointment of an agent for service of process violates the Due Process Clause. However, it should give courts pause about the practice.

Consider the following: if the assertion of general jurisdiction based on a corporation’s consent passed constitutional muster, then all states could conceivably interpret their statutes in this way. This would mean that each of the fifty states could assume all-purpose jurisdiction over a corporation that registered to do business in the state and appointed an agent for service of process. This would largely wipe specific jurisdiction off the map, at least as it concerns corporations doing business in multiple places. Since corporations would be subject to general jurisdiction anywhere and everywhere they registered to do business, there would be no need to resort to minimum contacts as a basis for jurisdiction. With the substantial and sophisticated body of case law that exists concerning the minimum contacts test and the Court’s recent pronouncement that “specific jurisdiction [is] the centerpiece of modern jurisdictional theory,”<sup>257</sup> it would be odd indeed if specific jurisdiction over corporations could be virtually obliterated in one fell swoop. Thus, the practice of asserting registration-based general jurisdiction, if carried to its logical extreme, would revolutionize modern jurisdictional law. Again, this by itself does not render the practice unconstitutional; however, it strongly suggests that the practice is suspect.

Additionally, it is important to emphasize the far-reaching implications of the view that registration amounts to consent, which, in turn, amounts to general jurisdiction. This view creates universal jurisdiction in any state that chooses to interpret its statute as conferring general jurisdiction.<sup>258</sup> For instance, in the hypothetical presented at the outset of the Article, I noted that a New York court would be able to assert jurisdiction over an Italian clothing company in respect of a trademark dispute with a French designer. The clothing company would, in fact, be subject to jurisdiction in New York concerning *any* legal issue arising *anywhere* in the world. To purport to assume

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<sup>257</sup> *Daimler*, 134 S. Ct. at 749.

<sup>258</sup> See Taylor, *supra* note 16, at 1192 (“Even if registering corporations are fully apprised of the jurisdictional implications of registration, and manifest express consent to general jurisdiction, it threatens to place them in the impossible position of virtually universal jurisdiction.”).

universal jurisdiction over a corporation—particularly a foreign<sup>259</sup> corporation—smacks of overreaching. The Court in *Daimler* expressed serious concerns about this overreaching, albeit in the context of general jurisdiction premised on a defendant’s continuous and systematic general business contacts with the forum.<sup>260</sup> For instance, Justice Ginsburg provided the example of a Polish plaintiff getting into a car accident in Poland and suing Daimler, a Germany company, in California under a design defect theory.<sup>261</sup> She concluded that “[e]xercises of personal jurisdiction so exorbitant . . . are barred by due process constraints on the assertion of adjudicatory authority.”<sup>262</sup> There is no difference between the Polish car accident hypothetical posed in *Daimler* and the fashion company trademark dispute referenced above. Both concern lawsuits involving foreign plaintiffs, foreign defendants, and causes of action that accrued abroad.<sup>263</sup> The only difference is the basis of jurisdiction—contacts versus consent. Under current law, there is a marked difference in result: no jurisdiction in the Polish car accident scenario because the contacts do not render the foreign defendant “at home” in California and jurisdiction in the Italian trademark infringement case because the corporation consented to jurisdiction in New York when it registered to do business there. However, the assertion of jurisdiction in the latter case is no less exorbitant than the assertion of jurisdiction in the former case.

The Court in *Daimler* also expressed concerns about international comity, noting that other countries do not share an “uninhibited approach to personal jurisdiction.”<sup>264</sup> Again, the comments were made in reference to the assertion of general jurisdiction based on a corporation’s continuous and systematic general business contacts with the forum. However, the same can be said for general jurisdiction based on registration to do business. Other countries do not regard registration under domestic law as providing the basis for all-purpose jurisdiction. Indeed, if a foreign court did purport to assume jurisdiction based on a U.S. company registering to do business abroad,

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<sup>259</sup> Here, I am specifically referring to a corporation that is incorporated abroad. The term “foreign” is also used to refer to a corporation that is incorporated in another U.S. state.

<sup>260</sup> See *Daimler*, 134 S. Ct. at 751.

<sup>261</sup> *Id.* at 751, 754 n.5.

<sup>262</sup> *Id.* at 751.

<sup>263</sup> This confluence of foreign plaintiff, foreign defendant, and foreign cause of action is sometimes referred to as “f-cubed” litigation. See Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705, 705 (2014) (“Basically, an F-cubed case involves a lawsuit brought in an American court by foreign plaintiffs suing foreign defendants, based on events that took place in some foreign country.”). The expression is most prevalently used in the context of securities litigation.

<sup>264</sup> *Daimler*, 134 S. Ct. at 762–63.

it is highly unlikely any resultant money judgment would be enforced in the United States.<sup>265</sup>

The fact that general jurisdiction based on registration could obviate the need for minimum contacts and vests courts with universal (and exorbitant) jurisdiction that is not recognized internationally does not mean that it is inconsistent with due process. However, these considerations, along with others discussed below, should sound a note of caution in interpreting registration statutes as many courts currently do.

### B. *Registering to Do Business Versus Doing Business*

Interpreting registration statutes to confer general jurisdiction over a corporation creates a marked conceptual misalignment between “registering to do business” and “doing business” as a basis for personal jurisdiction. In the pre-*Goodyear/Daimler* era, there was generally a rough symbiosis between doing business, on the one hand, and registering to do business, on the other.<sup>266</sup> In theory, the jurisdictional results under each would be the same. Under the doing business standard that prevailed in the years following *International Shoe*, and clarified in cases such as *Perkins* and *Helicopteros*, if the defendant had continuous and systematic general business contacts, evidenced by a permanent presence, employees, offices, sales, and the like, that defendant would be subject to general jurisdiction in the state. Those same contacts with the state would also give rise to an obligation on the part of a defendant to register to do business pursuant to a state registration statute.<sup>267</sup> In other words, those contacts (doing business) were the triggering mechanism that required a corporation to register

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<sup>265</sup> See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 5 (2005); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 5 (1962). Neither of these statutes recognizes corporate registration in a foreign country as a presumptively acceptable basis for personal jurisdiction.

<sup>266</sup> The terminology here tends to get confusing, especially because “transacting business” in the state is also a ground for *specific* jurisdiction pursuant to many long-arm statutes. See *supra* note 37.

<sup>267</sup> The relationship between “doing business” in the sense of having continuous and systematic general business contacts sufficient for a court to assume general jurisdiction over a corporation and “doing business” which triggers an obligation to register is not precisely clear. In guidance issued by the New York Department of State, Office of General Counsel, it explains the relationship as follows:

It follows that if an organization is not doing business that subjects it to jurisdiction or taxation, it is not doing business that requires qualification. Conversely, by qualifying an organization concedes that it is subject to jurisdiction and taxation. Above the jurisdiction and taxation minimum contacts, however, not all business activity engaged in by a foreign organization rises to “doing business” in the qualification sense.

“*Doing Business*” in *N.Y.*, *supra* note 108.

under state statutes. Thus, once the corporation met the minimum threshold for doing business in the state, it would be subject to general jurisdiction—either under the continuous and systematic contacts theory (doing business) or under the consent theory (registration to do business). Provided that a corporation that registered to do business *actually did business* in the state, the jurisdictional results were fairly congruous and it did not really matter, except perhaps in the academic sense, whether a court premised its jurisdictional power on the continuous and systematic contacts between the defendant and the state or the defendant's act of registration.

Not surprisingly, however, there is not always a correlation between registering to do business in the state and actually doing business in the state. In some cases, a corporation will register to do business in a certain state but never do business there.<sup>268</sup> For instance, the corporation might have planned to do business but never was able to set up its business in the state. Or, it might register “just in case” it decided to eventually do business, in order to avoid any time delays down the line.<sup>269</sup> The point is that there are a myriad of reasons why a corporation might reasonably register to do business but not actually do business in a state. In such circumstances, a state that regards registration as consent to all-purpose jurisdiction would consider itself jurisdictionally competent to adjudicate any dispute involving that corporation. The sheer act of registering to do business in the state—even in the absence of doing business—would suffice to ground general jurisdiction.

For instance, in *Kropschot Financial Services, Inc. v. Balboa Capital Corp.*, the defendant corporation was not doing business in New York.<sup>270</sup> The court noted that “[n]one of the traditional indicia of general jurisdiction” were present: the defendant had no offices, bank accounts, or employees in New York.<sup>271</sup> However, the defendant was registered to do business in New York and had been for over fifteen

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<sup>268</sup> See, e.g., *Kropschot Fin. Servs., Inc. v. Balboa Capital Corp.*, No. 11 Civ. 8609 SAS, 2012 WL 1870697, at \*4 (S.D.N.Y. May 21, 2012); *Robfogel Mill-Andrews Corp. v. Cupples Co., Mfrs.*, 323 N.Y.S.2d 381, 383 (N.Y. Sup. Ct. 1971).

<sup>269</sup> See *Riou*, *supra* note 18, at 744 (“Corporations doing minimal business in a state, though unsure whether they must qualify, might choose to do so rather than risk penalties for noncompliance. Other corporations might choose to qualify in anticipation of future in-state business.”). See also *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 572 (9th Cir. 2011) (“The company has no contacts or contracts, no sales agents or producers, no employees, and no offices in Montana, nor has it filed insurance rates and other forms necessary to do business, solicited any business, advertised, sold any policies, collected any premiums, or transacted any business in Montana. The company is, in short, 99.99% ‘Montana free.’ Although it has done nothing more than dip its toe in the water to test the idea and preserve its option of doing business in Montana at some undetermined point in the future, the company now faces the prospect of being subject to general jurisdiction.”).

<sup>270</sup> *Kropschot*, 2012 WL 1870697, at \*4.

<sup>271</sup> *Id.*

years.<sup>272</sup> The court found that despite not doing any business in New York, the defendant was subject to general jurisdiction because it maintained its status as an active foreign business corporation.<sup>273</sup> Although perfectly defensible from a theoretical viewpoint, asserting general jurisdiction over a corporation in these circumstances can appear to be an arbitrary “gotcha” in cases where there is no other conceivable connection between the defendant and the state purporting to assume jurisdiction.

The jurisdictional results could also be anomalous in cases where the corporation registered to do business in a state and did business—but not sufficient business to establish general jurisdiction under the continuous and systematic standard. In other words, a court could find that a corporation, although conducting business activity within the state, was not doing business in the state sufficient to ground general jurisdiction. However, because the corporation registered to do business,<sup>274</sup> general jurisdiction would be appropriate under a consent-based theory.

The strange result is that a corporation would be better off, from a jurisdictional perspective, if it had not registered to do business.<sup>275</sup> This difference in jurisdictional consequences incentivizes corporations to flout the registration requirements. A corporation’s thinking will likely be as follows: “If we register to do business in X state, we will be deemed to have consented to general jurisdiction. If we do not register, X state might determine that we do not have continuous and systematic general business contacts with X state, and we would not be subject to general jurisdiction in X state. Consequently, we should not register and thereby preserve the opportunity to argue that our conduct in X state does not amount to doing business.”<sup>276</sup> This perverse jurisdictional incentive to not register has been noted by others. For instance, Professor Andrews observes:

The same level of activities (“doing business”) conferred different levels of jurisdiction depending on whether the court used a theory of implied consent or presence, and under consent theory, a corporation who defied registration statutes could face lesser jurisdictional consequences than a corporation who complied and

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Although it clearly should not have.

<sup>275</sup> *But see, e.g.*, CAL. CORP. CODE § 2203(a) (West 2014) (“Any foreign corporation which transacts intrastate business and which does not hold a valid certificate from the Secretary of State . . . by transacting unauthorized intrastate business, shall be deemed to consent to the jurisdiction of the courts of California in any civil action arising in this state in which the corporation is named a party defendant.”).

<sup>276</sup> This, of course, ignores the non-jurisdictional consequences associated with not registering to do business.



registered. Judge Learned Hand called for reform in an influential case cited by the Court in *International Shoe*. Judge Hand decried the developing doctrine under which “an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform.”<sup>277</sup>

These incentives to “refuse[] to obey the laws of the state” are even greater in the aftermath of *Goodyear* and *Daimler*. The message from these cases is clear: it will be an exceptional case where general jurisdiction is appropriate<sup>278</sup> in states other than the corporation’s principal place of business or place of incorporation.<sup>279</sup> Thus, even if a corporation has continuous and systematic general business contacts with a state, including multiple permanent places of business, employees, sales, etc., this will not suffice to ground general jurisdiction. In such circumstances, a company will surely fare better jurisdictionally by not registering to do business in any state. This is because any state outside of the state of incorporation and principal place of business will almost undoubtedly find that it does not have general jurisdiction over the corporation under the new “at home” standard. However, if the state regards registration as amounting to consent, it will find that it does have general jurisdiction over a corporation. The corporation benefits jurisdictionally from disregarding state registration laws and continuing to do business in the state.<sup>280</sup>

Although registering to do business and doing business developed along different trajectories and are justified on different theoretical bases, there is something odd about how the rules fit together. Under the new “at home” standard, a corporation that is actively doing business in a state is not subject to general jurisdiction on the theory that its connections, though continuous and systematic, still do not rise to the level of it being appropriate for a court to assert all-purpose jurisdiction over the corporation. A corporation can thus be doing business (and a lot of it) and not be subject to general jurisdiction. By

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<sup>277</sup> Andrews, *supra* note 7, at 1006 (footnotes omitted). See also *AstraZeneca AB v. Mylan Pharm., Inc.*, Civil Action No. 14-696-GMS, 2014 WL 5778016, at \*5 (D. Del. Nov. 5, 2014) (“Moreover, a contrary holding would lead to perverse incentives: foreign companies that comply with the statute in order to conduct business lawfully are disadvantaged, whereas those who do not register and do business in Delaware illegally are immune.”); Lewis, *supra* note 16, at 29 (“In fact, if simplifying service through the availability of appointed agents is the state’s goal, assertions of general jurisdiction based on the appointment will undermine that goal—by discouraging foreign corporations from complying with qualification provisions in order to avoid the jurisdictional exposure. The state’s interest in simplifying service would be fully served by requiring appointment of an agent to receive process in actions where the state otherwise has constitutionally acceptable jurisdiction over the defendant.”).

<sup>278</sup> Here, I am leaving aside the issue of consent.

<sup>279</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014).

<sup>280</sup> Again, I emphasize that I am only teasing out the jurisdictional consequences. As a business calculus, a corporation might still be better off registering to do business to avoid fines and other penalties.

contrast, a corporation that is not doing business at all—yet has registered to do business—can be subject to general jurisdiction.<sup>281</sup> The results seem to be backward. Shouldn't a company that has a permanent and enduring connection with the state be more likely to face the plenary power of the state than one that has virtually no connection to the state?

As noted, technically there is nothing inconsistent about finding that a state has general jurisdiction in one circumstance (registration) and no general jurisdiction in the other circumstance (lack of continuous and systematic general business contacts), since the two grounds of jurisdiction are conceptually separate.<sup>282</sup> Intuitively,

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<sup>281</sup> See *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, Civil Action No. 14-935-LPS, 2015 WL 186833, at \*14 (D. Del. Jan. 14, 2015) (“It seems an odd result that while there is not general jurisdiction over a corporation in every state in which the corporation does business, there may be general jurisdiction over a corporation in every state in which that corporation appoints an agent to accept service of process as part of meeting the requirements to register to do business in that state. But if consent remains a valid basis on which personal jurisdiction may arise—and the undersigned Judge concludes that *Daimler* did not change the law on this point—then this result, though odd, is entirely permissible.”).

<sup>282</sup> The *Daimler* decision does not have any direct impact on registration as a basis for general jurisdiction. *Daimler* spoke to the contacts that a corporation must have with a state in order to be subject to general jurisdiction there. It held that only where these contacts are so continuous and systematic as to render the corporation “at home” in the state will general jurisdiction be appropriate. 134 S. Ct. at 760–62. Ordinarily, a corporation is only “at home” in its state of incorporation or the state of its principal place of business. See *id.* Consent as a basis for general jurisdiction exists separate and apart from the new “at home” basis for jurisdiction. Nonetheless, there appears to be some confusion as to the impact of the *Daimler* decision on registration to do business. The court in *AstraZeneca*, for instance, viewed the *Daimler* decision as critical to its holding that registration under Delaware law does not amount to consent to general jurisdiction. 2014 WL 5778016, at \*5 (“The court finds . . . that *Daimler* does weigh on this issue. Both consent and minimum contacts (and all questions regarding personal jurisdiction) are rooted in due process. Just as minimum contacts must be present so as not to offend ‘traditional notions of fair play and substantial justice,’ the defendant’s alleged ‘consent’ to jurisdiction must do the same. . . . [T]he Supreme Court rejected the idea that a company could be haled into court for merely ‘doing business’ in a state. . . . In light of the holding in *Daimler*, the court finds that [the defendant’s] compliance with Delaware’s registration statute—mandatory for *doing business* within the state—cannot constitute consent to jurisdiction.”). See also *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, No. 14-CV-8679 CM, 2015 WL 539460, at \*5–6 (S.D.N.Y. Feb. 6, 2015) (“The strongest argument for establishing general jurisdiction . . . stems from [the defendant] being registered to do business in the forum. Prior to *Daimler*, some courts concluded that registering to do business in the state of New York automatically confers general jurisdiction on that person or entity. . . . After *Daimler*, with the Second Circuit cautioning against adopting ‘an overly expansive view of general jurisdiction,’ the mere fact of [the defendant] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.” (quoting *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014))). As discussed in note 2, the New York General Assembly introduced a bill in response to the *Daimler* decision to more explicitly address consent via registration as a basis for general jurisdiction. See S. 7078, 200th S., Reg. Sess. (N.Y. 2014); A. 9576, 200th Gen. Assemb., Reg. Sess. (N.Y. 2014). Documents offered in opposition to the bill also reveal confusion over the *Daimler* “at home” basis for jurisdiction and the registration/consent basis for jurisdiction. See, e.g., Letter from John J. Clarke, Jr., *supra* note 2 (“It is not clear that the bill’s alternative approach, to base general jurisdiction over a foreign business organization on its deemed consent as a result of registering to do business in the state, would solve this

however, it does appear strange to find jurisdictional power in a case where a corporation is not doing any business in the state and no jurisdictional power in a case where the corporation is doing a significant amount of business in the state. Although not all jurisdictional rules will fit together in a fully systematized and coherent way,<sup>283</sup> one would expect that jurisdictional rules governing one particular type of entity—corporations—would make some internal sense.

### C. *Registration to Do Business and Forum Shopping*

In addition to the conceptual issues described above, there is a practical problem associated with interpreting registration statutes to confer general jurisdiction on a court: it promotes forum shopping.<sup>284</sup> Forum shopping refers to the practice of a litigant seeking out an

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constitutional problem. As a factual matter, those organizations still would not be viewed as being ‘essentially at home’ in New York notwithstanding their deemed consent to jurisdiction under New York law.”); Memorandum from Wilson, Elser, Moskowitz, Eldelman & Dicker LLP, *supra* note 2 (“*Daimler* requires that, to achieve general jurisdiction, such corporations must be viewed as ‘essentially at home’ in New York. Mere registration at the State level would most likely not pass the essentially at home test.”). Both the submissions focus entirely on the wrong issue: whether consent via registration would meet the “at home” test (which it clearly would not). The question instead is whether registration is a valid form of consent so as to be independently consistent with due process. See *Acorda Therapeutics*, 2015 WL 186833, at \*12 (“*Daimler* distinguishes between consensual and non-consensual bases for jurisdiction. It preserves what has long been the case: that these are two distinct manners of obtaining jurisdiction over a corporation. Consistent with *Daimler*, it remains the law that general jurisdiction may be established by showing that a corporation is ‘at home’ in the sense described in detail in *Daimler*, or separately general jurisdiction may be established by a corporation’s consent to such jurisdiction. *Daimler* is directed to the former situation and has nothing to say about the latter scenario.”); *Forest Labs, Inc. v. Amneal Pharm. LLC*, Civil Action No. 14-508-LPS, 2015 WL 880599, at \*13 (D. Del. Feb. 26, 2015) (report and recommendation) (“[I]n the one instance in which *Daimler* mentions consent to jurisdiction[,] . . . it does so to *distinguish* the concept of consent from the circumstances relevant to its decision. In sum, it is difficult for the Court to read *Daimler* as overruling nearly century-old Supreme Court precedent regarding what amounts to voluntary consent to jurisdiction when: (1) *Daimler* never says it is doing any such thing; and (2) what *Daimler* does say about consent to jurisdiction suggests just the opposite.”).

<sup>283</sup> See *Daimler*, 134 S. Ct. at 772 (Sotomayor, J., concurring) (“Third, the majority’s approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit.”).

<sup>284</sup> See *Reynolds & Reynolds Holdings, Inc. v. Data Supplies, Inc.*, 301 F. Supp. 2d 545, 551 (E.D. Va. 2004) (“[A] finding of general personal jurisdiction on the basis of registration and appointment of an agent alone is extremely conducive to forum shopping because many companies have registered to do business and appointed an agent for service of process in numerous states.”); Riou, *supra* note 18, at 745 (“Assertion of general jurisdiction on th[e] basis [of registration to do business] promotes forum-shopping abuse by plaintiffs and may require a corporation to defend suit in a state where it has no other contacts on a cause of action unrelated to the forum. Venue statutes, transfer of venue, and the doctrine of forum non conveniens may not adequately protect a foreign corporation from inconvenient litigation in these circumstances.” (footnotes omitted)).

inappropriate forum in which to file suit in order to take advantage of some procedural or substantive benefits that the forum offers.<sup>285</sup> States that regard registration to do business as amounting to consent to general jurisdiction will soon become forum shoppers' havens. In the aftermath of *Daimler*, litigants will have an exceedingly hard time establishing general jurisdiction over a corporation in a place outside of its state of incorporation or principal place of business. In the event that, say, the statute of limitations has run in those places (and in any state that might otherwise have specific jurisdiction over the case), a litigant has every incentive to locate a forum—any forum—where the corporation has registered to do business and that regards such registration as consent to all-purpose jurisdiction.<sup>286</sup>

This is exactly what happened in *Cowan v. Ford Motor Co.*,<sup>287</sup> a case that is sometimes regarded as the poster child for forum shopping. Earl Cowan, a resident of Texas, died from injuries associated with a pickup truck accident in 1976.<sup>288</sup> Five years later, in 1981, long after the

<sup>285</sup> See generally Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006).

<sup>286</sup> Taylor, in his article *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, suggests the "need for limits on the exorbitation of jurisdiction." Taylor, *supra* note 16, at 1196. He argues:

But perhaps more seriously, the ill-defined line between substantive and procedural provisions threatens to introduce, as in the case of statutes of limitations, significant changes in the rules of decision in any particular dispute. This is particularly so because, in addition to statutes of limitations, choice of law rules have also been characterized as procedural; hence, choice of law determinations are governed by *lex fori*—that is, the forum will look to its own choice of law rules to determine what the applicable rules of decision are. Allocating the choice of law determination to the seized forum amplifies the unpredictability of the possibility of widespread jurisdiction.

*Id.* at 1194 (footnote omitted). In Taylor's view, the unpredictability that the aforementioned conflict of laws issues present compound the unpredictability already inherent in registration-based general jurisdiction. He argues that the potential changes in governing law "exacerbate the fairness concerns that the Due Process Clause is supposed to address." *Id.* at 1196. Taylor also posits that the increased uncertainty posed by the conflict of laws issues impacts the initial legitimacy of consent to jurisdiction. *Id.* at 1196–97. He writes:

[G]iven that the consequences of the assertion of jurisdiction are so unpredictable, the proposition that there has been any sort of meaningful ex ante consent—the very concept that enables registration-based jurisdiction—becomes increasingly tenuous. To the very possibility of accountability in a distant forum, choice of laws doctrine adds an absolutely unpredictable array of potential changes in the substantive rules of decision. In a sense, unpredictability impeaches consent, undermining its durability as a ground of personal jurisdiction.

*Id.* Thus, for Taylor, the question is not whether it is fair to allow general jurisdiction based on consent, but rather whether it is possible to actually find meaningful consent to jurisdiction in light of the unpredictability problem. *Id.* He believes that "[c]onsent can only be given to that which is predictable. . . . As the consequences become less predictable, the possibility of meaningful consent becomes increasingly remote." *Id.* at 1197.

<sup>287</sup> 694 F.2d 104, 105 (5th Cir. 1982), *on reh'g*, 713 F.2d 100 (5th Cir. 1983).

<sup>288</sup> *Id.*

statute of limitations had expired in Texas, his widow (also a resident of Texas) filed a wrongful death action against Ford in federal court in Mississippi.<sup>289</sup> Ford, the defendant, was incorporated in Delaware and had its principal place of business in Michigan.<sup>290</sup> The lawsuit in question had nothing to do with Mississippi—the truck was neither manufactured nor sold in Mississippi.<sup>291</sup> The plaintiff argued, and the court accepted, that Mississippi had general jurisdiction over Ford because Ford had registered to do business in Mississippi pursuant to that state’s registration statute.<sup>292</sup> The Court concluded that Ford had “come into Mississippi and voluntarily subjected itself to Mississippi process. It has agreed to be treated as a resident corporation.”<sup>293</sup> The court then proceeded to apply the Mississippi statute of limitations, under which the suit was not barred, stating that “[i]mposing Texas’ statute upon Mississippi . . . would quite certainly infringe upon Mississippi’s sovereignty.”<sup>294</sup> On rehearing, the *Cowan* court refused to dismiss the case on forum non conveniens grounds.<sup>295</sup> The Mississippi court also suggested that a transfer of the case back to Texas pursuant to 28 U.S.C. § 1404(a), the federal venue transfer statute, would be possible in the discretion of the trial court.<sup>296</sup> According to *Cowan*, a transfer would mean that a Texas court would have to apply Mississippi choice of law rules—including its choice of law rules on statutes of limitations—in deciding what law would apply.<sup>297</sup> In effect, this would mean that an action statute-barred in Texas could nonetheless be tried in Texas, under Texas substantive law, but pursuant to a Mississippi statute of limitations. One author refers to this scenario as “the epitome of forum shopping” and notes that plaintiffs have successfully taken

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 105–07.

<sup>293</sup> *Id.* at 107.

<sup>294</sup> *Id.*

<sup>295</sup> *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 (5th Cir. 1983).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 104 n.6 (“If the case is in fact transferred to another federal district court pursuant to a motion by Ford under § 1404(a), the transferee court must act as would the transferor court and follow Mississippi choice-of-law rules. This choice included the decision as to whether the case is governed by the Mississippi statute of limitations.”). The *Cowan* court was likely not correct in this respect. If the action were transferred to Texas, it is true that pursuant to *Van Dusen v. Barrack*, 376 U.S. 612 (1964), Texas would have to apply Mississippi’s choice of law rules in ascertaining the governing law. However, Texas would not necessarily be obligated to apply the Mississippi statute of limitations (or, for that matter, the Mississippi choice of law approach to statute of limitations). For instance, if Texas law regarded statutes of limitations as procedural, then they would be outside the ambit of choice of law. If a matter is characterized as one of procedure, it is governed by the law of the forum (i.e., Texas law). See Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19, 20 (1989) (“The traditional common law view is that statutes of limitations are procedural, and that therefore the forum may apply its own no matter whose substantive law it uses.”).

advantage of what he terms “statute of limitations havens” to pursue actions that are barred everywhere else.<sup>298</sup> Such shopping is only possible because courts have interpreted their state statutes as permitting the exercise of general jurisdiction over corporations that have registered to do business and appointed an agent for service in a state.

Prior to the *Daimler* decision, these cases were fairly few and far between. This is because in most circumstances, resort to registration as a basis for personal jurisdiction was not necessary. Rather, doing business jurisdiction was available to most plaintiffs, who could usually find some state where: a) the action was not statute-barred, and b) the corporation had continuous and systematic general business contacts to ground general jurisdiction. Now that doing business jurisdiction has been wiped off the map, plaintiffs will increasingly rely on registration as a basis for general jurisdiction. A plaintiff who is unable or unwilling to bring suit in an appropriate forum (where the underlying cause of action arose, the corporation’s place of incorporation, or the corporation’s principal place of business) will certainly seek out those jurisdictions with very liberal interpretations of their registration statutes.

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In this Part, I have argued that not only is premising general jurisdiction on a corporation’s registration and appointment of an agent for service of process inconsistent with due process, it is also problematic from a policy perspective. First, if carried to its logical extreme, such that every state exercised consent-based general jurisdiction over registered corporations, this would spell the end of the minimum contacts test as we know it. Moreover, this form of universal jurisdiction has been condemned as exorbitant and an affront to international comity in the related context of general jurisdiction based on a corporation’s forum contacts. Second, interpreting registration to do business as conferring general jurisdiction creates a profound disconnect between registration to do business and doing business. In the former scenario, a corporation is subject to general jurisdiction, even if it does no business in the forum; in the latter scenario, a corporation is

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<sup>298</sup> Walker, *supra* note 297, at 19 (“Besides Mississippi, the most prominent of these ‘havens’ is New Hampshire, as the well known *Keeton v. Hustler Magazine* case demonstrated. What characterizes both of these states is not merely their long statutes of limitations but also their willingness, expressed through judicial pronouncements, to apply these statutes to causes of action otherwise totally unrelated to them.” (footnotes omitted)). See also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (“This Court has long and repeatedly held that the Constitution does not bar application of the forum State’s statute of limitations to claims that in their substance are and must be governed by the law of a different State.”).

not subject to general jurisdiction, even if it does a significant amount of business in the forum. This disconnect incentivizes a corporation to disobey the law and not register pursuant to state law. Third, asserting general jurisdiction based on corporate registration is one of the last bastions of forum shopping. A plaintiff whose cause of action has expired in the appropriate forum can search for another (wholly arbitrary) forum and sue a defendant on a cause of action that has nothing to do with the corporation's actions or business in that state. Each of these concerns, both individually and collectively, further call into the question the propriety of asserting general jurisdiction over a corporation based solely on its registration to do business in a state.

#### CONCLUSION

The Supreme Court has demonstrated a great deal of interest in personal jurisdiction as of late.<sup>299</sup> It is only a matter of time before it decides to tackle one of the last remaining areas of jurisdictional uncertainty: the effect of corporate registration statutes. Those courts that assume general jurisdiction over a corporation based on its act of registering and appointing an agent for service of process focus on consent as the basis of jurisdiction. That is, because a corporation can consent to jurisdiction, and registration amounts to consent, due process is not offended when a court asserts general jurisdiction in these circumstances. However, it is far from apparent that registration amounts to consent (whether express or implied) to general jurisdiction. Registration does not look like any other form of consent recognized in the jurisdictional context; it bears very little resemblance, for instance, to forum selection clauses or submission. Moreover, the consent that underpins registration-based general jurisdiction is coercive. It is demanded by the state as the price of admission into the state, without the state relinquishing anything in return. It is not genuine, free, or voluntary. Accordingly, while consent can provide a basis for jurisdiction, registration to do business cannot meaningfully be regarded as consent. Additionally, registration-based jurisdiction does not fit well into the landscape of general jurisdiction. It could eliminate the need for minimum contacts altogether; it results in universal and exorbitant jurisdiction; it is conceptually misaligned with doing business as a ground for jurisdiction; and it promotes forum shopping.

It has been nearly a century since the Supreme Court has seen fit to address the issue of where registration statutes fit in the jurisdictional

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<sup>299</sup> See *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

scheme.<sup>300</sup> A lot has changed since then. We have seen the rise of fairness and minimum contacts as the touchstone of modern jurisdictional practice.<sup>301</sup> We have seen the demise of in rem jurisdiction.<sup>302</sup> We have seen an affirmation of the *Pennoyer* principle in the context of natural persons.<sup>303</sup> We have seen the development and refinement of “stream of commerce”<sup>304</sup> and “effects”<sup>305</sup> as particularizations of the minimum contacts test for specific jurisdiction. We have seen the rise and fall of doing business as a basis for jurisdiction.<sup>306</sup> The time has come for the Supreme Court to address the last remaining gulf in the area of jurisdiction: registration as a basis for general jurisdiction over corporations.

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<sup>300</sup> See *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

<sup>301</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>302</sup> See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>303</sup> See *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

<sup>304</sup> See *J. McIntyre Mach.*, 131 S. Ct. 2780; *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102 (1987).

<sup>305</sup> See *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

<sup>306</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).