Rousing the Dormant Commerce Clause in the Context of Personal Jurisdiction

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Abstract

All states require corporations to register to do business in the state before operating there. Some states further provide that registration to do business in the state constitutes consent to the general personal jurisdiction of the state's courts. In Mallory v. Norfolk Southern Railway Co.*, the United States Supreme Court held that these consent-by-registration statutes do not violate the Due Process Clause. Because personal jurisdiction is usually analyzed as a question of due process, that might seem to be the end of the matter—consent-by-registration statutes pass constitutional muster.*

But state legislatures are constrained by more than the Due Process Clause. The Dormant Commerce Clause, for example, invalidates state legislation that discriminates against, or unduly burdens, interstate commerce. The plurality opinion in Mallory *expressly left open the question of whether the Pennsylvania consent-by-registration statute at issue violated the Dormant Commerce Clause. A concurring opinion by Justice Alito indicated that it likely does.*

The Supreme Court has repeatedly described personal jurisdiction doctrine as protective not only of a defendant's individual rights but also of state sovereignty and federalism. The Due Process Clause is ill-suited to protect these interests because due process rights are individual rights that can be waived. A defendant that consents to personal jurisdiction effectively waives any objection based on due process. The Commerce Clause, however, was specifically designed to

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prevent competition and rivalry between the states. The Dormant Commerce Clause was recognized as a necessary corollary.

There was once a time when personal jurisdiction was regularly analyzed under the Dormant Commerce Clause. That approach was made largely irrelevant by the ascendancy of the Due Process Clause analysis, but Mallory *shows that it still has a place. Indeed, rousing the Dormant Commerce Clause analysis in this context is necessary to prevent personal jurisdiction doctrine from becoming more muddled and confused than it already is. To the extent consent-by-registration statutes discriminate against or unduly burden interstate commerce, they are unconstitutional as a matter of established Dormant Commerce Clause doctrine. Moreover, just as the due process question in* Mallory *was resolved by a "very old" case called* Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, the Dormant Commerce Clause question is resolved by a different very old case,* Davis v. Farmers' Cooperative Equity Co. *This Article demonstrates that consent-by registration statutes discriminate against and unduly burden interstate commerce and should be held unconstitutional.*

I. INTRODUCTION

In modern America, commerce is almost always interstate commerce. Goods purchased online are generally shipped from outside the state, and even goods purchased within a state are usually sourced from outside the state or made of components or materials from outside the state. A firm wishing to do business in another state, however, must invariably comply with a corporate registration statute. Business registration laws generally exist "to facilitate the enforcement of tax laws and to subject foreign corporations to legal process."[1]

"[A]ll fifty states and the District of Columbia have corporate registration statutes as a condition of doing business in the state."[2] But some states go further. Some states' corporate registration statutes provide that a firm registering to do business in the state also consents to the general jurisdiction of that state's courts. Pennsylvania has such a "consent-by-registration"[3] law, which came under United States Supreme Court scrutiny in *Mallory v. Norfolk Southern Railway Co*.[4]

Mallory originated in Pennsylvania state court and reached the Supreme Court of Pennsylvania. The state's high court held the consent-by-registration law unconstitutional under *Goodyear Dunlop*

1. Empire Excavating Co. v. Maret Dev. Corp., 370 F. Supp. 824, 827 (W.D. Pa. 1974).

2. Linda S. Mullenix, *Railroading Personal Jurisdiction*, 43 REV. LITIG. 141, 148 (2024).

3. References to "consent-by-registration" laws refer to laws that require consent to the general jurisdiction of the state's courts. Any statute that required consent to jurisdiction in a narrower range of cases is beyond the scope of this Article but would be subject to the same general analyses.

4. 600 U.S. 122 (2023).

Tires Operations, S.A. v. Brown,[5] *Daimler AG v. Bauman*,[6] and even *International Shoe Co. v. Washington*,[7] which taken together seem to make clear that doing business in a state is not sufficient to create general jurisdiction.[8] A majority of the United States Supreme Court disagreed, however, finding that because the defendant had *consented* to general jurisdiction under the Pennsylvania statutory scheme, it could not possibly show a due process violation.[9] Moreover, as far as the majority was concerned, the question before it was not an open question; neither *Goodyear* nor *Daimler* nor *International Shoe* provided the answer, but a "very old" case called *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*[10] did.[11]

Under *Mallory*, consent-by-registration laws pass muster under the Due Process Clause. A concurring opinion by Justice Alito explained, however, that the Court's due-process ruling "is not the end of the story for registration-based jurisdiction."[12] A challenge under the so-called Dormant Commerce Clause might—and probably would—yield a different result.[13] This Article picks up where Justice Alito left off.

Part II first sketches out the history of the Dormant Commerce Clause. The federal government's power to regulate interstate commerce has long been held to imply a corresponding limit on the power of states. The reason this limit exists—indeed, a large part of the reason the failed Articles of Confederation gave way to the Constitution—is to prevent individual states from interfering with the commercial endeavors of their sister states. Part II then discusses personal jurisdiction and highlights the Due Process Clause's intrinsic inability to prevent

5. 564 U.S. 915 (2011).

6. 571 U.S. 117 (2014).

7. 326 U.S. 310 (1945).

8. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 566 (Pa. 2021) ("[T]o conclude that registering as a foreign corporation invokes all-purpose general jurisdiction eviscerates the Supreme Court's general jurisdiction framework set forth in *Goodyear* and *Daimler* and violates federal due process by failing to comport with *International Shoe*'s 'traditional conception of fair play and substantial justice.'").

9. *Mallory*, 600 U.S. at 135 (plurality opinion); *id.* at 152 (Alito, J., concurring).

10. 243 U.S. 93 (1917).

11. *Mallory*, 600 U.S. at 135 (plurality opinion); *see also id.* at 152 (Alito, J., concurring).

12. *Id.* at 154 (Alito, J., concurring).

13. *See id.* at 152–63.

state courts' reach from exceeding their grasp. The United States Supreme Court has repeatedly said, for example, that "restrictions on personal jurisdiction . . . 'are a consequence of territorial limitations on the power of the respective States.'"[14] But because consent has been long understood to support personal jurisdiction, the Due Process Clause is not capable of robustly enforcing limitations rooted in sovereignty and federalism. The Dormant Commerce Clause can fulfill this function, and in the 1923 case *Davis v. Farmers' Cooperative Equity Co.*,[15] the Supreme Court struck down a law requiring out-of-state firms to consent to general jurisdiction because it "impose[d] upon interstate commerce a serious and unreasonable burden, which renders the statute obnoxious to the commerce clause."[16] Part II concludes by discussing *Mallory*, Pennsylvania's consent-by-registration law, and Justice Alito's concurrence.

Part III provides three different analyses showing that consent-by-registration laws violate the Dormant Commerce Clause. First, given the nature of the Due Process Clause and the purpose of the Dormant Commerce Clause, the Dormant Commerce Clause is best positioned to protect federalism concerns created by consent-by-registration statutes. Further, arguments that consent-by-registration statutes are somehow immune from review under the Dormant Commerce Clause have no basis in law or reason. Second, consent-by-registration statutes flunk each of the three tests applied under modern Dormant Commerce Clause doctrine: they facially discriminate against interstate commerce, they have a discriminatory effect on interstate commerce, and the burdens they place on interstate commerce outweigh any purported local benefits. Indeed, in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,[17] the Supreme Court stated that an analogous state law could "have been held to be a discrimination that invalidates without extended inquiry" and later observed that requiring out-of-state firms to submit to general jurisdiction is "a significant burden" and an "exaction" that is "is an unreasonable burden on commerce."[18] Third, consent-by-registration laws should be found unconstitutional under the analytical model employed by the majority in *Mallory*. Although courts have long understood *International Shoe* to essentially abrogate all of

14. Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017) (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

15. 262 U.S. 312 (1923).

16. *Id.* at 315.

17. 486 U.S. 888 (1988).

18. *Id.* at 891, 893, 895.

the Supreme Court's prior personal jurisdiction precedents, the majority in *Mallory* found *Pennsylvania Fire* still controlled because it is not "inconsistent with" *International Shoe*.[19] But *Pennsylvania Fire* resolves only the due process question. The Dormant Commerce Clause question is controlled by *Davis*, a different (less) old case that has not been overruled.

Along the way, this Article responds to counterarguments or stakes out positions different from those taken by prior commentators on this subject, most notably Professor Preis, whose article, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*,[20] should be credited for beginning this discussion nearly a decade before *Mallory* was decided.[21] Part IV deals with particular disagreements. While Professor Preis and others believe that consent-by-registration statutes might be upheld on an as-applied basis, they are facially unconstitutional because the constitutional violation occurs in every case—when consent is impermissibly exacted as a condition of doing business in the state. Since *Mallory*, other commentators have made results-oriented arguments against adoption of Justice Alito's concurrence. These arguments fail not only because they are results-oriented but also because they lack any basis in law or fact. Finally, some commentators suggest that "originalist" justices cannot possibly accept Justice Alito's concurrence because the Dormant Commerce Clause cannot be justified on originalist grounds. While the originalist bona fides of the Dormant Commerce Clause can certainly be debated, originalist justices have applied the Dormant Commerce Clause for decades, even if begrudgingly, because it is so engrained in constitutional law. An argument that the Dormant Commerce Clause must be repudiated to prevent its application to consent-by-registration statutes practically admits that these statutes cannot survive review under modern doctrine.

This Article concludes that consent-by-registration statutes are unconstitutional under the Dormant Commerce Clause.

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19. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 140 (2023) (quoting Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977)); *see also id.* at 152–53 (Alito, J., concurring).

20. John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121 (2016).

21. *See Mallory*, 600 U.S. at 161 n.7 (Alito, J., concurring) (citing Preis, *supra* note 20, at 138–40).

II. SETTING THE STAGE

Part II first traces the history of the Dormant Commerce Clause, which limits states' ability to interfere with interstate commerce and reflects a core purpose of the Constitution. It then examines personal jurisdiction and explains why the Due Process Clause cannot adequately enforce federalism-based limits on state-court authority, particularly where consent supports jurisdiction. As others have recognized, the Dormant Commerce Clause fills that gap. Part II finishes laying the foundation for this Article by describing *Mallory v. Norfolk Southern Railway Co.* and the Pennsylvania consent-by-registration statute at issue in that case.

A. The Commerce Clause—and Its Negative Implication

The Constitution grants Congress authority "[t]o regulate Commerce . . . among the several States."[22] It is this power, conveyed by the "Commerce Clause," that justifies the large majority of federal legislation.[23] "What is this power?"[24] The Supreme Court asked and answered this question in 1824, explaining that "[i]t is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."[25] If that sounds expansive, it's because it is. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[26]

The Constitution's immediate predecessor, the Articles of Confederation, did not grant the federal government any authority to

22. U.S. CONST. art. I, § 8, cl. 3.

23. *See* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 605–07 (2001).

24. Gibbons v. Ogden, 22 U.S. 1, 196 (1824).

25. *Id.*

26. *Id.*

regulate commerce.[27] That was left to the various states.[28] Rather than cooperating with each other, however, states often competed.[29] As Alexander Hamilton explained in Federalist No. 22, "interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others."[30] Absent "national control," there was a fear these laws would develop into "serious sources of animosity and discord" between the States.[31]

The experience of other countries with federal governments indicated that inter-sovereign competition was unavoidable.[32] James Madison observed in Federalist No. 42 that "[t]he necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated by other examples as well as our own."[33] The Commerce Clause was a specific solution to this specific difficulty inherent in the country's federal design under the Articles of Confederation.[34]

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27. Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 408 (2017) ("No provision gave [the Confederation] Congress power to regulate commerce, a power which was left to the states themselves.").

28. *Id.*; *see also* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1884–85 (2011).

29. *Id.* at 1884–86.

30. THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *Id.*

32. *Id.* at 145 (describing how German commerce was burdened by "the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories").

33. THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) (identifying Switzerland, Germany, and the Netherlands as nations grappling with similar problems).

34. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) ("[A] chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'" (citations omitted)); National Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 599 (2012) (Ginsburg, J., concurring in part) ("The Commerce Clause, it is widely acknowledged, 'was the Framers' response to the central problem that gave rise to the Constitution itself.'" (quoting EEOC v. Wyoming, 460 U.S. 226, 244, 245 n.1 (1983) (Stevens, J., concurring))); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 505 (1833); Donald J. Kochan, *The Meaning of Federalism in a System of Interstate Commerce: Free Trade Among the Several States*, 95 NOTRE DAME L. REV. REFLECTION 166, 172 (2020).

In and of itself, the Commerce Clause seemingly does little to stymie the interstate competition it was designed to address.[35] After all, it is simply a grant of power.[36] Congress can pass laws pursuant to that power, but it is not immediately clear that the Commerce Clause restricts States from enacting the discriminatory legislation that contributed to its creation.[37] As the Supreme Court itself acknowledged, "the Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce."[38]

The Supreme Court has also observed, however, that "drawing a negative inference from text is sometimes the best way to understand it."[39] The Commerce Clause had long been understood to be such a text.[40] In James Madison's view, for example, the Commerce Clause "was intended as a negative and preventive provision" and not merely "a power to be used for the positive purposes of the General Government."[41] Chief Justice John Marshall likewise understood the Commerce Clause to have a negative, or "dormant" aspect limiting State

35. *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429 (1982) ("The Framers did not explicitly protect free trade. Although the commerce clause conveys a grant of power to the federal government to regulate with respect to trade and commerce, our Constitution says nothing of the need for unfettered trade among the states.").

36. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–35 (1949) ("While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action . . . .").

37. *See id.*

38. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 796 n.12 (1995).

39. Berk v. Choy, 607 U.S. 187, 195 n.2 (2026) (citing ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012)).

40. Friedman & Deacon, *supra* note 28, at 1882 ("[T]he dormant commerce power is in fact one of the most longstanding constitutional doctrines."). "To be sure, the negative Commerce Clause remains controversial." Donald L. R. Goodson, *Toward a Unitary Commerce Clause: What the Negative Commerce Clause Reveals About the Commerce Power*, 61 CLEV. ST. L. REV. 745, 748 (2013).

41. *Letter from James Madison to J.C. Cabell (Feb. 13, 1829)*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (Max Farrand ed., 1966) (1911). Madison's letter is widely understood to support recognition of a *dormant* commerce clause. *See, e.g.*, Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1723 (1991). That interpretation been contested by some, however. *See, e.g.*, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 617 n.107 (1987).

authority to regulate interstate commerce.[42] And by 1851, the doctrine was "firmly established in Supreme Court jurisprudence."[43] Since then, the Commerce Clause has operated "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation."[44]

"[W]ithout the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising."[45] Nonetheless, the test for a violation of the clause has been steadily revised over the years.[46] "Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce."[47] "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."[48] Discriminatory state laws "face 'a virtually *per se* rule of

42. *See* Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) ("If [C]ongress had passed . . . any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But [C]ongress has passed no such act."); *see also* Gibbons v. Ogden, 22 U.S. 1, 196 (1824) (finding "great force" in the argument that the Commerce Clause granted Congress exclusive authority to regulate interstate commerce).

43. Redish & Nugent, *supra* note 41, at 577 (citing Cooley v. Bd. of Wardens of Port of Phila., 53 U.S. 299 (1851)). The Supreme Court itself seemingly views its adoption of the doctrine as coming a few decades later. *See* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 369 (2023) (citing Guy v. Baltimore, 100 U.S. 434, 443 (1880), as the case adopting the case first "holding that state laws offend the Commerce Clause when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States,' regardless of whether Congress has spoken"); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 522 (2019) ("By the late 19th century, the Court was firmly of the view that the Commerce Clause by its own force restricts state regulation of interstate commerce." (citing Bowman v. Chicago & Nw. Ry. Co., 125 U.S. 465 (1888); and then citing Leisy v. Hardin, 135 U.S. 100 (1890)).

44. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

45. *Tenn. Wine & Spirits Retailers*, 588 U.S. at 515.

46. *See* Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 610–22 (1997) (summarizing "the evolution of dormant Commerce Clause review tests").

47. South Dakota v. Wayfair, Inc., 585 U.S. 162, 173 (2018).

48. *Id.*

invalidity.'"[49] Non-discriminatory state laws that "effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[50] And while the Commerce Clause limits the power of legislatures,[51] personal jurisdiction doctrine limits the reach of courts.[52]

B. Personal Jurisdiction—and Its Limits

The limitation associated with personal jurisdiction is often portrayed as purely a question of due process.[53] But even cases analyzed under the Due Process Clause often consider interests beyond individual rights. The most vivid example is *World-Wide Volkswagen Corp. v. Woodson*.[54]

In *World-Wide Volkswagen*, the Supreme Court started its analysis by stating that "[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant."[55] The Court then identified the relevant rule: "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State."[56]

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[57]

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49. *Id.* (quoting Granholm v. Heald, 544 U.S. 460, 476 (2005)).

50. *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

51. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578 (1986).

52. *See* Hanson v. Denckla, 357 U.S. 235, 251 (1958).

53. *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause.").

54. 444 U.S. 286 (1980).

55. *Id.* at 291 (citation omitted).

56. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

57. *Id.* at 291–92.

The first stated function of the minimum-contacts standard plainly enforces the due-process requirement.[58] But the second—preventing state courts from reaching "out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"—is less clearly rooted in due process.[59] Indeed, the Supreme Court itself in *World-Wide Volkswagen* invoked federalism rather than due process in justifying this second function: "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."[60] The Court then explicitly invoked the Commerce Clause.

> The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are debarred from acting as separable economic entities. But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.[61]

Thus, as Professor Stein recognized in 2001, "the propriety of asserting personal jurisdiction cannot be separated from the question of extraterritorial effects, and such a consideration is already implicit in the Court's Due Process jurisprudence."[62] That observation holds true a quarter-century later. If anything, the Supreme Court's focus on sovereignty has only increased in recent years. In *Bristol-Myers Squibb*

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58. *See* Scott R. Bauries, *Jurisdictional Values*, 58 LOY. L.A. L. REV. 35, 86 (2025) ("Fairness lies among the central concerns for due process . . . .").

59. *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114, 1135 (1981).

60. *World-Wide Volkswagen*, 444 U.S. at 293.

61. *Id.* (citation omitted).

62. Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 391 (2001).

Co. v. Superior Court of California,[63] the Court defined the relevant "burden" on a defendant to include not only "the practical problems resulting from litigating in the forum" but also "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[64] Despite referencing the burden on the defendant, however, the very next few sentences of *Bristol-Myers Squibb* focus on the relationships between states as separate sovereigns.

> As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States."[65]

This focus on sovereignty and the interest *vel non* of the forum state has persisted. The Court found the exertion of personal jurisdiction authorized where the forum state had "significant interests at stake—'providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,' as well as enforcing their own safety regulations."[66] And just last year, the Supreme Court found that Fifth Amendment-based due-process challenges should be analyzed differently than Fourteenth Amendment-based due-process challenges precisely because "interstate federalism concerns . . . do not apply to limitations under the Fifth Amendment upon the power of the Federal Government and the corollary authority of the federal courts."[67]

Nonetheless, the Due Process Clause is an awkward guardian of state sovereignty.[68] And the uncomfortable fit becomes only more

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63. 582 U.S. 255 (2017).

64. *Id.* at 263.

65. *Id.* (citations omitted).

66. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 368 (2021) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985)).

67. Fuld v. Palestine Liberation Org., 606 U.S. 1, 15 (2025).

68. *See, e.g.*, James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 175 (2004)

pronounced when considered in conjunction with the basic doctrinal analysis. There are two types of personal jurisdiction—general and specific.[69] "A court with general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State."[70] "Specific jurisdiction is very different."[71] A state court has specific jurisdiction over a defendant if the plaintiff's claims "'arise out of or relate to the defendant's contacts' with the forum."[72]

At a broad level, these types of personal jurisdiction could be readily understood to both protect the individual rights of defendants and enforce limitations on state sovereignty. But because personal jurisdiction has long been treated as an individual defense that can be waived, there is a third way of acquiring personal jurisdiction—consent.[73] For anyone focused on federalism, a problem with consent quickly emerges: it is no respecter of state borders.[74] Perhaps in the individual case, where consent is given with respect to a particular dispute between particular parties, this is not a genuine concern.[75] But what happens when "consent" to general jurisdiction is extracted wholesale as a condition of doing business in a particular State? That, of course, is the subject of this Article.

Unsurprisingly then, despite the trend in practice to base all personal jurisdiction discussions on the Due Process Clause, "commentators cannot agree on the constitutional source of limits on state judicial authority, which in various contexts could be the Due Process Clause, the Full Faith and Credit Clause, the Commerce Clause, a

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(criticizing "current doctrine that erroneously assigns interstate federalism content to a due process source of authority").

69. *Bristol-Myers Squibb Co.*, 582 U.S. at 262.

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

71. *Id.*

72. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021) (quoting *Bristol-Myers Squibb Co.*, 582 U.S. at 262).

73. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–04 (1982) (discussing implied consent) .

74. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1047 & n.132 (1983).

75. *See*, *e.g.*, *Ins. Corp. of Ir.*, 456 U.S. at 704 (discussing individualized forms of consent to personal jurisdiction, like forum-selection agreements between parties, "a stipulation entered into by the defendant," and a defendant's own "voluntary use of certain state procedures").

constellation of clauses regulating federalism, or no clause."[76] This is not an academic debate that should be overlooked by practitioners and courts.[77] As *Fuld v. Palestine Liberation Organization* illustrates, identifying the constitutional source of the limitation can be outcome determinative.[78] Moreover, as discussed below, the Supreme Court has already recognized that the Dormant Commerce Clause has a role to play in limiting the jurisdictional reach of state courts.

C. The Dormant Commerce Clause's Recognized Role in Regulating Personal Jurisdiction

In 2016, John F. Preis published *The Dormant Commerce Clause as a Limit on Personal Jurisdiction* in the Iowa Law Review.[79] Professor Preis demonstrated that, prior to the Supreme Court's watershed ruling in *International Shoe*, "the Dormant Commerce Clause regularly figured into personal jurisdiction questions."[80] And though both doctrines were far less developed then than they are now, the Supreme Court specifically recognized that a state's personal jurisdiction statute could potentially run afoul of either the Due Process Clause *or* the

76. Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 3–4 (2010) (footnotes omitted).

77. *Cf.* John G. Roberts, Jr., Chief Justice of the United States, *Interview at Fourth Circuit Court of Appeals Annual Conference*, at 30:40 (C-SPAN, June 25, 2011), https://c-span.org/video/?300203-1/conversation-chief-justice-roberts (on file with the University of Memphis Law Review) ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.").

78. 606 U.S. 1, 16 (2025) (holding that arguments based on the Due Process clause of the Fifth Amendment should be analyzed differently than arguments based on the Due Process clause of the Fourteenth Amendment "[b]ecause the State and Federal Governments occupy categorically different sovereign spheres").

79. Preis, *supra* note 20; *see also* Stephen E. Sachs, *Dormant Commerce and Corporate Jurisdiction*, 2023 SUP. CT. REV. 213, 214 (2023) (noting that "for several decades in the early twentieth century," the Dormant Commerce Clause played a significant role in personal jurisdiction decisions); Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 694 n.171 (2019) ("Some older Supreme Court cases cited the Dormant Commerce Clause as a reason to invalidate expansive assertions of personal jurisdiction.").

80. Preis, *supra* note 20, at 132; *see also id.* at 132 n.58 (collecting cases).

Dormant Commerce Clause.[81] When the Supreme Court in *Davis v. Farmers' Cooperative Equity Co.* found that a Minnesota personal jurisdiction statute "violate[d] the commerce clause," it therefore had "no occasion to consider whether it also violate[d] the Fourteenth Amendment."[82]

In *Davis*, a Kansas plaintiff sued a Kansas railway company in Minnesota for events that occurred in Kansas.[83] The case was thus "in no way connected with Minnesota."[84] The defendant had a soliciting agent in Minnesota, however, and a Minnesota statute "compel[led] every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state."[85] In other words, the defendant was required to consent to the general jurisdiction of Minnesota courts as a condition of doing business in the State.[86]

The question before the Supreme Court was whether a state could constitutionally "requir[e]" an out-of-state company's "general submission to suit" as a condition of doing business in the state.[87] And the answer was no.[88] "By requiring . . . general submission to suit," the Minnesota statute "unreasonably obstruct[ed], and unduly burden[ed], interstate commerce."[89] As a result, it "violate[d] the commerce clause."[90]

For whatever reason, analyzing personal jurisdiction under the Dormant Commerce Clause has fallen out of favor.[91] While commentators seem to think this was caused by a shift in judicial perspectives,[92]

81. *Davis v. Farmers' Coop. Equity Co.*, 262 U.S. 312, 318 (1923).

82. *Id.*

83. *Id.* at 314.

84. *Id.*

85. *Id.* at 315.

86. *See id.* ("Jurisdiction is not limited to suits arising out of business transacted within Minnesota. . . . It is asserted, whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not, and never has been, a resident of the state." (citations omitted)).

87. *See id.* at 317.

88. *See id.*

89. *Id.*

90. *Id.* at 318.

91. *See* Stein, *supra* note 62, at 390; Preis, *supra* note 20, at 133 n.60.

92. *See* Preis, *supra* note 20, at 133 n.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.").

a better explanation is probably that practicing lawyers are not—or for several years were not—making Commerce-Clause-based personal jurisdiction arguments.[93] In our adversarial system, courts generally consider only arguments advanced by counsel.[94] Thus, "if the parties fail to raise a constitutional challenge to a statute, the norm generally bars courts from doing so sua sponte."[95] This is particularly true in the context of personal jurisdiction, which is a defense that is notoriously easy to waive.[96] Indeed, the Supreme Court recognized in *Davis* itself that the applicable personal jurisdiction analysis depends on the arguments presented by counsel.[97]

Moreover, when given the opportunity in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,[98] the Supreme Court "suggested that it might be interested" in finding personal jurisdiction absent based on "commerce clause-related concerns."[99] The Ohio statute at issue in *Bendix Autolite* automatically tolled a statute of limitations as to defendants "not 'present' in the State."[100] "To gain the protection of the

93. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 455 (2009) (describing the "party presentation" principle, i.e., "the conventional view that the parties to litigation, and not the judge, are responsible for raising the legal questions that will ultimately be resolved by the court").

94. *See, e.g.*, NASA v. Nelson, 562 U.S. 134, 147 n.10 (2011) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)); Greenlaw v. United States, 554 U.S. 237, 243 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

95. Frost, *supra* note 93, at 456–57.

96. *See* Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 736 n.18 (1988) ("Waiver of the defense of lack of personal jurisdiction has always been easy."); Weinstein, *supra* note 68, at 298 ("As every competent civil litigator in this country is well aware, the defense of jurisdiction over the person is notoriously easy to forfeit unintentionally.").

97. *See* Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 317–18 (1923) (observing that similar statutes previously found to pass constitutional muster when analyzed under the Due Process Clause had not been challenged under the Commerce Clause).

98. 486 U.S. 888 (1988).

99. Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 557 (1991).

100. *Bendix Autolite*, 486 U.S. at 889.

limitations period, [foreign corporations] would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts."[101] On these facts, the Ohio statute could have been found discriminatory and thus unconstitutional.[102] The Supreme Court chose, "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."[103]

Requiring out-of-state firms to submit to general jurisdiction "is a significant burden."[104] And requiring them to choose between submitting to general jurisdiction or surrendering limitations-based defenses puts them to an impermissible Hobson's choice because statutes of limitations are such "an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere."[105] States "may not withdraw such defenses on conditions repugnant to the Commerce Clause."[106] Ultimately, the Ohio statute was found to violate the Dormant Commerce Clause because it addressed a purported concern—"protecting [State] residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction"—that was already covered by the Ohio's long-arm statute.[107]

Notably, the plaintiff in *Bendix Autolite* suggested the defendant could have "simpl[y]" registered to do business in Ohio to avoid unequal application of the statute of limitations, but the Supreme Court rejected this argument because registration "likely would have subjected [the defendant] to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest" and "this exaction is an unreasonable burden on commerce."[108] *Bendix Autolite* thus indicates—like *Davis* before it—that conditioning authority to transact business in the state on a firm's submission to general jurisdiction violates the Dormant Commerce Clause.

101. *Id.* at 892.

102. *See id.* at 891.

103. *Id.*

104. *Id.* at 892.

105. *Id.* at 893; *see also* Preis, *supra* note 20, at 146 (identifying the "Hobson's choice" as "[t]he key to the burden").

106. *Bendix Autolite*, 486 U.S. at 893.

107. *Id.* at 894.

108. *Id.* at 895.

D. Pennsylvania's Consent-by-Registration Statute and Mallory v. Norfolk Southern Railway Co.

In *Mallory v. Norfolk Southern Railway Co.*,[109] the Supreme Court addressed "the circumstances under which a defendant may be deemed, consistent with due process, to have consented to jurisdiction."[110] The ostensible consent in this case was effectuated by nothing more than registering to do business in Pennsylvania.[111]

In the 1800s, various states "adopted statutes requiring out-of-state corporations to consent to in-state suits in exchange for the rights to exploit the local market and to receive the full range of benefits enjoyed by in-state corporations."[112] Pennsylvania was among them.[113] As the Supreme Court explained, the relevant statutes provided

> that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. 15 Pa. Cons. Stat. § 411(a). As part of the registration process, a corporation must identify an "office" it will "continuously maintain" in the Commonwealth. § 411(f); see also § 412(a)(5). Upon completing these requirements, the corporation "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties . . . imposed on domestic entities." § 402(d). Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. § 5301(a)(2)(i).[114]

Mallory was an asbestos case.[115] The plaintiff, Robert Mallory, was employed by the defendant, Norfolk Southern, for years, "first in Ohio, then in Virginia."[116] After his employment, he moved to

109. 600 U.S. 122 (2023) (plurality opinion).
110. Fuld v. Palestine Liberation Org., 606 U.S. 1, 23 (2025).
111. *See Mallory*, 600 U.S. at 134–35.
112. *Id.* at 130.
113. *See id.*
114. *Mallory*, 600 U.S. at 134.
115. *Id.* at 126.
116. *Id.*

Pennsylvania but then returned to Virginia, which is where he was living when he developed cancer and filed suit.[117] Mr. Mallory sued his previous employer in Pennsylvania state court, contending that Norfolk Southern was subject to personal jurisdiction because it was registered to do business in the Commonwealth and had thus consented to the general jurisdiction of its courts.[118] The defendant moved to dismiss for lack of personal jurisdiction, contending that Pennsylvania's consent-by-registration scheme violated the Due Process Clause.[119] The Supreme Court held otherwise.[120]

The *Mallory* analysis was not rooted in modern cases—far from it. Instead, the plurality stated that the case "pose[d] a very old question indeed—one this Court resolved more than a century ago in" a case called *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*[121] Because the *Pennsylvania Fire* Court found that a functionally identical Missouri statute did not violate the Due Process Clause, and because *Pennsylvania Fire* had never been overruled, the Supreme Court simply applied *Pennsylvania Fire*'s holding.[122]

In so doing, the Supreme Court recognized that "consent" eviscerates any power of the Due Process Clause to protect federalism or respect limitations on sovereignty.[123] "[O]ur personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State."[124] "After all, personal jurisdiction is a *personal* defense that may be waived or forfeited."[125]

The plurality in *Mallory* expressly left open the question of whether Pennsylvania's registration-by-consent law violates the

117. *Id.*

118. *Id.*

119. *Id.* at 127.

120. *Id.* at 136–37; *see also id.* at 152 (Alito, J., concurring).

121. *Id.* at 146 (citing Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917)).

122. *Id.*

123. *Id.* at 144.

124. *Id.*

125. *Id.*; *see also id.* at 156 (Alito, J., concurring) ("Despite these many references to federalism in due process decisions, there is a significant obstacle to addressing those concerns through the Fourteenth Amendment here: we have never held that a State's assertion of jurisdiction unconstitutionally intruded on the prerogatives of another State when the defendant had consented to jurisdiction in the forum State.").

Dormant Commerce Clause.[126] Justice Alito, however, was "not convinced" the law could withstand review under this provision and wrote separately to discuss the matter.[127] After pointing out the Due Process Clause's apparent inability to protect interests relating to federalism and sovereignty, Justice Alito observed that "federalism concerns . . . fall more naturally within the scope of the Commerce Clause."[128] And the Dormant Commerce Clause "prohibits state laws that unduly restrict interstate commerce."[129]

"Because the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right."[130] And, indeed, *Davis* provided an example where a statute much like Pennsylvania's consent-by-registration law had been found unconstitutional.[131] Moreover, requiring out-of-state corporations to consent to general jurisdiction merely to do business in the State, is potentially discriminatory and "at the very least" represents a "'significant burden' on interstate commerce" under *Bendix Autolite*.[132] Under a modern Dormant Commerce Clause analysis, because consent-by-registration statutes seemingly do not advance any legitimate local interests, Justice Alito was "skeptical that any local benefits of the State's assertion of jurisdiction in these circumstances could overcome the serious burdens on interstate commerce that it imposes."[133]

III. CONSENT-BY-REGISTRATION STATUTES VIOLATE THE DORMANT COMMERCE CLAUSE: THREE ANALYSES

Part III argues that consent-by-registration statutes violate the Dormant Commerce Clause for three independent reasons. First, the Dormant Commerce Clause—not the Due Process Clause—is best suited to police the federalism concerns these statutes create. Second,

126. *Id.* at 127 n.3 (plurality opinion).

127. *Id.* at 150–63 (Alito, J., concurring).

128. *Id.* at 157.

129. *Id.* (quoting Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 514 (2019)).

130. *Id.* at 158–59.

131. *Id.* at 159–60 (discussing Davis v. Farmers Coop. Equity Co., 262 U.S. 312 (1923)).

132. *Id.* at 161 (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988)).

133. *Id.* at 163.

the statutes fail every major Dormant Commerce Clause test because they discriminate against and unduly burden interstate commerce. Third, even under *Mallory*'s framework, the statutes remain unconstitutional; while *Pennsylvania Fire* addresses due process, *Davis* controls the separate Dormant Commerce Clause question and remains good law.

A. How the Dormant Commerce Clause Better Protects Federalism and Sovereignty Interests

Rousing the Dormant Commerce Clause in the context of personal jurisdiction analysis is vital because it protects interests related to federalism and sovereignty that the Due Process Clause has proven wholly incapable of protecting. Some commentators have looked askance at the general idea that the Dormant Commerce Clause has a role to play in regulating personal jurisdiction.[134] The idea seems to be that the Due Process Clause takes care of that.[135] But as already shown, as a waivable individual right, due process has a limited ability to protect interests rooted in federalism and sovereignty.[136] Moreover, precisely because it embodies an individual right, the Due Process Clause's role in protecting interests relating to the federal structure of our government seems tenuous at best.[137] Indeed, the Supreme Court

134. *See, e.g.*, Michael Vitiello & Daniel Croxall, Mallory v. Norfolk Southern Railway Co., *Due Process and Strange Bedfellows*, 89 MO. L. REV. 217, 259 (2024) ("[W]hy bring the Dormant Commerce Clause into the personal jurisdiction analysis at all when it stands on its own and is available to defendants when appropriate?").

135. *See id.*

136. *See, e.g.*, Drobak, *supra* note 74, at 1047 ("T]he federalism theme in personal jurisdiction cannot be an independent restriction on the sovereign power of a court; otherwise, waiver would not be possible."); Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 75 (1984) (arguing "that the due process clause is wholly inapposite to . . . interstate federalism concerns").

137. *See, e.g.*, Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 727 (1983) ("[T]he *sole* proper concern of the due process clause in the personal jurisdiction setting is with the interests of individual litigants, and not with interests of state governments."); Weinstein, *supra* note 68, at 174 (stating that the Supreme Court will never "be able to fully explain in due process terms rules formulated primarily to vindicate structural values rather than individual rights"); *see also* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 236 (5th Cir. 2022) (recognizing that "federalism concerns are central to the Supreme Court's

explicitly laid this all out in a footnote that both identifies the Due Process Clause as the sole relevant constitutional provision and observes its inadequacy to safeguard interests rooted in federalism and sovereignty.

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[138]

The apparent inconsistency between *World-Wide Volkswagen and Insurance Corp. of Ireland* is part of a larger trend.[139] The Supreme Court has since repeatedly reaffirmed the importance of state sovereignty to the question of personal jurisdiction, even declaring that in some cases "this federalism interest may be decisive."[140] Not so in cases involving consent, however. In *Mallory*, the Supreme Court observes that its "personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state

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interpretation of the Fourteenth Amendment Due Process Clause" but then stating that in the context of a personal jurisdiction analysis "'federalism' is a proxy for the abstract burden of a defendant's submitting to the coercive power of a forum with little interest in the dispute").

138. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982); *see also* Peter A. Diana & J. Michael Register, *Personal Jurisdiction in Flux:* Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 69 CORN. L. REV. 136, 161 (1983) (discussing the Court's "disavowal of sovereignty concerns in fourteenth amendment due process").

139. *See* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 689 (1987) ("The role of interstate federalism in explaining limits on personal jurisdiction is cyclical. Over the years, the courts have vacillated significantly on whether these limits reflect constitutional restrictions on the sovereign power of the state in which the court sits.").

140. Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017).

defendant submits to suit in the forum State" because "personal jurisdiction is a personal defense that may be waived or forfeited."[141] In short, while any number of cases support the notion that federalism is relevant to a due-process-based jurisdictional analysis, it is inherently incapable of protecting "'territorial limitations' on state power."[142]

The Commerce Clause, by contrast, represents a positive grant of federal power and, by negative implication, a limitation on the power of state legislatures. So, as Justice Alito recognized, "[t]he federalism concerns" raised by consent-by-registration statutes "fall more naturally within the scope of the Commerce Clause."[143] Like any other state statute relating to interstate commerce, state statutes attaching jurisdictional consequences to registration should be assessed for compliance with the Dormant Commerce Clause.

This proposition should not be controversial. Because corporations are generally creatures of state law, corporate law is generally state law.[144] But "corporate law is necessarily extraterritorial in impact."[145] This inevitably raises concerns under the Commerce Clause, which "permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited."[146] As a result, state statutes relating to corporate governance are subject to review under the Dormant Commerce Clause.[147] Consent-by-registration statutes are

141. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 144 (2023) (plurality opinion) (citing *Ins. Corp. of Ir.*, 456 U.S. at 704–05); *see also id.* at 156 (Alito, J., concurring in part) ("Despite these many references to federalism in due process decisions, there is a significant obstacle to addressing those concerns through the Fourteenth Amendment here: we have never held that a State's assertion of jurisdiction unconstitutionally intruded on the prerogatives of another State when the defendant had consented to jurisdiction in the forum State. Indeed, it is hard to see how such a decision could be justified.").

142. *Mallory*, 600 U.S. at 156 (Alito, J., concurring in part) (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

143. *Id.*

144. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89–90 (1987); Kelli A. Alces, *Moving Toward A Federal Law of Corporate Governance in Bankruptcy*, 31 S. ILL. U. L.J. 621, 623 (2007) ("The internal affairs of corporations, particularly those relating to corporate management, have long been the province of state law.").

145. Donald C. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96, 103 (1987).

146. Edgar v. MITE Corp., 457 U.S. 624, 640 (1982).

147. *See id.*; *see also CTS Corp.*, 481 U.S. at 87.

corporate governance statutes that, in a real sense, directly regulate interstate commerce.[148] Putting aside the question of whether, seen in this light, they might categorically run afoul of the rule against direct regulation of interstate commerce,[149] they are plainly at least subject to scrutiny under the Dormant Commerce Clause.[150] The contrary position—

148. The rule seems to be that corporate registration statutes categorically violate the Dormant Commerce Clause when applied to out-of-state firms whose in-state business is purely interstate. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 278 (1961). Such registration statutes may be permissible, provided they can otherwise survive review under the Dormant Commerce Clause, when applied to out-of-state business conducting both interstate and intrastate business in the state. *See id.* at 279; Union Brokerage Co. v. Jensen, 322 U.S. 202, 212 (1944). See Lacks v. Ultragenyx Pharm., Inc., 768 F. Supp. 3d 705, 720 (D. Md. 2025), for a modern case analyzing these cases and principles. *Lacks* is interesting because the Maryland registration statute at issue there is at least facially similar to the Ohio statute found unconstitutional in *Bendix Autolite*—Maryland's registration statute imposes certain "consequences" on out of-state companies who do not register, including "that the unqualified or unregistered foreign corporation may not benefit from a statute of limitations defense." *Id.* at 716. The *Lacks* court distinguished the unconstitutional Ohio statute scheme from the Maryland statutory scheme at issue with the observation that the Maryland statute did not require "corporations to consent to the general jurisdiction of Maryland courts." *Id.* at 733. The court further observed that "Maryland, unlike Ohio in *Bendix*, does not require foreign corporations to defend themselves 'with reference to all transactions, including those in which it [does] not have the minimum contacts necessary for supporting personal jurisdiction.'" *Id.* (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988)).

149. *Edgar*, 457 U.S. at 640; *see also* Atl. Coast Line R.R. Co. v. Wharton, 207 U.S. 328, 331 (1907) ("That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious."). Direct regulation of interstate commerce goes hand in hand with discrimination against interstate commerce. *See, e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 337 n.14 (1989) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986))). As shown below, consent-by-registration statutes are indeed categorically invalid as improperly discriminatory.

150. *See, e.g.*, Crutcher v. Kentucky, 141 U.S. 47, 57–58 (1891); Int'l Text-Book Co. v. Pigg, 217 U.S. 91, 109–10 (1910); Buck Stove & Range Co. v. Vickers, 226 U.S. 205, 216 (1912); Sioux Remedy Co. v. Cope, 235 U.S. 197, 203 (1914); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 291 (1921).

that such statutes are somehow immune from review[151]—has no ascertainable basis.

Moreover, under the Dormant Commerce Clause, firms also have "a 'right' to engage in interstate trade free from restrictive state regulation."[152] Like any other right, Dormant Commerce Clause "rights operate as 'a guarantee of freedom for private conduct that the State may not abridge.'"[153] The Supreme Court in *Dennis v. Higgins* affirmed that the rights conferred by the Dormant Commerce Clause are substantial enough to support liability under 28 U.S.C. § 1983.[154] They are certainly substantial enough to sustain an affirmative defense based on the absence of personal jurisdiction.

Finally, there is another reason why it is odd to treat the Due Process Clause as the sole constraint on the reach of state courts. The Fourteenth Amendment was not enacted until 1868—eighty years after the ratification of the Constitution.[155] If this amendment represented the sole limit on the reach of state courts, then no constraint existed for the first eighty years of this country's existence. The case law does not bear out that remarkable proposition.[156]

Pennoyer v. Neff[157] simultaneously illuminates and obscures this point. The manner in which it obscures the point is well known. Though *Pennoyer* is generally credited with anchoring the personal jurisdiction analysis in the Due Process Clause,[158] it could not do so in that particular case because "the fourteenth amendment was not in

151. *See, e.g.*, Vitiello & Croxall, *supra* note 134 (suggesting the Dormant Commerce Clause should not be brought "into the personal jurisdiction analysis at all").

152. Dennis v. Higgins, 498 U.S. 439, 448 (1991).

153. *Id.* at 450–51 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 112 (1989)).

154. *Id.*

155. *See* U.S. CONST. amend. XIV.

156. *See* Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1595 (2018); *see also* Pennoyer v. Neff, 95 U.S. 714, 724 (1877) (stating that limitations on personal jurisdiction had "been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases"), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977); Burnham v. Superior Ct., 495 U.S. 604, 608–09 (1990) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books," and "American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.").

157. 95 U.S. 714 (1877).

158. *See, e.g.*, *Burnham*, 495 U.S. at 609.

effect at the time the state purported to exercise jurisdiction."[159] This is inherently confusing, though not confused.[160]

Properly understood, *Pennoyer* is illuminating because it demonstrates that the Due Process Clause cannot possibly represent the sole limitation on the personal jurisdiction of courts. Rather than applying due process, the Court invoked "public law," including the principle "that no State can exercise direct jurisdiction and authority over persons or property without its territory."[161] And it did so after observing that the authority of state courts "is necessarily restricted by the territorial limits of the State in which it is established" *because* "[a]ny attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse."[162] While *Pennoyer* no longer represents the law, it unmistakably demonstrates that federalism and sovereignty values informed the personal jurisdiction analysis before the Fourteenth Amendment was ratified. Those values remain operative today,[163] even if the Due Process Clause is not their protector.[164]

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159. Redish, *supra* note 59, at 1115 n.25.

160. The Court in *Pennoyer* did not suggest that the Due Process Clause had any bearing on the dispute before it but merely observed in dicta that, given

> the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Pennoyer, 95 U.S. at 733.

161. *Id.* at 722.

162. *Id.* at 720.

163. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017) ("[A]t times, this federalism interest may be decisive.").

164. Professor Redish observed that while the "Court has assumed since the time of *Pennoyer* that the due process clause embodies such notions of federalism, it has relied on neither the language, history, nor policy of the due process clause to justify its construction." Redish, *supra* note 59, at 1114. He then went further, denying "as a matter of policy" that "federalism concerns should be relevant to the framework of personal jurisdiction" and concluding "that federalism limitations on the reach of judicial jurisdiction can be found neither in any other provision of the Constitution nor 'implicit' in the broad constitutional scheme." *Id.* at 1114–15. Professor Redish's article did not consider the Dormant Commerce Clause, however. A few years later, Professor Redish co-authored an article specifically addressing the Dormant

B. Registration-by-Consent Statutes Cannot Withstand a Modern Dormant Commerce Clause Analysis

While understanding the limitations of the Due Process Clause is important, in practice, a trial court considering a challenge brought under the Dormant Commerce Clause would likely simply focus on modern doctrine. Professor Preis' article conducted the analysis prior to *Mallory*, concluding that consent-by-registration statutes are unconstitutional except as applied in certain circumstances.[165] And, after *Mallory*, Professor Sachs recognized that, "[u]nder today's doctrines, plaintiffs . . . may face an uphill battle" in defending the constitutionality of these statutes.[166] The analysis is straightforward. Indeed, there are three different ways of showing that consent-by-registration statutes violate the Dormant Commerce Clause under modern doctrine.

The Dormant Commerce Clause "prohibits state laws that unduly restrict interstate commerce."[167] Courts considering whether a state statute violates the Dormant Commerce Clause must apply "a two-tiered approach."[168] First, courts ask whether a statute facially discriminates against interstate commerce.[169] Second, if the state law does not discriminate on its face, the question then becomes whether it discriminates in "practical effect."[170] "[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,'" the statute's defender must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be

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Commerce Clause and concluding it "finds no authorization in the constitutional text," meaning "the Supreme Court has no power to use the clause to invalidate state commerce legislation." Redish & Nugent, *supra* note 41, at 572–73. That view is shared by many, but not by a majority of Supreme Court Justices. Another assessment of the validity of the Dormant Commerce Clause is beyond the scope of this Article. But if it were wiped away, another constitutional provision would likely fill the void. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 158 n.4 (2023) (Alito, J., concurring) (discussing the Import-Export clause).

165. *See generally* Preis, *supra* note 20 (concluding that these statutes are unduly burdensome on interstate commerce, as compared to consent-by-jurisdiction or consent-by-contract).

166. Sachs, *supra* note 79, at 215.

167. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 514 (2019).

168. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578 (1986).

169. Maine v. Taylor, 477 U.S. 131, 138 (1986).

170. Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

served as well by available nondiscriminatory means."[171] Third, a state law that does not discriminate against interstate commerce will nonetheless be found to violate the Dormant Commerce Clause if it imposes a burden on commerce that is "clearly excessive in relation to the putative local benefits."[172]

Consent-by-registration statutes fail all three recognized Dormant Commerce Clause tests. Because Pennsylvania's statutory scheme was the subject of *Mallory*, it will also be the subject of the analysis below.

1. The Facially Discriminatory Nature of Pennsylvania's Consent-by-Registration Statute

While ultimately finding that consent-by-registration statutes generally violate the Dormant Commerce Clause, Professor Preis stated without analysis that "jurisdiction-via-registration laws do not facially discriminate against out-of-staters."[173] This view is shared by others.[174] But none of these commentators have asked—let alone conducted the necessary analysis as a matter of existing doctrine—what it means for a statute to facially discriminate. As shown below, Pennsylvania's consent-by-registration law is facially discriminatory.

In the context of a Dormant Commerce Clause challenge, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[175] Moreover, once discrimination is identified, "the magnitude and

171. *Taylor*, 477 U.S. at 138 (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

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

173. Preis, *supra* note 20, at 138.

174. *See, e.g.*, Matthew J. O'Hara, Comment, *From Mallory to Morality: The Compatibility of Registration-Jurisdiction Laws with the Dormant Commerce Clause*, 73 BUFF. L. REV. 199, 221 (2025) (asserting that Pennsylvania's registration-jurisdiction does not violate the Dormant Commerce Clause because it is neither facially nor practically discriminatory); Vitiello & Croxall, *supra* note 134, at 261–62 ("[I]f the concern is that consent by registration statutes violate the Dormant Commerce Clause by discriminating against foreign corporations, that is not the case. Instead, registration statutes like Pennsylvania's place foreign corporations on the same footing as in-state corporations due to consent."); William A. Schramkowski, *Look Before You Leap: The Measured Approach to Analyzing Registration Statutes Under the Dormant Commerce Clause*, 48 VT. L. REV. 355, 393 (2024) (accepting the assessment that the Pennsylvania law is not facially discriminatory).

175. Oregon Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994).

scope of the discrimination have no bearing on the determinative question whether discrimination has occurred."[176] Put another way, discrimination cannot be overlooked on the basis that it is "*de minimis*."[177]

Pennsylvania's consent-by-registration law is facially discriminatory because it applies to *out-of-state* corporations but not to in-state corporations.[178] An out-of-state corporation "may not do business" in the Commonwealth until it registers pursuant to the statute.[179] There is a "[p]enalty for failure to register" that applies only to these "foreign" entities.[180] And a "registered foreign association" (to use the statutory terminology) must "continuously maintain" a registered office in the Commonwealth.[181] It is only upon registration that a foreign corporation is permitted to "enjoy the same rights and privileges as a domestic entity and . . . subject to the same liabilities, restrictions, duties and penalties" as domestic entities.[182] But "qualification as a foreign corporation" permits state courts to "exercise general personal jurisdiction" over out-of-state corporations.[183]

In short, foreign corporations must give up due-process rights merely to access the Pennsylvania market and be on otherwise equal footing with domestic corporations.[184] Because the statutory scheme explicitly accords "differential treatment" between foreign and domestic corporations, it discriminates on its face.[185] Thus, "[i]t is not

176. Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 650 (1994).

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

178. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (observing that a statute is discriminatory on its face when it "applies only to out-of-state corporations").

179. 15 PA. CONS. STAT. § 411(a) (2026).

180. *Id.* § 411(b).

181. *Id.* § 411(f).

182. *Id.* § 402(d) (2026).

183. 42 PA. CONS. STAT. § 5301(a)(2)(i) (2026); *see also* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 134 (2023) (plurality opinion) (describing the statutory scheme).

184. *See Mallory*, 600 U.S. at 144 (finding that consent waives any due-process-based objection to personal jurisdiction); *id.* at 161 n.7 (Alito, J., concurring in part) ("Pennsylvania's law seems to discriminate against out-of-state companies by forcing them to increase their exposure to suits on all claims in order to access Pennsylvania's market while Pennsylvania companies generally face no reciprocal burden for expanding operations into another State.").

185. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

necessary to look beyond the text of" the Pennsylvania law "to determine that it discriminates against interstate commerce."[186]

The existence of different rules for out-of-state versus in-state corporations cannot be disputed. Those who say there is no discrimination insist that laws like Pennsylvania's merely put in-state and out-of-state corporations on equal footing.[187] Because this contention relates to a statute's effects rather than its text, it is not responsive to a showing that a consent-by-registration statute is facially discriminatory. This argument instead addresses the separate question of whether a consent-by-registration statute discriminates in effect and, accordingly, is addressed below.

2. The Discriminatory Effect of Pennsylvania's Consent-by-Registration Statute

If a statute is discriminatory in effect, then there is no need to consider whether it is facially discriminatory.[188] It is perhaps for this reason that scholarly debate has largely focused on the question of discriminatory effects.[189] As shown below—and by Professor Preis—arguments that consent-by-registration statutes are not discriminatory in effect ignore existing doctrine and real-world practical effects.[190]

186. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575–76 (1997).

187. *See* Vitiello & Croxall, *supra* note 134, at 261–62; *see also* O'Hara, *supra* note 174, at 227 ("[F]ar from putting out-of-state companies at a disadvantage to in-state companies, Pennsylvania's law merely evens the playing field between all parties."); Schramkowski, *supra* note 174, at 393–94 (reaching the same conclusion); Perdue, *supra* note 99, at 558 (concluding that a similar statute, "rather than discriminating, served to equalize treatment between domestic and foreign corporations").

188. Preis, *supra* note 20, at 138.

189. *See id.* (arguing that consent-by-registration statutes "do have the 'practical effect' of discriminating against out-of-state companies"), *with* Vitiello & Croxall, *supra* note 134, at 267 ("The burden on interstate commerce when a plaintiff sues a megacorporation seems frivolous."). Professor Vitiello and Croxall's reference to "a megacorporation" is telling. Of course, Pennsylvania's consent-by-registration law does not only apply to the "megacorporation" that operates in all fifty states and around the world; it also applies to small companies that deem it necessary to access Pennsylvania markets in order to survive. Moreover, as discussed below, the underdog framing is more rhetoric than reality. *See infra* notes 357–69 and accompanying text.

190. Preis, *supra* note 20, 139–40 (emphasizing the burdens on a foreign corporation to defend itself).

A state law is discriminatory in practical effect if "its effect is to favor in-state economic interests over out-of-state interests."[191] Consent-by-registration statutes do just that by requiring foreign corporations to give up due process rights merely to access the local market.[192] And the Supreme Court has already recognized that requiring consent to general jurisdiction constitutes "a significant burden."[193] While this alone seems to show discrimination, consent-by-registration statutes also discourage out-of-state corporations from expanding into the State without impacting in-state corporations' expansionist aspirations.[194] Moreover, as discussed below, by incentivizing out-of-state firms to stay out of the state,[195] the law favors in-state corporations who do not have to compete with any firms deterred by the consent-by-jurisdiction statute.[196]

The primary counterargument is that "registration statutes like Pennsylvania's place foreign corporations on the same footing as in-state corporations due to consent."[197] But this argument fails as a matter of established law. Sometimes, out-of-state corporations have an advantage over in-state corporations. Perhaps it is because apples graded under their state's standards have special cachet.[198] Perhaps it is because they can produce milk at lower costs than farmers in a

191. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

192. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988) (discussing the relinquishment of rights of out-of-state parties) .

193. *Id.*

194. *See* Preis, *supra* note 20, at 139 (discussing treatment of in-state and out-of-state firms); *see also* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 161 n. 7 (2023) (Alito, J., concurring in part) ("Pennsylvania's law seems to discriminate against out-of-state companies by forcing them to increase their exposure to suits on all claims in order to access Pennsylvania's market while Pennsylvania companies generally face no reciprocal burden for expanding operations into another State.").

195. *See* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 743 (1988) ("Because predicating jurisdiction upon interstate conduct provides disincentives to engage in it, such jurisdiction may be unconstitutional under the commerce clause.").

196. *See infra* notes 227–29 and accompanying text.

197. Vitiello & Croxall, *supra* note 134, at 261–62; *see also* O'Hara, *supra* note 174 ("Far from putting out-of-state companies at a disadvantage to in-state companies, Pennsylvania's law merely evens the playing field between all parties.").

198. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 351 (1977).

neighboring state.[199] Or perhaps it is because they are not subject to general jurisdiction in an undesirable forum.

As a matter of black-letter law, when out-of-state corporations possess an advantage over in-state corporations, states may not regulate to level the playing field. In the words of the Supreme Court, states "may not insist that" out-of-state businesses "surrender whatever competitive advantages they may possess" over in-state businesses.[200] Rather than being evidence of non-discrimination, the engineering of a "leveling effect" is proof of discrimination.[201] A statute regulation "designed to neutralize advantages" held by out-of-state corporations discriminates.[202] The level-the-playing-field argument is foreclosed by nearly a century of Supreme Court decisions.

It seems three other objections have been made to the foregoing analysis. According to Professors Vitiello and Croxall, because there is consent there can be no discrimination: "if a corporation wants to do business in a state, it should be able to waive the right not to be haled into court there in exchange for answering lawsuits in the state."[203] They also say that "[t]he Supreme Court has found several times that when out-of-state companies are subjected to the same requirements of in-state corporations, there is no burden on interstate commerce."[204] Commentator O'Hara believes that Pennsylvania's consent-by-registration law passes constitutional muster because it "harms local businesses" rather than helping them.[205] None of these arguments have merit.

First, Professors Vitiello and Croxall beg the question by stating that consent-by-registration statutes evade constitutional scrutiny because they operate based on "consent."[206] The observation that Pennsylvania allows out-of-state corporations to waive their due process

199. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522–23 (1935).

200. Healy v. Beer Inst., Inc., 491 U.S. 324, 333 (1989) (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986)).

201. *See Hunt*, 432 U.S. at 351.

202. *Baldwin*, 294 U.S. at 527.

203. Vitiello & Croxall, *supra* note 134, at 262.

204. *Id.* (citing Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023)).

205. O'Hara, *supra* note 174, at 229; *see also id.* at 225–26 (discussing the benefit and detriment to states through registration-jurisdiction laws).

206. *See* Vitiello & Croxall, *supra* note 134, at 262.

rights in order to do business in the state[207] tells us nothing about whether requiring this waiver violates the Dormant Commerce Clause. The entire issue is *whether* states can extract "consent" as a condition of doing business in the state.[208] Notably, a majority of the Supreme Court Justices who decided *Mallory* found that Pennsylvania's "extracti[on]" of "consent" was either not "reasonable,"[209] or burdensome.[210] The same consent that resolves the Due Process Clause analysis thus merely triggers the Dormant Commerce Clause analysis.

Second, the claim that "there is no burden on interstate commerce" "when out-of-state companies are subjected to the same requirements of instate corporations,"[211] conflates the issues of discrimination and burden. Professors Vitiello and Croxall rely on *National Pork Producers Council v. Ross*,[212] but the plaintiff in that case "conceded that" the law in question did "not implicate the antidiscrimination principle at the core of th[e] Court's dormant Commerce Clause cases."[213] Accordingly, the "antidiscrimination principle" had no role in the Court's analysis.[214] The petitioners in *Ross* instead argued in favor of an "'almost *per se*' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the

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207. *See id.* ("Personal jurisdiction is a waivable right, and therefore if a corporation wants to do business in a state, it should be able to waive the right not to be haled into court there in exchange for answering lawsuits in the state.").

208. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 157–63 (2023) (Alito, J., concurring in part).

209. *Id.* at 167–68 (Barrett, J., dissenting) ("The Court grounds consent in a corporation's choice to register with knowledge (constructive or actual) of the jurisdictional consequences. But on that logic, *any* long-arm statute could be said to elicit consent. Imagine a law that simply provides, 'any corporation doing business in this State is subject to general jurisdiction in our courts.' Such a law defies our precedent, which, again, holds that 'in-state business . . . does not suffice to permit the assertion of general jurisdiction." (citations omitted)).

210. *Id.* at 161–62 (Alito, J., concurring in part) ("Large companies may be able to manage the patchwork of liability regimes, damages caps, and local rules in each State, but the impact on small companies, which constitute the majority of all U.S. corporations, could be devastating. Large companies may resort to creative corporate structuring to limit their amenability to suit. Small companies may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation.")

211. Vitiello & Croxall, *supra* note 134, at 262.

212. 598 U.S. 356 (2023).

213. *Id.* at 371.

214. *Id.* at 369; *see also id.* at 370 ("[P]etitioners disavow any discrimination-based claim.").

State,' even when those laws do not purposely discriminate against out-of-state economic interests."[215] The Court rejected this argument while explaining that the authorities relied upon by the petitioners enforced the antidiscrimination principle—and in two cases invalidated state laws that would divest out-of-state competitors of natural advantages.[216]

Moreover, *Ross* did not state "there is no burden on interstate commerce" "when out-of-state companies are subjected to the same requirements of in-state corporations."[217] Instead, the Supreme Court acknowledged that at least in a few cases it had found "genuinely non-discriminatory" statutes invalid under the *Pike* balancing test[218]—i.e., the test for an intolerable burden on interstate commerce.[219] So, *Ross* deals with issues different than the issues relevant here and is not amenable to the gloss placed on it by Professors Vitiello and Croxall.[220]

Finally, O'Hara's argument is mistaken from the outset. He asserts that "out-of-state companies actually confer an economic benefit on Pennsylvania businesses, because they offer lower prices than their in-state counterparts."[221] In his view, out-of-state competition tends to

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215. *Id.* at 371.

216. *See id.* at 371–73. The three cases under the microscope were Healy v. Beer Inst., Inc., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); and Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). As explained in *Ross*, the New York statute at issue in *Healy* improperly "robbed out-of-state dairy farmers of the opportunity to charge lower prices in New York thanks to whatever 'natural competitive advantage' they might have enjoyed over in-state dairy farmers." *Ross*, 598 U.S. at 372 (quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1248 (1986)). The New York statute struck down in *Brown-Forman Distillers Corp.* "sought to force out-of-state distillers to 'surrender' whatever cost advantages they enjoyed against their in-state rivals." *Ross*, 598 U.S. at 372 (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 580).

217. *Contra* Vitiello & Croxall, *supra* note 134, at 262.

218. *Ross*, 598 U.S. at 379 (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997)).

219. *See Tracy*, 519 U.S. at 299 n.12 (discussing the *Pike* balancing test).

220. The pincite provided in support of the Vitiello and Croxall interpretation, page 368, makes the intended basis for their sweeping claim uncertain. *See* Vitiello & Croxall, *supra* note 134, at 262 (citing *Ross*, 598 U.S. at 368). But the cited portion of *Ross* merely describes the background of the litigation, sets forth the arguments of the parties, and offers the very beginning of a primer on the Dormant Commerce Clause. *See Ross*, 598 U.S. at 368.

221. O'Hara, *supra* note 174, at 228.

drive down prices, which means that welcoming foreign competitors into the state means lower prices for in-state purchasers.[222] But the corollary of this argument would be that in-state *sellers* get to charge higher prices due to the absence of out-of-state competition.[223] A statutory scheme that discourages free trade and interstate competition is plainly discriminatory and at odds with the entire purpose of the Dormant Commerce Clause.[224] Protectionism is nothing if not "securing a greater share of the home market for domestic producers of the good."[225] Taken at face value, O'Hara's hypothetical confirms the Dormant Commerce Clause violation rather than disproving it.[226]

O'Hara also perceives support in the Supreme Court's repeated holding "that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'"[227] But the Pennsylvania consent-by-registration law effectively does force out-of-state firms to become residents of the Commonwealth—at least so far as personal jurisdiction is concerned.[228] True, the firm need not become an actual resident of the State, but it must waive due process rights so that it can

222. *See id.* at 228–29.

223. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 134 (2023) (plurality opinion) (explaining that the Pennsylvania statutory scheme "permit[s] state courts to 'exercise general personal jurisdiction' over a registered foreign corporation, *just as they can over domestic corporations*" (emphasis added)).

224. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 205 (1994) ("Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.").

225. Regan, *supra* note 216, at 1094.

226. Preis, *supra* note 20, at 153 (explaining that because consent-by-registration statutes discourage out-of-state entrants to the local market "companies who are already located in those states will enjoy some protection from competition from outsiders").

227. Granholm v. Heald, 544 U.S. 460, 475 (2005) (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963)); *see also* O'Hara, *supra* note 174, at 229 (quoting *Granholm*, 544 U.S. at 475; and then quoting *Halliburton Oil Well Cementing Co.*, 373 U.S. at 72).

228. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 352 (2021) ("A state court may exercise general jurisdiction only when a defendant is 'essentially at home' in the State." (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))).

be treated as if it is "at home" in Pennsylvania for purposes of analyzing personal jurisdiction.[229] Again, this framing reinforces, rather than undercuts, a conclusion that Pennsylvania's consent-by-registration law violates the Dormant Commerce Clause.

3. Even If Not Discriminatory, the Statute Unreasonably Burdens Interstate Commerce

If not found discriminatory, consent-by-registration statutes would be subject to *Pike* balancing.[230] The questions under *Pike* are whether the state statute advances a "legitimate" interest "and whether the burden on interstate commerce clearly exceeds the local benefits."[231] The *Pike* balancing test as applied in *Bendix Autolite* provides the answers.[232]

The Ohio statute at issue in *Bendix Autolite* automatically tolled a statute of limitations as to defendants "not 'present' in the State."[233] "To gain the protection of the limitations period, [foreign corporations] would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts."[234] On these facts, the Ohio statute could "have been held to be a discrimination that invalidates without extended inquiry."[235] The Supreme Court chose, "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."[236] The Supreme Court began and ended its *Pike* analysis with the observation that requiring consent to general jurisdiction "is a

229. *See* Daimler AG v. Bauman, 571 U.S. 117, 139 & n.20 (2014) (recognizing that a defendant must be "at home" in a state to be subject to general jurisdiction in the state).

230. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) ("When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

231. *Id.*

232. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891–92 (1988).

233. *Id.* at 889.

234. *Id.* at 892.

235. *Id.* at 891.

236. *Id.*

significant" and "unreasonable burden on commerce."[237] In between, it held that states have "no interest" in resolving disputes unconnected to the state—i.e., in exercising general jurisdiction over out-of-state firms.[238] Consent-by-registration statutes could be found to violate the Dormant Commerce Clause under *Bendix Autolite* alone.[239]

A *Pike* analysis that did not consider *Bendix Autolite* would reach the same conclusion.[240] Consenting to general jurisdiction as a condition of doing business is not a meaningless formality.[241] In the abstract, it means, of course, generally submitting to personal jurisdiction in a state "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State."[242] But it also means, more concretely, submitting every dispute to the (often elected) judges of the state, despite having no say in the process by which the judge is selected.[243] And because America has an anomalous right to jury trials in civil cases, it means submitting every dispute to a jury of that state.[244] The courts of some states have been empirically

237. *Id.* at 893, 895.

238. *Id.* at 895.

239. Preis, *supra* note 20, at 147 ("Under *Bendix* and the other cases discussed above, jurisdiction-via registration will be unconstitutional in suits brought by nonresidents 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.'").

240. *See id.* at 144–54.

241. *See id.*

242. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

243. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., https://brennancenter.org/judicial-selection-map (Aug. 20, 2024) (documenting how the various states select their judges). Even appellate judges are often elected. *See* Diane M. Johnsen, *Picking Judges: How Judicial Selection Methods Affect Diversity in State Appellate Courts*, 101 JUDICATURE, no. 1, Spring 2017, at 29, 29 ("Today, voters in 22 states elect their appellate judges. Two states leave the selection of appellate judges to the legislature, and in the remaining 26 states, the governor appoints members of the appellate courts."). If taxation without representation is cause enough for a revolution, adjudication without representation is at least a burden on interstate commerce.

244. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) ("[J]ury trials are almost always available in the United States, while they are never provided in civil law jurisdictions."); *see also* Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1336 (2012) ("The United States is currently the only country that uses a jury in a large number of civil cases.").

shown to be more likely to award larger damages.[245] It was not a coincidence that *Mallory* was filed in Pennsylvania, which "is reputed to be especially favorable to tort plaintiffs."[246]

Consenting to general jurisdiction as a condition of entering into a state's market burdens interstate commerce even when a single statute is viewed in isolation.[247] But *Pike* instructs courts to play things out further, "considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[248] If consent-by-registration laws were universal, then businesses could be sued in any state with regard to any dispute, regardless of the dispute's connection to the state.[249] Professor Preis amply demonstrated that such a regime would unconstitutionally burden interstate commerce.[250]

Of course, while the burden is placed on one side of the scale, the benefit must be placed on the other.[251] Professor Preis identified one: "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."[252] But that benefit is incidental at best when a consent-by-registration statute requires consent to general jurisdiction—which, of course, is the type of consent-by-registration statute at issue in *Mallory* and in this Article.[253] States have no legitimate interest in exercising

245. *See* NUCLEAR VERDICTS: AN UPDATE ON TRENDS, CAUSES, AND SOLUTIONS, U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM 15–30 (2024), https://instituteforlegalreform.com/wp-content/uploads/2024/05/ILR-May-2024-Nuclear-Verdicts-Study.pdf.

246. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 154 (2023) (Alito, J., concurring in part); *see also* Mark A. Behrens & Cary Silverman, *Litigation Tourism in Pennsylvania: Is Venue Reform Needed?*, 22 WIDENER L.J. 29, 31 (2012).

247. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 895 (1988) ("As we have already concluded, this exaction is an unreasonable burden on commerce.").

248. Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

249. *See* Preis, *supra* note 20, at 148 ("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.").

250. *Id.* at 147–53.

251. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

252. *See* Preis, *supra* note 20, at 153.

253. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 134 (2023) (plurality opinion) (citing 42 PA. CONS. STAT. § 5301(a)(2)(i)).

jurisdiction over disputes that do not relate to the state.[254] Because requiring consent to general jurisdiction is manifestly overbroad if "the putative local benefits" are limited to providing a forum for state-linked plaintiffs and injuries, then the interest is wholly unavailing under *Pike* because it "could be promoted as well with a lesser impact on interstate activities"[255]—to wit, a state requiring submission to personal jurisdiction only in this narrow range of state-linked cases.[256]

Professors Vitiello and Croxall recognized that *Bendix Autolite* "is fairly factually analogous" but tried to distinguish it on the grounds that the analysis involved "a statute of limitations" not "personal jurisdiction."[257] The statute at issue was indeed a statute of limitations, but

254. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.").

255. *Pike*, 397 U.S. at 142.

256. Professors Rhodes and Robertson have suggested the crafting of a model consent-by-registration statute that, "[b]y precisely tailoring the statute to the state's sovereign interests," would "avoid[] constitutional pitfalls while still providing an effective jurisdictional reach for the states." Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 433, 437 (2020) ("[W]here the state does actually possess a legitimate sovereign interest (such as the cases governed by our registration proposal), scholars largely agree that the dormant commerce clause poses no barrier to consent-based jurisdiction."). The constitutionality of such a statute is beyond the scope of this Article. If, however, the statute reached no further than the state's long-arm statute, then it would fail under *Bendix Autolite* because the goal could be achieved without burdening interstate commerce. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 894 (1988) ("Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long-arm statute would have permitted service on Midwesco throughout the period of limitations."). After *Ford Motor Co.*, the range of cases that would fit Professor Preis' criteria without also falling within the reach of a long-arm statute seems insignificantly small. 592 U.S. 351, 356 (2021).

257. Vitiello & Croxall, *supra* note 134. The key language in *Bendix Autolite* has also been dismissed as dicta. *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World,* 64 FLA. L. REV. 387, 440 (2012) ("The Supreme Court has not issued a holding on the jurisdictional effect of the appointment of an agent under a corporate registration statute since *International Shoe*, although it addressed this issue in dicta in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*"). Some courts view the holding of a case expansively: "where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of

the *burden on interstate commerce* existed because a defendant could not take advantage of the statute of limitations unless it subjected itself to the general jurisdiction of Ohio's courts.[258] Indeed, the Court cited two personal jurisdiction cases—*World–Wide Volkswagen Corp. v. Woodson*[259] and *Asahi Metal Industry Co. v. Superior Court*[260]—in analyzing burdensomeness.[261] So, the rationale of *Bendix Autolite* applies directly to consent-by-registration statutes, which impose the exact same burden in exchange for the mere ability to conduct business in the state.

Professors Vitiello and Croxall also suggest that *Bendix Autolite* should be distinguished because it was decided at the summary judgment stage and "the evidentiary analysis in a Rule 56 motion, based on undisputed facts learned throughout discovery, is quite different than the personal jurisdiction analysis under Rule 12(b)(2) based on the allegations in a complaint."[262] This attempt to distinguish *Bendix Autolite* suffers from multiple flaws.

First, a procedural flaw—it is simply wrong to suggest that Rule 12(b)(2) motions are always "based on the allegations in a complaint."[263] In stating otherwise, Professors Vitiello and Croxall cite *Behrens v. Pelletier*[264] as a case "distinguishing between evidentiary basis of a Rule 56 motion from the allegations-based analysis of a

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the circuit, regardless of whether doing so is necessary in some strict logical sense." Route v. Garland, 996 F.3d 968, 977 (9th Cir. 2021) (quoting Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004)). "Classically," however, "dicta is regarded as any portion of the opinion that is inessential to the outcome." Ryan S. Killian, *Dicta and the Rule of Law*, 2013 PEPP. L. REV. 1, 8 (2013). Even under the narrower classic approach, the Court's twice-stated determination regarding the burdensome effect of requiring consent to general jurisdiction as a condition of doing business in the state was essential to the outcome. *Bendix Autolite*, 486 U.S. at 893, 895. The plaintiff there argued that the out-of-state defendant could have obtained protection of the statute of limitations merely by designating an in-state agent for service of process, but the Court rejected this argument because that would entail consent "to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest," which as "already concluded" would be "an unreasonable burden on commerce." *Id.* at 894–95.

258. *Bendix Autolite*, 486 U.S. at 893.
259. 444 U.S. 286 (1980).
260. 480 U.S. 102 (1987).
261. *Bendix Autolite*, 486 U.S. at 893.
262. Vitiello & Croxall, *supra* note 134.
263. *Id.*
264. 516 U.S. 299, 300 (1996).

motion to dismiss."[265] But *Behrens* did not involve personal jurisdiction. The Court there distinguished between a summary judgment motion and a "motion to dismiss" in the context of assessing the defendant's assertion of qualified immunity.[266] The motion to dismiss at issue was thus a Rule 12(b)(6) motion to dismiss,[267] which is why the plaintiff would be permitted to "rest on the pleadings" at that stage.[268]

Motions to dismiss challenging personal jurisdiction are authorized by Rule 12(b)(2) rather than Rule 12(b)(6).[269] Rule 12(b)(2) motions can be decided on the pleadings when jurisdictional allegations are inadequate or dismissal is warranted even if the plaintiff's allegations are true.[270] But Rule 12(b)(2) motions are commonly decided based on affidavits and other evidence.[271] Ultimately, jurisdiction must be established by a preponderance of the evidence,[272] which makes the evidentiary standard more demanding than the Rule 56 standard—which permits a claim to proceed to trial if a plaintiff can merely present evidence sufficient to create a question of fact.[273]

Second, a substantive flaw—while it is true that justice is not served by a personal jurisdiction doctrine that needs a fact-intensive

265. Vitiello & Croxall, *supra* note 134, at 259 n.359. The pinpoint citation provided is to the syllabus of the case rather than to the actual opinion. *See id.*

266. *Behrens*, 516 U.S. at 308.

267. *See* FED. R. CIV. P. 12(b)(6) (authorizing dismissal for "failure to state a claim upon which relief can be granted"); *see also* Thompson v. Ragland, 23 F.4th 1252, 1256 (10th Cir. 2022) (explaining how *Behrens* dictates the Rule 12(b)(6) standard when a defendant asserts qualified immunity).

268. *See Behrens*, 516 U.S. at 309.

269. *Compare* FED. R. CIV. P. 12(b)(2) (lack of personal jurisdiction), *with* FED. R. CIV. P. 12(b)(6) (failure to state a claim upon which relief can be granted).

270. *See, e.g.*, Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000) ("Plaintiff's burden in alleging personal jurisdiction is to plead sufficient material facts to establish the basis for exercise of such jurisdiction.").

271. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1067.6 (4th ed.) ("In considering the jurisdictional issue, a district court may examine discovery material as well as affidavits submitted by the parties.").

272. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1351 (4th ed.) ("The most common formulation found in the judicial opinions is that the plaintiff bears the ultimate burden of demonstrating that the court's personal jurisdiction over the defendant exists by a preponderance of the evidence . . . .").

273. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

analysis requiring significant discovery and evidentiary showing,[274] the Dormant Commerce Clause analysis under *Bendix Autolite* is straightforward and simple. In deciding *Bendix Autolite*, the Supreme Court did not identify evidence in the record that might vary from case to case or from forum to forum.[275] Instead, it reached the two conclusions practically as a matter of law.[276] It should be axiomatic that a state has "no interest" in resolving disputes between out-of-state parties that do not involve the state.[277] And it seems undeniable that interstate commerce is burdened when states pass laws decreeing that out-of-state firms cannot access their markets without waiving constitutional rights.[278] Thus, the fact that *Bendix Autolite* was decided at the summary judgment stage does not preclude its holding from being applied at the pleading stage. Indeed, the Dormant Commerce Clause analysis suggested by *Bendix Autolite* and proposed here is far less factually complex than many of the jurisdictional disputes that have reached the Supreme Court in recent years on due process grounds.[279] While insisting that its

274. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) ("Simple jurisdictional rules . . . promote greater predictability." (quoting Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010))).

275. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891–95 (1988) .

276. *Id.*

277. *Id.* at 895; *see also* Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).

278. *Bendix Autolite*, 486 U.S. at 893.

279. Personal jurisdiction decisions often involve the recitation of intricate and obscure facts. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 365 (2021) ("Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota."); BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 406 (2017) ("BNSF has 2,061 miles of railroad track in Montana (about 6% of its total track mileage of 32,500), employs some 2,100 workers there (less than 5% of its total work force of 43,000), generates less than 10% of its total revenue in the State, and maintains only one of its 24 automotive facilities in Montana (4%)."); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 895 (2011) (Ginsburg, J., dissenting) (setting forth a series of facts ostensibly relevant to the due-process analysis, including that, "[i]n 2008, New Jersey recycling facilities processed 2,013,730 tons of scrap iron, steel, aluminum, and other metals—more than any other State—outpacing Kentucky, its nearest competitor, by nearly 30 percent"); Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 106 (1987) ("Asahi is a Japanese corporation. It manufactures tire valve assemblies in Japan and sells the assemblies to Cheng Shin, and to several other tire manufacturers, for use as components in finished tire tubes. Asahi's sales to Cheng Shin took place in Taiwan. The shipments from Asahi to Cheng Shin were sent from Japan to Taiwan. Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in

decision relied entirely on application of *Pennsylvania Fire* and consent, Justice Gorsuch's plurality opinion in *Mallory* itself involved a detailed discussion of the defendant's Pennsylvania activities, along with the publication of a "State Fact Sheet" "boasting" of those activities.[280] The Dormant Commerce Clause will not make personal jurisdiction analyses any more fact-intensive than they already are.

Professors Vitiello and Croxall also say that "it is difficult to balance the burden against the local interest."[281] The first problem with that argument is that it relies entirely on Justice Scalia's concurrence in *Bendix Autolite*.[282] Justice Scalia objected that the majority "label[ed] the effect of exposure to the general jurisdiction of Ohio's courts 'a significant burden' on commerce," whereas he felt himself unable to "assess whether the Court's evaluation and balancing of interests in this case is right or wrong."[283] Obviously, courts are not generally free to adopt Justice Scalia's uncertainty when the Supreme Court ruled to the contrary.[284] In any event, his disagreement was philosophical. Justice Scalia disagreed with balancing tests as a theoretical matter.[285] His inability to "confidently" reach any conclusion under the Pike balancing test was thus a product of his disdain for *Pike* balancing altogether.[286]

1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.").

280. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 141–43 (2023) (Gorsuch, J., plurality opinion).

281. Vitiello & Croxall, *supra* note 134, at 265.

282. *See id.* at 265 n.396.

283. *See Bendix Autolite*, 486 U.S. at 895 (Scalia, J., concurring).

284. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182–85 (1989) (arguing against the utilization of "balancing" tests and criticizing Dormant Commerce Clause doctrine to the extent it calls for "standardless balancing").

285. *See id.*

286. *Bendix Autolite*, 486 U.S. at 895–97 (Scalia, J., concurring) (stating that he would "abandon the 'balancing' approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike*"); *see also* Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1012 (1994) (observing that "Justice Scalia's dislike of the Court's dormant Commerce Clause analysis also stems in large part from his dislike of balancing tests"); David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles,"* 22 U. TOLEDO L. REV. 675, 700 (1991) ("As

Professors Vitiello and Croxall's reliance on Justice Scalia's concurrence is also self-defeating. There is a reason that Justice Scalia *concurred* in *Bendix Autolite* rather than dissented: he agreed with the outcome.[287] While Justice Scalia was not sold on the balancing,[288] and while he would join Dormant Commerce Clause opinions only in a narrow range of cases,[289] he agreed that the Ohio statute at issue violated the Dormant Commerce Clause as it was "on its face discriminatory because it applies only to out-of-state corporations."[290] Thus, far from suggesting that consent-by-registration statutes survive review under the Dormant Commerce Clause, Justice Scalia's concurrence unambiguously supports the conclusion reached in this Article—that consent-by-registration statutes are virtually per se unconstitutional because they facially discriminate against interstate commerce.

C. Consent-by-Registration Statutes Violate the Dormant Commerce Clause Under Davis*—and the Analytical Model Employed in* Mallory

Supreme Court constitutional decisions bind all lower courts unless overruled by the Supreme Court itself.[291] Indeed, this rule "dictated" the outcome in *Mallory*.[292] The question of whether consent-by-

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of *Bendix Autolite*, it became clear that Justice Scalia believed that 'balancing' is a function that only a legislative body should do."). Professor Day's article surveys Justice Scalia's Dormant Commerce Clause opinions as of 1991, demonstrating "that Justice Scalia's position marks a distinct departure from the 'well-settled' principles of the dormant commerce clause doctrine." *Id.* at 693–704.

287. *See Bendix Autolite*, 486 U.S. at 898 (Scalia, J., concurring) ("Because the present statute discriminates against interstate commerce by applying a disadvantageous rule against nonresidents for no valid state purpose that requires such a rule, I concur in the judgment that the Ohio statute violates the Commerce Clause.").

288. *See* Scalia, *supra* note 284, at 1185 (criticizing *Pike*'s "standardless balancing").

289. *See Bendix Autolite*, 486 U.S. at 898 (Scalia, J., concurring) ("In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose.").

290. *Id.*

291. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) ("Our general practice is to apply the rule of law we announce in a case to the parties before us.").

292. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 136 (2023) (plurality opinion) ("As this Court has explained: 'If a precedent of this Court has direct application in a case,' as *Pennsylvania Fire* does here, a lower court 'should follow the case which

registration statutes violated the Due Process Clause was decided in 1917 by *Pennsylvania Fire*.[293] And when Supreme Court precedent has "direct application," courts "should follow the case which directly controls, leaving to th[e] Court the prerogative of overruling its own decisions."[294] "This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'"[295]

The defendant in *Pennsylvania Fire* "had obtained a license to do business in Missouri," which meant that it was statutorily required to file with the state "a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state."[296] The defendant complied with the statute and was then sued in a Missouri state court regarding a dispute that had no connection to the state.[297] The Supreme Court of Missouri interpreted the applicable state statutes to mean that the defendant had consented to the general jurisdiction of Missouri state courts.[298] When the case reached the United States Supreme Court, the defendant argued that "except in suits upon Missouri contracts," the assertion of personal jurisdiction under this statutory scheme denied it "due process of law."[299] But the Supreme Court rejected this argument, holding that Missouri's

directly controls, leaving to this Court the prerogative of overruling its own decisions.'").

293. Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917)).

294. *Mallory*, 600 U.S. at 136 (plurality opinion) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

295. *Id.* (quoting *Rodriguez de Quijas*, 490 U.S. at 484).

296. *Pennsylvania Fire*, 243 U.S. at 94.

297. *See id.* at 94–95.

298. Scholars contest this account of *Pennsylvania Fire*. Professor Scott Dodson points out that while the *Mallory* plurality relied on *Pennsylvania Fire* and similar cases, "crucially, none of the registration statutes in the precedent cited by the Court required consent to personal jurisdiction directly." Scott Dodson, *The Complexities of Consent to Personal Jurisdiction*, 113 CALIF. L. REV. 333, 350 (2025). "Rather, every single one required consent to appointment of an agent for purposes of subsequent in-state service of process." *Id.* "*Mallory* glosses over this distinction, recharacterizing the consent-to-service cases to bring them closer to direct consent to jurisdiction." *Id.* Any challenge to the Supreme Court's various opinions in *Mallory* is beyond the scope of this Article.

299. *Pennsylvania Fire*, 243 U.S. at 94–95.

interpretation of the state statute was rational and "did not deprive the defendant of due process of law."[300]

A majority of the Supreme Court in *Mallory* held that *Pennsylvania Fire* remained good law and thus foreclosed any argument that Pennsylvania's consent-by-registration scheme violates the Due Process Clause.[301] *Mallory*'s bottom line was that *Pennsylvania Fire* controlled.

> Not every case poses a new question. This case poses a very old question indeed—one this Court resolved more than a century ago in *Pennsylvania Fire*. Because that decision remains the law, the judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded. It is so ordered.[302]

While the *Mallory* plaintiff's argument carried the day, the vitality of *Pennsylvania Fire* was far from self-evident.[303] As Justice Barrett pointed out in dissent, *Pennsylvania Fire* "was 'decided before th[e] Court's transformative decision on personal jurisdiction in *International Shoe*.'"[304] *Pennsylvania Fire*, therefore, could have been found expressly "overruled" by *Shaffer v. Heitner*.[305] And so Justice Barrett and the other dissenting justices would have held.[306] In deciding otherwise, the plurality and Justice Alito emphasized the continuing legitimacy of old constitutional precedents, even when related doctrine has significantly evolved.[307]

300. *Id.* at 95.

301. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 136 (2023) (plurality opinion); *id.* at 151 (Alito, J., concurring).

302. *Id.* at 146 (plurality opinion).

303. *See, e.g.*, James P. George, *Chimeric Contacts and Consent: The Ill-Reasoned Expansion of Corporate Jurisdictional Exposure*, 17 WM. & MARY BUS. L. REV. 1, 59 (2025) ("Justice Gorsuch emphasized that [*Pennsylvania Fire*] was not an isolated holding but an observed precedent; however, he did not point out that the latest Supreme Court reaffirmation was in 1928.").

304. *Mallory*, 600 U.S. at 177 (Barrett, J., dissenting) (quoting BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 412 (2017)).

305. *See* Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (confirming that all "prior decisions" inconsistent with *International Shoe* "are overruled").

306. *See Mallory*, 600 U.S. at 177–78 (Barrett, J., dissenting).

307. *See id.* at 136 (plurality opinion); *id.* at 152–53 (Alito, J., concurring).

Mallory can thus be understood to have two lessons. First, consent-by-registration statutes comport with due process. Second, personal jurisdiction decisions issued before *International Shoe* should be deemed overruled only if found "inconsistent with" that decision.[308] That brings us to *Davis v. Farmers' Cooperative Equity Co.*,[309] which was handed down six years after *Pennsylvania Fire* and twenty-two years before *International Shoe*.[310]

In *Davis*, a Kansas plaintiff sued a Kansas railway company in Minnesota for events that occurred in Kansas.[311] The case was "in no way connected with Minnesota."[312] The defendant had a soliciting agent in Minnesota, however, and a Minnesota statute "compel[led] every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state."[313] Accordingly, the defendant was required to consent to the general jurisdiction of Minnesota courts as a condition of doing business in the state.[314]

This fact pattern is indistinguishable from cases where courts in Pennsylvania assert personal jurisdiction solely pursuant to Pennsylvania's consent-by-registration law: as a matter of Pennsylvania statutory law, the defendant must "consent" to the general jurisdiction of Pennsylvania courts simply to conduct business in the Commonwealth.[315] The question in that scenario is—and the question in *Davis* was—whether this "compel[led]" "submission" violates the Commerce Clause.[316] It does.

Conditioning authorization to do business in a state on consent to general jurisdiction "imposes upon interstate commerce a serious and unreasonable burden, which renders the statute obnoxious to the

308. *Id.* at 140 (plurality opinion) (quoting the respondent's brief which quoted *Shaffer*, 433 U.S. at 204); *id.* at 153 (Alito, J., concurring) ("*Pennsylvania Fire*'s holding, insofar as it is predicated on the out-of-state company's consent, is not 'inconsistent' with *International Shoe* or its progeny.").

309. 262 U.S. 312 (1923).

310. *See id.*

311. *Id.* at 314.

312. *Id.*

313. *Id.* at 315.

314. *See id.* ("Jurisdiction is not limited to suits arising out of business transacted within Minnesota. . . . It is asserted, whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not, and never has been, a resident of the state." (citations omitted)).

315. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 134–35 (2023) (plurality opinion).

316. *See Davis*, 262 U.S. at 315, 317.

commerce clause."[317] As explained by the Supreme Court, exposure to the general jurisdiction of a given state's courts imposes heavy burdens because of the costs of defense and travel, the potential liability, and impaired operational efficiency.[318] And it matters not that a corporate defendant's activities are already interstate in nature: "[t]he requirements of orderly, effective administration of justice are paramount."[319] "By requiring from [the defendant] general submission to suit," the Pennsylvania consent-by-registration law "unreasonably obstructs, and unduly burdens, interstate commerce."[320]

Under *Mallory*'s approach to aged personal jurisdiction precedents, *Davis* is still good law. "*Davis* has not been overruled by the Supreme Court . . . ."[321] It cannot be described as "inconsistent" with *International Shoe* under *Shaffer* because it was decided under the Commerce Clause rather than the Due Process Clause.[322] Nor is it inconsistent with *Mallory* or *Pennsylvania Fire*. In *Mallory*, the Supreme Court specifically left open the question of whether Pennsylvania's consent-by-registration law violates the Dormant Commerce Clause.[323] And in *Davis*, the Supreme Court expressly distinguished *Pennsylvania Fire* as a case involving the Due Process Clause rather than the Commerce Clause.[324]

Commentators often analyze personal jurisdiction decisions in terms of what the court is trying to do.[325] Maybe it's naïve, but perhaps

317. *Id.* at 315.

318. *See id.* at 315–16.

319. *Id.* at 316.

320. *Id.* at 317.

321. In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591, 2016 WL 2866166, at *5 (D. Kan. May 17, 2016).

322. *See* Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977) .

323. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 127 n.3 (2023) (plurality opinion).

324. *See Davis*, 262 U.S. at 318 & n.5.

325. *See, e.g.*, Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 23 (2018) ("The story of personal jurisdiction took an abrupt turn in 2011, when the Supreme Court began restricting the doctrine and creating, indirectly, more significant tension between personal jurisdiction and aggregation."); Patrick J. Borchers, J. Mcintyre Machinery*,* Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1246 (2011) (stating, with regard to, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011), that "the plurality opinion attempted to roll back the clock by a century or more and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before").

we can listen when the Court tells us what it is trying to do. And perhaps we can even believe the Court when it tells us it is trying to do nothing more than apply existing, "old" law.[326] If *Mallory* is accepted at face value, it means not only that Pennsylvania's consent-by-registration law comports with the Due Process Clause under *Pennsylvania Fire* but also that the same statutory scheme violates the Dormant Commerce Clause under *Davis*. Lower courts bound to follow *Mallory* and "old" precedents should adhere to the Supreme Court's instructions and invalidate Pennsylvania's consent-by-registration law under the Dormant Commerce Clause.[327]

IV. COUNTERARGUMENTS CONSIDERED

Part IV addresses and rejects the leading counterarguments for applying the Dormant Commerce Clause to consent-by-registration statutes.

A. Consent-by-Registration Statutes Are Facially Invalid

While Professor Preis was the first to set forth a detailed analysis showing how consent-by-registration statutes practically discriminate against, and impossibly burden, interstate commerce, he concluded that they may be upheld on an as-applied basis.[328] This view has some support,[329] and the possibility of this conclusion was

326. *But see* Mullenix, *supra* note 2, at 170 ("In upholding Pennsylvania's right to subject any non-resident corporate defendant to its jurisdiction without any connection to the state, the plurality defaulted to the theory of general jurisdiction and conflated mandatory, coercive consent with submission to a court's general jurisdiction."). Professor Mullenix contends that "Mallory's invocation of the Court's *Pennsylvania Fire* decision as controlling was mistaken; the Court's consent analysis there addressed service of process and not jurisdiction." *Id.* at 153.

327. *See Mallory*, 600 U.S. at 128, 146 (plurality opinion); *id.* at 153 (Alito, J., concurring); *see also* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

328. Preis, *supra* note 20, at 154.

329. *See, e.g.*, Sloan v. Burist, No. 2:22-CV-76, 2023 WL 7309476, at *5 (S.D. Ga. Nov. 6, 2023) (declining to apply *Davis* to invalidate Georgia's consent-by-registration law because the claim at issue arose in Georgia); AK Steel Corp. v. PAC Operating LP, No. 2:15-CV-09260-CM-GEB, 2017 WL 3314294, at *5 (D. Kan. Aug. 3, 2017) (analyzing a challenge to Kansas' consent-by-registration law and stating, "*Davis* does not support a finding of discriminatory effects where, as here, the cause of

acknowledged by *Davis* itself.[330] But it does not account for either the discriminatory nature of consent-by-registration statutes or *Mallory*'s focus on consent.

Statutes that are either facially discriminatory or discriminatory in effect are "virtually *per se* invalid" and have been "generally struck down . . . without further inquiry."[331] With a footnote citing *Bendix Autolite* and several other cases, Professor Fallon demonstrated that the Supreme Court "frequently invalidates state statutes under the dormant Commerce Clause."[332] Consent-by-registration statutes should meet the same fate because they are unconstitutional in design.

"A facial challenge is an attack on a statute itself as opposed to a particular application."[333] Here, the statute itself is the problem. Consider the interplay between *Mallory* and *Bendix Autolite*. The key to *Mallory* is consent.[334] It is at the moment that a firm consents to general jurisdiction that it surrenders its due process right to challenge personal jurisdiction. And, under *Bendix Autolite*, it is this "exaction" that, at a minimum, unreasonably burdens interstate commerce.[335] Accordingly, consent-by-registration statutes violate the Dormant Commerce Clause the moment consent is given and the registering corporation is stripped of a due process right.

At least to the extent they require consent to general jurisdictions,[336] "no set of circumstances exists under which" consent-by-

action arose in Kansas and relates to the local activity of nonresident parties"); Hegna v. Smitty's Supply, Inc., No. CV 16-3613, 2017 WL 2563231, at *5 (E.D. Pa. June 13, 2017) (finding *Davis* inapplicable because the plaintiff was "a resident of Pennsylvania").

330. Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 316–17 (1923) ("It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, or if the plaintiff was, when it arose, a resident of the state." (footnotes omitted)).

331. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) .

332. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 936 & n.122 (2011).

333. City of Los Angeles v. Patel, 576 U.S. 409, 415 (2015).

334. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023) (plurality opinion).

335. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 895 (1988).

336. Professors Charles W. "Rocky" Rhodes and Cassandra Burke Robertson have suggested, that by "precisely tailoring" consent-by-registration statutes "to the state's sovereign interests," they may be crafted to comport with the Constitution.

registration statutes would be valid, which in essence makes them facially unconstitutional.[337] And because these statutes are unconstitutional in design, they are "as inoperative as if [they] had never been passed, for an unconstitutional act is not a law."[338] This conclusion also comports with multiple Supreme Court decisions.

The Court has recognized this in the very context of corporate-registration statutes: a statute making waiver of a constitutional right "a condition precedent to obtaining a permit to do business within the state" was found "unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."[339]

The doctrine of unconstitutional conditions likewise shows both that the exaction of consent is improper and that the purported

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Rhodes & Robertson, *supra* note 256. The model statute they propose does not purport to require consent to general jurisdiction and instead requires consent to personal jurisdiction only in a defined set of forum-linked circumstances. *See id.* at 412–13. Whether or not that statute would pass constitutional muster is beyond the scope of this Article, but it is not remotely similar to consent-by-registrations statutes that exist today.

337. United States v. Salerno, 481 U.S. 739, 745 (1987).

338. Chicago, I., & Louisville Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913); *see also* Montgomery v. Louisiana, 577 U.S. 190, 204 (2016), as revised (Jan. 27, 2016) (reaffirming that "[a]n unconstitutional law is void, and is as no law" (quoting Ex parte Siebold, 100 U.S. 371, 376 (1879)).

339. S. Pac. Co. v. Denton, 146 U.S. 202, 207 (1892). Professor Scott Dodson is of the view that consent is not "dependent upon the validity or constitutionality of the statute purporting to extract it." Dodson*, supra* note 298, at 358. And he made this statement in discussing *Mallory* and its Dormant Commerce Clause implications: "[a] statute might be unconstitutional for any number of reasons, including that it attempts to extract consent in violation of due process or that it violates the Dormant Commerce Clause, but that invalidity does not retroactively negate a party's intent to consent to personal jurisdiction." *Id.* (footnote omitted). It was also Professor Dodson who recognized that "[t]he Court said otherwise in *Southern Pacific Co. v. Denton*." *Id.* In addition to disagreeing with the Supreme Court, he also disagrees with scholars who "have also argued that contractual ex ante consent 'may be vitiated by resort to traditional contract doctrines such as fraud, undue influence, or overweening bargaining power or mistake, public policy, and unconscionability.'" *Id.* (quoting Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 SAN DIEGO L. REV. 309, 322 (2021)). While Professor Dodson's theoretical discussion of what he calls "true ex ante consent" is thought-provoking, for purposes of deciding cases it is sufficient to recognize, as he did, that it is inconsistent with Supreme Court authority.

exaction is void.[340] Consider *Terral v. Burke Construction Co.*,[341] where the statute at issue purported to revoke authorization to do business of any out-of-state company that exercised its right to remove a case to federal court.[342] This is impermissible:

> a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. . . . [S]tate action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the soverign [sic] power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.[343]

While the unconstitutional conditions doctrine has application beyond the context of foreign corporations seeking authorization to do business, its roots lay here.[344] In *Sioux Remedy Co. v. Cope*, the Supreme Court observed that, while "a state may restrict the right of [foreign] corporations to engage in business within its limits," that power "like all other state powers, can only be exerted within the limitations

340. *See* 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, 4 (1990) ("Described simply but inadequately, the doctrine holds that a state cannot condition the receipt of a state-conferred benefit on the recipient's consent to the relinquishment or limitation of constitutional rights."); s*ee also id.* at 7–14 (discussing the doctrine in the context of registration statutes).

341. 257 U.S. 529 (1922).

342. *Id.* at 531–32.

343. *Id.* at 532–33. Because *Terral* involved an out-of-state firm and a statute that applied to out-of-state firms, it is tempting to read the case as a Dormant Commerce Clause case. But the Supreme Court specifically stated that the dispositive "principle does not depend for its application on the character of the business the corporation does, whether state or interstate." *Id.* at 532.

344. *See* Sioux Remedy Co. v. Cope, 235 U.S. 197, 203 (1914) (observing that while "a state may restrict the right of [foreign] corporations to engage in business within its limits," that power "like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state action").

which the Constitution of the United States places upon state action."[345] "One of these limitations" arises "from the commerce clause, whose operation . . . is such that a corporation authorized by the state of its creation to engage in interstate commerce 'may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce.'"[346] Because compelling consent to general jurisdiction as a condition to do business is an unconstitutional "exaction" under *Bendix Autolite*,[347] it is "void" under *Terral*.

B. Results-Oriented Critiques Have No Merit

Most would agree that the applicable constitutional analysis should not be results-driven.[348] Indeed, Professors Vitiello and Croxall attack the Alito/Preis view by describing it as "a thinly veiled, results-driven outcome."[349] But if a doctrinal analysis based on discrimination and undue burden seems results-oriented, that is because doctrine points to a single, inescapable conclusion—that consent-by-registration statutes are unconstitutional. Professors Vitiello and Croxall do not present any significant contrary doctrinal analysis. Instead, in the very sentence after making the "results-driven" accusation, they assert their own policy preferences: "if there are inequities to be had, those burdens should be imposed on the party most able to shoulder them, not the injured plaintiff."[350] This statement, asserted without support, has no merit as a legal argument.[351]

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345. *Id.* at 203.

346. *Id.* at 203–04 (quoting W. Union Tel. Co. v. Kansas, 216 U.S. 1, 27 (1910)).

347. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 895 (1988).

348. *See, e.g.*, David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 945 (2016) (observing that "constitutional theory is unusually preoccupied with ideals of faithfulness and neutrality and contemptuous of results-oriented reasoning" and that "[d]ebates over how to interpret the Constitution implicate an enormous range of human goals and desires, as well as political and ideological struggles, and yet to openly pursue any end other than constitutional fidelity is to violate the rules of the interpretive game").

349. Vitiello & Croxall, *supra* note 134, at 260.

350. *Id.*

351. Professors Vitello and Croxall wrap up their Dormant Commerce Clause argument by claiming that the Alito concurrence "is consistent with prior attempts to further close the courthouse doors on plaintiffs while protecting corporate defendants who rightfully should bear the brunt of inconvenience if any is to be had." *Id.* at 265. This is a nakedly results-driven critique. Moreover, their effort to characterize and then attach Justice Alito's motives is facially uncompelling. If Alito's goal was to

As an initial matter, there is no basis to assume that every plaintiff alleging an injury is actually injured.[352] The existence of an injury is a substantive element that every plaintiff has the burden to prove.[353] That injury, moreover, must have been caused by the defendant.[354] This is a concrete issue, not merely a theoretical observation. Because of the ascendancy of mass-tort litigation, courts are packed with cases filed by plaintiffs who are either uninjured or have no way of establishing causation.[355] This "problem is well known and broadly acknowledged."[356] The constitutional analysis plainly cannot be driven by an

prevent plaintiffs from accessing courts, he could have voted with his four colleagues, including Justice Elena Kagan, who would have found against Mallory. In any event, an inability to sue in Pennsylvania (where Mallory did not live and had only briefly resided) would not have prevented Mallory from bringing the suit in other fora, including the state where he did live—Virginia. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 126 (2023) (plurality opinion).

352. *See* Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 24 (2019) ("[I]n mass-tort cases, some injury victims will have suffered a bona fide impairment at the hands of an at-fault defendant. But, sensing a payday, other individuals (no one knows how many) are also apt to be sucked in, typically claiming that they have sustained an injury that is, in fact, either nonexistent, grossly exaggerated, or unrelated to the instant defendant's conduct.") [hereinafter Engstrom, *The Lessons of Lone Pine*]; *see also* Nora Freeman Engstrom, *Retaliatory Rico and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 653 (2017) (defining "injury fabrication" as "the submission of claims for nonexistent or preexisting injuries following a bona fide accident at the hands of an at-fault defendant").

353. The immediately following discussion focuses on personal-injury cases because those seem to be the types of cases that Professors Vitiello and Croxall have in mind. But of course, general jurisdiction means jurisdiction with respect to *all* disputes—contract, employment, intellectual property, real property disputes, data privacy litigation, etc. It is not clear what application, if any, Vitiello and Croxall's arguments have to these areas of law.

354. *See generally Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2164 (2017) ("[A] defendant actually causes a plaintiff's injury if the defendant's action is a 'but-for' cause of the injury, meaning that the injury would not have occurred 'but for' (had it not been for) the defendant's action.").

355. *See* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J.F. 32, 47–51 (2023) ("The Grim Reality of Nonmeritorious Claims") [hereinafter Parikh, *Opaque Capital*]; *see also* Samir D. Parikh, *Crossing the Rubicon: Assembling a Litigation Colossus in Mass Torts*, 124 MICH. L. REV. ONLINE 1, 15 (2025) ("Many claims in a mass-tort dispute turn out to be entirely nonmeritorious. The claimant did not suffer the harm alleged or did not use the service or product at issue.") [hereinafter Parikh, *Crossing the Rubicon*].

356. Engstrom, *The Lessons of Lone Pine*, *supra* note 352; *see also* Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL*

assumption that every plaintiff is injured. And yet, it is only this unfounded assumption that gives a plaintiff-deferential jurisdictional analysis even a sliver of merit.

In any event, the common practice of treating every lawsuit between an individual and a corporation as a contest between David and Goliath has little basis in reality.[357] Plaintiffs typically hire law firms on contingency, meaning there is no fee unless there is a recovery—the fee is a portion of the recovery, if any.[358] So, the contest of resources is between plaintiffs' firms and corporate defendants, not individual plaintiffs and corporate defendants. Just as many corporate defendants have very little in terms of resources,[359] many plaintiffs' firms have a lot.[360] The underdog framing is dubious from the outset.

Mallory provides an example. At the trial-court level, Robert Mallory was represented by Levin Sedran & Berman LLP, a firm that specializes in plaintiffs' work and, according to its website, has recovered billions of dollars for its clients.[361] These are sophisticated and skilled attorneys with tremendous resources.[362] By the time *Mallory*

Integrity, 101 TEX. L. REV. 1623, 1630–31 (2023) (describing "the nonmeritorious claim problem" as "well documented and enduring," and providing examples).

357. *See* Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENV'T L. & POL'Y REV. 123, 124 (2001) (demonstrating "the elimination of the systematic defendant advantage").

358. *See, e.g.*, Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J.F. 259, 282–83 & n.128 (2022); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267–68 & n.1 (1998).

359. According to the United States Small Businesses Administration, 99.9 percent of United States businesses are small businesses. *Frequently Asked Questions About Small Business*, OFF. OF ADVOC., U.S. SMALL BUS. ADMIN. (Mar. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.

360. *See* Samir D. Parikh, *The Alchemist's Inversion*, 110 CORN. L. REV. 1693, 1734 (2026) (documenting how one plaintiffs' firm "received $396 million in common-benefit fees alone" from a single settlement (footnotes omitted)).

361. *See Our Firm*, LEVIN SEDRAN & BERMAN LLP, https://lfsblaw.com/our-firm/ (last visited May 13, 2026).

362. For example, in 2014, the firm combined forces with two other national plaintiffs' firms and filed a class action lawsuit against a then-family-owned domestic manufacturer called Windsor Surry Company. *See* Class Action Compl., *Cover v. Windsor Surry Co.*, 14-CV-05262-WHO, Dkt. No. 1 (Dec. 1, 2014). Large litigations often settle precisely because the corporate defendant cannot shoulder the burden of sustained litigation prosecuted by a consortium of plaintiffs' firms. *See* Parikh, *supra* note 360, at 1736 ("The litigation labyrinth is daunting, but a party with the resources

reached the Supreme Court, other law firms had joined in Mr. Mallory's representation, including Cooper & Kirk, PLLC and Keller Postman LLC.[363] These are elite law firms.[364] Mallory was no underdog.

And this narrative is deteriorating only further. Much modern litigation is underwritten by third-party investors.[365] While plaintiff-side third-party litigation funding is common, defense-side funding is exceedingly rare.[366] Thus, rather than pitting David versus Goliath, these lawsuits pit large plaintiffs' firms, "[h]edge funds, institutional investors, foreign sovereign wealth funds, and wealthy individuals" against defendants.[367] If this trend continues, defendants in mass-tort litigation will soon be up against a "litigation colossus," to use the

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to stay the course knows that the corporate defendant will invariably have to concede.").

363. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 124 (2023) (plurality opinion) (listing counsel).

364. *See* David Lat, *A Leading Litigation Boutique Turns 25*, ORIGINAL JURISDICTION, (Jan. 18, 2022), https://davidlat.substack.com/p/a-leading-litigation-boutique-turns (describing Cooper & Kirk as an "elite" firm with "alumni includ[ing] two U.S. senators, three federal judges, a former U.S. solicitor general, and the chief legal officer of the #1 company on the Fortune 500"); Emily Jackoway, *Disrupting the Personal Injury Space with the Launch of Postman Law*, LAWDRAGON, (May 19, 2025), https://www.lawdragon.com/lawyer-limelights/2025-05-19-disrupting-the-personal-injury-space-with-the-launch-of-postman-law (recounting Keller Postman's "staggering" success, with "more than one million clients represented and $3B recovered to date").

365. *See* Parikh, *Opaque Capital and Mass-Tort Financing*, *supra* note 355, at 39 ("In a relatively short period of time, [third-party litigation funding] has become a ubiquitous feature of litigation around the world with over $17 billion of third-party capital flowing to litigants and the professionals that represent them."). Third-party litigation "funding 'more than doubled' from 2017 to 2021." Mark Behrens, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product that is Transforming the Civil Justice System*, 34 CORN. J.L. & PUB. POL'Y 1, 5 (2024) (quoting U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 11 (2022)).

366. EUR. COMM'N DG JUST. & CONSUMERS, MAPPING THIRD-PARTY LITIGATION FUNDING IN THE EUROPEAN UNION 601 (2025) (reporting Maya Steinitz's findings that "[d]efense-side litigation finance is rare due to difficulties such as the ability to price the risk and assess the benefits" and that "[e]ven so, rare instances of defense-side litigation finance have been reported").

367. Behrens, *supra* note 365, at 2.

phrase coined by Professor Parikh.[368] In addition to having no basis in constitutional law, a rule designed to offset perceived systematic disadvantages has little basis in fact. Indeed, litigation has been known to drive corporations out of business.[369]

This is not to suggest that corporations need any favors from the law. The point is that corporations' perceived relative ability to shoulder the burdens of litigation should not result in a constitutional doctrine tilted in favor of plaintiffs.

O'Hara similarly argues that Pennsylvania's consent-by-registration law survives *Pike* because "Pennsylvania's moral interest here is in *showing solidarity* with injured parties across the country—that is, in allowing plaintiffs to redress their injuries in a forum that they otherwise would not have had, even if those plaintiffs are not Pennsylvania residents."[370] This is another improper results-oriented analysis that assumes injury and ignores "territorial limitations on the power of the respective States."[371] Pennsylvania and its courts have no legitimate interest in resolving disputes unconnected to the Commonwealth.[372] There is, therefore, "nothing to be weighed in the balance to sustain the

368. *See* Parikh, *Crossing the Rubicon*, *supra* note 355. The "litigation colossus" is "a corporate entity that rolls up law firms, financiers, inventory builders, marketers, vendors, and medical clinics." *Id.* at 3. Professor Parikh describes "the most troubling threat" of the "litigation colossus" as "the idea of weaponizing litigation." *Id.* at 15. "The primary threat is that the colossus is able to methodically marshal nonmeritorious claims and more easily build cases—arguably frivolous ones—where other actors would retreat." *Id.* "The second facet is that the litigation colossus may be able to enhance claim value in entirely unpredictable and unethical ways." *Id.* at 16. Notably, to support these two propositions, Professor Parikh described practices that are already occurring in the real world. *See id.* at 15–16. David versus Goliath might have a ring to it, but so does Goliath versus the Colossus.

369. *See, e.g.*, Mark A. Behrens, *Asbestos Trust Transparency*, 87 FORDHAM L. REV. 107, 111 (2018) (noting that "[o]ver 120 companies have declared bankruptcy due, at least in part, to asbestos-related liabilities").

370. O'Hara, *supra* note 174, at 227.

371. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

372. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017) (recognizing that states may have "little legitimate interest" in resolving a given dispute); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 895 (1988) (stating that Ohio "had no interest" in the dispute at issue).

law."[373] As fully discussed above, the Dormant Commerce Clause protects against precisely the overreach that O'Hara promotes.[374]

C. Originalist Justices Would Not Likely Repudiate 150-Plus Years of Dormant Commerce Clause Jurisprudence Just to Save Consent-by-Registration Statutes

Lastly, Professors Vitiello and Croxall claim that "Justices who are originalists ought to be embarrassed about following Justice Alito's lead: they can garner little support that the Constitution as originally understood included a Dormant Commerce Clause."[375] It is true that both Justice Thomas and former Justice Scalia—widely regarded as the ultimate originalists,[376] have criticized Dormant Commerce Clause doctrine as a post-ratification innovation.[377] But the Supreme Court has already justified that same doctrine in originalist terms.[378] Moreover, scholars have made a strong showing that the negative aspect of the

373. Edgar v. MITE Corp., 457 U.S. 624, 644 (1982); *see also id.* ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.").

374. Ultimately, O'Hara recognizes that the consent-by-registration statutes impose a significant burden on interstate commerce under *Bendix* but then concludes that Pennsylvania's purported solidarity interest is "unweighable," essentially making the statute immune from invalidation under *Pike*. *See* O'Hara*, supra* note 174, at 237–42. Among other problems with this analysis is that it relies on Part IV-B of Justice Gorsuch's opinion in *Ross*. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 390 (2023). Moreover, that section of the opinion attracted the support of only three Justices. *See id.* at 390 (Gorsuch, J., plurality opinion).

375. Vitiello & Croxall, *supra* note 134, at 266.

376. *See, e.g.*, Sara Sachse, Comment, *United We Stand—but for How Long? Justice Scalia and New Developments of the Dormant Commerce Clause*, 43 ST. LOUIS U. L.J. 695, 705 (1999).

377. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) ("The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice."); Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring) ("The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce.").

378. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.").

Commerce Clause was always part of the constitutional design.[379] And Professor Tushnet, former clerk to Justice Thurgood Marshall, and who is most certainly *not* an originalist, demonstrated that "the historical case against dormant commerce clause doctrine [is] weaker than Justice Scalia claims it to be."[380] This is unsurprising given that preeminent jurists dating back to "Chief Justice Marshall (who served as a delegate to the Virginia Ratification Convention) believed that Congress's commerce power was exclusive and thus should, without congressional action, displace some state laws."[381] "One would think that this all-star cast of early statesmen, who either participated in or worked close on the heels of the constitutional founding, would have a strong sense of originalist purposes and the textual justifiability of the dormant Commerce Clause."[382] Justice Alito describes himself as an originalist—in the title of his forthcoming book, no less.[383] He certainly is not embarrassed to defend and apply modern Dormant Commerce Clause doctrine.[384] The charge that no originalist Justice could agree with him is baseless.

In any event, most originalist Justices are generally inclined to accept and apply existing constitutional doctrine without relitigating its

379. *See, e.g.*, Friedman & Deacon, *supra* note 28, at 1938 (concluding, after a thorough analysis, that the Dormant Commerce Clause "rests on sound textual arguments, strongly bolstered by original intentions and meanings").

380. Tushnet, *supra* note 41.

381. Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 626 n.395 (2010) (also citing decisions from Justice Story and Justice William Johnson).

382. *Id.*

383. *See* SAMUEL A. ALITO JR., SO ORDERED: AN ORIGINALIST'S VIEW OF THE CONSTITUTION, THE COURT, AND OUR COUNTRY (forthcoming Oct. 2026).

384. *See, e.g.*, Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 549 (2015) (Alito, J.) (specifically noting Justice Scalia and Justice Thomas' objections to recognition of the Dormant Commerce Clause, then stating that the doctrine "has deep roots" and that "[b]y prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce"); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 514 (2019) (Alito, J.) (observing that Dormant Commerce Clause doctrine "has a long and complicated history" with "roots" dating "back as far as *Gibbons v. Ogden* . . . where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had 'great force'").

originalist bona fides.[385] Justice Scalia, in a concurrence joined by Justice Thomas, made this very point in explaining why he would "on *stare decisis* grounds, enforce a self-executing 'negative' Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court."[386] Thus—given the facially discriminatory nature of the Pennsylvania consent-by-registration law, *Davis*, and *Bendix Autolite*—even Justice Scalia, were he still on the bench, would potentially agree with Justice Alito that the Pennsylvania consent-by-registration law violates the Dormant Commerce Clause.[387]

V. CONCLUSION

State statutes that require out-of-state businesses to consent to general jurisdiction as a condition for operating violate the Dormant Commerce Clause. *Davis*, *Bendix Autolite*, and even *Mallory*, in its

385. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–39 (Amy Gutmann ed., 1997) ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) ("[A]lmost every originalist would adulterate it with the doctrine of *stare decisis*."); United States v. Rahimi, 602 U.S. 680, 718–30 (2024) (Kavanaugh, J., concurring) (defending originalism, but then tempering its role by explaining that "the first stop in this Court's constitutional decisionmaking is the Court's precedent"); Ramos v. Louisiana, 590 U.S. 83, 123 (2020) (Kavanaugh, J., concurring) (recognizing that the sheer wrongness of a decision is not reason enough to overrule it and proposing a set of considerations that, if applied, would "set a high (but not insurmountable) bar for overruling a precedent"). In fairness, Justice Gorsuch potentially disagrees. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 423 (2024) (Gorsuch, J., concurring) ("[A] past decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain."). But he was not embarrassed to apply "received dormant Commerce Clause case law," albeit in a case where there was "no need to engage with" critiques leveled by Justices Scalia and Thomas. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 370 (2023) (Gorsuch, J., plurality opinion).

386. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring).

387. Justice Thomas, however, now "rejects the dormant Commerce Clause altogether, including in cases of facial discrimination." Michael S. Knoll & Ruth Mason, Bibb *Balancing: Regulatory Mismatches Under the Dormant Commerce Clause*, 91 GEO. WASH. L. REV. 1, 45 n.236 (2023).

own way, should compel courts to hold that consent-by-registration statutes violate the Dormant Commerce Clause and are thus unconstitutional. A traditional Dormant Commerce Clause analysis yields the same conclusion because consent-by-registration statutes discriminate against and unduly burden interstate commerce.

The Supreme Court, of course, has the prerogative of reconsidering its prior decisions. When the validity of consent-by-registration statutes reaches that Court, existing precedents and doctrine will serve as guideposts rather than commandments. But the Court should adhere to its prior decisions. The limitations on a court's personal jurisdiction go beyond the individual rights protected by the Due Process Clause and implicate federalism concerns that the Dormant Commerce Clause is far more capable of, and conceptually suited to, protecting. And when consent-by-registration statutes are subjected to scrutiny under the Dormant Commerce Clause, they turn out to be the sort of protectionist, overreaching measures that first impelled the founders and early courts to recognize a negative aspect to the Commerce Clause. Justice Alito's *Mallory* concurrence is just an essay for now, but the conclusion he previews therein should, in the fullness of time, be recognized as constitutional law.