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## Consent By Registration: The "Back-Door Thief"

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# CONSENT BY REGISTRATION: THE “BACK-DOOR THIEF”

Nate Arrington\*

## I. INTRODUCTION

Consider this personal jurisdiction quandary: A growing Arizona company wants to start expanding into other states. The company is incorporated in Delaware and has its principal place of business in Arizona. It decides to make the leap and begins registering to do business in a few surrounding states, including New Mexico. The registration seems straightforward and does not mention anything about jurisdiction. After the registration, but before conducting any business in New Mexico, a Kentucky resident decides to sue the Arizona-based corporation. The suit is based on an alleged tort occurring in Utah, and the plaintiff files the lawsuit in New Mexico. According to current New Mexico law, without any other contacts with the state, the New Mexico court would have personal jurisdiction over the corporation.<sup>1</sup>

In several states, a corporation may be subject to personal jurisdiction based purely on its registration, which leads to inconsistent results and unfair rulings.<sup>2</sup> Consequently, this Article seeks to accomplish two goals. First, it will demonstrate

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1. See *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 581 (N.M. Ct. App. 2018); see also *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 273-74 (N.M. Ct. App. 1993).

2. See Bexis, *Updating Our Post-Bauman 50-State Survey on General Jurisdiction by Consent*, DRUG & DEVICE L. BLOG (Nov. 5, 2018), [<https://perma.cc/LAQ9-N6KZ>] (fifty-state survey on the use of consent by registration).

For purposes of this Article, it is unimportant that only a minority of states may actually allow consent by registration. Unless this practice is directly overruled or uniformly abrogated, states will still have the ability to retroactively allow consent by registration at any point, either through the legislative or judicial bodies.

the current problems with the use of registration statutes to obtain personal jurisdiction over defendants. These problems include the broad nature of the consent, the lack of clarity on the effects of registration, the use of coercion to obtain a business's registration, and the due process concerns following the U.S. Supreme Court cases *Goodyear*<sup>3</sup> and *Daimler*.<sup>4</sup> These issues are especially concerning when taking into consideration the Supreme Court's focus on fairness and reasonableness.<sup>5</sup> Second, this Article encourages courts to find solutions for obtaining personal jurisdiction with the help of the Supreme Court's guidance without unfairly utilizing the conduit of a business's registration.

Part II discusses the evolution of personal jurisdiction jurisprudence and the recent narrowing of both specific and general jurisdiction. Through this narrowing, the Supreme Court created a jurisdictional gap, leading courts to use other means of obtaining personal jurisdiction. One method that has recently received increased scrutiny is the practice of using a business's registration to serve as consent to personal jurisdiction.<sup>6</sup> This Part concludes with a historical discussion of the use of consent by registration.

Part III analyzes the issues with the consent by registration method without considering the due process implications. First, this Part compares and contrasts the practice of consent by registration with other accepted methods of consenting to personal jurisdiction. Second, it examines the lack of clarity in the registration statutes themselves as to the jurisdictional effects of a business's registration. Finally, this Part demonstrates that these registration statutes and other state laws effectively coerce companies into registering with the state, thereby casting doubt as to the validity of the consent itself.

Part IV examines the due process concerns of consent by registration following *Goodyear* and *Daimler*.<sup>7</sup> This Article argues that these two cases, especially *Daimler*, reject the idea

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

4. *See Daimler AG v. Bauman*, 571 U.S. 117, 137-39 (2014).

5. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

6. *See infra* Part II.

7. *Goodyear*, 564 U.S. at 919; *Daimler*, 571 U.S. at 137-39.

that a corporation should be subject to general jurisdiction in every state in which it does business.<sup>8</sup> It then notes that using consent by registration effectively circumvents *Daimler*'s holding because, if consent by registration continues to be allowed, a business will be subject to personal jurisdiction in any state where it is registered.<sup>9</sup> Finally, Part IV establishes that it is impossible to reconcile the practice of consent by registration with the ultimate touchstone of personal jurisdiction—fairness and reasonableness.<sup>10</sup>

While the use of a business's registration as consent to personal jurisdiction made sense in the nineteenth and early twentieth centuries,<sup>11</sup> this practice is outdated and unworkable in our modern global society. When considering the problems with consent by registration in conjunction with the due process concerns recently enunciated by the Court, a company's registration in the state should not be used as a conduit to obtain personal jurisdiction over a defendant.<sup>12</sup>

## II. PERSONAL JURISDICTION & HISTORY OF CONSENT BY REGISTRATION

Personal jurisdiction is the court's power "to assert judicial authority over" a particular party, typically a defendant.<sup>13</sup> Historically, personal jurisdiction was not a controversial or contested area of the law, as courts used a territorial approach, exemplified by the seminal case of *Pennoyer v. Neff*.<sup>14</sup> This territorial approach stood for the principle that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and that a state does not have jurisdiction over defendants not within its territory.<sup>15</sup> However,

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8. *Daimler*, 571 U.S. at 137-39.

9. *See infra* Part IV.

10. *See World-Wide Volkswagen*, 444 U.S. at 292.

11. States would allow the registration to serve as a proxy for presence in the era dominated by the territorial approach to personal jurisdiction. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 632 (2d Cir. 2016).

12. *See Daimler*, 571 U.S. at 137-39; *Goodyear*, 564 U.S. at 919.

13. 1 JAMES WM. MOORE ET AL., *MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE* § 6.01 (2020).

14. *See Pennoyer v. Neff*, 95 U.S. 714 (1877).

15. *Id.* at 722.

this approach proved insufficient in a modern, more mobile society. As the national and global economies became increasingly interdependent, the courts shifted away from a territorial approach of personal jurisdiction in favor of a dispute-based approach rooted in notions of fundamental fairness.<sup>16</sup> In 1945, the Supreme Court outlined this new approach to personal jurisdiction in *International Shoe Co. v. Washington*, basing personal jurisdiction on the location of the dispute itself and not purely on the defendant's location.<sup>17</sup> Since then, two distinct types of personal jurisdiction have emerged: specific jurisdiction and general jurisdiction.<sup>18</sup>

Specific jurisdiction is found explicitly in *International Shoe* and applies to causes of action that directly arise from contacts within the forum state.<sup>19</sup> The test used for specific jurisdiction examines a defendant's "minimum contacts" with the forum state and whether the lawsuit "offend[s] 'traditional notions of fair play and substantial justice.'"<sup>20</sup> Specific jurisdiction allows lawsuits from a particular party that assert a particular cause of action.<sup>21</sup> If the defendant's contacts in the dispute meet the "minimum contacts" standard, the court may exercise personal jurisdiction over the defendant.<sup>22</sup>

The second type of personal jurisdiction, general jurisdiction, also derives from *International Shoe*.<sup>23</sup> General jurisdiction, intended to mimic presence within a state, relates to disputes where the defendant's activities within the forum state are "continuous and systematic" in a manner that renders the defendant subject to the authority of the forum state.<sup>24</sup> This type of jurisdiction, sometimes referred to as "all-purpose

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

17. See *id.* at 319.

18. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (introducing the concepts of specific and general jurisdiction to the personal jurisdiction doctrine).

19. *Int'l Shoe*, 326 U.S. at 319; see also von Mehren & Trautman, *supra* note 18, at 1136.

20. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

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

22. *Int'l Shoe*, 326 U.S. at 316; see, e.g., *Walden v. Fiore*, 571 U.S. 277, 285 (2014).

23. *Int'l Shoe*, 326 U.S. at 317; see also von Mehren & Trautman, *supra* note 18, at 1136.

24. *Int'l Shoe*, 326 U.S. at 317.

jurisdiction,” vests the court with personal jurisdiction over the defendant in *any* lawsuit from *any* plaintiff.<sup>25</sup> In other words, general jurisdiction would confer personal jurisdiction regardless of whether the claim arose from within the forum state or whether the plaintiff resides in the forum state.<sup>26</sup>

*International Shoe* and later Supreme Court decisions rooted the concept of personal jurisdiction in “traditional notions of fair play and substantial justice.”<sup>27</sup> In *World-Wide Volkswagen*, the Court expanded on the role fairness and reasonableness play in personal jurisdiction analysis, elucidating a four-factor test.<sup>28</sup> The Court has continued to reaffirm the importance of fairness and reasonableness in evaluating personal jurisdiction.<sup>29</sup> This fairness doctrine, while sometimes neglected by courts, should always be used as a touchstone in informing a personal jurisdiction analysis.<sup>30</sup>

However, since *International Shoe*, the Court has significantly reduced the scope of specific jurisdiction by adding additional requirements to the two-part analysis discussed above.<sup>31</sup> One example includes requiring the defendant to “purposefully avail[] itself” to the benefits of the forum state.<sup>32</sup> In the last decade, after failing to address it for twenty-seven years, the Court narrowed the scope of general jurisdiction,

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25. *Goodyear*, 564 U.S. at 919.

26. *See id.*

27. *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (articulating factors for evaluating the fairness of exerting personal jurisdiction).

28. *World-Wide Volkswagen*, 444 U.S. at 292. The Court listed four factors in evaluating fairness: (1) “the forum State’s interest in adjudicating the dispute,” (2) “the plaintiff’s interest in obtaining convenient and effective relief . . . at least when that interest is not adequately protected by the plaintiff’s power to choose the forum,” (3) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies[,]” and (4) “the shared interest of the several States in furthering fundamental substantive social policies[.]” *Id.* (internal citations omitted).

29. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985); *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987).

30. *World-Wide Volkswagen*, 444 U.S. at 292; *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

31. *See Burger King*, 471 U.S. at 475; *see also* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 509 (2015).

32. *Burger King*, 471 U.S. at 475; *see also* Trammell, *supra* note 31, at 509.

especially in regard to corporations.<sup>33</sup> The Court did this in two cases, *Goodyear* and *Daimler*, in which it limited the states where personal jurisdiction can be properly asserted to: (1) the corporation's principal place of business, (2) its incorporation state, or (3) where the corporation is "essentially at home."<sup>34</sup> These increased jurisdictional requirements have functionally led to a narrowing of personal jurisdiction both for specific and general jurisdiction.

This narrowing of specific and general jurisdiction has created a jurisdictional vacuum that courts are attempting to fill through other means. Prior to *Goodyear* and *Daimler*, courts were filling the vacuum left by this narrowing primarily through expanding the scope of general jurisdiction.<sup>35</sup> But since *Goodyear* and *Daimler*, some courts have been relying on other workarounds of the jurisdictional vacuum, including using a business's registration as consent to personal jurisdiction.<sup>36</sup>

Consent by registration comes from a relatively simple concept. Every state has adopted a registration statute.<sup>37</sup> Typically, these registration statutes require the company to appoint a registered agent for service of process.<sup>38</sup> Courts use either the registration to transact business or the appointment of a registered agent as evidence of consent to personal jurisdiction; functionally, however, there is no difference in the analysis because registration statutes require both the registration and the appointment to fully register as a foreign corporation.<sup>39</sup>

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33. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

34. *Goodyear*, 564 U.S. at 919, 924; see also *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

35. Trammell, *supra* note 31, at 511-12.

36. See, e.g., *In re Asbestos Prods. Liab. Litig.* (No. VI), 384 F. Supp. 3d 532, 534 (E.D. Pa. 2019); *In re Syngenta AG MIR 162 Corn Litig.*, MDL No. 2591, 2016 WL 1047996, at \*3 (D. Kan. Mar. 11, 2016); *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 581 (N.M. Ct. App. 2018).

37. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016); *Gulf Coast Bank & Tr. Co. v. Designed Conveyor Sys., LLC*, Civ. Action No. 16-412-JJB-RLB, 2017 WL 120645, at \*3 (M.D. La. Jan. 11, 2017).

38. See, e.g., ARK. CODE ANN. § 4-27-1503(a)(5) (2007); ARK. CODE ANN. § 4-20-105 (2007); WYO. STAT. ANN. § 17-16-1503(a)(v) (2009).

39. See *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1197-98 (8th Cir. 1990); see also, e.g., ARK. CODE ANN. § 4-27-1503(a)(5); ARK. CODE ANN. § 4-20-105; WYO. STAT. ANN. § 17-16-1503(a)(v).

In the pre-*International Shoe* era, the Supreme Court recognized consent by registration, holding in *Pennsylvania Fire Insurance* that a business assumed “the risk of the interpretation that may be put upon [the state’s registration statute] by the courts.”<sup>40</sup> The Supreme Court reasoned that the business’s “voluntary act” of appointing an agent for service of process demonstrated consent to the jurisdiction of the forum state.<sup>41</sup> Even after *International Shoe*, lower courts continued the practice of allowing a company’s registration to serve as consent to general jurisdiction.<sup>42</sup> In permitting registration to confer personal jurisdiction, courts have adopted various arguments.<sup>43</sup> However, the majority of courts that have allowed consent by registration primarily rely on the idea that the business is consenting to personal jurisdiction by registering in the state or appointing a registered agent.<sup>44</sup>

One illustrative case is *Knowlton v. Allied Van Lines, Inc.*<sup>45</sup> There, the Eighth Circuit reversed a trial court ruling that did not permit consent by registration.<sup>46</sup> In allowing the corporation’s registration to serve as consent to personal jurisdiction, the *Knowlton* court reasoned that the Minnesota Supreme Court had interpreted their State’s registration statute to provide consent to personal jurisdiction by registering.<sup>47</sup> Thus, by registering (and thereby appointing a registered agent) in Minnesota, the defendant had impliedly consented to personal jurisdiction.<sup>48</sup> The

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

41. *Id.*

42. See, e.g., Sternberg v. O’Neil, 550 A.2d 1105, 1107 (Del. 1988); STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte. Ltd., 560 F.3d 127, 131 (2d Cir. 2009); Bane v. Netlink, Inc., 925 F.2d 637, 640-41 (3d Cir. 1991).

43. One argument states that a business registering in that state qualifies as “minimum contacts” with the forum state. See Price v. Wheeling Dollar Sav. & Tr. Co., 460 N.E.2d 264, 269 (Ohio Ct. App. 1983); Junction Bit & Tool Co. v. Institutional Mortg. Co., 240 So.2d 879, 882 (Fla. Dist. Ct. App. 1970). This analysis confuses the tests for specific and general jurisdiction and is “functionally . . . resting its analysis on consent” alone, just through another name. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1372-77 (2015).

44. See, e.g., Sternberg, 550 A.2d at 1107; STX Panocean, 560 F.3d at 131; Bane, 925 F.2d at 640.

45. Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196 (8th Cir. 1990).

46. *Id.* at 1200.

47. *Id.*

48. *Id.*



court stated that “[o]ne of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.”<sup>49</sup> The court infers this consent to general jurisdiction by reasoning that it is unnecessary for a foreign corporation to be mandated to register an agent for service if the corporation is not subject to the personal jurisdiction of the state.<sup>50</sup>

Before *Goodyear* and *Daimler*, the use of consent by registration was not a significant issue, as courts would generally bypass the narrowing of specific jurisdiction by expanding the use of general jurisdiction.<sup>51</sup> But since the narrowing of general jurisdiction in *Goodyear* and *Daimler*, courts have been forced to turn to other methods of obtaining personal jurisdiction, such as consent by registration.<sup>52</sup>

### III. ISSUES WITH THE USE OF CONSENT BY REGISTRATION

While the use of consent by registration has become increasingly tenuous following the due process concerns outlined in *Daimler* and *Goodyear*,<sup>53</sup> the practice of consent by registration has significant issues by itself aside from the due process concerns. Part III will consider these problems, namely (A) the broad nature of consent by registration when that consent extends to general jurisdiction, (B) the registration statutes’ lack of clarity on the jurisdictional effects of registration, and (C) the coercion on foreign businesses to register through harsh penalties.

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49. *Id.* at 1999.

50. *Knowlton*, 900 F.2d at 1999.

51. *See, e.g.*, *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1175 (9th Cir. 2006) (holding assertion of general jurisdiction reasonable where the defendant engaged in political and social activity in the forum state).

52. *See, e.g.*, *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 581 (N.M. Ct. App. 2018); *Forest Labs., Inc. v. Amneal Pharm. LLC*, Civ. Action No. 14-508-LPS, 2015 WL 880599, at \*12 (D. Del. Feb. 26, 2015).

53. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Daimler AG v. Bauman*, 571 U.S. 117, 137-39 (2014); *see also, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016).

### A. Difference between Consent to Specific Jurisdiction and General Jurisdiction

The Supreme Court has long permitted a defendant to expressly or implicitly consent to personal jurisdiction.<sup>54</sup> There are two widely accepted methods of giving consent to personal jurisdiction: actual submission to a court's authority and consent through a forum selection clause in a contract.<sup>55</sup> When compared to these two methods of obtaining consent from a defendant, consent by registration stands out as an overly broad and unfair method of obtaining consent to personal jurisdiction.

The first and most widely accepted method of consenting to personal jurisdiction is the defendant's act of submission to the court's authority.<sup>56</sup> Similar to a waiver, a defendant may submit to a court's authority by making an appearance in the court.<sup>57</sup> For example, the Seventh Circuit stated that, in evaluating whether a defendant has consented by submission to the court's authority, the "defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking" in order "[t]o waive or forfeit a personal jurisdiction defense[.]"<sup>58</sup> In submission cases, a defendant knows with a great degree of particularity both the party that initiated the lawsuit and the nature of the claim made against him before deciding to submit to the court's authority.<sup>59</sup> After all, a defendant cannot legally contest any facts or claims in a particular lawsuit prior to the lawsuit being initiated by a known party with a specific claim against the defendant.

The second relatively uncontroversial method of consent to personal jurisdiction is consent by contract through forum

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54. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("[A] litigant may give 'express or implied consent to the personal jurisdiction of the court.'"); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982).

55. *Monestier*, *supra* note 43, at 1380-81.

56. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) ("A person may submit to a [s]tate's authority in a number of ways. There is, of course, explicit consent.").

57. See, e.g., *In re Marriage of Williams*, 417 P.3d 1033, 1045 (Kan. 2018).

58. *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010).

59. See *id.*; *Monestier*, *supra* note 43, at 1383.

selection clauses, which occurs when a party negotiating a contract includes a clause limiting the forum where a lawsuit may be sustained.<sup>60</sup> For example, whenever negotiating a commercial contract, Apple Inc. may include an enforceable forum selection clause that requires all claims arising from the contract to be litigated in California.<sup>61</sup> This clause has the effect of obtaining express consent from both contracting parties to litigate any disputes in a particular forum or a limited number of forums.<sup>62</sup> Notably, while these clauses are generally held enforceable and controlling,<sup>63</sup> they are not inherently valid where the forum selection clause is unreasonable.<sup>64</sup> Many courts employ a specific analysis when determining whether a forum selection clause is valid and enforceable.<sup>65</sup> However, similar to the submission method, even if a court finds a forum selection clause enforceable and the party's consent to personal jurisdiction valid, the consent obtained through this clause still deals with a known party in regard to a specifically contemplated dispute.<sup>66</sup>

In stark contrast stands the problematic consent by registration. Unlike the consent obtained through submission and forum selection clauses, parties who register to do business engage with the forum state itself, without any knowledge of the type of disputes that could arise or the parties that would file suit against them.<sup>67</sup>

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60. Monestier, *supra* note 43, at 1380.

61. Dace Int'l, Inc. v. Apple Computer, Inc., 275 Ill. App. 3d 234, 242 (1995).

62. *See id.* at 236-37.

63. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985); Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013).

64. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

65. *See* Martinez v. Bloomberg LP, 740 F.3d 211, 217 (2d Cir. 2014) (analyzing a forum selection clause using a four-part test involving (1) notice to the parties, (2) "whether the clause is 'mandatory or permissive,'" (3) whether the claims arose under the clause/contract, and (4) whether the enforcement of the clause would be substantially unreasonable or inconvenient); Wong v. PartyGaming, Ltd., 589 F.3d 821, 828 (6th Cir. 2009) (analyzing a forum selection clause using three factors: (1) whether the contract process was flawed, (2) whether the chosen forum would be unfair, and (3) whether the chosen forum would be substantially inconvenient).

66. *See* Hunter v. Deutsche Lufthansa AG, 863 F. Supp. 2d 190, 201 (E.D.N.Y. 2012) ("A company's submission to jurisdiction and service of process in New York pursuant only to isolated contracts does not thereby signal its unrestricted consent to personal jurisdiction in New York for all future claims brought against it.")

67. Monestier, *supra* note 43, at 1383-84.

In other words, both submission and forum selection clauses are similar to consenting to specific jurisdiction, while consent by registration infers consent to general jurisdiction.<sup>68</sup> In the case of submission, the consenting party knows the party making a claim against him and the nature of the specific claim.<sup>69</sup> In the case of forum selection, while the consenting party may not know the *exact* claim that would be made against him, the consenting party knows the other party that would make the claim and that the claim relates to or arises under the disputed contract.<sup>70</sup> However, when considering consent by registration, the registering corporation knows neither the party that would make the claim against it nor the alleged claim.<sup>71</sup> Consent by registration opens the consenting party up to lawsuits from any party concerning any dispute, regardless of whether the claim relates to the forum state or not.<sup>72</sup> It is the broad nature of this consent that distinguishes consent by registration from consent by submission and consent by forum selection clause.

Consent by registration is the only method that allows consent to general jurisdiction.<sup>73</sup> And, as will be discussed in more detail below,<sup>74</sup> the alleged consent obtained through registration may not be truly genuine to begin with. Consent by registration should not be permitted when considering the overarching and broad consequences involved, especially given that the only other methods of consenting to personal jurisdiction concern more specific and particularized circumstances.

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68. *Id.*

69. *See id.*

70. *See Hunter*, 863 F. Supp. 2d at 201 (“A company’s submission to jurisdiction and service of process in New York pursuant only to isolated contracts does not thereby signal its unrestricted consent to personal jurisdiction in New York for all future claims brought against it.”).

71. *See Monestier*, *supra* note 43, at 1384.

72. *See, e.g., Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 632 (2d Cir. 2016) (Alabama resident claiming negligence against a Maryland corporation in Connecticut federal court).

73. *Monestier*, *supra* note 43, at 1384.

74. *See infra* Part III.B-C.

### B. Registration Statutes Are Unclear or Vague

Even if one believes courts should allow this broad implied consent by registration, the current statutes are likely too vague to support an inference of consent. These statutes' lack of clarity has led commenters to question whether foreign businesses are sufficiently on notice in order to provide valid consent.<sup>75</sup> Only two states—Kansas<sup>76</sup> and Pennsylvania<sup>77</sup>—have statutes requiring explicit consent to personal jurisdiction through a foreign corporation's registration. All other state registration statutes are silent as to the jurisdictional effects of registering as a foreign company.<sup>78</sup> In a typical registration statute, standard language includes: “[a] foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.”<sup>79</sup> While the statutes generally go on to define the term “transacting business[,]” these statutes do not mention the jurisdictional effects of registering.<sup>80</sup>

This silence in the registration statutes fails to put a foreign corporation on notice that the registration may serve as consent to

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75. See Monestier, *supra* note 43, at 1382-83.

76. KAN. STAT. ANN. § 17-7931 (2016). Subsection (g) requires the registering foreign corporation to attach an “irrevocable written consent” to personal jurisdiction as part of the corporation's registration application. KAN. STAT. ANN. § 17-7931. It should be noted that commentators are not in agreement as to whether Kansas' statute gives explicit consent. See Monestier, *supra* note 43, at 1368 n.121 (arguing that the language of the statute is subject to other plausible interpretations, such as that the statute only gives consent to service of process). This Article, however, will treat the Kansas statute as giving explicit consent, as the Kansas Supreme Court held that the statute gives explicit consent. *Merriman v. Crompton Corp.*, 146 P.3d 162, 171-77 (Kan. 2006). Further, the statute requires the registering corporation to affirmatively give “an irrevocable written consent . . . that actions may be commenced against it in the proper court of any county where there is proper venue by the service of process on the secretary of state . . . and stipulating and agreeing that such service shall be taken and held, in all courts, to be as valid and binding as if due service had been made upon the [officers] of the . . . entity.” KAN. STAT. ANN. § 17-7931(g).

77. 42 PA. CONS. STAT. § 5301 (1981) (Subsection (a)(2)(i) allows Pennsylvania courts to have personal jurisdiction over corporations “[i]ncorporat[ed] under or qualifi[ed] as a foreign corporation under the laws of [Pennsylvania.]”). Notably, while the language does provide explicit notice to registering foreign corporations, this language is not located in the registration statute, potentially creating a notice issue even in an explicit consent jurisdiction.

78. Monestier, *supra* note 43, at 1387.

79. See, e.g., ARK. CODE ANN. § 4-27-1501(a) (1987).

80. See, e.g., ARK. CODE ANN. § 4-27-1501(b); N.M. STAT. ANN. § 53-17-1 (1975); CONN. GEN. STAT. § 33-920(b) (2014).

personal jurisdiction in the state.<sup>81</sup> If a corporation does not know that registration could serve as consent to personal jurisdiction,<sup>82</sup> then the consent itself is suspect. How can consent be genuine if the party lacks any kind of notice that it is giving consent?<sup>83</sup>

Some courts have argued that, while the corporation has no actual notice of the jurisdictional effects of registration, the corporation does not need actual notice or may even have constructive notice of the effects of registration.<sup>84</sup> This reasoning is founded in the idea articulated by the Supreme Court pre-*International Shoe* that the registering corporation “takes the risk of the interpretation that may be put upon it by the courts.”<sup>85</sup> Several courts have used this notion to support the idea that the corporation consented to the state’s personal jurisdiction, even where there was no notice to the corporation prior to its registration.<sup>86</sup> This reasoning, however, ignores two significant issues. First, this argument relies on retroactive implicit consent. Second, this language comes from a pre-*International Shoe* decision that the Court has not since reexamined.<sup>87</sup>

In the foremost article on consent by registration, Professor Tanya Monestier noted the problem of a corporation’s registration providing retroactive consent without being given notice:

[T]his notion of consent is contradictory, because it premises jurisdiction on the corporation’s prior consent, but then holds that the scope of this consent will not be established until the state court has interpreted the registration statute. In other words, this conception

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81. See Monestier, *supra* note 43, at 1387-88.

82. Especially when considering the consent is to a broader and more overarching type of personal jurisdiction. See *infra* Part III.A.

83. This lack of notice could also raise procedural due process issues, as the registering corporation loses the right to contest personal jurisdiction in the forum state without any notice that the corporation has lost this right. See generally Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23 (2018).

84. See, e.g., *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 581 (N.M. Ct. App. 2018); *Forest Labs., Inc. v. Amneal Pharm., LLC*, Civ. Action No. 14-508-LPS, 2015 WL 880599, at \*12 (D. Del. Feb. 26, 2015).

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

86. See, e.g., *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990); *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 273 (N.M. Ct. App. 1993).

87. See *Pa. Fire Ins.*, 243 U.S. at 96.

forces a foreign corporation to agree to a condition before that condition has been established.

Consent must mean that one knows what one is consenting to. This is especially the case when one's actions are retroactively deemed to constitute consent to something.<sup>88</sup>

This implicit consent relies on the presumption that if a corporation appoints a registered agent for service of process, then the corporation implicitly accepts service, and therefore personal jurisdiction, for any lawsuits served to that agent.<sup>89</sup> The Eighth Circuit has stated “[t]he whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts[,]” and, therefore, a company's appointment of a registered agent confers consent to personal jurisdiction.<sup>90</sup> However, states originally used business registration as a method of mimicking presence in the era dominated by the territorial approach to personal jurisdiction.<sup>91</sup> This presence imitation allowed the forum state to point to the business's acceptance of process through its appointed agent as evidence that the corporation had affirmatively consented to jurisdiction in the state.<sup>92</sup> In an era dominated by territorial thinking, courts needed to use this consent/presence argument to exert any reasonable authority over foreign companies.<sup>93</sup> However, continuing a practice that courts used in the pre-*International Shoe* territorial era seems unwise.<sup>94</sup> The Eighth Circuit's reasoning also ignores the important consideration that registering corporations are effectively coerced into registering an agent, a distinction that will be explored in more depth later in this Article.<sup>95</sup>

Further, even if there is a prior case allowing consent by registration that could serve as constructive notice to the foreign corporation, this would not serve as sufficient notice that a

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88. Monestier, *supra* note 43, at 1389.

89. *Knowlton*, 900 F.2d at 1199.

90. *Id.*

91. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 632 (2d Cir. 2016).

92. *Id.*

93. *Id.*

94. *See Daimler AG v. Bauman*, 571 U.S. 117, 138 n.18 (2014).

95. *See infra* Part III.C; *see also* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1074-75 (2012).

corporation consents to personal jurisdiction by registering to do business in a state.<sup>96</sup> Often, these courts point to solitary lower court opinions to support the notion of constructive notice.<sup>97</sup> This should not qualify as sufficient notice to foreign corporations for multiple reasons.

First, courts often decided these older decisions prior to the Supreme Court's decisions in *Goodyear* and *Daimler*.<sup>98</sup> It would not be unreasonable for a foreign corporation to surmise that these recent Supreme Court decisions significantly changed the validity of these prior cases. This is especially true given that these Supreme Court decisions did change the use of consent by registration in several states.<sup>99</sup> Second, the registration statute itself gives no actual notice to foreign corporations of the jurisdictional effects of registration.<sup>100</sup> This contravenes Supreme Court precedent stating parties must "have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign[.]'"<sup>101</sup> Using older, pre-*Daimler* intermediate appellate decisions as a form of constructive notice in lieu of any type of notice in the registration statute itself does not seem to meet the standard of a sufficient "fair warning" under Supreme Court precedent.<sup>102</sup>

Some courts have observed this lack of notice issue when ruling to discontinue the use of consent by registration.<sup>103</sup> For instance, in *Brown v. Lockheed Martin Corp.*, the Second Circuit compared Connecticut's registration statute to Pennsylvania's.<sup>104</sup>

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96. See *Brown*, 814 F.3d at 634-35, 637, 641; see also *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 125-26, 148 (Del. 2016).

97. See, e.g., *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 581 (N.M. Ct. App. 2018) (citing a twenty-six-year-old New Mexico Court of Appeals case allowing consent by registration); see also *Brown*, 814 F.3d at 634-35, 641 (analyzing a Connecticut Appellate Court decision allowing consent by registration and declining to allow consent by registration without direct judicial authority from the Connecticut Supreme Court).

98. See, e.g., *Rodriguez*, 458 P.3d at 581 (relying on a New Mexico Court of Appeals case from 1993); see also *Brown*, 814 F.3d at 634-35 (analyzing a Connecticut Appellate Court opinion from 2009).

99. See, e.g., *Brown*, 814 F.3d at 641; *Genuine Parts*, 137 A.3d at 148.

100. See *Monestier*, *supra* note 43, at 1366, 1368.

101. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

102. *Id.* (internal quotations omitted); see also *Rodriguez*, 458 P.3d at 581.

103. See, e.g., *Brown*, 814 F.3d at 637; *Genuine Parts*, 137 A.3d at 136.

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



In holding that consent by registration was no longer a valid practice in the Second Circuit, the *Brown* court stated the Connecticut statute “gives no notice to a corporation registering to do business in the state that the registration might” be used as consent for personal jurisdiction.<sup>105</sup>

If a foreign corporation registers under a statute that does not explicitly give notice to the corporation of the jurisdictional effects of registering, courts should not impute onto the corporation implicit consent to personal jurisdiction. Further, even a statute that expressly states the jurisdictional effects may be improperly coercing that consent from the corporation or violating the Supreme Court precedent set by *Goodyear* and *Daimler*.<sup>106</sup>

### C. Registration May Be Coerced

Even assuming a statute is unambiguously clear on the jurisdictional effects of registration and provides explicit consent from the foreign corporation, that consent may still not be genuine due to the coercive nature with which states obtain registration from a foreign corporation. First, given that an overwhelming majority of states do not have an explicit consent statute, these states obtain the registration without giving any notice to the registering corporation.<sup>107</sup> Second, even in explicit consent jurisdictions, states create and enforce significant penalties for foreign companies doing business in the state without properly registering.<sup>108</sup>

As discussed above, nearly every state’s registration statute fails to discuss the jurisdictional effects of registration and fails to give foreign corporations adequate notice of the jurisdictional consequences of registration.<sup>109</sup> While this lack of notice casts doubt on the validity of the consent by itself, this problem is

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105. *Id.*

106. *Daimler AG v. Bauman*, 571 U.S. 117, 137-39 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

107. *See supra* Part III.B.

108. *See, e.g.*, ARK. CODE ANN. § 4-27-1502 (2005); DEL. CODE ANN. tit. 8, § 378 (2013); N.M. STAT. ANN. § 53-17-20 (1978); *see also* Andrews, *supra* note 95, at 1074-75.

109. Every state other than Kansas and Pennsylvania has a registration statute that gives no explicit notice. *See supra* Part III.B.

compounded by the coercive effects of failing to give notice. If a foreign company is required to register with the state before transacting any business and the company is not properly informed of the consequences of registering, then the state is engaging in coercive actions by deeming that registration to implicitly give consent to personal jurisdiction in that state.<sup>110</sup> As noted by commentators, neither the registration statutes themselves<sup>111</sup> nor the required paperwork for registering<sup>112</sup> require the business to give any level of consent to personal jurisdiction. When the state fails to give proper notice of consent by registration to foreign companies, it fails to inform the companies of all the relevant facts in making the decision to register. Therefore, to some degree this failure to inform coerces a business into making the decision to register.<sup>113</sup>

Even in explicit consent jurisdictions, states may also engage in coercive conduct by penalizing foreign corporations for failing to register in the state.<sup>114</sup> Every state has codified penalties for companies conducting business in the state without registering.<sup>115</sup> While there is some variance among the states as to what the particular penalties are, these penalties typically “include an inability of the defendant to sue in the state’s courts, the payment of a fine, and the tolling of the statute of limitations against the corporation.”<sup>116</sup>

These legal penalties leave a foreign company with only three options: (1) do not register and do not transact any business in the state, (2) conduct business in the state without registering with the state, or (3) register and transact business within the state. The first option is economically inefficient, as it directly discourages companies from expanding into other states. The second option subjects the corporation to legal penalties such as

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110. Monestier, *supra* note 43, at 1399.

111. *Id.* at 1387-88.

112. *Id.* at 1396.

113. See Andrews, *supra* note 95, at 1074-75.

114. See, e.g., ARK. CODE ANN. § 4-27-1502 (2005); DEL. CODE ANN. tit. 8, § 378 (2013); N.M. STAT. ANN. § 53-17-20 (1978).

115. See Monestier, *supra* note 43, at 1365-66 & n.116; see also, e.g., ARK. CODE ANN. § 4-27-1502; DEL. CODE ANN. tit. 8, § 378; N.M. STAT. ANN. § 53-17-20.

116. Monestier, *supra* note 43, at 1366.

finances and the inability to sue in the state's courts.<sup>117</sup> The third option allows the corporation to transact business in the state without fear of legal penalties from the state; however, it also subjects the corporation to general jurisdiction.<sup>118</sup>

None of these options are particularly advantageous to a business considering registering in a state. Further, the decision to register can create economically inefficient results. There are two possibilities depending on whether the corporation is on notice of the jurisdictional effects of registration. The first possibility assumes that the corporation is on notice of these jurisdictional effects. In this scenario, the business is less likely to expand into other states due to the broad nature of consent by registration, thereby discouraging economic expansion and growth.<sup>119</sup> Some companies have attempted to argue that this economic interference violates the dormant Commerce Clause with varying results.<sup>120</sup> This argument is not often used and is still an evolving area of the law with conflicting outcomes.<sup>121</sup> However, even without this dormant Commerce Clause argument, the jurisdictional effects would still discourage economic growth.

The other possibility assumes that the corporation is not on notice of the jurisdictional effects of registration. Under this scenario, states implicitly concede that, while this does not discourage business registration and economic activity, corporations are not in fact on notice and therefore cannot give consent to personal jurisdiction, either implicitly or explicitly.<sup>122</sup>

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117. See, e.g., ARK. CODE ANN. § 4-27-1502; DEL. CODE ANN. tit. 8, § 378; N.M. STAT. ANN. § 53-17-20. This is not to mention that it is typically not advisable for a party to engage in illegal conduct.

118. See *supra* Part III.A.

119. See *generally supra* Part III.A.

120. See, e.g., *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 578-580 (N.M. Ct. App. 2018) (holding the registration statute did not violate the dormant Commerce Clause); *In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 2866166, at \*5 (D. Kan. May 17, 2016) (holding the registration statute violates the dormant Commerce Clause); *Hegna v. Smitty's Supply, Inc.*, 2017 WL 2563231, at \*5 (E.D. Pa. June 13, 2017) (holding the registration statute does not violate the dormant Commerce Clause).

121. See, e.g., *Rodriguez*, 458 P.3d at 578-580 (holding the registration statute did not violate the dormant Commerce Clause); *In re Syngenta*, 2016 WL 2866166, at \*5 (holding the registration statute violates the dormant Commerce Clause); *Hegna*, 2017 WL 2563231, at \*5 (holding the registration statute does not violate the dormant Commerce Clause).

122. See *generally supra* Part III.B.

In either of these two possibilities, the state is either discouraging economic expansion or implicitly admitting that the corporation has no notice as to the jurisdictional effects of registering for business.

This coercion poses a significant problem when considering the validity of a company's consent to personal jurisdiction. While some level of government coercion may be acceptable in some areas,<sup>123</sup> the coercion experienced in the consent by registration context is far more unreasonable in comparison. Consider issuing driver's licenses for instance; state governments regularly impose restrictions and requirements on a person's ability to drive on public roads.<sup>124</sup> However, that coercion involves the state's significant regulatory interest in maintaining the safety of the state's roads and its citizens.<sup>125</sup> In this context, the state does not have a significant regulatory interest in hearing lawsuits involving any cause of action from residents of any state.<sup>126</sup>

A state may have a regulatory interest in hearing lawsuits involving its residents or involving conduct in its state, but the consent here is not limited to lawsuits that involve a state interest.<sup>127</sup> Because the consent at issue here involves consent to general jurisdiction and not specific jurisdiction, this coercion appears especially unreasonable. This lack of notice and the civil penalties and fines levied against non-registering companies effectively coerce the company into registering with the state, further questioning the validity of the business's consent to personal jurisdiction.<sup>128</sup>

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123. See Alexander L. Mounts, *A Safer Nation?: How Driver's License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists*, 37 IND. L. REV. 247, 249-50 (2003) (discussing the requirements state governments impose for obtaining a driver's license).

124. See *id.*

125. See *id.*

126. Monestier, *supra* note 43, at 1398 ("A state has no conceivable interest in adjudicating a dispute that does not involve the state in any way or does not involve a defendant who has made the state its home.").

127. This argument is analogous to the evolution of Conflicts of Law, where courts take a state's policies and regulatory interests into account in examining whether to apply that state's law. See AARON D. TWERSKI & NEIL B. COHEN, CHOICE OF LAW 73-74 (2015).

128. See Monestier, *supra* note 43, at 1387-89.

#### IV. CONSENT BY REGISTRATION CONTRAVENES THE SPIRIT OF *DAIMLER*

No state's registration statute solves every one of the above-mentioned issues. Even Pennsylvania's registration statute, which requires express consent of registering businesses and therefore avoids the notice issue, still fails to address the issue of allowing parties to consent to general jurisdiction or the economic and legal coercion that businesses may face in deciding to register.<sup>129</sup> However, even if every one of the outlined problems had an implemented solution, consent by registration would still contravene recent Supreme Court precedent.<sup>130</sup>

Just in 2011, the Supreme Court began limiting the scope of general jurisdiction.<sup>131</sup> This began with *Goodyear*, where the Court articulated a strict definition of the contacts required for general jurisdiction, requiring a domicile-like presence that "render[s] [the corporation] essentially at home in the forum State."<sup>132</sup> In 2014, the Court cemented this domicile-like presence requirement, limiting where a corporation can be subject to general jurisdiction to a discrete set of forums: the incorporation state, its principal place of business, or where the corporations activities "render [it] essentially at home in the forum State."<sup>133</sup>

These two decisions significantly narrowed the ability of states to subject corporations to general jurisdiction. Professor Tanya Monestier has argued that the recent shift "signal[s] a new direction for general jurisdiction—and one where it will be exceedingly difficult to establish general jurisdiction in circumstances other than the two traditional bases: place of

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129. 42 PA. CONS. STAT. ANN. § 5301 (1981); see 15 PA. CONS. STAT. ANN. § 411 (2015) (penalizing non-registered foreign corporations); see also *supra* Part III.A.

130. See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016); see also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011); *Daimler AG v. Bauman*, 571 U.S. 117, 137-39 (2014).

131. See *Goodyear*, 564 U.S. at 919; see also Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 478-79 (2016).

132. *Goodyear*, 564 U.S. at 919; see also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438, (1952).

133. *Daimler*, 571 U.S. at 137-39.

incorporation and principal place of business.”<sup>134</sup> Through these decisions, the court implicitly rejects a corporation—even in the most exceptional cases—being subject to general jurisdiction in more than three states.<sup>135</sup> In other words, this shift unequivocally disavows a doctrine that subjects a corporation to general jurisdiction in more than a few states and especially rejects a doctrine that would allow a business to be subject to nationwide general jurisdiction.<sup>136</sup>

Courts have taken notice of this shift with differing results. A minority of courts have continued to permit consent by registration.<sup>137</sup> These courts generally continue to employ the rationale used by pre-*Daimler* courts, arguing that whenever the corporation registers and appoints an agent for service of process, the corporation effectively consents to personal jurisdiction in that state regarding any lawsuit.<sup>138</sup> Following *Daimler*, these courts further argue that no Supreme Court case overturns or further addresses *Pennsylvania Fire Insurance*'s holding that allowed consent by registration in the pre-*International Shoe* era.<sup>139</sup> In the absence of a direct overruling of *Pennsylvania Fire Insurance*, courts have decided not to take it upon themselves to overrule Supreme Court precedent, even in situations where it seems warranted.<sup>140</sup>

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134. Monestier, *supra* note 43, at 1357; *see Daimler*, 571 U.S. at 139 n.19 (stating the use of “at home” general jurisdiction on an out-of-state corporation will only occur in an “exceptional case”); *see also* *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (stating it is “incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business” following *Daimler*).

135. *See Daimler*, 571 U.S. at 137-39.

136. *See id.* at 139; *Goodyear*, 564 U.S. at 919-20.

137. *See, e.g.*, *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 581 (N.M. Ct. App. 2018); *Mitchell v. Eli Lilly & Co.*, 159 F.Supp.3d 967, 979 (E.D. Mo. 2016); *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 817 F.3d 755, 770 (Fed. Cir. 2016); *AK Steel Corp. v. PAC Operating Ltd. P’ship*, No. 2:15-CV-09260-CM-GEB, 2017 WL 3314294, at \*4 (D. Kan. Aug. 3, 2017).

138. *See, e.g.*, *Rodriguez*, 458 P.3d at 580-82; *Acorda Therapeutics, Inc.*, 817 F.3d at 766-67 (O’Malley, J., concurring); *Mitchell*, 159 F. Supp. 3d at 976.

139. *See, e.g.*, *Freedom Transp., Inc. v. Navistar Int’l Corp.*, No. 2:18-CV-02602-JAR-KGG, 2019 WL 4689604, at \*18-20 (D. Kan. Sept. 26, 2019); *see also* *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917).

140. *See, e.g.*, *Schmidt v. Navistar, Inc.*, No. 18-CV-321-KG/KBM, 2019 WL 1024285, at \*6 (D.N.M. Mar. 4, 2019) (noting “[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of

However, lower courts that argue that they do not have the authority to overrule Supreme Court precedent ignore specific Supreme Court jurisprudence cautioning against continued reliance on pre-*International Shoe* decisions. Since *International Shoe*, the Court has expressed doubt as to the continued authority of pre-*International Shoe* decisions, effectively disaffirming that older precedent.<sup>141</sup> Courts overruling the practice of consent by registration have found that, while the Supreme Court has not explicitly overruled *Pennsylvania Fire Insurance*, the Court has functionally overruled the holding, considering both *International Shoe* and the recent doctrinal shifts seen in *Goodyear* and *Daimler*.<sup>142</sup> These courts point out that even the Supreme Court has cautioned against following pre-*International Shoe* precedent “due to concerns that such cases were ‘decided in the era dominated by . . . territorial thinking.’”<sup>143</sup> The Supreme Court has also warned that pre-*International Shoe* cases such as *Pennsylvania Fire Insurance* “should not attract heavy reliance today.”<sup>144</sup> The Court’s recent decisions on personal jurisdiction heavily imply the danger of following precedent that contrasts with the spirit of current general jurisdiction doctrine.

The most influential case rejecting consent by registration following *Daimler* is *Brown v. Lockheed Martin Corp.*<sup>145</sup> There, the Second Circuit interpreted a Connecticut statute, determining that consent by registration—especially where there was no explicit consent—violated due process under *Daimler*.<sup>146</sup> The *Brown* Court concluded its *Daimler* due process analysis by

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decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.”).

141. See *Daimler AG v. Bauman*, 571 U.S. 117, 138 n.18 (2014).

142. See, e.g., *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 n.21 (2d Cir. 2016); *DeLeon v. BNSF Ry. Co.*, 2018 MT 219, ¶ 22, 392 Mont. 446, 426 P.3d 1, 8.

143. *DeLeon*, 2018 MT 219, ¶ 22, 392 Mont. 446, 426 P.3d at 8 (quoting *Daimler*, 571 U.S. at 138 n.18).

144. *Daimler*, 571 U.S. at 138 n.18.

145. *Brown*, 814 F.3d at 640; see *In re Asbestos Prods. Liab. Litig.* No. VI, 384 F. Supp. 3d 532, 539 (E.D. Pa. 2019) (citing *Brown*); *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 176 (D.N.J. 2016) (same); *Magna Powertrain de Mex. S.A. de C.V. v. Momentive Performance Materials USA LLC*, 192 F. Supp. 3d 824, 829 (E.D. Mich. 2016) (same); *Perez v. Air & Liquid Sys. Corp.*, No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153, at \*8-9 (S.D. Ill. Dec. 2, 2016) (same).

146. *Brown*, 814 F.3d at 640-41.

arguing that, because *Daimler* “rejected the idea that a corporation was subject to general jurisdiction in every state in which it conducted substantial business[,]” to permit consent by registration would effectively circumvent *Daimler*’s holding.<sup>147</sup> In allowing consent by registration, “*Daimler*’s ruling would be robbed of meaning by a back-door thief[,]” as it could subject a corporation to the power of any state where it registered.<sup>148</sup>

The Second Circuit noted 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 . . . might well be constitutional.”<sup>149</sup> But courts have even called express consent statutes into question since *Daimler*.<sup>150</sup> Following that decision, both the Pennsylvania Superior Court and the Eastern District Court of Pennsylvania reexamined whether consent by registration still comports with due process.<sup>151</sup> These courts have reached differing results.<sup>152</sup> The Eastern District of Pennsylvania, focusing on the coercive nature of the registration statute, held that Pennsylvania’s statute violated due process in light of *Daimler*.<sup>153</sup> The court argued that, while the corporation gave consent “knowingly,” the consent runs the risk of not being “voluntary,” as the state conditions the ability to conduct business on the corporation forgoing its due process rights.<sup>154</sup> Meanwhile, the Pennsylvania Superior Court has affirmed the practice of consent by registration.<sup>155</sup> However, Pennsylvania state courts have increasingly begun reexamining

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147. *Id.* at 640.

148. *Id.*

149. *Id.* at 641.

150. *In re Asbestos Prods.*, 384 F. Supp. 3d at 543 (rejecting consent by registration); *but see* *Webb-Benjamin, LLC v. Int’l Rug Grp., LLC*, 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018) (affirming consent by registration).

151. *See In re Asbestos Prods.*, 384 F. Supp. 3d at 534; *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 652-53 (E.D. Pa. 2016); *Webb-Benjamin*, 192 A.3d at 1139.

152. *See In re Asbestos Prods. Liab.*, 384 F. Supp. 3d at 534 (holding that consent by registration, even with express consent, does not comport with due process following *Daimler*); *Bors*, 208 F. Supp. 3d at 653 (holding that consent by registration does comport with due process following *Daimler*); *Webb-Benjamin*, 192 A.3d at 1139 (same).

153. *In re Asbestos Prods.*, 384 F. Supp. 3d at 541-43.

154. *Id.* at 538, 542.

155. *Webb-Benjamin*, 192 A.3d at 1139.



this issue, with the Pennsylvania Superior Court hearing an *en banc* reargument on the wisdom of consent by registration.<sup>156</sup>

Following *Daimler*, it would be inconsistent for courts to continue the practice of consent by registration, even if the state uses an express consent statute. *Daimler* declined to follow the principle that a corporation is subject to general jurisdiction in every state in which it does a significant amount of business.<sup>157</sup> To allow consent by registration would make *Daimler*'s ruling toothless, as a corporation would be subject to personal jurisdiction in any state in which it is registered.<sup>158</sup>

Further, when considering the due process issues in conjunction with the other issues with consent by registration, this practice does not comport with the foundational principle of fairness.<sup>159</sup> As discussed earlier, the Supreme Court has deeply rooted the concept of personal jurisdiction in "traditional notions of fair play and substantial justice."<sup>160</sup> The Court even implicitly emphasized these ideals of fairness and justice in pre-*International Shoe* cases before giving these ideals an explicit role in personal jurisdiction.<sup>161</sup> In the context of specific jurisdiction, the Court has articulated specific factors for evaluating the fairness of a court exerting personal jurisdiction over a particular party.<sup>162</sup> Time and again, the Court has declared its adherence to the concepts of fairness, justice, and

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156. See *Murray v. Am. Lafrance, LLC*, 234 A.3d 782, 785-87 (Pa. Super. 2020) (granting an *en banc* reargument to examine whether to continue to allow consent by registration but ultimately dismissing the appeal without addressing the merits due to waiver of the issue by the defendant); see also K&L Gates LLP, *En Banc Panel of the Pennsylvania Superior Court Gets Set for Reargument Regarding Business Registration as Consent to General Personal Jurisdiction*, JD SUPRA (Oct. 28, 2019), [<https://perma.cc/T2UX-PWRS>].

157. See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016).

158. *Daimler AG v. Bauman*, 571 U.S. 117, 137-39 (2014).

159. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

160. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see also *World-Wide Volkswagen*, 444 U.S. at 292.

161. See Effron, *supra* note 83, at 34-35, 43.

162. *World-Wide Volkswagen*, 444 U.S. at 292 (articulating four factors: (1) "the forum State's interest in adjudicating the dispute," (2) "the plaintiff's interest in obtaining convenient and effective relief . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum," (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies[.]" and (4) "the shared interest of the several States in furthering fundamental substantive social policies[.]").

reasonableness in the context of personal jurisdiction.<sup>163</sup> But some courts seem to ignore these concerns when practicing consent by registration.

The Court's personal jurisdiction law intertwines a sense of "natural justice" with these ideals of fairness and reasonableness.<sup>164</sup> While the Court sometimes crafts complex and seemingly convoluted specific jurisdiction tests, its fundamental goal in these tests is to produce a fair result.<sup>165</sup> If courts have articulated fairness as the so-called "North Star" of personal jurisdiction, then fairness should be the guiding principle when examining personal jurisdiction.<sup>166</sup> For example, instead of viewing *Goodyear* and *Daimler* as purely limiting a court's authority in cases involving general jurisdiction, these decisions could be seen as using fairness to correct the course of general jurisdiction in today's more global and interdependent world.<sup>167</sup> In other words, in these decisions the Court recognized and reaffirmed the role of fairness in personal jurisdiction in ruling a business in today's global economy should not be subject to general jurisdiction in every state in which they do business.<sup>168</sup> This concept implicitly recognizes that fairness is a fluid ideal—that, even if the practice of consent by registration was fair in a less interdependent and territorial-focused society, consent by registration no longer conforms to the touchstone of fairness and justice.<sup>169</sup>

When analyzing consent by registration under a fairness framework, consent by registration is an inherently unfair practice. As demonstrated throughout this Article, courts ignore

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163. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011); *World-Wide Volkswagen*, 444 U.S. at 292; *Int'l Shoe*, 326 U.S. at 316.

164. See *Pennoyer v. Neff*, 95 U.S. 714, 730 (1877); Effron, *supra* note 83, at 34.

165. See, e.g., *World-Wide Volkswagen*, 444 U.S. at 291-92, 297 (applying a "minimum contacts" test influenced by "purposeful[] avail[ment]" and "foreseeability" despite articulating factors in evaluating fairness).

166. See *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

167. See *Daimler AG v. Bauman*, 571 U.S. 117, 137-39 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

168. See *Daimler*, 571 U.S. at 137-38; *Goodyear*, 564 U.S. at 919; *World-Wide Volkswagen*, 444 U.S. at 292.

169. See *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 632 (2d Cir. 2016).

significant problems when using consent by registration. From the broad nature of the consent, to the lack of notice and clarity in registration statutes, to the probable coercion in obtaining a business's registration to the due process concerns following *Goodyear* and *Daimler*, the practice of consent by registration appears exceptionally unfair under a personal jurisdiction analysis.<sup>170</sup> While consent by registration could be seen as "fair" for large corporations with vast resources, the practice still seems unfair due to its uneven application depending on the state and its impact to businesses without those vast resources.<sup>171</sup> Why should we ignore this paramount concern of fairness and justice when it comes to personal jurisdiction obtained through consent, particularly when that consent is predicated on dubious presumptions and practices?

## V. CONCLUSION

Courts reasonably want to use consent by registration, as the practice allows businesses to be haled into court where the current personal jurisdiction doctrine fails to confer the court jurisdiction.<sup>172</sup> But consent by registration is ultimately an unfair conduit to obtain authority over parties, with problems such as the broad nature of the consent, lack of clarity on the effects of registration, the use of coercion to obtain registration, and the due process concerns following *Goodyear* and *Daimler*.<sup>173</sup> Instead of using consent by registration, courts (with the Supreme Court's guidance) could expand the use of specific jurisdiction or stream of commerce doctrine to correct the recent limiting of personal jurisdiction.<sup>174</sup> But courts should not continue to use consent by registration to unfairly close the current jurisdictional gap. Doing

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170. See *Daimler*, 571 U.S. at 137-39; *Goodyear*, 564 U.S. at 919; *World-Wide Volkswagen*, 444 U.S. at 292.

171. See *Daimler*, 571 U.S. at 156 (Sotomayor, J., concurring).

172. See *id.* at 143.

173. See *id.* at 137-39; *Goodyear*, 564 U.S. at 919.

174. See generally Trammell, *supra* note 31, at 502; Shane Yeargan, *Purpose and Intent: Seeking a More Consistent Approach to Stream of Commerce Personal Jurisdiction*, 90 WASH. U. L. REV. 543 (2012).

so would circumvent the spirit of *Daimler* and our framework for due process and fairness.<sup>175</sup>

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175. See *Daimler*, 571 U.S. at 137-39; *World-Wide Volkswagen*, 444 U.S. at 292.