

# NOTES

## PENNOYER'S GHOST: CONSENT, REGISTRATION STATUTES, AND GENERAL JURISDICTION AFTER DAIMLER AG V. BAUMAN

KEVIN D. BENISH\*

*This Note evaluates general personal jurisdiction based on a “consent-by-registration” theory, arguing that this old basis of jurisdiction is unconstitutional after Daimler AG v. Bauman. Daimler overturned nearly seventy years of law on general jurisdiction, and in doing so provoked the return to a basis of jurisdiction dating back to Pennoyer v. Neff, with plaintiffs arguing that foreign corporations “consent” to general jurisdiction when they register to do business in states outside their place of incorporation or principal place of business. But Pennoyer is dead. Thus, the question is whether Pennoyer’s ghost provides a constitutional basis for general jurisdiction, even after Daimler’s severe limitations of it.*

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INTRODUCTION

*Daimler AG v. Bauman* signaled the end of an era.<sup>1</sup> Through that decision, eight justices of the Supreme Court overturned nearly seventy years of jurisprudence on general personal jurisdiction.<sup>2</sup> The impact of *Daimler* is so fundamental that many famous procedure cases of the twentieth century would never have made it through the courthouse door under the decision’s narrow standard.<sup>3</sup>

But *Daimler* has proven to be a double-edged sword. *Daimler* limited general jurisdiction under the Due Process Clause to a defendant corporation’s principal place of business or place of incorporation.<sup>4</sup> In doing so, longstanding bases of personal jurisdiction in the United States have been eliminated,<sup>5</sup> sparking the search for alternative means to establish general jurisdiction over foreign corporations.<sup>6</sup>

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<sup>1</sup> 134 S. Ct. 746 (2014); see also Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. (forthcoming 2015) (discussing the sweeping nature of the *Daimler* decision and its implications for future litigation).

<sup>2</sup> *Daimler*, 134 S. Ct. at 763.

General jurisdiction is the “power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected.” Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

In contrast, *specific* jurisdiction is based on “affiliations between the forum and the underlying controversy,” which “normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate.” *Id.*

<sup>3</sup> E.g., *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (venue case based on “doing business” general jurisdiction); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (global class action case based on “doing business” general jurisdiction); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (conflict of laws case based on “doing business” jurisdiction).

<sup>4</sup> *Daimler*, 134 S. Ct. at 760.

<sup>5</sup> This includes “doing business,” which long prevailed as a basis for general jurisdiction. *Id.* at 761 n.18.

<sup>6</sup> For the purposes of this Note, “foreign corporation” means any corporation sued outside its place of incorporation or principal place of business. Thus, “foreign

This search produced an unanticipated result: Century-old cases are finding new life,<sup>7</sup> and the theory that foreign corporations “consent” to general jurisdiction by registering to do business in a forum state is now the go-to alternative to *Daimler*’s holding.<sup>8</sup> This notion of “consent-by-registration” implicates case law as old as *Pennoyer v. Neff*,<sup>9</sup> a cornerstone of American civil procedure.

But *Pennoyer* is dead. As Professor Linda Silberman has noted, the death-knell rendered to *Pennoyer* in *Shaffer v. Heitner* was so long-coming it proved anticlimactic.<sup>10</sup> Yet the turn to consent-by-registration after *Daimler* signals the rise of *Pennoyer*’s ghost, a theory of general jurisdiction based on a corporation’s compliance with state registration statutes.<sup>11</sup>

*Pennoyer*’s ghost and its consent-by-registration theory attempts to circumvent the minimum contacts test established by *International Shoe v. Washington* in 1945,<sup>12</sup> stirring a decades-old split among federal courts of appeal.

TABLE 1: CONSENT-BY-REGISTRATION TO GENERAL JURISDICTION CIRCUIT SPLIT

<i>Circuit Court</i>	<i>Constitutionality of Consent-by-Registration</i>	<i>Case</i>
First Circuit	Violates due process	Cossaboon v. Me. Med. Ctr., 600 F.3d 25, 37 (1st Cir. 2010).
Second Circuit	Satisfies due process (dicta)	Spiegel v. Schulmann, 604 F.3d 72 (2d Cir. 2010).
Third Circuit	Satisfies due process	Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991).
Fourth Circuit	Violates due process	Ratliff v. Cooper Labs., Inc., 444 F.2d 745 (4th Cir. 1971).
Fifth Circuit	Violates due process	Siemer v. Learjet Acquisition Corp., 966 F.2d 179 (5th Cir. 1992).
Sixth Circuit	Undecided	None

corporation” includes corporations from other U.S. states and corporations established outside the country. “Nonresident” and “foreign” corporations are synonymous.

<sup>7</sup> See *infra* Part I.B (discussing post-*Daimler* litigation over the jurisdictional impact of corporate registration statutes).

<sup>8</sup> See generally *infra* Appendix (surveying the laws of all fifty states regarding registration to do business and the penalties for failure to register to do business and collecting post-*Daimler* case law).

<sup>9</sup> 95 U.S. 714 (1877).

<sup>10</sup> Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 64 (1978). The Supreme Court relegated its overruling of *Pennoyer* to a mere footnote. *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977).

<sup>11</sup> All fifty states have such statutes. See sources cited *infra* Appendix (providing a full account of these provisions).

<sup>12</sup> 326 U.S. 310 (1945); see also *infra* notes 40–43 and accompanying text.

<i>Circuit Court</i>	<i>Constitutionality of Consent-by-Registration</i>	<i>Case</i>
Seventh Circuit	Violates due process	Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir. 1990).
Eighth Circuit	Satisfies due process	Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990).
Ninth Circuit	Satisfies due process (dicta)	King v. Am. Family Mut. Ins. Co., 632 F.3d 570 (9th Cir. 2011).
Tenth Circuit	Undecided	None
Eleventh Circuit	Violates due process	Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286 (11th Cir. 2000).
D.C. Circuit	Undecided	None
Federal Circuit	Undecided (case on appeal)	Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., No. CV 14-935-LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015), <i>appeal docketed</i> , 2015 WL 186833 (Mar. 17, 2015).

As the table above illustrates, the Third<sup>13</sup> and Eighth<sup>14</sup> Circuits interpret consent-by-registration to general jurisdiction as consistent with the Due Process Clause, and are supported in dicta by the Second<sup>15</sup> and Ninth<sup>16</sup> Circuits. Opposed to this interpretation, the First,<sup>17</sup> Fourth,<sup>18</sup> Fifth,<sup>19</sup> Seventh,<sup>20</sup> and Eleventh<sup>21</sup> Circuits hold consent-based general jurisdiction violates due process. Only the Sixth,

<sup>13</sup> See *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991) (holding that Netlink was subject to general personal jurisdiction because it was authorized to do business in Pennsylvania).

<sup>14</sup> See *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) (holding that foreign corporations that appoint an agent for service of process under Minnesota's registration statute have consented to general jurisdiction regardless of any minimum contacts analysis).

<sup>15</sup> See *Spiegel v. Schulmann*, 604 F.3d 72, 77 n.1 (2d Cir. 2010) (citing *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787 (App. Div. 1983)).

<sup>16</sup> See *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 576 n.6 (9th Cir. 2011).

<sup>17</sup> The First Circuit suggests that the scope of consent-by-registration is limited to specific jurisdiction only. Compare *Cossaboon v. Me. Med. Ctr.*, 600 F.3d 25, 37 (1st Cir. 2010) ("Corporate registration . . . adds some weight to the jurisdictional analysis, but it is not alone sufficient to confer general jurisdiction."), with *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) ("It is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority.").

<sup>18</sup> See *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) ("Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another. . . . The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

<sup>19</sup> See *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992) ("[B]eing qualified to do business . . . is of no special weight in evaluating general personal jurisdiction." (internal quotation marks omitted)).

<sup>20</sup> See *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). While the Seventh Circuit did not expressly discuss "consent," it held that registration to do business alone "cannot satisfy . . . the demands of due process." *Id.*

Tenth, D.C., and Federal Circuit Courts of Appeal have yet to take a position on the jurisdictional impact of consent-by-registration.<sup>22</sup> But post-*Daimler* courtroom battles over whether this “consent” to general jurisdiction satisfies due process in cases where foreign corporate defendants are not “at home” under the *Daimler* standard are growing in number.<sup>23</sup> Until the Supreme Court resolves this question, *Pennoyer*'s ghost will haunt defendants in every forum where they are registered.<sup>24</sup>

This Note argues that it is unconstitutional to assert general jurisdiction over foreign corporations based on a consent-by-registration theory.<sup>25</sup> Consent is a possible basis of limited jurisdiction,<sup>26</sup> but in the twenty-first century there is no constitutional basis for asserting gen-

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<sup>21</sup> See *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (citing *Learjet*, 966 F.2d at 183, and *Ratliff*, 444 F.2d at 748). *Sherritt* does not explicitly mention consent, but the case cites *International Shoe* and holds that “casual presence of a corporate agent . . . is not enough to subject the corporation to suit where the cause of action is unrelated to the agent’s activities.” *Id.*

<sup>22</sup> The Federal Circuit has recently taken a case on appeal regarding this matter, however. See *infra* Part I.B (discussing *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, No. CV 14-935-LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015), *appeal docketed*, 2015 WL 186833 (Mar. 17, 2015)).

<sup>23</sup> See, e.g., *Gucci Am., Inc. v. Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014) (suggesting the district court consider whether consent-by-registration is a valid basis of general jurisdiction); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 2015 WL 539460, at \*6 (S.D.N.Y. Feb. 6, 2015) (“After *Daimler* . . . the mere fact of [the defendant’s] 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.” (citation omitted)); *Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 396–400 (D. Conn. 2014) (holding that the imposition of general jurisdiction on a foreign registered entity, pursuant to Connecticut’s registration statute, violated due process); *Sioux Pharm, Inc. v. Summit Nutritionals Int’l, Inc.*, 859 N.W.2d 182, 187 (Iowa 2015) (dismissing jurisdiction over foreign corporation but noting it was “never . . . registered to do business in Iowa”); *Zucker v. Waldmann, N.Y. Slip Op.* 50055, 2015 WL 390192 (N.Y. Sup. Ct. 2015) (stating foreign corporations can consent to jurisdiction by registering to do business in New York); see also *infra* Part I.B (elaborating on judicial reactions to *Daimler*).

<sup>24</sup> All fifty states and the District of Columbia have registration statutes, though states vary on whether registration establishes consent to jurisdiction, and whether that jurisdiction is general or specific. See *infra* Appendix.

<sup>25</sup> Cf. Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. (forthcoming 2015) (manuscript at 17) (on file with author) (arguing that consent-by-registration is an adequate basis of jurisdiction “implicating state sovereign interests”).

<sup>26</sup> See *infra* Part II.A (outlining a statutory and constitutional analysis to determine whether registration to do business establishes consent to jurisdiction); see also, e.g., *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–05 (1982) (noting possible bases of consent); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* 106 (4th ed. 2005) (“[P]erhaps the biggest exception to the *Pennoyer* rule was the notion, still valid today, that a defendant not physically present in the state may consent to the jurisdiction of its courts.”); AUSTIN WAKEMAN SCOTT, *FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW* 39 (1922) (“[J]urisdiction over the

eral jurisdiction through a corporation's compliance with state registration statutes.<sup>27</sup> *Daimler* provoked the rise of *Pennoyer's* ghost by eliminating "doing business" as a basis of general jurisdiction; however, in doing so, it simultaneously made assertions of consent-by-registration to general jurisdiction violative of post-*Daimler* due process limits.

Part I of this Note provides an overview of personal jurisdiction in the United States and then reviews the *Daimler* decision and its less anticipated effect—the exploration of consent-by-registration as a separate basis for general jurisdiction over foreign corporations. Part II analyzes consent-by-registration as a theory of general personal jurisdiction under two separate lenses of due process. Part II.A analyzes the theory in the context of *Daimler's* rationale that calls for "uniqueness" and "ascertainability." Part II.B examines the history of consent-by-registration and its relationship to the now invalidated "doing business" basis of general jurisdiction in order to determine whether compliance with registration statutes is a "touchstone of jurisdiction" that satisfies due process outside the prevailing minimum contacts standard required by *International Shoe* and its progeny. Part III then illustrates an additional concern implicated by consent-by-registration—the unconstitutional conditions doctrine. Under each analysis, this Note demonstrates that *Daimler* renders consent-by-registration to general jurisdiction unconstitutional. Ultimately, this Note concludes that the future of personal jurisdiction lies in reforms to specific jurisdiction, not fictions done away with by *International Shoe* and its progeny—including the *Daimler* case itself.<sup>28</sup>

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person of the defendant may be acquired by his consent. This consent may be given either before or after action has been brought.”).

<sup>27</sup> In the decades prior to *Daimler*, others have articulated the problems with consent-by-registration, yet none have addressed the due process concern or anticipated the particulars of twenty-first century personal jurisdiction. 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 (1990) (arguing consent-based general jurisdiction is an unconstitutional condition); Pierre Riou, *General Jurisdiction over Foreign Corporations: All that Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741, 793–800 (1995) (arguing consent-based general jurisdiction should be overturned on federalism grounds); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1192–93 (2003) (arguing registration statutes satisfy due process but are unpredictable).

<sup>28</sup> See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 (2011) (Ginsburg, J., dissenting) (“[I]nvocation of a fictitious consent . . . is unnecessary and unhelpful.”); *Burnham v. Superior Court*, 495 U.S. 604, 618 (1990) (plurality opinion) (stating the pre-*International Shoe* notions of presence and consent were “purely fictional” (citing J. Beale, CONFLICT OF LAWS 360, 384 (1935))); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 n.11 (1980) (labeling “implied consent” a fiction); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957) (“[T]his Court accepted and then abandoned ‘consent,’ ‘doing

## I

*DAIMLER AG v. BAUMAN* AND THE RISE  
OF *PENNOYER'S GHOST*

It all started with *Pennoyer*.<sup>29</sup> A shibboleth for first-year law students, *Pennoyer* established the connection between personal jurisdiction and the Due Process Clause.<sup>30</sup> Articulating a theory of jurisdiction that prevailed from the late-nineteenth to the mid-twentieth century, *Pennoyer's* territorial view united notions of “power”<sup>31</sup> and “consent”<sup>32</sup> at a time when territorial borders determined the reach of state authority.<sup>33</sup> Under *Pennoyer's* “power theory,” summons issued to natural persons who were physically present in a forum, combined with service of process that guaranteed notice, were the requisite components of jurisdiction.<sup>34</sup> Consequently, state

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business,’ and ‘presence’ as the standard for measuring the extent of state judicial power over [foreign] corporations.”); *Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 340–41 (1953) (labeling *Pennoyer's* rules as “fictive”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 90 cmt. a (1934) (stating “consent” means “a real consent, not a fictitious one”); Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla*, 25 U. CHI. L. REV. 569, 573 (1958) (arguing that courts between *Pennoyer* and *International Shoe* “stretch[ed] the concepts of consent and presence to authorize jurisdiction where consent in fact did not, and presence could not, exist”).

<sup>29</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877); see Kurland, *supra* note 28, at 570 (citing *Pennoyer* for “the origins of our modern law of personal jurisdiction”).

<sup>30</sup> *Pennoyer*, 95 U.S. at 733.

<sup>31</sup> See *id.* at 722 (“[T]he laws of one State have no operation outside of its territory. . . . [N]o tribunal . . . can extend its process beyond that territory so as to subject either persons or property to its decisions.”); see also *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) (stating that, under *Pennoyer*, “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power”).

<sup>32</sup> *Pennoyer*, 95 U.S. at 733 (holding that courts may exercise *in personam* jurisdiction over nonresident defendants when those individuals make a “voluntary appearance” within a state or “assent[ ] in advance” to substituted service of process). See also *Shaffer*, 433 U.S. at 197 (stating *Pennoyer* recognized that if a defendant “consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State” (internal citation omitted)).

<sup>33</sup> *Pennoyer*, 95 U.S. at 722 (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . . [N]o tribunal established by it can extend its process beyond that territory.”).

<sup>34</sup> Under *Pennoyer's* “power theory,” summons issued to natural persons who were physically present in a forum, combined with “service of process” that guaranteed notice, were the requisite components of jurisdiction. *Pennoyer* itself typifies the required nexus between these dual requirements. At the time of the initial state court action that eventually led to the *Pennoyer v. Neff* decision, Neff did not live in the forum state. As a result, Neff was not personally served. Service in the state action was made by newspaper publication. *Id.* at 717.

authority over corporations was limited by the nineteenth-century view that corporations resided only in their state of incorporation.<sup>35</sup>

Corporate liabilities were not so limited, however, and tensions quickly developed between *Pennoyer's* rigid territoriality and economic reality. As corporations increasingly conducted commerce beyond the borders of their places of incorporation, courts struggled to reconcile a legitimate interest in regulating activities taking place within their borders and the personal jurisdiction doctrine that constrained them.<sup>36</sup> Fictions of jurisdiction developed in response,<sup>37</sup> complementing *Pennoyer* through more expansive interpretations of “consent,” “presence,” and—by the beginning of the twentieth century—“doing business.”<sup>38</sup>

But even these were insufficient. Principles of due process once “appropriate for the age of the ‘horse and buggy’ or even for the age of the ‘iron horse’ could not serve the era of the airplane, the radio, and the telephone.”<sup>39</sup> In response to exponential economic growth, new communications, and transportation that could travel farther and faster, the Supreme Court signaled its formal departure from *Pennoyer's* sway in *International Shoe v. Washington*.<sup>40</sup> Instead of “power

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<sup>35</sup> See *infra* Part II.B (discussing this issue and its relationship to consent-by-registration). For a historical overview of jurisdiction over corporations up to the mid-nineteenth century, see William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry On Business Within the Territory*, 30 HARV. L. REV. 676, 679–90 (1917).

<sup>36</sup> See, e.g., *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 169 (1939) (describing the “long, tortuous evolution” of personal jurisdiction precedent with respect to corporations as a “history of judicial groping for a reconciliation between the practical position achieved by the corporation in society and a natural desire to confine the[ir] powers”).

<sup>37</sup> See *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194 (1915) (“Whatever long ago may have been the difficulty in applying the principles of *Pennoyer v. Neff* to corporations, . . . such difficulty ceased to exist.”) (citing *St. Clair v. Cox*, 106 U.S. 350 (1882)).

<sup>38</sup> Kurland, *supra* note 28, at 577–86, charts the development of these three jurisdictional bases between *Pennoyer* and *International Shoe*, arguing “consent” and “presence” were used interchangeably and ultimately subsumed by “doing business” jurisdiction. *Cowan v. Ford Motor Co.* supports Kurland’s assessment. 694 F.2d 104, 107 (5th Cir. 1982) (holding that appointing an agent and conducting substantial business in Mississippi established general jurisdiction based on consent), *on reh’g*, 713 F.2d 100 (5th Cir. 1983), *certified question answered*, 437 So. 2d 46 (Miss. 1983); see also Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 149–52 (noting differences between “presence” and “consent” and arguing the Supreme Court “vacillated” between them).

<sup>39</sup> Kurland, *supra* note 28, at 573 (citations omitted).

<sup>40</sup> 326 U.S. 310, 316–17 (1945); see also *Daimler AG v. Bauman*, 134 S. Ct. 746, 754–55 (2014) (citing *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990) (plurality opinion)); Linda J. Silberman, “*Two Cheers*” for *International Shoe* (and *None* for *Asahi*): *An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755 (1995).



over the defendant's person,"<sup>41</sup> the relationship between the parties, the dispute, and the forum became the new inquiry for personal jurisdiction.<sup>42</sup> Due process no longer limited adjudicative authority to the territorial borders of each state; instead, defendants could be called into court wherever they had "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>43</sup>

Through its "minimum contacts" test, *International Shoe* established the standards for specific jurisdiction and general jurisdiction,<sup>44</sup> doing away with the fictions of "consent" and "presence" that courts developed to complement *Pennoyer*. Without overturning the results reached in earlier cases, *International Shoe* acknowledged that earlier cases involving corporations "resort[ed] to the legal fiction that [the corporation] has given its consent to service and suit, consent being implied from its presence in the state. . . . *But more realistically . . . those authorized acts were of such a nature as to justify the fiction.*"<sup>45</sup> However, responses to *Daimler* demonstrate that these fictions somehow persist, even after *Pennoyer* was thought overruled in *Shaffer v. Heitner*.<sup>46</sup>

The Supreme Court decided only three general jurisdiction cases between *International Shoe* and *Daimler*: *Perkins v. Benguet Consolidated Mining Co.*,<sup>47</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>48</sup> and *Goodyear Dunlop Tires Operations S.A. v. Brown*.<sup>49</sup> All three of these cases quietly inform the consent-by-registration jurisdictional issue.<sup>50</sup> However, *Goodyear* had the greatest influence on the Supreme Court's decision in *Daimler*.

<sup>41</sup> *Shaffer v. Heitner*, 433 U.S. 186, 203 (1977) (referencing *Pennoyer*).

<sup>42</sup> *Id.* at 204 ("[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 personal jurisdiction [after *International Shoe*].").

<sup>43</sup> *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>44</sup> See von Mehren & Trautman, *supra* note 2, at 1136 (defining specific and general jurisdiction). *But see* Kurland, *supra* note 28, at 586 (arguing *International Shoe* "served rather to destroy existent doctrine than establish new criteria").

<sup>45</sup> *Int'l Shoe*, 326 U.S. at 318 (emphasis added) (citing *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915)). For more on *Smolik*, see *infra* Part II.B.

<sup>46</sup> *Shaffer*, 433 U.S. at 206 ("[T]he law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*.").

<sup>47</sup> 342 U.S. 437 (1952).

<sup>48</sup> 466 U.S. 408 (1984).

<sup>49</sup> 131 S. Ct. 2846 (2011).

<sup>50</sup> In every general jurisdiction case heard by the Supreme Court following *International Shoe*, Justices have either commented on or made inquiries into the consequences of consent-by-registration. First, in *Perkins*, 342 U.S. at 440 n.2, the Court noted that the foreign corporation did *not* register to do business or appoint an agent for

In *Goodyear*, a unanimous Court found it unconstitutional to assert general jurisdiction over foreign tire manufacturers sued in North Carolina after two thirteen-year-old residents were killed in a tragic bus accident abroad.<sup>51</sup> The jurisdictional question raised was an “easy case” based on Supreme Court precedent,<sup>52</sup> as well as the prevailing view among lower courts,<sup>53</sup> which acknowledged that “regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”<sup>54</sup> But *Goodyear* went further than affirming already accepted views of general jurisdiction.<sup>55</sup> By holding that general jurisdiction requires a corporation’s forum contacts be “so continuous and systematic as to render [it] essentially *at home* in the forum state,”<sup>56</sup> and by listing “domicile, place of incorporation, and principal place of business as ‘paradig[m]’ bases for the exercise of general jurisdiction,”<sup>57</sup> *Goodyear* gave a preview of the new era *Daimler* would usher in.<sup>58</sup>

### A. *The Daimler Case*

The Supreme Court’s decision in *Daimler* represents a fundamental shift in personal jurisdiction, but few would have imagined that

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service of process in Ohio. Then, in *Helicopteros*, counsel for the foreign corporation went so far as to concede his client would be subject to general jurisdiction if the South American helicopter company had registered to do business in Texas. See Oral Argument at 19:24, *Helicopteros*, 466 U.S. 408 (1984), available at <https://www.oyez.org/cases/1983/82-1127>. Finally, in *Goodyear*, a split of authority on the jurisdictional consequences for consent-by-registration was acknowledged by both counsel for petitioners and respondents at oral argument before the Court, as well as by the U.S. government. See Transcript of Oral Argument, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), No. 10-76, 2011 WL 87746 (documenting that Justice Ginsburg asked, “suppose it’s just a corporation that’s registered to do business in North Carolina, and the connection with that registration; it says: I so-and-so my agent to receive process for any and all claims?”). For comment on the Court’s mention of “consent” in the *Daimler* decision, see *infra* note 223.

<sup>51</sup> *Goodyear*, 131 S. Ct. at 2851.

<sup>52</sup> Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 612 (2012).

<sup>53</sup> See, e.g., *Johnston v. Multidata Sys. Int’l Corp.*, 523 F.3d 602, 611 (5th Cir. 2008) (collecting cases).

<sup>54</sup> *Goodyear*, 131 S. Ct. at 2857 n.6.

<sup>55</sup> See, e.g., Silberman, *supra* note 52, at 612 (noting general jurisdiction would not be established over Goodyear’s foreign subsidiaries “even under a theory of aggregate contacts”).

<sup>56</sup> *Goodyear*, 131 S. Ct. at 2851 (emphasis added) (internal quotation marks omitted).

<sup>57</sup> *Id.* at 2854 (alteration in original) (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

<sup>58</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014) (citing *Goodyear*, 131 S. Ct. at 2851).

the case would produce such a result.<sup>59</sup> In *Daimler*, twenty-two Argentinian plaintiffs sued in California federal district court, alleging German car manufacturer DaimlerChrysler AG was vicariously liable for the acts of its Argentinian subsidiary during Argentina's "Dirty War."<sup>60</sup> According to the complaint, Mercedes-Benz Argentina—a Daimler subsidiary—collaborated with state security forces from 1976 to 1983, aiding in the torture, kidnapping, detention, and murder of plaintiffs or their close relatives.<sup>61</sup>

After a series of dramatic appeals,<sup>62</sup> the case eventually reached the Supreme Court, which held that Daimler could not be sued in California, because Daimler could not be deemed "at home" in that state.<sup>63</sup> However, in the process of reaching that decision, the Court jettisoned notions of "doing business" and "presence" based on "continuous and systematic" activities,<sup>64</sup> theories that supported general jurisdiction over claims for more than a century—even after *Goodyear*.<sup>65</sup>

In *Daimler*, Justice Ginsburg's opinion for eight members of the Court held that general jurisdiction over corporations is limited to places where those defendants are "fairly regarded as at home."<sup>66</sup> Two

<sup>59</sup> Before *Goodyear*, the view was that "continuous and systematic" activities of a corporation could suffice for general jurisdiction. See, e.g., Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 35 (1990) ("[C]ontinuous and substantial contacts with the forum permitted the assertion of general jurisdiction."); Riou, *supra* note 27, at 742 ("[A] corporation is amenable to general jurisdiction if it has 'continuous and systematic' contacts with the forum state.").

<sup>60</sup> *Daimler*, 134 S. Ct. at 750–52; see also Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123, 124 (2013) (outlining the basis for the claims leveled against Daimler).

<sup>61</sup> *Daimler*, 134 S. Ct. at 751.

<sup>62</sup> For an overview of the case history in *Daimler*, see Silberman, *supra* note 60, at 133.

<sup>63</sup> *Daimler*, 134 S. Ct. at 762 ("It was therefore error for the Ninth Circuit to conclude that Daimler . . . was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.").

<sup>64</sup> *Id.* at 761 n.18 (concluding *Perkins's* citation to cases upholding the exercise of general jurisdiction based on presence "should not attract heavy reliance today").

<sup>65</sup> Doing business jurisdiction was the most controversial and most commonly utilized basis of general jurisdiction prior to *Daimler*. See Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 678–95 (2012) (criticizing doing business jurisdiction for lacking historical pedigree and predictability); Silberman, *supra* note 52, at 614 (critiquing the "excesses of general jurisdiction" prior to *Goodyear* and *Daimler*); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (arguing for the elimination of doing business jurisdiction). But see Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 129–39 (arguing general jurisdiction is an "unpleasant necessity" because of problems with specific jurisdiction, and suggesting alternatives to doing business as a basis for general jurisdiction).

<sup>66</sup> *Daimler*, 134 S. Ct. at 760 (internal citations omitted).

“paradigms” for that standard exist in the corporate-general-jurisdiction context: a corporation’s principal place of business, and its place of incorporation.<sup>67</sup> Noting that “[s]imple jurisdictional rules . . . promote greater predictability,”<sup>68</sup> the Court’s stated rationale in finding that these two paradigms satisfy due process was that they are *unique* (“each ordinarily indicates only one place”) and *ascertainable*.<sup>69</sup> And though it left open the door to an “exceptional case” where “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>70</sup> Justice Ginsburg’s majority opinion was explicit that “general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business” would be “unacceptably grasping.”<sup>71</sup>

Stating that general jurisdiction “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide,” rather than a defendant’s in-state contacts alone,<sup>72</sup> the Court held Daimler’s activities in California did not come near the level required to establish general jurisdiction over the German parent corporation, even if the contacts of Daimler AG’s subsidiary, Mercedes-Benz USA (MBUSA), were imputed to Daimler and MBUSA was considered “at home” in California.<sup>73</sup> According to the Court, holding otherwise would merely substitute the now-defunct “doing business” jurisdiction for the Court’s nascent “at home” standard,<sup>74</sup> allowing “exorbitant exercises of all-purpose jurisdiction [that] would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>75</sup> For the majority, such rampant unpredictability violated due process.<sup>76</sup>

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<sup>67</sup> *Id.* (internal citations omitted).

<sup>68</sup> *Id.* (internal quotation marks omitted) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

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

<sup>70</sup> *Id.* at 761 n.19.

<sup>71</sup> *Id.* at 761.

<sup>72</sup> *Id.* at 762 n.20.

<sup>73</sup> *Id.* at 762. The Court noted that MBUSA’s California sales accounted for only 2.4% of Daimler’s global sales. *Id.* at 752. The Court also noted that neither MBUSA nor Daimler had its principal place of business or place of incorporation in California. *Id.* at 761.

<sup>74</sup> See *id.* at 762 n.20 (“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>75</sup> *Id.* at 761–62 (internal citations and quotation marks omitted).

<sup>76</sup> In the process of limiting general jurisdiction to all but two “paradigm” locations and putting an end to doing business jurisdiction, the Court overturned two long-standing

### B. Responses to *Daimler*: Problems in the Courts and Legislatures

The response to the Court's decision was immediate.<sup>77</sup> In the post-*Daimler* Era, courts have overwhelmingly followed the Supreme Court's restraint of general jurisdiction, finding it only in instances where a corporation is genuinely "at home."<sup>78</sup> Yet *Daimler* also produced an unanticipated response: Courts are now looking to "consent" as a basis of general jurisdiction over foreign corporations, asserting not that foreign corporations have consented to be "found at home" through registration to do business, but that they have *consented to be sued over anything*. Neither *Daimler* nor any other post-*International Shoe* Supreme Court case clearly ruled on consent-based general jurisdiction,<sup>79</sup> leaving lower courts to interpret the issue independently. This has produced disparate results, and state and federal

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cases: *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898), and *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (1917) (Cardozo, J.). *Daimler*, 134 S. Ct. at 761 n.18 (putting an end to cases "dominated by *Pennoyer's* territorial thinking" and suggesting that general jurisdiction based on consent-by-registration is subject to the same due process limitations as any other theory of jurisdiction).

<sup>77</sup> See Lawrence Hurley, *U.S. Top Court Rules for Daimler in Argentina Human Rights Case*, REUTERS (Jan. 14, 2014, 10:37AM), [www.reuters.com/article/2014/01/14/us-usa-court-rights-idUSBREA0D0YF20140114](http://www.reuters.com/article/2014/01/14/us-usa-court-rights-idUSBREA0D0YF20140114) (describing the case as "a boost for multinational companies facing lawsuits alleging misconduct abroad").

<sup>78</sup> See, e.g., *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) ("It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."); *Sonera Holding B.V. v. Çukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (stating that *Daimler* makes "clear that even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum" (alternation in original)), *cert. denied*, 134 S. Ct. 2888 (2014); *Gliklad v. Bank Hapoalim B.M.*, No. 155195/2014 (N.Y. Sup. Ct. Aug. 11, 2014) (denying general jurisdiction over a foreign bank with place of incorporation and principal place of business in Israel, even though the defendant bank possesses a New York branch that is "the center of its operations in the United States, where it actively conducts business"); see also Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. (forthcoming 2016).

One case that seemingly departs from *Daimler's* "at home" standard is *Barriere v. Juluca*, No. 12-23510-CIV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014). In that case, a Florida district court asserted general jurisdiction over an Anguillian corporation in a suit where an American plaintiff slipped and fell at the corporation's resort in Anguilla. *Id.* at \*1. The district court acknowledged *Daimler's* requirement that a corporation must be "at home" in the forum for a court to exercise general jurisdiction. *Id.* at \*6. Nevertheless, the district court held that, under *Daimler*, it is still "possible for a corporation to be 'at home' in places outside of its place of incorporation or principal place of business." *Id.* at \*7. It should be noted that the defendant at issue failed to offer documents supporting its argument against jurisdiction. As a result, it may be argued that the defendant thus waived its objection to general jurisdiction being asserted over it.

<sup>79</sup> *But see infra* note 223 (discussing the singular mention of "consent" in Justice Ginsburg's *Daimler* opinion).

courts are in disarray over the jurisdictional and due process implications of registration statutes, especially after *Daimler*.

For instance, in *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*,<sup>80</sup> the Swedish company AstraZeneca and its Delaware-based U.S. subsidiary filed a patent infringement claim in Delaware federal district court against Mylan, a corporation with its place of incorporation and principal place of business in West Virginia.<sup>81</sup> Plaintiff AstraZeneca alleged three bases for the court's exercise of jurisdiction over Mylan: (1) general jurisdiction; (2) specific jurisdiction;<sup>82</sup> and (3) consent to general jurisdiction.<sup>83</sup> The district court judge was quick to find Mylan was not "at home" in Delaware and thus not subject to general jurisdiction based on that standard.<sup>84</sup> The case would have been uninteresting but for AstraZeneca's third alleged basis: "Consent to personal jurisdiction obviates the need to consider due process and minimum contacts."<sup>85</sup>

Noting disagreement on the consent-by-registration issue,<sup>86</sup> the district court held that "compliance does not amount to consent to jurisdiction or waiver of due process" in the post-*Daimler* world.<sup>87</sup> Not only did the district court deny general jurisdiction based on consent, it rejected a widely cited 1988 Delaware State Supreme Court decision upholding consent-by-registration,<sup>88</sup> stating that it "can no longer be said to comport with federal due process," because "just as minimum contacts must be present so as not to offend 'traditional

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<sup>80</sup> No. CV 14-696-GMS, 2014 WL 5778016 (D. Del. Nov. 5, 2014), *motion to certify appeal granted sub nom.* AstraZeneca AB v. Aurobindo Pharma Ltd., No. CV 14-664-GMS, 2014 WL 7533913 (D. Del. Dec. 17, 2014).

<sup>81</sup> *Id.* at \*1.

<sup>82</sup> *Id.* at \*6. This Note focuses on consent to general jurisdiction, but the Delaware district court's willingness to find specific jurisdiction in this case demands attention. The court noted specific jurisdiction has been historically disfavored involving the claims at issue in *AstraZeneca*, *id.* at \*6, but nevertheless found specific jurisdiction was proper. *Id.* at \*7. According to the district court judge, because of *Daimler*'s impact on general jurisdiction, courts must look at specific jurisdiction in new ways. *Id.* at \*6-7; *see also* Silberman, *supra* note 1, at 12-17 (discussing the likelihood that courts will attempt to expand specific jurisdiction in the wake of *Daimler*); *cf.* Eli Lilly & Co. v. Mylan Pharm., Inc., No. 1:14-CV-00389-SEB-TA, 2015 WL 1125032, at \*4-5 (S.D. Ind. Mar. 12, 2015) (upholding specific jurisdiction over Mylan after determining the foreign corporation is not "at home" in Indiana).

<sup>83</sup> *AstraZeneca*, 2014 WL 5778016, at \*3. The court also discussed the "exceptional case" scenario outlined in *Daimler* and the creative attempts by plaintiffs to use it. *Id.* at \*4.

<sup>84</sup> *Id.* at \*3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*4.

<sup>87</sup> *Id.* at \*5.

<sup>88</sup> Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988).

notions of fair play and substantial justice,' the defendant's alleged 'consent' to jurisdiction must do the same."<sup>89</sup>

Less than two months later, in a case involving the same defendant and the same claims, a different Delaware district court judge reached the opposite conclusion on the consent issue. *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*<sup>90</sup> differs from *AstraZeneca* in only two respects—different judge, different plaintiff. Conceding *AstraZeneca*'s "rejection of consent as a basis for general jurisdiction," and noting that the holding in that case "may well be the correct view,"<sup>91</sup> *Acorda* held that "*Daimler* does not change the fact that [the defendant subsidiary] consented to this Court's exercise of personal jurisdiction when it registered to do business and appointed an agent for service of process in the State of Delaware."<sup>92</sup> The court noted *International Shoe*'s minimum contacts test, but nevertheless held that "due process may also be satisfied by consent of the party asserting a lack of personal jurisdiction."<sup>93</sup>

According to the judge, consent satisfies due process, even in cases of general jurisdiction. In *Acorda*, it did not matter that neither the subsidiary nor parent corporate defendants were "at home" under the *Daimler* standard. Based on the theory that registration to do business in a state constitutes "consent to general jurisdiction," even the fact that no section of Delaware's registration statute "expressly addresses whether or not registration to do business in Delaware constitutes consent [to] general jurisdiction"<sup>94</sup> was irrelevant.<sup>95</sup>

Post-*Daimler* litigation over consent-by-registration general jurisdiction continues to grow.<sup>96</sup> Exemplifying the tension created

<sup>89</sup> *AstraZeneca*, 2014 WL 5778016, at \*5 (citation omitted) ("[M]ere compliance with such statutes sufficient to satisfy jurisdiction would expose companies . . . to suit all over the country, a result specifically at odds with *Daimler*.").

<sup>90</sup> *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, No. CV 14-935-LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015).

<sup>91</sup> *Acorda*, 2015 WL 186833, at \*14.

<sup>92</sup> *Id.* at \*1; *accord* *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. CV 14-508-LPS, 2015 WL 880599, at \*3, \*15 (D. Del. Feb. 26, 2015) (following *Acorda* in upholding consent-by-registration to general jurisdiction).

<sup>93</sup> *Id.* at \*5.

<sup>94</sup> *Id.* at \*10.

<sup>95</sup> *Id.* at \*12 ("*Daimler* does not expressly address consent.").

<sup>96</sup> *Compare, e.g.*, *Senju Pharm. Co. v. Metrics, Inc.*, No. CIV. A. 14-3962 (JBS/KMW), 2015 WL 1472123, at \*6–8 (D.N.J. Mar. 31, 2015) (discussing the issue at length before rejecting the argument that *Daimler* changed jurisdiction-by-consent), *Novartis Pharm. Corp. v. Mylan Inc.*, No. CV 14-777-RGA, 2015 WL 1246285, at \*4–5 (D. Del. Mar. 16, 2015) (following *Acorda* in upholding general jurisdiction and permitting discovery for the purpose of specific jurisdiction), *Forest Labs.*, 2015 WL 880599, at \*3, \*15 (upholding general jurisdiction based on a theory of consent), *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/2012, 2014 N.Y. Slip Op. 32079(U), 2014 WL 3885949, at \*4–5 (N.Y. Sup. Ct. Aug.

between consent-based general jurisdiction and *Daimler*, Mylan Pharmaceuticals—the same defendant exposed to conflicting decisions in *AstraZeneca* and *Acorda*—has been subjected to general jurisdiction in at least two states outside its “home.”<sup>97</sup> The tension between these lower court decisions and *Daimler* illustrates the need for Supreme Court resolution of the consent-by-registration issue.<sup>98</sup>

In addition to new case law, the New York State Legislature is considering legislation to “reinforce the continuing viability of consent as a basis of general (all-purpose) personal jurisdiction over foreign corporations authorized to do business in New York.”<sup>99</sup> Based on recommendations of the New York Advisory Committee on Civil Practice, the proposal suggests *Daimler* is limited to jurisdiction “decided on the basis of constitutional due process.”<sup>100</sup> The proposed law relies on consent as a separate basis for general jurisdiction, pur-

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5, 2014) (“Although *Daimler* clearly narrows the reach of . . . general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent.”), *Beach v. Citigroup Alt. Invs.*, No. 12 Civ. 7717(PKC), 2014 WL 904650, at \*6 (S.D.N.Y. Mar. 7, 2014) (“[A] corporation may consent to jurisdiction in New York.”), and *Hoffman v. McGraw-Hill Fin., Inc.*, No. ESX-C-216-13, 2014 WL 7639158, at \*5–6 (N.J. Super. Ch.) (upholding general jurisdiction based on consent-by-registration), with *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 2015 WL 539460, at \*6 (S.D.N.Y. Feb. 6, 2015) (citing *Gucci Am., Inc. v. Li*, 768 F.3d 122, 135 (2d Cir. 2014) (holding that compliance with state registration statutes is “insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business”)).

<sup>97</sup> In addition to Delaware, a New Jersey federal court upheld general jurisdiction over Mylan based on a consent-by-registration theory. *Otsuka Pharm. Co. v. Mylan Inc.*, No. CIV. A. 14-4508 JBS, 2015 WL 1305764, at \*8–10 (D.N.J. Mar. 23, 2015).

<sup>98</sup> *Acorda* is currently on appeal to the Federal Circuit as an issue of first impression before that court, but resolution either way could exacerbate the unpredictable nature in which consent-based general jurisdiction works. Given the existing circuit split on this issue, *supra* Table 1, and the fact that federal district courts would be bound by the Federal Circuit on issues related to its jurisdiction (e.g., patents), federal district courts simultaneously bound by their own circuit will be forced to interpret the same statute in two ways, depending on how *Acorda*’s appeal is resolved.

<sup>99</sup> A. Doc. 6714 (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A06714&term=2015&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A06714&term=2015&Summary=Y&Text=Y) (last visited Oct. 7, 2015). New York’s consent-based general jurisdiction proposal was introduced for a second time on March 30, 2015, but has yet to pass both houses of the legislature. The bill was previously introduced in 2014. S. Doc. 7078 (N.Y. 2014), <http://open.nysenate.gov/legislation/bill/S7078-2013> (last visited Sep. 21, 2015). See also Joe Palazzolo, *New York Weighs Jurisdictional Rule for Foreign Firms*, WALL ST. J. (May 15, 2015, 8:25 PM), <http://www.wsj.com/articles/new-york-weighs-jurisdictional-rule-for-foreign-firms-1431735907> (discussing New York’s 2015 legislative proposal); Alison Frankel, *New York’s (Stalled) Grab for Jurisdiction Over Foreign Businesses*, REUTERS (June 30, 2014, 9:45 PM), <http://blogs.reuters.com/alison-frankel/2014/06/30/new-yorks-stalled-grab-for-jurisdiction-over-foreign-businesses> (discussing the 2014 version of the bill and its failure to pass).

<sup>100</sup> A. Doc. 6714-7013, *supra* note 99. However, every assertion of jurisdiction must meet the requirements of due process. The issue is whether consent-by-registration satisfies due process based on a theory outside *Daimler*’s “at home” standard. See *infra* Part II.B (concluding it does not).



porting to make clear that registration to do business in New York results in consent to general jurisdiction in that state.<sup>101</sup>

If enacted, the New York statute will almost certainly face constitutional challenge.<sup>102</sup> Ultimately, its success and the validity of court decisions like *Acorda* depend on whether consent-based general jurisdiction is within the limits of the Due Process Clause. However, as Part II demonstrates, it is not.

## II

### CONSENT-BY-REGISTRATION TO GENERAL JURISDICTION VIOLATES DUE PROCESS

Mere compliance with state registration statutes and the appointment of an agent for service of process<sup>103</sup> is an insufficient constitutional rationale for asserting general jurisdiction over a foreign corporation in the post-*Daimler* Era. Consent-by-registration to general jurisdiction was ambiguous and the subject of a split among state and federal courts even in the twentieth century.<sup>104</sup> After *Daimler*, registration statutes cannot serve as a constitutional basis for general jurisdiction over foreign corporations for three reasons. First, neither *Daimler*'s demand for "uniqueness" and "ascertainability" as prerequisites for general jurisdiction, nor *International Shoe*'s minimum contacts requirement is satisfied under a consent-by-registration theory. Second, the consent-by-registration theory asserted against foreign corporations is not a "touchstone of jurisdiction" that warrants its use

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<sup>101</sup> Historically, New York courts have overwhelmingly upheld consent-by-registration as a basis for general jurisdiction. *E.g.*, *Spiegel v. Schulmann*, 604 F.3d 72, 77 n.1 (2d Cir. 2010) (discussing consent-by-registration in dicta); *Steuben Foods, Inc. v. Oystar Grp., Inc.*, No. 10-CV-780S, 2013 WL 2105894, at \*3 (W.D.N.Y. May 14, 2013) (stating that for at least 60 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"); *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983) ("The privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction."). *See also infra* Appendix (detailing how New York courts uphold the consent-by-registration theory). Note, however, that even recent courts blur concepts of "presence" and "consent" in the context of registration statutes. *See STX Panocean (U.K.) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131–32 (2d Cir. 2009) (discussing consent-by-registration but also stating "registration with the State satisfies the . . . test for being 'found'").

<sup>102</sup> In addition to New York's proposed legislation, a Pennsylvania jurisdiction statute, 42 PA. CONS. STAT. § 5301(a)(2)(ii) (2013), is a prime candidate for constitutional challenge after *Daimler*. The Pennsylvania provision states that Pennsylvania may "exercise general personal jurisdiction" over corporations through "[c]onsent, to the extent authorized by the consent."

<sup>103</sup> As the statutes in the Appendix illustrate, all fifty states provide the requirement for both registration and appointment, so these provisions can be treated as the same for the purposes of consent-based jurisdiction.

<sup>104</sup> *Supra* Table 1.

as an alternative basis for satisfying due process. Third, consent-by-registration to general jurisdiction after *Daimler* likely violates the unconstitutional conditions doctrine.

A. *Consent-by-Registration Is Not Unique, Ascertainable, or Sufficient Under a Minimum Contacts Analysis*

Differing interpretations of registration statutes might render foreign corporations subject to general jurisdiction in dozens of states.<sup>105</sup> Each state may interpret broadly its jurisdiction-rendering statutes (such as registration statutes and long-arm statutes) to the limits of due process. But that interpretive authority neither *requires* states to open their courts to the full extent permitted under the Due Process Clause, nor does it *prohibit* states from doing so.<sup>106</sup> As demonstrated in the Appendix to this Note, different states thus interpret their registration statutes to have different consequences. Furthermore, because federal courts are not required to follow state court interpretations of federal due process, and because state courts are only truly bound by federal due process interpretations of the U.S. Supreme Court, foreign corporations are subjected to varying consequences when they register to do business. Registration statutes fail to satisfy *Daimler*'s due process requirements as a result.<sup>107</sup>

Determining whether registration to do business establishes consent to general jurisdiction requires courts to perform a three-step statutory and constitutional analysis: (1) Determine whether the applicable registration statute equates compliance with consent to personal

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<sup>105</sup> *E.g.*, *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1393 (8th Cir. 1993) (stating consent-by-registration would establish general jurisdiction over unrelated claims arising *even before registration*); *Rose's Stores, Inc. v. Cherry*, 526 So. 2d 749, 752 (Fla. Dist. Ct. App. 1988) ("By having a registered agent in the state, the minimum contacts requirement is met."). *But see* *Cossaboon v. Me. Med. Ctr.*, 600 F.3d 25, 37 (1st Cir. 2010) ("Corporate registration in New Hampshire adds some weight . . . but it is not alone sufficient to confer general jurisdiction."); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 88–90 (1st Cir. 1990) (counting registration to do business as a contact in the determination of whether there is general jurisdiction, but finding it insufficient even when combined with in-state advertising and employee recruitment).

<sup>106</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) ("[W]e find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels Ohio to do so.").

<sup>107</sup> The Advisory Committee on Civil Practice—which initially suggested the consent-based general jurisdiction legislation in New York—asserts that "*Daimler*'s limitation on general jurisdiction was decided on the basis of constitutional due process." REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 31 (2015). Problematically, this suggests that due process need not be met in order to assert jurisdiction, which cannot be the case as long as jurisdiction is tied to the Fourteenth Amendment. *Minimum contacts* might not be the sole basis for personal jurisdiction, but *due process* must always be satisfied.

jurisdiction, or whether it only intends to provide service of process resulting in notice to defendants;<sup>108</sup> (2) Decide whether that consent establishes general or specific jurisdiction;<sup>109</sup> (3) Consider whether this consent satisfies due process.<sup>110</sup> The first two steps are matters of statutory interpretation. The third is crucial after *Daimler*. It is a matter of constitutional due process that must ultimately be answered by the Supreme Court, and one on which state courts and federal courts differ widely.<sup>111</sup>

Split decisions persist not only between federal district and circuit courts, but also in *intra*-forum splits between state and federal courts interpreting the same statute. Connecticut's registration statute and cases interpreting it illustrate this issue.<sup>112</sup> Nearly thirty years before *Daimler*, a Connecticut state appellate court in *Wallenta v. Avis Rent a Car System, Inc.* interpreted Connecticut's registration statute as consent to general jurisdiction.<sup>113</sup> Later, a Connecticut federal district

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<sup>108</sup> *E.g.*, *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 329 (6th Cir. 1993) (reasoning the Ohio Supreme Court "rejected the proposition that service of process may be equated with personal jurisdiction" (citing *Wainscott v. St. Louis-S.F. Ry.*, 351 N.E.2d 466 (Ohio 1976))); *Anderson v. Bedford Assocs., Inc.*, No. 3:97cv1018 (GLG), 1997 WL 631117, at \*3 (D. Conn. Sept. 19, 1997) (distinguishing between "service of process" and personal jurisdiction and collecting cases on that point); *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 272 (N.M. Ct. App. 1993) ("While designation of an agent for service of process may confer power on a state to exercise its jurisdiction, it does not automatically do so. We must look to the legislative intent.").

<sup>109</sup> *E.g.*, *Gray Line Tours v. Reynolds Elec. and Eng'g Co.*, 238 Cal. Rptr. 419, 421 (Ct. App. 1987); *Springle v. Cottrell Eng'g Co.*, 391 A.2d 456, 468 (Md. Ct. Spec. App. 1978); *Middlestadt v. Rouzer*, 328 N.W.2d 467, 469 (Neb. 1982); *Osage Oil & Refining Co. v. Interstate Pipe Co.*, 253 P. 66, 69 (Okla. 1926); *Eure v. Morgan Jones & Co.*, 79 S.E.2d 862, 863 (Va. 1954); ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 3.02[2][a] (4th ed. 2014) (observing that courts have reached different conclusions as to whether consent confers specific or general jurisdiction).

<sup>110</sup> See *supra* Table 1 (outlining the circuit split on the question). As this Note demonstrates, courts throughout the United States are grappling with this issue. Compare *In re Asbestos Litig.*, No. CV N14C-03-247 ASB, 2015 WL 5016493, at \*3 (Del. Super. Aug. 25, 2015) ("*Daimler* does not foreclose a state registration statute from conferring jurisdiction over a foreign corporation registered to do business in Delaware by virtue of its express consent."), *motion to certify appeal denied*, No. CV N14C-03-247 ASB, 2015 5692811 (Del. Super. Sept. 24, 2015), with *Keely v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at \*4 (E.D. Mo. July 1, 2015) ("A defendant's consent to jurisdiction must satisfy the standards of due process and finding a defendant consents to jurisdiction by registering to do business in a state or maintaining a registered agent does not.").

<sup>111</sup> See *infra* Appendix.

<sup>112</sup> The wording of Connecticut's registration statute is similar to that of most state registration statutes: "The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation." CONN. GEN. STAT. ANN. § 33-929(a) (West 2015).

<sup>113</sup> 522 A.2d 820, 823 (1987). This case was remanded to determine whether or not assertion of general jurisdiction satisfied due process. *Id.* at 824.

court judge disagreed with that interpretation, stating the statute merely constitutes *consent to service*, and that “amenability to service of process is different from activities sufficient to subject the company to personal jurisdiction.”<sup>114</sup> More than a decade later, in *Talenti v. Morgan*,<sup>115</sup> a Connecticut state appellate court ignored the federal court decision, but went further than *Wallenta* to equate registration with a “voluntary consent” to general jurisdiction that meets the requirements of the Due Process Clause.<sup>116</sup>

This schism on issues of statutory interpretation and due process persists,<sup>117</sup> though at least one Connecticut district judge since *Daimler* has held that due process is not satisfied, even if the state’s registration statute is interpreted as consent to general jurisdiction.<sup>118</sup> Regardless, the state of personal jurisdiction in Connecticut illustrates that consent-by-registration fails to meet *Daimler*’s due process demand for limited, “unique,” and “ascertainable” locations for general jurisdiction.<sup>119</sup>

It is thus incompatible with the Court’s post-*Daimler* interpretation of due process to uphold consent-by-registration as a basis for general, all-purpose jurisdiction. Not only does such a theory bury *Daimler* by keeping in place the pre-*Daimler* jurisdictional status quo (merely switching the ostensible basis of jurisdiction from “doing business” to “consent”), it contradicts the due process criteria required for general jurisdiction: *ascertainability* and *uniqueness*. This latter point is best illustrated by the circular logic announced in the legal guidelines provided by New York State to foreign corporations contemplating registration to do business:

[I]f an organization is not doing business that subjects it to jurisdiction . . . it is not doing business that requires qualification. Conversely, by qualification an organization concedes that it is subject to jurisdiction . . . however, not all business activity engaged in by a foreign organization rises to “doing business” in the qualification sense.<sup>120</sup>

<sup>114</sup> *Anderson v. Bedford Assocs., Inc.*, No. 3:97cv1018 (GLG), 1997 WL 631117, at \*3 (D. Conn. Sept. 19, 1997).

<sup>115</sup> 968 A.2d 933 (2009).

<sup>116</sup> *Id.* at 940–41 n.14 (stating the defendant “voluntarily consented” to jurisdiction, and that “the exercise of jurisdiction by the court does not violate due process”).

<sup>117</sup> *See, e.g., WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (“Expansive, non-explicit consent to being hailed 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>118</sup> *Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 394, 396–400 (D. Conn. 2014).

<sup>119</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

<sup>120</sup> NEW YORK SECRETARY OF STATE, OFFICE OF GENERAL COUNSEL, “DOING BUSINESS” IN NEW YORK: AN INTRODUCTION TO QUALIFICATION, [www.dos.ny.gov/cnsl/](http://www.dos.ny.gov/cnsl/)

These guidelines stand in stark contrast to the Uniform Law Commission's Model Registered Agent Act,<sup>121</sup> which ten states and the District of Columbia have implemented to explicitly state that registration statutes provide no jurisdictional basis over foreign corporations.<sup>122</sup>

Furthermore, compliance with a registration statute neither establishes the continuous and systematic contacts that render a foreign corporation "at home" as *Daimler* requires nor results in an "exceptional case" that allows jurisdiction to be asserted over claims wholly unrelated to a forum state. Prior to *Daimler*, some courts considered registration to do business or the appointment of an agent for service of process to be sufficient to uphold general jurisdiction under a traditional minimum contacts analysis, even in cases where foreign corporations registered, but never conducted any actual business in a forum state.<sup>123</sup> However, *Daimler* invalidates the theory that registration creates sufficient contacts for general jurisdiction by holding that even "continuous and systematic contacts" are insufficient to confer general jurisdiction, unless those contacts render a corporation "at home." Almost every court accepts this view in the wake of *Daimler*.

Ironically, the post-*Daimler* disarray described above provokes the same concerns that *Daimler* sought to address,<sup>124</sup> exacerbating the Supreme Court's concern over comity in the U.S. exercise of judicial jurisdiction.<sup>125</sup> Yet consent-by-registration to general jurisdiction

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do\_bus.html (last visited Sept. 21, 2015). As the memorandum notes, New York law on "doing business" jurisdiction is based on case law, which "afford[s] no precise measure of the extent of the activities which may be determinative of whether a foreign organization is doing business in New York for the purposes of qualification."

<sup>121</sup> LEGISLATIVE FACT SHEET: MODEL REGISTERED AGENTS ACT, [http://www.uniformlawcommission.com/Act.aspx?title=Registered+Agents+Act,+Model+\(2006\)+\(Last+Amended+2011\)](http://www.uniformlawcommission.com/Act.aspx?title=Registered+Agents+Act,+Model+(2006)+(Last+Amended+2011)) (last visited Sept. 25, 2015).

<sup>122</sup> See *infra* Appendix.

<sup>123</sup> See, e.g., *Rose's Stores, Inc. v. Cherry*, 526 So. 2d 749, 752 (Fla. Dist. Ct. App. 1988) ("By having a registered agent in the state, the minimum contacts requirement is met.") But according to *Daimler*, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler*, 134 S. Ct. at 760.

<sup>124</sup> See *id.* at 760–61 (rejecting "unacceptably grasping" assertions of general jurisdiction); see also *Riou*, *supra* note 27, at 745 (noting the possibility that *forum non conveniens* and venue statutes will fail to protect against unfair litigation sparked by consent-by-registration general jurisdiction).

<sup>125</sup> Acknowledging the transnational nature of litigation today, Justice Ginsburg in *Daimler* noted the narrower approach to general jurisdiction taken by other countries. See *Daimler*, 134 S. Ct. at 763. Thus, it bears noting that neither the European Union's Brussels Regulation (Recast), Council Regulation 1215/2012 L. 351(EU) (effective Jan. 2015), nor the laws of England support general jurisdiction based on a registration theory. See DICEY, MORRIS, & COLLINS, *THE CONFLICT OF LAWS* 425 (15th ed. 2012) ("[T]o say that a corporation which, under the threat of heavy fine, files with the Registrar of Companies . . . thereby submits to the jurisdiction seems even more artificial than saying that a

might nevertheless satisfy due process if that theory were rooted in the origins of American jurisprudence on personal jurisdiction, allowing the theory to potentially circumvent a minimum contacts analysis.<sup>126</sup> However, Part II.B demonstrates that statutory compliance with registration statutes lacks that requisite history and tradition.

### B. *Consent-by-Registration Is Not a “Touchstone of Jurisdiction”*

Consent-by-registration goes to the heart of *Pennoyer*, but its constitutionally permissible boundaries are significantly more limited than what post-*Daimler* decisions upholding consent-based general jurisdiction suggest. Because consent-by-registration fails a traditional minimum contacts analysis under *Daimler*, its due process validity depends on the Supreme Court’s willingness to consider consent-based general jurisdiction a “touchstone of jurisdiction” along the lines of personal jurisdiction based on physical presence discussed in Justice Scalia’s plurality opinion in *Burnham v. Superior Court*.<sup>127</sup>

A “touchstone of jurisdiction” is a basis of adjudicative authority that satisfies due process because of its historical connection to the adoption of the Fourteenth Amendment and its continued practice up to the present day.<sup>128</sup> In *Burnham*, Justice Scalia wrote for four justices of the Court, upholding jurisdiction over natural persons based on their physical presence in a forum. Because they found so-called “tag” jurisdiction to be part of personal jurisdiction’s history and tradition since the days of *Pennoyer v. Neff*, service upon a physically present defendant in the forum state was enough to establish personal

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corporation which establishes a place of business in England is deemed to be present in England.”).

<sup>126</sup> See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) (arguing that jurisdiction based on just being physically present in the forum satisfies due process because it always has and is rooted in American jurisprudence); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding that the Court has long approved forum-state application of its own statute of limitations, and there was no justification to alter that tradition); Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1072–73 (2012) (arguing that “consent theory changes the constitutional inquiry” by “shift[ing] any due process analysis from minimum contacts to the validity of the consent”).

<sup>127</sup> *Burnham*, 495 U.S. at 619. However, as Justice Scalia’s *Burnham* opinion discussed, “*International Shoe* confined its ‘minimum contacts’ requirement to situations in which the defendant ‘be not present within the territory of the forum.’” *Id.* at 621. But see Burt Neuborne, *General Jurisdiction, Corporate Separateness, and the Rule of Law*, 66 VAND. L. REV. EN BANC 95, 107 & n.45 (2013) (arguing *Burnham* alone survived *International Shoe*’s “‘minimum contacts’ shipwreck” and that *Burnham*’s unanimous result “obscures the fierce disagreement” over whether *International Shoe*’s fairness standard controls all assertions of personal jurisdiction).

<sup>128</sup> *Burnham*, 495 U.S. at 622.

jurisdiction. No question into whether minimum contacts existed was required.<sup>129</sup>

But while historically supported in-state service may require no inquiry into “traditional notions of fair play and substantial justice,”<sup>130</sup> assertions of consent-by-registration to general jurisdiction demand one. As the remainder of this Part demonstrates, consent-by-registration to general jurisdiction carries neither the history nor the tradition required to establish it as a touchstone of jurisdiction. On the contrary, although registration statutes were commonly accepted as a basis for *specific* jurisdiction, it was not until the twentieth century that three of America’s most prominent jurists, in a rapid trilogy of cases, expanded the scope of state authority over foreign corporations to include what is known today as general jurisdiction. Thus, even accepting the argument that “[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it,”<sup>131</sup> consent-by-registration is still an insufficient basis for asserting general jurisdiction over foreign corporations.

### 1. *Consent in Context: A Nexus of Territory, Registration, Service, and Jurisdiction*

Consent is far from a singular concept, especially in the personal jurisdiction context.<sup>132</sup> As such, “the primary source of problems arises in those cases in which the thesis of consent has been extended to cover cases where in fact consent does not exist.”<sup>133</sup> The question of whether or not genuine consent exists complicates a constitutional inquiry into the validity of registration statutes as a basis for general jurisdiction.<sup>134</sup> Nevertheless, while some forms of consent are valid bases of jurisdiction, consent-by-registration to *general* jurisdiction is not one of them.

*Pennoyer* established the nexus between adjudicative authority over a defendant and fair notice to that defendant provided through

<sup>129</sup> *Id.* at 604–05.

<sup>130</sup> *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>131</sup> *Sun Oil*, 486 U.S. at 730.

<sup>132</sup> See Kevin D. Benish & Nathan D. Yaffe, *A Typology of Consent* (unpublished manuscript) (on file with author) (categorizing various manifestations of consent and their effect on jurisdiction, immunity, venue, notice, and aggregate litigation).

<sup>133</sup> Kurland, *supra* note 28, at 575 (citing *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877)); see also *WorldCare Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (“‘Consent’ is meaningless unless its scope is defined.”).

<sup>134</sup> Consent may be express or implied, exacted before or after commencing litigation, genuine or coerced. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (“[P]ersonal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”).

service of process.<sup>135</sup> Like the doctrine of personal jurisdiction itself, the meaning of “service of process” and its relationship to assertions of jurisdiction have changed over time.<sup>136</sup> In *Pennoyer*’s heyday, service of process was limited to the territorial borders of each state. As a result, while service on a natural person “sufficed both to assert the state’s power over him and to give the defendant notice of the pending action,”<sup>137</sup> such service was impossible over a corporation that existed only in its home state. This was a result of the nineteenth-century principle that “a corporation must dwell in the place of its creation,” and the fact that officers of a corporation did not carry corporate liabilities with them and thus could not be automatically served while in another state.<sup>138</sup>

Registration statutes developed as a solution to this “manifest injustice.”<sup>139</sup> But registration statutes alone did not remedy states’ inability to assert jurisdiction over foreign corporations under *Pennoyer*’s power theory.<sup>140</sup> Instead, states conditioning the right to

<sup>135</sup> Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 983 (1999). Through “process,” a state established jurisdiction, whereas “service” of it gave notice to defendants. Jurisdiction and notice through service of process seemed indivisible during the *Pennoyer* Era, but there is no doubt they can be achieved through separate means today. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (noting due process requires both notice *and* personal jurisdiction, and that adequate service established notice but was insufficient to confer jurisdiction); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181, 183 (5th Cir. 1992) (denying general jurisdiction based on registration to do business and categorizing registration statutes as a “procedural requirement[ ] of notice”).

<sup>136</sup> As noted by Professor Korn, “process” is a legal term “laden with more meanings than it can usefully bear,” given the evolution of the jurisdiction-notice nexus. Korn, *supra* note 135, at 983.

<sup>137</sup> FRIEDENTHAL, KANE & MILLER, *supra* note 26, at 103.

<sup>138</sup> *St. Clair v. Cox*, 106 U.S. 350, 354 (1882) (citation omitted) (discussing situations when a corporate officer travels to other forums and noting that “his functions and his character would not accompany him”).

<sup>139</sup> *Id.* at 354–55 (“To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein.”). Note that in *Barrow v. Kane*, one of the two “*Pennoyer* Era” cases overturned by *Daimler*, the Supreme Court acknowledged that registration statutes were about establishing jurisdiction over causes of action arising out of contracts in a particular forum state. *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 107–08 (1898) (noting that since it would be a “manifest injustice” to allow foreign corporations to “do business” and sue in courts without being subject to suit themselves, states have responded by enacting statutes that required foreign corporations “making contracts within the state” to appoint agents “upon whom process may be served in actions upon such contracts” (emphasis added)). Liabilities on which a corporation could be sued, however, were limited to instances involving specific jurisdiction under today’s standard.

<sup>140</sup> SCOTT, *supra* note 26, at 50 n.46 (“A corporation . . . is domiciled only in the state creating it. Hence, jurisdiction over a foreign corporation cannot be based upon domicile.”).



conduct interstate business on compliance with registration statutes relied on *Pennoyer's* other basis of jurisdiction—consent.<sup>141</sup>

But while *Pennoyer* permitted courts to establish general “tag” jurisdiction over a natural person through service based on defendants’ physical presence—recognized in *Burnham*—consent had a comparatively limited jurisdictional reach.<sup>142</sup> As noted by Arthur von Mehren, “[l]egislation, passed in the early decades of the nineteenth century, involved the state’s power to exclude foreign corporations from doing business in the state and required that they consent to state-court jurisdiction over *causes of action arising from business done locally* on their behalf.”<sup>143</sup> That the limitations of consent-by-registration precede the *Pennoyer* Era itself is a fact demonstrated by the Supreme Court’s decision in *Lafayette Insurance Co. v. French*.<sup>144</sup>

In 1855, thirteen years before the ratification of the Fourteenth Amendment and more than twenty years prior to *Pennoyer*, an Ohio citizen sued in Indiana federal court to enforce an Ohio judgment. In the original suit, the Ohio Supreme Court held it could imply consent of a foreign corporation to suits *arising out of in-state contacts* based on service of process upon a foreign corporation’s in-state agent.<sup>145</sup> Like the registration statutes of today, Ohio’s registration statute required state authorization and appointment of an agent for service before a foreign corporation could legally conduct business.

Upholding Ohio’s jurisdiction over the nonresident Indiana corporation, the U.S. Supreme Court wrote that a “corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. . . . This consent may be accompanied by such conditions . . . provided they are not repugnant to the constitution or laws of the United States.”<sup>146</sup> The Court emphasized its decision was limited to claims arising out of in-state activity.<sup>147</sup> In

<sup>141</sup> See *supra* note 32 (noting the role of consent in *Pennoyer*).

<sup>142</sup> See, e.g., *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1915) (“[T]he statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states.” (citing *Old Wayne Mut. Life Ass’n v. McDonough*, 204 U.S. 8, 22 (1907))).

<sup>143</sup> ARTHUR T. VON MEHREN, *ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW* 175 (2006) (emphasis added).

<sup>144</sup> 59 U.S. 404, 407 (1855).

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

<sup>146</sup> *Id.* As Professor Richard Epstein notes, *Lafayette Ins. Co. v. French* is the origin of the unconstitutional conditions doctrine. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 n.7 (1988). The doctrine presents a possible challenge to assertions of consent-based general jurisdiction in the post-*Daimler* world. See *infra* Part III (evaluating consent-by-registration as a possible unconstitutional condition).

<sup>147</sup> *French*, 59 U.S. at 408–09 (“We limit our decision to the case of a corporation acting in a State foreign to its creation, under a law of that State which recognized its existence,

other words, *French* was a *specific* jurisdiction case in today's personal jurisdiction vocabulary. But as the legal fiction of corporate presence developed, so did the consequences for corporations registering to do business in foreign states.<sup>148</sup>

In *St. Clair v. Cox*,<sup>149</sup> the Supreme Court expanded the notion of implied consent articulated in *French* to encompass cases where corporate consent to jurisdiction could be implied by the fact that a corporation was "doing business" in the forum state, even if they had *not* registered to do business.<sup>150</sup> Yet the Supreme Court continued to consistently limit jurisdiction to only those claims that arose out of each forum state, since those were the truly voluntary acts corporations were making by directing commerce into foreign forums.<sup>151</sup> But that jurisdictional limitation vanished in the early twentieth century.

## 2. "Doing Business" and the Leap to Consent-by-Registration to General Jurisdiction

As cases overruled by *Daimler* illustrate, limits on a consent theory of jurisdiction began to change as interpretations of "doing business" expanded and came to more closely resemble a corporation's "presence" rather than its implied "consent."<sup>152</sup> This more

for the purposes of *making contracts there and being sued on them, through notice to its contracting agents.*" (emphasis added)).

<sup>148</sup> Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 622 (1988) (noting the analogy sometimes drawn between corporations and natural persons and arguing that corporate "presence" supported general jurisdiction as if a natural person were in the forum).

<sup>149</sup> 106 U.S. 350, 356 (1882).

<sup>150</sup> Nevertheless, general jurisdiction still applied only where corporations at the time could be said to reside: in their place of incorporation. As Justice Field noted in *St. Clair*: The principle that a corporation must dwell in the place of its creation, and cannot . . . migrate to another sovereignty . . . prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

*Id.* at 354.

<sup>151</sup> See GERALD CARL HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 77–100 (The Lawbook Exchange, Ltd. 1999) (1918) (providing a history of jurisdiction over foreign corporations in the nineteenth century).

<sup>152</sup> In *Barrow S.S. Co. v. Kane*, a New Jersey plaintiff sued, in New York, a British corporation that kept offices, property, and employees in New York City. 170 U.S. 100, 101 (1898). At the time, service on New York agents did not establish jurisdiction, but the Supreme Court upheld jurisdiction, stating it "*may be implied from a grant of authority . . . to carry on its business there.*" *Id.* at 107 (emphasis added). *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917), held the same. Writing for the New York Court of Appeals, Judge Cardozo upheld general jurisdiction over the defendant Pennsylvania company, because it maintained a "branch office in New York" that "contain[ed] eleven desks, and other suitable equipment" for salesmen. *Id.* at 916. Although both *Barrow* and

expansive interpretation of “doing business” eventually confused the three concepts.<sup>153</sup> As a result, consent-by-registration experienced a theoretical leap to general jurisdiction through a trilogy of cases decided one hundred years ago.

Writing in the 1915 case *Smolik v. Philadelphia & Reading Coal & Iron Co.*,<sup>154</sup> Judge Learned Hand held that “in the interests of justice,” courts may “impute[ ] results to the *voluntary act* of doing business within [a] foreign state, quite independently of any intent.”<sup>155</sup> The defendant in *Smolik*, a Pennsylvania mining corporation, was sued by Anthony Smolik after he was injured in a mine operated by the company.<sup>156</sup> Although no part of its mines were in New York, the defendant was found to be “doing business” in the state. By virtue of having obtained a state license, the defendant had appointed an agent for service of process, but since service was made on the non-resident corporation on a claim unrelated to New York, the defendant moved to set aside the service.<sup>157</sup>

In a four-page opinion, Judge Hand upheld jurisdiction over the unrelated claim, stating that “personal jurisdiction . . . depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes.”<sup>158</sup> Interpreting the relevant statute to permit New York residents to “sue foreign corporations upon any cause of action whatever,”<sup>159</sup> Hand found “no constitutional objection to a state’s exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business.”<sup>160</sup>

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*Tauza* were cited in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 & n.6 (1952), *Daimler* made clear that these cases are no longer persuasive. *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.18 (2014).

<sup>153</sup> The first Supreme Court case articulating a rule that collapses these theories appears to be *People’s Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 87 (1918) (“The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has *subjected* itself to the local jurisdiction, and is . . . *present* within the state or district where service is attempted.” (emphasis added)). *Cf. Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917) (Brandeis, J.) (discussing “presence” and “doing business” “in the absence of consent”).

<sup>154</sup> 222 F. 148 (2d Cir. 1915).

<sup>155</sup> *Id.* at 151 (emphasis added).

<sup>156</sup> *Id.* at 149.

<sup>157</sup> *Id.* The defendant’s argument was that “the express consent [of registering to do business and appointing an agent for service of process] must be limited in exactly the same way” as implied consent is limited. *Id.* (discussing defendant’s arguments related to *St. Clair v. Cox*, 106 U.S. 350 (1882)).

<sup>158</sup> *Id.* at 150.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 150–51. After upholding jurisdiction over the unrelated claim, he acknowledged that “[w]hen . . . a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does *not* mean that . . . it has

In a New York Court of Appeals decision one year later, Judge Cardozo articulated the same view held by Judge Hand. *Bagdon v. Philadelphia & Reading Coal & Iron Co.* presented nearly identical facts to those in *Smolik*.<sup>161</sup> The exact same defendant contested the validity of service upon it in New York for the same reason as in the year before: Registration to do business in New York State only established jurisdiction for claims related to that forum. According to the Pennsylvania company, “any other construction would do violence to its rights under the federal Constitution.”<sup>162</sup>

Judge Cardozo held otherwise. Citing *Smolik* and characterizing the issue before the court as one of contract,<sup>163</sup> Cardozo wrote “when a foreign corporation *is* engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted.”<sup>164</sup> Doing business in New York required a “stipulation” that designated an agent for service of process in the state.<sup>165</sup> Thus the court in *Bagdon*, like Judge Hand in *Smolik*, determined its jurisdictional reach as a matter of statutory interpretation. As such, the stipulation involved was considered “a true contract,” one that “deals with the jurisdiction of the person.”<sup>166</sup> *Bagdon*’s only reference to due process rights of the defendant was contained as an aside in the case’s closing sentence.<sup>167</sup>

Other courts in the United States quickly adopted the rationale of these cases to expand jurisdiction over claims unrelated to a

consented . . . , because *the corporation does not . . . consent*; but, the court, for the purposes of justice, treats it as if it had.” *Id.* at 151 (emphasis added).

<sup>161</sup> *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075 (1916).

<sup>162</sup> *Id.* at 1075.

<sup>163</sup> *Id.* at 1077 (“We are not imposing or implying a legal duty. We are construing a contract.”).

<sup>164</sup> *Id.* This case is in conflict with contemporary views of due process and jurisdiction, since Judge Cardozo’s view of jurisdiction over the defendant in *Bagdon* is undermined by its reliance on “presence.” *Compare id.* (“Officer and agent [serve] a corporation engaged in business in this state. Their presence in that service has brought the corporation within our jurisdiction; and in coming here it has become subject to the rule that transitory causes of action are enforceable *wherever the defendant may be found.*” (emphasis added)), with *Burnham v. Superior Court*, 495 U.S. 604, 617–18 (1990) (plurality opinion) (noting “*Pennoyer*’s rigid requirement of either ‘consent,’ . . . or ‘presence,’ . . . were purely fictional,” and that “*International Shoe* cast those fictions aside”).

<sup>165</sup> *Bagdon*, 111 N.E. at 1076. Nonresident corporations failing to provide such a designation lose their right to sue in New York and every other state. *See* Appendix. Under the *Erie* Doctrine, the consequences of this holding go farther than *Bagdon* anticipated. *See infra* notes 200–05 and accompanying text.

<sup>166</sup> *Bagdon*, 111 N.E. at 1076.

<sup>167</sup> *Id.* at 1077 (“We think there is nothing to the contrary either in the decisions of the Supreme Court of the nation or in the guaranty of due process under the federal Constitution.”).

forum.<sup>168</sup> One year later, the Supreme Court accepted the principle established in *Smolik* and *Bagdon*. In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,<sup>169</sup> a Pennsylvania insurance company registered to do business in Missouri, establishing an agent for service of process pursuant to the statutory requirements for that registration. The Gold Issue Mining and Milling Company was an Arizona corporation that owned property in Colorado insured by Pennsylvanian Fire. After that property was struck by lightning and destroyed, Gold Issue Mining sued Pennsylvania Fire in Missouri over the Colorado claim.<sup>170</sup>

Departing from the Court's narrower precedents of the past, Justice Holmes held that "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."<sup>171</sup> However, as suggested in Part II.A, the unpredictable "risk of interpretation" rationale underlying the holding of *Pennsylvania Fire* creates an impermissible level of uncertainty for defendants under the *Daimler* standard. But cases far predating *Daimler* also support the fact that *Pennsylvania Fire* can no longer provide a constitutional basis for consent-by-registration to general jurisdiction.

While *Pennsylvania Fire*, *Bagdon*, and *Smolik* stand for the proposition that state registration statutes can be interpreted to uphold general jurisdiction over foreign corporations based on a "consent" theory,<sup>172</sup> courts relying on this trilogy of cases ignore the qualifications quickly placed on it by the Supreme Court in *Chipman, Ltd. v.*

<sup>168</sup> See, e.g., *Rishmiller v. Denver & R.G.R. Co.*, 159 N.W. 272, 273–74 (Minn. 1916) (upholding jurisdiction "no matter where the cause of action arose" based on "consent," "presence," and "doing business," stating "[n]either the nature of the business nor the volume of the business transacted is important so long as the corporation can fairly be said to be doing business in the state" (citing *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579 (1914); *Comm. Mut. Accident Co. v. Davis*, 213 U.S. 245, 256 (1909); *Bagdon*, 111 N.E. at 1075)).

<sup>169</sup> 243 U.S. 93 (1917); see also *Kipp*, *supra* note 59 (suggesting registration statutes were enacted to establish service on corporations, not jurisdiction); *Riou*, *supra* note 27, at 748–68 (analyzing *Pennsylvania Fire*).

<sup>170</sup> *Gold Issue Mining & Mill. Co. v. Pa. Fire Ins. Co.*, 184 S.W. 999, 1000 (1916), *aff'd*, 243 U.S. 93 (1917).

<sup>171</sup> *Pennsylvania Fire*, 243 U.S. at 96.

<sup>172</sup> Post-*Daimler* cases universally rely on *Pennsylvania Fire* in upholding consent-based general jurisdiction. See e.g., *Otsuka Pharm. Co. v. Mylan Inc.*, No. CIV.A. 14-4508 JBS, 2015 WL 1305764, at \*9 (D.N.J. Mar. 23, 2015); *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. CV 14-508-LPS, 2015 WL 880599, at \*6–7 (D. Del. Feb. 26, 2015); *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, No. CV 14-935-LPS, 2015 WL 186833, at \*584–85 (D. Del. Jan. 14, 2015).

*Thomas B. Jeffrey Co.*<sup>173</sup> and *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*<sup>174</sup> Through these cases, the Supreme Court clarified the intended scope of its *Pennsylvania Fire* decision.

*Chipman* presented facts similar to the *Pennsylvania Fire-Bagdon-Smolik* trilogy.<sup>175</sup> However, a significant difference was that the foreign corporation was no longer “doing business” in New York—it had merely not yet revoked its registration.<sup>176</sup> Although the Court noted registration could be of “federal cognizance,” it specifically distinguished the case from both *Bagdon* and *Tauza* based on the quantum of activity the foreign corporations in those cases were conducting compared to the Wisconsin-based Thomas B. Jeffrey Company.<sup>177</sup> *Robert Mitchell* provided a similarly narrow decision to further cabin *Pennsylvania Fire*. Stressing the “limited interpretation of a compulsory assent,” Justice Holmes stated courts should not expand the scope of registration, and that “appointment of the agent is the only ground for imputing to the defendant an even technical presence.”<sup>178</sup>

This stands in contrast to post-*Daimler* theories of consent-by-registration as a separate basis for general jurisdiction, especially given the history of those statutes that illustrates their use as a commonly accepted basis for specific jurisdiction,<sup>179</sup> and the fact that their validity was questioned and caveated from the start.<sup>180</sup> Notable early twentieth-century proceduralists support the view that the *Pennsylvania Fire-Bagdon-Smolik* trilogy’s true basis of jurisdiction was “doing business,” not consent.<sup>181</sup> Furthermore, as discussed by

<sup>173</sup> 251 U.S. 373 (1920).

<sup>174</sup> 257 U.S. 213 (1921).

<sup>175</sup> Here, suit was filed in a New York court by a New York plaintiff over a Wisconsin-based claim against a Wisconsin-based corporation. *Chipman*, 251 U.S. at 376–77.

<sup>176</sup> *Id.* at 378.

<sup>177</sup> *Id.* at 378–79.

<sup>178</sup> *Robert Mitchell*, 257 U.S. at 216.

<sup>179</sup> See *supra* Part II.B.1 (demonstrating this point).

<sup>180</sup> See, e.g., *Chipman, Ltd. v. Thomas B. Jeffrey Co.*, 260 F. 856, 858 (S.D.N.Y. 1919) (interpreting *Smolik* as requiring a foreign corporation to have been “transacting business” in order for a court to hear claims unrelated to its jurisdiction), *aff’d sub nom.*, *Chipman, Ltd., v. Thomas B. Jeffrey Co.*, 251 U.S. 373 (1920); see also HENDERSON, *supra* note 151, at 94–96 (criticizing the rationale supporting *Smolik* and *Bagdon*).

<sup>181</sup> Austin Scott’s 1922 treatise articulated the three bases of personal jurisdiction over foreign corporations: “implied consent,” “presence,” and “doing business.” *Smolik, Bagdon, and Pennsylvania Fire* are placed clearly under the “doing business” category, which underscores the unreliable nature of a consent-by-registration theory over claims unrelated to a forum after *Daimler*. SCOTT, *supra* note 26, at 48–52. However, “doing business” does not capture the full theoretical scope for which Scott cites *Smolik*. See *id.* (citing *Smolik* for the “principle[] of justice [that] if a corporation voluntarily *does business* within the state, it is bound by the reasonable regulations by the state of that business” (emphasis added)); see also Cahill, *supra* note 35, at 691–95 (arguing the

Justice Scalia in *Burnham*, presence and consent in the context of jurisdiction over corporations were “purely fictional,” and “*International Shoe* cast those fictions aside.”<sup>182</sup> And although the most important cases purporting to establish general jurisdiction through consent-by-registration were decided at a time when it was “difficult . . . *it seem[ed] impossible*, to impute the idea of locality to a corporation,”<sup>183</sup> *Daimler* stands for the proposition that “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”<sup>184</sup> Thus, according to an overwhelming majority of the Supreme Court, the world has changed. It is necessary to understand the limits of consent-by-registration as a theory of jurisdiction in this new light.

*Daimler* endorsed the move away from jurisdictional fictions, stating that “changes in the technology of transportation and communication, and the tremendous growth of interstate business activity” have transformed our understanding of how jurisdiction functions.<sup>185</sup> The consequence has been that both “consent and doing business . . . have narrower implications.”<sup>186</sup> With “doing business” interred by *Daimler*, the general jurisdiction consent-by-registration theory embodying *Pennoyer*'s ghost is equally impermissible, and is thus likely unconstitutional.<sup>187</sup>

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Supreme Court abandoned consent as a basis for jurisdiction over foreign corporations at the turn of the twentieth century in favor of “doing business” jurisdiction); Case Comment, *Service of Process on Nonresidents in Actions in Personam*, 34 *YALE L.J.* 415, 423 (1925) (stating that “a growth of law on what constitutes ‘doing business’” accompanied the consent-by-registration decisions).

<sup>182</sup> 495 U.S. 604, 617–18 (1990) (plurality opinion); see also Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 *FLA. L. REV.* 387, 426 (2012) (arguing that the “at home” standard announced in *Goodyear* “completed the rejection of the . . . fictitious presence construct” that predated *International Shoe*).

<sup>183</sup> *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930) (Hand, J.) (emphasis added); see also *New Eng. Mut. Life Ins. v. Woodworth*, 111 U.S. 138, 144 (1884) (discussing the development of registration statutes as a response to foreign corporations “doing business” in multiple forums).

<sup>184</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014).

<sup>185</sup> *Id.* at 753–54 (citing *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990) (plurality opinion) (internal quotation marks omitted)). As suggested shortly after *International Shoe* by Kurland, *supra* note 28, at 580, if the Due Process Clause “denied the power of the state to imply consent to suit on claims arising out of transactions occurring elsewhere than within the state,” it is questionable that “it did not also deny to the state the power to extort such a consent in writing.”

<sup>186</sup> Von Mehren & Trautman, *supra* note 2, at 1142 n.53.

<sup>187</sup> See, e.g., *Daimler*, 134 S. Ct. at 761 n.18 (referring to post-*International Shoe* Supreme Court citations of cases upholding general jurisdiction without minimum contacts as “unadorned citations . . . dominated by *Pennoyer*'s territorial thinking . . . [that] should not attract heavy reliance today”); *Morris v. Scandinavia Ins.*, 279 U.S. 405, 408–09 (1929) (“The purpose of state statutes requiring the appointment by foreign corporations of

## III

CONSENT-BY-REGISTRATION IS AN UNCONSTITUTIONAL  
CONDITION AFTER *DAIMLER*

After *Daimler*, consent-by-registration also burdens foreign corporations with an unconstitutional condition.<sup>188</sup> Under the unconstitutional conditions doctrine, “the government ‘may not deny a benefit to a person because he exercises a constitutional right.’”<sup>189</sup> Describing the doctrine in its “canonical form,” Richard Epstein once noted that “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional right.”<sup>190</sup> Requiring foreign corporations to relinquish their due process right to be free from lawsuits where they are not “at home” violates this doctrine.

A. *The Coercive Effect of Registration Statutes in the Absence of Doing Business Jurisdiction*

The crux of the unconstitutional condition question presented by *Pennoyer*'s ghost is *coercion*. Professors Adam Cox and Adam Samaha have illustrated elsewhere that “there is no snappy and established test for analyzing unconstitutional conditions questions.”<sup>191</sup> While various analyses exist, ranging from “germaneness” tests,<sup>192</sup> to “balancing” tests,<sup>193</sup> to tests focused on other factors that may trigger

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agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in *controversies growing out of transactions within the state.*” (emphasis added)).

<sup>188</sup> Commentators made this assertion nearly a century ago. See Recent Case, *Foreign Corporations—Service of Process—Jurisdiction Over Cause of Action Arising Outside the State*, 29 HARV. L. REV. 880, 880 (1916) (arguing *Bagdon* and *Smolik* likely present an unconstitutional condition).

<sup>189</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (citation omitted) (collecting cases); see also Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989) (“Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”).

<sup>190</sup> Epstein, *Unconstitutional Conditions*, *supra* note 146, at 6–7.

<sup>191</sup> Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 67 (2013); see also *id.* at 68 (“‘Unconstitutional conditions doctrine’ actually designates a kind of problem calling for analysis rather than the analysis used to solve a kind of problem.” (footnote omitted)); cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 301 (1993) (calling the unconstitutional conditions doctrine an “anachronism” and arguing that it should be abandoned).

<sup>192</sup> Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1966–67 (1995) (analyzing conditional federal spending).

<sup>193</sup> See, e.g., SUNSTEIN, *supra* note 191, at 305–18 (arguing for a shift “away from an emphasis on whether there has been ‘coercion’ or ‘penalty,’ and toward an inquiry into the



an unconstitutional condition,<sup>194</sup> case law on the relationship between foreign corporations, judicial power, and unconstitutional conditions suggests that a “coercive effects test” will most likely apply in a challenge to the consent-by-registration general jurisdiction question.<sup>195</sup>

The coercive effects test applied here is triggered if an entity is required to sacrifice one constitutional right for another when exercising a privilege or a benefit. This test is specific to consent-based general jurisdiction, since a full-blown analysis of the relationship between genuine consent and coercion is beyond the scope of this Note.<sup>196</sup> However, as this Part demonstrates, this coercive effects test is both independently sufficient and historically supported as a means to identify an unconstitutional condition involving registration statutes and foreign corporations. Under this analysis, and even assuming that compliance with a registration statute constitutes “consent to general jurisdiction” (it does not), a foreign corporation’s statutory compliance is likely a “coerced consent” unable to withstand legal scrutiny after *Daimler*.

As long as “doing business” and “continuous and systematic” activities were accepted bases of adjudicative authority, courts and states extracted nothing more than they already had over corporations—general personal jurisdiction. Prior to *Daimler*, it did not matter whether general jurisdiction was based on minimum contacts or consent-by-registration. General jurisdiction existed on the basis of “doing business,” so there was arguably no constitutional right to be sacrificed. Thus, registration statutes possessed no coercive effect on foreign corporations that failed to comply.<sup>197</sup> But with “doing business” eliminated as a basis of general jurisdiction,<sup>198</sup> the courthouse door-closing penalty statutes enacted by states for failure to register to

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nature of the interest affected by the government and the reasons offered by government for its intrusion”).

<sup>194</sup> See Cox & Samaha, *supra* note 191, at 67 n.11 (collecting sources).

<sup>195</sup> See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 60 (2001) (arguing that “coercion analysis provides the only sound explanation and justification” for holding as an unconstitutional condition the state law requirement that foreign corporations waive their right to federal court removal in diversity jurisdiction cases); see also Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984) (using “history,” “equality,” and “prediction” as three “baselines” for identifying coercive government conditions).

<sup>196</sup> For a discussion of “unimpeachable consent” and coercion in the broader context of the civil justice system, see Benish & Yaffe, *supra* note 132.

<sup>197</sup> *But see* Lewis, *supra* note 27, at 15–20 (arguing there was a possible unconstitutional condition, even when “doing business” was a valid basis of jurisdiction); Recent Case, *supra* note 188, at 880 (same).

<sup>198</sup> See *supra* Part I.A.

do business bear the hallmarks of coercion that trigger an unconstitutional condition.<sup>199</sup>

In the wake of *Daimler*, a foreign corporation conducting interstate commerce in a state that upholds consent-by-registration to general jurisdiction is forced to forfeit one of two constitutional rights: (1) the due process protection against unwarranted assertions of all-purpose jurisdiction; or (2) access to federal courts via diversity jurisdiction, which is likely barred by door-closing state penalty statutes that eliminate access to state courts and thus also deny federal court access under the *Erie* Doctrine,<sup>200</sup> specifically under the Supreme Court's holding in *Woods v. Interstate Realty Co.*<sup>201</sup> But if corporations may engage freely in interstate commerce<sup>202</sup> and be free from general personal jurisdiction except in cases where they are "at home," it follows that states do *not* have the power to demand a tradeoff between the Fourteenth Amendment's due process protections and access to federal court diversity jurisdiction under Article III of the Constitution.<sup>203</sup> The coercive effect of this false choice represents no choice at all, except between "the rock and the whirlpool."<sup>204</sup>

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<sup>199</sup> Part III.B and the Appendix to this Note detail contemporary penalties for failure to comply with foreign corporate registration statutes.

<sup>200</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>201</sup> 337 U.S. 535 (1949). In *Woods*, a Tennessee corporation brought a diversity action against a Mississippi defendant in Mississippi federal court. Because the foreign corporate plaintiff was not registered to do business in Mississippi, the defendant asserted that the suit had to be dismissed pursuant to a Mississippi door-closing statute providing that non-registered corporations "shall not be permitted to bring or maintain any action or suit in any of the courts of this state." In a 6-3 decision, the Supreme Court held that "where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court." *Id.* at 538; *cf.* *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211-12 (1944) (upholding door-closing statute as permissible under the Commerce Clause where foreign corporation was "localized" and the state law was designed "for the purpose of insuring the public safety and convenience" (internal quotation marks and citation omitted)).

<sup>202</sup> See *Int'l Text-book Co. v. Pigg*, 217 U.S. 91, 112 (1910) (holding unconstitutional a statute burdening the interstate commerce right of a foreign corporation).

<sup>203</sup> U.S. CONST. art. III, § 2. There is an unresolved tension between those cases that held non-removal statutes to be an unconstitutional condition and the *Erie* Doctrine's impact on door-closing penalties for non-compliance with registration statutes. Compare *supra* notes 199-203 and accompanying text (discussing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)), with *infra* notes 208-18 (discussing non-removal statutes and unconstitutional conditions). Though beyond the scope of this Note, analysis of these two lines of case law is necessary to determine whether this tension can be resolved.

<sup>204</sup> *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593 (1926). Further emphasizing the coercive effect of this false choice is that corporations are incentivized to violate state laws in order to preserve their due process protection against exorbitant jurisdiction, an argument against consent-by-registration made 100 years ago in *Smolik*. *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150 (S.D.N.Y. 1915). There, the defendant argued that its *express* consent to appoint an agent for service of process could not be expanded beyond the jurisdictional reach of consent when it is *implied* (e.g., when corporations fail to

This coerced consent-by-registration to general jurisdiction is likely void under the unconstitutional conditions doctrine as a result.<sup>205</sup>

*B. Parallels Between Today's Door-Closing Penalties and the Original Unconstitutional Condition Cases*

The unconstitutional condition implicated by consent-by-registration statutes and the sufficiency of the coercive effects test that identify it are supported by historical parallels between today's consent-by-registration statutes and what are considered the original unconstitutional conditions cases: Nineteenth-century statutes that conditioned a foreign corporation's right to do business on waiving the right to federal diversity jurisdiction.<sup>206</sup> Struck down as an unconstitutional condition between 1874 and 1922,<sup>207</sup> these "non-removal" statutes are similar to the registration statutes at issue today in terms of their door-closing effect on federal court access. An overview of the cases overturning these bygone statutes illustrates the invalidity of consent-by-registration to general jurisdiction today.

*Home Insurance Co. v. Morse* was the first Supreme Court case to address a state statute conditioning a foreign corporation's authority to do business within a state upon surrendering access to federal court.<sup>208</sup> The basic facts of the case are as follows: The Home Insurance Company was a New York corporation with its principal place of business in New York City that registered to do business and appointed an agent for service in Wisconsin. In doing so, the New York company was required to file an *explicit agreement* stating it

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follow the law in registering to do business and appointing an agent for service of process, but are still carrying on business activities in the forum). To hold otherwise would leave "an outlaw who refused to obey the laws of the state . . . in better position than a corporation which chooses to conform." *Id.* After *Daimler*, the observation made long ago by HENDERSON, *supra* note 151, at 99, that "a corporation occupies a more favorable constitutional position because it has violated a state law" suggests a coerced consent rather than a genuine one capable of meeting due process.

<sup>205</sup> *Cf. Union Pac. R.R. Co. v. Pub. Serv. Comm'n*, 248 U.S. 67, 70 (1918) ("It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.").

<sup>206</sup> Berman, *supra* note 195, at 63 n.246 (crediting an 1876 dissent as the Supreme Court's first reference to "unconstitutional conditions" (citing *Doyle v. Cont'l Ins. Co.*, 94 U.S. 535, 543–44 (1876) (Badley, J., dissenting))).

<sup>207</sup> For an overview of this history, see Berman, *supra* note 195, at 59–70.

<sup>208</sup> 87 U.S. (20 Wall.) 445 (1874). As discussed in Part II.B, States throughout the nineteenth century could exclude corporations entirely from their borders. *Compare Morse*, 87 U.S. (20 Wall.) at 458–59 (Chase, C.J., dissenting) ("The right to impose conditions upon admission follows . . . from the right to exclude altogether."), *with Sec. Mut. Life Ins. Co. v. Prewitt*, 202 U.S. 246, 249 (1906) ("A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution.").

“agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts.”<sup>209</sup> Upon being sued in Wisconsin state court over an insurance policy, the New York company attempted to remove the dispute to federal court on the basis of diversity jurisdiction. However, the state trial court refused to recognize the removal and rendered judgment in favor of the plaintiff.<sup>210</sup>

The Supreme Court reversed the case after Wisconsin’s supreme court affirmed the trial court judgment.<sup>211</sup> Although noting an individual’s right to forego the right to federal court removal “as often as he sees fit, in each recurring case,” the Court stated that a defendant cannot “bind himself in advance . . . to forfeit his rights at all times and on all occasions, whenever the case may be presented.”<sup>212</sup> Citing Article III and the Judiciary Act of 1789,<sup>213</sup> the Supreme Court held that the Constitution provides an “absolute right” to remove cases into federal court, that Wisconsin’s non-removal statute was “repugnant to the Constitution” and void, and that the explicit agreement between Home Insurance and the State of Wisconsin which sacrificed the corporation’s removal right was “void, as it would be had no such statute been passed.”<sup>214</sup>

Constitutional questions surrounding non-removal statutes were fully resolved in 1922 by the Supreme Court in *Terral v. Burke Construction Co.*<sup>215</sup> In that case, a Missouri corporation was on the verge of losing its license to do business in Arkansas because it was attempting to maintain suits in Arkansas federal district court.<sup>216</sup> Holding that states may not “exact from [a foreign corporation] a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not,”<sup>217</sup> the Court rested its decision on the ground that States cannot “curtail the free exercise” of rights endowed by the U.S. Constitution.<sup>218</sup>

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<sup>209</sup> *Morse*, 87 U.S. (20 Wall.) at 446 (internal quotation marks omitted).

<sup>210</sup> *Id.* at 447.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 451 (emphasis added).

<sup>213</sup> *Id.* at 453–54.

<sup>214</sup> *Id.* at 458.

<sup>215</sup> 257 U.S. 529 (1922).

<sup>216</sup> *Id.* at 530.

<sup>217</sup> *Id.* at 532.

<sup>218</sup> *Id.* at 532–33 (“[T]he sovereign power of a state . . . is subject to the limitations of the supreme fundamental law.”); see also *Harrison v. St. Louis & S.F. R.R. Co.*, 232 U.S. 318, 328 (1914) (“[T]he several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious [the Constitution’s judicial power].”).

Today's door-closing penalties for non-compliance with consent-by-registration statutes raise concerns similar to those that rendered non-removal statutes unconstitutional one hundred years ago. Present-day registration statutes might soon be invalidated under the unconstitutional conditions doctrine as a result. Today a corporation conducting interstate business and seeking to maintain federal court access is faced with registration statutes in multiple states that are interpreted as "consent to general jurisdiction." By obeying those laws, that corporation forfeits its due process protection from all-purpose jurisdiction "in advance," "at all times," and "on all occasions."<sup>219</sup> This scenario presents coercive effects that are at least as severe as those which triggered an unconstitutional condition in both *Morse* and *Terral*. Thus, like the unconstitutional conditions struck down in those cases, the conditions attached to general-jurisdiction-rendering registration statutes after *Daimler* are too burdensome and likely void as a result.<sup>220</sup>

#### CONCLUSION

Séances with ghosts of jurisdiction past are no way to satisfy the demands of due process. "The Constitution is not to be satisfied with a fiction,"<sup>221</sup> and consent to general jurisdiction through a registration statute appears to be just that—a fiction capable of transforming every court in the United States into an all-purpose forum for disputes throughout the world.<sup>222</sup> The potential for such outcomes, and the tension it creates with the Court's overwhelming consensus in *Daimler*, illustrates the constitutional inadequacy of consent-by-registration to general jurisdiction.

Those seeking jurisdictional inroads must look beyond the vestiges of *Pennoyer's* bygone era. Rather than focus the lawsuits of tomorrow on a constitutionally suspect theory of jurisdiction, the future of adjudicative authority lies in reforms to specific jurisdic-

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<sup>219</sup> *Morse*, 87 U.S. (20 Wall.) at 451.

<sup>220</sup> *Cf. Bendix Autolite Corp. v. Midwestco Enters., Inc.*, 486 U.S. 888, 895 (1988) (Kennedy, J.) ("[D]esignation with the Ohio Secretary of State of an agent for the service of process likely would have subjected [the defendant] to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest. . . . [T]his exaction is an unreasonable burden on commerce.").

<sup>221</sup> *Hyde v. United States*, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting).

<sup>222</sup> Based on the facts of *Daimler* itself—*Daimler* AG's subsidiary (MBUSA) was registered to do business in California at the time the original suit was filed—*Daimler* hypothetically could have been hailed into California's courts if (1) that state adopted a consent-by-registration theory of general jurisdiction; and (2) that consent could be attributed to *Daimler*. *Cf. Daimler*, 134 S. Ct. at 761 n.19 ("It is one thing to hold a corporation answerable for operations in the forum . . . quite another to expose it to suit on claims having no connection whatever to the forum State.").

tion.<sup>223</sup> Such reforms present better opportunities for successful suits, rather than the entrenchment likely to result from reliance on registration statutes as a basis of general jurisdiction.

Fictions must not be allowed to deny “fair play and substantial justice.” However, the story of *Pennoyer’s* ghost demonstrates that “fair play” is a two-way street. Defendants must not be forced to litigate over any and every issue wherever they might have registered to do business as required by the laws of all fifty states, but plaintiffs must also have access to justice. That access depends on courts asserting jurisdiction where the authority to do so exists, as well as guaranteeing everyday people the same protections from unconstitutional burdens which corporations enjoy. By taking these needs into account and moving away from consent-based general jurisdiction, reformers and civil justice advocates can make personal jurisdiction less about avoiding disputes and more about enforcing rights.

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<sup>223</sup> Consent is referenced only once in Justice Ginsburg’s *Daimler* opinion. However, that reference provides twenty-first century insight into consent-by-registration as a theory of jurisdiction and suggests avenues of future research into how compliance with corporate registration statutes affects specific jurisdiction. Compare *Daimler*, 134 S. Ct. at 755–56 (referencing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), as “the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum” (quoting *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011) (internal quotation marks and brackets omitted) (emphasis added)), with *Perkins*, 342 U.S. at 440 n.2 (noting the foreign corporate defendant in *Perkins* did *not* register to do business or appoint an agent for service of process), and *Daimler*, 134 S. Ct. at 755 (noting that “specific jurisdiction . . . form[s] a considerably more significant part of the scene” in American courts today (internal citation omitted))).

## APPENDIX

This Appendix outlines the jurisdictional implications of corporate compliance with registration statutes in all fifty states and the District of Columbia. Most states are *unclear* and have not yet clarified the jurisdictional consequences of their registration statutes (thirty-two states have no definite interpretation). However, eleven states and the District of Columbia have made clear that their corporate registration statutes affect *service only*, while six states have made it clear that registration to do business results in “consent” to *general jurisdiction*. Note also that New Jersey, New Mexico, and Tennessee each strongly suggest that a consent-by-registration theory is acceptable under the registration statutes enacted in those states.

**Alabama**

**Registration Statute:** ALA. CODE § 10A-1-5.31 (LexisNexis 2013).

**Penalty:** door-closing statute and fines. ALA. CODE §§ 10A-1-7.21–23 (LexisNexis 2013).

**Consequence of Registration:** *Unclear*. No relevant cases.

**Alaska**

**Registration Statute:** ALASKA STAT. § 10.06.753 (2014).

**Penalty:** door-closing statute and fines (up to \$10,000 per year). ALASKA STAT. §§ 10.06.710, .713 (2014).

**Consequence of Registration:** *Unclear*. No relevant cases.

**Arizona**

**Registration Statute:** ARIZ. REV. STAT. ANN. § 10-1507 (2013).

**Penalty:** door-closing statute. ARIZ. REV. STAT. ANN. § 10-1502 (2013).

**Consequence of Registration:** *Unclear*. No decisive statutory interpretation. *But see* Bohreer v. Erie Ins. Exch., 165 P.3d 186, 187 (Ariz. Ct. App. 2007) (upholding general jurisdiction without minimum contacts and stating consent-by-registration satisfies due process).

**Arkansas**

**Registration Statute:** ARK. CODE ANN. § 4-27-1501 (2001); ARK. CODE ANN. § 4-20-115 (Supp. 2013).

**Penalty:** door-closing statute. ARK. CODE ANN. § 4-27-1502 (Supp. 2013).

**Consequence of Registration:** *Service only*. ARK. CODE ANN. § 4-20-115 (Supp. 2013) explicitly states appointment of a registered agent has no effect on jurisdiction or venue.

### **California**

**Registration Statute:** CAL. CORP. CODE §§ 1502, 2105 (West 2014).

**Penalty:** door-closing statute. CAL. CORP. CODE § 17708.07 (West 2014). See also CAL. CORP. CODE § 2203(a), which charges a \$20 per day penalty to unregistered foreign corporations conducting business, and also states that unauthorized corporations “shall be deemed to consent to the jurisdiction . . . in any civil action arising in this state in which the corporation is named a party defendant.”

**Consequence of Registration:** *Service only.* Although there is not a California Supreme Court case interpreting the state’s registration statute, case law historically holds that consent-by-registration affects service, but has no consequence for personal jurisdiction. See *Gray Line Tours v. Reynolds Elec. and Eng’g Co.*, 238 Cal. Rptr. 419, 421 (Cal. Ct. App. 1987) (citing *Miner v. United Air Lines Transp. Corp.*, 16 F. Supp. 930 (S.D. Cal. 1936)). See also *AM Trust v. UBS AG*, No. C 14-4125 PJH, 2015 WL 395465, at \*8 (N.D. Cal. Jan. 29, 2015) (stating in dicta that “personal jurisdiction of a corporation is based solely on the place of incorporation and principal place of business” (emphasis added)); *Thomson v. Anderson*, 6 Cal. Rptr. 3d 262, 268 (Cal. Ct. App. 2003) (collecting cases).

### **Colorado**

**Registration Statute:** COLO. REV. STAT. §§ 7-90-701(1), -704(1) (2014).

**Penalty:** door-closing statute and civil penalty less than \$5000. COLO. REV. STAT. § 7-90-802 (2014).

**Consequence of Registration:** *Unclear.* No decisive interpretation. *But see Allied Carriers Exch., Inc. v. Alliance Shippers, Inc.*, No. CV 98-WM-2744, 1999 WL 35363796, at \*5 (D. Colo. Sept. 22, 1999) (stating that registration to do business and appointment of an agent do not satisfy due process for either specific or general jurisdiction); *Packaging Store, Inc. v. Leung*, 917 P.2d 361, 363 (Colo. App. 1996) (asserting specific jurisdiction over foreign defendant, but discussing the validity of consent-by-registration to general jurisdiction and collecting cases).

### **Connecticut**

**Registration Statute:** CONN. GEN. STAT. ANN. §§ 33-926, -929 (West 2015).

**Penalty:** door-closing statute. CONN. GEN. STAT. ANN. § 33-921 (West Supp. 2015).

**Consequence of Registration:** *Unclear.* Connecticut’s state supreme court has not issued a definitive interpretation of the state’s registra-



tion statute, and state and federal district courts are divided on whether consent-by-registration satisfies due process. *Compare* *Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 397 (D. Conn. May 14, 2014) (discussing *Daimler* and finding that due process is not satisfied by registering to do business even though Connecticut's registration statute confers general jurisdiction), *and* *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341 (D. Conn. 2011) (noting Connecticut's registration statute confers general jurisdiction, but does not comport with due process), *with* *Talenti v. Morgan & Bro.*, 968 A.2d 933, 940–41, 941 n.14 (2009) (upholding consent-based general jurisdiction); *Wallenta v. Avis Rent a Car Sys., Inc.*, 522 A.2d 820, 823 (1987) (finding registration to do business establishes consent to general jurisdiction, but not deciding whether that jurisdiction violates due process).

### **Delaware**

**Registration Statute:** DEL. CODE ANN. tit. 8, §§ 132(a), 376(a) (2011).

**Penalty:** door-closing statute and fines. DEL. CODE ANN. tit. 8, §§ 372, 378 (2011).

**Consequence of Registration:** *General Jurisdiction.* In *Sternberg v. O'Neil*, 550 A.2d 1105, 1113 (Del. 1988), the Delaware State Supreme Court interpreted the state's registration statute as conferring general jurisdiction based on consent, holding that consent satisfied due process. As post-*Daimler* cases show, *Sternberg's* continued validity is now questioned. *Compare* *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, No. CV 14-935-LPS, 2015 WL 186833, at \*12 (D. Del. Jan. 14, 2015) (upholding consent-by-registration to general jurisdiction), *Forest Labs, Inc. v. Amneal Pharm. LLC*, No. 14-508-LPS, 2015 WL 880599 (D. Del. Feb. 26, 2015) (following *Acorda*), *and* *Novartis Pharm. Corp. v. Mylan Inc.*, No. CV 14-777-RGA, 2015 WL 1246285 (D. Del. Mar. 16, 2015) (following *Acorda*), *with* *AstraZeneca AB v. Mylan Pharm., Inc.*, No. 14-696-GMS, 2014 WL 5778016 (D. Del. Nov. 5, 2014) (holding consent-based general jurisdiction unconstitutional after *Daimler*).

### **District of Columbia**

**Registration Statute:** D.C. CODE § 29-104.14 (LexisNexis 2013).

**Penalty:** None.

**Consequence of Registration:** *Service only.* D.C. CODE § 29-104.02 explicitly states that registration to do business and designation of an agent does not itself establish personal jurisdiction.

## **Florida**

**Registration Statute:** FLA. STAT. ANN. §§ 607.0505, .1507, .15101 (West 2011).

**Penalty:** door-closing statute and penalty between \$500 and \$1000 per year. FLA. STAT. ANN. § 607.1502 (West 2011). *But see* 770 PPR, LLC v. TJC Land Trust, 30 So. 3d 613, 618 (Fla. Dist. Ct. App. 2010) (holding Florida's registration statute unconstitutional under the Supremacy Clause as the statute applies to national banks).

**Consequence of Registration:** *Unclear.* There is no clear due process interpretation of the Florida registration statute. *Compare* Confederation of Canada Life Ins. Co. v. Vega y Arminan, 144 So. 2d 805, 810 (Fla. 1962) (holding that it does not violate due process to subject a registered foreign corporation to service of process on a cause of action that arose outside the forum), *with In re* Farmland Indus., No. 3:05-CV-587-J-32MCR, 2007 WL 7694308, at \*12 (M.D. Fla. Mar. 30, 2007) (holding that general jurisdiction through Florida's registration statute does not satisfy due process), *and* Sofrar, S.A. v. Graham Eng'g Corp., 35 F. Supp. 2d 919, 921 & n.2 (S.D. Fla. 1999) (holding that registration to do business is insufficient to subject company to personal jurisdiction under Florida's long-arm statute).

## **Georgia**

**Registration Statute:** GA. CODE ANN. §§ 14-2-1507, -1510 (2011).

**Penalty:** door-closing statute and fines. GA. CODE ANN. § -1502 (2011).

**Consequence of Registration:** *Unclear.* There is no decisive interpretation of the Georgia registration statute. *But see* Moore v. McKibbin Bros., 41 F. Supp. 2d 1350, 1354 (N.D. Ga. 1998) (stating that registration to do business alone is insufficient for jurisdiction but counting it as part of a minimum contacts analysis); Wheeling Corrugating Co. v. Universal Const. Co., 571 F. Supp. 487, 488 (N.D. Ga. 1983).

## **Hawaii**

**Registration Statute:** HAW. REV. STAT. § 414-437 (Supp. 2013), HAW. REV. STAT. § 414-440 (2004).

**Penalty:** door-closing statute. HAW. REV. STAT. § 414-432 (2004).

**Consequence of Registration:** *Unclear.* No relevant cases.

## **Idaho**

**Registration Statute:** IDAHO CODE §§ 30-21-404 (2015).

**Penalty:** door-closing statute. IDAHO CODE § 30-21-810 (2015).

**Consequence of Registration:** *Service only.* IDAHO CODE § 30-21-414 (2015) explicitly states that appointment of a registered agent has no effect on jurisdiction or venue.

### **Illinois**

**Registration Statute:** 805 ILL. COMP. STAT. ANN. 5/5.05, .25 (West 2010).

**Penalty:** door-closing statute and fees. 805 ILL. COMP. STAT. ANN. 5/13.70 (West 2010).

**Consequence of Registration:** *Unclear.* No relevant cases. *But see* Shrum v. Big Lots Stores, Inc., No. 3:14-cv-03135-CSB-DGB, 2014 WL 6888446, at \*2, \*7 (C.D. Ill. Dec. 8, 2014) (eschewing discussion of a consent-by-registration theory, but noting defendant's registration to do business and appointment of an agent for service were insufficient to establish general jurisdiction); Sullivan v. Sony Music Entm't, No. 14CV731, 2014 WL 5473142, at \*3 (N.D. Ill. Oct. 29, 2014) (stating in dicta that registration to do business and appointment of an agent are insufficient for general jurisdiction without discussing a consent-by-registration theory).

### **Indiana**

**Registration Statute:** IND. CODE ANN. §§ 23-1-24-1, -49-7, -49-10 (West 2014).

**Penalty:** door-closing statute and fines up to \$10,000. IND. CODE ANN. § 23-1-49-2 (West 2014).

**Consequence of Registration:** *Unclear.* No relevant case law. *But see* Everdry Mktg. & Mgmt., Inc. v. Carter, 885 N.E.2d 6, 11–13, 12 n.6 (Ind. Ct. App. 2008) (citing Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1245 (7th Cir. 1990)) (discussing consent-by-registration and noting that “[o]rdinarily, registration, standing alone, will not satisfy due process”).

### **Iowa**

**Registration Statute:** IOWA CODE §§ 490.501, .1507, .1510 (2015).

**Penalty:** door-closing statute. IOWA CODE § 490.1502 (2015).

**Consequence of Registration:** *Unclear.* No controlling case law. *But see* Daughetee v. CHR Hansen, Inc., No. C09-4100-MWB, 2011 WL 1113868, at \*7 (N.D. Iowa Mar. 25, 2011) (“[A] registered corporation consents to [general] jurisdiction, obviating the need for due process analysis.”).

### **Kansas**

**Registration Statute:** KAN. STAT. ANN. §§ 17-7931 (Supp. 2014).

**Penalty:** door-closing statute. KAN. STAT. ANN. § 17-7931 (Supp. 2014).

**Consequence of Registration:** *General Jurisdiction.* In *Merriman v. Crompton Corp.*, 146 P.3d 162, 171, 177 (Kan. 2006), the Kansas State Supreme Court held that registration to do business results in consent to general jurisdiction that does not violate the Due Process Clause. *But see* 2000 Int'l Ltd. v. Chambers, No. 99-2123-JTM, 2000 WL 1801835, at \*4 (D. Kan. Nov. 6, 2000) (“[R]egistration to do business in a state is of little consequence in general personal jurisdiction analysis.”); *see also* Exec. Aircraft Consulting, Inc. v. Towers Fin. Corp., No. 91-1357-B, 1992 WL 402032, at \*2 (D. Kan. Dec. 1, 1992) (holding that registration to do business in Kansas constitutes a consent to general jurisdiction without any further due process inquiry).

### **Kentucky**

**Registration Statute:** KY. REV. STAT. ANN. §§ 14A.4-010, -040(1) (West 2012).

**Penalty:** door-closing statute and \$2 per day fine for each day corporations conduct business without registration. KY. REV. STAT. ANN. § 14A.9-020 (West 2012).

**Consequence of Registration:** *Unclear.* No relevant cases. *But see* Williams v. Chase Bank USA, N.A., 390 S.W.3d 824, 828 (Ky. Ct. App. 2012) (holding the registration statute unconstitutional as applied to national banks, due to preemption under the National Banking Act, 12 U.S.C. § 1 (2011)).

### **Louisiana**

**Registration Statute:** LA. REV. STAT. ANN. §§ 12:301, :308 (2014).

**Penalty:** Fines. LA. REV. STAT. ANN. §§ 12:314.1, :315, :316 (2014).

**Consequence of Registration:** *Unclear.* No relevant cases.

### **Maine**

**Registration Statute:** ME. REV. STAT. ANN. tit. 5, § 113; tit. 13-C, § 1507-A (2013).

**Penalty:** door-closing statute and fine up to \$500 per year. ME. REV. STAT. ANN. tit. 13-C, § 1502 (2013).

**Consequence of Registration:** *Service Only.* ME. REV. STAT. ANN. tit. 5, § 115 explicitly states that appointment of a registered agent has no effect on jurisdiction or venue.

### **Maryland**

**Registration Statute:** MD. CODE ANN., CORPS. & ASS'NS §§ 7-101, 205(a)(1) (LexisNexis 2014).

**Penalty:** door-closing statute, fines for corporations, as well as individual officers and agents, misdemeanor charges for individual officers and agents, and forfeiture of the right to do “intrastate business.” MD. CODE ANN., CORPS. & ASS'NS §§ 7-301 to -02, 7-304 (LexisNexis 2014).

**Consequence of Registration:** *Unclear.* No controlling case law. *But see* Republic Props. Corp. v. Mission W. Props., LP, 895 A.2d 1006 (Md. 2006) (calling into doubt the constitutionality of *Pennsylvania Fire*).

### **Massachusetts**

**Registration Statute:** MASS. GEN. LAWS ANN. ch. 156D, §§ 5.01, .04, 15.07 (West 2005).

**Penalty:** door-closing statute and monetary penalty. MASS. GEN. LAWS ANN. ch. 156D, § 15.02 (West 2005).

**Consequence of Registration:** *Unclear.* No relevant cases. *But see* Galvin v. Jaffe, No. 09-179-BLS2, 2009 WL 884605, at \*6–11 (Mass. Super. Ct. Jan. 26, 2009) (discussing consent-by-registration and stating in dicta that consent-based general jurisdiction satisfies due process).

### **Michigan**

**Registration Statute:** MICH. COMP. LAWS §§ 450.1241, .1246 (2015).

**Penalty:** door-closing statute and fines up to \$1,000 per year. MICH. COMP. LAWS §§ 450.2055 (2015).

**Consequence of Registration:** *Unclear.* No relevant cases.

### **Minnesota**

**Registration Statute:** MINN. STAT. §§ 5.36, 303.10, 303.13 (2015).

**Penalty:** door-closing statute and fines up to \$1000 plus \$100 per month. MINN. STAT. § 303.20 (2015).

**Consequence of Registration:** *General Jurisdiction.* In *Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc.*, 469 N.W.2d 88, 90–91 (Minn. 1991), the Minnesota State Supreme Court held that consent-by-registration establishes general jurisdiction over foreign corporations and satisfies due process.

### **Mississippi**

**Registration Statute:** MISS. CODE ANN. §§ 79-4-15.01, 79-35-13 (2013).

**Penalty:** door-closing statute and fines up to \$1000 per year. MISS. CODE ANN. § 79-4-15.02 (2013).

**Consequence of Registration:** *Service Only.* MISS. CODE ANN. § 79-35-15 (2013).

## **Missouri**

**Registration Statute:** MO. ANN. STAT. §§ 351.572, .594 (West 2015).

**Penalty:** door-closing statute. MO. ANN. STAT. § 351.574 (West 2015).

**Consequence of Registration:** *Unclear*. Although there is not a definitive interpretation of the Missouri registration statute, district courts in Missouri are starting to hold that consent-by-registration to general jurisdiction is unconstitutional in the post-*Daimler* era. See *Keeley v. Pzifer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at \*4 (E.D. Mo. July 1, 2015) (“A defendant’s consent to jurisdiction must satisfy the standards of due process and finding a defendant consents to jurisdiction by registering to do business in a state or maintaining a registered agent does not.”); *Neeley v. Wyeth LLC*, No. 4:11-CV-00325-JAR, 2015 WL 1456984, at \*3 (E.D. Mo. Mar. 30, 2015) (noting that adopting the consent-by-registration theory would make every foreign corporation registered to do business in Missouri subject to general jurisdiction and that “*Daimler* clearly rejects this proposition”).

## **Montana**

**Registration Statute:** MONT. CODE ANN. §§ 35-7-105 (2013).

**Penalty:** door-closing statute and fines (\$1,000 per year maximum). MONT. CODE ANN. § 35-1-1027 (2013).

**Consequence of Registration:** *Service only*. MONT. CODE ANN. § 35-7-115 (2013) explicitly states that appointment of a registered agent has no effect on jurisdiction, though it is silent on venue.

## **Nebraska**

**Registration Statute:** NEB. REV. STAT. §§ 21-20,174, 179 (2012) (repealed 2015).<sup>224</sup>

**Penalty:** door-closing statute and fines totaling \$500 per day (\$10,000 maximum per year). NEB. REV. STAT. § 21-20,169 (2012).

**Consequence of Registration:** *General Jurisdiction*. In *Mittelstadt v. Rouzer*, 328 N.W.2d 467, 469 (1982), the Nebraska State Supreme Court held that registration to do business and appointment of an agent establishes consent-based jurisdiction. In April 2015, a Nebraska federal district court held that *Daimler* did not change the consent-by-registration calculus. *Perrigo Co. v. Merial Ltd.*, No. 8:14-CV-403, 2015 WL 1538088, at \*7 (D. Neb. Apr. 7, 2015) (“*Daimler* circumscribes the extent to which a defendant can be *compelled* to submit to general jurisdiction, but . . . it does nothing to upset well-

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<sup>224</sup> This is repealed as of Jan. 1, 2016, and will be replaced by the Nebraska Model Business Corporation Act, 2014 Neb. Laws 749. However, this does not make any substantive changes to Nebraska’s law.

settled law regarding what acts may operate to imply consent.” (citation omitted)).

### **Nevada**

**Registration Statute:** NEV. REV. STAT. §§ 80.010 (2013).

**Penalty:** door-closing statute and suspension of statute of limitations, as well as fines up to \$10,000. NEV. REV. STAT. §§ 80.055, .095 (2013).

**Consequence of Registration:** *Service Only*. The Nevada State Supreme Court interpreted the statute as consent to service only in *Freeman v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 1 P.3d 963, 968 (2000).

### **New Hampshire**

**Registration Statute:** N.H. REV. STAT. ANN. §§ 293-A:15.01, :15.07, :15.10 (2015).

**Penalty:** door-closing statute and fines. N.H. REV. STAT. ANN. § 293-A:15.02 (2015).

**Consequence of Registration:** *Unclear*. No decisive statutory interpretation. For an opinion holding that New Hampshire's statute establishes at least *specific* jurisdiction (but refusing to comment on general jurisdiction), see *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 699 (1st Cir. 1984).

### **New Jersey**

**Registration Statute:** N.J. STAT. ANN. §§ 14A:4-1 to -2 (West 2003).

**Penalty:** door-closing statute and fines (\$1000 per year maximum). N.J. STAT. ANN. § 14A:13-11 (West 2003).

**Consequence of Registration:** *Unclear*. No controlling case law, however, courts in New Jersey support consent-by-registration to general jurisdiction. *E.g.*, *Senju Pharm. Co. v. Metrics, Inc.*, No. 14-3962 (JBS/KMW), 2015 WL 1472123, at \*6–8 (D.N.J. Mar. 31, 2015) (citing *Burnham v. Superior Court*, 495 U.S. 604, 622 (1990)) (upholding consent-by-registration to general jurisdiction); *Otsuka Pharm. Co. v. Mylan Inc.*, No. 14-4508 (JBS/KMW), 2015 WL 1305764, at \*8–11 (D.N.J. Mar. 23, 2015) (citing *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917)) (upholding general jurisdiction based on consent-by-registration and appointment of an agent and collecting New Jersey cases); *Sadler v. Hallsmith SYSCO Food Servs.*, No. 08-4423 (RBK/JS), 2009 WL 1096309, at \*1 (D.N.J. Apr. 21, 2009) (“A foreign corporation consents to being sued in a particular state by registering to do business in that state.” (citation omitted)).

### New Mexico

**Registration Statute:** N.M. STAT. ANN. §§ 53-17-9, -11 (LexisNexis 2014).

**Penalty:** door-closing statute. N.M. STAT. ANN. § 53-17-20 (LexisNexis 2014).

**Consequence of Registration:** *Unclear.* No decisive statutory interpretation. *But see* Werner v. Wal-Mart Stores, Inc., 861 P.2d 270, 273–74 (N.M. Ct. App. 1993) (interpreting New Mexico’s registration statute as upholding general jurisdiction, but refusing to make a ruling on the due process issue).

### New York

**Registration Statute:** N.Y. BUS. CORP. LAW §§ 304–305, 1301 (McKinney 2003).<sup>225</sup>

**Penalty:** door-closing statute. N.Y. BUS. CORP. LAW § 1312 (McKinney 2003).

**Consequence of Registration:** *General Jurisdiction.* The overwhelming majority of New York courts interpret registration to do business as consent to general jurisdiction in a manner that satisfies due process. *E.g.*, Beach v. Citigroup Alt. Invs. No. 12 Civ. 7717(PKC), 2014 WL 904650, at \*6 (S.D.N.Y. Mar. 7, 2014); Bailen v. Air & Liquid Sys. Corp., No. 190318/2012, 2014 WL 3885949, at \*4–5 (N.Y. Sup. Ct. Aug. 5, 2014) (“Although Daimler clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent.”); *see also* Steuben Foods, Inc. v. Oystar Grp. Inc., No. 10-CV-780S, 2013 WL 2105894, at \*3 (W.D.N.Y. May 14, 2013); Rockefeller Univ. v. Ligand Pharms. Inc., 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008); Augsbury Corp. v. Petrokey Corp., 470 N.Y.S.2d 787, 787 (N.Y. App. Div. 1983). This has been the case for the past 100 years. Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1077 (N.Y. 1916). *But see* Chatwal Hotels & Resorts LLC v. Dollywood Co., No. 14-CV-8679(CM), 2015 WL 539460, at \*6 (S.D.N.Y. Feb. 6, 2015) (holding registration “insufficient to confer general jurisdiction”).

### North Carolina

**Registration Statute:** N.C. GEN. STAT. ANN. §§ 55D-30, -33, 55-15-07 (West 2011).

**Penalty:** door-closing statute and fines (\$1000 per year maximum). N.C. GEN. STAT. ANN. § 55-15-02 (West 2011).

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<sup>225</sup> For information on the pending New York State consent-by-registration legislation, see A. DOC. 6714, 2015 Leg., Reg. Sess. (N.Y. 2015), <http://bit.ly/NY-A6714>.



**Consequence of Registration:** *Unclear.* No controlling case law. *But see* Pub. Impact, LLC v. Boston Consulting Grp., Inc., No. 15-CV-464, 2015 WL 4622028, at \*4–6 (M.D.N.C. Aug. 3, 2015) (denying general jurisdiction on the basis of consent-by-registration).

### **North Dakota**

**Registration Statute:** N.D. CENT. CODE §§ 10-01.1-13, -33-131 (2012).

**Penalty:** door-closing statute. N.D. CENT. CODE § 10-33-135 (2012).

**Consequence of Registration:** *Service only.* N.D. CENT. CODE § 10-01.1-15 (2012) explicitly states registration and appointment of a registered agent has no effect on jurisdiction or venue.

### **Ohio**

**Registration Statute:** OHIO REV. CODE ANN. §§ 1703.041, .191 (West 2009).

**Penalty:** door-closing statute and fines up to \$10,000. OHIO REV. CODE ANN. §§ 1703.28, .29 (West 2013). In addition, § 1703.99 states that corporate officers conducting business without registration will be charged with a misdemeanor. *But see* Citibank v. Eckmeyer, 2009 WL 1452614 (Ohio Ct. App. 11th Dist., May 8, 2009) (holding Ohio's registration statute as applied to national banks is unconstitutional under the Supremacy Clause because of the National Banking Act, 12 U.S.C. § 1 (2011)).

**Consequence of Registration:** *Service only.* In *Wainscott v. St. Louis-S.F. Ry. Co.*, 351 N.E.2d 466, 471 (1976), the Ohio State Supreme Court noted the “consent theory” of personal jurisdiction only supports claims arising out of *activities within the forum*. Federal courts interpreting *Wainscott* and the Ohio registration and appointment statutes echo this holding. *E.g.*, *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 329 (6th Cir. 1993) (“[*Wainscott*] provided that proper service of process does not eliminate the requirement that minimum contacts exist to permit Ohio courts to acquire personal jurisdiction.”). *See also* *Avery Dennison Corp. v. Alien Tech. Corp.*, 632 F. Supp. 2d 700, 711 n.7 (N.D. Ohio 2008) (“[I]t appears that registration to do business in Ohio is simply one fact to consider in analyzing personal jurisdiction.”).

### **Oklahoma**

**Registration Statute:** OKLA. STAT. ANN. tit. 18, § 1022 (West 2012).

**Penalty:** door-closing statute and fines. OKLA. STAT. ANN. tit. 18, §§ 1134, 1137 (West 2012).

**Consequence of Registration:** *Unclear.* No relevant cases.

### **Oregon**

**Registration Statute:** OR. REV. STAT. §§ 60.721, .731 (2013).

**Penalty:** door-closing statute. OR. REV. STAT. § 60.704 (2013).

**Consequence of Registration:** *Unclear.* No controlling case law. *But see* Lanham v. Pilot Travel Centers, LLC, No. 03:14-CV-01923-HZ, 2015 WL 5167268, at \*11 (D. Or. Sept. 2, 2015) (holding that compliance with Oregon's registration statute cannot be interpreted to establish general jurisdiction, and noting conflicting opinions on whether consent-by-registration to general jurisdiction is a valid theory after *Daimler*).

### **Pennsylvania**

**Registration Statute:** 15 PA. CONS. STAT. ANN. § 411(a) (West Supp. 2015). *See generally* 42 PA. CONS. STAT. ANN. §§ 5301, 5308 (West 2013); 15 PA. CONS. STAT. ANN. § 4144 (West 2013), *repealed by* Act of Oct. 22, 2014, Pub. L. 2640, No. 172, § 29 (effective July 1, 2015).

**Penalty:** door-closing statute. 15 PA. CONS. STAT. ANN. § 411(b) (West 2015) (effective July 1, 2015).<sup>226</sup>

**Consequence of Registration:** *General Jurisdiction.* 42 PA. CONS. STAT. ANN. § 5301 (West 2013) explicitly states that registration to do business results in consent to general jurisdiction.

### **Rhode Island**

**Registration Statute:** R.I. GEN. LAWS §§ 7-1.2-501, -1408, -1410 (2014).

**Penalty:** door-closing statute. R.I. GEN. LAWS § 7-1.2-1418 (2014). *But cf.* R.I. GEN. LAWS § 7-1.2-1803 (2014) (extending the authority of registration statutes only so far as the U.S. Constitution permits).

**Consequence of Registration:** *Unclear.* *But see* Harrington v. C.H. Nickerson & Co., No. 10-104-ML, 2010 WL 3385034, at \*3-4 (D.R.I. Aug. 25, 2010) (holding registration to do business is not a valid form of consent to jurisdiction without intent being indicated by the Rhode Island Legislature or a defendant).

### **South Carolina**

**Registration Statute:** S.C. CODE ANN. § 33-15-107 (2014).

**Penalty:** door-closing statute and fines (\$1,000 per year maximum). S.C. CODE ANN. § 33-15-102 (2014).

**Consequence of Registration:** *Unclear.* No relevant cases.

### **South Dakota**

**Registration Statute:** S.D. CODIFIED LAWS §§ 59-11-6, -16 (2009).

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<sup>226</sup> This replaced 15 PA. CONS. STAT. § 4141 and § 4143, which are repealed.

**Penalty:** door-closing statute and fines up to \$1,000 per year. S.D. CODIFIED LAWS §§ 47-1A-1502, -1502.2 (2007).

**Consequence of Registration:** *Service only.* S.D. CODIFIED LAWS § 59-11-21 (2009) explicitly disclaims registration as a basis for jurisdiction or venue.

### Tennessee

**Registration Statute:** TENN. CODE ANN. §§ 48-25-107, -110 (2012).

**Penalty:** door-closing statute. TENN. CODE ANN. § 48-25-102 (2012).

**Consequence of Registration:** *Specific or General Jurisdiction.* In *Davenport v. State Farm Mut. Auto. Ins. Co.*, the State Supreme Court of Tennessee noted the state has historically upheld “the consent theory as a basis of *in personam* jurisdiction over foreign corporations.” 756 S.W.2d 678, 679 (Tenn. 1988). In doing so, the court held foreign corporations that registered to do business did not benefit from a state statute which limited suits in Tennessee courts to claims arising from within Tennessee itself. *Id.* at 684. The opinion’s dicta may support a consent-by-registration to general jurisdiction argument, but one subsequent court interpreted this decision as relating to *specific jurisdiction*. *Ratledge v. Norfolk S. Ry. Co.*, 958 F. Supp. 2d 827, 838 (E.D. Tenn. 2013). *But see* *Alwood & Greene v. Buffalo Hardwood Lumber Co.*, 279 S.W. 795, 797 (1926) (citing *Barrow Steamship Co. v. Kane*, 170 U.S. 100 (1898) and using “consent” and “doing business” theories interchangeably to uphold general jurisdiction).

### Texas

**Registration Statute:** TEX. BUS. ORGS. CODE ANN. § 5.201 (West 2012).

**Penalty:** door-closing statute and fines. TEX. BUS. ORGS. CODE ANN. §§ 9.051(b), .052 (West 2012).

**Consequence of Registration:** *Unclear.* No controlling case law. *But see* 800 Adept, Inc. v. Enter. Rent-A-Car, Co., 545 F. Supp. 2d 562, 569 n.1 (E.D. Tex. 2008) (“A party does not consent to personal jurisdiction merely by complying with a state’s registration statutes or appointing an agent for service of process.”); *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993) (“A foreign corporation must have contact, other than mere compliance with Texas domestication requirements, to be subject to personal jurisdiction in Texas.”); *Conner v. ContiCarriers and Terminals, Inc.*, 944 S.W.2d 405 (Tex. App. 1997) (“By registering to do business, a foreign corporation only *potentially* subjects itself to jurisdiction.”).

### **Utah**

**Registration Statute:** UTAH CODE ANN. §§ 16-10a-1511, -17-203 (LexisNexis 2013).

**Penalty:** door-closing statute and fines (\$5000 per year maximum). UTAH CODE ANN. § 16-10a-1502 (LexisNexis 2013).

**Consequence of Registration:** *Service only.* Under UTAH CODE ANN. § 16-17-401 (LexisNexis 2013), registration to do business and appointment of an agent do not create an independent basis for jurisdiction.

### **Vermont**

**Registration Statute:** VT. STAT. ANN. tit. 11A, § 15.07, tit. 12, § 855 (2010).

**Penalty:** door-closing statute, fines (\$1,000 per year maximum), fees, and injunction against doing business in Vermont. VT. STAT. ANN. tit. 11A, § 15.02 (2010).

**Consequence of Registration:** *Unclear.* No controlling case law. *But see* Viko v. World Vision, Inc., No. 2:08-CV-221, 2009 WL 2230919, at \*5–7 (D. Vt. July 24, 2009) (interpreting Vermont’s statute as conferring service only, and stating that assertions of general jurisdiction through consent-by-registration would violate due process).

### **Virginia**

**Registration Statute:** VA. CODE ANN. §§ 13.1-763, -766 (2011).

**Penalty:** door-closing statute and fines up to \$5,000. VA. CODE ANN. § 13.1-758 (2011).

**Consequence of Registration:** *Unclear.* No controlling case law. *But compare* Reynolds & Reynolds Holdings, Inc. v. Data Supplies, Inc., 301 F. Supp. 2d 545, 551 (E.D. Va. 2004) (stating that consent-by-registration does not comport with due process under *International Shoe* and its progeny), *with* Cognitronics Imaging Sys., Inc. v. Recognition Research Inc., 83 F. Supp. 2d 689, 693–94 (E.D. Va. 2000) (stating in dicta that compliance with a registration statute can result in consent to general jurisdiction).

### **Washington**

**Registration Statute:** WASH. REV. CODE ANN. §§ 23B.15.070, .100 (West 2013), *amended by* S.B. 5387, 64th Leg., Reg. Sess. (Wash. 2015) (effective Jan. 1, 2016) (amending Washington’s laws to conform to Uniform Business Organizations Code § 1-502).

**Penalty:** door-closing statute and fees. WASH. REV. CODE ANN. § 23B.15.020 (West 2013), *amended by* S.B. 5387, 64th Leg., Reg. Sess.

(Wash. 2015) (effective Jan. 1, 2016) (amending Washington's laws to conform to Uniform Business Organizations Code § 1-502).

**Consequence of Registration:** *Unclear.* No controlling case law. *But see* United States *ex rel.* Imco Gen. Constr., Inc. v. Ins. Co. of Pa., No. C14-0752RSL, 2014 WL 4364854, at \*3 (W.D. Wash. Sept. 3, 2014) (avoiding a consent-by-registration analysis but denying general jurisdiction over foreign corporation despite acknowledging defendant's 217 registered agents and registration to do business in Washington State for more than 100 years); Wash. Equip. Mfg. Co. v. Concrete Placing Co., 931 P.2d 170, 173 (Wash. Ct. App. 1997) ("A certificate of authority to do business and appointment of a registered agent do not then confer general jurisdiction over a foreign corporation.").

### **West Virginia**

**Registration Statute:** W. VA. CODE ANN. §§ 31D-15-1501, -1507, -1510 (LexisNexis 2009).

**Penalty:** door-closing statute. W. VA. CODE ANN. § 31D-15-1502 (LexisNexis 2009).

**Consequence of Registration:** *Unclear.* No relevant cases.

### **Wisconsin**

**Registration Statute:** WIS. STAT. §§ 180.0501, .1507, .1510 (2013).

**Penalty:** door-closing statute. WIS. STAT. § 180.1502 (2013).

**Consequence of Registration:** *Unclear.* No relevant cases.

### **Wyoming**

**Registration Statute:** WYO. STAT. ANN. §§ 17-19-1507, 17-28-104 (2015).

**Penalty:** door-closing statute. WYO. STAT. ANN. § 17-19-1502 (2015).

**Consequence of Registration:** *Unclear.* No relevant cases.