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## Registration, Fairness, and General Jurisdiction

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Jack B. Harrison\*

## Registration, Fairness, and General Jurisdiction

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## I. INTRODUCTION

“Whenever you get there, there is no there there.”<sup>1</sup>

—Gertrude Stein

The United States Supreme Court’s recent decisions in *Goodyear*<sup>2</sup> and *Daimler*<sup>3</sup> significantly narrowed the traditional understanding of general personal jurisdiction. Historically, general personal jurisdiction concerned only the defendant’s relationship with the forum, allowing plaintiffs to sue defendants in a particular jurisdiction irrespective of the claim at issue or where that claim arose.<sup>4</sup>

Personal jurisdiction was initially limited to strict territorial limits.<sup>5</sup> Due to advancements in technology, the Court expanded personal jurisdiction with the introduction and development of minimum-contacts analysis.<sup>6</sup> The impetus for this initial expansion of personal jurisdiction from territorial limits to minimum contacts was the concern that potential defendants could enjoy the benefits and protections of a specific state’s laws while simultaneously being able to dodge the repercussions of potential liability within that state.

Following the Court’s decision in *International Shoe*,<sup>7</sup> lower courts and those who teach civil procedure did not question the assertion that general personal jurisdiction exists where a corporate defendant is incorporated and where it has its principal place of business. Such an articulation of general jurisdiction was, in effect, simply an articulation of domicile jurisdiction that had existed since *Pennoyer*.<sup>8</sup> However, in addition to this very narrow understanding of general jurisdiction, lower courts and academics also assumed that general jurisdiction could be based on a foreign corporation’s activities within the forum state, concluding that general jurisdiction over a defendant may be found where that defendant’s contacts with the forum state were “continuous and systematic.”<sup>9</sup>

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1. GERTRUDE STEIN, EVERYBODY’S AUTOBIOGRAPHY 289 (1937).

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

3. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

4. See Leo Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 727 (1988).

5. See discussion *infra* Parts II–III.

6. Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 531–32 (2012); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 506 (2015) (citing Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 620–21 (1988)).

7. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

8. Jack B. Harrison, *Here and There and Back Again: Drowning in the Stream of Commerce*, 44 STETSON L. REV. 1, 5–9 (2014).

9. Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1069 (2012); Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 812 (2004); Sarah R. Cebik, “A Riddle Wrapped in a Mystery Inside an Enigma”: *General Personal Jurisdiction and Notions of Sover-*

With *Goodyear* and *Daimler*, the Court rejected the traditional understanding of general jurisdiction based on a defendant corporation's activities within the forum state, adopting an almost exclusively domicile basis for general jurisdiction.<sup>10</sup> These decisions swept away years of lower court decisions that found general jurisdiction over corporate defendants based on corporate activities in the forum state.<sup>11</sup>

In *Goodyear* and *Daimler*, the Court rejected arguments that sales into a forum state by a corporate defendant could form the basis for general jurisdiction.<sup>12</sup> More importantly, the Court also concluded that the fairness factors that had run through the Court's personal jurisdiction jurisprudence for generations have no applicability in the general jurisdiction context.<sup>13</sup> These two conclusions by the Court ignore the world of modern commerce and unnecessarily hamper plaintiffs pursuing redress for injuries.

In a previous article, I explored the manner in which the Court's jurisprudence surrounding the doctrine of specific jurisdiction, particularly related to the "stream of commerce" theory, greatly hindered plaintiffs' efforts to find a convenient forum in which to seek redress for real injuries.<sup>14</sup> This Article continues that discussion within the context of the Court's developing jurisprudence in the area of general jurisdiction and proposes a more balanced approach to the general jurisdiction conundrum.

Part II of this Article traces the historical development of the Court's personal jurisdiction jurisprudence, from the territorial limita-

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*eighty*, 1998 ANN. SURV. AM. L. 1, 14 (1998); Emily Eng, *A New Paradigm: Domicile as the Exclusive Basis for the Exercise of General Jurisdiction over Individual Defendants*, 34 CARDOZO L. REV. 845, 861 (2012); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1130 (1990); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 614 (1988).

10. See Tanya J. Monestier, *Where is Home Depot at Home?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L. J. 233, 260 (2014) (discussing the meaning of "at home").

11. See Richard D. Freer, *Four Specific Problems with the New General Jurisdiction* 5, 8 n.30 (Emory Law Research Paper No. 14-327, 2014), <http://ssrn.com/abstract=2490034> [<https://perma.unl.edu/N7HJ-S9FB>] (noting that "a Lexis search on September 1, 2014 found that no state-court case had ever used the phrase 'at home' within 18 words of 'general jurisdiction' in a personal jurisdiction case before 2011. In contrast, 891 state-court cases had used the phrase 'continuous and systematic' within 18 words of 'general jurisdiction' in such cases.>").

12. *Id.* at 6.

13. *Id.*; Monestier, *supra* note 10, at 263 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014)) ("... the Court, on the other hand, is of the view that the reasonableness test applies only to assertions of specific jurisdiction, not to assertions of general jurisdiction. This is because the nature of general jurisdiction is such that it is *de facto* fair and reasonable to require a defendant to answer to suit in that particular forum.>").

14. See *generally* Harrison, *supra* note 8.

tions of *Pennoyer v. Neff*<sup>15</sup> to the abandonment of this overly restrictive approach because of the development of the modern, mobile industrial state of the twentieth century. Part III of this Article then looks at the Court's modern development of personal jurisdiction doctrine, specifically, the Court's conclusion in *International Shoe Co. v. Washington* that contacts with a forum may serve as a substitute for actual physical presence in the forum.<sup>16</sup> Part IV examines the role of "fairness" in the analysis of personal jurisdiction, as articulated by the Court in *World-Wide Volkswagen v. Woodson*,<sup>17</sup> where the Court outlined the factors to be employed in determining reasonableness.<sup>18</sup> Part V analyzes the continued existence of general jurisdiction after *International Shoe*, looking specifically at the Court's decisions in *Perkins v. Benguet Consolidated Mining Co.*<sup>19</sup> and *Hall v. Helicopteros Nacionales de Colombia, S.A.*,<sup>20</sup> in which the Court continued to hold that exercise of general personal jurisdiction over a foreign corporation was appropriate where that corporation had "continuous and systematic contacts" with the forum. Part VI reviews the Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>21</sup> and *Daimler AG v. Bauman*,<sup>22</sup> questioning the continued viability of the doctrine of general personal jurisdiction after these decisions. Part VII of this Article examines whether a foreign corporation's compliance with a state registration statute provides a basis for that state to exercise general personal jurisdiction over the foreign corporation.<sup>23</sup>

In conclusion, this Article proposes that despite the Court's decisions in *Goodyear* and *Daimler*, the Court should, at a minimum, adopt an approach to general jurisdiction whereby a corporation that registers to do business in a state, appoints an agent for service of process in the state, and actually conducts business in the state con-

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15. 95 U.S. 714 (1877).

16. *Int'l Shoe v. Washington*, 326 U.S. 310 (1945).

17. 444 U.S. 286 (1980).

18. Those factors include: (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 292 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92-93, 98 (1977); *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977)).

19. 342 U.S. 437 (1952).

20. 466 U.S. 408 (1984).

21. 131 S. Ct. 2846, 2854 (2011).

22. 134 S. Ct. 746, 751 (2014); see John N. Drobak, *Personal Jurisdiction in a Global World: A Comment on the Supreme Court's Recent Decisions in Goodyear Dunlop Tires and Nicasastro*, 90 WASH. L. REV. 1707 (2013); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012).

23. See discussion *infra* Part VII.

sents to general jurisdiction in that state, particularly for injuries to citizens of that state that occur outside the state.<sup>24</sup> This Article also asserts that, consistent with the Court's opinion in *Burnham*, where a corporation's statutorily appointed agent is properly served within a state, that state may properly exercise personal jurisdiction over that corporation. Additionally, this Article argues that the Court should revisit its rejection of the fairness factors in the general jurisdiction context in order to restore the balance between the interest of a plaintiff seeking redress in her home state and the burden on foreign defendants whose "continuous and systematic" contacts in the forum state require them to defend in the forum state.<sup>25</sup>

## II. IN THE BEGINNING WAS "PRESENCE"

The concept of personal jurisdiction has, of necessity, evolved with the growth of commerce and the development of new technology.<sup>26</sup> However, before addressing the current state of affairs regarding personal jurisdiction, one must first examine the historical development of the doctrine of personal jurisdiction. While the concept of personal jurisdiction finds its constitutional roots in the Due Process Clause, the earliest important cases to discuss the concept of personal jurisdiction focused on events that occurred prior to the ratification of the Fourteenth Amendment in 1868. These early cases were deeply rooted in the fundamental concept of state sovereignty as the primary basis for the exercise of personal jurisdiction.<sup>27</sup>

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24. See discussion *infra* Part VIII.

25. See discussion *infra* Part VIII.

26. See discussion *supra* Part I.

27. Stephen Higdon, *If It Wasn't on Purpose, Can a Court Take It Personally?: Untangling Asahi's Mess that J. McIntyre Did Not*, 45 TEX. TECH. L. REV. 463, 467 (2013) (noting that personal jurisdiction initially was a function of state-by-state common law before developing constitutional roots); 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, 25 (1990); see Allan Erben, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 96 (2010); *Pennoyer v. Neff*, 95 U.S. 714, 719 (1877); *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 354 (1873).

In *Galpin v. Page*, both an heir and a grantee claimed title for a piece of real property located in San Francisco, California. *Galpin*, 85 U.S. (18 Wall.) at 351–52. At issue before the Court was whether any determination reached by the courts below was valid, given a necessary party who was domiciled outside of California and who held a potential interest in the property at issue had not been served in the state. *Id.* at 353. In fact, the only service on the out-of-state party had been by publication. *Id.* In reviewing this issue, the Court determined that the judgment reached by the court below was void because publication service on the out-of-state defendant was invalid. *Id.* at 359. The primary concern of the Court in *Galpin* was preserving the sovereign jurisdictions of the individual states. *Id.* at 373. In reaching its conclusion, the Court stated:

The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot ex-

As most first-year law students discover early in their law school careers, the modern origins of personal jurisdiction began with *Pennoyer v. Neff*.<sup>28</sup> In *Pennoyer*, an attorney brought an action against his client, Neff, for unpaid legal fees in Oregon.<sup>29</sup> As in *Galpin v. Page*, service on Neff was attempted by publication in a newspaper. Neff was not personally served.<sup>30</sup> Default judgment was then awarded to the attorney when Neff failed to respond or appear.<sup>31</sup> In order to satisfy the judgment, the attorney took action to seize property owned by Neff in Oregon, with the property subsequently being sold at a sheriff's auction.<sup>32</sup> At the auction, the attorney purchased the land and then assigned the rights to the property to Pennoyer.<sup>33</sup>

Shortly thereafter, Neff sued Pennoyer for quiet title.<sup>34</sup> In effect, Neff argued that the original judgment against him was invalid because the original court did not have proper personal jurisdiction over him, in that he did not reside within the jurisdiction of the Oregon court and, thus, was not properly served.<sup>35</sup> The district court found the original judgment against Neff invalid, determining that the property continued to belong to Neff.<sup>36</sup> The case was then appealed, and the Supreme Court granted certiorari.<sup>37</sup>

In an opinion by Justice Field, the Court held that the authority of every lower court is restricted by the territorial limits of the state where it is established.<sup>38</sup> However, for the development of personal

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tend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy.

*Id.* at 367. The Court reasoned that “[j]udgment without jurisdiction is unavailing for any purpose.” *Id.* at 373. Thus, the Court laid the foundation for a personal jurisdiction problem that has confused and troubled courts up to the present.

28. *Pennoyer*, 95 U.S. 714.

29. *Id.* at 719–20.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 719.

34. *Neff v. Pennoyer*, 17 F. Cas. 1279, 1280 (C.C.D. Or. 1875), *aff'd*, 95 U.S. 714 (1877).

35. *Id.* at 1280–81.

36. *Id.* at 1290.

37. *Pennoyer*, 95 U.S. 714.

38. *Id.* at 720. In so holding, the Court stated:

[A] State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.

*Id.* at 723. The Court further reasoned:

jurisdiction, the critical analysis in *Pennoyer* rested upon linking the concept of personal jurisdiction with the constitutional requirements of the Fourteenth Amendment's Due Process Clause.<sup>39</sup> Thus, *Pennoyer* allowed a state court to exercise personal jurisdiction over a nonresident defendant only when that defendant was served within the territorial bounds of the state, when the defendant voluntarily appeared before the court for the proceedings, or when property owned by the defendant within the territorial bounds of the state was attached prior to the filing of the lawsuit.<sup>40</sup>

In the years following *Pennoyer*, the Court continued to wrestle with the concept of personal jurisdiction and due process. For exam-

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The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down . . . as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

*Id.* at 722; see Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts; From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 571 (1958).

39. As stated by the Court:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State . . . .

*Pennoyer*, 95 U.S. at 733; see also Higdon, *supra* note 27, at 467 (noting that the Court continued the states' approach, however the Court also utilized the Due Process Clause to check the states' use of personal jurisdiction); Cebik, *supra* note 9, at 4 (stating that "[t]he Court further held that whether a court had personal jurisdiction over the defendant was a constitutional matter rooted in the Due Process Clause of the Fourteenth Amendment."); Kurland, *supra* note 38, at 572 (indicating the importance of *Pennoyer*'s holding to be its application of the Due Process Clause).

40. *Pennoyer*, 95 U.S. at 723, 733; Higdon, *supra* note 27, at 467–68; Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1505 (2006); Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1067–68 (1990).



ple, in *St. Clair v. Cox*,<sup>41</sup> the Court affirmed its prior holdings that “[p]ersonal service of citation on the party or his voluntary appearance is, with some exceptions, essential to the jurisdiction of the court.”<sup>42</sup> In defining what those exceptions might be, the Court stated that “[t]he exceptions related to . . . where proceedings are taken in a [s]tate to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself.”<sup>43</sup> The Court also went on in *St. Clair* to confirm that the same requirements applied to corporations that apply to natural persons.<sup>44</sup>

Over the ensuing years, the analysis of personal jurisdiction based on a defendant’s physical presence and the territorial sovereignty of the states found in *Pennoyer* formed the linchpin of courts’ application of the concept of personal jurisdiction.

### III. WHEN “PRESENCE” CEASED TO MEAN “PRESENCE”

As modern commerce developed in the twentieth century, business entities increasingly engaged in commerce in multiple states, including many states in which the business had no “presence” as that concept had been articulated in *Pennoyer*. With this development, the requirement of physical presence allowing a court to exercise personal jurisdiction over out-of-state business entities conducting commerce within the state became increasingly unworkable.<sup>45</sup> As a result, to exercise personal jurisdiction over out-of-state entities, courts were increasingly forced to create legal fictions revolving around consent in order to find the “presence” required by *Pennoyer*.<sup>46</sup>

To address the increasingly complicated jurisdictional conundrums that arose as courts struggled with the need to protect in-state citizens from the in-state activities of out-of-state commercial entities, the

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41. 106 U.S. 350 (1882).

42. *Id.* at 353.

43. *Id.* (citing *Pennoyer*, 95 U.S. 714).

44. *Id.*

45. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 214 (3d ed. 2004) (stating that “[a] corporation, like an individual, could consent to suit in a forum . . . [but] [i]n the absence of actual consent, the traditional rule was that a corporation could not be sued outside [their] state [of incorporation]”); see also SAMUEL ISSACHAROFF, CIVIL PROCEDURE 93–94 (2005) (noting the shift to away from a territorial approach to a transactional approach that assessed minimum contacts).

46. Erik T. Moe, Comment, *Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive but Still Kicking*, 76 GEO. L.J. 203, 206 (1987); see also Angela M. Laughlin, *This Ain’t the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 688–89 (2009) (noting states solved the problem of corporations’ consent to personal jurisdiction with the appointment of agents and notions of implied consent).

Court needed to develop a more flexible approach than it had established in *Pennoyer*.<sup>47</sup> In *International Shoe Co. v. Washington*,<sup>48</sup> the Court moved beyond the rigid requirement of physical presence it had established in *Pennoyer* and articulated a new definition of “presence.”<sup>49</sup> The Court in *International Shoe* concluded that the exercise of personal jurisdiction is appropriate when an out-of-state defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>50</sup>

In *International Shoe*, the State of Washington sued the International Shoe Company in Washington state court.<sup>51</sup> The suit was filed to obtain contribution payments to the state unemployment compensation fund.<sup>52</sup> The International Shoe Company was a Delaware corporation with its principal place of business in St. Louis, Missouri.<sup>53</sup> It maintained places of business in several states, not including Washington, where it carried on its manufacturing and from where it distributed its merchandise interstate.<sup>54</sup> International Shoe had no office or stock in the State of Washington and only maintained eleven to thirteen salesmen under the direct supervision of a sales manager in St. Louis, Missouri.<sup>55</sup>

Nonetheless, the Court held that the exercise of jurisdiction by the Washington state court was appropriate because constitutional due process requires only that a defendant have certain minimum contacts within the forum state such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”<sup>56</sup> In its opinion, the Court redefined what was meant by “presence” in determining whether a state court could exercise personal jurisdiction over an out-of-state defendant, stating “‘present’ or ‘presence’ are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.”<sup>57</sup>

The Court has reasoned that this move away from the rigidity of *Pennoyer* became necessary due to advances in technology and modern

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47. See ISSACHAROFF, *supra* note 45, at 93–94.

48. 326 U.S. 310 (1945).

49. *Id.* at 316–17.

50. *Id.* at 316.

51. *Int’l Shoe Co. v. State*, 22 Wash. 2d 146, 147 (1945), *aff’d sub nom.* *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

52. *Int’l Shoe v. Washington*, 326 U.S. at 311.

53. *Id.* at 313.

54. *Id.*

55. *Id.*

56. *Id.* at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

57. *Id.* at 316–17.

commerce in the twentieth century.<sup>58</sup> Moreover, in addressing the concept of “presence” in *International Shoe*, the Court stated:

‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have . . . been continuous and systematic . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.<sup>59</sup>

While the Court did not articulate a clear boundary line between those activities that would subject a foreign defendant to suit and those that would not, the Court noted that the criteria could not be “simply mechanical or quantitative.”<sup>60</sup> The Court stated that for the acts to be enough to subject a foreign defendant to suit, those acts are to be judged based on their “nature and quality and the circumstances of their commission.”<sup>61</sup> The Court reasoned that “to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state” and “[t]he exercise of that privilege may give rise to obligations . . . which [require] the corporation to respond to a suit brought to enforce them.”<sup>62</sup>

In analyzing the nature of activity in a forum state required to show “presence,” the Court focused on the burden or “inconveniences” on the corporate defendant if it were required to litigate in the forum.<sup>63</sup> The Court then discussed a continuum of cases involving the question of personal jurisdiction, focusing on different types of activity within the forum state.<sup>64</sup> Arising out of this continuum was our modern understanding of the categories of specific and general jurisdiction.<sup>65</sup>

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58. *Daimler AG v. Bauman*, 134 S. Ct. 746, 753–54 (2014) (“In time, however, that strict territorial approach yielded to a less rigid understanding, spurred by ‘changes in the technology of transportation and communication, and the tremendous growth of interstate business activity.’”) (quoting *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990)) (plurality opinion of Scalia, J.).

59. *Int’l Shoe*, 326 U.S. at 317 (citations omitted).

60. *Id.* at 319.

61. *Id.* at 318.

62. *Id.* at 319.

63. *Id.* at 317 (“[a]n ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.”) (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930)).

64. *Id.* at 317–18.

65. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (“In American thinking, affiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based

At one end of the continuum, and perhaps the easiest cases, were those cases where personal jurisdiction was based on the cause of action arising out of the corporate defendant's contacts in the state. The Court described these cases as follows:

'Presence' in the state [as a basis for personal jurisdiction] has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.<sup>66</sup>

These cases would be those now typically characterized as cases involving specific personal jurisdiction.

At the other end of the continuum were those cases where it was argued that personal jurisdiction existed because of the casual presence of a corporate agent in the forum state or some single isolated act by a corporate defendant in the forum state, even though the cause of action itself did not arise in the forum state or as a result of the corporate defendant's contact with the forum state.<sup>67</sup> In these cases, the Court determined that personal jurisdiction would not exist, holding "the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject [the corporate defendant] to suit on causes of action unconnected with the activities there."<sup>68</sup> In arriving at this conclusion, the Court examined the burden on the corporate defendant on being forced to defend itself in a forum where it had only an isolated casual contact.<sup>69</sup> As the Court explained, requiring "the corporation in such circumstances to defend the suit away from its home or

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on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction."). Note that some authors have questioned the utility of this bipartite framework. See Monestier, *supra* note 10, at 237–246; Andrews, *supra* note 9, at 1075 ("Finally, some courts and commentators have suggested that jurisdiction is proper in cases that fall between the definitions or categories of specific and general jurisdiction. They object to strict characterization of a case as falling in one category or the other. They suggest either a 'sliding scale' or 'hybrid' approach. Professor Richman proposes a sliding scale theory, and Professor Simard a hybrid form of jurisdiction. The theories vary slightly, but both would find proper jurisdiction in fact patterns that are 'near misses' on both the relatedness and extent of contacts factors." (footnotes omitted)).

66. *Int'l Shoe*, 326 U.S. at 317 (citing *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579 (1914); *St. Louis Sw. Ry. Co. of Tex. v. Alexander*, 227 U.S. 218 (1913); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245, 255–56 (1909); *Pa. Lumberman's Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 414–15 (1905); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 610–11 (1899); *St. Clair v. Cox*, 106 U.S. 350, 355 (1882)).

67. *Id.* (citing *Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough*, 204 U.S. 8, 21 (1907); *Cox*, 106 U.S. at 359–60; *Frere v. Louisville Cement Co.*, 134 F.2d 511, 515 (D.C. Cir. 1943)).

68. *Id.*

69. *Id.*

other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.”<sup>70</sup>

In between these two extremes on the continuum were those cases where it was asserted that personal jurisdiction existed because the corporate defendant had substantial “continuous and systematic” contacts with the forum state, even though the cause of action itself did not arise in the forum state or as a result of the corporate defendant’s contact with the forum state.<sup>71</sup> In these cases, the Court concluded that the exercise of personal jurisdiction over the corporate defendant was appropriate when the corporate defendant had substantial “continuous and systematic” contacts with the forum state,<sup>72</sup> stating “there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against [the corporate defendant] on causes of action arising from dealings entirely distinct from those activities.”<sup>73</sup> This analysis led to the development of what became characterized as general personal jurisdiction.

#### IV. WHAT’S “FAIRNESS” GOT TO DO WITH IT?

In *World-Wide Volkswagen*, the Court was faced with the question of whether an Oklahoma state court could exercise personal jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products liability action when the retailer and distributor had placed the automobile in the stream of commerce and when the automobile subsequently caused harm in the forum state.<sup>74</sup>

In *World-Wide Volkswagen*, a family purchased a new Audi automobile from a retailer in New York who obtained it from a local distributor who served New York, New Jersey, and Connecticut.<sup>75</sup> A year after purchasing the automobile, the family left New York to move to their new home in Arizona.<sup>76</sup> En route to Arizona, the family drove the Audi through the state of Oklahoma, where another vehicle struck their Audi in the rear.<sup>77</sup> The collision caused a fire that severely burned the mother and her two children.<sup>78</sup>

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70. *Id.*

71. *Id.* at 318.

72. *Id.* (citing *Mo., Kan. & Tex. Ry. v. Reynolds*, 255 U.S. 565 (1921) (per curiam); *St. Louis Sw. Ry. v. Alexander*, 227 U.S. 218 (1913); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917)).

73. *Id.*

74. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

75. *Id.* at 288–89.

76. *Id.* at 288.

77. *Id.*

78. *Id.*

Subsequently, the family filed suit in Creek County, Oklahoma state court, listing the retailer and distributor as two of many defendants in their products liability action.<sup>79</sup> After the retailer and distributor made a special appearance to contest personal jurisdiction, the District Court for Creek County ruled that they were subject to the court's jurisdiction.<sup>80</sup> Similarly, on appeal, the Supreme Court of Oklahoma held that jurisdiction was authorized.<sup>81</sup> The U.S. Supreme Court subsequently granted certiorari.<sup>82</sup>

The Court held that jurisdiction was not proper because the retailer and distributor had no "contacts, ties, or relations" with Oklahoma at all.<sup>83</sup> The Court reasoned that the retailer and distributor carried on no activity, sales, services, or business with the state and thus availed themselves of none of the privileges and benefits of Oklahoma law.<sup>84</sup>

Justice White, writing for the Court, succinctly described the development of the doctrine of personal jurisdiction, explaining that the concept of minimum contacts from *International Shoe* performed two distinguishable functions.<sup>85</sup> Those functions included protecting defendants against the burden of litigating in a "distant or inconvenient forum" and ensuring that states do not reach "beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>86</sup> The Court explained that the first function of protecting defendants is "typically described in terms of 'reasonableness' or 'fairness.'"<sup>87</sup>

However, the Court noted that the "Due Process Clause, in its role as a guarantor against inconvenient litigation . . . [has] been substantially relaxed over the years" because of modern transportation and communication.<sup>88</sup> The Court went on to note that it would be a mistake to assume that this trend would lead to the demise of all personal

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79. *Id.*

80. *Id.* at 288–89.

81. The Court further clarified that "[a]lthough the court noted that the proper approach was to test jurisdiction against both statutory and constitutional standards, its analysis did not distinguish these questions, probably because . . . [Oklahoma's "long-arm" statute] has been interpreted as conferring jurisdiction to the limits permitted by the United States Constitution." *Id.* at 289–90.

82. *Id.* at 290. The Court granted certiorari in this case to resolve the same conflict in Kansas, Colorado, Utah, and Washington. *Id.* at 290 n.9.

83. *Id.* at 299.

84. *Id.* at 295.

85. *Id.* at 291.

86. *Id.* at 292.

87. *Id.*

88. *Id.* at 292–93. The Court further noted that the historical developments noted in *McGee* have only further accelerated in the generation since. *Id.* at 293 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)).

jurisdiction restrictions.<sup>89</sup> In addition, Justice White noted that the Court had never accepted the proposition that state lines were irrelevant for jurisdictional purposes because it was vital to remain faithful to the principles of interstate federalism embodied in the Constitution.<sup>90</sup>

The Court also synthesized the factors hinted at in other cases that apply in determining reasonableness.<sup>91</sup> Those factors include: (1) “the burden on the defendant;” (2) “the forum State’s interest in adjudicating the dispute;” (3) “the plaintiff’s interest in obtaining convenient and effective relief;” (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies;” and (5) “the shared interest of the several States in furthering fundamental substantive social policies.”<sup>92</sup>

Next, the Court addressed the requirements of “foreseeability” within a court’s analysis of personal jurisdiction.<sup>93</sup> The plaintiffs asserted that “because an automobile is mobile by its very design and purpose it was ‘foreseeable’ that [it] would cause injury in Oklahoma.”<sup>94</sup> In addressing this contention, the Court rejected the plaintiffs’ argument. Rather, the Court held that when addressing the question of foreseeability, a court should focus on whether “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there” rather than the “mere likelihood that a product will find its way into the forum State.”<sup>95</sup>

## V. THE DOCTRINE OF GENERAL JURISDICTION AFTER *INTERNATIONAL SHOE*

In *International Shoe*, the Court expanded the reach of a state’s jurisdiction by moving beyond the defendant’s actual “presence” required by *Pennoyer* and adopting an analysis focused on the nature of a defendant’s contacts with the forum state and on fairness.<sup>96</sup> In light

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89. *Id.* at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958)).

90. *Id.* at 293.

91. *Id.* at 292.

92. *Id.* (citing *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92–93, 98 (1977); *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

93. *Id.* at 295–99.

94. *Id.* at 295.

95. *Id.* at 297.

96. This expansion continued to evolve post-*International Shoe*. *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (plurality opinion of Scalia, J.) (citing *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984) (explaining that the history of cases after *International Shoe* permit deviations from traditional restrictions on personal jurisdiction “but only with respect to suits arising out of the absent defendant’s contacts with the State.”)). Twelve years after *International Shoe*, Justice Black wrote an opinion sustaining California’s

of the Court's subsequent decisions in *Goodyear* and *Daimler*, it is important to note the concerns raised by Justice Black in his concurring opinion.<sup>97</sup> Justice Black was concerned that the approach adopted in *International Shoe* could ultimately lead to a narrowing of a state's jurisdiction over a nonresident defendant, rather than expanding that jurisdiction.<sup>98</sup> As Professor Michael Hoffheimer has written:

While every member of the Court agreed that personal jurisdiction over International Shoe Co. was constitutional, Justice Black wrote separately to express concern that the new policy-oriented approach could restrict state power over a nonresident corporation doing business in the state. For Justice Black, a nonresident corporation engages in activity in a state only by grace of the state's law, and the state may condition its recognition of the corporation on the corporation's consent to jurisdiction in the state's court. While Justice Black's vision of state power lost traction over time, his warning that *International Shoe's* approach could reduce as well as expand personal jurisdiction was prescient.<sup>99</sup>

#### A. *Perkins v. Benguet Consolidated Mining Co.*

In *Perkins v. Benguet Consolidated Mining Co.*,<sup>100</sup> the Court, for the first time after *International Shoe*, addressed the issue of the reach of general personal jurisdiction. *Perkins* involved the Benguet Consolidated Mining Co., which held and operated gold and silver mines in the Philippines.<sup>101</sup> The corporation stopped mining operations during World War II and its president returned to his home state of Ohio.<sup>102</sup> In Ohio, the corporation's president kept an office, maintained the corporate records, and conducted some business for the corporation.<sup>103</sup> Corporate funds were maintained in Ohio banks

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exercise of personal jurisdiction over a claim arising from a nonresident insurance company's sale of one life insurance policy in the state. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957). The opinion expressly referred to the judicial trend of expanding the reach of personal jurisdiction. *Id.* at 222 ("Looking back over this long history of [personal jurisdiction decisions,] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy . . .").

97. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945) (Black, J., concurring).

98. *Id.*

99. Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 561–62 (2012).

100. 342 U.S. 437 (1952).

101. *Id.* at 439.

102. *Id.* at 447. The state court found that the corporation's surface operations were destroyed, but the court did not explain how or by whom. *Perkins v. Benguet Consol. Mining Co.*, 95 N.E.2d 5, 8 (Ohio Ct. App. 1950), *aff'd*, 98 N.E.2d 33 (Ohio 1951), *vacated*, 342 U.S. 437 (1952). During the years of World War II, three of Benguet's five directors suffered internment by the Japanese. *Id.* In 1945, John W. Haussermann, Jr. was named a director of Benguet to replace a director who had been killed by the Japanese in 1944. *Id.*

103. *Perkins*, 342 U.S. at 447–48. The president had a long connection with Clermont County, Ohio, where he had a farm and personal office. *Perkins*, 95 N.E.2d at 7.



and a specific Ohio bank was identified as the transfer agent for the corporation's stock.<sup>104</sup> While based in Ohio, the corporation's president disbursed funds and subsequently coordinated the rebuilding of the foreign mining facilities.<sup>105</sup> The directors of the corporation met at both the president's home in Ohio and at the corporate offices in Ohio.<sup>106</sup> While the corporation had significant contact with Ohio, it did not reincorporate in Ohio, formally establish a principal place of business there, or appoint an agent for service of process in Ohio.<sup>107</sup>

A lawsuit was brought alleging a failure on the part of the corporation to issue dividends and stock certificates.<sup>108</sup> The lawsuit was filed in Ohio state court, and service of summons was made on the corporation's president.<sup>109</sup> The trial court, however, granted the defendant's motion to quash the summons concluding that Ohio courts lacked personal jurisdiction over the corporate defendant because the corporation was a foreign corporation and the conduct complained of did not result from any contacts the corporation had with Ohio.<sup>110</sup> The Ohio Supreme Court affirmed this decision, and the petitioner subsequently appealed to the U.S. Supreme Court.<sup>111</sup>

In holding that due process allowed Ohio courts to exercise jurisdiction over the corporation, even though the claims were unrelated to contacts with Ohio, the Court focused on the systematic and continuous contacts of the corporation through the activities of the president.<sup>112</sup> Because the corporation, through the activities of its president, "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company," the Court concluded that the exercise of general personal jurisdiction over the corporation was appropriate.<sup>113</sup>

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104. *Perkins*, 342 U.S. at 448.

105. *Perkins*, 95 N.E.2d at 8. The corporation's funds were moved from California to Ohio where they were held by the president in his own name. *Id.* The president paid himself a salary of \$12,000 for the year 1945 from the corporate funds that he controlled. *Id.* at 7.

106. *Id.* While some directors' meetings were held in Ohio during the war, most were held in locations in the United States outside of Ohio. *Id.* (noting meetings in Ohio, Washington, New York, and San Francisco).

107. *Id.* at 6-8.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Perkins v. Benguet Consol. Mining Co.*, 98 N.E.2d 33 (Ohio 1951).

112. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952).

113. *Id.* Ohio law requires the state supreme court's syllabus to state the law applicable to the case. *Id.* The Ohio Supreme Court's syllabus, unlike the accompanying opinion, did not identify the Due Process Clause as the ground for the refusal to accept jurisdiction. *Perkins*, 98 N.E.2d at 34, *vacated*, 342 U.S. 437. Chief Justice Vinson joined Justice Minton's dissent. *Id.* at 449 (Minton, J., dissenting). These two dissenting Justices concluded that the syllabus left an adequate state law basis for the decision below. *Id.* at 449-50.

### B. *Helicopteros Nacionales de Colombia, S.A. v. Hall*

Following *Perkins*, state courts began to exercise general jurisdiction over nonresident corporations with “continuous and systematic” business contacts in the state. In *Hall v. Helicopteros Nacionales de Colombia, S.A.*, the Supreme Court of Texas found that a Colombian corporation providing helicopter transportation services in Peru had “continuous and systematic” business contacts with Texas based on its purchases in Texas. The court found these purchases supported the state’s exercise of general jurisdiction over the corporation, notwithstanding the fact that the claims were completely unrelated to the Colombian corporation’s business contacts with Texas.<sup>114</sup> In *Hall*, decedents of the plaintiffs were killed in a helicopter accident in Peru.<sup>115</sup> At the time of the accident, the decedents were working for a joint venture based in Texas.<sup>116</sup> The joint venture had hired Helicopteros Nacionales de Colombia, S.A. (“Helicol”) to provide transportation for its employees.<sup>117</sup> A lawsuit related to the deaths resulting from the accident was brought against Helicol, the owner and operator of the helicopter involved in the accident, but not against the Texas employer.<sup>118</sup>

While the Texas Supreme Court held that Helicol’s contacts with the state of Texas were sufficient to support the Texas court’s exercise of jurisdiction, this decision was reached over strong objections from other members of the Court.<sup>119</sup> The dissent presaged, in many ways, the holding years later by the Supreme Court in *Goodyear* and *Daimler*. Writing in dissent, Justice Pope argued that while substantial and continuous activity with the state could form the basis for the exercise of general jurisdiction over a defendant, the exercise of jurisdiction by Texas courts in such a circumstance required “some close substantial connection with the state approaching the relationship between the state and its own residents.”<sup>120</sup> Further, Justice Pope asserted that the fairness factors identified by the Supreme Court in the context of specific jurisdiction had no relevance for determining whether the application of general jurisdiction was appropriate.<sup>121</sup>

On appeal, the United States Supreme Court reversed the decision of the Texas Supreme Court in *Helicopteros Nacionales de Colombia*

114. *Hall v. Helicopteros Nacionales de Colom., S.A.*, 638 S.W.2d 870, 873–74 (Tex. 1982), *rev’d sub nom.* *Helicopteros Nacionales de Colom., S.A., v. Hall*, 466 U.S. 408 (1984).

115. *Id.* at 870–71.

116. *Id.*

117. *Id.* at 871.

118. *Id.*

119. *Id.* at 877 (Pope, J., dissenting).

120. *Id.* at 882–83 (Pope, J., dissenting) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438, 445, 448 (1952)).

121. *Id.*

*S.A. v. Hall*.<sup>122</sup> In the Court's decision, written by Justice Blackmun, the Court described Helicol's contacts with Texas as follows: (1) the corporation's chief executive officer negotiated the contract to provide transportation services in South America with the Texas joint venture that employed the decedents; (2) approximately eighty percent of the corporation's helicopters and equipment were purchased from Bell Helicopter Company, a Texas manufacturer; (3) pilots for the corporation went to Texas for training; (4) management and maintenance personnel of the corporation travelled to the Bell Helicopter factory in Texas on several occasions; and (5) payments made to the corporation were from funds held in a Texas bank.<sup>123</sup>

The Court noted that, other than the contacts with Texas identified above, the corporation had very little connection with Texas. Specifically, the Court noted that the corporation had no shareholder in Texas, owned no property in the state, had no office in Texas, had no records held in Texas, was not registered to do business in Texas, had never designated an agent for service of process in the state, had not sold or performed any helicopter services in the state, had solicited no business in the state, had signed no contracts in Texas, and had no employees located in Texas.<sup>124</sup>

The Court framed its analysis as an attempt to answer the question of whether the contacts Helicol had with Texas were "the kind of continuous and systematic general business contacts" that had supported the exercise of general jurisdiction in *Perkins*.<sup>125</sup> In doing so, first, the Court articulated the distinction between specific jurisdiction—where the "relationship among the defendant, the forum, and the litigation" is the essential foundation" for the exercise of personal jurisdiction over a defendant<sup>126</sup>—and general jurisdiction, which focuses on the issue of whether or not there exists "sufficient contacts between the State and the foreign corporation" to support the exercise of general jurisdiction.<sup>127</sup>

In reviewing Helicol's contacts with Texas to determine whether they were sufficient to support the exercise of general jurisdiction over the corporation, the Court rejected the findings of the Texas Supreme Court, holding that an occasional and temporary presence of the chief executive officer in Texas did not rise to the required level of continuous and systematic contacts.<sup>128</sup> Likewise, the Court found irrelevant

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122. 466 U.S. 408, 419 (1984).

123. *Id.* at 410–11. However, the parties conceded that the claims did not arise out of or relate to the defendant's activities in Texas. *Id.* at 415.

124. *Id.* at 411.

125. *Id.* at 416.

126. *Id.* at 414 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

127. *Id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 (1984)).

128. *Id.* at 416–17.

for general jurisdiction analysis the fact that funds paid by Helicol were paid from a bank located in Texas.<sup>129</sup> Finally, the Court rejected the assertion that Helicol's purchase of equipment in Texas and the regular training of its pilots in Texas constituted a sufficient level of contacts, stating "we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."<sup>130</sup>

Under *Helicopteros*, therefore, the Court made it clear that the level of activity or contacts in a particular forum must be relatively substantial in order to support the exercise of general jurisdiction.<sup>131</sup> While the Court in *Helicopteros* adopted the "continuous and systematic" analysis offered by the Court in *Perkins*, it also asserted that "mere purchases" in the forum, even if they took place on a regular basis, training in the forum, or the occasional presence of corporate officers in the forum were not "continuous and systematic" such that they would support the exercise of general jurisdiction.<sup>132</sup>

## VI. THE DEATH OF GENERAL JURISDICTION?

### A. *Goodyear Dunlop Tires Operations, S.A. v. Brown*

For the first time since *Helicopteros*, the Court addressed general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>133</sup> In fact, *Goodyear* was only the third occasion after *International Shoe* in which the Court addressed general jurisdiction.<sup>134</sup>

*Goodyear* stemmed from a tragic bus accident outside of Paris, France, that took the lives of two 13-year-old boys from North Carolina, Julian Brown and Matthew Helms.<sup>135</sup> The boys were riding on a bus that overturned while traveling to Charles De Gaulle Airport.<sup>136</sup> They sustained fatal injuries in the crash.<sup>137</sup> After the accident, the boys' parents filed a wrongful death action in North Carolina state

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129. *Id.*

130. *Id.* at 418. The Court relied in part on pre-*International Shoe* authority that "purchases and related trips" are not sufficient for general jurisdiction. *Id.* at 417 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923)).

131. *Id.* at 413–18.

132. *Id.* at 416–18.

133. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011).

134. *Id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Hall v. Helicopteros Nacionales de Colom., S.A.*, 466 U.S. 408 (1984)) ("In only two decisions postdating *International Shoe* . . . has this Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently 'continuous and systematic' to justify the exercise of general jurisdiction over claims unrelated to those contacts . . .").

135. *Id.* at 2851.

136. *Id.*

137. *Id.*

court in their capacity as administrators of the boys' estates.<sup>138</sup> The parents alleged that a defective tire manufactured by Goodyear Turkey caused the accident.<sup>139</sup>

The parents sued Goodyear USA, Goodyear Luxembourg Tires, SA ("Goodyear Luxembourg"), Goodyear Lastikleri T.A.S. ("Goodyear Turkey"), and Goodyear Dunlop Tires France, SA ("Goodyear France").<sup>140</sup> Goodyear Luxembourg, Goodyear Turkey, and Goodyear France ("the subsidiaries") were indirect subsidiaries of Goodyear USA, an Ohio corporation.<sup>141</sup> The subsidiaries manufactured tires primarily for sale in Europe and Asia.<sup>142</sup>

According to the Court, the subsidiaries had essentially no presence in North Carolina.<sup>143</sup> They had no place of business, employees, or bank accounts in North Carolina.<sup>144</sup> They did not advertise in North Carolina.<sup>145</sup> They did not solicit business in North Carolina or sell or ship tires to North Carolina.<sup>146</sup> They were also not registered to do business in North Carolina.<sup>147</sup> The Court did concede that a small percentage of the subsidiaries' tires had made their way into North Carolina.<sup>148</sup> However, nothing indicated that the subsidiaries "took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina."<sup>149</sup> Moreover, the type of tire involved in the accident was never distributed in North Carolina.<sup>150</sup>

The subsidiaries moved to dismiss the parents' claims for lack of personal jurisdiction.<sup>151</sup> The trial court denied the subsidiaries' motion, but they appealed.<sup>152</sup> The North Carolina Court of Appeals recognized that North Carolina courts did not have specific personal jurisdiction over the defendants.<sup>153</sup> Because specific jurisdiction hinges on an "affiliatio[n]" between the forum and the underlying controversy . . . , [it is] "confined to adjudication of 'issues deriving from,

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138. *Id.*

139. *Id.* at 2850–51.

140. *Id.* at 2851–52.

141. *Id.* at 2852.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (As noted by the Court, "a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates.")

149. *Id.* (quoting *Brown v. Meter*, 681 S.E.2d 382, 392 (N.C. Ct. App. 2009)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

or connected with, the very controversy that establishes jurisdiction.”<sup>154</sup>

In this case, the controversy did not arise out of or relate to the subsidiaries’ activities in North Carolina.<sup>155</sup> The bus accident occurred in France, and Goodyear Turkey manufactured and sold the allegedly defective tire abroad.<sup>156</sup> Therefore, the North Carolina Court of Appeals instead focused on whether North Carolina courts could exercise general personal jurisdiction over the subsidiaries and looked to whether the subsidiaries had “continuous and systematic contacts” with North Carolina.<sup>157</sup>

The North Carolina Court of Appeals ultimately found that the subsidiaries had continuous and systematic contacts with North Carolina because they placed their tires in the stream of commerce without geographical limitation.<sup>158</sup> The North Carolina Court of Appeals believed that the subsidiaries’ tires could be and were sold in the United States and North Carolina.<sup>159</sup> The court noted that the kind of tire involved in the accident was marked for sale in the United States, which further led the court to determine that “the [subsidiaries] contemplated that the tire might be sold in the United States.”<sup>160</sup> Moreover, the court found that the subsidiaries’ tires reached North Carolina through a “highly-organized distribution process” with other Goodyear USA subsidiaries—not just through a random, one-time occurrence.<sup>161</sup>

The North Carolina Court of Appeals also addressed the issue of fairness, as related to the exercise of personal jurisdiction over the subsidiaries.<sup>162</sup> It asserted that North Carolina’s “interest in provid-

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154. *Id.* at 2851 (quoting von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)).

155. *Id.* at 2852, 2855.

156. *Id.* at 2855 (“As the North Carolina Court of Appeals recognized . . . both the act alleged to have caused injury (the fabrication of the allegedly defective tire) and its impact (the accident) occurred outside [North Carolina].”).

157. *Id.*

158. *Id.* (quoting *Brown v. Meter*, 681 S.E.2d 382, 394 (N.C. Ct. App. 2009)).

159. *Id.*

160. Hoffheimer, *supra* note 99, at 571 (quoting *Brown*, 681 S.E.2d at 393); *Goodyear*, 131 S. Ct. at 2852.

161. *Goodyear*, 131 S. Ct. at 2852 (quoting *Brown*, 681 S.E. 2d at 393–94); *see also* Hoffheimer, *supra* note 99, at 571 (noting that the state of North Carolina imported “at least 33,923 tires manufactured by Goodyear France, 6,402 tires manufactured by Goodyear Luxembourg, and 4,059 tires manufactured by Goodyear Turkey” between the years of 2004 and 2007, inducing the court to find the subsidiaries accountable of fostering a global business presence (citing *Brown*, 681 S.E.2d at 394)).

162. This is contrary to the Supreme Court’s view that “fairness factors” or questions of reasonableness are not a part of general jurisdiction analysis. Monestier, *supra* note 10, at 263 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014)) (stating that “The Court, on the other hand, is of the view that the reason-

ing a forum in which its citizens are able to seek redress for [their] injuries,” combined with the hardship the parents would experience if required to litigate their claims in France, further supported the trial court’s exercise of general personal jurisdiction.<sup>163</sup> The North Carolina Court of Appeals thus affirmed the trial court’s exercise of personal jurisdiction over the subsidiaries.<sup>164</sup> The subsidiaries sought appeal. After the North Carolina Supreme Court denied discretionary review, the subsidiaries moved on to the U.S. Supreme Court.<sup>165</sup>

The Supreme Court granted certiorari and ultimately reversed the North Carolina Court of Appeals.<sup>166</sup> Justice Ginsburg authored the unanimous opinion of the court. She described the question presented as: “Are foreign subsidiaries of a United States parent corporation amendable to suit in state court on claims unrelated to any activity or subsidiaries in the forum State?”<sup>167</sup>

The Court began its analysis by addressing the limits that the Due Process Clause of the Fourteenth Amendment places on a state court’s authority to exercise jurisdiction over a foreign defendant.<sup>168</sup> The Court drew a clear distinction between the two categories of personal jurisdiction that developed from the analysis of *International Shoe*, namely specific personal jurisdiction and general personal jurisdiction.<sup>169</sup> It noted that unlike specific personal jurisdiction, general personal jurisdiction arises in “instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>170</sup> According to the Court, a state may exercise general jurisdiction over foreign corporations “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”<sup>171</sup>

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ableness test applies only to assertions of specific jurisdiction, not to assertions of general jurisdiction. This is because the nature of general jurisdiction is such that it is *de facto* fair and reasonable to require a defendant to answer to suit in that particular forum.”); see also Freer, *supra* note 11, at 6 (explaining that a court’s inability to consider equality measures puts prosecuting parties in a difficult spot, whereby courts have no ability to take under consideration either the plaintiff or the state’s interests).

163. *Goodyear*, 131 S. Ct. at 2853 (quoting *Brown*, 681 S.E.2d at 394).

164. *Id.* at 2852.

165. See *id.* at 2853 (citing *Brown v. Meter*, 695 S.E.2d 756 (N.C. 2010)).

166. *Id.*

167. *Id.* at 2850.

168. *Id.* at 2853.

169. *Id.* at 2853–54.

170. *Id.* at 2849, 2853 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

171. *Id.* at 2851 (citing *Int’l Shoe*, 326 U.S. at 317).

The North Carolina Court of Appeals recognized that *Goodyear* was a general jurisdiction case, and the Court agreed.<sup>172</sup> But according to the Court, the North Carolina Court of Appeals “elided the essential difference between” specific and general jurisdiction.<sup>173</sup> Specifically, the Supreme Court disagreed with the analysis of the North Carolina Court of Appeals that focused on the stream of commerce through which the subsidiaries’ products moved into North Carolina as its basis for finding that general jurisdiction was appropriate in that circumstance.<sup>174</sup> The Court noted a “[f]low of a manufacturer’s products into the forum . . . may bolster an affiliation germane to specific jurisdiction,” not general jurisdiction.<sup>175</sup> Indeed, the Court noted that “ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.”<sup>176</sup>

The Court in *Goodyear* did not expressly limit general jurisdiction to a corporation’s state of incorporation or its principal place of business.<sup>177</sup> Instead, it relied on *Helicopteros* to reach its decision. *Helicopteros* held that “mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State’s assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.”<sup>178</sup>

In light of the holding in *Helicopteros*, the Court treated *Goodyear* as an easy decision. The Court found that the subsidiaries’ “sporadic” sale of tires in North Carolina through intermediaries was not mark-

172. *Id.* at 2851 (“Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. The North Carolina Court of Appeals so acknowledged.” (citing *Brown v. Meter*, 681 S.E.2d 382, 388 (N.C. Ct. App. 2009))).

173. *Id.* at 2949, 2855.

174. *Id.*

175. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

176. *Id.* at 2855–56 (citing *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 203 n.5 (D.C. Cir. 1981)).

177. *See id.* at 2853–54 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”); *see also Hoffheimer, supra* note 99, at 574 (stating that “Justice Ginsburg did not limit general jurisdiction to a corporation’s place of incorporation or principal place of business.”). The Court, however, did cite authority describing these as the paradigm examples of jurisdictions where defendant-corporations are subject to general jurisdiction. *Goodyear*, 131 S. Ct. at 2851 (citing *Leo Brilmayer et al., A General Look at General Jurisdiction*, 66 TEXAS L. REV. 721, 728 (1988)).

178. *Goodyear*, 131 S. Ct. at 2856 (quoting *Helicopteros Nacionales de Colom. S.A. v. Hall*, 466 U.S. 408, 418 (1984)); *see also Hoffheimer, supra* note 99, at 574 (noting that *Goodyear’s* significant tire sales in the state of North Carolina were insufficient to convince the Court that *Goodyear* had reasonably “systematic or continuous” contacts with the state—adequate enough in which to categorize *Goodyear* as being “at home” in North Carolina).



edly different from the *Helicopteros* defendant's insufficient ties to Texas.<sup>179</sup> Whether the subsidiaries' tires made their way through a well-defined distribution channel was not a relevant question for a determination of general jurisdiction, in that "a corporation's 'continuous activity of some sorts within a state'" is simply "not enough to support the demand that the corporation be amenable to suits unrelated to that activity."<sup>180</sup> Unlike the defendant in *Perkins*, the subsidiaries were in "no sense at home in North Carolina."<sup>181</sup> Ultimately, the Court held that the subsidiaries' "attenuated" connections to North Carolina were "far short of the . . . 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."<sup>182</sup>

### B. *Daimler AG v. Bauman*

The *Goodyear* opinion illustrated how courts should apply general jurisdiction in relation to specific jurisdiction.<sup>183</sup> In *Daimler*, the Court solidified its holding in *Goodyear*, namely that a court may exercise general jurisdiction over a foreign corporation only when the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."<sup>184</sup> In doing so, however, the Court fundamentally changed the doctrine of general jurisdiction.

*Daimler*, like *Goodyear*, involved a unique set of facts. The case arose out of Argentina's "Dirty War"—a period between 1976 and 1983 in which military dictatorship ruled Argentina.<sup>185</sup> In 2004, the plaintiffs (respondents in the Supreme Court) filed suit against Daimler AG in the United States District Court for the Northern District of California.<sup>186</sup> Daimler is a German public stock company that manufactures Mercedes-Benz vehicles in Germany.<sup>187</sup> The plaintiffs alleged that during Argentina's dirty war, Mercedes-Benz Argentina ("MB Argentina")—a wholly owned subsidiary of Daimler's predeces-

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179. *Goodyear*, 131 S. Ct. at 2856 ("We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries.").

180. *Id.* 2849, 2856 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

181. *Id.* at 2857.

182. *Id.* (citing *Helicopteros*, 466 U.S. at 416).

183. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) ("In *Goodyear* . . . we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction."); *Goodyear*, 131 S. Ct. at 2854 ("[S]pecific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role").

184. *Daimler*, 134 S. Ct. at 751 (2014) (quoting *Goodyear*, 564 U.S. at 2851).

185. *Id.*

186. *Id.*

187. *Id.* at 752.

son in interest—“collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives.”<sup>188</sup>

The plaintiffs asserted that MB Argentina had colluded with the Argentinian government by allowing military and police officers stationed inside the plant to determine which employees were “subversive.”<sup>189</sup> As a result of this action, the plaintiffs alleged that the government determined that each plaintiff was a “subversive,” leading to the kidnapping and torture, murder, or exile of the plaintiffs.<sup>190</sup> At the time of these events, MB Argentina was a wholly owned subsidiary of Daimler’s predecessor in interest.<sup>191</sup> Plaintiffs sought to hold Daimler liable for MB Argentina’s alleged wrongful conduct.<sup>192</sup> However, all of MB Argentina’s alleged wrongdoing took place in Argentina; the plaintiffs never alleged that MB Argentina did anything in California or anywhere else in the United States.<sup>193</sup>

Daimler moved to dismiss the plaintiffs’ complaint for lack of personal jurisdiction.<sup>194</sup> The plaintiffs conceded that California courts did not have specific personal jurisdiction over Daimler—the plaintiffs’ claims did not arise out of or relate to Daimler’s alleged activity in California.<sup>195</sup> Instead, the plaintiffs argued that Daimler’s contacts with California were extensive enough to subject it to the general personal jurisdiction of California courts.<sup>196</sup> In turn, they submitted evidence and tried to demonstrate Daimler’s presence in California.<sup>197</sup> Plaintiffs contended alternatively that the District Court could exercise jurisdiction over Daimler through the California contacts of its indirect subsidiary, Mercedes-Benz USA (“MBUSA”).<sup>198</sup>

MBUSA was Daimler’s exclusive importer and distributor in the United States.<sup>199</sup> MBUSA purchased Mercedes cars from Daimler in Germany.<sup>200</sup> It then imported the cars and distributed them to independent dealers located throughout the United States.<sup>201</sup> MBUSA, a

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188. *Id.* at 751–52.

189. First Amended Complaint for Damages and Declaratory Relief at 10, *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 U.S. Dist. LEXIS 31929 (N.D. Cal. Nov. 22, 2005).

190. *Id.* at 11–14.

191. *Daimler*, 134 S. Ct. at 752.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 758; *Daimler AG v. Bauman*, 128 HARV. L. REV. 311 (Nov. 10, 2014), <http://harvardlawreview.org/2014/11/daimler-ag-v-bauman/> [<https://perma.unl.edu/P755-7PNA>].

196. *Daimler*, 134 S. Ct. at 752.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Delaware LLC, had its principle place of business in New Jersey, but it also had numerous facilities in California.<sup>202</sup> Additionally, MBUSA was California's largest supplier of luxury vehicles.<sup>203</sup>

The District Court granted Daimler's motion to dismiss after allowing jurisdictional discovery on the plaintiffs' agency allegations.<sup>204</sup> First, the District Court determined that Daimler did not have enough contact with California to support the court's exercise of general personal jurisdiction over it.<sup>205</sup> The court then found that the plaintiffs failed to demonstrate that MBUSA acted as Daimler's agent, and thus it refused to impute MBUSA's contacts with California to Daimler.<sup>206</sup>

On appeal, the Ninth Circuit initially affirmed the District Court's ruling with one judge dissenting.<sup>207</sup> The Ninth Circuit addressed the agency question alone and held that the plaintiffs had failed to demonstrate a relationship that would allow MBUSA's California contacts to be imputed to Daimler.<sup>208</sup> The court concluded that "[b]ecause there [was] insufficient control and because MBUSA does not serve as [Daimler]'s representative, the contacts of MBUSA cannot be imputed."<sup>209</sup>

The Ninth Circuit, however, granted the plaintiffs' petition for rehearing and changed its ruling.<sup>210</sup> A three-judge panel heard the case and reversed the district court's decision granting Daimler's motion to dismiss.<sup>211</sup> On rehearing, the court determined that the agency test was satisfied, such that the exercise of jurisdiction over Daimler would be reasonable.<sup>212</sup> The court concluded that MBUSA was indeed Daimler's agent because the services performed by MBUSA were necessary for Daimler's operation and that the General Distributor Agreement that governed the relationship between Daimler and

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202. MBUSA maintained a regional office in Costa Mesa, California, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. *Id.*

203. *Id.* ("[O]ver 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.").

204. *Id.*

205. *Id.* (citing Application to Petition for Certiorari at 111a–112a, *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at \*9–\*10. (N.D. Cal. Nov. 22, 2005)).

206. *Id.* at 752–53 (citing Application to Petition for Certiorari at 117a, 133a, *Bauman*, 2005 WL 3157472, at \*12, \*19; Application to Petition for Certiorari at 83a–85a, *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2007 WL 486389, at \*2 (N.D. Cal. Feb. 12, 2007)).

207. *Daimler*, 134 S. Ct. at 753.

208. *Id.* (citing *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1096–97 (9th Cir. 2009)).

209. *Bauman*, 579 F.3d at 1097.

210. *Daimler*, 134 S. Ct. at 753 (citing *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011)).

211. *See Bauman*, 644 F.3d 909.

212. *Id.* at 921–30.

MBUSA demonstrated the intent that Daimler “has the right to control nearly all aspects of MBUSA’s operations.”<sup>213</sup> The court determined that it was reasonable for California to exercise jurisdiction over Daimler, because it comported “with fair play and substantial justice,” in that Daimler “has purposefully and extensively interjected itself into the California market through MBUSA.”<sup>214</sup> Daimler petitioned the court for rehearing en banc, but the Ninth Circuit denied the petition over the dissent of eight judges.<sup>215</sup>

The Supreme Court granted certiorari and ultimately reversed the Ninth Circuit’s ruling.<sup>216</sup> Justice Ginsburg delivered the opinion of the Court. In the first sentence of the Court’s opinion, she stated that *Daimler* “concern[ed] the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.”<sup>217</sup>

The Ninth Circuit and the parties alike had focused on the agency question—whether MBUSA’s California contacts could be imputed to Daimler.<sup>218</sup> Moreover, a split of authority existed about the Circuit Courts of Appeals on whether and when courts could attribute a subsidiary corporation’s contacts to a corporate parent.<sup>219</sup> Essentially, Daimler argued that the Ninth Circuit’s analysis was not sufficiently rigorous.<sup>220</sup> Justice Ginsburg, however, did not base her decision on agency; she resolved the issue on her own terms.<sup>221</sup> Indeed, she as-

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213. *Id.* at 921–24. As the court noted, under the General Distributor Agreement, MBUSA was bound to comply with all requirements established by Daimler and was required to notify Daimler of its actions, “including personnel changes, customer information, and marketing strategy.” *Id.* at 924.

214. *Id.* at 925, 929–30.

215. *Daimler*, 134 S. Ct. at 751 (citing *Bauman v. Daimler Chrysler Corp.*, 676 F.3d 774 (9th Cir. 2011)).

216. *Id.* at 751, 753.

217. *Id.* at 750.

218. *See id.* at 753, 758; *see also* William Baude, *Opinion Recap: A Stricter View of General Jurisdiction*, SCOTUSBLOG (Jan. 15, 2014, 11:30 AM), <http://www.scotusblog.com/2014/01/opinion-recap-a-stricter-view-of-general-jurisdiction/> [<https://perma.unl.edu/DK9K-4SQ7>] (summarizing the Supreme Court’s decision in *Daimler Chrysler v. Bauman*).

219. *See Daimler*, 134 S. Ct. at 759 (“Daimler argues, and several Courts of Appeals have held, that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an ‘agency’ relationship.”); *see also* Baude, *supra* note 218 (acknowledging the circuits are in disagreement over when conduct can be credited to a parent corporation).

220. *See Daimler*, 134 S. Ct. at 759; *see also* Baude, *supra* note 218 (stating Daimler argued the Ninth Circuit “made it too easy to attribute one corporation’s behavior to another.”).

221. *See Daimler*, 134 S. Ct. at 760; *see also* Baude, *supra* note 218 (noting the Court held it did not matter whether one corporation’s behavior was attributed to another).

sumed that California courts had general jurisdiction over MBUSA and that MBUSA's California contacts were attributable to Daimler.<sup>222</sup> Even so, she found that Daimler was not subject to general jurisdiction in California because its "slim contacts" with California "hardly render[ed] it at home there."<sup>223</sup>

But why? The Court framed the issue in *Daimler* as whether, consistent with the Due Process Clause of the Fourteenth Amendment, a California court could exercise jurisdiction over Daimler for claims involving only foreign plaintiffs and conduct occurring entirely abroad.<sup>224</sup> Justice Ginsburg began her opinion with a lengthy discussion of the Court's specific and general personal jurisdiction precedent.<sup>225</sup> Similar to her opinion in *Goodyear*, she set the playing field by noting the marked differences between specific jurisdiction and general jurisdiction.<sup>226</sup> Perhaps most importantly, based on Justice Ginsburg's opinion, it appears that the traditional understanding of general jurisdiction has fallen out of favor with the Court. Justice Ginsburg noted that specific jurisdiction is the "centerpiece of modern jurisdiction theory[,] while "[g]eneral jurisdiction has come to occupy a less dominant place . . . ."<sup>227</sup>

With the parameters of the analysis established, Justice Ginsburg then turned to the issue at hand. She took care to make it clear that "*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."<sup>228</sup> But Justice Ginsburg characterized the plaintiffs' argument that courts may exercise general jurisdiction in every state in which a corporation engages in a "substantial, continuous, and systematic course of business" as "unacceptably grasping."<sup>229</sup> She repeated again that the proper inquiry under *Goodyear* is whether a corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."<sup>230</sup> In a footnote in *Daimler*, however, Justice Ginsburg recognized a wholly new factor in general personal jurisdiction analysis.<sup>231</sup> One must now

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222. *Daimler*, 134 S. Ct. at 760.

223. *Id.*

224. *Id.* at 753.

225. *Id.* at 753–58.

226. *Id.* at 754–58. Specific jurisdiction is implicated where the cause of action arises out of or is related to the defendant's contacts with the forum. Meanwhile, general jurisdiction allows defendants to be sued on claims that are "entirely distinct" from their activities in the forum. *Id.* at 749.

227. *Id.* at 755, 758.

228. *Id.* at 760.

229. *Id.* at 760–61.

230. *Id.* at 761 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

231. *Id.* at 762 n.20.

look not only to a corporation's activities in the forum, because "[g]eneral jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."<sup>232</sup> According to Justice Ginsburg, however, "[a] corporation that operates in many places can scarcely be deemed at home in all of them."<sup>233</sup>

In *Daimler*, neither Daimler nor MBUSA was incorporated or had their principal place of business in California.<sup>234</sup> Likewise, Justice Ginsburg noted that "[i]f Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales [were] sizeable."<sup>235</sup> Justice Ginsburg classified such an exercise of general jurisdiction "exorbitant" because it would not allow out-state defendants to predict where they will be sued.<sup>236</sup> Meanwhile, a corporation's place of incorporation and principle place of business, as they each are usually only one place, are easily ascertainable.<sup>237</sup> Both of those bases "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."<sup>238</sup> Thus, while Justice Ginsburg maintained that *Goodyear* did not limit general jurisdiction to a corporation's place of incorporation and principle place of business, the Court in *Daimler* held that general jurisdiction would be limited to those two places in all but "exceptional" cases—the Court cited *Perkins* as an example of such a case.<sup>239</sup>

Finally, Justice Ginsburg turned to the transnational aspect of the dispute in *Daimler*. The Ninth Circuit believed that the plaintiffs'

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232. *Id.*

233. *Id.*

234. *Id.* at 761.

235. *Id.*

236. *Id.* at 761–62.

237. *Id.* at 760.

238. *Id.*

239. *Id.* at 761 n.19 ("We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.") (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). Professors Hoffheimer and Cornett have identified five situations that might present "exceptional cases," writing that these are "five situations that remain viable candidates for general jurisdiction, either because the level of the defendant's in-state activity establishes a principal place of business in the state or because a corporation's activity makes the corporation 'at home' in the state." Michael H. Hoffheimer & Judy M. Cornett, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 151 (2015). These five situations are:

1. Foreign Corporation Conducting All or Most of Its Business in the Forum State
2. Foreign National Corporation Engaging in Most of Its U.S. Business in One State

claims under the Alien Tort Statute and the Torture Victim Protection Act of 1991 supported the exercise of general jurisdiction.<sup>240</sup> The Court fundamentally disagreed with this conclusion.<sup>241</sup> According to Justice Ginsburg, the Ninth Circuit failed to consider “the risks to international comity its expansive view of jurisdiction posed.”<sup>242</sup>

In concurrence, Justice Sotomayor agreed with the Court that, in light of the unique circumstances of the case, the Due Process Clause prohibited a California court from exercising personal jurisdiction over Daimler.<sup>243</sup> However, she disagreed with how the Court reached its conclusion.<sup>244</sup> Most notably, she characterized the proportionality approach adopted by Justice Ginsburg in footnote 20 of the Court’s opinion as “wholly foreign to the [Court’s] due process jurisprudence.”<sup>245</sup> Moreover, she maintained that the Court’s focus on Daimler’s out-of-state contacts was inexplicably inconsistent with the Court’s previous personal jurisdiction decisions.<sup>246</sup>

For Justice Sotomayor, California’s exercise of personal jurisdiction in this situation would be unreasonable.<sup>247</sup> She conceded that the Court had never decided whether the “reasonableness” prong of personal jurisdiction analysis should apply in general jurisdiction cases.<sup>248</sup> In this case, however, Daimler had never argued against the Court’s application of the reasonableness prong and had conceded that the inquiry was appropriate.<sup>249</sup> Therefore, according to Justice Sotomayor, the Court could conduct a reasonableness inquiry in this case without deciding whether such an inquiry would be proper in all general jurisdiction cases.<sup>250</sup>

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3. Foreign Corporation Conducting All or Most of Its Business Activity in the United States but Maintaining No Principal Place of Business or Place of Incorporation in Any State
  4. Corporation with an Outsized Presence in the State
  5. Corporations Maintaining a Permanent Physical Presence in the State By Operating Factories, Mines, or Other Non-Sales Related Activities

*Id.* at 151–55.

240. *Daimler*, 134 S. Ct. at 762.

241. *Id.* at 763 (noting that “[c]onsiderations of international rapport . . . reinforce [the Court’s] determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the ‘fair play and substantial justice’ due process demands.”).

242. *Id.*

243. *Id.* at 763–73 (Sotomayor, J., concurring).

244. *Id.*

245. *Id.* at 764.

246. *Id.* at 764, 767 (stating that “[i]n every case where we have applied [*International Shoe*], we have focused solely on the magnitude of the defendant’s in-state contacts, not the relative magnitude of those contacts in comparison to the defendant’s contacts with other States.”).

247. *Id.* at 765.

248. *Id.* at 764.

249. *Id.* at 765.

250. *Id.*

## VII. REGISTRATION AND GENERAL PERSONAL JURISDICTION

### A. Introduction

Through *Goodyear* and *Daimler*, the Court has radically transformed the traditional understanding of general jurisdiction. For generations, scholars and courts did not question that continuous and systematic contacts sufficed for the exercise of general jurisdiction. *Goodyear* and *Daimler* together make clear that general jurisdiction exists where a “corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State.’”<sup>251</sup>

According to the Court, “[s]imple jurisdictional rules . . . promote greater predictability. Predictability is valuable to corporations making business and investment decisions.”<sup>252</sup> Thus, the primary goal of the standard adopted by the Court in *Daimler* was to have a jurisdictional analysis that was both predictable and certain. By focusing on principal place of business and state of incorporation as the paradigmatic bases for general jurisdiction, the Court injected a far more categorical and restrictive approach to general jurisdiction than seen in any of its prior jurisprudence.<sup>253</sup>

Before *Daimler*, the Court had never limited general jurisdiction to a strict categorical approach, although state of incorporation and principal place of business have long been seen as the primary models of general jurisdiction.<sup>254</sup> Yet, even though *Daimler* presented the Court with the opportunity to strictly limit general jurisdiction to state of incorporation and principal place of business, the Court declined that opportunity. While not really defining what the surviving basis for general jurisdiction would be, the Court looked to *Perkins* as the type of unique situation where a corporation’s contacts with the forum are “so substantial and of such a nature as to render the corporation at home.”<sup>255</sup>

However, in addition to this third undefined category of “at home” general jurisdiction, is the continuing question of whether the exercise of personal jurisdiction over a corporation who has registered to do business in a state, who has appointed an agent to receive service of process in the state, and who has been served within the state as a result of registration is proper. Some scholars have noted that with

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251. *Id.* at 751 (majority opinion).

252. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

253. Twitchell, *supra* note 9, at 669–70 (noting that principal place of business, or the company’s headquarters, is equivalent to an individual’s domicile, and that the state of incorporation provides an additional “uniform home base”).

254. *Id.*

255. *Daimler*, 134 S. Ct. at 761 n.19 (2014).



the narrowing of the traditional understanding of general jurisdiction as a result of the decision in *Daimler*, “the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look . . . is in a state registration filing that designates a corporate agent for service of process.”<sup>256</sup>

Nearly all states have registration statutes requiring corporations that do business in the state register with the state and appoint an agent for service of process.<sup>257</sup> What are the purposes of such stat-

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256. Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 259–60 (2014); accord Monestier, *supra* note 10, at 279–82. While Professor Monestier agrees on this particular point, she has strongly argued that corporate registration cannot be a valid basis for the exercise of general jurisdiction after *Daimler*, contrary to the position asserted in this Article. See generally Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1358 (2014). Justice Ginsburg had previously indicated some curiosity regarding whether registration could serve as a basis for the exercise of general jurisdiction over a foreign corporation. During oral argument in *Goodyear*, the following exchange occurred between Justice Ginsburg and counsel for the United States:

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

MR. HORWICH: Well, . . . there is a division in the lower courts on whether that sort of a consent is effective to permit the State general jurisdiction over — over the consenting party.

Transcript of Oral Argument at 15:16–25, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (No. 10-76), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-76.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/10-76.pdf) [<https://perma.unl.edu/W27B-NB7Z>].

257. See, e.g., Monestier, *supra* note 256, at 1358–1400; Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436 (2012); Mark Schuck, Comment, *Foreign Corporations and the Issue of Consent to Jurisdiction Through Registration to Do Business in Texas: Analysis and Proposal*, 40 Hous. L. REV. 1455, 1482 (2004) (referring to these statutes as “registration and appointment” statutes); Conna Bond, Note, *Florida’s Corporate Qualification Statute: Implications for Foreign Lenders*, 49 FLA. L. REV. 139 (1997) (referring to these statutes as “qualification” statutes); and Note, *The Legal Consequences of Failure to Comply with Domestication Statutes*, 110 U. PA. L. REV. 241 (1961) (referring to these statutes as “domestication” statutes). The relevant state registration statutes are: ALA. CODE § 10A-1-7.01 (2010); ALASKA STAT. § 10.06.705 (2014); ARIZ. REV. STAT. ANN. § 10-1501(A) (2013); ARK. CODE ANN. § 4-27-1501(a) (2001); CAL. CORP. CODE § 2105(a) (West 2014); COLO. REV. STAT. § 7-90-801(1) (2014); CONN. GEN. STAT. ANN. § 33-920(a) (West 2015); DEL. CODE ANN. tit. 8, § 371(b) (2011); D.C. CODE § 29-105.02(a) (2013); FLA. STAT. § 607.1501(1) (West 2015); GA. CODE ANN. § 14-2-1501(a) (2003); HAW. REV. STAT. ANN. § 414-431(a) (LexisNexis 2008); 805 ILL. COMP. STAT. ANN. 5/13.05 (West 2010); IND. CODE ANN. § 23-1-49-1(a) (West 2005); IOWA CODE ANN. § 490.1501(1) (West 1999); KAN. STAT. ANN. § 17-7931(a) (2007); KY. REV. STAT. ANN. § 14A.9-010(1) (West 2010); LA. STAT. ANN. § 12:301 (2010); ME. REV. STAT. ANN. tit. 13-C, § 1501(1) (2005); MD. CODE ANN., Corps &

utes? Generally, such statutes allow the state to protect its sovereignty by creating a mechanism to hold foreign corporations accountable when they do business within the state.<sup>258</sup> In analyzing the jurisdictional impact of registration statutes, courts tend to take one of three basic approaches:

- (1) corporate registration provides a basis for the exercise of general jurisdiction over a defendant;
- (2) corporate registration provides a basis for the exercise of specific jurisdiction over a defendant related to its in-state business activities; or
- (3) corporate registration provides a mechanism for effecting service of process over a defendant but provides no independent basis for the exercise of personal jurisdiction.<sup>259</sup>

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Ass'n's § 7-203(a) (West 2002); MASS. GEN. LAWS ANN. ch. 156D, § 15.01(a) (West 2005); MICH. COMP. LAWS ANN. § 450.2011 (West 2002); MINN. STAT. ANN. § 303.03 (West 2011); MISS. CODE ANN. § 79-4-15.01(a) (2013); MO. ANN. STAT. § 351.572(1) (West 2015); MONT. CODE ANN. § 35-1-1026(1) (2015); NEB. REV. STAT. § 21-20, 168(1) (Reissue 2012), *repealed by* NEB. REV. STAT. § 21-2,203(a) (Cum. Supp. 2015); NEV. REV. STAT. ANN. § 80.010(1) (LexisNexis 2010); N.H. REV. STAT. ANN. § 293-A:15.01(a) (2014); N.J. STAT. ANN. § 14A:13-3(1) (West 2003); N.M. STAT. ANN. § 53-17-1 (2015); N.Y. BUS. CORP. LAW § 1301(a) (McKinney 2003); N.C. GEN. STAT. § 55-15-01(a) (2013); N.D. CENT. CODE ANN. § 10-19.1-134 (West 2008); OHIO REV. CODE ANN. § 1703.03 (West 2009); OKLA. STAT. ANN. tit. 18, § 1130(B) (West 2012); OR. REV. STAT. § 60.701(1) (2013); 15 PA. STAT. AND CONS. STAT. ANN. § 4121(a) (West 2013), *repealed by* 15 PA. STAT. AND CONS. STAT. ANN. § 20302 (2013); 7 R.I. GEN. LAWS § 7-1.2-1401(a) (1999); S.C. CODE ANN. § 33-15-101(a) (2006); S.D. CODIFIED LAWS § 47-1A-1501 (2007); TENN. CODE ANN. § 48-25-101(a) (2012); TEX. BUS. ORGS. CODE ANN. § 9.001 (West 2012); UTAH CODE ANN. § 16-10a-1501(1) (LexisNexis 2013); VT. STAT. ANN. tit. 11A, § 15.01(a) (2010); VA. CODE ANN. § 13.1-757(A) (2011); WASH. REV. CODE § 23B.15.010(1) (2015); W. VA. CODE ANN. § 31D-15-1501(a) (West 2012); WIS. STAT. ANN. § 180.1501(1) (West 2002); WYO. STAT. ANN. § 17-16-1501(a) (2013).

258. See generally Monestier, *supra* note 256, at 1358–71; Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1164 (2003) (“Certainly, the increasing complexity of legal relationships makes clear the need for states to develop some regime of regulatory jurisdiction in order to ensure domestic accountability, and so renders registration or ‘qualification’ statutes generally unexceptionable.”).

259. Monestier, *supra* note 256, at 1369. As Professor Tanya Monestier has written in arguing that after *Daimler*, registration is not a valid basis for the exercise of general jurisdiction:

For those courts that subscribe to the view that corporate registration amounts to general jurisdiction, the reasoning usually focuses on the issue of consent—that by registering to do business pursuant to the state registration statute, a corporation has expressly consented to jurisdiction. Since consent is an independent basis for jurisdiction, separate and apart from minimum contacts, no additional due process analysis is necessary. The corporation’s consent, in itself, satisfies due process.

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

Courts not only are divided as to whether registration provides a basis for the exercise of general jurisdiction over a foreign corporation, but even where courts have concluded that registration does provide such a basis, a split remains as to why registration is a basis for the exercise of general jurisdiction over a foreign corporation.<sup>260</sup> As Professor Monestier points out, courts have articulated three rationales to support the position that registration provides a basis for the exercise of general jurisdiction over a foreign corporation:

The overwhelming majority of courts that view registration as conferring general jurisdiction justify their conclusion on the basis of consent—i.e., by taking steps to register under a state statute, the corporation has manifested its express consent to general jurisdiction. Some courts, however, justify the assertion of general jurisdiction on the basis of either “presence” or “minimum contacts.”<sup>261</sup>

The Court has previously addressed the issue of whether registration provides a sufficient basis for the exercise of general jurisdiction over a foreign corporation. In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, the Court held that a corporation had consented to personal jurisdiction within Missouri by obtaining a license to do business in that State.<sup>262</sup> The Court concluded that by obtaining the license to do business, the corporation had complied with a state statute requiring it to file a form indicating that service of process on a state agency would be deemed personal service upon the corporation.<sup>263</sup> On the issue of whether limitations existed as to the consent of the corporation, the Court looked to the relevant state statute and noted that the defendant appointed a statutory agent for service of process in compliance with a state statute that could rationally reach any and all lawsuits filed against the de-

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

*Id.* at 1369–71 (footnotes omitted).

260. *Id.* at 1359. Compare *Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 393–96 (D. Conn. 2014) (rejecting registration as a basis of personal jurisdiction), and *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 354–57 (D. Conn. 2011) (same), with *Talenti v. Morgan & Bro. Manhattan Storage Co., Inc.*, 968 A.2d 933, 940–41 (Conn. App. Ct. 2009) (holding that registration in Connecticut results in a defendant voluntarily consenting to personal jurisdiction, making a due process analysis unnecessary), and *Wallenta v. Avis Rent A Car Sys., Inc.*, 522 A.2d 820, 824 (Conn. App. Ct. 1987) (engaging in a due process analysis even after finding that the defendant consented to suit by registration).

261. Monestier, *supra* note 256, at 1371.

262. *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917).

263. *Id.*

fendant.<sup>264</sup> In reaching this conclusion, the Court rejected the argument made by the defendant that applying general personal jurisdiction based upon registration to do business in the state, appointment of an agent to receive service in the state, and actual service on the agent in the state violated the due process rights of the defendant.<sup>265</sup>

In *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, the Court clarified its holding in *Pennsylvania Fire* and explained that federal courts should first look to how state courts have interpreted state registration statutes to determine whether a corporation's compliance with the statute grants the court personal jurisdiction over the corporation:

The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. *Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court.* But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. . . . *Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by foreign corporations elsewhere.*<sup>266</sup>

The Supreme Court reaffirmed *Pennsylvania Fire* in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*<sup>267</sup> *Neirbo* did not address personal jurisdiction, but rather the issue of whether a defendant had waived the right to contest venue in a federal court after it had complied with a

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264. *Id.* at 95.

265. *Id.* In reaching this conclusion, Justice Holmes wrote:

The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert. *O'Neil v. Northern Colorado Irrig. Co.*, 242 U. S. 20, 26, 61 L. ed. 123, 37 Sup. Ct. Rep. 7. Other state laws have been construed in a similar way; e. g., *Bagdon v. Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, L.R.A.1916F, 407, 111 N. E. 1075; *Johnston v. Trade Ins. Co.*, 132 Mass. 432.

*Id.*

266. *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213, 215–16 (emphasis added) (citing *Pa. Fire Ins. Co.*, 243 U.S. at 93).

267. 308 U.S. 165 (1939).

state statute and appointed an agent for service.<sup>268</sup> Nonetheless, the *Neirbo* Court cited *Pennsylvania Fire* and noted that by complying with the statute, the defendant had committed a “voluntary act” and given “a real consent” to the effect that “service on the agent shall give jurisdiction of the person.”<sup>269</sup> Likewise, the defendant had waived its right to contest venue.<sup>270</sup> Moreover, the Court recognized that “state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case.”<sup>271</sup>

### B. Circuit Split: Pre-*Daimler*, Post-*International Shoe*

According to most federal circuit courts, a corporation’s compliance with a state registration statute *can* amount to that corporation consenting to personal jurisdiction in that state.<sup>272</sup> Registration statutes, however, vary from state to state. Thus, at this point, whether a corporation’s compliance with such a statute amounts to consent to personal jurisdiction hinges on the registration statute itself.<sup>273</sup> For example, a Pennsylvania statute expressly provides that “[q]ualification as a foreign corporation under the laws of this Commonwealth” “constitutes a sufficient basis of jurisdiction to enable to the tribunals of this Commonwealth to exercise general personal jurisdiction over such person . . . .”<sup>274</sup> Thus, by registering to do business in Pennsylvania and designating an agent for service of process, a corporation consents to the general jurisdiction of Pennsylvania courts.<sup>275</sup>

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268. *Id.* at 167, 175.

269. *Id.* at 172–75; *see also* *Forest Labs., Inc. v. Amneal Pharms., LLC*, No. 14-508-LPS, 2015 WL 880599, at \*8 (D. Del. Feb. 26, 2015) (quoting *Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 341–42 (1953) (explaining that “in *Neirbo*, the defendant had ‘designated an agent in New York’ upon whom a summons could be served in that State, and that this constituted an ‘actual consent’ to be sued in [the federal and state courts of] New York, not the [l]ess so because it was ‘part of the bargain by which [the defendant] enjoys the business freedom of the State of New York.’”). The *Forest Labs* court explained that *Olberding* “applied this logic to explain why the defendant had consented to *venue* in a particular court,” but noted that it could not “think of a reason why the same logic would not apply to the question of what amounts to ‘actual consent’ to personal jurisdiction.” *Id.*

270. *Neirbo*, 308 U.S. at 168, 175.

271. *Id.* at 175 (citing *Ex parte Schollenberger*, 96 U.S. 369, 377 (1877)).

272. *Forest Labs*, 2015 WL 880599, at \*9. However, various commentators have suggested that consent-by-registration cannot survive in a post-*Daimler* world. *See generally* Kevin Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609 (2015); Monestier, *supra* note 256, at 1372–1400.

273. *See Forest Labs*, 2015 WL 880599, at \*6.

274. *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (quoting 42 PA. CONS. STAT. ANN. § 5301 (West 1990)).

275. *Id.*

The Third Circuit held that such a statute is constitutional in *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991). In doing so, the Third Circuit noted that “[c]onsent is a traditional basis for assertion of jurisdiction long upheld as constitutional.”<sup>276</sup> The court also noted that “[b]y registering to do business in Pennsylvania, the [defendant] ‘purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’”<sup>277</sup> And thus it stated that it “need not decide whether authorization to do business in Pennsylvania is a ‘continuous and systematic’ contact with the Commonwealth for purposes of the dichotomy between ‘general’ and ‘specific’ jurisdiction because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts.”<sup>278</sup>

At least four other courts of appeals have upheld the constitutionality of construing state registration statutes to provide jurisdiction to courts in that state over corporations that comply with the statutes—registering to do business in the state and appointing an agent in the jurisdiction for service of process. In *Knowlton v. Allied Van Lines, Inc.*, the Eighth Circuit followed the Minnesota Supreme Court’s interpretation of the state’s registration statute and found that compliance with Minnesota’s registration statute amounts to consent to general jurisdiction in Minnesota.<sup>279</sup> Moreover, the court noted that “[t]he whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts.”<sup>280</sup> In *Holloway v. Wright & Morrissey, Inc.*, the First Circuit held likewise. It based its holding on a “natural reading” of New Hampshire’s registration statute and posited that “[i]t is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal

276. *Id.* at 641 (citing *Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927); *Dehne v. Hillman Inv. Co.*, 110 F.2d 456, 458 (3d Cir. 1940)).

277. *Id.* at 640 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Normally, consent jurisdiction does not involve questions of whether the defendant “purposefully availed itself of the privilege of conducting activities within the forum State.” Nonetheless, the notion that by registering to do business a corporation is gaining the benefit of state laws only furthers the province of consent to jurisdiction by registration. *See, e.g.*, *Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 341–42 (1953) (explaining that in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), the defendant had “designated an agent in New York” upon whom a summons could be served in that State, and that this “constituted an ‘actual consent’ to be sued in [the federal and state courts of] New York, not the less so because it was ‘part of the bargain by which [the defendant] enjoys the business freedom of the State of New York.’” (emphasis added)).

278. *Bane*, 925 F.2d at 640.

279. *Knowlton v. Allied Van Lines Inc.*, 900 F.2d 1196, 1199–1200 (8th Cir. 1990).

280. *Id.* at 1199.

jurisdiction in any action that is within the scope of the agent's authority."<sup>281</sup>

The two remaining circuits appear to agree in principle with the holdings of the First, Third, and Eighth Circuits in analyzing relevant state court precedent. However, these circuits ultimately held that jurisdiction was not proper under the facts presented.<sup>282</sup> In *King v. American Family Mutual Insurance Co.*, much like the approach of circuit courts discussed above, the Ninth Circuit noted that, "Federal courts must, subject to federal constitutional restraints, look to state statutes and case law in order to determine whether a foreign corporation is subject to personal jurisdiction in a given case because the corporation has appointed an agent for service of process."<sup>283</sup> The court, however, concluded that "[t]he Montana law regarding appointment of an agent for service of process does not, standing alone, subject foreign corporations to jurisdiction in Montana for acts performed outside of Montana, at least when the corporations transact no business in the state."<sup>284</sup> Similarly, in *Wenche Siemer v. Learjet Acquisition Corp.*, the Fifth Circuit looked to state case law interpreting Texas' registration statute and found that "[n]o Texas state court decision has held that this provision acts as a consent to jurisdiction over a corporation in a case such as ours—that is where plaintiffs are non-residents and the defendant is not conducting substantial activity within the state."<sup>285</sup>

Only three circuits have held that compliance with a state registration requirement cannot be the basis for finding that a corporation consented to general jurisdiction.<sup>286</sup> First, in *Consolidated Development Corp. v. Sherritt, Inc.*, the Eleventh Circuit held that under *International Shoe* appointment of an agent for service of process is not enough to provide a court with general personal jurisdiction over a

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281. *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984).

282. *Forest Labs., Inc. v. Amneal Pharms., LLC*, No. 14-508-LPS, 2015 WL 880599, at \*9 (D. Del. Feb. 26, 2015) ("Two other Circuits appear to have come to the same conclusion, but have gone on to analyze state court precedent and ultimately determine that consent had not been granted in the instant cases, since the scope of the particular state registration statutes at issue was not broad enough to cover the type of legal claims implicated in the case.")

283. *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 576 (9th Cir. 2011) (stating that "*Pennsylvania Fire, Chipman, and Robert Mitchell* collectively stand for [this] proposition").

284. *Id.* at 578.

285. *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992).

286. *But see Forest Labs.*, 2015 WL 880599, at \*9 (noting that "none of those opinions directly address the issue of consent—i.e., why compliance with such a statute could not, under any circumstances, amount to the kind of consent to jurisdiction referenced in" *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917), *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213 (1921), and *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)).

corporation.<sup>287</sup> Second, in *Wilson v. Humphreys (Cayman) Ltd.*, the Seventh Circuit noted that “[r]egistering to do business is a necessary precursor to engaging in business activities in the forum state.”<sup>288</sup> However, the court held that registration alone “[c]annot satisfy . . . the demands of due process.”<sup>289</sup> Moreover, the court stated that “[s]uch an interpretation of the [relevant state registration statute] would render [the statute] constitutionally suspect.”<sup>290</sup> Last, in *Ratliff v. Cooper Labs, Inc.*, the Fourth Circuit found that “[t]he principles of due process require a firmer foundation than mere compliance with state domestication statutes.”<sup>291</sup>

After a review of these circuit court cases, one is left with uncertainty as to the state of personal jurisdiction jurisprudence in the context of registration statutes. Much of a federal court’s analysis depends on the text of the relevant statute and the holdings of state courts interpreting the statutes, which leads to varied results. For example, in addition to the fact that a corporation has registered to do business, is the court to consider the level of business a corporation conducts in the forum state?<sup>292</sup> Is the court to evaluate its assertion of jurisdiction according to the standards of *International Shoe* and consider issues of fundamental fairness, or is consent-based jurisdiction analysis separate from *International Shoe* analysis?<sup>293</sup> Moreover, did the Supreme Court’s decision in *Daimler* change the circuit court opinions discussed above?

In order to begin to answer these questions, one must look to federal court opinions rendered after *Daimler*. This Article reviews numerous cases that have addressed whether compliance with registration statutes amounts to consent to personal jurisdiction.

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287. *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000).

288. *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990).

289. *Id.*

290. *Id.*

291. *Ratliff v. Cooper Labs, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971).

292. As noted by Benish, *supra* note 272, at 1638, some “early twentieth-century proceduralists” viewed Supreme Court cases like *Pennsylvania Fire*, which is discussed below, as being grounded in a theory of “doing business” jurisdiction, rather than consent jurisdiction. Moreover, in *Chipman, Ltd. v. Thomas B. Jeffrey Co.*, 251 U.S. 373 (1920), the Court distinguished the facts before it from prior cases because the foreign corporation at issue was no longer doing business in New York. Nonetheless, as discussed more below, circuit courts are not as sure that doing business jurisdiction and consent jurisdiction are the same. Indeed, it may be possible to consent to jurisdiction through multiple acts—registering to do business in a jurisdiction via compliance with a registration statute and then actually doing business in that jurisdiction.

293. See Freer, *supra* note 11, at \*6 (noting that “in *Daimler*, the Court needlessly concluded that the assessment of general jurisdiction does not entail consideration of fairness factors.”). However, the question remains as to whether fairness factors can and should be considered when addressing consent to general jurisdiction.



However, this discussion will be instructed by two particular cases, both from the United States District Court for the District of Delaware, both involving substantially the same defendants, and each reaching different results—*Forest Laboratories, Inc. v. Amneal Pharmaceuticals LLC* (“*Forest Labs*”)<sup>294</sup> and *AstraZeneca AB v. Mylan Pharmaceuticals Inc.* (“*AstraZeneca*”).<sup>295</sup>

### C. Post-*Daimler* Cases Concluding that Consent-By-Registration Is a Valid Basis for the Exercise of Personal Jurisdiction

Before delving into the court’s analysis, it is important to consider briefly the relevant jurisdictional facts.<sup>296</sup> The defendant challenging the court’s exercise of personal jurisdiction—Mylan Pharmaceuticals (“Mylan”)—was a West Virginia corporation with its principal place of business in Morgantown, West Virginia.<sup>297</sup> Mylan manufactured and distributed generic drugs throughout the United States.<sup>298</sup> It was registered to transact business in Delaware.<sup>299</sup> However, Mylan had no facilities or offices in Delaware.<sup>300</sup> None of its employees or officers was located in Delaware.<sup>301</sup> Moreover, its net sales in Delaware for the relevant year were zero.<sup>302</sup>

The court in *Forest Labs* entertained multiple jurisdictional issues. However, this Article will only address the court’s discussion of whether Mylan’s compliance with Delaware’s registration statute amounted to Mylan consenting to Delaware courts having general personal jurisdiction over it. The court started its analysis by noting, by way of a heading, that “Supreme Court precedent prior to *Daimler* supports the theory that a foreign corporation may consent to general jurisdiction, and may do so by way of compliance with a state registration statute requiring appointment of an agent for service of process.”<sup>303</sup>

The court consulted multiple cases and other authority to reach the above conclusion. First, it briefly addressed the history of the Supreme Court’s personal jurisdiction jurisprudence.<sup>304</sup> In reference to

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294. *Forest Labs., Inc. v. Amneal Pharms., LLC*, No. 14-508-LPS, 2015 WL 880599 (D. Del. Feb. 26, 2015).

295. *AstraZeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549 (D. Del. 2014).

296. The jurisdictional facts of *Forest Labs* and *AstraZeneca* are essentially the same.

297. *Forest Labs.*, 2015 WL 880599, at \*1.

298. *Id.*

299. Mylan was also registered to do business in twenty-one other states at the time of the court’s opinion. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at \*3.

304. *Id.* at \*4.

the “strict territorial approach” of *Pennoyer v. Neff*, which required one to either consent or be physically present in the forum before jurisdiction was present, the court noted that the “presence standard could be easily applied to individuals, but its application to a corporation was more difficult.”<sup>305</sup> Therefore, “[s]ome states solved [the] problem by requiring a foreign corporation to consent to general jurisdiction by the appointment of an agent for the service of process.”<sup>306</sup> Such a sentiment undoubtedly informs the analysis surrounding modern-day registration statutes.

Next, the court recognized the obvious—*International Shoe* forever changed personal jurisdiction jurisprudence.<sup>307</sup> However, neither party disputed that, “after *International Shoe*, consent remained a valid basis upon which a Court could obtain personal jurisdiction over a person or corporation, and that a party could consent to personal jurisdiction in a state in a number of ways.”<sup>308</sup> The court even declared that “[t]he language of the opinion in *International Shoe* itself, for example, makes clear that there, the Supreme Court did *not* intend to abolish the concept that a party could consent to personal jurisdiction.”<sup>309</sup>

The court also noted that, post-*International Shoe*, the Supreme Court has held that a party may consent to personal jurisdiction.<sup>310</sup> For example, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, the Supreme Court found that because “the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”<sup>311</sup> Moreover, such waiver can occur through a “variety of legal arrangements [that] have been taken to represent express or implied consent to the personal jurisdiction of the court.”<sup>312</sup> These arrangements include “state procedures which find constructive consent to the personal jurisdiction of the state court in

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305. *Id.* (citing 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE—CIVIL § 108.23 (2012)).

306. *Id.* (citing 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE—CIVIL § 108.23 (2012)).

307. *Id.* (noting that “[t]he Supreme Court cast aside these fictions in *International Shoe*”) (citing *Burnham v. Superior Court*, 495 U.S. 604, 604 (1990) (plurality opinion of Scalia, J.)).

308. *Id.*

309. *Id.* (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (“discussing, as prelude to the decision, certain circumstances in which a corporation’s contacts with the state are deemed to be continuous and systematic, and noting that this discussion related to cases where ‘no consent to be sued or authorization to an agent to accept service of process has been given.’”).

310. *Id.* at \*5 (noting that “the Supreme Court went on to emphasize in a number of subsequent cases that a party may consent to personal jurisdiction where such jurisdiction might otherwise not exist.”).

311. *Id.* (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982)).

312. *Id.* (quoting *Ins. Corp. of Ir.*, 456 U.S. at 704).

the voluntary use of certain state procedures”—e.g., state registration statutes.<sup>313</sup>

After considering *International Shoe* and *Insurance Corp. of Ireland*, the court was satisfied that a party could still validly consent to personal jurisdiction.<sup>314</sup> Nevertheless, the question of whether a corporation could consent to personal jurisdiction through compliance with a state registration statute remained.<sup>315</sup> To answer this question, the court first looked to Supreme Court decisions rendered before *International Shoe* that discussed personal jurisdiction in the context of registration statutes.<sup>316</sup>

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313. *Id.*

314. *Id.* at \*6.

315. *Id.* (“If it is clear that a party can consent to personal jurisdiction, then the next question becomes whether *one of the ways* in which such consent can be manifested is when a corporation complies with a state registration statute like the one at issue here? On that score, the Court has to conclude that, prior to *International Shoe*, the Supreme Court’s answer to this question was ‘yes.’”).

316. *Id.* (citing *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917)). Similar to the circuit court opinions discussed above, in *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, the Court clarified its holding in *Pennsylvania Fire* and explained that federal courts should first look to how state courts have interpreted state registration statutes to determine whether a corporation’s compliance with the statute grants the court personal jurisdiction over the corporation:

The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. *Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court.* But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one . . . . *Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere . . . .*

*Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213 at 215–16 (emphasis added) (citations omitted) (citing *Pa. Fire Ins. Co.*, 243 U.S. at 93). The Supreme Court then reaffirmed *Pennsylvania Fire* in *Neirbo Co. v. Bethlehem Shipbuilding Corp. Forest Labs.*, 2015 WL 880599, at \*6 (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)). *Neirbo* did not address personal jurisdiction, but rather the issue of whether a defendant had waived the right to contest venue in a federal court after it had complied with a state statute and appointed an agent for service. *Id.* (citing *Neirbo*, 308 U.S. at 167, 175). Nonetheless, the *Neirbo* Court cited *Pennsylvania Fire* and noted that by complying with the statute, the defendant had committed a “voluntary act” and given “a real consent” to the effect that “service on the agent shall give jurisdiction of the person.” *Id.* (quoting *Neirbo*, 308 U.S. at 172–75); *Id.* (quoting *Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 341–42 (1953) (explaining that in *Neirbo*, the defendant had “designated an agent in New York” upon whom a summons could be served in that State, and that this “constituted an ‘actual consent’ to be sued in [the federal and state courts of] New York, not the [less so because it was ‘part of the bargain by which [the defendant] enjoys the business freedom of the State of

As stated above, in *Forest Labs*, Mylan did not dispute the fact that consent to personal jurisdiction remained valid after *International Shoe*. Mylan, however, did argue that the “consent-by-registration approach . . . [could not] be squared with *International Shoe*, which changed the focus of the jurisdictional inquiry from one based on a defendant’s ‘physical presence’ in the forum State to one based on ‘substantial contacts[,]’ ‘fair play and substantial justice,’ and ‘fundamental fairness.’”<sup>317</sup> The court, however, disagreed with Mylan. According to the court, for Mylan’s argument to hold water, *International Shoe* had to overrule cases like *Pennsylvania Fire* and *Neirbo*, and the court concluded that *International Shoe* neither explicitly nor implicitly did so.<sup>318</sup>

Mylan’s most compelling argument—that *International Shoe* implicitly overruled cases like *Pennsylvania Fire* and *Neirbo*—was taken from *Shaffer v. Heitner*, in which the Supreme Court stated that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”<sup>319</sup> The court, however, was “not convinced that this portion of *Shaffer* was intended to address situations in which a party affirmatively consents to personal jurisdiction.”<sup>320</sup> The court noted that “*Shaffer* addressed the vitality of *quasi in rem* jurisdiction; it did not specifically address the question of consent to personal jurisdiction, nor the concept of general jurisdiction.”<sup>321</sup> The court bolstered this conclusion with Justice Scalia’s plurality opinion in *Burnham*, from which it gleaned that “the statement from *Shaffer* was meant only to indicate that *quasi in rem* jurisdiction ‘must satisfy the litigation-relatedness requirement of *International Shoe*.’”<sup>322</sup> Moreover, the court referenced *Bendix Autolite Corp. v. Midwesco Ents., Inc.*, a decision rendered well after *Shaffer* in which “the Supreme Court again suggested that appointment of an

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New York.”). The *Forest Labs* court explained that *Olberding* “applied this logic to explain why the defendant had consented to *venue* in a particular court,” but noted that it could not “think of a reason why the same logic would not apply to the question of what amounts to ‘actual consent’ to personal jurisdiction.” *Id.* Likewise, the court recognized how a defendant could waive its right to contest venue in a similar manner. *Id.* at \*8 (citing *Neirbo*, 308 U.S. at 167, 175). Moreover, the Court recognized that “state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case.” *Id.* at \*6 (quoting *Neirbo*, 308 U.S. 172–75).

317. *Forest Labs.*, 2015 WL 880599, at \*7.

318. *Id.*

319. *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)).

320. *Id.*; see also *Acorda Therapeutics, Inc. v. Mylan Pharms., Inc.*, 73 F. Supp. 3d 572, 589 n. 13 (D. Del. 2015) (distinguishing *Shaffer* because it did not “apply to situations in which a defendant has consented to jurisdiction, or has otherwise waived the requirement of personal jurisdiction”).

321. *Forest Labs.*, 2015 WL 880599, at \*7 (citing *Shaffer*, 433 U.S. at 212–16).

322. *Id.* (quoting *Burnham v. Superior Court*, 495 U.S. 604, 620–21 (1990) (plurality opinion of Scalia, J.)).

agent for service of process can amount to consent to general jurisdiction.”<sup>323</sup>

Through its review of circuit court cases and Supreme Court cases pre and post-*International Shoe*, the court formulated a three-part conclusion regarding consent-by-registration:

- (1) if a foreign corporation designated an agent for service of process in compliance with a state registration statute of the kind at issue here, and (2) if the statute’s text (as further interpreted by the courts of that state) was broad enough to encompass service of process as to the type of lawsuit at issue, then (3) the corporation, by complying with the state statute, had demonstrated actual, voluntary consent to personal jurisdiction in the state’s courts with regard to that particular suit.<sup>324</sup>

The court next turned to the state registration scheme at issue, specifically sections 376 and 371 of the Delaware Code. Section 376 provides that:

- (a) All process issued out of any court of this State, all orders made by any court of this State, all rules and notices of any kind required to be served on any foreign corporation which has qualified to do business in this State may be served on the registered agent of the corporation designated in accordance with § 371 of this title, or, if there be no such agent, then on any officer, director or other agent of the corporation then in this State.<sup>325</sup>

Meanwhile, section 371 states that “[n]o foreign corporation shall do any business in this State . . . until it shall have paid the Secretary of State of this State for the use of this State, \$80, and shall have filed in the office of the Secretary of State . . . [a] statement . . . setting forth (i) the name and address of its registered agent in this State . . . .”<sup>326</sup>

Neither section 371 nor section 376 of the Delaware Code explains the scope of the Delaware registration scheme—for what type of ac-

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323. *Id.* (citing *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 889 (1988) (“To be present in Ohio, a foreign corporation must appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts.”)).

324. *Id.* at \*6 (citing *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 573–74 (9th Cir. 2011)); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44 cmt. c (AM. LAW. INST. 1971) (“If a corporation has authorized an agent or a public official to accept service of process in actions brought against it in the state, the extent of the authority thereby conferred is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given. It is a question of interpretation whether the authority extends to all causes of action or is limited to causes of action arising from business done in the state . . . . *By qualifying under one of these statutes, the corporation renders itself subject to whatever suits may be brought against it within the terms of the statutory consent as interpreted by the local courts provided that this interpretation is one that may fairly be drawn from the language of the enactment.*” (emphasis added)).

325. *Forest Labs.*, 2015 WL 880599, at \*10 (quoting DEL. CODE ANN. tit. 8, § 376 (West 2016)).

326. *Id.* (quoting DEL. CODE ANN. tit. 8, § 371 (West 2016)).

tions registration of an agent for service is effective.<sup>327</sup> In line with its three-part conclusion and because the statute itself was silent, the court looked to state court interpretations of the statute to determine whether it was broad enough to encompass service of process as to the type of lawsuit at issue.<sup>328</sup>

Luckily, the Delaware Supreme Court had already interpreted the breadth of the statute. In *Sternberg v. O'Neil*, the Delaware Supreme Court concluded that “when [a defendant corporation] qualify[es] as a foreign corporation, pursuant to 8 Del. C. § 371, and appoint[s] a registered agent for service of process, pursuant to 8 Del. C. § 376, [it] consent[s] to the exercise of general jurisdiction by the Courts of Delaware.”<sup>329</sup> In reaching its conclusion, the *Sternberg* Court compared sections 371 and 376 to section 382 of the Delaware registration statute, which the court characterized as a long-arm statute.<sup>330</sup> Through section 382, a corporation transacting business in Delaware *implicitly* consents to the jurisdiction of Delaware courts.<sup>331</sup> On the other hand, in reference to *Pennsylvania Fire* and *Neirbo*, the *Sternberg* court explained that a corporation *expressly* consents to the jurisdiction of Delaware courts when it appoints an agent for service of process under section 376.<sup>332</sup>

The *Sternberg* court was also mindful of the Supreme Court’s statement in *Shaffer* that “all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”<sup>333</sup> But *Shaffer* did not alter the court’s conclusion. It concluded that the statement from *Shaffer*, “read in context, . . . stands for the proposition that *all assertions* of state court jurisdiction *based upon legal fictions* must be evaluated according to the standards set forth in *International Shoe*.”<sup>334</sup> Because the corporation in *Sternberg* had complied with the registration statute and thus *expressly* consented to jurisdiction, the court concluded that no minimum contacts analysis was required.<sup>335</sup>

Naturally, and regardless of the scope of the registration statute at issue, before one can argue that a corporation has consented to personal jurisdiction through compliance with a registration statute, it must be established that the corporation actually complied with the

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327. *Id.*

328. *Id.* at \*10–11.

329. *Id.* at \*11 (quoting *Sternberg v. O'Neil*, 550 A.2d 1105, 1115 (Del. 1988)).

330. *Id.* at \*10 (citing *Sternberg*, 550 A.2d at 1115–16).

331. *Id.*

332. *Id.* (citing *Sternberg*, 550 A.2d at 1116).

333. *Id.* at \*11 (citing *Sternberg*, 550 A.2d at 1116).

334. *Id.*

335. *Id.* (quoting *Sternberg*, 550 A.2d at 1116–17).

registration statute.<sup>336</sup> In *Forest Labs*, Mylan had been registered to do business in Delaware since at least April 2010—when it complied with the Delaware registration statute and appointed an agent in Delaware to accept service.<sup>337</sup>

Instead of contesting this, Mylan argued that even if it was “possible for the mere act of registering to transact business in a State to confer general jurisdiction, the *Sternberg* court’s interpretation of the Delaware registration statute [was] unconstitutional.”<sup>338</sup> Mylan suggested that the registration statute must expressly state that through compliance with the statute a corporation consents to personal jurisdiction in all cases.<sup>339</sup> Otherwise, according to Mylan, a corporation would not have adequate notice of the “consequences flowing from the decision to register.”<sup>340</sup>

The court again was not persuaded. It noted that the *Sternberg* decision was issued twenty-two years before Mylan registered to do business in Delaware, and that the Supreme Court has “[r]epeatedly made it clear exactly where a corporation like Mylan should look to obtain ‘notice’ as to the impact such registration could have on questions of personal jurisdiction—to both the registration statute’s text, and to the interpretation given to that text by the State’s highest court.”<sup>341</sup> Therefore, the court could not envision how Mylan would be taken by surprise if sued in Delaware after complying with the registration statute.<sup>342</sup> Moreover, the court noted that “[i]n at least such a circumstance, [it could not] see how maintenance of the suit would offend traditional notions of fair play and substantial justice on ‘notice’ grounds.”<sup>343</sup>

The court’s last battle was whether, given all of the above, *Daimler* changed things.<sup>344</sup> Mylan argued that regardless of whether consent-

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336. See *id.* at \*6; see also *Novartis Pharms. Corp. v. Zydus Noveltech Inc.*, No. 14-cv-1104-RGA, 2015 WL 4720578, at \*4 (D. Del. Aug. 7, 2015) (stating that “Defendant has not registered to do business in Delaware, and thus no consent to general jurisdiction similar to that in *Acorda* can be found.”).

337. *Forest Labs.*, 2015 WL 880599, at \*12.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* (citing *Sternberg*, 550 A.2d at 1115) (“*Robert Mitchell* thus confirms that federal courts should look first and foremost to a state’s construction of its own statute to determine whether appointment of an agent for service of process is a sufficient basis for the exercise of personal jurisdiction over a foreign corporation.” (quoting *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921); *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 575 (9th Cir. 2011))).

342. *Id.*

343. *Id.* (citing *Acorda Therapeutics, Inc. v. Mylan Pharms., Inc.*, 73 F. Supp. 3d 572 (D. Del. 2015)); cf. *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008)).

344. See discussion *supra* section VI.B for a discussion of *Daimler*.

by-registration was valid beforehand, the Supreme Court's opinion in *Daimler* rendered it *invalid*.<sup>345</sup> Once again, the court disagreed and found that *Daimler* *did not* change the law regarding consent to general jurisdiction.<sup>346</sup>

While Mylan contended that *Daimler* eviscerated the kind of consent jurisdiction discussed in *Pennsylvania Fire*, the *Daimler* Court never stated that it was overruling *Pennsylvania Fire* or cases that came after it, like *Neirbo*.<sup>347</sup> In fact, the *Daimler* opinion never mentioned those cases.<sup>348</sup> The court in *Forest Labs* noted that *Daimler* brought up the concept of consent jurisdiction only once—and in a way that hurt Mylan's argument.<sup>349</sup> In *Daimler*, the Court “[r]eferred to (and relie[d] on) *Perkins v. Benguet Consolidated Mining Co.* as ‘the textbook case of *general jurisdiction* appropriately exercised over a foreign corporation that *has not consented to suit in the forum.*’”<sup>350</sup> Thus, the “one instance in which *Daimler* mention[ed] consent to jurisdiction—in the context of a discussion regarding general jurisdiction—it [did] so to *distinguish* the concept of consent from the circumstances relevant to its decision.”<sup>351</sup> Overall, the district court found it hard to read *Daimler* as overruling “nearly century-old Supreme Court precedent” when “(1) *Daimler* never says it is doing any such thing; and (2) what *Daimler* does say about consent to jurisdiction suggests just the opposite.”<sup>352</sup>

Mylan took the drastic position that, after *Daimler*, corporations could never consent to general jurisdiction.<sup>353</sup> Of course, the court smoked out Mylan's position and eventually Mylan agreed that a corporation could consent to general jurisdiction by contract.<sup>354</sup> Nonetheless, Mylan rightfully attempted to distinguish contractual consent from consent-by-registration.<sup>355</sup> The court agreed that consent-by-registration was “different,” but it ultimately found that, in light of Supreme Court precedent like *Pennsylvania Fire*, “differences in the

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345. *Forest Labs.*, 2015 WL 880599, at \*13.

346. *Id.* at \*12–13.

347. *Id.* at \*13.

348. *Id.*

349. *Id.*

350. *Id.* (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 755–76 (2014)).

351. *Id.*

352. *Id.* at \*13 n.15 (citing *Gucci Am., Inc., v. Weixing Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014); *Tiffany (NJ) LLC v. China Merchs. Bank*, 589 Fed. Appx. 550, 553 (2d Cir. 2014) (noting that “perhaps for this reason, the United States Court of Appeals for the Second Circuit has suggested, post-*Daimler*, that a district court should consider whether a party has consented to personal jurisdiction in New York by applying for authorization to do business in New York and thus designating the New York Secretary of State as its agent for service of process.”)

353. *Id.* at \*13–14.

354. *Id.* at \*14.

355. *Id.*



*form* of consent should not make a difference in the outcome [of the case]” because “[consent-by-registration] is a valid form of ‘real consent’ to personal jurisdiction—one just as valid as consent by contract.”<sup>356</sup>

Mylan also argued that “if registration alone made [it] ‘at home’ in Delaware,” then it would also be at home in the twenty-one other states in which it was registered to do business.<sup>357</sup> A result, according to Mylan, that “*Daimler* addressed and rejected.”<sup>358</sup> The court conceded that if others adopted its rationale, “Mylan could be subject to personal jurisdiction in many states around the country (as to at least certain legal actions).”<sup>359</sup> Nevertheless, the court found that Mylan’s argument “ignore[d] the different and unique role that consent plays in the personal jurisdiction analysis.”<sup>360</sup> The court noted that it was not suggesting that Mylan was “essentially at home” in Delaware—this is of course in response to *Daimler*’s mandate that corporations must be “essentially at home” to be subject to general jurisdiction, and its position that corporations cannot be “at home” in many different states.<sup>361</sup> Rather, for jurisdictional purposes, the court stated that Mylan was “at home” in likely one state only—West Virginia.<sup>362</sup> The court explained, however, that “even if it is at home in only one State, surely Mylan can freely agree to be subject to personal jurisdiction in other states—so long as that consent is knowing and voluntary in the eyes of the law.”<sup>363</sup>

*Forest Laboratories* provides a comprehensive analysis of how consent-by-registration works and why it remains a valid basis for personal jurisdiction after *Daimler*. However, there are still a few other cases worth considering—*Hoffman v. McGraw-Hill Finance Inc.*, *Senju Pharmaceutical Co. Ltd. v. Metrics Inc.*, and *Otsuka Pharmaceutical Co. Ltd. v. Mylan Inc.*

Unlike the other cases considered in this part, *Hoffman* is a New Jersey state court case holding that consent-by-registration is valid post-*Daimler*. In *Hoffman*, the plaintiffs argued that the defendants consented to personal jurisdiction in New Jersey by registering to do business there and appointing an agent for service of process.<sup>364</sup> Predictably, the defendants responded by invoking *Daimler* and argued that because merely doing business in a state is not enough to confer

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356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Hoffman v. McGraw-Hill Fin., Inc.*, No. ESX-C-216-13, 2014 WL 7639158, at \*4 (N.J. Super. Ct. Ch. Div. Dec. 31, 2014).

jurisdiction over a corporation in that state, “then merely registering to conduct business within a state can no longer be a basis for exercising personal jurisdiction.”<sup>365</sup> The defendants then cited *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.* (discussed below) for the proposition that finding jurisdiction based on compliance with a registration statute would be “specifically at odds with *Daimler*.”<sup>366</sup>

The court disagreed with the holding of *AstraZeneca*.<sup>367</sup> In doing so, it adopted the view taken by the United States District Court for the Southern District of New York in *Beach v. Citigroup Alternative Investments LLC*.<sup>368</sup> In *Beach*, the court “held that notwithstanding *Daimler*’s holding that a state may assert general jurisdiction only when the defendant corporation is at home in that state, a corporation may nevertheless consent to jurisdiction by registering as a foreign corporation and designating a local agent to accept service of process under New York’s corporation law.”<sup>369</sup> This only furthers the notion that while *Daimler* undoubtedly narrows the reach of general jurisdiction, it has nothing to do with personal jurisdiction based on consent.<sup>370</sup>

*Senju* is a case from the United States District Court for the District of New Jersey. Like *Forest Labs* and *Hoffman*, the court found that *Daimler* had no effect on consent-by-registration.<sup>371</sup> Unlike those cases, however, *Senju* explored in greater depth how *Burnham*

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365. *Id.* at \*5.

366. *Id.*

367. *Id.* at \*6. The court also invoked *Goodyear* and noted that in reaching its conclusion “that North Carolina could not exercise jurisdiction over the defendant, the Supreme Court specifically considered the fact that the defendant was not registered to do business in North Carolina.” *Id.* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852 (2011)).

368. *Id.*

369. *Id.* (citing *Beach v. Citigroup Alt. Invs. LLC*, No. 12 Civ. 7717(PKC), 2014 U.S. Dist. LEXIS 30032 (S.D.N.Y. Mar. 7, 2014)).

370. *Id.* (quoting *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/12, 2014 N.Y. Misc. LEXIS 3554, at \*8 (N.Y. Sup. Ct. Aug. 5, 2014)) (“[a]lthough *Daimler* clearly narrows the reach of New York courts in terms of its exercise of *general jurisdiction* over foreign entities, it does not change the law with respect to personal jurisdiction based on *consent*.”); *id.* (“[I]n *Daimler*, while the Court held that merely conducting business within a state is not enough to confer general jurisdiction, the Supreme Court was concerned *only* with whether California could properly exercise *general jurisdiction* over the defendants. As such, the Court was tasked with determining whether the defendants’ contacts with California were sufficiently continuous and systematic so as to render the defendants essentially at home in California. The Court did not, however, analyze the separate and distinct issue of whether the defendants had *consented* to jurisdiction in California.”); *see also* *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (explaining the district court had only considered general jurisdiction and not consent to jurisdiction).

371. *Senju Pharms., Co., Ltd. v. Metrics Inc.*, 96 F. Supp. 3d 428, 427 (D.N.J. 2015) (“Contrary to Defendants’ contention, [*Daimler*], did not disturb the consent-by-in-state service rule described in *Burnham*.”).

affected the issue. The court noted that *Burnham* “explained that the long-standing in-state service rule does not require an independent inquiry into whether ‘traditional notions of fair play and substantial justice’ were observed, because ‘a doctrine that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.’”<sup>372</sup> Moreover, the court pointed out that the *Burnham* court “explicitly stated that the in-state service rule ‘remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government.’”<sup>373</sup> In doing so, the *Burnham* court cited a string of cases “[i]ncluding, importantly, some applying the in-state service rule to foreign corporate defendants accepting service by agent.”<sup>374</sup>

*Otsuka* is another case from the District of New Jersey that addresses consent-by-registration.<sup>375</sup> Again, like the preceding cases, *Otsuka* treated consent jurisdiction as a doctrine separate from the *International Shoe* analysis.<sup>376</sup> The court even went as far as saying that it “need not belabor [defendant’s] arguments, because it cannot be genuinely disputed that consent, whether by registration or otherwise, remains a valid basis for personal jurisdiction following *International Shoe* and *Daimler*.”<sup>377</sup> Ultimately, like in *Forest Labs*, the court found in review of Supreme Court and circuit court opinions “[c]lear confirmation that designation 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.”<sup>378</sup>

In its conclusion, the *Otsuka* court held that the defendants “consented to the Court’s jurisdiction by registering to do business in New Jersey, by appointing an in-state agent for service of process in New Jersey, and by actually engaging in a substantial amount of business in this State.”<sup>379</sup> While the level of business that a corporation en-

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372. *Id.* (quoting *Burnham v. Superior Court*, 495 U.S. 604, 628, 640 (1990)).

373. *Id.* (quoting *Burnham*, 495 U.S. at 615–16).

374. *Id.* (citing *Burnham*, 495 U.S. at 615–16).

375. Like *Forest Labs* and *AstraZenca*, it involved Mylan Pharmaceuticals.

376. See *Otsuka Pharm. Co., Ltd. v. Mylan Inc.*, 106 F. Supp. 3d 456, 467 (D.N.J. 2015) (“*International Shoe* itself clearly reflects that the Supreme Court’s jurisdictional determinations related to cases where ‘no consent to be sued or authorization to an agent to accept service of process has been given.’” (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945))).

377. *Id.*

378. *Id.* at 468 (citing *Forest Labs., v. Amneal Pharms. LLC*, No. 14–508–LPS, 2015 WL 880599, at \*6 (D. Del. Feb. 26, 2015)) (noting that, in *Robert Mitchell*, the Supreme Court “emphasized that, in appointing an agent, a foreign corporation ‘takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court.’” (quoting *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921))).

379. *Id.* at 470 (emphasis added).

gaged in within the forum state normally would play no role in consent-by-registration analysis, the court so noted in order to refute the defendants' reliance on prior District of New Jersey cases and *Ratliff v. Cooper Labs., Inc.*, a Fourth Circuit case.<sup>380</sup> In those cases, the courts found that a corporation's compliance with the New Jersey registration statute was insufficient to confer general jurisdiction in the absence of evidence that the corporation conducted business in New Jersey.<sup>381</sup>

Most recently, in *In re Syngenta AG MIR 162 Corn Litigation* ("*In re Syngenta*"), the United States District Court for the District of Kansas concluded that consent through registration remains a valid basis for a court to exercise personal jurisdiction over a foreign corporate defendant after *Daimler*.<sup>382</sup> In *In re Syngenta*, two corporate defendants, Syngenta Seeds, LLC and Syngenta Crop Protection, LLC, while having offices and employees in Kansas, were neither incorporated in Kansas nor had their principal place of business in Kansas.<sup>383</sup> However, both had registered to do business in Kansas under the Kansas registration statute.<sup>384</sup> The defendant corporations moved to dismiss

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380. *Id.* at 470 n.14.

381. The fact that a corporation is registered and engaging in a substantial amount of business in a state would appear to change the outcome of cases like *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570 (9th Cir. 2011) and *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), which are discussed above.

382. *In re Syngenta AG MIR 162 Corn Litigation*, No. 14-md-2591-JWL, 2016 WL 1047996, at \*3 (D. Kan. Mar. 11, 2016).

383. *Id.* at \*1.

384. *Id.* The relevant portion of the Kansas registration statute states:

Before doing business in the state of Kansas, a foreign covered entity shall register with the secretary of state. In order to register, a foreign covered entity shall submit to the secretary of state, together with payment of a fee if authorized by law, as provided by K.S.A. 17-7910, and amendments thereto, an original copy executed by a governor, of an application for registration as a foreign covered entity, setting forth:

- (a) The name of the foreign covered entity;
- (b) the state or other jurisdiction or country where organized;
- (c) the date of its organization;
- (d) a statement issued within 90 days of the date of application by the proper officer of the jurisdiction where such foreign entity is organized, or by a third-party agent authorized by such proper officer, that the foreign covered entity exists in good standing under the laws of the jurisdiction of its organization;
- (e) the nature of the business or purposes to be conducted or promoted in the state of Kansas, including whether the covered entity operates for-profit or not-for-profit;
- (f) the address of the registered office and the name and address of the resident agent for service of process required to be maintained by this act;
- (g) *an irrevocable written consent of the foreign covered entity that actions may be commenced against it in the proper court of any county where there is proper venue by the service of process on the secretary of state as provided for in K.S.A. 60-304, and amendments thereto, and stip-*

the action against the non-Kansas corporate defendants, asserting that the court had no basis for the exercise of personal jurisdiction over these defendants.<sup>385</sup> Plaintiffs argued that by registering to do business in Kansas pursuant to the Kansas registration statute, the two corporations “consented to general jurisdiction over them in Kansas courts and that such consent is sufficient to support jurisdiction.”<sup>386</sup>

In resolving this question, the court looked to prior jurisprudence of the United States Supreme Court and the Kansas Supreme Court on the issue.<sup>387</sup> Concluding this review, the court stated:

It is clear that at one time, under the jurisprudence of the United States Supreme Court, such consent by registration was sufficient to overcome a challenge to personal jurisdiction. See *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 214-16 (1921); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-75 (1939); see also *Forest Labs., Inc. v. Amneal Pharmaceuticals LLC*, 2015 WL 880599, at \*6 (D. Del. Feb. 26, 2015) (discussing these Supreme Court cases). Moreover, in *Robert Mitchell Furniture*, the Supreme Court indicated that a state’s construction of its own statute determines the effect of the registration. See *Robert Mitchell Furniture*, 257 U.S. at 215-16. The Kansas Supreme Court has held that the Kansas registration statute requires a consent to general personal jurisdiction, that is, jurisdiction even in cases not arising from or related to the defendant’s actions in the state. See *Merriman v. Crompton Corp.*, 282 Kan. 433, 443-45 (2006). Thus, under *Pennsylvania Fire* and its progeny, the registering Syngenta defendants have consented to personal jurisdiction in Kansas.<sup>388</sup>

Defendants argued that the court should not rely upon *Pennsylvania Fire* and its progeny, because all of these cases predated *International Shoe* in which the Court established the modern personal jurisdiction paradigm.<sup>389</sup> The court rejected this argument on the following grounds: (1) that no basis existed to conclude that *International Shoe* overturned these cases recognizing consent to personal jurisdiction through registration; (2) that following the decision in *International Shoe*, the Court continued to suggest the viability of jurisdiction through consent; and (3) that “various federal circuit courts have endorsed the concept of consent by registration since *Interna-*

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*ulating and agreeing that such service shall be taken and held, in all courts, to be as valid and binding as if due service had been made upon the governors of the foreign covered entity;*

(h) the date on which the foreign covered entity first did, or intends to do, business in the state of Kansas.

KAN. STAT. ANN. § 17-7931 (West 2016) (emphasis added).

385. *In re Syngenta*, 2016 WL 1047996, at \*1.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at \*2.

*tional Shoe*.”<sup>390</sup> The court also rejected the argument that even if consent to jurisdiction through registration survived *International Shoe*, the decision by the Supreme Court in *Daimler* rejected registration as a basis for general jurisdiction.<sup>391</sup>

Finally, the court rejected the arguments by the corporate defendants that consent to jurisdiction through registration is unconstitutional, either as a violation of the unconstitutional conditions doctrine or as a violation of the Dormant Commerce Clause.<sup>392</sup> As to the unconstitutional conditions doctrine, the court concluded that consent to jurisdiction through registration does not coerce a corporation “into giving up a constitutional right by denying a benefit to that [corpora-

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390. *Id.* at \*2 (citing *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) (citing *Pennsylvania Fire* and *Neirbo* in noting that it is “well-settled” that a corporation may consent to jurisdiction through registration)); *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (stating that defendant consented to jurisdiction through registration); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) (finding consent through state registration statute); *see also* *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 180–81 (5th Cir. 1992) (interpreting particular state statute as not providing necessary consent to general jurisdiction); *King v. American Family Mut. Ins. Co.*, 632 F.3d 570, 576–78 (9th Cir. 2011) (citing *Pennsylvania Fire* and *Robert Mitchell Furniture* in holding that a court must look to state law to determine the effect of registration on jurisdiction, before concluding that the particular state statute did not require consent). It is true that three circuit courts have seemingly held that mere compliance with a registration statute does not support jurisdiction, but those cases are of little persuasive value because the courts did not directly address the issue of consent or the relevant Supreme Court jurisprudence. *See* *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971).

391. 2016 WL 1047996, at \*2-3. As the court stated:

As discussed above, the Supreme Court has continued to sanction personal jurisdiction by consent even after *International Shoe*, and the Court has not overruled its precedents concerning consent through registration. The Court is not prepared to ignore such Supreme Court precedent based on speculation about how the Court might view jurisdiction in contexts other than that discussed in *Daimler*. Rather, the Court is persuaded by the reasoning of courts that have rejected similar arguments based on *Daimler*. *See, e.g., Forest Labs.*, 2015 WL 880599, at \*3-15; *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, 78 F. Supp. 3d 572, 583-92 (D. Del. 2015); *Otsuka Pharmaceutical Co., Ltd. v. Mylan Inc.*, 106 F. Supp. 3d 456, 467-71 (D.N.J. 2015).<sup>2</sup> Syngenta argues that if a company is not necessarily subject to general jurisdiction in every state in which it does business (under *Daimler*), it should not be subject to general jurisdiction in every state in which it must execute a consent as a prerequisite to doing business. As the *Acorda* court stated, however, such a result may seem odd, but because consent remains a valid basis for personal jurisdiction under the law of the Supreme Court, that result must be permitted. *See Acorda*, 78 F. Supp. 3d at 591.

*Id.* at \*3 (footnote omitted).

392. *Id.* at \*3-4.

tion] because of the exercise of that right.”<sup>393</sup> As to the Dormant Commerce Clause, the court concluded that because the result of consent to jurisdiction through registration “is that out-of-state companies are subjected to the jurisdiction of Kansas’s courts, just as resident companies are subject to the jurisdiction of those courts,” no violation exists because foreign corporations are treated no differently than resident corporations.<sup>394</sup>

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393. *Id.* at \*3. In finding no violation, the court stated:

Syngenta argues that such a requirement of consent would violate the unconstitutional conditions doctrine, which prevents the government from coercing a person into giving up a constitutional right by denying a benefit to that person because of the exercise of that right. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). The Court rejects this argument. Syngenta relies on two cases in which the Supreme Court ruled that a state could not require a company to give up the right to remove cases to federal court as a condition of doing business there. *See Southern Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922). In *Neirbo*, one of the successor cases to *Pennsylvania Fire* discussed above, however, the Supreme Court distinguished *Denton* as a case involving “an entirely different situation,” as the statute in *Denton* sought to deny access to federal courts. *See Neirbo*, 308 U.S. at 173. As in *Neirbo*, the consent in the present case does not similarly deprive Syngenta of access to federal courts. Syngenta has not cited any other precedent to support application of this doctrine in this context. In light of the Supreme Court precedent sanctioning consent by registration as a basis for jurisdiction, the Court cannot conclude that giving effect to Syngenta’s consent in this case would be unconstitutional.

*Id.* at \*3–4.

394. *Id.* at \*4. In finding no Dormant Commerce Clause violation, the court stated:

Similarly, the Court rejects Syngenta’s argument that giving effect to the consent would violate the Dormant Commerce Clause. In support of this argument, Syngenta relies solely on *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). In that case, the Supreme Court ruled that an Ohio statute that tolled limitations periods for claims against corporate defendants that had not registered in the state (which registration operated as a consent to general jurisdiction) violated the Dormant Commerce Clause. *See id.* In so ruling, however, the Court relied on the result that an out-of-state corporation was treated differently from an in-state corporation with respect to tolling. *See id.* at 894–95. In these cases, the result of the consent through registration is that out-of-state companies are subjected to the jurisdiction of Kansas’s courts, just as resident companies are subject to the jurisdiction of those courts—which means that the statute does not treat out-of-state companies differently. Thus, the reasoning of *Bendix* is not applicable here. Syngenta has not cited any caselaw to support invalidating consent jurisdiction under the Dormant Commerce Clause. In the absence of such authority, and in light of the Supreme Court cases sanctioning such jurisdiction, the Court will not refuse to give effect to Syngenta’s consent in these cases.

*Id.*

**D. Post-*Daimler* Cases Concluding that Consent-By-Registration Is Not a Valid Basis for the Exercise of Personal Jurisdiction**

*AstraZeneca* involved the same defendant as *Forest Laboratories*—Mylan Pharmaceuticals—and the same court, the United States District Court for the District of Delaware. However, the *AstraZeneca* court reached a different result. It held that, in light of *Daimler*, Mylan’s compliance with the Delaware registration statute did not amount to Mylan consenting to the general jurisdiction of Delaware courts.<sup>395</sup>

The plaintiff argued that the defendant consented to the jurisdiction of Delaware courts by registering to do business and appointing an agent for service of process in compliance with the Delaware registration statute.<sup>396</sup> It contended that consent ends the jurisdictional inquiry and obviates the need to consider due process and minimum contacts, and argued that “Supreme Court cases holding that personal jurisdiction is satisfied merely by complying with state business registration statutes remain a viable path to finding jurisdiction even after *International Shoe* and its progeny.”<sup>397</sup> Moreover, the plaintiff contended that *Daimler* plays no role in the consent analysis because it “dealt with the minimum-contacts aspect of *International Shoe*, which is distinct from the question of consent.”<sup>398</sup>

The *AstraZeneca* court, however, was not convinced that *International Shoe* and *Daimler* had no bearing on consent. It noted the Supreme Court has not “expressly addressed the continuing vitality of cases like *Neirbo* and [*Pennsylvania Fire*] in the wake of *International Shoe*.”<sup>399</sup> With a passing citation to *International Shoe*, the court pronounced that:

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395. *AstraZeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549, 556–57 (D. Del. 2014). It is worth mentioning that the plaintiff also argued that Mylan was subject to the general jurisdiction of Delaware courts merely because it had registered to do business and had “a broad network of third-party contacts within the state.” Predictably, the court disagreed and found that these facts were not enough to show that Mylan was “essentially at home” in Delaware. This conclusion demonstrates that a corporation registering to do business, absent a consent jurisdiction argument, is not alone enough for a court to exercise general jurisdiction over the corporation. *Id.* at 554–55.

396. *Id.* at 555.

397. *Id.*

398. *Id.* at 556 (“[E]xpress consent is a valid basis for the exercise of general jurisdiction in the absence of any other basis for the exercise of jurisdiction, i.e. ‘minimum contacts.’” (citing *Sternberg v. O’Neil*, 550 A.2d 1105, 1111 (Del. 1988))).

399. *Id.* at 556 (citing *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (noting this was the Court’s only real mention of cases like *Pennsylvania Fire* and *Neirbo*, and it is unclear what, if anything, the Supreme Court’s failure to discuss these cases has to do with their “continuing vitality”); see also *Ins. Corp. of Ir. v. Campagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982) (stating the Court has upheld that



Both consent and minimum contacts (and all questions regarding personal jurisdiction) are rooted in due process. Just as minimum contacts must be present so as not to offend “traditional notions of fair play and substantial justice,” the defendant’s alleged “consent” to jurisdiction must do the same.<sup>400</sup>

Unlike the courts in *Forest Laboratories* and *Acorda*, the *AstraZeneca* court engaged in virtually no discussion of consent jurisdiction as a doctrine separate from the jurisdictional analysis of *International Shoe*<sup>401</sup>—even though *International Shoe* itself noted that it concerned cases where “no consent to be sued or authorization to an agent to accept service of process [had] been given.”<sup>402</sup> Other binding Supreme Court cases, both pre and post-*International Shoe*, had referenced consent jurisdiction as a separate basis for jurisdiction.<sup>403</sup> Even further, the *Daimler* Court cited *Perkins v. Benguet Consol. Mining Co.* as “the textbook case of *general jurisdiction* appropriately exercised over a foreign corporation *that has not consented to suit in the forum.*”<sup>404</sup> Seemingly, the *AstraZeneca* court hung its hat on the lone statement in *Shaffer* that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,” without bothering to consider the context in which the statement was made or subsequent interpretations of the statement, such as Justice Scalia’s in *Burnham*.<sup>405</sup>

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certain legal arrangements “represent express or implied consent to the personal jurisdiction of the court,” including “voluntary use of certain state procedures”); *cf. Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (urging lower courts to follow Supreme Court precedent that “has direct application in a case”); *Forest Labs. v. Amneal Pharm. LLC*, No. 14–508–LPS, 2015 WL 880599, at \*7 (citing *Eberhart v. United States*, 546 U.S. 12, 14–15, 19–20 (2005) (noting that it was a “prudent course” for a lower court to apply prior Supreme Court precedent that had not been expressly overruled)).

400. *AstraZeneca*, 72 F. Supp. 3d at 556 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
401. *See id.* at 555–57.
402. *See Otsuka Pharm. Co., Ltd. v. Mylan Inc.*, 106 F. Supp. 3d 456, 467 (D.N.J. 2015) (“*International Shoe* itself clearly reflects that the Supreme Court’s jurisdiction determinations related to cases where “no consent to be sued or authorization to an agent to accept service of process has been given.” (citing *Int’l Shoe*, 326 U.S. at 317)).
403. *See Campagnie des Bauxites de Guinee*, 456 U.S. 694; *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213 (1921); *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917). *But see Benish*, *supra* note 272, at 1638–39 (noting that there is support for the notion that “doing business” jurisdiction and consent jurisdiction are one the same in the context of business entities.).
404. *Forest Labs., Inc. v. Amneal Pharms., LLC*, No. 14-508-LPS, 2015 WL 880599, at \*13 (D. Del. Feb. 26, 2015) (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 755–56 (2014)).
405. *AstraZeneca*, 72 F. Supp. 3d at 556 (citing *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)).

Instead, the court focused on the cornerstone of *Daimler*, that merely “doing business” in a state is insufficient to subject a corporation to the general jurisdiction of the state’s courts.<sup>406</sup> The court found that “[i]n light of the holding in *Daimler*, . . . Mylan’s compliance with Delaware’s registration statutes—mandatory for *doing business* within the state—[could not] constitute consent to jurisdiction, and the Delaware Supreme Court’s decision in *Sternberg* [could] no longer be said to comport with federal due process.”<sup>407</sup> Moreover, the court noted that “[f]inding mere compliance with such statutes sufficient to satisfy jurisdiction would expose companies with a national presence (such as Mylan) to suit all over the country, a result specifically at odds with *Daimler*.”<sup>408</sup> In sum, the court characterized registration statutes like Delaware’s as “administrative” statutes that “merely outline procedures for doing business in the state; compliance does not amount to consent to jurisdiction or waiver of due process.”<sup>409</sup> Nonetheless, the court conceded that statutes, like the Pennsylvania statute, which the Third Circuit addressed in *Bane v. Netlink, Inc.*, may lead to different results.<sup>410</sup>

In *Brown v. Lockheed Martin Corp.*,<sup>411</sup> the Court of Appeals for the Second Circuit confronted the “nettlesome and increasingly contentious question about the import of a foreign corporation’s registration to conduct business and appointment of an agent for service of process in a state for the exercise of personal jurisdiction by that state’s courts over the registered corporation.”<sup>412</sup> In *Brown*, the court affirmed the dismissal of personal injury claims brought in Connecticut against Lockheed, a company that is incorporated and maintains its principal place of business in Maryland, after concluding that Lockheed was not subject to the general jurisdiction of the Connecticut courts.<sup>413</sup> The court reached this conclusion even though Lockheed derived about \$160 million in revenue for its Connecticut-based work, was registered to conduct business in Connecticut, leased office spaces, maintained

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406. *Id.* at 555–57.

407. *Id.* at 556.

408. *Id.* at 557.

409. *Id.*

410. *Id.* at 557 n.6 (“The court does not address the more difficult question raised when state statutes expressly indicate that foreign corporations consent to general jurisdiction by complying with the statutes.”); *see, e.g.*, *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (“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: . . . (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.” (quoting 42 PA. CONS. STAT. ANN. § 5301 (West 1990))).

411. 814 F.3d 619 (2d Cir. 2016).

412. *Id.* at 622.

413. *Id.* at 622–23.

between thirty and seventy employees, and appointed a designated agent for service of process there.<sup>414</sup>

Because the alleged conduct of Lockheed that caused the plaintiff's injury was not the result of Lockheed's contacts with Connecticut, the court concluded that there was no basis to assert that Lockheed was subject to the specific jurisdiction of the Connecticut courts.<sup>415</sup> Rather, the plaintiff argued "that Lockheed consented to having those courts in Connecticut exercise general jurisdiction over it by registering—years earlier—to do business in the state and appointing an agent to receive service of process there."<sup>416</sup> Additionally, Plaintiff argued that:

the Supreme Court's recent decisions in *Daimler AG v. Bauman*, — U.S. —, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 546 U.S. 915, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), support the demand for the District Court's exercise of general jurisdiction over Lockheed in Connecticut because the company's contacts with Connecticut were "continuous and systematic" enough to place it "essentially at home" in the state. *Daimler*, 134 S.Ct. at 761 (quoting *Goodyear*, 131 S.Ct. at 2851).<sup>417</sup>

The court turned to the decisions in *Goodyear* and *Daimler* to determine whether Lockheed's contacts with Connecticut were sufficient to subject it to the general jurisdiction of that state's courts.<sup>418</sup> As the court noted, under *Goodyear* and *Daimler*, "the general jurisdiction inquiry 'is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systemic,' but rather, . . . 'whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum.'"<sup>419</sup> According to *Goodyear* and *Daimler*, the paradigmatic locus for a corporation to be "essentially at home" is "where it is incorporated or where it has its principal place of business."<sup>420</sup>

Relying upon *Daimler*, the *Brown* court noted:

Only in the "exceptional" case will another jurisdiction be entitled to exercise such sweeping powers as the use of its adjudicatory authority to decide matters unrelated to its citizens or to affairs within its borders. *Id.* at 761 n. 19. As the Court explained earlier in *Goodyear*: "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.'" 131 S.Ct. at 2856 (quoting *Int'l Shoe*, 326 U.S. at 318, 66 S.Ct. 154).<sup>421</sup>

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414. *Id.* at 628.

415. *Id.* at 625.

416. *Id.* at 622.

417. *Id.*

418. *Id.* at 626–30.

419. *Id.* at 627.

420. *Id.*

421. *Id.*

In determining whether *Brown* was such an “exceptional” case, the court concluded that Connecticut could not be said to be Lockheed’s “surrogate principal place of business,” nor was Lockheed’s activity within the state significant in comparison to its overall activity.<sup>422</sup> Based on this, the court ultimately concluded that no basis existed for finding that Lockheed was subject to the general jurisdiction of the Connecticut courts, reasoning that “given that it is common for corporations to have presences in multiple states exceeding that of Lockheed in Connecticut, general jurisdiction would be quite the *opposite* of ‘exceptional’ if such contacts were held sufficient to render the corporation ‘at home’ in the state.”<sup>423</sup>

The court then turned to the question of whether Lockheed consented to the general jurisdiction of the Connecticut courts by registering to do business and appointing an agent to accept service of process there.<sup>424</sup> The court noted that initially business registration statutes were “enacted primarily to allow states to exercise jurisdiction over corporations that, although not formed under its laws, were transacting business within a state’s borders and thus potentially giving rise to state citizens’ claims against them.”<sup>425</sup> Through registration, the corporation consented “to appear in state court on actions by a state’s citizens arising from the corporation’s operations in the jurisdiction.”<sup>426</sup>

The court noted that Connecticut’s registration statute “nowhere expressly provides that foreign corporations that register to transact business in the state shall be subject to the ‘general jurisdiction’ of the Connecticut courts.”<sup>427</sup> However, the court indicated that several years before *Daimler*, the Connecticut Appellate Court had in fact ascribed just such a broad meaning to the statute.<sup>428</sup> In *Talenti*, the Connecticut Appellate Court held that registration in Connecticut indicates that the corporation is consenting to the general jurisdiction of Connecticut state courts:

[W]hen a foreign corporation . . . obtain[s] a certificate of authority and . . . authoriz[es] a public official to accept service of process, it has consented to the exercise of jurisdiction over it by the courts of this state. *This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.* Such a corporation has purposely availed itself of the privilege of conducting activities within this state, thus invoking the benefits

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422. *Id.* at 627–30.

423. *Id.* at 630.

424. *Id.* at 630–41.

425. *Id.* at 632.

426. *Id.* at 633.

427. *Id.* at 634.

428. *Id.* at 635–37 (discussing *Talenti v. Morgan & Brother Manhattan Storage Co.*, 968 A.2d 933 (Conn. App. 2009)).

and protections of its laws . . . . Therefore, the defendant has voluntarily consented to the personal jurisdiction of it by the courts of this state.<sup>429</sup>

In *Talenti*, the court also determined that because “the defendant [had] consented to jurisdiction, the exercise of jurisdiction by the court [did] not violate due process.”<sup>430</sup>

In *Brown*, the court rejected the rationale of the Connecticut appellate court in *Talenti*, holding that Connecticut’s registration statute provided “no notice to a corporation registering to do business in the state that the registration might have the sweeping effect that the [Connecticut Appellate Court] envisioned.”<sup>431</sup> Rather, the text of the statute “suggests that assent only to specific jurisdiction is what the statute required.”<sup>432</sup>

Additionally, despite the clear holding of *Pennsylvania Fire*, the court rejected *Pennsylvania Fire* as a basis for concluding that registration reflected to consent to general jurisdiction, stating:

[W]e believe that the holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general “consent” has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the Court’s 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.<sup>433</sup>

Based on this reasoning, the court concluded that “[i]f mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*’s ruling would be robbed of meaning by a back-door thief.”<sup>434</sup> The court does acknowledge, however, that “[w]ere the Connecticut statute drafted such that it could be fairly construed as requiring foreign corporations to consent to general jurisdiction, we would be confronted with a more difficult constitutional question about the validity of such consent after *Daimler*.”<sup>435</sup>

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429. *Talenti*, 968 A.2d at 940 (internal citations omitted).

430. *Id.* at 941 n.14.

431. *Brown*, 814 F.3d at 637.

432. *Id.*

433. *Id.* at 639.

434. *Id.* at 640 (emphasis added).

435. *Id.* at 640. As the court noted:

Though a defendant may ordinarily, through free and voluntary consent given (for example) in a commercial agreement, submit to jurisdiction a court would otherwise be unable to exercise, we decline to decide here whether consent to general jurisdiction via a registration statute would be similarly effective notwithstanding *Daimler*’s strong admonition against the expansive exercise of general jurisdiction. Jurisdictions other than Connecticut have enacted registration statutes that more

Additionally, *Chatwal Hotels & Resorts LLC v. Dollywood Co.* and *Keeley v. Pfizer Inc.* are two federal district court cases that briefly address jurisdiction based on registration post-*Daimler*. Both courts concluded that the mere fact that a foreign corporation was registered to do business in a state was insufficient to provide courts of that state general jurisdiction over the foreign corporation.<sup>436</sup>

The problem is, both courts failed to engage in any real analysis. They never mentioned that multiple cases after *Daimler* have found that consent-by-registration remains a valid path to jurisdiction. In fact, they never even mentioned consent jurisdiction as a separate doctrine. Instead, they engaged in a limited general jurisdiction analysis and held that a finding of general jurisdiction would be contrary to the holding of *Daimler* that merely doing business in a state is not enough.<sup>437</sup> Interestingly, the court in *Chatwal Hotels* rested its conclusion in part on a quote from *Gucci America, Inc. v. Weixing Li*, in

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plainly advise the registrant that enrolling in the state as a foreign corporation and transacting business will vest the local courts with general jurisdiction over the corporation. *E.g.*, 42 Pa. Cons. Stat. § 5301(a)(2)(i)-(ii). The registration statute in the state of New York has been definitively construed to accomplish that end, and legislation has been introduced to ratify that construction of the statute. *See Monestier, supra*, at 1344–45 & nn. 2 & 4. And some of our sister circuits have upheld states' determinations that in their respective states, registration to do business constitutes consent to the exercise of general jurisdiction, and that due process requires no more: That is, personal jurisdiction by consent of a corporate defendant is consistent with due process. *See Bane*, 925 F.2d at 640 (1991 decision interpreting Pennsylvania statute that expressly stated that registration “enable[s] the tribunals of [that] Commonwealth to exercise general personal jurisdiction”); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199–1200 (8th Cir.1990) (reading Minnesota registration law, as interpreted by that state’s Supreme Court, to confer general jurisdiction over common carrier). These two decisions reason that, because of its nature as a personal right, a defendant may consent to personal jurisdiction without regard to what a due process analysis of its contacts would yield. *See Knowlton*, 900 F.2d at 1199 (“Consent is the other traditional basis of jurisdiction, existing independently of long-arm statutes.”). Similarly, in an approach emphasizing the amenability to waiver of personal jurisdiction as an individual right, applicable to a defendant corporation without regard to the due process analysis, the Supreme Court has upheld the assertion of personal jurisdiction as a sanction for failure to comply with jurisdictional discovery, holding such failures “may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.” *Bauxites*, 456 U.S. at 704–05, 102 S.Ct. 2099. From these sources, it could be concluded that a carefully drawn state statute that expressly required consent to general jurisdiction as a condition on a foreign corporation’s doing business in the state, at least in cases brought by state residents, might well be constitutional.

*Id.* at 640–41.

436. *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015); *Keeley v. Pfizer, Inc.* No. 4:15CV00583 ERW, 2015 WL 3999488, at \*4 (E.D. Mo. June 1, 2015).

437. *Chatwal*, 90 F. Supp. 3d at 104–05; *Keeley*, 2015 WL 3999488, at \*4.

which the Second Circuit cautioned against adopting “an overly expansive view of general jurisdiction.”<sup>438</sup> The court apparently failed to realize, however, that the *Gucci* court noted, by way of footnote, that district courts might consider whether defendants have “consented to jurisdiction in New York by applying for authorization to conduct business in New York and designation of the New York Secretary of State as its agent for service of process.”<sup>439</sup>

### VIII. CONCLUSION: A MIDDLE PATH

With the significant restrictions on the traditional application of general jurisdiction, the Court has arguably burdened American plaintiffs to a significant degree.<sup>440</sup> Placing greater burdens on plain-

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438. *Chatwal*, 90 F. Supp. 3d at 105 (quoting *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014)).

439. *Gucci*, 768 F.3d at 136 n.15 (2d Cir. 2014) (citing N.Y. BUS. CORP. LAW §§ 1301(a), 1304(a)(6) (McKinney 2016); N.Y. BANKING LAW § 200 (McKinney 2016); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075 (1916) (opinion of Cardozo, J.); *Daimler AG v. Bauman*, 134 S. Ct 746, 755–56 (2014) (noting that general jurisdiction defines the scope of a court’s jurisdiction when an entity “has not consented to suit in the forum”)).

440. As Professor Richard Freer has noted:

Consider the facts in *J. McIntyre Machinery Ltd. v. Nicastro*. Mr. Nicastro, a citizen of New Jersey, was severely injured at work while using a machine manufactured in Great Britain. The manufacturer sold its machines to a company in Ohio, which then sold them to businesses throughout the United States. One machine was sold to Mr. Nicastro’s employer. Mr. Nicastro sued the British manufacturer in New Jersey, and asserted a product liability claim. The Court held that New Jersey did not have specific jurisdiction over the British manufacturer. Many commentators have criticized this parsimonious view of specific jurisdiction.

But consider Mr. Nicastro’s plight when the holding in *J. McIntyre* is combined with *Goodyear* and *Daimler*. Under traditional, well-understood practice, Mr. Nicastro could have sued the British company in Ohio. Because the claim arose in New Jersey, it would have to be general jurisdiction. The theory, of course, would be that the British company engaged in “continuous and systematic” activities in Ohio by selling and marketing all of its products sold in North America to a single Ohio company. Had such litigation been pursued, it is likely that the Ohio company (like John Deere in *Ferens*, Goodyear USA in *Goodyear*, and MBUSA in *Daimler*) would not have contested general jurisdiction.

Today, however, the British company would challenge jurisdiction and would prevail. Why? Because that company is not “at home” in Ohio. It is formed and has its headquarters in Britain, so Ohio certainly does not qualify as a paradigm for home. Could Ohio qualify for activities-based general jurisdiction? Aside from attending trade shows throughout the country, every contact the British company has with the United States is in Ohio; the company sold every machine sold in North America to a business in Ohio. Nonetheless, *Goodyear* and *Daimler* seem to rule out jurisdiction. First, general jurisdiction cannot be based upon sales into the forum. Second, while Ohio is the site of all of the defendant’s North

tiffs to seek redress against corporate defendants seems to characterize much of the Court's recent jurisprudence in the area of personal jurisdiction.<sup>441</sup> From *J. McIntyre to Goodyear* to *Daimler*, the Court has consistently made it much more difficult for plaintiffs, even American plaintiffs, to find a convenient forum in which they can pursue legitimate claims.<sup>442</sup> Some of the Court's concern, as evidenced by Justice Ginsburg's opinions in both *Goodyear* and *Daimler*, is rooted in a concern over the international extraterritorial reach of United States courts.<sup>443</sup> However, the Court has gone much further than

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American contacts, presumably this is but a small part of the corporation's overall worldwide business.

Freer, *supra* note 11, at 24–25.

441. See, e.g., Patrick J. Borchers, J. McIntyre Machinery, *Goodyear*, and the *Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245 (2011); Freer, *supra* note 11, at 19–29; Harrison, *supra* note 8, at 38–41; Arthur R. Miller, McIntyre in Context: A Very Personal Perspective, 63 S.C. L. REV. 465 (2012); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41 (2012); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. ARGUENDO 1 (2011) <http://www.gwlr.org/the-timing-of-minimum-contacts-after-goodyear-and-mcintyre/> [<https://perma.unl.edu/P4FR-C6MC>].

442. As Justice Sotomayor pointed out in her concurrence in *Daimler*:

[I]t should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions. Under the majority's rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States. See, e.g., *Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264 (C.A.11 2002). Similarly, a U.S. business that enters into a contract in a foreign country to sell its products to a multinational company there may be unable to seek relief in any U.S. court if the multinational company breaches the contract, even if that company has considerable operations in numerous U.S. forums. See, e.g., *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 712 F. Supp. 383 (S.D.N.Y.1989). Indeed, the majority's approach would preclude the plaintiffs in these examples from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief.

*Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (footnotes omitted).

443. See Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705 (2014); see also Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1544 (2013) (“[A] close relationship exists between personal jurisdiction and choice of law.”); Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kibobel's “Touch and Concern” Test*, 66 HASTINGS L.J. 443 (2015) (discussing how the presumption against extraterritoriality precludes Alien Tort Statute claims unless they “touch and concern” the United States sufficiently to overcome the presumption); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1119 (2009) (arguing for “a recognition that state courts and state legislatures embody state power in similar ways and that the



that in adopting the extremely narrow understanding of general jurisdiction adopted in *Goodyear* and *Daimler*.

In today's global economy, it is rare for a corporation to intentionally target one individual state and ignore another.<sup>444</sup> In fact, in most marketing and manufacturing contexts, it is easily foreseeable by the corporate marketer or manufacturer that its product may be transported from nation to nation and from state to state.<sup>445</sup> Indeed, the corporation's goal is to sell its product to willing buyers, wherever they may be located. A corporation, in the modern commercial world, with assistance from national or international marketing campaigns or through use of the Internet, often seeks to turn entire nations into a single target market without a thought of addressing individual states or considering the sovereign interests of individual states.<sup>446</sup>

Given this reality, the Court must create a clear process whereby proper personal jurisdiction involving potential corporate defendants with a national market is easily and predictably analyzed for both specific and general jurisdiction.<sup>447</sup> This is a reality recognized by Justice Breyer in his concurrence in *J. McIntyre*, wherein he stated regarding specific jurisdiction, it is "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."<sup>448</sup> Equally unwise is the Court's complete overhaul of the historical understanding of general jurisdiction without giving "full consideration of the modern-day consequences."<sup>449</sup>

One such predictable approach would be for state statutes requiring corporations intending to conduct business in that state to register and appoint an agent for service of process to explicitly state that the consequence of registration and proper service within the forum as a result of that registration is that the corporation consents to the jurisdiction of the courts of that state for injuries caused to citizens of that

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fundamental concerns about allowing either to regulate across state boundaries are similar").

444. Harrison, *supra* note 8, at 38.

445. *Id.*

446. *Id.*

447. *Id.* See also Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, But "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 235–236 (2005) (asserting that "registration and appointment of an agent is not enough to establish consent, except perhaps in those situations in which the state registration statute is considered explicit enough to constitute actual, rather than fictional, consent.").

448. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., with Alito, J., concurring).

449. *Id.* In *J. McIntyre*, Justice Breyer asserted that because the "case does not implicate modern concerns, and because the factual record leaves many open questions, [the case presented] is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." *Id.* at 2792–93. The same could easily be said about both *Goodyear* and *Daimler*.

state, regardless of where those injuries occurred.<sup>450</sup> Such an approach would strike a balance between the concerns articulated by the Court in *Goodyear* and *Daimler* regarding the international extraterritorial reach of American courts, the burden on large national and international corporate defendants who might be subject to general jurisdictions in all states, due process considerations about predictability and coercion, and traditional state sovereignty concerns regarding the need of a state to protect its citizens.

Further, while the Supreme Court has not spoken directly on this issue since *Pennsylvania Fire*, it is logical that where a foreign corporation (1) has registered to conduct business in a state, appointing an agent within the state for the purpose of accepting service of process within the state, and (2) is actually properly served within that state, that corporation is subject to jurisdiction in that state under the traditional understanding of personal jurisdiction dating back to *Pennoyer*.<sup>451</sup> In *Burnham v. Superior Court of California*, the Court held that service in California on a New York defendant, even when the defendant was only temporarily present in California, was sufficient to confer general personal jurisdiction over that defendant in California.<sup>452</sup> While *Burnham* dealt with an individual defendant, Justice Scalia, writing for the plurality, made clear that it was long established that proper service over a foreign defendant within the state allowed the courts of that state to exercise personal jurisdiction over

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450. *But see* Andrews, *supra* note 9, at 1074–75 (“Registration statutes . . . remain coercive and punish nonregistration through fines and forfeiture of the right to bring suit in local courts.”); Benish, *supra* note 272, at 16–32; Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1 (1990); D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 3 (1990) (asserting that a corporation’s appointment of an agent for service or process cannot be used as a basis for general jurisdiction because it results in an unconstitutional burden on a foreign corporation’s ability to transact business in the state); Monestier, *supra* note 256, at 1372–1400 (asserting that under any theory (presence, minimum contacts, or consent), registration and appointment of an agent to receive service of process in a state fails to provide a valid basis for the exercise of general personal jurisdiction); Pierre Riou, Note, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold* Issue Mining, 14 REV. LITIG. 741 (1995); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1163 (2003); T. Griffin Vincent, Comment, *Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461 (1989).

451. Hoffheimer, *supra* note 99, at 600–601; Hoffheimer & Cornett, *supra* note 239, at 136–38; *see also* *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion of Scalia, J.) (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard . . .”).

452. 495 U.S. at 607, 628.

that defendant.<sup>453</sup> While the Court has not recently explicitly stated that service within a forum would confer general personal jurisdiction over a corporate defendant, it would seem logical that the rationale from *Burnham* would apply equally to corporate defendants. In the oral argument in *Goodyear*, this was of concern to a number of the justices.<sup>454</sup>

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453. *Id.* at 619. Justice Sotomayor identified this rather bizarre result in her concurrence in *Daimler*, where she wrote:

[T]he majority's approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 110 S. Ct. 2105, 109 L.Ed.2d 631 (1990), but a large corporation that owns property, employs workers, and does billions of dollars' worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well).

*Daimler AG v. Bauman*, 134 S. Ct. 746, 772–73 (2014) (Sotomayor, J., concurring); see also Freer, *supra* note 11, at 14–19 (discussing natural person's domicile and "equivalents"). See generally Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M.L. REV. 1 (2016) (arguing "that both the originalist and fairness-based tests proposed in *Burnham* support allowing the assertion of tag jurisdiction over corporations and other entities through in-state service on their officers").

454. See Transcript of Oral Argument, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (No. 10-76), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-76.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-76.pdf) [<https://perma.unl.edu/U36L-YJQQ>]. For example, Justice Kagan asked counsel for the Goodyear subsidiaries whether general jurisdiction would be appropriate over Goodyear USA had the corporation not consented to the exercise of jurisdiction by the North Carolina court. *Id.* at 4. Justice Ginsburg also inquired of the Assistant Solicitor General as to whether general jurisdiction would be proper based on service of an agent appointed by a corporation that otherwise lacked continuous and systematic contacts. *Id.* at 15. The responses from both counsel informed the Court that there was a split of authority among the lower courts on this issue. *Id.* at 5–6, 15–18. However, the Court chose not to address the issue at that time, thus leaving this issue open for further resolution. In discussing this issue, Professor Hoffheimer has written:

The Court's decision in *Goodyear Dunlop Tires* does not resolve an issue on which lower courts have been divided: whether service of process on an agent appointed by a corporation to receive process establishes valid general jurisdiction. During oral argument, Justices on the Court expressed keen interest in this issue.

Opinions in both *Goodyear Dunlop Tires* and *Nicastro* contain statements that general jurisdiction over corporations exists in the state where the corporation is "at home," identified as its place of incorporation or principal place of business. Because the opinions do not further qualify such statements, it is possible to read them as signaling obliquely that the method of service is unimportant.

This is not a plausible reading. The Court similarly observes, without qualification, that general jurisdiction over an individual is proper in the courts of his or her domicile. This observation hardly signals that the Court intends to overrule its holding that personal service establishes

For examples of the distorted results that will occur from a narrow application of the general personal jurisdiction analysis found in *Goodyear* and *Daimler*, one need only look to the factual situations seen in *Goodyear*, *Daimler*, and *J. McIntyre*. In the factual situation presented in *Goodyear*, under a narrow reading of the Court's analysis in *Goodyear* and *Daimler*, not only could the Goodyear foreign subsidiaries not be sued in North Carolina for their potential role in the death of North Carolina citizens, but neither could Goodyear USA, as North Carolina is neither its place of incorporation nor its principal place of business.<sup>455</sup> Under *Goodyear* and *Daimler*, such a result would arguably occur regardless of how much business, including manufacturing operations, Goodyear USA conducted in North Carolina. While Goodyear USA could certainly be sued in Ohio, should the citizens of North Carolina necessarily be forced to travel to Ohio to seek redress for injuries potentially caused by Goodyear USA in a non-North Carolina forum? The approach taken by the Court in *Goodyear* and *Daimler* simply ignores the burden on plaintiffs who need redress and ignores the real sovereign interests a state, North Carolina in this instance, has in protecting its own citizens through its courts.

By way of contrast, the factual scenario presented in *Daimler* does not alter the general jurisdiction outcome even were the limited approach proposed in this Article accepted.<sup>456</sup> In *Daimler*, the plaintiffs were not United States citizens. Thus, the sovereignty interests of California were not at issue at all. Based on the Court's analysis in *Daimler*, Daimler, as a foreign subsidiary of MBUSA, would not be subject to general jurisdiction in California because it was, in no way, "at home" in California, as it neither was incorporated in California nor was California its principal place of business. Under the proposal offered in this Article, Daimler would still not be subject to personal jurisdiction by the California courts, because Daimler had not registered to do business in California and had not appointed an agent for service of process. Under the proposal set forth in this Article, MBUSA would also not be subject to general personal jurisdiction by the California courts on these facts, even if it had registered to do business in California, had appointed an agent for service of process, and actually had been served in California. This result would occur because the injuries alleged were not to California citizens and thus,

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valid general jurisdiction over an individual. In describing the places where corporations are "at home" as analogous to an individual's domicile, the Court leaves open the possibility that traditional methods of service on corporate agents may also support general jurisdiction analogous to service on an individual.

Hoffheimer, *supra* note 99, at 600–601.

455. *See* discussion *supra* section VI.A.

456. *See* discussion *supra* section VI.B.

California had no sovereign interest in providing redress for these alleged injuries.

As Professor Freer noted, the facts of *J. McIntyre* present yet another wrinkle on this same theme.<sup>457</sup> In *J. McIntyre*, a thirty-year employee injured his hand while working in October 2001 at his place of employment, Curcio Scrap Metal.<sup>458</sup> The injury occurred while the employee was using a metal-shearing machine, manufactured by J. McIntyre Machinery, Ltd. (“J. McIntyre”), a business entity incorporated and operating out of England.<sup>459</sup> The machine had been sold in the United States through an independent exclusive distributor, McIntyre Machinery America, Ltd. (“McIntyre America”), headquartered in Stow, Ohio.<sup>460</sup>

The employee, employed in New Jersey, sued the manufacturer in New Jersey Superior Court.<sup>461</sup> Upon motion by the manufacturer, the trial court dismissed the action finding that the manufacturer lacked minimum contacts with New Jersey.<sup>462</sup> The New Jersey Appellate Division reversed in an unreported opinion.<sup>463</sup> The Supreme Court of New Jersey then reviewed the case and concluded that New Jersey could exercise jurisdiction.<sup>464</sup> Subsequently, in an attempt to “answer decades-old questions left open in *Asahi*,”<sup>465</sup> the U.S. Supreme Court granted certiorari.<sup>466</sup> In a plurality opinion, Justice Kennedy reversed the decision of the Supreme Court of New Jersey and concluded that New Jersey did not have specific personal jurisdiction over the out-of-state defendant because of the lack of sufficient contacts with J. McIntyre with New Jersey.<sup>467</sup>

If New Jersey did not have specific personal jurisdiction over J. McIntyre because of the insufficiency of the company’s contacts with the state, then where may Mr. Nicastro seek redress for his injuries? As Professor Freer points out, under the pre-*Daimler* understanding of general jurisdiction, Mr. Nicastro could have sued J. McIntyre in Ohio, because the company had “continuous and systematic” contacts with Ohio through the sale of its machines in Ohio.<sup>468</sup> Presumably, post-*Daimler*, this would not be true, because J. McIntyre could not be

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457. Freer, *supra* note 11, at 14–19, 24–25.

458. *Nicastro v. J. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578 (N.J. 2010), *rev’d*, 131 S. Ct. 2780 (2011). The device blades severed four fingers from the hand of the employee. *Id.* at 577.

459. *J. McIntyre Mach.*, 131 S. Ct. at 2786.

460. *Nicastro*, 987 A.2d at 578.

461. *J. McIntyre Mach.*, 131 S. Ct. at 2786.

462. *Nicastro*, 987 A.2d at 578.

463. *Id.*

464. *J. McIntyre Mach.*, 131 S. Ct. at 2786.

465. *Id.* at 2785.

466. *Id.* at 2786.

467. *Id.* at 2791.

468. Freer, *supra* note 11, at 14–19, 24–25.

considered “at home” in Ohio, despite its extensive contacts with the state, in that J. McIntyre neither was incorporated in Ohio nor was Ohio its principal place of business. Thus, post-*Daimler*, the only forum available in which Mr. Nicastro, an American citizen, could seek redress would be in the United Kingdom. This bizarre and distorted result completely ignores the interest of Mr. Nicastro as a plaintiff who was certainly injured, potentially because of J. McIntyre’s conduct, and the sovereign interests of New Jersey in protecting its citizens through its courts.

How would the proposal offered in this Article change the outcome for Mr. Nicastro, if at all? If one assumes that *Pennsylvania Fire* and *Burnham* control with no limitations, then to the extent J. McIntyre registered to do business in Ohio, appointed an agent to accept service on its behalf in Ohio, and was served in Ohio, then arguably under the broadest reading, J. McIntyre would be subject to suit by Mr. Nicastro in Ohio, even though the cause of action arose in New Jersey. However, under the narrower proposal offered in this Article, unless J. McIntyre registered to do business in New Jersey, appointed an agent to accept service on its behalf in New Jersey, and was then served in New Jersey, Mr. Nicastro would still be left with the United Kingdom as his only forum for redress.

Both the benefits and the limitations of the narrow proposal put forth in this Article can be seen in the three factual scenarios described above. As the Court is likely to be faced with a case in the near future raising the issue of whether registration and appointment can serve as a basis for general personal jurisdiction in any circumstance, this Article attempts to posit a middle ground between a broad reading of registration and appointment statutes that would confer broad general jurisdiction over corporations and a very narrow reading of those statutes which, when coupled with the Court’s decision in *Goodyear* and *Daimler*, would greatly burden plaintiffs in seeking redress for legitimate injuries.

In this context, some have argued that reading registration and appointment statutes to grant general personal jurisdiction over corporate defendant either based on a theory of consent or of presence violates various constitutional rights of corporate defendants, either by violating due process rights, imposing unconstitutional conditions, or by violating the Dormant Commerce Clause.<sup>469</sup>

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469. See discussion *supra* section VII.A; see also Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 662–66 (2015) (discussing the application of the unconstitutional-conditions doctrine to consent and personal jurisdiction through registration). Rhodes and Robertson note the following in discussing the application of the unconstitutional conditions doctrine to consent to personal jurisdiction through registration:

One mechanism for addressing these potential constitutional concerns, to the extent deemed legitimate, is for the Court to correct its mistake in *Daimler* where it concluded that the traditional fairness and reasonableness analysis recognized in *International Shoe* is not required in the determination of the existence of general personal jurisdiction in a particular case.<sup>470</sup>

As Justice White pointed out in his decision in *World-Wide Volkswagen*, the traditional idea of minimum contacts as a basis for determining whether the exercise of personal jurisdiction was appropriate had two distinct purposes in the doctrine of personal jurisdiction.<sup>471</sup> These two purposes were the protection of defendants against the burden of litigating in a “distant or inconvenient forum” and the protection of state sovereignty by defining the limits of that sovereignty.<sup>472</sup>

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First, for consent to be appropriate, the bound party should have legally sufficient notice of the terms of the exchange. Consent to jurisdiction under registration statutes, then, cannot extend beyond the limits specified by either the terms of the relevant statutes or their case-law interpretation.

Second, for such an exchange to be an exchange—and not merely a fictional implied consent that the Supreme Court has disavowed—the state must have something to exchange. States are generally free to enact conditions on the conferral of benefits, as long as the conditions do not violate the unconstitutional-conditions doctrine or another constitutional prohibition. When the state possesses this authority, the corporation is merely trading a guarantee of its amenability to suit in the forum in exchange for the privileges of conducting business operations within the state and accessing the state’s courts. This bargain is certainly not unconscionable with respect to the corporation’s amenability for those claims implicating state sovereign interests in regulating conduct subject to its substantive law or in redressing harms suffered by its citizens.

The state has substantial interests in providing both a forum for its injured residents and a mechanism for serving nonresident corporations. Corporations obtaining economic benefits from their in-state business activities do not suffer an undue burden by being required to answer for their obligations to state citizens. Indeed, the burden imposed on such corporations is often less than the burden imposed by contractual consent to jurisdiction or forum selection clauses (especially those in form contracts)— and such clauses have routinely been upheld by the Supreme Court. The corporation has a choice if it views the state-imposed burdens as excessive: it can refrain from “doing business” in the state and not appoint the required agent. We therefore propose that a state can typically obtain a nonresident corporation’s consent to jurisdiction through the appointment of a registered agent for service of process, as a necessary condition for the corporation to conduct intrastate business and access forum courts, in those actions implicating sufficient state sovereign interests, including state interests in prescribing the substantive law governing the action or providing a convenient forum for its injured residents.

*Id.* at 662–664.

470. See discussion *supra* section VI.B.

471. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

472. *Id.* at 292.

Justice White explained that the first function, that of protecting defendants, is “typically described in terms of ‘reasonableness’ or ‘fairness.’”<sup>473</sup> *International Shoe* and its progeny drew no distinction between specific personal jurisdiction and general personal jurisdiction in the application of a reasonableness analysis as part of a court’s jurisdictional analysis.<sup>474</sup> Thus, any concern regarding burdens on corporate defendants if their compliance with explicit registration and appointment statutes resulted in a state court being able to exercise general personal jurisdiction over them in the limited circumstances described in this Article could be addressed by the reintroduction of the traditional fairness factors in all analysis of personal jurisdiction.

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473. *Id.*

474. See discussion *supra* Parts III–IV.