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## NOTES

### EMERGING FROM *DAIMLER*'S SHADOW: REGISTRATION STATUTES AS A MEANS TO GENERAL JURISDICTION OVER FOREIGN CORPORATIONS

NICHOLAS D'ANGELO<sup>†</sup>

#### INTRODUCTION

In 1999, an American family of four travelled from Utah to Atlantis, a luxurious Bahamian getaway, for a long-anticipated vacation.<sup>1</sup> Off the shores of Paradise Island, Victor, a thirteen-year-old boy, was snorkeling with his father and younger brother when a motorboat suddenly cut through the water and hit him.<sup>2</sup> Victor was airlifted to Florida, where he underwent medical treatment for massive injuries.<sup>3</sup> He survived, but his arm had been severed, and he was permanently disfigured.<sup>4</sup>

The motorboat operator conducted business at the Atlantis Hotel, owned by multinational corporations principally based in the Bahamas.<sup>5</sup> Although the corporation attempted to hide behind its foreign citizenship, Victor and his family were able to hold the corporation accountable through an American court's exercise of general jurisdiction.<sup>6</sup>

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<sup>1</sup> See *Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1267 (11th Cir. 2002).

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1274. See also Catherine Wilson, *Utah Family Allowed To Sue in Miami Over Bahamian Injury*, FL. TIMES-UNION (Apr. 22, 2002, 6:15 PM), <http://jackson>

Today, however, under the framework of a modern Supreme Court that has “systematically restricted plaintiffs’ access to courts,”<sup>7</sup> Victor and his family would have few avenues available to hold foreign corporations accountable in an American court.<sup>8</sup> Since the United States Supreme Court’s landmark holding in *Daimler AG v. Bauman*,<sup>9</sup> this restrictive methodology has been applied to general jurisdiction.<sup>10</sup> In that case, the Court narrowed the ability of states to exercise general jurisdiction over foreign corporations by applying a “proportionality” framework.<sup>11</sup> Now, a corporation must be considered “at home” in the forum state in order for general jurisdiction to be exercised.<sup>12</sup> Still, the Court left open a significant opportunity that states should use in order to ensure corporate accountability: consent to general jurisdiction through business registration statutes.<sup>13</sup> Several states, notably New York and Delaware, have long held that registering to do business within a state forms a contractual relationship whereby a corporation is obligated to submit to the jurisdiction of that state’s courts.<sup>14</sup>

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ville.com/tu-online/apnews/stories/042202/D7J27CG01.html. Victor’s story was not unique. In 2005, the same powerboat company was involved in the death of two-year old Paul Gallagher. *See Lois Rogers, Bahamas Silent Over Boy’s Death*, THE SUNDAY TIMES (London), (Apr. 3, 2005, 1:00 AM), <https://www.thetimes.co.uk/article/bahamas-silent-over-boys-death-0mb565n7xbx> (“The boat hit the sand and bounced over the heads of sunbathers . . . the vessel’s propeller sliced through Paul’s head. He died five days later.”).

<sup>7</sup> Case Comment, *Personal Jurisdiction—General Jurisdiction—Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 315 (2014).

<sup>8</sup> Victor’s family could not afford litigation in a foreign forum and the Bahamas does not recognize jury trials for personal injury suits. *See Wilson, supra* note 6.

<sup>9</sup> 134 S. Ct. 746 (2014).

<sup>10</sup> *See* George Bundy Smith & Thomas J. Hall, *General Jurisdiction in New York After ‘Daimler,’* N.Y. L.J., Oct. 17, 2014 (citing *Chambers v. Weinstein*, No. 157781/2013, 2014 WL 4276910, at \*15 (N.Y. Sup. Ct. N.Y. Cty. Aug. 22, 2014)); Natia Daviti, *Daimler AG v. Bauman: A Change in the Climate of General Jurisdiction over Foreign Corporations*, 40 WESTCHESTER B.J. 7, 11 (2015).

<sup>11</sup> *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring).

<sup>12</sup> *Id.* at 751 (majority opinion); *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919–20 (2011).

<sup>13</sup> *See Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 576 (D. Del. 2015) (noting that *Daimler* does not address consent-based general jurisdiction), *aff’d*, 817 F.3d 755, 757 (Fed. Cir. 2016); *see also Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014) (noting that a court could consider whether a corporation consented to jurisdiction through registration).

<sup>14</sup> *See Sternberg v. O’Neil*, 550 A.2d 1105, 1113 (Del. 1988). *But see* *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 (Del. 2016). *See also* *Frummer v. Hilton Hotels Int’l, Inc.*, 19 N.Y.2d 533, 536, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 43 (1967).

This Note argues for the increased exercise of general jurisdiction based on registration statutes.<sup>15</sup> Carefully drafted state statutes, explicitly stating that corporations registering to do business in a state thereby consent to general jurisdiction, not only solve the consequences of *Daimler*, but also fully comport with traditional values of fairness.

Part I outlines the jurisprudential history related to general jurisdiction. Section A begins with the concept of territoriality introduced in *Pennoyer* and the minimum contacts analysis in *International Shoe*, then discusses the modern doctrine in *Perkins*, *Helicopteros*, and *Goodyear*, culminating with *Daimler*. Section B outlines the jurisprudence of consent-based jurisdiction before *Daimler*. Next, Part II addresses the consequences of *Daimler* and how lower courts have interpreted and implemented the decision. Finally, Part III discusses statutory solutions. Section A summarizes legislation pending in New York that would codify consent-based jurisdiction. Section B addresses the criticisms of consent to jurisdiction based on registration statutes. Finally, Section C suggests improvements to legislation to ensure corporate accountability.

## I. BACKGROUND LAW

When a court determines whether it has jurisdiction over the parties to a civil action, it divides that analysis into two avenues: specific jurisdiction and general jurisdiction.<sup>16</sup> Specific jurisdiction is based solely on the relationship between the forum state and the events giving rise to the cause of action and exists when those events occurred within the state.<sup>17</sup> In contrast, general jurisdiction is based on the relationship between the forum state and one of the parties to the suit without regard to the geographical location of the dispute being litigated.<sup>18</sup> The

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<sup>15</sup> Similar to other works addressing this topic, this Note will not discuss the potential Interstate Commerce Clause issues related to registration statutes and general jurisdiction. See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1362 n.106 (2015).

<sup>16</sup> See Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 726 (1988).

<sup>17</sup> See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

<sup>18</sup> See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 627 (1988) (referring to general jurisdiction as “dispute-blind”).

authority of the state is a central feature of both forms of jurisdiction. From the earliest articulations of personal jurisdiction, the sovereignty of the forum state has played a pivotal role.<sup>19</sup>

A. *General Jurisdiction: Pennoyer to Daimler*

1. Historical Foundation: *Pennoyer* and *International Shoe*

The long-running debate over the definition and extent of state authority over non-resident defendants was sparked in 1877. In *Pennoyer v. Neff*,<sup>20</sup> the United States Supreme Court defined personal jurisdiction as limited to the territorial boundaries of the state.<sup>21</sup> States remained all-powerful within their borders, but were limited in obtaining jurisdiction over out-of-state defendants. For over sixty years territoriality reigned. Then, in 1945, a new Court began to adapt the doctrine to an evolving world.

In *International Shoe v. Washington*,<sup>22</sup> the Court addressed whether a state could adjudicate proceedings against a foreign corporation<sup>23</sup> based only on activities of that corporation within the forum.<sup>24</sup> The difficulty the Court wrestled with involved the personhood of a corporate entity.<sup>25</sup> Although the fiction of corporate personhood had existed since the mid-19<sup>th</sup> century,<sup>26</sup> corporations differ from individuals in that they can be “present” in multiple jurisdictions simultaneously.<sup>27</sup> Therefore, the Court

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<sup>19</sup> See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952).

<sup>20</sup> 95 U.S. 714 (1877).

<sup>21</sup> *Id.* at 729. Neff had hired John Mitchell, an attorney, to help obtain a land grant in Oregon. *Id.* at 715. Neff was ultimately successful in gaining the land, but Mitchell brought suit in Oregon for outstanding legal debts owed by Neff. *Id.* at 716. After Mitchell won a default judgment, he assigned the land to Pennoyer, resulting in this suit. *Id.*

<sup>22</sup> 326 U.S. 310 (1945).

<sup>23</sup> “Foreign corporation” refers to any corporation that comes into the state, but is neither incorporated nor has its principal place of business there. In this sense, a foreign corporation could be from another country or merely from another state.

<sup>24</sup> *Int'l Shoe*, 326 U.S. at 311.

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

<sup>26</sup> See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 650 (1819); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888); see also Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 134 (2013).

<sup>27</sup> *Int'l Shoe*, 326 U.S. at 314. International Shoe was incorporated in Delaware, with a principal place of business in Missouri. *Id.* at 313.

reasoned, it becomes necessary to examine the interactions that the corporation has with the state to determine if jurisdiction comports with constitutional due process.<sup>28</sup> Even though there may be no express consent to be sued, the extended presence of a corporation within the forum based on certain minimum contacts with the state is enough to subject it to jurisdiction.<sup>29</sup>

Such action satisfies due process because of a *quid pro quo* relationship.<sup>30</sup> A corporation gains the privileges and protections of the state by operating within the state in exchange for the obligation to submit to the state's judicial process.<sup>31</sup> All that due process requires of an out-of-state defendant is that the entity have certain minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>32</sup> Applying this test, the Court determined that International Shoe's contacts with the state were "systematic and continuous,"<sup>33</sup> and thus the corporation was amenable to suit.

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<sup>28</sup> *Id.* at 316–17.

<sup>29</sup> *Id.* at 317.

<sup>30</sup> See Twitchell, *supra* note 18, at 621.

<sup>31</sup> *Int'l Shoe*, 326 U.S. at 319; see also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 422 (1984) (Brennan, J., dissenting) (arguing that as active members in "interstate and foreign commerce," corporations coming into the state should be subjected to jurisdiction).

<sup>32</sup> *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>33</sup> *Id.* at 320. The suit revolved around a Washington tax on businesses to contribute to a state unemployment fund and arose out of the company's contacts with the state of Washington. International Shoe had avoided the tax by not having a permanent business site. The Court determined that 11 to 13 employees renting space, selling products, and earning compensation was enough to establish jurisdiction. *Id.* The minimum contacts analysis is a test based on reasonableness: do the contacts between the corporation and the forum reach a minimum threshold where it would be fair to subject the corporation to suit? See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). The minimum contacts analysis has been criticized over the decades following *International Shoe* for being "confusing," "vague," and "uncertain." See Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998).

While the holding has been expanded and clarified since the case was decided,<sup>34</sup> *International Shoe* has remained the genesis of modern personal jurisdiction analysis. However, the Court has been less effective in articulating the more specific scope of a state's jurisdiction over a foreign corporation when the cause of action is not related to the corporation's activities within the state.

## 2. Modern Doctrine: *Perkins* and *Helicopteros*

In the arena of modern general jurisdiction jurisprudence, *Perkins v. Benguet Consolidated Mining Co.*<sup>35</sup> serves as the starting point.<sup>36</sup> In *Perkins*, a shareholder of Benguet Mining sued the company in Ohio for actions unrelated to events in that state.<sup>37</sup> Although the company originally operated in the Philippines, its operations halted after the Japanese invasion during World War II.<sup>38</sup> During the Japanese occupation, the company's president returned to his home in Ohio and ran the company from there.<sup>39</sup> The Court held that subjecting a foreign corporation to the jurisdiction of Ohio under these circumstances comported with due process.<sup>40</sup> The Court reasoned that the business done in Ohio was "sufficiently substantial" to justify jurisdiction.<sup>41</sup> Therefore, it did not violate due process to hold the company amenable to suit in Ohio, even though the cause of action did not result from its activities in the forum.<sup>42</sup>

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<sup>34</sup> For example, in *Hanson v. Denckla*, the Court explained that minimum contacts require "some act [of the corporation] by which the [corporation] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. 235, 253 (1958).

<sup>35</sup> 342 U.S. 437 (1952).

<sup>36</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014) (referring to *Perkins* as the "textbook case" for general jurisdiction in post-*International Shoe* jurisprudence).

<sup>37</sup> *Perkins*, 342 U.S. at 439. Idonah Slade Perkins, a non-resident of Ohio and a stockholder in the Benguet Mining, brought suit seeking unpaid dividends and damages relating to those shares. *Id.*

<sup>38</sup> *Id.* at 447-48.

<sup>39</sup> *Id.* The company president maintained an office in Ohio, where he kept office files, distributed salary checks, maintained company funds in two bank accounts, and held several directors' meetings. *Id.* at 448.

<sup>40</sup> *Id.* at 438.

<sup>41</sup> *Id.* at 447.

<sup>42</sup> *Id.* at 448. The difference between the *International Shoe* and *Perkins* analyses is the focus on *where* the cause of action arose in relation to the state.

Since *Perkins*, the case law governing general jurisdiction has been limited.<sup>43</sup> It was not until 1984, in *Helicopteros Nacionales v. Hall*,<sup>44</sup> that the Supreme Court laid out a limited rubric for establishing general jurisdiction. In that case, a Colombian corporation, which provided helicopter transportation for oil and construction companies in South America, purchased helicopters from a Texas corporation.<sup>45</sup> The contracts were negotiated in Texas, the helicopters were manufactured in Texas, and prospective pilots were trained in Texas.<sup>46</sup> When an accident in Peru involving one of the helicopters killed four Americans, their families brought suit in Texas state courts.<sup>47</sup>

In deciding whether jurisdiction over the foreign corporation could be asserted, the Court laid out a two-part test.<sup>48</sup> First, a court must determine whether the defendant had “continuous and systematic” contacts with the forum.<sup>49</sup> Second, a court must decide whether the exercise of jurisdiction comports with due process.<sup>50</sup> Finding that the Colombian corporation’s contacts were not continuous and systematic, the Court held that extending jurisdiction over the corporation would not comport with due process.<sup>51</sup> “[M]ere purchases” occurring regularly were not enough to give rise to a state’s exercise of general jurisdiction.<sup>52</sup> This ruling exacerbated the confusion over the scope of general jurisdiction, leaving it unclear what facts and circumstances could demonstrate continuous and systematic activity. For thirty years after *Helicopteros*, the confusion persisted.

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<sup>43</sup> See Brilmayer et al., *supra* note 16, at 724 (noting that, at the time of publication, only two Supreme Court cases since 1952 had discussed general jurisdiction, *Perkins* and *Helicopteros*).

<sup>44</sup> 466 U.S. 408 (1984).

<sup>45</sup> *Id.* at 409–10.

<sup>46</sup> *Id.* at 410–11. Despite these contacts, the corporation had never registered to do business in Texas and never appointed an agent for service of process. *Id.* at 411.

<sup>47</sup> *Id.* at 412.

<sup>48</sup> *Id.* at 415–16. This two-part test was an attempt to harmonize the pieces of the jurisdiction analysis explained in *International Shoe* and *Perkins*. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>49</sup> *Helicopteros*, 466 U.S. at 416.

<sup>50</sup> *Id.* at 418.

<sup>51</sup> *Id.* at 418–19.

<sup>52</sup> *Id.* at 418.



### 3. The Sea Change: *Goodyear* and *Daimler*

As lower courts began to interpret and apply the Supreme Court's general jurisdiction doctrine, it became clear that there was a lack of uniformity and understanding.<sup>53</sup> To address that problem, the Supreme Court decided a pair of cases in 2011 and 2014 to clarify the extent of a state's jurisdiction over foreign defendants.<sup>54</sup>

In 2011, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>55</sup> the Court began to refine the "continuous and systematic" contacts test for the exercise of jurisdiction, originally expressed in *Perkins*.<sup>56</sup> In *Goodyear*, the families of two North Carolina teenagers brought suit against Goodyear Tire and its various foreign subsidiaries.<sup>57</sup>

During a soccer tournament abroad, two teenagers died in a fatal bus accident in Paris caused by a defective tire manufactured by Goodyear Turkey.<sup>58</sup> When suit was brought in North Carolina state courts, jurisdiction over the foreign companies was disputed.<sup>59</sup> The trial court determined that it had general jurisdiction over the foreign subsidiaries and the North Carolina Court of Appeals affirmed.<sup>60</sup> On appeal to the U.S.

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<sup>53</sup> See Brilmayer et al., *supra* note 16, at 724; Twitchell, *supra* note 18, at 611, 629.

<sup>54</sup> Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish for: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2002 (2014) (arguing that while academia hoped the U.S. Supreme Court would clarify the general jurisdiction analysis, *Goodyear* and *Daimler* should have been decided on narrower grounds).

<sup>55</sup> 564 U.S. 915 (2011).

<sup>56</sup> *Id.* at 919; see *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

<sup>57</sup> *Goodyear*, 564 U.S. at 918. Named in the suit were Goodyear Luxembourg, Goodyear Turkey, and Goodyear France, all incorporated and having their principal places of business in those countries. *Id.* None of the subsidiaries were registered to do business in North Carolina. *Id.* at 921. However, Goodyear USA, an Ohio corporation, was registered to do business in North Carolina and never questioned jurisdiction. *Id.* at 920–21.

<sup>58</sup> *Id.* at 920.

<sup>59</sup> *Id.* at 919. Jurisdiction was disputed because the foreign subsidiaries lacked the "continuous and systematic" contacts with North Carolina that would have made jurisdiction proper. *Id.* at 919–20.

<sup>60</sup> *Id.* at 921–22.

Supreme Court, Justice Ginsburg accused the North Carolina courts of “[c]onfusing or blending general and specific jurisdictional inquiries.”<sup>61</sup>

Clarifying the test for general jurisdiction, Justice Ginsburg wrote that a state may only exercise general jurisdiction over foreign corporations “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”<sup>62</sup> Under this test, North Carolina did not have jurisdiction over the foreign subsidiaries, because they could not be considered “at home” in the state.<sup>63</sup> While the Court may have intended this new “at home” test to clear the murky waters of general jurisdiction, confusion persisted.

In 2014, the Supreme Court again attempted to refine the framework for general jurisdiction by clarifying *Goodyear*'s “at home” rubric.<sup>64</sup> The chosen suit, though, involved foreign plaintiffs taking advantage of U.S. law to sue foreign defendants over foreign events and, as a result, was a poor vehicle for reform. After the death of long-time Argentine president Juan Peron in 1974, a political vacuum resulted in a power struggle that plunged the country into chaos.<sup>65</sup> From 1974 to 1983, the Argentine Military Government orchestrated an epoch of state terrorism, hunting down political opponents, academics, lawyers, and sympathizers.<sup>66</sup> The official death count of the “Dirty War” is 9,000, but human rights groups have estimated as many as 30,000 victims.<sup>67</sup>

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<sup>61</sup> *Id.* at 919–20. The North Carolina court relied on a “stream of commerce” theory, whereby jurisdiction is gained over a corporation due to its purposeful placement of products in the forum state. *Id.* at 920. However, Justice Ginsburg noted that the “stream of commerce” theory only applies to the exercise of specific jurisdiction. *Id.* at 927. Therefore, states have an interest in adjudicating matters caused by foreign corporations purposefully targeting products to the forum state or reasonably foreseeing the products eventually reaching the forum. *Id.* at 926–27; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>62</sup> *Goodyear*, 564 U.S. at 919.

<sup>63</sup> *Id.* at 929.

<sup>64</sup> See Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 82–83 (2013).

<sup>65</sup> See PATRICIA MARCHAK & WILLIAM MARCHAK, *GOD'S ASSASSINS: STATE TERRORISM IN ARGENTINA IN THE 1970S* 120–22 (1999).

<sup>66</sup> See RICHARD MORROCK, *THE PSYCHOLOGY OF GENOCIDE AND VIOLENT OPPRESSION: A STUDY OF MASS CRUELTY FROM NAZI GERMANY TO RWANDA* 184 (2010).

<sup>67</sup> See Jorge Rafael Videla, *Death of a 'Dirty War' Criminal*, *ECONOMIST: AMERICAS VIEW* (May 23, 2013, 12:11 PM), <http://www.economist.com/blogs/amicasview/2013/05/jorge-rafael-videla>.

Two decades later, a group of victims and relatives brought suit against DaimlerChrysler under the United States' Alien Tort Statute ("ATS") and the Torture Victims Protection Act ("TVPA")<sup>68</sup> in California.<sup>69</sup> The plaintiffs contended that Daimler's subsidiary, Mercedes-Benz Argentina, had collaborated with the Argentine military and police forces to intimidate, kidnap, and murder union agitators.<sup>70</sup> The question presented by this unusual case was whether the court could constitutionally exercise jurisdiction over Daimler based on the California contacts of its subsidiary, Mercedes-Benz USA, for alleged crimes by the Argentine subsidiary.<sup>71</sup> The District Court for the Northern District of California held that it could not.<sup>72</sup>

The Ninth Circuit reversed, deciding that jurisdiction was reasonable and articulating three justifications.<sup>73</sup> First, Daimler had injected itself into California courts by initiating lawsuits there for years.<sup>74</sup> Second, as an international corporation, Daimler would not be overly burdened by litigating in California.<sup>75</sup> Third, California had an interest in the suit because Daimler had inserted itself into the California market and because the United States generally maintains an interest in redressing international human rights violations.<sup>76</sup> Therefore, the Ninth Circuit held that the exercise of general jurisdiction was proper.

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<sup>68</sup> Both statutes provide a cause of action for certain violations of international human rights, stressing the United States' interest in providing a forum for redress. See Philip Mariani, *Assessing the Proper Relationship Between the Alien Torture Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1392–93 (2008).

<sup>69</sup> See *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 911–12 (9th Cir. 2011), *rev'd sub nom. Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>70</sup> *Id.* at 912.

<sup>71</sup> *Id.* at 913–14, 919.

<sup>72</sup> *Id.* at 917–18.

<sup>73</sup> *Id.* at 931.

<sup>74</sup> *Id.* at 925. Daimler had initiated lawsuits in California courts to challenge the state's clean air laws and to protect its own patents and business interests. *Id.* at 917. Moreover, Daimler had retained permanent counsel within the state. *Id.* at 918.

<sup>75</sup> *Id.* at 926 (citing *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988)).

<sup>76</sup> *Id.* at 925 ("[T]he sale of DCAG's vehicles in California 'is not an isolated occurrence but arises from the efforts of DCAG to serve the California market.'"); see *id.* at 927.

In *Daimler AG v. Bauman*,<sup>77</sup> the Supreme Court granted certiorari and reversed.<sup>78</sup> The Court framed the issue as whether California was precluded from exercising general jurisdiction “given the absence of any California connection to the atrocities, perpetrators, or victims.”<sup>79</sup> Answering in the affirmative, the Court clarified language from *Goodyear*.<sup>80</sup> Justice Ginsberg explained that while a corporation’s place of incorporation and principal place of business are not the *only* forums that satisfy the “at home” test for general jurisdiction, those locations are the “paradigm all-purpose forums.”<sup>81</sup>

The Court stressed predictability. If Daimler could be sued in California for a case originating in Argentina, then the corporation could be sued in any state in which its subsidiaries’ sales were “sizeable.”<sup>82</sup> And if that were the case, corporations would never be able to conduct their affairs “with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>83</sup> Therefore, the proper analysis to determine whether a corporation is essentially “at home” in the forum state is to compare its contacts with the forum with its relative contacts globally.<sup>84</sup>

Concurring in the judgment, Justice Sotomayor disagreed with the Court’s reasoning.<sup>85</sup> Concerned that the Court was essentially uprooting personal jurisdiction precedent and due process jurisprudence,<sup>86</sup> Justice Sotomayor characterized the majority’s approach as determining “not that Daimler’s contacts with California [were] too few, but that its contacts with other forums [were] too many.”<sup>87</sup> She charged that, by adopting such an approach, the Court had discarded “the lodestar” of personal

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<sup>77</sup> 134 S. Ct. 746 (2014).

<sup>78</sup> *Id.* at 751.

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

<sup>80</sup> *Id.* at 760 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923–24 (2011)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 761.

<sup>83</sup> *Id.* at 762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). *But see* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting) (arguing it is a “commercial reality” that corporations may be amenable to suit in many states).

<sup>84</sup> *Daimler*, 134 S. Ct. at 751.

<sup>85</sup> *Id.* at 763 (Sotomayor, J., concurring).

<sup>86</sup> *Id.* at 764.

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

jurisdiction analysis: “[I]f the defendant has sufficiently taken advantage of the State’s laws,” the “State may subject the defendant to the burden of suit.”<sup>88</sup> Therefore, she argued, a defendant’s contacts outside the forum have always been, and should have remained, immaterial.<sup>89</sup>

Instead, Justice Sotomayor took a different approach. Foremost in her analysis was the concept of reciprocal fairness. After all, it simply cannot be fair for a corporation to avail itself of the forum and then immunize itself from suit therein.<sup>90</sup> Moreover, the majority’s approach actually diminished the predictability that had always been a centerpiece of jurisdiction analyses, because it created an uncertain comparison framework between the corporation’s forum contacts and its global contacts.<sup>91</sup> Finally, there is nothing unpredictable about a rule forcing multinational corporations to be prepared for suit in any forum with which they have substantial contacts.<sup>92</sup>

Further, Justice Sotomayor reiterated the importance of a state’s sovereignty in regulating corporations within its boundaries.<sup>93</sup> She charged that, by ignoring this principle, the Court had defined general jurisdiction “so narrowly and arbitrarily as to contravene the States’ sovereign prerogative” to hold corporations accountable.<sup>94</sup> In Justice Sotomayor’s view, the policy concerns that the majority addressed should be left to the individual state legislatures to resolve.<sup>95</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also Judy M. Cornett and Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 104 (2015) (arguing that “*Daimler* departs from settled law”).

<sup>90</sup> See *Daimler*, 134 S. Ct. at 768 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); see also Brilmayer et al., *supra* note 16, at 742 (“We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states.”).

<sup>91</sup> See *Daimler*, 134 S. Ct. at 770 (“[T]he majority does not even try to explain just how extensive the company’s in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.”).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 772.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 771; see also Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 28 (1989) (“Territorial sovereignty exists and is a reasonable basis for state power.”).

Finally, she argued, the majority approach would insulate massive international corporations while simultaneously punishing smaller domestic companies.<sup>96</sup> Under the majority's framework, a small business operating solely in California, but producing a fraction of Daimler's production, could be held liable in a California court, while Daimler could not.<sup>97</sup> Thus, she reasoned, the *Daimler* majority had made goliath corporations, known in a different context as "too big to fail,"<sup>98</sup> also "too big for general jurisdiction."<sup>99</sup>

*Daimler v. Bauman* was meant to finally clarify the unanswered questions surrounding general and specific jurisdiction and the appropriate instances in which both may be invoked.<sup>100</sup> However, there is a crucial area that has not been addressed.<sup>101</sup> Consent-based jurisdiction, whereby a state may exercise jurisdiction over a defendant based on an authorizing state statute, is one of the last open questions in this juridical realm and a powerful tool to remedy the restrictions on general jurisdiction imposed by *Daimler*.

#### B. Consent-Based Jurisdiction: Pre-Daimler

Ancillary to its general jurisdiction analysis, the U.S. Supreme Court has long relied on the "doing business" test to justify the exercise of general jurisdiction, whereby a corporation is amenable to suit in the forum state based on its registration to conduct business in that state.<sup>102</sup> For a century, the Supreme Court and lower courts have articulated the necessity and legitimacy of this avenue to jurisdiction. This theory of express

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<sup>96</sup> See *Daimler*, 134 S. Ct. at 772.

<sup>97</sup> *Id.* While car production itself had nothing to do with the cause of action, the manufacturing of cars in California helped establish Daimler's contacts with the forum. *Id.*

<sup>98</sup> "Too big to fail" refers to a corporation so large that the national economy depends on it. Therefore, it cannot fail because a domino effect would ensue. See Catherine Rampell, *Defining "Too Big to Fail,"* N.Y. TIMES: ECONOMIX BLOG (Aug. 20, 2009, 5:08 PM), <http://economix.blogs.nytimes.com/2009/08/20/defining-too-big-to-fail>.

<sup>99</sup> *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

<sup>100</sup> See Case Comment, *supra* note 7, at 311.

<sup>101</sup> See Linda J. Silberman, *Daimler AG v. Bauman: A New Era for Judicial Jurisdiction in the United States* 237 (N.Y.U. Pub. Law & Legal Theory Working Papers, Paper No. 522, 2015), [http://lsr.nellco.org/nyu\\_plltwp/522](http://lsr.nellco.org/nyu_plltwp/522) (listing significant questions left open by *Daimler*, including consent based on registration statutes).

<sup>102</sup> See *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 198 (2d Cir. 1990) (defining the "doing business" test under New York C.P.L.R. § 301).

consent is based on the state's interest in keeping corporations accountable, as well as honoring the contract developed between the state and the corporation through the latter's registration to conduct business in the former.

### 1. Early Twentieth-Century Application

As corporations grew at the onset of the twentieth century, so did public concern over their power and "seeming ability to swallow or to ruin effective competitors and to control consumer prices at will."<sup>103</sup> Moreover, with corporations expanding across state borders, courts sensed a social duty to ensure fairness.<sup>104</sup> In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining and Milling Co.*,<sup>105</sup> Justice Holmes articulated the legitimacy of a state's regulation of corporations operating within its borders, drawing on New York case law.<sup>106</sup> In *Pennsylvania Fire*, an Arizona company purchased an insurance policy for buildings in Colorado, and then brought suit against the insurer in Missouri.<sup>107</sup> The insurance company argued that its registration to do business in Missouri made it amenable only to suits arising out of its Missouri contracts.<sup>108</sup> The court disagreed, holding that the exercise of jurisdiction was valid because the company had consented to suit by registering to do business.<sup>109</sup> While the court conceded that consent may be a "mere fiction," it

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<sup>103</sup> See Leroy G. Dorsey, *Theodore Roosevelt and Corporate America, 1901-1909: A Reexamination*, 25 PRESIDENTIAL STUD. Q. 725, 732 (1995).

<sup>104</sup> See Theodore H. Davis, Jr., Note, *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603, 603 (1991); see also *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 61 (2010), *rev'd sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (recounting the history of the expansion of general jurisdiction in relation to economic growth).

<sup>105</sup> 243 U.S. 93 (1917).

<sup>106</sup> *Id.* at 95, 97.

<sup>107</sup> *Id.* at 94. Suit could properly be brought in Missouri, despite the contract at issue being executed in Colorado, because the defendant had formed a contract with the state. *Id.* In exchange for the privilege of doing business with Missouri, its Missouri Insurance Superintendent would accept service on its behalf, thus authorizing general jurisdiction. See Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 138 n.130 (1992).

<sup>108</sup> *Pa. Fire Ins. Co. of Phila.*, 243 U.S. at 94-95 (1917).

<sup>109</sup> *Id.* at 95.

was justified because it placed the out-of-state corporation on the same footing as a local corporation operating within the state borders.<sup>110</sup>

During the same period, New York courts, and especially the New York Court of Appeals under Chief Judge Cardozo's leadership, played a unique role as proponents of broad general jurisdiction.<sup>111</sup> Two seminal cases from this era, both authored by Chief Judge Cardozo, articulate New York's long-standing support for corporate accountability. In *Bagdon v. Philadelphia & Reading Coal & Iron*,<sup>112</sup> a New York resident brought suit against a Pennsylvania company after he was injured while working in Pennsylvania.<sup>113</sup> The company sought to avoid jurisdiction by arguing that it was only accountable for actions occurring within New York.<sup>114</sup> Noting that New York requires foreign corporations to obtain a certificate in order to conduct business within the state,<sup>115</sup> Chief Judge Cardozo reasoned that this registration creates a contract between the state and the company: the privilege of doing business is received in exchange

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<sup>110</sup> *Id.* at 96; see also *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring).

<sup>111</sup> Chief Judge Cardozo has been referred to as the "ultimate scholar judge." He served eighteen years on the New York Court of Appeals before being appointed to the U.S. Supreme Court in 1932. See William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 264 (1992). Chief Judge Cardozo developed a strong record of regulating corporate behavior during this period. See, e.g., *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N.Y. 483, 121 N.E. 378 (1918) (conflict of interest in corporate contracts); *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 155 N.E. 58 (1926) (piercing the corporate veil); *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) (fiduciary duty owed partners). Because it is focused on his work while serving on the New York Court of Appeals, this Note refers to Cardozo as "Chief Judge." See Joseph W. Bellacosa, *Benjamin Nathaniel Cardozo: The Teacher*, 16 *Cardozo L. Rev.* 2415, 2417 (1995) ("Though he earned the title Associate Justice of the United States Supreme Court, I know you will not mind that I refer to him as the Chief Judge of the New York State Court of Appeals, the title New Yorkers affectionately cherish the most, because it is associated with his eighteen years of service and leadership on our great common law tribunal.").

<sup>112</sup> 217 N.Y. 432, 111 N.E. 1075 (1916).

<sup>113</sup> *Id.* at 433, 111 N.E. at 1075. The company also made a contract to compensate the worker, but subsequently reneged on that agreement. *Id.*, 111 N.E. at 1075.

<sup>114</sup> *Id.* at 433-34, 111 N.E. at 1075.

<sup>115</sup> *Id.* at 436, 111 N.E. at 1076.



for submitting to jurisdiction.<sup>116</sup> Therefore, New York had jurisdiction over the Pennsylvania company even though the cause of action had no relation to transactions within the state.<sup>117</sup>

Just one year later, the Court of Appeals reaffirmed the extension of jurisdiction. In *Tauza v. Susquehanna Coal*,<sup>118</sup> a New York resident brought suit against a Pennsylvania coal company.<sup>119</sup> In addressing the state's jurisdictional authority, Chief Judge Cardozo conducted a minimum contacts analysis nearly three decades before the United States Supreme Court would adopt such a test in *International Shoe*.<sup>120</sup>

Chief Judge Cardozo began the analysis by noting that process had been served on an appointed agent, unlike in *Tauza*, where process had been served on an officer of the defendant corporation.<sup>121</sup> Yet, according to Chief Judge Cardozo, service on an agent similarly satisfied the test for state jurisdiction. All that need be determined is "that the corporation is here."<sup>122</sup> To Chief Judge Cardozo, this was simple fairness.<sup>123</sup> Whether that defined agent is an officer of the corporation or a state official makes no difference.<sup>124</sup> If the corporation "is here"—that is, if it is taking advantage of the privileges and protections of the state—then the state has jurisdiction over the corporation, regardless of where the cause of action arose.<sup>125</sup>

As a consequence of economic globalization, New York state courts relied on *Tauza* and *Bagdon* to provide justice for state residents.<sup>126</sup> Decades later, in *Bryant v. Finnish National*

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<sup>116</sup> *Id.* at 437, 111 N.E. at 1076; *see also* Brilmayer, *supra* note 95 at 17–21.

<sup>117</sup> *Bagdon*, 217 N.Y. at 438, 111 N.E. at 1077. Other states had reached the same conclusion. *Id.*, 111 N.E. at 1077 (citing *Johnston v. Trade Ins. Co.*, 132 Mass. 432 (Mass. 1882); *Reeves v. S. Ry. Co.*, 49 S.E. 674 (Ga. 1905)).

<sup>118</sup> 220 N.Y. 259, 115 N.E. 915 (1917).

<sup>119</sup> *Id.* at 265, 115 N.E. at 916.

<sup>120</sup> *See id.*, 115 N.E. at 916; *see also* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>121</sup> *Compare Bagdon*, 217 N.Y. at 433, 111 N.E. at 1075, *with Tauza*, 220 N.Y. at 268–69, 115 N.E. at 918.

<sup>122</sup> *Tauza*, 220 N.Y. at 268, 115 N.E. at 918.

<sup>123</sup> *Id.* at 269, 115 N.E. at 918; *see also* *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014) (Sotomayor, J., concurring) (noting that the task of weighing policy concerns belongs to legislators).

<sup>124</sup> *Tauza*, 220 N.Y. at 268, 115 N.E. at 918. Both cases involved New York's General Corporation Law. *Id.*, 115 N.E. at 918.

<sup>125</sup> *Id.*, 115 N.E. at 918.

<sup>126</sup> *See, e.g., Elish v. St. Louis S.W. Ry. Co.*, 305 N.Y. 267, 112 N.E.2d 842 (1953); *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964).

*Airlines*,<sup>127</sup> a New York resident brought suit against a Finnish airline for an accident caused by the corporation's negligence in Paris.<sup>128</sup> Relying on *Tauza*, the Court of Appeals held that the Finnish corporation was amenable to suit in New York based on its compliance with the business registration statute and its active business contacts within the state.<sup>129</sup> The court reasoned that the test for exercising jurisdiction over a foreign corporation "should be a simple pragmatic one."<sup>130</sup>

These cases make up New York's century-old tradition of consent-based jurisdiction, demonstrating a judicial response to ensure fairness. By protecting the powers of the legislature to hold corporations accountable, New York has set a standard for ensuring that state residents may bring causes of action against foreign corporations that avail themselves of the forum.

## 2. The Federal Circuit Courts and Consent-Based Jurisdiction Pre-*Daimler*

While New York's highest court was defining the scope of consent-based jurisdiction, federal courts were also wrestling with this theory of extending general jurisdiction. In the decades preceding *Daimler*, commentators split on the legitimacy of basing general jurisdiction on business registration statutes as well as the overall scope of general jurisdiction.<sup>131</sup> Between 1971 and 2008, most federal circuits found occasion to rule on this question.<sup>132</sup> The result has been a three-way split among the Circuits. The First, Third, and Eighth Circuits have held that business registration statutes are a valid means of establishing a

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<sup>127</sup> 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

<sup>128</sup> *Id.* at 428–29, 208 N.E.2d at 439, 260 N.Y.S.2d at 626. The plaintiff was struck by a baggage cart that was blown by an "excessive blast of air" from one of the defendant's aircrafts. *Id.* at 429, 208 N.E.2d at 439, 260 N.Y.S.2d at 626.

<sup>129</sup> *Id.* at 428, 431, 208 N.E.2d at 439, 441, 260 N.Y.S.2d at 626, 628. *Bryant* essentially applied a two-part recipe for jurisdiction: the registration to do business plus the sufficient contacts between the corporation and the state. This analysis is best suited for consent-based jurisdiction. See *infra* Part III, Section C.

<sup>130</sup> See *Bryant*, 15 N.Y.2d at 432, 208 N.E.2d at 441, 260 N.Y.S.2d at 629.

<sup>131</sup> See Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 809 (2004) (outlining different theories on the scope of general jurisdiction).

<sup>132</sup> See *Takeda GmbH v. Mylan Pharms. Inc.*, Civ. Action No.: 15-3384 (FLW)(DEA), 2016 WL 146443, at \*3 (D. N.J. Jan. 12, 2016) (discussing the circuit split as to whether consent-by-registration remains a viable basis for general jurisdiction).

corporation's consent to general jurisdiction.<sup>133</sup> The Fifth and Ninth Circuits have held that a state may condition general jurisdiction on registration statutes; however, the registration statutes in question in those cases were not sufficiently specific to grant consent.<sup>134</sup> Finally, the Fourth and Seventh Circuits have held that a state registration requirement cannot provide a corporation's consent to general jurisdiction.<sup>135</sup> These cases reveal the importance of the specific statutory language and the necessity of some activity in addition to registration.

*a. The First Circuit: Consent Authorizes Jurisdiction*

In *Holloway v. Wright & Morrissey, Inc.*,<sup>136</sup> the First Circuit determined that as long as a cause of action was within the scope of the agent's authority, the corporation had consented to jurisdiction based on its registration to do business.<sup>137</sup> In that case, a New Hampshire resident brought suit against his employer, a Vermont corporation, for injuries he sustained on a New Hampshire construction site.<sup>138</sup> Pursuant to New Hampshire's long-arm statute, plaintiff served process on the corporation's in-state agent,<sup>139</sup> but the District Court of New Hampshire dismissed for lack of personal jurisdiction.<sup>140</sup> Subsequently, the First Circuit reversed.<sup>141</sup>

As a matter of statutory interpretation, the First Circuit determined that New Hampshire's long-arm statute was sufficiently broad to encompass jurisdiction based on the separate business registration statute.<sup>142</sup> The court reasoned that if the New Hampshire legislature had intended to restrict

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<sup>133</sup> See, e.g., *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695 (1st Cir. 1984); *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990).

<sup>134</sup> See, e.g., *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992); *King v. Am. Family Mut. Ins.*, 632 F.3d 570 (9th Cir. 2011).

<sup>135</sup> See, e.g., *Ratcliff v. Cooper Labs., Inc.*, 444 F.2d 745 (4th Cir. 1971); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990).

<sup>136</sup> 739 F.2d 695 (1st Cir. 1984).

<sup>137</sup> *Id.* at 697.

<sup>138</sup> *Id.* at 696.

<sup>139</sup> *Id.* at 696 n.1.

<sup>140</sup> *Id.* at 696.

<sup>141</sup> *Id.* The opinion was authored by Justice Potter Stewart, retired and sitting by designation. See E. Jon A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals*, 11 SETON HALL CIR. REV. 285, 295 (2015).

<sup>142</sup> *Holloway*, 739 F.2d at 697–98.

the applicability of the provision, it would have done so.<sup>143</sup> The statute did not require that the cause of action occur *within* the state; in fact, earlier language imposing such a requirement had been deliberately removed by the legislature.<sup>144</sup> Therefore, the court held that the clear language of the statute ensured that the exercise of general jurisdiction was constitutional.<sup>145</sup>

*b. The Seventh and Ninth Circuits: Consent Alone Is Not Enough*

Other circuit courts, construing different statutes, have determined that registering to do business alone is not sufficient to grant general jurisdiction. In *Wilson v. Humphreys (Cayman), Ltd.*,<sup>146</sup> the Seventh Circuit rejected plaintiff's argument that Holiday Inns, a Tennessee corporation, had consented to general jurisdiction through its registration to do business in Indiana.<sup>147</sup> Registering to do business was a "necessary precursor" to conducting business in Indiana and, standing alone, could not act as authorization for the court's exercise of jurisdiction.<sup>148</sup> The Indiana registration statute never mentioned the state's exercise of jurisdiction.<sup>149</sup> Therefore, jurisdiction would require registration plus some greater activity within the forum.<sup>150</sup>

The Ninth Circuit took up the validity of consent-based jurisdiction in 2011, in *King v. American Family Mutual Insurance*.<sup>151</sup> There, a Wisconsin insurance company contemplated expanding its business to Montana.<sup>152</sup> Comporting with Montana law, the company registered to do business in the state as part of its exploration.<sup>153</sup> However, it never actually

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<sup>143</sup> *Id.* at 697. Justice Stewart noted that the legislature had, in fact, restricted the language in other statutes, including Subsection IV of the long-arm statute. *Id.*

<sup>144</sup> *Id.* at 699.

<sup>145</sup> *Id.* The Eighth Circuit has held that designating an agent for service of process through state business statutes is one of the most "solidly established ways" of providing consent to jurisdiction. *See Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990).

<sup>146</sup> 916 F.2d 1239 (7th Cir. 1990).

<sup>147</sup> *Id.* at 1241.

<sup>148</sup> *Id.* at 1245.

<sup>149</sup> *Id.*

<sup>150</sup> *Wilson*, 916 F.2d at 1245.

<sup>151</sup> 632 F.3d 570 (9th Cir. 2011).

<sup>152</sup> *Id.* at 572.

<sup>153</sup> *Id.*

conducted any business in Montana.<sup>154</sup> When Colorado residents brought suit against the company in Montana following a motorcycle accident there, the district court dismissed for lack of jurisdiction because the company had never issued policies in Montana.<sup>155</sup> On appeal, the Ninth Circuit affirmed.<sup>156</sup>

The court reasoned that the exercise of general jurisdiction was improper because the insurance company had “done nothing more than dip its toe in the water.”<sup>157</sup> The state’s interest in corporate oversight does not exist if the corporation is not invoking the privileges of conducting business in the state.<sup>158</sup> In short, the quid pro quo relationship relied on in previous cases simply did not exist.<sup>159</sup> Therefore, registering to do business alone, without some greater activity within the state, was not enough to justify general jurisdiction.<sup>160</sup>

As this survey of decisions has shown, lower courts were unable to agree on the legitimacy of basing general jurisdiction on business registration statutes in the period before *Daimler*. The resulting three-way split among the Circuits has continued to muddy the waters after *Daimler*, making the need for explicit registration statutes apparent.

## II. CONSENT-BASED JURISDICTION: POST-*DAIMLER*

Since *Daimler*, lower courts have relied on registration statutes as one way of asserting general jurisdiction over foreign corporations.<sup>161</sup> These statutes, enacted by state legislatures, provide a valuable tool for courts. In essence, the statutes require that a corporation register to do business with the state

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<sup>154</sup> *Id.* The court considered the insurance company “99.99% ‘Montana free.’” *Id.*; see also Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 24 (1990).

<sup>155</sup> *King*, 632 F.3d at 573.

<sup>156</sup> *Id.* at 580.

<sup>157</sup> *Id.* at 572.

<sup>158</sup> See *id.* The precedent cited by the court rested on the state courts’ interpretation of governing state statutes. See *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *Chipman, Ltd. v. Thomas B. Jeffrey Co.*, 251 U.S. 373, 379 (1920) (holding that New York’s registration statute only applied to corporations actually conducting business in New York).

<sup>159</sup> See *King*, 632 F.3d at 575.

<sup>160</sup> *Id.* at 580.

<sup>161</sup> See Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. EN BANC 197, 202 (2014) (concluding that lower courts will continue to find creative methods of establishing general jurisdiction).

to obtain permission to conduct business in the state.<sup>162</sup> Part of registering involves the corporation consenting to the state's exercise of general jurisdiction in future litigation.<sup>163</sup> Therefore, consent-based jurisdiction represents the foundation of personal jurisdiction case law: a quid pro quo agreement between the foreign corporation, which gains the privileges and protections of the state, and the forum state, which gains the right to hold those operating within its borders accountable.<sup>164</sup>

A. *Vera v. Republic of Cuba: New York's Tradition of Consent-Based Jurisdiction*

After *Daimler*, courts began reexamining their traditional framework of consent-based general jurisdiction.<sup>165</sup> A pointed example involved foreign banks that had registered to do business in New York. *Vera v. Republic of Cuba*<sup>166</sup> dealt with two U.S. citizens bringing suit against Cuba under the Foreign Sovereign Immunities Act (FSIA).<sup>167</sup> One plaintiff alleged that the Cuban regime extra-judicially killed her brother after a sham trial in 1960.<sup>168</sup> The other alleged that agents of the Castro regime sentenced his father to death *in absentia* and assassinated him in 1976.<sup>169</sup> Both were granted judgments from

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<sup>162</sup> See *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 436–37, 111 N.E. 1075, 1076 (1916).

<sup>163</sup> See *Rockefeller Univ. v. Ligand Pharms.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008) (explaining registration to do business as consent to jurisdiction).

<sup>164</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (reasoning that obtaining protections and benefits from the forum make it “presumptively not unreasonable” to submit to jurisdiction).

<sup>165</sup> See Marshall Fishman & David Y. Livshiz, *Do Recent Southern District Decisions Undo ‘Daimler’?*, N.Y. L.J.: OUTSIDE COUNSEL (June 11, 2015), <http://www.newyorklawjournal.com/id=1202728945298/Do-Recent-Southern-District-Decisions-Undo-Daimler?slreturn=20170312130306> (explaining that recent decisions “demonstrate the reluctance of lower courts to apply such a restrictive approach to general jurisdiction”).

<sup>166</sup> 91 F. Supp. 3d 561 (S.D.N.Y. 2015).

<sup>167</sup> *Id.* at 563–64. The purpose of FSIA was “to endorse and codify the restrictive theory of sovereign immunity” and to transfer to the courts responsibility for deciding immunity claims of foreign states. See *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010).

<sup>168</sup> *Vera v. Republic of Cuba*, 40 F. Supp. 3d 367, 370 (S.D.N.Y. 2014) (determining plaintiffs’ state court judgments were entitled to full faith and credit).

<sup>169</sup> *Id.* at 371.

a Florida Circuit Court and sought to execute those judgments against Cuban assets transferred through the defendant banks in New York.<sup>170</sup>

The defendant banks argued that, under *Daimler*, New York lacked jurisdiction because the events at the center of the litigation occurred outside of the state and the banks could not be considered “at home” in the forum.<sup>171</sup> Plaintiffs argued that under New York Banking Law § 200(a), a foreign bank must register to conduct business in the state, thereby providing jurisdiction.<sup>172</sup> The court held that the foreign banks consented to the “necessary regulatory oversight in return for permission to operate in New York” and thus subjected themselves to the court’s general jurisdiction.<sup>173</sup>

In his decision, Judge Hellerstein emphasized principles similar to those propounded by Justice Sotomayor in her *Daimler* concurrence.<sup>174</sup> First, the district court reasoned that *Daimler* cannot be read so broadly as to prohibit *any* oversight over foreign actors.<sup>175</sup> The court observed that foreign corporations doing business in New York should not receive preferential treatment over domestic banks, but instead must be bound by the same rules.<sup>176</sup>

Additionally, the court noted that New York has routinely held foreign corporations accountable through applications of general jurisdiction under a consent-based justification.<sup>177</sup> While *Daimler* may have cast doubt on that practice,<sup>178</sup> the decision never explicitly outlawed it.<sup>179</sup> Finally, the authorization of jurisdiction stems from the contractual relationship between the

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<sup>170</sup> *Vera*, 91 F. Supp. 3d at 564.

<sup>171</sup> *Id.* The Banco Bilbao was neither incorporated in New York nor had its principal place of business there. *Id.* at 570.

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

<sup>173</sup> *Id.* at 571.

<sup>174</sup> *Compare id.* at 570 with *Daimler AG v. Bauman*, 134 S. Ct. 746, 768–69 (2014) (Sotomayor, J., concurring).

<sup>175</sup> *Vera*, 91 F. Supp. 3d at 571.

<sup>176</sup> *Id.* at 570. The court compared the foreign corporation’s action to a legitimate business that launders money in its back room. *Id.* at 571.

<sup>177</sup> *Id.* at 566.

<sup>178</sup> *Id.* (noting that *Daimler* casts doubt on the “doing business” analysis); see also *Daimler*, 134 S. Ct. at 761 n.18 (majority opinion).

<sup>179</sup> See *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014).

forum state and the foreign corporation.<sup>180</sup> If a corporation registers to do business within the state, it cannot then decide that it would prefer not to be hauled into that state's courts.<sup>181</sup> Therefore, the court concluded, New York properly exercised jurisdiction over the foreign banks.<sup>182</sup>

### B. *The Challenges Courts Face with Consent Statutes Post-Daimler*

Not all courts have been so willing to adapt the consent-based justification to a post-*Daimler* landscape. Many courts have taken the opinion at face value, assuming that “at home” refers only to the corporation's principal place of business or state of incorporation. In addition, some courts have been stymied by the lack of explicit language in state statutes.<sup>183</sup>

For example, in *McCourt v. A.O. Smith Water Products Co.*,<sup>184</sup> James McCourt and his wife, Mabel, residents of Florida, brought a tort action against a number of manufacturing corporations for injuries arising from asbestos exposure.<sup>185</sup> The McCourts sued in federal court in New Jersey, and the defendant corporation filed a motion to dismiss.<sup>186</sup> Unable to show that the corporation was essentially “at home” in New Jersey,<sup>187</sup> the McCourts contended that the corporation consented to jurisdiction when it registered to do business in New Jersey.<sup>188</sup>

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<sup>180</sup> *Vera*, 91 F. Supp. 3d at 570 (noting that the benefits associated with a foreign bank operating in New York “give rise to commensurate, reciprocal obligations”).

<sup>181</sup> *Id.* at 571 (“When corporations receive the benefits of operating in this forum, it is critical that regulators and courts continue to have the power to compel information concerning their activities.”).

<sup>182</sup> *Id.*

<sup>183</sup> *See Acorda Therapeutics, Inc. v. Mylan Pharms., Inc.*, 817 F.3d 755, 767 (Fed. Cir. 2016) (O'Malley, J., concurring) (arguing that *Daimler* did not overrule precedent establishing that a corporation may consent to general jurisdiction through a registration statute).

<sup>184</sup> Civ. Act. No. 14-221, 2015 WL 4997403 (D. N.J. Aug. 20, 2015). *See also* *Display Works, LLC v. Bartley*, Civ. Act. No. 16-583, 2016 WL 1644451, at \*6 (D. N.J. Apr. 25, 2016) (holding that the court could not exercise general jurisdiction because the New Jersey registration statute did not explicitly grant that authority).

<sup>185</sup> *McCourt*, 2015 WL 4997403, at \*1.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at \*3 (noting that the corporation maintained no bank accounts in the forum, did not own any property, leased only two office spaces, and had only 30 employees in the state compared to its 63,000 nationwide).

<sup>188</sup> *Id.*



The court granted the defendant's motion to dismiss, holding that registering to do business alone could not be considered consent.<sup>189</sup>

The district court relied on Third Circuit precedent establishing a long tradition of general jurisdiction based on registration statutes.<sup>190</sup> The seminal case, *Bane v. Netlink, Inc.*,<sup>191</sup> held that a foreign corporation registered to do business in Pennsylvania had consented to Pennsylvania's exercise of general jurisdiction.<sup>192</sup> However, while the *McCourt* court recognized that *Bane* remained good law even after *Daimler*,<sup>193</sup> it nonetheless distinguished the facts in that case from those in *McCourt*.<sup>194</sup> Because New Jersey lacked an explicit statute authorizing courts to exercise general jurisdiction over foreign corporations registered to do business in the state, as had existed in Pennsylvania, *Bane* could not be applied.<sup>195</sup> Without that explicit grant, the court was powerless.

The District of Oregon faced a similar dilemma in *Lanham v. Pilot Travel Centers, LLC*.<sup>196</sup> An Oregon resident brought suit against a Delaware company when he tripped over a block of concrete at one of the company's locations in Idaho.<sup>197</sup> While the corporation's contacts with Oregon were continuous, they did not reach the "at home" threshold.<sup>198</sup> Therefore, the plaintiff alternatively argued that the corporation consented to Oregon's general jurisdiction when it registered to do business there.<sup>199</sup>

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<sup>189</sup> *Id.* at \*4.

<sup>190</sup> *Id.*

<sup>191</sup> 925 F.2d 637 (3d Cir. 1991).

<sup>192</sup> *Id.* at 641.

<sup>193</sup> *McCourt*, 2015 WL 4997403, at \*4.

<sup>194</sup> *Id.* Regardless of the general jurisdiction analysis, it does not seem that the McCourts had a particularly strong case.

<sup>195</sup> *Id.*; see also *Bane*, 925 F.2d at 641.

<sup>196</sup> No. 03:14-cv-01923-HZ, 2015 WL 5167268 (D. Or. Sept. 2, 2015).

<sup>197</sup> *Id.* at \*1.

<sup>198</sup> *Id.* at \*4. The corporation maintained 550 travel centers across North America, including ten in Oregon. *Id.* Additionally, the court noted that the defendant employed 521 employees in Oregon and owned real property within the state, but never derived more than 2% of its revenue from Oregon business. *Id.* at \*1.

<sup>199</sup> *Id.* Plaintiff argued business registration statutes provided "an independent method of establishing personal jurisdiction," while defendant argued that consent is no longer a valid analysis for general jurisdiction post-*Daimler*. *Id.* at \*4.

The court noted the difficulty of resolving the issue in the absence of any post-*Daimler* federal appellate cases on the subject and in view of the conflicting district court decisions.<sup>200</sup> Still, the court determined that consent would be a valid justification for general jurisdiction if a state statute explicitly authorized it.<sup>201</sup> Accordingly, a court must first look to the “plain language” of the statute as enacted by the legislature and, if that is insufficient, to the interpretation of the statute by state courts.<sup>202</sup> For that reason, the court in *Lanham* rejected the plaintiff’s argument.

More recently, the Second Circuit grappled with these same issues. In *Brown v. Lockheed Martin Corp.*,<sup>203</sup> the court faced the “nettlesome and increasingly contentious question” of consent to general jurisdiction through business registration statutes.<sup>204</sup> While the court did not say registration statutes could *never* be the basis for general jurisdiction, it seemed to take *Daimler* to the extreme, exemplifying the very arguments Justice Sotomayor worried about in her concurrence.<sup>205</sup> *Brown*, a resident of Connecticut, brought suit against Lockheed Martin on behalf of her father to recover tort injuries sustained from asbestos exposure while he was an Air Force airplane mechanic.<sup>206</sup> While the exposure occurred in Europe and across the United States, it did not occur in Connecticut.<sup>207</sup>

First, the court ruled that the Connecticut statute at issue was not explicit enough and did not “speak to the relationship between process so served and the state courts’ jurisdiction.”<sup>208</sup> And while Connecticut courts had previously held that the statute in question did confer general jurisdiction,<sup>209</sup> those rulings were pre-*Daimler*.<sup>210</sup> More importantly, the statute did

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<sup>200</sup> *See id.* at \*5.

<sup>201</sup> *See id.* at \*5–6 (discussing *King v. Am. Family Mut. Ins.*, 632 F.3d 570, 576 (9th Cir. 2011)).

<sup>202</sup> *Id.* at \*6.

<sup>203</sup> 814 F.3d 619 (2d Cir. 2016).

<sup>204</sup> *Id.* at 622.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 623.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 634.

<sup>209</sup> *See Talenti v. Morgan & Bro. Manhattan Storage Co.*, 968 A.2d 933, 940 (Conn. App. Ct. 2009).

<sup>210</sup> *See Brown*, 814 F.3d at 639.

not “contain express language alerting the potential registrant that by complying with the statute . . . it would be agreeing to submit to the general jurisdiction of the state courts.”<sup>211</sup>

Additionally, the court toed the *Daimler* line, misconstruing decades of general jurisdiction precedent.<sup>212</sup> Compared to its “substantial activity worldwide,” Lockheed’s Connecticut contacts were grossly disproportionate.<sup>213</sup> Its contacts, although systematic and continuous,<sup>214</sup> simply did not reach the level of being “essentially at home.”<sup>215</sup> And so, while Lockheed has had a physical presence in the state for three decades, Connecticut lacks general jurisdiction over its activities.<sup>216</sup> However, the Second Circuit still noted that “a carefully drawn state statute that expressly required consent to general jurisdiction as a condition on a foreign corporation’s doing business in the state, at least in cases brought by state residents, might well be constitutional.”<sup>217</sup> In other words, all is not lost.

Thus, in order for courts to validly exercise general jurisdiction over foreign corporations, clear and explicit statutes authorizing such jurisdiction must exist. Without the plain language of the statute, courts will be bound by the restrictive confines of *Daimler* and will not be able to exercise general jurisdiction over foreign corporations when citizens of the state seek recourse.

### III. EXPLICIT REGISTRATION STATUTES: A NEW FRONTIER OF AN OLD TRADITION

Properly drafted registration statutes, including an explicit statement that registering to do business constitutes consent to general jurisdiction, are a legitimate means to general jurisdiction that should be utilized. New York has led the way by introducing legislation in the State Assembly and State Senate providing a proper remedy to the general jurisdiction ailment.

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<sup>211</sup> *Id.* at 636.

<sup>212</sup> *See Daimler AG v. Bauman*, 134 S. Ct 746, 773 (2014) (Sotomayor, J., concurring).

<sup>213</sup> *Brown*, 814 F.3d at 623.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 628.

<sup>217</sup> *Id.* at 641.

A. *New York's Pending Legislation for Consent-Based Jurisdiction*

In the spring of 2014, concerned about the consequences of *Daimler* for decades of New York case law, Chief Administrative Judge Gail Prudenti requested that the state legislature amend licensure statutes for foreign corporations conducting business in New York.<sup>218</sup> By June, the legislation was drafted and approved by advisory committees.<sup>219</sup> The companion bills, Assembly Bill 9576 and Senate Bill 7078, would amend Business Corporation Law (“BCL”) § 1301, and similar statutes, by codifying case law, making it unequivocal that a foreign corporation’s application to do business in New York constitutes consent to jurisdiction in all actions against the corporation.<sup>220</sup> While the Assembly bill passed on June 2, 2014, the Senate bill only made it through the Judiciary Committee before the 2014 session ended.<sup>221</sup> However, the bill’s sponsor, Senator John Bonacic, reintroduced the bill at the beginning of the 2015 session.<sup>222</sup> It passed the Judiciary Committee with bipartisan support on June 25, 2015 and is currently awaiting a floor vote.<sup>223</sup>

The 2015 version is identical to the earlier version.<sup>224</sup> It amends New York’s Civil Practice Law and Rules, the Business Corporation Law, and all related laws to explicitly provide that registration to conduct business in New York is the equivalent to consenting to the state’s jurisdiction.<sup>225</sup> The legislation is not

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<sup>218</sup> Alison Frankel, *New York's (Stalled) Grab for Jurisdiction over Foreign Businesses*, REUTERS (June 30, 2014), <http://blogs.reuters.com/alison-frankel/2014/06/30/new-yorks-stalled-grab-for-jurisdiction-over-foreign-businesses>.

<sup>219</sup> *See id.*

<sup>220</sup> Brian J. Farrar, *Jurisdiction in New York Courts*, FED. B. COUNCIL Q., (Aug. 21, 2014), <http://federalbarcouncilquarterly.org/?p=311>.

<sup>221</sup> *See* Frankel, *supra* note 218.

<sup>222</sup> Lanier Saperstein, et al., *New York State Legislature Seeks to Overturn Daimler*, N.Y. L.J.: Outside Counsel (May 20, 2015), <http://www.newyorklawjournal.com/id=1202726893242/New-York-State-Legislature-Seeks-to-Overturn-Daimler>.

<sup>223</sup> The vote was 15 in favor, 6 in favor with reservation, and 2 excused. The legislators voting in favor of the legislation were both politically and geographically diverse. The ayes included Senator Bonacic, a Republican from Orange County; Majority Leader Flanagan, a Republican from Nassau County; Senator Avella, a Democrat from Queens; and Senator Savino, a member of the Independent-Democratic Conference from Staten Island/Brooklyn.

<sup>224</sup> *See* N.Y.S. 4846, 238th Sess. (2015), WL 2015 NY S.B. 4846 (NS).

<sup>225</sup> *See id.*

perfect, but it represents an important step to ensuring that state courts have the ability to properly oversee foreign corporations.

First, the bill provides the plain language courts need to rely on consent as the means for asserting general jurisdiction over a foreign corporation. Second, the statute comports with the long history of personal jurisdiction in New York and throughout the United States. Finally, it satisfies an important public interest by ensuring states have oversight over corporations that choose to conduct business within their borders.

### *B. Addressing the Criticism of Consent-Based Jurisdiction*

Critics of consent-based jurisdiction founded on registration statutes focus on three main areas: the fairness, burden, and predictability to the defendant; the risk of increasing forum shopping; and the risk of “universal jurisdiction.”

#### 1. Fairness, Burden, Predictability, and Coerced Consent

Critics charge that consent-based jurisdiction is not consent at all. Instead, the argument is that registration provides the guise of consent, but in reality acts as a gun to the head, forcing corporations to enter a contractual relationship.<sup>226</sup> This coercion, critics contend, leads to limited fairness, substantial burdens, and rampant unpredictability for defendant corporations.<sup>227</sup> However, these concerns can be alleviated by carefully drafting the registration statutes granting jurisdiction.

Fairness based on explicit authority is within the realm of due process. That explicit authority must be expressed in clear statutory language. Once specific language is inserted into the statutory scheme, notice is provided to corporations, thus fulfilling due process requirements. In fact, a large part of the debate has involved the specific language of the legislation. For example, opponents of the proposed New York legislation have been primarily concerned with specific language, not necessarily

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<sup>226</sup> See Monestier, *supra* note 15, at 1387.

<sup>227</sup> See Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1165 (2003); Monestier, *supra* note 15, at 1402 (arguing that registration statutes as a means to general jurisdiction fails “common sense” by granting “universal jurisdiction”).

the theory of general jurisdiction itself.<sup>228</sup> The New York City Bar Association Committee on Banking, while also raising constitutional concerns,<sup>229</sup> lobbied to amend the language of the bill to exclude banks.<sup>230</sup> Therefore, the debate is focused on which, if any, groups of corporations should be excluded from the revised jurisdictional reach.<sup>231</sup>

Further establishing fairness, the proposed statute comports with the long history of personal jurisdiction broadly, as well as general jurisdiction, because it respects a contractual relationship. Since *International Shoe*, the underpinning of personal jurisdiction has been the “traditional notions of fair play and substantial justice.”<sup>232</sup> Moreover, since *Bagdon* and *Tauza*, New York has emphasized the important contractual relationship between a foreign corporation and the forum state.<sup>233</sup> Both values are achieved by this legislation because corporations are put on notice while simultaneously being forced to acknowledge the agreement.

The importance of this contractual relationship has been a foundational democratic political value,<sup>234</sup> and the fairness factors emphasized in personal jurisdiction jurisprudence are achieved through honoring that tradition.<sup>235</sup> Further, states have

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<sup>228</sup> See Letter from John J. Clarke, Jr., Chairman, N.Y. City Bar Ass'n Comm. on Banking, to Hon. Bonacic & Hon. Weinstein, N.Y.C. B. Assoc. Committee on Banking L., (April 9, 2014).

<sup>229</sup> The Committee argued that the legislation violates the Due Process Clause and Commerce Clause, and cited three district court opinions since *Daimler*, but ignored other cases that have disagreed with its position. *Id.*

<sup>230</sup> See *id.* Of course, other incentives could be the basis for the committee's concerns considering its special interest representing the banking industry. However, banks make up an important class of corporation that demands state jurisdictional oversight. See, e.g., *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015).

<sup>231</sup> Likely, no groups of corporations should be excluded, but that is a debate for the floor of the New York State Senate.

<sup>232</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer* 311 U.S. 457, 463 (1940)).

<sup>233</sup> See discussion *supra* Section I.B.1; see also Brief for the United States as Amicus Curiae Supporting Petitioner, *DaimlerChrysler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), 2013 WL 3377321, at \*28 (arguing that within the “broad limits” of Due Process, “a State has latitude to provide for the exercise of personal jurisdiction over a foreign defendant on the basis of someone else's direct or physical contacts with the State”).

<sup>234</sup> See Michalski, *supra* note 26, at 164.

<sup>235</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 423 (1984) (Brennan, J., dissenting) (noting that as “active participants” in commerce, corporations have an obligation to be amenable to “suit in any forum that is

a responsibility to treat foreign corporations the same as domestic corporations, holding both to the same regulatory standards.<sup>236</sup> In fact, Justice Ginsburg suggested that an exceptional circumstance under *Daimler* could arise if the foreign corporation was “comparable to a domestic enterprise in that state.”<sup>237</sup> Equality is all that is sought.

Finally, jurisdiction as a means of ensuring corporate accountability becomes even more necessary as we become an increasingly globalized world, connected in all aspects of economic life.<sup>238</sup> Granting states more autonomy and authority in jurisdiction should be encouraged because it ensures increased corporate accountability.<sup>239</sup> In fact, the purpose of statutes such as New York’s Business Corporation Law is to regulate foreign corporations and put them on equal footing with their in-state counterparts.<sup>240</sup>

The proposed legislation also satisfies predictability concerns.<sup>241</sup> The *Daimler* majority worried that, in an increasingly international world, it would be unfair to force corporations to defend themselves in multiple forums because there would be no way to predict where they might be sued.<sup>242</sup> However, under a consent-based framework, a foreign

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significantly affected by the corporation’s commercial activities.”); *see also* Michalski, *supra* note 26, at 185 (arguing that submitting to jurisdiction is a “political obligation” of corporations).

<sup>236</sup> *See* *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring) (concluding that under the court’s framework, a U.S. business that enters a contract with an international corporation that subsequently breaches may not be able to seek relief in U.S. courts).

<sup>237</sup> *See id.* at 758 n.11 (majority opinion) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>238</sup> *See* *McGee v. Int’l Life Ins.*, 355 U.S. 220, 222 (1957) (a fundamental growth in the national economy has made the expansion of state jurisdiction permissible).

<sup>239</sup> *See* *Helicopteros*, 466 U.S. at 423 (Brennan, J., dissenting); *see also* *Barriere v. Juluca*, No. 12-23510-CIV, 2014 WL 652831, at \*8-9 (S.D. Fla. 2014) (arguing that restricting jurisdiction “would effectively deprive American citizens from litigating in the United States”).

<sup>240</sup> *Reese v. Harper Surface Finishing Sys.*, 129 A.D.2d 159, 162, 517 N.Y.S.2d 522, 524 (2d Dep’t 1987) (noting that B.C.L. § 1312 was enacted to ensure that foreign corporations were not given an unfair advantage over in-state corporations).

<sup>241</sup> *See* *Daimler*, 134 S. Ct. at 762-63.

<sup>242</sup> *Id.* at 761-62.

corporation could readily predict where it might be sued: in any forum where it had registered to do business under a clear and explicit registration statute.<sup>243</sup>

Additionally, foreign corporations would not be overly burdened by having to defend themselves in multiple jurisdictions. As the Ninth Circuit explained, international corporations would not be disadvantaged due to the breadth of their business.<sup>244</sup> Moreover, while litigation in a foreign forum may be an inconvenience for international corporations, that is part of the bargain.<sup>245</sup> Therefore, a registration statute with explicit language of consent satisfies traditional notions of fairness, and also recognizes the value of strong contractual relationships that have been essential to our history of personal jurisdiction.

## 2. Risk of Forum Shopping

Critics of registration statutes as consent to general jurisdiction have argued that such actions represent the “last bastion[] of forum shopping.”<sup>246</sup> Forum shopping is the process by which a plaintiff may search for a favorable, if arbitrary, forum in which to bring claims. Critics argue that if all states exercised consent-based jurisdiction, there would be a free-for-all of plaintiffs busily shopping around for the best forum.<sup>247</sup> This argument is not persuasive for two reasons. First, “forum

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<sup>243</sup> See *id.* at 770 (Sotomayor, J., concurring) (arguing “there is nothing unpredictable about a rule” that subjects corporations to general jurisdiction in each state where they have substantial contacts); see also Von Mehren & Trautman, *supra* note 17, at 1138 (noting jurisdiction based on consent is easily administered and “relatively precise”).

<sup>244</sup> See *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 925 (9th Cir. 2011), *rev'd sub nom.*, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); see also *McGee v. Int'l Life Ins.*, 355 U.S. 220, 224 (1957) (determining that litigating in a foreign forum may be inconvenient, but it is not a denial of due process).

<sup>245</sup> See *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 538, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 45 (1967) (arguing that while litigation in a foreign forum may be burdensome, “it is part of the price which may properly be demanded of those who extensively engage in international trade . . . [Corporations] receive considerable benefits from such foreign business and may not be heard to complain about the burdens”).

<sup>246</sup> See *Monestier*, *supra* note 15, at 1413; see also *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (calling forum shopping the “most disfavored practice”).

<sup>247</sup> Selecting the best forum could be based on liberal statutes of limitation, beneficial tort or contract laws, or favorable juries or demographics.



shopping” has never been the epidemic critics feared, even in the years before *Daimler*. Second, restricting general jurisdiction is not the best way to combat frivolous suits being brought in favorable forums.

First, forum shopping is not the evil critics have warned against.<sup>248</sup> Chief Justice Rehnquist endorsed forum shopping as a “litigation strategy of countless plaintiffs,”<sup>249</sup> while Judge Widener of the Fourth Circuit noted, “[t]here is nothing inherently evil about forum-shopping.”<sup>250</sup> Instead, forum shopping, despite the negative label, should be considered dedicated advocacy,<sup>251</sup> fundamentally embedded in the American legal tradition.<sup>252</sup> The concern should not be forum shopping for its own sake, as some commentators would have it, but unfair “advantage-seeking activit[ies].”<sup>253</sup> In the realm of consent-based jurisdiction, benign forum shopping may result, but malignant forum shopping would not.

Moreover, even if forum shopping generally were a cause for concern, the more important concern is whether plaintiffs are able to bring suit in their home states at all. These plaintiffs have no need to forum shop; litigation in their home forum is convenient enough. Therefore, the need to address forum shopping is not as related to fairness to the defendant as some critics insist.

Finally, the best solution to address malignant forum shopping is not to constrict jurisdiction, but to encourage judicial gate keeping. The doctrine of *forum non conveniens*, whereby a court may determine that it is not the best forum for the pending

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<sup>248</sup> See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1695 (1990) (concluding that forum shopping is not simply “an evil to be avoided” and safeguards exist to prevent abuses).

<sup>249</sup> See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

<sup>250</sup> See *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987).

<sup>251</sup> See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 573 (1989); see also *Tex. Instruments, Inc. v. Micron Semiconductors, Inc.*, 815 F. Supp. 994, 996 (E.D. Tex. 1993) (“In reality, every litigant who files a lawsuit engages in forum shopping when he chooses a place to file suit.”).

<sup>252</sup> See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1509 (1995) (“The American way is to provide plaintiffs with a wide choice of venues.”); Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 82 (2014).

<sup>253</sup> See Richard Maloy, *Forum Shopping? What’s Wrong with That?*, 24 QUINNIPAC L. REV. 25, 33 (2005); see also *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990).

litigation, is the more appropriate tool.<sup>254</sup> Restricting general jurisdiction risks preventing plaintiffs from having their day in court, and registration statutes work to provide convenience for a plaintiff to bring suit in their home forum. At the same time, by utilizing *forum non conveniens*,<sup>255</sup> courts can still ensure fairness to defendant corporations.<sup>256</sup>

In conclusion, the forum shopping criticism of consent-based jurisdiction is merely a fiction premised on the ill-founded and outmoded apprehension of forum shopping in general.

### 3. Universal Jurisdiction

To hold a state amenable to suit in multiple forums is not “universal jurisdiction,” it is simply the same jurisdiction we have always had.<sup>257</sup> In fact, it is *Daimler* that departed from settled historical precedent. For generations, jurisdiction has been premised on the relationship between the corporation and the forum state, *not* on the relationship between the corporation and other states or countries.<sup>258</sup> Now, the Court has abandoned decades of precedent in order to restrict jurisdiction, just as Justice Black warned in his *International Shoe* concurring opinion.<sup>259</sup> Indeed, even Justice Ginsburg warned about the dangers of limiting jurisdiction too strictly, only three years before *Daimler*.<sup>260</sup> To ignore precedent and historical practice is

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<sup>254</sup> See Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 142 (1998).

<sup>255</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.23 (1981).

<sup>256</sup> See *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001).

<sup>257</sup> Universal jurisdiction refers to foreign corporations being hauled in to any court among the fifty states. See *supra* Section III.B.1 for a discussion on Fairness, Burden, Predictability, and Coerced Consent.

<sup>258</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 768 (2014) (Sotomayor, J., concurring) (noting precedent has developed from “the concept of reciprocal fairness”); see also Justice Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J. FORUM 375, 386 (2014) (“The Court announced a rule limiting the test for general jurisdiction on a set of facts that were the worst for the exercise of jurisdiction.”).

<sup>259</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945) (Black, J., concurring) (quoting *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting)).

<sup>260</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 893–94 (2011) (Ginsburg, J., dissenting).

not only inconsistent with constitutional theory, it “creates divergent bodies of case law,” resulting in further confusion for future plaintiffs, defendants, and courts.<sup>261</sup>

Additionally, allowing states to exercise general jurisdiction through registration statutes would leave the discretion to do so in the hands of the individual states. Some states may choose not to enact such statutes. For example, Delaware’s pro-corporate climate may make it undesirable for the state’s legislature to pass such a statute. Moreover, Delaware would be an exceptional case because so many corporations are also incorporated there, making those corporations amenable to suit under *Daimler*’s framework alone. However, states in which many corporations have a large presence, but in which few are actually incorporated, face an unfair disadvantage in meaningful oversight. Therefore, the risk of “universal jurisdiction” is not much of a risk at all.

### C. *Improving the New York Legislation*

The proposed New York registration statute is not perfect. While it provides plain language that courts have always relied on to exercise general jurisdiction, it could still be more explicit. Moreover, a presence analysis should be added to ensure fairness to defendant corporations.

As Chief Judge Cardozo expressed at the dawn of New York’s tradition of consent-based jurisdiction, establishing general jurisdiction based on a registration statute is about construing a contract.<sup>262</sup> The bargained-for exchange between the state and the corporation should be clearly defined. While the language of the proposed New York statute is strong, it should be more explicit. For example, the statute never mentions “general jurisdiction,” but instead declares that registration “constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation.”<sup>263</sup> In order to remove any question as to the extent courts may rely on the statute, language should be added clarifying that the cause of action against the corporation

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<sup>261</sup> See Cornett & Hoffheimer, *supra* note 89, at 161; see also *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (“[T]he Court adopts a new rule of constitutional law that is unmoored from decades of precedent.”).

<sup>262</sup> See *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 438, 111 N.E. 1075, 1077 (1916).

<sup>263</sup> See N.Y.S. 4846, 238th Sess. (2015), WL 2015 NY S.B. 4846 (NS).

need not arise within the state.<sup>264</sup> This provision would make clear to the corporation that registration to do business in New York is consent to the *general* jurisdiction of her courts.

Additionally, consent to jurisdiction through a registration statute does not automatically remove the need for judicial inquiry into the corporation's contacts with the state.<sup>265</sup> Minimum contacts with the state are still an important element despite the registration to do business.<sup>266</sup> For instance, if a corporation registers to do business in New York, but never actually conducts any business there, it would not be fair to subject the corporation to general jurisdiction. To paraphrase the Ninth Circuit, dipping a toe in New York waters is not enough.<sup>267</sup> The corporation must have sufficient affiliation with the state such that there is "political consent" for the exercise of jurisdiction.<sup>268</sup> Actually conducting business within the state is enough to make a corporation an insider, separate and distinct from incorporation or domicile.<sup>269</sup> An evaluation of reasonable jurisdiction is thus based on the relationship formed between state and corporation.<sup>270</sup> Therefore, the same evaluation used by Chief Judge Cardozo is embraced: Is the corporation here?<sup>271</sup> If it has consented to jurisdiction in exchange for doing business, and is actually doing business, general jurisdiction may be exercised.

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<sup>264</sup> For example, the amended proposal would read: "A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the general jurisdiction of the courts of this state for all actions against such corporation, occurring within or outside of the state."

<sup>265</sup> See *King v. Am. Family Mut. Ins.*, 632 F.3d 570, 572 (9th Cir. 2011) ("Mere appointment of an agent for service of process cannot serve as a talismanic coupon to bypass [minimum contacts].").

<sup>266</sup> See *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990).

<sup>267</sup> *King*, 632 F.3d at 572. The "toe" in *King* was the appointment of an agent for the service of process, as required by Montana statute. *Id.* In this case, the same rationale would apply for the registration to do business.

<sup>268</sup> See Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 853 (1989); Sarah R. Cebik, "A Riddle Wrapped in a Mystery Inside an Enigma": *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 28 (1998).

<sup>269</sup> See Lea Brilmayer, *How Contacts Count: Due Process Limitation on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 87.

<sup>270</sup> See Cebik, *supra* note 268, at 24.

<sup>271</sup> See *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 268–69, 115 N.E. 915, 918 (1917).

## CONCLUSION

Today, we protect multibillion dollar foreign corporations from any inconvenience, preferring to make plaintiffs forego a bite of the apple. That cannot be the intention of *Daimler*. For decades, the Constitution was generally interpreted to respect a state's autonomy to determine the extent of its jurisdiction over those corporations that choose to enter its borders, conduct business, and take advantage of its laws. Suddenly, the *Daimler* decision has called into doubt decades of precedent. Consent-based jurisdiction derived from a registration to do business statute remedies the unintended consequences of *Daimler*.

For many recent commentators, it is easier to simply dismiss consent-based jurisdiction as outside the bounds of modern doctrine. But what about the Utah family that is denied relief from a corporation hiding behind its foreign veil? What about a consumer defrauded by an international manufacturer that may be "too big" to be hauled into court? These concerns cannot be simply flicked away. A properly drafted consent-based registration statute addresses the legitimate concerns of Justice Sotomayor's concurrence without going beyond the scope of the *Daimler* ruling.