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CONSENT TO JUDICIAL JURISDICTION: THE FOUNDATION OF “REGISTRATION” STATUTES

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I. INTRODUCTION

Every state has enacted a statute that requires foreign corporations¹ to “register” with a designated official if they do business in that state.² Registration may carry with it an obligation to pay taxes or fees or to designate a state official as an agent for the service of process on the corporation.³ States primarily incentivize registra-

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1. A corporation is considered “foreign” in any state other than that in which it is incorporated. *See, e.g.*, N.Y. C.P.L.R. 105 (McKinney 2018).

2. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 125 (Del. 2016); *see also* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1345 (2015); Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1647–61 (2015) (listing and summarizing all state registration statutes).

3. *See* Benish, *supra* note 2; *see also* Monestier, *supra* note 2.

tion by closing their courts to nonregistrant foreign corporations that “do business” in the state until they do register.⁴ Of significance to this Article, some states interpret registration as consent to the exercise of general jurisdiction by the courts of those states.⁵ Thus, in those states the registered entity will be subject to jurisdiction, whether or not it has any other connections to the states.⁶ The Supreme Court upheld registration as a mode of obtaining general jurisdiction a century ago in *Pennsylvania Fire Insurance Co. of Philadelphia. v. Gold Issue Mining and Milling Co.*⁷ Despite this history, two recent decisions, *Goodyear Dunlop Tires Operation, S.A. v. Brown*⁸ and *Daimler AG v. Bauman*,⁹ have led some courts and academics to re-examine the continued viability of general jurisdiction-by-registration laws.¹⁰ Unquestionably, these cases eviscerated the long-

4. Monestier, *supra* note 2 at 1366; Benish, *supra* note 2, at 1647–61.

5. Benish, *supra* note 2, at 1647 (“[S]ix states have made it clear that registration to do business results in ‘consent’ to *general jurisdiction*.” (emphasis in original)). *But see* Monestier, *supra* note 2, at 1366. n.125 (citing cases in Arizona, Delaware, Florida, Georgia, Iowa, Kansas, Minnesota, Mississippi, New Jersey, New Mexico, New York, Pennsylvania, and Vermont, as states where corporate registration confers general jurisdiction). *But see Cepec*, 137 A.3d at 148 (holding after Professor Monestier’s article that the Delaware registration statute did not allow general jurisdiction).

6. *See* *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (establishing that *Goodyear* held that a court may assert general jurisdiction over a foreign corporation only when the corporation is deemed at home in the forum state).

7. “If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert.” *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917) [hereinafter *Pennsylvania Fire*] (internal citations omitted) (jurisdiction acquired in Missouri over defendant, a Pennsylvania insurance company despite the fact that the claim was for damage to buildings in Colorado, and there were no apparent connections with Missouri other than the registration); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 44 cmt. a (AM. LAW INST. 1971) (“By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends. This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.”).

8. *Goodyear Dunlop Tires Operation, S.A. v. Brown*, 564 U.S. 915 (2011).

9. *Daimler AG*, 571 U.S. 117 (2014).

10. Professor Monestier argues that general jurisdiction by registration is unconstitutional because “registration cannot fairly be regarded as express—or even implied—consent to personal jurisdiction.” Monestier, *supra* note 2, at 1347; *see*

applied doctrine that had allowed state courts to exercise general jurisdiction over foreign corporations that had “substantial and continuous” activities within their borders.¹¹ In *Goodyear*, the Court held that jurisdiction could be effected only if the defendant corporation was “at home” in the forum state.¹² *Daimler* went a step further and limited the number of “homes” a corporation could have. A corporation, the Court opined, could have two “homes,” but no more than two: its state of incorporation and its principal place of business.¹³

The contemporary argument against general jurisdiction by registration is that it undermines the core holding of *Goodyear* and *Daimler*, namely that a corporation can be subject to general jurisdiction only where it is “at home.”¹⁴ The purported consent of the registrant does not avoid the limitations of those cases, the argument goes, because the “consent” is not freely given.¹⁵ Professor

also Benish, *supra* note 2, at 1613–14 (“[I]n the twenty-first century there is no constitutional basis for asserting general jurisdiction through a corporation’s compliance with state registration statutes.”). Even prior to the *Goodyear* and *Daimler* cases, commentators asserted the unconstitutionality of restriction-based general jurisdiction. See, e.g., D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 4 (1990) (“[T]reating a foreign corporation’s appointment of a resident agent, in compliance with a state’s registration requirements, as the basis for altering the state’s jurisdictional power over the corporation imposes an unconstitutional condition on a foreign corporation’s opportunity to transact business in the state.”); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1163 (2003) (the unpredictability that registration statutes produce “invalidates the consent theory upon which . . . personal jurisdiction is premised”). But see Jack B. Harrison, *Registration, Fairness and General Jurisdiction*, 95 NEB. L. REV. 477, 480–81 (2016) (registration statutes are constitutional despite the *Daimler* limitations).

11. See *Goodyear*, 564 U.S. at 929 (reversing the Supreme Court of North Carolina’s decision to exercise general jurisdiction on the grounds that defendant Goodyear did not have continuous and systematic business contacts to render it at home in North Carolina).

12. *Id.* at 919.

13. *Daimler*, 571 U.S. at 137 (“With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.” (cleaned up)); see also *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 136 (Del. 2016) (the *Daimler* Court “confirmed that the proper inquiry for general jurisdiction under *Goodyear* ‘is not whether a foreign corporation’s in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation’s affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.’” (emphasis added in *Cepec*)).

14. See *Cepec*, 137 A.3d at 141 (quoting *Daimler* 571 U.S. at 138); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 638–39 (2d Cir. 2016); *Keeley v. Pfizer*, No. 4:15CV00582 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015).

15. See *Monestier*, *supra* note 2, at 1377–401; *infra* Section III.B.

Tanya J. Monestier argues that “registration cannot fairly be regarded as express—or even implied—consent to personal jurisdiction.”¹⁶ Another objection is the prediction that many if not all States that have not adopted registration jurisdiction will do so in order to “get around” the strict due process rule of *Goodyear/Daimler*.¹⁷ Finally, a variation on the due process argument focuses on whether a registration statute provides sufficient notice of its jurisdictional effect, with critics asserting that inadequate notice is itself a defect that invalidates general jurisdiction.¹⁸

I take the contrary position and contend that registration jurisdiction is, and should be, alive and well. Neither *Daimler* nor *Goodyear* challenges the role of corporate registration as a source of general jurisdiction and in no way upsets the doctrinal underpinnings of consent to jurisdiction, which continues to exist as an independent and viable means of exercising jurisdiction. Rather, in *Goodyear* the Court tacitly implied that corporate consent was still valid, stating: “Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains ‘[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum.*’”¹⁹ Despite the Court’s apparent distinction of consent as a jurisdictional basis, the misconception persists that *Goodyear* and *Daimler* have effectively invalidated one version of corporate consent: corporate registration statutes. Understood as a form of corporate consent, registration jurisdiction must then survive, notwithstanding the holdings in these cases.

16. Monestier, *supra* note 2, at 1347.

17. “[I]n our view, the Supreme Court’s analysis in recent decades, and in particular in *Daimler* and *Goodyear*, forecloses such an easy use of [consent] to establish general jurisdiction over a corporation based solely on the corporation’s registration to do business and appointment of an agent under a state statute lacking explicit reference to any jurisdictional implications.” *Lockheed Martin*, 814 F.3d at 638–39; see *Pfizer*, 2015 WL 3999488, at *4 (consent to general jurisdiction through registration statutes that would render national companies subject to suit anywhere in the United States is contrary to the holding in *Daimler*); discussion *infra* Section III.B; see also *Cepec*, 137 A.3d at 141 (citing *Daimler*, 571 U.S. at 138 n.18).

18. “[I]t could be concluded that a carefully drawn state statute that expressly required consent to general jurisdiction as a condition on a foreign corporation’s doing business in the state, at least in cases brought by state residents, might well be constitutional. . . . We need not reach that question here, however, because we conclude that the Connecticut business registration statute did not require [the defendant] to consent to general jurisdiction in exchange for the right to do business in the state.” *Lockheed Martin*, 814 F.3d at 641; see discussion *infra* Part V.

19. See *Goodyear Dunlop Tires Operation, S.A. v. Brown*, 564 U.S. 915, 927–28 (2011) (emphasis added); *Daimler*, 571 U.S. at 129 (quoting *Goodyear*).

Professor Linda J. Silberman has put it as a question: “Will registration statutes that exact consent to jurisdiction offer an alternative basis for general jurisdiction?”²⁰ Cases on the question—even before *Daimler*—were not consistent.²¹ Nor do they agree post-*Daimler*.²² Since *Daimler*, courts addressing the continuing viability of registration jurisdiction have reached different conclusions. Several have held that registration jurisdiction no longer meets constitutional requirements.²³ Others have held to the contrary.²⁴ Some

20. Linda J. Silberman, *The End of Another Era: Reflections on Daimler and its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 692 (2015); see also Monestier, *supra* note 2, at 1358 (“Now that plaintiffs will have a much harder time establishing general jurisdiction over defendants in all but the most obvious of cases, a different ground of jurisdiction will most certainly take center stage: that of corporate registration.”); Monestier, *supra* note 2, at 1346 (“[G]iven the constriction of general jurisdiction in [*Daimler*], the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look . . . is in a state registration filing that designates a corporate agent for service of process.” (quoting Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 259–60 (2014))).

21. Compare *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (concluding without resort to minimum contacts analysis that the Minnesota registration and service of process statute is a valid basis of general personal jurisdiction), and *Rockefeller Univ. v. Ligand Pharm., Inc.*, 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008) (concluding that defendant’s authorization to do business and designation of a registered agent for service of process amounted to consent to personal jurisdiction in New York), with *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (declining to find the defendant subject to general personal jurisdiction based on its appointment of an agent for service of process), and *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (same), and *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (same), and *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 888–89 (S.D. Tex. 1993) (holding that registration only potentially subjects a defendant to jurisdiction and that due process requires a minimum contacts analysis before a nonresident is subject to a state’s judicial power). See generally *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 699 (1st Cir. 1984) (finding that respondent had consented to jurisdiction through corporate registration and appointment of an agent to receive service of process but did not decide whether the state could exercise general jurisdiction over a claim with no relationship to New Hampshire); RESTATEMENT (SECOND) CONFLICT OF LAWS § 44 cmt. a (AM. LAW INST. 1971) (stating that corporate consent to general jurisdiction is perfected through registration).

22. See Benish, *supra* note 2, at 1622–24, for a review of cases.

23. See, e.g., *Famular v. Whirlpool Corp.*, No. 16-cv-944, 2017 WL 2470844, at *4–5 (S.D.N.Y. June 7, 2017) (refusing to exercise general jurisdiction over a corporation under a consent theory, and collecting cases); *Minholz v. Lockheed Martin Corp.*, 227 F. Supp. 3d 249, 264 (N.D.N.Y. 2016) (declining to find consent to jurisdiction after *Daimler* in part because New York Business Corporations Law § 1301 does not give explicit notice that the registering corporation will be subject to jurisdiction); *Taormina v. Thrifty Car Rental*, No. 16-cv-3255(VEC), 2016 WL

courts have declined to reach the issue because, as interpreted in light of *Goodyear* and *Daimler*, the relevant state registration statute did not authorize the exercise of general jurisdiction.²⁵

This Article focuses on the primary judicial and academic objections to registration jurisdiction: those founded on notions of due process, as elaborated in *Goodyear* and *Daimler*.²⁶ I argue that the case for the constitutionality of registration statutes is far stronger than these commentators and courts have allowed.

First, *stare decisis* weighs heavily in its favor. The Supreme Court endorsed the exercise of general jurisdiction based on registration statutes almost a century ago in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,²⁷ which has

7392214, at *6–7 (S.D.N.Y. Dec. 21, 2016) (refusing to subject a registered corporation to general personal jurisdiction under a consent theory, and collecting cases); *see also* Display Works, L.L.C. v. Bartley, 182 F. Supp. 3d 166, 174 (D.N.J. 2016) (jurisdiction not acquired pursuant to the New Jersey registration statute because the statute does not “expressly discuss consent or general jurisdiction”); *Norex Petroleum Ltd. v. Blavatnik*, No. 650591/2011, 2015 WL 5057693, at *20–21 (N.Y. Sup. Ct. Aug. 25, 2015) (stating that *Daimler* eliminated any form of general jurisdiction based on “doing business”).

24. *See, e.g.*, *Serov ex rel. Serov v. Kerzner Int’l Resorts, Inc.*, No. 162184/2015, 2016 WL 4083725, at *4–5 (N.Y. Sup. Ct. July 26, 2016) (holding that registration to do business in New York was consent to general jurisdiction and precluded arguments that the defendant corporation was not operating continuously or systematically); *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/12, 2014 WL 3885949, at *4 (N.Y. Sup. Ct. Aug. 5, 2014) (stating that *Daimler* “does not change the law with respect to personal jurisdiction based on consent” and exercising jurisdiction over a defendant corporation because they were registered to do business in New York); *see also* *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 n.120 (Del. 2016) (collecting cases).

25. *See* *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 623 (2d Cir. 2016) (holding that Connecticut registration statute did not authorize exercise of general jurisdiction over foreign corporation and declining to answer whether general jurisdiction by registration would violate the Due Process Clause); *see also* *Cepec*, 137 A.3d at 148 (“In light of the U.S. Supreme Court’s clarification of the due-process limits on general jurisdiction in *Goodyear* and *Daimler*, we read our state’s registration statutes as providing a means for service of process and not as conferring general jurisdiction.”); *Minholz*, 227 F. Supp. 3d at 264 (“Because New York Business Corporations Law § 1301 is absent an explicit indication that registration subjects a registrant to general jurisdiction in New York, an exercise of general personal jurisdiction based on registration alone would be counter to the principles of due process articulated in *Daimler*.”).

26. In addition to the *Daimler*-based due process argument, opponents of registration statutes have argued that they impose an unconstitutional condition on foreign corporations. *See* *Benish*, *supra* note 2, at 1640–45. No court post-*Daimler* has so held, however, and some of these concerns are discussed in Section III.B.1.

27. *Pennsylvania Fire*, 243 U.S. 93, 95 (1917); *see supra* note 7 and accompanying text.

never been overruled. Rather, the Court has endorsed registration jurisdiction in subsequent cases.²⁸ As noted, neither *Goodyear* nor *Daimler* even suggests that registration-based jurisdiction is invalid. Unless the Supreme Court itself overrules *Pennsylvania Fire* (which I argue it should not) it is inappropriate for the lower courts to do so.²⁹

The second and related reason is respect for consent: *Pennsylvania Fire* is based on the respect for the defendant's consent to the exercise of jurisdiction over it.³⁰ The Supreme Court has accepted consent as a basis of jurisdiction in any number of situations in which the incentives to consent were powerful—whether the consent was explicit or implicit.³¹ According to some contemporary Justices, all exercise of jurisdiction depends on the explicit or implicit consent effected by the defendant.³² Rejection of registration jurisdiction would undermine the important role of consent as an accepted jurisdictional basis. Arguments that foreign corporations seeking to operate in registration states have no choice but to register and accept the jurisdictional consequences inaccurately ignore the free choice corporations exercise in practice.

28. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174–75 (1939) (affirming the effect of consent to obtain jurisdiction over the foreign corporation); discussion *infra* Part III; cf. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536 n.1 (1949) (a federal court in Mississippi dismissed an action brought by a Tennessee corporation because it had failed to comply with a Mississippi law that requires registration as a condition of bringing suit and doing business in the state).

29. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); see also *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (stating that even if a Supreme Court precedent contains many “infirmities” and rests upon “wobbly, moth-eaten foundations,” it remains the “Court’s prerogative alone to overrule one of its precedents.” (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *vacated*, 522 U.S. 3 (1997))); *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 817 F.3d 755, 764 (Fed. Cir. 2016) (O’Malley, J., concurring) (“Unless the Supreme Court or Congress overrules [the *Pennsylvania Fire*] line of Supreme Court authority, we are bound to follow it.”).

30. See *Pennsylvania Fire*, 243 U.S. at 96 (distinguishing implied consent, which would not be sufficient to obtain jurisdiction). “But when a power actually is conferred by a document, the party takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant’s voluntary act.” *Id.*

31. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); see also *infra* notes 148–65 and surrounding discussion.

32. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); discussion *infra* Section III.B.2.

Corporations have agency. They can and do decide whether or not to conduct business in a particular forum because of various legal disadvantages such as taxes, other restrictions, or even the breadth of jurisdiction generally. They may decide not to do business in a state that requires acceptance of general jurisdiction, they may decide to limit the breadth of business so that the state does not require registration, or they may decide not to register despite the closing of the state's court until they decide it is desirable.³³

Third, it would be inconsistent to strike down jurisdiction based on registration while simultaneously accepting the state of incorporation as one of the two places in which the corporation is "at home" and subject to general jurisdiction as held in *Daimler*.³⁴ As with its registration statute, incorporation in New York, for example, requires appointment of the secretary of state as an agent for service of process, which is regarded as consent to general jurisdiction by the courts of New York.³⁵ Ironically, incorporation by no means indicates that the corporation has any other activities in the state, whereas only a corporation that has active business in that state would comply with its registration requirement.³⁶

In addition, it is important to keep sight of the reason registration statutes exist. States enacted them in large part because they wanted to keep foreign corporations on a level playing field with locally incorporated entities.³⁷ Further, these statutes provide a forum for aggrieved citizens who otherwise have no convenient forum—or perhaps no forum at all—in which to seek recourse against a foreign defendant who caused them an injury. Professor Arthur R. Miller pointed out the impossibility for an injured workman to bring an action against the manufacturer of the allegedly defective machine in *J. McIntyre Machinery, Ltd. v. Nicastro*³⁸ because it was out of jurisdictional reach in New Jersey where the accident

33. See discussion *infra* Part II.

34. See *Daimler, AG v. Bauman*, 571 U.S. 117, 137 (2014) (holding that a corporation's place of incorporation and principal place of business are "paradigm[m] . . . bases for general jurisdiction." (quoting *Goodyear Dunlap Tires Operation, S.A. v. Brown*, 564 U.S. 915, 924 (2011))).

35. N.Y. BUS. CORP. LAW § 304(a) (McKinney 2018) provides: "The secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served." § 304(b) provides: "No domestic or foreign corporation may be formed or authorized to do business in this state . . . unless in its certificate of incorporation or application for authority it designates the secretary of state as such agent." See *infra* note 51.

36. See discussion *infra* Part II.

37. See *id.*

38. *J. McIntyre Mach., Ltd. v. Nicastro*. 564 U.S. 873 (2011).

happened.³⁹ He noted that on the same day, the Supreme Court also decided *Goodyear*, which “suggests[s] a possible narrowing of [general jurisdiction].”⁴⁰ His prescience was evident when *Daimler* itself was decided a few years later. In concluding his examination of personal jurisdiction, Professor Miller concluded: “What’s next? A sign on the courthouse door proclaiming, ‘Closed?’”⁴¹

Critics of registration jurisdiction inadequately address the purpose these statutes serve. Given the limitations on the fora that are available to potential plaintiffs under the current law of personal jurisdiction, a state resident may find that the only forum available for redress absent registration jurisdiction is very inconvenient or no forum at all, as Professor Miller has argued.⁴² Many other countries have litigation procedures that are unfair to complainants, as compared to those of American rules of procedure.⁴³ Consider a New Yorker who is injured abroad by a foreign corporation that “does business” in New York but has its place of incorporation and principal place of business in the jurisdiction of the injury—say, Rome. If that entity has registered and designated an agent in New York, the plaintiff could obtain jurisdiction over it in the state. If not, an Italian court will be the only choice. Unfortunately, that is close to no choice at all, as litigation in the Italian courts is so notoriously subject to delays that justice is unavailable.⁴⁴ The availability of registration-based jurisdiction can in some states provide a reasonable forum. Whether a nondomiciliary or nonresident of the state should also be protected by registration jurisdiction is a more

39. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 347–53 (2013).

40. *Id.* at 347 n.222.

41. *Id.* at 353.

42. *Id.* at 348.

43. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981) (describing procedural benefits of American courts, including jury trials, contingent fees, and more extensive discovery).

44. See CIVIL LITIGATION IN COMPARATIVE CONTEXT 12 n.36 (Oscar G. Chase & Helen Hershkoff eds., 2nd ed. 2017) (“The statistical data confirm year after year the deterioration of the Italian civil process, and the failure of the ‘urgent measures’ enacted by the legislator almost every year, which demonstrates, in the end, the lack of an organic coherent reform project. The Annual Report on the Administration of Justice by the President of the Court of Cassation, indicates an average delay of 358, 437, and 1051 days respectively for proceedings before the Justices of the Peace, the tribunals and the courts of appeal, while a proceeding before the Court of Cassation takes as long as an average of 1293 days.”).

difficult question.⁴⁵ As Professor Mary Twitchell observed with regard to general jurisdiction as a whole, “[C]areful application of the forum non conveniens doctrine and venue transfer statutes[] will enable courts to avoid unfair results.”⁴⁶

II. NEW YORK’S REGISTRATION REQUIREMENT

In stating its case for the continuing validity of registration statutes, this Article looks through the lens of New York law. New York provides a convenient vehicle because of its importance as a hub of global commerce and because it is one of the states that treats registration as consent to general jurisdiction.⁴⁷ While New York provides a representative example for present purposes, none of the arguments herein is specific to that state. For simplicity, this Article will refer to New York’s relevant law as a registration statute, though by its terms it speaks of “authorization.”

New York requires all foreign corporations that “do business” in the state to obtain authorization to do so.⁴⁸ Section 1301 of New York Business Corporation Law provides:

A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article. A foreign corporation may be authorized to do in this state any business which may be done lawfully in this state by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business.

The requirements to obtain authorization, which are set forth in section 1304, are mostly a matter of description⁴⁹ and would seem unlikely to raise any controversy except when it comes to jurisdiction. The corporation seeking authorization must designate the New York secretary of state “as its agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process

45. See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (“Were the Connecticut statute drafted such that it could be fairly construed as requiring foreign corporations to consent to general jurisdiction, we would be confronted with a more difficult constitutional question about the validity of such consent after *Daimler*.”).

46. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 666 (1988) (citations omitted).

47. N.Y. BUS. CORP. LAW § 1301 (McKinney 2018).

48. *Id.*

49. § 1304.

against it served upon him.”⁵⁰ This designation has been held to confer general jurisdiction over the corporation in the courts of New York.⁵¹

Section 1312 incentivizes foreign corporations “doing business” in New York to obtain authorization by restricting nonregistrants from instituting actions in New York’s courts. It provides:

(a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation.⁵²

The prohibition, however, can be overcome if the corporation obtains authorization during the litigation.⁵³ In addition to section 1312, the requirement of authorization is enforceable by the attorney general of New York, who “may bring an action to restrain a foreign corporation from doing in this state without authority any business for the doing of which it is required to be authorized in this state”⁵⁴ The goal of sections 1301 and 1312 and their

50. § 1304(a)(6); *see also* § 305(a) (“In addition to such designation of the secretary of state, every domestic corporation or authorized foreign corporation may designate a registered agent in this state upon whom process against such corporation may be served.”).

51. *See* *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (“The registration statute in the state of New York has been definitively construed to accomplish that end, and legislation has been introduced to ratify that construction of the statute.”); *Steuben Foods, Inc. v. Oystar Grp.*, No. 10-CV-780S, 2013 WL 2105894, at *3 (W.D.N.Y. May 14, 2013) (“For more than sixty years, New York courts have determined that general jurisdiction may be asserted over a corporation solely on the basis that it has registered to do business in the forum.”); *Rockefeller Univ. v. Ligand Pharm., Inc.*, 581 F. Supp. 2d 461, 465 (S.D.N.Y. 2008) (“[C]ases . . . have found [general] personal jurisdiction where a defendant has maintained an active authorization to do business on file with the Department of State.”).

52. § 1312.

53. *Beer v. F.W. Myers & Co.*, 159 A.D.2d 943, 943 (N.Y. App. Div. 1990); *see also* *Tri-Terminal Corp. v. CITC Indus., Inc.*, 432 N.Y.S.2d 184, 185 (App. Div. 1980) (remedy for failure to register is not dismissal of complaint but conditional dismissal or stay, thus giving plaintiff opportunity to obtain the requisite authority).

54. § 1303. Such actions are apparently very seldom brought, if ever. None are reported in Thomson Reuters Westlaw. *See also* *Mahar v. Harrington Park Villa Sites*, 204 N.Y. 231, 234 (1912) (referring to a prior iteration of section 1301 to

predecessors is to ensure that foreign corporations conducting regular business in New York stand on the same legal footing as domestic ones. Part of putting the foreign corporation on the “same footing” as a domestic corporation is equalizing its availability to actions. All domestic corporations—those incorporated within the state—are subject to general jurisdiction in New York (even if they have no other activities there) because their certificate of incorporation must designate the secretary of the state as an agent “upon whom process against the corporation may be served.”⁵⁵ Accordingly, “[i]t appears well settled that a domestic corporation is subject to ‘general’ jurisdiction in New York”⁵⁶ Incentivizing foreign corporations to consent to general jurisdiction eliminates arguably unfair advantages that foreign corporations would have over domestic ones. In addition to imposing general jurisdiction over the corporation, the designation of the secretary of state provides an official on whom process may be served if the defendant is difficult to find. This could be a particular danger when dealing with a nonregistered foreign corporation.

Given that the filing of an application for authorization under section 1304 will submit the applicant to general jurisdiction, and given that a failure to register will prevent a foreign corporation from “maintaining an action” in New York if it is “doing business” in the state, the interpretation of the latter term is critical for a foreign corporation considering activities in New York. The question whether a foreign corporation is “doing business” for the purposes of section 1301 arises only when a defendant moves to dismiss an action on the ground that the plaintiff is a foreign corporation “doing business” without authorization and therefore may not “maintain” an action because of section 1312. The issue of fact is thus whether the plaintiff has sufficient activities in the state to be deemed “doing business” there.⁵⁷ Section 1301 does not provide a

find that “[t]he only penalty which the general corporation itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York.”); *Wm. G. Roe & Co. v. State*, 43 Misc. 2d 417, 422 (N.Y. Ct. Cl. 1964) (“Ample statutory authority exists to permit the Attorney General to bring an action against a non-qualifying corporation to restrain it from exercising corporate rights or privileged not granted to it.”).

55. § 402(a)(7).

56. Vincent C. Alexander, *Practice Commentaries, Cons Laws of NY*, Book 7B, CPLR § C301:6(c) Corporate registration.

57. The term “doing business” is used in New York in several other contexts, none of which are interpreted in the same way as section 1301. *See Airtran N.Y., L.L.C. v. Midwest Air Grp., Inc.*, 844 N.Y.S.2d 233, 237 (App. Div. 2007) (“Section 1312(a), which denies an unauthorized foreign corporation “doing business” in

definition, although subsection (b) describes four activities that will not alone constitute “doing business.”⁵⁸ In the absence of an additional statutory definition, the courts have established two basic principles: A defendant seeking to dismiss an action on the ground that the plaintiff may not maintain the suit (1) has the burden of proof that the plaintiff is “doing business,”⁵⁹ and (2) must show that “the plaintiff’s business activities in New York were not simply ‘casual or occasional,’ but rather were ‘systematic and regular,’ intra-state in character, and essential to the plaintiff’s corporate business.”⁶⁰ The burden is high because “a lesser showing might infringe on Congress’s constitutional power to regulate interstate commerce.”⁶¹ Maintenance of an office or showroom in New York

this state capacity to sue here, employs a heightened “doing business” standard, fashioned specifically to avoid unconstitutional interference with interstate commerce under the Commerce Clause.”).

58. “Without excluding other activities which may not constitute doing business in this state, a foreign corporation shall not be considered to be doing business in this state, for the purposes of this chapter, by reason of carrying on in this state any one or more of the following activities:

- (1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitral 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 depositories with relation to its securities.”

N.Y. Bus. Corp. Law § 1301 (McKinney 2018).

59. See *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 735–41 (2d Cir. 1983) (citing cases); see also *Highfill, Inc. v. Bruce & Iris, Inc.*, 855 N.Y.S.2d 635, 636–38 (App. Div. 2008) (dismissing breach of contract claim brought by a Louisiana corporation because the plaintiff was doing business regularly and continuously in New York but did not register); *Posadas de Mexico, S.A. de C.V. v. Dukes*, 757 F. Supp. 297, 301–02 (S.D.N.Y. 1991) (finding that plaintiff Posadas, a Mexican corporation operating hotels there was not doing business in New York even though it had an office in New York and had contracted with independent New York corporations for its hotel business); *New Asia Enters. Ltd. v. Fabrique, Ltd.*, No. 13 Civ. 5271 (JFK), 2014 WL 3950901, at *6–7 (S.D.N.Y. Aug. 13, 2014) (finding that plaintiff Chinese company did not do business in New York even though New York was the “nerve center” and principal place of business because majority of plaintiff’s business dealings were international); *Penn Collieries Co. v. McKeever*, 75 N.E. 935, 936 (N.Y. 1905) (“It did not appear that anything was done here by the corporation beyond the mere maintenance of an office for [consignment of some merchandise manufactured elsewhere.]”).

60. *Highfill, Inc.*, 855 N.Y.S.2d at 637 (internal citation omitted).

61. *Airtran*, 844 N.Y.S.2d at 238; see also *Storwal Int’l, Inc. v. Thom Rock Realty Co.*, 784 F. Supp. 1141, 1144 (S.D.N.Y. 1992) (“This standard is stricter than the ‘doing business’ standard under New York’s long-arm statute. Because of the possi-

does not, by itself, indicate that a corporation is “doing business” in the state.⁶² Nor is a foreign corporation deemed to do business in New York through its wholly owned New York subsidiary.⁶³ These rulings place meaningful limitations on the reach of New York’s registration statute.

The actual application of New York’s registration system shows that foreign corporations considering commercial activities in New York have several reasonable choices. Foremost, a corporation could simply elect to avoid conducting substantial activities in the state and arrange its affairs accordingly. It may decide to carry on no business in New York at all for this and other reasons, such as taxes, regulations of its business, or a variety of other goals.

Corporations enter new states to earn profit and expand their business, just as individuals travel to, or interact with, new states because it is personally, socially, or professionally advantageous. People have motives that need not (and generally do not) involve deliberate manifestations of assent to the states’ coercive power.⁶⁴

Or the corporation may instead decide to conduct activities in the state that meet its needs but fall short of “doing business” in New York as that term has been interpreted.⁶⁵ This involves essentially no risk because noncompliance with the registration statute

bility of an unconstitutional infringement of interstate commerce, a higher level of intrastate activity must be shown to trigger § 1312.”).

62. See *Alicanto, S.A. v. Woolvorton*, 514 N.Y.S.2d 96 (App. Div. 1987) (reversing trial court finding that plaintiff corporation was doing business in New York—even though plaintiff had an office, bank accounts, and employed a lawyer in New York—because it had only made a few purchases in New York which were meant to be used internationally); *James Talcott, Inc. v. J.J. Delaney Carpet Co.*, 213 N.Y.S.2d 354, 355 (Sup. Ct.), *aff’d*, 14 A.D.2d 866 (1961) (plaintiff allowed to maintain suit although its assignor had an office and showroom in New York, but had its main offices in Georgia where orders accepted and products manufactured). See also *Stafford-Higgins Indus., Inc. v. Gaytone Fabrics, Inc.*, 300 F.Supp. 65, 67 (S.D.N.Y. 1969) (“The maintenance of an office within the state does not prevent the corporation from bringing suit, even if coupled with the employment of solicitors to transmit orders obtained here to the home office for acceptance, and even if the corporation’s name appears on the door.”).

63. See *Audemars Piguet Holding S.A. v. Swiss Watch Int’l, Inc.*, 46 F. Supp. 3d 255 285–86 (S.D.N.Y. 2014), *rev’d in part on other grounds*, 2015 WL 150756 (S.D.N.Y. Jan. 12, 2015) (finding that a subsidiary’s doing business in New York is not imputed to Swiss parent); see also *Storwal*, 784 F. Supp. at 1145 (foreign parent corporation cannot be deemed to be doing business through a New York subsidiary).

64. Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre v. Nicastro*, 63 S.C. L. REV. 617, 621 (2012).

65. See *supra* note 62.

becomes an issue only if the corporation brings an action in New York and the defendant raises the issue. Even if the plaintiff is held to be “doing business” and is momentarily noncompliant, it may register at once and continue with the litigation, or discontinue the action and perhaps pursue it in another state.⁶⁶ Importantly, failing to register does not carry true penalties, in the sense of fines or being banned from operating in the state. To the extent the closure of the state’s courts to the nonregistrant poses an impediment, that corporation may avoid this issue to a substantial degree by the simple expedient of including an arbitration clause in its contracts with New York entities. Alternatively, a corporation that, for whatever reason, must conduct activity within New York that rises to the level of “doing business” and that also wants access to the courts can set up a subsidiary to register and carry out these activities, thereby shielding the parent from being subject to general jurisdiction in the state.⁶⁷

The variety of strategies that a foreign corporation can reasonably follow make it obvious that the decision to register and consent to general jurisdiction is freely made. Unlike the plight of the “out-of-state defendants” that worried Justice Ginsburg in *Daimler*,⁶⁸ the New York registration rules *do* allow foreign corporations “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”⁶⁹

A corporation considering conducting business in New York could easily learn of the registration statute and its legal effect through competent counsel. That becoming informed may entail consultation with counsel hardly suggests unfairness to the corporation. Reasonable corporate leaders would not proceed without due diligence, including receiving legal advice from both New York and its “home” place of business. Nor is the lack of explicit notice of the jurisdictional effect of registration problematic. The incorporation of an entity in New York has the same effect on jurisdiction and no explicit warning is provided in the incorporation statute.⁷⁰

66. *See supra* note 53.

67. *See supra* note 63.

68. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

69. *Id.* at 762 (quoting *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

70. *See* discussion *infra* Part V.

III. CONSENT TO JURISDICTION

A. *The Development of Consent by Registration*

Consent to the exercise of personal jurisdiction has long been recognized as valid and binding. In *Pennoyer v. Neff*, the first case to address jurisdiction over persons after the adoption of the Fourteenth Amendment, the Court affirmed consent as one of the bases on which a court could obtain jurisdiction over a person who was not found in the state despite its principal holding that state sovereignty limited the jurisdiction of each state to persons found within it.⁷¹ More to the point of this Article, the *Pennoyer* Court recognized that states could require foreign “partnerships and associations” to designate agents, including public officers, as proper persons upon whom to serve process, a power that was not impaired by the adoption of the Fourteenth Amendment.⁷² The Court found support in an 1855 case, *Lafayette Insurance Co. v. French*, which held that an Indiana corporation was subject to jurisdiction in Ohio because process had been served on an agent doing business there on its behalf.⁷³ Under Ohio law, a foreign corporation was deemed to have assented to service on such agents for suits concerning “contracts made and to be performed in Ohio.”⁷⁴ In today’s parlance, the jurisdiction consented to was limited to specific jurisdiction. For the *Lafayette* Court, the implied jurisdiction was justified (and constitutional) because the Indiana corporation could not transact business in Ohio without its permission, “express or implied.”⁷⁵ The Court found “nothing in this provision either unreasonable in itself, or in conflict with any principle of public law”⁷⁶ and the obligation to attend court in such cases “is well founded in morals and law.”⁷⁷ *Lafayette* thus established that consent was a valid basis for

71. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (exceptions to the rule that jurisdiction may not be obtained against a non-resident include “cases in which that mode of service may be considered to have been assented to in advance”)

72. *Id.* at 735.

73. *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855).

74. *Id.* at 408.

75. *Id.* at 407.

76. *Id.*; see also Arthur T. Von Mehren & Donald T. Trautman, *THE LAW OF MULTISTATE PROBLEMS* 641 (1965) (“The *Lafayette* decision is taken to mark both the firm establishment of the proposition that a corporation can, in appropriate circumstances, be sued abroad and to articulate the then-accepted theoretical justification for this result. From this point on the problem became when—no longer whether—a foreign corporation can be made subject to local process.” (cleaned up)).

77. *Lafayette Ins. Co.*, 59 U.S. at 408.

jurisdiction, even if the consent was implicit, so long as state law so provided.⁷⁸ Subsequent cases expanded state power to find implicit consent to serve a government officer in addition to an agent of the corporation.⁷⁹

Although the power of states to exclude foreign corporations from doing business within their borders was later eliminated,⁸⁰ state power to base jurisdiction on implicit corporate consent to jurisdiction remained valid, at least when the claim was connected to the defendant's activity in the state.⁸¹ In *Simon v. Southern Railway Co.*,⁸² the Court recognized that “[s]ubject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law.”⁸³ Further, the implicit consent was found if the corporation “doing business” in the state had failed to appoint another agent.⁸⁴ Citing *Old Wayne Mutual Life Association v.*

78. See *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150 (S.D.N.Y. 1915) (“[C]onsent to such an appointment must be assumed from the doing of business, and that jurisdiction in personam would be acquired, just as if there had been in fact an appointment.” (citing *Lafayette*)).

79. *E.g.*, *Mut. Reserve Fund Life Ass'n v. Phelps*, 190 U.S. 147, 158–59 (1903) (finding that service on the insurance commissioner of Kentucky was valid.); *Ex parte Schollenberger*, 96 U.S. 369, 376 (1877) (finding that service on a designated agent in Pennsylvania of a foreign insurance corporation satisfied the requirement of federal law that the defendant be “found” in the district where the action was brought because Pennsylvania law had required all foreign insurance companies to designate an agent for service of process).

80. See *Lea Brilmayer et al.*, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 759 (1988) (“Furthermore, the old notion that a state could entirely exclude corporations or condition their entry upon consent to jurisdiction because corporations were state-created legal entities that could not operate beyond a sovereign's borders eroded long ago.” (citing *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 10–12 (1877))).

81. *Mut. Reserve Fund Life Ass'n*, 190 U.S. at 158–59.

82. *Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1915).

83. *Id.*

84. *Id.* at 130. The statute relied upon provided: “Whenever any such corporation shall do any business of any nature in the state without having complied with the requirements of § 1 of this act [which required the designation of an agent], it may be sued for any legal cause of action in any parish of the state where it may do business, and such service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served.” Louisiana Act No. 54 of 1904 § 2.

McDonough,⁸⁵ however, the Court held in *Simon* that Louisiana's power to appoint the secretary without the actual consent of a Virginia corporation was limited to claims that arose in Louisiana, which was not the case there.⁸⁶ This left open the question whether general jurisdiction could be obtained over a foreign corporation that had *explicitly* designated an agent for the service of process. The answer was not long in coming.

Distinguishing the *Simon* and *Old Wayne Mutual. Life* cases, Judge Learned Hand held that the Constitution permitted corporate consent to jurisdiction to include claims "upon any cause of action" in *Smolik v. Philadelphia & Reading Coal & Iron Co.*⁸⁷ The defendant was a Pennsylvania mining corporation sued in New York for damages suffered in Pennsylvania.⁸⁸ The consent given by the corporate defendant in *Smolik*, Judge Hand observed, was not a "legal fiction" as was the case when consent was implied by the doing of business.⁸⁹ Rather, "actual consent" had been given by the Philadelphia and Reading Coal and Iron Company.⁹⁰ To be sure, that consent had been given pursuant to a requirement of New York law that corporations "doing business" in the state appoint an agent for the service of process within the state.⁹¹ Judge Hand found "no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business."⁹² Critics of registration jurisdiction have overlooked that *Smolik* was endorsed by the Supreme Court in *International Shoe*.⁹³

85. *Old Wayne Mut. Life Ass'n v. McDonough* 204 U.S. 8, 18 (1907) (finding that an Indiana Corporation that did business in Pennsylvania was not entitled to enforcement in Indiana because even though the life insurance contract was made in Indiana the insured and the beneficiaries resided in Pennsylvania).

86. *Simon*, 236 U.S. at 130 (citing *Old Wayne Mut. Life Ass'n* for the principle "that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."); see also *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F.148, 149-50 (S.D.N.Y. 1915) ("The ground of the decision was that the implied consent of the corporation arising from its doing business within Louisiana must be limited to actions arising out of the business done within the state.").

87. *Smolik*, 222 F. at 150-51 (1915).

88. *Id.* at 148.

89. *Id.* at 151.

90. *Id.*

91. *Id.* at 148.

92. *Id.* at 150-51 ("There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consents covered such actions as these.").

93. See *Int'l Shoe*, 326 U.S. at 318.

Smolik led soon to *Bagdon v. Philadelphia & Reading Coal & Iron Co.*,⁹⁴ in which the same Pennsylvania corporation was again sued in New York, this time by a New Yorker alleging a breach of a contract made in Pennsylvania.⁹⁵ Following *Smolik*, Judge Cardozo's opinion in *Bagdon* emphasized the explicit consent made by the defendant⁹⁶ and then explored the free will behind the consent. New York law, he said, instructed that a foreign corporation

shall not do business here until it has obtained a certificate from the secretary of state. . . . To obtain such a certificate, however, there are conditions that must be fulfilled. One of them is a stipulation, to be filed in the office of the secretary of state, "designating a person upon whom process may be served within this state."⁹⁷

Failure to obtain the certificate had a cost: "The penalty is that [the corporation] may not maintain any action in our courts 'upon any contract made by it in this state, unless before the making of the contract it has procured such certificate.'"⁹⁸ However, the opinion continued, "[t]he business, though unlicensed, is not illegal; the contract is not void; it may be enforced in other jurisdictions; all that is lost is the right to sue in the courts of the state."⁹⁹ This "penalty" was considered insufficiently harmful to undermine the consent: "The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent."¹⁰⁰ The service on the designated agent was held effective and consistent with the Due Process Clause.¹⁰¹

One year after the *Bagdon* decision and two years after *Smolik*, the issue of general jurisdiction by consent reached the Supreme Court in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*¹⁰² Gold Issue, an Arizona corporation, brought an action in a Missouri court seeking compensation from

94. *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075 (N.Y. 1916).

95. *Id.* at 1075.

96. *Id.* at 1076.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Bagdon*, 111 N.E. at 1076.

101. *Id.* at 1077.

102. *Pennsylvania Fire*, 243 U.S. 93 (1917); see Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 434–35, 444, 446–47 (2012) (discussing *Pennsylvania Fire* decision).

Pennsylvania Fire, a Pennsylvania insurance company,¹⁰³ which had insured a building owned by Gold Issue in Colorado.¹⁰⁴ The latter claimed that the insurer refused to indemnify it after the property had been destroyed by lightning.¹⁰⁵ Jurisdiction over Pennsylvania Fire was based on service filed with the superintendent of the Missouri insurance department.¹⁰⁶ As required by the relevant Missouri statute, the defendant had obtained a license to do business in Missouri and “had filed with the superintendent . . . a power of attorney consenting that service upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state.”¹⁰⁷ Pennsylvania Fire argued that such jurisdiction would violate the Fourteenth Amendment unless the claim was based on “Missouri contracts.”¹⁰⁸ Rejecting that limitation, the Supreme Court relied directly on the defendant’s consent, stating: “But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant’s voluntary act.”¹⁰⁹ The “document” referred to was the power of attorney in which Pennsylvania consented to acceptance of service on the Missouri superintendent of insurance.¹¹⁰ Under Missouri law, that consent authorized the exercise of jurisdiction over the corporation even though it had no other contacts with Missouri.¹¹¹ As in *Bagdon* and *Smolik*, the importance of consent was underscored by the Supreme Court’s distinction between *Pennsylvania Fire* and earlier cases in which jurisdiction was held invalid because the defendants in those cases “had not appointed the agent as required by statute.”¹¹²

103. See *Gold Issue Mining & Milling Co. v. Pa. Fire Ins. Co. of Phila.*, 184 S.W. 999, 1000–01 (Mo. 1916).

104. *Id.*

105. *Id.*

106. *Id.* at 103.

107. See *Pennsylvania Fire*, 243 U.S. at 94.

108. *Id.* at 94–95.

109. *Id.* at 96.

110. *Id.* at 94.

111. See *Gold Issue Mining & Milling Co.*, 184 S.W. at 1004–05 (rejecting the Arizona corporation’s defense that the court did not acquire jurisdiction over defendant because neither party was a resident of Missouri and the action accrued in Colorado).

112. *Id.* at 95–96 (citing *Old Wayne Mut. Life Ass’n v. McDonough*, 204 U.S. 8, 22–23 (1907)). Under *McDonough*, a Pennsylvania court could not, consistent with the Due Process Clause of the Fourteenth Amendment, obtain jurisdiction over an Indiana corporation when the plaintiff had served process only on the Insurance Commissioner when the defendant had not designated the commis-

The recognition of consent as the basis of general jurisdiction by registration was followed in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*¹¹³ There, the Supreme Court accepted registration jurisdiction over the Bethlehem Shipbuilding Corporation, a Delaware corporation. Citing and quoting *Pennsylvania Fire*, the Court said, through Justice Frankfurter: “A statute calling for such a designation is constitutional, and the designation of the agent ‘a voluntary act.’”¹¹⁴

The constitutionality of registration jurisdiction was implicitly accepted in *International Shoe Co. v. Washington*,¹¹⁵ later described by Justice Ginsburg as the “canonical opinion” in the area of personal jurisdiction.¹¹⁶ In *International Shoe*, the Supreme Court held that the International Shoe Company was subject to jurisdiction in the State of Washington because the claim at issue arose from the corporation’s activities in that state.¹¹⁷ There was no need for the Court to directly examine registration jurisdiction as jurisdiction was not based on it. In discussing the concept of corporate “presence,” however, the Court impliedly affirmed the validity of registration by noting that “[p]resence” in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, *even though no consent to be sued or authorization to an agent to accept service of process has been given.*¹¹⁸ The obvious reference is to *Pennsylvania Fire*¹¹⁹ and the implication is that where consent has been given, jurisdiction is available.

The continued constitutionality of registration-based jurisdiction, therefore, hangs on the validity of the consent. In the next Section, I argue that the Supreme Court’s long acceptance of a very broad understanding of “consent” in the American law of jurisdiction ratifies the continuing authority of *Pennsylvania Fire*.

sioner, or any other Pennsylvanian, as an agent, and the business from which the claim arose was not transacted in Pennsylvania. *Id.* A plaintiff could, however, obtain jurisdiction by serving the Commissioner if the claim was based on a transaction in the state. *Simon v. S. Ry. Co.*, 236 U.S. 115, 130–32 (1915) (same).

113. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174–75 (1939).

114. *Id.* at 175.

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

116. *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014).

117. *Int’l Shoe*, 326 U.S. at 320.

118. *Id.* at 317 (emphasis added).

119. *Pennsylvania Fire*, 243 U.S. at 95.

B. *Consent or Compulsion?*

Some commentators and courts have challenged the validity of the consent that underlies general jurisdiction obtained by corporate registration, arguing that it is not a true consent and should not be treated as such.¹²⁰ For example, Professor Monestier, while accepting that “[i]t is black letter law that one can consent to personal jurisdiction and thereby waive any protection afforded by the Due Process Clause,”¹²¹ argues that corporate registration does not amount to consent, either express or implied, to general jurisdiction.¹²² Her argument is based on the assertion that “[a]side from registering to do business in the state and thereby consenting to general jurisdiction, a corporation really only has one of two choices: not do business in the state or do business in the state without registering and face whatever penalties the law ascribes.”¹²³ This statement, ironically, admits that the corporation does have the choice of entering or avoiding a state that would require acceptance of registration jurisdiction. The choice may or may not be difficult for a corporation—but it is still a choice and the consent, if granted, is not compelled. Further, her argument overlooks the flexibility of “doing business” as I have shown above:¹²⁴ the corporation may choose to limit its business in the particular state so that it is not required to register. New York, for example, allows a wide range of activities that do not amount to “doing business” for registration purposes.¹²⁵ Finally, Professor Monestier makes much of the nonregistered corporation as facing “penalties.” Again, using the New York example, the only realistic penalty is the inability to institute an action in the state’s courts if the court finds that the corporation is “doing business” without having registered. And even in that event, the problem is readily cured by registration at that time, rendering the rule hardly a penalty at all.¹²⁶

120. See, e.g., *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639–41 (2d Cir. 2016) (suggesting that a state’s jurisdictional power obtained by a corporation’s purported consent may be limited by the Due Process Clause, but not reaching the question); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 147 (Del. 2016); Monestier, *supra* note 2, at 1347 (“In this Article, I argue that general jurisdiction based on registration to do business violates the Due Process Clause, because such registration does not actually amount to ‘consent’ as that term is understood in personal jurisdiction jurisprudence.”); see also *id.* at 1379–92.

121. Monestier, *supra* note 2, at 1379.

122. *Id.* at 1379–80.

123. *Id.* at 1389.

124. See *supra* notes 57–67.

125. *Id.*

126. See *supra* note 53.

Professor Monestier asserts that the choice in this context is illusory: “Since all fifty states have the same laws requiring registration, this ‘option’ really amounts to a corporation simply not doing business *at all* in the United States.”¹²⁷ As she acknowledges, however, there are states that do not treat registration as imposing general jurisdiction on the registrant.¹²⁸ In fact, the vast majority of states do not assume it.¹²⁹ Obviously, this state of affairs gives corporations a wide range of additional choice—for example, to do substantial business only in those states. Professor Monestier speculates that all fifty states could adopt registration jurisdiction,¹³⁰ but history and the interests of the states to attract business make this possibility extremely unlikely.¹³¹

Another concern Professor Monestier raises is that defendants subject to jurisdiction by virtue of registration are not protected by the “contractual policing doctrines” available to parties to a forum selection clause,¹³² such as the unreasonable nature of the agreement or “‘fraud, undue influence, or overweening bargaining power.’”¹³³ In fact, however, the Supreme Court has shown scant concern for parties seeking to get out from under a forum selection clause.¹³⁴ In this way, registration jurisdiction and the consent underlying it fall easily within the bounds of free choice and voluntariness the Court requires in order to give effect to a defendant’s consent to jurisdiction.

1. Incentives to Registration Are Constitutional

The fundamental weakness in the argument that registration jurisdiction is compulsory is that it fails to distinguish compulsion from incentive. The easy claim of “compulsion” ignores the agency that corporations exercise in deciding whether to accept general jurisdiction through registration. In fact, the behavior of corporate entities in New York and elsewhere shows that they have substantial room to decide whether or not to accept the jurisdiction effected by registration.¹³⁵ It also ignores the Supreme Court cases that have

127. Monestier, *supra* note 2, at 1390.

128. *Id.*

129. *See supra* note 5.

130. Monestier, *supra* note 2, at 1390.

131. *See* discussion *infra* Part IV.

132. Monestier, *supra* note 2, at 1384.

133. *Id.* at 1385–86.

134. *See, e.g.,* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

135. *See supra* in Part II.

enforced jurisdiction by consent, even when the defendant's consent was obtained through pressure.¹³⁶

True, it is not always easy to distinguish compulsory agreement from incentive. We know that a person who gives up his wallet at gunpoint has no real choice; it is not a matter of incentives in any ordinary meaning (unless he is Jack Benny¹³⁷) and the "contract" is not enforceable. That said, a bargain between two parties agreeing to a choice of forum will be enforceable even if one party is stronger than the other.¹³⁸ The Supreme Court has validated choice-of-forum agreements between contract parties that were not freely negotiated in any real sense, notably in *Carnival Cruise Lines v. Shute*.¹³⁹ Plaintiff, a resident of Washington State who was injured while on defendant's cruise ship off the coast of Mexico brought an action against Carnival Cruise in the U.S. District Court for the Western District of Washington.¹⁴⁰ Relying on a clause in the cruise ticket that required all disputes to be litigated in a court located in Florida (where Carnival Cruise had its headquarters) the defendant moved to dismiss the case in Washington.¹⁴¹ The Court held that the forum agreement was binding and that the action in Washington should be dismissed. The Court admitted that "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."¹⁴² The Court opined that a reasonable forum clause . . . of this kind may be permissible for several reasons: . . . the cruise line has a special interest in limiting the fora in which it potentially be subject to suit . . . the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended [and the] reduced fares reflecting the sav-

136. See *infra* notes 148–178.

137. Jack Benny (1894–1974) was a famous comedian on radio and television in the twentieth century known for his (comedic) cheapness. A favorite skit had Benny stopped by a mugger who demands: "Your money or your life." When Benny does not answer the mugger repeats the threat. Finally, Benny responds, "I'm thinking it over." See *Jack Benny*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jack_Benny#.22Your_money_or_your_life.22, [<https://perma.cc/8NQR-KBGM>].

138. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea.").

139. *Carnival Cruise Lines*, 499 U.S. at 592–94.

140. *Id.* at 588.

141. *Id.*

142. *Id.* at 593.

ings that the cruise line enjoys by limiting the fora in which it may be sued.¹⁴³

In his dissent in *Carnival Cruise*, Justice Stevens wrote: “I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision . . . A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs.”¹⁴⁴ And now, in the digital age, even the waiver of access to courts and their due process protection is only a click away.¹⁴⁵ *AT&T Mobility LLC v. Concepcion* exemplifies the point: the contract required a consumer who wanted cell phone service from AT&T to accept a clause that “provided for arbitration of all disputes between the parties” and prohibited “any purported class or representative proceeding.”¹⁴⁶ Were the plaintiffs “compelled” to accept their loss of access to court and the restriction on class-wide arbitrations, or was using the service of AT&T Mobility merely an “incentive”? Given the reasonable assumption that all available phone companies in the same area have similar contract requirements, this incentive comes very close to compulsion, and yet the Supreme Court held the contract enforceable. One might respond that the purchaser of a phone or a cruise could decline to buy rather than give up his right to sue, and that is precisely the point. Having to choose is not the same as compulsion. Jurisdiction by registration is no more or less consensual.¹⁴⁷

The Supreme Court has also validated consent to jurisdiction through action, “implicit” consent, as it were. As it said in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, “The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.”¹⁴⁸ In the case, CBG had purchased business-interruption insurance from the petitioner and other foreign insurers for its operations in the Republic

143. *Id.* at 593–94.

144. *Id.* at 597.

145. See the discussion and cases collected in *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834–41 (S.D.N.Y. 2012). See also *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 347 (2011) (“The times in which consumer contracts were anything other than adhesive are long past.”).

146. *Concepcion*, 563 U.S. at 336 (holding that the contract’s prohibition against class-wide arbitration, though unconscionable under California law, would be applied because to find otherwise would be inconsistent with the Federal Arbitration Act).

147. See *supra* notes 64–70.

148. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704–07 (1982).

of Guinea.¹⁴⁹ When CBG ran into difficulties, it sought compensation from the insurers, eventually bringing an action against the insurers in federal court in the Western District of Pennsylvania.¹⁵⁰ Some of the insurers moved for summary judgment on the ground that there was no personal jurisdiction over them.¹⁵¹ In response, CBG sought discovery of copies of business-interruption policies from the movants, with which they refused to comply.¹⁵² The district judge ordered the defendants to provide the material sought, threatening that he would assume jurisdiction over the recalcitrant defendants if they did not.¹⁵³ Eventually, the judge imposed the sanction, also finding that the defendants were subject to jurisdiction based on the record regardless of the sanction.¹⁵⁴ The court of appeals affirmed the holding solely on the ground of the sanction.¹⁵⁵ In affirming, the Supreme Court reasoned: "The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights."¹⁵⁶

The district judge had put the defendants in a very difficult position. If they failed to provide documents as ordered by the judge, they would give up their due process right to contest the court's jurisdiction over them. If they complied, they would have provided documents that they regarded as private. Their position was analogous to that of a corporation faced with the choice of submission to general jurisdiction or failure to register and thus temporary loss of the opportunity to bring an action in the state. It is true that an open-ended acceptance of general jurisdiction could be more problematic than the one-case acceptance of specific jurisdiction facing the CBG defendants, but their loss was not trivial, and the same problem could confound them whenever they were sued in United States courts.

Justice White's opinion for the Court in *Bauxites* noted that "[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court."¹⁵⁷ The Court's "variety" of acceptable "express or implied consent[s]" included stipulations, arbitration agreements, cross ac-

149. *Id.* at 696.

150. *Id.* at 697-98.

151. *Id.* at 698.

152. *Id.* at 698-99.

153. *Id.* at 699.

154. *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 699 (1982).

155. *Id.* at 700.

156. *Id.* at 705.

157. *Id.* at 703-05.

tions against the plaintiff, waiver, agreement in advance, and presence in the state upon service of process.¹⁵⁸ These examples could have been labeled as compulsion, but nonetheless, much like in *Bauxites* itself, the Court upheld their constitutionality.

*Adam v. Saenger*¹⁵⁹ is another case in which the Court validated implicit consent to jurisdiction. The question was whether a plaintiff who was served on a “cross-action” could be held to have consented to jurisdiction in the place of the litigation.¹⁶⁰ A Texas corporation had brought an action against Rodolfo Montes in California for money due for goods sold and delivered.¹⁶¹ “Montes later brought a ‘cross-action’ against the corporation by service upon the corporation’s attorney of record in the pending suit to recover for the conversion of other chattels.”¹⁶² The Texas corporation defaulted on the cross action, so Montes obtained a judgment from the California court, which Adam, his successor to the judgment, sought to enforce in Texas.¹⁶³ The Texas court denied the enforcement on due process grounds, holding that the Texas corporation was not otherwise subject to jurisdiction in California.¹⁶⁴ The Supreme Court reversed, holding that the judgment was valid:

There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.

158. *Id.* (citing cases). It has been argued that the lack of a specific reference to jurisdiction by registration in *Bauxites* shows that the Court did not consider it as still valid by 1982. See Monestier, *supra* note 2, at 1381–82. This argument ignores the Court’s broad references in *Bauxite* to the sweep of the general rule that jurisdiction can be secured by consent, e.g., “In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue.” *Bauxites*, 456 U.S. at 704. Further, the Court was offering a set of examples—nowhere did it say that it was listing every possible example of consent jurisdiction. Examples are just that—examples. See also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (“A person may submit to a State’s authority in a number of ways.”).

159. *Adam v. Saenger*, 303 U.S. 59 (1938).

160. *Id.* at 61–62.

161. *Adam v. Saenger*, 101 S.W.2d 1046, 1047 (Tex. Civ. App. 1937).

162. *Id.*

163. *Id.* at 1047–48.

164. *Id.* at 1048.

*It is the price which the state may exact as the condition of opening its courts to the plaintiff.*¹⁶⁵

The similarity to registration jurisdiction is clear: in *Saenger*, the Texas corporation had to choose between bringing an action in California and risking a cross-claim against it or giving up its opportunity to sue the California defendant. Moreover, in *Saenger* the consent given by the cross action was implicit unlike the explicit consent of jurisdiction accepted by registration.

The concept of jurisdiction by consent was more recently relied upon in the plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*. It affects several of the issues that have been raised regarding registration jurisdiction. The issue was whether a New Jersey court could exercise jurisdiction over J. McIntyre Machinery, a British corporation, in a product liability action brought by Nicastro, the injured plaintiff.¹⁶⁶ Although the injury occurred in New Jersey, the allegedly defective machine involved was made in England. It had been sold to Nicastro's employer through an independent U.S. distributor.¹⁶⁷ The New Jersey Supreme Court found that jurisdiction was available, holding that "New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer 'knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.'"¹⁶⁸

A fractured U.S. Supreme Court reversed. Justice Kennedy wrote an opinion for a four-Justice plurality.¹⁶⁹ Justices Breyer and Alito concurred.¹⁷⁰ Justice Ginsburg wrote a dissent joined by Justices Sotomayor and Kagan.¹⁷¹ Of primary interest for this Article is Justice Kennedy's opinion because he treats the matter of jurisdiction as one of submission: "A person may submit to a State's authority in a number of ways."¹⁷² Expounding upon these ways, he writes:

There is, of course, explicit consent. . . . Presence within a State at the time suit commences through service of process is another example. Citizenship or domicile—or, by analogy incorporation or principal place of business for corporations—

165. *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938) (emphasis added).

166. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011).

167. *Id.*

168. *Id.* at 877.

169. *Id.* at 876 (Kennedy, J., was joined by Roberts, C.J., as well as Scalia and Thomas, JJ.).

170. *Id.* at 887 (Breyer, J., concurring).

171. *Id.* at 893 (Ginsburg, J., dissenting).

172. *Nicastro*, 564 U.S. at 880 (2011).

also indicates general submission to a State's powers. . . . These examples support exercise of the *general jurisdiction* of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere.¹⁷³

He applied the submission trope as well to specific jurisdiction, referring to it as “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.’”¹⁷⁴ On this view, a defendant that “‘purposefully avails itself of the privilege of conducting activities within the forum State’ . . . submits to the judicial power of an otherwise foreign sovereign. . . .”¹⁷⁵ He asserts that “jurisdiction is in the first instance a question of authority rather than fairness. . . .”¹⁷⁶ The plurality held that jurisdiction could not be exercised in New Jersey because the plaintiff did not “engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws.”¹⁷⁷ Justice Kennedy noted that J. McIntyre Machinery did not market goods in New Jersey or ship them there; that the company did not sell its machines in the U.S. directly, but rather sold them to an independent U.S. distributor; that its officials attended annual conventions to advertise its machines; and that no more than four of J. McIntyre Machinery's machines reached New Jersey.¹⁷⁸

The conception of jurisdiction as a matter of “submission” (or consent) in *Nicastro* directly relates to the issues presented by registration-based jurisdiction. One, the plurality's inclusion of “explicit consent” as one of the examples “that support exercise of the general jurisdiction”¹⁷⁹ belies the argument that explicit consent can effect only specific jurisdiction.¹⁸⁰ In fact, the preceding quotation is an acceptance of registration jurisdiction. Two, the *Nicastro* plurality contradicts the argument that consent to jurisdiction by registration is invalid in the absence of specific warning:¹⁸¹ notice of the effects of particular activities is not given to most of the potential defendants listed by the plurality. No state informs a corporation that its activities in a state may lead to specific jurisdiction, neither a

173. *Id.* at 880–81 (emphasis added).

174. *Id.* at 881.

175. *Id.*

176. *Id.* at 883.

177. *Id.* at 877.

178. *Nicastro*, 564 U.S. at 878.

179. *Id.* at 880–81.

180. *See also infra* Part IV.

181. *See infra* Part V.

corporation that chooses a particular place as its principal place of business, nor an entity when it incorporates. Accordingly, registration jurisdiction should not be subject to a “notice” rule.

Most notably, the plurality opinion has much to say about the difference between consent and compulsion. All of Justice Kennedy’s examples of “submission” to jurisdiction involve a tradeoff by corporations (or persons) either to enter a state and thus subject themselves to jurisdiction or, alternatively, to avoid the state and enjoy their due process right not to be sued there. No matter how essential a given forum may be to carrying on business (say, to maintain a principal place of business), no one would argue that because of the manifest “compulsion” the jurisdiction would be invalid. In fact, the general jurisdiction obtained by registration involves a lesser degree of compulsion than do the examples recognized by the plurality. The critical insight of the *Nicastro* plurality is that all acts that yield jurisdiction over the actor are the result of the defendant’s choice.

2. Incorporation as Consent to General Jurisdiction

Analysis of incorporation as a basis of general jurisdiction buttresses the validity of general jurisdiction by registration. I claim that general jurisdiction by incorporation is constitutional only because it is based on the consent that statutes of incorporation exact. We are so used to jurisdiction by incorporation that we do not notice that such jurisdiction sits very uneasily in modern jurisdictional theory. Incorporation does not equal or even imply that the corporation has any agents, property, or offices within the state in which it is incorporated. By contrast, registration is predicated on “doing business” in the state. In this way, general jurisdiction over a registrant is more intuitively proper than over a corporation that is connected to the state only by reason of incorporation. Critics of registration jurisdiction inadequately contend with the universal acceptance of incorporation jurisdiction.

Daimler established that a corporation is subject to general jurisdiction only where it is “at home” and that corporate “homes” are the states in which it is incorporated and has its principal place of business.¹⁸² The difference between the two “homes” is striking in the context of contemporary jurisdiction theory as established in *International Shoe*, the “canonical opinion in this area.”¹⁸³ The

182. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (“Here, neither *Daimler* nor *MBUSA* is incorporated in California, nor does either entity have its principal place of business there.”).

183. *Id.* at 126.

Daimler opinion describes that theory and a bit of its history. Justice Ginsburg's opinion for the Court observes that the 1878 case of *Pennoyer v. Neff*,¹⁸⁴ limited the exercise of that power to persons or property found within the state. She observes that as technology and interstate commerce took hold, "that strict territorial approach yielded to a less rigid understanding"¹⁸⁵ and "'the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.'"¹⁸⁶ Applying *International Shoe's* new approach to general jurisdiction over corporations, Justice Ginsburg summarized that "the inquiry . . . is . . . whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'"¹⁸⁷ It bears repeating that incorporation does not entail "continuous and systematic" presence in the state if what we mean by that phrase is not a fictional presence, but instead the actual presence exemplified by a principal place of business. As the Supreme Court explained its more pragmatic approach in *International Shoe Co. v. Washington*, "due 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.'"¹⁸⁸

The Court then applied this new approach to corporations. The International Shoe Company was incorporated in Delaware and had its principal place of business in St. Louis, Missouri. It had no plants or offices in Washington but it did employ salesmen there.¹⁸⁹ The state's claim against the corporation sought to recover unpaid contributions to the state unemployment compensation fund.¹⁹⁰ Implicitly referring to *Pennoyer*, the corporate defendant objected to jurisdiction on the ground that it was not "present" in Washington as "its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts

184. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

185. *Daimler*, 571 U.S. at 126.

186. *Id.* at 754 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

187. *Id.* at 749 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

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

189. *Id.* at 313.

190. *Id.* at 312–13.

were without jurisdiction. . . .¹⁹¹ The *International Shoe* Court solved the problem of corporate presence by recognizing the fiction underlying *International Shoe's* defense:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. . . . For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.¹⁹²

Finding that the activities of *International Shoe* in Washington were "systematic and continuous" and that "[t]he obligation which is here sued upon arose out of those very activities," "[i]t is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice. . . ." ¹⁹³

The effect of incorporation on jurisdiction received only passing reference in *International Shoe*: in one of the only two references to a corporate "home" the Court said, "An 'estimate of the inconveniences which would result to the corporation from a trial away from its home' or principal place of business is relevant in this connection [to a proposed forum]."¹⁹⁴ The Court later added: "To require the corporation in such circumstances [of casual presence of the corporate agent] to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."¹⁹⁵ The "home" referred to here as distinct from the principal place of business can only mean the state of incorporation. (The reference to the state of incorporation as a corporate "home" had been used in nineteenth-century

191. *Id.* at 315.

192. *Id.* at 316–17 (internal citations omitted).

193. *Id.* at 320.

194. *Int'l Shoe Co.*, 326 U.S. at 317 (1945).

195. *Id.*

decisions.¹⁹⁶) The implication is that when a corporation is sued in its “home” any “contacts of the corporation with the forum”¹⁹⁷ are not necessary to the exercise of jurisdiction. In the context of *International Shoe* this is very odd because the fact of incorporation says nothing about convenience or activities within the state. Incorporation is, and by 1947 when *International Shoe* was decided, simply a matter of filing some papers (by mail) with the appropriate state officer and paying some fees. The principals of the corporation need never step foot in the state at the time of incorporation, or ever thereafter. As Justice Breyer reminds us in *Hertz Corp. v. Friend*,¹⁹⁸ corporations can and have chosen the state of their incorporation to obtain or avoid federal court diversity jurisdiction, where “perhaps a State did no business at all.”¹⁹⁹ To call the place where the filing is made, “home”, is thus a fiction, one that disguises its contradiction to *International Shoe*’s basic rejection of fictions as basis for jurisdiction.

The Court had no need to explore the role of incorporation in the context of the new pragmatic approach to jurisdiction as the International Shoe Company was not incorporated in Washington. Unquestionably, though, the notion that a mere filing of a few papers to incorporate is a source of general jurisdiction grates against the basic theory of *International Shoe*. Yet, to my knowledge, no corporation has challenged this exercise of general jurisdiction. If such a challenge were made, would it be successful? One might think that the answer is yes if it depended on the “estimate of inconveniences” faced by the corporation.²⁰⁰ But, regardless of *International Shoe*, the answer is no, because consent to general jurisdiction is a requirement of incorporation in every state.

196. See e.g. *Merrick v. Van Santvoord*, 34 N.Y. 208, 218 (1866) (suggesting that the corporation is at home in its chartering state); Caroline Kaeb, *Putting “Corporate” Back into Corporate Personhood*, 35 Nw. J. INT’L L. & BUS. 591, 602 (explaining that in 1844 the Supreme Court found that a corporation was a citizen of the state of its incorporation in Louisville); *Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 557–59 (1844)).

197. *Int’l Shoe*, 326 U.S. at 317.

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

199. *Id.* at 85–86 (“Since the Supreme Court has decided that a corporation is a citizen . . . it has become practice for corporations to be incorporated in one State while they do business in another.” (quoting S. REP. NO. 530, 72d at 4–7 (1932))).

200. *Id.*

In her exploration of general jurisdiction and its various sources,²⁰¹ Professor Lea Brilmayer emphasizes the role of consent as the basis of jurisdiction by incorporation. She explains:

In some respects, the decision to incorporate in a particular state provides a more powerful basis for adjudicatory jurisdiction than does domicile. First, *the 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. Second, the corporation, unlike an individual, cannot ever be absent from the state of incorporation. Third, even if a corporation neither does business nor maintains an office in the incorporating state, *the incorporation process itself provides notice of the potential for judicial jurisdiction*. Finally, the corporation is likely to be familiar with that state's law, arguably more familiar than an individual domiciliary would be, because the corporation presumably based *its incorporation decision* in part on the state's substantive law.²⁰²

Professor Brilmayer's insight is borne out by the actual requirements of incorporating. The certificate one must file to incorporate in New York, for example, includes a "designation of the secretary of state as agent of the corporation upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him."²⁰³ Moreover, New York Business Corporations Law Section 304 provides:

- (a) The secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served.
- (b) No domestic or foreign corporation may be formed or authorized to do business in this state under this chapter unless in its certificate of incorporation or application for authority it designates the secretary of state as such agent.

Thus, New York treats domestic and authorized (registered) foreign corporations the same. Each is required to accept the secretary of state as its agent for the service of process. Indeed, the authorized foreign corporation will often have *more* contacts and

201. Lea Brilmayer et al., *supra* note 80, at 733.

202. *Id.* at 733–34 (emphasis added).

203. N.Y. BUS. CORP. LAW § 402(a)(7) (McKinney 2018).

relations with the state than a domestic corporation, yet the former and not the latter has been challenged on constitutional grounds.

Professor Brilmayer suggests that the constitutionality of “unlimited general jurisdiction” based on registration and the designation of an agent does not seem “viable under today’s due process standard”²⁰⁴ in light of “the minimum contacts approach of *International Shoe v. Washington*.”²⁰⁵ Professor Brilmayer thus assumes that *International Shoe* implicitly undermined *Bagdon* and *Pennsylvania*, but she does not explore the role of consent by registration.²⁰⁶ As I have already shown, that assumption is not justifiable.²⁰⁷

How shall we reconcile acceptance of incorporation as a basis for general jurisdiction when, despite the same consent, registration is not?²⁰⁸ One way to distinguish the two would be to accept the ipse dixit statements in *Goodyear* and *Daimler* that the state of incorporation is the corporate “home.”²⁰⁹ The reference to a corporate “home” is apparently an analogy to the rule governing natural persons, which holds that one’s domicile or “home” is a valid basis of general jurisdiction.²¹⁰ But this reasoning by metaphor is troublesome. Corporations do not have “homes.” People do. The difference is not merely a matter of bad logic; the metaphor disguises a real-world difference between a person’s domicile and an entity’s place of incorporation. The reference of a corporate home

204. Lea Brilmayer et al., *supra* note 80, at 758.

205. *Id.* at 758–59.

206. *Id.* at 756 (“The constitutional limitations on assertion of judicial jurisdiction based on general consent are unclear; the Due Process Clause possibly would intervene . . .”).

207. See discussion *supra* notes 115–19.

208. The difficulty of determining where a corporation “is” has never been better presented than by Felix Cohen, in his article *Transcendental Nonsense and the Functional Approach*. He observes that “[T]he question of *where a corporation is* . . . not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question of identical metaphysical status with the question of which scholastic theologian are supposed to have argued at great length, ‘How many angels can stand on the point of a needle.’” I am grateful to Professor Bryan Camp to have pointed Cohen’s article to me. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935).

209. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

210. *Milliken v. Meyer*, 311 U.S. 457, 462–64 (1940) (“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment by means of appropriate substituted service One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him.”).

or “residence” had been used in the nineteenth century in a variety of contexts, but this hardly justifies the continued effect on jurisdiction post-*International Shoe*.²¹¹ Domicile of an individual is based on actual, ongoing, physical connection with that place. Incorporation implies nothing of the kind. The fictitious “home” metaphor for corporations does nothing to justify general jurisdiction based on incorporation—“that concept, like other metaphors, has its deficiencies as well as its utilities.”²¹² The deficiency of the “home” metaphor is its implication that the corporation is in some sense physically in the state of incorporation, and therefore it is not inconvenient for it to litigate in that state. Realistically, however, incorporation by no means says anything about the actual connection to the state or its capacity to litigate there.²¹³ Thus, the metaphor disguises the reality that incorporation jurisdiction is in many ways at odds with the core holding of *International Shoe*. It is remarkable that the Supreme Court, which in *International Shoe* specifically disclaimed the use of fictions in jurisdictional law, continues to apply a fiction to justify general jurisdiction in a place far away from corporations’ actual business “homes.” A better—and in fact the only—justification of general jurisdiction based on incorporation that is consistent with *International Shoe* is consent, which likewise underlies registration jurisdiction.

IV. DOES REGISTRATION JURISDICTION UNDERMINE *DAIMLER*?

Even though *Daimler* does not openly attack registration jurisdiction, some courts and commentators have argued that registra-

211. See, e.g., *Marshall v. Balt. Co.*, 57 U.S. 314, 328–29 (1853). The issue there was whether corporations were “persons” for the purpose of diversity jurisdiction. The Court observed that if diversity was not available, the plaintiff’s only recourse would be an action in state court, an outcome that the Court found as an unwise limitation of diversity jurisdiction. More legalistically, the Court explained that the corporation, a creature of Maryland, where it was incorporated, could not sue or be sued in any other state. Holding that the corporation was a citizen of the state in which it was incorporated, diversity jurisdiction requirement was met. See also *Covington Drawbridge Co. v. Shepherd*, 61 U.S. 227, 233 (1857) (“And in the case of the *Bank of Augusta v. Earle*, 13 Pet., 519, the court said that a corporation can have no legal existence outside of the dominion of the State by which it is created. Consequently, the Covington Drawbridge Company being chartered by the State of Indiana, it necessarily has its home and place of business in that State.”).

212. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011).

213. *Hertz Corp. v. Friend*, 559 U.S. 77, 86 (2010).

tion jurisdiction will undermine the policy goals of *Daimler* and for that reason is unconstitutional.²¹⁴ In his opinion in *Lockheed Martin*, Judge Carney, for one, asserts that an acceptance of registration jurisdiction “would risk unraveling the jurisdictional structure envisioned in *Daimler* and *Goodyear*.”²¹⁵ In *Cepec*, Justice Strine, speaking for the Supreme Court of Delaware, observed that “[h]uman experience shows that ‘grasping’ behavior by one, can lead to grasping behavior by everyone.”²¹⁶ He saw this as a potential problem for Delaware because of the many companies incorporated there—“theoretically, under the [plaintiffs’] position, major Delaware public corporations with national markets could be sued by its [sic] stockholders on an internal affairs claim in any state in the nation because the corporations have had to register to do business in every state.”²¹⁷ To avoid this unhappy result, he wrote, “Delaware should be prudent and proportionate in exercising jurisdiction over foreign corporations, and a narrower reading of [its registration statute] accomplishes that.”²¹⁸ Consequently, the court interpreted its registration statute as not conferring general jurisdiction.²¹⁹

The prediction that many states will adopt general jurisdiction by registration is mistaken for two reasons. First, it has been proven wrong empirically. The history of general jurisdiction by registration gives us no reason to believe that a substantial number of states—if any—will amend or interpret existing registration statutes to establish general jurisdiction post-*Daimler*. Although 100 years have passed since *Pennsylvania Fire* upheld the constitutionality of general jurisdiction by registration,²²⁰ few states have “grasped” it. According to Professor Monestier, only one state (Pennsylvania) has enacted a statute that, by its terms, states that registration yields general jurisdiction.²²¹ She lists only several other states in which the courts that have held that “corporate registration amounts to general jurisdiction.”²²² Another survey of the states in which registration was so interpreted found only six states that clearly did so.²²³

214. *E.g.*, Monestier, *supra* note 2, at 1346.

215. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016).

216. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 143 (Del. 2016) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014)).

217. *Id.* at 143.

218. *Id.* at 144.

219. *Id.* at 148.

220. *Pennsylvania Fire*, 243 U.S. 93 (1917).

221. Monestier, *supra* note 2, at 1368 n.121.

222. *See supra* note 5.

223. *Id.*

No state has done so since *Goodyear* was decided in 2011. For current purposes, it does not matter whether there are ten or seven states that have adopted general jurisdiction by registration. It is obvious that for whatever reasons, the great majority of states have not done so since *Pennsylvania Fire* was decided. One might argue that there was no need to rely on registration jurisdiction prior to the evisceration of general jurisdiction by *Goodyear* and *Daimler*²²⁴ because plaintiffs could rely on general jurisdiction based on the “substantial and continuous” doctrine that was in effect prior to those cases. This point overlooks the amorphous and thus unpredictable nature of the “substantial and continuous” rule then governing general jurisdiction as was explained in *International Shoe*.²²⁵ States seeking more clarity in jurisdiction could have been much better off adopting registration jurisdiction to avoid the problems of the “substantial and continuous” rule. Ironically, the decision of the Supreme Court of Delaware in *Cepec* supports my view that there will likely be no “grasping” by registration post-*Goodyear* and *Daimler*. *Cepec* dealt with the reach of the extant Delaware registration statute and, overruling lower courts, held that the statute did not authorize general jurisdiction.²²⁶ In part, the Delaware court was also moved by a concern for the interests of the companies incorporated in Delaware—“as the home of a majority of the United States’ largest corporations, Delaware has a strong interest in overreaching in this sensitive area.”²²⁷

Cepec illustrates how states can have different interests with respect to jurisdiction and leads to the second reason that registration does not undermine *Goodyear* and *Daimler*. A state may view registration jurisdiction as protective of its citizens and choose to risk the possibility that some corporations will avoid the state. Other states, like Delaware, may decide that using registration as a jurisdictional door would be contrary to the state’s benefit. States might reasonably decide that registration-based jurisdiction would discourage some corporations from doing business in those states. Perhaps that is the reason why the great majority of states have so decided. Given

224. See *supra* notes 8–9.

225. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (“While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”).

226. *Cepec*, 137 A.3d at 148.

227. *Id.* at 143.

the importance of state sovereignty and the long respect for consent in American jurisprudence, the states should not be constitutionally prohibited from recognizing registration jurisdiction.

V. THE ISSUE OF NOTICE

Another due process concern raised by commentators and courts is that corporations lack adequate notice that registration will subject them to general jurisdiction. Professor Monestier argues that, except for Pennsylvania, registration statutes do not fairly alert the corporation of the jurisdictional effect of the “paperwork” or the “governing statutory scheme [of registering].”²²⁸ The notice issue was also addressed by Judge Carney in his opinion for the court in *Lockheed Martin*.²²⁹ As described previously, the Second Circuit held that the defendant corporation’s registration in Connecticut could not be read as consent to general jurisdiction in that state.²³⁰ While declining to hold that general jurisdiction by registration was unconstitutional, the court was troubled by the lack of notice by the statute or state court decisions that would alert registrants of the jurisdictional effect of registration.²³¹

The court noted with apparent approval that other jurisdictions “more plainly advise the registrant” of the jurisdictional effect of registration.²³² It cited the Pennsylvania statute, which specifically provides that “qualification” (registration) by a foreign corporation is “a sufficient basis” on which to authorize general jurisdiction.²³³ The court also observed that “[t]he registration statute in the state of New York has been definitively construed to accomplish that end”²³⁴ Whether the definitive holdings of the New York courts²³⁵ that registration is consent to general jurisdiction would also satisfy the Constitution was not considered. But the opinion in dicta stated that “a carefully drawn state statute that *expressly required consent* to general jurisdiction as a condition on a foreign corporation’s doing business in the state, at least in cases

228. Monestier, *supra* note 2, at 1393.

229. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016).

230. *Id.* at 641.

231. *Id.* at 637–38.

232. *Id.* at 640.

233. *Id.* at 637 (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (quoting 42 PA. CONS. AND STAT. ANN. § 5301 (Purdon 1990))).

234. *Id.* at 640.

235. See discussion *supra* Part II; see also Monestier, *supra* note 2, at 1344 n.4 (citing cases).

brought by state residents, might well be constitutional.”²³⁶ The court’s suggested requirements, which would involve more notice than is already provided (by statute or well-developed judicial holdings), are not supported by precedent and should not be adopted.

Pennsylvania Fire itself forecloses arguments that actual notice need be given in the statute to effect registration jurisdiction. There, the Supreme Court upheld registration jurisdiction despite the lack of actual consent or even notice of the jurisdictional impact of registering. The defendant insurer “had executed a power of attorney that made service on the superintendent the equivalent of personal service [upon the company].”²³⁷ Rejecting the defense that the Missouri court did not obtain general jurisdiction by such service, the Supreme Court said: “[The insurer] did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert.”²³⁸ In other words, the defendant had the responsibility of anticipating the effects of its registration: “[the] party executing it takes the risk of the interpretation that may be put on it by the courts.”²³⁹ More generally, there is no support for a rule that a state must provide specific notice or obtain actual formal consent from a defendant to obtain jurisdiction over it.

For example, the Constitution does not prohibit the exercise of general jurisdiction over a person who is physically but only temporarily present in the forum state.²⁴⁰ No warning or notice is required. In his opinion for the Court in *Burnham v. Superior Court*,²⁴¹ Justice Scalia did not mention the issue of notice or consent in finding that presence in the state allowed general jurisdiction. Justice Brennan, concurring with the judgment, relied in part on the “fact that American courts have announced the rule for perhaps a cen-

236. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016) (emphasis added). *But see Sae Han Sheet Co. v. Eastman Chem. Corp.*, No. 17 Civ. 2734 (ER), 2017 U.S. Dist. LEXIS 173410, at *13 (S.D.N.Y. Oct. 19, 2017) (registration in New York does not confer jurisdiction on the registrant) (emphasis in original); *see also Amelius v. Grand Imperial, L.L.C.*, 64 N.Y.S.3d 855, 869 (Sup. Ct. 2017) (finding that Yelp was not subject to general jurisdiction in New York merely because it registered to business there).

237. *Pennsylvania Fire*, 243 U.S. 93, 95 (1917).

238. *Id.*

239. *Id.* at 96.

240. *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 604 (1990).

241. *Id.*

ture . . . [that] provides a defendant voluntarily present in a particular State *today* ‘clear notice that [he] is subject to suit’ in the forum.”²⁴² Notably, Justice Brennan’s concurrence did not require a sign posted on the state border, let alone prior written consent by the defendant. Obviously, the “clear notice” to which Justice Brennan refers is a fiction: how many New Yorkers (or foreigners) know that they can be sued in New Jersey on any claim whatever it may be when they voluntarily enter that state? The fiction that defendants have “clear notice” such that jurisdiction over them is justified has been relied upon by the Court to find specific jurisdiction as well.²⁴³

Applying the same concept to corporations, it is noteworthy that no notice or writing of consent is required to obtain jurisdiction over a corporation when it chooses its principal place of business. The law implicitly assumes that the principals of the entity will be aware of it, an assumption that may or not be true. Incorporation, the other “home” of a corporation, is a different matter. State laws typically provide that an entity cannot obtain the status of a corporation without designating a state official as an agent for service of process. However, aside from requiring the designation of a state official for service,²⁴⁴ the entity is not given explicit warning that incorporation will yield general jurisdiction over it. Presumably, the corporation-to-be has “clear notice” of that effect by virtue of counsel’s advice, or is assumed to know that the designation of the state official is consent to accept general jurisdiction in that state. There is no reason why the designation required as part of registration should not also satisfy that as proper notice to the registrant. Rather, the same assumption of “clear notice” that is applied for all other means of obtaining jurisdiction should be applied to registration jurisdiction.

VI. CONCLUSION

The constitutionality of general jurisdiction by registration was established almost a century ago in *Pennsylvania Fire* and has not

242. *Id.* at 636–37 (Brennan, J., concurring) (emphasis in original).

243. *See, e.g.,* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“When a corporation purposefully avails itself of the privilege of conducting activities within the forum State . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs to customers, or, if the risks are too great, severing its connection with the State.” (cleaned up)).

244. N.Y. BUS. CORP. LAW § 402(a)(7) (McKinney 2018).

since been challenged by the Supreme Court. The arguments to overrule it are not persuasive largely because registration by a corporation reflects a knowing, voluntary choice. The Supreme Court has regularly upheld state judicial jurisdiction based on implicit or explicit consent, even in situations where it appeared the defendant lacked any realistic alternatives. The assertion that the consent given by registration is not freely given ignores the reality of corporate principals' powers of decision. Weighing the alternatives, they may elect to limit or avoid activity in some states or to proceed with business in the state anyway but decline to register (risking little if any sanction), or they may elect to register. Importantly, these options reflect realistic alternatives that individual corporations can pursue according to their particular purposes. Nothing in *Daimler* or *Goodyear* explicitly challenges the long line of cases validating consent. Rather, the Court's long and continuing endorsement of state exercise of general jurisdiction based only on incorporation within the state—i.e., by consent and nothing more—strongly supports the constitutionality of registration jurisdiction.

The justifications for registration jurisdiction include the state's intention to keep a level playing field between domestic and foreign competitors that enjoy doing business in it.²⁴⁵ Exacting general jurisdiction is an important way of accomplishing that leveling.²⁴⁶ From the position of persons and entities with claims against a foreign corporation, moreover, the availability of general jurisdiction by registration is desirable as a matter of fairness. Registration jurisdiction may provide the only forum in which an injured party may sue in its own "home." Given the modern judicial defense of consent jurisdiction in many contexts,²⁴⁷ and the recent narrowing of other applications of judicial jurisdiction,²⁴⁸ the attack on registration general jurisdiction itself is "unacceptably grasping."

245. See *Storwal Int'l, Inc. v. Thom Rock Realty Co.*, 784 F.Supp. 1141, 1145 (S.D.N.Y. 1992) ("The purpose of the statute is to put foreign corporations on equal footing with domestic ones."); see also discussion *supra* Part II.

246. See *supra* notes 37–41.

247. See discussion *supra* Part III.B.

248. See discussion *supra* notes 37–41.