

## OF CARROTS AND STICKS: GENERAL JURISDICTION AND GENUINE CONSENT

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**ABSTRACT**—The United States Supreme Court’s 2014 decision in *Daimler AG v. Bauman* changed how the courts will determine whether companies should be subject to general personal jurisdiction. In 1945, *Pennoyer v. Neff*’s geographical fixation gave way to *International Shoe Co. v. Washington*, which provided a test for courts to determine whether corporations had sufficient contact with a forum to meet the bar for personal jurisdiction there. Specific jurisdiction requires “minimum contacts,” provided the action is satisfactorily related to the forum. However, to be subject to general jurisdiction, a corporation must possess more than just “minimum contacts,” and claimants can bring actions in forums where companies are subject to general jurisdiction regardless of whether those actions have any relationship to that forum. Precisely how much contact a company must have with a forum to be subject to general jurisdiction has evolved since *International Shoe*, and *Daimler* is the most current iteration.

Analyzing general jurisdiction by pinpointing a company’s level of contact with a particular forum can be a superfluous exercise. The case law has developed such that “consent” can overcome even a remarkable lack of contacts with a particular forum and subject a company to general jurisdiction. Some courts have interpreted a corporation’s registration and appointment of someone to accept service of process in a state as implied consent to general jurisdiction. Others at least require a state’s registration procedure to explicitly mandate the company submit to general jurisdiction. *Daimler*, and its recent progeny, may have signaled the death knell for at least implied consent to general jurisdiction by virtue of registration and perhaps for explicit consent as well. Some courts and commentators are rightly noting that mandating consent as the cost of doing business in a particular forum is consent in name only. While courts used to give credence to the legal fictions of corporate consent and corporate presence, they are now striking them down as violations of the Fourteenth Amendment’s Due Process Clause.

This Note seeks to address how states can maintain general jurisdiction over corporations that do not meet *Daimler*’s apparent demand

that a company be “at home” in the forum. The inevitable chipping away of states’ registration statutes as sufficient (impliedly or explicitly) for general jurisdiction potentially leaves a viable alternative intact: genuine consent. States might look to structure a form of incentive-based consent by use of their regulatory or taxing authority. States can craft solutions based on how important it is to them to provide their courtrooms to those who would seek redress from corporations operating within their borders. Additionally, an incentive-based genuine consent to jurisdiction serves the ancillary benefit of ensuring more companies go through the proper channels of a state’s registration process, including filling out the appropriate paperwork, instead of operating outside its bounds.

After *Daimler*, states will have to decide whether, and how, to adapt their corporate registration statutes to ensure their courts remain open to claims based on general jurisdiction. This Note will put forward solutions so that states will be able to craft new legislation before the courts invalidate their reliance on fictional consent.

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## INTRODUCTION

Consider this scenario: Sarah owns a farm equipment business, Northwest Harvest, that has been in her family for three generations. The business is based out of Coeur d'Alene, Idaho, and primarily sells to farmers in Idaho, Montana, and eastern Washington. The company also makes a specific type of combine tool that has become very popular in parts of the Midwest. To meet this demand, Northwest Harvest partnered with a farm equipment company in Topeka, Kansas, leasing a small space in its store and selling directly to local farmers. Since Northwest Harvest is selling product in Kansas, Sarah had to register her business in the state. As this Note will discuss, some states craft registration statutes that expressly mandate that out-of-state corporations must defend against any lawsuit brought within the state, simply because the company registered to do business or appointed someone to accept service of process there. Kansas's registration statute does not.<sup>1</sup> Under these facts, Northwest Harvest would be required to defend against lawsuits in Kansas related to the combine tool. But what about unrelated lawsuits? What if Sarah, as part of operating her Idaho business, neglected the upkeep of her physical storefront in Idaho and an employee got severely injured as a result? If an attorney convinced the employee that he should sue in Kansas because the jury verdicts are much higher there, should Sarah have to defend against the negligence suit in Kansas? What if Kansas's registration statute, rather than being silent on the issue of whether registering a business in the state is sufficient for its courts to assert general jurisdiction, says precisely that—all businesses operating within its borders *shall* be subject to general jurisdiction in the state? Does that make a difference in the negligence suit? Should it? What changes could Kansas make in its statutory regime, if any, to ensure its courts are able to hear any and all suits brought against those companies who register and operate within its borders? This Note seeks to address these questions.

This Note will proceed in Section I.A by first describing the history of the Supreme Court's personal jurisdiction jurisprudence, leading up to *Daimler AG v. Bauman*.<sup>2</sup> This Section will then summarize *Daimler* and explain how it has altered the Court's general jurisdiction analysis as it relates to power over corporations for conduct not related to the forum state. Section I.B will discuss how, with the power analysis altered, states and litigants have attempted to rely on a consent-based approach regarding registration statutes to claim general jurisdiction over corporations. Section

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<sup>1</sup> See KAN. STAT. ANN. §§ 17-7931, 17-7934 (2016).

<sup>2</sup> 134 S. Ct. 746 (2014).

II.A will provide a case comparison to illustrate the problem created by the absence of any coherent rule as to whether compliance with a state's mandatory registration requirements is sufficient for a state to demonstrate corporate consent while Section II.B will show that the consent-based rationale is lacking. In Section II.C, this Note will address potential solutions the states could implement to maintain general jurisdiction over corporations operating within their borders without running afoul of the Due Process Clause.

## I. BACKGROUND

### A. *Goodyear and Daimler Change the Power Analysis*

The power analysis refers to whether—through the courts—plaintiffs can force defendants to submit to suit in a particular forum. A state's jurisdictional power over defendants is couched in either specific “conduct-linked” jurisdiction or general “all-purpose” jurisdiction.<sup>3</sup> Specific jurisdiction over a defendant in a particular state requires both that a defendant “purposefully avails itself of the privilege of conducting activities within the forum [s]tate”<sup>4</sup> and that those activities “give rise to the liabilities sued on.”<sup>5</sup> Applying specific jurisdiction to the initial scenario, a suit in Idaho would withstand a court's jurisdictional inquiry since the negligence action involved property in that state. However, the circumstances surrounding plaintiff's Kansas suit are unlikely to involve sufficient minimum contacts to establish specific jurisdiction since the physical storefront has no relation to Kansas. A state can also claim general jurisdiction over defendants in certain circumstances, which would allow lawsuits on any matter, whether bearing a relation to the forum state or not. A state exercising general jurisdiction over a defendant may subject that defendant to suits in its courts regardless of the issues in dispute.<sup>6</sup>

In 1945, the Supreme Court decided the seminal *International Shoe v. Washington* case,<sup>7</sup> which broke with *Pennoyer v. Neff*'s elevation of states' geographical boundaries<sup>8</sup> and provided that states could use nonresident

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<sup>3</sup> *Id.* at 751 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>4</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Court noted that some level of purposeful availment will always be necessary to satisfy that a defendant has sufficient “minimal contacts.” *Id.* at 251 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

<sup>5</sup> *Int'l Shoe*, 326 U.S. at 317.

<sup>6</sup> *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

<sup>7</sup> 326 U.S. 310.

<sup>8</sup> 95 U.S. 714, 733 (1877) (holding that suits to determine liability for defendants require that the defendant “must be brought within [the state's] jurisdiction by service of process within the State, or . . . voluntary appearance”).

defendants' activities within state borders to claim personal jurisdiction over defendants.<sup>9</sup> The Court's first stake in the ground in *International Shoe* was that general jurisdiction could lie where there are "continuous corporate operations within a state . . . so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."<sup>10</sup> Without clarity for lower courts, the Supreme Court's holding yielded many factors courts would consider, including whether a company had employees or a place of business within the state, whether it targeted advertisements to the state's residents, and how much product it sold in the state.<sup>11</sup>

This broad, factor-based analysis existed until 2011 when the Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>12</sup> Justice Ruth Bader Ginsburg, writing for the Court, inserted a key phrase—"essentially at home"—in what otherwise would have been a standard *International Shoe* recitation of general jurisdiction.<sup>13</sup> This seemingly innocuous phrase tightened the reins on future general jurisdiction analyses, which now require a company to have more than merely continuous or substantial contact with the state. *Goodyear* provided that a corporation will generally only be subject to general jurisdiction in the state where it is incorporated or has its principal place of business.<sup>14</sup> Three years after *Goodyear*, the Supreme Court reaffirmed the narrow set of circumstances in which a company may be subject to general personal jurisdiction in *Daimler*.<sup>15</sup>

In *Daimler*, the Court found "unacceptably grasping" the plaintiffs' contention that general jurisdiction should apply whenever a company "engages in a substantial, continuous, and systematic course of business" in a state.<sup>16</sup> *Daimler* involved Argentinian plaintiffs who attempted to sue the German automotive company, Daimler AG, in a California federal court

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<sup>9</sup> *Int'l Shoe*, 326 U.S. at 316. The Court provided further that allowing these types of suits should comport with "traditional notions of fair play and substantial justice." *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>10</sup> *Id.* at 318.

<sup>11</sup> Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1352 (2015).

<sup>12</sup> 564 U.S. 915 (2011).

<sup>13</sup> *Id.* at 919 ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them *essentially at home* in the forum State." (emphasis added) (citing *Int'l Shoe*, 326 U.S. at 317)).

<sup>14</sup> *Id.* (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

<sup>15</sup> 134 S. Ct. 746 (2014).

<sup>16</sup> *Id.* at 760–61 (quoting Brief for Respondents at 16 & n.7, 17 & n.8, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 4495139).

based on a subsidiary's substantial business contacts within California.<sup>17</sup> The subsidiary, Mercedes-Benz USA, had a number of facilities in California and was "the largest supplier of luxury vehicles to the California market."<sup>18</sup> The Court held that California could not exercise general jurisdiction over Daimler.<sup>19</sup> Even imputing the subsidiary's contacts to the parent corporation would not satisfy the plaintiffs' assertion of general jurisdiction, as the Court found that general jurisdiction was appropriate only where a defendant is "at home," and reasserted *Goodyear's* two examples of "home" as "where [a company] is incorporated or has its principal place of business."<sup>20</sup> The Court indicated a broader, more grasping general jurisdiction would not permit out-of-state defendants to conduct themselves in a way in which they could have some expectation of where they might be subject to litigation.<sup>21</sup> This ruling then served the dual purpose of allowing defendants to predict where they might be subject to suit while also guaranteeing "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."<sup>22</sup> In *Daimler's* wake, plaintiffs' shrinking power to claim general jurisdiction over corporations not meeting one of the two stated conditions has encouraged them to seek out an alternative method of claiming general jurisdiction.

#### B. *Consent as a Daimler Escape Hatch*

As complex as the previous jurisdictional analyses may be, *Daimler* certainly seems to have simplified the inquiry. If a company does not consent to general jurisdiction, a court must conduct a power analysis. States, companies, and courts are looking to clarify both what constitutes consent, and—in the wake of *Goodyear* and *Daimler*—whether consent-based jurisdiction will be subject to a due process analysis or exempt from it. Before *Goodyear*, large national and multinational corporations saw

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<sup>17</sup> *Id.* at 750–51.

<sup>18</sup> *Id.* at 752.

<sup>19</sup> *Id.* at 760.

<sup>20</sup> *Id.* The Court held to its previous ruling in *Goodyear* and maintained that *Goodyear* did not restrict general jurisdiction only to those places where a company is incorporated or has its principal place of business, but it might be difficult to produce a ready example falling outside those two areas. Indeed, the Court stated in a footnote:

We do not foreclose the possibility that in an exceptional case, . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.

*Id.* at 761 n.19 (citation omitted). That the Court did not point to an example might give credence to the idea that general jurisdiction should be available in limited places.

<sup>21</sup> *Id.* at 761–62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

<sup>22</sup> *Id.* at 760.

little reason to contest the consent issue since an analysis of their contacts would likely have satisfied general jurisdiction.<sup>23</sup> Now, litigants can no longer rely on general jurisdiction based on a power analysis for those corporations not satisfying *Daimler*'s "at home" test. They must instead turn to consent to assert general jurisdiction. The remainder of Section I.B will proceed by examining the origins of registration statutes and corporate consent, tracing their jurisprudential evolution, and demonstrating that the current reliance on consent is insufficient to assert general jurisdiction over a corporation.

1. *Origins and Evolution of Registration Statutes and Corporate Consent.*—In *Bank of Augusta v. Earle*,<sup>24</sup> the Supreme Court articulated a general rule that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."<sup>25</sup> However, in that same opinion, the Court provided an exception allowing "foreign corporations" to contract within jurisdictions outside of their boundaries "when they are not contrary to the known policy of the state, or injurious to its interests."<sup>26</sup> The Court then rejected the argument that—since the Constitution is silent on this issue—this relationship applies only to foreign nations and not the states:

The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations.<sup>27</sup>

The Court had legitimized one state's jurisdiction over another's corporate entity provided the corporation consented to the host state's conditions.<sup>28</sup>

In *Lafayette Insurance Co. v. French*,<sup>29</sup> the Court took the next step. The issue of jurisdictional consent to a registration statute arose within the *Bank of Augusta* exception.<sup>30</sup> In *Lafayette*, the Supreme Court held that Ohio could assert jurisdiction over an insurance company incorporated in Indiana as a condition for allowing the company to conduct business in

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<sup>23</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (holding "continuous and systematic" contacts sufficient to assert general jurisdiction).

<sup>24</sup> 38 U.S. (13 Pet.) 519 (1839).

<sup>25</sup> *Id.* at 588.

<sup>26</sup> *Id.* at 589–90.

<sup>27</sup> *Id.* at 590.

<sup>28</sup> *Id.* at 589.

<sup>29</sup> 59 U.S. (18 How.) 404 (1855).

<sup>30</sup> Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 12 (1990).

Ohio.<sup>31</sup> Ohio was free to impose conditions, and those “conditions [had to] be deemed valid and effectual by other States, . . . provided they are not repugnant to the [C]onstitution or laws of the United States.”<sup>32</sup> However, the *Lafayette* Court still required Ohio’s conditions to be related to the insurance business transacted *in Ohio*.<sup>33</sup>

The landmark case of *Pennoyer*<sup>34</sup> confirmed the above rationale but also provided the genesis for an alternative principle.<sup>35</sup> The Court asserted that states can “require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent . . . to receive service of process” to ensure those companies were bound by the states’ judgments.<sup>36</sup> However, *Pennoyer*’s introduction of the agent’s “presence” as part of the analysis sowed the seed of a separate, broader principle than *Lafayette* stated.<sup>37</sup> Four years after *Pennoyer*, the Court decided *St. Clair v. Cox*.<sup>38</sup> Once again, it held for the broad principles of contacts-based jurisdiction, endorsing essentially the same elements as *Pennoyer*.<sup>39</sup> Whether express or implied, the Court sanctioned states’ conditions that nonresident companies consent to service, *provided the suit is related to the activities* within the host state.<sup>40</sup> However, the “presence” seed sown in *Pennoyer* began to grow in *St. Clair*. The Court, referring to a corporation, stated, “Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created.”<sup>41</sup> The Court had thus far held that registration statutes conditioning corporate consent to service were based only on those transactions related to the forum. However, *Pennoyer* and *St. Clair* also found that corporations consenting to appoint an agent on whom to serve

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<sup>31</sup> 59 U.S. (18 How.) at 407.

<sup>32</sup> *Id.* at 407.

<sup>33</sup> *Id.* at 408 (“[W]hen this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them . . .”).

<sup>34</sup> 95 U.S. 714 (1878).

<sup>35</sup> See Kipp, *supra* note 30, at 14–15.

<sup>36</sup> *Pennoyer*, 95 U.S. at 735.

<sup>37</sup> See Kipp, *supra* note 30, at 15.

<sup>38</sup> 106 U.S. 350 (1882).

<sup>39</sup> *Id.* at 356 (“The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that *in any litigation arising out of its transaction in the State*, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed.” (emphasis added)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

process establishes some measure of legal presence even without a physical presence.<sup>42</sup>

In the early part of the twentieth century, some lower courts held that consent could allow courts to confer general jurisdiction rather than just specific jurisdiction.<sup>43</sup> Soon after, the Supreme Court endorsed the switch to registration statutes being able to establish general jurisdiction in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*<sup>44</sup> One commentator described that the *Pennsylvania Fire* holding essentially abandoned the Court's previous ruling in *St. Clair* in three ways: "(1) it differentiated between express and implied consent; (2) it permitted registration statutes to confer general jurisdiction; and (3) it ignored the notion of limited corporate presence."<sup>45</sup>

However, *Pennsylvania Fire* was not the only case to address consent to registration statutes, and though the Court's decisions were mixed, they actually tended away from construing registration-based consent as allowing for general jurisdiction.<sup>46</sup> The dividing line indicated in *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, if there was one at all, was whether the company itself had designated an agent for service of process.<sup>47</sup> The merger of *Pennoyer's* "presence" with a corporation's

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<sup>42</sup> Though this Note constrains general jurisdiction analyses to either power or consent, commentators reference another less accepted basis, corporate presence, as a possible support for general jurisdiction. See Monestier, *supra* note 11, at 1372 ("A very small minority of courts find that registration statutes confer general jurisdiction over corporations based on a 'presence' theory of jurisdiction."); *id.* at 1374 ("Commentators are generally in agreement that this presence-based rationale for general jurisdiction over corporations is not justifiable.")

<sup>43</sup> See *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150 (S.D.N.Y. 1915) (differentiating between what it considered express consent—where an out-of-state corporation appointed its own agent—and implied consent, where the state appointed the agent on behalf of the corporation, and holding there was consent to general jurisdiction in the former); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1076 (N.Y. 1916) (holding the same and noting "[t]he consent that [the appointed agent] shall represent the corporation is a real consent").

<sup>44</sup> 243 U.S. 93, 94 (1917).

<sup>45</sup> Kipp, *supra* note 30, at 22.

<sup>46</sup> See, e.g., *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 408–09 (1929) ("The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the State."); *Mo. Pac. R.R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922) (noting that the Court "has indicated a leaning" away from interpreting registration statutes as reaching beyond the bounds of the state); *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 215–16 (1921) (In denying general jurisdiction when a company did not choose its own agent on whom to serve process, Justice Holmes stated, "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course when a foreign corporation appoints one as required by statute it takes the risk of construction that will be put upon the statute and the scope of the agency by the State Court.")

<sup>47</sup> 257 U.S. at 216.

consent to appoint an agent (in accordance with a state's registration rules) provided a fiction for the Court to establish general jurisdiction.<sup>48</sup>

When the Court decided *International Shoe*<sup>49</sup> in 1945, it no longer relied on the legal fiction of "presence" to establish personal jurisdiction but instead inquired whether a defendant's contacts with the forum state were sufficient "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>50</sup> The Court subsequently interpreted *International Shoe* to not only disregard fictional presence but also fictional consent in ascertaining a state's jurisdictional power over corporations.<sup>51</sup>

In *Shaffer v. Heitner*,<sup>52</sup> the Court stated that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"<sup>53</sup> and "[t]o the extent that prior decisions are inconsistent with this standard, they are overruled."<sup>54</sup> However, the *Shaffer* Court's apparent stripping of the pre-*International Shoe* "presence" and "consent" standards as applied to registration statutes was not complete, and "in the last paragraphs of the opinion, the Court breathed new life into these statutes."<sup>55</sup> The majority noted, "[A]ppellants had no reason to expect to be haled before a Delaware court. Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State."<sup>56</sup> The dissent questioned the need to include Delaware's statutory shortcomings:

I cannot understand how the existence of minimum contacts in a constitutional sense is at all affected by Delaware's failure statutorily to express an interest in controlling corporate fiduciaries . . . . Nor would I view as controlling or even especially meaningful Delaware's failure to exact from appellants their consent to be sued. Once we have rejected the jurisdictional framework created in *Pennoyer v. Neff*, I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, expressed or implied.<sup>57</sup>

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<sup>48</sup> Kipp, *supra* note 30, at 24.

<sup>49</sup> 326 U.S. 310 (1945).

<sup>50</sup> *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 456, 463 (1940)).

<sup>51</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957) ("In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations.").

<sup>52</sup> 433 U.S. 186 (1977).

<sup>53</sup> *Id.* at 212.

<sup>54</sup> *Id.* at 212 n.39.

<sup>55</sup> Kipp, *supra* note 30, at 30.

<sup>56</sup> *Shaffer*, 433 U.S. at 216 (footnote omitted).

<sup>57</sup> *Id.* at 226–27 (Brennan, J., dissenting) (citations omitted).

Unfortunately, the majority's reference to Delaware's statute has only helped to muddy this area of the law and has led to inconsistent outcomes. The question of whether registration-based consent is sufficient to assert general jurisdiction is especially important now since *Goodyear* and *Daimler* narrowed the sphere by which states can assert general jurisdiction based on power. The Supreme Court is likely to see the wobbly logical foundations of the registration-equals-consent rationale. If and when it invalidates this practice, states will need another avenue to subject corporations to jurisdiction. This Note provides such an avenue.

2. *Registration-Based Consent is a Misnomer.*—It is important to note first that a party can waive Due Process Clause protection by consenting to jurisdiction.<sup>58</sup> Professor Tanya Monestier holds this as half the relevant equation: the “consent equals personal jurisdiction” half.<sup>59</sup> The other then is the “registration equals consent” half.<sup>60</sup> Professor Monestier persuasively argues that a corporation's mandatory registration within a state is not consent.<sup>61</sup> Given the seemingly facial incongruity of a mandatory provision being designated voluntary,<sup>62</sup> registration-based consent fails under both the Due Process Clause and the Commerce Clause.

Despite *Daimler*'s silence on the issue of registration-based consent, the decision set a high bar for a state to be able to assert general jurisdiction.<sup>63</sup> If even a “substantial, continuous, and systematic course of business” is insufficient to satisfy due process, merely registering to do business seems unlikely to suffice.<sup>64</sup> Every state mandates that nonresident corporations conducting business within its borders register and appoint an agent for service of process.<sup>65</sup> As this Note will demonstrate, *Daimler* would be rendered meaningless if courts decided to interpret registration statutes as an implied consent or allowed states to exact express consent as the cost of doing business.

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<sup>58</sup> Monestier, *supra* note 11, at 1379 (citing *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982)).

<sup>59</sup> *Id.* at 1379.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Of course, one might argue that the mandatory compliance is only mandatory so far as a corporation chooses to reap the benefits of conducting business within the borders of the state extracting its consent. When pitted against the Due Process Clause and the Commerce Clause, a state obtaining consent merely for permitting interstate commerce is not a sufficient quid pro quo, as the remainder of Section I.B.2 will illustrate.

<sup>63</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 761–62 (2014) (quoting Brief for Respondents, *supra* note 16, at 16 & n.7, 17 & n.8).

<sup>64</sup> *Id.* at 760–61.

<sup>65</sup> *Sternberg v. O'Neil*, 550 A.2d 1105, 1109 n.5 (Del. 1988) (citing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 3.02[2][a] (1983)).

Aside from the due process issue, the Supreme Court has previously held this type of coerced consent runs afoul of the Commerce Clause because states have limitations on the powers they can exercise over nonresident corporations:

One of these limitations . . . aris[es] from the [C]ommerce [C]lause, whose operation, as this court has said, is such that a corporation authorized by the state of its creation to engage in interstate commerce “may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce.”<sup>66</sup>

The above quote demonstrates that the Court’s interpretation of the Commerce Clause does not permit a state to exact its jurisdictional toll for those corporate activities that exist outside its borders.

As Professor Monestier has asserted, and as the Supreme Court has reaffirmed, after *International Shoe*, and especially after *Daimler*, any state’s attempt to mandate consent as a threshold to conduct business is no more than coercion, and cannot be called genuine consent. A corporation cannot consent to something it does not realize it is consenting to, and nearly all fifty states have registration statutes that are silent on the effects of registering.<sup>67</sup> Additionally, a corporation’s “choice” to simply not do business in a state is not a real choice and certainly does not fit the integrated nature of the modern economy.<sup>68</sup>

## II. MAKING SENSE OF CONSENT-BASED JURISDICTION

### A. *A Tale of Two Mylans: The Problem Materializes*

As Section I.B.1 explained, state registration statutes are closely tied to consent. Registration clauses can either explicitly condition consent as part of the registration<sup>69</sup> or allow for courts to read in implied consent

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<sup>66</sup> *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 203–04 (1914) (quoting *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 27 (1910)); *see also* *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 13 (1877) (“Upon principles of comity, the corporations of one State are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the State into which they come.”).

<sup>67</sup> Monestier, *supra* note 11, at 1387 & n.214 (“Technically, every one of the fifty registration statutes is silent on the jurisdictional effects of registering to do business since Pennsylvania’s law that registration confers general jurisdiction actually appears in its long-arm statute, not its registration statute.”).

<sup>68</sup> For a detailed discussion about how the lack of a real choice not to do business leads to coerced consent for those states that attempt to assert general jurisdiction based on registration, *see* Monestier, *supra* note 11, at 1387–401.

<sup>69</sup> For example, when the Third Circuit decided *Bane v. Netlink, Inc.*, 925 F.2d 637 (1991), it quoted the Pennsylvania statute, which stated in relevant part

simply by virtue of a corporation registering within a state (harkening back to constructive consent based on fictional presence). The following two cases feature the same defendant objecting to consent as an implied basis for general personal jurisdiction. The cases were decided post-*Daimler* in federal court in the District of Delaware by different federal judges, just over two months apart, and came to diametrically opposed positions on the issue of registration-based consent.

*I. The AstraZeneca Case*—In *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*,<sup>70</sup> the defendant, Mylan Pharmaceuticals (Mylan), was both incorporated and had its principal place of business in West Virginia.<sup>71</sup> AstraZeneca, the plaintiff, asserted the U.S. District Court for the District of Delaware had personal jurisdiction over Mylan based on three theories: “(1) Mylan has consented to general jurisdiction in Delaware, (2) Mylan is subject to specific jurisdiction in Delaware, and (3) Mylan is subject to general jurisdiction in Delaware.”<sup>72</sup> This Section will focus only on the court’s resolution of the first assertion: that Mylan consented to general jurisdiction.

AstraZeneca maintained that Mylan “consented to be subject to Delaware’s general jurisdiction by registering to do business in the state and by appointing a registered agent to accept service of process.”<sup>73</sup> The court acknowledged a circuit split on the issue of whether what it called “statutory consent” (consent implied through registration) was sufficient to satisfy personal jurisdiction.<sup>74</sup> The relevant Delaware statutes require out-

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The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person . . . . Corporations: (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth[;] (ii) Consent, to the extent authorized by the consent[;] (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 PA. CONS. STAT. ANN. § 5301(a)(2) (Purdon 1990).

<sup>70</sup> 72 F. Supp. 3d 549 (D. Del. 2014), *aff’d sub nom.* Acorda Therapeutics Inc. v. Mylan Pharm., 817 F.3d 755 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 625 (2017).

<sup>71</sup> *Id.* at 552.

<sup>72</sup> *Id.* at 553 (citation omitted).

<sup>73</sup> *Id.* at 555 (citation omitted).

<sup>74</sup> *Id.* Compare *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (“The principles of due process require a firmer foundation than mere compliance with state domestication statutes.”), and *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (“Not only does the mere act of registering an agent not create Learjet’s general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter.”), with *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (“We need not decide whether authorization to do business in Pennsylvania is a ‘continuous and systematic’ contact with the Commonwealth . . . because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts.”), and *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990)

of-state companies to complete various registration requirements as well as appoint a designated agent to whom process can be served.<sup>75</sup> AstraZeneca pointed to the Delaware Supreme Court's ruling in *Sternberg v. O'Neil*,<sup>76</sup> which established that "[e]xpress consent is a valid basis for the exercise of general jurisdiction in the absence of any other basis for the exercise of jurisdiction, i.e. 'minimum contacts.'"<sup>77</sup> Further, in addressing *Daimler*, AstraZeneca maintained that the Court was concerned with a contacts-based analysis and not the issue of consent.<sup>78</sup>

The district court disagreed with AstraZeneca, finding that *Daimler* is not confined only to minimum-contacts analyses and that all questions of personal jurisdiction are entrenched in due process.<sup>79</sup> Not only must minimum contacts comport with "traditional notions of fair play and substantial justice,"<sup>80</sup> but consent-based jurisdiction must as well.<sup>81</sup> The court found no appreciable difference between "doing business"—insufficient under *Daimler* to warrant having to defend against any unrelated liabilities that may arise in a forum—and "doing business" while being lawfully registered with the state.<sup>82</sup> The court also brought up the issue of perverse incentives, stating that "foreign companies that comply with the statute in order to conduct business lawfully are disadvantaged,

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("We conclude that appointment of an agent for service of process under [the Minnesota statute] gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify . . . jurisdiction is unnecessary." (citation omitted)).

<sup>75</sup> *AstraZeneca*, 72 F. Supp. 3d at 556. The Delaware statutes to which the court refers are DEL. CODE ANN. tit. 8 §§ 371, 376 (2016). Section 371 states,

No foreign corporation shall do any business in this State, through or by branch offices, agents or representatives located in this State, until it shall have paid to the Secretary of State . . . [a filing fee] and shall have filed in the office of the Secretary of State: (1) A certificate . . . issued by an authorized officer of the jurisdiction of its incorporation evidencing its corporate existence . . . ; (2) A statement executed by an authorized officer of each corporation setting forth (i) the name and address of its registered agent . . . ; (ii) a statement . . . of the assets and liabilities of the corporation, and (iii) the business it proposes to do in this State . . . .

§ 371(b). Section 376 outlines the procedure for service of process.

<sup>76</sup> 550 A.2d 1105 (Del. 1988).

<sup>77</sup> *AstraZeneca*, 72 F. Supp. 3d at 556 (quoting *Sternberg*, 550 A.2d at 1111).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>81</sup> *AstraZeneca*, 72 F. Supp. 3d at 556.

<sup>82</sup> *Id.* ("In light of the holding in *Daimler*, the court finds that Mylan's compliance with Delaware's registration statutes—mandatory for *doing business* within the state—cannot constitute consent to jurisdiction, and the Delaware Supreme Court's decision in *Sternberg* can no longer be said to comport with federal due process.").

whereas those who do not register and do business in Delaware illegally are immune.”<sup>83</sup>

2. *The Acorda Case—Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*,<sup>84</sup> decided only two months after the preceding case, analyzed the same issue: whether complying with Delaware’s registration statute (without an express condition of consent in the registration statute itself) constituted valid consent.<sup>85</sup> Because the *AstraZeneca* case had been decided so recently within the same district, the judge in this case provided a detailed analysis into the deliberative process that led him to draw the opposite conclusion. Ultimately, the *Acorda* judge held that mere compliance with the Delaware registration statute was sufficient to permit the court to exercise general personal jurisdiction over Mylan.<sup>86</sup>

The *Acorda* court first pointed to the Supreme Court’s holding in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,<sup>87</sup> which stated, “Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”<sup>88</sup> The judge next turned to the Court’s decision in *Pennsylvania Fire*<sup>89</sup> for support that, not only can the individual right of personal jurisdiction be waived, but a valid method by which to waive is to consent “to the jurisdiction of the courts in a particular state . . . by complying with the requirements imposed by that state for registering or qualifying to do business there.”<sup>90</sup> Additionally, the *Acorda* court used another Supreme Court case, *Robert Mitchell Furniture*,<sup>91</sup> to provide further clarification of *Pennsylvania Fire*.<sup>92</sup>

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<sup>83</sup> *Id.* at 557.

<sup>84</sup> 78 F. Supp. 3d 572 (D. Del. 2015), *aff’d*, 817 F.3d 755 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 625 (2017).

<sup>85</sup> *Id.* at 576.

<sup>86</sup> *Id.* at 583–84.

<sup>87</sup> 456 U.S. 694 (1982).

<sup>88</sup> *Acorda*, 78 F. Supp. 3d at 584 (quoting *Bauxites*, 456 U.S. at 704). The *Acorda* court also pointed to this explanation later in the *Bauxites* decision:

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff’s demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i.e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. *The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.*

*Id.* (quoting *Bauxites*, 456 U.S. at 704–05).

<sup>89</sup> 243 U.S. 93 (1917).

<sup>90</sup> *Acorda*, 78 F. Supp. 3d at 584 (discussing *Pennsylvania Fire*).

<sup>91</sup> 257 U.S. 213 (1921).

<sup>92</sup> *Acorda*, 78 F. Supp. 3d at 585 (“The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course when a

The court used “*Pennsylvania Fire* and its progeny” as ammunition for interpreting registration as consent, but both it and *Robert Mitchell Furniture* were decided years before *International Shoe*.<sup>93</sup> It is difficult to ignore *Pennoyer*’s underpinnings in both cases’ language as the Court seems to be concerned with in-state service of process, a lynchpin of *Pennoyer*, but relegated to a more secondary role after the contacts-based test appeared in *International Shoe*. Indeed, the *Acorda* court noted, “The Federal Circuit, whose interpretation on this point will be governing in patent cases like this one, has not addressed the constitutionality of treating registration to do business in a state as consent to the jurisdiction of courts in that state.”<sup>94</sup> If *Pennsylvania Fire* and its succeeding cases do as much work on the issue of consent as *Acorda* seems to suggest, it strains credulity that the federal circuits would remain split on the issue.

The court then addressed the current circuit split in the federal courts on the issue of registration as consent before turning to Delaware’s statutory and common law bases for upholding registration as valid to imply consent.<sup>95</sup> The court discussed the same statutes as did the *AstraZeneca* court, noting that neither provision of the statute “expressly addresses whether registration to do business in Delaware constitutes consent to the general jurisdiction of courts in Delaware.”<sup>96</sup> However, the court addressed the Delaware Supreme Court’s decision in *Sternberg*,<sup>97</sup> adding emphasis throughout and noting that *Sternberg* “unambiguously” held that “[a] corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent’s authority.”<sup>98</sup> All of this provides a strong stare decisis argument in a pre-*Daimler* world but does little if *Daimler* mandates that a due process analysis applies to consent-based jurisdiction in addition to contacts-based jurisdiction. The court spent considerable time wrestling with *Daimler* to address this issue.

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foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court . . . . *Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere . . . .*” (quoting *Robert Mitchell Furniture*, 257 U.S. at 215–16)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citation omitted).

<sup>95</sup> *Id.* at 585–87.

<sup>96</sup> *Id.* at 587.

<sup>97</sup> 550 A.2d 1105 (Del. 1988).

<sup>98</sup> *Acorda*, 78 F. Supp. 3d at 587 (emphasis omitted) (quoting *Sternberg*, 550 A.2d at 1115–16).

The court rightly assessed Mylan’s position that *Daimler* stands broadly as an assertion that due process analyses restrict general jurisdiction’s breadth and applies not only to contacts-based tests, but also to consent; those restrictions now limit a company’s all-purpose liabilities to only those forums where it is “at home.”<sup>99</sup> The court found this argument unpersuasive especially in light of the fact that *Daimler* only once mentions any derivative of the word “consent” when it stated that its “1952 decision in *Perkins v. Benguet Consolidated Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum.”<sup>100</sup> This provides quite the impasse. On one hand, *Daimler* characterized “the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business’” as “unacceptably grasping.”<sup>101</sup> On the other hand, the *Daimler* Court made no mention of consent despite the near certainty that corporations which engage in this level of substantial contact with a forum will almost certainly register to do business in that forum and could be made to consent simply by virtue of that fact.<sup>102</sup>

### B. *The Current Landscape of Consent*

The dispute between the two *Mylan* opinions disappears if one imagines two scenarios: in one, suppose all fifty states had a statute at the time *Daimler* was decided that mandated consent by virtue of registering with the state, and registration is required to legally conduct business. In this scenario, either *Daimler* would have been forced to touch on the consent-by-registration issue or its ruling would have had zero practical effect. In either case, whether *Daimler* did or did not overturn these types of statutes, it would have provided an answer for lower courts. In the

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<sup>99</sup> *Id.* at 588.

<sup>100</sup> *Id.* at 589 (citation omitted) (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 755–56 (2014)).

<sup>101</sup> *Daimler*, 134 S. Ct. at 761 (quoting Brief for Respondents, *supra* note 16, at 17).

<sup>102</sup> The court in *Acorda* acknowledges this quandary:

Plainly, today’s holding is at one level in tension with the holding in *Daimler* that it would be “unacceptably grasping” to find general jurisdiction over a corporation “in every State in which a corporation engages in a substantial, continuous, and systematic course of business.” It seems an odd result that while there is not general jurisdiction over a corporation in every state in which the corporation does business, there may be general jurisdiction over a corporation in every state in which that corporation appoints an agent to accept service of process as part of meeting the requirements to register to do business in that state. But if consent remains a valid basis on which personal jurisdiction may arise—and the undersigned Judge concludes that *Daimler* did not change the law on this point—then this result, though odd, is entirely permissible.

*Acorda*, 78 F. Supp. 3d at 591 (citation omitted).

opposite scenario, registration-based consent was never allowed, and instead a company has to give voluntary consent to be subject to general jurisdiction in a particular forum. In this case, the *AstraZeneca* court would have needed to apply only a standard *Daimler* contacts test (which would have failed) unless it found genuine consent. The opposition to consent-based jurisdiction would have dissipated since that opposition was clearly based on a perception of mandatory or coerced consent.

Unfortunately, reality is not nearly as tidy as either of the two scenarios above. Consent-based jurisdiction is, quite literally, all over the map.<sup>103</sup> The two *Mylan* cases dealt with a statute that did not expressly provide for consent<sup>104</sup> but rather was implied via case law.<sup>105</sup> But do statutes expressly mandating consent to general jurisdiction provide any more of a justification for that consent? The *AstraZeneca* court hinted in a footnote that perhaps there is some difference.<sup>106</sup> However, once case law has established implied consent as a valid basis for asserting general jurisdiction, it seems unlikely that companies would be any less aware just because case law—rather than statutory law—mandated it.<sup>107</sup>

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<sup>103</sup> See Kevin D. Benish, Note, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609 (2015). Benish thoroughly analyzes the status of all fifty states' registration statutes including the consequences of registering in terms of jurisdictional consent under either the statutory provisions or case law and penalties for failure to register. *Id.* at 1647–62. The statutes—accompanied by state court decisions when silent—run the gamut from explicit consent to general jurisdiction written into the statute (Pennsylvania), to personal jurisdiction only (Ohio), to implied consent to general jurisdiction (Nebraska, joining Delaware of course), to many states with little or no case law and unclear consequences. *Id.* Additionally, Benish outlines the current state of the federal circuits as to whether registration-based consent to general jurisdiction violates or satisfies due process and lists the controlling case. *Id.* at 1611. The following circuits find registration-based consent violates due process: First Circuit, *Cossaboon v. Maine Medical Center*, 600 F.3d 25, 37 (1st Cir. 2010); Fourth Circuit, *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 746–47 (4th Cir. 1971); Fifth Circuit, *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 180–81 (5th Cir. 1992); Seventh Circuit, *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990); and Eleventh Circuit, *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000). The circuits finding registration-based consent satisfies due process include the Second Circuit, *Spiegel v. Schulmann*, 604 F.3d 72, 77 (2d Cir. 2010); Third Circuit, *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991); Eighth Circuit, *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990); and Ninth Circuit, *King v. American Family Mutual Insurance Co.*, 632 F.3d 570, 576 (9th Cir. 2011). The Sixth, Tenth, and D.C. Circuits are all undecided. Benish, *supra*, at 1611–12.

<sup>104</sup> DEL. CODE ANN. tit. 8 §§ 371, 376 (2016).

<sup>105</sup> *Sternberg v. O'Neil*, 550 A.2d 1105, 1115 (Del. 1988).

<sup>106</sup> 72 F. Supp. 3d 549, 557 n.6 (D. Del. 2014) (“The court limits its holding to Delaware’s statutes specifically. The court does not address the more difficult question raised when state statutes expressly indicate that foreign corporations consent to general jurisdiction by complying with the statutes.”).

<sup>107</sup> Indeed, in *Acorda*, the court stated that although the Delaware statutes did not expressly state that “registration to do business in Delaware constitutes consent to the general jurisdiction of courts in Delaware, this has long been the definitive judicial interpretation of these statutes.” *Acorda*, 78 F. Supp. 3d at 587.

Whether registration-based consent is express or implied, mandatory compliance with a state's registration statute (assuming a company wants to do business there) and appointing an agent to whom process can always be served harkens more to a *Pennoyer* determination of jurisdiction—personal service in state satisfies the jurisdictional inquiry—than the contacts-based *International Shoe* test. As Kevin Benish stated in his student note, “[T]he turn to consent-by-registration after *Daimler* signals the rise of *Pennoyer*'s ghost, a theory of general jurisdiction based on a corporation's compliance with state registration statutes.”<sup>108</sup>

Commentators, much like the courts, are split on whether registration-based consent should satisfy the general jurisdiction analysis.<sup>109</sup> Professor Monestier aptly noted that “[c]alling registration consent does not *actually make* it consent.”<sup>110</sup> Professor Monestier goes on to attack consent on two grounds: first, that it differs from what jurisdictionally passes as traditional consent; and second, that the “registration and the appointment of an agent for service of process are coercive and accordingly cannot amount to consent, which by definition is a voluntary act.”<sup>111</sup> The second of Professor Monestier's arguments makes intuitive sense, and she goes on to describe in detail how the options provided to a corporation operating under registration-based consent are not really viable.<sup>112</sup> Certainly, if the Court in *Daimler* was concerned about defendant corporations being subject to any

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<sup>108</sup> Benish, *supra* note 103, at 1611 (footnote omitted).

<sup>109</sup> Compare Monestier, *supra* note 11, at 1379–80 (noting that corporate registration and the appointment of an agent for service of process does not amount to consent, either express or implied, to general jurisdiction), and Benish, *supra* note 103, at 1640 (arguing that registration-based consent extending general jurisdiction over nonresident corporations is unconstitutional), with Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 670 (2015) (finding that New York's implied consent by registration does not violate due process).

<sup>110</sup> Monestier, *supra* note 11, at 1379.

<sup>111</sup> *Id.* at 1380.

<sup>112</sup> Professor Monestier states:

[E]ven if the relevant statute provided ample notice that the registration and the appointment of an agent for service of process would be deemed consent to all-purpose jurisdiction, this would still not be consistent with due process. The notion of consent implies that a party has alternatives . . . . Aside from registering to do business in the state and thereby consenting to general jurisdiction, a corporation really only has one of two choices: not do business in the state or do business in the state without registering and face whatever penalties the law ascribes.

The option of refraining from doing business in the state is not really a viable one for most corporations. 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. Thus, the choice appears to be that a corporation can register to do business in a state and therefore consent to being sued on any and all causes of action or it can simply refrain from doing business at all, thereby abandoning its *raison d'être*.

*Id.* at 1389–90 (footnotes omitted).

suit in any forum in which they conduct business at the whim of plaintiffs, it seems nonsensical that it would allow the same result by virtue of fifty state legislatures passing (or maintaining) registration statutes.

### C. *Potential Solutions for States*

What options do states have if they want to allow their citizens a forum in which they can bring lawsuits against large, multinational corporations for conduct not related to the forum? States may attempt to transition to express-consent registration statutes perhaps expecting courts to shy away from implying consent based on silent registration statutes in a post-*Daimler* landscape. Section II.C.1 discusses one state, New York, apparently attempting that. But as previously discussed, this is unlikely to survive a due process inquiry. A more permanent solution is to attempt to fashion a genuine consent-based remedy that both satisfies the due process notions of “fair play and substantial justice” and allows for all-purpose general jurisdiction over companies that do business within their borders. Section II.C.2 discusses one such option, tax incentives, as a carrot by which states could induce a more genuine voluntary consent—and pass constitutional muster.

1. *The Move to Express-Consent Statutes.*—Depending on which federal circuit has interpreted a state’s registration statute, the options vary. If a state lies in one of the circuits holding that registration statutes silent on consent establish general jurisdiction and do not violate due process, it can wait until the Supreme Court weighs in on the issue and hope the Court effectively guts *Daimler* and holds that it only applies in those cases where a company never registered (and thus consented) in a state. Though this Note argues that neither express-consent nor implied-consent registration statutes satisfy due process—in accordance with Professor Monestier’s reasoning<sup>113</sup>—express-consent statutes at least provide a more straightforward inquiry. At a minimum, every state which has a registration statute that does not expressly provide for consent to general jurisdiction should take note of *AstraZeneca*’s rationale, which demonstrates a preference for express-consent statutes over implied-consent statutes.<sup>114</sup>

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<sup>113</sup> See *id.*

<sup>114</sup> Recall that the court indicated that express-consent statutes raised a more difficult issue than Delaware’s current implied-consent statute, which the court found lacking to impute consent. *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 557 n.6 (D. Del. 2014). Also, recall the discussion in Section I.B.1 where courts found some support for express consent over implied consent in pre-*International Shoe* cases, even though their methodology for what constituted express and implied consent was different. See *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213 (1921); *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075 (N.Y. 1916).

New York is one example of a state trying to effect this change. With the passage of New York Assembly Bill No. 6714,<sup>115</sup> the state legislature attempted to add the following language to its registration statute: “A foreign corporation’s application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.”<sup>116</sup> Notably, the Second Circuit is one of the circuits that finds due process satisfied with a consent-by-registration assertion of general jurisdiction.<sup>117</sup> So, New York is perhaps taking a page out of the *AstraZeneca* playbook and trying to preempt the potential sea change.

The New York City Bar provided the following statement in opposition to the bill:

The New York City Bar Association has determined not to support this legislation because the rationales presented in favor of the legislation do not outweigh the potential constitutional issues the bill would raise. In the Association’s view, the proposed legislation raises significant potential issues arising from the Due Process Clause and the Commerce Clause of the United States Constitution.<sup>118</sup>

The report goes on to detail the Due Process Clause and Commerce Clause concerns.<sup>119</sup> Interestingly, although the association has constitutional concerns, the Second Circuit has already held that due process is satisfied with the implied-consent statute (presumably, the association disagrees with that holding as well).<sup>120</sup> However, this “fix” is likely to be short lived should the Supreme Court weigh in on the issue.

2. *Replacing Coerced Consent with Genuine Consent.*—What alternative options can states employ to withstand constitutional scrutiny? Perhaps instead of the stick—consent to jurisdiction or leave the state and lose business—states could employ the carrot to encourage corporations to consent genuinely to jurisdiction in their courts. One option that has been used to promote various states’ goals for years has been the tax system.<sup>121</sup> If

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<sup>115</sup> The bill died in the state senate and was returned to the assembly on January 6, 2016. Assemb. B. A06714, 2015 Gen. Assemb., Reg. Sess. (N.Y. 2015), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A06714&term=2015&Summary=Y&Actions=Y&Text=Y&Votes=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A06714&term=2015&Summary=Y&Actions=Y&Text=Y&Votes=Y) [<https://perma.cc/DRK9-2C46>].

<sup>116</sup> *Id.*

<sup>117</sup> *Spiegel v. Schulmann*, 604 F.3d 72, 77 n.1 (2d Cir. 2010).

<sup>118</sup> N.Y. CITY BAR, REPORT ON LEGISLATION A.6714 1 (2015).

<sup>119</sup> *Id.* at 1–3.

<sup>120</sup> *Spiegel*, 604 F.3d at 77 n.1.

<sup>121</sup> Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382 (1996).

a state has a goal of opening up its courts to allow for more suits between its citizens and large corporations, it can utilize the same incentive-based system it has used to achieve other goals—especially the goal of attracting businesses to the state.

Nearly every state attempts to attract business with some form of location incentive.<sup>122</sup> As one commentator stated, “Scarcely a day passes without some state offering yet another incentive to spur economic development, often in an effort to attract a particular enterprise to the state.”<sup>123</sup> So the apparatus is already in place on which states can add the jurisdictional piece. Given *Daimler*’s potential (and likely) reverberations, states can look to package jurisdiction into the incentives that they are already providing or set up other incentives designed solely to get corporations to agree not to fight jurisdiction in the state. Whether or not the incentives pass an internal cost–benefit analysis would depend on the perceived value and importance a particular state places on general jurisdiction for its citizens. These incentives will also still have to comport with the Commerce Clause.<sup>124</sup> Companies would have to ensure that one remedy—genuine consent—to avoid a constitutional challenge under the Due Process Clause does not lead to another one under the Commerce Clause.

#### CONCLUSION

The Supreme Court’s 2014 decision in *Daimler* shrank the potential locations where a corporation can be subject to general jurisdiction, at least under a power analysis. As states and courts interpret *Daimler*, consent will

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<sup>122</sup> *Id.* at 383–84 (noting that a survey demonstrated that only one of the forty-eight states that responded, Wyoming, “had not enacted at least one location incentive between 1991 and 1993” (citing Georganna Meyer & John Hassig, *Economic Development Policy*, 5 STATE TAX NOTES 1229, 1232–36 (1993))).

<sup>123</sup> Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996) (footnotes omitted).

<sup>124</sup> *Id.* at 791. The potential impact of adding the jurisdictional element into potential incentive-based programs, and how that might affect those programs, is beyond the scope of this Note. However, a jurisdiction-for-benefits program, even if combined with other incentives, will certainly come with some of the same legal challenges that other incentive programs face. *See, e.g.*, Jeanette K. Doran, *The People Versus Corporate Welfare: North Carolina’s Forsaken Opportunity to Reverse Perversion of the Commerce Clause and to Reinvigorate the Public Purpose Doctrine*, 33 CAMPBELL L. REV. 381, 387 (2011) (“[N]oble intentions do not warrant ignoble means, permissible ends do not dissolve constitutional constraints, and North Carolina’s economic development efforts are not unfettered by the Commerce Clause.”); Enrich, *supra* note 121, at 409 (stating that businesses bring most of the challenges to tax incentives that “give improper advantages to local competitors”); Hellerstein & Coenen, *supra* note 123, at 793 (“State tax incentives, whether in the form of credits, exemptions, abatements, or other favorable treatment typically possess two features that render them suspect under the rule barring taxes that discriminate against interstate commerce.” (footnote omitted)).

be thrust under the microscope. The legal fictions employed before *International Shoe*—and still being argued in the courts—will likely disappear and leave either a “contacts-based” power analysis or an “incentive-based” consent analysis, each providing more predictability for states and corporations.

The proposition that mandatory registration equals consent, which in turn equals general jurisdiction in potentially all fifty states, cannot survive a due process analysis after *Daimler*. States seeking to maximize court access for their citizens to these types of cases must adapt to the changes that the Supreme Court has clearly announced. Presumably Sarah—the unfortunate Idaho business owner from the initial scenario—will (and should) be able to decide whether a carrot that Kansas dangles is worth the risk of defending against unrelated suits in that state. But the stick, in the form of either violating the law by not registering or being forced to defend against lawsuits unrelated to the forum, cannot be the method by which businesses “consent” in the modern era of interstate commerce.

