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Comment

APPARENTLY, THERE ARE PLACES LIKE HOME: A PATH TO PROPRIETY FOR CONSENT-BY-REGISTRATION JURISDICTION IN THE THIRD CIRCUIT

BRETT E. BROCKOWSKI*

“The history of American freedom is, in no small measure,
the history of procedure.”¹

I. THE WICKED WITCH OF THE WEST: THE TORNADIC BEGINNINGS OF CONSENT-BY-REGISTRATION

Forget continuous or systematic contacts; your six-employee Pennsylvania outpost that grosses a sneeze-worthy \$20,000 a year just signed your corporation up for general jurisdiction in the state.² Sure, *Daimler AG v. Bauman*³ stands for the proposition that a corporation can be sued in the state of incorporation and the state that hosts its principal place of business.⁴ But what about where your corporation is merely registered to

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1. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

2. *See, e.g.*, Defendant’s Motion to Dismiss at 6, *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, No. 5:18-cv-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018) (stating its global workforce is 56,000, “only [six] of whom are located in Pennsylvania”). Electrolux only maintained six employees in the state, but was found amenable to personal jurisdiction in the state pursuant to Pennsylvania’s consent-by-registration law. *See Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, No. 5:18-cv-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018) (finding the exercise of personal jurisdiction over defendant proper on the basis of consent-by-registration).

3. 571 U.S. 117 (2014).

4. *See id.* at 137 (holding exercise of general jurisdiction under contacts theory requires continuous and systematic contacts). While the Court enumerated the state of incorporation and principal place of business as the hallmark locales of corporate general jurisdiction, it made clear that general jurisdiction may be proper in others. *See id.* (noting the Court has not previously held that a corporation can be subject to general jurisdiction in only its state of incorporation and principle place of business).

do business?⁵ This is not a law class hypothetical; it is a reality.⁶ The three continental states within the Third Circuit all confer general jurisdiction over those corporations that register to do business within the respective state.⁷ Pennsylvania boasts a statutory provision that explicitly purports to confer general jurisdiction over business registrants.⁸ New Jersey and Delaware, despite lacking any explicit statutory provision, interpret their respective business registration statutes to serve as an entity's consent to general jurisdiction in each state.⁹ Although consent is a long-recognized manner of obtaining personal jurisdiction, the Third Circuit district courts have concerns when it comes to equating business representation with such consent.¹⁰ The United States Supreme Court's

5. *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2018) (stating a corporation's registration to do business in Pennsylvania constitutes consent to general jurisdiction in state).

6. *See id.* ("The existence of any of the following relationships between a person and this Commonwealth shall . . . enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person . . ."). The provision in subsection (a)(2)(i) provides that "qualification as a foreign corporation under the laws of this Commonwealth" is one of the relationships that allows the Commonwealth to exercise general jurisdiction over the corporation. *See id.* § 5301(a)(2)(i) (stating registration is one of the relationships that constitutes consent to general jurisdiction).

7. *Compare* § 5301(a) (stating registration is a basis for general jurisdiction over corporations), *with* *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 470 (D.N.J. 2015) (interpreting New Jersey's business registration statutes to confer general jurisdiction over registrants), *and* *Sternberg v. O'Neil*, 550 A.2d 1105, 1116 (Del. 1988) (interpreting Delaware's business registration statutes to confer general jurisdiction over registrants). For a discussion of the interpretation of New Jersey and Delaware statutes to confer jurisdiction, see *infra* notes 44–52 and accompanying text.

8. *See* § 5301(a) (stating "qualification as a foreign corporation under the laws of this Commonwealth" constitutes consent to general jurisdiction).

9. *See Otsuka*, 106 F. Supp. 3d at 470 (interpreting registration under New Jersey business registration statute to constitute consent to jurisdiction); *Sternberg*, 550 A.2d at 1116 (interpreting registration under Delaware business registration statute to constitute consent to jurisdiction). For a discussion of the New Jersey and Delaware cases and their impact on their respective states' registration statutes, see *infra* notes 53–65 and accompanying text.

10. *See, e.g.*, *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (finding registration does not amount to consent based on due process grounds discussed in *Daimler*). The court in *AstraZeneca* expressed concern that consent-by-registration jurisdiction would offend "traditional notions of fair play and substantial justice." *See id.* (citation omitted) (holding registration to do business does not constitute consent to jurisdiction). The court frames these issues in the context of due process concerns. *See id.* (discussing the due process concerns regarding exercise of general jurisdiction). However, at least one commentator takes the position that due process concerns need not be addressed where consent to jurisdiction is properly found. *See* Tayna J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1377–79 (2015) (asserting need for due process discussion is obviated by presence of valid consent). For further discussion of *AstraZeneca*, see *infra* notes 72–75 and accompanying text.

decision in *Daimler* brought on, or at least exacerbated, many of these concerns.¹¹

Four years after *Daimler*, the emerging body of law highlights both sides of the debate.¹² Since *Daimler*, a number of district courts in the Third Circuit hold that consent-by-registration remains a valid manner of obtaining personal jurisdiction.¹³ Still, other district courts within the Third Circuit hold that consent-by-registration is valid only where the statutory registration provision explicitly notifies registrants of the consequences of their registration.¹⁴ Finally, a number of other district courts within the Third Circuit hold that consent-by-registration contravenes due process and is therefore invalid under any circumstances.¹⁵

11. See *Daimler AG v. Bauman*, 571 U.S. 117, 136–39 (2014) (addressing only contacts-based jurisdiction and omitting discussion of applying concepts to consent-based jurisdiction). For a discussion of *Daimler* and its impact on general jurisdiction, see *infra* notes 53–65 and accompanying text.

12. See, e.g., *AstraZeneca*, 72 F. Supp. 3d at 556–57 (finding that registration to do business in Delaware does not amount to consent to general jurisdiction). *But see, e.g., Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 587 (D. Del. 2015) (finding that registering to do business in Delaware is sufficient consent to constitute general jurisdiction).

13. See, e.g., *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (citation omitted) (determining *Daimler* did not eliminate consent-by-registration, and upholding practice as valid conferral of general jurisdiction in Pennsylvania); *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (citation omitted) (determining that the due process concerns raised in *AstraZeneca* do not foreclose on the use of consent-by-registration to obtain general jurisdiction); *Otsuka*, 106 F. Supp. 3d at 468 (citation omitted) (“Nor can the [c]ourt find any support for Mylan’s position that *Daimler*, in essence, precludes general jurisdiction by consent . . .”).

14. See, e.g., *Horowitz v. AT&T Inc.*, No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525, at *12 (D.N.J. Apr. 25, 2018) (citing *Bane v. Netlink, Inc.*, 925 F.3d 637 (3d Cir. 1991) (declining to follow *Bane* where New Jersey’s statutory provision lacked the explicit jurisdiction-conferring language that *Bane* relied on); *Bors*, 208 F. Supp. 3d at 654–55 (highlighting importance of Pennsylvania’s explicit statutory provisions and noting fatality of New Jersey statutes that lack similar explicit language conferring jurisdiction); *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (stating that a business that *knowingly* registers to do business in the state has “no uncertainty as to the jurisdictional consequences of its actions”). *Acorda Therapeutics* conflates actual knowledge, in the form of an explicit statutory provision, with actual knowledge in the form of a non-explicit statute that has nonetheless been unambiguously “interpreted as constituting consent to general jurisdiction in that state’s courts . . .” See *Acorda*, 78 F. Supp. 3d at 591. For a further discussion of *Acorda Therapeutics*, see *infra* notes 85–89 and accompanying text.

15. See *AstraZeneca*, 72 F. Supp. 3d at 556 (determining that consent-by-registration contravenes due process). Although *AstraZeneca* tailored its holding to Delaware’s consent-by-registration scheme, its reliance on due process concerns would mean that the practice of consent-by-registration, no matter where its practiced, is invalid. See *id.* (determining that consent-by-registration violates due process and is therefore invalid as a practice).

The Third Circuit has not addressed this issue since 1991 in *Bane v. Netlink, Inc.*,¹⁶ making the issue ripe for judicial comment.¹⁷ Given the validity of consent where it is made voluntarily and knowingly, the Third Circuit should only allow consent-by-registration to confer valid personal jurisdiction when the a scheme provides actual notice of the consequences of registration to registrants.¹⁸

Part II of this Comment provides a background of consent statutes and their evolving role within the realm of jurisdiction.¹⁹ It also lays the groundwork for those cases that have addressed consent-by-registration since *Daimler*.²⁰ Part III of this Comment analyzes the arguments made in favor and against the practice of consent-by-registration.²¹ Part IV critically addresses the various arguments against the continued practice of consent-by-registration and offers a new way of viewing the problems created by consent-by-registration schemes.²² Finally, Part V discusses the impact of the problems addressed in Part IV and provides a legislative solution for the affected consent-by-registration schemes.²³

II. FOLLOW THE YELLOW-BRICK ROAD: THE THEN-AND-NOW OF CONSENT-BY-REGISTRATION JURISDICTION

Among other things, a court must have personal jurisdiction over the parties before it may hear a case.²⁴ While the plaintiff's presence in the court constitutes his or her consent to jurisdiction, the battle is often waged over whether jurisdiction exists over the defendant.²⁵ According to the Supreme Court, a state has general jurisdiction over a corporate defendant where its contacts are "so constant and pervasive 'as to render [it]

16. 925 F.2d 637 (3d Cir. 1991).

17. *See id.* at 640–41 (upholding jurisdiction over defendant on the basis of defendant's registration to do business under Pennsylvania's consent-by-registration statute). For a further discussion of *Bane*, see *infra* notes 34–36 and accompanying text.

18. For a discussion of the arguments regarding the notice requirement, see *infra* notes 172–85 and accompanying text.

19. For a discussion of the background of consent-by-registration, see *infra* notes 24–52 and accompanying text.

20. For a discussion of those cases that have addressed consent-by-registration following *Daimler*, see *infra* notes 66–104 and accompanying text.

21. For a discussion of the arguments made for and against consent-by-registration, see *infra* notes 105–47 and accompanying text.

22. For a critical analysis of the arguments made for and against consent-by-registration, see *infra* notes 148–85 and accompanying text.

23. For a discussion of the impact and potential solutions to the issues presented by consent-by-registration, see *infra* notes 186–204 and accompanying text.

24. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982) (citation omitted) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties.").

25. *See id.* ("[A]n individual may submit to the jurisdiction of the court by appearance.").

essentially at home in the forum State.’”²⁶ The Supreme Court created this formulation so as not to offend the “traditional notions of fair play and substantial justice.”²⁷ When a state properly exercises general jurisdiction over a corporate defendant, that defendant may be sued for any dispute whatsoever in that forum, regardless of whether the dispute arose out of events that transpired in that forum.²⁸ In other words, general jurisdiction constitutes “all-purpose” jurisdiction.²⁹

Consensual appointment of an agent for service originated as a means of obtaining personal jurisdiction around 1917.³⁰ In 1991, the practice of registration to do business as a form of consent would receive its first endorsement in the Court of Appeals for the Third Circuit.³¹ Notwithstanding, the Supreme Court’s Decision in *Daimler*, a far more recent commentary on general jurisdiction, potentially changed the propriety of consent-by-registration jurisdiction.³² As such, it is necessary to appraise the position of the various district courts in the Third Circuit following the *Daimler* decision.³³

A. *The Genesis of Consent-based Jurisdiction and Consent-by-registration*

Over a century ago, the United States Supreme Court addressed the constitutionality of statutes that require appointment an agent for service

26. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

27. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945) (internal citations omitted) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (stating due process requires exercise of jurisdiction that does not offend fair play and substantial justice)).

28. *See Daimler*, 571 U.S. at 122 (quoting *Goodyear*, 564 U.S. at 919) (stating that general jurisdiction provides the courts of the forum state the ability to properly hear “any and all claims against [the corporate defendant]”).

29. *See Goodyear*, 564 U.S. at 919 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)) (noting general jurisdiction does not require a connection between the forum and the underlying claim).

30. *See Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94–95 (1917) (holding appointment of an agent for service of process constituted consent to suit). For a discussion of the origins of consent-based jurisdiction, see *infra* notes 34–39 and accompanying text.

31. *See Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (determining general jurisdiction exercised pursuant to Pennsylvania’s consent-by-registration statute was valid). For a discussion of the origins consent-by-registration jurisdiction in the Third Circuit, see *infra* notes 40–52 and accompanying text.

32. *See Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014) (holding general jurisdiction may only be exercised where defendant’s contacts are so continuous and systematic as to render them at home in state). For a discussion on the Supreme Court’s decision in *Daimler*, see *infra* notes 53–65 and accompanying text.

33. *See, e.g., AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (finding *Daimler* does weigh on the issue of consent-based jurisdiction). For a discussion on how district courts within the Third Circuit have addressed consent-by-registration following *Daimler*, see *infra* notes 66–96 and accompanying text.

of process as a means obtaining personal jurisdiction.³⁴ In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,³⁵ the Supreme Court allowed Missouri to exercise general jurisdiction over a defendant that appointed, via statute, an agent within the state for service of process.³⁶ After *Pennsylvania Fire*, the use of this sort of statutory consent as a means of obtaining jurisdiction found continued support in the Court's general jurisdiction jurisprudence.³⁷ In 1978, Pennsylvania became the first state to enact legislation that explicitly conferred general jurisdiction over business registrants.³⁸ Pennsylvania's consent-by-registration statute unambiguously states that "qualification as a foreign corpora-

34. See *Pennsylvania Fire*, 243 U.S. at 94–95 (addressing question of using appointment of agent for service as basis for jurisdiction). In *Pennsylvania Fire*, the defendant challenged the validity of service of process pursuant to a Missouri statute that required the appointment of an in-state agent for service. See *id.* (recounting the facts leading to the jurisdictional question). The Court placed the onus on the defendants to determine the lengths to which the statutory language may be interpreted. See *id.* at 95 ("It did appoint an agent in language that rationally might be held to go to that length.").

35. 243 U.S. 93 (1917).

36. See *id.* at 94 (holding the exercise of general jurisdiction was proper). Specifically, the statute required that an insurance company who was licensed to do business in Missouri file "with the superintendent of the insurance department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state." See *id.* (discussing the language of the statute and the jurisdictional implications).

37. See, e.g., *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174–75 (1939) (holding defendant's designation of an agent for service was sufficient consent to suit in New York courts); *Hess v. Pawloski*, 274 U.S. 352, 355 (1927) (holding state may declare use of its highways constitutes an appointment of agent for service and exercise general jurisdiction on that basis). The Court in *Neirbo* found that a statute calling for the designation of an agent is "constitutional, and the designation of the agent 'a voluntary act.'" See *Neirbo*, 308 U.S. at 175 (quoting *Pennsylvania Fire*, 243 U.S. at 96) (holding the designation statute constitutional). The Court then determined that the appointment of the agent, as per the statute, represented valid consent to be sued in the forum state. See *id.* (finding "an actual consent by Bethlehem to be sued in the courts of New York"). In *Hess*, the Court considered the due process implications of requiring an individual defendant driving in the state, by statute, to appoint an agent in the state for service of process related to his driving activities. See *Hess*, 274 U.S. at 355 (analyzing statute that equated act of driving on highways to the appointment of an agent for service). The Court determined that the state could require such an appointment by statute without running afoul of due process considerations. See *id.* at 356 (citing *Kane v. New Jersey*, 242 U.S. 160, 167 (1916)) (holding the appointment of agent by virtue of travel on highways valid).

38. See *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 296 (M.D. Pa. 2018) (considering the history of consent-by-registration in Pennsylvania). As *Gorton* notes, Pennsylvania remains the only state to date that "spells out the jurisdictional consequences associated with registering to do business." See *id.* (quoting *Monestier*, *supra* note 10, at 1368 (describing the status of consent-by-registration in Pennsylvania)).

tion under the laws of this Commonwealth” constitutes a sufficient basis for the exercise of general jurisdiction over said corporation.³⁹

The Third Circuit addressed the validity of jurisdiction exercised pursuant to Pennsylvania’s consent-by-registration statute in 1991 in *Bane v. Netlink, Inc.*⁴⁰ First, the court began by equating a business’s “qualification as a foreign corporation” to a defendant’s seeking “a certificate of authority to do business in the Commonwealth”⁴¹ The court determined that businesses, by means of their registration, “purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁴² Thus, the Court stated that by voluntarily registering to do business in the forum, the business knowingly consented to general jurisdiction in the forum.⁴³

39. 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a)(2)(i) (West 2018) (stating the relationships that qualify as consent to jurisdiction in Pennsylvania).

40. *See Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (determining general jurisdiction exercised pursuant to Pennsylvania’s consent-by-registration statute was valid). *Bane* held that the district court below “failed to consider the effect of Netlink’s application for and receipt of authorization to do business in Pennsylvania” *Id.*

41. *See id.* (analyzing the requirements of Pennsylvania’s consent-by-registration statute). Although the court does not explicitly state a definition for the statutory phrase “qualification as a foreign corporation,” it uses the phrase interchangeably with the phrases “authorization to do business” and “registering” to do business. *See id.* (using the phrases interchangeably in reference to the requirements of the statute). Specifically, the court stated:

In so holding, the court failed to consider the effect of Netlink’s application for and receipt of *authorization to do business* in Pennsylvania Pennsylvania law explicitly states that the *qualification of a foreign corporation* to do business is sufficient contact to serve as the basis for the assertion of personal jurisdiction.

Id. (emphasis added).

42. *See id.* (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation marks omitted)) (determining that the registration to do business constituted consent to jurisdiction under the Pennsylvania statute). It is noteworthy that *Burger King* used the phrase, “purposeful availment” when discussing *specific* jurisdiction over the corporate defendant. *See Burger King*, 471 U.S. at 475 (describing the conditions under which specific jurisdiction may be exercised over a defendant). However, in *Bane*, the court used the language to justify the exercise of *general* jurisdiction over the defendant via Pennsylvania’s consent-by-registration statute. *See Bane*, 925 F.2d at 640 (adapting the language of *Burger King* to an application of general jurisdiction). However, this import from *Burger King* did not come without limiting language. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (discussing requirement that underlying claim have a relation to forum state). As the Supreme Court stated in *International Shoe*:

[T]he exercise of [the privilege of doing business in the forum] may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. (emphasis added).

43. *See Bane*, 925 F.2d at 641 (finding the exercise of personal jurisdiction over defendant valid). The court stated that Netlink “should have been ‘reasona-

Unlike Pennsylvania, New Jersey and Delaware do not have explicit statutory provisions that purport to confer jurisdiction on registrants.⁴⁴ In *Sternberg v. O'Neil*,⁴⁵ the Delaware Supreme Court first interpreted the Delaware business registration statute.⁴⁶ It stated that the statute conferred jurisdiction on an express consent theory via the business registration process, despite the fact that Delaware's statute does not mention jurisdiction at all.⁴⁷ In doing so, the court relied in large part on *Pennsylvania Fire*, determining that appointment of an agent for service of process represents express consent to jurisdiction.⁴⁸

The path to consent-by-registration in New Jersey largely tracked that of Delaware.⁴⁹ In a 2015 opinion, the District of New Jersey determined that New Jersey's business registration statutes conferred general jurisdic-

able to anticipate being haled into court' in Pennsylvania." *Id.* (quoting *Provident Nat'l Bank v. California Federal Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987)).

44. Compare 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a) (West 2018) (stating explicitly registration to do business constitutes consent to general jurisdiction), with DEL. CODE ANN. tit. 8, § 376(a) (West 2018) (omitting any mention that registration amounts to consent to general jurisdiction), and N.J. STAT. ANN. § 14A:4-1 (West 2018) (omitting any mention of jurisdictional language).

45. 550 A.2d 1105 (Del. 1988), *abrogated by* *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016).

46. *See id.* at 1109 (addressing question of whether Delaware may exercise jurisdiction over foreign corporation based on qualification to do business in the state).

47. *See id.* at 1116 (determining that registration to do business in Delaware constituted express consent). Although the statute lacks any specific language similar to that of Pennsylvania's jurisdiction-conferring registration statute, the Supreme Court of Delaware concluded that compliance with Delaware's registration statute constituted "[e]xpress consent to jurisdiction." *See id.* (terming the consent "express" despite lacking jurisdictional language in statute).

48. *See id.* (citations omitted) ("Express consent to jurisdiction by a foreign corporation takes the form of an appointment of a statutory agent to receive service of process . . ."). It is important that the court defined the state's consent-by-registration practice as express consent, because "[w]hen jurisdiction is based on implied consent, '[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.'" *Id.* at 1112 (citations omitted) (emphasis added).

49. Compare *id.* at 1116 (determining registration to do business in Delaware constitutes express consent to jurisdiction), with *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 469–70 (D.N.J. 2015) (interpreting a registration statute without any jurisdictional language to confer general jurisdiction over registrants). Like Delaware, New Jersey's registration statutes do not explicitly confer such jurisdiction. *See* DEL. CODE ANN. tit. 8, § 376(a) (2018) (omitting any mention of consent or jurisdiction related to registration); N.J. STAT. ANN. § 14A:4-1 (West 2018) (omitting any similar mention). Thus, the statutes required the interpretation of the court to gain the ability to confer general jurisdiction over registrants. *See Otsuka*, 106 F. Supp. 3d at 469 (citations omitted) (holding that designation of an agent can constitute consent "if supported by the breadth of the statute's text or interpretation").

tion over registrants.⁵⁰ The court relied in part on the Third Circuit’s decision in *Bane*, citing it for the proposition that the registrant had “purposefully avail[ed] itself” of the benefits of the laws of New Jersey and noting that the interpretation of a registration statute can support a finding of personal jurisdiction.⁵¹ As such, the court interpreted the text of New Jersey’s registration statute as constituting consent to jurisdiction;

50. *See id.* at 469–70 (holding New Jersey business registration statute confers general jurisdiction over registrants). Relying on district court cases from Delaware, the court asserted that *Daimler* had not “preclude[d] general jurisdiction by consent . . .” *See id.* at 468 (first citing *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 588–89 (D. Del. 2015); and then citing *Forest Labs., Inc. v. Amneal Pharms. LLC*, No. 14-508-LPS, 2015 WL 880599, at *13 (D. Del. Feb. 26, 2015)) (determining that consent-based jurisdiction is not precluded by *Daimler*).

51. *See id.* at 468–69 (discussing *Bane* and its impact on registration statutes as a basis for consent jurisdiction). At least one commentator argues that courts tend to only address part of the concerns when determining the continued validity of consent-by-registration. *See Monestier, supra* note 10, at 1738 (discussing the conclusions necessary to reach a finding that consent-by-registration is valid). While courts are quick to state that consent remains a valid form of obtaining jurisdiction, the courts rarely address whether registration itself is properly considered valid consent. *See id.* (stating courts often presume registration is a form of valid consent). *But see Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, 2018 WL 3025283, at *6–7 (Pa. Ct. Com. Pl. May 30, 2018) (addressing the notion that consent is not valid on the grounds of involuntariness). *Mallory* declined to exercise general personal jurisdiction over the defendant corporation, resting its argument in large part on the theory that the “[d]efendant’s consent to jurisdiction was not voluntary.” *See id.* at *6 (analyzing the propriety of registration as a valid form of consent). The court determined that the binary choice presented to corporations—either register and consent or refrain from doing business in Pennsylvania—did not amount to a voluntary choice. *See id.* at *7 (determining that no practical choice exists). In addressing Supreme Court precedent including *Pennsylvania Fire*, the court refers to them as “relics of the *Pennoyer* era.” *See id.* at *12 (citing *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877)) (stating older Supreme Court precedent must be interpreted in light of its more recent general jurisdiction pronouncements). However, this view must be contrasted with that of a few courts that have determined that, in at least one state, “‘doing business’ is a question of fact to be resolved on a case-by-case basis.” *See Univ. of Dominica v. Pa. Coll. of Podiatric Med.*, 446 A.2d 1339, 1341 (Pa. Super. Ct. 1982) (citation omitted) (noting there are actions a business can take in a state without necessarily doing business); *see also Wenzel v. Morris Distrib. Co.*, 266 A.2d 662, 666–67 (Pa. 1970) (noting similar actions, including use of an independent contractor). In *Wenzel*, the court stated that a corporation could utilize independent contractors within the forum state without necessarily having to register to do business. *See Wenzel*, 266 A.2d at 666–67 (describing one action a business may take without being considered as doing business in the forum). The court contrasted the use of independent contractors with those corporations that “entered [or] conducted activities in the Commonwealth,” suggesting that there are activities that can be accomplished by a corporation in Pennsylvania that do not require registration. *See id.* (contrasting activities that constitute doing business from those that do not). Following a sweeping overhaul of Pennsylvania’s statutes relating to corporate registration in 2015, the legislature explicitly confirmed that “selling through independent contractors,” along with ten other enumerated actions, does not implicate the need for registration to do business in the Commonwealth. *See* 15 PA. STAT. AND CONS. STAT. ANN. § 403(a) (5) (West 2018) (enumerating the actions a business may take without necessarily doing business within the state).

however, the Supreme Court's most recent general jurisdiction pronouncement raises questions about the validity of this interpretation.⁵²

B. *Enter: Daimler, The Great and Powerful*

In 2014, the Supreme Court of the United States clarified the concept of general jurisdiction based on a minimum contacts analysis.⁵³ Daimler, a German defendant, was hauled into federal court in California to answer claims brought by Argentinian workers under Argentina and California laws.⁵⁴ Plaintiffs in the action asserted that general jurisdiction over Daimler was proper because of the contacts that Mercedes-Benz USA, Daimler's subsidiary, had with the forum state.⁵⁵ Although rejected at first, the Ninth Circuit Court of Appeals ultimately accepted this argument, and found that the court properly exercised general jurisdiction over Daimler.⁵⁶

However, the Supreme Court reversed the Ninth Circuit's decision, holding that a corporate defendant is amenable to general jurisdiction only where its contacts are so continuous and systematic that the defendant corporation is essentially "at home" in the state where jurisdiction is sought.⁵⁷ As for those locales that satisfy such a demanding test, the Court noted that the corporation's "place of incorporation" and "principal place

52. *See Otsuka*, 106 F. Supp. 3d at 469 (likening New Jersey's statute to Pennsylvania's as addressed in *Bane*, despite lacking jurisdictional language).

53. *See Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014) ("The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint.").

54. *See id.* (noting the location of each party for the purpose of setting the stage for a jurisdiction discussion). The plaintiffs sought damages for human rights violations allegedly perpetuated by Daimler's Argentinian subsidiary during the period of Argentina's "Dirty War." *See id.* (recounting the facts that led to the jurisdictional question).

55. *See id.* (stating plaintiffs' theory of personal jurisdiction). Mercedes-Benz USA (MBUSA) is a subsidiary of Daimler that is incorporated in Delaware with its principal place of business in New Jersey. *See id.* (noting the relationship between the parent and subsidiary corporations).

56. *See id.* at 124 (describing the Ninth Circuit's analysis of the jurisdiction issue). In its first hearing, the Ninth Circuit declined to allow California to exercise general jurisdiction over Daimler because of a lack of agency between MBUSA and Daimler. *See id.* (stating the initial reasoning of the Ninth Circuit). Without agency, the plaintiffs were unable to attribute MBUSA's contacts to Daimler. *See id.* (noting the need to draw a connection between MBUSA and Daimler). However, on rehearing, the panel withdrew its initial opinion and allowed for the exercise of general jurisdiction over Daimler. *See id.* (discussing the Ninth Circuit's shift in reasoning). A subsequent request for a rehearing en banc was denied. *See id.* at 125 (noting procedural posture of case before it reached Supreme Court).

57. *See id.* at 137 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)) ("*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.").

of business” are where the corporation will most likely be “at home.”⁵⁸ Finding that Daimler’s contacts were not so continuous and systematic as to render it “at home” in California, the Court declined to allow the exercise of general jurisdiction over the defendant car manufacturer in that state.⁵⁹

The Supreme Court made clear that a view of general jurisdiction that allows for its exercise every time a corporation “engages in substantial, continuous, and systematic” contacts would be “unacceptably grasping.”⁶⁰ In doing so, the Court set a high bar for litigants to meet in order to show that a locale beyond the corporation’s “place of incorporation and principal place of business” warrant diverting from those “paradigm . . . bases” of jurisdiction.⁶¹ Nonetheless, the Court’s only mention of consent as a means of obtaining jurisdiction came in a passing reference to *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁶² stating that *Perkins v. Benguet Con-*

58. *See id.* at 137 (noting the two locales that most commonly satisfy the test). The Court noted that while other locales exist in which a corporation can be amenable to general jurisdiction, these are the two “paradigm” bases. *See id.* (describing the scope of the test). Although noting that other forums may exist, the Court limited the range of options by barring the exercise of general jurisdiction based solely on “substantial, continuous, and systematic course of business.” *See id.* at 137–38 (citation omitted) (limiting the potential scope of the test).

59. *See id.* at 139 (“[N]either Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there.”). The Court went on to reject the idea that general jurisdiction could be exercised in “every other State in which MBUSA’s sales are sizable.” *See id.* (limiting the scope of general jurisdiction).

60. *See id.* at 138 (reaffirming that the corporation need be virtually at home in forum for general jurisdiction to be proper). In rejecting the use of continuous and systematic contacts alone, the Court reiterated that this language appears in the context of specific jurisdiction. *See id.* (differentiating between specific and general jurisdiction). *International Shoe* used the language “continuous and systematic” to define the type of contacts that would suffice to meet specific jurisdiction standards. *See id.* (citing *Int’l Shoe Corp. v. Washington*, 326 U.S. 310, 317 (1945)) (describing the test for specific jurisdiction). The Court then reiterated that the test for general jurisdiction doesn’t end with “continuous and systematic” contacts; rather, the “affiliations with the state [must be] so ‘continuous and systematic’ as to render [the corporation] essentially at home in the forum State.” *See id.* at 138–39 (citing *Goodyear*, 564 U.S. at 919) (making clear the distinction between the tests for specific and general jurisdiction).

61. *See id.* at 137 (citing *Goodyear*, 564 U.S. at 924) (noting other locales exist but placing heavy limits beyond the two paradigm bases). While the Court does not provide any examples of bases of general jurisdiction outside of the state of incorporation and principal place of business, it foreclosed on the idea that sizable sales alone would be enough to render a corporation “at home” in the forum state. *See id.* at 139 (noting Daimler’s sales presence in California is insufficient to meet the test for general jurisdiction). In doing so, the court stated that “such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

62. 564 U.S. 915 (2011).

*sol. Mining Co.*⁶³ is the proper test for general jurisdiction where the corporation has *not consented* to jurisdiction.⁶⁴ Thus, lower courts are left with little direct commentary on which to ground the debate over *Daimler's* effect on consent-based jurisdiction.⁶⁵

C. *The Landscape of Consent-by-registration after Daimler*

One of the most common concerns for district courts involves the potential for conflict between *Daimler's* due process requirements and the doctrine of consent-by-registration jurisdiction.⁶⁶ Tangential to that concern is the possibility that some courts conflate contacts with consent in applying contacts-based doctrines to consent-based jurisdiction.⁶⁷ Beyond that, some district courts focus more exclusively on the notice requirements for jurisdiction and how such a requirement either precludes or supports consent-by-registration.⁶⁸

1. *On the Question of Daimler and Due Process Preclusion*

In the wake of *Daimler*, district courts within the Third Circuit needed to re-examine the validity of their consent-by-registration schemes.⁶⁹ Many courts ultimately decided that *Daimler* did not eliminate consent as a means of obtaining jurisdiction.⁷⁰ This theory emerged from *Daimler's* failure to explain how consent jurisdiction fits into the larger general jurisdiction landscape.⁷¹

63. 342 U.S. 437 (1952).

64. See *Daimler*, 571 U.S. at 129 (emphasis added) (citation omitted) (citing *Goodyear*, 564 U.S. at 927–28) (acknowledging a difference between consent-based and contacts-based jurisdiction).

65. See, e.g., *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 654–55 (E.D. Pa. 2016) (finding *Daimler* does not weight on the issue of consent-based jurisdiction).

66. For a discussion of district court examination of *Daimler*, due process, and consent-by-registration, see *infra* notes 69–83 and accompanying text.

67. For a discussion of district court analysis of the difference between consent and contacts based jurisdiction, see *infra* notes 84–89 and accompanying text.

68. For a discussion of district court analysis of notice, see *infra* notes 90–96 and accompanying text.

69. See, e.g., *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (noting the need to reexamine consent-by-registration in light of *Daimler*). “The court finds, however, that *Daimler* does weigh on this issue.” *Id.*

70. See, e.g., *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, 5:18-CV-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018) (holding *Daimler* does not preclude consent-based jurisdiction).

71. See *Allstate*, 2018 WL 3707377, at *5 (“This court is persuaded by the reasoning of those courts that have found that the Supreme Court in *Daimler* did not mean ‘*sub silentio*, to eliminate consent as a basis for jurisdiction.’” (quoting *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 591 (D. Del. 2015))); see also *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 298 (M.D. Pa. 2018) (“*Daimler* did not abdicate or overrule *Bane*, and after 1978 under section 5301 a corporation that applies for and receives a certificate of authority to do business in Pennsylvania consents to the general jurisdiction of state and federal courts in Pennsylvania.”); *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (citing *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 468

However, the District of Delaware determined just months after *Daimler* that the newly-minted “at home” test precluded the use of consent-by-registration to obtain general jurisdiction.⁷² The court in *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*⁷³ determined that *Daimler*’s near-silence on consent did not change the fact that jurisdiction via consent is still subject to the constraint that it must not offend “traditional notions of fair play and substantial justice”⁷⁴ The court concluded that *Daimler* precludes the practice of exercising jurisdiction over a corporation simply because they do business in the forum state.⁷⁵

The Delaware Supreme Court and the District of New Jersey echoed this concern regarding *Daimler*’s preclusion of consent-by-registration.⁷⁶ *Genuine Parts Co. v. Cepec*⁷⁷ took a practical perspective, recognizing that *Daimler* set a high bar for general jurisdiction to be exercised outside of the state of incorporation and principal place of business.⁷⁸ The court in

(D.N.J. 2015)) (“The ruling in *Daimler* does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania.”).

72. See *AstraZeneca*, 72 F. Supp. 3d at 556 (“In light of the holding in *Daimler*, . . . [defendant’s] compliance with Delaware’s registration statutes—mandatory for *doing business* within the state—cannot constitute consent to jurisdiction”). The court went on to state that the corporate defendant at issue in the case, being registered to do business in over twelve states would be exposed “to suit all over the country, a result specifically at odds with *Daimler*.” See *id.* at 556–57 (citing *Daimler AG v. Bauman*, 571 U.S. 117, 138–41 (2014)) (describing the concerns with using registration as consent to general jurisdiction).

73. 72 F. Supp. 3d 549 (D. Del. 2014).

74. See *id.* at 556 (discussing the due process limits of general jurisdiction as set forth in *Daimler*). The court asserts here that all bases of jurisdiction are subject to some level of due process scrutiny related to the notions of “fair play” and “justice.” See *id.* (applying *Daimler*’s general jurisdiction limits to contacts-based and consent-based jurisdiction alike). However, this notion has been disputed by at least one commentator. See Monestier, *supra* note 10, at 1378 (asserting that due process concerns do not apply where the basis for jurisdiction is valid consent). For a discussion of the opposition to the need for due process where consent is the basis for jurisdiction, see *infra* notes 126–30 and accompanying text.

75. *AstraZeneca*, 72 F. Supp. 3d at 556 (quoting *Daimler*, 571 U.S. at 138–41).

76. See *Horowitz v. AT&T Inc.*, No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525, at *12 (D.N.J. Apr. 25, 2018) (determining that *Daimler* has precluded the practice of registration as a basis for jurisdiction); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126–128 (Del. 2016) (holding *Daimler* precluded the practice of registration as a basis for jurisdiction). *Horowitz* stated that “consent-by-registration is inconsistent with *Daimler*.” *Horowitz*, 2018 WL 1942525, at *12. Further, the court posited that “*Daimler* also advised that older decisions addressing general jurisdiction over a corporation should be afforded little weight.” *Id.* (citing *Daimler*, 571 U.S. at 138 n.18). The court in *Genuine Parts* stated that the interpretation given to Delaware’s business registration statutes by *Sternberg* “rested on a view of federal jurisprudence that has now been fundamentally undermined by *Daimler*” See *Genuine Parts*, 137 A.3d at 126 (changing the previous interpretation of Delaware’s registration statute to strip it of its ability to constitute consent to jurisdiction).

77. 137 A.3d 123 (Del. 2016).

78. See *id.* at 135–36. (acknowledging that jurisdiction might, “in an exceptional case,” be proper in a locale other than the state of incorporation or principal place of business (quoting *Daimler*, 571 U.S. at 139 n.19)).

Genuine Parts also pointed to *Daimler*'s prohibition on the use of "continuous and systematic" contacts alone, noting that consent-by-registration would equate to even fewer contacts.⁷⁹ In a similar vein, the court in *Horowitz v. AT&T, Inc.*⁸⁰ determined that prior "sweeping interpretation" of the exercise of general jurisdiction have since "yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* . . ."⁸¹ Notwithstanding, the court in *Bors v. Johnson & Johnson*⁸² disagreed with this rationale, stating that *Daimler* prohibited the use of continuous and systematic contacts *by themselves* to establish jurisdiction and leaving untouched the use of consent to obtain jurisdiction.⁸³

2. *Distinguishing Consent from Contacts*

Setting aside those courts that found *Daimler* fatal to consent-by-registration, a majority of federal district courts representing states within the Third Circuit uphold the continued validity of consent-by-registration after *Daimler*.⁸⁴ The courts focus on *Daimler*'s lack of a discussion regarding consent to jurisdiction as evidence that it did not preclude the practice.⁸⁵

79. *See id.* at 136 (determining that consent-by-registration falls below even continuous and systematic contacts). For a discussion of *Daimler*'s prohibition on the continuous and systematic test in the context of consent jurisdiction, see *infra* notes 108–12 and accompanying text.

80. No. 3:17-cv-4827-BRM-LHG, 2018 WL 1942525, at *1 (D.N.J. Apr. 25, 2018).

81. *See id.* at *12 (quoting *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 178 (D.N.J. 2016)) (noting that prior general jurisdiction case law should be interpreted in light of recent Supreme Court decisions). The court in *Horowitz* agreed with the rationale from *Display Works*. *See id.* ("The [c]ourt finds Judge Arleo's reasoning in *Display Works* persuasive."). Namely, *Horowitz* concluded that older decisions like *Pennsylvania Fire* should not be given the weight that they once were, given the "[Supreme] Court's 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business." *Id.* (quoting *Display Works*, 182 F. Supp. 3d at 178).

82. 208 F. Supp. 3d 648 (E.D. Pa. 2016).

83. *Id.* at 654 (emphasis added) (quoting *Pfizer Inc. v. Mylan Inc.*, Civ. A. No. 15-26-SLR-SRF, 2016 WL 1319700, at *10 (D. Del. Apr. 4, 2016)).

84. *See, e.g., Bors*, 208 F. Supp. 3d at 655 ("Consent remains a valid form of establishing personal jurisdiction under the Pennsylvania registration statute after *Daimler*."); *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 468 (D.N.J. 2015) ("*Daimler* in its entirety contains but one fleeting reference to the concept of jurisdiction by consent, and this limited reference served only to distinguish between traditional 'consensual' jurisdiction and the 'non-consensual bases for jurisdiction' addressed in the decision . . .") (citing *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 589 (D. Del. 2015)) ("*Daimler* preserves what has long been the case: that these are two distinct manners of obtaining jurisdiction over a corporation.>").

85. *See Bors*, 208 F. Supp. 3d at 653 ("*Daimler* did not overrule 'nearly century-old Supreme Court precedent regarding what amounts to voluntary consent to jurisdiction when (1) *Daimler* never says it is doing any such thing; and (2) what *Daimler* does say about consent to jurisdiction suggests just the opposite." (quoting *Forest Labs., Inc. v. Amneal Pharms. LLC*, No. 14-508-LPS, 2015 WL 880599, at *13 (D. Del. Feb. 26, 2015))); *Otsuka*, 105 F. Supp. 3d at 468 (characterizing *Daimler*'s treatment of consent as "one fleeting reference"); *Acorda Therapeutics*, 78 F. Supp.

This argument became the cornerstone of *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*,⁸⁶ a District of Delaware case that departed from the previously-decided *AstraZeneca* matter.⁸⁷ The case, decided just three months after *AstraZeneca*, determined that *Daimler's* single reference to consent was effectively “distinguish[ing] between consensual and non-consensual bases for jurisdiction.”⁸⁸ The court determined that due process concerns do not reach a situation where jurisdiction is premised on a statute that carries with it a longstanding interpretation that registration constitutes consent.⁸⁹

3. Notice as a Crucial Concern

Beyond the issue of squaring consent-by-registration with *Daimler*, the issue of notice has been discussed by various district courts as a poison pill

3d at 589 (“Indeed, in the entire opinion in *Daimler*, there is but a single, passing reference to the concept of consent . . .”).

86. 78 F. Supp. 3d 572 (D. Del. 2015).

87. *See id.* at 589–90 (declining to follow the previously-decided case of *AstraZeneca* and upholding consent-by-registration in Delaware). *AstraZeneca* focused on the due process implications of squaring *Daimler's* prohibition on the sole use of continuous and systematic contacts to gain jurisdiction over a defendant. *See AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (noting registration falls below continuous and systematic contacts let alone *Daimler's* heightened standard for general jurisdiction). *Acorda Therapeutics*, on the other hand, focused on the distinction between consent to jurisdiction and jurisdiction via the minimum contacts analysis. *See Acorda Therapeutics*, 78 F. Supp. 3d at 589–90 (noting the distinction between consent-based and contacts-based jurisdiction). In rebutting *AstraZeneca's* concern about the failure of consent-by-registration to meet the due process notice requirements, the court in *Acorda Therapeutics* stated, “[w]hen, instead, the basis for jurisdiction is the voluntary compliance with a state’s registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state’s courts, the corporation can have *no uncertainty* as to the jurisdictional consequences of its actions.” *Id.* at 591 (emphasis added). In fact, the court stated that the minimum contacts analysis provides more jurisdictional uncertainty than consent-by-registration. *See id.* (describing how consent-based jurisdiction provides corporations certainty of potential forums).

88. *See id.* at 589 (analyzing *Daimler's* sole mention of consent). The court made explicit that “general jurisdiction may be established by showing that a corporation is ‘at home’ in the sense described in detail in *Daimler*, or separately, general jurisdiction may be established by a corporation’s consent to such jurisdiction.” *Id.* The court further noted that while *Daimler* was instructive on the former, it had “nothing to say about the latter scenario.” *See id.* (noting *Daimler* did not rule on the propriety of consent-based jurisdiction).

89. *Id.* at 591. This line of reasoning squares with the reasoning of at least one commentator that due process concerns need not be addressed where the basis for jurisdiction is “voluntary” compliance with the statute. *See Monestier, supra* note 10, at 1359 (asserting due process concerns are obviated by valid consent to jurisdiction). However, there are concerns about conflating statutes that contain explicit statutory language, like that of Pennsylvania, with statutes that have just been “long and unambiguously . . . interpreted as constituting consent to general jurisdiction.” *See Acorda Therapeutics*, 78 F. Supp. 3d at 591.

to certain consent-by-registration schemes.⁹⁰ The Eastern District of Pennsylvania in *Bors* relied on the explicit nature of Pennsylvania's statute as a key to its survival.⁹¹ The court distinguished the Pennsylvania statute, which contained explicit jurisdiction-conferring language, from a similar New Jersey statute lacking such language—notably, the lack of this language was the sole reason the court invalidated this New Jersey statute.⁹²

The Court in *Horowitz* declined to blindly follow the Third Circuit's decision in *Bane* regarding New Jersey's consent-by-registration scheme because New Jersey's statute lacked the explicit language found in its Pennsylvania counterpart.⁹³ As was the case with *Bors*, the explicit language in

90. See *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 297 (M.D. Pa. 2018) (“This court agrees that merely registering as a foreign corporation with a state—in the absence of specific statutory language providing otherwise—does not equate to the foreign corporation being ‘at home’ in the state”); *Horowitz v. AT&T Inc.*, No. 3:17-CV-4827-BRM-LHG, 2018 WL 1942525, at *12 (D.N.J. Apr. 25, 2018) (“The Court agrees that *Bane* is distinguishable due to the differences in the Pennsylvania and New Jersey corporation registration statutes. Notably, the New Jersey Statute does not contain any express language to put a corporation on notice that by registering to do business in New Jersey, it is also consenting to personal jurisdiction in the state.”).

91. See *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 654–55 (E.D. Pa. 2016) (noting the jurisdiction conferring language of Pennsylvania's registration statute). The court noted that other courts have “distinguished Pennsylvania's specific notice statute in comparing other states' statutes.” *Id.* at 654. In one instance, a Second Circuit Court of Appeals decision “used Pennsylvania's statute as an example of providing notice registering to do business in a state will subject a corporation to general personal jurisdiction.” *Id.* (citing *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016)).

92. See *id.* at 654–55 (citing *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 175 (D.N.J. 2016)) (comparing the explicit jurisdictional language in Pennsylvania's statute with others lacking similar language). In *Display Works*, the court clarified two key considerations in the practice of consent-by-registration. See *Display Works*, 182 F. Supp. 3d at 179 (analyzing the requirements of valid consent-by-registration). Foremost, the court clarified that “consent and contacts are not interdependent.” See *id.* (stating a defendant may consent to jurisdiction even where minimum contacts is not met). Thus, it is the registration that matters for the purposes of consent, not the act of doing business pursuant to the registration. See *id.* (distinguishing between registration to do business and actually doing business). Second, *Display Works* clarified that a consent-by-registration scheme can be found invalid solely on the basis that the relevant statutes fail to reference consent or general jurisdiction. See *id.* at 175–76 (stating that New Jersey registration statutes “do not contain any language intimating that the foreign corporation will be subject to suit in this state for conduct that occurred elsewhere, and do not discuss consent. That absence of any such language distinguishes New Jersey's statutes from those in *Bane*”). The court's holding stated explicitly that the statutes failed to confer general jurisdiction “because they do not contain express references to any such terms.” See *id.* at 179 (finding New Jersey's registration statute could not confer valid consent based on a lack of jurisdictional language in the statute).

93. See *Horowitz*, 2018 WL 1942525, at *12 (relying on the jurisdictional language distinction to justify diverging from *Bane*). But see Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation Of “Registration” Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 198 (2018) (stating that “*Pennsylvania Fire* itself forecloses arguments that actual notice need be given in statute to affect registration jurisdiction”). Although the court in *Horowitz* declined to follow *Bane* on the distinction of actual

Pennsylvania's statute was key to the Eastern District of Pennsylvania in *Gorton v. Air & Liquid System Corporation*⁹⁴ finding that consent-by-registration remains valid following *Daimler*.⁹⁵ Notwithstanding, much of the support for consent-by-registration remains contained in the Third Circuit.⁹⁶

D. *Consent-by-registration Elsewhere in the Nation*

A majority of federal courts outside of the Third Circuit hold that registration to do business within a forum cannot constitute consent to jurisdiction.⁹⁷ *Genuine Parts* collected cases from district courts presiding in the Second, Fifth, Seventh, and Eighth Circuits that heard the issue

notice, at least one commentator asserts that actual notice need not be given for a consent-by-registration scheme to survive. See *Horowitz*, 2018 WL 1942525 at *12. But see *Chase*, *supra*, at 198 (pointing to early Supreme Court precedent on the need for notice). The commentator notes the Second Circuit's commentary on Pennsylvania statute in *Brown v. Lockheed Martin*, requiring that consent-by-registration schemes in the Second Circuit provide express notice in the statute of the consequences of registering. See *id.* at 197 (citing *Brown*, 814 F.3d at 637-38) (providing an example case where notice was the lynchpin of the consent analysis). However, the commentator cites to *Pennsylvania Fire's* proposition that the onus is on the defendant in "anticipating the effects of its registration." See *id.* at 198 (citing *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917)) (arguing defendant bears burden of knowing where they can be brought to suit). Thus, the commentator concludes, "there is no support for a rule that a state must provide specific notice or obtain actual formal consent from a defendant to obtain jurisdiction over it." *Id.*

94. 303 F. Supp. 3d 278 (M.D. Pa. 2018).

95. See *id.* at 297 (holding Pennsylvania's explicit registration provision confers valid personal jurisdiction). In addition, there is inconsistency among commentators on where the issue of notice fits into the calculus. See *Chase*, *supra* note 93, at 197 (analyzing notice as a separate due process concern apart from the requirements of consent). One commentator explicitly states that "[a]nother due process concern raised by commentators and courts is that corporations lack adequate notice that registration will subject them to general jurisdiction." *Id.* However, as another commentator notes, there is case law to support the argument that due process need not be addressed where consent is validly found. See *Monestier*, *supra* note 10, at 1378 (analyzing notice as part of the two requirements for consent). In either case, there is support for a third position that notice can be addressed separate of the due process considerations as part of the requirements for valid consent in the first place. See *id.* at 1359 (arguing that consent must be knowing and voluntary).

96. See *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (upholding use of Pennsylvania's registration statute as means to confer jurisdiction over corporations registered in the forum). For a discussion of other jurisdictions, see *infra* notes 97-104.

97. *Gorton*, 303 F. Supp. 3d at 296 (citing *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 (Del. 2016)). *Gorton* noted, before upholding Pennsylvania's consent-by-registration scheme, that the national landscape does not generally support the use of consent-by-registration. See *id.* (surveying the national status of consent-by-registration). However, it was the "specific statutory language" of Pennsylvania's registration statutes that convinced the court in *Gorton* that it was not at odds with *Daimler*. See *id.* at 297 (noting Pennsylvania's statute differs from all others in its explicit language).

following *Daimler*.⁹⁸ District Courts within the Second and Fifth Circuits nullified consent-by-registration based on the theory that merely “doing business” in the state was not enough to meet the requirements of *Daimler*’s “at home” test.⁹⁹

In tandem with the argument that *Daimler* has foreclosed on the practice of consent-by-registration is the notion that the practice, if allowed, will run rampant.¹⁰⁰ The Second and Eighth Circuits relied on this policy-based theory that allowing every state to exercise consent-by-registration

98. See *U.S. Bank Nat’l Ass’n v. Bank of Am., N.A.*, No. 1:14-cv-01492-TWP-DKL, 2015 WL 5971126, at *6 (S.D. Ind. Oct. 14, 2015) (holding that neither “merely registering to do business in Indiana” nor “registering to do business in Indiana and also appointing an agent for service” establishes personal jurisdiction over a corporation); *Hazim v. Schiel & Denver Pub. Ltd.*, No. H-12-1286, 2015 WL 5227955, at *4 (S.D. Tex. Sept. 8, 2015) (citation omitted) (“The Fifth Circuit has held that ‘the mere act’ of registering a corporate agent in the forum state who is then served with process shows neither general jurisdiction in Texas nor ‘consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter.’”); *Pitts v. Ford Motor Co.*, 127 F. Supp. 3d 676, 683 (S.D. Miss. 2015) (declining to exercise general jurisdiction over a foreign corporation where the only theory asserted is qualification and registration to do business under Mississippi laws); *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (citation omitted) (determining that exercising general jurisdiction on the sole basis of registration to do business “is contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction”); *Neeley v. Wyeth LLC*, No. 4:11-cv-00325-JAR, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015) (finding *Daimler* rejected notion of subjecting “every foreign corporation transacting business in the state of Missouri” to general jurisdiction); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (citations omitted) (determining, after *Daimler*, the “mere fact of [a defendant’s] being registered to do business is insufficient to confer general jurisdiction”).

99. See *Pitts*, 127 F. Supp. 3d at 683 (applying *Daimler* “at home” test to consent-based jurisdiction); *Chatwal Hotels*, 90 F. Supp. 3d at 105 (applying *Daimler* “at home” test to consent-based jurisdiction). The court in *Pitts* determined that the registration to do business and appointment of an agent for the service of process constituted “at most ‘doing business.’” See *Pitts*, 127 F. Supp. 3d at 683 (finding doing business was not enough to allow for general jurisdiction under *Daimler*). *Chatwal Hotels* similarly noted that “courts were unwilling to find that registering to do business in the state, without more, was enough to confer general jurisdiction over an entity” *Chatwal Hotels*, 90 F. Supp. 3d at 105. However, this characterization of the registration as a sort of contact to be analyzed within the minimum contacts framework runs afoul of the notion that consent and contacts are two separate bases of jurisdiction. See *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653–54 (E.D. Pa. 2016) (differentiating between consent-based and contacts-based jurisdiction).

100. See *Keeley*, 2015 WL 3999488, at *4 (agreeing with the Supreme Court in *Daimler* that “[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 138–41 (2014))); see also *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) (expressing concern about the wide reach of consent-by-registration jurisdiction).

would lead to “national companies . . . subject to suit all over the country.”¹⁰¹

However, as one commentator points out, the practice of consent-by-registration nationwide is objectively minimal.¹⁰² As of 2015, all fifty states and the District of Columbia maintain business registration statutes, but only “six states have made it clear that registration to do business results in ‘consent’ to *general jurisdiction*.”¹⁰³ This result comes nearly a century after the decision of the Supreme Court of the United States in *Pennsylvania*

101. See *Keeley*, 2015 WL 3999488, at *4 (noting the breadth of jurisdiction that would result from consent-by-registration jurisdiction); see also *Brown*, 814 F.3d at 640 (noting the breadth of jurisdiction that would result from consent-by-registration jurisdiction). The court in *Brown* distinguished Pennsylvania’s statute from that of Connecticut, which it called “ambiguous.” See *id.* at 640 (comparing Pennsylvania’s explicit statute with that of Connecticut). The court expressed fear that mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*’s ruling would be robbed of meaning by a backdoor thief.

Id. It is unclear if the Second Circuit purposely left the door open for statutory schemes like that of Pennsylvania by setting off “express consent to general jurisdiction” from the rest of the proposition. See *id.* (acknowledging Pennsylvania’s explicit statutory attempt to confer jurisdiction through registration).

102. See Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, And General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1647 (2015) (surveying impact of business registration statutes nationwide). This Article’s appendix belies many of the fears that courts have raised in opposition to consent-by-registration. See, e.g., *Brown*, 814 F.3d at 640 (stating that use of consent-by-registration will lead to “every corporation . . . subject to general jurisdiction in every state in which it registered”); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 143 (Del. 2016) (“Human experience shows that ‘grasping’ behavior by one, can lead to grasping behavior by everyone . . .” (citing *Daimler*, 571 U.S. at 138)). While the Article ultimately calls for the disuse of consent-by-registration, the appendix presents a state-by-state list, detailing the effects of business registration statutes nationwide. See Benish, *supra*, at 164–61 (amalgamating business registration statutes of each state). The first important takeaway from the appendix is that there are very few states that have written or interpreted their registration statutes to confer personal jurisdiction over registrant defendants. See *id.* (noting small number of statutes that are interpreted to confer jurisdiction). The second is that there are a large number of states that have not yet interpreted the meaning of their registration statutes. See *id.* (noting large number of statutes yet to be interpreted).

103. See Benish, *supra* note 102, at 1647 (stating number of statutes interpreted to confer jurisdiction). At the time the Article was written, New Jersey had not “clearly” interpreted its statute to establish general jurisdiction over the defendant corporation. See *id.* at 1655 (acknowledging statutes without clear interpretation). They have since done so. See *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 470 (D.N.J. 2015) (interpreting New Jersey’s business registration statute to confer jurisdiction over registrants). For a discussion on New Jersey’s interpretation of its business registration statute as conferring general jurisdiction, see *supra* notes 49–52 and accompanying text.

Fire, which allowed for the use of consent statutes as a means of obtaining jurisdiction.¹⁰⁴

III. TOTO, WE ARE NOT IN F]DAIMLER ANYMORE: AN ANALYSIS OF THE ARGUMENTS FOR AND AGAINST CONSENT-BY-REGISTRATION

Although some courts assert the opposite, *Daimler* has not precluded consent-by-registration.¹⁰⁵ Furthermore, despite the position that consent-by-registration does not comport with due process requirements, a due process analysis is unnecessary where consent is validly given.¹⁰⁶ Notwithstanding, some courts still forbid the practice on the grounds that registration is not a voluntary or knowing form of consent.¹⁰⁷

A. *Has Daimler Precluded Consent-by-registration?*

Courts that decline to extend consent-by-registration often rely on the theory that *Daimler* itself precludes the practice.¹⁰⁸ The opinions tend to split over what language in *Daimler* is truly dispositive.¹⁰⁹ One school of thought posits that *Daimler's* silence on consent as a means of obtaining jurisdiction indicates that the opinion did not seek to affect the longstand-

104. See *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94–95 (1917) (holding statutory appointment of agent for service constitutes consent to suit in forum). For a discussion on *Pennsylvania Fire*, see *supra* notes 34–36 and accompanying text.

105. For further discussion on the argument for preclusion of consent-by-registration, see *infra* notes 108–20 and accompanying text.

106. For further discussion on the argument that consent-by-registration violates due process, see *infra* notes 121–47 and accompanying text.

107. For further discussion on the argument that consent-by-registration violates due process, see *infra* notes 121–47 and accompanying text.

108. See, e.g., *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (determining consent-by-registration does not comport with *Daimler's* requirements for jurisdiction). In *AstraZeneca*, the court stated specifically that, “[i]n light of the holding in *Daimler* . . . [the defendant’s] compliance with Delaware’s registration statutes . . . cannot constitute consent to jurisdiction . . .” *Id.* It found the resulting jurisdiction exercised through consent-by-registration was “specifically at odds with *Daimler*.” See *id.* at 557 (citing *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014)) (comparing the low bar of registration to the high bar *Daimler* set).

109. See *AstraZeneca*, 72 F. Supp. 3d at 556 (relying on *Daimler's* prohibition of using continuous and systematic contacts). But see *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 588–89 (D. Del. 2015) (noting *Daimler* was largely silent on consent-based jurisdiction except to differentiate it from contacts-based jurisdiction). While *AstraZeneca* focused on the limiting language of *Daimler* regarding the prohibition on the use of continuous and systematic contacts, *Acorda Therapeutics* focused instead on the distinction between consent-based and contacts-based jurisdiction. See *Acorda Therapeutics*, 78 F. Supp. 3d at 589 (noting *Daimler's* lacking discussion of consent-based jurisdiction). The *Acorda Therapeutics* court states that *Daimler* “preserves what has long been the case: . . . that . . . jurisdiction may be established by showing that a corporation is ‘at home’ . . . or . . . ‘by a corporation’s consent to such jurisdiction.’” See *id.* (interpreting *Daimler's* silence on consent as evidence that it did not disturb the doctrine).

ing practice of consent to jurisdiction.¹¹⁰ An example of this interpretation of *Daimler* is most notable in the cases of *Acorda Therapeutics* and *Bors*.¹¹¹ *Acorda Therapeutics* decided that *Daimler* sought to differentiate consent-based and contacts-based jurisdiction.¹¹²

The opposing theory requires a much broader interpretation of *Daimler*.¹¹³ Rather than focus on the lack of references to consent in *Daimler*, some courts assert that *Daimler*, when viewed as an attempt to create a certain landscape of general jurisdiction, renders consent-by-registration invalid.¹¹⁴ In order to achieve this conclusion, courts, such as the District of Delaware in *AstraZeneca*, focus on the parameters that *Daimler* set for general jurisdiction via the “at home” test.¹¹⁵ For example, *Daimler* prohibits the exercise of general jurisdiction under a contacts theory where a corporation’s actions within the state are only “continuous and systematic.”¹¹⁶ It follows that if continuous and systematic contacts are

110. See *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, No. 5:18-CV-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018) (agreeing with reasoning of *Acorda Therapeutics* and stating that “*Daimler* did not mean, ‘sub silentio, to eliminate consent as a basis for jurisdiction.’” (citing *Acorda Therapeutics*, 78 F. Supp. 3d at 591)); *Acorda Therapeutics*, 78 F. Supp. 3d at 589 (noting that *Daimler* had “nothing to say” about consent as means of establishing jurisdiction).

111. See *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (determining that the Supreme Court’s mention of consent jurisdiction in *Daimler* was “to distinguish between ‘consensual’ jurisdiction and ‘non-consensual bases for jurisdiction’” (citing *Daimler*, 571 U.S. at 128)); *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (finding *Daimler* did not preclude consent-by-registration).

112. See *Acorda Therapeutics*, 78 F. Supp. 3d at 589 (interpreting *Daimler*’s single reference to consent). Beyond *Daimler*, *Acorda Therapeutics* examined the effect of *International Shoe* on the distinction between consent-based and contacts-based jurisdiction. See *id.* (affirming the difference between consent and contacts as means of obtaining jurisdiction). There, too, *Acorda Therapeutics* found that the language in *International Shoe* distinguished between consent and contacts. See *id.* (“*International Shoe* described how a corporation may have sufficient ‘presence’ in a forum to give rise to personal jurisdiction over it ‘even though *no consent* to be sued . . . has been given.’” (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945))).

113. See, e.g., *AstraZeneca*, 72 F. Supp. 3d at 556 (applying the holding of *Daimler* to consent-based jurisdiction). *AstraZeneca* rejects the argument “that *Daimler* plays no role in the consent analysis because that case dealt with the minimum-contacts aspect” See *id.* (extending *Daimler*’s analysis beyond the contacts-based jurisdiction at issue in *Daimler*).

114. See *id.* at 556–57 (clarifying that consent, like contacts, must be “rooted in due process”); see also *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 141 (Del. 2016) (calling for narrower reading of Delaware’s registration statute so as not to run afoul of “*Daimler*’s teachings”). *AstraZeneca* referenced the jurisdictional results that would occur from consent-by-registration, calling them “specifically at odds with *Daimler*.” See *id.* at 557 (applying the due process concerns from *Daimler* to the facts of the case).

115. See *AstraZeneca*, 72 F. Supp. 3d at 556 (remarking on contact-based limits that *Daimler* reaffirmed for exercise of general jurisdiction).

116. See *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014) (describing the jurisdictional results of looking only to continuous and systematic contacts as “unacceptably grasping”).

insufficient for the exercise of general jurisdiction under the “at home” test, then the imposition of general jurisdiction where the corporation is “merely ‘doing business’” would also be improper.¹¹⁷

When district courts attempt to reconcile *Daimler*’s mandate against the sole use of continuous and systematic contacts with the practice of consent-by-registration, the courts necessarily conclude that the two conflict and cannot be simultaneously true.¹¹⁸ The impetus for these decisions rests on a theory that *Daimler* was doing more than merely stating a rule for the minimum contacts necessary for general jurisdiction; rather, the Court was attempting to create a larger regime or scheme of general jurisdiction.¹¹⁹ Thus, the argument goes, in order for a means of obtaining jurisdiction to remain valid after *Daimler*, it must comport with the larger scheme of general jurisdiction.¹²⁰

B. Does Consent-by-registration Violate Due Process?

Another argument often advanced by courts in declining to uphold consent-by-registration is that the practice violates the due process requirements for jurisdiction.¹²¹ Famously, the Court in *International Shoe Co. v. Washington*¹²² stated that the exercise of jurisdiction must not offend

117. See *AstraZeneca*, 72 F. Supp. 3d at 556 (finding registration to do business falls within *Daimler*’s prohibitions). The court quoted a portion of *Daimler* stating, “[s]uch a theory . . . ‘would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” *Id.* (quoting *Daimler*, 571 U.S. at 138–39) (citation omitted). However, this notion must be contrasted with the theory that voluntary consent leaves a corporation with “no uncertainty as to the jurisdictional consequences of its actions.” See *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (determining that consent provides more jurisdictional certainty than contacts-based jurisdiction).

118. See, e.g., *AstraZeneca*, 72 F. Supp. 3d at 556 (“[T]he Supreme Court rejected the idea that a company could be haled into court merely for ‘doing business’ in a state.” (citing *Daimler*, 571 U.S. at 138–39)); *Genuine Parts*, 137 A.3d at 143–44 (“*Daimler* rejected the notion that a corporation that does business in many states can be subject to general jurisdiction in all of them.” (footnote omitted)).

119. See *AstraZeneca*, 72 F. Supp. 3d at 556 (determining that both contacts-based jurisdiction and consent-based jurisdiction were subject to due process limitations set forth in *Daimler*).

120. See *id.* (applying *Daimler* limitations to consent-based jurisdiction).

121. See *id.* (“[A]ll questions regarding personal jurisdiction[] are rooted in due process.”); Monestier, *supra* note 10, at 1388–91 (discussing due process concerns as they pertain to the *validity* of consent). While cases like *AstraZeneca* address due process concerns with respect to the results of consent-by-registration, at least one commentator addresses the due process concerns as they pertain specifically to the *validity* of consent and not to the jurisdictional results. See Monestier, *supra* note 10, at 1388–89 (analyzing due process issues as they arise in the course of determining valid consent as opposed to the resulting jurisdiction). This is because, as the scholar puts it, “consent provides the underlying basis of jurisdiction, and no further due process analysis is necessary.” See *id.* at 1381 (citing *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)) (asserting valid consent obviates need for due process inquiry into the resulting jurisdiction).

122. 326 U.S. 310 (1945).

“traditional notions of fair play and substantial justice.”¹²³ The court in *AstraZeneca* echoed this concern, asserting that consent to jurisdiction, like minimum contacts, is “rooted in due process.”¹²⁴ As such, the *AstraZeneca* court found that consent to jurisdiction must also comport with notions of fair play and justice.¹²⁵

Notwithstanding, scholars and judges disagree over the role of due process concerns where consent is the basis for jurisdiction.¹²⁶ At least one commentator argues that “due process is satisfied by virtue of the defendant corporation’s knowing and voluntary consent in registering to do business and appointing an agent for service of process.”¹²⁷ In such a

123. See *id.* at 316 (denoting the due process limits of personal jurisdiction). This language, although used in a specific jurisdiction case, has made its way into the calculus for general jurisdiction as well. See *Daimler*, 571 U.S. at 126 (citing *Int’l Shoe*, 326 U.S. at 316) (citing language from *International Shoe* regarding the due process limits of personal jurisdiction).

124. See *AstraZeneca*, 72 F. Supp. 3d at 556 (applying *Daimler* due process concerns to consent-based jurisdiction). Unlike the commentator who addressed due process concerns regarding the validity of consent, *AstraZeneca* focuses the due process concerns on the *resulting jurisdiction*. See *id.* (analyzing due process concerns as they pertain to resulting jurisdiction). But See Monestier, *supra* note 10, at 1388–89 (analyzing due process issues as they arise in the course of determining valid consent).

125. See *AstraZeneca*, 72 F. Supp. 3d at 556 (holding consent-by-registration jurisdiction did not comport with these due process requirements).

126. See *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 654 (E.D. Pa. 2016) (finding that “*Daimler* ‘was limited to the conclusion that continuous and systematic contacts, *by themselves*, were not enough to establish general personal jurisdiction’” (emphasis added) (citing *Pfizer Inc. v. Mylan Inc.*, Civ. A., No. 15-26-SLR-SRF, 2016 WL 1319700, at *10 (D. Del. Apr. 4, 2016))); Monestier, *supra* note 10, at 1378 (noting due process analysis is not necessary where consent is basis of jurisdiction). The conclusion that valid consent obviates a need for an analysis of due process concerns is seemingly at odds with the court’s opinion in *AstraZeneca*. See *AstraZeneca*, 72 F. Supp. 3d at 556 (applying due process concerns to use of consent to obtain jurisdiction). The court in *AstraZeneca* declined to uphold the consent-by-registration scheme because it did not meet due process requirements. See *id.* (applying due process implications to the resulting jurisdiction). However, according to one commentator, the court would have had to first determine that the consent itself was invalid before reaching the question of due process considerations. See Monestier, *supra* note 10, at 1378 (asserting valid consent obviates the need for a due process inquiry into the resulting jurisdiction).

127. See Monestier, *supra* note 10, at 1359 (“The corporation’s consent, in itself, satisfies due process.” (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 43 & cmt. b. (1971))); see also Craig Sanders, Note, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 Nw. U. L. REV. 1323, 1333 (2017) (“It is important to note first that a party can waive Due Process Clause protection by consenting to jurisdiction.” (citing Monestier, *supra* note 10, at 1379)). In addition to the concern that *AstraZeneca* may have preemptively introduced due process concerns into the calculus, there is also a concern that the court conflated consent with minimum contacts. See *AstraZeneca*, 72 F. Supp. 3d at 556 (equating consent-by-registration jurisdiction with type of “doing business” jurisdiction that was rejected in *Daimler*). The court in *AstraZeneca* used *Daimler*’s prohibition on continuous and systematic contacts to establish general jurisdiction over a defendant to reject the notion of consent-by-registration. See *id.* (finding consent-by-registration falls below even the continuous and systematic threshold). Nevertheless, as at least

case, a court need not inquire into due process concerns that stem from the resulting jurisdiction.¹²⁸ This theory also appears in the court's analysis in *Bors*.¹²⁹ The court reasoned that *Daimler's* prohibition on the use of continuous and systematic contacts extended only to situations where those contacts are used to justify jurisdiction in the *absence* of consent.¹³⁰

one commentator and one court note, “[c]onsent to jurisdiction is a separate and independent basis for jurisdiction that is not subject to the minimum contacts test.” See Monestier, *supra* note 10, at 1359 (citing *Burger King*, 471 U.S. at 472 n.14) (differentiating consent-based jurisdiction and contacts-based jurisdiction).

128. See Monestier, *supra* note 10, at 1378 (arguing valid consent satisfies any due process concerns regarding resulting jurisdiction). Although the commentator does not make an explicit distinction, it would seem that there are really two due process considerations at play. See *id.* at 1389 (stating that no due process is necessary, but also stating that “even if the relevant statute provided ample notice that registration . . . would be deemed consent . . . this would still not be consistent with due process”). Where consent is the basis of jurisdiction, it would seem that a due process analysis of the resulting jurisdiction is not required. See *id.* at 1378 (stating due process is satisfied by valid consent). However, implicit in the commentator's analysis is the theory that the validity of the consent *itself* must be considered with a due process lens. See *id.* at 1389 (arguing that lack of alternatives presented to corporation “[i]n the context of registration statutes” leads to involuntary decision that is inconsistent with due process).

129. See *Bors*, 208 F. Supp. 3d at 654 (differentiating between consent and contacts as bases for jurisdiction). The proposition in *Bors*, which allows for consent to stand separate and apart from a minimum contacts analysis, played out in *Allstate* to allow for jurisdiction over a corporate defendant without any inquiry into the number of relevant contacts. See *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, No. 5:18-CV-00699, 2018 WL 3707377, at *5 (E.D. Pa. Aug. 3, 2018) (finding jurisdiction properly exercised over defendant pursuant to Pennsylvania's registration provision). If an analysis of the contacts of the defendant was necessary, it would have required an exceptional case to establish that the corporation, incorporated in Delaware with its principal place of business in North Carolina and with only six Pennsylvania employees, would be amenable to general jurisdiction under the “at home” test. See Defendant's Motion to Dismiss at 6–7, *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, No. 5:18-cv-00699, 2018 WL 3707377, at *1 (E.D. Pa. Aug. 3, 2018). Thus, courts in Pennsylvania have largely interpreted *Daimler's* prohibition on the use of “continuous and systematic” contacts to be inapplicable where the basis of jurisdiction is consent-by-registration. See *Bors*, 208 F. Supp. 3d at 654–55 (limiting *Daimler's* prohibition on use of continuous and systematic contacts to contacts-based jurisdiction).

130. See *Bors*, 208 F. Supp. 3d at 654 (distinguishing sole use of continuous and systematic contacts from presence of consent that gives rise to jurisdiction). The court posits that the latter scenario does not run afoul of *Daimler's* prohibition on the use of continuous and systematic contacts. See *id.* at 654 (differentiating consent and contacts as bases of jurisdiction). This concern about conflation between minimum contacts and consent was specifically addressed by a district court for the District of New Jersey. See *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 179 (D.N.J. 2016) (correcting previous decision that conflated consent and contacts). In *Display Works*, the court addressed a pre-*Daimler* decision in the District of New Jersey in which the court announced that “[f]iling a certificate to do business in New Jersey [is] insufficient to establish general jurisdiction, absent evidence that [defendant] was *actually* doing business.” See *id.* (citing *Kubin v. Orange Lake Country Club, Inc.*, CIV.A. No. 10-1643 (FLW), 2010 WL 3981908, at *3 (D.N.J. Oct. 8, 2010)) (emphasis added) (describing reasoning of previous case to be corrected). *Display Works* disagreed with the requirement that there need be

Considering the theory that a due process discussion is unnecessary where the basis of jurisdiction is consent, the threshold issue of whether the consent itself is valid remains.¹³¹ As *Gorton* stated, “a corporation may freely agree to be subject to personal jurisdiction in other states – so long as that consent is *knowing* and *voluntary*”¹³² Nevertheless, commentators argue that even in the face of an explicit statute, consent-by-registration lacks voluntariness.¹³³ For these commentators, the take-it-or-leave-it decision that corporations are forced to make acts as a coercive force that thwarts the notion of voluntary consent.¹³⁴

Nevertheless, the choice between doing business and registering, not doing business at all, or doing business without registering and subjecting the company to the relevant fines *is* a choice, as another commentator argues.¹³⁵ Further, very few states interpret their registration statutes to

evidence of actual business conducted. *See id.* (noting a conflation of contacts and consent). The court recounted the Third Circuit’s decision in *Bane*, which relied solely on the registration of the corporation and did not consider its contacts with the state. *See id.* (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991)) (pointing to *Bane*’s sole reliance on consent). In declining to conflate minimum contacts and consent, the court stated “[t]he proposition that consent depends on business contacts therefore cannot be attributed to *Bane* or its progeny.” *Id.* (footnote omitted) (distinguishing clearly between contacts and consent bases for jurisdiction).

131. *See* *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, 2018 WL 3025283, at *6 (Pa. Ct. Com. Pl. May 30, 2018) (analyzing the validity of registration as a form of consent); Monestier, *supra* note 10, at 1379 (asserting validity of registration as a form of consent must be analyzed). Both the *Mallory* case and the commentator looked at whether the consent itself was validly given. *See, e.g.*, Monestier, *supra* note 10, at 1379–80 (noting courts often miss this step in the analysis). As one commentator characterizes the issue, “[c]alling registration consent does not *actually* make it consent.” *See id.* at 1379 (reinforcing need for analysis of registration as a form of consent).

132. *See* *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 295 (M.D. Pa. 2018) (emphasis in original) (internal citation and quotation marks omitted) (stating the requirements for valid consent). *Gorton* heavily addresses the issue of “knowing” consent, and implies that the consent had been legitimately voluntary. *See id.* at 297 (relying on Pennsylvania’s explicit statute in finding consent was knowingly given via registration).

133. *See* Monestier, *supra* note 10, at 1389–90 (arguing businesses do not have a voluntary choice to register); *see also* Sanders, *supra* note 127, at 111 (agreeing that act of registration is involuntary given lack of options).

134. *See* Monestier, *supra* note 10, at 1389–90 (asserting registration is not a choice). One commentator focused specifically on the lack of alternatives in deciding that the consent was involuntary. *See id.* (noting, in a globalized economy, nonregistration is hardly an option). The commentator suggests that a corporation that wishes to do business in a state only has three options: (1) register and thereby consent to jurisdiction, (2) refrain from doing business in the state, or (3) do business without registering and face the penalties associated with such action. *See id.* at 1390 (explaining the list of alternatives available to a business).

135. *See* Chase, *supra* note 93, at 180–81 (stating choice between doing business and registering, doing business and not registering, and refraining from doing business is still choice nonetheless).

confer general jurisdiction over registrants.¹³⁶ Although the choice of whether to do business in the state may prove difficult for a national corporation with a large presence, a choice exists nonetheless.¹³⁷

Beyond the requirement of voluntariness, consent must also be knowing.¹³⁸ *Gorton* remarked on this explicitly, stating it is uncertain whether a statute that lacked the same statutory language as Pennsylvania's would be able to claim that it provides adequate notice.¹³⁹ Notwithstanding, the court in *Acorda Therapeutics* determined that where a registration statute "has long and unambiguously been interpreted as constituting consent to general jurisdiction," the registrant business "[has] no uncertainty as to the jurisdictional consequences of its actions."¹⁴⁰ At least one commentator argues that *Pennsylvania Fire* eliminated the need for actual notice for consent.¹⁴¹ In support, the commentator points to the onus that *Pennsylvania Fire* placed on the defendant corporation in anticipating where it may be sued as a result of its choice to register.¹⁴² Taking the opposite

136. *See id.* at 181 (noting low adoption of consent-by-registration statutes). This idea shows that a corporation is not, as one commentator suggested, precluded from doing business in the United States at all if they wish to remain free from general jurisdiction. *See Monestier, supra* note 10, at 1390 (positing widespread preclusion from business if corporations wanted to avoid jurisdiction).

137. *See Chase, supra* note 93, at 181 (arguing that businesses do have a choice to register). The argument that a choice exists is the opposite of that made by the court in *Mallory*. *See Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, 2018 WL 3025283, at *7 (Pa. Ct. Com. Pl. May 30, 2018) (determining no choice existed for corporations when it came to registration). Even though *Mallory* noted the choice that businesses have, the court still determined that the requirement of registration as a pre-requisite to doing business in the state made it an involuntary action. *See id.* (describing alternatives, but finding nonetheless that registration is involuntary).

138. *See Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 295 (M.D. Pa. 2018) (defining valid consent as knowing and voluntary).

139. *See id.* at 297 (relying on the explicit notice provided by Pennsylvania's statute). The court repeated multiple times that, in the absence of *explicit* language, "qualifying as a foreign corporation in a state is not a sufficient basis upon which to conclude that a corporation is 'at home' in the state." *Id.* at 298. This implies the importance of notice to the validity of the consent. *See id.* at 297–98 (noting a nonexplicit statute would likely fail to confer valid jurisdiction).

140. *See Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 591 (D. Del. 2015) (finding consent-based jurisdiction provides some certainty as to possible forums for suit). For concerns that arise from conflating this type of notice with actual notice, see *infra* notes 177–85.

141. *See Chase, supra* note 93, at 198 (recounting *Pennsylvania Fire* allowed for exercise of jurisdiction where there was no explicit statutory notice to that effect (citing *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917))).

142. *See id.* (citing *Pennsylvania Fire*, 243 U.S. at 96) (stating onus is on defendant in "anticipating the effects of its registration . . ."). As the court in *Pennsylvania Fire* stated, the insurer had appointed "an agent in language that rationally might be held to go to that length." *See Pennsylvania Fire*, 243 U.S. at 95 (reinforcing duty of defendant to understand consequences of registration statute language). As argued later in this Comment, this notion that jurisdiction may take a defendant "by surprise" does not comport with the Supreme Court's later jurispru-

position, another commentator submits that even if each jurisdiction provided explicit statutory notice to each registrant, the exercise of jurisdiction is inconsistent with due process.¹⁴³

Despite the argument that due process concerns need not be evaluated where valid consent is found, there are commentators and courts that analyzed notice as a due process issue and invalidated consent-by-registration on those grounds.¹⁴⁴ For example, the court in *Display Works, LLC v. Bartley*¹⁴⁵ explicitly held that a consent-by-registration scheme may be held invalid on the basis of lacking notice.¹⁴⁶ Further, at least one commentator refers to the issue of notice as a “due process concern” rather than as a part of the consent analysis.¹⁴⁷

IV. “I’LL GET YOU MY PRETTIES”: HOW A CONSENT-BY-REGISTRATION SCHEME CAN SUCCESSFULLY ESTABLISH JURISDICTION OVER REGISTRANTS

This Comment argues that *Daimler* does not preclude consent-by-registration.¹⁴⁸ It further argues, consent-by-registration constitutes volun-

dence on jurisdiction. *Compare id.* (stating that it would make no difference even if jurisdiction “took the defendant by surprise”), *with* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (“[T]he Due Process Clause ‘gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit’” (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))).

143. *See* Chase, *supra* note 93, at 198 (discussing the due process consideration as it pertains to the voluntariness of the consent). For a discussion of the distinction between due process considerations that focus on the resulting jurisdiction and those that focus on the component pieces of valid consent, see *supra* note 128 and accompanying text.

144. *See* *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 179 (D.N.J. 2016) (“The [c]ourt holds that New Jersey’s registration and service statutes do not constitute consent to general jurisdiction because they do not contain express reference to any such terms.”); Chase, *supra* note 93, at 197 (“Another due process concern raised by commentators and courts is that corporations lack adequate notice that registration will subject them to general jurisdiction.”).

145. 182 F. Supp. 3d 166 (D.N.J. 2016).

146. *See* *Display Works*, 182 F. Supp. 3d at 179 (addressing lack of express reference to jurisdiction in statute as “because” reason for lack of consent-by-registration in the case).

147. *See* Chase, *supra* note 93, at 197 (describing notice as another due process concern to be considered). It is unclear here whether this commentator, like others, is using the phrase “due process concern” to address the concerns related to the resulting jurisdiction or to the component parts of adequate consent. *See id.* (failing to distinguish between the different applications of due process concerns). At least one case that the commentator cites to addressed the issue of notice as an independent concept, separate of the requirements for consent. *See id.* (citing *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016)) (addressing notice as a due process concern outside of the requirements for valid consent).

148. For a discussion of why *Daimler* does not preclude consent-by-registration, see *infra* notes 151–55 and accompanying text.

tary consent.¹⁴⁹ The issue that differentiates certain schemes from others is the issue of notice, and therefore, only those exercises of consent-by-registration that provide actual notice represent valid consent.¹⁵⁰

As a threshold matter, *Daimler* does not preclude general jurisdiction through consent.¹⁵¹ At least one court recognized large-scale changes, left undiscussed by *Daimler*, that would result from reading *Daimler* as eliminating consent.¹⁵² Therefore, the analysis assumes that consent remains a valid basis of obtaining jurisdiction after *Daimler*.¹⁵³ In keeping with the black letter law of consent-based jurisdiction, the presence of valid consent obviates the need for due process considerations to enter the calculus.¹⁵⁴ Thus, it must first be determined if registration is a valid form of consent.¹⁵⁵

A. *Consent-by-registration Meets the Voluntariness Requirement for Valid Consent*

Although commentators make spirited arguments against the voluntariness of consent-by-registration, evidence supports the conclusion that the

149. For a discussion of why consent-by-registration is voluntary consent, see *infra* notes 156–71 and accompanying text.

150. For a discussion of why consent-by-registration should require actual notice, see *infra* notes 172–85 and accompanying text.

151. See *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 589 (D. Del. 2015) (determining that *Daimler* has not precluded the practice of consent-by-registration); see also *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (finding *Daimler* did not eliminate consent-based jurisdiction). For a discussion of the rationales of these courts with respect to *Daimler* preclusion, see *supra* notes 108–12 and accompanying text.

152. See *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (“[T]he undersigned [j]udge does not believe that *Daimler* meant, *sub silentio*, to eliminate consent as a basis for jurisdiction.”). The court makes an interesting point regarding a rarely-discussed effect of reading *Daimler* to eliminate consent as a basis for jurisdiction. See *id.* (analyzing *Daimler*’s effect on consent as a basis of jurisdiction). It posits that, if *Daimler* did eliminate consent, the personal jurisdiction defense would be altered “from a waivable to a non-waivable right, a characteristic of the defense that was not before the *Daimler* Court and is not explicitly addressed in its opinion.” See *id.* (describing a major impact to personal jurisdiction that would result from reading *Daimler* as having eliminated consent-based jurisdiction).

153. For a more thorough discussion of the arguments related to *Daimler* and consent, see *supra* notes 108–17 and accompanying text.

154. See *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982) (stating consent obviates a need for due process considerations involving the resulting jurisdiction). Despite the urge of some courts to address due process concerns related to the resulting jurisdiction prior to addressing the validity of consent, the law is well settled that valid consent eliminates the need for a due process discussion regarding the resulting jurisdiction. See *id.* (describing the effect of consent on due process concerns).

155. See *Monestier*, *supra* note 10, at 1378–80 (asserting validity of the consent must be addressed prior to any analysis of due process concerns that result from the actual exercise of general jurisdiction).

options for corporations may not be as limited as they seem.¹⁵⁶ First, because businesses have the decision of registering to do business, not doing business in the state, or doing business in the state sans registration and subjecting themselves to the applicable fines, they have a voluntary choice before them.¹⁵⁷ These options are, in fact, “alternatives,” which are required for consent to be voluntary.¹⁵⁸ In addition, case law provides businesses with other alternatives to registering to do business in the state.¹⁵⁹ For example, in Pennsylvania, whether or not a corporation is deemed to be “doing business” is a question of fact to be determined by the fact finder.¹⁶⁰ Therefore, a corporation may conduct business-related activi-

156. *See id.* at 1379 (“Calling registration consent does not *actually make* it consent.”); *see also* Mallory v. Norfolk S. Ry. Co., No. 1961 802 EDA 2018, 2018 WL 3025283, at *6 (Pa. Ct. Com. Pl. May 30, 2018) (“A review of Pennsylvania’s statutory scheme belies [p]laintiff’s argument because [d]efendant’s consent to jurisdiction was not voluntary.”). The commentator makes two distinct arguments against the voluntariness of the registration. *See* Monestier, *supra* note 10, at 1389–90 (arguing registration is involuntary). The first involves a lack of alternatives that a corporation may choose if they are seeking to avoid amenability to suit. *See id.* at 1389 (asserting lack of choice as an argument against voluntariness). The second argument is the presence of registration statutes in all fifty states. *See id.* at 1390 (asserting widespread use of registration statutes as argument against voluntariness). According to the commentator, the fact that each state *may* exercise jurisdiction on the basis of registration further supports a lack of voluntary choice in the matter. *See id.* (concluding registration is involuntary). However, as this Comment argues, such a result can be remedied by adjustments to the notice requirement and will be accounted for by incentives that guard against mass adoption of consent-by-registration. For a discussion of the concerns surrounding mass adoption, *see infra* notes 162–71 and accompanying text.

157. *See* Monestier, *supra* note 10, at 1389 (noting alternatives do exist but finding them insufficiently voluntary). *But see* Chase, *supra* note 93, at 180 (noting, after all, choices of doing business with registration, doing business without registration, or not doing business at all are still choices).

158. *See* Monestier, *supra* note 10, at 1389 (requiring alternatives be present for consent to be voluntary). As another commentator has noted, there are alternatives in this decision. *See* Chase, *supra* note 93, at 180 (listing the alternatives available for corporations).

159. *See* Wenzel v. Morris Distrib. Co., 266 A.2d 662, 666–67 (Pa. 1970) (analyzing whether corporation was “doing business” in the state).

160. *See id.* at 666–67 (acknowledging that doing business is question of fact for a fact-finder); *see also* Univ. of Dominica v. Pa. Coll. of Podiatric Med., 446 A.2d 1339, 1341 (1982) (acknowledging that doing business is question of fact for a fact-finder). Both of these cases remark that whether a corporation is doing business is a “question of fact.” *See* Wenzel, 266 A.2d at 666 (“Whether a corporation is ‘doing business’ . . . is a matter of fact to be resolved on an Ad hoc or case-by-case basis.”); *see also* Univ. of Dominica, 446 A.2d 1339 (stating same test for whether corporation is doing business). In a counterfactual analyzed by the court, a corporation was able to avoid having to register to do business in the state by dealing through independent contractors. *See* Wenzel, 266 A.2d at 666–67 (noting corporations may conduct certain activities without necessarily doing business); *see also* 15 PA. CONS. AND STAT. ANN. § 403(a)(5) (West 2018) (enumerating different activities a corporation may take engage in that do not constitute doing business).

ties in the state without the requisite registration, representing yet another alternative.¹⁶¹

Furthermore, it is important to address the concern of mass adoption of consent-by-registration that scholars use to bolster arguments that consent-by-registration is involuntary.¹⁶² It is not the case that, because all fifty states maintain consent-by-registration statutes, a corporation can only really choose to not do business “*at all* in the United States.”¹⁶³ Despite the contention, only a handful of states have interpreted their registration statutes to confer consent over the registrant.¹⁶⁴ This fact, gleaned over 100 years since *Pennsylvania Fire’s* glowing endorsement of consent to jurisdiction, cuts harshly against arguments of widespread adoption.¹⁶⁵

While *Genuine Parts* signaled that a corporate-leading state such as Delaware might have a tide-changing impact on the landscape of consent-by-registration in the nation, the court remarked on facts that cut against widespread adoption of the practice.¹⁶⁶ This argument often begins with the premise that *Daimler* sought to limit the scope of general jurisdiction by stating that “continuous and systematic” contacts were not sufficient for general jurisdiction.¹⁶⁷ It then posits that widespread use of consent-by-registration would lead “to an ‘unacceptably grasping’ and ‘exorbitant’ ex-

161. See *Wenzel*, 266 A.2d at 666 (noting alternatives exist to the binary “doing business” or not doing business choice).

162. See *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142–43 (Del. 2016) (expressing concern that if Delaware were to act in favor of consent-by-registration that other jurisdictions would soon follow); Monestier, *supra* note 10, at 1390 (“Since all fifty states have the same laws requiring registration, this ‘option’ really amounts to a corporation simply not doing business *at all* in the United States.”).

163. See Monestier, *supra* note 10, at 1390 (arguing widespread presence of registration statutes hampers business’ alternatives). The commentator addresses the counter-argument that very few of the fifty states have interpreted their registration statutes to confer general jurisdiction over the corporate defendant. See *id.* (noting small number of states that use registration to confer jurisdiction). Nonetheless, the commentator asserts that this is no consolation, as “all fifty states *could* constitutionally exercise it.” See *id.* (emphasis added) (asserting possibility of widespread registration jurisdiction is sufficient to warrant its involuntariness).

164. See Benish, *supra* note 102, at 1647 (noting only a handful of states have interpreted their registration statutes to confer jurisdiction).

165. See *id.* (noting low adoption rates of registration jurisdiction long after passing of case that allowed for it). For a discussion of *Pennsylvania Fire* and its endorsement of consent-based jurisdiction, see *supra* notes 34–36 and accompanying text.

166. See *Genuine Parts*, 137 A.3d at 142–43 (expressing concern that Delaware’s action may lead to widespread action in favor of consent-by-registration).

167. See *id.* at 136 (citing *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014)) (noting the limiting language from *Daimler*). But see *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 653 (E.D. Pa. 2016) (finding that *Daimler’s* prohibition on sole use of continuous and systematic contacts was limited to just that and “offered no guidance on acceptable criteria for jurisdiction by consent”) (citing *Pfizer Inc. v. Mylan Inc.*, No. 15–26-SLR-SRF, 2016 WL 1319700, at *10 (D. Del. Apr. 4, 2016)).

ercise of jurisdiction, [in]consistent with *Daimler's* teachings.”¹⁶⁸ Furthermore, the Delaware Supreme Court expressed concern that interpreting its statute to confer general jurisdiction essentially increases the cost of doing business in the state, such that a corporation may choose to do business elsewhere.¹⁶⁹ If this proposition is accepted as true, states that seek to maintain their business-friendly status will decline to interpret their statutes as requiring consent in an effort to retain business in that state, which effectively cuts against the notion of widespread use of the practice.¹⁷⁰ Given the alternatives available to corporations and the incentives that guard against broad-spectrum acceptance of consent-by-registration, consent-by-registration amounts to voluntary consent.¹⁷¹

B. *Valid Consent-by-registration Should Require Actual Statutory Notice*

In addition to being voluntary, consent must also be given knowingly.¹⁷² Foremost, the notice inquiry should not be conflated with the voluntariness inquiry.¹⁷³ It is not the case that absolutely no notice is re-

168. See *Genuine Parts*, 137 A.3d at 141 (discussing why registration jurisdiction is inconsistent with *Daimler*). The court in *Genuine Parts* noted that Delaware plays host to “a majority of the United States’ largest corporations” *Id.* at 143. There is a concern that “[s]uch an exercise of overreaching by Delaware will also encourage other states to do the same.” *Id.* at 142–43. The court fears that “‘grasping’ behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good.” *Id.* at 143. Despite these concerns, history shows that the continued validity of consent-by-registration has not led to the sort of grasping or sprawling view of jurisdiction that some cases predicted. See Benish, *supra* note 102, at 1647 (noting low adoption rates of registration jurisdiction). For a discussion on the current use of consent statutes nationwide, see *supra* notes 97–104 and accompanying text.

169. See *Genuine Parts*, 137 A.3d at 142 (discussing economic rationales for declining to adopt registration jurisdiction). This concern over raising the cost of doing business cuts against the concern that states will, by and large, interpret their registration statutes to confer general jurisdiction. See *id.* at 142–43 (“Such an exercise of overreaching by . . . Delaware may encourage other states to do the same.”). Beyond offering a counter-argument against widespread adoption, this reality also affirms the fact that there is indeed a choice that businesses can exercise when it comes to where they register to do business. See *id.* (stating business may choose to do business elsewhere if registration constitutes jurisdiction).

170. See *id.* at 142 (discussing cost of doing business as driver for corporate action).

171. See *Wenzel v. Morris Distrib. Co.*, 266 A.2d 662, 666–67 (Pa. 1970) (discussing how corporation may engage in certain corporate activities without triggering need to register to do business); see also *Genuine Parts*, 137 A.3d at 142 (discussing incentives that point away from mass adoption including raising of cost of doing business that would result from upholding consent-by-registration); Chase, *supra* note 93, at 180 (discussing alternatives that exists for corporations when faced with decision of where to do business).

172. See *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 295 (M.D. Pa. 2018) (noting that valid consent is both voluntary and knowingly given).

173. See *Monestier*, *supra* note 10, at 1389 (rejecting consent-by-registration nearly entirely on voluntariness grounds). After asserting that no amount of notice can salvage the practice of consent-by-registration, the commentator relies on an argument of involuntariness to support the assertion. See *id.* at 1389–90 (declin-

quired for consent in this manner to be given knowingly.¹⁷⁴ Rather, actual statutory notice should be required for consent-by-registration to be deemed knowing consent consistent with general jurisdiction requirements.¹⁷⁵

The scholarly body that argues for consent-by-registration's validity without statutory notice finds backing in district court opinions.¹⁷⁶ Namely, in *Acorda Therapeutics*, the court determined that the statute's interpretation satisfies knowing consent, given that the interpretation was longstanding and unambiguous.¹⁷⁷ There is one major issue with considering judicial interpretation of a statute to satisfy the notice necessary to validate consent: the preservation of defendants' ability to structure their conduct to avoid suit.¹⁷⁸

From early on in the Supreme Court's personal jurisdiction jurisprudence, there is a well-recognized concern about the ability of defendants to structure their conduct such that they may know where they are and are not amenable to suit.¹⁷⁹ Even the court in *Acorda Therapeutics* noted the importance that a registrant "have no uncertainty as to the jurisdictional

ing to discuss notice in depth after determining involuntariness). As such, the critique that no amount of notice can salvage the scheme fails to address the notice issue outside of the confines of the voluntariness issue. *See id.* at 1389 (passing on issue of notice insofar as involuntariness decides the question).

174. *See Chase, supra* note 93, at 197–98 (asserting *Pennsylvania Fire* abdicates the need for actual notice of consent within a registration statute (citing *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917))).

175. For arguments regarding the proper notice required, see *infra* notes 176–85 and accompanying text.

176. *Compare Chase, supra* note 93, at 198 (requiring no statutory notice for valid consent-by-registration scheme), *with Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 591 (D. Del. 2015) (finding that registration statute, absent explicit notice, can still confer general jurisdiction where it has been "long and unambiguously" interpreted to do so).

177. *See Acorda Therapeutics*, 78 F. Supp. 3d at 591 (determining judicial interpretation of statute can qualify as notice). Although it used the terminology "long and unambiguously," the court did not set any temporal limits as to how long the statute must have been interpreted in that manner, nor how courts should attempt to square the initial interpretive case with the import that the interpretation be longstanding. *See id.* (failing to explain how to apply interpretation test to future cases).

178. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) ("[T]he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit'").

179. *See Kulko v. Superior Court of Cal.*, 436 U.S. 84, 97–98 (1978) ("[W]e therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] court'" (citing *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977))); *Burger King*, 471 U.S. at 472 (noting importance of corporation's ability to structure conduct to avoid suit).

consequences of its actions.”¹⁸⁰ While this may be true in Delaware where the interpretation dates back to 1988, the same cannot be true for the practice of consent-by-registration as a whole.¹⁸¹ For example, consider a state that has not yet interpreted its registration statute to confer consent; there is no longstanding judicial interpretation to rely on, nor is there any explicit statutory language that confers jurisdiction beyond the standard appointment of an agent for service of process.¹⁸² If the status of a state’s registration statute can be amended through judicial interpretation, corporations lose the ability to structure their conduct, becoming beholden to the new interpretation in an instant.¹⁸³

180. See *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (noting consent provides certainty as to jurisdiction). While this may be true in Pennsylvania, there is an argument to be made that this is not true in Delaware or New Jersey, as their statutory provisions do not provide any explicit notice of the consequences of registration. See *id.* (discussing certainty but providing little guidance regarding what constitutes certainty in registration as consent); *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 470 (D.N.J. 2015) (interpreting statute, for first time, to confer jurisdiction). Furthermore, *Acorda Therapeutics* used this point as a counter-argument against the notion that consent-by-registration did not afford defendants the opportunity to structure their conduct. See *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (stating consent-by-registration provides more jurisdictional certainty than a contacts-based inquiry).

181. See Benish, *supra* note 102, at 1647 (noting majority of states have not interpreted their statutes in one direction (jurisdiction conferring) or the other (benign)). Requiring only judicial interpretation in lieu of explicit statutory provisions in these states would lead to jurisdiction where there is no longstanding interpretation of the statute to mean such. See, e.g., *Otsuka*, 106 F. Supp. 3d at 470 (deciding, in 2015, that New Jersey’s registration statute should be interpreted to establish general jurisdiction over registrants).

182. See Benish, *supra* note 102, at 1647 (noting large number of statutes without interpretation). While this presents a problem for those states in which the registration statute has not been interpreted either way, the problem is also a reality for those states like Delaware where the interpretation is inconsistent among courts. See *Acorda Therapeutics*, 78 F. Supp. 3d at 591 (interpreting Delaware’s registration statute to confer general jurisdiction over registrants). But see *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556–57 (D. Del. 2014) (interpreting same statute as lacking power to confer jurisdiction); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016) (interpreting same statute as lacking power to confer jurisdiction). Where the interpretation is under debate, corporations continue to be deprived of the ability to effectively structure their conduct to avoid suit. See *Burger King*, 471 U.S. at 472 (describing the importance of a corporation’s ability to structure its conduct).

183. See *Burger King*, 471 U.S. at 472 (stating importance of defendant’s ability to structure its conduct to avoid suit). One commentator has argued that *Pennsylvania Fire* forecloses any argument that actual notice is required. See Chase, *supra* note 93, at 198 (arguing no notice is required for consent jurisdiction). Nonetheless, *Pennsylvania Fire* must be interpreted in light of those cases that have followed it. See, e.g., *Burger King*, 471 U.S. at 472 (discussing the importance of a corporation’s ability to structure its conduct with respect to jurisdiction). Since the decision in *Pennsylvania Fire*, the Supreme Court, in some of the most important jurisdiction cases to date, has shown a strong preference for the preservation of the ability of corporate defendants to structure their conduct such that they may be able to reasonably anticipate where they can be hauled into court. See, e.g., *id.* (illustrating need for jurisdictional predictability).

Where the legislative process is the vehicle for changing the registration statute through the addition of explicit jurisdiction-conferring language, both the length and deliberate nature of the process afford corporations time to situate their affairs in order to avoid jurisdiction in that forum.¹⁸⁴ Therefore, in order for a consent-by-registration scheme to meet the requirements for valid consent, the registration statute or other jurisdiction-conferring statute of the state must provide, in explicit terms, that registration as a corporation under the laws of the state amounts to consent to general jurisdiction in that forum.¹⁸⁵

V. THE MAN BEHIND THE CURTAIN: THE IMPACT OF CONSENT-BY-REGISTRATION WITHIN THE THIRD CIRCUIT

On its face, the argument that consent-by-registration requires actual notice would leave one scheme intact and would require legislative action to remedy the other two.¹⁸⁶ Pennsylvania's scheme meets the two requirements; it is volitional and provides actual notice.¹⁸⁷ Therefore, the Third Circuit should find that Pennsylvania's consent-by-registration scheme is valid.¹⁸⁸

However, the practice of consent-by-registration in both New Jersey and Delaware is does not meet the standards I argue are required for valid-

184. See, e.g., 42 PA. CONS. AND STAT. ANN. § 5301 (West 2018) (representing an explicit jurisdiction-conferring registration statute passed through the democratic process). *But see* Otsuka Pharm. Co. v. Mylan, Inc., 106 F. Supp. 3d 456, 470 (D.N.J. 2015) (representing a nonexplicit registration statute that was judicially interpreted to confer jurisdiction.). *Otsuka* is evidence that a statute's interpretation can change overnight, which scarcely affords corporations an opportunity to structure their conduct so as to avoid suit. See *id.* (interpreting a statute without jurisdictional consequences as now having jurisdictional consequences).

185. See, e.g., § 5301 (providing, in jurisdictional terms, the consequences of registering to do business in Pennsylvania).

186. Compare *id.* (explicitly stating registration confers jurisdiction), with DEL. CODE. ANN. tit. 8 § 376(a) (West 2018) (lacking any jurisdictional language), and N.J. STAT. ANN. § 14A:4-1 (West 2018) (lacking any jurisdictional language). The registration statutes nor long arm statutes of neither Delaware nor New Jersey contain explicit language that would put a corporation on notice that its registration amounts to consent to general jurisdiction. See § 376(a) (lacking language that may be read to confer jurisdiction via consent); § 14A:4-1 (lacking similar language). Pennsylvania, on the other hand, does explicitly state in its long-arm statute that such registration amounts to conferral of general jurisdiction. See § 5301 (stating registration constitutes consent to suit and therefore jurisdiction).

187. See § 5301 (stating explicitly the consequences of registration). For a discussion of the voluntariness of consent-by-registration, see *supra* notes 156–71 and accompanying text.

188. See *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 295 (M.D. Pa. 2018) (requiring that consent be given knowingly and voluntarily); see also *Monestier*, *supra* note 10, at 1379 (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982)) (stating due process concerns need not be addressed where basis of jurisdiction is valid consent).

ity.¹⁸⁹ While both schemes are arguably voluntary like Pennsylvania's, the lynchpin is notice.¹⁹⁰ New Jersey presents an easy case, as its registration statute did not gain the interpretation of conferring general jurisdiction until 2015.¹⁹¹ This overnight shift, from a statute that does not confer jurisdiction to one that does, deprives defendants of the ability to structure their conduct such that they may avoid suit in the forum.¹⁹² Practically, a business that was previously safe from a forum's jurisdiction would open its doors on Monday to find it can suddenly be hauled into court in a jurisdiction in which it sought to avoid suit.¹⁹³

Although Delaware's statute enjoys a longer history of interpretation stemming from 1988, that fact provides little solace.¹⁹⁴ As the state of the case law in Delaware shows, the interpretation of its registration statute remains unsettled.¹⁹⁵ The Supreme Court of Delaware remains in disagreement with some District Courts for the District of Delaware.¹⁹⁶ The ever-changing interpretation of the statute can be remedied by simply requiring that any consent-by-registration scheme provide explicit statutory

189. For a discussion of why actual notice should be required, see *supra* notes 175–85 and accompanying text.

190. For a discussion of why actual notice should be required, see *supra* notes 175–85 and accompanying text.

191. See *Otsuka Pharm. Co. v. Mylan, Inc.*, 106 F. Supp. 3d 456, 470 (D.N.J. 2015) (interpreting New Jersey's statute as conferring jurisdiction in 2015). Although *Acorda Therapeutics* seemed to require a "longstanding" interpretation of a registration statute to confer general jurisdiction, the court in *Otsuka* did not consider such a requirement when it decided that New Jersey's statute could be read to confer general jurisdiction over registrants in 2015. Compare *id.* (being first case to determine interpretation of registration statute for state), with *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 587 (D. Del. 2015) (using 1988 Supreme Court of Delaware case as basis for longstanding interpretation).

192. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (noting importance of jurisdictional predictability). For a discussion on the importance of the defendant's ability to structure their conduct to avoid suit, see *supra* notes 179–85.

193. See, e.g., *Otsuka Pharm. Co.*, 106 F. Supp. 3d at 470 (changing the interpretation of New Jersey's registration statute long after its enactment).

194. See *Sternberg v. O'Neil*, 550 A.2d 1105, 1116 (Del. 1988) (interpreting Delaware's registration statute to confer general jurisdiction over registrants).

195. Compare *Acorda Therapeutics*, 72 F. Supp. 3d 591 (noting Delaware's registration statute establishes general jurisdiction), with *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 147 (Del. 2016) (holding opposite of *Acorda Therapeutics*), and *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 557 (D. Del. 2014) (holding opposite of *Acorda Therapeutics*). From 2014 through 2016, the interpretation of Delaware's registration statutes has changed three times. See *supra* notes 44–48, 72–76, and 85–89 (describing the alternating interpretations of Delaware's statute). The changing interpretation leaves corporations without the opportunity to effectively structure their conduct to avoid jurisdiction where they so choose. See *supra* note 179 (describing the importance of a corporation's ability to structure their activities to avoid suit).

196. See *Acorda Therapeutics*, 72 F. Supp. 3d 591 (interpreting Delaware's registration statute in 2014 to establish general jurisdiction over registrants). But see *Genuine Parts*, 137 A.3d at 147 (interpreting Delaware's registration statute, after *Acorda Therapeutics*, as not establishing general jurisdiction over registrants).

notice of the effects of registration.¹⁹⁷ Therefore, the Third Circuit should find that registration under both Delaware's and New Jersey's statutes do not amount to valid consent because the provisions lack actual notice.¹⁹⁸

As mentioned earlier, where consent is invalid, one cannot avoid addressing due process concerns.¹⁹⁹ If the "consent" offered through the registration process is invalid on the basis of it being made unknowingly, the only other way to characterize registration-based jurisdiction is to posit that general jurisdiction is being exercised over the defendant corporations solely by virtue of their having registered to do business in the state.²⁰⁰ Registering to do business falls far below the "at home" requirement set forth in *Daimler* and even falls far short of *Daimler's* prohibition on the sole use of "continuous and systematic" contacts.²⁰¹ Therefore, having determined that the schemes in New Jersey and Delaware do not amount to valid consent, the two schemes subsequently fail to meet the one of the basic due process requirements necessary for the exercise of contacts-based general jurisdiction.²⁰² As such, the exercise of general jurisdiction in New Jersey and Delaware under the consent-by-registration theory does not meet the requirements of valid consent-based jurisdiction.²⁰³ In the spirit of offering solutions that engage the democratic process, both New Jersey and Delaware could remedy the deficiencies in their respective consent-by-registration schemes by amending their business registration statutes or long arm statutes to explicitly state that registration confers jurisdiction over registrants.²⁰⁴

197. See, e.g., *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 297 (M.D. Pa. 2018) (eliding importance of Pennsylvania's explicit statute in validly conferring general jurisdiction over registrants).

198. For a discussion on the voluntariness of consent-by-registration and why actual notice should be required, see *supra* notes 156–85 and accompanying text.

199. See Monestier, *supra* note 10, at 1378 (stating that where there is valid consent is basis for jurisdiction, no due process analysis is required).

200. See, e.g., *AstraZeneca*, 72 F. Supp. 3d at 556 (suggesting a contacts-based view of registration jurisdiction). In not addressing the validity of consent, *AstraZeneca* looked at the practice from the standpoint that it was allowing the exercise of general jurisdiction where all that existed was a registration to do business. See *id.* (applying *Daimler's* prohibition on use of continuous and systematic contacts to registration jurisdiction).

201. See *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014) (prohibiting exercise of contacts-based general jurisdiction on nothing more than continuous and systematic contacts). If *Daimler* prohibited the use of continuous and systematic contacts alone as a basis for general jurisdiction, it reasonably follows that registration to do business would not be a permissible basis for contacts-based jurisdiction under *Daimler*. See *id.* (requiring a corporation to be "at home" in the forum state).

202. For a discussion of the requirements for valid consent-by-registration jurisdiction, see *supra* notes 156–85 and accompanying text.

203. For a discussion of the requirements for valid consent-by-registration jurisdiction, see *supra* notes 156–85 and accompanying text.

204. For a discussion of why actual notice is necessary, see *supra* notes 172–185 and accompanying text.