Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction

JEFFREY L. RENSBERGER*

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I. INTRODUCTION

Recent Supreme Court cases have given an old issue of personal jurisdiction fresh pertinence. One basis of jurisdiction is the defendant's consent.[1] Consent has been held to exist when an out-of-state corporation complies with a state law requiring that it register and appoint a local agent for service of process.[2] Jurisdiction based on consent requiring registering and appointing a local agent for service was recognized over a century ago in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Company*.[3] Intimations of the consent by registration doctrine trace back to the headwaters of jurisdiction, *Pennoyer v. Neff*.[4] This submission to jurisdiction is, at least according to some decisions, unlimited, thus extending to any claim whether connected to the forum or not.[5] But because these cases predate the modern jurisdictional scheme established in *International Shoe v. Washington*, their continued vitality is unsure.

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1. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

2. *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990); *see also* Bohreer v. Erie Ins. Exch., 165 P.3d 186, 192 (Ariz. Ct. App. 2007).

3. 243 U.S. 93, 96 (1917).

4. *See* Pennoyer v. Neff, 95 U.S. 714, 735 (1878). *Pennoyer* explained that a state may "require a non-resident entering into a partnership or association within its limits . . . to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership [or] association" and that "judgments rendered upon such service" are "binding upon the non-residents both within and without the State." *Id*.

5. *See Pa. Fire*, 243 U.S. at 94–95 (rejecting argument that Missouri's jurisdiction over out-of-state corporation should be limited to "suits upon Missouri contracts").

The Supreme Court has created fresh limits on other bases of jurisdiction. Like rain in a watershed, claims for jurisdiction seek other channels when old ways are blocked. And as has been predicted,[6] parties are dusting off the old registration-as-consent basis of general jurisdiction. This Article examines whether a state may declare that an out-of-state corporation consents to jurisdiction over claims having no connection to the state when it registers to do business. I conclude that a state may assert such general jurisdiction when it has a local plaintiff for whom it wishes to provide a forum. Other assertions of such general jurisdiction are bad jurisdictional policy and pose constitutional problems.

Part II of this Article sets the stage by laying out some basics of personal jurisdiction and summarizing recent Supreme Court cases that have curtailed some bases of jurisdiction. Part III sets out the argument for general jurisdiction by registration, considering both its historical pedigree and modern jurisdictional theory. Part IV addresses the important question of why plaintiffs seek to sue in an unconnected forum. What are the occasions when general jurisdiction based on registration is attractive? This analysis reveals the extent to which such jurisdiction is necessary or useful. Part V sets out arguments against general jurisdiction based on registration, considering both the practical problems it creates and constitutional difficulties. Part VI provides a resolution. It finds a limited role for this type of general jurisdiction: a state may validly assert such jurisdiction when it has an interest in affording a forum for a local plaintiff.

II. THE PRESENT IMPORTANCE OF CONSENT TO GENERAL JURISDICTION BASED ON REGISTRATION TO DO BUSINESS

General jurisdiction based on registering to do business fits within the consent category of the current framework of personal jurisdiction.[7] Consent to jurisdiction is a form of general jurisdiction, meaning that a consenting

6. *See generally* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 258 (2014) ("In the face of a significantly narrowed test for contacts-based general jurisdiction, courts will be faced with new requests for consent-based general jurisdiction.").

7. *See* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1380–82 (2015) (discussing consent-based jurisdiction based on business registration). *But see id.* at 1399 (noting that equating registration to do business with consenting to personal jurisdiction is "faulty").

defendant can be sued for any claim, whether or not the claim has any connection to the forum.[8]

A. Some Basics of Personal Jurisdiction: General and Specific Jurisdiction

The heads of personal jurisdiction are as follows. For an individual, physical presence in the state accompanied by in-hand service of process has long sufficed to establish a court's authority to render a valid in personam judgment.[9] Likewise, it has long been the law that an individual is subject to jurisdiction in the state of his domicile,[10] and a corporation is subject to jurisdiction in the state of its incorporation.[11] Following *International Shoe Co. v. Washington*, states can subject individuals—and corporations—to jurisdiction if they have "minimum contacts" with the state.[12] Finally,

8. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 32 (AM. L. INST. 1971) ("A state has power to exercise judicial jurisdiction over an individual who has consented to the exercise of such jurisdiction.").

9. *See* Burnham v. Superior Ct., 495 U.S. 604, 610 (1990) (plurality opinion) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

10. *See* Milliken v. Meyer, 311 U.S. 457, 463–64 (1940) ("One such incident of domicile is amenability to suit within the state even during sojourns without the state . . . ."); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 29 (AM. L. INST. 1971) ("A state has power to exercise judicial jurisdiction over an individual who is domiciled in the state.").

11. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) ("[T]he place of incorporation and principal place of business are 'paradigm bases for general jurisdiction.'" (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988)); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 41 (AM. L. INST. 1971) ("A state has power to exercise judicial jurisdiction over a domestic corporation."). For an analysis that challenges the historicity of this commonly accepted rule, see Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 HOUS. L. REV. 631, 676 (2016) ("[A]fter the early nineteenth century, there appear to be no reported decisions, federal or state, basing personal jurisdiction solely on the fact of incorporation."), and *id*. at 678 ("[G]eneral jurisdiction based solely on the fact of incorporation is a 'traditional' rule with a very weak pedigree.").

12. 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting *Milliken*, 311 U.S. at 463)). *International Shoe* involved a corporate defendant, but its dicta extended to individuals. *See id*. at 319. Subsequently, the Court applied the minimum contacts test to individual defendants. *See Burger King*, 471 U.S. at 474.

a defendant is subject to jurisdiction if he or she consents to the forum's authority.[13]

Modern jurisdictional theory describes two subcategories of jurisdiction: general and specific. General jurisdiction allows a court to adjudicate any controversy concerning the defendant regardless of the subject matter of the suit.[14] It is "dispute-blind."[15] In contrast, a court's authority under specific jurisdiction extends only to a particular dispute or controversy.[16] General jurisdiction is based on a relationship between the defendant and the forum of sufficient depth to allow the forum to adjudicate any claim involving that defendant.[17] Domicile, state of incorporation, service within

13. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) ("[A] party may insist that the limitation [of personal jurisdiction] be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority."); *see also* 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1067.3 (4th ed. 2015) ("[P]ersonal jurisdiction can be based on the defendant's consent to have the case adjudicated in the forum, or the defendant's waiver of the personal jurisdiction defense.").

14. *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017) ("A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 919, 919 (2011)); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."); *see also* Brilmayer et al., *supra* note 11, at 727 ("[G]eneral jurisdiction establishes forum adjudicative power over any controversy involving that defendant."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) (AM. L. INST. 1971) ("A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.").

15. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613 (1988).

16. *See Daimler*, 571 U.S. at 127 ("Adjudicatory authority [in cases] in which the suit 'arises out of or relates to the defendant's contacts with the forum,' . . . is today called 'specific jurisdiction.'" (citation omitted) (first quoting Helicopteros, 466 U.S. at 414 n.8; and then quoting *Goodyear*, 564 U.S. at 923–24)); *see also* Brilmayer et al., *supra* note 11, at 727 ("Specific jurisdiction . . . depends on a connection between the defendant, the forum, and the particular litigation."). The original and still classic formulation of the general-specific jurisdictional dichotomy defines specific jurisdiction as "the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate." Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

17. *See Goodyear*, 564 U.S. at 919 ("A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations

the territory of the state, and consent are examples of such a relationship.[18] Specific jurisdiction, on the other hand, is narrower because the defendant has a less profound affiliation with the forum.[19] It rests instead on a particular controversy involving the defendant having occurred in the forum.[20] Specific jurisdiction is a creature of minimum contacts jurisdiction. When the defendant has relatively few contacts with the forum, but the lawsuit arises from or relates to those contacts, the forum has specific jurisdiction.[21] But contacts can also give rise to general jurisdiction—the ability to adjudicate any claim against the defendant—if the defendant has enough contacts or the right kind of contacts to create a sufficiently profound relationship to the forum. Thus, the pre-*International Shoe* landscape of jurisdiction—domicile, transient jurisdiction, and state of incorporation —were all types of general jurisdiction.[22] *Shoe* added a new element to the landscape, specific jurisdiction based on related contacts.[23]

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with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." (quoting *Int'l Shoe*, 326 U.S. at 317); von Mehren & Trautman, *supra* note 16, at 1136 (explaining that general jurisdiction allows a court to "exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected").

18. *See* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 123 (listing "in-state service of process, defendant's domicile, appearance, and consent" as bases of general jurisdiction (first citing Burnham v. Superior Ct., 495 U.S. 604, 610–11 (1990); then citing Milliken v. Meyer, 311 U.S. 457, 462 (1940); then citing Adam v. Saenger, 303 U.S. 59, 67–68 (1938); and then citing Nat'l Equip. Rental v. Szukhent, 376 U.S. 311, 314(1964)); *see also* Brilmayer et al., *supra* note 11, at 733 (stating that the state of incorporation provides a basis for general jurisdiction).

19. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011) (plurality opinion) (specific jurisdiction is "a more limited form of submission to a State's authority" (citing *Int'l Shoe*, 326 U.S. at 319).

20. *See Goodyear*, 564 U.S. at 919 ("Specific jurisdiction, on the other hand, depends on an 'affiliation between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State . . . ." (quoting von Mehren & Trautman, *supra* note 16, at 1136)).

21. *See Daimler*, 571 U.S. at 127 ("'[T]he commission of some single or occasional acts of the corporate agent in a state' may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity." (quoting *Int'l Shoe*, 326 U.S. at 318)).

22. *See supra* note 18 and accompanying text.

23. *See* von Mehren & Trautman, *supra* note 16, at 1142 ("The formulas current before *International Shoe Co. v. Washington* emphasized consent, presence, and doing business—concepts broad enough to ground a fully general jurisdiction . . . ." (footnote omitted)).

B. Some Basics of Personal Jurisdiction: Consent

Personal jurisdiction is an "individual right" and therefore "it can, like other such rights, be waived."[24] This basis of jurisdiction may be conceived of alternatively as either a waiver of an objection to jurisdiction or a consent to jurisdiction. Courts often use the terms consent and waiver interchangeably.[25] "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued," Justice Frankfurter observed, "is merely an expression of literary preference."[26] But in fact, one can and should distinguish between the two. Consent is a voluntary, subjective assent to a court's jurisdiction. Waiver is a consequence imposed by the law as a result of voluntarily taking some *other* action.[27] Although the defendant's underlying action was voluntary, the submission to the court's jurisdiction may not have been.[28] Judge Learned Hand made this distinction between actual subjective consent and an "impute[d] result of a voluntary act" in the context of corporate registration:

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

25. *See id.* at 703 ("[P]ersonal jurisdiction . . . can . . . be *waived*. . . . A variety of legal arrangements have been taken to represent express or implied *consent* to the personal jurisdiction of the court." (emphasis added)); *see also In re* Asbestos Prods. Liab. Litig. (No. VI), 921 F.3d 98, 101 (3d Cir. 2019) (describing alternatively a decision by defendants to "waive" a jurisdictional defense or "consent" to jurisdiction); Innovation Ventures, LLC v. Nutrition Lab'ies, LLC, 912 F.3d 316, 333 (6th Cir. 2018) ("Defendants consented to this court's jurisdiction so long as we found in their favor and so waived the objection."); *In re* Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532, 538 (E.D. Pa. 2019) (framing the questions as whether a "corporation knowingly and voluntarily *consent*[*s*] to general jurisdiction in a state by registering to do business under a statutory regime that conditions the right to do business on the *waiver* of general jurisdiction" (emphasis added)).

26. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939). The Court in that case was discussing venue, but the purported equivalence of waiver and consent is equally applicable to personal jurisdiction. *See id.*

27. *See* Monestier, *supra* note 7, at 1381 n.190 ("[J]urisdiction [based on] a defendant's failure to follow certain procedural rules . . . is probably more aptly called 'waiver' or 'estoppel' than it is consent.").

28. *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1187 (2003) (drawing a distinction, in the context of the Eleventh Amendment, between consent based on "a state voluntarily and knowingly agree[ing] to be sued" and waiver, which occurs when a "a state's actions otherwise eliminate its immunity").

> When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.[29]

Consent, as defined above, can arise in a variety of ways. The parties may contractually agree in advance of any actual dispute to submit to jurisdiction in a designated forum.[30] Occasionally, parties will express their consent by designating a local agent to receive service of process.[31] In *National Equipment Rental, Ltd. v. Szukhent*, a lease designated a local person as an "agent for the purpose of accepting service of any process within the State."[32] The Supreme Court analyzed this clause as not merely creating a convenient vehicle for service or process, but also as consenting to jurisdiction.[33] This scheme of consenting by designating a local agent for service has echoes in the context of registration statutes, which require appointment of a local agent.[34]

Whether the consent is expressed in plain terms or indirectly, contractual consent is, at least ostensibly, a wholly voluntary assent to a court's jurisdiction, "represent[ing] the parties' agreement as to the most proper forum."[35] The voluntariness may be understood as purely subjective[36] or may rest on an objective rule that one signing an agreement is deemed to

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29. Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915).

30. *See* Atl. Mar. Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 62 (2013) ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause."); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding forum selection clause in cruise ticket contract); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (stating that forum selection clauses in commercial contracts are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances").

31. *See, e.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 313 (1964).

32. *Id.*

33. *See id.* at 315 ("The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York.").

34. *See infra* note 70 and accompanying text.

35. Stewart Org. v. Ricoh Corp., 487 U.S. 22, 31 (1988).

36. Some have taken the extreme position that with "forum selection clauses, voluntary and knowing assent is impossible, regardless of the information disclosed" given the complexities of personal jurisdiction. Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 730 (1992). Under such a view, forum selections clause can be enforced only under an objective—or fictional—notion of consent.

know of and assent to its terms.[37] The only limitation is that the voluntariness of the agreement may be vitiated by resort to "traditional contract doctrines such as 'fraud, undue influence, or overweening bargaining power' . . . or mistake, public policy, and unconscionability."[38] But assuming that a forum selection clause is found to be voluntary, such jurisdiction is based on a submission by the defendant to the forum.

Consent's sibling is waiver, which, as noted above, does not rest upon a subjective notion of assent. A defendant waives any objection to jurisdiction by appearing in the action.[39] Similarly, a plaintiff waives objections to jurisdiction over a counterclaim by having filed its initial claim in the forum.[40] Jurisdiction is the "price which the state may exact as the condition of opening its courts to the plaintiff."[41] Likewise, a defendant who fails to timely and properly raise a personal jurisdiction objection waives it.[42] The party in such cases may not have had a subjective desire to consent to jurisdiction. But even if they did not, jurisdiction is found as a *consequence* of another voluntary action. Some "actions of the defendant may amount to a legal submission to the jurisdiction of the court," the Supreme Court has observed, "whether voluntary or not."[43] In this category of cases, the jurisdiction arises not because it was the goal of the defendant, but as a rule-imposed byproduct of the party's other actions.

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37. *See* Lighthouse MGA, LLC v. First Premium Ins. Grp., 448 F. App'x 512, 515 (5th Cir. 2011) ("[Defendant] cannot maintain that it did not knowingly and willingly waive diversity jurisdiction on the basis that [plaintiff's] general counsel did not discuss the forum selection clause with [defendant] or warn [defendant] of the clause's existence.").

38. Monestier, *supra* note 7, at 1385–86 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

39. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982). This is a longstanding rule. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (stating that a state has in personam jurisdiction if the defendant has made a "voluntary appearance").

40. *See* Adam v. Saenger, 303 U.S. 59, 67 (1938) ("The plaintiff . . . by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court . . . .").

41. *Id*. at 68 (citing Frank L. Young Co. v. McNeal-Edwards Co., 283 U.S. 398, 400 (1931)).

42. *See* FED. R. CIV. P. 12(g)–(h); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1391 (3d ed. 2004) (noting that a defense for lack of personal jurisdiction is "waived if [it is] not included in a preliminary motion under Rule 12 as required by Rule 12(g) or, if no such motion is made, [it is] not included in the responsive pleading or an amendment as of right to that pleading under Rule 15(a)").

43. *Ins. Corp. of Ir.*, 456 U.S. at 704–05.

C. The Contraction of Contacts-Based Jurisdiction

The Supreme Court has curtailed contacts-based personal jurisdiction.[44] One may characterize these cases as contracting the previously established range of personal jurisdiction.[45] Alternatively, one might more charitably view the Supreme Court as declining to ratify lower courts' extensions of jurisdiction on issues that had not previously reached the Court. But regardless of how one sets the baseline jurisdictional norm, it is undisputed that some avenues of personal jurisdiction previously available in the lower courts have been foreclosed.[46] This contraction creates an incentive for litigants to attempt to find alternative bases of jurisdiction.

In *Daimler AG v. Bauman*, the Supreme Court reeled in a broader view of contacts-based general jurisdiction that had held sway in the lower courts.[47] The Court there held that general jurisdiction exists only in states in which the defendant has so many contacts that it is "essentially at home,"[48] which in the ordinary case is limited to the corporation's state of incorporation and its principal place of business.[49] Lower courts had previously applied a more generous standard of allowing general jurisdiction if the defendant's contacts were "continuous and systematic."[50] Under that standard, major national retailers, such as Wal-Mart, might be subject to general jurisdiction in every state because such businesses could be said to have "substantial and continuous" contacts in each state.[51]

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44. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014).

45. *See* Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 501–02 (2018) ("[T]he Roberts Court's personal jurisdiction decisions are changing the shape of litigation. New restrictions on jurisdiction make it harder . . . for plaintiffs to find available courts.").

46. *See id.*

47. *See Daimler AG*, 571 U.S. at 138–39.

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

49. *See id.* at 139 n.19 ("[I]n 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." (citations omitted)).

50. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984); *see* Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 779 (2017) (stating that lower courts upheld general jurisdiction "when a defendant's in-state contacts were continuous, systematic, and substantial").

51. *See* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 24 (2018) ("Prior to *Goodyear*, the common understanding was that companies doing substantial business in all fifty states—Daimler, Goodyear, Walmart, and the like—would have been subject to general jurisdiction in every state."); Robertson & Rhodes, *supra* note 50, at 779 (explaining that general jurisdiction under the pre-*Daimler* standards allowed "Wal-Mart . . . to be subject to dispute-blind jurisdiction in all fifty states"); Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler v. Bauman *and the End of Doing*

A few years later, the Court provided a limitation on specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of California*.[52] In *Bristol-Myers Squibb* the Court limited specific jurisdiction to cases in which there "is a connection between the forum and the specific claims at issue."[53] In *Squibb*, the defendant's nationally marketed drug had been sold and administered in the forum to *other* coparty plaintiffs.[54] The Supreme Court held that despite these contacts between the defendant and coparties, the out-of-state plaintiffs, who were prescribed and ingested the drug outside the forum, could not sue the defendant in that state.[55] This was also a narrower view than that of many of the lower courts on what sufficed for a "related" contact.[56]

Bristol-Myers Squibb creates uncertainty for personal jurisdiction for class actions and other types of joinder when some claims arise from

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Business Jurisdiction, 66 HASTINGS L.J. 233, 242 (2014) (noting the possibility that "all large companies with a substantial presence in all fifty states—either physical or virtual—would be subject to general jurisdiction everywhere in the United States"); Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* Mcintyre, 80 GEO. WASH. L. REV. 202, 214 (2011) ("General Motors, most scholars have assumed, is subject to general jurisdiction in every state".).

The case law was actually more nuanced. Some courts held Wal-Mart to be subject to general jurisdiction based simply on its level of in-state activities. *See, e.g.*, Wilgus v. Hartz Mountain Corp., No. 3:12-CV-86 WCL, 2012 WL 2425496, at *2 (N.D. Ind. June 26, 2012) ("Wal–Mart owns stores and conducts continuous and systematic business in the State of New Jersey that is sufficient to establish general jurisdiction in the State of New Jersey."). Other courts found that Wal-Mart's high volume of unrelated contacts did not create general jurisdiction. *See, e.g.*, Follette v. Clairol, Inc., 829 F. Supp. 840, 846 (W.D. La. 1993) ("[G]eneral jurisdiction . . . should be limited to the state of incorporation and the state where the corporation's principal place of business is located."). For a summary of the approaches to general jurisdiction in the lower courts, see James R. Pielemeier, Goodyear Dunlop*: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 982–83 (2012).

52. 137 S. Ct. 1773 (2017).

53. *Id.* at 1781.

54. *Id.* at 1775.

55. *Id.* at 1781.

56. *See id.* The Court rejected the lower court's "sliding scale approach," which allowed for a looser connection between the defendant's forum activities and the claim if the defendant had a higher volume of contacts. *Id.* Under such an approach, a claim need not arise from or even directly relate to the defendant's contact if the defendant had a large number of contacts. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1210 (9th Cir. 2006) ("[W]e consider the extent of the defendant's contacts with the forum and the degree to which the plaintiff's suit is related to those contacts. A strong showing on one axis will permit a lesser showing on the other.").

defendant's forum activities and other similar claims do not.[57] It also furthers the pressure to find an alternative basis for general jurisdiction. To the extent that *Bristol-Myers Squibb* tightens the required nexus between the defendant's contacts and the claim,[58] fewer cases will qualify for specific jurisdiction and more will require general jurisdiction. But at the same time, *Daimler* restricts contact-based general jurisdiction. The net effect is to lessen the breadth of contact-based jurisdiction.

The Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*,[59] does not eliminate the restrictions of *Bristol-Myers Squibb.* The Court in *Ford Motor* rejected a causal relation test for minimum contacts: it is not necessary that the claim arises from the defendant's contacts.[60] It suffices that the claim "relates to" them.[61] There is accordingly jurisdiction when the identical model of the defendant's product is advertised and sold within the forum but the particular vehicle was manufactured, designed, and initially sold to the public outside the forum when a forum plaintiff is injured by it in the forum.[62] This does not affect *Bristol-Myers Squibb*'s rejection of jurisdiction when the plaintiff and his injury are not connected to the forum.

III. THE ARGUMENT FOR CONSENT TO JURISDICTION UNDER REGISTRATION STATUTES

If jurisdiction cannot be justified by contacts, then one of the other heads of jurisdiction must be used. Consent to jurisdiction by way of registering to do business in a state thus beckons, and its vitality acquires a new urgency.[63] The issue of whether a corporation consents to general jurisdiction by registering to do business has been percolating in the

57. *See* Hoffheimer, *supra* note 45, at 526–34.

58. The Court failed to set out a rule in *Bristol-Myers Squibb*. *See id.* at 525. It held that for specific jurisdiction the defendant's contact must be related to the claim and that in the case before it there was no such relationship. *See id.* But it failed to explain what kind of relationship between contacts and plaintiff's claim would suffice. *See id.*

59. 141 S. Ct. 1017 (2021).

60. *See id.* at 1026.

61. *See id.*

62. *See id.* 1028.

63. *See* Monestier, *supra* note 7, at 1346 ("Plaintiffs who are now foreclosed from arguing continuous and systematic contacts with the forum as a basis for jurisdiction will most likely look to registration statutes to provide the relevant hook to ground personal jurisdiction over corporations."); Rhodes & Robertson, *supra* note 6, at 259–60 ("In the past, the defendant's 'continuous and systematic' contacts with the forum would have been sufficient to give rise to personal jurisdiction. Now, however, plaintiffs will be searching for another basis on which the court can exercise general jurisdiction. . . . [T]he natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look for such consent is in a state registration filing . . . .").

lower courts for decades. Before *Daimler*, state and federal courts were split over whether a registration statute created general jurisdiction.[64] A majority of states have not addressed the issue.[65] After *Daimler*, several courts have revisited the issue, some holding that *Daimler*, or at least *Daimler*'s jurisdictional policies, make such consent-based jurisdiction improper.[66] Others have concluded that general jurisdiction by reason of registration is unaffected because *Daimler* addressed contacts-based jurisdiction, not consent.[67]

Before proceeding further, it is helpful to address some details: What do the registration statutes typically say? How have they been interpreted as a matter of state law? And what has the Supreme Court said about consent via registration?

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64. *See* Kevin D. Benish, Note, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1647 (2015) ("[S]ix states have made it clear that registration to do business results in 'consent' to general jurisdiction." (emphasis omitted)). Benish's collation of the state statutes is very useful but is already in need of an update. Delaware previously was among the six states that had interpreted its registration statutes as creating general jurisdiction. *See* Sternberg v. O'Neil, 550 A.2d 1105, 1113 (Del. 1988), *overruled by* Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016); *see also* Benish, *supra*, at 1649. But the Delaware Supreme Court in 2016 reversed itself, holding that "we read our state's registration statutes as providing a means for service of process and not as conferring general jurisdiction." *Genuine Parts Co.*, 137 A.3d at 148.

65. *See* Benish, *supra* note 64, at 1647.

66. *See In re* Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532, 545 (E.D. Pa. 2019) (holding that Pennsylvania's assertion of general jurisdiction "offends the Due Process Clause and is unconstitutional" and prior Third Circuit case law to the contrary "is irretrievably irreconcilable with the teachings of *Daimler*, and can no longer stand"); Horowitz v. AT&T Inc., No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525, at *12 (D.N.J. Apr. 25, 2018) ("[C]onsent by registration is inconsistent with *Daimler.*"); *Genuine Parts Co.*, 137 A.3d at 148; Keeley v. Pfizer Inc., No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (noting that general jurisdiction based on registration is "contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction" (citing Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014)).

67. *See* Rodriguez v. Ford Motor Co., 458 P.3d 569, 577 (N.M. Ct. App. 2018) ("[B]oth *International Shoe* and *Daimler* recognized that consent presented a distinct avenue for jurisdiction, but neither directly addressed consent by registration given that such a circumstance was not present in the facts of those cases."); Allstate Ins. Co. v. Electrolux Home Prods., No. 5:18-CV-00699, 2018 WL 3707377, at *4 (E.D. Pa. Aug. 3, 2018) ("*Daimler* did not directly address the matter of jurisdiction by consent.").

A. Illustrative Registration Statutes

The argument for general jurisdiction under registration statutes is that by registering to do business in a state a corporation consents to jurisdiction over all claims against it in the courts of the forum.[68] The consent is extracted as a condition for doing business in the state.[69] These statutes universally require the corporation to appoint a local agent to receive service of process.[70] Appointing a local agent may itself be seen as a form of consent: By agreeing to be amenable to service in the state, one is submitting to the jurisdiction of the state. But whether a corporation consents to jurisdiction by registering and appointing an agent for service is in the first instance a matter of state law.[71] If the statute was not intended to assert general jurisdiction or, stated differently, it was not intended to extract a consent to general jurisdiction by registering, then the matter is at an end.

Because the argument is based on an assumed demand for consent from the state, one must start with the language and intent of the registration statute. But the language, alas, is usually opaque. Some examples help. Minnesota requires that "[e]very non-Minnesota corporation shall have a registered office and shall have a registered agent."[72] Further, it provides that "[a] foreign corporation shall be subject to service of process . . . by service on its registered agent."[73] Upon this rather slender reed the Eighth Circuit concluded that by registering to do business in Minnesota a corporation

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68. *See* Monestier, *supra* note 7, at 1359 ("[B]y registering under the relevant state statute and appointing an agent for service of process, a corporation has expressly consented to the jurisdiction of the state's courts—period.").

69. *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in A Twenty-First Century World*, 64 FLA. L. REV. 387, 393–94 (2012).

70. *See* Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 159 (2018); *see also* Monestier, *supra* note 7, at 1363, 1363 n.109 (collecting state statutes). For a comprehensive summary of each state's statute, see Benish, *supra* note 64, at 1647 (noting that all states require as a part of registration the appointment of an agent).

71. *See* N. Butte Mining Co. v. Tripp, 128 F.2d 588, 590 (9th Cir. 1942) (stating that because the registration "statute applied only to causes of action arising in Montana . . . appellant's consent to be sued in Montana did not go beyond the requirements of the statute"); Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 584 (D. Del. 2015), *aff'd*, 817 F.3d 755 (Fed. Cir. 2016); Bors v. Johnson & Johnson, 208 F. Supp. 3d 648, 652 (E.D. Pa. 2016) ("The law of the state determines whether a corporation consents to the personal jurisdiction." (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982))); Lanham v. Pilot Travel Ctrs., LLC, No. 03:14-CV-01923-HZ, 2015 WL 5167268, at *6 (D. Or. Sept. 2, 2015) ("[A] court must look to state law to determine whether compliance with business registration or agent designation statutes confer general personal jurisdiction over a nonresident corporate defendant.").

72. MINN. STAT. § 303.10 (2021).

73. *Id.* § 303.13.

submitted itself to the jurisdiction of that state.[74] And the scope of jurisdiction is unlimited.[75] The "appointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state."[76]

Compare Minnesota's statutory language to Connecticut's, which likewise requires that a "foreign corporation authorized to transact business in this state shall continuously maintain in this state: (1) A registered office . . . ; and (2) a registered agent at such registered office."[77] It also provides that "[t]he registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation."[78] Although the language of the two statutes is very similar, the Second Circuit found that registering under the Connecticut statute was *not* a consent to general jurisdiction.[79]

Pennsylvania presents a special case due to its transparency on the intended scope of jurisdiction.[80] A foreign corporation "may not do business . . . until it registers" in with the Pennsylvania Department of State.[81] Pennsylvania statutes then provide that the "relationship" created by the "qualification as a foreign corporation" creates "general personal jurisdiction" over the corporation.[82] The case law under this statute has long held that it means what it says: registering to do business is effective to create general jurisdiction by consent.[83]

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74. *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990).
75. *See id.*
76. *Id.*
77. CONN. GEN. STAT. § 33-926(a) (2021).
78. *Id.* § 33-929(a). The language referring to service on an agent "permitted by law" is similar to the language found in the Model Registered Agents Act. *See* MODEL REGISTERED AGENTS ACT § 13(a) (UNIF. L. COMM'N 2011) ("A represented entity may be served with any process, notice, or demand required or permitted by law by serving its registered agent.").
79. Brown v. Lockheed Martin Corp., 814 F.3d 619, 641 (2d Cir. 2016).
80. *See* Monestier, *supra* note 7, at 1366 ("Only one state, Pennsylvania, actually purports to directly address the jurisdictional consequences of registering to do business.").
81. 15 PA. CONS. STAT. § 411(a) (2021). This statute refers to the "Department," which is defined elsewhere as the Department of State. *See id.* § 102.
82. 42 PA. CONS. STAT. § 5301(a)(2) (2021).
83. *See* Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991) ("[R]egistration by a foreign corporation carries with it consent to be sued in Pennsylvania courts."); Bors v. Johnson & Johnson, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016) ("Parties can agree to waive challenges to personal jurisdiction by . . . registering to do business under a statute which specifically advises the registrant of its consent by registration.").

On the other hand, some statutes explicitly negate an argument of consent by registration. The Uniform Business Organizations Code has a provision requiring registration and the appointment of an agent.[84] It also provides, however, that "[t]he designation or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state."[85] Eleven states have adopted this provision,[86] which would seem to answer in those states the question of jurisdiction on the basis of registration. The only possible way to make this provision not decisive on the question is to read it to address, and deny, *contacts-based* jurisdiction but not consent. That is, it could be read as saying merely that that the *contact* of having a registered agent "does not by itself create the basis for personal jurisdiction" as a matter of counting contacts but as not addressing the separate question of *consent*, which might be satisfied by agreeing to have a local agent.[87] To illustrate the argument, the Court in *Daimler* concluded that the defendant lacked sufficient contacts in the forum to create general jurisdiction.[88] But that does not mean the same defendant, on different facts, might not have consented to jurisdiction.[89] Some courts have analyzed registration as a contact or activity separated from consent,[90] but such a distinction is an

84. *See* UNIF. BUS. ORG. CODE § 1-502(a) (UNIF. L. COMM'N 2011) ("[A foreign corporation] may not do business in this state until it registers."); *id*. § 1-402 ("[A foreign corporation] shall designate and maintain a registered agent.").

85. *Id.* § 1-414.

86. *See* ARK. CODE ANN. § 4-20-115 (2021); IDAHO CODE § 30-21-414 (2021); IND. CODE § 23-0.5-4-12 (2021); ME. STAT. tit. 5, § 115 (2021); MISS. CODE. ANN. § 79-35-15 (2021); MONT. CODE ANN. § 35-7-115 (2021); NEV. REV. STAT. § 77.440 (2021); N.D. CENT. CODE § 10-01.1-15 (2021); S.D. CODIFIED LAWS § 59-11-21 (2019); UTAH CODE ANN. § 16-17-401 (LexisNexis 2021); WASH. REV. CODE § 23.95.460 (2021).

87. *See* Monestier, *supra* note 7, at 1376–77.

88. *See* Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) ("It was therefore error for the Ninth Circuit to conclude that Daimler . . . was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.").

89. The Court in *Daimler* characterized the issue in cases such as the one before it as whether there was general jurisdiction "over a foreign corporation that has not consented to suit in the forum." *Id.* at 129 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 928 (2011)).

90. *See* Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991) ("We 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."); Allstate Ins. Co. v. Electrolux Home Prods., No. 5:18-CV-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018) (discussing whether jurisdiction based on registration is predicated on a "relationship" with the state or upon consent).

unlikely reading of the statutes quoted above given that they disavow rather than assert jurisdiction, and no court has advanced it.[91]

Two last issues should be noted before leaving the statutory underpinnings of the consent question. First, what are the consequences of not registering? If a corporation can painlessly flout a requirement to register, it can simply not register and avoid the possibility of consenting to general jurisdiction. The sanction imposed on a nonregistering corporation thus effects the extent to which the corporation is truly coerced into submitting to jurisdiction. The states commonly have two sanctions for failing to register.[92] First, most states close the doors of its courts to corporations who have failed to register.[93] Commonly, this failure can be retroactively cured, enabling a corporation to remedy its nonregistration during litigation in a court of the state.[94] Second, states frequently provide fines[95] for nonregistration, which can go as high as $10,000 per year.[96] One state goes so far as to impose criminal liability, albeit a misdemeanor.[97]

Second, what level of activity in a state triggers the duty to register? Most states have a definition of what constitutes "doing business" in the state. Frequently this is done by a statutory list of activities that will *not*

91. In fact, the cases run in the opposite direction, eliding any distinction between registering as a potentially sufficient contact and registering as consent. In *DeLeon v. BNSF Railway Co.*, the plaintiff argued that jurisdiction was possible even in the face of a statute that said registering "does not by itself create the basis for personal jurisdiction" because registering combined with other contacts created jurisdiction. 426 P.3d 1, 7 (Mont. 2018) (emphasis omitted) (quoting MONT. CODE ANN. § 35-7-115). The court rejected this contact-based argument using the language of consent: "Nothing puts a corporation on notice that, by appointing a registered agent to receive service of process in Montana, it is *consenting* to general personal jurisdiction in Montana." *Id.* (emphasis added). The court's analysis is thus inconsistent with treating the statutory denial of jurisdiction as going only to a contacts-based jurisdiction analysis.

92. *See* MO. ANN. STAT. § 351.574 (2021); *see also* Monestier, *supra* note 7, at 1365–66; Benish, *supra* note 64, at 1647–61.

93. *See, e.g.*, MO. ANN. STAT. § 351.574 ("A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority."). For a comprehensive list, see Benish, *supra* note 64, at 1647–61, and Monestier, *supra* note 7, at 1365–66.

94. *See* Chase, *supra* note 70, at 169.

95. See Monestier, *supra* note 7, at 1365–66 and Benish, *supra* note 64, at 1647–61 for a collection of statutory penalties.

96. *See, e.g.*, ALASKA STAT. § 10.06.710 (2021).

97. *See* OHIO REV. CODE ANN. § 1703.99 (LexisNexis 2021).

result in a finding of doing business.[98] New York, for example, provides the following list of activities that will not be considered doing business:

> (1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting settlement thereof or the settlement of claims or disputes.
> (2) Holding meetings of its directors or its shareholders.
> (3) Maintaining bank accounts.
> (4) Maintaining offices or agencies only for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.[99]

This is similar to the approach of the Uniform Business Organizations Code, which lists eleven activities that do not constitute "doing business."[100] Among them are "conducting an isolated transaction that is not in the course of similar transactions," "owning, without more, property," and "doing business in interstate commerce."[101] Case law in New York further limits "doing business" to activities that are systematic, regular, and intrastate.[102]

B. Supreme Court Case Law on General Jurisdiction by Registration

A venerable line of Supreme Court cases supports the use of registration statutes to acquire jurisdiction over out-of-state corporations. Although these cases predate the reimagining of personal jurisdiction in *International Shoe*, they have not been disclaimed by the Court and thus they support general jurisdiction based on registration. Because others have ably covered this ground,[103] this Article will only briefly highlight its most salient features.

The thread starts in 1855 with *Lafayette Insurance Co. v. French*.[104] The Supreme Court there held that an Ohio judgment against an Indiana corporation was entitled to full faith and credit.[105] Jurisdiction in Ohio had been based on a statute that provided for service upon a "resident agent" of the corporation in suits "founded on contracts of insurance there made by them with citizens of that State."[106] The Court rested jurisdiction upon

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98. *See, e.g.*, N.Y. BUS. CORP. LAW § 1301(b) (2021); UNIF. BUS. ORG. CODE § 1-505(a) (UNIF. L. COMM'N 2011).
99. N.Y. BUS. CORP. LAW § 1301(b).
100. UNIF. BUS. ORG. CODE § 1-505(a).
101. *Id.* § 1-505(a)(9)–(11).
102. Chase, *supra* note 70, at 171 (quoting Highfill, Inc. v. Bruce & Iris, Inc., 855 N.Y.S.2d 635, 637 (N.Y. App. Div. 2008)).
103. *See, e.g.*, Rhodes, *supra* note 69, at 436–40; Chase, *supra* note 70, at 174–79.
104. 59 U.S. 404 (1855).
105. *Id.* at 404, 408.
106. *Id.* at 406.

the power of a state to condition the right of a foreign corporation to transact business in the state.[107] "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State . . . [which] may be accompanied by such conditions as Ohio may think fit to impose . . . ."[108] We would today call *Lafayette Insurance* an exercise of specific jurisdiction:[109] The claim arose from the defendant's contacts with the state. A series of subsequent cases allowed states to assert such jurisdiction.[110]

Smolik v. Philadelphia & Reading Coal & Iron Co.,[111] an opinion authored by Learned Hand, made the jump to general jurisdiction. The plaintiffs in that case sued a Pennsylvania corporation that had registered to do business in New York for injuries they suffered as employees of the defendant in Pennsylvania.[112] Earlier cases from the Supreme Court had forbade jurisdiction over causes of action unrelated to a corporation's in-state business when the defendant corporation had failed to register even though required to by a registration statute.[113] But in *Smolik*, the defendant had in fact registered.[114] Judge Hand concluded that actual registration led to general jurisdiction. The idea that a corporation consents to appointing an agent for service over claims related to its business in the state was a "legal fiction . . . because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had."[115] But in cases where the corporation had actually registered, there is no need to resort to implied consent. "The actual consent in the cases at bar . . . must be measured by the proper meaning to be attributed to the words used" in the state statute.[116] And state law in *Smolik* allowed a resident to "sue foreign corporations upon any cause of action whatever."[117] Because general jurisdiction was the price New York put on conducting business in the state, the defendant by registering agreed to pay it.

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107. *See id.* at 404, 407–08.
108. *Id.* at 407 (citing Bank of Augusta v. Earle, 38 U.S. 519 (1839)).
109. *See* Chase, *supra* note 70, at 174.
110. *See* Rhodes, *supra* note 69, at 436–37; Chase, *supra* note 70, at 174–75.
111. 222 F. 148 (S.D.N.Y. 1915).
112. Benish, *supra* note 64, at 1635.
113. *See Smolik*, 222 F. at 149–50.
114. Benish, *supra* note 64, at 1635.
115. *Smolik*, 222 F. at 151.
116. *Id.*
117. *Id.* at 150.

Smolik's result and reasoning was soon ratified by the Supreme Court. In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, an Arizona corporation sued its insurer, Pennsylvania Fire, for a loss on an insurance policy covering Colorado property.[118] The chosen forum, Missouri, had no apparent connection to the dispute, but the defendant had registered to do business there.[119] Relying on *Smolik*, the Supreme Court concluded that jurisdiction existed as a result of the defendant's "voluntary act" of registering, making the case indistinguishable from one in which the corporation by a "corporate vote . . . had accepted service in this specific case" or had "appointed an agent authorized in terms to receive service."[120] Similarly, the Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, held that a corporation had waived venue restrictions by appointing a local agent for service of process.[121] Venue is a privilege and "[b]eing a privilege, it may be lost" by consent.[122] Such consent may be found in the "failure to assert [an objection] seasonably, by formal submission in a cause, or by submission through conduct."[123] In the case of corporation registration, the consent is "part of the bargain by which [the corporation] enjoys the business freedom of the [s]tate."[124] Thus, the consent was a "true contract" based on "real consent."[125]

These cases have never been disavowed by the Court. Indeed, *Smolik* was cited in *International Shoe*.[126] Whether there is reason to now question them is a matter to which I shall return.[127]

C. General Jurisdiction Based on Registration Comports with the Transactional Model of Jurisdiction

One can identify two models of personal jurisdiction. One, what I will call the fiat model, rests on the power of the state. It is unilateral so far as the defendant and the state are concerned, although it is multilateral as

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118. 243 U.S. 93, 94 (1917).
119. *See id.*
120. *Id.* at 95–96 (citing N.Y., Lake Erie & W.R.R. Co. v. Estill, 147 U.S. 591 (1893)).
121. 308 U.S. 165, 175 (1939). The defendant objected that the suit "was not brought 'in the district of the residence of either the plaintiff or the defendant'" as required by the venue statute of the time. *Id.* at 167 & n.1.
122. *Id.* at 168.
123. *Id.* at 168 (citing Commercial Casualty Ins. Co. v. Stone Co., 278 U.S. 177, 179 (1929)).
124. *Id.* at 175.
125. *Id.* (quoting Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1076 (N.Y. 1916)).
126. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318–19 (1945) (citing Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148 (S.D.N.Y. 1915)).
127. *See infra* notes 304–15 and accompanying text.

between the states. The other model, which is often associated with the post-*Shoe* run of cases but which in fact has roots in *Pennoyer*, I will call the transactional model. Under this understanding of personal jurisdiction, a state acquires the right to act against the defendant as a result of the defendant's placing itself within the power of the state. This model of jurisdiction is bilateral, the state acquiring power from the defendant's conscious, volitional acts.

The jurisdictional scheme of *Pennoyer v. Neff* is commonly understood to rest on the power of the state—"naked physical power"[128]—over persons and property within the borders of the state. A state, *Pennoyer* explained, "possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[129] Multilateralism under *Pennoyer* arises only with respect to other states, who are protected against sister states engaging in jurisdictional overreach: any attempt "to enforce an ex-territorial jurisdiction . . . would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation."[130] But as between the state and the defendant, the question is simply one of the authority of the state. "The foundation of jurisdiction is physical power," explained the Court about midway between *Pennoyer* and *Shoe*.[131] The Court in *Shoe* understood *Pennoyer* this way, as it described its approach as shifting the question of jurisdiction away from power:

> *Historically* the jurisdiction of courts to render judgment in personam is grounded on their de facto *power* over the defendant's person. . . . *But now* . . . , due process requires only that in order to subject a defendant to a judgment in personam . . . he have certain *minimum contacts* with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[132]

Thus, after *Shoe* the "historical basis of *in personam* jurisdiction," the "court's power over the defendant's person[,] . . . was no longer the central concern."[133]

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128. *See* Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 677 (1991); *see also* Shaffer v. Heitner, 433 U.S. 186, 199 (1977) ("[U]nder *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property.").

129. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

130. *See id.* at 723.

131. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

132. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

133. *Shaffer*, 433 U.S. at 203.

Underlying the minimum contacts approach is an idea of reciprocity, that personal jurisdiction is an exchange. A defendant chooses to benefit from or affiliate with a state and in return it is subject to jurisdiction.[134] This transactional approach to jurisdiction runs through much of the modern personal jurisdiction cases. Personal jurisdiction is transactional between the defendant and the state, and the role of the courts and due process, is to provide some policing of the fairness of the bargain.[135]

One sees this quite explicitly in *Milliken v. Meyer*,[136] a case *Shoe* relied on in formulating its "traditional notions of fair play" test.[137] *Milliken* established that domicile in a state is "sufficient to bring an absent defendant within the reach of the state's jurisdiction."[138] The rationale was entirely transactional: "The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. . . . One such incident of domicile is amenability to suit within the state."[139] *Shoe* built on the idea of a reciprocal exchange in discussing contacts as a basis for jurisdiction:

> [T]o 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. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[140]

Justice Kennedy has relatively recently attempted to create a unified vison of jurisdiction that explains the traditional power basis in terms of the transactional model.[141] Writing for a plurality in *J. McIntyre Mach., Ltd. v. Nicastro*, he explained that although jurisdiction is a question of power, "[t]he Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."[142] Power is generally lawful only when "the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"[143] A defendant who

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134. *See Int'l Shoe*, 326 U.S. at 319.
135. *Milliken*, 311 U.S. at 463.
136. *Id.*
137. *See Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463); *see also Shaffer*, 433 U.S. at 203.
138. *Milliken*, 311 U.S. at 462.
139. *Id.* at 463–64.
140. *Int'l Shoe*, 326 U.S. at 319.
141. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) (plurality opinion).
142. *Id.*
143. *Id.* at 877 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

purposefully avails himself of the state's benefits thus "submits" to its "authority."[144] Justice Kennedy then proceeded to reconceptualize all of the heads of jurisdiction as instances of a consensual "submission."[145] A fairly literal form of submission is "explicit consent."[146] And physical presence within the state "is another example" of submitting to the state.[147] For an individual domicile and for a corporation incorporation or principal place of business "also indicates general submission to a State's powers."[148] Finally, minimum contacts jurisdiction fits into the transactional scheme of submission:

> Where a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' . . . it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State.[149]

Thus, the Kennedy Grand Unified Theory of Jurisdiction: "Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an *intention to submit* to the laws of the forum State."[150]

This may be an innovation. But as Rocky Rhodes has pointed out, it also rings of the political theory of John Locke, so it is perhaps instead an atavistic reference to "a seventeenth and eighteenth century philosophical understanding of adjudicative jurisdiction."[151] Or perhaps it is a return to the true understanding of *Pennoyer*, which, it has been argued, was based on Lockean political theory.[152] Regardless of its pedigree, it is a transactional model of jurisdiction, one which does have antecedents in the language of reciprocity and of "purposefully availing" oneself state

144. *Id.* at 880.
145. *Id.*
146. *See id.*
147. *Id.*
148. *Id.* at 880–81 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011)).
149. *Id.* at 881 (citation omitted) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
150. *Id.* (emphasis added).
151. Rhodes, *supra* note 69, at 417.
152. *See id*. at 395; *see also* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 300 (1990) (noting that *Pennoyer's* jurisdictional rules "followed from Lockean notions of consent").

benefits and thereby incurring a jurisdictional debt.[153] And it is not just Justice Kennedy off on a frolic. In *Daimler AG v. Bauman*, Justice Ginsberg, in an opinion joined by seven Justices, criticized overly broad general jurisdiction on the ground that it would fail to "permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[154] Nor is the idea that a defendant should be able to decide where to be subject to jurisdiction by structuring its conduct recently coined. Its pedigree runs to nearly forty years, having first appeared in *World-Wide Volkswagen Corp. v. Woodson*.[155]

The argument for general jurisdiction based on registration is strengthened if personal jurisdiction is fundamentally a transaction between the defendant and the state. Contacts-based jurisdiction under this model is somewhat fictive. The defendant will be *regarded* as having placed itself within the state's ambit by activities in the state whether or not the defendant actually so intended. In contrast, basing jurisdiction on a voluntary act of registering with the state in exchange for the privilege of conducting business in the state requires no metaphorical reasoning. The defendant *literally* submitted to the state. And under general jurisdiction based on registration, the Supreme Court is relieved of the difficult burden of policing the fairness of the transactional bargain as it must in minimum contacts cases.

IV. ILLUSTRATIVE REGISTRATION CASES

Merely because the law allows a plaintiff to obtain jurisdiction over a defendant in a particular state does not make a suit there likely. Under minimum contacts, the state in which the defendant has purposeful contacts that are related to the litigation will always have jurisdiction.[156] Because

153. *See* Kogan, *supra* note 152, at 363–64.

154. Daimler AG v. Bauman, 571 U.S. 117, 119, 139 (2014) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

155. *See* 444 U.S. 286, 297 (1980).

156. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011) ("[T]he commission of certain 'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections." (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945))); *Burger King*, 471 U.S. at 472–73 (stating that due process is "satisfied if the defendant has 'purposefully directed' his activities at residents of the forum. . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities" (citation omitted) (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984))); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 346 (2005) ("[I]f a defendant has one or more contacts with a state, the state may be able to subject the defendant to jurisdiction for suits arising out of or relating to the forum state contacts." (citing *Int'l Shoe*, 326 U.S. at 316–17)).

litigation-related events happened in that state, litigation there would generally be convenient. So why would a plaintiff seek to sue a defendant elsewhere, in a state unrelated to the events of the case under a consent by registration theory? Who are the plaintiffs attempting to take advantage of general jurisdiction by registration and what are their motives?

Cases relying on registration for jurisdiction fall into several categories. In some cases, the facts or procedural history reveal that the plaintiff is attempting to take advantage of jurisdiction by registration in order to shop for an advantageous forum.[157] In other cases, there is no affirmative record of forum shopping, but neither is there any apparent reason related to convenience for the choice of the forum.[158] In such cases one can only assume that forum shopping is the motivation. On the other hand, some cases reveal a convenience-related reason for the plaintiff to sue in the forum.[159] These cases often involve a forum that is connected to and convenient for the plaintiff but is unconnected to the defendant.

Before discussing this further, a few words are necessary about forum shopping. In ordinary usage, forum shopping is a term of derision.[160] "[C]ounsel, judges, and academicians employ the term 'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit."[161] But much hangs on the word "unfairly." In every case the plaintiff has made an initial choice about where to sue, and forum shopping is in that sense necessary, ubiquitous, and

157. *See* Ferens v. John Deere Co., 494 U.S. 516, 519–21 (1990) (describing how plaintiffs purposely filed suits in multiple forums to take advantage of differing statute of limitations before transfer all the suits to their home state).

158. *See, e.g.*, Keeley v. Pfizer Inc., No. 4:15CV00583 ERW, 2015 WL 3999488, at *3 (E.D. Mo. July 1, 2015) ("[N]o facts suggest[] Plaintiff was prescribed the medication . . ., purchased the medication . . ., saw the advertisements . . . or in any way was injured in [the forum].").

159. *See Goodyear*, 564 U.S. at 918 (noting that plaintiff filed suit in their home state of North Carolina, but the cause of action and defendants were based in Europe).

160. *See* Hamilton v. Roth, 624 F.2d 1204, 1210 n.6 (3d Cir. 1980) ("[T]he primary evil of forum shopping . . . results whenever a plaintiff has the ability to choose between state and federal fora, and can obtain more favorable result in federal court."); Torres v. S.S. Rosario, 125 F. Supp. 496, 497 (S.D.N.Y. 1954) (stating that 28 U.S.C. § 1404, providing for transfers within the federal system, was designed to "remedy the evils of forum shopping" (citing *Ex parte* Collett, 337 U.S. 55, 69 (1949))).

161. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989).

unexceptionable.[162] When one uses the term "forum shopping" derisively, there is an unstated premise that a litigant should be allowed to choose a forum only for certain reasons and that other motives are proscribed. Plaintiffs choosing to sue in their own home state, for example, are not regarded as forum shopping in the bad sense although the forum selected is of course a product of a plaintiff's choice. "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice."[163] But a plaintiff suing in an otherwise unconnected forum to take advantage of favorable substantive law is seen as improper, indeed "evil" forum shopping.[164] There is a sense in these cases that the plaintiffs are taking something to which they are not entitled—even though jurisdiction is proper—that they are not merely forum shopping, but, we might say, *forum shoplifting*. Preventing this kind of forum shopping in the state versus federal court context is one to the "twin aims" of the *Erie* doctrine.[165] And in the state-to-state forum shopping context, one of the main goals of choice of law doctrine is to advance the "[p]redictability and uniformity of result" in order that "forum shopping will be discouraged."[166] On the other hand, a plaintiff selecting a forum based on favorable forum *procedural* law is generally not criticized for

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162. *See In re* Schlotzsky's, Inc., 351 B.R. 430, 435 (Bankr. W.D. Tex. 2006) ("All plaintiffs who have a choice of forums in which to bring litigation engage in de facto 'forum shopping' as soon as they pick one available forum over the other.").

163. Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) ("[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." (citing *Koster*, 330 U.S. at 524)); Sun Pharm. Indus., Ltd. v. Eli Lilly & Co., No. 07-CV-15087, 2008 WL 1902111, at *4 (E.D. Mich. Apr. 30, 2008) ("[P]laintiff forum shopping is not an evil to be avoided, but rather is an inherent part of our federal court network. A plaintiff may have available numerous places of equal convenience to bring his or her suit, and has every right to file in the forum that is most geographically convenient . . . . .").

164. *See* Walters v. Inexco Oil Co., 440 So. 2d 268, 276 (Miss. 1983).

> We refer to the forum shopping evil. By forum shopping we refer to the situation where an action would lie within the subject matter jurisdiction of both federal and state trial court and where there may be differences in the law applied in each court which may affect the plaintiff's decision where to file—and which may produce differing final results, depending upon which court is selected.

Id.

165. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

166. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (AM. L. INST. 1971).

illegitimate forum shopping.[167] Although this is a large topic[168]—larger than I wish to completely assay here—I will offer the following working definition of forum shopping, which is of sufficient precision for our purposes: Illegitimate forum shopping is a choice of forum for no reason relating to litigational convenience.[169] I will call this "invidious" forum shopping.[170] If the plaintiff could be imagined to have chosen the same forum absent any advantage in the substantive law applied, choosing the forum instead, for example, on the basis of the location of evidence or procedural advantages of the forum, then we should not be troubled by forum shopping.

A. Invidious Forum Shopping

DeLeon v. BNSF Railway Company[171] serves as an example of those cases asserting general jurisdiction based on registration in an attempt at invidious forum shopping. Three plaintiffs sued their employer, a railroad, in Montana for injuries occurring in other states.[172] The plaintiffs were from Missouri and Texas, and the defendant was a Delaware corporation with its principal place of business in Texas.[173] The plaintiffs argued for jurisdiction based on the defendant's registering to do business in the state.[174] Why, one may wonder, would these plaintiffs go to the trouble of seeking jurisdiction in Montana, given that they, the defendant, and

167. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010) (Stevens, J., concurring) ("[D]ivergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure."); *Hanna*, 380 U.S. at 475 (Harlan, J., concurring) ("[L]itigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure."); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 362–63 (2006) ("*Erie* and *Hanna* did not criticize (much less prohibit) forum shopping as between . . . differences in procedural provisions.").

168. See generally Bassett, *supra* note 167, for a discussion and typology of forum shopping.

169. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 114 (1987) (plurality opinion) (rejecting personal jurisdiction in part because the party asserting jurisdiction had "not demonstrated that it is more convenient for it to litigate its indemnification claim" in the forum as opposed to other possible forums).

170. For other commentators' use of this term, see 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:7 (4th ed. 2013), and Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 119 (2009).

171. DeLeon v. BNSF Ry. Co., 426 P.3d 1 (Mont. 2018).

172. *Id.* at 3.

173. *Id.* at 4.

174. *See id.*

the underlying events had no connection to Montana? The answer is that for a time Montana had become catnip to Federal Employers' Liability Act (FELA) plaintiffs.[175] A similar attempt at jurisdictional overreaching occurred in *BNSF Railway Co. v. Tyrrell*.[176] As in *DeLeon*, the plaintiffs and the underlying events were unconnected to Montana.[177] The Supreme Court had already decided in *Daimler AG v. Bauman*[178] that general jurisdiction based on a high volume of contacts is limited to a corporation's state of incorporation and its principal place of business.[179] The Montana Supreme Court thought *Daimler* did not apply to railroad defendants in FELA cases.[180] The United States Supreme Court clarified that *Daimler* did apply and held that general jurisdiction was not satisfied despite the defendant's thousands of miles of tracks and thousands of employees in the state.[181] But why sue in Montana of all places? The answer is found in the brief for the defendant railroad:

> Once a complaint is timely filed within the applicable statute of limitations, Montana gives plaintiffs up to three additional years to serve the complaint on the defendant. . . . Montana does not require discovery to be proportional to the needs of the case. . . . The Montana Supreme Court refuses to allow motions to transfer FELA cases based on forum non conveniens. . . . Montana generally does not follow the standards for expert witnesses in *Daubert* . . . . Montana requires only two-thirds of a jury to agree on a verdict. . . . The Montana Supreme Court has . . . interpreted FELA's statutory three-year statute of limitations to allow plaintiffs to recover for the full amount of their injuries so long as, sometime in the past three years, the defendant's alleged negligence contributed in any way (however slight) to the injury. . . . Whereas railroad defendants in other courts are entitled to seek have their FELA liability apportioned to account for a plaintiff's preexisting conditions, . . . the Montana Supreme Court has strongly suggested that railroads cannot make this defense. . . . [T]he Montana Supreme Court has approved—and held that FELA does not preempt—novel independent causes of action against railroads . . . .
>
> *Given this extraordinary combination of plaintiff-friendly procedural rules, legal standards, and case outcomes, it is unsurprising that BNSF has recently faced 36 FELA lawsuits in Montana state court that have no connection whatsoever to Montana*.[182]

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175. *See, e.g.*, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558–59 (2017).

176. *Id.*

177. *See id.* at 1554 ("[N]either [plaintiff] appears ever to have worked for BNSF in Montana.").

178. Daimler AG v. Bauman, 571 U.S. 117 (2014).

179. *See supra* notes 47–49 and accompanying text.

180. *See Tyrrell*, 137 S. Ct. at 1554–55.

181. *See id.* at 1558–59.

182. Brief for Petitioner at 10–13, *Tyrrell*, 137 S. Ct. 1549 (No. 16-405) (original emphasis omitted) (emphasis added) (citations omitted) (first citing Mont. R. Civ. P. 4(t)(1); then citing State *ex rel.* Burlington N. R.R. Co. v. Dist. Ct., 891 P.2d 493, 499

Other cases asserting jurisdiction on the basis of registration are less compelling but are still suggestive of invidious forum shopping. In *Keeley v. Pfizer Inc*., a mother and son sued in Missouri for the son's birth defects allegedly caused by the mother's ingesting the defendant's prescription drug while pregnant.[183] The plaintiffs failed in their efforts to convince the court to assert general jurisdiction.[184] There was no obvious reason for the case to be filed in Missouri: "it is unclear how Defendant's contacts with Missouri relate to the cause of action in this suit."[185] The plaintiff son "was born in Georgia" and "no facts suggest[] Plaintiff was prescribed the medication in Missouri, purchased the medication in Missouri, saw the advertisements in Missouri, or in any way was injured in Missouri."[186] Thus, invidious forum shopping seems the likely motive for choosing the forum. Similarly, no reason of convenience appeared to motivate the plaintiffs choice of forum in *AM Trust v. UBS AG*.[187] The plaintiff was a "Bahamian trust whose beneficiaries are the heirs of a deceased Indonesian government official [who] filed a purported class action in the Northern District of California . . . against UBS, a Swiss bank."[188] The only apparent connection of California to the matter was a vague reference in the complaint that "some" unidentified members of the "class reside in California."[189] The court rejected the plaintiff's attempt at using general jurisdiction based on registration.[190]

B. Capturing a Longer Statute of Limitations

Other cases present a plaintiff choosing a forum with perhaps more defensible motives. In *Brown v. Lockheed Martin Corp*., the plaintiff sued for asbestos exposure.[191] He had been a mechanic in the Air Force and alleged exposure at his work "at various bases in Europe and in the United

(Mont. 1995); then citing Mont R. Civ. P. 48; and then citing Winslow v. Mont. Rail Link, 16 P.3d 992, 995–96 (Mont. 2000)).

183. No. 4:15CV00583 ERW, 2015 WL 3999488, at *1 (E.D. Mo. July 1, 2015).
184. *See id.* at *4.
185. *Id.* at *3.
186. *Id.*
187. AM Tr. v. UBS AG, 681 F. App'x 587 (9th Cir. 2017) (mem.).
188. *Id.* at 588.
189. AM Tr. v. UBS AG, 78 F. Supp. 3d 977, 983 (N.D. Cal. 2015), *aff'd* 681 F. App'x 587 (9th Cir. 2017).
190. *AM Tr.*, 681 F. App'x at 588–89.
191. Brown v. Lockheed Martin Corp., 814 F.3d 619, 622 (2d Cir. 2016).

States (i.e., in Alabama, Delaware, Georgia, Illinois, New Mexico, and Michigan)."[192] He originally sued Lockheed in his home state of Alabama, but voluntarily dismissed in the face of a statute of limitations defense.[193] He then brought the action in Connecticut, asserting general jurisdiction based on registration.[194] Thus, the choice of forum was entirely driven by the availability of a longer statute of limitations.[195] Similarly, the statute of limitations drove the choice of forum in *Knowlton v. Allied Van Lines, Inc*.[196] The plaintiff was injured while driving through Iowa from her then home in Minnesota en route to Colorado.[197] By the time she filed suit, she had moved from Minnesota to Colorado.[198] Rather than sue in Iowa, the place of the accident, or Colorado, her new home, she sued in Minnesota arguing for general jurisdiction based on registration.[199] Why Minnesota? Because the statute of limitations.[200] The Minnesota district court ruled that it lacked personal jurisdiction and in lieu of a dismissal transferred the case to the Southern District of Iowa.[201] That court dismissed the case on the basis of Iowa's statute of limitations.[202] The action was timely under Minnesota law,[203] which is no doubt the reason plaintiff chose that forum.

Is an effort to find a longer statute of limitations in an unconnected state an instance of invidious forum shopping, or is it a case of a plaintiff legitimately taking advantage of a forum's favorable procedure? The resolution to this question depends on whether one views the statute of limitations as a mere procedure or as substantive, a hoary old problem.[204] On the one hand, the traditional characterization of a statute of limitations for horizontal choice of law purposes is that it is "procedural and thus may be governed by forum law even when the substance of the claim must be governed by another State's law."[205] On the other hand, this result was

192. *Id.* at 623.
193. *Id*.
194. *Id.* at 623–24.
195. *Id.* at 623 n.3.
196. 900 F.2d 1196, 1197 (8th Cir. 1990).
197. *Id.*
198. *Id.* at 1198.
199. *Id.*
200. *See id.* at 1197.
201. *Id.*
202. *Id*. at 1198.
203. *Id.* at 1197.
204. *See, e.g*., Guar. Tr. Co. v. York, 326 U.S. 99, 107–08 (1945) (asking whether in a diversity case a statute of limitations "a matter of 'substantive rights' . . . or is such statute of 'a mere remedial character' . . . which a federal court may disregard?" (citation omitted) (quoting Henrietta Mills v. Rutherford Cnty., 281 U.S. 121, 128 (1930))).
205. Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988); *see also* Bournias v. Atl. Mar. Co., 220 F.2d 152, 154 (2d Cir. 1955) ("[F]or the purpose of deciding whether to

criticized[206] and so a Uniform Law proposed to flip the characterization of statutes of limitations from procedural to substantive.[207] The Second Restatement of Conflicts here follows its usual, unhelpful pattern of giving an apparently precise rule whose clarity is undermined by making its application dependent on an impossibly abstruse concept: "An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy."[208] Thus, there is a rule—apply the law of the state whose substantive law governs—with an exception turning on the inscrutable distinction of whether the foreign law "bars the right" as opposed to merely the "remedy."[209] Finally, many states have borrowing statutes, providing that a cause of action is barred in the courts of the state if barred under the law of the state where the cause of action arose.[210]

C. Facilitating Joinder of Defendants

In *In re Asbestos Products Liability Litigation (No. VI)*[211] the forum appears to have been chosen in an effort to sue all defendants in one proceeding. The plaintiff brought an asbestos claim alleging that her late husband had been exposed to asbestos while serving in the Navy.[212] Plaintiff sued in Pennsylvania, but both she and the defendant were Virginia citizens,

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apply local law or foreign law, statutes of limitations are classified as 'procedural.'" (citing GEORGE WILFRED STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 147 (1951); Comment, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919)); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 604 (AM. L. INST. 1934) ("If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose.").

206. *See Bournias*, 220 F.2d at 154.

207. *See* UNIF. CONFLICT OF LAWS-LIMITATIONS ACT § 2 (UNIF. L. COMM'N 1982) ("[I]f a claim is substantively based . . . upon the law of one other state, the limitation period of that state applies.").

208. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 143 (AM. L. INST. 1971).

209. *Id.*

210. *See, e.g.*, 42 PA. CONS. STAT. § 5521(b) (2020) ("The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim."). *See generally* Francis M. Dougherty, Annotation, *Validity, Construction, and Application, in Nonstatutory Personal Injury Actions, of State Statute Providing for Borrowing of Statute of Limitations of Another State*, 41 A.L.R. 4th 1025 (2020).

211. 384 F. Supp. 3d 532 (E.D. Pa. 2019).

212. *Id.* at 534–35.

and the exposure to the defendant's product occurred outside Pennsylvania.[213] The plaintiff argued for general jurisdiction on the basis of registration.[214] On these facts, the absence of any Pennsylvania connection produces an odor of forum shopping. But plaintiff chose Pennsylvania for some reason. Why? Several facts are suggestive. The plaintiff sued a total of forty-eight defendants.[215] The defendant moving to dismiss for lack of jurisdiction had no Pennsylvania connection to the plaintiff, but the plaintiff did allege that the decedent "was exposed to asbestos in Pennsylvania," albeit "it was not asbestos for which [the defendant in question] could be responsible."[216] So, reading between the lines, the plaintiff sued one or more defendants in Pennsylvania who did have some litigation-related Pennsylvania contacts making that forum a convenient and logical place to sue. The plaintiff additionally wanted to join another defendant who lacked such contacts.[217] The problem for the plaintiff was one of personal jurisdiction barriers to defendant joinder.[218] Jurisdictional doctrine requires that each defendant be subject to jurisdiction.[219] When a plaintiff has claims against one defendant arising in one state and against another defendant arising in a different state, obtaining personal jurisdiction over both defendants in a single state will be difficult.[220] Under the pre-*Daimler* broad conception of general jurisdiction, large corporations could be sued in every state in which they did substantial business, and it would be relatively easy for the plaintiff to find an overlap state, one in which all defendants were subject to general jurisdiction.[221] But now that contacts-based general jurisdiction is limited to a defendant's state of incorporation and its principal place of business, finding a state in which all defendants are "at home" in the *Daimler* sense is harder.[222] General jurisdiction by registration is thus attractive as an alternative. It is understandable why plaintiff should wish to sue all defendants

213. *Id.* at 535.
214. *Id.*
215. *Id.* at 534.
216. *Id.* at 535 n.4.
217. *Id.* at 534–35.
218. For a discussion of the problems of personal jurisdiction and defendant joinder, see Dodson, *supra* note 51, at 32–34.
219. *See* Calder v. Jones, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); Rush v. Savchuk, 444 U.S. 320, 332 (1980) (noting that *International Shoe*'s test "must be met as to each defendant over whom a state court exercises jurisdiction").
220. *See* Dodson, *supra* note 51, at 32–34.
221. *See* Monestier, *supra* note 51, at 242.
222. *See* Daimler AG v. Bauman, 571 U.S. 117, 139 n.19 (2014).

in one forum.[223] Plaintiff's apparent motive is litigational convenience, not shopping for favorable law.

The desire to join multiple defendants was likewise the apparent motive for invoking general jurisdiction based on registration in *Genuine Parts Co. v. Cepec*.[224] *Cepec* was an asbestos case brought in Delaware by a Georgia husband and wife based on exposure to asbestos at the husband's place of work in Florida.[225] Five of the seven defendants were Delaware corporations.[226] The desire to sue as many defendants as possible in one forum explains the choice of Delaware as the forum despite its lack of connection to the plaintiffs or the underlying events. But one of the defendants, Genuine Parts, was a Georgia corporation with its principal place of business in that state.[227] Thus, Delaware had no specific jurisdiction over Genuine Parts because the events giving rise to the claim occurred wholly out of the state and no contacts-based general jurisdiction existed under *Daimler*.[228] The plaintiff's remaining option was to rest jurisdiction on registration.[229]

D. Facilitating Joinder of Plaintiffs and of Plaintiff's Claims

The joinder problems underlying *Bristol-Myers Squibb Co. v. Superior Court of California*[230] present another motive for asserting general jurisdiction based on registration.[231] Under *Squibb*, every plaintiff's claim must arise from the defendant's contacts with the state; it is not enough that other plaintiffs have identical claims that did arise in the state.[232] As Justice Alito put it, "what is missing here . . . is a connection between the forum

223. *Cf.* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) ("What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated?").
224. 137 A.3d 123, 128–29 (Del. 2016).
225. *Id.* at 128.
226. *Id.*
227. *Id.*
228. *Id.* at 148.
229. *See id.* at 128–29. The court rejected the argument. *Id.* at 148 ("In light of . . . *Goodyear* and *Daimler*, we read our state's registration statutes as providing a means for service of process and not as conferring general jurisdiction.").
230. 137 S. Ct. 1773 (2017).
231. On the problems that *Squibb* creates for claim joinder by plaintiffs and party joinder of plaintiffs, see Dodson, *supra* note 51, at 28–32.
232. *See supra* notes 52–55 and accompanying text.

and the specific claims at issue,"[233] and what he meant by "specific claims at issue" are the claims of the particular plaintiff who is asserting jurisdiction. Jurisdiction is thus *party-specific*, not merely transaction-specific: For a given course of conduct carried on across states, whether a defendant is subject to jurisdiction depends upon the identity of the plaintiff. But given the attractions of plaintiff joinder,[234] it is not surprising that plaintiffs would seek to join together claims against a single defendant in one forum.

These limitations created by *Squibb* are illustrated by *Perez v. Air and Liquid Systems Corporation*.[235] The plaintiff in that case alleged that her late husband had been exposed to asbestos during Navy service while serving in California and Hawaii.[236] She sued General Electric, a New York corporation with its principal place of business in Massachusetts, in Illinois.[237] General Electric moved to dismiss for lack of jurisdiction.[238] The court rejected the argument that "specific jurisdiction exist[ed] because the 'Illinois residents' claims and nonresident plaintiffs' claims, including Plaintiff's claims here, are based on the same defective asbestos-containing products, which caused injuries both in and out of Illinois.'"[239] Because specific jurisdiction thus failed, the plaintiff was left to argue, unsuccessfully, for general jurisdiction based on registration.[240]

Horowitz v. AT&T Inc.[241] is another instance of attempting to use general jurisdiction based on registration to achieve the joinder of multiple plaintiffs in one suit. In that case, several named plaintiffs brought a putative class

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233. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

234. *See* Dodson, *supra* note 51, at 8 ("Aggregating plaintiffs offers them the opportunity to reduce costs in a way that can make meritorious but otherwise economically nonviable litigation viable, offers defendants the opportunity for mass resolution, . . . and furthers private enforcement of compliance with substantive law.").

235. Perez v. Air & Liquid Sys. Corp., No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153 (S.D. Ill. Dec. 2, 2016).

236. *Id.* at *5.

237. *Id.* at *3.

238. *Id.*

239. *Id.* at *5.

240. *Id.* at *6–9. In fact, there were no local co-plaintiffs in *Perez*. *Id*. at *6 ("This is not a multi-plaintiff case where some plaintiffs were injured in Illinois and others were not."). Why the case was filed in Illinois is unclear. The plaintiff was from California. Notice of Removal at 6, *Perez*, 2016 WL 7049153 (No. 3:16-CV-00842). The docket contains a PDF of the Notice of Removal from state court, which includes as an attachment the plaintiff's state court complaint. *See id.* That complaint lists her address as "Vista, CA" and attaches a copy of her husband's California death certificate. *Id.* One possible reason for suing in Illinois is that one of the defendants, John Crane, Inc., was an Illinois corporation. *Id.* at 5. If that is true, then this would be an instance of attempting to use general jurisdiction based on registration to achieve the joinder of defendants from different states. One might wonder, however, why Illinois was selected, as opposed to the home states of the other defendants such as G.E.

241. No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525 (D.N.J. Apr. 25, 2018).

action alleging age discrimination in employment claims in New Jersey federal court.[242] Although three of the named plaintiffs lived and had been employed by the defendant in New Jersey, two others lived and had worked in other states.[243] Under *Squibb*, specific jurisdiction failed because "there must be a connection between [these plaintiffs'] claims" and the defendants' "activities within New Jersey, even if [these plaintiffs'] claims are similar or identical to claims brought by the resident named plaintiffs."[244] With specific jurisdiction thus foreclosed, the plaintiffs argued, unsuccessfully, for general jurisdiction based on registration.[245]

The desire by a single plaintiff to join *claims* against a single defendant that occurred in many states presents another occasion for attempts to use general jurisdiction based on registration. In *Allstate Insurance Co. v. Electrolux Home Products*, Allstate, an Illinois corporation with its principal place of business in that state, sued Electrolux, a Delaware corporation with its principal place of business in North Carolina, seeking to recover amounts Allstate had paid out in insurance claims due to fires caused by Electrolux dryers.[246] The fires occurred in "eighty-six separate instances occurring across twenty-one states."[247] According to Electrolux, of the eighty-six fires, only fourteen occurred in Pennsylvania, with the remaining seventy-two having occurred in twenty other states.[248] The court observed that the reasons for Allstate's choice forum "are not apparent."[249] But because some of the fires were local to Pennsylvania, it would one logical place to sue, albeit not the only one. The desire to join the claims is understandable. But if that were the only motivating factor in forum selection, North Carolina, the defendant's principal place of business, would suffice. Perhaps the plaintiff was seeking a single forum for all of its claims without giving the defendant a homecourt advantage. Why Pennsylvania? Perhaps exactly

242. *Id.* at *1, *15–16 (discussing class allegations).
243. *Id.* at *1–2.
244. *Id.* at *15.
245. *Id.* at *11–12.
246. No. 5:18-CV-00699, 2018 WL 3707377, at *1 (E.D. Pa. Aug. 3, 2018).
247. *Id.*
248. Defendant Electrolux Home Products, Inc.'s Reply in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, Sever and Dismiss for Lack of Subject Matter Jurisdiction at 4, *Allstate Ins. Co.*, 2018 WL 3707377 (No. 5:18-CV-00699).
249. *Allstate Ins. Co.*, 2018 WL 3707377, at *8.

because of its uniquely broad statutory assertion of general jurisdiction based on registration.[250]

E. Peripatetic Plaintiffs and Peregrinating Products

Finally, there are cases in which the plaintiff seeks to use general jurisdiction based on registration in order to sue in plaintiff's home state. In these cases, the defendant is not subject to specific jurisdiction in the plaintiff's home state because it has no contacts there. Some of these cases simply involve a plaintiff who travels from home, is injured, then returns home and wishes to sue there.[251] In *Lanham v. Pilot Travel Centers, LLC*, a truck driver who resided in Oregon tripped and fell while at defendant's Idaho truck stop.[252] He sought to sue in his home state. Although the defendant operated truck stops throughout the United States,[253] the accident did not involve anything it did in Oregon, so there was no basis for specific jurisdiction.[254] The plaintiff thus had to rely on general jurisdiction based on registration.[255] In other cases, the plaintiff previously lived in another state and was injured or exposed to a toxic substance there.[256] After moving to another state, the plaintiff sought to sue in his new home forum.[257] *Gorton v. Air & Liquid Systems Corp.*[258] is an example. The plaintiffs brought an asbestos case in Pennsylvania for injuries that manifested in Pennsylvania,[259] the plaintiff's home state.[260] But the plaintiff's exposure had occurred years earlier while he had been employed in other states.[261] Because his claim was not based on defendants' in-state activities, he had to rely on general jurisdiction based on registration.[262]

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250. *See supra* notes 81–82 and accompanying text.
251. *See, e.g.*, Lanham v. Pilot Travel Centers, LLC, No. 03:14-CV-01923-HZ, 2015 WL 5167268 (D. Or. Sept. 2, 2015).
252. *Id.* at *1.
253. *Id.*
254. *Id.* at *4.
255. *Id.*
256. *See, e.g.*, Gorton v. Air & Liquid Sys. Corp., 303 F. Supp. 3d 278, 288 (M.D. Pa. 2018).
257. *See id.*
258. *Id.*
259. *Id.* at 292.
260. Supplemental Memorandum of Law in Opposition to Defendants' Pacific Bell Tel. Co., Nev. Bell Tel. Co., and AT&T, Inc. Motion to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction at 1, *Gorton*, 303 F. Supp. 3d 278 (No. 1:17-CV-01110-YK) ("Mr. Gorton was a resident of the Commonwealth of Pennsylvania at the time that his symptoms began to manifest themselves.").
261. *Gorton*, 303 F. Supp. 3d at 288.
262. *Id.* at 295, 297.

Also in the category of plaintiffs using registration-based jurisdiction in an attempt to sue at home are those where the defendant lacks minimum contacts because the product, not the plaintiff, traveled.[263] In these cases, the product came to the plaintiff in the plaintiff's home state but was not directly marketed there by the defendant.[264] In *Bors v. Johnson & Johnson*, a Pennsylvania plaintiff sued Johnson & Johnson in Pennsylvania, alleging that she was injured by its baby powder, which contained talc manufactured by Imerys, an out-of-state, defendant.[265] Because plaintiff, per her allegations, "purchased and used Johnson & Johnson baby powder in Pennsylvania,"[266] Johnson & Johnson would appear to be subject to specific jurisdiction there because its advertising would satisfy the most rigorous tests of stream of commerce jurisdiction, "targeting" the forum, as is required by a plurality in *J. McIntyre Machinery, Ltd. v. Nicastro*,[267] or taking actions showing an intent to serve the market in that state, as is required by a plurality in *Asahi Metal Industry Co. v. Superior Court of California*.[268] But Imerys, the talc manufacturer, "d[id] not sell talc in Pennsylvania for baby powder or ship or distribute talc in Pennsylvania for baby powder," and the "transactions between Imerys and Johnson & Johnson did not occur in Pennsylvania."[269] Similarly, in *Rodriguez v. Ford Motor Co.*, the plaintiff resorted to general jurisdiction based on registration to overcome the limitations of modern specific jurisdiction doctrine in order to sue in his home state.[270] Plaintiff's decedent had purchased a used Ford pick-up truck in New Mexico.[271] He was killed in an accident occurring in New Mexico.[272] The truck had

263. *See, e.g.*, Bors v. Johnson & Johnson, 208 F. Supp. 3d 648 (E.D. Pa. 2016).
264. *See, e.g.*, *id.* at 651.
265. *Id.* at 650–51, 657 (noting that plaintiff alleged that the out-of-state defendant "provid[ed] the talc to co-defendant Johnson & Johnson").
266. *Id.* at 651.
267. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011) (plurality opinion) ("[A] defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.").
268. *See* Asahi Metal Indus. Co. v. Superior Ct. , 480 U.S. 102, 111 (1987) (plurality opinion) ("[P]lac[ing] . . . a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State [or] advertising in the forum State . . . .").
269. *Bors*, 208 F. Supp. 3d at 651.
270. 458 P.3d 569, 572 (N.M. Ct. App. 2018).
271. *Id.*
272. *Id.*

originally been sold by Ford to a Ford dealership in Arizona.[273] After the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*,[274] some argued that there was no specific jurisdiction in such a case because the defendant's contacts with the forum related to other instances of this model, not the actual vehicle involved in the crash. This extreme reading of *Bristol-Myers Squibb* was rejected by the Court in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[275] But jurisdiction under *Ford Motor* remains unclear for other cases. What if the product is not a car, which is designed for geographically dispersed use? What if the defendant was smaller and had less of a national presence than the Ford Motor Company? What if the plaintiff was local to the forum, but the accident happened out of state? Or what of the converse case, a foreign plaintiff but a local accident? Or what if the plaintiff was not local at the time of the accident but moved to the forum afterwards? *Ford Motor* leaves jurisdiction unsettled in such cases. And so, given the strictures of stream of commerce theory, general jurisdiction based on registration offers to rescue the plaintiff.

V. ARGUMENTS AGAINST GENERAL JURISDICTION BASED ON REGISTRATION

General jurisdiction based on registration raises a variety of concerns. The concerns are both theoretical and practical. General jurisdiction based on registration strains at the boundaries of jurisdictional theory. In at least some cases, this warping of the jurisdictional structure is unnecessary to achieve what general jurisdiction based on registration offers. That is, other less troublesome solutions to the problems of the narrowing of specific jurisdiction exist. And in many cases, general jurisdiction based on registration introduces harms of its own.

273. *Id.* at 573.
274. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017).
275. 141 S. Ct. 1017, 1028 (2021). *See supra* notes 59–62 and accompanying text.

A. General Jurisdiction Based on Registration Creates Inconvenient Litigation

Starting with the practical concerns, litigational convenience argues against general jurisdiction based on registration.[276] In contrast to general jurisdiction, a state exercising specific jurisdiction is by definition one in which at least some of the events underlying the litigation occurred.[277] But the opposite is true in general jurisdiction. The forum is unconnected to the facts of the case. As a result, the litigation has an inherent potential for inconvenience.

Take, for example, *Gulf Oil Corp. v. Gilbert*,[278] the wellspring of the forum non conveniens doctrine in the federal courts. The plaintiff in *Gilbert* was a Virginia resident who sued for his losses from a Virginia warehouse fire allegedly caused by the defendant's negligence in Virginia.[279] The defendant was a Pennsylvania corporation, but had registered to do business in both Virginia and New York.[280] Rather than suing at the location of the events underlying the claim, plaintiff sued in New York.[281] More than a hint of invidious forum shopping existed: The plaintiff explained his preference for New York by arguing that the nearly $400,000 amount claimed was "one which may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature."[282] The district court declined to exercise jurisdiction under the doctrine of forum non conveniens, and the Supreme Court affirmed.[283]

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276. *See* Twitchell, *supra* note 15, at 667 ("[G]eneral jurisdiction [carries] the risk of an inconvenient forum. If the defendant is forced to defend a claim that is not related to its forum activities . . . the lack of litigational support and the difficulty in procuring witnesses and proof may make it much harder to defend the claim."); *see also* Wm. Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction,* 100 MARQ. L. REV. 375, 421 (2016) ("[A]n expansive view of general jurisdiction could result in very inconvenient forums.").

277. Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1025 (2012) ("[J]urisdiction over related claims is relatively convenient [because] the evidence concerning the claim is more likely to be found in the forum state.").

278. 330 U.S. 501 (1947).

279. *Id.* at 502–03.

280. *Id.* at 503.

281. *Id.* at 502–03.

282. Gilbert v. Gulf Oil Corp., 62 F. Supp. 291, 293 (S.D.N.Y. 1945), *rev'd*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947).

283. *Gilbert*, 330 U.S. at 503, 512.

Gilbert was in fact a case based on general jurisdiction by reason of registration, as was the Court's other forum non conveniens decision handed down the same day, *Koster v. (American) Lumbermens Mutual Casualty. Co*.[284] That the litigation in *Gilbert* necessitated the Court's recognition of forum non conveniens should give us pause. If a head of jurisdiction leads to the Supreme Court recognizing a power to decline jurisdiction upon the grounds of inconvenience, we might be well served to reconsider altogether that head of jurisdiction. Indeed, the Court in *Gilbert* indicated that the concerns of an inconvenient forum overrode the consent argument of registration. The Court specifically rejected an argument that the issue of the appropriateness of the forum was put to rest by the defendant's consent.[285] Earlier cases using registration as a basis for consent to jurisdiction only established, the Court explained, that a "defendant may consent to be sued, and it is proper for the federal court to take jurisdiction, not that the plaintiff's choice cannot be questioned" under forum non conveniens.[286]

Nor is *Gilbert* an outlier. Other Supreme Court forum non conveniens cases had their genesis in general jurisdiction, often based on registration. In *Ferens v. John Deere Co*., a Pennsylvania plaintiff injured in Pennsylvania sued the defendant in Mississippi, which had a uniquely long statute of limitations.[287] The plaintiff thereupon moved to transfer the case back to Pennsylvania under 28 U.S.C. § 1404—the statutory treatment of the forum non conveniens doctrine for inter-district transfers.[288] The Supreme Court held that even if the plaintiff initiates the transfer, the normal rule that after a transfer the law of the transferor court continues to apply still obtains.[289] But the problem that the Court had to solve would not have existed were it not for general jurisdiction based on registration: The plaintiff sued the defendant, John Deere, in Mississippi, based on John Deere having registered to do business there.[290] Likewise, in *Piper Aircraft Co. v. Reyno*, the plaintiff brought suit in California against a Pennsylvania airplane manufacturer for a crash in Scotland on behalf of Scottish decedents.[291] Although not stated in the Supreme Court or any lower court's opinion,

284. 330 U.S. 518, 531 (1947) (noting that jurisdiction in New York over out-of-state corporate defendants was predicated on service of process in New York).

285. *See Gilbert*, 330 U.S. at 506.

286. *Id.*

287. 494 U.S. 516, 519–20 (1990).

288. *Id.* at 518–20. On the relationship between § 1404 and forum non conveniens, see Atl. Mar. Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 60 (2013) ("Section 1404(a) is merely a codification of the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal court system . . . .").

289. *Ferens*, 494 U.S. at 519.

290. Ferens v. Deere & Co., 819 F.2d 423, 424 (3d Cir. 1987).

291. 454 U.S. 235, 238–40 (1981).

the claim for jurisdiction in California must have been some form of general jurisdiction, resting on registration or on the pre-*Daimler*[292] broad conception of general jurisdiction based on "continuous and systematic" contacts.[293] Similarly, jurisdiction was predicated on registration in *American Dredging Co. v. Miller*, a case that considered forum non conveniens in the context of admiralty jurisdiction.[294] In *Miller*, a Mississippi resident moved to Pennsylvania and took work as a seaman.[295] After being injured there, he sued in Louisiana a Pennsylvania corporation that had its principal place of business in New Jersey.[296] The lower court appeared to base jurisdiction on the fact the defendant had a registered agent in the state.[297]

The particular problems created by general jurisdiction include the difficulty of supplying proof from witnesses, documents, and other tangible evidence that are distant. General jurisdiction also requires the court to apply choice of law rules, because the unconnected forum has no legitimate basis for applying its own law.[298] Additionally, after having identified the properly governing law, the forum must go to the trouble of ascertaining the law's content and applying it accurately. All of these factors make for inconvenient litigation. Indeed, these are standard factors in applying forum non conveniens.[299] To be sure, many of these factors are lessened, perhaps to

292. *See supra* note 50 and accompanying text.

293. *See* Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. REV. 959, 962 ("Assume that Piper is subject to general personal jurisdiction in California, either because it has qualified to do business and thus appointed an agent for service there or because it does substantial and continuous business there by marketing and selling aircraft in that state.").

294. *See* 510 U.S. 443, 446 (1994).

295. *Id.* at 445.

296. *Id.*

297. Miller v. Am. Dredging Co., 595 So. 2d 615, 616 (La. 1992).

298. *See* Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799, 818 (1995) ("Many conflicts problems are created by the uncoupling of the standards of jurisdictional and legislative competence. In ordinary civil cases, the chief villain is the rule of transient jurisdiction . . . [which] allows a forum to assert judicial jurisdiction in a case in which, because the facts of the case have no connection whatsoever to the forum, it clearly lacks legislative jurisdiction."); *see also* Albert A. Ehrenzweig, *Contracts in the Conflict of Laws, Part Two: Performance*, 59 COLUM. L. REV. 1171, 1173 (1959) (stating that transient jurisdiction is "primarily responsible for our assumed need for imperative conflicts rules").

299. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947) (noting that factors include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises" and having litigation "in a forum that is at home with the state law

the point of elimination, if general jurisdiction is based on the defendant's principal place of business. But using corporate registration as a basis for general jurisdiction does nothing to assure that the ligation is convenient. Broad forms of jurisdiction come at the cost of courts having to develop and apply doctrines of choice of law and forum non conveniens.[300] Although addressing general jurisdiction based on in-state service, Albert Ehrenzweig's half-century old observation rings true today: "American courts are developing a common law of forum non conveniens as a corrective of the serious shortcomings in a law of personal jurisdiction . . . ."[301]

Choice of law and forum non conveniens, seen in this light, are *second-order problems*. The first-order problem is overly broad jurisdiction. Its ill-shaped development has created second-order problems. Rules for choice of law and forum non conveniens, in short, are palliatives designed to alleviate symptoms, not to cure the underlying pathology.

Nor can general jurisdiction based on registration be justified by the need to give the plaintiff a safe harbor for jurisdiction, free of the uncertainties and cross seas of minimum contacts specific jurisdiction.[302] A safe harbor —a sure and certain forum[303]—is a worthwhile objective in the law of personal jurisdiction, but plaintiffs do not need *fifty* such forums as would be the case were general jurisdiction based on registration widely accepted. *Daimler* already gives plaintiffs two ready-made forums, the place of incorporation and the principal place of business.[304] Limiting general jurisdiction to those two avoids the potential for invidious forum shopping in which the plaintiff seeks the most advantageous substantive law and choice of law combination in the nation. It also assures that there will be at least some litigational convenience.[305]

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that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws").

300. *See* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289–92 (1956).

301. *Id.* at 312.

302. This is one of the traditional justifications for general jurisdiction. *See* Brilmayer et al., *supra* note 11, at 730 ("For the convenience of plaintiffs, general jurisdiction should exist somewhere." (citing von Mehren & Trautman, *supra* note 16, at 1179)); von Mehren & Trautman, *supra* note 16, at 1179 ("It is . . . appropriate to preserve some place where the defendant can be sued on any cause of action.").

303. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (noting the virtue of state of incorporation and principal place of business as be "easily ascertainable").

304. *See supra* note 49 and accompanying text.

305. *See* Twitchell, *supra* note 15, at 667–69.

B. General Jurisdiction Based on Registration Is Unnecessary to Enable Party Joinder

The current jurisdictional landscape limits plaintiffs' ability to take advantage of party joinder rules. The problem may arise in the context of either plaintiff joinder or defendant joinder. As to plaintiff joinder, the roadblock is *Bristol-Myers Squibb Co. v. Superior Court of California,* in which the Court held that the claim of each plaintiff in a multi-plaintiff case must arise from or relate to the defendant's in-state contacts as regards that plaintiff's claim;[306] it is not enough that some of the other plaintiffs assert claims arising from the defendant's identical in-state activities.[307] If many plaintiffs are injured across the nation by a common product of the defendant, they may naturally want to sue together in one action. And judicial efficiency would be served by such aggregated litigation. But because of *Squibb*, no one state would have jurisdiction over the defendant as to all of the claims except for the defendant's home state.[308] In response to these dynamics, plaintiffs have begun resorting to claims of general jurisdiction based on registration to allow such plaintiff joinder.[309]

On the defendant joinder side, the problem is created by *Daimler*. Suppose a plaintiff has claims against several defendants arising from the same transaction or occurrence. The federal rules would allow joinder.[310] But if the defendants acted in different states—suppose a years-long exposure to several asbestos products in different states—there may not be any single state where jurisdiction exists over all defendants. Before *Daimler*, the plaintiff could argue for general jurisdiction based on each of the defendants having substantial and continuous activities in the forum. But after *Daimler*, the standard for such jurisdiction is limited to where the defendant is "at home," which is typically limited to the corporation's state of incorporation and its principal place of business.[311] It is thus quite possible that there is no one state in which all the defendants are jurisdictionally "at home."

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306. 137 S. Ct. 1773, 1781–82 (2017).
307. *See supra* notes 52–55 and accompanying text.
308. *Bristol-Myers Squibb*, 137 S. Ct. at 1781–82.
309. *See, e.g.*, Horowitz v. AT&T Inc., No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525 (D.N.J. Apr. 25, 2018).
310. *See* FED. R. CIV. P. 20(b).
311. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (citing Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 919, 924 (2011)).

Although general jurisdiction based on registration is helpful to plaintiffs wishing to join together to sue a single defendant or to a single plaintiff wishing to join multiple defendants, other procedural remedies exist and general jurisdiction by registration is not necessary to achieve this kind of aggregated litigation. Considering first plaintiff joinder, all plaintiffs could —although they may not want to—sue where the defendant is subject to general jurisdiction based on the defendant's principal place of business or state of incorporation. They could also, as the Court noted in *Squibb*, bring a series of statewide class actions.[312] Beyond that, it may be possible to have a nationwide class action in a state where only some of the plaintiffs—the named representative plaintiffs—were injured, the rest of the plaintiffs participating not as parties but as class members. There are conflicting views on how *Squibb* affects personal jurisdiction in class actions. Some view it as fatal to a nationwide class, each class member needing but being unable under *Squibb* to establish specific jurisdiction over its claim.[313] But other commentators note that some jurisdictional characterizations of class actions limit analysis to the named representative plaintiff, not to all members of the class, treating the class as an entity for jurisdictional purposes.[314] That is how the federal courts assess diversity jurisdiction; only the citizenship of the named representative plaintiff counts.[315] Class members' citizenships are irrelevant.[316] If personal jurisdiction is treated the same way—consider the jurisdictional question only as to the named plaintiff—then *Squibb* poses no threat to nationwide class actions. At least one lower federal court has so concluded;[317] others have found *Squibb* to preclude specific jurisdiction in nationwide class actions.[318]

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312. *See Bristol-Myers Squibb*, 137 S. Ct. at 1783.

313. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1285 (2018) ("[U]nder *Bristol-Myers*[,] . . . it is hard to see how a state court other than the defendant's home state could have specific jurisdiction over most multistate class actions."); *see also* Hoffheimer, *supra* note 45, at 532–33.

314. *See* Dodson, *supra* note 51, at 31; *see also* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:26 (5th ed. 2012) (citing Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 614–16 (1987)).

315. *See* Devlin v. Scardelletti, 536 U.S. 1, 10 (2002).

316. *See id.*; Snyder v. Harris, 394 U.S. 332, 340 (1969); 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1755 (3d ed. 2005) ("[T]he citizenship of the representative parties continues to be determinative." (citing McLaughlin v. Miss. Power Co., 376 F.3d 344, 354–55 (5th Cir. 2004))).

317. *See* Fitzhenry-Russell v. Dr. Pepper Snapple Grp., No. 17-CV-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

318. *See, e.g.*, DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018).

Even assuming that *Squibb* does preclude nationwide class actions, general jurisdiction based on registration is not needed to solve the aggregation problem. Fact patterns like *Squibb*, with hundreds of plaintiffs injured around the country by a defendant's product, are ripe for Multidistrict Litigation ("MDL") treatment.[319] Under 28 U.S.C. § 1407, "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."[320] Going forward, each plaintiff in a *Squibb* fact pattern would file individually in the state where he or she interacted with the defendant's product, i.e., consumed a drug or was injured by a consumer product. In most cases, unless the plaintiff has roamed, this will be the plaintiff's home state, but it matters little because the litigation will not stay there. Specific jurisdiction is satisfied by the defendant having marketed the drug or other product in that state. Next, one of the plaintiffs in one of the cases will move for a transfer from the Judicial Panel on Multidistrict Litigation. The Panel will designate one of the courts in which such a case is filed as the MDL court.[321] What the plaintiffs attempted in *Squibb* will thus be achieved: consolidated litigation in a single court. Of course, the transfer is only for pretrial proceedings,[322] but that is a very large "only." A mere three to six percent of the cases transferred to an MDL ever return to the transferring court.[323] As a practical matter, the resolution of the case, through dispositive pretrial motions or settlement, occurs in the MDL transferee court.[324] And the terms of a global

319. *See* 28 U.S.C. § 1407(a).

320. *Id.*

321. *See id.* § 1407(c)(ii). MDL transfers can be initiated by a motion made by any "party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate." *Id*.

322. *See id.*

323. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400–01 (2014); Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, WIS. L. REV. 847, 904 (2018). The widely cited 3% figure comes from Professor Elizabeth Chamblee Burch. *See* Burch, *Judging Multidistrict Litigation*, *supra*, at 73; Burch, *Remanding Multidistrict Litigation*, *supra*, at 400–01. I calculated a slightly higher number, 6.24%, using more recent data. *See* Rensberger, *supra*, at 904.

324. *See* 28 U.S.C. § 1407(a). Professors Bradt and Rave reach the same conclusions about MDL becoming a substitute for other aggregated litigation such as class actions. *See* Bradt & Rave, *supra* note 313, at 1294 ("If our reading of *Bristol-Myers* is correct, much of the mass-tort litigation that has previously been aggregated in state courts is likely to end up in MDL. Unless plaintiffs want to litigate alone or on the defendant's home turf,

settlement in an MDL case can be generous to the plaintiffs, the defendant being willing to pay a premium on claims in order to achieve a final resolution of the matter.[325] The specter of hundreds or thousands of individual plaintiffs having to slug it out in different states across the country thus fades.

The MDL solution is equally availing on the issue of defendant joinder. Although many think of an MDL case as involving multiple plaintiffs with claims against a common defendant, there are many MDL cases in which a single plaintiff uses the MDL to obtain coordinated treatment of claims against many defendants.[326] In such cases, a plaintiff can achieve its desire to litigate together against multiple defendants whose activity spanned many states.

C. General Jurisdiction Based on Registration Violates the Principle of Proportionality

One sees a principle of proportionality underlying much of the law of personal jurisdiction. A state's jurisdiction over a defendant is not an all or nothing proposition. States have greater or lesser degrees of power over a defendant depending on the facts that constitute the relationship between the defendant and the state.[327] Other areas of the law likewise limit the power of a state to impose a waiver of constitutional rights on or extract a consent from a party absent a sufficient and proportionate nexus to a state interest. Unlimited general jurisdiction based on registration violates this proportionality and nexus principle.

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they will file in (or allow their claims to be removed to) federal court in their home states or the states where they were injured, and those cases will then be consolidated under § 1407 in an MDL.")

325. *See* Bradt & Rave, *supra* note 313, at 1312–13.

326. *See, e.g.*, *In re* TLI Commc'ns LLC Patent Litig., 26 F. Supp. 3d 1396 (J.P.M.L. 2014) (consolidation of seventeen actions brought by a single plaintiff in multiple states); *In re* Body Sci. LLC Patent Litig., No. 12-10536-FDS, 2012 WL 5449667, at *1 (D. Mass. Jan. 11, 2012) (single plaintiff suits against multiple defendants for patent infringement consolidated as an MDL); *In re* Katz Interactive Call Processing Patent Litig., No. 07-ML-01816-B-RGK (FFMx), 2009 WL 8635984, at *1 (C.D. Cal. Aug. 14, 2009) ("approximately fifty different lawsuits" brought by a single plaintiff were consolidated); *In re* Omeprazole Patent Litig., 490 F. Supp. 2d 381, 390 (S.D.N.Y. 2007) (consolidation of patent cases brought by single patent holder); *In re* Triax Co. Patent Litig., 385 F. Supp. 590, 591 (J.P.M.L. 1974) (transferring three patent infringement actions brought by a single plaintiff against three separate defendants).

327. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011) (plurality opinion) (describing specific jurisdiction as "a more limited form of submission to a State's authority"); Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 85 (2013) ("In contrast to specific jurisdiction, where the state has an interest in the conduct at issue in the dispute, general jurisdiction concerns the state's interest in the defendant itself by virtue of the defendant's relationship with the forum state.").

As to the law of personal jurisdiction, the transactional strand of personal jurisdiction noted above[328] allows a state to assert jurisdiction in proportion to the defendant's connection to the state. A profound connection to the state—domicile, state of incorporation, or principal place of business—will allow the state the greatest latitude of jurisdiction, general jurisdiction. But this follows from the defendant's profound submission to the state. In contrast, only a lesser quantum of jurisdiction—specific jurisdiction—is allowed based on "a more limited form of submission to a State's authority for disputes that 'arise out of or are connected with the activities within the state.'"[329]

Even if one sets aside Justice Kennedy's submission theory of jurisdiction, the whole scheme of general and specific jurisdiction illustrates the proportionality principle. A lot of contacts—so many that the defendant is metaphorically "at home"—will allow the defendant to be sued on any claim; a lesser volume of contacts creates jurisdiction only for claims related to those contacts.[330] The extent of jurisdiction is also informed by the profundity of the defendant's relationship to the state in addition to its enumerative aspects. That is, in the words of the venerable *Shoe*, the question of contacts is both quantitative and qualitative.[331] Some relationships are so profound that a single instance—one contact if you will—suffices.[332] A corporation can be sued on any claim in the state of its incorporation.[333]

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328. *See supra* notes 137–55 and accompanying text.

329. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011) (plurality opinion) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

330. *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1228 (2007) ("[C]urrent jurisdictional doctrine tends to be grounded in the number of contacts a party has with a territorial location."); *see also* Brilmayer, *supra* note 11, at 727 ("[F]ewer contacts—perhaps only one—will support specific jurisdiction, [but] general jurisdiction require[s] a larger number of contacts."); Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 513 (1984) ("Where the suit is not based on the jurisdiction-conferring contact, it is necessary to show that the defendant engaged in substantial, ongoing and systematic activity within the jurisdiction before the court may properly assert its power over him. When the suit arises from the contact, however, even a single contact suffices . . . .").

331. *Int'l Shoe*, 326 U.S. at 319.

332. *See* Brilmayer, *supra* note 11, at 727.

333. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). The rationale for such jurisdiction rests on the quality of the relationship created by incorporation: "[T]he corporation intentionally chooses to create a relationship with the state of incorporation, presumably to obtain the benefits of that state's substantive and procedural laws. Such a choice creates a unique relationship that justifies general jurisdiction over the corporation." *See* Brilmayer, *supra* note 11, at 733.

A person domiciled in a state can be sued on any claim.[334] On the other hand, a person only temporarily present in a state is not subject to such broad jurisdiction, unless they have the misfortune of being served with process while there.[335] The latter rule, transient jurisdiction, seems incongruous with a principle of proportionality. It is in fact regarded as incongruous with other modern strands of jurisdiction and has been much criticized on that ground. Shortly before the Supreme Court ratified transient jurisdiction in *Burnham v. Superior Court*, the American Law Institute issued a revision to the Restatement of the Conflict of Laws that rejected transient presence and service of process as a basis of jurisdiction.[336] It noted that "considerations of reasonableness qualify the power of a State to exercise personal jurisdiction over an individual on the basis of his physical presence" and that jurisdiction is proper only if the defendant had "been present . . . for a substantial period of time" or "when there is some connection between the State and the particular transaction involved."[337] Jurisdiction would be proper, in other words, only if *Shoe*'s contact principle was satisfied and the defendant's presence was proportionate to an assertion of jurisdiction. But a principle of jurisdiction "based upon the unrelated physical presence of a defendant within the forum state" is inconsistent with modern jurisdictional theory.[338] Those who argue against transient jurisdiction thus endorse a proportionality principle. The problem with transient jurisdiction is its disproportionality.

The requirement of proportionality finds expression elsewhere in the law. Consent to jurisdiction is a form of waiver.[339] Cases addressing general jurisdiction by registration often analyze the issue in terms of waiver.[340]

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334. *See supra* notes 137–55 and accompanying text. One rationale supporting jurisdiction over absent domiciliaries is the reciprocal benefits and burdens of that relationship. Brilmayer, *supra* note 11, at 733. In addition, domiciliaries have the right to vote in the state of their domicile, and subjecting them to jurisdiction in that state does no more than subject them to court procedures and substantive law that they "theoretically . . . had a chance to influence." *Id.*

335. *See* Burnham v. Superior Ct., 495 U.S. 604, 610–11 (1990) (plurality opinion).

336. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28, comment. b (AM. L. INST. 1971).

337. *Id.*

338. Donald J. Werner, *Dropping the Other* Shoe*:* Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 589 (1979).

339. *See supra* notes 25–26 and accompanying text; *see also* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939) ("Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference.").

340. *See In re* Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532, 538 (E.D. Pa. 2019) ("[D]oes a foreign corporation knowingly and voluntarily consent to general jurisdiction in a state by registering to do business under a statutory regime that conditions the right to do business on the waiver of general jurisdiction?"); *see also* Acorda Therapeutics,

Given that a corporation may well not in fact have subjectively assented to jurisdiction when it registered, waiver—a legal consequence attached to a voluntary act—is perhaps the better way to understand such jurisdiction. In general, waivers of constitutional rights must be supported by an adequate state interest. A party may lose the right to raise in the Supreme Court a constitutional objection to state court proceedings by having failed to comply with state procedure for raising the objection in state court.[341] But the state law of waiver will be upheld as an adequate independent ground only to the extent that its application serves a "legitimate state interest."[342] Thus, an "exorbitant application of a generally sound rule renders the state ground inadequate."[343] A state therefore may impose a waiver of a constitutional right as a consequence of some action or inaction of a party, but it may do so only if the waiver is supported by a sufficient state interest. A state could not, I presume, have a rule that a defendant waives its objection to personal jurisdiction if an otherwise properly submitted special appearance contains a single spelling error. The loss of the right must be proportionate to the state interest in its procedural rules.

The law of exactions in takings cases provides another example. Here the problem is not that the state lacks an interest but instead that the interest is unconnected to the consequence the state seeks to impose on the defendant. In a series of cases, the Supreme Court has struck down state attempts to condition the grant of a land use permit upon a property owner's performing some unrelated service to the state. For example, in *Koontz v. St. Johns River Water Management District*, a state regulatory agency denied the plaintiff a permit to develop his wetlands parcel unless he agreed to hire contractors to undertake improvements—replacing culverts or filling ditches—on agency-owned wetlands several miles distant from the plaintiff's property.[344] Similarly, in *Nollan v. California Coastal Commission*, a property owner planned to build a larger residence on his beachfront property.[345] The state asserted that this would create a visual barrier obstructing views of the beach.[346] The state development agency

Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 590 (D. Del. 2015), *aff'd*, 817 F.3d 755 (Fed. Cir. 2016) ("*Daimler* does not address whether personal jurisdiction is an individual right, whether it may therefore be waived, whether waiver may occur by consent . . . .").

341. *See* Henry v. Mississippi, 379 U.S. 443, 446 (1965).
342. *See id.* at 448–49.
343. Lee v. Kemna, 534 U.S. 362, 376 (2002).
344. 570 U.S. 595, 602 (2013).
345. 483 U.S. 825, 827–28 (1987).
346. *Id.* at 835.

conditioned granting the permit not upon a condition that enhanced public views of the beach but instead upon the owner granting a public access easement along the shoreline between the ocean and their property.[347] And in *Dolan v. City of Tigard*, a city conditioned a permit to increase the paved area of a parcel, which raised a legitimate concern of flooding and drainage, on the dedication of certain land to a public access greenway.[348] The problem in each case was that the legitimate state interest implicated by the permit bore no relationship to the condition imposed.[349] Wetland conditions on one parcel are not improved by enhancing drainage on another parcel miles away (*Koontz*); visual obstruction of a beach from the landward side of a structure is not ameliorated by public access along the seaward side of the structure (*Nollan*); and a public access to a greenway does not aid in flood control (*Dolan*). The lesson of these cases is that while "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development . . . it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an *essential nexus* and *rough proportionality* to those impacts."[350]

At a broader level, these decisions are applications of the "overarching . . . unconstitutional conditions doctrine, [which] vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[351] Under the unconstitutional conditions doctrine, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" constitutional right.[352] This doctrine limits a state's power to coercively extract a consent and thus impacts the validity of the corporate consent to jurisdiction, a topic to which I take up below.[353]

General jurisdiction based on registration poses problems similar to the exaction cases. The state has an interest in regulating the conduct of an out-of-state corporation that has a local impact, such as claims arising from the conduct of the corporation within the state. But the state's ability to claim jurisdiction in those cases is already allowed by specific jurisdiction. General jurisdiction allows the state to attach its jurisdiction to disputes entirely unrelated to the state's regulatory interest.[354] The state is thus attempting

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347. *Id.* at 829, 836.
348. 512 U.S. 374, 391 n.8, 392–93 (1994).
349. *See Koontz*, 570 U.S. at 614; *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 395.
350. *Koontz*, 570 U.S. at 606 (emphasis added).
351. *Id.* at 604.
352. *Dolan*, 512 U.S. at 385.
353. *See infra* notes 373–86 and accompanying text.
354. Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 673 (2012) ("Just as a state cannot regulate or tax a

to "leverage its legitimate interest" in some conduct of the corporation "to pursue governmental ends that lack an essential nexus and rough proportionality to" the in-state conduct of the corporation.[355] Acme Inc. wishes to open an outlet in Pennsylvania. Fine, says Pennsylvania, we grant permission on the condition that you cede to us jurisdiction over your California activities.

General jurisdiction based on registration is thus untamed and ill-ridden. It applies to create jurisdiction regardless of the defendant's connections to the state regarding the underlying controversy. In some cases the state may have an interest in jurisdiction that is proportionate to the defendant's conduct. But in other cases there is no such state interest.[356] This is because the basis for finding general jurisdiction—registration as a condition of doing unrelated business in the state—is unconnected to the underlying controversy. A state should not be able to subject an unwilling defendant to jurisdiction without an interest in doing so that is proportionate to the defendant's activities in the state and a nexus between that activity and the underlying litigation.

The qualification that the defendant is unwilling is important. True consent would obviate any jurisdictional objection. Consent in the context of registration has been invoked as a universal solvent that erases any jurisdictional objection. But how should consent be understood in the context of general jurisdiction based on registration? It is to that topic that we now turn.

D. General Jurisdiction Based on Registration Rests on a Fictive Consent

Commentators[357] and cases[358] support general jurisdiction by registration as a straightforward application of the consent basis of jurisdiction. Although consent is a valid basis of jurisdiction, its application to general jurisdiction is problematic.

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corporation's out-of-state activities merely because it does business in the state, the state has no legitimate interest in asserting judicial authority over such out-of-state activities.").

355. *Koontz*, 570 U.S. at 606.

356. For examples of attempts to use general jurisdiction based on registration to forum shop to an entirely unrelated state, see DeLeon v. BNSF Ry. Co., 426 P.3d 1 (Mont. 2018), and Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 3025283 (Pa. Ct. Com. Pl. May 30, 2018).

357. *See, e.g.*, Chase, *supra* note 70, at 174–79.

358. *See, e.g.*, Allstate Ins. Co. v. Electrolux Home Prods., No. 5:18-CV-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018); Sternberg v. O'Neil, 550 A.2d 1105, 1111 (Del. 1988), *overruled by* Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016).

First, the Supreme Court cases that establish general jurisdiction based on registration predate *International Shoe*. A precedent's great age is normally a reason to respect, not doubt, it. But when the surrounding law has changed, one must ask whether the precedent is an artifact of a now obsolete historical setting. Indeed, this concern of updating old features of the law of jurisdiction to conform to the new law was part of the Court's reasoning in casting off the venerable, traditional rule of quasi in rem jurisdiction. "Traditional notions of fair play and substantial justice," the Court explained in *Shaffer v. Heitner,* "can be . . . offended by the perpetuation of ancient forms that are no longer justified."[359] *Shoe* did more than add another arrow to the personal jurisdiction quiver, it replaced the quiver with a new one. The framework of *International Shoe* "represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer v. Neff*."[360] And so pre-*Shoe* cases must be taken with at least a grain, and more likely a shaker, of salt.

Much of the jurisdictional reasoning of cases such as *Lafayette Insurance Co. v. French*[361] and *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*,[362] is unavoidably bound up with a now obsolete jurisdictional apparatus. Under the territorialism that reigned under *Pennoyer*, jurisdiction over out-of-state corporations was difficult to obtain.[363] As *French*—the earliest case on corporate consent to jurisdiction—understood things, a corporation as a creature of the law of its creating state "cannot be deemed to pass personally beyond the limits of that State."[364] But as a substitute for actual physical presence, courts developed for corporate defendants the "doing business" test, under which a corporation that did enough in-state business would be deemed "present" in the state.[365] Once present, the defendant would then be subject to jurisdiction for *any* claim,

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359. 433 U.S. 186, 212 (1977) (quoting Int'l Shoe Co. v Washington, 326 U.S. 310, 316 (1945)).

360. *Id.* at 219 (Brennan, J., concurring) (citation omitted); *see also* Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, 76 U. PITT. L. REV. 153, 186 (2014) ("*Shaffer* . . . sweepingly presumed that *Shoe's* minimum contacts requirements totally replaced *Pennoyer's* territorial approach.").

361. 59 U.S. 404 (1855).

362. 243 U.S. 93 (1917).

363. *See* Rhodes, *supra* note 69, at 393 ("Corporate defendants posed different conceptual challenges to this power-based jurisdictional regime. Because a corporation . . . could not truly be 'physically present' within the state's borders, jurisdiction over a corporation depended on [a] fiction[] . . . that by designating a corporate agent within the state, the corporation consented that in-state service of process on the agent established its amenability[to jurisdiction].").

364. *Lafayette Ins. Co.*, 59 U.S. at 407.

365. Rhodes, *supra* note 69, at 395.

wherever arising, because it would fall within the rule of presence under transient jurisdiction.[366] Cases from this era made distinctions under registration statutes between corporations that were in fact doing business, and hence present, in the state and those who had registered but had not actually done business.[367] They declined to interpret state registration laws to allow for general jurisdiction when the corporation had registered but had not actually done any in-state business.[368] Thus, cases such as *Pennsylvania Fire*, in which the Court extended corporate registration to general jurisdiction,[369] are based not so much on consent as on the fictive presence that the Court later abandoned in *Shoe*.[370] These cases "adopt[ed] a presumption that, by serving an in-state registered corporate agent, the plaintiff established both that the corporation was doing business in state (because registration was only required for in-state business) and that the appropriate service requirements had been met for jurisdiction over unrelated causes of action."[371] Several recent cases considering general jurisdiction based on registration in today's jurisdictional world have accordingly concluded that the older Supreme Court cases in this area are to be regarded as relics of their era with no current relevance.[372]

Second, there is the question of how to treat consent that is coerced. A corporation's consent to general jurisdiction "can hardly be characterized as voluntary," it has been said, because it is faced with a "Hobson's choice" of either declining to do business in the state or submitting to general jurisdiction.[373] Commentators have disagreed on this point. Professor Monestier, for example, argues that the consent in these cases is fictive

366. *See id.* at 395, 438–39.
367. *See id.* at 438–39.
368. *See id.* at 439–40 (discussing Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 405 (1929)).
369. *See supra* notes 118–20 and accompanying text. *See generally* Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 94–96 (1917).
370. *See* Rhodes, *supra* note 69, at 438–39.
371. *Id.* at 439.
372. *See, e.g.*, DeLeon v. BNSF Ry. Co., 426 P.3d 1, 8 (Mont. 2018) (noting that the older U.S. Supreme Court cases "do not hold significant precedential weight in our nation's personal jurisdiction jurisprudence"); Genuine Parts Co. v. Cepec, 137 A.3d 123, 146 (Del. 2016) ("[T]he older case law was rooted in an era where foreign corporations could not be sued in other states unless there was some fictional basis to find them present . . . ."); *see also* Mallory v. Norfolk S. Ry. Co., No. 1961, 2018 WL 3025283, at *5 (Pa. Ct. Com. Pl. May 30, 2018) (explaining that such cases are "relics of the *Pennoyer* era").
373. *Mallory*, 2018 WL 3025283, at *5.

because the corporation lacks a viable choice.[374] The "option of refraining from doing business in the state is not really a viable one for most corporations" and the alternative of doing business without registering involves the corporation in willful violations of the law.[375] As to the latter, federal corporate reporting requirements such as Sarbanes-Oxley[376] may make violations of registrations laws a significant concern wholly apart from the usually modest[377] penalties imposed directly under the registration acts. Professor Chase, on the other hand, argues that a choice influenced by incentives is still consensual.[378] It "may or may not be difficult for a corporation—but it is still a choice and the consent, if granted, is not compelled."[379] Nor are the penalties for nonregistration serious.[380] The most common is merely a temporary closing of the doors of the state's courts until such time as the registration is complied with.[381] Which of these arguments one finds convincing depends upon how one views the legitimacy of the demand the state makes upon out-of-state corporations. The corporation's consent seems unobjectionable if the state is making a reasonable demand for that consent. But if the state lacks a legitimate basis to ask for consent, the request to consent to jurisdiction seems extortionate. This in turn leads to the third difficulty of a straightforward view of registration as consent.

Discussions on registration as a form of consent tend to overlook the distinction between consent and waiver.[382] Consent is better understood as being limited to cases of a true, subjective agreement to jurisdiction. Defendants may have such a subjective desire to submit to the court's jurisdiction when they prefer the forum chosen by the plaintiff for tactical reasons or they wish to have the litigation resolved sooner rather than later. Waiver, on the other hand, is a consequence of some *other* voluntary action. "The court," Learned Hand explained in addressing jurisdiction based on registration, "in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent."[383] But imputing a waiver as a result of some other action presumes

374. Monestier, *supra* note 7, at 1390.
375. *Id.*
376. 17 C.F.R. § 229.406(b) (2020) (requiring a code of ethics for corporations that are "designed to deter wrongdoing and to promote . . . [c]ompliance with applicable governmental laws, rules and regulations").
377. *See supra* notes 93–97 and accompanying text.
378. *See* Chase, *supra* note 70, at 180.
379. *Id.*
380. *Id.*
381. *See id.*
382. *See supra* notes 25–29 and accompanying text.
383. Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915).

that the law may fairly impose such a consequence. A waiver can only be imputed if it is required by the "purposes of justice."[384] Whether justice requires courts to treat a defendant as if it consented to jurisdiction when it in fact did not remains the irreducible question. Moreover, it is a question that must be answered by some principle exterior to a theory of consent. There must be some *legitimate* reason for treating a defendant as if it consented. Arguments for jurisdiction based on a fictional consent thus "assume almost exactly what they set out to prove."[385] Instead of such circularity, "rules must be developed that delineate what voluntary actions are 'sufficiently affiliating' to legitimate the exercise of power," rules that are based on a "meta theory of legitimacy, independent of consent."[386]

One place to look for answers to such questions is the doctrine of unconstitutional conditions. In general, this doctrine holds that a state may not grant a benefit only upon the condition that a person forego a constitutional right.[387] Admittedly, this doctrine is often regarded as a muddle.[388] But it has been applied—albeit, in older cases—to the very context at issue here: permission to do business within a state. In *Frost & Frost Trucking Co. v. Railroad Commission of California*, the Supreme Court invoked the doctrine to hold unconstitutional a state regulatory scheme that characterized "using the public highways [by a] private carrier" as a "special privilege" that was granted "upon condition that he shall dedicate his property to the quasi-public use of public transportation," becoming a public carrier.[389] The Court rejected this appropriation.[390] In doing so, the court quoted with approval a dissent by Justice Day in the earlier case of *Security Mutual Life Insurance Co. v. Prewitt*:

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384. *Id.*

385. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L. J. 1277, 1304 (1989).

386. Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 542 (1991).

387. *See* Richard A. Epstein*, Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988) ("[E]ven if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.").

388. *See* Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1030 (2011) ("[C]alling it a 'doctrine' may be somewhat charitable, since it's more like a number of apparently unrelated (and perhaps incoherent) subdoctrines in different constitutional fields.").

389. 271 U.S. 583, 591 (1926).

390. *Id.* at 599.

> [T]he right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the state would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the state . . . .[391]

Similarly in *Terral v. Burke Construction Co*., the Court struck down an Arkansas statute that revoked a foreign corporation's license to do business if it removed a case from an Arkansas state court to federal court.[392] "[A] state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts . . . ."[393]

These cases come rather close to the matter at hand. They involve the state conditioning a corporation's doing business upon submission to an unrelated burden. And *Burke* was an effort by a state to aggrandize its courts' power through the leverage of registration to do business. In *Burke*, the defendant was coerced to forgo a right it otherwise had to a federal forum.[394] And the federal judiciary was deprived of its ability to hear cases that otherwise would have come to it. There was thus a shift in the distribution of jurisdiction toward the state and away from the federal courts at the expense of both individual defendants and the federal courts. The attempt to acquire power in the present context differs only in detail. Were it not for mandated consent[395] via registration, cases falling within general jurisdiction in the registration state would have been heard only in other states or in federal courts. Absent the general jurisdiction purportedly created by registration, the defendant could only have been sued in other courts. Thus, the situation is almost exactly parallel to *Burke*. The state is attempting to arrogate to itself a unit of litigation that by the otherwise applicable rules of jurisdiction would be in another court. This is an offense to the defendant and to the sister states whose jurisdiction is thus invaded.[396]

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391. 202 U.S. 246, 268 (1906) (Day, J., dissenting).
392. 257 U.S. 529, 530 (1922).
393. *Id.* at 532.
394. *See id.*
395. A purposefully crafted oxymoron.
396. That personal jurisdiction limitations are based at least in part on notions of horizontal federalism—restricting states from overreaching as against sister states—has a long pedigree and despite scholarly criticism a current vitality in recent cases. *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017) ("The sovereignty of each State implies a limitation on the sovereignty of all its sister States." (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980))); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) ("[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.").

Professor Sullivan's influential article on the unconstitutional conditions doctrine is one of the more successful attempts to make sense of it.[397] Her work identifies the problem areas as those in which the state in extracting a waiver attempts either to redistribute power and rights between states and rightsholders or among rightsholders.[398] In the context of general jurisdiction based on registration, the relevant problem is a state's attempt to leverage power against a person—the corporation—holding rights against the state. A state may

> tend to use the strategic manipulation of gratuitous benefits to aggrandize public power . . . [and it] overreaches when it offers benefits in order to gain leverage over constitutional rights. The state may have many good reasons to deal out regulatory exemptions and subsidies, but gaining strategic power over constitutional rights is not one of them.[399]

To the extent that the state is attempting to use general jurisdiction in a case of invidious forum shopping,[400] it violates this principle. There is no legitimate reason to require submission to jurisdiction other than simply to acquire power. The matter might be different if there is some legitimate reason for the state to assert jurisdiction, such as a local plaintiff it seeks to protect. But in cases of "pure" forum shopping, the state would appear to be attempting to extract a concession when it has no legitimate reason to seek one.[401]

Finally, the reality of consent is particularly problematic for corporations whose business is based on an interstate network. Some argue that a defendant can choose to either do business and register in a state or choose to avoid that state and not do business there.[402] But the business model of some defendants does not allow for a checkerboard of business operations.

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397. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

398. *See id.* at 1491 ("A systemic approach to unconstitutional conditions problems recognizes that constitutional liberties regulate three relationships: the relationship between government and rightholders, horizontal relationships among classes of rightholders, and vertical relationships among rightholders.").

399. *Id.* at 1493.

400. *See supra* notes 168–70 and accompanying text.

401. For a case applying the unconstitutional conditions doctrine to the issue of general jurisdiction based on registration, see *In re* Asbestos Prods. Liab. Litig. (No. VI), 384 F. Supp. 3d 532, 542 (E.D. Pa. 2019) (holding that such jurisdiction "violates the unconstitutional conditions doctrine because it conditions the benefit of doing business in the state with the surrender of constitutional due process protections").

402. *See* Chase, *supra* note 70, at 173.

Network industries need to have operations in as many states as possible. The paradigm case is a railroad, such as the defendant in *DeLeon v. BNSF Railway Co*.[403] The railroad could not easily elect to forgo doing business in Montana. Its entire business model, its rationale for existing, is its ability to move things physically from one state to another. It could theoretically decline to have railroad tracks in Montana, but that would significantly undermine its operations in other states. Not only could it not ship to Montana, it could not ship from North Dakota—or from the further eastern ports on the Great Lakes in Wisconsin and Minnesota—to Idaho or Washington in the west without detouring south. A state that seeks to assert general jurisdiction based on corporate registration thus imposes costs on neighboring states.

For this reason, general jurisdiction based on registration raises concerns of imposing unduly on interstate commerce. The Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc*., held that a state statute that tolled the statute of limitations so long as an out-of-state corporation did not maintain a registered agent for service of process violated the dormant commerce clause.[404] The Court was concerned that the cost of securing the protection of a statute of limitations was a submission to the "significant burden" of unlimited jurisdiction: a corporation must "choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense."[405] Indeed, networked industries receive special solicitude under the dormant commerce clause.[406] Whether or not general jurisdiction based on registration rises to the level of a commerce clause violation, it certainly creates bad jurisdictional policy. The old learning in the personal jurisdiction case law about horizontal federalism[407] and the

403. 426 P.3d 1 (Mont. 2018). This case is discussed *supra* notes 171–82 and accompanying text.

404. 486 U.S. 888, 891–93 (1988); *see also* John F. Preis, *The Dormant Commerce Clause As a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 146 (2016). Professor Preis concludes that general jurisdiction by way of registration violates the dormant commerce clause as being both discriminatory, *see* Preis, *supra*, at 138, and unduly burdensome, *see id.* at 154.

405. *Bendix*, 486 U.S. at 893.

406. *See, e.g.*, New York v. Fed. Energy Regul. Comm'n, 535 U.S. 1, 31–32 (2002) (Thomas, J., concurring) ("[E]lectricity . . . transmission is inherently interstate. It takes place over a network or grid, which consists of a configuration of interconnected transmission lines that cross state lines."); *see also* Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. ON TELECOMMS. & HIGH TECH. L. 293, 304 (2008) (arguing that "industries whose interconnected networks cut across state boundaries, such as the electric power, railroad, trucking, airline, and gas pipeline industries" need to be free of inconsistent state regulation).

407. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (noting that jurisdictional limits "act[] to ensure that the States through their courts, do not

need to consider the "shared interest of the several States"[408] has new salience in this context.

If one accepts this argument as to networked defendants, the obvious next question is what other types of businesses have network structures that also raise this concern. Shipping companies, such as FedEx, have increased value in every state by virtue of their ability to ship to every other state. Imagine the decrease in utility of a, say, thirty-eight state FedEx. Interstate franchises also have network effects. A consumer driving through Ohio has a good sense of what he can expect if he chooses to spend the night at a Red Roof Inn or a Motel 6. But he knows that not from his own prior experience in Ohio. He would know it from experience at other iterations of the franchise he has encountered in other states. The broader a franchise spreads nationally, the greater the national name recognition, the greater the value to the consumer in having a stock of knowledge against which to gauge a market transaction. If a given state were to assert general jurisdiction by registration and as a result Motel 6 chose not to operate there, the utility of the Motel 6 brand is diminished. And, importantly, it is diminished not only in the state from which it has withdrawn, it is diminished in every state.

VI. RESOLUTION: A LIMITED USE FOR GENERAL JURISDICTION

The foregoing identifies the utility of and drawbacks to general jurisdiction based on registration. From this discussion, one can now sketch out some solutions. What I propose below is to allow general jurisdiction based on registration if there is also a sufficient interest of the state in asserting jurisdiction, some "plus" factor. Under this analysis, some assertions of general jurisdiction based on registration are proper and others are not.

I previously identified[409] six types of cases in which a plaintiff may seek to use general jurisdiction based on registration:

1. to provide for jurisdiction for a local plaintiff who has moved away from the state where the defendant was subject to jurisdiction or who temporarily traveled to another state and was injured there;

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reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

408. *Id.*

409. *See supra* notes 171–277 and accompanying text.

2. to provide jurisdiction when the injury-causing product was taken by a third party to a state where the defendant lacks minimum contacts;
3. to facilitate joinder on the plaintiff side of multiple plaintiffs or of multiple claims by one plaintiff;
4. to facilitate joinder of defendants that are not otherwise subject to jurisdiction in a single state;
5. in order to take advantage of a longer statute of limitations; and
6. simple invidious forum shopping.

Looking at general jurisdiction based on registration in this way allows us to categorize assertions of such jurisdiction in relation to the reasons a state may have for asserting it. In a given category, a state may have an interest in asserting jurisdiction but because of doctrinal limitations, specific jurisdiction fails. General jurisdiction based on registration in such cases would appear appropriate. The state interest in other categories is more difficult to discern and the assertion of general jurisdiction based on registration therefore more suspect. The question in general is whether the reason for invoking the jurisdiction of the forum state is of sufficient weight to satisfy the concerns, discussed above, of proportionality, of unconstitutional conditions, and of litigational convenience.

Finally, it should be remembered that in these cases the defendant has no forum activities that would justify an assertion of jurisdiction on some other basis. The defendant is not a complete stranger to the forum because it has registered to do business. But the particular claim in question does not arise from or relate to the defendant's activities in the forum. If it did, specific jurisdiction would exist and general jurisdiction based on registration would be unnecessary. For this reason, in assessing the nature of the forum's interest, if any, in the case, it is a given that the forum has no jurisdictionally sufficient basis for regulating the particular conduct of the defendant at issue.

A. General Jurisdiction in Order to Accommodate a Local Plaintiff

If the plaintiff is local to the forum, the state will have an interest in providing a forum for him to receive redress.[410] In many cases, a local plaintiff will be able to assert specific jurisdiction. He may do so if the defendant acted in the plaintiff's state, such as by committing a tort there

410. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (explaining why the forum "ha[d] a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims").

or selling a defective product there, or if the defendant acted only in another state but its actions had consequences in the plaintiff's state for which the defendant is jurisdictionally responsible—i.e., the defendant satisfies whichever stream of commerce test the Court settles on. But specific jurisdiction will fail for a local plaintiff in the following situations:

- The plaintiff was injured by the defendant in another state and the plaintiff later moved to the forum;
- The plaintiff lived in the forum state the entire time but temporarily left, went to another a state, and was injured there;
- The plaintiff never left his or her home state, but the product injuring the plaintiff found its way there in a way for which the defendant is not jurisdictionally responsible.

Regardless of how the plaintiff came to interact with the defendant, the fact remains that the plaintiff is a state citizen, a person the state has an interest in protecting. Some of the cases in this category present more sympathetic cases for jurisdiction than others. Perhaps ironically, the case of after-acquired domicile, those in which the plaintiff permanently relocates to the forum after having been injured while living elsewhere, is more appealing than those in which the plaintiff never moved his or her domicile but was injured while temporarily out of state. This result is perhaps surprising because in the case of a plaintiff injured while temporarily out of state, the forum had an interest in the plaintiff's wellbeing before, at the time of, and after the plaintiff's injury elsewhere. In the case of a post-injury relocation, on the other hand, the forum had no interest in the plaintiff at the time of the injury or other wrong. But a state asserting jurisdiction for a plaintiff injured by the defendant while sojourning elsewhere imposes jurisdiction on a stay-at-home defendant for the benefit of a plaintiff who chose to go the defendant's state. In contrast, a state asserting jurisdiction for the benefit of a local plaintiff who was injured in the state of his former home benefits a plaintiff who was *always* acting in his home state, albeit he changed his identification of home.[411] But these are exceedingly fine gradations upon which to base a distinction of constitutional magnitude,

411. I am assuming here that the plaintiff's relocation was bona fide and not a strategic effort to create jurisdiction. A court should discount after-acquired domicile if the plaintiff was in that sense forum shopping.

and it is preferable to attempt no such distinction. In either case, the state has an interest in protecting the plaintiff.

Litigational convenience is satisfied by the presence of a local plaintiff. The litigation will at the least be convenient for one party. And in a personal injury case, the plaintiff is him or herself an item of real evidence; evidence of the present physical condition of the plaintiff will necessarily be available in the forum. As to the concern of the state imposing an unconstitutional condition, the state in effect is conditioning entry into its market upon a consent to jurisdiction but only if the injured party is local. This seems much less of a disproportionate exchange than if the plaintiff has no connection to the forum. A nexus exists between the state's imposition of the burden and its interests.

This leaves the case of an always-at-home plaintiff injured by a defendant's product that found its way to the plaintiff outside of accepted jurisdictional channels. The state interest here is as strong as in the foregoing cases, and the plaintiff has not ventured out of state to voluntarily put him or herself within the defendant's ambit. The argument for jurisdiction based on litigational convenience may be even stronger than in the cases of roaming plaintiffs because in these cases the event of the injury may itself have happened in the forum state. For example, the plaintiff may have been injured in his home state by a product that came to him there outside the stream of commerce. And, again, the state is not improperly leveraging its jurisdictional power. It has an interest in imposing a jurisdictional consequence upon the defendant's doing business in the state when it seeks to protect a local plaintiff.[412]

B. General Jurisdiction in Order to Facilitate Joinder

Some plaintiffs assert general jurisdiction based on registration in order to facilitate joinder of one kind or another. It may be party joinder of plaintiffs, or joinder of multiple claims by a single plaintiff, or joinder of multiple defendants that are not otherwise subject to jurisdiction in a single state. Joinder of plaintiffs is limited by the strictures of *Bristol-Myers Squibb*, which requires that each plaintiff's claim be related to the defendant's in-state contacts.[413] General jurisdiction based on registration would allow

412. The result suggested by this paragraph is supported by *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), which upheld specific jurisdiction over a car manufacturer even though the defendant designed, manufactured, and sold the car outside the forum because the forum was the home of the plaintiff and the site of the injury. *See supra* notes 59–62 and accompanying text. While general jurisdiction is no longer needed in such a case, it is still useful if some of the elements that made for jurisdiction in *Ford Motor* are lacking. *See supra* note 275 and accompanying text.

413. *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1781 (2017).

plaintiffs with related claims to sue a common defendant together or a single plaintiff to assert multiple claims against one defendant that arose in different states. Or general jurisdiction based on registration may be used in connection with defendant joinder to sue, in a single suit, a group of defendants who are not otherwise subject to suit in a single state. In an asbestos case, for example, the exposure may have occurred in different states at different times. One defendant's product injured the plaintiff in state A. Another defendant's product injured the plaintiff in state B. And so on. Before *Daimler* restricted the use of general jurisdiction based on a high number of unrelated contacts, the plaintiff might easily find a single state where each of the defendants had, under the former standard, "substantial and continuous" contacts.[414] But jurisdiction in such cases is now limited to usually no more than two states where the defendant is "at home," its state of incorporation and the state of its principal place of business.[415] To overcome this problem, the plaintiff sues some defendants in a state where they are otherwise subject to jurisdiction—e.g., a state where a number of the defendants are incorporated or have their principal place of business—and joins the others in reliance on registration to do business.

In such cases, the plaintiff is either local to the forum state or is not. If the plaintiff is local, then general jurisdiction based on registration should be upheld for the reasons stated in the preceding section. In the event that a court disagrees with that analysis and determines that the interest of a state in providing a forum for a local plaintiff is by itself insufficient to support jurisdiction, the enhanced judicial efficiency created by joinder should be an additional factor that would, in combination with a local plaintiff, give the state a sufficient interest.

The joinder-based argument for general jurisdiction based on registration is as follows. First, the concern that general jurisdiction based on registration creates litigational inconvenience by placing the adjudication in an unconnected forum is undercut by the litigational inconvenience that would arise were general jurisdiction based on registration not available. The alternative to using general jurisdiction in a forum unrelated to some of the claims is multiple duplicative litigation in connected forums. There is no gain in judicial

414. *See* Robertson & Rhodes, *supra* note 50, at 779 (noting that, before *Daimler*, lower courts upheld general jurisdiction "when a defendant's in-state contacts were continuous, systematic, and substantial" (citing Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction after* Dailer AG v. Bauman, 76 OHIO ST. L.J. 101, 110 (2015)).

415. *See supra* notes 48–49 and accompanying text.

efficiency when the law atomizes the litigation into multiple lawsuits in multiple forums. Second, a state investing judicial resources in hosting a significant part of the litigation has an interest in its resources being used efficiently.[416] A state's "efforts and expense on a plaintiff's behalf are wasted when that applicant obtains a duplicative remedy in another State."[417]

But what if the plaintiff is not local? Is a naked interest in efficient litigation sufficient to create a state interest when the state has no interest in the plaintiff or in the defendant's activity that creates liability to the plaintiff? General jurisdiction is much harder to justify here. To make the discussion more concrete, suppose a plaintiff wished to sue multiple defendants for asbestos exposure that occurred over many years and in multiple states. If the plaintiff is domiciled in the forum state, one can easily discern a state interest in facilitating his or her recovery against all defendants in a single proceeding. But that interest is far less apparent when the plaintiff is not domiciled in the forum. The plaintiff may have a jurisdictionally viable claim against one or more defendants. As to that litigation properly before the courts of the forum, the state would have an interest in fair and efficient procedures. But it stretches too far to allow the state to bootstrap this interest into an interest in also adjudicating claims against other defendants who are not otherwise subject to jurisdiction simply to promote efficiency.

In the first place, the Supreme Court has repeatedly made clear that personal jurisdiction is not simply about efficiency.[418] Due process limitations on jurisdiction are "more than a guarantee of immunity from inconvenient or distant litigation."[419] And "even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[420]

Second, state interests must be assessed on a claim-by-claim basis if specific jurisdiction is to make any sense. If a state had an interest in "litigation" considered as an amalgam of all claims a plaintiff or group of

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416. *See* Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 111 (1968) ("[T]here [is an] interest of the courts and the public in complete, consistent, and efficient settlement of controversies . . . [and a] public stake in settling disputes by wholes, whenever possible . . . .").

417. Thomas v. Wash. Gas Light Co., 448 U.S. 261, 293 (1980) (Rehnquist, J., dissenting).

418. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (listing efficiency as just one of several factors that courts consider in determining personal jurisdiction, with other factors including: the burden on the defendant, the plaintiff's interest in obtaining relief, and the shared interest of several states in furthering social policies).

419. *Id.* at 294 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

420. *Id.* (citing *Hanson*, 357 U.S. at 251, 254).

plaintiffs against a defendant or group of defendants then it would be unnecessary to inquire into whether any one of the defendants in particular had contacts related to the litigation so long as there was jurisdiction over one. A state does not have jurisdiction over defendant X because it has jurisdiction over defendant Y. Nor, as *Bristol-Myers Squibb* teaches,[421] does it have jurisdiction over claim X merely because it has jurisdiction over a factually related claim Y. Several other Supreme Court cases bear this out. *In World-Wide Volkswagen Corp. v. Woodson*, the Court found that two defendants of four lacked contacts with the forum and were not subject to jurisdiction even though the case proceeded as to the other defendants.[422] Likewise in *Asahi Metal Industry Co. v. Superior Court*, the Court doubted the interest of the forum to hear a claim for contribution against an impleaded defendant even though the forum clearly had jurisdiction over the initial defendant and had invested judicial resources into the resolution of the main claim.[423] If an interest in efficiency that sprang from adjudication of another claim against another defendant was sufficient for jurisdiction, these cases would have come out the other way. The Supreme Court specifically addressed jurisdiction in the multiparty context in *Phillips Petroleum Co. v. Shutts*.[424] In *Shutts*, a Kansas court adjudicated a nationwide class action claiming mineral interest royalty underpayments against a Delaware corporation with its headquarters in Oklahoma.[425] A small number of the royalty owners and mineral leases were in Kansas.[426] The Court upheld personal jurisdiction over the absent class members because they had a right to opt out and the burdens on class members were low.[427] Notably, the Court did not rely on a procedural interest in efficiency to allow jurisdiction. If a state could assert jurisdiction over a claim simply because it had jurisdiction over related claims, the Court would not have needed to rely on the class action opt out procedure to justify its conclusion in favor of jurisdiction. Moreover, the other question in *Shutts* was choice of law: May Kansas constitutionally apply Kansas law to all claims, even those involving non-Kansas plaintiffs and non-Kansas mineral estates?[428] The court specifically

421. *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1781–84 (2017).
422. *World-Wide Volkswagen*, 444 U.S. at 288 & n.3.
423. 480 U.S. 102, 114–15 (1987).
424. 472 U.S. 797, 811–12 (1985).
425. *Id.* at 799.
426. *Id.* at 801.
427. *Id.* at 811–12.
428. *See id.* at 816.

rejected in the context of choice of law a state interest in efficiency that overcomes the normal requirement that a state have some connection to a dispute in order to apply its own law: Constitutional limits on choice of law are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum."[429]

General jurisdiction, in this context, asserts power over a defendant not otherwise subject to jurisdiction over a claim that is unrelated to anything the defendant did in the forum. This is done in favor of a plaintiff—who is likewise unconnected to the forum—simply because the plaintiff has claims against *other* defendants who are connected to the forum or because the plaintiff has claims similar to those of other plaintiffs who do have forum-related claims. Such an assertion of jurisdiction violates the proportionality principle because the assertion of power is unconnected to a corresponding state interest. For the same reason, extracting consent to general jurisdiction in such a case improperly conditions entry into the state on matters as to which the state has no interest. The state is saying, in effect, you may come into our state and transact business, but only if you consent to be sued here by plaintiffs who are not our citizens on claims arising elsewhere, so long as claims against another defendant or by another plaintiff are similar to those against you.[430]

Finally, as noted above, even assuming that a state may properly be so solicitous toward the efficiency interests of out-of-state plaintiffs, there are other ways for efficiency to be served. MDL can be used as a substitute for joinder and gain much of its efficiency when either plaintiff or defendant joinder is the problem.[431] And class actions may be a substitute on the plaintiff joinder side.

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429. *Id.* at 821.

430. Rocky Rhodes and Cassandra Burke Robertson have recently proposed a Model Act to clarify and constrain general jurisdiction based on registration. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 381 (2020). Many of their conclusions align with mine, especially the need for the forum to have an interest in asserting jurisdiction. One of our chief differences, however, is the validity of a state interest in efficiency. Their Model Act would allow general jurisdiction based on registration over a corporation when another defendant "is subject to general jurisdiction in this state; and . . . the claims against the defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of conflicting judgments resulting from separate proceedings." *Id.* at 413.

431. *See supra* notes 319–21 and accompanying text.

C. General Jurisdiction in Order to Take Advantage of a Longer Statute of Limitations

Some plaintiffs attempt to use general jurisdiction based on registration to take advantage of a longer statute of limitations in the forum. General jurisdiction based on registration should not be available solely to accommodate a plaintiff seeking to take advantage of a long statute of limitations. This is a separate question from whether a state may choose to apply its own longer statute of limitations as a matter of choice of law if the state has jurisdiction. As to the latter question, the Supreme Court has approved the traditional and still frequently used choice of law rule that a forum may always apply its own longer statute of limitations.[432]

Once again, if the forum is also the plaintiff's home state, then the plaintiff should be allowed to use general jurisdiction based on registration for that reason alone. But what of a plaintiff who is a stranger to the forum? Suppose a case in which the plaintiff, the defendant, and the underlying liability producing event are all foreign to the forum. The plaintiff seeks to use the forum solely because it has a long, perhaps uniquely long, statute of limitations and the defendant has registered to do business.

The interest of a forum state in providing jurisdiction to enable recovery to a foreign plaintiff on a foreign claim is not apparent.[433] As noted above, the traditional characterization of statutes of limitation is that they are procedural, meaning that—as to choice of law—the forum applies its own longer or shorter statute of limitations. But this assumes that the state has jurisdiction. No one has ever argued that a state *acquires jurisdiction* by virtue of a longer statute of limitations. It is one thing for a state to act altruistically to aid a foreign plaintiff by applying its own law to a case in which the defendant is otherwise subject to jurisdiction. It is quite another to say that a state acquires coercive power over a defendant in order to give advantage to a plaintiff in whom the state is uninterested.

The Supreme Court has considered jurisdiction in cases where the plaintiff was forum shopping for a longer statute of limitations, but it did not rely on the longer period of limitations as a reason for asserting

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432. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988).

433. As to choice of law, "when the forum has the longer statute of limitations . . . and when neither the plaintiff nor the claim is significantly affiliated with the forum, it is hard to imagine that any policy behind the forum's statute of limitations would be furthered by its application." Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1181 (1994).

jurisdiction.[434] Instead, jurisdiction rested on other grounds. In *Keeton v. Hustler Magazine, Inc*., neither the plaintiff nor the defendant was local to the New Hampshire forum.[435] New Hampshire was the only state where the claim for libel was not time-barred.[436] The Court upheld jurisdiction on the basis of minimum contacts because the defendant's magazine had a circulation in the forum of between 10,000 and 15,000 copies.[437] It did not hold that a state has jurisdiction simply to provide altruistically a forum for a claim time-barred elsewhere. Instead, the Court relied upon the contacts of the defendant and explained at some length that the fact of local publication created a state interest: "False statements of fact harm both the subject of the falsehood and the readers of the statement [and] New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."[438] Moreover, because of the publication within the forum, the plaintiff suffered a reputational injury there giving the state an additional interest.[439]

Allowing a state to assert jurisdiction simply because it desires to aid a plaintiff with whom it has no connection conflicts with the requirement that a court assess the interest of the forum state in evaluating minimum contacts jurisdiction. Even if a defendant has minimum contacts with the state, the court must still assess fairness,[440] and one of the factors is "the forum State's interest in adjudicating the dispute."[441] In *Asahi*, Justice O'Conner's plurality opinion denied that the forum had an interest in adjudicating an indemnification dispute because the litigants were two foreign parties.[442] Lower courts likewise find no state interest when the plaintiff, the defendant, and the underlying transaction are all out of state.[443]

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434. *See* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 776 (1984).

435. *Id.* at 772.

436. *Id.* at 773.

437. *Id.* at 772, 773–74 ("Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.").

438. *Id.* at 776.

439. *Id.*

440. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945))).

441. *Id.* at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

442. Asahi Metal Indus. Co. v. Superior Ct. , 480 U.S. 102, 114–15 (1987).

443. *See, e.g.*, OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1096 (10th Cir. 1998) (concluding that, although "a state may . . . have an interest in adjudicating a dispute between two non-residents where the defendant's conduct affects forum residents," the Kansas forum lacked an interest when neither Plaintiff nor Defendants were Kansans and

A state may have an interest or a state may wish to be altruistic, but a desire to pursue altruism is not an interest.[444] Indeed, altruism is the opposite of pursuing self-interest. If the state had an interest, it would be acting out of self-interest, not altruism. Thus, one cannot construct the necessary interest from the mists of altruism.

D. Simple Invidious Forum Shopping

The remaining category is unadorned forum shopping, cases in which there is no discernable convenience reason for the plaintiff to choose the forum. This is obviously the least attractive case for allowing general jurisdiction based on registration. Even if a court would, contrary to the analysis above, find registration a proper basis for jurisdiction to promote joinder efficiency or to aid a plaintiff in overcoming a statute of limitations problem, at a minimum courts should not recognize general jurisdiction based on registration when there is no discernible reason for it. Such jurisdiction is disproportionate to the state's interest, it is the imposition of a condition upon the defendant that has no nexus to any legitimate state interest, and it creates inconvenient litigation.

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no tort or breach of contract was alleged as to any Kansas resident); Leney v. Plum Grove Bank, 670 F.2d 878, 880 (10th Cir. 1982) ("Colorado [as the forum] probably has little interest in adjudicating this dispute or helping this plaintiff obtain relief: Plaintiff is a California resident who sought payment on the letter of credit through his California bank, and the Illinois bank's refusal to honor it took place in Illinois."); SeaHAVN, Ltd. v. Glitnir Bank, 226 P.3d 141, 153 (Wash. Ct. App. 2010) ("Washington has no particular interest in resolving the dispute between these two foreign corporations."); Disney Enters., Inc. v. Esprit Fin., Inc., 981 S.W.2d 25, 32 (Tex. App. 1998) ("Texas ha[d] . . . no interest . . . [when] [n]o Texas residents are directly or indirectly involved in the suit; no Texas residents have been harmed by the alleged transactions; there are no witnesses residing in Texas; and there is no evidence to be gathered in Texas.").

In general, states find that they have an interest in hosting the litigation when the plaintiff is local, when the plaintiff resides elsewhere but has local business, when the economic impact of an injury is being felt locally, when there is injury to land within the forum, and when forum law is to be applied. *See* Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 451–55 (1991).

444. *See* Preis, *supra* note 404, at 141 ("[A] state has no legitimate interest in protecting non-residents injured out of state." (citing Edgar v. MITE Corp., 457 U.S. 624, 644 (1982))).

VII. CONCLUSION

General jurisdiction based on registration leads to a state overreaching if not properly constrained. When the plaintiff is local to the forum, the state has an interest in providing a forum. This makes the extracted consent to jurisdiction reasonable and provides for at least some litigational convenience. But other uses, to allow joinder or to avoid statute of limitations problems, are untethered to a state interest. In such cases, general jurisdiction based on registration should be regarded as invalid.