

MALLORY v. NORFOLK SOUTHERN RAILWAY COMPANY:
THE UNWARRANTED END OF CONSENT TO GENERAL
JURISDICTION IN PENNSYLVANIA*

I. INTRODUCTION

Pennsylvania is unique. The Commonwealth has Gritty, the Phillie Phanatic, and a business registration statute that requires foreign corporations to consent to general jurisdiction when they register to do business.¹ This is the only statute in the nation that requires foreign corporations to agree to general jurisdiction.² By setting this requirement, the statute pits two key concepts of personal jurisdiction against each other: general jurisdiction and jurisdiction by consent.³

These concepts date back to 1945, when the United States Supreme Court held that, absent consent, the exercise of personal jurisdiction over a nonresident corporate defendant would violate due process unless that defendant had certain minimum contacts with the forum state.⁴ In *International Shoe Co. v. Washington*,⁵ the Court explained that certain contacts can lead to specific jurisdiction, while others can lead to general jurisdiction.⁶

In the decades that followed *International Shoe*, the Court repeatedly reinterpreted the requirements for specific jurisdiction and consistently narrowed its scope.⁷ However,

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1. 42 PA. STAT. AND CONS. STAT. ANN. § 5301 (West 2021).

2. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1366–68 (2015).

3. *See id.* at 1413.

4. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945); RESTATEMENT (THIRD) U.S. LAW OF INT'L COM. ARB. § 4.25 Rep. Notes a.ii (AM. L. INST. 2021); *but see* *Burnham v. Super. Ct.*, 495 U.S. 604, 620–21 (1990) (standing for the proposition that a minimum contacts analysis is not always necessary).

5. 326 U.S. 310 (1945).

6. *Id.* at 317–18; D.E. Wagner, *Hertz So Good: Amazon, General Jurisdiction's Principal Place of Business, and Contracts Plus as the Future of the Exceptional Case*, 104 CORNELL L. REV. 1085, 1094 (2019). While the Court in *International Shoe* did not use the modern terms “specific jurisdiction” or “general jurisdiction,” it described the circumstances in corporations can be subject to each. *Int'l Shoe*, 326 U.S. at 317–18.

7. *See* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (refusing to find specific jurisdiction based on the unilateral activities of the plaintiff); *Kulko v. Super. Ct.*, 436 U.S. 84, 94 (1978) (holding that a father's decision to send his daughter to spend time with her mother in California did not amount to purposeful availment); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (refusing to find specific jurisdiction based on the unilateral activities of the plaintiff); *Bristol-Myers Squibb Co. v. Super. Ct.*, 173 S.Ct. 1773, 1780

until the 2010s, the Court had not truly addressed the matter of general jurisdiction.⁸ In 2015, the Court drastically curtailed the scope of general jurisdiction, holding that a corporation is typically only subject to general jurisdiction in the state where it is incorporated or has its principal place of business.⁹

Key to the reasoning in *Daimler AG v. Bauman*¹⁰ was the idea that a corporation's continued and systematic contacts alone could not make it subject to general jurisdiction in every state.¹¹ Such a formulation would be "unacceptably grasping" and violate due process.¹² Separately, the United States Supreme Court has found that consent is a valid way to attain personal jurisdiction over a foreign defendant.¹³ *Daimler* never discussed the relationship between consent and general jurisdiction.¹⁴ As of November 2022, that question remains unanswered by the Court.

Nonetheless, in *Mallory v. Norfolk Southern Railway Co.*,¹⁵ the Pennsylvania Supreme Court ruled that the Pennsylvania business registration statute was unconstitutional.¹⁶ This Note argues that the Pennsylvania Supreme Court applied the wrong legal analysis by employing a *Daimler* due process analysis instead of a consent analysis. In doing so, the court ignored U.S. Supreme Court precedent and misinterpreted *Daimler*.¹⁷ Rather than asking whether the defendant was at home in Pennsylvania,¹⁸ the court should have asked whether the defendant actually consented to personal jurisdiction. Additionally, this Note argues that when the Pennsylvania Supreme Court did discuss consent, it applied the wrong analytical framework.

This Note begins by providing the facts and procedural history of *Mallory* in Parts II.A and II.B, respectively. Section III discusses the history of personal jurisdiction before *Mallory*, focusing on personal jurisdiction, general jurisdiction, consent, consent via business registration statute, the unconstitutional conditions doctrine, and personal jurisdiction in Pennsylvania. Section IV provides a detailed look at the Pennsylvania Supreme Court's analysis of the case.

(2017) (refusing to find specific jurisdiction unless the defendant's actions alleged to have caused the underlying controversy took place within the forum state).

8. See Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1011–12 (2012).

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

10. 571 U.S. 117 (2014).

11. *Id.* at 137–39.

12. *Id.* at 138.

13. See *Insurance Corp. of Ir., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents . . . an individual right, it can, like other such rights, be waived."); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("Similarly, if the defendant consented to the jurisdiction of the state courts . . . a judgment could affect his interest in property outside the State.").

14. *Kraus v. Alcatel-Lucent*, 441 F. Supp. 3d 68, 75 (E.D. Pa. 2020) ("*Daimler* did not address the interplay between consent to jurisdiction and the due process limits of general jurisdiction." (quoting *Plumbers' Loc. Union No. 690 Health Plan v. Apotex Corp.*, No. CV 16-665, 2017 WL 3129147, at *11 (E.D. Pa. 2017))).

15. 266 A.3d 542, 567 (Pa. 2021), *cert. granted*, 142 S. Ct. 2646 (2022).

16. *Id.* at 567.

17. See *Daimler*, 571 U.S. at 137–39.

18. See *id.* at 138–39 ("Accordingly, the inquiry under *Goodyear* [564 U.S. 914 (2011)] is not whether a foreign corporation's in-form contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." (alterations in original) (internal quotations omitted)).

Section V offers an analysis and discussion of the court’s opinion and argues that the *Mallory* court improperly used a *Daimler* analysis rather than a consent analysis to examine the statute. Additionally, Section V points out that when the court discussed the defendant’s consent, its analysis was not supported by the facts or the law. Ultimately, this Note argues that by ruling the Pennsylvania business registration statute unconstitutional, the court applied Supreme Court precedent that does not exist.

II. FACTS AND PROCEDURAL HISTORY

A. *Relevant Facts of the Case*

On September 18, 2017, Robert Mallory (“Mallory” or “the plaintiff”) filed a complaint against Norfolk Southern Railway Company (“Norfolk” or “the defendant”),¹⁹ alleging that during his employment with the defendant, he was exposed to harmful carcinogens that caused him to develop colon cancer.²⁰ Norfolk filed a preliminary objection, seeking dismissal and arguing that the Philadelphia County Court of Common Pleas (“trial court”) lacked personal jurisdiction.²¹ Mallory alleged that his claim arose out of work that he did for the defendant while in Virginia and Ohio between 1988 and 2005.²² Norfolk, a Virginia corporation, argued that it had only one connection with Pennsylvania—its registration to do business within the Commonwealth.²³

B. *Procedural History*

Trial Court Judge Arnold New sustained Norfolk’s preliminary objection,²⁴ and the Pennsylvania Superior Court took this decision under advisement.²⁵ This court “immediately punted [the appeal] to the [Pennsylvania] Supreme Court, ruling in October 2020 that . . . [it] held exclusive jurisdiction over appeals . . . that questioned the constitutionality of state law.”²⁶

The Pennsylvania Supreme Court heard oral arguments on September 21, 2021.²⁷ On December 22, 2021, it affirmed the trial court’s decision.²⁸

III. PRIOR LAW

This Section provides background information about the law and precedent that underpins the *Mallory* decision. Part III.A provides an overview of the concept of

19. *Mallory*, 266 A.3d at 551.

20. *Id.*

21. *Id.*

22. *Id.*

23. See *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, 2018 WL 3025283, at *1 (Pa. Ct. Com. Pl. 2018), *aff’d* 266 A.3d 542 (Pa. 2021).

24. *Mallory*, 266 A.3d at 552.

25. Matthew Santoni, *Pa. Cases to Watch in 2021: Midyear Report*, LAW360 (July 9, 2021, 4:18 PM), <https://www.law360.com/articles/1401942/pa-cases-to-watch-in-2021-midyear-report> [https://perma.cc/T6CC-WPKX].

26. *Id.*; *Mallory v. Norfolk S. Ry. Co.*, 241 A.3d 480 (Pa. Super. Ct. 2020).

27. *Mallory*, 266 A.3d at 542.

28. *Id.*

personal jurisdiction. Part III.B discusses the evolution of modern-day general jurisdiction. Part III.C discusses the concept of consent as a tool to achieve personal jurisdiction; Part III.C.1 focuses on consent to personal jurisdiction via business registration statute and Part III.C.2 on the unconstitutional conditions doctrine. Part III.D discusses the Pennsylvania business registration statute at issue in *Mallory*; Part III.D.1 provides an overview of cases in which Pennsylvania's business registration statute was held unconstitutional and Part III.D.2 an overview of cases in which courts upheld Pennsylvania's business registration statute.

A. Personal Jurisdiction

Personal jurisdiction is a doctrine that determines where an individual or entity can be sued²⁹ and was addressed by the Court in the seminal case *Pennoyer v. Neff*.³⁰ In *Pennoyer*, the U.S. Supreme Court reasoned that where a nonforum defendant³¹ does not consent to personal jurisdiction,³² a court's authority is "restricted by the territorial limits of the [forum] State."³³ The Court based these restrictions on the Due Process Clause of the Fourteenth Amendment³⁴ These restrictions on personal jurisdiction gave each state the power to determine civil remedies regarding persons within its borders while barring each state from exercising jurisdiction over persons or property outside its territory.³⁵

In the twentieth century, the territorial restrictions of *Pennoyer* began to conflict with a modernized, industrialized, and more mobile society.³⁶ This mobility caused problems for states that had a "legitimate interest in deciding cases against out-of-staters."³⁷ To meet the territorial requirements of *Pennoyer*, states began constructing legal fictions to achieve personal jurisdiction over nonforum state residents.³⁸

Rather than continue its focus on the territorial aspects of *Pennoyer*, the Court shifted to a more holistic approach to determine personal jurisdiction.³⁹ *International*

29. See Matthew D. Kaminer, *The Cost of Doing Business? Corporate Registration as Valid Consent to General Personal Jurisdiction*, 78 WASH. & LEE L. REV. 55, 67 (2021); see also Nicholas R. Spampata, *King Pennoyer Dethroned a Policy-Analysis-Influenced Study of the Limits of Pennoyer v. Neff in the Jurisdictional Environment of the Internet*, 85 CORNELL L. REV. 1742, 1743, 1746 (2000).

30. 95 U.S. 714 (1877).

31. A nonforum defendant is a defendant who does not reside in the forum state.

32. See *Pennoyer*, 95 U.S. at 725 ("If the defendant appears, the cause becomes mainly a suit *in personam* . . .").

33. *Id.* at 720.

34. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

35. See *Pennoyer*, 95 U.S. at 722.

36. Edward D. Cavanagh, *General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 ME. L. REV. 287, 290–91 (2016); see also Spampata, *supra* note 29, at 1744–45.

37. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1269 (2018).

38. See Robin J. Efron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 42–43 (2018).

39. See Spampata, *supra* note 29, at 1747 ("In *International Shoe Co. v. Washington*, the Court abandoned these [territorial] fictions and adopted a test based on fairness and a minimum amount of acts connecting the defendant to the forum state.").

Shoe Co. acknowledged that the due process concerns underlying personal jurisdiction should be assessed.⁴⁰

After *International Shoe*, the initial question in a personal jurisdiction analysis was whether a state's long-arm statute⁴¹ extends to the claim.⁴² If the long-arm statute covered the claim, the inquiry turned to whether allowing personal jurisdiction offended due process.⁴³ To determine when personal jurisdiction existed absent a defendant's consent, the Court created a "minimum contacts" test that grants personal jurisdiction only where a defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁴⁴ The Court noted that the Fourteenth Amendment's Due Process Clause does not allow individuals—or corporations—to be subject to in personam jurisdiction where they have "no contacts, ties, or relations."⁴⁵

Personal jurisdiction was divided into two categories: specific jurisdiction and general jurisdiction.⁴⁶ Though this distinction was first acknowledged in a 1966 law review article,⁴⁷ it was later adopted by the Court.⁴⁸

International Shoe held that specific jurisdiction occurs where a subject's in-state contacts are continuous, systematic, and contribute to the suit in question.⁴⁹ The Court clarified that "single or isolated" contacts with the forum state are not considered "continuous and systematic," and that such limited contact⁵⁰ does not constitute specific jurisdiction where the suit is not based on those contacts.⁵¹ Requiring a corporation to

40. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

41. Long-arm statutes are laws that "allow[] for a court to obtain personal jurisdiction over an out-of-state defendant on the basis of certain acts committed by an out-of-state defendant, provided that the defendant has a sufficient connection with the state." *Long-arm statute*, CORNELL L. DICTIONARY, https://www.law.cornell.edu/wex/long-arm_statute [<https://perma.cc/Q9F7-9QLQ>] (last visited Nov. 1, 2022).

42. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 493 (2004) (explaining that in personam jurisdiction may be established over a nonresident if service upon that nonresident is authorized by a long-arm statute and if the statute is within the constitutional limits of due process).

43. See McFarland, *supra* note 42, at 493 (explaining that in personam jurisdiction may be established over a nonresident if service upon that nonresident is authorized by a long-arm statute and if the statute is within the constitutional limits of due process).

44. *Int'l Shoe*, 326 U.S. at 316; see also Kevin N. Rolando, *Express Consent by Registration: A Personal Jurisdiction Reminder*, 60-OCT. R.I. B.J. 11, 11 (2011) ("It is therefore important to distinguish the minimum-contacts test as a tool by which a court may impose personal jurisdiction over an otherwise non-consenting defendant. It is necessary only when a foreign corporation's consent to jurisdiction must be implied. Thus, it is best designated as implied consent by minimum contacts, as distinct from express consent by registration.").

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

46. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

47. *Id.*; see Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 701 n.57 (1987) (stating that the terms "specific" and "general" jurisdiction were "originally coined by Professors von Mehren and Trautman" and citing the 1966 article).

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

49. *Int'l Shoe*, 326 U.S. at 317. Instead of the modern term "specific jurisdiction," the Court referred to a corporation's "presence" in a state to represent contacts sufficient to subject it to suit there. *Id.*

50. *Id.*

51. *Id.*

defend contacts that are so limited, the Court reasoned, would “lay too great and unreasonable a burden on the corporation to comport with due process.”⁵²

The Court viewed general jurisdiction as something different. *International Shoe* explained that general jurisdiction occurs where a corporation’s continuous, in-state activities are “so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”⁵³ Inferentially, such findings of general jurisdiction do not offend due process.⁵⁴

Subsequent decisions further defined *International Shoe*’s minimum contacts analysis. The test sought to ensure that individuals have fair warning that their activities could give rise to suit in a foreign jurisdiction.⁵⁵ In *World-Wide Volkswagen Corp. v. Woodson*,⁵⁶ the Court held that defendants should be subject to personal jurisdiction only where they can “reasonably anticipate being haled into court.”⁵⁷ The focus on notice and foreseeability ensured “orderly administration of the laws” by creating a “degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them to suit.”⁵⁸ In *Bristol-Myers Squibb Co. v. Superior Court of California*,⁵⁹ the Court held that specific jurisdiction was a tool of federalism by which personal jurisdiction imposes “limitations on the power of the respective [s]tates.”⁶⁰ Additional factors exist when personal jurisdiction arises,⁶¹ including potential “burden on the defendant.”⁶²

B. *The Evolution of General Jurisdiction*

The primary form of personal jurisdiction the Court discussed in *Pennoyer* was general jurisdiction.⁶³ The concept was further defined in *International Shoe*,⁶⁴ which held that, in addition to specific jurisdiction, there were cases where “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those

52. *Id.*

53. *Id.* at 318. The Court does not use the term “general jurisdiction” but describes its features. *Id.*

54. *See id.* at 317–18 (explaining that while isolated contacts cannot give rise to specific jurisdiction for an unrelated suit, continuous systematic contacts can give rise to general jurisdiction).

55. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

56. 444 U.S. 286, 297 (1980).

57. *Id.* at 297 (first citing *Kulko v. Super. Ct.*, 436 U.S. 84, 97–98, and then citing *Shaffer*, 433 U.S. at 216).

58. *Id.*

59. 137 S. Ct. 1773 (2017).

60. *Id.* at 1780.

61. *See id.* (“These [interests] include the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice.” (internal citations omitted) (internal quotation marks omitted)).

62. *Id.* at 1780.

63. *See* *Andrews*, *supra* note 8, at 999.

64. *Id.*

activities.”⁶⁵ However, unlike specific jurisdiction, the case law regarding general jurisdiction is sparse.⁶⁶

In *Perkins v. Benguet Consolidated Mining Co.*,⁶⁷ the Court held that because the defendant-corporation’s president moved operations from the Philippines to Ohio during World War II, the company had continuous and systematic contacts with the Ohio forum such that the state’s exercise of general jurisdiction would not violate due process.⁶⁸

The Court limited the scope of general jurisdiction set in *Perkins* in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.⁶⁹ In *Helicopteros*, the Court held that the mere purchase of helicopters from and training of pilots in Texas did not lead to general jurisdiction in the Texas forum.⁷⁰ These contacts, the Court held, were not the “kind of continuous and systematic” contacts that allowed for a finding of general jurisdiction in *Perkins*.⁷¹ The Court noted that the defendant had no place of business in Texas and was not licensed to do business in the state.⁷²

The parameters set by *Perkins* and *Helicopteros* would be partially supplanted in the 2010s. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁷³ the Court “significantly advanced the analysis by setting an *at home* standard for the continuous and systematic contacts necessary for general jurisdiction.”⁷⁴ The Court found that general jurisdiction exists where a corporate defendant’s contacts are so “‘continuous and systematic’ as to render them essentially *at home* in the forum state.”⁷⁵

In 2014, the Court further defined the “at home” standard in *Daimler AG v. Bauman*.⁷⁶ There, the plaintiffs—Argentinians who themselves or whose family members were subject to torture or murder at the hands of the Argentinian government—sued Daimler, a German corporation whose subsidiary in Argentina was alleged to be vicariously liable for violations of the Alien Tort Statute⁷⁷ and the Torture Victim Protection Act.⁷⁸ In a California court, the Argentinian plaintiffs sued the German company over claims that arose in Argentina.⁷⁹ The only connection to California was a separate, U.S.-based Daimler subsidiary, distinct from Daimler’s Argentinian

65. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

66. *See Andrews, supra* note 8, at 1010–11.

67. 342 U.S. 437 (1952).

68. *Id.* at 447–48; *see also Andrews, supra* note 8, at 1048–49 (“The company in essence had relocated in Ohio for the duration of the war.”).

69. 466 U.S. 408 (1984); *see also Kaminer, supra* note 29, at 73 (explaining that “*Perkins* and *Helicopteros* defined the contours of the ‘continuous and systematic general business contacts’ necessary to exercise general jurisdiction”).

70. *Id.* at 411, 415–416.

71. *Id.* at 415–16.

72. *Id.*

73. 564 U.S. 915 (2011).

74. *See Andrews, supra* note 8, at 1049 (emphasis added) (citing *Goodyear*, 564 U.S. at 915 (2011)).

75. *Goodyear*, 564 U.S. at 919 (emphasis added).

76. 571 U.S. 117 (2014).

77. 28 U.S.C. § 1350.

78. 28 U.S.C. § 1350; *Daimler*, 571 U.S. at 122–23.

79. *Id.* at 121.

subsidiary.⁸⁰ The plaintiffs urged that the California subsidiary had enough contacts to make Daimler amenable to general jurisdiction in the state.⁸¹

Instead of deciding whether the contacts of the subsidiary could be imputed to the parent company, the Court simply concluded that—even assuming they could be imputed—Daimler was not “at home” in California⁸² because a corporate defendant is at home only where they have their “place of incorporation and principal place of business.”⁸³ The Court held that allowing for general jurisdiction where a corporation simply has continuous and systematic contacts would be “unacceptably grasping”⁸⁴ and clarified that continuous and systematic contacts, while acceptable for specific jurisdiction, were not intended by *International Shoe* to apply to general jurisdiction.⁸⁵ While the ruling could have been limited to a case-specific rejection of lower court misapplication,⁸⁶ the Court instead “committed to restricting . . . the constitutional limits of general personal jurisdiction against business enterprises in all cases, international and domestic.”⁸⁷

As of 2022, the at home restriction may not stand on solid ground. In 2021, Justice Gorsuch called out the at home test in *Ford Motor Co. v. Montana Eighth Judicial District*.⁸⁸ There, Justice Gorsuch expressed confusion that a corporation can be considered at home only in one or two states even though “global conglomerates boast of their many ‘headquarters.’”⁸⁹ He went on to question why the Court still gives corporations “special jurisdictional protections.”⁹⁰

C. Personal Jurisdiction by Consent

Consent to personal jurisdiction evolved differently than the minimum contacts analysis of *International Shoe*. In the *Pennoyer* era, consent was viewed as a valid basis for a state to obtain personal jurisdiction,⁹¹ and this view did not change after

80. *Id.*

81. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 390 (2020) (“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.”).

82. *Id.* at 391.

83. *Daimler*, 571 U.S. at 137 (citations omitted).

84. *Id.* at 137–38.

85. *Id.* at 138.

86. See Rhodes & Robertson, *supra* note 81, at 392 (agreeing that the Ninth Circuit’s ruling in favor of general jurisdiction was an “‘egregious example’ of ‘blindly applying substantive law doctrines’ in the jurisdictional context” (quoting 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, 774–75 (2013))).

87. *Id.* (explaining that the Court in *BNSF Railway Co. v. Tyrell* applied the *Daimler* at home test in a completely domestic context).

88. 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

89. *Id.*

90. *Id.*

91. See *Pennoyer v. Neff*, 95 U.S. 714, 725 (1877) (“If the defendant appears, the cause becomes mainly a suit *in personam* . . .”).

International Shoe.⁹² As Justice Brennan explained in his *Shaffer v. Heitner*⁹³ partial concurrence, the Fourteenth Amendment's Due Process Clause is not violated when one consents to personal jurisdiction because "[their] expectation is enhanced that [they] may be haled into that State's courts."⁹⁴

However, the concept of consent raises the question of whether the consent was explicit, implicit, or coerced. The constitutional inquiry for consent "shifts any due process analysis from minimum contacts to [focus on] the validity of the consent."⁹⁵ The Court has held that express consent to jurisdiction, though not required, can amount to a valid waiver of rights associated with Article III adjudication.⁹⁶

Nonetheless, the Court has held that waiver of a right to Article III adjudication can be based on semicoercive means.⁹⁷ In *M/S Bremen v. Zapata Off-Shore Co.*,⁹⁸ the Court held that a "freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."⁹⁹ The Court found that the forum selection clause, which controlled where the parties could bring suit, should be enforced "absent a strong showing that it should be set aside."¹⁰⁰

In *Carnival Cruise Lines, Inc. v. Shute*,¹⁰¹ the parameters of "overweening bargaining power" were better defined.¹⁰² The plaintiffs argued that their form contract with the cruise line represented a circumstance of overweening bargaining power.¹⁰³ The Court rejected this reasoning, explaining that the plaintiffs had notice of the forum selection provision¹⁰⁴ and that the lack of bargaining in the form contract did not make the forum selection clause *per se* unconstitutional.¹⁰⁵ The Court also explained that form

92. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court . . ."); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents . . . an individual right, it can, like other such rights, be waived."); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("Similarly, if the defendant consented to the jurisdiction of the . . . courts . . . a judgment could affect his interest in property outside the State.").

93. 433 U.S. 186 (1977).

94. *Id.* at 227 n.6 (Brennan, J., concurring in part and dissenting in part).

95. *Andrews*, *supra* note 8, at 1072–73.

96. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 n.13 (2015) ("Even though the Constitution does not require that consent be express, it is good practice for courts to seek express statements of consent or nonconsent, both to ensure irrefutably that any waiver of the right to Article III adjudication is knowing and voluntary and to limit subsequent litigation over the consent issue.").

97. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594–95 (1991); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013).

98. 407 U.S. 1 (1972).

99. *Id.* at 12–13.

100. *Id.* at 15.

101. 499 U.S. 585 (1991).

102. *Id.* at 591–94.

103. See *id.* at 590 ("[R]espondents urge that the forum clause should not be enforced because . . . the clause was not the product of negotiation . . .").

104. *Id.*

105. See *id.* at 593 ("[W]e do not adopt the . . . determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.").

contracts contain an added benefit for the end user, thus creating more equal bargaining.¹⁰⁶

The holding in *Carnival Cruise* has been furthered by the Court and circuit courts.¹⁰⁷ In *Atlantic Marine Construction Co. v. United States District Court*,¹⁰⁸ the Court found that by agreeing to a forum selection clause, the consenting party forfeits its right to challenge the forum as inconvenient.¹⁰⁹ In a separate case, the U.S. Court of Appeals for the First Circuit held that there is no overweening bargaining power where the affected party had the opportunity to discuss the forum selection clause with its attorney.¹¹⁰

In *American Express Co. v. Italian Colors Restaurant*,¹¹¹ the Court upheld another contract of adhesion that enforced individual arbitration and stripped the plaintiff of its right to sue in the manner it desired.¹¹² Although it had signed a contract to arbitrate in a predetermined manner,¹¹³ the plaintiff argued that it could not achieve “effective vindication” if forced to arbitrate as individuals and not as part of a class.¹¹⁴ The Court disagreed, holding that even though the suit would be more expensive, the plaintiff could achieve effective vindication.¹¹⁵

1. Consent via Business Registration Statute

The Court has also recognized personal jurisdiction where a defendant consents by registering to do business in a state.¹¹⁶ Registration statutes can be categorized as those that allow for general jurisdiction because a corporation has registered and appointed a corporate agent,¹¹⁷ and those that require explicit consent to general jurisdiction to register.¹¹⁸

106. *See id.* at 594 (“[I]t stands to reason that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”).

107. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63–64 (2013); *Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 22 (1st Cir. 2009).

108. 571 U.S. 49 (2013).

109. *Id.* at 64 (“When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.”).

110. *See Rivera*, 575 F.3d at 22.

111. 570 U.S. 228 (2013).

112. *Id.* at 231.

113. *Id.*

114. *Id.* at 235.

115. *Id.* at 235–36 (“The ‘effective vindication’ exception . . . finds its origin in the desire to prevent ‘prospective waiver of a party’s right to pursue statutory remedies’ . . . [T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.” (first emphasis added) (citation omitted)).

116. *See Rolando*, *supra* note 44, at 11–12 (citing *Pa. Fire Ins. Co., v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917)).

117. *See Pa. Fire Ins. Co.*, 243 U.S. at 94–95.

118. Nate Arrington, Comment, *Consent by Registration: The “Back-Door Thief”*, 73 ARK. L. REV. 771, 782–83 (2021).

In the early twentieth century, statutes that required a business to register or appoint a corporate agent allowed for general jurisdiction over a corporation.¹¹⁹ In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining and Milling Co.*,¹²⁰ the Court held that a foreign corporation that voluntarily appoints an agent in a state is conceding to service and a possible suit.¹²¹ Even without express consent, this result made sense when the test for general jurisdiction was based on continuous and systematic contacts.¹²²

While the continuous and systematic contacts test faded away after *Goodyear* and *Daimler*, the Court never explicitly overturned the ruling in *Pennsylvania Fire*.¹²³ However, one commentator argues that the absence of an explicit overruling does not bar lower courts from denying personal jurisdiction based on *Pennsylvania Fire* statutes.¹²⁴ In his Comment, Nate Arrington explains that by upholding personal jurisdiction via registration and agent appointment statutes, lower courts “ignore . . . Supreme Court jurisprudence cautioning against continued reliance on pre-*International Shoe* decisions.”¹²⁵

The U.S. Court of Appeals for the Second Circuit has agreed with that rationale¹²⁶ and analyzes business registration statutes differently.¹²⁷ Instead of asking whether corporate registration and the appointment of an agent can confer general jurisdiction, the Second Circuit asks whether these statutes allow for proper or actual consent to general jurisdiction.¹²⁸ The issue the court has struggled with is whether the consent was explicit or implicit.¹²⁹

Only Pennsylvania’s registration statute “directly address[es] the jurisdictional consequences of registering to do business.”¹³⁰ Simply put, by registering to do business in Pennsylvania, a foreign corporation explicitly consents to general personal

119. See Rhodes & Robertson, *supra* note 81, at 409.

120. 243 U.S. 93 (1917).

121. See *id.* at 96 (“But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts.”).

122. See Rhodes & Robertson, *supra* note 81, at 409 (“[R]egistering to do business in a state usually accompanied the requisite continuous and systematic contacts for ‘doing business’ general jurisdiction . . .”).

123. See Arrington, *supra* note 118, at 791.

124. See *id.* at 792.

125. *Id.* But see *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 89 (Ga. 2021) (upholding a general jurisdiction via business registration statute because the Court has not explicitly overturned *Pennsylvania Fire*), *petition for cert. filed*, No. 21-926 (Dec. 22, 2021).

126. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016) (“[W]e believe that the holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general ‘consent’ has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the Court’s 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.”).

127. See *id.* at 639–40 (explaining that Connecticut’s business registration statute cannot withstand the due process concerns raised in *Daimler*).

128. See *id.* at 640 (“Were the Connecticut statute drafted such that it could be fairly construed as requiring foreign corporations to consent to general jurisdiction, we would be confronted with a more difficult constitutional question about the validity of such consent after *Daimler*.”).

129. See *id.*

130. Monestier, *supra* note 2, at 1366–68.

jurisdiction.¹³¹ Other states' registration statutes are "silent as to the jurisdictional effects of registering as a foreign company."¹³² Early decisions about these business registration statutes held that a defendant has "expressly consented to the forum's courts by registering to do business there (regardless of whether it has exercised that license) and/or appointed an agent for service of process in the forum."¹³³ Thus, the corporation's registration to do business in the state allowed for the exercise of general jurisdiction over it.¹³⁴

While the Court has not yet reached the question of whether business registration statutes can confer general jurisdiction via consent after *Daimler*,¹³⁵ circuit courts have discussed the issue. Some have found that statutes cannot confer personal jurisdiction where they fail to provide sufficient notice to a corporate defendant of their consent to general jurisdiction.¹³⁶ Others have explained that business registration statutes providing explicit notice to defendants can give proper grounds for general jurisdiction.¹³⁷

In the post-*Daimler* era, two key questions remain as to whether state registration statutes permit a state to exercise general jurisdiction over corporate registrants. First, if *Daimler* does not address the issue of consent, should the legality of these statutes be viewed through the lens of *Daimler*? Second, if the answer to that question is "yes," do *Daimler*'s due process constitutional rules prohibit states from exercising general jurisdiction over a corporation under a business registration statute?

2. Unconstitutional Conditions Doctrine

Another key question looming over the concept of consent by registration is whether the consent—if achieved via semicoercive means—can be invalidated by the unconstitutional conditions doctrine. This doctrine "vindicates the Constitution's

131. See 42 PA. STAT. AND CONS. STAT. ANN. § 5301 (West 2021).

132. Arrington, *supra* note 118, at 782.

133. Rolando, *supra* note 44, at 11.

134. *Id.* at 12 ("The Court held that a foreign corporation's license to do business in the forum state and appointment of resident agent there, in compliance with the forum's statutory guidelines, volunteered that corporation to the state's jurisdiction in litigation unrelated to the forum.")

135. See *AM Trust v. UBS AG*, 681 F. App'x 587, 588 (9th Cir. 2017) ("It is an open question, whether, after *Daimler*, a state may require a corporation to consent to general personal jurisdiction as a condition of registering to do business in the state.")

136. *E.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 636 (2d Cir. 2016) (rejecting consent to general jurisdiction where the business registration statute did not contain explicit language alerting the defendant that it was agreeing to consent to general jurisdiction in Connecticut); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1320–22 (11th Cir. 2018) (rejecting consent to general jurisdiction where the business registration statute did not clearly indicate that by appointing an agent to receive service of process was equivalent of consent to general jurisdiction); *Fidrych v. Marriot Int'l, Inc.*, 952 F.3d 124, 137 (4th Cir. 2020) ("[O]btaining the necessary certification to conduct business in a given state amounts to consent to general jurisdiction in that state only if that condition is explicit in the statute or the state courts have interpreted the statute as imposing that condition.")

137. *E.g.*, *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991) (upholding Pennsylvania business registration statute because it "explicitly lists 'consent' as a basis for assertion of jurisdiction over corporations"); *Brown*, 814 F.3d at 637 (differentiating the Connecticut statute from the Pennsylvania statute by noting that the Pennsylvania statute gave notice to a corporation registering to do business in Pennsylvania that it would be subject to general jurisdiction).

enumerated rights by preventing the government from coercing people into giving them up.”¹³⁸ Under this thinking, a state “cannot grant [a] privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”¹³⁹ The Court has limited states from “wrongly using their taxing and spending powers to encourage or discourage conduct that they cannot regulate directly.”¹⁴⁰ However, the Court has never given lower courts a consistent definition of coercion, leaving judges to apply the doctrine using their own “normative judgments.”¹⁴¹

D. Personal Jurisdiction in Pennsylvania

The first step to understanding personal jurisdiction in Pennsylvania is looking to the Commonwealth’s long-arm statute,¹⁴² which contains ten specific instances in which a nonresident can expect to be haled into court.¹⁴³ It also contains a “catchall provision which authorizes the exercise of personal jurisdiction over persons . . . so long as the minimum requisites of federal constitutional law are met.”¹⁴⁴ Section 5322 of Pennsylvania’s Judiciary and Judicial Procedure Code provides the following:

(a) General rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object

....

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth

....

(b) Exercise of full constitutional power over nonresidents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum

138. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

139. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988).

140. Samuel C. Salganik, *What the Unconstitutional Conditions Doctrine Can Teach Us About ERISA Preemption: Is it Possible to Consistently Identify “Coercive” Pay-Or-Play Schemes?*, 109 COLUM. L. REV. 1482, 1484 (2009).

141. *Id.*

142. 42 PA. STAT. AND CONS. STAT. ANN. § 5322 (West 2021).

143. *Scoggins v. Scoggins*, 555 A.2d 1314, 1318 (Pa. Super. Ct. 1989).

144. *Id.* (citing 42 PA. STAT. AND CONS. STAT. ANN. § 5322 (West 2021)).

contact with this Commonwealth allowed under the Constitution of the United States.¹⁴⁵

Before conducting business in Pennsylvania, a corporation must register to do business in the Commonwealth.¹⁴⁶ Pennsylvania law *explicitly* states that any company that registers to do business within the Commonwealth consents to general personal jurisdiction.¹⁴⁷ Section 5301 states:

(a) General rule.—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to *exercise general personal jurisdiction* over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

....

(2) Corporations.—

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.¹⁴⁸

Before *Daimler*, in *Bane v. Netlink, Inc.*,¹⁴⁹ the Third Circuit found that the statute was explicit enough to allow the Commonwealth to exercise personal jurisdiction over the defendant because the statute “gave [the defendant] notice that [it] was subject to personal jurisdiction in Pennsylvania and thus it should have been reasonably able to anticipate being haled into court.”¹⁵⁰

However, after *Daimler*, courts within the Third Circuit have disagreed on whether, taken together, these three statutes¹⁵¹ allow for a foreign corporation to consent to general jurisdiction in a manner consistent with the Constitution.¹⁵²

1. Cases that Found Pennsylvania’s Registration Statute Unconstitutional in Light of *Daimler*.

In *In re Asbestos Products Liability Litigation (No. VI)*,¹⁵³ Judge Eduardo Robreno relied upon the unconstitutional conditions doctrine to strike down the statutory scheme as unconstitutional.¹⁵⁴ Judge Robreno interpreted the statute as conditioning the ability to do business in Pennsylvania “upon the surrender of the constitutional right, recognized

145. 42 PA. STAT. AND CONS. STAT. ANN. § 5322 (West 2021).

146. 15 PA. STAT. AND CONS. STAT. ANN. § 411(a) (West 2021).

147. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 5301 (West 2021).

148. *Id.* (emphasis added).

149. 925 F.2d 637 (3d Cir. 1991).

150. *Bane*, 925 F.2d at 641 (internal quotations omitted).

151. Meaning Pennsylvania’s requirement to register, Pennsylvania’s business registration statute, and Pennsylvania’s long-arm statute. 15 PA. STAT. AND CONS. STAT. ANN. § 411(a) (West 2021); 42 PA. STAT. AND CONS. STAT. ANN. §§ 5301, 5322 (West 2021).

152. *See infra* Parts III.D.1, III.D.2.

153. 384 F. Supp. 3d 532 (E.D. Pa. 2019).

154. *Id.* at 541.

in *Daimler*, to be subject to general personal jurisdiction only where the corporation is ‘at home.’”¹⁵⁵ He found that the Pennsylvania business registration statute offered two “unsatisfactory choices” that made the statute coercive—either register and consent to general jurisdiction or refuse to register and face exclusion from doing business in the Commonwealth.¹⁵⁶ However, Judge Robreno cited no binding precedent for the notion that involuntary consent in this setting was unconstitutional, let alone disfavored.¹⁵⁷ Other courts in the Eastern District have agreed with Judge Robreno’s reasoning.¹⁵⁸

2. Cases that Found Pennsylvania’s Registration Statute Constitutionally Permissible Despite *Daimler*.

Still other decisions in the Eastern District of Pennsylvania have held the statutory scheme to be constitutional, even after *Daimler*.¹⁵⁹ The court in *Kraus v. Alcatel-Lucent*¹⁶⁰ viewed *Daimler*’s holding as limited to setting due process constraints on general jurisdiction.¹⁶¹ In *Kraus*, Judge Timothy Savage applied the holding in *Bane*, explaining that neither the Third Circuit nor the Supreme Court has “addressed consent-based jurisdiction since *Daimler*.”¹⁶² In *Bors v. Johnson & Johnson*,¹⁶³ Judge Mark Kearney found that “[t]he ruling in *Daimler* does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania.”¹⁶⁴ He explained that *Daimler* only mentioned “consent” to distinguish between “‘consensual’ jurisdiction and ‘non-consensual bases for jurisdiction,’”¹⁶⁵ “rather than to cast any doubt on the continued vitality of consent-based jurisdiction.”¹⁶⁶

155. *Id.*

156. *Id.* at 542 (citing *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993)).

157. *See id.*

158. *See Metro Container Grp. v. AC&T Co., Inc.*, No. 18-3623, 2021 WL 5804374, at *1, *5–6 (E.D. Pa. Dec. 7, 2021); *Reynolds v. Turning Point Holding Co., LLC*, No. 2:19-cv-01935-JDW, 2020 WL 953279, at *1, *4–5 (E.D. Pa. Feb. 26, 2020); *Ruffing v. Wirpo Ltd.*, 529 F. Supp. 3d 359, 367–68 (E.D. Pa. 2021); *Fend v. Allen-Bradley Co.*, No. 17-CV-01701, 2019 WL 6242119, at *1 (E.D. Pa. Nov. 20, 2019).

159. *See Data v. A.O. Smith Corp.*, No. 2:19-CV-00879-CRE, 2021 WL 1566336, at *1, *5 (W.D. Pa. Feb. 11, 2021) (holding that Pennsylvania’s consent-by-registration statute does not offend due process in the wake of *Daimler*); *Replica Auto Body Panels and Auto Sales Inc. v. inTech Trailers Inc.*, 454 F. Supp. 3d 458, 464 (M.D. Pa. 2020) (same); *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (same); *Tupitza v. Texas Roadhouse Mgmt. Corp.*, No. 1:20-CV-2, 2020 WL 6268631, at *1 (W.D. Pa. Oct. 21, 2020) (same); *Diab v. British Airways, PLC*, No. 20-3744, 2020 WL 6870607, at *1 (E.D. Pa. Nov. 23, 2020) (same); *Winters v. Akzo Nobel Surface Chemistry, LLC*, No. 19-5398, 2020 WL 2474428, at *4 (E.D. Pa. May 13, 2020) (same); *Smith v. NMC Wollard, Inc.*, No. 19-5101, 2020 WL 1975074, at *4 (E.D. Pa. Apr. 24, 2020) (same); *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 299 (M.D. Pa. 2018) (same); *Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*, No. 16-665, 2017 WL 3129147, at *11 (E.D. Pa. Jul. 24, 2017) (same).

160. 441 F. Supp. 3d 68 (E.D. Pa. 2020).

161. *Id.* at 75 (“*Daimler* did not address the interplay between consent to jurisdiction and the due process limits of general jurisdiction.” (internal quotation marks omitted)).

162. *Id.*

163. 208 F. Supp. 3d 648 (E.D. Pa. 2016).

164. *Id.* at 653.

165. *Id.*

166. *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 468 (D.N.J. 2015).

Other district courts within the Third Circuit have aligned with the reasoning in *Kraus* and *Bors*.¹⁶⁷ The court in *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*¹⁶⁸ found that *Daimler* did not overrule Supreme Court precedent recognizing “the existence of personal jurisdiction . . . [where compliance with] the statute . . . constitute[d] such consent, and the statute itself might ‘rationally . . . be held to go to that length.’”¹⁶⁹ Other courts have found it unlikely that *Daimler* overruled “nearly century-old Supreme Court precedent regarding what amounts to voluntary consent to jurisdiction when: (1) *Daimler* never says it is doing any such thing; and (2) what *Daimler* does say about consent to jurisdiction suggests just the opposite.”¹⁷⁰

As mentioned above,¹⁷¹ the Supreme Court has noted that “because the personal jurisdiction requirement is a waivable right, there are a ‘variety of legal arrangements’ by which a litigant may give ‘express or implied consent to the personal jurisdiction of the court.’”¹⁷² The Court has also noted that consent to general jurisdiction allows “the State to resolve both matters that originate within the State and those based on activities and events elsewhere.”¹⁷³ District courts have stated that based on those rulings and the Third Circuit’s decision in *Bane*, a court may find that

by registering to do business in a state . . . a corporation [can be found to have] consented to personal jurisdiction . . . [and] the consent-by-registration inquiry is separate from the standard “general” and “specific” jurisdiction analysis because the inquiry turns on the statutory text, not the foreign corporation’s contacts with the forum state.¹⁷⁴

In *Display Works, LLC v. Bartley*,¹⁷⁵ the District of New Jersey found that the New Jersey business registration statute did not expressly discuss consent or general jurisdiction and, therefore, did not allow for a finding that the defendant corporation consented to general jurisdiction.¹⁷⁶

167. *Data v. A.O. Smith Corp.*, 2:19-CV-00879-CRE, 2021 WL 1566336, at *1, *5 (W.D. Pa. Mar. 24, 2021) (holding that Pennsylvania’s consent-by-registration statute does not offend due process in the wake of *Daimler*); *Replica Auto Body Panels and Auto Sales Inc. v. inTech Trailers Inc.*, 454 F. Supp. 3d 458, 464 (M.D. Pa. 2020) (same); *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (same); *Tupitza v. Texas Roadhouse Mgmt. Corp.*, No. 1:20-CV-2, 2020 WL 7586889, at *1 (W.D. Pa. Dec. 17, 2020) (same); *Diab v. British Airways*, No. 20-3744, 2020 WL 6870607, at *5 (E.D. Pa. Nov. 23, 2020) (same); *Winters v. Azko Nobel Surface Chemistry, LLC*, No. 19-5398, 2020 WL 2474428, at *4 (E.D. Pa. May 13, 2020) (same); *Smith v. NMV Wollard, Inc.*, No. 19-5101, 2020 WL 1975074, at *4 (E.D. Pa. Apr. 24, 2020) (same); *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 299 (M.D. Pa. 2018) (same); *Plumbers’ Local Union No. 690 Health Plan v. Apotex Corp.*, Civ. A. No. 16-665, 2017 WL 3129147, at *11 (E.D. Pa. Jul. 24, 2017) (same).

168. 78 F. Supp. 3d 572 (D. Del. 2015), *aff’d*, 817 F.3d 755 (Fed. Cir. 2016).

169. *Id.* at 584–85 (quoting *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94 (1917)).

170. *Forest Lab’ys, Inc. v. Amneal Pharm. LLC*, No. 14-508-LPS, 2015 WL 880599, *1, *13 (D. Del. Feb. 26, 2015) (explaining that because *Daimler* did not overrule *Pennsylvania Fire*, the court refused to do so here).

171. *See supra* Part III.C.

172. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982)).

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

174. *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 174 (D.N.J. 2016).

175. 182 F. Supp. 3d 166 (D.N.J. 2016).

176. *Id.* at 175.

Before the Pennsylvania Supreme Court took up the instant issue in *Mallory*, the Pennsylvania Superior Court addressed the statute,¹⁷⁷ holding, in *Webb-Benjamin, LLC v. International Rug Group, LLC*,¹⁷⁸ that *Daimler* did not “eliminate consent as a method of obtaining personal jurisdiction.”¹⁷⁹ It did so in part by pointing to the reasoning in cases like *Bors* and *Gorton v. Air and Liquid Systems Corporation*.¹⁸⁰ Some have argued that the *Webb-Benjamin* ruling was ready to be examined as it stood for the notion that “almost any company that touched [Pennsylvania] could be sued there.”¹⁸¹ In a 2020 case decided after *Webb-Benjamin*, the court refused to take up the issue because the question was not raised at trial.¹⁸² As of the writing of this Note, the Pennsylvania high court has overruled *Webb-Benjamin* and stated that the Pennsylvania business registration statute is unconstitutional.¹⁸³

IV. COURT’S ANALYSIS

In *Mallory v. Norfolk Southern Railway Co.*, the trial court sustained the defendant’s preliminary objection to the exercise of personal jurisdiction, ruling that Norfolk, as a Virginia corporation, was not “at home” in Pennsylvania.¹⁸⁴ Mallory then filed a timely appeal arguing that the trial court erred because Section 5301 of the Pennsylvania Judiciary Act “confers . . . [personal] jurisdiction by consent over any corporation who registers to do business in Pennsylvania.”¹⁸⁵

In affirming the trial court decision, Chief Justice Max Baer wrote for a unanimous Pennsylvania Supreme Court and focused on three lines of reasoning: first, that general jurisdiction based on a *Daimler* “at home” test did not exist in this case;¹⁸⁶ second, that due process—acting as a tool of federalism—disallows the Pennsylvania business registration statute from conferring general personal jurisdiction;¹⁸⁷ and third, that any consent conferred by the Pennsylvania business registration statute is involuntary and barred by the unconstitutional conditions doctrine.¹⁸⁸

The court began its general jurisdiction discussion with a review of cases from *International Shoe* to *Daimler*.¹⁸⁹ The court discussed the due process concerns outlined in *Daimler*, opining that general jurisdiction is only appropriate where the corporation is incorporated, has its principal place of business, or where an “exceptional” circumstance

177. *Webb-Benjamin, LLC v. Int’l Rug Grp., LLC*, 192 A.3d 1133, 1138 (Pa. Super. Ct. 2018).

178. 192 A.3d 1133 (Pa. Super. Ct. 2018).

179. *Id.* at 1138–39.

180. 303 F. Supp. 3d 278 (M.D. Pa. 2018); *Webb-Benjamin*, 192 A.3d at 1139.

181. *See* Santoni, *supra* note 25.

182. *See* Murray v. American Lafrance, LLC, 234 A.3d 782, 789 & n.6 (Pa. Super. Ct. 2020).

183. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 567 (Pa. 2021), *cert. granted*, 142 S. Ct. 2646 (2022).

184. *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, at *2 (Pa. Ct. Com. Pl. May 30, 2018), *aff’d* 266 A.3d 542 (Pa. 2021); *Mallory*, 266 A.3d at 551.

185. *Mallory*, No. 1961, 802 EDA 2018, at *2 (internal citations omitted).

186. *Mallory*, 266 A.3d at 569–571.

187. *Id.* at 566–67.

188. *Id.* at 569.

189. *Id.* at 548–49.

exists.¹⁹⁰ The court held that exercising jurisdiction over Norfolk in this case would offend due process as outlined in *Daimler*.¹⁹¹

Next, the court discussed federalism concerns,¹⁹² finding that one consideration in determining whether personal jurisdiction exists is the effect on state sovereignty.¹⁹³ The court explained that if a state has little legitimate interest in the outcome of the case, the Due Process Clause—as a tool of federalism—may divest that forum of its right to hear the case.¹⁹⁴ The court explained that, under *Daimler*, the Due Process Clause prohibits a foreign corporation from being subject to general jurisdiction in every state.¹⁹⁵ The court agreed with the trial court that the registration statute “infringes upon our sister states’ ability to try cases against their corporate citizens.”¹⁹⁶ Based on these reasons and the opinion that Pennsylvania has “no legitimate interest” in Mallory’s claim, the court held that the Commonwealth should not hear the case.¹⁹⁷

The court finally turned its attention to the question of consent. First, the court recognized that a foreign corporation may waive its right to challenge personal jurisdiction via consent.¹⁹⁸ However, it cautioned that such consent is valid only if it is voluntary.¹⁹⁹ The court found that while Norfolk was certainly on notice that it was consenting to general personal jurisdiction, that notice does not mean the consent was voluntary.²⁰⁰ Rather, Norfolk’s consent was coerced.²⁰¹ The court reasoned that the statutory scheme gave Norfolk a false choice: either register to do business in Pennsylvania and consent to general personal jurisdiction or forgo doing business in Pennsylvania completely.²⁰² The Pennsylvania Supreme Court held that by offering this false choice, the business registration statute compelled the surrender of a constitutional right as a condition of granting some privilege.²⁰³ In other words, by forcing corporations to choose between one or the other, the statute violated the unconstitutional conditions doctrine.²⁰⁴

190. *Id.* at 565–66.

191. *Id.* at 566. (“Here, a Virginia plaintiff filed the FELA action against Defendant, a foreign railway company, which is incorporated in Virginia and has its principal place of business there, alleging injuries in Virginia and Ohio It is equally clear that Defendant did not incorporate in Pennsylvania and does not have its principal place of business [there]. Further, there is no indication that this is an otherwise ‘exceptional case’ . . . so as to afford our courts general jurisdiction.” (citation omitted)).

192. *Id.* at 567.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* (citing *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, No. 1961, 802 EDA 2018 at *13 (Pa. Ct. Com. Pl. May 30, 2018)).

197. *Mallory*, 266 A.3d at 567.

198. *Id.* at 568–69.

199. *Id.* at 569.

200. *Id.*

201. *Id.* at 570.

202. *Id.*

203. *Id.*

204. *Id.* at 569 (“Pursuant to the unconstitutional conditions doctrine, the government may not deny a benefit to a person because that person exercised a constitutional right.”).

V. PERSONAL ANALYSIS

This Note argues that the Pennsylvania Supreme Court should have overruled the trial court because Norfolk consented to personal jurisdiction via business registration statute. This Note also argues that even if Norfolk's consent was coerced, semicoercive consent is still a valid way to establish consent to personal jurisdiction. This Section discusses whether consent is still a valid way to establish general personal jurisdiction after *Daimler*. To do so, one must determine whether *Daimler*'s due process analysis is the proper vehicle for a review of Pennsylvania's consent-based registration statute. Part V.A examines whether express consent is still a valid way to establish personal jurisdiction.

A. Express Consent Is Still a Valid Way To Establish Personal Jurisdiction Post-Daimler.

When deciding *Daimler*, the United States Supreme Court did not do away with a state's ability to achieve personal jurisdiction by consent. Rather, *Daimler* and other *International Shoe* progeny cases offer an alternative way to achieve personal jurisdiction when a defendant has not consented to personal jurisdiction.²⁰⁵ *Daimler*, instead of dealing with consent, focused only on what quality and quantity of contacts allow a corporation to be "at home."²⁰⁶

Rather than parsing out this distinction, the Pennsylvania Supreme Court dove headfirst into a *Daimler* general jurisdiction analysis.²⁰⁷ Using *Daimler* and *Goodyear*, the court explained that general jurisdiction is only appropriate where a corporation is incorporated, has its principal place of business, or where some other extraordinary circumstance exists.²⁰⁸ In doing so, the court reasoned that the utter lack of contacts the defendant has with the Commonwealth prohibits a Pennsylvania court from establishing general jurisdiction over it.²⁰⁹

While this analysis might be fair in a situation where Norfolk had not consented to general personal jurisdiction, it is misplaced here. The *Daimler* contacts-based due process analysis should not apply to consent. Rather, when a court is deciding whether consent to personal jurisdiction comports with due process, the question becomes whether the consent was given voluntarily and knowingly.²¹⁰

In the following Parts, this Note explores how the United States Supreme Court's treatment of consent to and waiver of rights associated with Article III adjudication allows for the Pennsylvania business registration statute to establish personal jurisdiction through consent. Part V.A.1 discusses why a *Daimler* analysis should not be used to analyze consent to general jurisdiction, and Part V.A.2 outlines the proper way to analyze

205. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81 (2011) ("A person may submit to a State's authority in a number of ways. There is, of course explicit consent . . . There is also a more limited form of submission to a state's authority for disputes that 'arise out of or are connected with the activities within the state.'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945))).

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

207. *Mallory*, 266 A.3d at 566.

208. *Id.*

209. *Id.*

210. *Wellness Int'l Network v. Sharif*, 575 U.S. 665, 685 n.13 (2015).

Pennsylvania's business registration statute. Part V.A.3 argues that Norfolk's consent in this case was given knowingly and voluntarily. Part V.A.3.a explains that even if Norfolk's consent was achieved through semicoercive means, the United States Supreme Court allows personal jurisdiction to be attained through semicoerced consent. Finally, Part V.A.3.b explains that contrary to the Pennsylvania Supreme Court's analysis, the unconstitutional conditions doctrine does not apply here.

1. Consent to General Jurisdiction Should Not Be Analyzed by the Due Process Analysis Set Forth in *Daimler*.

In holding that Section 5301 is unconstitutional post-*Daimler*, the Pennsylvania Supreme Court incorrectly analyzed the issues under a minimum contacts due process analysis.²¹¹ It did so, even while noting that *Daimler* did not address whether a business registration statute that conditions registration on consent to general personal jurisdiction violates the Due Process Clause.²¹² The court's dubious reasoning for such an analysis is that "until the High Court speaks on the interplay between consent to jurisdiction by registration and the due process limits on general jurisdiction, it is our role to interpret that Court's governing case law on the topic and apply it to the facts presented."²¹³ Even though it deployed this logic, the court still ignored precedent that allows for consent to general jurisdiction²¹⁴ and relied on case law that says nothing on the matter.²¹⁵

The Pennsylvania high court focused on minimum contacts and federalism to further its argument.²¹⁶ The minimum contacts analysis is straightforward enough. The court found that because this case involved a Virginia plaintiff suing a Virginia company (that is neither incorporated nor headquartered in Pennsylvania) over a claim that occurred outside of Pennsylvania, no personal jurisdiction could exist in a Pennsylvania forum.²¹⁷ This Note does not contend that absent consent, general jurisdiction could be found in this case.

The court's federalism analysis, however, is questionable. The court held that Pennsylvania's statutory scheme butts heads with the federalism concerns outlined in *Bristol-Myers Squibb*.²¹⁸ Of course, *Bristol-Myers Squibb* was a case that dealt neither with general jurisdiction, nor personal jurisdiction through consent, but instead with specific jurisdiction.²¹⁹ As the Pennsylvania Association for Justice wrote in its amicus brief filed to the Superior Court of Pennsylvania, such an analysis is misplaced.²²⁰

After walking through the reasoning in *Bristol-Myers Squibb*, the Pennsylvania Supreme Court agreed with Judge New's trial court opinion, explaining that the statutory

211. See *Mallory*, 266 A.3d at 563–68.

212. *Id.* at 563–64.

213. *Id.* at 564.

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

215. *Mallory*, 266 A.3d at 564–65.

216. *Mallory*, 266 A.3d at 565–67.

217. *Id.* at 566.

218. *Id.* at 567.

219. *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1783–84 (2017) (“[O]ur decision concerns the due process limits on the exercise of specific jurisdiction by a state . . .”).

220. Brief for Robert Mallory, as Amici Curiae Supporting Appellant at 2, *Mallory v. Norfolk S. Ry. Co.*, 241 A.3d 480 (Pa. Super. Ct. 2020).

scheme raises federalism concerns by allowing general jurisdiction anywhere a corporation is registered to do business.²²¹ In that opinion, Judge New acknowledged that while Supreme Court precedent permitted state courts to “obtain personal jurisdiction over foreign corporations via mandatory registrations statutes . . . such innovative efforts . . . [were] obviated . . . by . . . the specific jurisdiction/general jurisdiction dichotomy [from *International Shoe*]”²²² The Pennsylvania Supreme Court then noted that Pennsylvania’s innovation, the Pennsylvania registration statute, infringes upon the sovereignty of the forty-nine other states.²²³

The fear, as articulated by the *Mallory* court, is that if any state could mandate consent to general jurisdiction as a requirement of registering to do business, companies would be subject to general jurisdiction in all fifty states, and the holding of *Daimler* would be effectively meaningless.²²⁴ Still, this fear is not based in reality. Since 1991, Pennsylvania’s statutory scheme has been good law.²²⁵ If other states wanted a way to circumvent *Daimler* and *Goodyear*, why have those states not yet copied the Pennsylvania statutory scheme? Why has no other state followed suit?²²⁶

Notwithstanding the proposed parade of horrors, a *Daimler* due process analysis is not the right tool to analyze consent to general personal jurisdiction. It is clear from Supreme Court precedent²²⁷ that express consent, whether through contract or common law, has always been a separate and distinct ground for establishing jurisdiction, regardless of the contacts that a party may have with the forum state.²²⁸

Furthermore, it is not clear that a due process analysis is even necessary for personal jurisdiction attained through consent. In *Burnham v. Superior Court of California*,²²⁹ the Court held that “[a]mong the most firmly established principles of personal jurisdiction . . . is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.”²³⁰ In doing so, the Court explained that not “all bases for the assertion of *in personam* jurisdiction . . . must be treated alike and subjected to the ‘minimum contacts’ analysis of *International Shoe*.”²³¹ Some argue *Burnham*’s “reasoning leads to the conclusion that sufficiently long-standing grounds of jurisdiction

221. See *Mallory*, 266 A.3d at 566–67.

222. *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018 at *12 (Pa. Ct. Com. Pl. May 30, 2018).

223. See *Mallory*, 266 A.3d at 567 (“The factual predicate underlying the instant appeal illustrates the textbook example of infringement upon the sovereignty of sister states, as Pennsylvania has no legitimate interest in a controversy with no connection to the Commonwealth that was filed by a non-resident against a foreign corporation that is not at home here.”).

224. *Id.* at 570 (“It cannot be ignored that if Pennsylvania’s legislative mandate of consent by registration satisfied due process by constituting voluntary consent to general jurisdiction, all states could enact it, rendering every national corporation subject to the general jurisdiction of every state. This reality flies in the face of *Goodyear* and *Daimler* and cannot be condoned.”).

225. *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991).

226. See Monestier, *supra* note 2, at 1366–68.

227. See *supra* notes 91–94 and accompanying text.

228. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982).

229. 495 U.S. 604 (1990).

230. *Id.* at 610.

231. *Id.* at 621.

are not conditioned by the Due Process Clause.²³² And while the Court has never stated that consent should receive the same treatment as “tag-jurisdiction,” a concept like consent could easily fall into that category.

2. This Case Is Not About *Daimler*: It Is About Consent.

To understand whether the Pennsylvania registration statute can provide for valid consent, it is important to parse through two prevailing types of registration statutes. This is necessary because there is a divide in how courts interpret these statutes in the three states that still allow consent via registration.²³³ This divide can be broken down into two categories: 1) registration statutes that confer general jurisdiction through registration and appointment of an agent,²³⁴ and 2) registration statutes that gain *express consent* to personal jurisdiction.²³⁵

The first category is a largely disfavored approach to achieving personal jurisdiction.²³⁶ In *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, the United States Supreme Court decided whether corporate registration alone could achieve general jurisdiction.²³⁷ The Court held that by signing a document and registering to do business, “the party executing it takes the risk of the interpretation

232. Lee Scott Taylor, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1177, 1186 (2003). *But see id.* (“But Burnham cannot be said to stand only, or even at all, for this proposition. As a counterweight to Justice Scalia’s dispensing with an independent due process analysis, Justice Brennan insists that the due process analysis must be independently applied to any assertion of jurisdiction.”).

233. See Bexis, *Quasi Guest Post – 50 State Survey on General Jurisdiction Through Consent by Registration To Do Business: Putting Bauman and Baseball Back Together*, DRUG & DEVICE LAW (Dec. 18, 2017), <https://www.druganddeviceclawblog.com/2017/12/quasi-guest-post-50-state-survey-on-general-jurisdiction-through-consent-by-registration-to-do-business-putting-bauman-and-baseball-back-together.html> [<https://perma.cc/WU7X-FTLT>] (explaining that Iowa, Nebraska, Pennsylvania, and Minnesota are the only states that allow for consent via registration statute). Iowa currently follows *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (holding that mere appointment of an agent for service of process under state statute is equivalent to corporate consent to personal jurisdiction like the ruling in *Pennsylvania Fire*). Minnesota follows the logic in *Knowlton* and finds that when a foreign corporation registers and appoints an agent under Minnesota law, that corporation consents to general jurisdiction. See *Ritchie Cap. Mgmt., Ltd. v. Costco Wholesale Corp.*, 2017 WL 4990520 at *2 (D. Minn. Oct. 30, 2017). Pennsylvania differs from Iowa and Minnesota by implementing an explicit consent via registration statute. 42 PA. STAT. AND CONS. STAT. ANN. § 5301. But since that post, the Nebraska Supreme Court ruled that consent via mere registration and appointment of an agent would “exceed the due process limits prescribed in *Goodyear . . .* and *Daimler*.” *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363, 371 (Neb. 2020).

234. See Taylor, *supra* note 232 (discussing how Iowa and Minnesota still allow for consent via registration and appointment of agent).

235. See *id.*

236. See *Fidrych v. Marriot International, Inc.*, 952 F.3d 124, 137 (4th Cir. 2020); *AM Trust v. UBS AG*, 681 F. App’x 587, 589 (9th Cir. 2017); see also *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1319 (11th Cir. 2018) (“After *Daimler* there is ‘little room’ to argue that compliance with a state’s ‘bureaucratic measures’ render a corporation at home in a state.”); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016); see also Bexis, *supra* note 233 (explaining that courts or statutes in the following states disallow consent to general jurisdiction via registration and appointment of an agent: Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Mississippi, Missouri, Montana, New York, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, and Washington).

237. *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94 (1917).

. . . [that] [t]he execution was the defendant’s voluntary act.”²³⁸ This holding stood for the proposition that when a foreign corporation registers to do business in a state and appoints an agent, it has impliedly consented to general jurisdiction in that forum.²³⁹ The Restatement (Second) of Conflict of Laws § 44 later adopted that notion.²⁴⁰

After *Daimler*, it is unclear if these statutes, which extract *implied* consent to general jurisdiction from the registering corporation, are still permissible. Such statutes could subject a corporation to general jurisdiction in every state in which it is registered—an outcome that the *Daimler* Court considered offensive to due process.²⁴¹ One commenter has argued that *Pennsylvania Fire* “creates an impermissible level of uncertainty for defendants under the *Daimler* standard.”²⁴² While the United States Supreme Court has not addressed the issue, lower courts have. At least one state supreme court has held, that even after *Daimler*, *Pennsylvania Fire* is still good law.²⁴³ On the other hand, federal circuit courts have stated that even though *Daimler* did not directly overturn *Pennsylvania Fire*, a registration statute amounts to consent to general jurisdiction “only if that condition is explicit in the statute or the state courts have interpreted the statute as imposing that condition.”²⁴⁴

This distinction between explicit and implicit seems to come down to notice and fairness. The Second Circuit has explained that if the registration statute fails to put a corporation on notice that registration amounts to consent to general jurisdiction, the state cannot use registration as consent to personal jurisdiction.²⁴⁵ The Ninth Circuit held that the mere designation of an agent for service of process does not “amount to consent to personal jurisdiction . . . [as] [s]ervice of process and personal jurisdiction are two different things.”²⁴⁶ Mere registration and appointment of an agent for service of process is “insufficient to subject foreign corporations to suits for business transacted

238. *Id.* at 96.

239. Rolando, *supra* note 44, at 11–12.

240. RESTATEMENT (SECOND) CONFLICT OF LAWS § 44 cmt. a (Am. L. Inst. 1981) (“By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends. This consent is effective even though no other basis exists for the exercise of personal jurisdiction over the corporation.”); Rolando, *supra* note 44, at 12.

241. *See supra* notes 9–12 and accompanying text.

242. Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1637 (2015).

243. *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 89 (Ga. 2021) (“[W]hile Cooper Tire relies on *Goodyear* and its progeny to challenge the viability of *Pennsylvania Fire*’s ‘consent by registration’ theory of general personal jurisdiction and to argue that *Pennsylvania Fire*’s holding ‘conflicts with modern due process jurisprudence,’ *Pennsylvania Fire* has not been overruled, nor was it even addressed by the majority opinions in these cases.”).

244. *E.g.*, *Fidrych, v. Marriot International, Inc.*, 952 F.3d 124, 137 (4th Cir. 2020).

245. *Brown v. Lockheed Martin Corp.*, 814 F.3d 613, 637 (2d Cir. 2016) (“The Connecticut statute, in contrast, gives no notice to a corporation registering to do business in the state . . . [w]e have been directed to no basis on which the corporation should have understood that, by registering and appointing an agent, it could be haled into Connecticut court on non-Connecticut based actions.”).

246. *AM Trust v. UBS AG*, 681 F. App’x 587, 589 (9th Cir. 2017); *see* *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318 (11th Cir. 2018) (“After *Daimler* there is ‘little room’ to argue that compliance with a state’s ‘bureaucratic measures’ render a corporation at home in a state.”).

elsewhere.²⁴⁷ The Eleventh Circuit held that after *Daimler*, the proper analysis for whether such bureaucratic measures can lead to general jurisdiction is the “at home” due process test.²⁴⁸

The second category of registration statutes includes those that *explicitly* state that a corporation consents to general jurisdiction by registering to do business. As described in *Brown v. Lockheed Martin Corp.*,²⁴⁹ the implied consent category is differentiated from statutes that “have been definitively construed to convey a foreign corporation’s consent to general jurisdiction.”²⁵⁰ In fact, *Brown* concluded that “a carefully drawn state statute that expressly required consent to general jurisdiction as a condition on a foreign corporation’s doing business in the state, at least in cases brought by state residents, might well be constitutional.”²⁵¹ For example, the Connecticut business registration statute in *Brown* was not explicit enough because it lacked any “specific reference to ‘general jurisdiction.’”²⁵² *Brown* differentiated the Connecticut statute from the explicit Pennsylvania business registration at issue in *Mallory*.²⁵³ The Delaware Supreme Court agreed with *Brown*’s reasoning in holding that the Delaware registration statute cannot act as consent to personal jurisdiction.²⁵⁴

Even though Pennsylvania’s consent provision is explicit, the Pennsylvania Supreme Court analyzed it under the directives of *Pennsylvania Fire* because the plaintiff argued that registration statutes can still confer personal jurisdiction based on *Pennsylvania Fire*.²⁵⁵ Nevertheless, viewing this statute through a *Pennsylvania Fire* lens is peculiar because Section 5301 requires explicit consent to general jurisdiction, whereas the statute in *Pennsylvania Fire* allowed for implied consent based on mere registration and appointment of agent.²⁵⁶

The court explained that pre-*International Shoe* holdings like *Pennsylvania Fire* should not be relied upon and cannot be used to justify this statute.²⁵⁷ This is even after the court cautioned that “until the High Court speaks on the interplay between consent to jurisdiction by registration and the due process limits on general jurisdiction, it is [the

247. *AM Trust*, 681 F. App’x at 589 (citing *King v. Am. Fam. Mut. Ins. Co.*, 632 F.3d 570, 575 (9th Cir. 2011)) (internal quotation marks omitted).

248. *Waite*, 901 F.3d at 1318 (“After *Daimler* there is ‘little room’ to argue that compliance with a state’s ‘bureaucratic measures’ render a corporation at home in a state.”).

249. 814 F.3d 619 (2d Cir. 2016).

250. *Id.* at 637.

251. *Id.* at 641.

252. *Id.* at 637.

253. *Id.*

254. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 140 n.95 & 148 (Del. 2016).

255. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 557, 567 (Pa. 2021), *cert. granted*, 142 S. Ct. 2646 (2022) (citing *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917)).

256. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2021) (“The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to *exercise general personal jurisdiction* over such person” (emphasis added)); *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) (“But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts.”).

257. *Mallory*, 266 A.3d at 567 (first citing *Daimler AG v. Bauman*, 571 U.S. 117, 138 n.18 (2014)); and then citing *Shaffer v. Heitner*, 433 U.S. 186, 212 & n.39 (1977)).

court’s] role to interpret that Court’s governing case law on the topic and apply it to the facts presented.”²⁵⁸ Here, the court relied on a footnote from *Daimler*, a case that mentions neither consent-via-registration nor *Pennsylvania Fire*, to overrule century-old case law.²⁵⁹

Pennsylvania’s business registration statute requires more than the registration and appointment of an agent. Pennsylvania’s business registration statute contains a condition that explicitly ties registration to consent to general jurisdiction in the Commonwealth.²⁶⁰ Thus, it is different from the implied consent statute in *Brown*²⁶¹ and, as such, should be treated differently. The proper analysis for Pennsylvania’s registration statute is a consent analysis.

3. Businesses that Register To Do Business in Pennsylvania Knowingly and Voluntarily Consent to Personal Jurisdiction in the Commonwealth.

A party may consent to a court’s jurisdiction in a variety of ways: in a contract,²⁶² through stipulation,²⁶³ or by making a voluntary appearance before the court.²⁶⁴ A defendant’s consent to personal jurisdiction represents a waiver of their right to contest personal jurisdiction, a right that has been validated by the Supreme Court.²⁶⁵ If a defendant has consented to personal jurisdiction, the proper test is whether the consent is “knowing and voluntary.”²⁶⁶

It cannot be contested that Norfolk knew, or should have known, that by registering to do business in Pennsylvania, it consented to general jurisdiction. Pennsylvania’s business registration statute is explicit in the fact that by registering to do business, the corporation submits to the general jurisdiction of the state.²⁶⁷

A foreign corporation is lawfully present in Pennsylvania only if it registers to do business there.²⁶⁸ In order to register, a foreign corporation must consent to general jurisdiction.²⁶⁹ A foreign corporation that does business in Pennsylvania and fails to register cannot bring forth an action in the Commonwealth’s courts.²⁷⁰ So, to maintain its ability to bring an action in a Pennsylvania court, a corporation must register, and thus

258. *Id.* at 564.

259. *See id.* at 567 (citing *Daimler*, 571 U.S. at 138 n.18).

260. 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2021) (“The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to *exercise general personal jurisdiction* over such person” (emphasis added)).

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

262. *See Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964).

263. *See Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495 (1956).

264. *See McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

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

266. *Wellness Int’l Network Ltd. v. Sharif*, 575 U.S. 665, 685 n.13 (2015); *see also In re Tribune Media Co.*, 902 F.3d 384, 394 (3d Cir. 2018) (citing *Sharif*, 575 U.S. at 685).

267. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a)(2) (West 2021).

268. 15 PA. STAT. AND CONS. STAT. ANN. § 411(a) (West 2021).

269. 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2021).

270. 15 PA. STAT. AND CONS. STAT. ANN. § 411(b) (West 2021).

must consent to general jurisdiction.²⁷¹ As explained in Part V.A.3.b, Norfolk Southern had an incentive to maintain the right to bring suit in Pennsylvania.²⁷² Such an incentive belies any argument that their consent was not voluntary.

Nevertheless, the court reasoned that because a foreign corporation must choose to either register to do business and thus have access to Pennsylvania courts as a plaintiff, or not register and have no access as a plaintiff, Norfolk was left with an impossible choice.²⁷³ The court held that the choice was a false one that coerced voluntary waiver of the right to contest personal jurisdiction,²⁷⁴ and that this choice implicates the unconstitutional conditions doctrine.²⁷⁵

a. Semicoerced Consent Does Not Invalidate Consent.

Although the Pennsylvania Supreme Court viewed the involuntariness of the consent as determinative,²⁷⁶ semicoerced consent to personal jurisdiction is still a valid way to attain personal jurisdiction. In fact, the United States Supreme Court has held that the waiver should be upheld as long as it was not the result of overweening bargaining power,²⁷⁷ the waiving party was on notice,²⁷⁸ and no party was prevented from achieving effective vindication.²⁷⁹ Furthermore, if such a waiver offers benefits to the waiving party, it should be given greater deference.²⁸⁰

In *Carnival Cruise*, the Court refused to find that a form contract between a corporation and the Shute family was unenforceable “simply because it [was] not the subject of bargaining.”²⁸¹ The Court reasoned that it would be “unreasonable . . . to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause.”²⁸² Common sense dictates that such contracts, which typically include waivers of the right to challenge personal jurisdiction, are not subject to negotiation.²⁸³

Carnival Cruise explained several reasons why a nonnegotiated forum selection clause is reasonable.²⁸⁴ First, the Court held that because a cruise company services passengers from around the country or world, it has a valid reason to limit litigation to a

271. 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2021).

272. See *infra* notes 305, 336 and accompanying text.

273. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 569–70 (Pa. 2021), *cert. granted*, 142 S. Ct. 2646 (2022).

274. *Id.*

275. *Id.* at 569.

276. See *id.* at 569–70.

277. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972).

278. See *Carnival Cruise Lines, Inc.*, 499 U.S. at 590.

279. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).

280. See *Carnival Cruise Lines, Inc.*, 499 U.S. at 594 (noting that the Shute family benefited from the forum selection clause).

281. *Id.* at 593.

282. *Id.*

283. *Id.*

284. See *id.* at 593–95.

singular forum instead of opening itself up to suit in every court in the nation.²⁸⁵ Second, by specifically stating where suits arising out of a cruise ticket may be brought, the forum selection clause “dispel[s] any confusion about where suits arising from the contract must be brought and defended, sparing litigants . . . time and expense.”²⁸⁶ Third, passengers who buy nonnegotiated tickets benefit financially because without the forum selection clause, the company would need to pay more for insurance or attorney fees, costs which could be passed onto the customer.²⁸⁷ Finally, the Court explained that such clauses should be examined for “fundamental fairness.”²⁸⁸

But is it appropriate to compare forum selection clauses to business registration statutes? Nate Arrington points out that forum selection clauses involve consent to *specific* jurisdiction, whereas registration statutes involve consent to *general* jurisdiction.²⁸⁹ He argues that a party who agrees to a forum selection clause, “may not know the exact claim that would be made against him, [but] the consenting party knows the other party that would make a claim and that the claim relates to or arises under the disputed contract.”²⁹⁰ Arrington differentiates this from a business registration statute which “opens the consenting party up to lawsuits from any party concerning any dispute, regardless of whether the claim relates to the forum state or not.”²⁹¹

This comparison, however, misstates the relevant question. It relies on the quantity and quality of the contacts²⁹² and fails to recognize that a corporation *can* permissibly waive its jurisdictional rights without an *International Shoe* due process analysis.²⁹³ For example, the Supreme Court mentioned neither “minimum contacts” nor “due process” in *Carnival Cruise*.²⁹⁴ Instead, the Court conducted a reasonableness analysis.²⁹⁵ The Court found that it would be unreasonable for a cruise ship passenger to expect to negotiate a forum selection clause with the cruise line.²⁹⁶

Pennsylvania’s registration statute should be treated no differently than a form contract on a cruise ticket. First, as Justice Gorsuch points out in his concurrence in *Ford Motor Co.*, it is unclear why “corporations continue to receive special jurisdictional

285. *Id.* at 593.

286. *Id.* at 593–94.

287. *Id.* at 594.

288. *Id.* at 595 (explaining that if the cruise line had made Florida its selected forum to dissuade passengers from bringing suit in the first place, the clause would not be reasonable).

289. Arrington, *supra* note 118, at 781.

290. *Id.* (contrasting forum selection clauses with registration statutes where the registering corporation “knows neither the party that would make the claim against it nor the alleged claim”).

291. *Id.*

292. *See id.*

293. *See* *Wellness Int’l Network v. Sharif*, 575 U.S. 665, 685 n.13 (2015) (“Even though the Constitution does not require that consent be express, it is good practice for courts to seek express statements of consent or nonconsent, both to ensure irrefutably that any waiver of the right to Article III adjudication is knowing and voluntary and to limit subsequent litigation over the consent issue.”).

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

295. *Id.* at 594; *see also id.* at 600 (“The common law recognizing that standardized form contracts account for a significant portion of all commercial agreements, has taken a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness.”).

296. *Id.* at 594.

protections in the name of the Constitution.”²⁹⁷ If the Court could not find overweening bargaining power in the agreement between Mrs. Shute and Carnival Cruise, then how could there possibly be such an issue where a billion-dollar company makes the explicit choice to do business in the Commonwealth?

Second, just as it would be unreasonable for a passenger on a cruise line to expect to negotiate the terms of their form contract, it would be unreasonable for corporations doing business in Pennsylvania to negotiate the terms of their registration. There are millions of businesses registered in the Commonwealth.²⁹⁸

Third, the registration statute serves the Commonwealth’s legitimate interest in ensuring that litigants can access Pennsylvania courts to bring suit against businesses registered there.²⁹⁹ Some may argue that such consent only makes sense if it serves Pennsylvania citizens wronged by some corporation registered in their state.³⁰⁰ Perhaps the statute is guilty of overbreadth. Still, by ensuring that Pennsylvanians have the right to sue a corporation registered to do business in the Commonwealth, the statute serves the valid purpose of allowing for the adjudication of civil disputes.³⁰¹ Nevertheless, such a narrow reading—worrying about who is harmed where—seems to mistakenly apply a minimum contacts analysis to the separate issue of consent.

Fourth, like the cruise passengers in *Carnival Cruise*, businesses that register to do business within the Commonwealth enjoy the benefits of doing so.³⁰² Businesses that register in Pennsylvania are granted access to Pennsylvania courts.³⁰³ Thus, like the Shutes who went on a cruise at the price they paid,³⁰⁴ businesses that register in Pennsylvania can then access Pennsylvania courts.³⁰⁵ And as Mallory points out in his brief to the Pennsylvania Superior Court, such access was necessary for Norfolk, a

297. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

298. PA. DEP’T OF STATE, A GUIDE TO BUSINESS REGISTRATION IN PENNSYLVANIA 1 (2018) (“The Bureau of Corporations and Charitable Organizations of the Pennsylvania Department of State is the repository for the records of more than 2.6 million companies authorized to do business in the Commonwealth of Pennsylvania.”) <https://www.dos.pa.gov/BusinessCharities/Business/Documents/FEB2018%2021460%20Guide%20to%20Business%20Registration.pdf>

299. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 633 (2d. Cir. 2016) (“[C]onsent through registration [was] . . . born of the necessity of exercising jurisdiction over corporations outside of their state of incorporation”); *see also Taylor, supra* note 232 at 1164 (“Such statutes perform a number of functions, primarily that of ensuring that nonresident corporations are accountable for their actions within the state.”).

300. *See Brown*, 814 F.3d at 633 (“A corporation’s ‘consent’ through registration has thus always been something of a fiction, born of the necessity of exercising jurisdiction over corporations outside of their state of incorporation: Consent was perhaps more of a promise, fairly extracted, to appear in state court on actions by a state’s citizens arising from the corporation’s operations in the jurisdiction”).

301. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (“[T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute”).

302. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991).

303. 15 PA. STAT. AND CONS. STAT. ANN. § 411(b) (West 2021) (“[A] foreign filing association or foreign limited liability partnership doing business in this Commonwealth may not maintain an action or proceeding in this Commonwealth unless it is registered to do business under this chapter.”).

304. *Carnival Cruise Lines, Inc.*, 499 U.S. at 594.

305. *See* 15 PA. STAT. AND CONS. STAT. ANN. § 411(b) (West 2021).

company that had invested significantly in doing business in Pennsylvania.³⁰⁶ Simply put, by registering to do business within the state, the railroad ensured it would have access to Pennsylvania courts as a plaintiff.³⁰⁷

Finally, there is no indication that Pennsylvania adopted this statute in a manner that offends fundamental fairness. Key to the *Carnival Cruise* ruling was the fact that there was no indication that Carnival had acted in “bad faith by selecting Florida as the forum.”³⁰⁸ Neither the railroad nor the Pennsylvania Supreme Court point to any facts showing that the Commonwealth acted in bad faith or was guilty of fraud or overreach in enacting this law.

b. The Unconstitutional Conditions Doctrine Does Not Apply

Although the Pennsylvania Supreme Court primarily used a *Daimler* due process analysis to analyze the business registration statute, it briefly discussed consent as a separate vehicle for obtaining general personal jurisdiction.³⁰⁹ The court concluded that the consent given in this case was involuntary and thus invalid.³¹⁰ To reach that conclusion, the court used the unconstitutional conditions doctrine.³¹¹

The unconstitutional conditions doctrine is typically raised when the First or Fifth Amendments are at issue.³¹² However, at least one Pennsylvania federal district court found that the doctrine “applies with equal force in any case in which the enjoyment of a government-sponsored benefit is conditioned upon a person’s nonassertion of any constitutional right.”³¹³ Under such reasoning, that court found that the Pennsylvania registration statute impermissibly coerced consent by forcing a business to give up its right to engage in interstate commerce if it refuses to register.³¹⁴

306. Mallory’s brief states:

Norfolk and its predecessors have operated in Pennsylvania for over 150 years, and Norfolk has maintained a registered office and registered agent in Pennsylvania since 1999 when it took over Conrail. As of 2014, Norfolk had 5,200 employees in Pennsylvania paying wages of \$340 million.

Norfolk owns 2,278 miles of track in Pennsylvania and has rights to 372 through Conrail Shared Assets. Pennsylvania operates 5600 miles of track with Norfolk controlling 2278 miles. Norfolk is the *largest* rail operator in Pennsylvania in terms of miles of track operated. Norfolk’s tracks run the full length of Pennsylvania, from the Ohio border to the Delaware River.

Brief of Appellant at 8–9, *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, (Pa. Super. Ct. Aug. 9, 2018) (emphasis added) (citations omitted).

307. *See infra* note 337 (explaining that Norfolk has brought suit as a plaintiff at least four times).

308. Rodger D. Citron, *The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of Justice John Paul Stevens*, 88 U. DET. MERCY. L. REV. 433, 461 (2011).

309. *See* *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 548 (Pa. 2021) (“[C]onsent to jurisdiction by waiving one’s due process right is an independent basis for jurisdiction, assuming that the consent is given voluntary.”), *cert. granted by*, 142 S. Ct. 2646 (2022).

310. *Id.* at 569.

311. *See id.* (“In accord with [the unconstitutional conditions doctrine], we hold that a foreign corporation’s registration to do business in the Commonwealth does not constitute voluntary consent to general jurisdiction . . .”).

312. *See In re Asbestos Prods. Liab. Litig.* (No. VI), 384 F. Supp. 3d 532, 542 (E.D. Pa. 2019).

313. *See id.* (quoting *Wojtczak v. Cuyler*, 480 F. Supp. 1288, 1306 (E.D. Pa. 1979)).

314. *See id.*

Professor Benish seems to agree that business registration statutes should be viewed through the lens of the unconstitutional conditions doctrine.³¹⁵ Benish explains that the proper test for the unconstitutional conditions doctrine is the “coercive effects test,”³¹⁶ which is triggered if a corporation is forced to forego a constitutional right in the process of enjoying a privilege or benefit.³¹⁷

The constitutional right at issue in *Mallory* is *Daimler*’s ruling that corporations are “free from lawsuits where they are not ‘at home.’”³¹⁸ The privilege that the corporation gives up is access to courts.³¹⁹ That is reality. The Pennsylvania Supreme Court suggests a fiction—that the real privilege ceded is the right to do business at all.³²⁰ The court argues that a corporation cannot be forced to choose between its Fourteenth Amendment due process rights and the right to do business in Pennsylvania.³²¹

However, while *Daimler* set boundaries for when contact-based general jurisdiction can arise, it did not set boundaries for when consent-based jurisdiction applies.³²² Thus, the court’s analysis that a corporation’s *Daimler* due process protections are violated by this consent statute is misplaced.³²³ Contrary to what the court states, *Daimler* did not “expressly” prohibit consent-based jurisdiction.³²⁴

Nevertheless, the Pennsylvania Supreme Court propped up a straw man once again while discussing the unconstitutional conditions doctrine. The court stated that a foreign corporation hoping to do business in Pennsylvania either submits to general jurisdiction or is barred from the Commonwealth entirely.³²⁵ Using the words of the trial court, the court explained that this is a “Hobson’s choice” where forced consent by registration cannot be considered voluntary.³²⁶

However, the real privilege surrendered—the right to affirmatively access Commonwealth courts³²⁷—was not coerced because registration presented a clear

315. Benish, *supra* note 242, at 1640.

316. *Id.* at 1640–41.

317. *Id.* at 1641.

318. *Id.* at 1640.

319. *See id.* at 1642 (explaining that access to federal courts via diversity jurisdiction is likely limited by state statutes that “eliminate access to state courts and thus also deny federal court access under the *Erie* Doctrine”).

320. *See Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 570 (Pa. 2021), *cert. granted by*, 142 S. Ct. 2646 (2022) (“[A] foreign corporation desiring to do business in Pennsylvania can either lawfully register to do business and submit to the general jurisdiction of Pennsylvania courts or not do business in Pennsylvania at all.”). *But see infra* notes 317–318 (“In reality, and as the court recognizes in a buried footnote, a corporation *could* continue to conduct business in the Commonwealth without registering. All that the corporation would cede by failing to register is their right to bring a case as a plaintiff.”).

321. Benish, *supra* note 242, at 1642.

322. *See supra* Part V.A.I.

323. *See Mallory*, 266 A.3d at 570 (“Conversely, consent by registration requires the foreign corporation to consent to general jurisdiction over all claims filed by any plaintiff against the foreign corporation in the forum State, thereby relinquishing its due process liberty right to be free from suits in a forum within which it has no meaningful contacts, in exchange for the privilege of conducting business in the forum state. *Daimler* expressly prohibits such broad exercise of general jurisdiction.”).

324. *Id.* (emphasis added).

325. *Id.*

326. *Id.*

327. 15 Pa. STAT. AND CONS. STAT. ANN. § 411(b) (West 2021).

benefit to Norfolk.³²⁸ Pennsylvania, like all other states,³²⁹ has a closed-door statute.³³⁰ A closed-door statute bars corporations that fail to qualify or register to do business within a state from accessing that state's courts.³³¹ The Supreme Court has consistently upheld these registration statutes.³³²

When a corporation does business within a forum state that maintains a closed-door statute, it may have a difficult time achieving judicial vindication in that state.³³³ Still, the Pennsylvania statute is not overly harsh. Instead, Pennsylvania sets out a list of eleven types of activities that do not constitute doing business in the Commonwealth.³³⁴ Additionally, committee notes show that “[t]he purpose of subsection (b) is to induce foreign associations to register without imposing harsh or erratic sanctions.”³³⁵ Finally, a foreign corporation that does not register is not barred from *all* causes of action.³³⁶ By registering, Norfolk could bring affirmative actions within the Commonwealth of Pennsylvania, which it has done.³³⁷

Though this closed-door statute is a commonsense measure, the Pennsylvania Supreme Court claimed that it amounts to a complete bar on doing business in the Commonwealth.³³⁸ In reality, and as the court recognizes in a buried footnote, a corporation *could* continue to conduct business in the Commonwealth without registering.³³⁹ All that the corporation would cede by failing to register is its right to bring a case as a plaintiff.³⁴⁰ Given the business that Norfolk maintained in Pennsylvania,

328. See *supra* note 307 and accompanying text.

329. WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8609 (perm. ed., rev. 2021); see also Rhodes & Robertson, *supra* note 81, at 405–06.

330. 15 PA. STAT. AND CONS. STAT. ANN. § 411(b) (West 2021) (“A foreign filing association . . . doing business in this Commonwealth may not maintain an action or proceeding in this Commonwealth unless it is registered to do business under this chapter.”).

331. See James O. Pearson, Jr., *What Constitutes Doing Business Within State for Purposes of State “Closed-door” Statute Barring Unqualified or Unregistered Foreign Corporations from Legal Courts—Modern Cases*, 88 A.L.R. 4th § 2[a] (1991).

332. Rhodes & Robertson, *supra* note 81, at 406 (first citing *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278–83 (1961); then citing *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 206–12 (1944); and then citing *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 275–78 (1927)).

333. See Pearson, *supra* note 331.

334. 15 PA. STAT. AND CONS. STAT. ANN. § 403(a) (West 2021).

335. 15 PA. STAT. AND CONS. STAT. ANN. § 411 committee cmt. (West 2021).

336. *Id.* (“Subsection (b) does not prevent a foreign association that has failed to register from ‘defending’ an action or proceeding. The distinction between ‘maintaining’ and ‘defending’ an action or proceeding under subsection (b) is determined on the basis of whether affirmative relief is sought.”).

337. See e.g., *Norfolk S. Ry. Co. v. ALJ Haifa Corp.* No. G.D. 05-006268, 2005 WL 4876496, at *1 (Pa. Ct. Com. Pl. Nov. 16, 2005); *Norfolk S. Ry. Co. v. James C. Long & Brenntag Ne.*, No. 15-001758, 2015 Pa. Dist. & Cnty. Dec. LEXIS 6068, at *1 (Pa. Ct. Com. Pl. Oct. 9, 2015); *Norfolk S. Ry. Co. v. PUC*, No. 2157 C.D. 2010, 2014 WL 1477585 (Pa. Commw. Ct. Apr. 14, 2014); *Norfolk S. Ry. Co. v. Pa. PUC*, 875 A.2d 1243 (Pa. Commw. Ct. 2005). The foregoing are cases where Norfolk Southern used Pennsylvania courts affirmatively, not as a defendant.

338. See *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 569–70 (Pa. 2021), *cert. granted by*, 142 S. Ct. 2646 (2022).

339. *Id.* at 570 n.20 (“Of course, a corporation could conduct business in Pennsylvania unlawfully without registering to do business, but in doing so, it would be forced to relinquish its right to maintain an action or proceeding in this Commonwealth.” (internal citations omitted)).

340. See 15 PA. STAT. AND CONS. STAT. ANN. § 411(b) (West 2021).

can it be fairly argued that Norfolk was *forced* into registering? Or is it more likely that it voluntarily registered and consented to general jurisdiction as a prophylactic measure to protect its interests?

VI. CONCLUSION

In striking down the Pennsylvania business registration statute, the Pennsylvania Supreme Court decided a question that the United States Supreme Court has left open: whether consent to general jurisdiction via business registration is still permissible after *Daimler*. In doing so, it read between the lines of *Daimler* and ignored longstanding consent precedent, even after acknowledging that it was bound to interpret United States Supreme Court precedent as is until the Court speaks on the matter.³⁴¹ Now, defendants who were haled into court based on that statute may flock back to court to dismiss on jurisdictional grounds.³⁴²

Whether *Daimler* allows for consent to general jurisdiction via business registration statute is ripe for Supreme Court review.³⁴³ Will the Supreme Court feel the need to clarify an issue that may only impact only the Commonwealth of Pennsylvania? Will it clear up this ambiguity once and for all? Or, will it hold—as its own case law seems to suggest—that explicit consent, whether semicoerced or voluntary, can still give rise to general jurisdiction? Only time will tell.

341. *Mallory*, 266 A.3d at 564.

342. See Max Mitchell, *Plaintiffs Seek to Narrow Pa. High Court's Ruling Axing Jurisdiction by Business Registration*, THE LEGAL INTELLIGENCER (Feb. 1, 2022, 2:33 PM), <https://www.law.com/thelegalintelligencer/2022/02/01/plaintiffs-seek-to-narrow-pa-high-courts-ruling-striking-down-jurisdiction-by-business-registration-law/> [<https://perma.cc/U9PE-AJP3>].

343. In fact, on April 25, 2022, the Supreme Court granted Mallory's petition for a writ of certiorari. *Mallory v. Norfolk Southern Railway Co.*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/mallory-v-norfolk-southern-railway-co/> [<https://perma.cc/WST9-LRWE>], (last visited Nov. 1, 2022).