

# ARTICLE

## A NEW STATE REGISTRATION ACT: LEGISLATING A LONGER ARM FOR PERSONAL JURISDICTION

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### ABSTRACT

*In a sextet of recent decisions, the Roberts Court upended the longstanding framework for general and specific contacts-based personal jurisdiction. The Court’s new approach has engendered uncertainty and erected insurmountable obstacles for some plaintiffs in locating an effective forum to vindicate their rights. We propose a novel solution to the injustices and unpredictability unleashed by these decisions: a new model corporate registration act that would require, as a condition of doing business in a state, the corporation’s consent to personal jurisdiction in defined circumstances that implicate state sovereign regulatory, protective, and prescriptive interests.*

*Registration-based consent to jurisdiction has a long pedigree, dating back to the years before the Fourteenth Amendment’s ratification. For much of its history, however, registration-based jurisdictional consent languished in obscurity, as general “doing business” jurisdiction overshadowed the doctrine. With the Supreme Court’s recent “at-home” trilogy sounding the death knell of general “continuous and systematic” contacts jurisdiction, the constitutional propriety of interpreting a state corporate registration scheme to require the corporation’s all-purpose jurisdictional consent for claims arising anywhere in the world is in doubt. Instead of litigating the meaning and the ongoing validity of these longstanding registration statutes, we recommend that the states adopt a modernized jurisdictional-consent statute that ensures an appropriate state jurisdictional reach and operates within the Supreme Court’s pronounced adjudicative framework.*

*We draft and evaluate a proposal for such a statute, which we believe the Uniform Law Commission is especially well situated to consider, refine, and promulgate for the states’ benefit. Such a statute would avoid the wasteful expense of litigating the interpretation of registration statutes initially adopted during the heyday of the horse and buggy. More importantly, the proposed act would allow the states to assert their sovereign authority to ensure access to justice for their residents after the dismantling of general jurisdiction. By precisely tailoring the statute to states’ sovereign interests, the proposed act avoids*

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*constitutional pitfalls while still providing an effective jurisdictional reach for the states after the Roberts Court's jurisdictional revolution.*

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I. INTRODUCTION

The Supreme Court promised. The demise of “doing business” general personal jurisdiction would not restrict plaintiffs’ forum choice so severely that “deep injustice” would result.<sup>1</sup> Instead, “flourish[ing]” conceptions of specific jurisdiction would fill any voids and ensure that plaintiffs would still have a convenient forum in which to seek relief.<sup>2</sup> Perhaps the Court might

<sup>1</sup> Daimler AG v. Bauman, 571 U.S. 117, 133 n.10 (2014).

<sup>2</sup> *Id.*

still someday keep this promise by adopting a broad enough understanding of specific jurisdiction to balance appropriately the interests of plaintiffs, defendants, and sovereign states.<sup>3</sup> But that day is not yet here. Until (and unless) that day arrives, uncertainty and injustice will continue to plague jurisdictional doctrine.

From 2011 to 2017, the Supreme Court invalidated exercises of adjudicative jurisdiction in six separate cases.<sup>4</sup> The decisions from 2017, *Bristol-Myers Squibb Co. v. Superior Court*<sup>5</sup> and *BNSF Railway Co. v. Tyrrell*,<sup>6</sup> illustrate the resulting doctrinal upheaval. In both cases, bases for jurisdiction had been so well settled by consistent lower-court interpretations that similarly situated multi-state corporate defendants previously often waived any jurisdictional challenge.<sup>7</sup> Now such defendants are not only raising such challenges, but are prevailing—even without any indication that the plaintiffs’ selected fora would cause any litigation-related inconveniences.<sup>8</sup>

These decisions are particularly troubling because the Roberts Court has not explained its view of what personal jurisdiction is.<sup>9</sup> The Court’s off-hand assurances regarding still-extant jurisdictional avenues, made in opinions that sharply restrict personal jurisdiction in previously routine contexts, are impossible to evaluate when the Court has not provided its guidance on the new jurisdictional tapestry. Instead, the Court has been snipping the supporting doctrinal strands, without indicating whether the remaining strands will be strengthened, ignored, or discarded.<sup>10</sup>

<sup>3</sup> See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 263–69 (2014) (proposing such a framework).

<sup>4</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler*, 571 U.S. 117; *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

<sup>5</sup> 137 S. Ct. 1773.

<sup>6</sup> 137 S. Ct. 1549.

<sup>7</sup> See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb & the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1275 (2018) (recognizing that before 2011 Bristol-Myers did not have “a leg to stand on in contesting jurisdiction”); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503 (2015) (contending Supreme Court’s recent decisions tightened general jurisdiction over multi-state and multi-national corporations “to an extent that, until quite recently, would have been unfathomable”).

<sup>8</sup> See *Bristol-Myers*, 137 S. Ct. at 1780–81 (emphasizing the defendant’s burden from “submitting to the coercive power of a State that may have little legitimate interest in the claims in question,” but not identifying any litigation-related burdens suffered by Bristol-Myers); Bradt & Rave, *supra* note 7, at 1254 (“There was, of course, nothing inconvenient about [Bristol-Myers] litigating in California.”). Indeed, Bristol-Myers never argued that California was an unduly inconvenient or burdensome forum for the litigation. See *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 892 (Cal. 2016), *rev’d*, 137 S. Ct. 1773 (2017).

<sup>9</sup> See Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1179 (2018) (“[T]he Supreme Court doesn’t seem to have a clear consensus on what its personal-jurisdiction doctrine is trying to do, or how it is supposed to do it.”).

<sup>10</sup> Cf. Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 505 (2018) (asserting the Supreme Court has stealthily “implement[ed] radical law reform” in personal jurisdiction without “constructing persuasive explanations” or principled

This case-by-case repudiation of jurisdictional authority undercuts the primary goals of the adjudicative system. By dismantling prevailing general-jurisdiction jurisprudence without resolving key issues that were certain to arise in its absence, the Court crippled predictability.<sup>11</sup> And the resulting doctrinal instability significantly raises litigation costs, as previously settled issues become ripe fodder for litigating new jurisdictional objections.<sup>12</sup> Nor is the current jurisdictional scheme fair.<sup>13</sup> Unless the Court later expands the contours of specific jurisdiction (which it has not done yet despite prior opportunities), the Court's approach will prevent some injured parties from seeking effective relief, contradicting, as Professor Arthur Miller explained, "the aspirations of the American civil justice system."<sup>14</sup>

Yet these recent Roberts Court holdings focus only on the limits of contacts-based adjudicative jurisdiction. Even as these cases narrow the outer due-process limits of the minimum-contacts standard, they leave room for the states to identify, assert, and enforce their interests in protecting state residents and regulating in-state business activities through alternative jurisdictional means. We therefore propose that, instead of awaiting a potential but uncertain judicial rebalancing or an unlikely federal legislative or rule cure, state legislatures once again take the lead in ensuring appropriate adjudicative power for their courts, legislatively asserting their sovereign authority to resolve claims implicating state interests.<sup>15</sup>

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constitutional grounding); Samuel P. Jordan, *Hybrid Removal*, 104 IOWA L. REV. 793, 794 (2019) (arguing a "personal jurisdiction revolution is underway").

<sup>11</sup> See Rhodes & Robertson, *supra* note 3, at 230 (predicting future likely jurisdictional disputes); cf. Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 790–91 (2017) [hereinafter Robertson & Rhodes, *Business*] (discussing lower court cases addressing such issues); 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, 661 (2015) [hereinafter Robertson & Rhodes, *Shifting Equilibrium*] (discussing cases beginning to raise the predicted issues).

<sup>12</sup> See Cassandra Burke Robertson, *Personal Jurisdiction in Legal Malpractice Litigation*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 15 (2016) (noting that under "[t]he prior pervasiveness of the 'continuous and systematic' standard" many defendants "did not even challenge jurisdiction").

<sup>13</sup> See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 100 (2018) ("Limiting the general jurisdiction of domestic defendants to just one or two states drastically changed the presumed access to courts that plaintiffs previously enjoyed against large companies with a hefty business presence in many or even all states.").

<sup>14</sup> Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 369 (2013).

<sup>15</sup> The political climate in some states, of course, may not be conducive to such legislative action. Nevertheless, a state-level approach provides the opportunity for state experimentation and evades the political intransigence in Washington (both in legislating and rulemaking) that may doom the insightful academic calls for beneficial statutory or rule changes at the federal level. See, e.g., Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413 (2017) [hereinafter Borchers, *Extending*]; Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1 (2018); Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking*

During the late-nineteenth and early-twentieth centuries, when the Supreme Court's prevailing territorial-sovereignty notions of jurisdictional authority under the common law became incompatible with interstate corporate operations and interstate travel, the states did not wait for a judicial solution.<sup>16</sup> Rather, the states sought to expand their jurisdictional reach legislatively by requiring explicit or deeming implicit appointment of in-state agents for service of process when nonresidents undertook defined activities within the state.<sup>17</sup> Service on the in-state agent within state territory provided a means to authorize jurisdictional power over the nonresident while comports with the then-prevailing sovereignty limitations on adjudicative authority.<sup>18</sup> After the Supreme Court adopted a more realistic fairness jurisdictional rationale in *International Shoe Co. v. Washington*,<sup>19</sup> the states began enacting so-called long-arm statutes to take advantage of the new framework.<sup>20</sup> These statutes typically authorize the service of summons on a nonresident defendant unless such an assertion of adjudicative authority would violate due process of law.<sup>21</sup> But with the recent Roberts Court decisions rendering the meaning of the due-process limitations in flux, long-arm statutes need supplementation to promote predictability and ensure an appropriate state jurisdictional reach.

We recommend that the Uniform Law Commission ("ULC") propose a Model Act that would amend existing state corporate registration schemes to require, as a condition of doing business in a state, the corporation's consent to suit in defined circumstances that implicate state sovereign interests. For example, the statute might permit jurisdiction when the suit arises from an injury suffered in the state, the suit is brought by a state resident, the suit is governed by that state's law, or the suit is to enforce a judgment or remedial order against persons or property within the state. This explicit, defined-consent proposal differs from existing state registration statutes, almost all of which do not specify the jurisdictional consequences, if any, of a corporation's in-state registration to do business.<sup>22</sup> Courts accordingly are sharply

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*FRCP 4(k)(1)(A)* and *Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713 (2015); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014); A. Benjamin Spencer, *The Territorial Reach of the Federal Courts*, 71 FLA. L. REV. 979 (2019).

<sup>16</sup> See Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 392–95 (2012) [hereinafter Rhodes, *Nineteenth Century*].

<sup>17</sup> See *id.*

<sup>18</sup> See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (upholding implied-consent statute for nonresident motorists).

<sup>19</sup> 326 U.S. 310 (1945).

<sup>20</sup> See 1 ROBERT C. CASAD, WILLIAM M. RICHMAN & STANLEY E. COX, JURISDICTION IN CIVIL ACTIONS § 4.01 (4th ed. 2018); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 (4th ed. 2018).

<sup>21</sup> See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (detailing state long-arm statutes).

<sup>22</sup> See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1366–68 (2015) (highlighting that only Pennsylvania's registration statute explicitly specifies that registration is a consent to jurisdiction).

divided on whether the existing registration statutes operate as a consent to general or dispute-blind jurisdiction for any and all claims arising anywhere in the world, and, if so, whether such all-purpose consent schemes might be an unconstitutional form of exorbitant jurisdiction.<sup>23</sup> But our recommendation avoids these divides. An explicit, defined-consent scheme, limited only to those claims implicating well-recognized state adjudicative interests, promotes predictability, satisfies current constitutional limitations, and achieves a balance between the interests of plaintiffs, defendants, and sovereign states.

This Article proceeds as follows. Part II briefly explores the prior jurisdictional landscape and the changes wrought by the Roberts Court's decisions over the last few years on the due-process limitations on assertions of personal jurisdiction. Part III introduces consent as an alternative basis for jurisdictional assertions, tracing its historical development from the antebellum era to modern times. In light of this history, Part IV proposes an explicit consent-based registration scheme, which we suggest the ULC recommend, that *ex ante* authorizes the exercise of personal jurisdiction over nonresident corporations in specified situations that sufficiently implicate state sovereign interests. Part IV also highlights the normative and theoretical advantages of such a scheme, especially with the ULC's participation. Part V details the state sovereign interests that support the proposal and then dismisses any conceivable constitutional challenges, whether based on the Due Process Clause, the dormant commerce clause, or the unconstitutional conditions doctrine. Part VI concludes with a plea for the states to amend their corporate registration framework to adopt an appropriate twenty-first century jurisdictional reach to protect their protective and prescriptive sovereign interests.

## II. THE TWENTY-FIRST CENTURY PERSONAL JURISDICTION UPHEAVAL

In 1945, *International Shoe Co. v. Washington*<sup>24</sup> famously reconceptualized the adjudicative jurisdictional touchstone from a state's power over those present within its territory to the fairness or reasonableness of jurisdiction in light of the defendant's forum contacts.<sup>25</sup> *International Shoe* sketched three situations from its prior precedents as illustrations of reasonable jurisdictional assertions: (1) "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on"; (2) when "the continuous corporate operations within a state were thought so substantial and of such a nature to justify suit against it on causes of action entirely distinct from those activities"; and (3) when "the commis-

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<sup>23</sup> See *id.* at 1369–71 (collecting cases); Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 669–72 (2017) (collecting cases).

<sup>24</sup> 326 U.S. 310 (1945).

<sup>25</sup> *Id.* at 316.

sion of such [single or occasional] acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient.”<sup>26</sup> The second scenario, which predicates jurisdiction on activities “entirely distinct” from the asserted cause of action, today is termed “general jurisdiction,” while the term “specific jurisdiction” encompasses the other two scenarios where adjudicative power depends on a relationship between the suit and the nonresident defendant’s in-state activities.<sup>27</sup>

The Supreme Court embarked on two distinct thirteen-year quests during the twentieth century, separated by almost twenty years, to further define fairness in the jurisdictional context. Beginning with *International Shoe* in 1945 and ending with *Hanson v. Denckla* in 1958, the Court developed the required contacts analysis and then added the principle that such contacts depended upon purposeful forum activity by the nonresident defendant.<sup>28</sup> From 1977 to 1990, the Court first banished jurisdiction over property for unrelated claims and then attempted to provide greater clarity on the necessary purposeful forum conduct for both specific and general jurisdiction.<sup>29</sup> Thereafter, though, the Rehnquist Court withdrew from the adjudicative power field after failing to coalesce around a single majority opinion in either of its two attempts,<sup>30</sup> leaving the lower federal and state courts to their own devices until the Roberts Court’s recent jurisdictional revival.<sup>31</sup>

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<sup>26</sup> *Id.* at 317–18.

<sup>27</sup> *See, e.g.,* Daimler AG v. Bauman, 571 U.S. 117, 126–27 (2014). The Supreme Court first employed this terminology in 1984, borrowing the terms from an influential law review article. *See* Calder v. Jones, 465 U.S. 783, 787 (1984) (mentioning general jurisdiction); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 nn.8–9 (1984) (discussing both specific and general jurisdiction); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (coining the terms).

<sup>28</sup> *See, e.g.,* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int’l Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Travelers Health Ass’n v. Virginia, 339 U.S. 643 (1950); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

<sup>29</sup> *See, e.g.,* Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); *Helicopteros*, 466 U.S. 408; *Calder*, 465 U.S. 783; Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

<sup>30</sup> *See, e.g.,* Burnham, 495 U.S. at 607 (plurality opinion); *id.* at 628 (White, J., concurring); *id.* at 628 (Brennan, J., concurring); *id.* at 640 (Stevens, J., concurring); *Asahi*, 480 U.S. at 108–13 (plurality opinion); *id.* at 116–21 (Brennan, J., concurring); *id.* at 121–22 (Stevens, J., concurring). The severe constriction in the Supreme Court’s mandatory jurisdiction docket and the departures of certain Justices who pressed their colleagues to hear personal jurisdiction cases also likely contributed to the Court’s refusal to resolve jurisdictional cases during this time. *See* Troy A. McKenzie, *Revisiting Personal Jurisdiction*, at 6 (unpublished manuscript) (on file with authors).

<sup>31</sup> *See* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 463, 463 (2012) (highlighting the Supreme Court’s 2011 personal jurisdiction decisions were its first since 1990); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 317 (2012) (noting that, after *Burnham*, the Court did not decide any personal jurisdiction cases for over twenty years).

During the Court's jurisdictional hiatus, the lower courts developed and applied a framework for adjudicative authority constructed, to the extent possible, from the Supreme Court's binding pronouncements. This undertaking was not an easy task, predominantly due to the Supreme Court's avoidance of—or inability to resolve—several foundational jurisdictional issues.<sup>32</sup> Not surprisingly, then, the lower courts' jurisdictional decisions on quite a few issues became discombobulated, with deep splits in result and reasoning.<sup>33</sup> Nevertheless, certain broad jurisdictional precepts enjoyed widespread acceptance.

One of these uniform precepts was that general jurisdiction was appropriate anytime a defendant's in-state business activities were substantial, continuous, and systematic, which authorized jurisdiction against large national and international business enterprises doing business throughout the United States in any state, irrespective of the nature of the controversy.<sup>34</sup> Some lower courts went much further and authorized general jurisdiction based on almost any repeated activity in the forum, such as a nonresident defendant's sporadic sales to forum residents or the possibility that forum residents accessed the defendant's interactive website.<sup>35</sup> But despite the disagreement on the outermost limits of general jurisdiction, the cases concurred that general jurisdiction was available over a nonresident defendant conducting continuous and substantial business activities from a physical location within the forum.<sup>36</sup> So a corporation like Wal-Mart, with stores in each and every state, was subject to general jurisdiction in each and every state—and this was so well accepted that it routinely went unchallenged.<sup>37</sup>

The Supreme Court's limited guidance on general jurisdiction during the twentieth century seemingly supported this accepted interpretation. *Perkins v. Benguet Consolidated Mining Co.*<sup>38</sup> held that Ohio could exercise adjudicatory jurisdiction over a Philippine Islands mining corporation with respect to claims unrelated to its forum activities when it was conducting a “continuous and systematic, but limited part of its general business” in the

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<sup>32</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (avoiding presented issue on the relationship required for specific personal jurisdiction by resolving case based on forum selection clause).

<sup>33</sup> See Rhodes & Robertson, *supra* note 3, at 230.

<sup>34</sup> Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 114–15 (2015) (noting that “[t]reatises printed as black letter law that corporations were subject to general jurisdiction wherever they engaged in a sufficiently high level of business activity” and that a leading casebook presented it as settled law).

<sup>35</sup> See Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 867–86 (2004) (discussing examples).

<sup>36</sup> See *id.*

<sup>37</sup> The unique circumstances in the rare jurisdictional challenges raised by Wal-Mart indicate the ubiquity of this understanding. See *Follette v. Clairol, Inc.*, 829 F. Supp. 840, 846 (W.D. La. 1993) (holding that the exercise of general jurisdiction over Wal-Mart in this particular case was neither fair nor reasonable when the plaintiffs filed suit in the forum solely to take advantage of a longer limitations period), *aff'd mem.*, 998 F.3d 1014 (5th Cir. 1993).

<sup>38</sup> 342 U.S. 437 (1952).



state by supervising, from an Ohio corporate office, the necessarily limited rehabilitation of the company's properties during the Japanese occupation of the Philippine Islands.<sup>39</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>40</sup> on the other hand, determined that a Colombian corporation providing helicopter transportation in South America was not amenable in Texas for its non-suit-related activities there, as such activities were dissimilar to the "continuous and systematic general business contacts" existing in *Perkins*.<sup>41</sup> In another decision, the Supreme Court did not dispute the proposition, which was vital to the decision below under review, that a nationwide insurance company "doing business" in all fifty states could be subject to dispute-blind jurisdiction in every state.<sup>42</sup> So the lower courts appeared to follow dutifully the Supreme Court's insinuations by holding that "continuous and systematic" forum business activities of a substantial nature sufficed for general jurisdiction.

Scholars, though, often critiqued this sweeping expanse for general jurisdiction.<sup>43</sup> But even the critics acknowledged that a broad reach for general jurisdiction served as a backstop to ensure an accessible forum when the Supreme Court's defendant-centric understanding of specific jurisdiction in its decisions during the latter half of the twentieth century barred reasonable jurisdictional assertions.<sup>44</sup>

These decisions restricted specific jurisdiction by requiring every named nonresident defendant (by itself or through an agent) to perform activities that either purposefully sought the benefits and protections of the forum's laws or targeted the forum for some benefit or advantage.<sup>45</sup> Although this purposeful-availing requirement did not necessitate the actual physical presence of the defendant or its agents in the forum state, out-of-state conduct at least had to be "purposefully directed" at the forum.<sup>46</sup> This occurred, for instance, when a nonresident defendant executed a contract with a "sub-

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<sup>39</sup> *Id.* at 438, 447–48.

<sup>40</sup> 466 U.S. 408 (1984).

<sup>41</sup> *Id.* at 416. The corporation's Texas activities included a singular trip of its president to Texas for a contract negotiating session, payments drawn on a Texas bank, and purchases of helicopters, equipment, and training from a Texas corporation. *Id.* at 410–11, 416–18.

<sup>42</sup> *Rush v. Savchuk*, 444 U.S. 320, 330 (1980); *cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317 & n.23 (1981) (plurality opinion) (concluding "Allstate was at all times present and doing business in Minnesota" and did not question jurisdiction in Minnesota courts); *id.* at 329–30 (Stevens, J., concurring) ("By virtue of doing business in Minnesota, Allstate was aware that it could be sued in the Minnesota courts.").

<sup>43</sup> *See, e.g.*, Lea Brillmayer et al., *A General Look at General Jurisdiction*, 66 *TEX. L. REV.* 721, 725–26 (1988) [hereinafter Brillmayer, *General Look*]; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 *TEX. L. REV.* 689, 758 (1987); Mary Twitchell, *The Myth of General Jurisdiction*, 101 *HARV. L. REV.* 610, 676 (1988).

<sup>44</sup> *See, e.g.*, Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 *U. CHI. LEGAL F.* 119, 132–39 (arguing general jurisdiction was an "unpleasant necessity" due to the limitations of specific jurisdiction).

<sup>45</sup> *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985); *Helicopteros*, 466 U.S. at 417; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>46</sup> *Burger King*, 471 U.S. at 476.

stantial connection” to the forum;<sup>47</sup> “expressly aimed” intentional tortious actions at the forum;<sup>48</sup> or manufactured or distributed products causing harm within the forum, coupled with efforts “to serve, directly or indirectly,” the in-state market for its product.<sup>49</sup> Yet many times, this avilment requirement prevented such apparently reasonable forum choices as suing all the defendants in a products case in the forum in which the accident occurred.<sup>50</sup> In these situations where specific jurisdiction was not available, a broad understanding of general jurisdiction sometimes allowed an alternative forum where the plaintiff could sue all the alleged wrongdoers.<sup>51</sup>

Another concern regarding specific jurisdiction was that the Court never defined the necessary relationship between the defendant, the forum, and the controversy. Although the Supreme Court declared that the litigation must “arise out of,” be “related to,” or be “connected with” the defendant’s forum activities,<sup>52</sup> these alternative formulations hinted at very different linkages. The Supreme Court declined, despite two opportunities, to provide additional guidance.<sup>53</sup> Without the Supreme Court’s guidance, a bewildering array of different approaches developed in the lower courts: narrow approaches allowing specific jurisdiction only when the injury occurred in the forum or the defendant’s forum activities were the “proximate cause” of the injury, ill-defined approaches requiring a “substantial,” “causal,” or “sufficient” connection between the defendant’s forum activities and the litigation, and expansive approaches that required a minimal “but for” relationship between the defendant’s forum actions and the suit or adjudged the necessary relationship on a “sliding scale.”<sup>54</sup> As a practical matter, though, this disagreement had little impact on the jurisdictional power of courts, as the courts

<sup>47</sup> *Id.* at 479. This determination is dependent upon the contract’s provisions, the parties’ negotiations, the contemplated future consequences, and the actual course of conduct under the contract. *See id.*

<sup>48</sup> *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

<sup>49</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

<sup>50</sup> *See, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 90 (1990).

<sup>51</sup> *Cf.* Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 216–17 (2005) [hereinafter Rhodes, *Predictability Principle*] (discussing the inclination of courts to expand general jurisdiction to support reasonable jurisdictional assertions when confronting the limits of specific jurisdiction).

<sup>52</sup> *See, e.g.*, *Burger King*, 471 U.S. at 472 (“arise out of or relate to”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“arise out of or are connected with”).

<sup>53</sup> *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (avoiding presented issue on the relationship required for specific personal jurisdiction by resolving case based on forum selection clause); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 415 n.10 (declining to address arguments posed by Justice Brennan’s dissent regarding “(1) whether the terms ‘arising out of’ and ‘related to’ describe different connections between a cause of action and a defendant’s contacts with a forum, and (2) what sort of tie between a cause of action and a defendant’s contacts with a forum is necessary”).

<sup>54</sup> *See* Rhodes, *Predictability Principle*, *supra* note 51, at 201–08. For further descriptions and insightful critiques of the various approaches that developed, see Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1026–48 (2012), and

turned to general jurisdiction when the outermost limits of specific jurisdiction were uncertain.<sup>55</sup>

The broad expanse of general jurisdiction thus made up for the deficiencies in specific jurisdiction doctrine. This approach came with normative costs, however. General jurisdiction presented opportunities for blatant forum shopping, authorizing jurisdiction in locales that had minimal or no interest in the suit.<sup>56</sup> For instance, a Texas citizen could rely on general jurisdiction to bring a claim regarding a slip-and-fall in a Texas Wal-Mart store in any state in the nation, trying to obtain the best potential recovery in light of limitations periods, conflicts of law, procedural rules, and sympathetic jurists and jurors.<sup>57</sup> Moreover, in the transnational context, many other nations abhorred the expansive American view of general jurisdiction, a constant source of friction in attempts to negotiate a treaty on the recognition and enforcement of foreign judgments.<sup>58</sup> As a result, scholars frequently championed the broadening of specific jurisdiction, which would allow a concomitant narrowing of general jurisdiction to accord with international standards and limit blatant national and international forum shopping.<sup>59</sup>

But rather than first expanding specific jurisdiction as recommended by scholars, the Roberts Court's twenty-first century jurisdictional upheaval discarded general "doing business" jurisdiction while contemporaneously *re-*

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Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 348–73 (2005).

<sup>55</sup> See, e.g., *Thomason v. Chem. Bank*, 661 A.2d 595, 605 & n.9 (Conn. 1995) (declining to resolve specific jurisdiction issue dependent on the required connection between the litigation and the defendant's forum activities when general jurisdiction was available).

<sup>56</sup> See Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 540–41 (2012) [hereinafter Stein, *Meaning*] ("A handful of judicial districts across the country have become magnets for litigation against large, interstate corporations because of their tendency to render large jury awards. The more permissive the constitutional standards for the exercise of general jurisdiction, the more these problems arise.").

<sup>57</sup> Cf. *Ferens v. John Deere Co.*, 494 U.S. 516, 519–20 (1990) (plaintiff injured in Pennsylvania by combine sued manufacturer in Mississippi, relying on general jurisdiction, in order to take advantage of state's six-year limitations period for tort actions).

<sup>58</sup> See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999) ("The Europeans' principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts.").

<sup>59</sup> See, e.g., Twitchell, *supra* note 43, at 667–70; von Mehren & Trautman, *supra* note 27, at 1139, 1141–44, 1177–79. On the other hand, though, if personal jurisdiction limits are constitutionally mandated by the Due Process Clause, as the Supreme Court has repeatedly emphasized, such pure policy considerations, divorced from questions of state sovereignty and individual liberty interests, should have little force. Cf. Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 627–43 (2007) [hereinafter Rhodes, *Liberty*] (discussing appropriate considerations in ascertaining a state's permissible reach under due process). Some scholars have, in the same vein, recently critiqued the premise that an expansion of specific jurisdiction necessarily entails a restriction of general jurisdiction. See Cornett & Hoffheimer, *supra* note 34, at 124 n.105 (citing scholarship to this effect by Kristina Angus); Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, 76 U. PITT. L. REV. 153, 174 (2014).

*stricting* (instead of expanding) specific jurisdiction.<sup>60</sup> The Court, despite occasional paeans to an expansive role for specific jurisdiction in its opinions slashing general jurisdiction,<sup>61</sup> has not followed such dictum when confronted with specific jurisdiction cases, but rather has announced new restraints to tighten the confines of state jurisdictional authority.<sup>62</sup> The uncertain future created by these newfound constraints in the Roberts Court's general jurisdiction decisions will be discussed first before turning to the Court's specific jurisdiction holdings.

### A. *The Demise of General "Doing Business" Jurisdiction*

*Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>63</sup> did not appear a likely vehicle for kindling a jurisdictional revolution, as the case addressed a rather "sprawling" assertion of adjudicative authority that violated well-established jurisdictional norms.<sup>64</sup> The issue in the case was whether a North Carolina state court could exercise general jurisdiction over Turkish and European indirect subsidiaries of The Goodyear Tire and Rubber Company when the tires manufactured by the Turkish subsidiary allegedly caused a fatal accident in France that killed two American teenagers from North Carolina.<sup>65</sup> The only indirect business tie those foreign subsidiaries had with North Carolina was that a very small percentage of the tires the subsidiaries made abroad reached North Carolina, being distributed by other Goodyear affiliates through the stream of commerce.<sup>66</sup> The Supreme Court, in an opinion by Justice Ginsburg, unanimously held, in accord with its prior general jurisdiction precedents, that the state court's jurisdictional assertion was improper, as the foreign subsidiaries' "attenuated connections to the State . . . fall far short of the [sic] 'the continuous and systematic general business

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<sup>60</sup> Cf. Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 108–09 (2015) ("A limited scope for general jurisdiction was supposed to have followed, rather than preceded, an expansion of specific jurisdiction.").

<sup>61</sup> See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 133 n.10 (2014).

<sup>62</sup> See *infra* Part II.B; accord *Dodson*, *supra* note 15, at 24 (noting specific jurisdiction has narrowed through recent cases that have "considerably tighte[ned]" the necessary relationship between the defendant, the forum, and the claim); Jonathan R. Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 511 (2019) ("Personal jurisdiction has always constrained plaintiffs' access to courts; recent Supreme Court decisions impose even more severe limits . . .").

<sup>63</sup> 564 U.S. 915 (2011).

<sup>64</sup> *Id.* at 929.

<sup>65</sup> *Id.* at 918.

<sup>66</sup> *Id.* at 921. The foreign subsidiaries had not registered to do business in North Carolina; did not operate a place of business in North Carolina; and did not themselves advertise, solicit, sell, or ship tires to North Carolina customers. *Id.* Their tires were predominantly designed for sale in the European and Asian markets; while the tire at issue bore the markings necessary for sale in the U.S., there was no evidence that this particular type of tire had ever been distributed in North Carolina. *Id.* at 921–22.

contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."<sup>67</sup>

*Goodyear* was, in the words of Professor Linda Silberman, "an easy case" under established precedents.<sup>68</sup> As the Supreme Court highlighted, under the lower court's theory predicating all-purpose general jurisdiction on the stream-of-commerce flow of goods into the forum, "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed," a premise that the Supreme Court had refused to embrace even when the product had caused an injury in the forum.<sup>69</sup> As a result, the outcome was never really in doubt.

Yet *Goodyear*'s true significance was introducing a new metaphor into the general jurisdiction lexicon. The Court's opinion, while retaining earlier iterations that substantial "continuous and systematic" affiliations were necessary for general jurisdiction, added to the description that such affiliations had to render the defendant "essentially at home" in the forum.<sup>70</sup> The Court explained that the "paradigm forum" for general jurisdiction over a natural person is domicile, while for corporations "it is an equivalent place, one in which the corporation is fairly regarded as at home."<sup>71</sup> Citing an article by Professor Lea Brilmayer, the Court parenthetically described a corporation's state of incorporation and principal place of business as the "'paradig[m] bases for general jurisdiction."<sup>72</sup> But the Court never indicated that general jurisdiction was limited to such paradigms or other true "homes" of the corporation, instead always describing general jurisdiction under its prior precedents as places where the corporation was "essentially at home," "fairly regarded as at home," or "in [a] sense at home."<sup>73</sup>

<sup>67</sup> *Id.* at 929 (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

<sup>68</sup> Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 677 (2015).

<sup>69</sup> *Goodyear*, 564 U.S. at 929 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980)).

<sup>70</sup> *Id.* at 919 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

<sup>71</sup> *Id.* at 924.

<sup>72</sup> *Id.* (citing Brilmayer, *General Look*, *supra* note 43, at 728). Professor Brilmayer's article proposed that general jurisdiction extended beyond these paradigms to corporations engaged in a large quantum of intrastate activity that rose "to the level . . . of an insider," such that "relegating the defendant to the political process [was] fair." Brilmayer, *General Look*, *supra* note 43, at 742-43, 746-47.

<sup>73</sup> *Goodyear*, 564 U.S. at 919, 924, 929. For examples of the scholarly debate after *Goodyear* on the significance and potential meanings of the "essentially at home" metaphor, see Andrews, *supra* note 54, at 1059-75; Lindsey D. Blanchard, *Goodyear and Hertz: Reconciling Two Recent Supreme Court Decisions*, 44 McGEORGE L. REV. 865, 886-900 (2013); Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tire Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 581-604 (2012); Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler AG v. Bauman*, 34 U. PA. J. INT'L L. 765, 777-82 (2013); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 215-17 (2011); Rhodes, *Nineteenth Century*, *supra* note 16, at 425-30; Stein, *Meaning*, *supra* note 56, at 531-47.

Just three years later, though, the Court in *Daimler AG v. Bauman*<sup>74</sup> rejected as “unacceptably grasping” the longstanding understanding (as reiterated in *Goodyear*) that a “substantial, continuous, and systematic course of business” supported general jurisdiction, downplayed the “essentially” modifier from *Goodyear*’s “at home” language, and held that general jurisdiction is only appropriate when a corporate defendant is “at home” in the forum.<sup>75</sup> “At home,” Justice Ginsburg’s opinion for the Court continued, encompasses only the paradigm bases of state of incorporation and principal place of business, unless perhaps in an exceptional case, such as where the forum is the corporation’s temporary de facto or surrogate principal place of business.<sup>76</sup> And through these newly announced constraints, *Daimler* utterly upended the prior judicial understanding of personal jurisdiction.

The Argentinian plaintiffs in *Daimler* had filed suit in California federal court alleging the German public stock company Daimler was vicariously liable for the purported actions of its Argentinian subsidiary, Mercedes-Benz Argentina, in collaborating with Argentinian security forces to kidnap, detain, torture, or murder plaintiffs and their family members during Argentina’s “Dirty War.”<sup>77</sup> After Daimler moved to dismiss for want of personal jurisdiction, the plaintiffs responded that Daimler was amenable to California’s jurisdiction because general jurisdiction was appropriate in California over yet another Daimler indirect subsidiary, Mercedes-Benz USA (“MBUSA”). The plaintiffs urged that MBUSA’s extensive California contacts—including a regional headquarters in the state, several other physical California facilities, and billions of dollars of forum sales—both supported general jurisdiction and were imputable to Daimler for jurisdictional purposes under an agency theory.<sup>78</sup> Daimler did not contest that the California courts could exercise general jurisdiction over MBUSA (presumably because the district court’s consideration of Daimler’s motion to dismiss predated *Goodyear* by several years); instead, Daimler urged that attributing the California jurisdictional contacts of its subsidiary to Daimler itself violated due process.<sup>79</sup>

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<sup>74</sup> 571 U.S. 117 (2014).

<sup>75</sup> *Id.* at 136–39. Although *Daimler* quoted from *Goodyear*’s “essentially at home” language in the course of the opinion, *see id.* at 122, 127, 133 n.11, 139, the Court’s holding was that the lower court erred by concluding that Daimler “was at home in California, and hence subject to suit there.” *Id.* at 139; *see also id.* at 136 (“Daimler’s slim contacts with [California] hardly render it at home there.”); *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1554 (2017) (citing *Daimler* as establishing that a state cannot “hale an out-of-state corporation before its courts when the corporation is not ‘at home’ in the State and the episode-in-suit occurred elsewhere”).

<sup>76</sup> *Daimler*, 571 U.S. at 129–32, 138–39 & n.19.

<sup>77</sup> *Id.* at 120–22.

<sup>78</sup> *Id.* at 123; *see also id.* at 142, 148 (Sotomayor, J., concurring).

<sup>79</sup> *Id.* at 124, 133–34.

The primary question presented to the Supreme Court thus involved the thorny issue of imputation of a subsidiary's contacts to a parent.<sup>80</sup> Indeed, the argument that if MBUSA's contacts were attributable to Daimler such contacts did not suffice for general personal jurisdiction first appeared in a footnote to Daimler's brief on the merits and was also stressed by a handful of its amici.<sup>81</sup> Nevertheless, the Supreme Court, after a quick dismissal of the particular agency theory relied upon by the Ninth Circuit, sidestepped this jurisdictional imputation issue, instead holding that Daimler was not "at home" in California, even assuming the propriety of attributing all of MBUSA's California contacts to Daimler.<sup>82</sup>

The Court rejected the premise that general jurisdiction was appropriate "in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" <sup>83</sup> Instead, the relevant analysis was the one alluded to—but not expanded upon—in *Goodyear*: was the defendant "at home" in the forum?<sup>84</sup> The Court explained that in all except the most unusual circumstances, a defendant would be at home in no more than two jurisdictions: the state of incorporation and the state in which the corporation maintained its principal place of business.<sup>85</sup> This was because "home" did not depend solely on the extent of the defendant's forum contacts, but rather "an appraisal of a corporation's activities in their entirety" throughout the globe, as a corporation operating in many jurisdictions "can scarcely be deemed at home in all of them."<sup>86</sup> Daimler, as a German company with a principal place of business in Germany, was therefore not amenable to the jurisdiction of the California courts for claims arising from alleged actions in Argentina, despite MBUSA's California presence.<sup>87</sup>

Yet the Supreme Court had other paths to render judgment in Daimler's favor. As Professor Richard Freer explained, *Daimler*, like *Goodyear*, was an "easy case[ ]" because it involved a foreign defendant with minimal forum contacts of its own that were not substantial enough to support gen-

<sup>80</sup> See Tanya J. Monestier, *Where Is Home Depot "at Home"?* *Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 287–89 (2014); Robertson & Rhodes, *Business*, *supra* note 11, at 784. For insightful in-depth analysis of the attribution issue, see Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1 (1986); Lonny S. Hoffman, *The Case Against Vicarious Jurisdiction*, 162 U. PA. L. REV. 1023 (2004); and Hoffman, *supra* note 73.

<sup>81</sup> *Daimler*, 571 U.S. at 134; see also *id.* at 146–47 & n.3 (Sotomayor, J., concurring).

<sup>82</sup> *Id.* at 134–39.

<sup>83</sup> *Id.* at 138.

<sup>84</sup> See *id.* at 137–39. The Court's iterations of the test as being where the defendant was "at home" was a change from the allusion in *Goodyear*, which, as discussed previously, described general jurisdiction as appropriate where the defendant was "essentially at home," "fairly regarded as at home," or "in [a] sense at home." See *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919, 924, 929 (2011).

<sup>85</sup> See *Daimler*, 571 U.S. at 139 n.19 (citing, as a potential "exceptional case," its description of *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437 (1952)).

<sup>86</sup> *Id.* at 139 n.20.

<sup>87</sup> *Id.* at 139.

eral jurisdiction even under prior doctrine.<sup>88</sup> The Court could have held, as it hinted, that imputation of MBUSA's contacts to Daimler was not warranted.<sup>89</sup> Indeed, the Ninth Circuit's attribution holding was aptly described by Professor Lonny Hoffman as not only "breathtaking" in scope, but also an "egregious example" of "blindly applying substantive law doctrines" in the jurisdictional context.<sup>90</sup> The Court also could have followed the approach in Justice Sotomayor's concurrence, which, while disagreeing with the majority's "at home" limitation, concluded that California's exercise of jurisdiction was "unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct."<sup>91</sup> Even Justice Ginsburg's majority opinion highlighted "risks to international comity" from an expansive understanding of general jurisdiction, which might have been used to limit sharply general jurisdiction only in the transnational context at issue in both *Daimler* and *Goodyear*.<sup>92</sup> But the Court appeared committed to restricting, based almost exclusively on policy concerns regarding forum shopping and comity, the constitutional limits of general personal jurisdiction against business enterprises in all cases, international and domestic.<sup>93</sup>

The Court reaffirmed this commitment in the domestic context in its most recent general personal jurisdiction decision, *BNSF Railway Co. v. Tyrrell*.<sup>94</sup> Although the outcome was not surprising given the new limits pronounced in *Daimler* and *Goodyear*, this was the Court's first opportunity to apply its newfound jurisdictional restrictions in a context where general jurisdiction previously was routinely exercised by lower courts.<sup>95</sup> *BNSF* involved two consolidated suits filed in Montana state court by allegedly injured railroad employees against their railroad employer under the Federal Employers' Liability Act ("FELA").<sup>96</sup> The workers, who neither resided in nor apparently ever worked for BNSF in Montana, did not contend their injuries had any connection to the state; instead, the alleged jurisdictional grounds included that BNSF was "doing business" and "found within" Montana by operating over 2000 miles of railroad track there (approximately 6% of its track), maintaining one of its twenty-four automotive facilities in

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<sup>88</sup> Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1162 (2015) [hereinafter Freer, *Specific Concerns*].

<sup>89</sup> See *Daimler*, 571 U.S. at 134–36.

<sup>90</sup> Hoffman, *supra* note 73, at 774–75.

<sup>91</sup> *Daimler*, 571 U.S. at 143–44 (Sotomayor, J., concurring).

<sup>92</sup> See *id.* at 140–42.

<sup>93</sup> See *id.* at 136–42. As other scholars have noted, the Court's newfound limitations on general "doing business" jurisdiction appear incompatible with the Court's approval in *Burnham v. Superior Court*, 495 U.S. 604 (1990), of transient presence jurisdiction over individuals. See Cox, *supra* note 59, at 176 (collecting sources); Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M. L. REV. 1, 24 (2016) (arguing asymmetry between treatment of individuals and corporations regarding transient jurisdiction justifies jurisdiction predicated on in-forum service on officers acting on the corporation's behalf).

<sup>94</sup> 137 S. Ct. 1549, 1562 (2017).

<sup>95</sup> Cf. Freer, *Specific Concerns*, *supra* note 88, at 1162 (explaining *Daimler* and *Goodyear* could have been decided the same way under prior doctrine).

<sup>96</sup> *BNSF*, 137 S. Ct. at 1553–54.



the state, employing 2100 Montana workers (around 5% of its workforce), and generating almost 10% of its total revenue from the state.<sup>97</sup>

Despite its ongoing activities in Montana, though, BNSF was neither incorporated nor had its principal place of business there.<sup>98</sup> And therefore, according to the Supreme Court, BNSF was not “at home” in Montana and could not be sued there for claims unrelated to its forum activities.<sup>99</sup> The Court first confronted and then dismissed the workers’ argument that the FELA statutorily authorized state courts to exercise personal jurisdiction over railroads doing some business within the state before turning to the constitutional limits of adjudicative authority under the Fourteenth Amendment.<sup>100</sup> Quoting extensively from her prior writings in *Daimler* and *Good-year*, Justice Ginsburg’s majority opinion reiterated that general jurisdiction is appropriate only when the defendant’s affiliations with the state render it “essentially at home” there, and only in an “exceptional case,” such as perhaps illustrated by *Perkins* where a corporation temporarily relocated during a war, would this occur outside the corporation’s principal place of business and state of incorporation.<sup>101</sup> These limitations, the Court highlighted, govern “all state-court assertions of general jurisdiction over nonresident defendants,” irrespective of “the type of claim asserted or business enterprise sued.”<sup>102</sup>

The Supreme Court did remand the case to the Montana Supreme Court to address a further argument that the workers raised below but the Montana Supreme Court did not reach: whether BNSF consented to personal jurisdiction in Montana by obtaining an authorization to do business in the state and by designating an in-state agent for service of process. The Supreme Court proffered no hints on the appropriate outcome of this issue, instead relying on its position as “a court of review, not of first view.”<sup>103</sup> But this has led to more uncertainty and recurrent litigation, as lower courts have divided on

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<sup>97</sup> *Id.* at 1554.

<sup>98</sup> *Id.* BNSF was incorporated in Delaware with a principal place of business in Texas. *See id.*

<sup>99</sup> *Id.* at 1558–59.

<sup>100</sup> *Id.* at 1555–58. The Justices all concurred that the FELA provision relied upon by the workers did not authorize personal jurisdiction, but instead embodied a venue provision for federal courts and a grant of subject matter jurisdiction for state courts. *See id.*; *see also id.* at 1560 (Sotomayor, J., concurring and dissenting) (“I concur in the Court’s conclusion that [the FELA] does not confer personal jurisdiction over railroads on state courts.”).

<sup>101</sup> *Id.* at 1558.

<sup>102</sup> *Id.* at 1559. Although the Court did not discuss forum shopping in its opinion, the underlying briefing repeatedly alleged that Montana was a magnet forum for FELA claims. *See, e.g.*, Brief for Petitioner at 10–13, *BNSF*, 137 S. Ct. 1549 (2017) (No. 16-405). During oral argument, BNSF’s counsel contended Montana represented “a true wild west” for FELA claims, which then provoked a four-minute colloquy between the Justices and counsel regarding forum shopping. *See The Supreme Court, 2017 Term—Leading Cases: BNSF Railway Co. v. Tyrrell*, 131 HARV. L. REV. 333, 341 (2017).

<sup>103</sup> *BNSF*, 137 S. Ct. at 1559 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). The Montana Supreme Court subsequently held that its registration statute, which specifically provides that the appointment of a registered agent “does not by itself create the basis for personal jurisdiction over the represented entity,” in light of constitutional due process limita-

whether the existing corporate registration statutes operate as a consent to jurisdiction, and, if so, whether allowing registration statutes to serve as an equivalent basis for all-purpose adjudicative jurisdiction would violate constitutional limitations.<sup>104</sup>

In any event, general contacts jurisdiction is now only available in the state of incorporation or a principal place of business of a domestic corporation (and only available over foreign corporations in extreme situations where an American forum is its de facto principal place of business, such as in *Perkins*). This leaves specific jurisdiction as the only available option for a defendant's amenability in most American states.<sup>105</sup> But, contemporaneously with eviscerating general "doing business" jurisdiction, the Roberts Court limited specific jurisdiction.

### B. *The New Restraints on Specific Jurisdiction*

Specific jurisdiction is a more limited form of adjudicative power over a nonresident defendant, subjecting the defendant to amenability only in those cases where a sufficient relationship exists between the litigation and the nonresident's in-state activities.<sup>106</sup> Its essential requirements are that the nonresident defendant purposefully establish contacts with the forum state and that the plaintiff's cause of action be adequately related to the defendant's forum activities. Specific jurisdiction, the Court promised, was supposed to "flourish" after the demise of general "doing business" jurisdiction.<sup>107</sup> But instead, the Roberts Court's jurisdictional doctrine has engrafted further restrictions on exercising this already limited adjudicative power, first by imposing a more stringent examination of whether the defendant itself (rather than an intermediary or the plaintiff) created the connec-

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tions, prevents registration from operating as a consent to personal jurisdiction. *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 7 (Mont. 2018) (quoting 35 M.C.A. § 35-7-115 (2007)).

<sup>104</sup> See, e.g., *Skinner*, *supra* note 23, at 669–72 & nn.282–89 (collecting cases). Scholars are divided as well. Numerous scholars, including one of us, have argued that all-purpose jurisdictional consent predicated on corporate registration alone exceeds constitutional jurisdictional limits. See, e.g., Brilmayer, *General Look*, *supra* note 43, at 757–60; Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 981–82 (1981); Monestier, *supra* note 22, at 1346–48; Jeffrey L. Rensberger, *Consent to General Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction* (unpublished manuscript); Rhodes, *Nineteenth Century*, *supra* note 16, at 442–44. But other scholars view all-purpose jurisdictional consent more favorably, albeit while recognizing that whether a nonresident of the forum should also obtain the benefit is a more difficult issue. See, e.g., Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 162–68 (2018); Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 480–81 (2016).

<sup>105</sup> See William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1207 (2018) (recognizing domestic defendants will always be "at home" in some U.S. forum, while foreign defendants will not, leaving specific jurisdiction "as the only alternative").

<sup>106</sup> See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 126–27 (2014).

<sup>107</sup> *Id.* at 133 n.10.

tion and then by tightening the relationship required between the defendant's activities and the plaintiff's claims.<sup>108</sup>

In the first specific jurisdiction case decided by the Roberts Court, *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>109</sup> the Court considered whether a New Jersey state court could exercise specific jurisdiction in Robert Nicastro's products liability action against the English manufacturer J. McIntyre Machinery when that manufacturer sold a metal shearer to its exclusive independent U.S. distributor (McIntyre Machinery America, Ltd.), which then sold the shearer to Nicastro's New Jersey employer.<sup>110</sup> A sharply divided Supreme Court concluded, without a majority opinion, that generalized "targeting" by the foreign manufacturer of the entire United States as a market for its products was insufficient to support jurisdiction in New Jersey, at least, according to the concurrence, in the absence of regular forum sales.<sup>111</sup> As Justice Ginsburg pointed out in dissent, though, the effect of the Court's holding was to allow J. McIntyre to "wash its hands" of liability merely by assigning its American sales function to an exclusive, independent distributor.<sup>112</sup>

The Court's next specific jurisdiction case, *Walden v. Fiore*,<sup>113</sup> further refined the type of "targeting" necessary for specific jurisdiction; it held that the defendant's mere awareness that the plaintiff will feel the effects of the defendant's conduct in a particular forum is insufficient to amount to targeting that forum for jurisdictional purposes.<sup>114</sup> The Court reasoned, in a relatively brief opinion, that a police officer's alleged actions in drafting a false

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<sup>108</sup> In an apt metaphor, Professor Richard Freer has referred to these constraints as two "walls" or "barriers" between plaintiffs and access to reasonable jurisdictional fora. See Richard D. Freer, *Personal Jurisdiction: The Walls Blocking an Appeal to Rationality*, 72 VAND. L. REV. EN BANC 99, 100 (2019), <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/02/06121950/Personal-Jurisdiction-The-Walls-Blocking-an-Appeal-to-Rationality.pdf> [<https://perma.cc/H364-E5WG>].

<sup>109</sup> 564 U.S. 873 (2011).

<sup>110</sup> *Id.* at 878 (plurality opinion).

<sup>111</sup> *Id.* at 887–89 (Breyer, J., concurring). Justice Kennedy's plurality opinion concluded that McIntyre did not appropriately "manifest an intention to submit to the power of a sovereign" because the company did not target New Jersey on its own for the transmission of goods, but rather "directed marketing and sales efforts at the United States" as a whole. *Id.* at 882–87 (plurality opinion). Justice Breyer's concurring opinion reasoned that the Court's prior cases had never considered a similar singular sale through a distributor as sufficient for jurisdiction. *Id.* at 888–89 (Breyer, J., concurring). For critical commentary, see Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the *Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2012) (urging Kennedy's plurality opinion was "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era"); Megan M. La Belle, *The Future of Internet-Related Personal Jurisdiction After Goodyear Dunlap Tires v. Brown and J. McIntyre v. Nicastro*, 15 J. INTERNET L. 8 (2012) ("[T]he opinions issued by the Court—especially in *McIntyre*—fall far short of the clear-cut guidance that lower courts and litigants seek."); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 491–96 (2012) (contending the plurality opinion is perplexing, deficient, and poorly reasoned).

<sup>112</sup> *Nicastro*, 564 U.S. at 893–94 (Ginsburg, J., dissenting).

<sup>113</sup> 571 U.S. 277 (2014).

<sup>114</sup> See *id.* at 291.

probable cause affidavit to seize the Nevada plaintiffs' poker winnings at the Atlanta airport had an effect in Nevada only "because Nevada is where [plaintiffs] chose to be at a time when they desired to use the funds," and not because "the defendant's conduct connects him to the forum in a meaningful way."<sup>115</sup> Thus, because the defendant had not purposefully "create[d] contacts with the forum State," jurisdiction was improper.<sup>116</sup>

As Professor Scott Dodson explained, *Walden's* holding demands "a direct link between the defendant and the forum that cannot be bridged by the plaintiff's activities or presence."<sup>117</sup> Such a requirement, though, undercuts the venerable holding of *Calder v. Jones*,<sup>118</sup> where the Court reasoned that the plaintiff's forum contacts "may be so manifold as to permit jurisdiction when it would not exist in their absence."<sup>119</sup> Although the *Walden* Court attempted to distinguish *Calder*, its efforts were not convincing; instead, as we previously opined, "*Walden* is a 'stealth overruling' of *Calder*—if a new case were to arise today with the exact same fact pattern as *Calder*, it is unlikely that the Court would sustain jurisdiction."<sup>120</sup> The uncertainty created by the Court's de facto disavowal of *Calder* impacts numerous cases, as controversies involving the "aiming" of intentional conduct to cause in-forum effects are growing exponentially, due to ever-expanding commercial and personal interactions over the web.<sup>121</sup>

After constructing these new obstacles to purposefully targeting the forum in *Nicastro* and *Walden*, the Court next turned to the relationship required between the defendant's forum activities and the litigation in its most recent specific jurisdiction decision, *Bristol-Myers Squibb Co. v. Superior Court*.<sup>122</sup> This pharmaceutical products liability suit against Bristol-Myers for its blood-thinning drug Plavix was filed in California state court by consumers from California and thirty-three other states.<sup>123</sup> Bristol-Myers sold almost a billion dollars of Plavix to California consumers between 2006 and 2012 with the help of its 250 California sales representatives, but it had not developed, manufactured, labeled, packaged, or established the marketing strategy for the drug in any of its five research and development facilities in

<sup>115</sup> *Id.* at 290.

<sup>116</sup> *Id.* at 291.

<sup>117</sup> Dodson, *supra* note 15, at 24–25.

<sup>118</sup> 465 U.S. 783 (1984).

<sup>119</sup> *Id.* at 788 (allowing a defamation case to go forward in California against a journalist and editor who had no connection with the state other than the expectation that individuals in California would read their article).

<sup>120</sup> Rhodes & Robertson, *supra* note 3, at 254 (footnotes omitted).

<sup>121</sup> See Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 389–90 (2015) (noting hundreds of cases relied on *Walden* in a two-year period); Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103, 127–38 (2019) (documenting the rise of web traffic and e-commerce over the last two decades and the resulting jurisdictional challenges); Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1304 (2012) (noting the rapid rise of effects-based cases filed each year).

<sup>122</sup> 137 S. Ct. 1773 (2017).

<sup>123</sup> *Id.* at 1778.

California.<sup>124</sup> Bristol-Myers challenged whether the California courts could exercise jurisdiction over the claims of the nonresident plaintiffs, who did not allege that they obtained the drug through a California source or had any injury in the state.<sup>125</sup> The California Supreme Court rejected the jurisdictional challenge, reasoning that, although general jurisdiction was not available since Bristol-Myers was not at home in California, specific jurisdiction was appropriate under a “sliding scale” relationship because of the company’s extensive California contacts and the similarity between the claims of the nonresidents and the California residents.<sup>126</sup>

But the United States Supreme Court, in an opinion by Justice Alito, reversed. The opinion held, over Justice Sotomayor’s solo dissent, that the state court’s “sliding scale approach,” which was described by the Court as resembling “a loose and spurious form of general jurisdiction,” contravened its precedents.<sup>127</sup> The Court thereby rejected the notion that specific jurisdiction may be relaxed because of the defendant’s extensive unrelated forum contacts; instead, “a connection between the forum and specific claims at issue” is required.<sup>128</sup> This necessary “affiliation between the forum and the underlying controversy” typically arises through an “activity or an occurrence that takes place in the forum State and is therefore subject to the state’s regulation.”<sup>129</sup> Here, the nonresidents “were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.”<sup>130</sup> As a result, specific jurisdiction did not exist over their claims.

Yet while the Court thereby rejected the sliding scale approach used by some lower courts, its decision, as Professor Patrick Borchers highlighted, “shines little light on what counts as a related contact.”<sup>131</sup> Lower courts still employ a bewildering array of often ill-defined approaches to this problem, running the gamut from narrow approaches limiting specific jurisdiction to in-forum injuries proximately caused by the defendant’s forum activities to expansive approaches merely requiring a minimal “but for” relationship between the defendant’s forum actions and the suit.<sup>132</sup> While *Bristol-Myers* emphasized the necessity of a “connection” or an “affiliation,” how much of a connection is necessary? Would it have been enough if the marketing strat-

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874, 887–89 (Cal. 2016), *rev’d*, 137 S. Ct. 1773 (2017). Under the sliding scale approach, “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.” *Id.* at 889 (internal quotations omitted).

<sup>127</sup> *Bristol-Myers*, 137 S. Ct. at 1781.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1780, 1781 (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>130</sup> *Id.* at 1781.

<sup>131</sup> Borchers, *Extending*, *supra* note 15, at 437.

<sup>132</sup> See Rhodes, *Predictability Principle*, *supra* note 51, at 201–08.

egy for Plavix had been established in California? What if some of the research for the drug was conducted by Bristol-Myers in one of its five California facilities? Or could the labeling and packaging of the drug in California be a sufficiently related contact for specific jurisdiction?

These questions went unanswered, leaving no meaningful guidance on the expanse of specific jurisdiction, a boundary which is critical in ensuring the availability of a forum for injured plaintiffs after the demise of general “doing business” jurisdiction. Consider *Nicastro* again. Is there anywhere in the United States Nicastro could have brought his claims against J. McIntyre, who purposefully distributed its shearing machines throughout the United States via an independent exclusive U.S. distributor? General jurisdiction is not possible because J. McIntyre is incorporated with a principal place of business in the United Kingdom. With respect to specific jurisdiction, one option is perhaps Nevada, where Nicastro’s employer first learned of the metal shearer from representatives of J. McIntyre and its distributor before purchasing one from the distributor.<sup>133</sup> Although J. McIntyre thus “purposefully availed” itself of Nevada by directly marketing its products there, is that a sufficient connection for specific jurisdiction when the employer purchased the machine from a distributor in Ohio and the injury occurred in New Jersey? Alternatively, could Nicastro have sued J. McIntyre in Ohio, where it delivered the machine to its independent distributor who then sold it to New Jersey? That would appear to be the best candidate for a U.S. forum<sup>134</sup>—but an ominous passage from *Bristol-Myers* opens the possibility that it does not suffice.

*Bristol-Myers* rejected “a last ditch contention” by the plaintiffs: that the company’s decision to use a California corporation as one of its national distributors for Plavix established another basis for personal jurisdiction.<sup>135</sup> The Court, returning to *Walden*, first highlighted that a defendant’s relationship with a third party, standing alone, is not sufficient for jurisdiction, unless the parties acted together or the defendant had derivative liability for the conduct of the third party.<sup>136</sup> The Court then added that the plaintiffs could not trace their Plavix to a particular distributor to demonstrate the necessary connection.<sup>137</sup> While this latter basis for rejecting the plaintiffs’ jurisdictional argument would not impact those in situations similar to that Nicastro confronted, with a single U.S. distributor, what happens when the foreign manu-

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<sup>133</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878–79 (2011) (plurality opinion); *id.* at 888 (Breyer, J., concurring); *id.* at 894–96 (Ginsburg, J., dissenting).

<sup>134</sup> See Transcript of Oral Argument at 8–13, *Nicastro*, 564 U.S. 873 (2011) (No. 09-1343) (J. McIntyre’s counsel arguing Nicastro’s claim should have been brought in Ohio during skeptical questioning by Justices Ginsburg and Kagan).

<sup>135</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783 (2017).

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*; see also Transcript of Oral Argument 33, *Bristol-Myers*, 137 S. Ct. 1773 (2017) (No. 16-466) (plaintiffs’ counsel conceding before the Supreme Court that it was impossible to track a particular pill to a particular distributor).

facturer has several U.S. agents distributing a standardized product that cannot be traced to a particular distributor?

Or what if *Bristol-Myers* is later read to impose a stand-alone requirement that a distributor's activities cannot be considered in ascertaining the amenability of manufacturers in the absence of concerted action? Such an interpretation would utterly upend jurisdiction over foreign product manufacturers. No evidence would typically exist that a manufacturer engaged in relevant acts together with its distributor in its distributor's home state, nor would a legal basis typically exist for holding the manufacturer derivatively liable for its distributor's home-state conduct. If in-forum delivery of products to a third-party distributor is not a relevant specific jurisdiction contact for a subsequent products liability suit, foreign manufacturers like J. McIntyre would be insulated from any claim in an American forum as long as they used an independent U.S. distributor for their products.

And the uncertainties and injustices arising from the Court's new jurisdictional restrictions extend well beyond foreign manufacturers' liability and other transnational disputes.<sup>138</sup> Returning to the *BNSF* scenario, could a Montana truck driver, who was hired and employed by BNSF in Montana, sue BNSF in Montana under the FELA if the driver was injured while temporarily working in another state?<sup>139</sup> Would the in-state residence, hiring, and employment of the truck driver establish a sufficient connection to the injury to authorize a Montana court to exercise specific jurisdiction over the claim, or would the driver be relegated to suing BNSF in the state where the actual injury occurred? The answer is now unclear after general jurisdiction's demise—BNSF maintained before the Montana Supreme Court that the driver in such a situation would be unable to bring his action in the state where he regularly resides and works due to the lack of the necessary connection between the forum and the injury, even though the FELA's purposes included safeguarding injured workers from the injustice of pursuing claims in distant locales.<sup>140</sup>

Comparable uncertainties and injustices now routinely plague jurisdictional doctrine. Could a family sue in their home state for an injury suffered in another state by the negligence of a Delaware corporation's employees in

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<sup>138</sup> Scholars have addressed the troubling potential ramifications of the Court's jurisdictional limitations in a myriad of transnational contexts. See, e.g., Tanya J. Monestier, *Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments*, 96 B.U. L. REV. 1729 (2016) (recognition and enforcement of foreign judgments); Robertson & Rhodes, *Shifting Equilibrium*, *supra* note 11, at 643 (asset-freeze orders against the customer accounts of foreign banks maintaining permanent U.S. branches); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344 (2016) (recognition and enforcement of foreign judgments); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325 (2018) (Anti-Terrorism Act and Foreign Sovereign Immunities Act); Skinner, *supra* note 23 (federal transnational claims).

<sup>139</sup> Cf. *Tyrrell v. BNSF Railway Co.*, 373 P.3d 1, 7 (Mont. 2016) (posing this hypothetical), *rev'd*, 137 S. Ct. 1549 (2017).

<sup>140</sup> See *id.* at 4.

operating one of the company's ubiquitous national brand-name hotels?<sup>141</sup> How about suing at home for a slip-and-fall claim against Wal-Mart or Home Depot while shopping on vacation in another state?<sup>142</sup> Can a worker exposed to asbestos manufactured by a national corporation sue in his home state when the corporation operates in-forum facilities and he first manifested an asbestos-related disease there, but his actual exposure to the corporation's asbestos-containing products occurred in another state?<sup>143</sup> All these questions would have been answered affirmatively before the Roberts Court's jurisdictional sextet, but now the answers, while not definitive, appear to be to the contrary.<sup>144</sup>

Such decisions barring residents from maintaining suits in their home states against out-of-state corporations conducting substantial in-state business operations aptly illustrate the disarray and inequity unleashed by the Court's jurisdictional revolution.<sup>145</sup> The Supreme Court will soon be grappling directly with the appropriate causation standard in two recently granted consolidated cases, both involving suits against Ford Motor Corporation by forum residents injured in their home state in their used vehicles Ford originally sold in another state.<sup>146</sup> Regardless of the ultimate resolution of these cases, however, an alternative jurisdictional approach is sorely needed to restore the fairness and efficiency aspirations of the adversary system.

### III. AN ALTERNATIVE: CONSENTING TO THE EXERCISE OF STATE AUTHORITY

Consent provides such an alternative jurisdictional avenue, operating outside the due process minimum contacts analysis.<sup>147</sup> The Supreme Court has long acknowledged that non-resident defendants can consent to personal jurisdiction, which, when given in accordance with the Constitution, waives other potential constitutional challenges to the state's adjudicative power.<sup>148</sup>

<sup>141</sup> See Rhodes & Robertson, *supra* note 3, at 212–13 & n.7 (posing a similar hypothetical based on earlier cases addressing the issue).

<sup>142</sup> *Cf.* Lawson v. Simmons Sporting Goods, Inc., 569 S.W.3d 865, 870–72 (Ark. 2019) (holding Louisiana store near Arkansas border that targeted Arkansas consumers not amenable to jurisdiction in Arkansas for resident's slip-and-fall claim).

<sup>143</sup> *Cf.* Waite v. AII Acquisition Corp., 901 F.3d 1307, 1310–11 (11th Cir. 2018) (upholding jurisdictional dismissal of similar claim).

<sup>144</sup> See, e.g., *id.* at 1310–11; Lawson, 569 S.W.3d at 870–72.

<sup>145</sup> *Cf.* Waite, 901 F.3d at 1310–11; Lawson, 569 S.W.3d at 870–72.

<sup>146</sup> Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, 395 Mont. 478 (Mont. 2019), *cert. granted*, 140 S. Ct. 917 (2020); Ford Motor Co. v. Bandemer, 932 N.W.2d 744 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020).

<sup>147</sup> See, e.g., Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988) (distinguishing consensual jurisdiction under an appointment statute from the minimum contacts analysis); Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (distinguishing contacts jurisdiction from consent jurisdiction).

<sup>148</sup> E.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985); Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–07 (1982); Pennoyer v. Neff, 95 U.S. 714, 733 (1878); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856).



The Court's decisions have recognized "a variety of legal arrangements" as "represent[ing] express or implied consent to the personal jurisdiction of the court."<sup>149</sup> One arrangement that historically has indicated at least a limited consent to jurisdiction is corporate registration and agent appointment statutes.

A. *Historical Development and Interpretation of Corporate Registration Statutes*

Corporate registration and appointment statutes first appeared in the mid-nineteenth century in response to the initial common-law understanding that a corporation had no existence outside its state of incorporation.<sup>150</sup> This common-law view at first prevented corporations from being amenable to suit at all in the courts of another state.<sup>151</sup> To alleviate the injustice from a corporation's avoidance of its obligations where they arose, states began to require, as a statutory condition for the corporation to do business in the state, that the corporation register with state authorities and appoint an agent to accept service of process in cases related to its forum activities.<sup>152</sup>

The Supreme Court first upheld service on an appointed agent under a registration statute as an appropriate jurisdictional basis entitled to full faith and credit in 1856, in *Lafayette Insurance Co. v. French*.<sup>153</sup> Lafayette Insurance, an Indiana corporation, executed an insurance contract in Ohio with Ohio citizens to insure property in Ohio through its statutory Ohio resident agent.<sup>154</sup> Under Ohio law, service of process on a resident insurance agent bound an out-of-state insurer to appear for suits founded on its in-state insurance contracts with state citizens.<sup>155</sup> Nevertheless, Lafayette did not appear when its agent was served with the contract suit, allowing the insureds to obtain a judgment in Ohio state court that the insureds then sought to execute in the federal circuit court for Indiana.<sup>156</sup> The Supreme Court affirmed the circuit court's dismissal of Lafayette's full-faith-and-credit jurisdictional challenge to the Ohio judgment, reasoning that, because Lafayette could transact business in Ohio only with the authorization of the state, Ohio could impose as a condition for that authorization that the agent accept service of process in lawsuits founded on its contracts of insurance entered into in the

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<sup>149</sup> *Ins. Corp. of Ir.*, 456 U.S. at 703.

<sup>150</sup> *E.g.*, *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301, 314 (1841); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588–89 (1839). Of course, the Supreme Court subsequently discarded this common-law notion. *See, e.g.*, *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 10–13 (1878).

<sup>151</sup> *See, e.g.*, *Peckham v. N. Par. in Haverhill*, 16 Pick. 274, 275 (Mass. 1834); *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 6 (N.Y. Sup. Ct. 1819).

<sup>152</sup> *See St. Clair v. Cox*, 106 U.S. 350, 354–55 (1882).

<sup>153</sup> 59 U.S. (18 How.) 404 (1856).

<sup>154</sup> *Id.* at 406.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 404–06.

state.<sup>157</sup> Yet the decision was limited to situations in which the suits were related to the business being conducted within the forum: “We limit our decision to the case of a corporation acting in a State foreign to its creation, under a law of that State which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents.”<sup>158</sup>

Subsequent nineteenth-century cases continued to describe the permissible corporate consent for the privilege of conducting business as limited to actions related to the corporation’s conduct of business within the forum.<sup>159</sup> As the corporate presence fiction developed, though, service on a statutory agent became a jurisdictional basis in early twentieth-century cases to adjudicate claims unrelated to the corporation’s activities within the state.<sup>160</sup> Yet these cases were linked to the then-prevailing “presence” by “doing business” construct.<sup>161</sup> The Court was hesitant to predicate a defendant’s amenability on serving a registered agent when the defendant no longer was conducting business within the forum, several times construing state registration statutes as not encompassing such a questionable jurisdictional reach.<sup>162</sup> Now that the Roberts Court has discarded general jurisdiction via a defendant’s “presence” in the state through conducting in-state business,<sup>163</sup> registration statutes might no longer be a permissible basis for all-encom-

<sup>157</sup> *Id.* at 407. The Court viewed this as an exchange: “Now when this corporation sent its agents 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.” *Id.* at 408.

<sup>158</sup> *Id.* at 408–09.

<sup>159</sup> *See, e.g.,* *St. Clair v. Cox*, 106 U.S. 350, 356 (1882) (declaring corporation could be required to “stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specifically designated”); *Ex parte Schollenberger*, 96 U.S. 369, 378 (1878) (noting a nonresident corporation “may, for the purpose of securing business, consent to be ‘found’ away from home, for the purposes of suit as to matters growing out of its transactions”); *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878) (opining its holding did not preclude a state from requiring “a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts”); *Balt. & Ohio R.R. Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1871) (stating a corporation could be required to “consent to be sued” in a forum, with such assent presumed through conducting in-forum business).

<sup>160</sup> *See, e.g.,* *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94 (1917).

<sup>161</sup> *See* Rhodes, *Nineteenth Century*, *supra* note 16, at 437–40.

<sup>162</sup> *See, e.g.,* *Chipman Ltd. v. Thomas B. Jeffrey Co.*, 252 U.S. 373, 379 (1920) (leaving open the constitutionality of all-encompassing jurisdiction over a corporation based on serving its registered forum agent when the corporation was not doing business there); *accord* *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 408–09 (1929) (construing state registration statute as not conferring jurisdiction over registered corporations not actually conducting business within the state); *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213, 216 (1921) (construing state registration statute similarly).

<sup>163</sup> *See supra* Part II.A.

passing general jurisdiction for claims arising anywhere in the world.<sup>164</sup> Yet the Supreme Court has never indicated any hesitancy with upholding consent by registration when there is some even attenuated connection with the forum state, as the defined articulation of an exchange of benefits and burdens has authorized adjudicative jurisdiction in situations where the relationship necessary for specific contacts jurisdiction may not otherwise have been present.

Take *Louisville & Nashville Railroad Co. v. Chatters*,<sup>165</sup> which found the necessary relationship with the forum under a consent statute for an injury suffered outside the forum solely because the plaintiff purchased his railroad ticket from another entity in the forum.<sup>166</sup> Chatters was injured when a train window broke and he was hit with flying glass while the train was being operated by the Southern Railway Company, a Virginia corporation, in Virginia.<sup>167</sup> Chatters had purchased his ticket for his journey in New Orleans from the Louisville & Nashville Railroad Company, a Kentucky corporation, which operated the train from New Orleans to Alabama. Chatters sued both Southern and Louisville & Nashville in Louisiana, but Southern asserted that, under Louisiana state law, its appointment of an agent constituted a consent to suit only upon causes of action arising out of business conducted within the state.<sup>168</sup> Southern continued that, since the accident occurred in Virginia, and the ticket was sold in Louisiana by another entity (Louisville & Nashville), an adequate relationship did not exist between Southern's business in Louisiana and Chatters' claim. While accepting the argument that state law required a relationship between the corporation's forum business and the claim, the Supreme Court held that Southern was amenable to jurisdiction in Louisiana.<sup>169</sup> The Court concluded that the obligation to Chatters predicated on the contract of transportation was incurred within Louisiana and, even though the contract was not executed by Southern, the obligation was accepted by Southern after being executed by an agent.<sup>170</sup> This established that the subsequent injury in Virginia was sufficiently connected to Southern's forum business to comport with the consent statute.<sup>171</sup> The Court was unwilling to construe the relationship requirement for a consent statute narrowly when Southern conducted activities within the forum state and appointed a designated agent for service of process.<sup>172</sup>

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<sup>164</sup> See Monestier, *supra* note 22, at 1346; Rhodes, *Nineteenth Century*, *supra* note 16, at 442–44.

<sup>165</sup> 279 U.S. 320 (1929).

<sup>166</sup> *Id.* at 329.

<sup>167</sup> *Id.* at 323.

<sup>168</sup> *Id.* at 325–26.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 327.

<sup>171</sup> *Id.* at 327–29.

<sup>172</sup> *Id.*

The same principle could also explain the Supreme Court's implicit suggestion in *Shaffer v. Heitner*<sup>173</sup> that Delaware could enact a consent statute deeming the acceptance of a Delaware corporate directorship as a consent to jurisdiction for claims related to the director's duties.<sup>174</sup> Although the Supreme Court held in *Shaffer* that a directorship alone did not establish the propriety of specific jurisdiction, the Court distinguished the situation from the expectations arising under statutes in other states requiring directors to consent to jurisdiction for suits related to their corporate duties.<sup>175</sup> This distinction has led the lower courts to uphold such consent statutes, including the one adopted by Delaware immediately after the *Shaffer* decision, even though a consent statute does not change the director's contacts with the forum state.<sup>176</sup> Yet because a state's corporate law creates benefits regarding the status, authority, and privileges of directors, these benefits may be exchanged for the directors' promise of amenability for causes of action arising from or related to their duties.<sup>177</sup> Such an appropriate bargain, where the state has the authority to establish the parameters of directors' powers and obligations, should authorize an expanded jurisdictional reach, as long as the state does not exceed its legitimate regulatory authority. Although a directorship alone cannot establish the propriety of contacts jurisdiction in the forum when the conduct giving rise to the litigation arose elsewhere under *Shaffer*, a consent statute may change the analysis through the exchange of state benefits for guaranteed amenability for claims related to directors' corporate obligations.<sup>178</sup>

The single potential constitutional concern that has been raised by scholars concerning the consent statute Delaware adopted in response to *Shaffer* is that it "deems" the consent through the director's activity (that is, accepting the directorship), irrespective of the director's knowledge of the obligation.<sup>179</sup> The Supreme Court has largely abandoned its prior view that a state can rest adjudicative power on an implied, fictional consent arising

<sup>173</sup> 433 U.S. 186 (1977).

<sup>174</sup> *Id.* at 216 ("Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State.").

<sup>175</sup> *See id.*

<sup>176</sup> *E.g.*, *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157–58 (3d Cir. 2010); *In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1271–73 (D. Md. 1981); *Stearn v. Malloy*, 89 F.R.D. 421, 423–24 (E.D. Wis. 1981); *Wagenberg v. Charleston Wood Prods., Inc.*, 122 F. Supp. 745, 748 (E.D.S.C. 1954); *Gansler v. Stephens*, 965 A.2d 695, 704–09 (Del. 2009); *Armstrong v. Pomerance*, 423 A.2d 174, 176–80 (Del. 1980); *Swenson v. Thibaut*, 250 S.E.2d 279, 290 (N.C. App. 1978).

<sup>177</sup> *See Armstrong*, 423 A.2d at 176–77.

<sup>178</sup> *Shaffer*, 433 U.S. at 216.

<sup>179</sup> *See Eric A. Chiappinelli, The Myth of Director Consent: After Shaffer, Beyond Nicastro*, 37 DEL. J. CORP. L. 783, 813 (2013) (urging Supreme Court precedent "made it perfectly clear that predicating personal jurisdiction upon 'implied consent' was both ineffective and unhelpful"); Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1185 (arguing implied consent is an insufficient basis for personal jurisdiction over nonresident corporate officers).

solely from the nonresident's activities.<sup>180</sup> Yet, as these objecting scholars have proposed, the conceptual difficulty with implied consent can be readily avoided by moving to a recognized form of actual consent, which would ensure that corporate directors had legally sufficient notice of the exchange of their jurisdictional amenability for the legal benefits received from the state.<sup>181</sup>

### B. *The Constitutionality of Explicit Registration Conditions*

The exchange of obligations and benefits when nonresident corporations are required to register and obtain a certificate of authority to do business in a state likewise supports that state imposing explicit jurisdictional consequences as part of the bargain. Corporations are artificial entities that depend on legal recognition, first springing into existence via filing articles of incorporation and obtaining a certificate of incorporation from a sovereign authority.<sup>182</sup> Thus, a "corporation . . . owes its existence and attributes to state law,"<sup>183</sup> as a sovereign must give its permission as a regulatory precondition for a corporation to conduct its operations.<sup>184</sup> Corporations are not "citizens" for purposes of the Privileges and Immunities Clause of Article IV, having no protection against the state denial of those benefits and privileges protected by that clause, including the right to maintain an action in the courts of another state or the right to conduct ongoing local, in-state business activities.<sup>185</sup>

Every state statutorily requires out-of-state corporations transacting in-state business to register with and obtain a certificate of authority from a

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<sup>180</sup> See, e.g., Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 169 (noting the Supreme Court abandoned "wholly fictional notions of 'implied' and 'hypothetical consent' . . . after a century or so of experimenting with it"); Wendy Collins Purdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 537–44 (1991) (discussing the difficulties with implicit consent as a jurisdictional justification).

<sup>181</sup> See Chiappinelli, *supra* note 179, at 836; Winship, *supra* note 179, at 1199. Professor Chiappinelli's article proposed a tailored statutory fix to amend Delaware's annual reporting requirements to necessitate a separate signed consent to personal jurisdiction from each director and officer. Chiappinelli, *supra* note 179, at 836.

<sup>182</sup> See 1A WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* 129, 137–46, 166 (2010).

<sup>183</sup> *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987).

<sup>184</sup> *Id.*; William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1503 (1989).

<sup>185</sup> See, e.g., *Ry. Express Agency, Inc. v. Virginia*, 282 U.S. 440, 443–44 (1931) (upholding Virginia statute precluding nonresident corporations from exercising powers and intrastate business activities of a public service corporation); *Hemphill v. Orloff*, 277 U.S. 537, 548–51 (1928) (holding out-of-state commercial investment trust conducting in-state negotiable notes business could not rely upon the Privileges and Immunities Clause to maintain a breach of contract action in Michigan state court that had been dismissed for the trust's failure to obtain a certificate of authority); *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 275–78 (1927) (holding out-of-state insurance company could not sue in state court to enforce insurance contract without complying with state licensing requirements).

designated official in order to do business in the state.<sup>186</sup> Without obtaining the required authorization, a nonresident corporation is barred from accessing the state's judicial system under all or almost all these registration statutes, with many states also imposing fines and other penalties, including the restraint of further intrastate business transactions, for the failure to comply.<sup>187</sup> The Supreme Court has consistently upheld the constitutionality of both these registration and authorization statutes and their associated consequences for noncompliant nonresident corporations conducting local, intrastate business activities, although such cases largely pre-date the Roberts Court's recent personal jurisdiction jurisprudence.<sup>188</sup>

Not all corporate business transactions, though, can constitutionally trigger a registration responsibility. The dormant commerce clause prohibits states from placing an undue burden on interstate commerce, thereby barring state-compelled registration or the accompanying burdens on out-of-state corporations solely engaged in interstate business *with* state citizens and not conducting local business operations *within* the state.<sup>189</sup> Thus, for example, the Supreme Court held in *Davis v. Farmers' Co-op Equity Co.*<sup>190</sup> that a state statute authorizing jurisdiction over any railroad based on an in-state agent soliciting interstate traffic for its out-of-state railroad lines violated the dormant commerce clause when applied to "a suit in a state in which the cause

<sup>186</sup> See Monestier, *supra* note 22, at 1363–66.

<sup>187</sup> See *id.* For some examples of state statutes authorizing injunctive relief to preclude further corporate intrastate activity for failure to obtain the required certificate of authority, see ALA. CODE §§ 10A-1-7.22–.23 (2020); ARIZ. REV. STAT. ANN. § 10-1502 (2020); ARK. CODE ANN. § 4-27-1502 (2020); COLO. REV. STAT. § 7-90-802 (2020); CONN. GEN. STAT. § 33-921 (2020); DEL. CODE ANN. tit. 8, §§ 378–84 (2020); N.J. STAT. ANN. §§ 14A:13-11–12 (2019); N.Y. BUS. CORP. LAW § 1303 (McKinney 2020); UTAH CODE ANN. § 16-10A-1502 (2020).

<sup>188</sup> See, e.g., *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278–83 (1961) (affirming dismissal of nonresident corporation's state court complaint for its failure to obtain a certificate of authority when it was conducting some intrastate business through a forum office); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 206–12 (1944) (affirming dismissal of nonresident's state court complaint for its failure to obtain a certificate of authority when it was conducting localized in-state business in furtherance of its import-export brokerage business); *Bothwell*, 275 U.S. at 275–78 (affirming dismissal of nonresident insurance corporation's breach of contract suit for failing to comply with state licensing requirements).

<sup>189</sup> See, e.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 29–34 (1974) (holding dismissal of nonresident cotton merchant's state court suit for breach of contract due to its failure to qualify to do business violated the Commerce Clause as the merchant's state contacts did not establish the necessary "localization or intrastate character" for compelled state registration); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290–93 (1921) (holding nonresident milling company's breach of contract action for the interstate sale and delivery of wheat could be maintained in state court despite its failure to register for in-state business because registration requirement could not be applied to a transaction in interstate commerce without violating the Commerce Clause); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 204–05 (1914) (reversing dismissal, for failing to comply with registration statute, of a state court action brought by nonresident corporation to recover on a contractual transaction in interstate commerce); *Int'l Textbook Co. v. Pigg*, 217 U.S. 91, 110–12 (1910) (holding statutory condition that out-of-state corporation conducting interstate business submit a statement of its financial condition and a listing of all its directors, officers, and trustees unconstitutionally burdened interstate commerce).

<sup>190</sup> 262 U.S. 312 (1923).

of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside.”<sup>191</sup> The railroad, a Kansas corporation, had entered into a contract with another Kansas corporation to ship grain within Kansas over its railroad line, yet the plaintiff sued the railroad in Minnesota, relying entirely on the Minnesota statute that compelled interstate carriers to submit to suit there as a condition of maintaining an agent to solicit out-of-state freight and passenger traffic.<sup>192</sup> Yet because such solicitation was “a recognized part of the business of interstate transportation,” the Court reasoned the Minnesota statutory condition requiring a general submission to suit to conduct interstate business imposed “a serious and unreasonable burden” on interstate commerce, rendering the statute “obnoxious to the commerce clause.”<sup>193</sup> The linchpin to invalidating this statutory jurisdictional condition, then, was the exclusively interstate nature of the company’s business, without any local activity recognized as the regular conduct of intrastate business.

To ensure compliance with this dormant commerce clause limitation, corporate registration statutes explicitly limit their application to those non-resident corporations that “transact business” in the state, which is typically statutorily defined by excluding those in-state activities that are *not* sufficient to transact business (such as interstate business activities, isolated in-state transactions, or mere solicitations).<sup>194</sup> Only those corporations engaging in an ongoing and regular course of intrastate or local business activity are required to register and obtain a certificate of authority, as such corporations are conducting activities comparable to a local business enterprise.<sup>195</sup> These

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<sup>191</sup> *Id.* at 317.

<sup>192</sup> *Id.* at 313–14.

<sup>193</sup> *Id.* at 315–17.

<sup>194</sup> See generally CSC GLOBAL, GUIDE TO DOING BUSINESS OUTSIDE YOUR STATE: THE CSC 50-STATE QUALIFICATION HANDBOOK (2018). The Model Business Corporation Act lists the following activities as insufficient for transacting in-state business: conducting isolated in-state transactions, transacting interstate business, soliciting orders, selling through independent contractors, owning property or bank accounts, collecting debts, participating in litigation, creating or acquiring indebtedness, holding certain meetings, and maintaining offices for the transfer of securities. See *id.* Most states have adopted these exclusions in whole or in substantial part, although there are variations. See *id.*

<sup>195</sup> See, e.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 29–34 (1974) (holding compelled state registration impermissible without the requisite “localization or intrastate character” of business activities); *Netherlands Shipmortgage Corp. v. Madias*, 717 F.2d 731, 736 (2d Cir. 1983) (summarizing New York cases as requiring the intrastate activity to be “permanent, continuous, and regular” to impose a registration requirement, necessitating that some activities subjecting the nonresident to adjudicative jurisdiction will not constitute transacting business); *Charter Fin. Co. v. Henderson*, 326 N.E.2d 372, 375 (Ill. 1975) (holding isolated business transactions within the state insufficient to trigger registration duty); *Yangming Marine Transport Corp. v. Revon Prods. U.S.A., Inc.*, 536 A.2d 633, 636 (Md. 1988) (holding unqualified corporation can only be barred from suing in Maryland courts if corporation is engaging in “such a substantial amount of localized business in this State that the corporation could be deemed ‘present,’” requiring a “significantly greater amount of local activity” than the minimum for personal jurisdiction); *Long Mfg. Co. v. Wright-Way Farm Serv., Inc.*, 214 N.W.2d 816, 818–20 (Mich. 1974) (holding a nonresident corporation’s isolated or indepen-

local, ongoing activities implicate the regulatory authority of the state to attach conditions on the terms under which the nonresident corporation operates within the state.<sup>196</sup> In other words, in exchange for the state's permission to conduct such local activities, the corporation can be obligated to accept proportional state-imposed qualifications, as a state is generally free to enact reasonable conditions on those state-conferred benefits that the Constitution allows to be withheld.

In light of the Supreme Court's revolutionary restrictions on state adjudicative authority discussed in Part II, states should reassert their authority to adjudicate claims related to their sovereign interests through attaching reasonable qualifications on corporate privileges in using state courts and conducting local intrastate business operations. Our proposal suggests accomplishing this through an explicit, defined-consent corporate registration scheme. The proposal requires, as a condition for the corporation to obtain or maintain a certificate of authority to do business in the state, the corporation's consent to suit in defined circumstances that implicate state sovereign interests, including situations where (1) the suit arises from an injury suffered in the state, (2) the suit is brought by a state resident, (3) the suit is governed by that state's law, or (4) the suit is to enforce a judgment or remedial order against persons or property within the state.

#### IV. A PROPOSAL FOR A DEFINED-CONSENT REGISTRATION SCHEME

Although states could act unilaterally to define the scope of their registration acts, the Uniform Law Commission is especially well positioned to recommend a draft act. The ULC, founded in 1892, is a nonpartisan organization composed of commissioners from all fifty states and several U.S. territories, many of whom have legislative experience.<sup>197</sup> The ULC proposes legislation in areas where states have the primary regulatory authority, but where state uniformity is necessary or desirable.<sup>198</sup> Those acts are then made available to the states, becoming effective only when adopted by state legislatures.

To date, the ULC has produced more than 300 different acts.<sup>199</sup> Perhaps the best-known ULC project is the Uniform Commercial Code, which has been adopted in all fifty states and has created an efficient and reliable set of

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dent intrastate activities, even if sufficient to establish adjudicative jurisdiction, do not suffice to compel its registration, as an intent to carry on the ongoing corporate business in the state is necessary); *Highfill, Inc. v. Bruce & Iris, Inc.*, 855 N.Y.S.2d 635, 636–38 (App. Div. 2008) (dismissing contract claims of Louisiana corporation doing regular in-state business in New York for failing to register because it was engaging in a systematic, continuous, and regular course of intrastate business essential to its overall operations).

<sup>196</sup> See *supra* notes 173–85.

<sup>197</sup> ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION 1 (2013); *Overview, UNIFORM LAW COMM'N*, <http://www.uniformlaws.org/aboutulc/overview> [https://perma.cc/LQ6J-YVXP].

<sup>198</sup> STEIN, *supra* note 197, at 236.

<sup>199</sup> UNIFORM LAW COMM'N, *supra* note 197.



rules for commercial transactions.<sup>200</sup> Other well-known acts emanating from the ULC include the Uniform Trade Secrets Act and the Model Registered Agents Act.<sup>201</sup>

The ULC develops two different types of acts. “Uniform” acts are aimed at “establish[ing] the same law on a subject among the various jurisdictions.”<sup>202</sup> In cases where absolute uniformity is not needed, “model” acts are intended to enable state variations; these acts “promote uniformity and minimize diversity even though a significant number of jurisdictions may not adopt the act in its entirety.”<sup>203</sup> For the reasons discussed below, we believe that an act specifying the jurisdictional consequences of corporate registration would be best structured as a model act, allowing states to choose the provisions best suited to their own needs.

### A. *The Need for a Clarified Jurisdictional Reach*

An essential aspect of the proposed act is providing corporations explicit notice as to the jurisdictional consequences of registering to do business in the forum. Since registration and agent appointment statutes were promulgated in the nineteenth century, questions of statutory interpretation regarding the extent of the consent granted and any constitutional limitations on obtaining such a consent have been recurring issues.<sup>204</sup> In the early twentieth century, the Supreme Court, along with lower courts, struggled with whether service on a registered or corporate agent, standing alone, could support all-purpose jurisdictional authority for a claim arising anywhere in the world.<sup>205</sup> But as the judiciary solidified the former “continuous and systematic” standard for general jurisdiction, the need to interpret registration statutes diminished—after all, registering to do business in a state usually accompanied the requisite continuous and systematic contacts for “doing business” general jurisdiction (because otherwise the state could not compel registration under the Commerce Clause).<sup>206</sup> Thus, the need to interpret the jurisdictional effect of business registration largely faded away.

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<sup>200</sup> *Id.*

<sup>201</sup> *Find an Act*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/acts/findact> [<https://perma.cc/3HSX-P5KQ>].

<sup>202</sup> *What Is a Uniform Act?*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/acts/overview/uniformacts> [<https://perma.cc/Q6JL-LRDH>].

<sup>203</sup> *What Is a Model Act?*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/acts/overview/modelacts> [<https://perma.cc/97TR-3U5V>].

<sup>204</sup> *See supra* Part III.

<sup>205</sup> *See, e.g.*, *Davis v. Farmers’ Co-op Equity Co.*, 262 U.S. 312, 317–18 (1923) (holding Commerce Clause barred states from compelling interstate carriers to generally submit to all suits through a solicitation agent); *Chipman Ltd. v. Thomas B. Jeffrey Co.*, 252 U.S. 373, 379 (1920) (leaving open the constitutionality of all-encompassing jurisdiction over a corporation based on serving its registered forum agent when the corporation was not doing business there).

<sup>206</sup> *See supra* Parts II, III.

Now, with the demise of “continuous and systematic” general “doing business” jurisdiction, the meaning of these registration statutes gains renewed urgency. In general, the states have adopted broad statutory conceptions of the permissible bounds of their jurisdictional reach in their long-arm statutes in order to protect their citizens, provide an available forum for redress, resolve cases implicating their regulatory power, and cooperate with other states to obtain efficient resolution of controversies. In approximately thirty states, the long-arm jurisdictional power extends as far as constitutional due process will allow.<sup>207</sup> Other state long-arm statutes either contain explicit provisions or were (before *Daimler*) interpreted as authorizing general jurisdiction in cases where the defendant was “doing business” within the state.<sup>208</sup> Few, if any, states have such narrow long-arm provisions that the demise of general jurisdiction leaves no jurisdictional void.

As a result, the question that was previously avoidable—that is, what is the jurisdictional effect of registering to do business and appointing an agent for in-state service of process?—must now be answered in nearly every state.<sup>209</sup> But at the present time, significant uncertainty remains regarding the interpretation of most states’ registration statutes. A 2015 post-*Daimler* survey of state practices found that thirty-two states had not then “clarified the jurisdictional consequences of their registration statutes.”<sup>210</sup> Another nine at that time had either decided or suggested that registration can give rise to general jurisdiction—though these states (as the Delaware Supreme Court recently did<sup>211</sup>) will likely need to revisit their holdings in light of the Supreme Court’s recent jurisprudence.

This pending jurisdictional interpretive question can be resolved by two separate institutions. First, the question can be addressed by the judiciary when a plaintiff sues a defendant who was registered to do business in the state for a cause of action arising outside the state. Since the *Daimler* decision, this issue has been frequently arising in litigation pending in state and

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<sup>207</sup> CASAD, RICHMAN & COX, *supra* note 20, § 4.01.

<sup>208</sup> See *Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 233 (D.C. 2006) (holding general jurisdiction could be based on a “consistent pattern of regular business activity” within the state (quoting *AMAF International Corp. v. Ralston Purina Co.*, 428 A.2d 849, 850 (D.C. 1981))); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 804 P.2d 627, 631 (Wash. Ct. App. 1991) (holding that general jurisdiction could be based on “continuous and substantial” in-state business).

<sup>209</sup> *Cf. State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 168 (Mo. 1999) (holding that the court need not decide whether the appointment of a registered agent “is always sufficient to confer jurisdiction” because general jurisdiction could be obtained over any defendant “conducting substantial and continuous business” within the state).

<sup>210</sup> Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1647 (2015). A few state supreme courts, including the high courts in Illinois, Missouri, Oregon, and Wisconsin, have since provided clarification. See *infra* note 212.

<sup>211</sup> See *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126–28 (Del. 2016) (overruling, in light of *Daimler*, earlier precedent holding that in-state registration could establish general jurisdiction).

federal courts.<sup>212</sup> Second, the interpretation question could be set to rest with an explicit jurisdictional pronouncement by the state legislature. Of course, in the absence of legislation, most states will eventually answer the question through litigation. Nonetheless, the litigation process is typically expensive and time consuming, and multiple cases may raise the issue in a single forum before the matter is resolved.<sup>213</sup> Moreover, even if the matter is resolved by the state's highest court, the court's decision is still only an interpretation of a legislative act—if the legislature disagrees with that interpretation, it may decide to amend the statute in any case.

Adopting an explicit defined-consent statute allows a state to avoid the perilous terrain of constitutional, statutory, and administrative regulations governing forum selection. Pre-suit express consent is an easy-to-administer and precise mechanism to establish the propriety of an adjudicative proceeding in a particular forum. By specifying an agreement in advance, the parties avoid a shifting and unstable jurisdictional doctrine that has engendered uncertainty and injustices regarding permissible locales for adjudication.

### B. *The Model Corporate Registration Jurisdictional Consent Act*

Given the inefficiency of litigating the same question in over half the states, and the ultimate responsibility of the legislature to statutorily define the jurisdictional reach of the state courts, we conclude that legislation is

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<sup>212</sup> For a sampling of post-*Daimler* published appellate court decisions addressing this issue, see *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318–22 (11th Cir. 2018) (interpreting Florida registration statute as not operating as a consent to general jurisdiction); *Gulf Coast Bank & Trust Co. v. Designed Conveyor Systems, L.L.C.*, 717 F. App'x 394, 397–98 (5th Cir. 2017) (interpreting the Louisiana registration statute as not operating as a consent to general jurisdiction); *AM Trust v. UBS AG*, 681 F. App'x 587, 588–89 (9th Cir. 2017) (interpreting the California statute similarly); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640–41 (2d Cir. 2016) (construing Connecticut's registration statute as not requiring registering corporations to submit to general jurisdiction in the absence of a definitive state interpretation and in light of constitutional concerns); *Cepac*, 137 A.3d at 126–28 (overruling earlier Delaware precedent that in-state registration could establish general jurisdiction); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 446–48 (Ill. 2017) (interpreting Illinois registration statute as not establishing a consent to general jurisdiction); *Norfolk S. Ry. v. Dolan*, 512 S.W.3d 41, 52 (Mo. 2017) (interpreting Missouri's registration statute as not providing for a corporation's amenability for suits unrelated to the corporation's forum activities); *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 9 (Mont. 2018) (interpreting Montana registration statute in light of due process concerns to hold registration does not give rise to general jurisdiction); *Rodriguez v. Ford Motor Co.*, No. A-1-CA-36402, 2018 WL 6716038, at \*1 (N.M. Ct. App. Dec. 20, 2018) (holding that registration to do business in New Mexico continues to operate as a constitutionally valid consent to jurisdiction within the state); *Figueroa v. BNSF Ry. Co.*, 390 P.3d 1019, 1030 (Or. 2017) (interpreting Oregon registration statute as not operating as a consent to general jurisdiction); *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 898 N.W.2d 70, 76–83 (Wis. 2017) (interpreting Wisconsin registration statute as not operating as a consent to general jurisdiction under statutory interpretation canons, including constitutional avoidance).

<sup>213</sup> See David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1925–26 (2014) (observing that “[p]rivate enforcement's decentralized and unyielding nature likewise exacts an efficiency toll by inviting duplicative enforcement actions”).

warranted. And given that the question is largely the same in each state—that is, what is the effect of registering to do business and appointing an in-state agent for service of process?—we believe that the most efficient process of adopting that legislation may be to work through the Uniform Law Commission.

This would not be the first time that the ULC has addressed jurisdictional issues. In 1962, it adopted the “Uniform Interstate and International Procedure Act,” which included a proposed long-arm statute “of moderate reach.”<sup>214</sup> A jurisdictional-consent act could update, modernize, and standardize that earlier work. We propose the following act as a starting point:

#### MODEL CORPORATE REGISTRATION JURISDICTIONAL CONSENT ACT

**Section 1. CONSENT TO JURISDICTION.** 180 days after the effective date of this Act, unless the corporation has otherwise agreed with the claimant or claimants to the exclusivity of another forum, a corporation’s application for authority or registration to do business in this state, whenever filed, encompasses a consent to the jurisdiction of the courts of this state once service is made upon the corporation’s registered agent (or, if there is none, upon the Secretary of State), if each claimant independently maintains or alleges one of the following suits, claims, or causes of action:

- (1) A claim that is based in whole or in part on any business or operations of the corporation conducted within this state, including providing or delivering a good or service within this state to a distributor, manufacturer, independent contractor, consumer, or other party when the provided good or service then causes harm either in this state or another state;
- (2) A suit sounding in contract or tort brought by
  - (a) an individual domiciled in this state at the time his or her claims accrued;
  - (b) a corporation either incorporated in this state or having a principal place of business in this state at the time its claims accrued; or
  - (c) a non-incorporated association, partnership, or venture with a principal place of business in this state at the time its claims accrued;
- (3) A claim that will be governed by this state’s statutory or common law under applicable choice-of-law principles;
- (4) A suit seeking redress for any injury or portion of an injury, whether sounding in contract or tort, suffered within this state;

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<sup>214</sup> WRIGHT & MILLER, *supra* note 20, § 1068.

- (5) A suit brought against the corporation and one or more other defendants when:
- (a) one of the other defendants is subject to general jurisdiction in this state; and
  - (b) the claims against the defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of conflicting judgments resulting from separate proceedings;
- (6) A suit to enforce a judgment subject to recognition in the state under the Full Faith and Credit Clause, a treaty or other international agreement, or comity principles against the corporation's property or assets located within the state; or
- (7) A suit to confirm an award made pursuant to an agreement to arbitrate if the agreement or award is or may be governed by a treaty or other international agreement in force for the United States that calls for the recognition and enforcement of arbitral awards.

**Section 2. TERMINATION OF CONSENT TO JURISDICTION.** A corporation's consent to jurisdiction pursuant to Section 1 terminates for the corporation's future acts, transactions, or omissions on the date it obtains a certificate of withdrawal or otherwise properly revokes its authorization or registration to do business. The withdrawal or revocation shall not affect jurisdiction over any claims based in whole or in part on any act, transaction, or omission occurring while the corporation was authorized or registered to do business in this state, unless the corporation declines to grant any consent to jurisdiction under this Act by withdrawing or revoking its authorization or registration to do business within the 180-day period after the Act's effective date.

**Section 3. NOTICE.** Upon the effective date of this Act, the Secretary of State shall provide a copy of this Act to each corporation authorized or registered to do business in this state by mail directed to the corporation's registered agent (or, if there is none, to the secretary of the corporation at its principal office shown in its most recent filing with the state). The Secretary of State shall also furnish a copy of this Act to each corporation that applies for authority or registers to do business in this state after the effective date of this Act.

**Section 4. SEVERABILITY.** The provisions of this Act are severable, such that in the event a court invalidates any provision, the remainder of the provisions shall remain in effect.

The various components of the proposed Model Act are intended to protect the state's sovereign protective, regulatory, and prescriptive interests in cases involving state residents, state law, or property within the state. The Model Act applies to those corporations that have taken the affirmative step of applying for authority or registering to do business within the state (which is only necessary if the corporation is conducting, or is planning to conduct soon, an ongoing and regular course of intrastate or local business activity<sup>215</sup>)—in the language of personal jurisdiction, each one has thus “purposefully avail[ed] itself of the privilege of conducting activities within the forum State.”<sup>216</sup> Although a plaintiff's claim may not necessarily arise out of those activities, the proposal's limitations ensure that any case brought under the Act would at least pertain to sovereign state interests authorizing the legitimate exercise of adjudicative power over the specified activities of registered businesses.<sup>217</sup>

Paragraphs (1), (4), and (6) in Section 1 of the proposed Model Act protect various facets of the state's regulatory authority. Paragraph (1) targets business activities that take place in the state, even if those activities end up causing harm outside the state, and paragraph (4) focuses on the reverse, covering in-state injuries caused by out-of-state activity. Paragraph (6) protects the state's authority over in-state property and provides a mechanism for interstate cooperation in giving teeth to the Constitution's Full Faith and Credit Clause.

Section 1's remaining paragraphs address additional state interests. Paragraph (2) protects in-state residents, ensuring that they have a convenient forum to seek recompense for injuries incurred outside the state. Paragraph (3) allows state courts to hear claims arising under that state's law, thus protecting the state's ability to enforce and interpret its own laws. Although the Act otherwise is not a joinder device, paragraph (5) allows sufficiently related multiparty cases to be filed in the home state of one of the defendants, ensuring the availability of a forum capable of resolving the claims in a single lawsuit—thereby authorizing plaintiffs to aggregate small-value claims, permitting claims against multiple defendants to be litigated efficiently, and reducing the risk of inconsistent verdicts that would arise from a multiplicity of suits.<sup>218</sup> Paragraph (7) protects the enforcement of valid arbitral awards, an issue that has been open to question post-*Daimler*.<sup>219</sup>

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<sup>215</sup> See *supra* Part III.

<sup>216</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1785 (2017).

<sup>217</sup> See *infra* Part V for more detail on the constitutionality of the state's exercise of authority.

<sup>218</sup> See Dodson, *supra* note 15, at 45 (explaining “[t]he Supreme Court's recent decisions narrowing both specific and general jurisdiction hinder the joinder of claims, parties, and cases in ways that reduce the fairness and efficiency of litigation”).

<sup>219</sup> See Silberman & Simowitz, *supra* note 138, at 381 (“The imposition of *Daimler*'s general jurisdiction test on recognition and enforcement of arbitral awards presents significant practical problems.”). This is especially true when defendants move assets around the world in an attempt to avoid the enforcement of an arbitration award or other judgment. *Id.*; see also

Taken together, these provisions bridge the key jurisdictional gaps left open after the Supreme Court's recent sextet of cases eviscerating general jurisdiction and further limiting specific jurisdiction. The proposed provisions do not, however, extend nearly as far as general jurisdiction did before the at-home trilogy. Instead, the proposed Model Act tackles the shortcomings of the new scope of adjudicative jurisdiction only in those areas where the state has a legitimate interest in regulating in-state activity or protecting in-state residents.<sup>220</sup> The proposed provisions thus seek to ensure that the Roberts Court's newfound jurisdictional limitations do not bar effective court access.<sup>221</sup>

Although the provisions together fill the most important gaps left open after the demise of general jurisdiction, they need not be taken together as a package. That is, states could reasonably pick and choose among the provisions, adopting only the ones that best fit each state's needs. Thus, for example, a state may emphasize the need to provide a remedy to either its residents or visitors injured inside the state; if so, the legislature might prioritize paragraphs (2) and (4). Another state, however, might want to commit to commercial efficiency, and so might reasonably choose to prioritize paragraphs (6) and (7), ensuring that both arbitration agreements and sister-state judgments could be easily enforced within the forum. For this reason, we recommend a model statute that states could adapt to their own needs, rather than a uniform act identical in every state. The heart of our proposal is that corporations should have explicit notice of the claims covered by their submission when registering or applying to do business; those claims need not be the same in every state.

### C. *The Benefits of the Uniform Law Process*

A state wishing to avoid the uncertainty of litigation over the scope of jurisdictional consent, or desiring an expedient cure to the injustices unleashed by the Roberts Court's jurisdictional onslaught, may wish to enact quickly a statutory solution similar to the one we have proposed. Yet significant structural and resource advantages are available through the Uniform Law Commission process. The ULC is designed to promote national uniformity while still deferring to state regulatory authority—and this structure is particularly well-suited for questions of personal jurisdiction through cor-

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Chevron Corp. v. Yaiguaje, [2015] S.C.R. 69, para. 56–57 (Can.) (writing “[i]n today’s globalized world and electronic age,” forcing a judgment creditor to “wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality”).

<sup>220</sup> See *infra* Part V (discussing the relevant state interests).

<sup>221</sup> See, e.g., Hoffheimer, *supra* note 10, at 549 (pointing out that the Court’s recent jurisdictional jurisprudence has “failed to adequately consider the sovereign interests of states and has devalued plaintiffs’ need for access to courts at the same time that it has arguably overvalued the defendant’s interest in avoiding litigation in particular forums”).

porate registration. Indeed, some observers have argued the ULC is most effective when tackling procedural matters.<sup>222</sup>

An act defining the jurisdictional consequences of corporate registration would work ideally with cooperation among the states. After all, the creation and regulation of corporate entities occurs primarily at the state level.<sup>223</sup> And adjudicative power also necessitates state authority, most often through state long-arm statutes.<sup>224</sup> But even though the state interests may be paramount, significant national interests are also presented. Corporate registration statutes, by their very nature, govern multistate businesses—that is, businesses incorporated outside the state, but doing business in more than one state.<sup>225</sup>

Today, this combination of state authority and interstate cooperation is often referred to as “horizontal federalism.”<sup>226</sup> Most personal jurisdiction problems today involve aspects of horizontal federalism, raising questions regarding whether the exercise of jurisdiction by one state impermissibly burdens residents of other states or infringes on other states’ regulatory authority.<sup>227</sup> Although the ULC was founded more than a century before the “horizontal federalism” label came into vogue, navigating the waters of horizontal federalism is what it does. Its mission—from its inception until today—is both to “promote uniformity of law among the states” and “to support and protect the federal system of government by seeking an appropriate balance between federal and state law.”<sup>228</sup>

The ULC is uniquely positioned to encourage cooperation in developing legislative solutions to problems involving interstate relations.<sup>229</sup> Commissioners, who are required to be members of a state bar, are appointed

<sup>222</sup> See Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT’L L. 819, 819 (2007) (suggesting the ULC should “limit its aspiration to seeking procedural and transactional efficiencies,” and arguing for the adoption of uniform choice-of-law principles).

<sup>223</sup> See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (“[T]he corporation . . . owes its existence and attributes to state law.”).

<sup>224</sup> WRIGHT & MILLER, *supra* note 20, § 1068.

<sup>225</sup> *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 632 (2d Cir. 2016) (“Business registration statutes . . . were enacted primarily to allow states to exercise jurisdiction over corporations that, although not formed under its laws, were transacting business within a state’s borders and thus potentially giving rise to state citizens’ claims against them.”).

<sup>226</sup> Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 62 (2010) (“Typically, the Constitution endows all fifty states with a certain power and thus creates a scenario where each state might exercise its power in a manner that burdens other states or citizens of other states, which in turn requires a rule explaining how the existence of multiple states with equivalent powers limits the authority of each.”); Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 772 (2015) [hereinafter Erbsen, *Horizontal Federalism*] (arguing “principles of horizontal federalism—which govern relationships between states in a federal system—can help courts allocate jurisdictional authority among potential fora”).

<sup>227</sup> Erbsen, *Horizontal Federalism*, *supra* note 226, at 772.

<sup>228</sup> Sandra Day O’Connor, *Foreward*, in STEIN, *supra* note 197, at x–xi.

<sup>229</sup> Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 592 (1998) (“The need to obtain uniform adoption will encourage the drafters to enact a statute that is widely acceptable and may effectuate a race to the top.”).



from all U.S. states and territories (typically by state governors),<sup>230</sup> and thus in the aggregate mirror the political spectrum across the United States. The ULC's vetting process has been fine-tuned over more than a century and, unlike that of some private legislative reform groups, is highly transparent, with outside observers and interested third parties invited to observe the proceedings and offer comments and suggestions as a model act is developed by a subset of commissioners.<sup>231</sup> After a proposal is drafted, it is discussed and debated by the ULC's entire membership of nearly 400 commissioners. Former Chief Justice William Rehnquist, who served as a ULC commissioner for six years (and served on the U.S. Supreme Court for thirty-three years), described the "high quality" of the ULC floor debate, recalling that he had "seen many deliberative bodies before and since, but in none were the discussions of the same high quality."<sup>232</sup>

The transparency and vitality of the ULC process would allow interested parties to offer feedback on the proposed Act. Thus, corporations registered in more than one state could discuss the likely impact of such a statute on their choice about where to do business—an easier process than trying to educate fifty different state legislatures, and a less onerous burden than filing amicus briefs in every case attempting to interpret a longstanding registration statute. Lawyers representing both plaintiffs and defendants in such cases could also be heard, allowing information to be collected about how the current personal jurisdiction regime affects court access in cases that span state or national boundaries. The availability of such information means that the ULC could vet a model jurisdictional consent act more efficiently than fifty-plus individual legislative bodies. Taking this approach would ensure that businesses have an opportunity for input and allows the states to take a deliberative approach.

## V. THE SOVEREIGN STATE INTERESTS IN DEFINING JURISDICTIONAL CONSENT BY CORPORATE REGISTRATION

A statutory enactment defining the scope of jurisdictional consent through corporate registration holds some value regardless of its content. Any such statute would establish a level of clarity and predictability in a field thrown into confusion after the elimination of the "continuous and systematic" test for general jurisdiction.<sup>233</sup> More than half the states currently

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<sup>230</sup> *FAQs*, UNIFORM LAW COMM'N, <http://www.uniformlaws.org/aboutulc/faq> [<https://perma.cc/24FW-7B7Q>].

<sup>231</sup> The American Legislative Exchange Council ("ALEC"), for example, has been criticized for its relative lack of transparency. Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/> [<https://perma.cc/298V-WY39>].

<sup>232</sup> O'Connor, *supra* note 228, at x.

<sup>233</sup> See *supra* Part IV.A; see also Arthur R. Miller, *What Are Courts for? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 750 (2018) ("At a minimum, the

lack a clear position on the jurisdictional effect of their registration schemes, and other states have adopted broad conceptions of implied consent that may be subject to constitutional challenge in the wake of *Daimler*.<sup>234</sup> Given this state of disorder, adopting almost any rule would at least avoid the need for jurisdictional litigation in a regime of uncertainty.

Our proposed Model Act has substantive benefits beyond this added clarity and predictability, however. Its provisions bridge the key jurisdictional gaps created by the Supreme Court's recent jurisdictional revolution, while still working within the Supreme Court's pronounced adjudicative framework in three interrelated ways. First, the proposal focuses tightly on the forum state's sovereign interests that support a state's paramount claim to exercise its regulatory power, thereby avoiding interference with the authority of other sovereigns while still ensuring that the newly announced limitations on contacts jurisdiction do not operate to bar effective court access.<sup>235</sup> Second, by creating an explicit mechanism to obtain consent for jurisdiction—and by ensuring that such consent is matched by return benefits—our model conforms with the modern trend toward agreement-based jurisdiction.<sup>236</sup> Finally, by limiting jurisdictional consent via registration to cases connected with the forum state, the proposal avoids the more difficult constitutional questions arising out of broad readings of registration statutes as a general, all-purpose jurisdictional submission.<sup>237</sup>

#### A. *The Vital Role of State Interests in Jurisdictional Doctrine*

The proposed defined-consent Act specifies the sovereign state protective and prescriptive interests supporting the registered corporation's submission to jurisdiction. Such state interests are a cornerstone of horizontal federalism, necessary to establish the validity of the state's regulatory and adjudicative authority and to prevent unconstitutional overreach in extraterritorial regulation.<sup>238</sup> By defining these interests explicitly, our proposal relieves courts of the need for guesswork in deciding the permissible constitutional parameters of the state's jurisdictional authority.

Forum state interests, as well as the shared interests of the combined states within the larger system of federalism, are integral components of the Supreme Court's jurisdictional framework.<sup>239</sup> On numerous occasions, the

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Court's decisions have put the question of personal jurisdiction 'in play' more often than in the past, encouraging motions to dismiss at a case's threshold with attendant cost and delay. Long-arm jurisdiction clearly is getting shorter.").

<sup>234</sup> See *supra* Part IV.A.

<sup>235</sup> See *infra* Part V.A.

<sup>236</sup> See *infra* Part V.B.

<sup>237</sup> See *infra* Part V.C.

<sup>238</sup> See Katherine Florey, *What Personal Jurisdiction Doctrine Does—and What It Should Do*, 43 FLA. ST. U. L. REV. 1201, 1224–25 (2016) (explaining constitutional limits on extraterritorial regulation).

<sup>239</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (providing that "courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest

Court has relied on state statutory provisions to ascertain the scope of such interests.<sup>240</sup> In *McGee v. International Life Insurance Co.*,<sup>241</sup> for example, the Court regarded the state statute subjecting foreign corporations to suit in California on insurance contracts with state residents as articulating the state's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."<sup>242</sup> Likewise, in *Keeton v. Hustler Magazine, Inc.*,<sup>243</sup> the Court eyed both the New Hampshire criminal defamation statute as well as the state's long-arm statute to determine that the state had an interest in both protecting nonresidents from libels circulated within the state and shielding its own residents from falsehoods, even when those falsehoods involved out-of-state victims.<sup>244</sup>

The Court has also underscored, in cases disclaiming adjudicative authority, the absence of legislative measures supporting the alleged state interests.<sup>245</sup> Consider *Kulko v. Superior Court*,<sup>246</sup> where a divorcing parent moved to California from the marital home in New York and later attempted to sue her ex-spouse for increased child support in her new state of residence.<sup>247</sup> In rebuffing her jurisdictional attempt, the Court noted that "California has not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute."<sup>248</sup> Or take *Shaffer v. Heitner*, where the shareholder appellee argued that Delaware courts should be authorized to exercise jurisdiction in shareholder derivative actions over nonresident corporate officers and directors of Delaware corporations.<sup>249</sup> In denying jurisdiction, the Supreme Court reasoned that the shareholder's argument was "undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling," as the Delaware statute

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in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies'" (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

<sup>240</sup> See Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1200 (2013) ("Concern about the forum state's sovereign interest has played a central role not merely in cases expanding the scope of personal jurisdiction, but also in cases limiting the scope of personal jurisdiction.").

<sup>241</sup> 355 U.S. 220 (1957).

<sup>242</sup> *Id.* at 221–23 (upholding California's assertion of personal jurisdiction against nonresident insurer based on its solitary policy issued to a state resident).

<sup>243</sup> 465 U.S. 770 (1984).

<sup>244</sup> *Id.* at 777 (upholding New Hampshire's assertion of jurisdiction for a nonresident's claim based on a libel circulated within the state, reasoning in part that the misdemeanor libel statute was not limited to residents and the state's long-arm statute had been amended to delete the prior residence requirement for tort claims).

<sup>245</sup> See Sterk, *supra* note 240, at 1200.

<sup>246</sup> 436 U.S. 84 (1978).

<sup>247</sup> *Id.* at 87–88.

<sup>248</sup> *Id.* at 98 (citing *McGee*, 355 U.S. at 221, 224). The Court continued that California's legitimate interest in ensuring the support of children within the state was served by its adoption of the Revised Uniform Reciprocal Enforcement of Support Act, which coordinated court procedures for obtaining and enforcing child-support orders between a resident and nonresident without the parties having to depart from their home states. *Id.* at 98–99.

<sup>249</sup> 433 U.S. 186, 214 (1977).

based jurisdiction “not on appellants’ status as corporate fiduciaries, but rather on the presence of their property in the State.”<sup>250</sup> The Court stressed that other states had enacted implied consent statutes for corporate fiduciaries, and concluded that “[i]f Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as appellee suggests, we would expect it to have enacted a statute more clearly designed to protect that interest.”<sup>251</sup> A mere thirteen days after the Supreme Court issued its ruling, the Delaware legislature adopted just such a statute.<sup>252</sup>

The plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro* is thus an aberration insofar as it failed to consider or discuss the forum state’s sovereign interests supporting adjudicative authority and instead fixated solely on the defendant’s intent, manifested by its activities targeting the forum, “to submit” to the sovereign’s power.<sup>253</sup> Of course, all plurality opinions by definition are not binding precedent, but even more so here, as the *Nicastro* plurality’s attempted refashioning of “basic jurisdictional rules,” through its submission and targeting touchstone, was explicitly rejected by the other five Justices.<sup>254</sup> In addition, as Professor Allan Erbsen has convincingly argued, the plurality’s disregard of the state’s manifest interests conflicts with a more recent Supreme Court decision relying on comparable interests to authorize states to compel nonresident merchants without any in-state physical presence to collect and remit sales taxes.<sup>255</sup> After all, “if South Dakota’s interests justified taxation of nonresident merchants, then New Jersey’s interests could have justified jurisdiction over nonresident manufacturers and should not have been so casually dismissed.”<sup>256</sup>

States are therefore well advised to adopt a statute explicitly predicated on the state’s interests in protecting both state residents and the state’s own regulatory authority. Otherwise, the gaps left open after the Roberts Court’s jurisdictional holdings, which are already engendering regulatory voids and difficulties for plaintiffs seeking to access justice, are unlikely to be bridged.<sup>257</sup>

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 214–15.

<sup>252</sup> See Winship, *supra* note 179, at 1177.

<sup>253</sup> 564 U.S. 873, 882 (2011) (plurality opinion).

<sup>254</sup> *Id.* at 890 (Breyer, J., concurring) (“I do not agree with the plurality’s seemingly strict no-jurisdiction rule . . . .”); *accord id.* at 901 n.5 (Ginsburg, J., dissenting) (“The plurality’s notion that jurisdiction over foreign corporations depends upon the defendant’s ‘submission’ seems scarcely different from the long-discredited fiction of implied consent. It bears emphasis that a majority of this Court’s members do not share the plurality’s view.”).

<sup>255</sup> Allan Erbsen, *Wayfair Undermines Nicastro: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 *YALE L.J.F.* 724, 727 (2019) (“Justice Kennedy’s exaltation of state interests in *Wayfair* is strikingly inconsistent with his 2011 plurality opinion . . . in *Nicastro*.”).

<sup>256</sup> *Id.* at 738.

<sup>257</sup> See, e.g., Cynthia L. Fountaine, “Don’t Come Around Here No More”: Narrowing Personal Jurisdiction over Non-Resident Corporations in Illinois, 42 *S. ILL. U. L.J.* 593, 636–37 (2018) (detailing a “flurry of dismissals” predicated on the Supreme Court’s new jurisdictional doctrine that impose “significant access to justice hurdles for plaintiffs”); Adam

Consider, as an example, *Waite v. All Acquisition Corp.*<sup>258</sup> James Waite's various occupations while he lived in Massachusetts often exposed him to asbestos products, including asbestos mined and sold by Union Carbide, a New York corporation with its principal place of business in Texas.<sup>259</sup> After Waite moved to Florida in 1978, he continued to be exposed to other companies' asbestos products and tragically developed mesothelioma in 2015 from his life-long asbestos exposure.<sup>260</sup> Since "it is impossible to exclude any particular exposure from the causal chain leading to the development of th[is] disease," the Waites sued ten asbestos companies, including Union Carbide, in his home state of Florida, where Union Carbide conducted substantial activities, including operating a plant in the state, registering to do business and maintaining an in-state agent continuously since 1949, selling asbestos products within the state through a distributor, and accessing Florida courts as a plaintiff.<sup>261</sup> But the Eleventh Circuit affirmed the dismissal of Union Carbide from the suit for lack of personal jurisdiction, reasoning specific jurisdiction collapsed because Waite's Massachusetts exposure to Union Carbide's asbestos was not connected to Florida, general jurisdiction failed because Union Carbide was "at home" only in Texas and New York, and Union Carbide had not consented to jurisdiction by registering when the Florida corporate registration scheme failed to specify any jurisdictional consequences for registering to do business.<sup>262</sup>

The trouble with *Waite's* holding was not due to the Eleventh Circuit's failure to follow the Roberts Court's jurisdictional decisions—rather, the injustice arose because the Supreme Court's recent pronouncements regarding general and specific adjudicative power were dutifully observed. Under these precedents, the Waites were denied any meaningful forum to pursue their claims,<sup>263</sup> even though no conceivable jurisdictional rationale supports disclaiming jurisdiction over Union Carbide in these circumstances.

In light of Union Carbide's substantial in-state business activities in Florida and purposeful exploitation of the prescriptive and adjudicative pro-

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N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1462 (2018) (highlighting concerns regarding access to justice after the recent personal jurisdiction decisions in three scenarios: where a forum resident is injured at home by an out-of-state defendant, when no alternative forum is available or adequate, and "where proceeding in a single forum is necessary for effective adjudication of claims arising from a common course of conduct").

<sup>258</sup> 901 F.3d 1307 (11th Cir. 2018).

<sup>259</sup> *Id.* at 1310–11, 1317.

<sup>260</sup> *Id.* at 1311.

<sup>261</sup> *Id.* at 1311–12.

<sup>262</sup> *Id.* at 1315–22.

<sup>263</sup> The fora in which Union Carbide would be amenable to jurisdiction (New York, Texas, and perhaps Massachusetts) would likely be unable to exercise jurisdiction over all the other defendants contributing to this single injury, requiring duplicative litigation and creating a substantial risk of inconsistent judgments, with the amenable defendants placing blame on the non-amenable defendants in each action. This illustrates why, as Justice Jackson remarked long ago, a "choice of courts" is often necessary for plaintiffs to ensure "some place in which to pursue [a] remedy." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

tections of Florida law, defending against the Waites' claims imposed no burden, difficulty, or inconvenience, much less a "severe disadvantage."<sup>264</sup> Rather, Florida, even from Union Carbide's perspective, was a convenient forum, with the most salient medical records and witnesses present in the state regarding Waite's comparative exposure to asbestos and his subsequent development of mesothelioma.<sup>265</sup> The Waites' Florida suit was hardly unexpected to Union Carbide when it had been peddling its asbestos products within the state's market for decades and defending against numerous other comparable claims arising from these products.<sup>266</sup> The suit implicated several compelling interrelated regulatory interests of the sovereign state of Florida: protecting its residents from suffering an injury in the state (even from out-of-state exposure),<sup>267</sup> ensuring a convenient forum for its residents to redress injuries caused by nonresidents,<sup>268</sup> and preserving a safe environment for its residents.<sup>269</sup> Florida's adjudicative regulation of this controversy threatened no incursion on the sovereignty of any co-equal state, as no other state had nearly as substantial a juridical claim.<sup>270</sup> The Waites, Florida residents for almost four decades, were not forum shopping<sup>271</sup>—to the contrary, they pursued their claims against all the potential defendants in the state wherein the disease manifested, Waite received treatment, and Waite was exposed to

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<sup>264</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (acknowledging forum cannot be "so gravely difficult and inconvenient" that a defendant is at a severe litigation disadvantage).

<sup>265</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977) (indicating presence of forum witnesses and records impacts personal jurisdiction query).

<sup>266</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (emphasizing predictability and defendants' expectations in structuring conduct to avoid suit in a forum).

<sup>267</sup> See *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 503 (1939) (noting "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power" than "the bodily safety and economic protection" of those injured within its borders); see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (recognizing state's "significant interest in redressing injuries that actually occur within the State," whether to residents or nonresidents). Waite, while exposed to Union Carbide's products in Massachusetts, likely did not suffer a redressable legal injury until his mesothelioma diagnosis in Florida. See *Waite*, 901 F.3d at 1315.

<sup>268</sup> See *Burger King*, 471 U.S. at 473 (highlighting state's interest "in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors"); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950) (explaining due process does not bar states from protecting their citizens from the injustice of seeking redress only in some distant state).

<sup>269</sup> See *Keeton*, 465 U.S. at 776 (underscoring state interest in safeguarding its citizens from deception and libels regarding a nonresident); cf. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114–15 (1987) (buttressing holding disclaiming jurisdiction because presented dispute between two foreign product manufacturers concerned indemnification rather than the state's interest in ensuring compliance with its safety standards).

<sup>270</sup> See *World-Wide Volkswagen*, 444 U.S. at 293 (reasoning the sovereign power of each state to exercise adjudicative jurisdiction "imply[s] a limitation on the sovereignty of all of its sister States").

<sup>271</sup> Cf. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (expressing concern that jurisdiction not be available for any claim in every state in which a party conducts continuous and systematic activities).

other asbestos products.<sup>272</sup> Indeed, Florida apparently was the state which could secure, for the interstate judicial system, the most efficient resolution of the controversy, with no other state likely connected to all ten defendants in order to adjudicate their comparative fault.<sup>273</sup> Accordingly, the Roberts Court's new formalistic rules governing the state's jurisdictional boundaries compelled the denial of any meaningful access to justice for the Waites, even though all the heretofore recognized normative considerations justified Florida's resolution of this dispute.<sup>274</sup>

Our consent proposal would preclude such injustices, which are becoming too common under the Supreme Court's new rigid approach to general and specific jurisdiction.<sup>275</sup> Notice *Waite* discounted Union Carbide's compliance with Florida's statutory corporate registration scheme because "[n]othing in these provisions would alert a corporation that its compliance would be construed as consent to answer in Florida's courts for any purpose."<sup>276</sup> But our proposal would provide exactly such notice, authorizing jurisdiction on several grounds closely tied to Florida's sovereign prescriptive and protective interests. The suit, after all, was brought by state citizens; the legal injury was suffered in Florida when the disease manifested; and the claim likely is governed by Florida law.<sup>277</sup>

Jurisdictional consent can thus play a key role in facilitating a remedy in situations involving eminently fair and reasonable jurisdictional assertions when neither general nor specific jurisdiction, as reshaped by the Roberts Court, currently exists. Although our proposed statute reaches only those

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<sup>272</sup> See *Waite*, 901 F.3d at 1310–11. The Court has repeatedly recognized "the plaintiff's interest in obtaining convenient and effective relief." *E.g.*, *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

<sup>273</sup> See *Keeton*, 465 U.S. at 777 (highlighting, in the context of a libel proceeding, the substantial interest in state cooperation to provide a single forum for efficiently litigating all issues and damage claims arising from a controversy in order to conserve judicial resources).

<sup>274</sup> See *Robertson & Rhodes, Business*, *supra* note 11, at 788–90 (emphasizing the risk to seeking effective redress from the influence of formalism and territorial boundaries in the Roberts Court's jurisdictional decisions).

<sup>275</sup> See *Fontaine*, *supra* note 257, at 636–37; *cf. Rodriguez v. Ford Motor Co.*, No. A-1-CA-36402, 2018 WL 6716038, at \*1 (N.M. Ct. App. Dec. 20, 2018) (interpreting Ford's registration to do business in New Mexico as consent to jurisdiction when Ford argued it could not be subject to jurisdiction in New Mexico for a products liability claim stemming from a New Mexico citizen's death in a single vehicle accident in New Mexico because it was not at home in New Mexico and did not design, manufacture, sell, or service the vehicle in New Mexico).

<sup>276</sup> *Waite*, 901 F.3d at 1320. The court did subsequently note that "an overly broad interpretation" of a corporate registration scheme as a general jurisdictional consent might contradict the Supreme Court's recent cautions against "exorbitant exercises" of general jurisdiction." *Id.* at 1322 n.5 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014)). As discussed in more detail below, our constrained proposal here, limited to well-recognized state regulatory and protective interests, alleviates any such potential constitutional concern. See *infra* Part V.C.

<sup>277</sup> See *supra* Part IV.B (setting out the potential bases for registration-based personal jurisdiction). Since the Waites' suit was removed to federal court from state court, see *Waite*, 901 F.3d at 1310–11, our proposed paragraph (5), applicable to claims with a risk of conflicting judgments from separate proceedings, would apparently not be implicated since one or more of the defendants must be "at home" in the forum state, see *supra* Part IV.B.

cases in which the corporate defendant registers in-state, such registration ensures an affiliation with the sovereign that indicates the defendant's amenability will not be unduly burdensome in light of the statutorily defined regulatory, protective, and prescriptive sovereign adjudicative interests at stake. A state legislature adopting such a statute thus ensures its appropriate role in defining the state's own sovereign interests and progresses toward shrinking the access-to-justice gaps created by the Supreme Court's recent jurisprudence.<sup>278</sup>

*B. Explicit Jurisdictional Consent Comports with the Modern Trend of Agreement-Based Jurisdiction*

Our proposed jurisdictional consent statute, which provides corporations a meaningful choice on whether to exchange a limited amenability for the privilege of conducting activities within and employing the courts of the state, fits comfortably within the modern trend of agreement-based adjudication. Over the last few decades, the civil litigation landscape has shifted in many respects to accommodate parties' forum choices, and courts now routinely enforce *ex ante* agreements selecting the forum as well as the adjudicator.<sup>279</sup> The New York Convention governing arbitration agreements, which entered into force in 1959,<sup>280</sup> marked a key early step. It made arbitration an effective option for international contracts, and its success paved the way for agreement-based adjudication to gain favor in numerous other contexts.<sup>281</sup>

Consider forum-selection clauses, which American courts historically disfavored and frequently refused to enforce on public policy grounds before the 1970s.<sup>282</sup> Then, in 1972, the Supreme Court upheld a forum-selection clause, albeit in a complex, negotiated agreement between an American and a German corporation to tow an ocean-going drilling rig from the Gulf of Mexico to the Adriatic Sea.<sup>283</sup> Yet by the early 1990s, the Court was extolling the virtues of forum-selection clauses even in non-negotiated consumer

<sup>278</sup> See Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1593 (2018) (noting "registration and implied consent statutes would return state legislatures to a central role in defining the scope of courts' jurisdiction").

<sup>279</sup> See Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMP. L. 127, 152 (2018) ("It is easy to articulate a general rule regarding the treatment of forum selection clauses in U.S. courts: almost always, in consumer as well as commercial contracts, they will be given effect.")

<sup>280</sup> See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*].

<sup>281</sup> See Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 26, 46 (2009) (writing "[o]ne can only marvel at the success of the New York Convention over its fifty-year span," and recognizing "how important the Convention has been in creating a vibrant climate in which international arbitration has flourished").

<sup>282</sup> See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 & n.10 (1972) (collecting sources).

<sup>283</sup> *Id.* at 17–18.



adhesion contracts, suggesting that such clauses benefitted the parties by limiting the fora in which a defendant with worldwide connections would be subject to suit; “dispelling any confusion” about where suits under the contract would be decided, thereby “sparing litigants the time and expense of pretrial motions” dealing with jurisdictional issues; and even lowering consumer costs.<sup>284</sup> The Roberts Court recently reiterated its commitment to upholding the parties’ forum choices in *Atlantic Marine Construction Co. v. U.S. District Court*,<sup>285</sup> specifying that “[o]nly under extraordinary circumstances unrelated to the convenience of the parties” should a motion to transfer based on a forum-selection clause be denied.<sup>286</sup> In reaching this holding, the Court emphasized that the enforcement of such clauses furthered the parties’ “settled expectations.”<sup>287</sup> Because the forum-selection term was assented to by the parties and “may, in fact, have been a critical factor in their agreement to do business together in the first place,” the Court held that “[i]n all but the most unusual cases, therefore, ‘the interest of justice’ is served by holding parties to their bargain.”<sup>288</sup>

Under similar reasoning, courts now routinely enforce a diverse array of contractual adjudication provisions—even ones found in boilerplate consumer contracts that lack options for individual negotiation. Thus, for example, the Supreme Court recently upheld the waiver of aggregation rights under an arbitration agreement.<sup>289</sup> Likewise, most states have allowed the pre-dispute waiver of jury-trial rights.<sup>290</sup> When such terms are included in mass consumer contracts, the consumer’s choice is not about whether to accept or reject the particular term—instead, the choice is about whether to accept or reject the contract altogether, as there is no allowance for individual negotiation. This “choice” may be somewhat illusory. Living in the twenty-first century without smart or cell phones, credit cards, computer operating systems, or computer software is not realistic for most Americans.<sup>291</sup> Nonetheless, the Supreme Court has reasoned that the agreement to adjudication-based terms is baked into the contract price and into the parties’ deal-

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<sup>284</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

<sup>285</sup> 571 U.S. 49 (2013).

<sup>286</sup> *Id.* at 62.

<sup>287</sup> *Id.* at 66.

<sup>288</sup> *Id.*

<sup>289</sup> See *Am. Exp. Co. v. It. Colors Rest.*, 570 U.S. 228, 236 (2013) (“The class-action waiver merely limits arbitration to the two contracting parties.”).

<sup>290</sup> California is a notable exception in this regard. See *California Court Foils Attempt to Avoid Prohibition on Pre-Dispute Jury Waivers*, MCGUIREWOODS (May 4, 2017), <http://www.mcguirewoods.com/client-resources/Alerts/2017/5/California-Court-Foils-Attempt-Avoid-Prohibition-Pre-Dispute-Jury-Waivers> [<https://perma.cc/JV6T-5QP7>] (“While most states permit parties to waive the right to a jury trial by contract before a dispute arises, the California Supreme Court held over a decade ago that California is not one of them.”).

<sup>291</sup> *Cf.* *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (discussing involuntary nature of carrying cell phones in modern life).

ings with one another, and the Court has therefore been willing to uphold such agreements.<sup>292</sup>

Of course, our proposed explicit consent-by-registration statute is not a typical form or negotiated contract, but the acceptance of obligations to acquire specified benefits under the sovereign authority of the state. Nevertheless, the Supreme Court has long viewed such statutory exchanges of obligations and benefits as manifesting valid consent.<sup>293</sup> In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*,<sup>294</sup> for example, the Court, in an opinion by Justice Frankfurter, determined that registration statutes requiring the designation of an agent are “constitutional,” with “the designation of the agent ‘a voluntary act’” that manifests “a real consent.”<sup>295</sup> In the more recent case of *Bendix Autolite Corp. v. Midwesco Enters., Inc.*,<sup>296</sup> Justice Kennedy’s opinion for the Court differentiated consensual jurisdiction under a registration and appointment statute from the minimum contacts analysis, and then presumed that an appointment of an agent could operate as a consent to general jurisdiction.<sup>297</sup>

This concept of pre-dispute consent by acquiring specified benefits under the sovereign authority of the state has been further extended in recent years. One example, as discussed previously, is that officers or directors in Delaware corporations are “deemed to have consented to jurisdiction in the courts of that state for any claim concerning breach of fiduciary duty,” with the courts upholding the constitutionality of this deemed consent despite scholarly objections.<sup>298</sup> And a number of states, once again led by Delaware, have allowed corporations to designate a forum for “internal corporate

<sup>292</sup> See *Atlantic Marine*, 571 U.S. at 66.

<sup>293</sup> See, e.g., *Ex parte Schollenberger*, 96 U.S. 369, 378 (1878) (noting a nonresident corporation “may, for the purpose of securing business, consent to be ‘found’ away from home, for the purposes of suit as to matters growing out of its transactions”).

<sup>294</sup> 308 U.S. 165 (1939).

<sup>295</sup> *Id.* at 175 (quoting *Pa. Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93, 96 (1917) & *Bagdon v. Phila. Reading Coal & Iron Co.*, 111 N.E. 1075, 1076 (N.Y. 1916)). *Neirbo* addressed whether the then-governing federal venue statute was satisfied by a foreign corporation’s designation of an agent for service of process under a state registration and authorization statute. *Id.* at 167. Under the Court’s interpretation of the relevant venue provisions, the propriety of venue depended on whether the corporation’s consent under state law was valid and constitutional. *Id.* at 174–75.

<sup>296</sup> 486 U.S. 888 (1988).

<sup>297</sup> *Id.* at 889–93. The Court thereafter held that requiring such an all-purpose jurisdictional submission to prevent the tolling of limitations against an out-of-state corporation was an undue burden on interstate commerce. See *id.* The Court’s dormant commerce clause analysis will be discussed in more detail in Part V.C.2. For present purposes, though, the key is the Court signaled that registering and appointing an agent represented a mode of consent for jurisdictional purposes outside the minimum contacts test. See *id.* *Bendix* is also noteworthy because it was decided six years after the Court did not mention registration as one of the listed examples of jurisdictional consent in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–05 (1982). Thus, any significance attributed to the *Insurance Corp.* omission appears misplaced, as *Bendix* thereafter indicated registration was a mode of consent. Cf. Monestier, *supra* note 22, at 1381–83.

<sup>298</sup> Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts”*, 93 WASH. L. REV. 265, 296 & nn.151–52 (2018) (quoting DEL. CODE ANN. tit. 10,

claims” in the corporate charter or even its bylaws.<sup>299</sup> Such provisions—which likewise have been routinely upheld by the courts despite objections—require shareholder suits to be brought only in the state of incorporation, and provide that those purchasing shares in the corporation are “deemed . . . to have consented to personal jurisdiction in the selected-forum court in a proceeding brought to enforce the exclusive forum-term.”<sup>300</sup>

Our proposal, though, does not extend this far. Instead, we propose incorporating safeguards and limitations to ensure actual notice to the corporation of the jurisdictional consequences of registration and to provide the corporation the means to withhold such consent.<sup>301</sup> So while Delaware law deems acts such as accepting a fiduciary position with or purchasing shares in a Delaware corporation as a consent to jurisdiction, regardless of the actor’s notice or knowledge of the consequences of the act, our proposal mandates an explicit notification to the corporation of the specific terms of the granted consent, with the corporation then having a real choice whether to register or, if it has previously registered, the option to withdraw its registration and avoid granting jurisdictional consent.

This is a meaningful choice. Recall that registration is only required when a corporation is engaging in an ongoing and regular course of intrastate or local business activity comparable in nature to a local business enterprise—registration is not necessary if the corporation is only conducting interstate business activities with state residents, or isolated in-state transactions, or mere solicitations within the state to do business.<sup>302</sup> As a result, a corporation has alternative avenues, even without registering to do business, to obtain economic benefits from a state and to provide goods and services to state residents. Moreover, a corporate entity seeking to perform those in-state business operations requiring registration could have a corporate subsidiary or related corporate entity register and conduct the intrastate activities, with the granted jurisdictional consent then extending only to the registering corporate entity.<sup>303</sup> In light of such alternatives, corporations in fact possess a greater appreciable choice whether to apply for or revoke their

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§ 3114 (2017)); see *supra* Parts III & V.A. (discussing the adoption of this provision in the wake of *Shaffer v. Heitner*).

<sup>299</sup> Hershkoff & Kahan, *supra* note 298, at 273–74 (quoting DEL. CODE ANN. tit. 8, § 115 (2017)). Connecticut, Indiana, New Jersey, North Carolina, Oklahoma, Virginia, and Washington have followed Delaware’s lead in allowing such forum-selection provisions. *Id.* As of 2014, approximately 750 corporations have adopted such provisions. *Id.*

<sup>300</sup> *Id.* at 274–76.

<sup>301</sup> See *supra* Part IV.B.

<sup>302</sup> See Joyce Yeager, *Borders and Barriers, Definition of Authority to Do Business as a Foreign Corporation*, 102 COM. L.J. 398, 420–21 (1997) (“The purpose of registration requirements is to force those foreign corporations intent upon conducting business on a continuous basis to qualify . . . . To do business a foreign corporation must do more than make a single contract, or engage in an isolated piece of business or an occasional undertaking; the foreign corporation must maintain continuity to be doing business.”); see also *supra* Part III.

<sup>303</sup> Cf. *Perrigo Co. v. Merial Ltd.*, No. 8:14-CV-403, 2015 WL 1538088, at \*8 (D. Neb. Apr. 7, 2015) (“The Court is aware of no authority suggesting that Merial LLC’s consent to jurisdiction is imputable to Merial SAS simply by virtue of their corporate affiliation.”). It is

authority to conduct in-state business than many of the same corporations offer to consumers in take-it-or-leave-it adhesion contracts.

The jurisdictional consequences of a corporation's deliberate decision to transact business in the forum are also significantly less under our proposal than existed before the Roberts Court's "at home" limitation on general adjudicative power. Under prior general jurisdiction precedent, after all, "continuous and systematic" forum activities subjected a corporation to amenability in that state for any and all claims.<sup>304</sup> As interpreted by many lower courts, this former "continuous and systematic" general jurisdiction test actually required less in-state activity than necessary for the corporation to be "transacting business" under corporate registration statutes.<sup>305</sup> So for almost a century before the "at home" limitation, a corporation choosing to conduct "continuous and systematic" forum activities, even if those activities were not extensive enough to require registration and authorization to do business, risked being subject to suit in the forum for any claim arising anywhere in the world. In contrast, under our proposal, only those corporations deliberately choosing to register in the forum, as a result of their more extensive in-state activities, will thereby exchange a limited consent to be sued in the forum (confined to specifically defined circumstances implicating state sovereign interests) in order to obtain the state's permission to conduct in-state business and to access the state's courts.

Such an exchange furthers policies comparable to those of other *ex ante* forum-selection agreements. The corporation's consent to jurisdiction spares litigants and the judiciary from the burdens, expense, and strain of jurisdictional discovery and pre-trial dismissal motions, enabling a more efficient consideration of the merits of the dispute.<sup>306</sup> The corporation, with knowledge of its amenability risk, may alleviate potential economic consequences by procuring insurance or passing on anticipated costs.<sup>307</sup> The corporation's compliance with its bargain also advances the settled expectations of the state and its sovereign citizens,<sup>308</sup> who have granted the corporation the right to transact intrastate business and to maintain suits in its courts.<sup>309</sup> These

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possible, of course, that the consent would not be so limited if an alter ego theory justified piercing the corporate veil.

<sup>304</sup> See *supra* Part II.

<sup>305</sup> See, e.g., *Neth. Shipmortgage Corp., Ltd. v. Madias*, 717 F.2d 731, 736 (2d Cir. 1983) (recognizing some activities subjecting the nonresident to adjudicative jurisdiction will not constitute transacting business); *Yangming Marine Transport Corp. v. Revon Prods. U.S.A., Inc.*, 536 A.2d 633, 637 (Md. 1988) (holding unqualified corporation can be barred from suing in state courts only based upon a "significantly greater amount of local activity" than the minimum for personal jurisdiction); *Long Mfg. Co. v. Wright-Way Farm Serv., Inc.*, 214 N.W.2d 816, 818–20 (Mich. 1974) (holding isolated or independent intrastate activities, even if sufficient to establish adjudicative jurisdiction, are insufficient to require registration).

<sup>306</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991).

<sup>307</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>308</sup> See *Atlantic Marine Constr. Co. v. U.S. District Court*, 571 U.S. 49, 66 (2013).

<sup>309</sup> See *Chase*, *supra* note 104, at 159–60 ("States primarily incentivize registration by closing their courts to nonregistrant foreign corporations that 'do business' in the state until they do register.").

granted benefits parallel the corporation's obligations under the exchange, as a corporation transacting enough in-state business to need the state's authorization to engage in its desired activities and to access state courts as a plaintiff can reasonably be expected to consent to jurisdiction in those suits that are either related to legitimate exercises of the state's regulatory authority or maintained by state residents.

### C. *The Proposed Defined-Consent Registration Scheme Satisfies Constitutional Limits*

The recent abolition of general “doing business” jurisdiction, as discussed earlier, intensified a long-simmering scholarly and judicial debate regarding whether existing corporate registration statutes operate as a consent to general, all-purpose jurisdiction and, if so, whether this interpretation transgresses constitutional limitations.<sup>310</sup> Some scholars have argued that such a reading does violate due process, the dormant commerce clause, or the unconstitutional conditions doctrine.<sup>311</sup> Others, however, have defended the constitutionality of general jurisdictional consent through registration.<sup>312</sup> These issues are now percolating through the courts, requiring judges to grapple with the underlying constitutional questions, typically without any guidance other than century-old, pre-*International Shoe* Supreme Court precedent and tea leaves from the Court's more recent decisions.<sup>313</sup>

Our proposal, though, avoids this ongoing debate, by limiting a corporation's jurisdictional consent to specified circumstances implicating state sovereign interests. As a result, we make only a narrower claim here: our proposal comports with any potential constitutional limits.

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<sup>310</sup> See *supra* Part IV.A.

<sup>311</sup> E.g., John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 163–64 (2016) (“[C]ourts should hold that jurisdiction based on (1) business registration, (2) extensive business contacts, and (3) service of process each violate the Dormant Commerce Clause in cases brought by non-residents injured out of state.”); Monestier, *supra* note 22, at 1412 (arguing that “premising general jurisdiction on a corporation's registration and appointment of an agent for service of process is inconsistent with due process”); Rhodes, *Nineteenth Century*, *supra* note 16, at 442–44 (urging general, all-purpose jurisdiction over registering corporations for unrelated claims is “ripe for invalidation by the Supreme Court”).

<sup>312</sup> E.g., Chase, *supra* note 104, at 162–68; Harrison, *supra* note 104, at 480–81. We previously urged—similarly but in less detail than the position taken here—that registration statutes can operate as a consent to jurisdiction with respect to “those actions implicating sufficient state sovereign interests, including state interests in prescribing the substantive law governing the action or providing a convenient forum for injured residents,” as long as the corporation has legally sufficient notice of the interpretation. Robertson & Rhodes, *Shifting Equilibrium*, *supra* note 11, at 662–64.

<sup>313</sup> E.g., *Rodriguez v. Ford Motor Co.*, No. A-1-CA-36402, 2018 WL 6716038, at \*1 (N.M. Ct. App. Dec. 20, 2018) (following the Supreme Court's century-old precedents to hold that the defendant consented to general jurisdiction in the state by registering to do business); see also *supra* Part III (discussing the Supreme Court's early case law on consent by corporation registration).

### 1. Due Process

The Due Process Clause applies to all government conduct,<sup>314</sup> which of course would encompass our proposed defined-consent registration scheme. Although the Supreme Court has not specifically addressed the due process framework for obtaining jurisdictional consent through corporate registration, three somewhat interrelated concerns are detectable from analogous decisions. First, the corporation must have legally sufficient notice of the scope of the consent granted, such that consent at least cannot extend beyond the limits specified by either the terms of the registration statute or its case-law interpretation.<sup>315</sup> Second, due process ensures the government's compliance with fundamental notions of fairness with respect to any exercise of its power, which may require a congruence between the scope of the consent granted and the state benefits obtained as part of the exchange.<sup>316</sup> Third, because *Daimler* warned against "grasping" or "exorbitant" jurisdictional rules that defendants cannot avoid, due process may independently mandate that corporations have the opportunity "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>317</sup>

Our proposal readily satisfies each of these potential limits. As discussed previously, a possible difficulty both with existing registration statutes, which are almost always silent on the consequences of registration, and other existing forms of statutory implied jurisdictional consent manifested through conduct, such as accepting a fiduciary position with or purchasing shares in a corporation, is the lack of actual notice of the consequences of the act.<sup>318</sup> But our express proposal provides notice in a way that an implied condition does not, allowing corporations the opportunity to choose voluntarily whether to subject their business to the state's jurisdiction in specified

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<sup>314</sup> See Rhodes, *Liberty*, *supra* note 59, at 572–76.

<sup>315</sup> *E.g.*, *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929) (concluding, "in the absence of language compelling it," a registration statute should not authorize state courts to obtain jurisdiction over transactions unconnected to sovereign interests); *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 215, 216 (1921) (reasoning the scope of the corporation's consent depends on explicit provisions of registration statutes or their judicial construction).

<sup>316</sup> See *N.C. Dep't of Rev. v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219–20 (2019).

<sup>317</sup> *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

<sup>318</sup> See, e.g., Chiappinelli, *supra* note 179, at 813 (urging such implied consent is both "ineffective and unhelpful"); Hershkoff & Kahan, *supra* note 298, at 274–76 (discussing notice problems to shareholders); Craig Sanders, Note, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 Nw. U. L. REV. 1323, 1334 (2017) ("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.").

circumstances in return for the state's permission to conduct in-state business operations and to access its courts.<sup>319</sup>

This exchange is proportional, with the state-granted benefits mirroring the corporation's obligations. In other scenarios involving the grant of state benefits accompanied by conditions on constitutional rights, the Supreme Court has required a suitable connection between the privilege granted to the citizen to engage in the activity and the government's conditions on that activity. Take, for example, state "implied consent" laws to blood-alcohol testing, which provide that consent to a Fourth Amendment breath or blood search, when a motorist is suspected of drunk driving, is a condition for the privilege of driving on the state's roads.<sup>320</sup> The Supreme Court has indicated that such laws are constitutional when merely imposing civil penalties (like revoking or suspending a driver's license) or evidentiary consequences (such as admitting the refusal as evidence of intoxication) on those refusing to comply, but the state cannot impose criminal penalties on a refusal because "[t]here must be a limit on the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on the public roads."<sup>321</sup> Similarly, the government may condition a land-use permit on a relinquishment of private property when there is a "nexus" and "rough proportionality" between the property demand and the effects of the private land use authorized by the permit, but the government may not leverage its conditions to pursue unrelated government objectives.<sup>322</sup> Due process may mandate, then, that jurisdictional consent, as a condition of corporate registration, only be imposed in fair relation to the benefits, protections, and opportunities granted by the state.<sup>323</sup> If so, our proposal precisely satisfies this requirement—the consent is limited to those suits related to those sovereign protective, prescriptive, and regulatory state interests implicated when a corporation is engaging in local, ongoing business activities and accessing the state's courts as a plaintiff against state residents.

These constraints on the jurisdictional bases for consent also ensure the proposed act comports with fair play and substantial justice by restricting the potential locales for a suit arising out of a particular transaction. Some courts, in the course of refusing to interpret existing registration statutes as requiring all-purpose consent to jurisdiction, have reasoned that adopting

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<sup>319</sup> Of course, the sufficiency of lead time is a matter that could be raised and debated through the Uniform Law Commission process. *See supra* Part IV.C.

<sup>320</sup> *See* ROBERT L. DONIGAN, *CHEMICAL TESTS AND THE LAW* 177–79 (2d ed. 1966) (discussing the origins of such statutes).

<sup>321</sup> *See* *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016).

<sup>322</sup> *E.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605–06 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 386–92 (1994).

<sup>323</sup> *Cf. N.C. Dep't of Rev. v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219–20 (2019) (limiting, under the Due Process Clause, state taxation to those taxes with "fiscal relation to protection, opportunities and benefits given by the state," when the "state has given anything for which it can ask return") (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

such an interpretation would conflict with *Daimler*'s due process caution against grasping or exorbitant jurisdictional rules subjecting a defendant to suit everywhere with respect to a particular claim.<sup>324</sup> Our proposed Act, though, would not require a registering corporation to consent to open-ended general jurisdiction. There only would be a handful of potential fora to adjudicate its liability for its activities allegedly causing harm to a particular claimant, such as the plaintiff's domicile, the place of injury, the locales of the corporate activities related to the claim, or the home states of inseparable co-defendants. With respect to these potential fora, the corporation is obtaining state benefits and protections from its registration, and the states have sovereign interests in adjudicating such claims, ensuring that the corporation's agreed consent to jurisdiction "does not offend traditional notions of fair play and substantial justice" safeguarded by the Due Process Clause.<sup>325</sup>

## 2. *The Dormant Commerce Clause*

The dormant commerce clause is another potential impediment to jurisdiction based on in-state registration.<sup>326</sup> This negative implication from the Constitution's grant of authority to Congress to regulate commerce among the states prohibits states from unduly burdening interstate commerce by barring discrimination against out-of-state entities and by limiting states' abilities to regulate extraterritorially.<sup>327</sup> In a series of early twentieth-century cases, the Supreme Court recognized that exorbitant state-law jurisdictional assertions may effectuate undue burdens on interstate commerce and thereby violate the dormant commerce clause.<sup>328</sup>

<sup>324</sup> *E.g.*, *AstraZeneca AB v. Mylan Pharms. Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014), *aff'd sub nom.* *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755 (Fed. Cir. 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016).

<sup>325</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>326</sup> *See Cepec*, 137 A.3d at 142 ("[I]n our federal republic, exacting such a disproportionate toll on commerce is itself constitutionally problematic."); *Robertson & Rhodes, Shifting Equilibrium*, *supra* note 11, at 664 ("[R]equiring a corporation to subject itself to all-purpose jurisdiction may violate the dormant Commerce Clause by imposing unconstitutional burdens on out-of-state businesses.").

<sup>327</sup> *Florey*, *supra* note 238, at 1224–25 ("[T]he dormant commerce clause—perhaps in tandem with structural constitutional principles—limits the degree to which states can regulate extraterritorially.").

<sup>328</sup> *See Mich. Cent. R.R. Co. v. Mix*, 278 U.S. 492, 494–95 (1929) (holding statutory service in Missouri on soliciting freight agent of a Michigan railroad unduly burdened interstate commerce when the railroad transacted no in-state Missouri business, the accident occurred in Michigan, and both parties resided in Michigan at the time of the accident); *Atchison, Topeka & Santa Fe Ry. Co. v. Wells*, 265 U.S. 101, 103 (1924) (holding interpretation of Texas garnishment statutes whereby a nonresident obtained a Texas judgment on a claim arising outside Texas against a Kansas railroad that did not transact any in-state Texas business violated the dormant commerce clause); *Davis v. Farmers Co-op. Equity Co.*, 262 U.S. 312, 315–17 (1923) (sustaining a Commerce Clause challenge to statute allowing service on a railroad's solicitation agent when the railroad was not engaged in in-state business, the plaintiff did not reside in the forum, and the cause of action had no connection with the forum); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 202–05 (1914) (holding an out-of-state corporation exclusively engaged in interstate commerce could not be excluded from the state



A modern pathmarking Supreme Court decision is *Bendix Autolite Corp. v. Midwesco Enterprises*, which held that an Ohio statute tolling limitations when a nonresident corporation did not have an agent for service of process within the state violated the Commerce Clause.<sup>329</sup> The Court reasoned that the tolling statute burdened out-of-state companies by making them choose whether to submit to jurisdiction or to give up a statute of limitations defense.<sup>330</sup> This burden, in the Court's view, was not matched by a corresponding benefit to the state; the Court concluded that the state's "legitimate sphere of regulation is not much advanced by the statute," and that "the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the State might advance."<sup>331</sup>

The balancing required by *Bendix* provides a compelling argument for limiting the reach of a registration statute's jurisdictional consent in the manner we propose. In a recent article, Professor Jack Preis argued that registration statutes are invalid under *Bendix* when jurisdictional consent extends to situations "where the plaintiff is a non-resident injured out of state," as such broad-based jurisdiction exceeds the forum state's interest.<sup>332</sup> But in those cases where the state does actually possess a legitimate sovereign interest (such as the cases governed by our registration proposal), scholars largely agree that the dormant commerce clause poses no barrier to consent-based jurisdiction.<sup>333</sup>

The Supreme Court's early twentieth-century dormant commerce clause holdings on the jurisdictional consequences of registration statutes are in accord. Take *Denver & Rio Grande Western Railroad Co. v. Terte*,<sup>334</sup> where a then-bona fide Missouri resident filed an action in Missouri against two separate out-of-state railroads, Santa Fe and Rio Grande, for injuries resulting from a Colorado workplace accident he suffered while residing there.<sup>335</sup> The railroads both objected that the jurisdictional assertion violated the Commerce Clause and the Due Process Clause. The Supreme Court agreed with Rio Grande's Commerce Clause argument, as Rio Grande did not operate any railroad line in Missouri, was not transacting in-state business in Missouri, and had not registered to do business in Missouri.<sup>336</sup> Nonetheless, the Court summarily upheld jurisdiction over Santa Fe, as it was operating railroad lines in Missouri and had accordingly obtained a license to do business

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courts for failing to register since such registration was "particularly burdensome, because . . . it requires the corporation to subject itself to the jurisdiction of the courts of the state in general as a prerequisite to suing in any of them").

<sup>329</sup> 486 U.S. 888, 892–95 (1988).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 891.

<sup>332</sup> Preis, *supra* note 311, at 154.

<sup>333</sup> *Id.*; see also Harrison, *supra* note 104, at 545–46; Robertson & Rhodes, *Shifting Equilibrium*, *supra* note 11, at 661–66.

<sup>334</sup> 284 U.S. 284 (1932).

<sup>335</sup> *Id.* at 286.

<sup>336</sup> *Id.* at 286–87.

there.<sup>337</sup> The Court thus held the extensive intrastate Missouri activities and in-state licensing of Santa Fe allowed the state to exercise jurisdiction over it for claims asserted by a state citizen, even though his claims arose in another state.<sup>338</sup> Of course, our proposal would operate similarly, allowing state citizens to sue in-state registered corporations no matter where the claim arose.

The “common thread” identified by the Supreme Court with respect to its decisions finding a dormant commerce clause violation is that “the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.”<sup>339</sup> But rather than interfering with the functioning of the interstate market, our proposal facilitates it. The most difficult jurisdictional cases tend to be tort cases—where the parties do not know in advance that a dispute is likely to arise, and therefore do not attempt to negotiate a forum *ex ante*. When an injury does arise, though, the market is concerned with compensating for the injuries and allocating liability among all those potentially liable for the injury, including product manufacturers, component manufacturers, distributors, retailers, and resellers. By ensuring a convenient single forum for addressing almost all (if not all) the claims arising from a defective product, our defined-consent proposal promotes an efficient functioning of the interstate market without imposing an undue burden on any party. Indeed, it is even possible that, as consumers become more aware of the difficulty of pursuing remedies against out-of-state corporations,<sup>340</sup> some corporations may employ registration as a competitive edge, advertising their registration as attesting to their commitment to the quality and safety of their products. But in any event, as the Supreme Court long ago recognized, the dormant commerce clause is not violated, even when interstate commerce is incidentally burdened, by a jurisdictional submission to those “requirements of orderly, effective administration of justice” that regulate the interstate market.<sup>341</sup>

### 3. Unconstitutional Conditions

Finally, the unconstitutional conditions doctrine has also been used to challenge broad-based registration statutes. This doctrine “vindicates the

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<sup>337</sup> See *id.* The Court relied on “the doctrine approved in” its earlier decision in *Hoffman v. Missouri*, 274 U.S. 21 (1927), which had held that the dormant commerce clause did not bar suit against a Missouri railroad sued in Missouri for an accident occurring in Kansas because the railroad was sued in its state of incorporation, it owned and operated a railroad there, and it carried on intrastate business there, *id.* at 22–23. *Terte* sub silentio extended the *Hoffman* rule to a railroad which was not incorporated in the forum state but was licensed to and did conduct intrastate business there. See *Terte*, 284 U.S. at 286–87.

<sup>338</sup> See *Terte*, 284 U.S. at 286–87.

<sup>339</sup> *McBurney v. Young*, 569 U.S. 221, 225 (2013) (citation omitted).

<sup>340</sup> See, e.g., Wilbur D. Owens & Joseph A. Mulherin, *The Chinese Manufacture Everything and You Cannot Sue Them!*, OWENS & MULHERIN, <https://www.owensmulherin.com/recent-cases/chinese-manufacture-everything-cannot-sue/> [<https://perma.cc/U5Y2-MPAR>] (explaining difficulties of pursuing remedies against Chinese defendants).

<sup>341</sup> *Hoffman*, 274 U.S. at 23.

Constitution's enumerated rights by preventing the government from coercing people into giving them up,"<sup>342</sup> thereby invalidating government-compelled surrenders of a constitutional right "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship" to the surrendered right.<sup>343</sup> In the jurisdictional context, the Supreme Court has employed the unconstitutional conditions doctrine to bar states from conditioning an entity's right to do business in the state on its willingness to give up its right to remove a case to federal court.<sup>344</sup>

The United States Chamber of Commerce drew on this parallel in an amicus brief in *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc.*,<sup>345</sup> arguing that consent-by-registration violates the unconstitutional conditions doctrine.<sup>346</sup> It maintained that, just as the Court has held that a state cannot condition registration on surrendering the right to remove a case to federal court, so too could the state not condition registration on consenting to jurisdiction within the state; specifically, the Chamber urged that such a rule would require the defendant to give up "the due process protection recognized in *Daimler*"<sup>347</sup>—that is, the right "to structure their affairs to provide some assurance regarding where a claim might be asserted."<sup>348</sup> Under this scenario, "[e]very state could enact a statute requiring consent to general jurisdiction, with the result that a corporation could be sued everywhere on any claim arising anywhere in the world."<sup>349</sup>

The Federal Circuit did not reach the issue, but a concurrence by Judge O'Malley expressed skepticism that the doctrine would apply to personal jurisdiction. She noted that "the Supreme Court has upheld the validity of consent-by-registration statutes numerous times since the development of the unconstitutional conditions doctrine."<sup>350</sup> She also suggested that the Court had earlier distinguished between attempting to "deny foreign corporations access to the federal courts," which the Supreme Court had not allowed, and requiring foreign corporations "to consent to general personal jurisdiction as a condition of being granted the right to do business in that state," which the Court had upheld in the same era.<sup>351</sup>

<sup>342</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

<sup>343</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (regulatory takings case).

<sup>344</sup> See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 60 (2001) (discussing Supreme Court precedent at the turn of the twentieth century eventually settling "that a state may not condition the privilege of doing business on a foreign corporation's waiver of its federal right of removal").

<sup>345</sup> 78 F. Supp. 3d 572 (D. Del. 2015).

<sup>346</sup> See Brief of Amicus Curiae Chamber of Commerce, *Acordas*, 78 F. Supp. 3d 572 (No. 14-935-LPS).

<sup>347</sup> *Id.* at 20.

<sup>348</sup> *Id.* at 9.

<sup>349</sup> *Id.*

<sup>350</sup> *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755, 770 n.1 (Fed. Cir. 2016) (O'Malley, J., concurring).

<sup>351</sup> See *id.* (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 173-74 (1939)).

In any event, a registration statute requiring broad consent to general jurisdiction would undoubtedly be challenged under the unconstitutional conditions doctrine, with the judiciary then having to address whether imposing this condition unconstitutionally leverages the state's regulatory authority over the in-state conduct of business to obtain a waiver of due process rights. Regardless of the resolution of this issue, however, our proposed consent statute is narrow enough to stay well on the side of constitutional permissibility. As we have written elsewhere, a registration statute will not trigger the unconstitutional conditions doctrine as long as it meets three requirements: (1) the statute must give notice of the terms *ex ante*; (2) both parties to the agreement must receive some benefit from it (that is, the exchange must actually be an exchange, and not a mere fiction); and (3) the forum state cannot seek consent to jurisdiction exceeding its sovereign interest.<sup>352</sup>

The proposed statute satisfies all three of those requirements. As discussed above, adopting an explicit statute in the modern era will give notice of the terms and allow businesses to make an informed choice about whether to register.<sup>353</sup> Businesses who register will also obtain real benefits—the opportunity to transact business within the state and the ability to sue as a plaintiff in state courts. And they may also use this *ex ante* jurisdictional consent as a competitive measure, as it allows registering parties essentially to agree to a forum selection clause even without knowing the identity of other potential parties in the case. Finally, and essentially, the statute applies only to those areas in which the state possesses genuine sovereign interests. The absence of such interests invalidates conditioning registration on giving up the removal power, but a personal jurisdiction statute that hews closely to legitimate state interests does not run the same risk of upending state-federal relations.<sup>354</sup> Indeed, when federal procedure accommodates the states' interests, our federal system is strengthened.<sup>355</sup>

## VI. CONCLUSION

The demise of general jurisdiction leaves regulatory gaps that have not been bridged by a corresponding expansion of specific jurisdiction. As a

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<sup>352</sup> Robertson & Rhodes, *Shifting Equilibrium*, *supra* note 11, at 663–64.

<sup>353</sup> See *supra* Part IV.A.

<sup>354</sup> See Berman, *supra* note 344, at 68 (noting that, while the Court's rationale was far from clear in its cases barring removal waivers as a registration condition, it likely gave significant weight to the idea that "whether a foreign corporation does or does not remove could make a dispositive difference in the state's assessment of whether state interests are advanced or impeded by allowing that corporation in").

<sup>355</sup> Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1887 (2018) ("[S]tates have a right to be concerned about the boundaries of federalism in the context of procedure. A robust view of the states' role would improve federal procedure because of the states' wealth of litigation information, democratic bona fides, and unique two-sided view of federal litigation.").

result, plaintiffs confront insurmountable obstacles in some situations in finding an effective forum to vindicate their rights. Registration-based jurisdictional consent can substantially assist in filling such gaps.

Registration-based consent to jurisdiction has a long pedigree. It dates back to the years before the Fourteenth Amendment's ratification—that is, the very beginning of the constitutional protections for personal jurisdiction. For much of its history, however, registration-based jurisdictional consent languished in obscurity, as “continuous and systematic” general jurisdiction overshadowed the doctrine. As a result, it is not entirely clear where the doctrine stands in modern practice, and some have alleged that the Supreme Court's recent decisions have rendered it inoperable.

Given this state of affairs, we propose that instead of litigating the ongoing validity of longstanding statutes, states adopt a modernized jurisdictional-consent statute that works in tandem with other constitutional protections. We believe the Uniform Law Commission is especially well situated to put forth such a statute, and that states would benefit from adopting it. Such a statute would avoid the wasteful expense of litigating the interpretation of registration statutes initially adopted during the heyday of the horse and buggy. More importantly, the proposed Act would allow the states to assert their sovereign authority to ensure access to justice for their residents after the demise of general jurisdiction. By precisely tailoring the statute to the state's sovereign interests, the proposed Act avoids constitutional pitfalls while still providing an effective jurisdictional reach for the states.