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Abstract

Every state has a statute that requires out-of-state corporations to register with a designated official before doing business there, but courts disagree on what impact, if any, those statutes can or should have on personal jurisdiction doctrine. A minority of states interpret compliance with their registration statutes as the company's consent to general personal jurisdiction, meaning it can be sued on any cause of action there, even those unrelated to the company's conduct in that state. The United States Supreme Court upheld this "consent by registration" theory over 100 years ago, but since then has manifested a sea change in personal jurisdiction jurisprudence that leaves its continued viability in limbo. Two decisions by the Court from the 2010s—Goodyear Dunlop Tire Operations, S.A. v. Brown *and* Daimler AG v. Bauman—*drastically contracted the scope of contacts-based general jurisdiction but did not appear to address the contours of consent jurisdiction. The palpable discord makes it high time for the issue to reach the*

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Supreme Court, as it has in the high courts of four states in 2021 alone.

So, the question remains: what is left of consent by registration? Many courts and scholars have rejected the theory, reasoning that a corporation cannot give valid, knowing consent to general jurisdiction by simply complying with a state business registration statute. This Note sets out to address these concerns; it suggests that, under certain legal frameworks—where either explicit statutory language or controlling decisional law makes clear to corporations the jurisdictional consequences of registration—corporations can indeed give valid, informed consent to general jurisdiction by registering to do business in the state.

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I. INTRODUCTION

"Even when the seatbelt sign is turned off, please keep your seatbelt fastened in case of turbulence."

If you have ever flown on an airplane, you likely have heard this phrase announced by a flight attendant over a loudspeaker before. But sometimes, duty calls. Amina Diab, a Pennsylvania resident, was a passenger on a British Airways flight from New York to London in August 2018.[1] After the flight reached cruising altitude and attendants turned off the seatbelt sign, Diab got up from her seat, walked down the aisle, and entered the restroom.[2] Suddenly, turbulence ensued and Diab was "violently thrown" throughout the restroom, injuring her leg.[3] When she returned to the United States, she was diagnosed with a lateral patellar dislocation and a sprained knee.[4]

Looking to file suit against British Airways for her injuries, Diab was in an odd position. Determining which state's courts would have personal jurisdiction over the defendant is, especially in aviation cases, "a daunting task."[5] Because the plane was at cruising altitude when Diab was injured, it was not clear where exactly the harm occurred, so the issue of specific personal jurisdiction over British Airways would likely be hotly contested in any state's courts, leading to extensive jurisdictional discovery and expenses for the plaintiff.[6]

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1. *See* Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607, at *1 (E.D. Pa. Nov. 23, 2020).

2. *See id.* ("[A]fter the seat belt sign was turned off, Diab walked down the aisle and entered the lavatory . . . .") (internal quotations omitted).

3. *See id.* ("[W]ithout warning, [Ms. Diab] was violently thrown about the lavatory causing her to rotate forcefully about her right knee causing Ms. Diab to suffer immediate pain to her right knee.").

4. *Id.*

5. *See* Don Swaim et al., *After the Crash, Where Do You Land*, 80 J. AIR L. & COM. 521, 524 (2015).

6. *See id.* at 533 ("Plaintiff's counsel should be mindful of a company's activities, advertisements, sales, and distribution practices in the chosen forum, and should be prepared to engage in jurisdictional discovery to determine if a defendant has undertaken sufficient activities to target the forum state.").

So Diab, like many individuals harmed by the conduct of large corporations,[7] wanted to sue British Airways in her home state: Pennsylvania. However, to bring the lawsuit there, a Pennsylvania state or federal court would need to properly exercise personal jurisdiction over British Airways.[8] Specific personal jurisdiction over British Airways in Pennsylvania seemed improbable, as the incident itself was not related to Pennsylvania, other than that the plaintiff lived there.[9] British Airways is an English corporation with its principal place of business in London, so general personal jurisdiction in any forum in the United States—let alone Pennsylvania—would also be unavailable.[10] Or would it?

Turns out, British Airways is actually registered to do business in Pennsylvania. Better yet, Pennsylvania has a unique law that requires any corporation seeking to register to do business in the Commonwealth to also consent to general personal jurisdiction there—meaning the corporation agrees to be sued in Pennsylvania courts on any cause of action, whether or not related to activities occurring in Pennsylvania.[11] Under

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7. *See* Nicholas D. Welly, *The Misleading Legacy of* Tseng*: Removal Jurisdiction Under the Montreal Convention*, 75 J. AIR L. & COM. 407, 413 (2010) ("[I]t is commonly recognized that trial courts in a plaintiff's home state provide the plaintiff with the most sympathetic recourse for justice."); *see also* Alexandra Wilson Albright, *Personal Jurisdiction*, 30 APP. ADVOC. 9, 9 (2017) ("A client's first question to her lawyer is often about forum choice: 'Can I sue at home?' To answer that question, the lawyer must first consider whether the defendant is subject to personal jurisdiction in the state where the plaintiff seeks to file suit.").

8. *See* Burnham v. Super. Ct. of Cal., 495 U.S. 604, 609 (1990) ("[T]he judgment of a court lacking personal jurisdiction violate[s] the Due Process Clause of the Fourteenth Amendment as well.") (citing Pennoyer v. Neff, 95 U.S. 714, 732 (1878)).

9. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) ("In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'") (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)).

10. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1034 (2021) (Gorsuch, J., concurring) ("A tribunal with 'general jurisdiction' may entertain any claim against the defendant. But to trigger this power, a court usually must ensure the defendant is 'at home' in the forum State.") (quoting Daimler AG v. Bauman, 571 U.S. 117, 137 (2014)).

11. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2020).

this statute, Diab could sue British Airways in Pennsylvania without having to demonstrate minimum contacts with Pennsylvania because British Airways consented to being sued there as a prerequisite to its state business registration. Pennsylvania gets to provide a forum for one of its injured residents, Diab gets to bring her lawsuit without fear of litigating overseas or in another foreign jurisdiction, and British Airways stands by the agreement it made with the Commonwealth of Pennsylvania.

Diab did ultimately pursue her claim in a Pennsylvania federal court under the Montreal Convention, which allows for people injured during international air travel to recover for their injuries.[12] But British Airways moved to dismiss the complaint for lack of personal jurisdiction, arguing that the exercise of general jurisdiction over the airline in Pennsylvania would be unconstitutional because it did not agree to be sued there and was not "at home" there, as the Due Process Clause of the Fourteenth Amendment would otherwise require.[13] The objection is understandable; despite being registered to do business in Pennsylvania, British Airways was clearly not at home there, at least as the United States Supreme Court has understood the phrase in the context of general jurisdiction.[14]

But does that matter?[15] Under the Pennsylvania statutory scheme, British Airways seemingly waived the minimum contacts protections of the Due Process Clause when it consented to general jurisdiction by registering to do business in Pennsylvania.[16] What should the court do? What is it allowed to do?

These questions have been the subject of fundamental disagreement among dozens of state and federal courts across

12. *See* Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607, at *2 (E.D. Pa. Nov. 23, 2020).

13. *See id.* at *1.

14. *See infra* note 128 and accompanying text.

15. *See Diab*, 2020 WL 6870607 at *3 (E.D. Pa. Nov. 23, 2020) ("But a full analysis of where British Airways is at home in the United States is unnecessary here.").

16. *See id.* at *6 ("British Airways registered to do business in Pennsylvania knowing that doing so subjected it to general personal jurisdiction in Pennsylvania.").

the country, particularly in the past decade.[17] Every state has a statute that requires corporations to register with the state before doing business there,[18] but courts disagree on what impact, if any, those statutes can or should have on personal jurisdiction doctrine. That divide only deepened after the Supreme Court drastically narrowed the scope of general jurisdiction in *Goodyear Dunlop Tires v. Brown*[19] and *Daimler AG v. Bauman*.[20] Through those decisions, the Court collectively held that Due Process permits the exercise of contacts-based general jurisdiction only where the defendant can fairly be regarded as "at home."[21] Prior to *Goodyear*, plaintiffs did not often need to resort to consent by registration because contacts-based general jurisdiction was construed more broadly.[22] Following *Goodyear* and *Daimler*, however, plaintiffs resuscitated consent theories in an effort to adapt, arguing—when litigating in the courts of certain states with plaintiff-friendly statutory schemes—that defendants had consented to general jurisdiction by registering to do business there.[23] Under this theory, plaintiffs would argue, Due Process

17. *See, e.g.*, cases cited *infra* note 41.

18. *See infra* note 151 and accompanying text.

19. 564 U.S. 915 (2011).

20. 571 U.S. 117 (2014).

21. *See id.* at 138–39 ("[T]he inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.'") (quoting *Goodyear*, 564 U.S. at 919) (internal quotations omitted).

22. *See infra* note 148 and accompanying text.

23. Pennsylvania's registration statute explicitly sets out that registering to do business in the state "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction." *Compare* 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a)(2)(i) (West 2020) (conferring general jurisdiction in Pennsylvania over foreign corporations that "qualif[y]" as a foreign corporation in Pennsylvania) *with* Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991) (applying Pennsylvania's registration statute). Similarly, Iowa, Kansas, Minnesota, and New Mexico have registration statutes which are silent as to jurisdictional consequences, but whose courts have interpreted the statutes as requiring consent to general jurisdiction. *Compare* IOWA CODE ANN. § 490.1501(1) (West 2020) (requiring a foreign corporation to obtain a certificate of authority from the Secretary of State before transacting business in Iowa) *with* Spanier v. Am. Pop Corn Co., No. C15-4071-MWB, 2016 WL 1465400, at *4 (N.D. Iowa Apr. 14, 2016)

would be satisfied by virtue of the defendant's voluntary consent through its registration.[24]

The results have been mixed. Since *Daimler*, the supreme courts of nine states—California,[25] Colorado,[26] Delaware,[27]

(denying two defendants' motions to dismiss for lack of personal jurisdiction because the defendants "maintain[ed] registered agents for service of process in Iowa" and thus "have consented to jurisdiction here"); *compare* MINN. STAT. ANN. § 303.10 (West 2020) (requiring non-Minnesota corporations to have a registered office and a registered agent), *with* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) ("[A]ppointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state."); Werner v. Wal-Mart Stores, Inc., 861 P.2d 270 (N.M. App. 1993).

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

25. *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 377 P.3d 874, 884 (Cal. 2016) ("[A] corporation's appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions."), *rev'd on other grounds*, 137 S. Ct. 1773 (2017).

26. *See* Magill v. Ford Motor Co., 379 P.3d 1033, 1038–39 (Colo. 2016) (finding no general jurisdiction via corporate registration because the defendant's contacts "pale[d] in comparison to the significant contacts that were deemed 'slim' in *Daimler*").

27. *See* Genuine Parts Co. v. Cepec, 137 A.3d 123, 128 (Del. 2016) ("*Daimler* makes plain that it is inconsistent with principles of due process to exercise general jurisdiction over a foreign corporation that is not 'essentially at home' in a state for claims having no rational connection to the state . . . . Hence, Delaware cannot exercise general jurisdiction over it consistent with principles of due process.").

Illinois,[28] Missouri,[29] Montana,[30] Nebraska,[31] Oregon,[32] and Wisconsin[33]—have held that registering to do business in their state does not amount to consent to general personal jurisdiction,[34] while one state—Georgia—has upheld consent by registration.[35] In five states where consent by registration is

28. *See* Aspen Am. Ins. Co. v. Interstate Warehousing, Inc., 90 N.E.3d 440, 447 (Ill. 2017) ("[T]he fact that a foreign corporation has registered to do business under [Illinois's business registration statute] does not mean that the corporation has thereby consented to general jurisdiction over all causes of action, including those that are completely unrelated to the corporation's activities in Illinois.").

29. *See* State *ex rel.* Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41, 51 (Mo. 2017) ("[A] broad inference of consent based on registration would allow national corporations to be sued in every state, rendering *Daimler* pointless.").

30. *See* DeLeon v. BNSF Ry. Co., 426 P.3d 1, 4 (Mont. 2018) ("[A] company does not consent to general personal jurisdiction by registering to do business in Montana and voluntarily conducting in-state business activities.").

31. *See* Lanham v. BNSF Ry. Co., 939 N.W.2d 363, 371 (Neb. 2020) ("[T]reating BNSF's registration to do business in Nebraska as implied consent to personal jurisdiction would exceed the due process limits prescribed in [*Goodyear*] and [*Daimler*].").

32. *See* Figueroa v. BNSF Ry. Co., 390 P.3d 1019, 1021 (Or. 2017) ("[T]he legislature did not intend that appointing a registered agent pursuant to [the Oregon registration statute] would constitute consent to the jurisdiction of the Oregon courts.").

33. *See* Segregated Acct. of Ambac Assurance Corp. v. Countrywide Home Loans, 898 N.W.2d 70, 82 (Wis. 2017) ("[S]ubjecting foreign corporations to general jurisdiction wherever they register an agent for service of process would reflect the sprawling view of general jurisdiction rejected by the Supreme Court in *Goodyear*.") (internal quotations omitted).

34. Prior to *Goodyear* and *Daimler*, at least six other state supreme courts (Maryland, Michigan, Nevada, North Carolina, Ohio, and South Carolina) had already held the same. *See* Republic Props. Corp. v. Mission West Props., LP, 895 A.2d 1006 (Md. 2006); Renfroe v. Nichols Wire & Aluminum Co., 83 N.W.2d 590 (Mich. 1957); Freeman v. Second Jud. Dist. Ct., 1 P.3d 963 (Nev. 2000); Byham v. Nat'l Cibo House Corp., 143 S.E.2d 225 (N.C. 1965); Wainscott v. St. Louis-S.F. Ry. Co., 351 N.E.2d 466 (Ohio 1976); Yarborough & Co. v. Schoolfield Furniture Indus., 268 S.E.2d 42, 44 (S.C. 1980).

35. *See* Cooper Tire & Rubber Co. v. McCall, __ S.E.2d __, 2021 WL 4268074, at *11 (Ga. 2021) ("[B]ecause Cooper Tire is registered and authorized to do business in Georgia, Cooper Tire is currently subject to the general jurisdiction of our courts under [a prior] general-jurisdiction holding, which we have decided to leave in place.").

alive—Pennsylvania,[36] Minnesota,[37] Iowa,[38] New Mexico,[39] and Kansas[40]—state and federal appellate courts endorsed the concept in pre-*Daimler* decisions that their lower courts have largely followed ever since. More broadly, though, courts across the country—some even within the same judicial district interpreting the same registration statute[41]—continue to clash on whether registration to do business can ever serve as valid consent to jurisdiction, let alone general jurisdiction. The palpable discord among the states undoubtedly makes it high time for the issue to reach the United States Supreme Court,[42] as it has in the New York Court of Appeals,[43] New Mexico

36. *See* Bane v. Netlink, 925 F.2d 637, 641 (3d Cir. 1991) ("[B]ecause Netlink was authorized to do business in Pennsylvania, it was subject to the exercise of personal jurisdiction by Pennsylvania courts . . . .").

37. *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (holding that the defendant's appointment of Minnesota agent for service of process operated as consent to jurisdiction of Minnesota courts).

38. *Compare id.*, *with* Spanier v. Am. Pop Corn Co., No. C15-4071-MWB, 2016 WL 1465400 (N.D. Iowa Apr. 14, 2016) (following *Knowlton*).

39. *See* Werner v. Wal-Mart Stores, Inc., 861 P.2d 270, 273 (N.M. App. 1993) (concluding that, "without an express limitation, the [New Mexico] legislature intended for [the state's business registration statute] to apply to any claims against a foreign corporation with a registered agent in New Mexico"); Brieno v. Paccar, Inc., No. 17-cv-867-SCY/KBM, 2018 WL 3675234 (D.N.M. Aug. 2, 2018) (following *Werner*).

40. Merriman v. Crompton Corp., 146 P.3d 162, 174 (Kan. 2006) (holding that the Kansas registration statute "provides a basis for general jurisdiction over foreign corporations").

41. *Compare In re* Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532, 534 (E.D. Pa. 2019) (finding that the consent-by-registration theory is "irretrievably irreconcilable with the teachings of *Daimler*, and can no longer stand"), *with* Kraus v. Alcatel-Lucent, 441 F. Supp. 3d 68, 70 (E.D. Pa. 2020) (holding that Pennsylvania's consent-by-registration statute is constitutional).

42. *See generally* Michael Huston, Sean Cooksey & David Casazza, *'Consent' is the Next Big Battle Over Personal Jurisdiction*, S.F. DAILY J. (July 5, 2017), https://perma.cc/3497-V99M; *see also* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 259–60 (2014) (opining that consent by registration is "ripe for invalidation by the Supreme Court").

43. Aybar v. Aybar, 2021 NY 54U (2021), https://perma.cc/9B4W-RDL6.

Supreme Court,[44] Pennsylvania Supreme Court,[45] and Georgia Supreme Court[46] in 2021 alone.

One of the most recurrent critiques of the consent-by-registration theory is that by registering to do business in a state, a corporation is not giving valid, knowing consent to general jurisdiction.[47] Pennsylvania's statute is the only law of its kind that explicitly tells the registrant that signing up to do business in the state equals consent to general jurisdiction in that state.[48] For this reason, the argument proceeds, registered businesses never receive fair notice of what rights they are waiving when they register.[49] One might argue that even if the statute did expressly provide that notice, the consent still would not be genuine because the corporation lacks real alternatives to registration that would make the consent free and voluntary.[50] This Note sets out to address these

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44. Oral Argument at 38:00, Rodriguez v. Ford Motor Co. (N.M. 2021) (No. S-1-SC-37491), https://perma.cc/GGG8-MA4E (plaintiff's counsel addressing "the issue of whether consent by registration remains constitutional")

45. Oral Argument at 1:07:30, Mallory v. Norfolk S. Ry. Co. (Pa. 2021) (No. 3 EAP 2021), https://perma.cc/8ZE8-94L5 ("This case is about whether Norfolk Southern can be subjected to general jurisdiction based on the voluntary actions that it did—the voluntary consent, when it registered under Pennsylvania laws to be a foreign corporation.").

46. *See generally* Cooper Tire & Rubber Co. v. McCall, __ S.E.2d __, 2021 WL 4268074 (Ga. 2021).

47. *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1347 (2015) ("[R]egistration cannot fairly be regarded as express—or even implied—consent to personal jurisdiction.").

48. *See* Rich Samp, *Personal Jurisdiction By 'Consent' May Be on the Way Out—Even in Pennsylvania*, FORBES (June 27, 2019), https://perma.cc/W7CC-QDFF ("[Pennsylvania's] statute includes a provision not contained in many other States' registration laws: it says explicitly that by registering, a nonresident corporation consents to the general jurisdiction of Pennsylvania courts over any and all claims filed against the corporation, even claims that bear no relation to Pennsylvania.").

49. *See* Monestier, *supra* note 47, at 1388 ("[T]he statutory source upon which courts pin their jurisdictional power does not provide any notice to corporations that by registering to do business and appointing an agent for service of process they are relinquishing due process protections.").

50. *See id.* at 1389 ("Aside from registering to do business in the state and thereby consenting to general jurisdiction, a corporation really only has one of two choices: not do business in the state or do business in the state without registering and face whatever penalties the law ascribes.").

criticisms and ultimately offers that, under certain statutory and common law schemes, corporations can effect valid consent to general jurisdiction when they register to do business in a state.[51]

Part II provides a background on consent as it relates to personal jurisdiction doctrine and discusses the landscape of general personal jurisdiction prior to and following the *Goodyear* and *Daimler* decisions.[52] Part III recalls the role that registration statutes played before *International Shoe Co. v. Washington*[53] and parses the Supreme Court's limited modern commentary on consent jurisdiction, questioning whether the core holdings of either *Goodyear* or *Daimler* had any abrogative effect on consent by registration.[54]

Part IV argues that corporations can, in some instances, give valid consent to general jurisdiction in a state through registration to do business.[55] Part IV addresses concerns related to notice and voluntariness, suggesting that where either express statutory language or decisional law makes it clear that registering under a given statute constitutes consent to general jurisdiction, corporations are put on fair notice of the jurisdictional consequences of such registration. Part V concludes the Note by recommending, in the interest of efficiency and predictability, that state legislatures take firm control of the consent-by-registration landscape in their jurisdictions by amending their registration statutes to be explicit as to the jurisdictional consequences, regardless of whether they decide to uphold or reject consent by registration.[56]

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51. *See, e.g.*, Otsuka Pharm. Co. v. Mylan Inc., 106 F. Supp. 3d 456, 469 (D.N.J. 2015) ("[D]esignation of an in-state agent for service of process in accordance with a state registration statute may constitute consent to personal jurisdiction, if supported by the breadth of the statute's text or interpretation.").

52. *See infra* Part II.

53. 326 U.S. 310 (1945).

54. *See infra* Part III.

55. *See infra* Part IV.

56. *See infra* Part V.

II. CONSENT AND GENERAL JURISDICTION

The distinction between specific and general personal jurisdiction is crucial to understanding the pressure points of this discussion. Specific personal jurisdiction allows a court to claim jurisdiction over an out-of-state defendant for a given lawsuit if (1) that suit arises out of, or is related to, the defendant's activities in the forum state;[57] and (2) if the exercise of jurisdiction in that specific case would not offend "traditional notions of fair play and substantial justice."[58] There must be some "affiliation between the forum State and the underlying controversy"—most likely an activity or occurrence "that takes place in the forum State and that is therefore subject to the State's regulation.[59] The defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[60] This ensures "that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."[61] In the end, though, when a court finds specific jurisdiction over a defendant, it does so only for that particular case.

General personal jurisdiction, however, is much broader in nature. If a defendant has an especially strong relationship with a state (for example, if the person permanently resides in that state, or the company is headquartered there), then a court may have general jurisdiction over that defendant, meaning that defendant can be sued in that state's courts on *any claim*—even those that have nothing to do with the defendant's contacts with the state.[62] As a general rule, a court that exercises either form

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57. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction.") (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

58. Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

59. *See* Bristol Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1780 (2017).

60. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

61. *See id.* at 475 (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984)).

62. *See* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 17 (2018) ("General jurisdiction could be asserted over a defendant

of jurisdiction where the defendant's contacts are insufficient to do so is in violation of the Due Process Clause.[63]

However, a defendant's consent to personal jurisdiction, or waiver of challenges to personal jurisdiction, is a long-recognized exception to the Due Process and long-arm statutory analysis.[64] Where a defendant agrees to be sued, there is no need to assess whether that defendant has sufficient contacts with the state to be "haled into court"[65] there.[66]

A. Personal Jurisdiction as a Waivable Right

Personal jurisdiction is, first and foremost, a right.[67] A civil procedure textbook might characterize it as a *court's* right to make binding decisions concerning the liabilities and duties of particular parties in particular civil actions.[68] At its core, though, personal jurisdiction creates an *individual* right:[69] the right to be free from the binding judgment of courts attempting

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with a strong connection to the state, even if the cause of action arose elsewhere and was unrelated to the defendant's contacts with the state.").

63. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (discussing the connection between personal jurisdiction and the Due Process Clause).

64. *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) ("Consent is the other traditional basis of jurisdiction, existing independently of long-arm statutes.").

65. *Burger King Corp.*, 471 U.S. at 475.

66. *See, e.g.*, DeLeon v. BNSF Ry. Co., 426 P.3d 1, 6 (Mont. 2018) (noting that due process is not offended when a defendant "waives its constitutional due process protections
by consenting to personal jurisdiction").

67. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("[P]ersonal jurisdiction represents first of all an individual right.").

68. *See Personal Jurisdiction*, CORNELL L. SCH., available at https://perma.cc/N6E8-L8SL ("Personal jurisdiction refers to the power that a court has to make a decision regarding the party being sued in a case."); *see also* Hand Cut Steaks Acquisitions v. Lone Star Steakhouse & Saloon of Neb., 298 Neb. 705, 722 (2018) ("Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.").

69. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) (plurality opinion) (explaining that personal jurisdiction is a Due Process right not to be subject to the adjudicatory authority of a sovereign); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("[The personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

to exceed their constitutional limitations.[70] It is tethered to the Due Process Clause,[71] and thereby provides protections to individuals.[72] This distinction is pivotal. At its foundation, personal jurisdiction doctrine is a product of personal autonomy, not structural integrity. It is a right that belongs to the people—to be wielded as they wish;[73] unlike, for example, subject-matter jurisdiction, which is a structural requirement by the court, not a personal right that one could simply consent to or waive.[74]

The Supreme Court established the now well-settled principle that a party can waive the jurisdictional protections of the Due Process Clause.[75] While in some instances a party might involuntarily waive its Due Process protections,[76] more often when parties waive this right, they do so by voluntarily

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70. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1015 (1983) (explaining that personal jurisdiction doctrine "gives litigants the individual right to protect themselves from overreaching courts").

71. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted)

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

72. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive *any person* of life, liberty, or property without due process of law . . . .") (emphasis added).

73. *See* Drobak, *supra* note 70, at 1018 (summarizing the Supreme Court's finding in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* that "the requirement of personal jurisdiction is a legal right protecting the individual, as shown by the ability of a defendant to waive that right").

74. *See* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *see also* Brown v. Lockheed Martin Corp., 814 F.3d 619, 625 (2d Cir. 2016) ("[U]nlike subject matter jurisdiction, a party may simply consent to a court's exercise of personal jurisdiction: for example, an entity may contract or stipulate with another to permit proceedings in a state's courts, notwithstanding the remoteness from the state of its operations and organization.").

75. *See Ins. Corp. of Ir.*, 456 U.S. at 703 ("[Personal jurisdiction rights] can, like other such rights, be waived.").

76. *See* Drobak, *supra* note 70, at 1018 ("Besides a voluntary waiver, a defendant can lose the legal right by failing to comply with certain procedural rules . . . [t]he loss occurs because the expression of legal rights in a court is subject to procedural rules.").

consenting to jurisdiction, offering some manifestation of an intent to litigate in the chosen forum.[77] One way to give consent to a court's jurisdiction would be to appear in or otherwise contest the merits of a lawsuit after filing.[78] Another way would be through a pre-suit agreement by the parties to submit to the jurisdiction of a court, such as a forum selection clause in a contract.[79]

The bulk of American personal jurisdiction doctrine concerns the rights of the defendant;[80] rarely, if ever, do courts see issues of jurisdiction pertaining to the plaintiff.[81] The reason for this—unremarkable to most law students and practicing lawyers—is that the plaintiff is presumed to have consented to jurisdiction by choosing to file suit in that court.[82] Normally the inertia of the lawsuit would then shift to the defendant, who has the option to dispute personal jurisdiction,[83] enforcing that same individual right which the plaintiff has already waived.[84] Alternatively, the defendant could also waive that right by consenting to personal jurisdiction and litigating the suit, either

77. *See Ins. Corp. of Ir.*, 456 U.S. at 703–04 (describing six ways that a defendant could consent to personal jurisdiction).

78. *See id.* ("[A]n individual may submit to the jurisdiction of the court by appearance.").

79. *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964) (recognizing contractual consent as a basis for jurisdiction).

80. *See* Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1466 (2019) ("[T]he overwhelming body of cases and commentary on personal jurisdiction has focused on its applicability to defendants.").

81. *See* DANIEL V. DAVIDSON & LYNN M. FORSYTHE, BUSINESS IN THE CONTEMPORARY LEGAL ENVIRONMENT 79 (2d ed. 2016) ("Questions do not arise about the court's jurisdiction over the plaintiff."). *But see* Dodson, *supra* note 80, at 1466 ("But the Due Process Clauses protect 'persons,' not just defendants, so plaintiffs arguably have similar entitlements to the protections of personal jurisdiction.").

82. *See id.* ("The plaintiff chose to file the suit in a particular court and so implicitly consents to the court's jurisdiction.").

83. *See* FED. R. CIV. P. 12(b)(2).

84. *See* Dodson, *supra* note 80, at 1466 ("In most cases, consent obviates any protections: the plaintiff's act of filing a complaint in a court manifests the plaintiff's consent to the personal jurisdiction of that court for purposes of resolving the claims asserted in that complaint.").

via voluntary appearance or submission, as discussed above.[85] In some cases, the defendant might have already waived jurisdictional challenges by consenting pre-suit through an agreement.[86] Though these processes are familiar, they also demonstrate the unavoidable role of consent in personal jurisdiction. Every civil action begins—in an unassuming way—with consent to personal jurisdiction.

When parties make the decision to waive Due Process protections, they more often are consenting to *specific* personal jurisdiction.[87] But a question less often asked is whether—and if so, how—a party could give consent to *general* personal jurisdiction.[88] If such consent is permissible, it is definitely uncommon among private parties contracting with other private parties. After all, when negotiating a private agreement, a company does not have much incentive to require another company to consent to personal jurisdiction for cases unrelated to the agreement itself.[89]

But what about state governments? States might have their own sovereign interests in providing a forum for suit,[90] even if personal jurisdiction over the defendant in those cases would not otherwise fit within the vexing goalposts of minimum contacts.[91] Remember Amina Diab, who was harmed by a large

85. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("[A]n individual may submit to the jurisdiction of the court by appearance.").

86. *See Szukhent*, 375 U.S. at 316 ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.").

87. *See* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 756 n.181 (1988) ("Consent to jurisdiction given in a private contract ordinarily does not constitute consent to a jurisdiction over any cause of action whatsoever.").

88. *See id.* at 756 ("[P]arties conceivably might provide for jurisdiction that is general in all respects.").

89. *See id.* (explaining that this kind of consent clause is rarely included in private contracts because "one party would have little reason to extract such consent from another").

90. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. LEGIS. 377, 408 (2020) (indicating that suits arising from an injury suffered in the state, brought by state residents, governed by that state's law, or brought to enforce a judgment against people or property within that state could implicate state sovereign interests).

91. *See id.* at 380 ("Even as [recent holdings of the Roberts Court] narrow the outer due-process limits of the minimum-contacts standard, they leave

corporation—registered to do business in all fifty states—due to conduct occurring outside the United States.[92] With comparatively minimal resources, Diab—and others similarly situated—might not be able to zealously pursue the claims in an unfamiliar forum far from home. Unlike large corporations, ordinary people usually do not have relationships with local counsel in multiple states, and their bargaining power as a plaintiff in settlement negotiations weakens with each accruing litigation cost. A state government might want to fill that void by requiring those corporations to consent to general jurisdiction in that state as a prerequisite for doing business there. It is on this issue—whether a state government could constitutionally set such a requirement—that courts and scholars vary widely.

B. The Waning Crescent of General Jurisdiction After Goodyear and Daimler

Until the mid-nineteenth century, notions of territorial sovereignty dominated Due Process personal jurisdiction doctrine.[93] The mandate of *Pennoyer v. Neff*[94] was that a person could not be subjected to the jurisdiction of a court unless they were actually was served with process within a court's territory or consented to the court's jurisdiction.[95] Applying this rule to individuals was not terribly complicated, but the rise of interstate commerce of the early twentieth century made its

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room for the states to identify, assert, and enforce their interests in protecting state residents and regulating in-state business activities through alternative jurisdictional means.").

92. *See* Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607 (E.D. Pa. Nov. 23, 2020).

93. *See id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse.") (citation omitted).

94. 95 U.S. 714 (1877).

95. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 (3d ed. 2014); Burnham v. Super. Ct. of Cal., 495 U.S. 604, 617 (1990) (Scalia, J., plurality opinion) (discussing *Pennoyer*'s "rigid requirement of either 'consent,' or 'presence'") (internal citations omitted).

application to corporations much more challenging.[96] While a company would undoubtedly be "present" in its state of incorporation, less clear was whether it could fairly be deemed present in the other states in which it does business.[97]

However, in 1945 the Supreme Court ushered in a "less wooden understanding" of the limits of personal jurisdiction over nonresident individuals and corporations[98] through the watershed case of *International Shoe Co. v. Washington*.[99] There, the Court held that judicial authority over an out-of-state defendant depends not on the defendant's presence in the state, but on the defendant having certain "minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[100] *International Shoe*'s recalibration of the Due Process analysis gave way to two distinct forms of jurisdiction: general (or "all-purpose") jurisdiction, and specific (or "case-linked") jurisdiction.[101] From then on, the primary focus of the personal jurisdiction inquiry became the "nature and extent of the 'defendant's relationship to the forum state.'"[102]

Since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory" while general jurisdiction has played "a reduced role."[103] From 1945 to 2011, the Court addressed only two general jurisdiction cases: *Perkins v. Benguet Consolidated Mining Co.*,[104] in which the Court

96. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 108.23 (2012) ("Fitting personal jurisdiction over corporations, which have no physical body, into [the physical power theory of jurisdiction] posed some problems.").

97. *See id.*

98. *See* Daimler AG v. Bauman, 571 U.S. 117, 118 (2014).

99. 326 U.S. 310 (1945).

100. *See id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

101. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (citations omitted).

102. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) (quoting Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1779 (2017)).

103. *See Goodyear*, 564 U.S. at 925 (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988)) (internal quotations omitted).

104. 342 U.S. 437 (1952).

upheld the exercise of general jurisdiction over the defendant,[105] and *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[106] in which the Court found general jurisdiction lacking.[107] Read together, *Perkins* and *Helicopteros* defined the contours of the "continuous and systematic general business contacts"[108] necessary to exercise general jurisdiction.[109] Lower courts would evaluate the totality of the defendant's contacts with the forum to assess whether they constitute "the kind of continuous and systematic contacts required to satisfy due process,"[110] using *Perkins* and *Helicopteros* as the outer bounds.[111] A dearth of further guidance in this area[112] led to uncertainty and inconsistent results, creating headaches for non-US entities and an overwhelming burden for large domestic companies.[113]

However, in the 2010s, with the status of general jurisdiction still in flux, the Court decided *Goodyear Dunlop*

105. *See id.* at 448 ("[I]t would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding.").

106. 466 U.S. 408 (1984).

107. *See id.* at 418–19 (concluding that the defendant's contacts with the forum state "were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment").

108. *See id.* at 416.

109. *See Perkins*, 342 U.S. at 438 ("The corporation has been carrying on in [the forum state] a continuous and systematic, but limited, part of its general business.").

110. Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 779 (5th Cir. 1986). The *Perkins* Court indicated that contacts that might be continuous and systematic include "directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc." *See Perkins*, 342 U.S. at 445.

111. *See, e.g.*, Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir. 1996) ("Many cases, including this one, fall between *Perkins* and *Helicopteros*.").

112. *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 511 (2015) (noting that, by this point, the Court had "offered no real clues about how to analyze cases that fell into the vast expanse between *Helico*[*pteros*] and *Perkins*").

113. *See* Monestier, *supra* note 47, at 1353–54 (noting that as general jurisdiction doctrine developed, non-US defendants were "unable to predict with any degree of certainty where they would be subject to general jurisdiction . . . [l]arge multinational corporations . . . would likely be regarded as having continuous and systematic general business contacts in all fifty states.").

Tires v. Brown[114] and *Daimler AG v. Bauman*.[115] In doing so, the Court replaced the irresolution from the twentieth century with a much stricter test for general jurisdiction than was previously in place.[116]

1. Goodyear Dunlop Tires Operations, S.A. v. Brown

In many respects, *Goodyear* "ultimately marked the beginning of the end for doing business jurisdiction,"[117] as the Court put a leash on the "continuous and systematic" standard by introducing the "at home" test.[118]

Goodyear involved two thirteen-year-old boys from North Carolina who died in a bus accident while in France.[119] Their parents, believing the cause of the accident to be a defective tire manufactured by foreign subsidiaries of The Goodyear Tire and Rubber Company, sued Goodyear for damages in North Carolina state court.[120] The question was whether the North Carolina court could exercise general personal jurisdiction over the foreign manufacturers[121]—who had not registered to do business in North Carolina, had not advertised or shipped to customers in North Carolina, and whose only contact with North Carolina was a negligible supply of tires made abroad that reached North Carolina through the stream of commerce.[122] For these reasons, *Goodyear* could be seen as "an easy case,"[123]

114. 564 U.S. 915 (2011).

115. 571 U.S. 117 (2014).

116. *See* Brooke A. Weedon, Note, *New Limits on General Personal Jurisdiction: Examining the Retroactive Application of* Daimler *in Long-Pending Cases*, 72 WASH & LEE L. REV. 1549, 1551–52 (2015).

117. *See* Monestier, *supra* note 47, at 1354.

118. *See* Rhodes & Robertson, *supra* note 90, at 389 (explaining that *Goodyear* "retain[ed] earlier iterations that substantial 'continuous and systematic' affiliations were necessary for general jurisdiction" but also "added to the description that such affiliations has to render the defendant 'essentially at home' in the forum") (internal citations omitted).

119. *See Goodyear*, 564 U.S. at 918.

120. *Id.*

121. *Id.* at 923.

122. *Id.* at 921.

123. *See* 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. 675, 677 (2015) ("On its facts, *Goodyear* was an easy case under the established Supreme Court and lower court precedents. Mere

reflected by the Court's unanimous holding that the Goodyear subsidiaries were not subject to general jurisdiction in North Carolina.[124]

But the disposition of the case was not the most significant detail in *Goodyear*. Rather, it was the Court's insistence that a defendant corporation is subject to general jurisdiction only when the corporation is fairly regarded as "at home" in the forum state.[125] The Court clarified that general jurisdiction requires more than just any sort of continuous activity in the state,[126] but rather that "'continuous and systematic general business contacts'" would be necessary.[127] The Court then offered examples of the "paradigm" forum for general jurisdiction over individuals and corporations—for an individual: the person's domicile; and for corporations: "an equivalent place, one in which the corporation is fairly regarded as at home."[128] For this proposition, the Court cited Professor Lea Brilmayer of Yale, who identified the place of incorporation and principal place of business as paradigm states in which general jurisdiction could be exercised.[129] But in the *Goodyear* opinion, paradigm examples and "textbook case[s]"[130] are where the clarification ended. The Court did not discuss any less paradigmatic situations in which contacts-based general jurisdiction might still be proper, nor did it say outright that the

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sales into the forum state—whether direct or as part of the stream of commerce—had never been sufficient to satisfy the systematic and continuous activity necessary to satisfy general jurisdiction.") (internal citations and quotations omitted).

124. *See Goodyear*, 564 U.S. at 931.

125. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 931 (2011) ("[Goodyear's] attenuated connections to [North Carolina] . . . fall far short of the 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.") (quoting *Helicopteros*, 466 U.S., at 416).

126. *See id.* at 927 ("A corporation's 'continuous activity of some sorts within a state' . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.") (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).

127. *See id.* at 929 (quoting *Helicopteros*, 466 U.S. at 416).

128. *Id.* at 924.

129. *See id.* (citing Brilmayer et al., *supra* note 87, at 728).

130. *See id.* at 927–28 (referring to the Court's exercise of general jurisdiction in *Perkins*).

examples given were the outer bounds for general jurisdiction. But to the extent that *Goodyear* left these doors open, *Daimler* shut them four years later.

2. Daimler AG v. Bauman

In *Daimler*, twenty-two Argentinian residents sued Daimler AG, a German company, in the Northern District of California.[131] They alleged that during Argentina's "Dirty War," Daimler's Argentinian subsidiary—Mercedez-Benz Argentina (MB Argentina)—"collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers,"[132] including the plaintiffs and their relatives. The plaintiffs argued that because Mercedez-Benz USA (MBUSA) had substantial contacts with California, the Northern District could exercise general personal jurisdiction over Daimler.[133] The case presented the novel question of whether a parent company could be subjected to general jurisdiction in a forum based on the forum contacts of its subsidiary,[134] but the Court instead assumed the premise and decided that even if MBUSA's contacts with California could be imputed to Daimler, California still could not exercise general jurisdiction over it, "for Daimler's *slim contacts* with the State hardly render it at home there."[135]

The *Daimler* Court acknowledged that the *Goodyear* opinion offered only the two "exemplar bases" for general jurisdiction and not an exhaustive list.[136] In the same breath, though, the Court declined to exercise general jurisdiction beyond those bases, reasoning that to do so would have been "unacceptably grasping."[137] The Court clarified that, under *Goodyear*, contacts sufficient to subject the defendant to general jurisdiction are not just "in some sense continuous and

131. *See* Daimler AG v. Bauman, 571 U.S. 117, 120 (2014).

132. *See id.* at 121.

133. *See id.*

134. *See id.* at 134.

135. *Id.* at 136 (emphasis added).

136. *See id.* at 137 ("*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.").

137. *See id.* at 137–38.

systematic,"[138] but rather are "so continuous and systematic as to render [it] essentially at home in the forum State."[139] Because neither Daimler nor MBUSA were incorporated in California or maintained their principal places of business there, the Court reasoned that it could not exercise general jurisdiction in California based on their other contacts.[140] The *Daimler* Court, however, added an important disclaimer in a footnote of the opinion, which left open "the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[141]

When general jurisdiction emerged from the rubble of the early 2010s, it was a shell of its former self. The purpose of *International Shoe* was to expand the reach of personal jurisdiction,[142] but with just two words,[143] the *Goodyear* Court squeezed general jurisdiction from a doctrine of inclusion to one of exclusion.[144] The *Daimler* Court twisted the knife by doubling down on *Goodyear* and elucidating that the place of incorporation and principal place of business are—outside of an

138. *See id.* at 139 (internal quotations omitted).

139. *Id.* (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

140. *See id.* (finding that the Ninth Circuit erred in concluding that "Daimler, even with MBUSA's contacts attributed to it, was at home in California").

141. *See id.* at 139 n.19.

142. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction*: *From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV 19, 55 (1990) ("*International Shoe* signaled a broader reach for state courts and an era of arguably fairer results."); *see also* McGee v. Int'l Life Ins. Co, 355 U.S. 220, 222 (1957) ("Looking back over [the history of personal jurisdiction] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.").

143. *See* Rhodes & Robertson, *supra* note 90, at 389 ("*Goodyear*'s true significance was introducing a new metaphor into the general jurisdiction lexicon."); Monestier, *supra* note 47, at 1355 ("[T]he significance of *Goodyear* lies in two words: 'at home.'").

144. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 100 (2018) ("Limiting the general jurisdiction of domestic defendants to just one or two states drastically changed the presumed access to courts that plaintiffs previously enjoyed against large companies with a hefty business presence in many or even all states.").

"exceptional case"[145]—the only available fora for contacts-based general jurisdiction over a corporation.[146]

Absent from either opinion, though, is any meaningful discussion of whether a party could consent to general jurisdiction and waive its Due Process protections.[147] While this makes sense—the issue was not central to either case before the Court—it also explains why the plaintiffs' bar saw the opportunity to gravitate to another theory: by registering to do business, a corporation consents to general jurisdiction.[148] Courts vary in their perception of what impact, if any, the *Daimler* holding had on the continued viability of this theory,[149] but there was enough ambiguity to compel plaintiffs to resort to this argument.[150] To best understand why plaintiffs perceived the consent-by-registration argument to be a formidable one at this point, it is important to contextualize corporate registration statutes and how they were construed by the courts before *Goodyear* and *Daimler*.

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145. Daimler AG v. Bauman, 571 U.S. 117, 139 n.19 (2014).

146. *See* Trammell, *supra* note 112, at 521

> *Daimler* thus confirmed the most ambitious reading of *Goodyear*. A corporation likely is subject to general jurisdiction only in a state where it has incorporated or maintains its principal place of business. The Court has left open only the slimmest possibility that general jurisdiction might be permissible in a state that is the functional equivalent of one of those paradigm examples. While such an exception is theoretically possible, the Court suggests that it will be the rarest of rarities.

147. *See infra* Part III.C.

148. *See* Rhodes & Robertson, *supra* note 42, at 259–60 (2014) ("Given the constriction of general jurisdiction in [*Daimler*], the natural next step for plaintiffs is to seek other grounds for general jurisdiction . . . ."); Chris Carey, *Explicit Consent-By-Registration: Plaintiffs' New Hope After the "At Home" Trilogy*, 67 U. KAN. L. REV. 195, 196 (2018) ("One such theory, increasingly relied on by plaintiffs in the wake of the at home trilogy, is consent-by-registration.").

149. *Compare In re* Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532, 534 (E.D. Pa. 2019) (finding that the consent-by-registration theory is "irretrievably irreconcilable with the teachings of *Daimler*, and can no longer stand"), *with* Webb-Benjamin, LLC v. Int'l Rug Grp., 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018) ("*Daimler* does not eliminate consent as a method of obtaining personal jurisdiction.").

150. *See* Rhodes & Robertson, *supra* note 90, at 411 n.212 (referring to several post-*Daimler* cases addressing consent via registration).

III. CORPORATE REGISTRATION STATUTES

Every state has a statute that requires any corporation doing business within a state to first be registered to do business there.[151] While these statutes vary in their specific language, generally they require that all foreign corporations obtain a certificate of authority from the Secretary of State and appoint an agent for service of process before they can conduct business.[152] Exactly what constitutes "conducting business" varies by state, but actions such as holding shareholder meetings, maintaining bank accounts, or maintaining, defending, or settling any proceeding will usually not be considered transacting business.[153] Registration statutes also typically set out penalties for conducting in-state business without registration, such as corporate fines or the inability to maintain any action proceeding in a court in the state.[154]

A. Consent by Registration Before International Shoe

When many state business registration statutes first arose in the 1800s, territorial views of judicial authority—focusing on the location of defendant's physical presence and the sovereignty of the states—defined personal jurisdiction

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151. *See* Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 1 n.1 (1990) (stating that registration statutes exist in all fifty states).

152. *See id.* (explaining typical language in registration statutes). *See, e.g.*, N.Y. BUS. CORP. LAW § 1301(a) (McKinney 2020) ("A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article.").

153. *See, e.g.*, N.Y. BUS. CORP. LAW § 1301(b) (McKinney 2020); VA. CODE ANN. § 13.1-1059 (2020).

154. *See, e.g.*, VA. CODE ANN. § 13.1-1057(A) (2020) ("A foreign limited liability company transacting business in the Commonwealth may not maintain any action, suit, or proceeding in any court of the Commonwealth until it has registered in the Commonwealth."); *id.* at (D)

> If a foreign limited liability company transacts business in the Commonwealth without a certificate of registration, each member, manager or employee of the limited liability company who does any of such business in the Commonwealth knowing that a certificate of registration is required and has not been obtained shall be liable for a penalty of not less than $500 and not more than $5,000 to be imposed by the Commission, after the limited liability company and the individual have been given notice and an opportunity to be heard.

doctrine.[155] The enactment of registration statutes was largely a response to the perceived "manifest injustice"[156] that would result if a corporation could not be served simply because it was only present in its home state.[157] The statutes, coupled with the recognition of consent in *Pennoyer v. Neff*,[158] operated to create the legal fiction of in-state corporate presence, and thus a basis for jurisdiction.[159]

The notion that a state legislature could require a foreign corporation to consent to jurisdiction as a condition of being granted the right to do business in that state was recognized as early as 1877, just over a decade after the Fourteenth Amendment was passed. *Ex parte Schollenberger*[160] dealt with a Pennsylvania statute that required insurance companies doing business in the state to consent to service of process on the state insurance commissioner having "the same effect as if served personally on the company within the State."[161] The Court reasoned that "if the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent."[162] In a specific personal jurisdiction case five years later—*St. Clair v. Cox*[163]—the Court

155. *See supra* note 95 and accompanying text.

156. St. Clair v. Cox, 106 U.S. 350, 355 (1882) ("This doctrine of the exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice.").

157. *See id.* ("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.").

158. 95 U.S. 714, 733 (1877) (recognizing a court's right to subject defendants to personal jurisdiction where they had voluntarily appeared or "assented in advance" to service of process).

159. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446–47 (1952) (citing cases "holding the corporation amenable to suit . . . by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents").

160. 96 U.S. 369 (1877).

161. *Id.* at 374.

162. *Id.* at 377.

163. 106 U.S. 350 (1882).

found that a state could require corporations to accept service of process on it agents in all litigation arising out of its business in the state as a condition of doing such business.[164]

The Supreme Court continued with this line of reasoning in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*[165] There, the defendant, a Pennsylvania insurance company, had registered to do business in Missouri under its registration statute and appointed an in-state agent for service of process.[166] After contracting to insure buildings in Colorado for the Gold Issue Mining and Milling Company (an Arizona corporation), the property was struck by lightning and destroyed.[167] Gold Issue Mining sued Pennsylvania Fire in Missouri state court on the Colorado insurance policy by serving the Missouri service agent.[168] Because the contracts at issue were not made in Missouri, Pennsylvania Fire argued that it could not be subjected to jurisdiction there. A unanimous Court disagreed, noting that "the construction of the Missouri statute thus adopted hardly leaves a constitutional question open." As the Court saw it, Pennsylvania Fire's registration and voluntary appointment of an agent for service of process in Missouri constituted consent to suit in the state.[169] On three other occasions prior to *International Shoe*, the Court had the opportunity to reconsider its jurisprudence in this area, yet it repeatedly held that registration statutes could form the basis for consent to personal jurisdiction, relying in part on

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164. *See id.* at 356

> A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose . . . . The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just.

165. 243 U.S. 93 (1917).

166. *Id.* at 94.

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

168. *Pa. Fire*, 243 U.S. at 94–95.

169. *Id.* at 96 ("[W]hen a power is actually 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.").

Pennsylvania Fire.[170] Importantly, in *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*,[171] the Court even postulated that while the typical business registration and appointment of a local agent might only provide consent to jurisdiction over local acts, "the state law [could] either expressly or by local construction give[ ] to the appointment a larger scope."[172] Still, it recognized the idea of consent to some form of jurisdiction via registration.

Some commentators argue that the Court's support of consent to jurisdiction via corporate registration and appointment of an agent in this line of precedent was a relic of the *Pennoyer* days that cannot survive *International Shoe*.[173] But that interpretation favors a flow chart of assumptions over the Court's own holdings. In *International Shoe*, the Court confined its analysis to cases where "no consent to be sued or authorization to an agent to accept service of process has been given."[174] Even though the Court's support of consent by registration came during a jurisprudential era that *International Shoe* largely ushered out, the prior holdings in favor of consent by registration still have force.[175]

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170. *See* Robert Mitchell Furniture Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921); Louisville & N.R. Co. v. Chatters, 279 U.S. 320, 332 (1929) ("[I]n the absence of an authoritative state decision giving a narrower scope to the power of attorney filed under the state statute, it operates as a consent to suit . . . .") (citing *Pa. Fire*, 243 U.S. at 93); Neirbo Co. v. Bethlehem Shipbuilding Co., 308 U.S. 165, 176 (1939) (finding the defendant's registration to do business in New York and designation of an agent for service of process to amount to consent to jurisdiction in New York courts).

171. 257 U.S. 213 (1921).

172. *Id.* at 216.

173. *See, e.g.*, Cognitronics Imaging Sys. v. Recognition Rsch. Inc., 83 F. Supp. 2d 689, 692 (E.D. Va. 2000)

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

174. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

175. *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U. S. 477, 484 (1989) (explaining that even when the holding of a Supreme Court decision appears to be contradicted by the reasoning of another line of decisions, the holding rather than the subsequent reasoning is binding on lower courts).

That said, the impact *International Shoe* had on consent by registration was at least unclear, because some appellate courts would continue to interpret state registration statutes as soliciting consent to general jurisdiction through the twentieth century (and today).

B. Consent by Registration After International Shoe

1. The Explicit Consent Statute

Pennsylvania stands alone in its consent-by-jurisdiction framework. In 1978, Pennsylvania became the first—and only—state to pass a statute that expressly provides for general personal jurisdiction over corporations that register to do business in the state.[176] Under Title 42, Section 5301(a) of the Pennsylvania Consolidated Statutes, registration to do business in Pennsylvania—which foreign corporations must do in order to conduct business in Pennsylvania—constitutes consent to general jurisdiction in Pennsylvania courts.[177] The Third Circuit confirmed as much in *Bane v. Netlink*,[178] where it held that the lower court erred in finding that Netlink—there the defendant

176. *See* Gorton v. Air & Liquid Sys. Corp., 303 F. Supp. 3d 278, 296 (M.D. Pa. 2018) (citing 42 PA. CONS. AND CONS. STAT. ANN. § 5301 (West 2020)). The statute provides, in relevant part:

> (a) General rule.--The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:
>
> (2) Corporations.—
>
> i. Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
>
> ii. Consent, to the extent authorized by the consent.
>
> iii. The carrying on of a continuous and systematic part of its general business within this Commonwealth.
>
> (b) Scope of jurisdiction.--When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section. Discontinuance of the acts enumerated in subsection (a)(2)(i) . . . shall not affect jurisdiction with respect to any act, transaction or omission occurring during the period such status existed.

177. *Id.*

178. 925 F.2d 637 (3d Cir. 1991).

in an Age Discrimination in Employment Act claim—was not subject to general jurisdiction in Pennsylvania despite being registered to do business there.[179] In a five-page opinion, the Third Circuit reasoned that it did not need to decide whether registration to do business would be a sufficiently continuous and systematic contact with Pennsylvania to exercise general jurisdiction (the standard at the time) because the registration amounted to consent to such jurisdiction in Pennsylvania courts.[180] The court distinguished that situation from another Third Circuit case, *Provident National Bank v. California Federal Savings and Loan Association*,[181] where the defendant had not registered to do business in Pennsylvania.[182]

The analysis from those courts that follow *Bane* and apply Pennsylvania's statutory framework is straightforward: "[B]ased upon the explicit language in [S]ection 5301, a corporation consents to the general jurisdiction of Pennsylvania courts when it applies for and receives a certificate of authority from the state,"[183] in satisfaction of Due Process.

2. Implicit Consent Statutes

In some jurisdictions, while the state registration statutes are not quite as explicit as that of Pennsylvania, courts interpret the statutory language as soliciting consent to general jurisdiction. For example, Minnesota's business registration scheme requires all foreign corporations wishing to do business in Minnesota to register and appoint an in-state agent for service of process.[184] It requires service to be effected on the registered agent,[185] but if a registered corporation has not appointed an agent, then service can be made on the Secretary

179. *See id.* at 640 ("[T]he court failed to consider the effect of Netlink's application for and receipt of authorization to do business in Pennsylvania . . . .").

180. *See id.*

181. 819 F.2d 434, 436 (3d Cir. 1987).

182. *See Bane*, 925 F.2d at 640 ("In [*Provident*], because the defendant . . . had not applied to do business in Pennsylvania, we were obliged to look to the question of its business activities in Pennsylvania.") (internal citations and quotations omitted).

183. *See, e.g.*, *Gorton*, 303 F. Supp. 3d at 297.

184. *See* MINN. STAT. ANN. § 303.10 (West 2020).

185. *See id.* § 303.13.

of State; provided, however, that if the corporation has withdrawn from the state, this type of service is valid "only when based upon a liability or obligation of the corporation incurred within this state or arising out of any business done in this state by the corporation prior to the issuance of a certificate of withdrawal."[186]

Minnesota state and federal courts have consistently interpreted these statutes as creating consent to general jurisdiction for registered foreign corporations.[187] In *Knowlton v. Allied Van Lines*,[188] the Eighth Circuit paid particular mind to the statutory scheme, observing that the "words of limitation . . . clearly indicate that the Legislature knew how to limit the purposes of service of process when it wanted to do so, and that provisions for service without such an express limitation are intended to apply to any claims made against a corporation with a registered agent within the state."[189] Noting that "[t]he whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts,"[190] the court concluded that "appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state."[191] Iowa federal courts have likewise relied on *Knowlton* to conclude that compliance with Iowa's registration statute—which is "almost identical to that of Minnesota"[192] and does not explicitly address jurisdictional consequences of registration—confers general jurisdiction.[193] Courts in

186. *See id.* § 5.25 subdiv. 4.

187. *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (interpreting Minnesota law to find that the defendant consented to general jurisdiction in Minnesota by complying with its registration statutes); Rykoff-Sexton, Inc. v. Am. Appraisal Assoc., Inc., 469 N.W.2d 88, 90 (Minn. 1991) (exercising general jurisdiction over a foreign corporation where the corporation had consented to service of process in Minnesota).

188. 900 F.2d 1196 (8th Cir. 1990).

189. *Id.* at 1199.

190. *Id.*

191. *Id.* at 1200.

192. Spanier v. Am. Pop Corn Co., No. C15-4071-MWB, 2016 WL 1465400, at *4 n.3 (N.D. Iowa Apr. 14, 2016).

193. *See id.* at *4 (following *Knowlton*); Daughetee v. CHR Hansen, Inc., No. C09-4100-MWB, 2011 WL 1113868 (N.D. Iowa Mar. 25, 2011) (same).

Kansas[194] and New Mexico[195] have adopted analogous reasoning, all in pre-*Daimler* cases. Most recently, in *Cooper Tire & Rubber Co. v. McCall*,[196] the Georgia Supreme Court confirmed that compliance with its silent registration statute constitutes consent to general jurisdiction, affirming a thirty year old decision of the court that held similarly.[197]

C. Consent by Registration After Goodyear and Daimler

Fast forward to 2015—at which point the Supreme Court had nearly eradicated contacts-based general jurisdiction through *Goodyear* and *Daimler*—and plaintiffs began to pivot toward consent-by-registration arguments in an attempt to subject large corporations to general jurisdiction.

Given the Court's decisions on general jurisdiction, registration statutes, and consent in the preceding century, several courts have reasonably concluded that *Goodyear* and *Daimler* had no impact on the right of a defendant corporation to consent to general jurisdiction through its registration to do business.[198] Up to that point, consent was a well-settled

194. Merriman v. Crompton Corp., 146 P.3d 162 (Kan. 2006).

195. Werner v. Wal-Mart Stores, Inc., 861 P.2d 270, 272–73 (N.M. App. 1993); Brieno v. Paccar, Inc., No. 17-cv-867-SCY/KBM, 2018 WL 3675234 (D.N.M. Aug. 2, 2018) (following *Werner*).

196. ___ S.E.2d ___, 2021 WL 4268074 (Ga. 2021).

197. *See id.* at *1 ("[A]lthough Klein's general-jurisdiction holding is in tension with a recent line of United States Supreme Court cases . . . *Klein* does not violate federal due process under [Pennsylvania Fire], a decision that the Supreme Court has not overruled.").

198. *See, e.g.*, Acorda Therapeutics, Inc. v. Mylan Pharm., Inc., 78 F. Supp. 3d 572, 576 (D. Del. 2015) ("While *Daimler* altered the analysis with respect to general jurisdiction . . . *Daimler* does not change the fact that [the defendant] 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."); Kraus v. Alcatel-Lucent, 441 F. Supp. 3d 68, 75 (E.D. Pa. 2020) ("Because *Daimler* did not address whether registration to do business is a sufficient basis for general personal jurisdiction, and neither the Supreme Court nor the Third Circuit have addressed consent-based jurisdiction since *Daimler*, we will apply Third Circuit precedent."); Bors v. Johnson & Johnson, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (citation omitted) (concluding that *Daimler* did not eliminate consent by registration and expressing support for corporate registration as a means of conferring general jurisdiction in Pennsylvania). *But see, e.g.*, Lanham v. BNSF Ry. Co., 939 N.W.2d 363 (Neb. 2020) (concluding that "treating [the defendant's] registration to do business

permissible basis for personal jurisdiction.[199] In late nineteenth- and early twentieth-century cases, the Court had recognized compliance with registration statutes as a proper means of effecting that consent, and upheld the exercise of both specific and general jurisdiction based on consent obtained from corporate registration.[200] Even after *International Shoe* fundamentally changed personal jurisdiction analysis, several circuit courts continued to hold that consent by registration obviated Due Process analysis and that states could exercise general jurisdiction based on that consent.[201]

If the Supreme Court intended to prohibit consent by registration—or consent to general jurisdiction more generally—through *Goodyear* or *Daimler*, it certainly could have been clearer in doing so. Neither case explicitly discussed registration statutes or whether a party could conceivably give consent to general jurisdiction—unsurprising, as the question was not central to either case.[202] The question that follows, then, is whether one could extrapolate from the holdings some new limitation on a defendant's right to waive Due Process protections from general jurisdiction. But a gloss of both opinions demonstrates that if consent was a permissible avenue to obtaining general jurisdiction over a defendant before *Goodyear*, it should remain available after *Daimler*.

The *Goodyear* Court's introduction of the "at home" phrase—identifying the place of incorporation and principal place of business as "'paradig[m]' bases for the exercise of jurisdiction"[203]—hardly forecloses the possibility that one could

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in Nebraska as implied consent to personal jurisdiction would exceed the due process limits prescribed in [*Goodyear*] and [*Daimler*]").

199. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982).

200. *See supra* Part III.A.

201. *See supra* note 23 and accompanying text.

202. In the *Goodyear* opinion, Justice Ginsburg briefly mentioned that the petitioners—Goodyear subsidiaries in Luxembourg, Turkey, and France—were not registered to do business in North Carolina. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 921 (2011). However, this was not relevant to any consent theory, but rather was one fact that helped demonstrate that the petitioners lacked the kind of "continuous and systematic general business contacts" necessary to allow North Carolina to exercise general jurisdiction on a claim unrelated to the state. *See id.* at 929.

203. *See id.* at 924 (citing Brilmayer et al., *supra* note 87, at 728).

affect consent to general jurisdiction in fora other than those in which the corporation would be at home. For one, even if the *Goodyear* Court did intend the "at home" language to apply to any and all exercises of general jurisdiction—whether based on minimum contacts, presence, or consent—the fact that the Court described paradigm examples of "at home" fora does not definitively instruct lower courts that no other fora could ever meet the threshold.[204]

Ultimately, however, that has no bearing on the question, because the "at home" standard does not speak to whether a defendant could still consent to jurisdiction, and thereby waive its Due Process right to be sued only in its state of incorporation or principal place of business. It clarified only what sorts of contacts were necessary to constitutionally establish general jurisdiction over an individual or corporation when such consent is absent.[205] *Daimler* in its entirety contains but one fleeting reference to the concept of jurisdiction by consent, and it served only to distinguish between consent jurisdiction and the contact-based jurisdiction rules on which the decision was predicated.[206] Moreover, interpreting the mandate of *Daimler* as restricting a party's right to waive Due Process protections would mean that even if a defendant wanted to consent to general jurisdiction, structural limitations would not allow it to

204. Trammell, *supra* note 112, at 520 ("[T]he mere description of paradigm examples does not deem them to be the exclusive places where general jurisdiction is appropriate.").

205. The manner in which the *Goodyear* Court introduced the "at home" phrase reflects this; the Court insinuated that to be essentially at home in a state is to have a certain degree of continuous and systematic contacts. *See Goodyear*, 564 U.S. at 919 (stating that a party is subject to general jurisdiction in a state "when *their affiliations with the State* are so 'continuous and systematic' as to render them essentially at home in the forum State") (emphasis added) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

206. Justice Ginsburg made this reference toward the end of the opinion, acknowledging that "[the Court's] 1952 decision in [*Perkins*] remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum*." Daimler AG v. Bauman, 571 U.S. 117, 129 (2014) (citing *Goodyear*, 564 U.S. at 927–28) (emphasis added); *see also* Brett E. Broczkowski, Comment, *Apparently, There Are Places Like Home: A Path to Propriety for Consent-by-Registration Jurisdiction in the Third Circuit*, 64 VILL. L. REV. 101, 111 (2019) ("[T]he Court's only mention of consent as a means of obtaining jurisdiction came in a passing reference to [*Goodyear*] . . . .").

do so. Such a reality "would threaten to fundamentally alter the personal jurisdiction defense from a waivable to a non-waivable right, a characteristic of the defense that was not before the *Daimler* Court and is not explicitly addressed in its opinion."[207]

It has been argued, though, that finding otherwise "would expose companies with a national presence . . . to suit all over the country, a result specifically at odds with *Daimler*."[208] But that conclusion ignores the reality that only a minority of states interpret their registration statutes as requiring consent to general jurisdiction, and it is not clear that other states would amend their registration statutes to require consent to general jurisdiction (like Pennsylvania) if given the opportunity. Maybe that is an indicator of where the "market" for consent by registration stands today. A state legislature does not necessarily have strong incentives to amend its registration statute in this way. In a world in which companies gravitate to states with the most advantageous tax benefits and corporate governance laws, a state with a consent-by-registration statute might struggle to stay competitive for the business of foreign corporations. Alternatively, however, the state might instead conclude that the benefits of acquiring general jurisdiction over corporate registrants would outweigh the negative economic impact of having fewer foreign corporations doing business in the state.[209]

The Court had the opportunity in a recent general jurisdiction case to address registration statutes and their import on consent theories, but elected not to do so. In *BNSF Railway Co. v. Tyrrell*,[210] two railroad employees—neither of whom lived in or had worked for BNSF in Montana—sued BNSF under the Federal Employers' Liability Act in Montana state court, arguing that BNSF was "doing business" and "found within" Montana by virtue of owning over 2,000 miles of railroad

207. *See Acorda Therapeutics*, 78 F. Supp. 3d at 591.

208. *See* AstraZeneca AB v. Mylan Pharm., Inc., 72 F. Supp. 3d 549, 557 (D. Del. 2014).

209. *See* Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607 (slip op. at *5) (E.D. Pa. Nov. 23, 2020) ("The Pennsylvania legislature could have concluded that the need to protect individuals and businesses by providing them with a forum to seek redress for possible legal grievances was worth the possible loss of business that might befall the Commonwealth.").

210. 137 S. Ct. 1549 (2017).

track, employing over 2,000 workers, and generating ten percent of its annual revenue in Montana.[211] Relying on *Goodyear* and *Daimler* at length, the Supreme Court found otherwise, holding that BNSF was not "at home" in Montana as it was not incorporated in Montana, did not maintain its principal place of business in Montana, nor was it "so heavily engaged in activity in Montana 'as to render [it] essentially at home' in the State."[212] Relevant to this discussion, however, is that the employees had also advanced the consent by registration theory, arguing that BNSF had consented to all-purpose general jurisdiction in Montana by obtaining a certificate of authority and appointing an in-state agent for service of process.[213]

Tyrrell offered the Court with the chance to speak—even if only in dicta—on consent by registration, but instead it remanded the issue to the state court.[214] Granted the Court cannot answer questions not properly put before it, but if the argument were, for example, "obnoxious to the Commerce Clause, the Due Process Clause, or both,"[215] one might expect the Court would either have more to say on it or not have mentioned it at all. That implication is exacerbated by the fact that Justices Sotomayor and Ginsburg even seemed interested in this question during oral argument.[216] Justice Sotomayor asked whether BNSF had registered to do business in Montana[217] (it had), and whether "the registration in Montana

211. *See id.* at 1553–54. The Montana Supreme Court had held that BNSF could be "found within" Montana due to those contacts. *See id.* at 1554.

212. *See id.* at 1559 (citing *Daimler*, 571 U.S. at 138–39) (internal quotations omitted).

213. *See* Plaintiffs' Consolidated Answer Brief, at *16, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

214. *Tyrrell*, 137 S. Ct. at 1559 (remanding the consent-by-registration issue to the Montana state court to address this argument and explaining that the Supreme Court is "a court of review, not of first view").

215. *See* Pierre Riou, *General Jurisdiction Over Foreign Corporations: All That Glitters Is Not* Gold Issue Mining, 14 REV. LITIG. 741, 748–49 (1995) (summarizing commentators' critiques of Justice Holmes' opinion in *Pennsylvania Fire*).

216. *See* Oral Argument at 4–6, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (No. 16-405), https://perma.cc/J6UC-M5D9 (documenting exchanges between counsel for BNSF and Justices Sotomayor, Ginsburg, and Roberts).

217. *Id.* at 4.

[would] change this discussion."[218] As Justice Ginsburg observed shortly thereafter, "there's an argument[—]there was an argument in the case we just heard that[—]that by registering, you effectively consent to jurisdiction and consent is always a good basis" for jurisdiction.[219] Even in April 2017, with *Daimler* in the rear-view mirror for over three years, two Justices were interested in the validity of consent by registration.

As the consent-by-registration theory percolated in the lower courts, in March 2021 it reemerged at the Supreme Court in an unlikely posture—Justice Neil Gorsuch's concurrence in *Ford Motor Co. v. Montana Eighth Judicial District Court*,[220] a specific jurisdiction case. In *Ford*, the plaintiff died in a crash in her home state of Montana involving a malfunction in her Ford Explorer—manufactured and purchased outside Montana—and a representative of her estate sued Ford in Montana.[221] Ford moved to dismiss the suit for lack of personal jurisdiction; although Ford advertises and sells the same model vehicle in Montana, it argued that the suit did not arise out of those Montana contacts because the vehicle in question was designed and sold in other states and only entered Montana through resales and relocations.[222] In a unanimous decision, the Court rejected Ford's "causation-only approach,"[223] finding instead that there was a sufficiently "strong 'relationship among the defendant, the forum, and the litigation'"[224] to hold that the suits relate to Ford's contacts in Montana.[225]

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218. *Id.*; *see also id.* at 4–5 ("So if you treat a corporation like a person, which we seem to be doing, why isn't their registration for purposes of accepting service enough?").

219. *Id.* at 5. The Court heard *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), earlier that same day.

220. 141 S. Ct. 1017 (2021).

221. *See id.* at 1023.

222. *See id.* ("According to Ford, the state court . . . had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims.").

223. *See id.* at 1026 (finding "no support" for the approach "in [the] Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities.") (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1779).

224. *See id.* at 1028 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

225. *See id.* at 1032 ("[T]he connection between the plaintiffs' claims and Ford's activities in those States . . . is close enough to support specific jurisdiction.").

Justice Gorsuch's concurrence, joined by Justice Thomas, not only referenced consent by registration as an unsettled issue,[226] but also indicated skepticism of the continuing practical value of *International Shoe*.[227] On general jurisdiction, Justice Gorsuch highlighted that, under the "at home" test for corporations—as compared to the "tag rule" under *Burnham v. Superior Court of California*[228]—"it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why."[229] For the courts that rely on *International Shoe* as permanently foreclosing the consent-by-registration theory, Justice Gorsuch's analysis seemingly casts doubt on their approach.

The consent-by-registration debate is still alive,[230] and even the high court in Pennsylvania—home to the most plaintiff-friendly registration statute in the country—is now taking up this issue for the first time since *Daimler*.[231] But even if consent by registration would, in theory, obviate the contacts-based Due Process analysis of *Daimler*, there remains the question of the validity of the consent itself.

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226. *See id.* at 1037 n.3 (Gorsuch, J., concurring) ("It is unclear what remains of the old 'consent' theory after *International Shoe*'s criticism. Some courts read *International Shoe* and the cases that follow as effectively foreclosing it, while others insist it remains viable.") (citations omitted).

227. *See id.* at 1038 ("Maybe, too, *International Shoe* just doesn't work quite as well as it once did . . . [t]he real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy.").

228. 495 U.S. 604 (1990) (Scalia, J., plurality opinion).

229. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

230. *See supra* notes 43–45 and accompanying text.

231. *See* Mallory v. Norfolk S. Ry. Co., No. 802 EDA 2018, 2020 WL 6375871 (Pa. Super. Ct. Oct. 30, 2020) (transfer to Pennsylvania Supreme Court); David R. Fine, David A. Fusco, & Hudson M. Stoner, *Pennsylvania Supreme Court to Consider Whether Business Registration Subjects an Out-of-State Company to General Personal Jurisdiction*, K&L GATES (Jan. 14. 2021), https://perma.cc/R9CS-QQGR (opining that the Pennsylvania Supreme Court "is poised to address" whether Pennsylvania's statutory scheme requiring consent to general personal jurisdiction is constitutional).

IV. IS CONSENT BY REGISTRATION REALLY CONSENT?

Consent by registration draws scrutiny from a variety of angles other than that of jurisdictional Due Process. One recent critique that ought to receive more attention is the idea that a company's registration to do business in a state cannot be deemed valid consent to general jurisdiction in that state.[232] The Honorable Eduardo C. Robreno of the Eastern District of Pennsylvania offered this justification for refusing to enforce the Pennsylvania registration statute in *In re Asbestos Products Liability Litigation (No. IV)*.[233] In *In re Asbestos*, Judge Robreno declined to follow *Bane*'s holding that the Pennsylvania statutory scheme comports with Due Process,[234] finding instead that the consent "extract[ed]" from foreign corporations by the Pennsylvania statutory scheme "impermissibly re-open[ed] the door to nation-wide general jurisdiction that *Daimler* firmly closed."[235]

To uphold consent under any statutory or common-law scheme, the consent must be informed and voluntary.[236] This Part addresses what seems to be the dispositive question: can consent by registration ever be considered knowing and voluntary?

A. Informed Consent by Registration

To reach the conclusion that a corporation's registration to do business can ever suffice as valid consent to general jurisdiction, it goes nearly without saying that the consent must be informed. Knowing consent would seemingly require that the corporation giving the consent to general jurisdiction was on

232. *See* Monestier, *supra* note 47, at 1347 (introducing the argument that "general jurisdiction based on registration to do business violates the Due Process Clause because such registration does not actually amount to 'consent' as that term is understood in personal jurisdiction jurisprudence").

233. 384 F. Supp. 3d 532 (E.D. Pa. 2019).

234. *See* Replica Auto Body Panels & Auto Sales Inc. v. inTech Trailers Inc., 454 F. Supp. 3d 458, 463 (E.D. Pa. 2020) (noting that Judge Robreno "departed from the consensus in *In re Asbestos*").

235. *In re Asbestos*, 384 F. Supp. 3d at 543.

236. *See, e.g.*, *id.* at 538 (noting that "consent is only valid if it is given both knowingly and voluntarily").

notice (either actual or constructive)[237] of the consequences of such consent.

This discussion implicates an important concept: consent need not be perfect to be valid. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[238] the Supreme Court listed "a variety of legal arrangements" that had been taken "to represent express or implied consent to the personal jurisdiction of the court."[239] Those arrangements included: (1) parties agreeing in advance to submit to the jurisdiction of a given court; (2) parties stipulating to jurisdiction; (3) parties agreeing to arbitrate; (4) parties voluntarily using certain state procedures; (5) parties waiving jurisdiction through a failure to timely raise the issue in an answer or responsive pleading; and (6) parties submitting to a court's jurisdiction. Despite the Court's recognition of each of these arrangements as valid consent, some of these expressions of consent might, situationally, be more informed than others. For example, a party failing to timely raise the issue of personal jurisdiction in a responsive pleading, although technically giving implied consent, is in reality effecting an involuntary forfeiture.[240] On the contrary, parties who stipulate to jurisdiction in advance of a particular lawsuit[241] provide a more perfect consent, in that they are faced with a particular lawsuit and voluntarily submit to jurisdiction for that suit. Yet both arrangements are considered valid consent to jurisdiction. Further, the Supreme Court has established that "what acts of the defendant shall be

237. Before *Daimler*, the Supreme Court consistently "upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)*; see also* Rockefeller Univ. v. Ligand Pharms. Inc., 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008) ("In maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction.").

238. 456 U.S. 694 (1982).

239. *Id.* at 703.

240. *See, e.g.*, *In re* Asbestos Prods. Liab. Litig. (No. VI), 921 F.3d 98, 107 (3d Cir. 2019) ("[E]ven if the [defendants] had not waived their personal jurisdiction defenses by filing answers or through other conduct consistent with waiver, they subsequently forfeited the defense by failing to diligently pursue it in [the forum].").

241. *See, e.g.*, Petrowski v. Hawkeye-Sec. Ins. Co., 350 U.S. 495 (1956).

deemed a submission to [a court's] power is a matter upon which States may differ."[242]

1. Explicit Notice

How might a corporation first be put on notice of the jurisdictional consequences of registering to do business in a particular state? The inquiry would logically begin with the relevant language in that state's registration statute. If the statute were to explicitly set out that registration to do business constitutes consent to general jurisdiction in the state, the corporation would undoubtedly be on notice that registration would constitute consent to general jurisdiction.[243]

A helpful analogue in this area is the forum selection clause. A forum selection clause is typically a section of a larger contractual agreement between two parties—either individuals or corporations—requiring that the parties expressly agree to litigate any lawsuit arising out of the contract in a particular, designated forum.[244] Forum selection clauses can be exclusive (providing that the dispute *can only* be maintained in the chosen forum) or permissive (providing that the dispute *can* be maintained in the chosen forum).[245] A typical exclusive forum selection clause might set out, for example, that:

> Each of the parties hereto irrevocably consents to the exclusive jurisdiction of the State of Delaware and the federal district or state courts sitting in the State of Delaware, in connection with any matter based upon or

242. *See* Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29–30 (1917).

243. *Compare, e.g.*, Gibraltar Factors Corp. v. Slapo, 125 A.2d 309, 309 (N.J. Super. A.D. 1956) ("[I]t is elementary that all persons are conclusively presumed to know the law of the land, and ignorance thereof excuses no one."), *with* Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607 (slip op. at *6) (E.D. Pa. Nov. 23, 2020) (concluding that the defendant "registered to do business in Pennsylvania knowing that doing so subjected it to general personal jurisdiction in Pennsylvania" based on compliance with the Pennsylvania explicit registration statutory scheme).

244. *See* John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1793 (2019) (describing forum selection clauses as "contractual provisions in which the parties agree to litigate their disputes in a specified forum" that are "now regularly written into commercial contracts in the United States").

245. *See id.* at 1802 ("A 'mandatory' clause contains language of exclusivity. A 'permissive' clause lacks such language.").

> arising out of this agreement or the matters contemplated herein, agrees that process may be served upon them in any manner authorized by the laws of the State of Delaware for such person and waives and covenants not to assert or plead any objection which they might otherwise have to such jurisdiction and such process.[246]

Execution of an agreement containing a forum selection clause usually results in waiver of personal jurisdiction objections to the chosen forum, because consent to the forum selection clause constitutes consent to jurisdiction in the selected forum.[247] This is so even if the chosen forum is unrelated to the litigation, because the consent provides the basis for the jurisdiction, obviating the Due Process analysis of the relationship between the defendant's contacts and the suit.[248] With forum selection clauses, the express language in the agreement providing for jurisdiction in the selected forum—to which the parties presumably have consented—gives the parties sufficient notice of the jurisdictional consequences of making that agreement. With an explicit consent-by-registration statute like that of Pennsylvania, it is the express language of the statute—with which any foreign corporation would have to be familiar before registering to do business in Pennsylvania—that provides the requisite notice of the jurisdictional consequences of registration.[249]

Explicit registration statutes and forum selection clauses bear similarities with respect to the adequacy of notice for

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246. *See* Ruggiero v. FuturaGene, PLC, 948 A.2d 1124, 1130 (Del. Ch. 2008).

247. *See* Coyle, *supra* note 244, at 1802 ("When a clause states that a particular court shall 'have jurisdiction' over a suit, for example, the parties have not waived their right to sue elsewhere. They have merely waived their right to object to the assertion of personal jurisdiction by the chosen court.").

248. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("[P]arties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction . . . . Where such forum-selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust . . . their enforcement does not offend due process.") (internal citations and quotations omitted).

249. *See, e.g.*, Bane v. Netlink, 925 F.2d 637, 641 (3d Cir. 1991) ("The . . . statute . . . gave Netlink notice that [it] was subject to personal jurisdiction in Pennsylvania and thus it should have been 'reasonably able to anticipate being haled into court' in Pennsylvania.").

purposes of consent to personal jurisdiction.[250] Where is the succinct difference? Professor Monestier finds it "difficult to conceive of consent via a forum selection clause or submission in the same way as 'consent' via registration to do business,"[251] positing that "a defendant who signs a contract containing a forum selection clause . . . does so with respect to *a particular dispute* involving *a particular plaintiff*,"[252] unlike consent by registration, which "is not limited to a particular plaintiff and a particular dispute" and instead "extends to any and all disputes involving any and all plaintiffs."[253]

But forum selection clauses do not necessarily reference a particular dispute. Rather, they often reference particular parties (the parties to the agreement) and a category of disputes (in our example clause,[254] "any matter based upon or arising out of" the agreement).[255] A party that assents to a contract with a forum selection clause might not necessarily know exactly how broad or narrow a court may interpret the meaning of "based upon or arising out of" in the future; rather, that determination would likely be made only upon enforcement of the forum selection clause.[256] But that does not mean the party's consent to the forum selection clause was uninformed or given without knowledge of the jurisdictional consequences. What matters is that the party is on notice of the *nature* of the jurisdiction to which it consents, not necessarily the particular dispute for which it consents to jurisdiction. Under any other

250. *See, e.g.*, Bors v. Johnson & Johnson, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016)

> Parties can agree to waive challenges to personal jurisdiction by agreements in forum selection clauses or, as here, by registering to do business under a statute which specifically advises the registrant of its consent by registration. We do not see a distinction between enforcing a forum selection clause waiving challenges to personal jurisdiction and enforcing a corporation's choice to do business in [Pennsylvania].

251. *See* Monestier, *supra* note 47, at 1384.

252. *Id.* at 1383.

253. *Id.* at 1384.

254. *See supra* note 246 and accompanying text.

255. *See supra* note 246 and accompanying text.

256. *See, e.g.*, Clark-Alonso v. Sw. Airlines Co., 440 F. Supp. 3d 1089, 1094–95 (N.D. Cal. 2020) (concluding that plaintiff's California Invasion of Privacy Act claim against Southwest did not "aris[e] out of or relat[e] to" Southwest's rewards program rules and regulations).

interpretation, forum selection clauses would be entirely unworkable; if one party enforced the clause to the disadvantage of the other party, the latter could simply claim a lack of informed consent. The same principles should prevail for consent by registration. If the statutory scheme puts the party on notice as to the contours of the jurisdiction to which it would be submitting through registration to do business, that suffices to create informed consent.

Additionally, the fact that forum selection clauses—unlike Pennsylvania's registration statute—call for consent to jurisdiction in only a certain category of disputes appears to be more of a general practice inherent in private contracting than a legal requirement. In her 1988 article on general jurisdiction later cited by the *Goodyear* Court, Professor Brilmayer acknowledged that parties conceivably could provide consent for "jurisdiction that is general in all respects,[257] and that, at least in theory, "parties could draft an agreement that subjects a defendant to the forum's general jurisdiction."[258] Professor Brilmayer also noted that "analogous consent" exists "when a foreign corporation appoints an agent for service of process."[259] That said, parties to a private contractual agreement typically would not have much incentive to negotiate such a broad jurisdictional clause.[260]

Another possible difference Professor Monestier underscores is that "the nature of the relationships between the entities involved" in forum selection clauses and a company's business registration "differs considerably."[261] With a forum

257. *See* Brilmayer et al., *supra* note 87, at 756 ("In other words, [parties] might agree to jurisdiction for suits that bear no relationship to the instrument in which they express consent and that have no relationship to the chosen forum.").

258. *Id.*; *see also* Forest Lab'ys, Inc., v. Amneal Pharms. LLC, No. CV 14-508-LPS, 2015 WL 880599, at *14 (D. Del. Feb. 26, 2015) ("[W]hy could a corporation not agree with a competitor, as part of a settlement agreement in which it obtained something of value in return, that it would not contest personal jurisdiction in a state as to any future claims that the competitor later brings in the state's courts as to any subject matter?").

259. Brilmayer et al., *supra* note 87. *But see id.* at 757 ("The most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment rather than from contract.").

260. *See supra* note 89 and accompanying text.

261. *See* Monestier, *supra* note 47, at 1384.

selection clause, the relationship forming the basis for the consent is between the plaintiff and defendant, while the state remains disinterested.[262] With consent by registration, however, the relationship is between the state and the defendant, and a third-party plaintiff—having no connection to the defendant corporation's prior consent—will benefit from the corporation's registration.[263]

It is unclear, though, how or why this would affect—in either context—a party's ability to understand the nature of the jurisdiction to which it consents, and then to effect the conduct that constitutes consent. It is true that typically "the notion of a contract generally implies that it only regulates activity between the contracting parties."[264] However, the logical bounds of that proposition are tested where the contract involves consent to general jurisdiction, which would necessarily benefit potential plaintiffs not party to the agreement who could obtain personal jurisdiction over a defendant corporation that was party to the agreement.[265] Moreover, governments might also benefit from this arrangement if they could then bring civil actions against that corporation in the selected jurisdiction based on that agreement. This is all to say that the existence of a third-party beneficiary to an agreement that requires consent to general jurisdiction should not make the consent any less voluntary.

2. Implicit Notice

If any type of registration statute should put a corporation on fair notice of the jurisdictional consequences of registering to do business, it would be one that is jurisdictionally explicit. But Pennsylvania's statute is still the only one of its kind in the United States. As Professor Monestier characterized it, "[i]n the vast majority of circumstances, a corporation does not know in

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262. *See id.*

263. *See id.*

264. *See* Kipp, *supra* note 151, at 19.

265. *See* Brilmayer et al., *supra* note 87, at 756 (explaining that a private agreement subjecting a party to general jurisdiction "would permit any individual, even one not a party to the agreement, to sue on any subject matter, even one with no connection to the forum").

advance what it is consenting to in registering to do business"[266] because "all but one of the fifty statutory schemes is silent on the jurisdictional effects of registering to do business."[267] Judge Robreno surmised the same in *In re Asbestos*, noting that many other courts confronting this issue have held that their state registration statutes do not imply consent to general jurisdiction "because, inter alia, the language of the statutes are not explicit in this regard," and therefore "the purported consent is not knowingly given."[268]

While the text of the statute itself is undoubtedly the first stop in determining whether the statute requires consent to general jurisdiction, Judge Robreno's observation fails to consider the possibility that a corporation might also be put on notice by decisional law interpreting the statute that the law requires consent to general jurisdiction. As the Honorable Leonard P. Stark of the District of Delaware reasoned in *Acorda Therapeutics v. Mylan Pharmaceuticals*,[269] "when courts have clearly held that compliance with a state's registration statute confers general jurisdiction, corporations have the requisite notice to enable them to structure their conduct so as to be assured where they will, and will not, be subject to suit."[270]

In the Eighth Circuit, *Knowlton* remains good law, and courts in Iowa and Minnesota, as well as in Kansas and New Mexico (despite being outside Eighth Circuit territory) have repeatedly applied *Knowlton* in interpreting their registration statutes to require consent to general jurisdiction.[271] Some parties might disagree with its legal predicate,[272] but as long as it remains unaltered by a court of last resort or legislature, *Knowlton*—and state supreme court cases following

266. Monestier, *supra* note 47, at 1387.

267. *Id.*

268. *See In re Asbestos*, 384 F. Supp. 3d at 538.

269. 78 F. Supp. 3d. 572 (D. Del. 2015).

270. *Id.* at 591.

271. *See supra* notes 184–195 and accompanying text.

272. *See, e.g.*, GreenState Credit Union v. Hy-Vee, Inc., 500 F. Supp. 3d 799, 807 (D. Minn. Nov. 10, 2020) ("Although defendant makes a compelling argument that *Knowlton* is inconsistent with the Supreme Court's recent general jurisdiction decisions, the court agrees with other courts in this district that it is still bound by *Knowlton*.") (allowing interlocutory appeal of jurisdictional issue).

Knowlton—provides a binding interpretation of the relevant registration statute, of which parties choosing to register under that statute are assumed to be aware.[273] Further, parties cannot impute to the legislature an intent to change well-established rules of law in the jurisdiction such as that set out in *Knowlton*, "in the absence of a clear manifestation of such intention."[274]

The idea that a party can give implied consent to personal jurisdiction in a lawsuit based solely on a rule established primarily through common law is not new. In the context of counterclaims, it is well settled. While the Due Process Clause does provide personal jurisdiction protections to plaintiffs,[275] the plaintiff effectively waives those protections by filing suit in the chosen forum.[276] Typically this causes no issues because, presumably, the plaintiff would only file in a particular forum if it actually wanted to litigate the case there. But defendants are also permitted to assert counterclaims against the original plaintiff that do not relate to the original plaintiff's chosen forum—and the Supreme Court has held that the original plaintiff's consent to jurisdiction extends to those claims as well.[277] Some courts have reasoned that plaintiffs, as voluntary party-claimants, are simply not subject to the protections of personal jurisdiction.[278] In short, when a party files a lawsuit in

273. *See* Am. Dairy Queen Corp. v. W.B. Mason Co., No. 18-cv-693, 2019 WL 135699, at *6 (D. Minn. Jan. 8, 2019) ("*Knowlton* has been good law since 1991, alerting any foreign corporation who registers under Minn. Stat. § 303, that by doing so, they are consenting to general personal jurisdiction in the forum."); *see also* United States v. Bronstein, 849 F.3d 1101, 1107 (D.C. Cir. 2017) ("Citizens are charged with generally knowing the law, and what a law means is a function of interpreting the statute.").

274. *See* Odell v. Humble Oil & Refin. Co., 201 F.2d 123, 126 (10th Cir. 1953) (citing Munson Line v. Green, 6 F.R.D. 14, 19 (S.D.N.Y. 1946)).

275. *See supra* note 81 and accompanying text.

276. *Id.*

277. *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938)

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

278. *See* Dodson, *supra* note 80, at 1467 ("A court may lack personal jurisdiction over a defendant, but never over a plaintiff, who consents to such

a state, Supreme Court precedent—not explicit statutory language—deems them to have consented to personal jurisdiction on unrelated counterclaims filed against them. By that logic, why, then, could a state not apply its own registration statute as requiring consent to general jurisdiction if there was legislative support for that interpretation?

B. Voluntary Consent by Registration

Even assuming that the corporation is fully aware that the state—whether through explicit text or common law—interprets its registration statute to require consent to general jurisdiction in the state, one could argue that the consent still fails to suffice because it is coerced, and thereby involuntary.[279] According to Professor Monestier:

> The notion of consent implies that a party has alternatives—in particular, the alternative not to consent. In the context of registration statutes, the idea that a corporation had the choice to register (and thereby consent to jurisdiction) suggests that there was also a legitimate choice to not register (and therefore not consent to jurisdiction). Aside from registering to do business in the state and thereby consenting to general jurisdiction, a corporation really only has one of two choices: not do business in the state or do business in the state without registering and face whatever penalties the law ascribes.[280]

Judge Robreno put it similarly in *In re Asbestos*: the Pennsylvania statute "presents a foreign corporation with a Hobson's choice: consent to general personal jurisdiction or be denied the benefits of doing business in Pennsylvania".[281] While reasonable to a point, these characterizations fail to "distinguish compulsory agreement from incentive."[282] Every state offers myriad incentives and deterrents to corporations considering

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jurisdiction by filing suit.") (citing Viron Int'l Corp. v. David Boland, Inc., 237 F. Supp. 2d 812, 818 (W.D. Mich. 2002)).

279. *See* Monestier, *supra* note 47, at 1389.

280. *See id.*

281. *See In re* Asbestos Prods. Liab. Litig., 384 F. Supp. 3d. 532, 541 (E.D. Pa. 2019).

282. *See* Oscar G. Chase, *Consent to General Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 182 (2018).

doing business there, such the tax rate, population, or any reputation for heavily (or lightly) regulating businesses. The jurisdictional rules of the state fall under the same umbrella. Corporations are free to choose from the fifty states and only register in the states that provide it a business advantage. [283] Likewise, state legislatures have an interest both in making their jurisdictions an attractive commercial destination and in providing a forum to their residents and visitors,[284] and must weigh those countervailing priorities when assembling its public law.

Similarly, while the language in the consent-by-registration statutes of the fifty states are not exactly up for debate (at least outside the legislature), courts regularly uphold agreements that likewise are not the product of free or fair negotiation.[285] Consider the example of forum selection clauses. In one of the Supreme Court's most significant opinions addressing forum selection clauses—*Carnival Cruise Lines v. Shute*[286]—the Court enforced a forum selection clause that was printed on a cruise ship ticket which the plaintiff—a passenger who was injured on the defendant's cruise—did not even receive until after purchase.[287] The majority acknowledged that,

> In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise

283. *See* Diab v. British Airways, PLC, No. 20-3744, 2020 WL 6870607 (slip op. at *5) (E.D. Pa. Nov. 23, 2020) ("[T]he mere fact that a company might need to face lawsuits in Pennsylvania as a price for doing business in the Commonwealth presents no great threat to companies.").

284. *See supra* notes 208–209 and accompanying text.

285. *See id.*

> [E]ven if Pennsylvania law requires foreign businesses to make a difficult decision, so what? Individuals regularly face difficult decisions about waiving important rights, such as the rights counsel, trial, appeal, and silence in the face of government questioning. Moreover, businesses regularly extract waivers from individuals, whether demanding that individuals agree to certain terms merely by clicking on a link or making a purchase. Individuals can even forfeit the right to sue in court by simply accepting employment. This Court discerns no problem with Pennsylvania extracting a concession from a business that voluntarily and knowingly does business in the Commonwealth.

286. 499 U.S. 585, 587 (1991).

287. *See id.* at 593.

> ticket. Common sense dictates that a ticket of this kind will be a form contract—the terms of which are not subject to negotiation—and that an individual purchasing the ticket will not have bargaining parity with the cruise line.[288]

In terms of the validity of consent, forum selection clauses and consent-by-registration statutes bear important similarities,[289] and if *Carnival Cruise Lines* is any indication of the threshold level of voluntariness a party must have to find valid consent to jurisdiction, consent by registration clears this hurdle with ease.

V. CONCLUSION

Though many jurisdictions have tossed consent by registration to the wayside as unconstitutional after *Daimler*, one could fairly interpret the prevailing Supreme Court authority as wholly permitting states to require corporations to consent to general jurisdiction by registering to do business, provided either that the statute is explicit in providing so, or the controlling authority is unambiguous in its interpretation of the statute to the same.[290] What this Note does *not* argue, though, is that every state court must—or even should—interpret their state's silent registration statute to require consent to general jurisdiction. To the contrary, courts should work through normal canons of statutory interpretation, applied separately to each state statute, to resolve whether the statute before them was written to require such consent.[291] Rather, this Note

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288. *Id.* at 595.

289. *See supra* Part IV.A.

290. *See, e.g.*, Fidrych v. Marriot Int'l, 952 F.3d 124, 137 (4th Cir. 2020) (noting that under the rules set out in *Pennsylvania Fire*, "obtaining the necessary certification to conduct business in a given state amounts to consent to general jurisdiction in that state only if that condition is explicit in the statute or the state courts have interpreted the statute as imposing that condition").

291. *See, e.g.*, Cooper Tire & Rubber Co. v. McCall, __ S.E.2d __, 2021 WL 4268074, at *9 (Ga. 2021) (considering, as a matter of statutory stare decisis, whether to overrule a prior decision of the Georgia Supreme Court that interpreted the state registration statute as requiring consent to general jurisdiction);); Aybar v. Aybar, 2021 NY 54U (2021), https://perma.cc/9B4W-RDL6 (concluding as a matter of statutory interpretation that registration to

suggests that if that process leads to the conclusion that an otherwise-silent registration statute requires consent to general jurisdiction, corporations should be held to that construction, at least until the Supreme Court ever finds it to be inconsistent with the Constitution.[292]

That said, given the Court's apparent reluctance to provide a definitive answer, there is a simpler solution outside the judiciary that has largely been ignored: states with silent registration statutes can—and should—displace their decisional law by passing modernized language that explicitly addresses whether or not the statute compels consent to personal jurisdiction—general or specific.[293] Though many appellate courts as have rejected consent by registration, only a small minority of state legislatures have adopted, or attempted to adopt, jurisdictionally explicit statutes.[294] Moreover, personal jurisdiction doctrine has evolved quite significantly since many of these statutes were adopted or last amended. An update is certainly warranted.[295]

This is not to say that every—or even any—state should pass registration statutes that require that all corporate registrants to consent to general jurisdiction. A state's revised statute could foreclose consent by registration altogether, mirror Pennsylvania's explicit consent-by-registration general

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do business in New York does not constitute consent to general jurisdiction in New York courts).

292. *See* Am. Dairy Queen Corp. v. W.B. Mason Co., No. 18-cv-693, 2019 WL 135699, at *6 (D. Minn. Jan. 8, 2019) ("It is for the Supreme Court to address consent by registration statutes in light of its new jurisprudence on general personal jurisdiction and/or for the Eighth Circuit to reconsider *Knowlton* in light of this changing view of the law.").

293. *See, e.g.*, S.B. 7253, 244th Leg. Sess. (N.Y. 2021), https://perma.cc/9FN2-FJWM. *But see* Letter from New York City Bar Association to Gov. Kathy Hochul (Aug. 26, 2021).

294. *See, e.g.*, ARK. CODE ANN. § 4-20-115 (West 2020) ("The appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state."); S.D. CODIFIED LAWS § 59-11-21 (2020) ("The appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state.").

295. *See Cooper Tire*, __ S.E.2d __, 2021 WL 4268074, at *11 (Bethel, J., concurring) (writing separately "for the sole purpose of calling the General Assembly's attention to the peculiar and precarious position of the current law of Georgia").

jurisdiction scheme or, as some scholars have suggested, provide some middle ground that confers sub-general jurisdiction in a narrow set of circumstances that implicate various state sovereign interests.[296] Any of these legislative changes would serve clarity and predictability, two crucial ends of the rule of law. By installing unambiguous jurisdictional language in the registration statute, state legislatures can make clearer the consequences of registering to do business—whatever they may be—in the text itself, without subjecting defendants to "the risk of the interpretation that may be put upon it by the courts."[297]

296. *See* Rhodes & Robertson, *supra* note 90, at 381 (proposing a model statute that would require consent to suit "in defined circumstances that implicate state sovereign interests," such as "when the suit arises from an injury suffered in the state, the suit is brought by a state resident, the suit is governed by that state's law, or the suit is to enforce a judgment or remedial order against persons or property within the state").

297. Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917).