The Dormant Commerce Clause As a Limit on Personal Jurisdiction

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ABSTRACT: For over 70 years, the Due Process Clause has defined the law of personal jurisdiction. This makes sense, because being forced to stand trial in a far-off state will sometimes be fundamentally unfair. What does not make sense, however, is the Dormant Commerce Clause's apparent irrelevance to personal jurisdiction. The Dormant Commerce Clause addresses state laws affecting interstate commerce, and a plaintiff's choice of forum is often a commercially driven choice between different state courts. So why isn't the Dormant Commerce Clause part of personal jurisdiction doctrine?

This Article makes the case for its relevance, and demonstrates how the Dormant Commerce Clause can resolve a new and vexing personal jurisdiction issue. Since the Supreme Court's 2014 decision in Daimler AG v. Bauman*—a personal jurisdiction case that significantly curtailed options for forum shoppers—plaintiffs across the country have been attempting to establish jurisdiction using a company's registration to do business in a state, even when the suit has nothing to do with the company's business there. Focusing solely on the Due Process Clause, courts across the country have split on the issue. The Dormant Commerce Clause, however, presents a clear answer.*

This Article offers the first comprehensive analysis of how the Dormant Commerce Clause impacts personal jurisdiction. It argues that jurisdiction based on a company's registration to do business violates the Dormant Commerce Clause—but only in cases where the lawsuit has no connection to the forum. It also demonstrates how personal jurisdiction comports with the Dormant Commerce Clause in most situations deemed constitutional under the Due Process Clause. In certain general jurisdiction cases (to the extent any remain after Daimler*) and transient jurisdiction cases, however, this Article argues that the Dormant Commerce Clause renders personal jurisdiction unconstitutional.*

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I. INTRODUCTION

Have you ever been to a "judicial hellhole?"[1] It is a place where judges hate summary judgment, and juries love to give money to old ladies burned by hot coffee. Or at least that is what the defense bar will tell you. The plaintiffs' bar will tell you that these dens of iniquity are actually safe havens—places where the little guy can fight a big corporation that forgot to put a safety shield in front of a spinning blade. Whether hellhole or haven, there is one issue that both sides can agree on: forum matters.

Because forum matters, plaintiffs understandably search for the most advantageous forum in which to bring their suit. A major factor in forum selection is the law of personal jurisdiction, a body of law based in large part on the Fourteenth Amendment's Due Process Clause.[2] The Due Process Clause means many things, but at a minimum, it guarantees litigants the freedom from random or irregular adjudication.[3] In the context of personal jurisdiction, this means that defendants may not be hauled into court in a far-off state simply because a plaintiff has chosen to sue them there. In the Supreme Court's opinion, a judicial system in which a plaintiff has unfettered discretion to file suit in dozens of different states, many of them thousands of miles away, is not an orderly system of law.[4]

Even though the Due Process Clause is an essential component of personal jurisdiction law, it is odd that it seems to be the *only* component. To the extent that a state's personal jurisdiction law discourages companies from doing business in a state (and thus subjecting themselves to jurisdiction there), the Dormant Commerce Clause—which renders unconstitutional state laws that discourage outsiders from engaging in commerce in a particular state—should have much to say about personal jurisdiction. Indeed, in the first part of the 20th century, courts routinely applied the Dormant Commerce Clause to limit state assertions of personal jurisdiction.[5]

After standing in the background for so long, it is high time for the Dormant Commerce Clause to step forward. In recent years, the Supreme

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1. For a list of the leading "hellholes," see JUDICIAL HELLHOLES, http://www.judicialhellholes.org (last visited September 16, 2016).

2. U.S. CONST. amend. XIV.

3. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that a court's assertion of authority over a party must comport with "traditional notions of fair play and substantial justice" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

4. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (explaining that the 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").

5. *See, e.g.*, Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284, 287 (1932); Michigan Cent. R.R. Co. v. Mix, 278 U.S. 492, 495 (1929); Davis v. Farmers' Co-Op. Equity Co., 262 U.S. 312, 315 (1923); Panstwowe Zaklady Graviozne v. Auto. Ins. Co., 36 F.2d 504, 506 (S.D.N.Y. 1928).

Court has issued a spate of major personal jurisdiction decisions.[6] These decisions have set off a wave of commentary in the legal academy,[7] but the questions raised by these new cases are not simply academic. At present, jurists across the country are wrestling with a new and vexing issue of personal jurisdiction: whether a company's registration to do business in a state amounts to consent to personal jurisdiction in that state.[8] What no scholar or jurist has recognized, however, is that the Dormant Commerce Clause clarifies modern personal jurisdiction law in a way that the Due Process Clause, on its own, cannot.

This Article offers the first comprehensive analysis[9] of how the Dormant Commerce Clause restricts state courts' assertion of personal jurisdiction.[10] Part II provides an overview of personal jurisdiction law and a summary of the current debate over whether registration to do business can, on its own, support personal jurisdiction. Part III explores the dictates of the Dormant

6. *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1121–22 (2014) (holding that a defendant must purposefully establish contacts with the forum state itself, not simply with a plaintiff who is a domiciliary of the forum state); Daimler AG v. Bauman, 134 S. Ct. 746, 750 (2014) (holding that general jurisdiction is unavailable in a state if such jurisdiction would "presumably be available in every other State in which [the defendant's] sales are sizable"); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (holding that general jurisdiction only exists where "affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State" (quoting *Int'l Shoe*, 326 U.S. at 317)); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (holding that placing an item into the "stream of commerce," without more, does not subject a defendant to jurisdiction in a state).

7. *See generally, e.g.*, Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385 (2015); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245 (2014); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015); John T. Parry, *Rethinking Personal Jurisdiction After* Bauman *and* Walden, 19 LEWIS & CLARK L. REV. 607 (2015); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387 (2012); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207 (2014); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014); Kevin D. Benish, Note, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction after* Daimler AG v. Bauman, 90 NYU L. REV. 1609 (2015); George Rutherglen, *Reconceiving Personal Jurisdiction: Sovereignty, Authority, and Individual Rights* (Virginia Public Law and Legal Theory Research Paper No. 13, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564300.

8. *Compare* Senju Pharm. Co. v. Metrics, Inc., 96 F. Supp. 3d 428, 440–43 (D.N.J. 2015) (holding that a company's registration to do business in a state signifies the company's consent to jurisdiction for any and all claims), *with* Brown v. CBS Corp., 19 F. Supp. 3d 390, 397–400 (D. Conn. 2014) (holding registration to do business in a state insufficient, on its own, to support personal jurisdiction). *See also infra* notes 46–50.

9. Scholars have periodically considered whether the Dormant Commerce Clause should play a role in personal jurisdiction. *See infra* note 61 (collecting sources). No scholar, however, has performed a full-scale analysis of the issue.

10. This Article only addresses personal jurisdiction in state courts. Federal courts, which are not bound by the Dormant Commerce Clause, would not be constitutionally bound to adhere to this Article's conclusions. Nonetheless, to the extent federal courts are statutorily required to obey the personal jurisdiction doctrine of state courts, see FED. R. CIV. P. 4(k)(1)(A)–(B), the Dormant Commerce Clause's limitations on personal jurisdiction would also apply in federal court.

Commerce Clause and how they resolve the registration question. It argues that the Dormant Commerce Clause prohibits a state from subjecting a defendant to jurisdiction based on registration, but only where the lawsuit lacks any connection to the forum state. Personal jurisdiction is unconstitutional in these situations because it impermissibly discriminates against interstate commerce[11] and imposes an impermissible burden on interstate commerce.[12] Registration laws discourage out-of-state companies from doing business in a particular state. This disincentive has the effect of protecting local businesses from outside competition—a phenomenon prohibited by the Dormant Commerce Clause unless the state has a sufficient local interest. Where the plaintiff resides in the forum state or the injury was suffered there, the state interest is significant enough to overcome the adverse effects on commerce. In contrast, where a nonresident is injured out of state—i.e., the plaintiff is a true forum shopper—the state interest is insufficient, and allowing jurisdiction in such situations violates the Dormant Commerce Clause. Part IV assesses the constitutionality of other accepted grounds for personal jurisdiction, concluding that personal jurisdiction based on domicile, minimum contacts, and other forms of consent are all constitutional. There are, however, two grounds for jurisdiction that are suspect. First, personal jurisdiction based on a company's extensive contacts with a state (to the extent such jurisdiction is still available[13]) is likely unconstitutional if invoked by a nonresident who suffered an injury out of state. Second, transient jurisdiction (jurisdiction based only on service of process) is likely unconstitutional in a narrow class of cases.[14]

In the end, this Article reinforces and partly modifies our judicial system's general disapproval of the boldest forms of forum shopping. Forum shopping is not per se wrong, and plaintiffs generally have wide latitude to

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11. *See* Granholm v. Heald, 544 U.S. 460, 472–76 (2005) (holding state tax unconstitutional because it discriminated against interstate commerce was not serving a legitimate state purpose in a narrowly tailored manner). For a description of the discrimination test under the Dormant Commerce Clause, see BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.05 (2016).

12. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529–30 (1959) (holding state law unconstitutional because it imposed a burden on interstate commerce that was not offset with a local benefit). For a description of the burden test under the Dormant Commerce Clause, see DENNING, *supra* note 11, § 6.06[A].

13. As explained in Part I, *Daimler AG v. Bauman* significantly narrowed the scope of general jurisdiction. It is clear, however, that such jurisdiction will still exist in "exceptional" cases. Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.19 (2014).

14. Such cases are those in which a plaintiff seeks transient jurisdiction over a defendant who is: (1) a natural person; (2) in a state in which neither the plaintiff nor defendant reside and which the defendant's activities did not give rise to the plaintiff's harm; and (3) in a state in which the defendant is plausibly present for the purpose of engaging in interstate commerce. *See infra* notes 206–08 and accompanying text.

choose the most advantageous forum possible.[15] Where the chosen forum lacks any connection with the lawsuit, however, our legal system has generally concluded that the fundamental fairness prohibits jurisdiction. The Due Process Clause has been used to achieve this result, but it sometimes falls short of the task. In these situations, the Dormant Commerce Clause can be used to ferret out impermissible forms of forum shopping. The result, on the whole, is a sturdier and more coherent body of law dealing with forum selection.

II. PERSONAL JURISDICTION AND THE NEW DEBATE OVER JURISDICTION-VIA-REGISTRATION

To see how the Dormant Commerce Clause impacts personal jurisdiction law, the first step is to lay out the contours of personal jurisdiction law itself. Subpart A outlines the contours of contemporary personal jurisdiction law, paying particular heed to *Daimler AG v. Bauman*—a recent Supreme Court case that significantly curtailed plaintiffs' choice of forum. Subpart B explores the judicial and scholarly responses to a question that has arisen in the wake of *Daimler*—whether a company's registration to do business in a state subjects it to personal jurisdiction, even where the claim does not arise from the company's activities in that state.

A. *PERSONAL JURISDICTION, BEFORE AND AFTER* DAIMLER

The Fourteenth Amendment's Due Process Clause establishes a right to be free from random justice. Random justice is justice by a roll of the dice or a spin of the wheel. Just as it would be ridiculous to determine guilt or innocence by chance, it would similarly be ridiculous to allow a plaintiff to spin a roulette wheel to send a case to Alaska involving a Florida car accident between two Florida residents. The law of personal jurisdiction—in the Supreme Court's view at least—gives our legal system a "degree of predictability."[16] It 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."[17]

The jurisdictions in which a defendant is most commonly sued are the states where the defendant is domiciled[18] and where the cause of action arose.[19] For a plaintiff intent on shopping for the ideal forum, this is not likely to yield a very good selection because it will often mean that a defendant is

15. *See generally* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999); *see also generally* Mary Garvey Algero, Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

16. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

17. *Id.*

18. Milliken v. Meyer, 311 U.S. 457, 462 (1940).

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

amenable to suit in only one state and very rarely more than three or four.[20] Plaintiffs can sometimes add a state to this list by serving the defendant while she is present in the plaintiff's preferred forum state,[21] but such "transient jurisdiction" is almost certainly unavailable against the most attractive defendants: corporations and other businesses.[22]

Until recently, plaintiffs suing large corporations had an additional and powerful option: they could bring suit anywhere the corporation conducted extensive business. For large companies, this could mean dozens of states across the country (as well as the District of Columbia and U.S. territories).[23] Often called "general jurisdiction"[24] or "doing business jurisdiction,"[25] the doctrine permitted plaintiffs to sue a defendant in any state in which it maintained "continuous and systematic general business contacts."[26] Plaintiffs could sue large corporations doing business throughout America in the state with the most plaintiff-friendly laws, regardless of where the cause of action arose. All of this changed, however, on January 14, 2014.

On that day, the Supreme Court issued its decision in *Daimler AG v. Bauman*.[27] The issue in *Daimler* was whether Daimler—the German parent company of Mercedes Benz USA—could be sued in California for harms

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20. Natural persons have a single domicile and corporate defendants typically have no more than two (the state of incorporation and state of the company's principle place of business). Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (2011). Causes of action usually arise in only a single state, but in some cases will touch multiple states. Thus, domicile and cause of action together often produce only a single state where personal jurisdiction can be established, and rarely more than three or four.

21. *See* Burnham v. Superior Court, 495 U.S. 604, 610–11 (1990).

22. Surprisingly, the Supreme Court has never definitively declared this to be the case. Nonetheless, Supreme Court precedent implies this and commentators agree. *See Int'l Shoe Co.*, 326 U.S. at 312, 320 (permitting personal jurisdiction where corporate agent was served with process in the forum state, only because the corporations contacts with the state were significant enough); Carol Rice Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1072 (2012) (explaining that personal jurisdiction over a corporation based only on service of process is "almost certainly is not a proper view"); Monestier, *supra* note 7, at 1374 ("Commentators are generally in agreement that this presence-based rationale for general jurisdiction over corporations is not justifiable."); *see also* Monestier, *supra* note 7, at 1373 (discussing cases). Regarding other types of business entities, the law appears less clear. At least one circuit, for example, permits transient jurisdiction over partnerships. *See* First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 18 (2d Cir. 1998). The analysis depends on whether the defendant is a small or closely held entity rather than a large entity with numerous agents capable of accepting service. With large entities, it is less likely that the entity would be present in every state where one of its agents is present.

23. *See generally* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

24. *See Helicopteros*, 466 U.S. at 414 n.9. The term "general jurisdiction" is thought to derive from Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–44 (1966).

25. *See generally* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171.

26. *Helicopteros*, 466 U.S. at 416.

27. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

allegedly committed in Argentina to Argentinian nationals.[28] Daimler could not be subject to personal jurisdiction in California based on its residency, service of process, or contacts with the state that gave rise to the alleged cause of action, and there was no suggestion that Daimler somehow consented to the court's jurisdiction. The *only* way to sue Daimler in California, therefore, was under the doctrine of general jurisdiction, if the company had engaged in extensive business within the state.[29]

The plaintiffs had a pretty good argument for general jurisdiction. California is practically teeming with shiny Mercedes cars. Indeed, as the plaintiffs demonstrated, the state accounts for 10% of Daimler's sales in the United States, and 2.4% of its worldwide sales.[30] If a plaintiff could sue Walmart in California for any claim, why not Daimler? The answer, in a surprise ruling from the Court, is that plaintiffs cannot sue *either* company in California using general jurisdiction.

The plaintiffs' chief error, according to the Court, was assuming that a corporation that maintains "continuous and systematic" contacts with a state is subject to general jurisdiction in that state.[31] The appropriate test is not simply whether the corporation's contacts are continuous and systematic, but whether they are "so 'continuous and systematic' as to render [it] *essentially at home in the forum State*."[32] If "continuous and systematic" is divorced from the "essentially at home" modifier, as the plaintiffs argued, then Daimler could presumably be sued "in every other State in which [its] sales are sizeable."[33] Such nationwide jurisdiction is at odds, the Court explained, with a fundamental purpose of personal jurisdiction law: to allow defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[34] The Court acknowledged that there might be situations in which a corporation could be

28. *Id.* at 751–52.

29. As *Daimler* illustrates, the doctrine of general jurisdiction has been particularly attractive to foreign plaintiffs suing companies with a significant presence in America. For further analysis of general jurisdiction as it relates to international forum shopping, see Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 77–79 (2013), and Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 497 (2011).

30. *Daimler*, 134 S. Ct. at 752. The Court sidestepped the issue of whether these sales were properly attributable to Daimler, given that it was only the parent company of Mercedes Benz USA, the corporation that actually made the sales. The Court assumed for the purpose of argument that the subsidiary's "contacts are imputable to Daimler" but yet still found "no basis" for subjecting "Daimler to general jurisdiction in California." *Id.* at 760.

31. *Id.* at 761.

32. *Id.* (emphasis added) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

33. *Id.*

34. *Id.* at 762 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

"essentially at home" in a state other than its state of incorporation or headquarters.[35] These situations, however, are "exceptional."[36]

Since *Daimler*, lower courts have quickly concluded that nationwide jurisdiction against large corporations is no longer available.[37] Scholars have likewise reached the same conclusion. As Professor Tanya Monestier explained, "[w]hat [*Daimler*] means, in practical terms, is that plaintiffs looking to sue corporate defendants will be severely circumscribed in their choice of forums."[38]

B. THE NEW FRONTIER OF JURISDICTION-VIA-REGISTRATION

When the Supreme Court shuts a door, clever litigants look for an open window. When the Supreme Court shut the door on general jurisdiction in *Daimler*, some plaintiffs found a window called "consent." What follows is a discussion of the consent arguments plaintiffs have been making, the judicial and scholarly responses to those arguments, and finally, the potential relevance of the Dormant Commerce Clause.

1. Arguing Consent After *Daimler*

The right to be free from jurisdiction in a particular state is a personal constitutional right. Just as a defendant can waive his right to be free from a police search by consenting to the search,[39] he can also waive his right to be free from jurisdiction by consenting to a court's power over him.[40] Defendants typically consent to a court's power by "agree[ing] in advance [via contract] to submit to the jurisdiction of a given court,"[41] or failing to "timely raise[] in the answer or a responsive pleading" the defense of lack of personal jurisdiction.[42] These types of consent are common enough, but they hardly expand the plaintiff's choice of forum. A contract with a choice-of-forum

35. *Id.* at 749 (quoting *Goodyear*, 564 U.S. at 919).

36. *Id.* at 761 n.19 (referring to Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).

37. *See, e.g.*, Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014) (stating that, after *Daimler*, it will be "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business"); Sonera Holding B.V. v. Çukurova Holding A.Ş., 750 F.3d 221, 226 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014) (*Daimler* makes it "clear that even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum." (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014))).

38. Monestier, *supra* note 7, at 1346.

39. Johnson v. Zerbst, 304 U.S. 458, 459 (1938).

40. Insurance Corp. of Ir., LTD. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

41. *Id.* at 704.

42. *Id.* Other, less common, types of consent include a stipulation of jurisdiction filed by a defendant, an agreement to arbitrate in a given state and a voluntary use of certain procedures in a court. *See id.* at 703–04.

clause actually limits a plaintiff's choice because it will almost always specify a *single* state in which suit must brought, not a list of 20 or 30 states in which suit may be brought. Similarly, a plaintiff can hardly shop for an advantageous forum if the viability of a suit in a given forum is dependent on the defendant overlooking the defense of personal jurisdiction and consenting.

Given these limitations, plaintiffs in the post-*Daimler* era have turned to another form of consent: registration to do business in a state.[43] "Every state has a registration statute that requires corporations doing business in the state to register with the state and appoint an agent for service of process,"[44] which means that corporations doing business throughout the country will have registered in a large number of states. Indeed, lots of large corporations will likely have registered to do business in *every* state and territory. According to the jurisdiction-via-registration argument, corporations willingly accept the possibility that they may be sued in any state where they have registered and appointed an agent to receive process. This acceptance of suit applies not just to suits arising from the corporation's activities in the state, but to any suit in which the corporation is a defendant—regardless of where or when it arises.

2. Judicial and Scholarly Assessments

The law pertaining to jurisdiction-via-registration is in its infancy, mainly because it was rarely needed in the pre-*Daimler* world. Now that the substantial business option is gone, courts have returned to their old cases on the topic and begun to apply them anew.[45] Courts were divided on the doctrine prior to *Daimler*, and now that it has been revived, the split continues today.

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43. Monestier, *supra* note 7, at 1358 ("Now that plaintiffs will have a much harder time establishing general jurisdiction over defendants in all but the most obvious of cases, a different ground of jurisdiction will most certainly take center stage: that of corporate registration." (footnote omitted)); *see also* Benish, *supra* note 7, at 1621 (noting that after *Daimler*, "[c]ourts are now looking to consent as a basis of general jurisdiction over foreign corporations" (footnote omitted)); Rhodes & Robertson, *supra* note 7, at 259–60 ("Given the constriction of general jurisdiction in [*Daimler*], the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look . . . is in a state registration filing that designates a corporate agent for service of process.").

44. Monestier, *supra* note 7, at 1363 (footnote omitted).

45. *See, e.g.*, Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) ("Not only does the mere act of registering an agent not create Learjet's general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter."); Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991) ("We need not decide whether authorization to do business in Pennsylvania is a 'continuous and systematic' contact with the Commonwealth . . . because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts."); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990) ("We conclude that appointment of an agent for service of process under [the Minnesota statute] gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state. Such consent is a valid basis of personal jurisdiction, and resort to minimum-contacts or due-process analysis to justify . . . jurisdiction is unnecessary."); Ratliff v. Cooper Labs., Inc., 444 F.2d

On one side of the post-*Daimler* split are cases like *Otsuka Pharmaceutical Co. v. Mylan, Inc.*[46] In *Otsuka*, the court stated plainly: "it cannot be genuinely disputed that consent, whether by registration or otherwise, remains a valid basis for personal jurisdiction following *International Shoe*. . . ."[47] On the other side are cases like *AstraZeneca AB v. Mylan Pharm., Inc.*[48] There, the court held that, because registration statutes exist in "[a] large number of states," "compliance with such statutes . . . would [thus] expose companies . . . to suit all over the country, a result specifically at odds with *Daimler*."[49] Numerous other courts have addressed the issue, some holding that jurisdiction-via-registration is permissible,[50] and others holding to the contrary.[51] There can be little doubt that the issue will reach the U.S. Supreme Court within the next several years.

Although courts are split about whether registration amounts to consent for the purposes of personal jurisdiction, scholars are in general agreement that registration should not be understood as consent. Some scholars argue that registration is not a true and knowing consent, especially given that the alleged consent would apply to "any and all disputes involving any and all plaintiffs," whether they arose before registration or decades after the date of

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745, 748 (4th Cir. 1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

46. Otsuka Pharm. Co. v. Mylan Inc., 106 F. Supp. 3d 456, 467 (D.N.J. 2015).

47. *Id.*

48. AstraZeneca AB v. Mylan Pharm., Inc., 72 F. Supp. 3d 549 (D. Del. 2014).

49. *Id.* at 556–57.

50. *See generally, e.g.*, Keeley v. Pfizer, Inc., No. 4:15CV00583 ERW, 2015 WL 3999488 (E.D. Mo. July 1, 2015); Perrigo Co. v. Merial Ltd., No. 8:14–CV–403, 2015 WL 1538088 (D. Neb. Apr. 7, 2015); Novartis Pharm. Corp. v. Mylan Inc., No. 14–777–RGA, No. 14–820–RGA, 2015 WL 1246285 (D. Del. Mar. 16, 2015); Forest Labs., Inc. v. Amneal Pharm. LLC, No. 14–508–LPS, 2015 WL 880599 (D. Del. Feb. 26, 2015); Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., No. 14–935–LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015); Senju Pharm. v. Metrics, Inc., 96 F. Supp. 3d 428 (D.N.J. 2015); Beach v. Citigroup Alt. Invests. LLC, No. 12 Civ. 7717(PKC), 2014 WL 904650, (S.D.N.Y. Mar. 7, 2014); Hudson v. Int'l Paper Co. (*In re* Asbestos Litig.), No. N14C–03–247 ASB, 2015 WL 5016493 (Del. Super. Ct. Aug. 25, 2015); Hoffman v. McGraw-Hill Fin., Inc., No. ESX–C–216–13, 2014 WL 7639158 (N.J. Super. Ct. Ch. Div. Dec. 31, 2014); Bailen v. Air & Liquid Sys. Corp., No. 190318/2012 (N.Y. Sup. Ct. Aug. 5, 2014).

51. Brown v. CBS Corp., 19 F. Supp. 3d 390, 397 (D. Conn. 2014); *see also* Lanham v. Pilot Travel Ctrs., LLC, No. 03:14–CV–01923–HZ, 2015 WL 5167268, at *4 (D. Or. Sept. 2, 2015); Cowart v. Various Defendants (In re Asbestos Prods. Liab. Litig. (No. VI)), No. 875, 2014 WL 5394310, at *11 (E.D. Pa. Oct. 23, 2014); Pub. Impact, LLC v. Bos. Consulting Grp., Inc., 117 F. Supp. 3d 732, 738–40 (M.D.N.C. 2015); Chatwal Hotels & Resorts LLC v. Dollywood Co., 90 F. Supp. 3d 97, 104–05 (S.D.N.Y. 2015) (citing Gucci America, Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014)); Shrum v. Big Lots Stores, Inc., No. 3:14–CV–03135–CSB–DGB, 2014 WL 6888446, at *2, *7 (C.D. Ill. Dec. 8, 2014); Sullivan v. Sony Music Entm't, No. 14 CV 731, 2014 WL 5473142, at *3 (N.D. Ill. Oct. 29, 2014); Genuine Parts Co. v. Cepec, 137 A.3d, at 123 (Del. 2016); Smith v. Union Carbide Corp., No. 1422–CC00457, 2015 WL 191118, at *2–3 (Mo. Cir. 2015); Chambers v. Weinstein, 997 N.Y.S.2d 668 (table), No. 157781/2013, 2014 WL 4276910, at *16, (N.Y. Sup. Ct. Aug. 22, 2014); Gliklad v. Bank Hapoalim B.M., No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014).

registration.[52] Others argue that extracting consent in exchange for the right to do business in a state is an "unconstitutional condition."[53] Under the unconstitutional conditions doctrine, a state may not take a state benefit (doing business in the state) hostage and demand the forfeiture of a constitutional right (the right to refuse to litigate in a particular forum) as ransom.[54]

3. A Role for the Dormant Commerce Clause?

Although the judicial and scholarly responses to the jurisdiction-via-registration issue are still developing, no one yet has considered whether this type of consent might violate the Dormant Commerce Clause. Before the Supreme Court decided *International Shoe v. Washington*[55] in 1945, the Dormant Commerce Clause regularly figured into personal jurisdiction questions. In the 1923 case of *Davis v. Farmers' Co-op*, for example, the Supreme Court considered whether a Kansas company that injured a Kansas resident in Kansas could be sued in Minnesota because it was registered to do business there.[56] The Court held that Minnesota's assertion of jurisdiction was unconstitutional. The problem with jurisdiction was not the company's lack of contacts with the state or any inherent unfairness to the company, but instead that the suit would require the company's Kansas employees to be "absen[t] . . . from their customary occupations," thus placing a "heavy" burden on interstate commerce.[57] *Davis* was one of many cases in which state and federal courts concluded that state assertions of personal jurisdiction will sometimes offend the Dormant Commerce Clause.[58] These pre-1945 decisions were somewhat crude, at least according to our modern approach

52. Monestier, *supra* note 7, at 1384. For a similar view on why consent via registration is impermissible, see Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 29 (1989), and for a view on why corporate officers and directors do not consent to jurisdiction in the state of incorporation, see generally Eric Chiappinelli, *The Myth of Director Consent: After* Shaffer, *Beyond* Nicastro, 37 DEL. J. CORP. L. 783 (2013).

53. *See* Benish, *supra* note 7, at 1640–43; *see also generally* D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1 (1990).

54. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

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

56. Davis v. Farmers' Co-op. Equity Co., 262 U.S. 312, 314 (1923).

57. *Id.* at 315.

58. *See, e.g.*, Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284, 287 (1932); Mich. Cent. R.R. Co. v. Mix, 278 U.S. 492, 496 (1929); Atchison, Topeka & S.F. R.R. Co. v. Wells, 265 U.S. 101, 103 (1924); Panstwowe Zaklady Graviozne v. Auto. Ins. Co., 36 F. 2d 504, 506 (S.D.N.Y. 1928). For further cases on this issue, see R.T.K., Annotation, *Assumption of Jurisdiction by Court as Violation of Commerce Clause*, 104 A.L.R. 1075 (1936).

to the Dormant Commerce Clause,[59] but they still focused on the central idea animating that doctrine: states may not maintain laws that steer commerce into or away from a particular state.

The Dormant Commerce Clause once played an important role in personal jurisdiction, and it can do so again.[60] In past decades, scholars have periodically considered the issue,[61] but no scholar has yet performed a full-scale analysis of whether the two bodies of law intersect anymore. This Article now turns to that issue, starting with the question of whether jurisdiction-via-registration is constitutional.

III. JURISDICTION-VIA-REGISTRATION AND THE DORMANT COMMERCE CLAUSE

This Part brings the Dormant Commerce Clause to bear on the emerging question of jurisdiction-via-registration. It argues that a state's assertion of jurisdiction based solely on a company's registration to do business is unconstitutional where the suit lacks any connection to the forum state, i.e., the plaintiff is a non-resident injured out of state. In other words, the Dormant Commerce Clause should bar jurisdiction when it is sought by the *true* forum shopper—the plaintiff who has selected a forum that has no relevance to the suit, save its comparative likelihood to favor the plaintiff.

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59. At this time, the Supreme had yet to develop the two tests currently used in Dormant Commerce Clause cases, the discrimination test and the *Pike* balancing test. For a discussion of these tests, see *infra* notes 83–95, 122–50 and accompanying text.

60. It is unclear why the Supreme Court turned away from the Dormant Commerce Clause in evaluating personal jurisdiction. The best explanation is probably that the Court, faced with personal jurisdiction cases involving increasingly complex interstate contacts, believed the flexibility of the Due Process Clause allowed it to better manage personal jurisdiction doctrine. After the Court decided *International Shoe v. Washington*, one sees the Dormant Commerce Clause virtually disappear from the analysis. Interestingly, in May 2016, a district court held—for the first time in many decades—that jurisdiction-via-registration violated the Dormant Commerce Clause. *See* McDonald AG Inc. v. Syngenta AG (*In Re* Syngenta AG MIR 162 Corn Litig.), No. 14-MD-2591-JWL, 2016 WL 2866166, at *6 (D. Kan. May 17, 2016) (holding that jurisdiction-via-registration violates the Dormant Commerce Clause) (relying on *Davis*, 262 U.S. at 317).

61. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.30 at 270–72 (5th ed. 2006); Andrews, *supra* note 22, at 1073 (noting that jurisdiction based on registration to do business "would face problems under the Dormant Commerce Clause"); Brilmeyer, *supra* note 52, at 29 (noting that jurisdiction-via-registration "may be unconstitutional" under the Dormant Commerce Clause); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 533–34 (1991) (considering whether the Due Process-based law of personal jurisdiction might be better understood as an attempt to address "commerce clause-related concerns about burdening and discriminating against outsiders who are not represented in the state's political process"); Rhodes, *supra* note 7, at 440 (noting that the issue of whether jurisdiction-via-registration violates the Dormant Commerce Clause is "still unresolved"); T. Griffin Vincent, Comment, *Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 491–92 (1989) (arguing that personal jurisdiction based on appointment of an agent will sometimes violate the Dormant Commerce Clause).

This Part is divided into two sections, each applying one of the two major strains of Dormant Commerce Clause analysis to personal jurisdiction.[62] Section A argues that jurisdiction-via-registration, when imposed by a state lacking any connection to the suit, impermissibly discriminates against interstate commerce. Section B argues that, even if such jurisdiction is not discriminatory, it nonetheless impermissibly burdens interstate commerce in cases that lack any connection to the forum state.

A. PERSONAL JURISDICTION AS UNCONSTITUTIONAL DISCRIMINATION

1. What is Unconstitutional Discrimination?

The Dormant Commerce Clause forbids a state from protecting local economic actors from competition by out-of-state economic actors, usually by imposing extra costs or burdens on out-of-state actors.[63] Laws imposing these unconstitutional costs or burdens can be either facially discriminatory or facially neutral with discriminatory effects.

A straightforward example of facial discrimination can be found in in *Granholm v. Heald*, a case involving the sale of wine.[64] In New York and Michigan, producers of wine sold it to wholesalers, who then sold it to retailers, who then sold it to consumers. Both states, however, made an exception for in-state wineries by allowing them to sell directly to consumers.[65] While consumers could tour New York or Michigan wineries, taste a wine, and buy a couple cases of it, a winery from Pennsylvania would be forced to sell its wine through the less lucrative wholesaler–retailer channel. The Supreme Court held that the state laws establishing this approach were "discrimination against interstate commerce."[66] Since the legislation favored New York and Michigan wineries over Pennsylvania wineries, it prevented Pennsylvania wineries from competing on an equal footing with New York wineries in New York and Michigan wineries in Michigan. The only way to compete on an equal footing would be to relocate within New York or Michigan—a result that "runs contrary to [the] admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'"[67]

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62. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) ("[O]ur case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce; and second, whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." (citations omitted)).

63. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) ("The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State.").

64. Granholm v. Heald, 544 U.S. 460, 473 (2005).

65. *Id.* at 469–70.

66. *Id.* at 467.

67. *Id.* at 475 (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963)).

As in *Granholm*, the Supreme Court has detected unequal treatment in laws that impose higher use fees on out-of-state truckers,[68] laws that impose higher taxes on dividends derived from out-of-state companies,[69] and laws that force consumers to purchase products and services from in-state businesses.[70] In these situations and others like them,[71] out-of-state companies find themselves at a competitive disadvantage when competing for in-state business, because in-state companies, having lower costs or built-in demand, are able to undercut their out-of-state competition.

Even if a state law does not facially discriminate against interstate commerce, it may nonetheless have a discriminatory effect. In *Hunt v. Washington State Apple Advertising Commission*, for example, the Supreme Court struck down a facially neutral law that had the "practical effect" of discriminating against out-of-state businesses.[72] *Hunt* concerned a North Carolina law aimed at preventing fraud in the labeling of apples. The law required all apples sold in the state to be labeled with "no grade other than the applicable U.S. grade or standard."[73] On its face, the law was nondiscriminatory. In effect, however, the law "insidiously operate[d] to the advantage of local apple producers."[74] Washington apple growers were prohibited from labeling their fruit as "Washington apples"—a label of apparent significance in the apple market.[75] Additionally, the law raised the costs to Washington apple producers because it forced them to label apples headed to North Carolina separately—a cost not borne by North Carolina producers.[76]

The year after *Hunt*, the Court narrowed its applicability in *Exxon Corp. v. Governor of Maryland*, where it upheld a Maryland law that barred petroleum producers and refiners from owning retail gas stations in that state.[77] Although this would harm only outsiders because "no petroleum products [we]re produced or refined in Maryland," the Court upheld the law because retail gasoline stations in Maryland would still face substantial competition.[78]

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68. *See* Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 284–87, 296 (1987).

69. *See* Fulton Corp. v. Faulkner, 516 U.S. 325, 327 (1996).

70. *See* C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 394–95 (1994).

71. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 100–01 (1994) (holding that a state may not impose a higher cost of disposal on trash imported from another state); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) (declaring invalid an Ohio tax rebate for ethanol that favored Ohio ethanol producers); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982) (invalidating Nebraska regulations that forbade use of Nebraska water outside the state of Nebraska).

72. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977).

73. *Id.* at 339.

74. *Id.* at 351.

75. *Id.*

76. *Id.*

77. Exxon Corp. v. Maryland, 437 U.S. 117 (1978).

78. *Id.* at 123.

Even though producers and refiners could not sell gas to consumers in Maryland, *other entities could*. Under *Exxon*, state laws that disadvantage out-of-state companies will not violate the dormant Commerce Clause as long as other out-of-state suppliers "will . . . 'promptly replace[ ]' the goods that would have been sold by the companies that cease selling in state."[79]

Even though some discriminatory laws—whether on their face or in effect—would not actually dissuade companies from doing business in a state, this is not relevant to the constitutionality of those laws. For example, if California imposed a $1 tax on cars sold in the state by non-residents, it is unlikely that out-of-state car sellers would give up on the lucrative California market. However, the Supreme Court assumes that discriminatory laws will have an effect on the flow of interstate commerce, even if the discriminatory costs are relatively small.[80] It is not hard to imagine why the Court might prefer this approach. A million-dollar apple producer, with its low cost of production, may see the North Carolina market as so lucrative that a discriminatory tax will have no effect on its decision to sell apples in the state. A smaller grower, with higher costs of production, may have an entirely different view. Should the constitutionality of the state law depend on the plaintiff's balance sheet? And if so, what is the rate of return that a state may not deprive an out-of-state business of? These questions are unanswerable—at least by a court attempting to implement legal rules for an entire nation. Accordingly, the Court has made it clear that there is no such thing as a "'*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause."[81] Out-of-staters are either treated equally or they are not, regardless of whether or to what degree the unequal treatment actually discourages them from doing business in the state.[82]

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79. Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 208 (2d Cir. 2003) (quoting *Exxon Corp.*, 437 U.S. at 127).

80. *See* Fulton Corp. v. Faulkner, 516 U.S. 325, 333 n.3 (1996).

81. *Id.*; *see also* Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 650 (1994) ("[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred."); Maryland v. Louisiana, 451 U.S. 725, 760 (1981) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.").

82. It appears that the Supreme Court's "*de minimis*" rule is not always religiously applied in the lower courts. In the recent case of *Churchill Downs Inc. v. Trout*, for example, the court refused to strike down a state law that required bets at racetracks to be placed in person. Churchill Downs Inc. v. Trout, 589 F. App'x 233 (5th Cir. 2014). Although the law "*may* result" in discriminatory effects, the court observed, there was no "concrete record evidence" providing that. *Id.* at 237. Even if some courts are not willing to presume discrimination in every case, however, the Supreme Court (as we shall soon see) has already held that the burden of jurisdiction-via-registration is far more than *de minimis*. In *Bendix Autolite Corp. v. Midwesco Enterprises Inc.*, the Court declared that "[r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a *significant burden*." Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988) (emphasis added).

Once the Court determines that a law discriminates against interstate commerce, it must then determine whether the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[83] If it does, then the law is constitutional; if not, the law is void. Importantly, this test is a high hurdle to clear. It is so rarely overcome, in fact, that the Court frequently refers to it as a "virtually *per se* rule of invalidity."[84]

The Supreme Court has never explicitly specified which state interests are "legitimate" for the purposes of the Commerce Clause, but the cases do provide some guidance. First, a state has a legitimate interest in the health and safety of persons inside the state—whether they are residents or not.[85] Second, a state has a legitimate interest in the integrity of its natural resources.[86] Third, a state has a legitimate interest in protecting the economic health of its populace—provided that it does not pursue that interest at the expense of out-of-state persons or businesses.[87] Fourth and finally, a state does *not* have a "legitimate interest in protecting nonresident[s]"—at least to the degree they are injured out of state.[88]

If a discriminatory law concerns a legitimate state interest, the next question is whether there is a non-discriminatory alternative for advancing the interest. In almost all the cases addressing this issue, the Court has found the state regulation unconstitutional because non-discriminatory alternatives existed. For example, in *Hughes v. Oklahoma*, the Court invalidated an Oklahoma law barring people who caught minnows in Oklahoma from shipping them out of state.[89] Though discriminatory, Oklahoma argued the discrimination was justified because it was attempting to conserve its minnow population. The Supreme Court held that the justification was inadequate, explaining that

> [f]ar from choosing the least discriminatory alternative, Oklahoma has chosen to conserve its minnows in the way that most overtly discriminates against interstate commerce. The State places no limits on the numbers of minnows that can be taken by licensed minnow

83. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

84. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

85. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (stating that states have an "unquestioned power to protect the health and safety of its people").

86. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956 (1982) ("[A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power.").

87. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 106 (1994) ("Our cases condemn as illegitimate, however, any governmental interest that is not 'unrelated to economic protectionism.'").

88. Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (holding that while "protecting local investors [*i.e.,* Illinois citizens] is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders").

89. Hughes v. Oklahoma, 441 U.S. 322, 323 (1979).

> dealers; nor does it limit in any way how these minnows may be disposed of within the state.[90]

In other words, Oklahoma could have enacted a non-discriminatory alternative by simply limiting the minnow harvest within the state, regardless of who harvests the minnows or where they are ultimately sold.[91]

One case in which the Court has found a discriminatory law to be justified is *Maine v. Taylor*—a case involving Maine's prohibition against importing certain baitfish into the state.[92] Though the discriminatory nature of the Oklahoma and Maine statutes was nearly identical, Maine was able to proffer a sufficient justification.[93] The goal of Maine's law was to protect its "unique and fragile fisheries" from parasites or non-native species, both of which were often found in shipments of baitfish into the state.[94] The Supreme Court found this justification sufficient, for the evidence showed that Maine had "no satisfactory way" to protect against these threats—other than banning the importation of baitfish.[95]

2. Jurisdiction-via-Registration Is Unconstitutionally Discriminatory

Given the law explained above, jurisdiction-via-registration statutes cannot pass muster, at least when they are used to assert jurisdiction over a non-domiciled defendant who is injured out of state. This conclusion follows from the analysis of two questions: first, is jurisdiction in these cases discriminatory and, second, if it is, then is the discrimination justified by a legitimate state interest that cannot be served in a non-discriminatory manner.

First, jurisdiction-via-registration laws do not facially discriminate against out-of-staters. They generally apply to all companies that desire to do business in the state, regardless of whether the companies also claim that state as their home.[96] However, these laws do have the "practical effect" of discriminating against out-of-state companies.[97]

To see the effect, consider a hypothetical in which two companies, Illinois Inc. (headquartered and incorporated in Illinois) and Florida Inc.

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90. *Id.* at 337–38.

91. *Id.* at 338. For other cases finding that the state lacked a legitimate non-discriminatory response, see Granholm v. Heald, 544 U.S. 460, 473 (2005); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 390 (1994); Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941, 956, 958 (1982); and Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

92. Maine v. Taylor, 477 U.S. 131 (1986).

93. *Id.* at 132.

94. *Id.* at 140–41.

95. *Id.* at 141.

96. *See* Benish, *supra* note 7, at 1647–61 (collecting registration statutes). Even if registration laws do not apply to residents and non-residents alike, states could easily re-write them in a non-discriminatory manner. Thus, there is little reason to consider whether the statutes discriminate on their face. The more important consideration is whether they discriminate in effect.

97. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977).

(headquartered and incorporated in Florida), are in the business of selling furniture. Both companies would like to expand into the other's home state, but Illinois requires all companies doing business in the state to consent to suit in the state—regardless of whether the suit arises from their business in that state. Florida does not have such a requirement. On these facts, Illinois Inc. would be marginally more likely to enter the Florida market than Florida Inc. would be to enter the Illinois market, because Florida Inc. would be subject to personal jurisdiction in Florida *and* Illinois for all suits arising throughout the world. By contrast, Illinois Inc. would be subject to personal jurisdiction *only* in Illinois for all suits arising throughout the world if it did business in Florida.

Why would Florida Inc.'s susceptibility to general jurisdiction in Illinois discourage it from doing business in Illinois? There are many reasons, including Illinois' rules of procedure, local practices, and choice-of-law rules. Illinois might have procedural rules that make jury trials far more likely, or punitive damages rules that make product liability suits especially risky. These matters are covered in greater detail in the following Part,[98] but for now, it will suffice to note that the Supreme Court's admonition (also covered in the following Part) in *Bendix Autolite v. Midwesco Enterprises*—a case discussing the intersection between personal jurisdiction and the Dormant Commerce Clause—that "[r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those in which it did not have minimum contacts necessary for supporting personal jurisdiction, is a significant burden."[99]

Notwithstanding this explanation, it is tempting to conclude that jurisdiction-via-registration merely *equalizes* the jurisdictional burdens of in-state and out-of-state companies. In-state companies, by virtue of their residency, are already subject to general jurisdiction in the state. So out-of-state businesses, when subjected to general jurisdiction based only on registration, are not treated *worse* than in-state companies; they are treated *exactly the same*. This line of argument misses the fact that laws can violate the Dormant Commerce Clause even where in-state and out-of-state businesses are treated the same.[100] Recall that in *Hunt*, North Carolina's unconstitutional labeling law applied to *all* apple producers, in-state and out-of-state alike. The law was nonetheless discriminatory because it "insidiously operate[d] to the

98. *See generally infra* Part III.B.

99. Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 893 (1988).

100. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 298 F.3d 201, 214 (3d Cir. 2002) (noting that *Carbone* "explicitly rejected the argument that a disputed statute would have to favor all in-state businesses as a group—a statute may be invalid if it favors only a single or finite set of businesses" (quoting Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788, 798 (3d Cir. 1995))).

advantage of local apple producers."[101] That is, the law took an advantage that out-of-staters possessed (the "Washington apple" label) and nullified its benefit within the state. In the personal jurisdiction context, out-of-state companies also have an advantage over in-state companies—the ability to avoid suits in the state that are unrelated to its activities there. As in *Hunt*, subjecting registrants to personal jurisdiction strips this advantage and thus potentially protects locals from competition.[102] And unlike in *Exxon*, there are no "out-of-state suppliers [that] 'will . . . promptly replace[ ]' the goods that would have been sold by the companies that cease selling in state."[103] That is, because jurisdiction-via-registration laws operate against *all* out-of-state businesses, there is no reason to think that another business (e.g., Alabama Inc., Nebraska Inc., etc.) will step into the market that Florida Inc. has vacated.[104]

Given its discriminatory nature, a jurisdiction-via-registration law should survive only if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[105] Whether a state has a legitimate interest in extracting consent from businesses, depends on the situations in which the state wishes to extract consent. Consider the following six hypothetical lawsuits that a plaintiff might file in Illinois[106] and the likely bases for personal jurisdiction:

Plaintiff 1 is an Illinois resident injured in Illinois by the defendant's purposeful conduct in the state. The plaintiff can sue in Illinois based on the defendant's purposeful activity in the state.[107]

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101. *Hunt*, 432 U.S. at 351.

102. *Id.*

103. Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 208 (2d Cir. 2003) (quoting Exxon Corp. v. Maryland, 437 U.S. 117, 127 (1978)).

104. It might also be argued that, to the extent that jurisdiction-via-registration forces companies to litigation disputes away from their home state or state where the cause of action arose, the doctrines of transfer and forum non conveniens ("FNC") can be invoked to alleviate those burdens. *See* 28 U.S.C. § 1404 (2012) (authorizing federal courts to transfer where plaintiff filed suit in an inconvenient forum); Martin J. McMahon, Annotation, *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 A.L.R. 4th 973 (1987) (describing circumstances in which state courts will dismiss suit because it would be more conveniently litigated elsewhere). There are two problems with this argument. First, transfer and FNC motions cost money to litigate. These costs, whether large or small, would amount to at least a *de minimis* burden, which is sufficient to state a constitutional violation. *See* Fulton Corp. v. Faulkner, 516 U.S. 325, 333 (1996). Second, there is no guarantee that such motions would routinely be granted. Questions concerning the convenience of a forum are typically left to the sound discretion of the trial judge. Even if transfer and FNC make the constitutional violation less significant, they do not amelioriate the violation altogether.

105. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

106. The state of Illinois is used here simply for illustration purposes. There is nothing about Illinois law or the state in general that affects the applicability of these examples to other states.

107. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding personal jurisdiction exists where defendant has established contacts with the forum state giving rise to the claim alleged).

Plaintiff 2 is an Illinois resident injured in Illinois by the defendant's conduct that has no relation to Illinois. The plaintiff can sue in Illinois only if the defendant is domiciled in Illinois or has consented to be sued there.[108]

Plaintiff 3 is an Illinois resident injured outside Illinois by the defendant's conduct that has no relation to Illinois. The plaintiff can sue in Illinois only if the defendant is domiciled in Illinois or has consented to be sued there.[109]

Plaintiff 4 is a non-resident of Illinois injured in Illinois by the defendant's purposeful conduct in the state. The plaintiff can sue in Illinois based on the defendant's purposeful activity in the state. [110]

Plaintiff 5 is a non-resident of Illinois injured in Illinois by the defendant's conduct that has no relation to Illinois. The plaintiff can sue in Illinois only if the defendant is domiciled in Illinois or has consented to be sued there.[111]

Plaintiff 6 is a non-resident of Illinois injured outside Illinois. The plaintiff can sue in Illinois only if the defendant is domiciled in Illinois or has consented to be sued there.[112]

Of the six different plaintiffs, Plaintiffs 1 and 4 will have no use for consent arguments. Those plaintiffs will be able to sue in Illinois using the state's long-arm statute (which comports with the Due Process Clause under *International Shoe).*[113] The question is whether, with regard to suits brought by Plaintiffs 2, 3, 5 and 6, Illinois has a legitimate interest in subjecting defendants to personal jurisdiction based on consent by registration.

The state has no interest in extracting consent in a suit brought by Plaintiff 6. Plaintiff 6 is a non-resident of Illinois injured outside Illinois, and it is clear a state has no legitimate interest in protecting non-residents injured out of state.[114]

That leaves Plaintiff's 2, 3, and 5. As to Plaintiff 2, Illinois does have a legitimate local purpose to subject the defendant to jurisdiction. The Plaintiff is an Illinois resident injured in Illinois and the Supreme Court has frequently held that states have a "manifest interest in providing effective means of

108. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (holding that personal jurisdiction exists where defendant consents); Milliken v. Meyer, 311 U.S. 457, 462 (1940) (holding that personal jurisdiction exists where defendant is a domicile of the forum state).

109. *Bauxites*, 456 U.S. at 703–04; *Millikin*, 311 U.S. at 462–64.

110. *Int'l Shoe*, 326 U.S. at 321.

111. *Bauxites*, 456 U.S. at 703–04; *Millikin*, 311 U.S. 462–64.

112. *Bauxites*, 456 U.S. at 703–04; *Millikin*, 311 U.S. 462–64.

113. As discussed in Part III, jurisdiction of this sort also comports with the Dormant Commerce Clause. *See infra* notes 193–91 and accompanying text. This Part only considers the constitutionality of consent under the Dormant Commerce Clause.

114. Edgar v. MITE Corp., 457 U.S. 624, 644, (1982) ("While protecting local investors [(i.e., Illinois citizens)] is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.").

redress for [their] residents."[115] Indeed, it is widely accepted that providing a forum for the "protection for the legal rights of its citizenry" is "[o]ne of the most basic duties of any sovereign."[116] Given its legitimate interest with regard to Plaintiff 2, Illinois also has a legitimate interest with regard to Plaintiff 3. Plaintiff 3 is a citizen of Illinois regardless of whether he is inside or outside the state when he is injured.

Finally, Illinois also has an interest in protecting Plaintiff 5—the non-resident of Illinois injured in Illinois by the defendant's conduct that has no relation to Illinois. To make Plaintiff 5 more concrete, assume that she is Kay Robinson, the owner of a Volkswagen purchased from Seaway Volkswagen, Inc. in New York State. She is injured in an accident while passing through Illinois and wishes to sue Seaway there—in other words, the same fact pattern presented in *World-Wide Volkswagen Corp. v. Woodson*.[117] She knows that personal jurisdiction based on Seaway's contacts with the state will be unconstitutional under the Due Process Clause and is thus relieved to find out that Seaway has registered to do business in the state. Seizing on this registration, Mrs. Robinson argues that Seaway is subject to jurisdiction in the state because it has consented by registering. Seaway responds by arguing that personal jurisdiction, if based on its registration alone, would violate the Dormant Commerce Clause. A state has a legitimate interest in the resolution of disputes that arise in its state. Unlike in the Due Process context, it is

115. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

116. *See* Earl M. Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U. L.Q. 671, 687–88 (1988); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 524 (1984) ("Typically, the forum's interest will be triggered by the plaintiff's residence in that forum."); *see also* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (noting that a state has "unquestioned power to protect the health and safety of its people"). A footnote in the recent case *Goodyear Dunlop Tires Operations, S.A. v. Brown* might seem to point in the opposite direction. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011). There, the court noted that "[g]eneral jurisdiction to adjudicate has in [United States] practice never been based on the plaintiff's relationship to the forum." *Id.* at 929 n.5 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1137 (1966)). This may be true with regard to the issue in *Goodyear*, which was jurisdiction based on extensive business contacts comported with the Due Process Clause. Just because the plaintiff's residence in the forum state may not be used to augment the case for doing-business jurisdiction under the Due Process Clause, however, does not mean that the plaintiff's residence is automatically irrelevant to a Dormant Commerce Clause inquiry involving consent to jurisdiction. A state's interest in its residents may be sufficient to justify its actions in some contexts but not others. *See* Bendix Autolite v. Midwesco Enter., 486 U.S. 888, 894 (1988). Nor does this footnote imply that personal jurisdiction in a case involving Plaintiff 4 would violate the Due Process Clause. *Goodyear*, as noted above, involved doing business jurisdiction and was unconcerned with consent. The Court has unequivocally declared that the Due Process Clause is not violated when a defendant consents to personal jurisdiction—regardless of whether the plaintiff is a state resident or not. *See generally* Ins. Corp. of Ir. v. Compagnie Des Bauxites, 456 U.S. 694 (1982). This Article does not challenge the validity of consent as a matter of Due Process; it argues that personal jurisdiction based on consent through registration to do business violates the Dormant Commerce Clause.

117. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288–89 (1980).

immaterial to the Dormant Commerce Clause whether the defendant purposefully availed itself of the benefits of the forum state. Lack of purposeful availment may defeat personal jurisdiction based on minimum contacts, but it does not defeat jurisdiction based on consent. Where a plaintiff suffers an injury inside its borders, a state has an interest in seeing that the injury is redressed because failure to do so reflects poorly on the state and may render it less attractive to business. Using *World-Wide Volkswagen* as an example, Professor Wendy Perdue has made the point this way:

> [A] state would seem also to have a legitimate interest in providing a forum whenever it is the place of injury. Injuries have ramifications beyond the people immediately affected. In *World-Wide Volkswagen*, for example, the plaintiff's car blew up on an Oklahoma road. Such an accident may well threaten the safety of passers-by and rescue workers as well as interfere with traffic. Local residents have a legitimate interest in knowing the cause of such an accident and likewise have an interest in providing a forum for disputes arising out of the accident.[118]

Given that states have a legitimate interest in providing a forum for redress to residents injured in and out of state (Plaintiffs 2 and 3) and non-residents injured in state (Plaintiff 5), the second part of the Dormant Commerce Clause test inquires whether that interest could "served by reasonable nondiscriminatory alternatives."[119] In the context of jurisdiction-via-registration, the *only* way that a state can effectuate its interest is to extract consent from the defendant somehow. A state could, of course, simply declare that companies who injure residents outside the state or non-residents in the state will be subject to personal jurisdiction in the state, but this law would be violate the Due Process Clause.[120] Therefore, the only option available to the state that comports with due process is to extract consent from the company with a registration law.

In sum, state laws that subject companies doing business in the state to general jurisdiction will sometimes have discriminatory effects on interstate commerce. Such effects will nonetheless be tolerable when the plaintiff is a state resident (whether injured in or out of state) or a non-resident injured in state. However, where the plaintiff is a non-resident injured out of state, the state has no legitimate interest in protecting him, so jurisdiction-via-registration would violate the Dormant Commerce Clause.

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118. Perdue, *supra* note 61, at 568 (footnotes omitted).

119. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

120. *World-Wide Volkswagen Corp.*, 444 U.S. at 286. *See generally* Walden v. Fiore, 134 S. Ct. 1115 (2014).

B. PERSONAL JURISDICTION AS UNCONSTITUTIONALLY BURDENSOME

1. What is an Unconstitutional Burden?

Even if a state law is not unconstitutionally discriminatory, it might still violate the Dormant Commerce Clause if it imposes on interstate commerce a burden that is "clearly excessive in relation to the putative local benefits."[121] Courts assess the relative burdens and benefits under the "*Pike* balancing test," first articulated in *Pike v. Bruce Church, Inc.*[122] Compared to the discrimination test discussed above, the *Pike* balancing test is much easier to overcome. As explained below, a state needs only to show that its non-discriminatory law, though potentially an impediment to commerce, delivers up a material benefit (even if relatively small) to the state.

Bibb v. Navaho Freight Lines is a good example of this principle. *Bibb* concerned a facially neutral Illinois law that required trucks operating in the state be equipped with "contour mudguards" on the rear wheels.[123] Its effect placed a burden on interstate commerce because truckers would have to stop at the Illinois border, replace their trucks' regular mudguards with contoured mudguards, and then stop again to replace the original mudguards after leaving the state.[124] This was clearly a "burden on interstate commerce," but the burden alone was not fatal to the law.[125] "[S]tate legislatures plainly have great leeway," the Court noted, "in providing safety regulations for all vehicles—interstate as well as local."[126] Many of these regulations will affect the flow of commerce through the state—speed limits and other traffic restrictions being the most obvious. Most of these laws will nonetheless be justified because they deliver a benefit to the state that outweighs the burden. Illinois' mudguard requirement, however, did not deliver any apparent benefit. The Court noted that the "contour mud flap possesses no advantages over the conventional or straight mud flap [and, in fact,] creates hazards previously unknown to those using the highways."[127] While states have "great leeway" to enact laws burdening commerce, the laws must offer up at least *some* plausible benefit.[128] Other cases reiterate the same rule applied in *Bibb*: where a state cannot show any local benefit, the state law violates the Dormant Commerce Clause.[129]

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121. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

122. *Id.*

123. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524–25 (1959).

124. *Id.* at 521.

125. *Id.* at 527–28.

126. *Id.* at 530.

127. *Id.* at 525 (quoting Navajo Freight Lines v. Bibbs, 159 F. Supp. 385, 388 (S.D. Ill. 1958)).

128. *Id.* at 530.

129. *See, e.g.*, Kassel v. Consol. Freightways Corp, 450 U.S. 662, 672 (1981) (rejecting a state limitation on twin trailers because the "evidence clearly establishes that the twin is as safe as the

To the same point, other cases demonstrate that, when a state can show some benefit, the Court will uphold the law without truly balancing the burden against the benefit because it is either unable or unwilling to perform such an analysis.[130] Who can say, for example, that a state's environmental interest in reducing the use of plastic containers truly "outweighs" the burden on out-of-state milk producers who sell milk in the state using plastic containers?[131] To balance these two matters against each other is akin to "judging whether a particular line is longer than a particular rock is heavy."[132] For this reason, courts tend to approve state laws that burden commerce as long as the law plausibly advances any legitimate state interest, even if the interest is slight. It is only where a law is unsupported by any plausible state interest that courts declare it unconstitutional.[133] While courts are largely unable to measure the size of a state benefit, they are able to see where a benefit is utterly absent.[134]

[single trailer]"); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 (1978) (invalidating a state highway law because of a "massive array of evidence . . . disprov[ing] the State's assertion that the regulations make some contribution to highway safety"); Southern Pacific Co. v. Arizona, 325 U.S. 761, 777 (1945) (invalidating an Arizona law limiting train lengths in part because the law does not improve safety but "tends to increase the number of accidents"); *see also* DENNING, *supra* note 11, § 6.05 ("If a measure imposes significant costs, but no real benefits, or the benefits prove to be illusory, courts will invalidate them under *Pike*. In some cases, the lack of appreciable benefits raises suspicion that some invidious purpose is lurking behind the statute.").

130. See Kentucky v. Davis, 553 U.S. 328, 353 (2008) (observing, in a case involving the market for municipal bonds, that the "Judicial Branch is not institutionally suited" to resolve the econometric questions that the *Pike* test demands an answer to).

131. *See generally* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

132. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

133. *See, e.g.*, Alliant Energy Corp. v. Bie, 330 F.3d 904, 914 (7th Cir. 2003) ("This makes any balancing under *Pike* fairly effortless: no legitimate local interest has been presented to justify the burden [state law] has on interstate commerce."); R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 735–76 (8th Cir. 2002) (invalidating state law because "the local benefit actually derived from the statute is minimal or nonexistent"); Locke v. Shore, 682 F. Supp. 2d 1283, 1294 (N.D. Fla. 2010) (approving state law subject to *Pike* challenge in part because "law promotes compliance with fire and accessibility codes, helps reduce indoor pollution, and protects consumers from incompetent interior designers"), *aff'd*, 634 F.3d 1185 (11th Cir. 2011); Martin Marietta Materials, Inc. v. Greenwood, No. 06-697-CV-W-W, 2008 WL 4832638, at *6 (W.D. Mo. Sept. 4, 2008) (rejecting state law pertaining to truck traffic because city "was unable to produce any evidence of safety issues related to truck traffic"); Sitco, Inc. v. Agco Corp., No. CV–05–073–E–BLW, 2005 WL 3244261, at *5 (D. Idaho Oct. 25, 2005) (finding "no evidence . . . that the [state] statute creates a substantial burden on interstate commerce" but noting that "[e]ven if such a burden exists, the statute does provide the significant local benefit of protecting dealers from unfair supplier practices").

134. In this sense, the *Pike* balancing test appears similar to a substantive due process rational basis test. *See* Cavel Int'l, Inc. v. Madigan, 500 F.3d 551, 556 (7th Cir. 2007) ("[E]ven in the absence of discrimination, a burden on interstate commerce that had no rational justification would be invalid."); DENNING, *supra* note 11, § 6.05 ("Dormant Commerce Clause challenges sometimes cloak what are, at bottom, economic substantive due process challenges.").

This approach to balancing can be seen in *Bendix Autolite Corp. v. Midwesco Enterprises*, a case that lies at the intersection of personal jurisdiction and the Dormant Commerce Clause.[135] Bendix (a Delaware corporation with its principal place of business in Ohio) hired Midwesco (an Illinois corporation with its principal place of business in Illinois) to install a boiler in Bendix's Ohio factory. Bendix became dissatisfied with the boiler and, six years after the installation, sued Midwesco for breach of contract.[136] Midwesco defended itself by arguing that the four-year statute of limitations had run. Bendix responded by citing an Ohio statute that tolled the statute of limitations for any period in which the defendant company did not maintain an agent in the state to receive service of process.[137] Bendix argued that because Midwesco did not have an agent in the state to receive process for at least two of the previous six years, the four-year time limit had not yet expired.[138] Midwesco responded by arguing that the Ohio statute violated the Dormant Commerce Clause.[139]

The Court held that the Ohio statute was unconstitutional. Although the Court suggested that the statute was probably unconstitutionally discriminatory,[140] the Court elected to apply the *Pike* balancing test. The Court explained that "the burden the tolling statute places on interstate commerce is significant."[141] The key to the burden is that the Ohio statute offered companies a Hobson's choice. On one hand, a company could appoint an agent to receive process in the state in return for a definite statute of limitations. A downside of this approach, however, is that the company would be subject in Ohio to any suit by any plaintiff on any matter for as long as the agent was appointed. As the Court put it, "requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have minimum contacts necessary for supporting personal jurisdiction, is a significant burden."[142] On the other hand, a company could escape this wide-ranging jurisdiction by refusing to appoint an agent. Yet doing so would require the company to forfeit its statute-of-limitations defense. By attempting to escape one "significant burden," the company would fall prey to another one. However, in-state companies do not face this Hobson's choice: as domiciliaries of the

135. *Bendix Autolite Corp.*, 486 U.S. at 889.

136. *Id.* at 889–90.

137. *Id.*

138. *Id.* at 890.

139. *Id.*

140. *Id.* at 891 ("The Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry. We choose, however, to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints.").

141. *Id.*

142. *Id.* at 892.

state, they are already subject to jurisdiction for any and all suits, and because they are always amenable to service of process, they may take advantage of ordinary limitations periods without any cost.[143]

A law's burdensomeness on its own, however, is not enough to render a law unconstitutional. If the law provides a plausible benefit to the state, the law will pass the *Pike* balancing test. In *Bendix*, however, the Court was unable to find any local benefit.[144] The first purported benefit was the state's interest in assisting plaintiffs with serving process on foreign companies, a task presumably made much easier if the company had an agent in the state.[145] With little explanation, the Court simply concluded that this benefit was illusory or at least insignificant.[146] The second purported benefit was the protection of Ohio "residents from corporations who become liable for acts done within the state but later withdraw from the jurisdiction."[147] Protecting residents from this problem obviously benefits the state, but the Court held that the statute was unnecessary to secure that benefit.[148] Ohioans injured in-state could make use of the "the Ohio long-arm statute," which allowed them to bring companies back into Ohio to stand trial.[149] Because the statute would impose a "significant burden" in cases "in which Ohio had no interest," the Court held that the statute must "fall under the Commerce Clause."[150]

Bendix illustrates how the burden/benefit analysis applies in the context of state judicial power. As in *Bibb* and similar cases, state burdens on commerce are most at risk where the state is unable to show any legitimate benefit that the law delivers to the state. Where the state can show a plausible interest, the courts will typically uphold the law.

2. Jurisdiction-via-Registration Is Unconstitutionally Burdensome

Under *Bendix* and the other cases discussed above, jurisdiction-via-registration will be unconstitutional in suits brought by non-residents injured out of state. In those cases, the local benefit is completely absent and the burden on interstate commerce will be "clearly excessive in relation to the putative local benefits."[151] In cases where the plaintiff is a resident or was injured in the state, however, a local benefit exists and jurisdiction-via-registration will be constitutional.

The specific burdens and benefits of jurisdiction-via-registration are discussed below. To an extent, however, it is immaterial what the exact nature

143. *Id.* at 894.
144. *Id.*
145. *Id.* at 893–94.
146. *Id.*
147. *Id.* at 894.
148. *Id.*
149. *Id.*
150. *Id.* at 894–95.
151. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

of the burden actually is, for the Supreme Court has already held that "[r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden."[152] Despite this declaration, it is nonetheless useful to explore what specifically constitutes the burden that will discourage companies from doing business in a particular state. The burdens are two-fold—choice-of-law rules and local bias[153]—and the benefits involve protecting state citizens or enforcing state law.

i. Burden: Choice-of-Law Rules

Every state has its own set of laws and, because of that, defendants are liable under a greater variety of laws when they are susceptible to suit in a greater number of states. A company that is registered to do business in all 50 states would, if those states all had jurisdiction-via-registration rules, be subject to a massive variety of laws. Some of these laws will be unfavorable to the defendant. When unfavorable laws are invoked in a suit that is based only on jurisdiction-via-registration, and more favorable laws would otherwise have been applicable, this is a burden on the defendant because it increases the defendant's risk of an unfavorable judgment.

To understand how this burden arises, it is necessary to explore how states decide which laws to apply in a particular case. Each state has a set of "choice-of-law" rules—rules that instruct its courts on which laws should apply in a given case.

Choice-of-law rules are complex and varied, but they do share some universal features. First, every state's choice-of-law rules will instruct its courts to apply the procedural law of that state. Procedure, of course, is neither neutral nor uniform across the country. Not surprisingly, plaintiffs prefer the forum that provides the most advantageous procedure.

It is important to note here that, in the choice-of-law arena, procedure includes a vast array of laws. At the core, state procedural laws are codified in each state's "Rules of Civil Procedure" and "Rules of Evidence." These codes (and their associated jurisprudence) contain a trove of laws worth shopping

152. *Bendix Autolite Corp.*, 486 U.S. at 893.

153. Traditionally, courts have considered a third burden: inconvenience. With advances in technology, however, inconvenience is deemed less important, and this Article thus ignores the potential burden on inconvenience. *See* Klerman, *supra* note 7, at 250 ("While it is intuitive to assume that it is significantly more expensive for a party to litigate out-of-state, this assumption is not well-founded. There are no empirical studies documenting increased costs for out-of-state litigants, and conversations with lawyers suggest that, in most situations, distance has little or no impact on litigation costs."); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1167 (2013) ("Today, litigation in a distant state is not a major inconvenience for most corporate defendants.").

for, such as rules for qualification of expert witnesses,[154] litigation of class actions,[155] and summary-judgment practice.[156] Beyond these codes, however, procedural laws in the choice-of-law arena also include statutes of limitation,[157] burdens of proof,[158] and measures of damages,[159] among numerous other laws.[160] All of these laws can make or break a case.

Second, every state's choice-of-law rules instruct its court to apply the substantive law of a particular state. Sometimes that law could be the state in which the plaintiff has brought suit, but often it is not. For example, in tort cases, some courts apply the substantive law of the state where the plaintiff was injured.[161] In contrast, other courts apply the substantive law of the state having the "most significant relationship to the occurrence and the parties."[162]

To illustrate the operation of these two approaches, consider a case in which a Virginia resident is injured in Montana while on a sightseeing tour operated by a Virginia company. The plaintiff believes that her injury was caused by the tour company, but the company believes that the plaintiff is at least partially to blame because she was under the influence of alcohol when she was injured. If the plaintiff were to file suit in Virginia, the court would apply Montana law because Virginia courts apply the substantive law of the

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154. There are three or four different tests for the admissibility of expert evidences in use across the states. *See* Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2001).

155. Many states employ class actions practices similar to those used in federal court, but important differences exist. Class actions are nearly non-existent in Virginia and Mississippi, and are very difficult to bring in Nebraska. For an explanation of these and other differences, see generally Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences from—and Lessons for?—Federal Rule 23*, 35 W. ST. U. L. REV. 147 (2007).

156. In Virginia, for example, a motion for summary judgment may not be supported by deposition testimony. VA. CODE § 8.01-420 (2015). Because defendants bring the great majority of summary-judgment motions, this rule tends to favor plaintiffs.

157. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(1) (1971) ("An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state."); WEINTRAUB, *supra* note 61, § 3.2C2 ("Statutes of limitations have traditionally been classified as 'procedural' for conflicts purposes.").

158. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 157, § 133 cmt. b ("Most rules relating to which party has the burden of persuasion are concerned primarily with questions of trial administration. When rules of this sort are involved, the forum will apply its own local law.").

159. *Id.* § 171 cmt. f ("The forum will follow its own local practices in determining whether the damages awarded by a jury are excessive.").

160. *See, e.g.*, *id.* § 135 cmt. a ("Regarding rules for sufficiency of the evidence,] [c]onsiderations of efficiency and convenience require that the question whether a party has introduced sufficient evidence to warrant a finding in his favor should usually be governed by the local law of the forum."); § 139 cmt. d ("[Regarding privilege,] [t]he forum will admit evidence that is not privileged under its local law but is privileged under the local law of the state which has the most significant relationship with the communication, unless it finds that its local policy favoring admission of the evidence is outweighed by countervailing considerations.").

161. *See generally, e.g.*, Boudreau v. Baughman, 368 S.E.2d 849 (N.C. 1988).

162. *See, e.g.*, Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 157, § 145).

place where the wrong occurred.[163] If the plaintiff filed suit in Montana, the court would likely apply Virginia law because Montana courts apply the substantive law of the state having "the most significant relationship" to the tortious conduct.[164] This distinction is important because Virginia law recognizes the defense of contributory negligence[165] while Montana law does not.[166] By suing in Virginia, the plaintiff could avoid a defense that could very likely defeat her suit.

Consider now how jurisdiction-via-registration expands the plaintiff's options. Suppose that Virginia, instead of applying the law of the state where the harm occurred (i.e., Montana law) will apply the law of the state with the most significant interest (i.e., Virginia law). The plaintiff would gain no advantage by filing in either state because both Montana and Virginia will apply Virginia law, which allows for the defense of contributory negligence. If jurisdiction-via-registration exists, however, the plaintiff may not be restricted to Montana and Virginia. If the tour company is registered to do business in other states (and has thereby consented to jurisdiction there), the plaintiff could choose to file in any of those states. If any of those states have a choice-of-law regime that instructs its courts to apply the law of state where the injury occurred, the plaintiff would have the advantage.

Accordingly, a company registered to do business in ten states, by being subject to suit in those states, will also be subject to ten different choice-of-law regimes. These regimes offer plaintiffs an advantage that would not exist if the defendant were only subject to jurisdiction in its states of residency and the states with which it had minimum contacts. Therefore, a company deciding whether to do business in a particular state will reasonably find registration statutes unattractive. Such statutes confer distinct benefits on plaintiffs and, correspondingly, distinct costs on registered companies.

ii. Burden: Local Practice

Even if choice-of-law rules were uniform and provided no advantage to plaintiffs, "local practice" could still benefit them. Local practice involves anything and everything except the substantive and procedural law applied in a suit, such as the identity of the judge, the composition of the jury, the pace of pleading, discovery and trial, the court's overall willingness to grant

163. Jones v. R.S. Jones & Assocs., Inc., 431 S.E.2d 33, 34 (Va. 1993).

164. Tidyman's Mgmt. Servs. Inc. v. Davis, 330 P.3d 1139, 1147 (Mont. 2014). Based on this simple fact pattern, it is difficult to say *for sure* whether Montana would apply Virginia law because Montana's choice of law test balances numerous different factors. A more detailed example could easily be written that would conclusively point to Virginia law, but for brevity's sake, this short example is used.

165. *See* Hoar v. Great E. Resort Mgmt., Inc., 506 S.E.2d 777, 787 (Va. 1998).

166. MONT. CODE ANN. § 27–1–702 (West 2015); Giambra v. Kelsey, 162 P.3d 134, 145 (Mont. 2007).

summary judgment, and all the other features of adjudication that differ according to the forum.[167]

The Eastern District of Texas is a prominent example of the advantages local practice. The Eastern District is the most popular district in the country for patent infringement cases,[168] but its popularity cannot stem from for a choice-of-law advantage because patent law is uniform throughout the nation.[169] The advantage must drive from somewhere else. In their paper, *Forum Selling*, Professors Daniel Klerman and Greg Reilly identify numerous factors that make the Eastern District so attractive to patent plaintiffs.[170] Plaintiffs in the Eastern District, for example, have an amazing amount of control over which judge will be assigned to their case,[171] and, lest the defendant attempts to avoid an unfavorable judge with a transfer motion, plaintiffs have a stronger-than-usual chance of resisting transfer.[172] Plaintiffs in the Eastern District can also get to a jury more often[173] and more quickly[174] than in most other districts. Further, the district employs rules making discovery[175] and party joinder[176] easier—traits that tend to benefit plaintiffs in patent cases.

The Eastern District of Texas is a good example how important local practices can be, but it is by no means the only example. Jefferson County Mississippi or perhaps Madison County, Illinois are so-called "magic jurisdictions" for asbestos litigation—places where, during the asbestos

167. To be sure, some of these features—like rules for jury and judge selection—might be better classified as "law" (and thus be included in the preceding discussion), but the distinction is of little practical importance. Whether classified as law or practice, the goal here is to explain the ways in which a forum can be disadvantageous to a defendant.

168. *See generally* Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193 (2007).

169. All patent appeals are resolved in a single circuit, the Federal Circuit. *See* 28 U.S.C. § 1295(a) (2012).

170. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV 241, 250–70 (2016).

171. Because of the way in which cases are assigned throughout the district, and the number of judges that serve in particular divisions within the district, a plaintiff is able to have "at least a 50% (and often far closer to 100%) chance of having a particular judge" hear her suit. *Id.* at 255.

172. *Id.* at 260–63.

173. *Id.* at 251–54.

174. *Id.* at 265–68. The Eastern District operates a "rocket docket." *Id.* This is an advantage to plaintiffs, who normally can only obtain what they want when the litigation concludes, and a disadvantage to defendants who normally want to continue to use the patented subject matter of the dispute for as long as possible. *Id.*

175. *Id.* at 268 (noting that certain mandatory discovery rules will impose outsized costs on defendants).

176. *Id.* at 257 (noting that joinder rules permitted plaintiffs to sue unrelated defendants and that the plaintiff's "perceived a significant strategic advantage" in suing defendants in this manner).

litigation boom, "a large plaintiffs' verdict was practically guaranteed."[177] Consider this description of magic jurisdictions by a plaintiff's lawyer who rode that litigation wave:

> [T]he "magic jurisdiction" [is a] jurisdiction[] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their place in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. Now a lot of times those get set aside on appeal, like in Texas, for example. A lot of you folks have succeeded in electing a very conservative Supreme Court, that reverses a lot of these things, but in order to get there you got to find it. It's pretty tough to handle a hundred or five hundred million-dollar judgment; it ties up your credit, your company; stock gets a hard hit; and so they're forced into a settlement.
>
> There are probably a dozen magic jurisdictions around the country where this is really a dangerous thing. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is. The jury is going to come back with a large number and the judge is going to let it go to the jury, often on punitive damages.[178]

It is clear that local practice, quite apart from the applicable law, makes a forum attractive. Something as prosaic as a bond requirement during appeal can confer huge benefits on a plaintiff.

Notwithstanding these examples, an empirical study of transfer in federal court by Professors Kevin M. Clermont and Theodore Eisenberg provides strong evidence that local practice significantly affects litigation outcomes.[179] Federal transfer is the perfect phenomenon for studying the purported effects

177. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 550–51 (2007).

178. Richard Scruggs, Remarks at "Asbestos for Lunch," a Prudential Financial Research Financial Services Group Conference (June 11, 2002), *in* Steven Hantler, *Toward Greater Judicial Leadership on Asbestos Litigation*, CIV. JUST. F., April 2003, at 20–21, http://www.manhattan-institute.org/pdf/cjf_41.pdf. For further commentary on "magic jurisdictions" by Richard Scruggs, see Richard Scruggs et al., *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001).

179. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511–13 (1995).

of local practice, because when a federal court transfers a case from one district to another, the substantive and procedural law will almost always remain the same.[180] Therefore, transfer is an instance in which the effects of the local practice are isolated from other forum-related matters. In their study of the topic, Clermont and Eisenberg concluded that "[t]he win rate drops from 57.97% when the case is not transferred to 29.26% when transfer is granted."[181] The win rate, in other words, just about falls in half. In the authors' view, the decreased win rate is partially attributable to a "less favorable set of local biases in the new forum."[182] The more "dominant influence, however, is probably the shifted balance of inconveniences."[183] Because the plaintiff will find it less convenient to litigate in the new forum and the defendant will find it more convenient, the plaintiff will typically fare worse.

Whether established qualitatively or quantitatively, there is little doubt that the choice of forum, independent of the applicable law, often affects the outcome of a case. In the context of interstate commerce, the effect of local practice means that companies will be less likely to do business in states with pro-plaintiff forums—at least to the extent that those states extract consent to general jurisdiction as a condition of doing business there. As a result, companies who are already located in those states will enjoy some protection from competition from outsiders.

iii. Benefit: Providing a Forum for Residents or Persons Injured in the State

On the benefit side of the Pike balancing test is a state's legitimate interest in providing a forum for its residents (regardless of where they are injured) and non-residents injured in the state.[184] Although our focus here is on "local benefits" rather than a "legitimate interest," the two are one in the same in this context. A state derives benefit from the authority to adjudicate the rights of residents injured out of state and non-residents injured in state.[185] Conversely, that the state derives no legitimate benefit from adjudicating the rights of nonresidents injured out of state.

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180. Regarding procedural law, because the transferred case remains in federal court, federal procedure will continue to apply. Regarding substantive law in a diversity case, *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990), requires the transferee court to apply the same substantive law that the transferor court would have applied. Regarding substantive law in a federal question case, the transferee court will apply the law in its own circuit, not the law in the transferor circuit. *See, e.g.*, Lanfear v. Home Depot, Inc. 536 F.3d 1217, 1223 (11th Cir. 2008). Thus, only in a tiny minority of cases (i.e., cases where the transferor and transferee circuits have different law on federal questions relevant to the case) will involve a post-transfer change in substantive law.

181. Clermont & Eisenberg, *supra* note 179, at 1512.

182. *Id.* at 1515.

183. *Id.*

184. *See supra* notes 106–20 and accompanying text.

185. *See supra* notes 106–20 and accompanying text.

iv. The Balance of Burdens and Benefits

The *Pike* balancing tests requires courts to determine whether the burdens are "clearly excessive in relation to the putative local benefits."[186] In making this determination, it is important to remember that the Supreme Court typically grants states "great leeway" in pursuing state welfare.[187] Traffic laws, for example, will undoubtedly affect the flow of traffic and, to some extent, will affect the flow of interstate commerce. Such laws will almost always be upheld because the courts are unable or unwilling to precisely measure the burdens and benefits.[188] It is only where a state law cannot possibly advance a legitimate state interest that courts will declare a state law unconstitutional under the Dormant Commerce Clause.

Given this, registration laws that subject defendants to general jurisdiction in a state are constitutional to the degree that they deliver some benefit to the state, such as protecting state residents injured anywhere and non-residents injured in state. It does not exist, however, where the plaintiff is a non-resident injured out of state. Where non-resident plaintiffs make use of registration laws to establish personal jurisdiction for injuries sustained out of state, courts should refuse to apply jurisdiction-via-registration laws because they are unconstitutional. In sum, personal jurisdiction based on business registration imposes an impermissible burden on interstate commerce in cases brought by non-residents injured out of state. Such laws produce no discernible benefits for a state and impose at least some costs. Therefore, courts should hold that they violate the Dormant Commerce Clause.

IV. THE DORMANT COMMERCE CLAUSE APPLIED TO OTHER BASES FOR PERSONAL JURISDICTION

The preceding Part argued that personal jurisdiction based on business registration will violate the Dormant Commerce Clause when the plaintiff is a non-resident injured out of state. This Part considers whether other bases for personal jurisdiction run afoul of the Dormant Commerce Clause. While most bases for personal jurisdiction comport with the Dormant Commerce Clause, courts should hold that jurisdiction based on either extensive business operations (to the extent any of it remains after *Daimler*) or service of process (transient jurisdiction) is unconstitutional.

A. CONSTITUTIONAL

There are three grounds for personal jurisdiction that will survive analysis under the Dormant Commerce Clause. They are jurisdiction based on (1) domicile; (2) consent; and (3) contacts giving rise to a law suit.

186. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

187. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959).

188. *See supra* notes 130–34 and accompanying text.

1. Domicile

Personal jurisdiction is frequently grounded on the defendant's status as a domiciliary of the forum state. On its face, this basis for personal jurisdiction is discriminatory: it defines jurisdiction according to where the defendant lives. Defendants that are domiciles of the forum state are subject to jurisdiction for any and all claims; most other defendants are subject to jurisdiction in the state only for claims related to their contacts with the state.

Though these laws differentiate between residents and non-residents, they are not discriminatory in a way that would violate the Dormant Commerce Clause. Laws that violate the Dormant Commerce Clause favor insiders at the expense of outsiders.[189] Yet personal jurisdiction based on domicile does not favor insiders at all; instead, it favors outsiders. In this sense, personal jurisdiction based on domicile is like an income tax imposed on residents. If a state decides to impose an exorbitant tax on its residents' incomes, the tax will encourage residents to leave the state and non-residents not to come. Taxes that apply only to residents, while discriminatory in a pure, definitional sense, do not violate the Dormant Commerce Clause.

Of course, just because personal jurisdiction based on residency is not discriminatory, it might still be unconstitutional if it imposes excessive burdens on interstate commerce. To survive this analysis, however, a state need only show that subjecting residents to jurisdiction produces some meaningful benefit for the state. A state plainly has an interest in adjudicating the rights of its citizens, even if those citizens are defendants.[190] It can ensure that its citizens are not wrongfully held liable, and perhaps just as importantly, ensure that its citizens are held accountable for their tortious acts. Thus, there is no Dormant Commerce Clause barrier to jurisdiction based on domicile.

2. Consent via Contract or Waiver

Although jurisdiction-via-registration—a form of jurisdiction by consent—violates the Dormant Commerce Clause when a non-resident plaintiff is injured out of state, jurisdiction-via-contract and jurisdiction-via-waiver are constitutional.

Consent via contract occurs when a defendant agrees, either before or after a dispute has arisen, to subject itself to jurisdiction in a particular state. Personal jurisdiction on this basis is perfectly constitutional under the Dormant Commerce Clause. Unlike jurisdiction based on registration, where the state extracts consent for the privilege of doing business, consent-via-contract is not extracted by the state, but by a private party. The state's role is simply to enforce the private agreement. As long as the state enforces such agreements evenhandedly (i.e., without regard to the residency of the defendant), then there is no discrimination in violation of the Dormant

189. *See supra* notes 63–82 and accompanying text.

190. *See supra* notes 115–16.

Commerce Clause. Nor is there any burden imposed on interstate commerce. A state's willingness to enforce these contracts would not drive business or other activity out of state or towards some other state—it simply invites business into the state by offering benefits (dispute resolution services).

Consent-via-waiver occurs when a defendant, who may or may not have a valid personal jurisdiction defense, fails to challenge personal jurisdiction in the manner prescribed by the court. This ground for jurisdiction is constitutional because it has no connection whatsoever to a non-resident defendant's decision to enter the forum state to do business. Consider a plaintiff that wishes to sue an Illinois corporation in Oregon. The plaintiff is well aware that the defendant has no contacts whatsoever with Oregon, but hopes that the defendant will waive any jurisdictional objections. The fact that this might occur would not affect the Illinois resident's decision to enter Oregon or not. By staying out of Oregon, the defendant does not insulate itself from the possibility of jurisdiction-via-waiver, and by doing business in the state, the company does not somehow increase its vulnerability to jurisdiction-via-waiver. Because a corporation's decision to do business in Oregon is completely unaffected by waiver, jurisdiction-via-waiver does not violate the Dormant Commerce Clause.

3. Specific Jurisdiction

Specific jurisdiction is neither impermissibly discriminatory nor unduly burdensome.[191] One of the most common bases for personal jurisdiction, "specific jurisdiction"[192] exists when a lawsuit arises out of the defendant's purposefully established "minimum contacts" with the forum state.[193] Specific jurisdiction is in fact discriminatory, but not unconstitutional. Recall the above example in the discussion of jurisdiction-via-registration.[194] If Illinois subjected corporate registrants to general jurisdiction but Florida did not, a Florida company would be less likely to do business in Illinois than an Illinois company could be likely to do in Florida. Put differently, Illinois companies would be marginally more protected from foreign competition than Florida

191. It should be noted that not all actions in a state that establish specific jurisdiction will even trigger the Dormant Commerce Clause. An action must be sufficiently connected with interstate commerce to come within the protections of the Clause. *See infra* note 208.

192. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923–24 (2011) ("Adjudicatory authority is 'specific' when the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'").

193. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). In addition to looking for contacts that give rise to the claim alleged, courts additionally consider whether jurisdiction would be consistent with "fair play and substantial justice." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting *Int'l Shoe Co.*, 326 U.S. at 320)).

194. *See supra* notes 97–103 and accompanying text.

companies. The same analysis applies with regard to specific jurisdiction. If Illinois maintains a specific jurisdiction statute but Florida does not, Illinois residents would be marginally more likely to do business in Florida than Florida residents would do in Illinois. Illinois businesses would thus be protected from foreign competition, to some degree, by their state's specific jurisdiction statute.

However, just because personal jurisdiction statutes are discriminatory does not mean they violate the Dormant Commerce Clause. Discriminatory laws are constitutional if they are justified by a legitimate state interest that cannot be accomplished in a non-discriminatory manner.[195] In this context, a state's interest in maintaining a specific jurisdiction statute is holding persons accountable for harms suffered in the state based on their purposeful actions directed at the state. Not only is this an interest that courts and scholars widely consider legitimate, it is an interest that cannot be accomplished in a less discriminatory way. Holding non-residents accountable for harms connected with a particular state will always involve coercive action by that state, and there is simply no other way for a state to achieve that interest.

Specific jurisdiction is also not unduly burdensome. Subjecting a person to suit who commits a harm connected to a particular state likely discourages, to some degree, persons from making contact with that state. Yet that burden is easily overcome by the state's interest in holding non-residents accountable for wrongs connected with the state. Regardless of the fact that specific jurisdiction is discriminatory and imposes a burden on interstate commerce, it is constitutional because it delivers important benefits to a state.[196]

B. UNCONSTITUTIONAL

1. General Jurisdiction

Even though the Supreme Court dramatically curtailed general jurisdiction in *Daimler AG v. Bauman*, it is not entirely dead.[197] Before *Daimler*, large corporations doing business throughout the country could often be sued in numerous states—regardless of where the cause of action arose. After *Daimler*, these companies can, generally speaking, only be sued in their home states or where the cause of action arose.[198]

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195. *See supra* notes 89–95 and accompanying text.

196. For the same reasons, in rem and quasi in rem jurisdiction will also comport with the Dormant Commerce Clause. In rem and quasi in rem jurisdiction are based the presence of the defendant's property in the state and the suit must pertain the property itself. *See generally* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1070 (3d ed. 2002). Thus, while these grounds for jurisdiction might dissuade persons from moving their assets into a particular state or purchasing an interest in assets already located in a state, the state has a legitimate interest in adjudicating the rights to the property in question and, because the property is located in the state, the state has no other way to vindicate that interest except by taking jurisdiction.

197. *See generally* Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

198. *See supra* notes 23–38 and accompanying text.

However, the *Daimler* Court declined to "foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[199] An exceptional case, according to the Court, is *Perkins v. Benguet Consolidated Mining Co.*[200] In *Perkins*, a plaintiff filed suit in Ohio against Benguet, a company incorporated "under the laws of the Philippines, where it operated gold and silver mines."[201] When Japan occupied the Philippines during World War II, Benguet shut down its operations and its "president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio[, where] he maintained an office in which he conducted his personal affairs and did many things on behalf of the company."[202] Even though the lawsuit was unrelated to the company's activities in Ohio, the Court held that Ohio had personal jurisdiction over the company because "Ohio was the corporation's principal, if temporary, place of business."[203]

Given the odd facts of *Perkins*, it is hard to imagine other cases in which the Court might find general jurisdiction appropriate. But under the Dormant Commerce Clause, it is clear that a state may not subject a defendant to jurisdiction for doing substantial business in a state unless the suit is brought by a resident of that state or a person injured in the state. Prior to *Daimler*, a company like Home Depot could be sued in California for any claim, even though the company is headquartered in Georgia and incorporated in Delaware. In contrast, a hardware retailer with the same corporate residencies but with only a single, small store in California could not be sued in the state for any claim. The difference between the two, of course, is the amount of business conducted in the state. The pre-*Daimler* approach to general jurisdiction essentially punished companies that dared to do a large amount of business in a particular state. This is the exact type of behavior that the Dormant Commerce Clause is designed to proscribe—the imposition of extra costs on a foreign company that will compete with local companies.

This conclusion is likely to elicit two responses. The first is that it requires us to believe that general jurisdiction has been unconstitutional for just about all of its history (as for the early case of *Perkins*, we will turn to that below). Were all the lawyers and judges and (most) scholars simply asleep while doing-business jurisdiction developed and took hold? Perhaps. But simply because an argument has been overlooked or even ignored does not make it wrong.

199. *Daimler*, 134 S. Ct. at 761 n.19.

200. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

201. *Id.* at 439.

202. *Id.* at 447–48.

203. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 n.11 (1984) (describing *Perkins*).

Indeed, the best evidence of this fallacy is *Daimler* itself. For decades, doing-business jurisdiction was a well-established aspect of personal jurisdiction law, but on January 14, 2014, the Court suddenly held that it was unconstitutional. Was the Supreme Court in *Daimler* wrong simply because it had waited too long? Because it had allowed doing-business jurisdiction to become too entrenched? Certainly not. Longstanding practices do not become constitutional simply because they are longstanding. This is not to say that the established nature of a rule is irrelevant to its likely constitutionality. Indeed, it might well be appropriate to grant long-established rules a presumption of constitutionality. But a presumption of constitutionality does not, on its own, win the day. Any such presumption is overcome by the observation that doing-business jurisdiction kicks in when a company dares to do serious business in a state. That is a plain violation of the Dormant Commerce Clause.

The second response is: what about *Perkins*? *Daimler* makes clear that *Perkins* is still good law, but—if the analysis above is correct—might the Court be required to overrule *Perkins*? Not necessarily. Although *Perkins* has long been understood as a general jurisdiction case, it can easily be understood as a case about corporate residency. *Perkins* was amenable to suit in Ohio not necessarily because its contacts there were pervasive (they were not) but because "Ohio was the corporation's principal, if temporary, place of business."[204] The company's operations in the Philippines had been completely shut down, Ohio was the company's only place of business. If a case like *Perkins* arises again, the Court could approve jurisdiction in that circumstance, while still holding general jurisdiction unconstitutional under the Dormant Commerce Clause in cases brought by non-residents injured out of state. The Court need only make clear that jurisdiction was based on the fact that the company was subject to jurisdiction because its headquarters, at the time, was located in the forum state.

2. Transient Jurisdiction

Transient jurisdiction—or personal jurisdiction based solely on service of process while the defendant is present in the state—likely violates the Dormant Commerce Clause in a narrow class of cases.[205] Establishing personal jurisdiction in this way simply involves delivering a court summons and copy of the complaint to the defendant while the defendant is present in the forum state.

Before explaining this analysis in greater detail, it is important to make clear how narrow this class of cases actually is. To be unconstitutional, the case must satisfy three separate criteria. First, jurisdiction must be sought over a

204. *Id.* (describing *Perkins*).

205. *See* Burnham v. Superior Court, 495 U.S. 604, 607 (1990) (finding transient jurisdiction to satisfy personal jurisdiction over a "nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State").

defendant that is a natural person.[206] Second, jurisdiction must be sought in a case where both the plaintiff and defendant are non-residents of the forum and the plaintiff was injured out of state.[207] Third, jurisdiction must be asserted in a case where the defendant's presence in the forum state is plausibly connected to interstate commerce, thus bringing the defendant within the protections of the Dormant Commerce Clause.[208] There will certainly be some cases where all three of these criteria line up, but it is fair to say that such cases will be extraordinarily rare.

In this narrow classes of cases, however, transient jurisdiction will be unconstitutional because it discriminates against interstate commerce.[209] Recall again the prior illustration showing how jurisdiction-via-registration statutes are discriminatory. If Illinois required companies doing business in the state to consent to general jurisdiction there, but Florida did not, an Illinois company would be marginally more likely to expand into Florida than a Florida company would be likely to expand into Illinois.[210] If the parties are natural persons instead of corporations (to accommodate the fact the transient jurisdiction can only be asserted over human beings[211]), the discriminatory nature of the jurisdiction remains. A Florida salesperson would

206. Although the issue has never been conclusively resolved, transient jurisdiction is not likely available against most corporate defendants and uncommonly available against other entities. *See supra* note 22.

207. In each of these three situations, any possible discrimination against or burden upon interstate commerce will be overcome by the state interest in adjudicating the dispute. *See supra* notes 105–20 and the accompanying text.

208. Somewhat surprisingly, some state courts have held a defendant's mere presence in a state will not automatically implicate interstate commerce. *See* Knappenberger v. Davis–Stanton, 351 P.3d 54, 64 (Or. Ct. App. 2015) (holding that, because defendant moved to Oregon to live but not for employment, "there are insufficient circumstances implicating interstate commerce to invoke the [Dormant] [C]ommerce [C]lause"); *see also* Pratali v. Gates, 5 Cal. Rptr. 2d 733, 740 (Cal. 1992) (refusing to apply Dormant Commerce Clause, and stating "[i]n any event, we question whether a single amicable loan between California acquaintances while visiting in Las Vegas can rise to the level of interstate commerce within the meaning of the commerce clause"). For further discussion of this point, see Conservation Force, Inc. v. Manning, 301 F.3d 985, 993–94 (9th Cir. 2002).

209. Given the discriminatory nature of transient jurisdiction in these cases, it is unnecessary to consider the burden that jurisdiction might impose on interstate commerce. Nonetheless, it is worth noting that whatever burden transient jurisdiction might impose, the burden will be far less than the burden imposed by personal jurisdiction imposed by corporate registration. For one, corporate registration is indefinite; it renders the company subject to personal jurisdiction for the entire duration of the company's registration—a period most likely measured in years. For another, corporate registration is public; it can be discerned with a couple phone calls or a brief internet search. In contrast, persons who travel to a new state do so only for short periods of time. If they do so for longer, they would likely become a resident of the state. Additionally, such travel (including the specific location of the defendant at any point in time) is usually laborious to uncover. The burden on commerce imposed by business registration statutes will typically far exceed that imposed by service of process on human defendants.

210. *See supra* notes 97–104 and accompanying text.

211. *See supra* note 22 and accompanying text.

be marginally less likely to sell her wares in Illinois if she could be amenable to suit under Illinois laws while she was there. Therefore, she would have to share her Florida territory with Illinois salespersons, but Illinois salespersons would need not share their territory with her.

The most compelling argument against this analysis comes from *Burnham v. Superior Court*.[212] In *Burnham*, the Supreme Court held that transient jurisdiction did not violate the Due Process Clause. Although the focus of this Article is on the Dormant Commerce Clause, the plurality's reasoning in *Burnham* is still powerful because it was based on the historical primacy of transient jurisdiction. Citing American cases dating back to 1793 (and English cases dating even further back), the Court explained that one of "the most firmly established principles of personal jurisdiction in American tradition is that the courts of a state have jurisdiction over nonresidents who are physically present in the state."[213] This begs the question, if transient jurisdiction was so "firmly established" that it could survive alongside modern Due Process doctrine, why should it not also be firmly established enough to survive alongside modern Dormant Commerce Clause doctrine? Or put differently, if transient jurisdiction was permissible at the Founding, how could it be impermissible now?

There are two responses to this point. First, even though all nine Justices voted to uphold transient jurisdiction in *Burnham*, only four Justices concluded that its historical foundations alone justified its retention.[214] Thus, *Burnham* does not hold that history is sufficient to justify transient jurisdiction against the Due Process Clause. Second, the four-Justice plurality explicitly acknowledged that transient jurisdiction might not have been firmly established at the Founding.[215] The plurality only posited that it was firmly established "at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted."[216] There is credible evidence that transient jurisdiction was not firmly established even at that point,[217] but even if it was, it would not resolve the Dormant Commerce Clause issue presented

212. Burnham v. Superior Court, 495 U.S. 604 (1990).

213. *Id.* at 610.

214. Outside the four-Justice plurality (composed of Justices Scalia, Rehnquist, Kennedy and White), four Justices (composed of Justices Brennan, Marshall, Blackmun and O'Connor), concluded that "although . . . history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements," it is not "the *only* factor." *Id.* at 629. Justice Stevens, writing alone, explained in a concurring opinion that the variety of reasons offered by his colleagues "combine to demonstrate that this is, indeed, a very easy case." *Id.* at 639.

215. *Id.* at 611 (after quoting Justice Story's endorsement of transient jurisdiction, noting that "recent scholarship has suggested that English tradition was not as clear as Story thought").

216. *Id.*

217. Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1004 (1992) (regarding the cases cited by the *Burnham* plurality, stating that "it is not at all apparent that those cases may collectively be read as categorically affirming transient jurisdiction in all situations, especially when understood in historical context").

here. To resolve that issue, one must discern transient jurisdiction's use in the late eighteenth and early nineteenth centuries—the era that would inform an understanding of the Commerce Clause.

The historical question here depends not just on whether transient jurisdiction, as a general matter, was widely used at the Founding, but instead on whether transient jurisdiction when pursued by non-residents in a state having no connection to the plaintiff's injury is permissible. On this issue, the evidence is far less clear, and it is not hard to imagine why. In an era where travel and communication were slow and arduous, it would have been quite rare that a plaintiff would leave his home state to chase down a defendant who was also outside of his own home state.[218]

Not only would such assertions of jurisdiction, as a practical matter, be rare, but scholarship suggests that their legal basis would have been dubious as well. Transient jurisdiction is based, at its bottom, on a sovereign's power over persons within its territory. It is far from clear, however, that personal jurisdiction at the Founding (whether in England or America) was a question of sovereign power. In *The Transient Rule of Personal Jurisdiction: the "Power" Myth and Forum Conveniens*, for example, Professor Albert Ehrenzweig explored this issue and concluded that, from early England through at least nineteenth century America, personal jurisdiction "depended upon voluntary subjection of both parties" to the court's authority, not on the court's unilateral authority over the parties.[219] Service of process, in his account, simply initiated a lawsuit; it did not amount to a type of "judicial arrest." In a separate study, Professor Geoffrey Hazard reached a similar conclusion.[220] Hazard canvassed English cases involving service of process and concluded that the cases are "reducible to the principal that personal service is a necessary, but not a sufficient, condition for the exercise of jurisdiction."[221] Looking at early American cases, Professor Ehrenzweig similarly found evidence of transient jurisdiction wanting. "[T]here is no indication in the available case law," he explained, "that [early American] courts were willing or anxious to exercise 'physical power' in 'transitory actions' against a nonresident on a foreign cause of action where the plaintiff was not a citizen of the forum state and so was not entitled to special consideration."[222]

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218. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296 (1956).

219. *Id.* at 296. Professor Ehrenzweig explained that this conclusion "is supported on the one hand by the fact that once submission has been obtained the law has always been satisfied with less than actual power, and on the other hand by the law's continuing desire for the defendant's 'co-operation'—expressed, for instance, in its hesitation in admitting judgments by default." *Id.*

220. *See generally* Geoffrey C. Hazard Jr., *A General Theory of State-Court Jurisdiction*, 1965 S. CT. REV. 241 (1965).

221. *Id.* at 256.

222. Ehrenzweig, *supra* note 218, at 303.

Professors Ehrenzweig and Hazard could be wrong, of course. But there are two reasons to give their conclusion special weight. First, the plurality in *Burnham* itself cited their work and admitted that it casts doubt on the existence of transient jurisdiction at the Founding.[223] Second, their conclusions make sense as a matter of history. England, unlike America, was not a nation of "competing, geographically limited jurisdictions."[224] It was a single nation with single set of laws and there thus would have had no need for a jurisdictional device designed to subject a defendant to suit one region of the country instead of another.[225] For this reason, it is not surprising to find that,

> until 1830, there was no developed English common law on what we now call interstate or international jurisdiction. . . . [T]he attitude toward territorial jurisdiction chiefly reflected two concerns, that the English courts not get themselves in a position of entering an unenforceable judgment and that the colonial courts not overreach themselves.[226]

In sum, the available scholarship on English and Founding era jurisdiction suggests that transient jurisdiction was invented well after the Founding.

Without evidence establishing its Founding-era use, transient jurisdiction should be held unconstitutional in the narrow category of cases defined above. Of course, if evidence is uncovered suggesting that transient jurisdiction of the sort at issue here was robust at the Founding, a re-evaluation of this conclusion would be in order. Until then, however, such jurisdiction should be considered invalid.

V. CONCLUSION

Personal jurisdiction has long lived under the dominion of the Due Process Clause, and for the most part, it should continue to reside there. But personal jurisdiction is about more than fairness. It plays a major role in the choice of forum—an enterprise driven by significant economic goals and with significant economic consequences. Given this, courts should evaluate personal jurisdiction under the Dormant Commerce Clause as well as the Due Process Clause.

The recent case of *Daimler AG v. Bauman* and its resultant focus on jurisdiction-via-registration make it perfect time to re-invigorate the Dormant Commerce Clause's role in personal jurisdiction. In doing so, courts should

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223. Burnham v. Superior Court, 495 U.S. 604, 611 (1990) ("Recent scholarship has suggested that English tradition was not as clear as Story thought." (citing Hazard, *supra* note 220, at 253–60, and Ehrenzweig, *supra* note 218, at 289)).

224. Ehrenzweig, *supra* note 218, at 298.

225. *Id.* at 297–98.

226. Hazard, *supra* note 220, at 253.

hold that jurisdiction based on (1) business registration, (2) extensive business contacts, and (3) service of process, each violate the Dormant Commerce Clause in cases brought by non-residents injured out of state. Importantly, declaring jurisdiction unconstitutional in these circumstances will leave most of personal jurisdiction law unchanged. The main effect of applying the Dormant Commerce Clause in this field will simply be to proscribe the boldest types of forum shopping—filing suit in a forum where no party or event has a connection to the suit.