

OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 49

WINTER 2024

NUMBER 2

NOTE

RESTORING CLARITY: A “CONSENT PLUS CONTACTS” APPROACH TO GENERAL PERSONAL JURISDICTION FOR STATE CONSENT-BY- REGISTRATION STATUTES POST-*MALLORY*

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Introduction

“‘Can we be sued for that?’ In all likelihood, this is the most frequent question corporate clients ask their lawyers. But a slightly different inquiry, of perhaps equal importance, is not far behind: ‘Where can we be sued for that?’”¹ Put simply, businesses want to know the circumstances under which they may be held accountable in court—and that includes

* Juris Doctor candidate, Oklahoma City University School of Law, May 2025. I would like to first thank Professor Michael O’Shea for his guidance and mentorship throughout the research and writing of this Note. I would also like to thank my family and friends for their love and support during law school. Finally, I would like to thank the members of the Oklahoma City University Law Review for their efforts to make this publication possible.

1. *Justices’ Jurisdiction Ruling Could Increase Business Liability*, SHEPPARD MULLIN (June 2, 2022), <https://www.sheppardmullin.com/article-3667> [https://perma.cc/HLV9-H6AS] (highlighting the uncertainty faced by litigants regarding the current landscape of personal jurisdiction, particularly in light of *Mallory v. Norfolk S. Ry. Co.*).

where. However, in the wake of the United States Supreme Court's decision in *Mallory v. Norfolk Southern Railway Co.*,² there is uncertainty about these questions when it comes to foreign corporations³ registered to transact business in states that mandate consent to general personal jurisdiction as a condition of conducting business there. More specifically, the question that gave rise to *Mallory* was whether state laws requiring out-of-state corporations to consent to general personal jurisdiction as a condition of conducting business there violate the Due Process Clause of the Fourteenth Amendment.⁴ Although a narrowly divided Supreme Court ultimately held that jurisdiction over a corporate registrant, even for its actions outside of the state, pursuant to Pennsylvania's "consent-by-registration" statute did not violate the Due Process Clause of the Fourteenth Amendment, it failed to draw a clear line regarding the extent to which states utilizing such statutes can assert authority over non-resident entities and begs the question: How fact-dependent is *Mallory*'s holding?⁵ Is consent, manifested simply by registering to transact business in a foreign state, enough—or does such a law only comport with Fourteenth Amendment Due Process when an out-of-state entity should "reasonably anticipate being haled into court" as a consequence of its activities and presence in the forum?⁶

In other words, the factual setting of *Mallory* raises a major question about its holding's scope. One could interpret the *Mallory* decision as suggesting that the validity of consent-by-registration statutes under the Fourteenth Amendment turns on the defendant's level of forum activity in combination with their consent to general personal jurisdiction.⁷ Until

2. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 127 (2023).

3. For the purposes of this Note, the term "foreign corporation" refers to any corporation that is sued outside of its place of incorporation or its principal place of business. This definition encompasses corporations from other states in the United States as well as those corporations established outside the country.

4. See *Mallory*, 600 U.S. at 143; see also *Personal Jurisdiction — General Jurisdiction — Consent-by-Registration Statutes — International Shoe and Its Progeny — Mallory v. Norfolk Southern Railway Co.*, 137 HARV. L. REV. 360, 360 (2023).

5. See *Mallory*, 600 U.S. at 146.

6. *Id.* at 153 (Alito, J., concurring) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

7. See, e.g., *Mallory*, 600 U.S. at 153 (Alito, J., concurring) (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 297) (discussing Norfolk Southern's significant level of forum activity and stating that "Norfolk Southern's 'conduct and connection with [Pennsylvania] are such that [it] should reasonably anticipate being haled into court there'").

Mallory is clarified by the Supreme Court or fleshed out by the lower courts, corporate clients—and their lawyers—cannot be entirely sure of the extent to which states utilizing consent-by-registration statutes can assert authority over them. This Note aims to promote clarity regarding the proper interpretation and application of *Mallory* in cases where the facts before the court do not precisely align with *Mallory*'s specific factual context. To achieve this goal, lower courts should adopt a hybrid approach that considers both the defendant's consent to general personal jurisdiction and their contacts with the forum state.

Personal jurisdiction is a “court’s power over a person (or entity) who is a party to, or involved in, a case or controversy before the court, including its power to render judgments affecting that person’s rights.”⁸ Although its definition has largely remained the same, the doctrines that govern personal jurisdiction have evolved from an exclusive focus on territoriality to a more flexible concern with fairness, centered on the nature and extent of a party’s connections with the forum state—and fairness requires some degree of predictability.⁹ However, Pennsylvania’s corporate registration statute has an unusual feature that seems to challenge the overarching principle of fairness, potentially diminishing the significance of a party’s connections with the forum state.¹⁰ Specifically, Pennsylvania’s registration statute requires foreign corporations to consent to general personal jurisdiction when they register to do business, setting it apart as “the only statute in the nation that requires foreign corporations to agree to general jurisdiction.”¹¹ Consequently, the *Mallory*

8. *Amdt 5.4.7.1.1 Overview of Personal Jurisdiction and Due Process*, CORNELL L. SCH.: LEGAL INFO. INST. (footnote omitted), <https://www.law.cornell.edu/constitution-conan/amendment-5/overview-of-personal-jurisdiction-and-due-process> [<https://perma.cc/L733-AGLL>].

9. *See, e.g., World-Wide Volkswagen Corp.*, 444 U.S. at 297 (stating that the Due Process Clause ensures a level of predictability for defendants to foresee whether their conduct will render them liable to suit in a particular forum); *see also* Megan M. La Belle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 EMORY L.J. 781, 781 (2023) (explaining how the predictability aspect of personal jurisdiction determinations has improved over time by “[a]pplying a uniform methodology to the . . . due process standard”).

10. *See e.g.*, 42 PA. CONS. STAT. § 5301 (2023).

11. Sam Heyman, Note, *Mallory v. Norfolk Southern Railway Company: The Unwarranted End of Consent to General Jurisdiction in Pennsylvania*, 95 TEMP. L. REV. 169, 169 (2022) (footnote omitted).

decision could pave the way for Pennsylvania's approach to corporate registration statutes to spread, as Justice Barrett worried in dissent.¹²

Adding another layer of uncertainty, Norfolk Southern also challenged Pennsylvania's consent-by-registration statute under "the so-called dormant Commerce Clause" in its claim before the Pennsylvania Supreme Court.¹³ Upon reaching the United States Supreme Court, only Justice Alito addressed the dormant Commerce Clause issue, determining that "[a] State's assertion of jurisdiction over lawsuits with no real connection to the State may violate . . . one or more constitutional provisions," hinting that in this case there is a high probability that "Pennsylvania's assertion of jurisdiction . . . violates the Commerce Clause."¹⁴ However, because the Pennsylvania Supreme Court did not address that issue, Justice Alito ultimately declared that "Norfolk Southern can renew [that issue] on remand."¹⁵ Thus, any further consideration into the dormant Commerce Clause issue would exceed the scope of this Note, which aims only to explore the Court's decision as it relates to the Due Process Clause of the Fourteenth Amendment.

More specifically, this Note explores the consequences of *Mallory v. Norfolk Southern Railway Co.* for defendants with varying levels of forum activity. Part I introduces the *Mallory* case and summarizes the split of authority in the lower courts that culminated in the Supreme Court's examination of the constitutionality of consent-by-registration statutes under the Fourteenth Amendment. Part II provides a brief historical overview of personal jurisdiction law leading up to *Mallory*, examining its traditional foundations, specific jurisdiction through minimum contacts, and the development of general personal jurisdiction. Part III takes a deeper look into Norfolk Southern's activities in Pennsylvania and examines discussions within the *Mallory* opinion that seem to suggest the outcome might have been different for a defendant with significantly lesser amounts of forum activity. Part IV will explore *Mallory*'s practical implications by examining how lower courts have been interpreting and applying *Mallory* in personal jurisdiction cases, with the objective of proposing the proper framework for how lower courts should interpret and apply *Mallory* in varied factual contexts going forward. Part V concludes

12. *Mallory*, 600 U.S. at 180 (Barrett, J., dissenting).

13. *Id.* at 150 (Alito, J., concurring).

14. *Id.* at 150, 160 (Alito, J., concurring).

15. *Id.* at 150 (Alito, J., concurring).

by summarizing the key takeaways of the *Mallory* case and its impact on the ever-evolving landscape of personal jurisdiction.

I. Unveiling *Mallory v. Norfolk Southern Railway Co.*

A. *Facts of the Case*

Robert Mallory worked for Norfolk Southern as a train mechanic for nearly two decades, first in Ohio and later in Virginia—but never in Pennsylvania.¹⁶ Although Mr. Mallory would live in Pennsylvania for a short time after leaving Norfolk Southern, he ultimately retired to Virginia.¹⁷ It was during this time that Mr. Mallory was diagnosed with cancer.¹⁸ Attributing his cancer diagnosis to his many years at Norfolk Southern, and seeking compensation, Mr. Mallory sued his former employer under a federal workers' compensation law that "permit[s] railroad employees to recover damages for their employers' negligence."¹⁹

Mr. Mallory filed his lawsuit in a Pennsylvania state court.²⁰ Norfolk Southern, headquartered in and incorporated under the laws of Virginia, challenged the lawsuit for lack of personal jurisdiction.²¹ The company maintained, *inter alia*, that under the given circumstances, Pennsylvania courts could not exercise valid personal jurisdiction over it without violating the Due Process Clause of the Fourteenth Amendment.²² Norfolk Southern relied on the fact that at the time Mr. Mallory filed the complaint, he lived in Virginia, and the complaint stated that his exposure to cancer-causing chemicals only occurred in Ohio and Virginia.²³

In response, Mr. Mallory pointed to Norfolk Southern's extensive activities and presence in Pennsylvania.²⁴ For instance, Norfolk Southern managed thousands of miles of train tracks in Pennsylvania, operated nearly a dozen rail yards in Pennsylvania, and operated a handful of repair shops in Pennsylvania.²⁵ But the key fact that Mr. Mallory contends sealed

16. *Id.* at 126.

17. *Id.*

18. *Id.*

19. *Id.* (citation omitted).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 127.

25. *Id.*

the fate for Norfolk Southern: The company was registered to do business in Pennsylvania, a state that “requires out-of-state companies that register to do business [there] to agree to appear in its courts on ‘any cause of action’ against them.”²⁶ Accordingly, Mr. Mallory contended that Norfolk Southern could be held accountable in a Pennsylvania state court whether or not his claim related to or arose out of Norfolk Southern’s contacts with Pennsylvania.²⁷

B. The Road to Mallory

The journey began with conflicting state supreme court decisions out of Georgia and Pennsylvania.²⁸ Those decisions illustrated an interesting close-question conflict between precedents on “consent” and “general jurisdiction,” which ultimately set the stage for the United States Supreme Court’s grant of certiorari in *Mallory v. Norfolk Southern Railway Co.* The questions were the same: whether a state statute, requiring out-of-state entities to agree to appear in its courts for any cause of action as a condition of doing business there, violates the Due Process Clause of the Fourteenth Amendment.²⁹ However, the conclusions varied significantly. The Supreme Court of Pennsylvania held that “[t]o assert general jurisdiction over Norfolk Southern would offend . . . the general jurisdiction framework furnished by *Daimler AG v. Bauman* and *International Shoe*.”³⁰ Conversely, the Supreme Court of Georgia asserted that “*International Shoe* . . . did not . . . reject the theory that an out-of-state corporation could consent to personal jurisdiction in a state’s courts by registering to do business there.”³¹ In light of this, it is necessary to bring attention to the fact that Norfolk Southern’s contacts with Pennsylvania

26. *Id.* (citing 42 PA. CONS. STAT. § 5301(a)(2)(i), (b) (2023)).

27. *Id.*

28. *Id.*

29. See *Personal Jurisdiction — General Jurisdiction — Consent-by-Registration Statutes — International Shoe and Its Progeny — Mallory v. Norfolk Southern Railway Co.*, *supra* note 4, at 360 (footnotes omitted) (explaining how the high courts of Georgia and Pennsylvania were split on whether “a state consent-by-registration statute, which required that corporations registered to do business in state also consent to general jurisdiction” violated the Due Process Clause).

30. See *id.* at 362 (footnotes omitted) (explaining how the Supreme Court of Pennsylvania affirmed the trial court’s reasoning that a state could exercise general jurisdiction only where it was incorporated or maintained its principal place of business and that the consent-by-registration statute violated Norfolk Southern’s due process rights).

31. *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 85 (2021).

were unlikely to satisfy the very high threshold set forth by the Supreme Court for establishing general jurisdiction, making the effect of the consent-by-registration statute central to the issues in *Mallory*.³² Thus, as a result of this split of authority, the United States Supreme Court agreed to hear the case in order to settle the issue once and for all.³³ However, the Supreme Court's decision in *Mallory* did not definitively settle the issue; rather, it gave rise to lingering uncertainties and created new questions regarding the rights and responsibilities of out-of-state corporations operating in states that require them to consent to general personal jurisdiction manifested by registering to transact business there.

First, in *Cooper Tire & Rubber Co. v. McCall*, the Supreme Court of Georgia held that the State's assertion of general personal jurisdiction over an out-of-state corporation based on consent through registration as a condition of conducting business there does not violate the Fourteenth Amendment.³⁴ That court explained that the Georgia statute at issue is worded in a way that deems corporations who are authorized to do business there a "resident" for purposes of personal jurisdiction.³⁵ In other words, this means "a plaintiff wishing to sue in Georgia a corporation authorized to do business [there] is not restricted by the . . . requirement that a cause of action arise out of a defendant's activities."³⁶ Georgia drew on its earlier general jurisdiction holding in *Allstate Insurance Co. v. Klein*, reasoning that its opinion in that case "notif[ie]d] out-of-state corporations that their corporate registration will be treated as consent to general personal jurisdiction in Georgia" and that "any corporation . . . authorized to do business in Georgia is subject to the general jurisdiction of [its] courts."³⁷

The Supreme Court of Pennsylvania took an opposing stance in *Mallory v. Norfolk Southern Railway Co.*³⁸ In that case, the Supreme Court of Pennsylvania held that a Pennsylvania statute requiring out-of-state

32. See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014) (holding that corporations can only be subject to general personal jurisdiction where they are deemed to be "at home" which may be in its place of incorporation, its principal place of business, or where "a corporation's operations . . . [are] so substantial and of such a nature as to render the corporation at home in that State").

33. *Mallory*, 600 U.S. at 127.

34. *Cooper Tire & Rubber Co.*, 863 S.E.2d at 92.

35. *Id.* at 88.

36. *Id.* (quoting *Allstate Ins. Co. v. Klein*, 422 S.E.2d 863, 865 (Ga. 1992) (footnote omitted)).

37. *Id.* at 88, 90.

38. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 564-69 (Pa. 2021).

companies registered to do business there to appear in its courts for any cause of action against them violates the Fourteenth Amendment.³⁹ The statute under consideration in that case reads:

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

...

(2) Corporations.—

- (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
- (ii) Consent, to the extent authorized by the consent.
- (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

...

- (b) Scope of jurisdiction.—When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section.⁴⁰

The Supreme Court of Pennsylvania rested its decision on three distinct rationales. First, it determined that the statute violated the Fourteenth Amendment because the defendant's activities within the forum were not sufficiently extensive to give rise to general personal jurisdiction.⁴¹ Next, it asserted that "due process—acting as a tool of federalism—disallows the Pennsylvania . . . statute from conferring general personal jurisdiction."⁴² More specifically, the court reasoned that allowing jurisdiction would violate principles of federalism because the

39. *Id.* at 571.

40. 42 PA. CONS. STAT. § 5301 (2023).

41. Heyman, *supra* note 11, at 185-86.

42. *Id.* at 185.

“sovereignty of each state implies a limitation on the sovereignty of all its sister states” and that “[b]y requiring foreign corporations to submit to general jurisdiction as a condition of doing business [in Pennsylvania], Pennsylvania’s statutory scheme infringes upon [their] sister state’s ability to try cases against their corporate citizens.”⁴³ Finally, the court added that “any consent conferred by the Pennsylvania . . . statute is involuntary and barred by the unconstitutional conditions doctrine.”⁴⁴ By reaching this conclusion, the Supreme Court of Pennsylvania created a direct split of authority with the Supreme Court of Georgia, prompting the U.S. Supreme Court to step in.⁴⁵

In the end, a bare majority of Justices agreed that Pennsylvania’s consent-by-registration statute did not violate the Due Process Clause of the Fourteenth Amendment as applied to Norfolk Southern in *Mallory*’s case.⁴⁶ While the Court may have held that the Pennsylvania statute did not violate Due Process as applied to the specific facts of that case, parts of the opinion seem to hint that the outcome might change for a defendant engaged in a significantly lesser amount of forum activity.⁴⁷ Accordingly, the outcome of *Mallory* failed to draw a clear line regarding the extent to which states utilizing consent-by-registration statutes can assert authority over non-resident entities registered to do business there.

C. The Opinion: “The Extremes Against the Middle”

*When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds*⁴⁸

43. *Mallory*, 266 A.3d at 567-69 (footnote omitted) (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty.*, 582 U.S. 255, 263 (2017)).

44. Heyman, *supra* note 11, at 185.

45. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 127 (2023).

46. *See id.* at 134.

47. *See, e.g., id.* at 153 (Alito, J., concurring) (quoting *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 297) (discussing Norfolk Southern’s significant level of forum activity and stating that “Norfolk Southern’s ‘conduct and connection with [Pennsylvania] are such that [it] should reasonably anticipate being haled into court there’”).

48. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted) (emphasis added).

The *Mallory* opinion exhibits a somewhat intricate voting dynamic within the Court—a primary characteristic of the case that generates uncertainties regarding its future application. For instance, the 5-4 decision, with Justices resting their votes on varying arguments, lays the foundation for interpretations of *Mallory*'s outcome as being inherently fact dependent. That is, certain parts of the opinion seem to indicate that in upholding the Pennsylvania statute, some Justices considered not only Norfolk Southern's consent to general personal jurisdiction but also considered the company's extensive activities and presence within the forum. Thus, if considerations of Norfolk Southern's activities and presence in Pennsylvania had a decisive influence on even one Justice's decision, it raises serious questions about how the outcome might have differed had Norfolk Southern engaged in significantly lesser amounts of activity in Pennsylvania. Accordingly, the *Mallory* decision also gives rise to uncertainties about how it will be applied in future cases involving defendants engaged in varying levels of forum activity.

Justice Gorsuch authored the lead opinion, announcing the judgment of the Court in Parts I and III-B, where he was joined by a five-justice majority (Justices Thomas, Alito, Sotomayor, and Jackson). However, the other sections of Justice Gorsuch's opinion—II, III-A, and IV—were not joined by Justice Alito and are only a plurality opinion. Furthermore, Justice Jackson concurred separately, explaining her reasons for joining Justice Gorsuch, while a well-argued dissenting opinion authored by Justice Barrett (joined by Chief Justice Roberts and Justices Kavanaugh and Kagan) sets forth her disagreements with the majority's approach. As a result of the fractured nature of the opinion, it is necessary to take a close look at the plurality opinion alongside Justice Alito's separate opinion (concurring in part [Parts I and III-B] and concurring in the judgment) in order to fully understand the grounds upon which the Justices rest their decisions and their ultimate effect on the outcome and future application of the case.

The majority ultimately upheld the Pennsylvania law that provides that any out-of-state business that registers to do business in Pennsylvania thereby consents to general personal jurisdiction in its courts.⁴⁹ To be more specific, the Court held that Pennsylvania's consent-by-registration statute does not violate the Due Process Clause of the Fourteenth

49. See *Mallory*, 600 U.S. at 136.

Amendment.⁵⁰ In reaching that determination, the Court heavily relied on its own precedent from more than a century ago, citing *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, where the facts were rather similar to those of *Mallory*.⁵¹ In both cases, out-of-state corporations, actively engaged in meaningful amounts of activity in states requiring them to consent to general personal jurisdiction as a condition of transacting business there, found themselves as defendants for causes of action originating elsewhere.⁵² Ultimately, a majority of the Court adhered to its earlier ruling in *Pennsylvania Fire* and held that “suits premised on these grounds do not deny a defendant due process of law.”⁵³

In a separate concurring opinion, Justice Alito expressed his agreement with the Court’s ultimate determination: The Due Process Clause of the Fourteenth Amendment is not violated when an out-of-state corporation, operating extensively within a state, adheres to a registration requirement that necessitates submission to general personal jurisdiction in any legal proceeding initiated within that state.⁵⁴ However, Justice Alito immediately expressed his skepticism with that determination, asserting that just because the Due Process Clause does not protect against a State’s imposition of a “submission-to-jurisdiction requirement,” it does not foreclose the possibility that “[a] State’s assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions,” alluding to the dormant Commerce Clause.⁵⁵ Thus, although Justice Alito acknowledged that the Court has “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,” he asserted that in this case there is a high probability that “Pennsylvania’s assertion of jurisdiction . . . violates the Commerce Clause.”⁵⁶ However, because there was no Commerce Clause challenge before the Court,

50. *Id.* at 134-35 (holding that “*Pennsylvania Fire* controls this case,” and that “*Pennsylvania Fire* held that suits premised on these grounds do not deny a defendant due process of law”).

51. *See id.* at 134; *see also id.* at 152 (Alito, J., concurring) (“The parallels between *Pennsylvania Fire* and the case before us are undeniable.”).

52. *See id.* at 127; *see also* *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 97 (1917).

53. *Mallory*, 600 U.S. at 135.

54. *Id.* at 150 (Alito, J., concurring).

55. *Id.* (Alito, J., concurring).

56. *Id.* at 156, 160 (Alito, J., concurring).

Justice Alito joined the Court's opinion as stated in Parts I and III-B, and left the Commerce Clause challenge to be renewed on remand.⁵⁷

Explaining an additional reason for joining Justice Gorsuch, Justice Jackson brought *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* to the Court's attention.⁵⁸ In short, *Insurance Corp. of Ireland* asserts that the due process requirement of personal jurisdiction is an "individual, waivable right."⁵⁹ She posited that Norfolk Southern voluntarily waived its right to challenge personal jurisdiction in choosing to register as a foreign corporation in Pennsylvania, fully aware of the potential consequences.⁶⁰ In Justice Jackson's view, Norfolk Southern's argument that it was induced to register in Pennsylvania because its trains passed through the state is meritless. As she points out, "[r]egistration is required when corporations seek to conduct *local* business in a 'regular, systematic, or extensive' way" and that "Norfolk Southern . . . deemed registration worthwhile and opted in."⁶¹ Thus, according to Justice Jackson, Norfolk Southern cannot turn around and challenge personal jurisdiction as it "waived that right by choosing to register as a foreign corporation under the circumstances presented in this case."⁶²

Justice Barrett authored the dissenting opinion for four justices, expressing her concerns about the abandonment of established Supreme Court precedent.⁶³ For example, citing both *International Shoe Co. v. Washington*⁶⁴ and *Daimler AG v. Bauman*,⁶⁵ Justice Barrett asserted that "[f]or 75 years, we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over foreign defendants merely because they do business in the State."⁶⁶ Justice Barrett went on to rebut the majority's position by arguing that consent-by-registration statutes allow states to merely "manufacture 'consent' to personal jurisdiction," and that regardless of what the Pennsylvania statute might say, "precedent makes [it] crystal clear, [that] simply doing business is *insufficient*."⁶⁷

57. *Id.* (Alito, J., concurring).

58. *Id.* at 147 (Jackson, J., concurring) (interpreting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)).

59. *Id.* (Jackson, J., concurring) (citing *Ins. Corp. of Ireland*, 456 U.S. 694).

60. *Id.* at 148 (Jackson, J., concurring).

61. *Id.* (Jackson, J., concurring).

62. *Id.* at 149 (Jackson, J., concurring).

63. *Id.* at 163 (Barrett, J., dissenting).

64. 326 U.S. 310 (1945).

65. 571 U.S. 117 (2014).

66. *Mallory*, 600 U.S. at 163 (Barrett, J., dissenting) (citation omitted).

67. *Id.* at 164, 166 (Barrett, J., dissenting).

Moreover, Justice Barrett rejected the majority's reliance on *Pennsylvania Fire Insurance Co.*, arguing that its rationale, driven by the sentiment that consent to general jurisdiction in exchange for an in-forum benefit and access to a state's markets does not violate due process, is erroneous. She asserted that *Pennsylvania Fire* was "decided before . . . *International Shoe*" and that "prior decisions [that] are inconsistent with this standard . . . are overruled."⁶⁸ Justice Barrett concluded by expressing general disagreement with the majority's approach and warned that such a significant shift in the law of personal jurisdiction could lead to the elimination of specific jurisdiction for corporations altogether.⁶⁹

Finally, the remaining parts of the *Mallory* opinion—namely, Part IV of the plurality opinion and Justice Alito's partial concurrence—seem to analyze whether Pennsylvania's consent-by-registration statute violates the Fourteenth Amendment by examining Norfolk Southern's consent to general personal jurisdiction alongside the significant level of activity the company undertook in Pennsylvania.⁷⁰ For instance, after acknowledging that Norfolk Southern "agree[d] to answer [for] any suit against it" and pointing to the company's extensive operations in Pennsylvania, the plurality rebutted the company's due process argument, as not only did Norfolk Southern consent to general personal jurisdiction, but it had also "taken full advantage of its opportunity to do business" there.⁷¹ Additionally, Justice Alito noted that Norfolk Southern "had clear notice that Pennsylvania considered its registration as consent to general jurisdiction," and concluded that there was no due process violation when its consent is viewed alongside the fact that Norfolk Southern is "a large . . . corporation with substantial operations in [the] State."⁷²

Put differently, the outcome of *Mallory* may have been influenced by the amalgamation of so-called "traditional bases" of personal jurisdiction together with outcome-determinative considerations of the defendant's meaningful amount of activity in the forum state. As a result, the *Mallory* decision failed to set forth a bright line rule, leaving out-of-state entities conducting business in states where consent to general personal jurisdiction is required, unsure about the extent to which such states can

68. *Id.* at 177 (Barrett, J., dissenting) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977)).

69. *Id.* at 180 (Barrett, J., dissenting).

70. *See, e.g., id.* at 141; *id.* at 150 (Alito, J., concurring).

71. *Id.* at 141.

72. *Id.* at 150, 153 (Alito, J., concurring) (citation omitted).

assert authority over them. Thus, before delving into the parts of the opinion that could be interpreted as suggesting *Mallory*'s outcome may have hinged on Norfolk Southern's level of forum activity—rather than its consent to general personal jurisdiction alone—this Note examines the historical development of personal jurisdiction. A brief overview of this historical progression will set the stage for examining the nuanced aspects of the opinion that seem to suggest the outcome was influenced by blending traditional foundations of personal jurisdiction together with a more modern approach centered on fairness, particularly focused on the nature and extent of a defendant's connections with the forum state.

II. Personal Jurisdiction: A Quick Historical Overview

A. Traditional Foundations

Although the doctrines governing personal jurisdiction have transformed significantly over the last two-and-a-half centuries, American legal tribunals have always been subject to certain jurisdictional limitations.⁷³ From the inception of the United States until nearly a decade after the ratification of the Fourteenth Amendment, Anglo-American legal norms typically determined when courts were considered competent to exercise jurisdiction over the parties before it.⁷⁴ These traditions generally held that a "tribunal's competence was . . . constrained only by the 'territorial limits' of the sovereign that created it."⁷⁵ Although a tribunal's concentration would remain focused on territoriality regardless of the action being brought, its application would ultimately depend on "the object of the court's attention."⁷⁶ In other words, with an eye towards territoriality, a legal tribunal's approach in determining its own competence would vary based on whether the legal matter pertained to immovable property or an individual.⁷⁷

For instance, a court's jurisdiction concerning immovable property would be treated as "*local*" or "*in rem*," and could only be brought "in the

73. *Id.* at 128 (citing Joseph Story, Commentaries on the Conflict of Laws § 539, pp. 450-51 (1834)); *see also* United States v. Union Pac. R. Co., 98 U.S. 569, 602-03 (1878).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

jurisdiction where the property was located.”⁷⁸ Under this approach, “the attachment of the defendant’s property within the forum sufficiently supported the exercise of in rem . . . jurisdiction over the nonresident property owner.”⁷⁹ Alternatively, suits involving individuals and natural persons, or “*in personam*” suits brought against a party “for injuries that . . . happened [anywhere],” were treated as “transitory” and were considered to “follow[] the individual.”⁸⁰ Ultimately, this was understood to mean that “a suit could be maintained by anyone on any claim in any place the defendant could be found.”⁸¹

After more than a century of common law traditions governing the American legal system’s understanding of personal jurisdiction, the Supreme Court solidified what are now considered the “traditional bases” of personal jurisdiction in the landmark decision of *Pennoyer v. Neff*.⁸² More specifically, the Court’s decision in *Pennoyer* accomplished this by concretely delineating the circumstances under which a court may exercise valid personal jurisdiction over the parties before it without offending the Due Process Clause of the newly adopted Fourteenth Amendment. First, the Court asserted that “no State can exercise direct jurisdiction and authority over persons or property without its territory” and “that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions,” thereby confirming the validity of the legal norms that governed personal jurisdiction up until that point, such as transient jurisdiction and domicile.⁸³ Additionally, *Pennoyer* established rules that would govern a court’s exercise of extraterritorial jurisdiction over nonresidents, rooted in “principles of public law.”⁸⁴ Accordingly, *Pennoyer* held that the exercise of extraterritorial jurisdiction was permissible in situations involving the defendant’s consent through “‘voluntary appearance,’ the appointment of ‘an agent or representative in the State to receive service of process,’ or

78. *Id.*; 3 William Blackstone, Commentaries on the Laws of England 117-18, 294 (1768).

79. William V. Dorsaneo, III, *Pennoyer Strikes Back: Personal Jurisdiction in a Global Age*, 3 TEX. A&M L. REV. 1, 3 (2015) (footnote omitted).

80. *Mallory*, 600 U.S. at 128 (emphasis omitted).

81. *Id.* (citing Joseph Story Commentaries on the Conflict of Laws § 539, at 450).

82. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

83. *Id.* (citation omitted).

84. Dorsaneo, *supra* note 79, at 3 (footnote omitted).

the implied designation of a ‘public officer’ on whom ‘service may be made.’”⁸⁵

Pennoyer established “rigid rules” for legal tribunals to adhere to in order to exercise authority over the parties before it without violating due process.⁸⁶ Although the rules set forth in *Pennoyer* would govern for nearly seven decades, “the Supreme Court and other courts increasingly struggled to apply this . . . test” as interstate travel grew more common.⁸⁷ Additionally, these struggles were worsened by the fact that these tests were “created for natural persons, not for fictional entities such as corporations.”⁸⁸ Thus, as “America’s business was becoming the domain of corporations,” applying the rules governing personal jurisdiction proved difficult for the courts, ultimately leading the Supreme Court to abandon *Pennoyer* for a new, more flexible test concerned with fairness and centered on the nature and extent of a party’s connections with the forum state.⁸⁹

B. A Modern Approach to Personal Jurisdiction

i. International Shoe Co. v. Washington

While *Pennoyer*’s approach to personal jurisdiction sufficed for nearly seventy years, dramatic technological and societal developments stemming from the rise of industrial America indicated that the existing rules governing personal jurisdiction were becoming outdated and unworkable.⁹⁰ Ultimately, it became apparent that these rules needed to be reworked in order to conform to America’s quickly changing society.⁹¹ For example, interstate travel and the corporate structure were simultaneously becoming more prevalent throughout the United States, and this meant that “plaintiffs were more likely to be injured by nonresident defendants.”⁹² Therefore, in order to respond to these societal changes, courts needed to accommodate to America’s changing business,

85. *Id.* (footnote omitted).

86. *Id.*

87. Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 755 (2003).

88. *Id.*

89. *Id.*

90. La Belle, *supra* note 9, at 792.

91. *Id.*

92. *Id.* at 790 (footnote omitted).

economic, and industrial landscapes to more effectively carry out their duties and to afford litigants more flexibility.⁹³

The change finally occurred in 1945 when the Supreme Court decided *International Shoe Co. v. Washington*, in response to corporations transacting business in states where they were neither incorporated nor headquartered.⁹⁴ This proved to be an issue because the existing rules governing personal jurisdiction seemed to afford these corporations a level of immunity in states where they conducted business but were not technically “present” for purposes of personal jurisdiction.⁹⁵ In other words, corporations were “hid[ing] behind their foreign character and deny[ing] their presence to defeat the court’s jurisdiction.”⁹⁶ Thus, because corporations could essentially evade a court’s jurisdiction under the tests set forth in *Pennoyer*, the Supreme Court “announced a new . . . theory of personal jurisdiction,” as courts, lawyers, and litigants could no longer “work within the confines of *Pennoyer*.”⁹⁷

Specifically, the test set forth in *International Shoe*—the “minimum contacts” test—allowed courts to exercise *specific* personal jurisdiction over out-of-state defendants who maintained “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁹⁸ However, in the wake of *International Shoe*, the practical application of the minimum contacts test was not immediately clear to courts or litigants.⁹⁹ Thus, over the next several decades, the Supreme Court slowly developed and defined the test initially laid out in *International Shoe* by deciding a number of cases relating to its application.

For instance, more than ten years after the Court’s decision in *International Shoe*, the Court held that a defendant’s relevant contact with the forum state, even if connected to the plaintiff’s claim, “must be purposeful.”¹⁰⁰ Moreover, continuing to shift its focus towards “concepts of fairness,” the Court held that the mere foreseeability of a defendant’s

93. *Id.* at 792.

94. *See* 326 U.S. 310, 312-13 (1945).

95. *See* La Belle, *supra* note 9, at 790.

96. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 129-30 (2023) (citation omitted).

97. La Belle, *supra* note 9, at 792 (footnote omitted).

98. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *see also* La Belle, *supra* note 9, at 792.

99. La Belle, *supra* note 9, at 794.

100. *Id.* at 795 (footnote omitted); *see also* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

purposeful contact with the forum state alone would not suffice, but that “the defendant’s conduct and connection with the forum state must be such that it ‘should reasonably anticipate being haled into court there.’”¹⁰¹ Finally, the Court held that for specific jurisdiction to lie under the minimum contacts test, the suit must “arise out of or relate to the defendant’s contacts with the forum [state]” and satisfy a “reasonableness prong” by weighing several “fairness factors.”¹⁰²

In short, the establishment and subsequent development of the minimum contacts test set forth by *International Shoe* and its progeny stands for a substantial shift in personal jurisdiction jurisprudence—an important step towards a more flexible approach, centered on the nature and extent of a party’s connections with the forum state. For instance, because the minimum contacts test balances the interests of both plaintiffs and defendants, litigants have been afforded greater flexibility, and courts can more effectively carry out their duties. However, this shift also meant that corporations could no longer “hide behind their foreign character and deny their presence to defeat the court’s jurisdiction,” exposing them to new frontiers of civil accountability.¹⁰³

ii. *Surviving International Shoe*

Eventually, the Court had to determine what effect, if any, *International Shoe* and its progeny had on the *Pennoyer* era “traditional bases” of personal jurisdiction. That is, do the “traditional bases” of personal jurisdiction still apply at all—and if so, has the application remained consistent with the pre-*Shoe* era? In addition to *Mallory*, the

101. See *La Belle*, *supra* note 9, at 797 (footnotes omitted); see also *Hanson*, 357 U.S. at 253; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

102. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 362 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty.*, 582 U.S. 255, 262 (2017)); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (explaining how the reasonableness prong is intended to ensure a court’s exercise of personal jurisdiction does not offend due process by “protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum” and “ensur[ing] 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”). The factors to be considered include burden on the defendant, the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

103. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 129-30 (2023) (citation omitted).

Court took up these inquiries in *Shaffer v. Heitner*¹⁰⁴ and *Burnham v. Superior Court of California, County of Marin*.¹⁰⁵ In those cases, the Court had to answer whether the minimum contacts test should be applied to assertions of in rem jurisdiction and whether “transient” jurisdiction survived *International Shoe*, respectively.¹⁰⁶

First, the question in *Shaffer* involved in rem proceedings and sought to determine whether courts maintained the authority to enter judgments over a defendant’s property in the forum state even where the defendant property owner lacked minimum contacts with that state. Prior to the Court’s employment of a more pragmatic approach to personal jurisdiction taken in *International Shoe*, such an action would have been permissible, as the Court in *Pennoyer* asserted that “the attachment of the defendant’s property within the forum sufficiently supported the exercise of in rem . . . jurisdiction over the nonresident property owner.”¹⁰⁷ However, the Court’s decision in *Shaffer* resulted in a major change from *Pennoyer*, as the Court ultimately held that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”¹⁰⁸

Alternatively, in *Burnham*, the Court determined that the traditional notions of “transitory” actions, such as serving the defendant while present in the forum state, still apply to natural persons in the same manner they did pre-*Shoe*.¹⁰⁹ In what is now commonly referred to as “tag jurisdiction,” the Court held that individuals served with summons would be subject to the personal jurisdiction of the courts in the state where the individual was served—consistent with the Due Process Clause—regardless of whether the defendant resided there or the suit related to or arose out of their contacts with the state.¹¹⁰ Notably, however, this rule only applies to natural persons.¹¹¹ Thus, because corporations are not subject to answer

104. 433 U.S. 186 (1977).

105. 495 U.S. 604 (1990).

106. *Shaffer*, 433 U.S. at 212; see generally *Burnham*, 495 U.S. at 604.

107. Dorsaneo, *supra* note 79, at 3 (footnote omitted).

108. *Shaffer*, 433 U.S. at 212 (footnote omitted).

109. See *Burnham*, 495 U.S. at 621 (stating that “*International Shoe* confined its ‘minimum contacts’ requirement to situations in which the defendant ‘be not present within the territory of the forum’”) (emphasis added).

110. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 129 (2023) (citing *Burnham*, 495 U.S. 604 *passim*).

111. *Golden Scorpio Corp. v. Steel Horse Saloon I*, No. CV-08-1781-PHX-GMS, 2009 WL 976598, at *3 n.4 (D. Ariz. 2009) (citing 4A CHARLES ALAN WRIGHT & ARTHUR R.

for “[any] suit . . . maintained by anyone . . . in any place [a corporation might] be found,” litigants have been left to take legal action against foreign corporations where they are deemed to be “at home,” to work within the confines of *International Shoe*’s minimum contacts test, or, more controversially, to contend that the corporation has consented to general personal jurisdiction.¹¹²

C. The Development of General Personal Jurisdiction

General personal jurisdiction stands for the principle that a defendant can be sued in the forum state for any claim whatsoever, regardless of where the claim arose. More specifically, when a court is deemed to exercise valid general personal jurisdiction over the parties before it, a plaintiff need not show that their claim is related to or arose out of the defendant’s contacts with the forum state.¹¹³ However, aside from the traditional bases of personal jurisdiction, the test for determining whether a court has valid general personal jurisdiction has not always been the same, as the rules governing it have been progressively narrowed and refined by the Supreme Court.

i. Pre-Daimler: “Doing-Business” Jurisdiction

Until just over a decade ago, the analysis for determining whether a court exercised valid general personal jurisdiction over a foreign corporation was “focused on [the corporation’s] meaningful contacts and ties to the putative forum state.”¹¹⁴ That is, in making the general personal jurisdiction determination, courts would inquire into whether the defendant had “continuous and systematic contacts with the forum state.”¹¹⁵ Although the Court did technically establish a rule for general

MILLER, FEDERAL PRACTICE AND PROCEDURE § 1103 (3d ed. 2002)) (“Service made upon a corporation, partnership, or other unincorporated association simply by delivering process to a corporate or comparable officer who happens to reside or be physically present in the state at the time the documents are served will not be effective to establish in personam jurisdiction, unless that entity also is doing business so as to be amenable to service of process and the assertion of jurisdiction in the forum state.”).

112. *Mallory*, 600 U.S. at 128 (citing Joseph Story, Commentaries on the Conflict of Laws § 538, at 450 (1834)).

113. *See id.*

114. *Justices’ Jurisdiction Ruling Could Increase Business Liability*, *supra* note 1 (footnote omitted).

115. *La Belle*, *supra* note 9, at 786 (footnote omitted).

personal jurisdiction, its application was not entirely clear and thus “failed to provide any guidance other than that the defendant’s contacts with the forum state must be continuous and systematic.”¹¹⁶ Ultimately, what became known as “doing-business” jurisdiction¹¹⁷ was generally understood to mean that corporations engaged in regular business transactions within a forum state met the threshold criteria of “continuous and systematic” contacts, thereby rendering them subject to the general personal jurisdiction of the courts in that state.¹¹⁸ As a result, this test brought about an unprecedented level of legal exposure for corporations engaged in nationwide business activities, and the test became “the subject of substantial criticism.”¹¹⁹

ii. Goodyear, Daimler, and Post-Daimler: The “At Home” Test

In response to the aforementioned criticisms associated with the “doing-business” test, “the Supreme Court . . . refined the test, and raised the bar for what contacts may satisfy the courts’ exercise of general jurisdiction over a defendant.”¹²⁰ First, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court announced that “defendants are only subject to general jurisdiction in a forum state if their contacts are so continuous and systematic ‘as to render them essentially at home’ there.”¹²¹ Under that test, the Court held that “[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s

116. *Id.* at 810.

117. Although Norfolk Southern’s contacts with Pennsylvania were not quite extensive enough to subject the company to *Daimler*’s “at home” general jurisdiction test described below, there would have been a solid argument that Norfolk Southern would have been subject to general personal jurisdiction in Pennsylvania under the pre-*Goodyear/Daimler* “doing-business” jurisdictional test that most lower courts formerly used for establishing general jurisdiction, even without needing to consider the “consent” argument and the special feature of Pennsylvania’s registration statute.

118. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1352 (2015) (“It was thought that if a corporation was doing business in the forum, in the sense of having continuous and systematic contacts with the forum, it would be subject to general jurisdiction there.”) (footnote omitted); La Belle, *supra* note 9, at 810.

119. La Belle, *supra* note 9, at 810 (footnote omitted).

120. *Justices’ Jurisdiction Ruling Could Increase Business Liability*, *supra* note 1 (footnotes omitted).

121. See La Belle, *supra* note 9, at 811 (footnote omitted); see also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

domicile,” and for corporations, that paradigm is the “place of incorporation, and principal place of business.”¹²²

A few years later, in *Daimler AG v. Bauman*, the Court clarified and cemented the new general personal jurisdiction test, explaining that “the inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.’”¹²³ Although this test held that corporations were generally considered “at home” in their place of incorporation and principal place of business, the Court in *Daimler* added that “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”¹²⁴ As a result, “*Daimler AG v. Bauman* signaled the end of an era,” and “spark[ed] the search for alternative means to establish general jurisdiction over foreign corporations,” such as consent-by-registration statutes.¹²⁵

III. A Deeper Look

In holding that Pennsylvania’s consent-by-registration statute did not violate the Due Process Clause of the Fourteenth Amendment, the *Mallory* majority asserted that the “facts [of *Mallory*] fall squarely within *Pennsylvania Fire*’s rule,” and that “[t]o decide this case, the Court need not speculate whether any other . . . set of facts would suffice to establish consent to suit.”¹²⁶ Accordingly, parts of the plurality opinion and Justice Alito’s separate concurrence closely examine the significance and effect of *Mallory*’s factual context on the case’s ultimate outcome. In fact, the dissenters also thought that Norfolk Southern’s level of forum activity was relevant; however, they ultimately determined that it was not enough to subject the company to general personal jurisdiction, regardless of its adherence to Pennsylvania’s registration statute. Thus, the specific facts

122. *Goodyear*, 564 U.S. at 924; La Belle, *supra* note 9, at 811.

123. *Daimler AG v. Bauman*, 571 U.S. 117, 138-39 (2014) (quoting *Goodyear*, 564 U.S. at 919).

124. *Id.* at 139 n.19.

125. Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1610 (2015) (footnotes omitted).

126. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 135-36 (2023).

of the *Mallory* case seem to indicate that they were necessary to the conclusion that Pennsylvania's consent-by-registration statute did not violate the Due Process Clause.

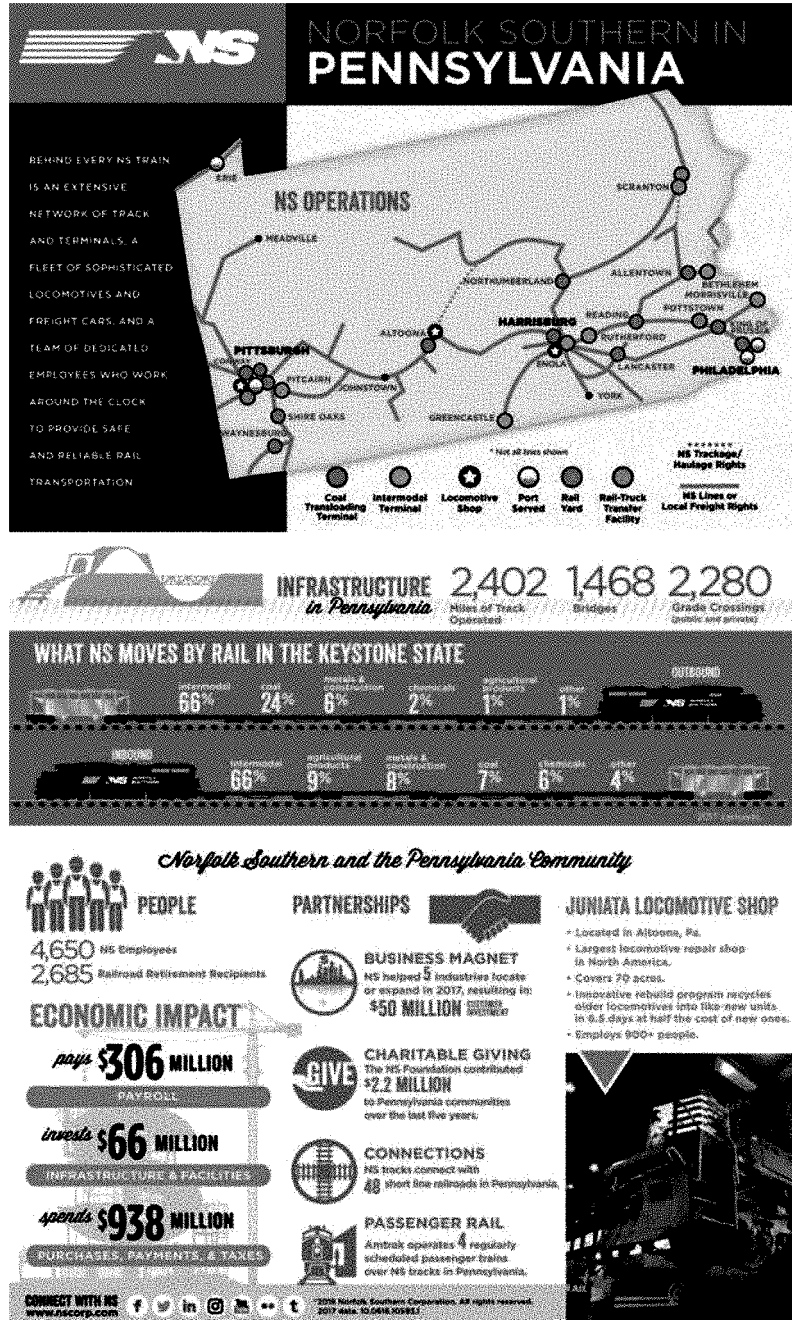
Put differently, parts of the opinion suggest that the case's outcome was influenced by blending traditional foundations of personal jurisdiction together with *Shoe*'s more modern approach focused on the nature and extent of the company's connections with the forum state. For instance, those parts of the opinion strongly hint that *Mallory*'s outcome was not solely based on Norfolk Southern's mere consent to general personal jurisdiction but also on the significant level of activity the company undertook in Pennsylvania. That is, had the defendant in *Mallory* only consented to general personal jurisdiction—but engaged in a significantly lesser amount of forum activity—the outcome may very well have been different. Because this leaves foreign corporations transacting business in states that mandate consent to general personal jurisdiction wondering whether consent alone is enough, Part IV of this Note proposes that the appropriate framework for lower courts interpreting and applying *Mallory* should entail a hybrid approach that considers both the defendant's consent to general personal jurisdiction and their contacts with the forum state.

A. Justice Gorsuch's Plurality Opinion

Turning to the significance of *Mallory*'s factual context, a plurality of Justices used Norfolk Southern's own words against it, quoting the company's appellate brief where it asserted that “the ‘primary concern’ of the personal jurisdiction analysis is ‘[t]reating defendants fairly’” arguing that “it would be ‘unfair’ to allow Mr. Mallory’s suit to proceed in Pennsylvania because doing so would risk unleashing ‘local prejudice’ against a company that is ‘not local’ in the eyes of the community.”¹²⁷ In response, the plurality reminded Norfolk Southern that it had been registered to do business in Pennsylvania for several years, established an office for receiving service of process in Pennsylvania, took advantage of its opportunity to do business in Pennsylvania—in agreement to answer for any suit against it—and even “boast[ed] of its presence [in Pennsylvania] this way.”¹²⁸

127. *Id.* at 141 (citation omitted).

128. *Id.*



The plurality continued to list several additional reasons as to why it could not stand behind Norfolk Southern's fairness argument, pointing out that:

[W]hen Mr. Mallory sued, Norfolk Southern employed nearly 5,000 people in Pennsylvania. It maintained more than 2,400 miles of track across the Commonwealth. Its 70-acre locomotive shop there was the largest in North America. . . . [T]he company even proclaimed itself a proud part of "the Pennsylvania Community." By 2020, too, Norfolk Southern managed more miles of track in Pennsylvania than in any other State. And it employed more people in Pennsylvania than it did in Virginia, where its headquarters was located. . . . The company *itself* highlighted its "intrastate activities" in the proceedings below. (discussing the firm's "extensive operations in Pennsylvania," including "2,278 miles of track," "eleven rail yards," and "three locomotive repair shops").¹²⁹

The plurality buttressed its position by citing *International Shoe*, rhetorically asking how, after considering all of the aforementioned facts, "fair play and substantial justice" would require a Pennsylvania court to turn aside Mr. Mallory's suit on the grounds that "it would be 'unfair' to allow [the] suit to proceed in Pennsylvania because doing so would risk unleashing 'local prejudice' against a company that is 'not local' in the eyes of the community."¹³⁰ The plurality then gave examples of actions that might carry "profound consequences for personal jurisdiction," such as "accepting an in-state benefit with jurisdictional strings attached."¹³¹ Finally, the plurality acknowledged that "'a variety of legal arrangements' can signal consent to jurisdiction . . . and these arrangements *can* include . . . consent to suit in exchange 'for access to [a State's] markets.'"¹³² Thus, after identifying Norfolk Southern's significant level of forum activity, the plurality firmly rebutted the company's fairness argument, as not only did

129. *Id.* at 143 (citations omitted).

130. *Id.* at 141 (citation omitted).

131. *Id.* at 145 (citations omitted).

132. *Id.* at 141 n.8 (citation omitted).

the company consent to general personal jurisdiction, but it had also “taken full advantage of its opportunity to do business” in Pennsylvania.¹³³

The plurality’s reasoning also heavily relied on *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*¹³⁴ In *Pennsylvania Fire*, the Supreme Court upheld the constitutionality of a Missouri law requiring out-of-state corporations to register and consent to general personal jurisdiction.¹³⁵ The plurality found this precedent directly applicable, as the Pennsylvania law at issue similarly mandated that out-of-state corporations register before doing business and explicitly provided for general personal jurisdiction over registered entities.¹³⁶ In *Mallory*, Norfolk Southern had complied with Pennsylvania’s registration requirement since 1998, thereby consenting to be sued in the state on any claim.¹³⁷ The plurality noted that this longstanding consent was consistent with the due process principles upheld in *Pennsylvania Fire*, which remains good law.¹³⁸ Thus, the plurality reinforced that Norfolk Southern’s registration and extensive business activities in Pennsylvania constituted sufficient grounds for general personal jurisdiction, which was in line with the established precedent.¹³⁹

Ultimately, there seems to be no question that the plurality at least considered Norfolk Southern’s activities within the forum state alongside its consent to general personal jurisdiction in reaching its conclusion. That is, the plurality’s discussion—especially in Part IV of the opinion—indicates that in determining the validity of Pennsylvania’s consent-by-registration statute, simply asking whether Norfolk Southern consented to general personal jurisdiction was not the sole inquiry; rather, the company’s level of forum activity seemed to be a critical factor in the plurality’s final due process determination. For instance, one might ask: If the Court felt that Norfolk Southern’s consent alone *was* enough to establish general personal jurisdiction, would there have been any reason for such an in-depth survey of all of the activity Norfolk Southern had conducted in Pennsylvania in the first place? The answer seems to be no, as the plurality noted that Norfolk Southern’s consent was made in

133. *Id.* at 141.

134. 243 U.S. 93 (1917).

135. *Id.* at 95.

136. *See Mallory*, 600 U.S. at 134.

137. *Id.* at 135.

138. *Id.*

139. *Id.* at 136.

“exchange for the ability to conduct business [in Pennsylvania]” and that it took “full advantage of its opportunity to do [so].”¹⁴⁰

B. Justice Alito’s Partial Concurrence

Justice Alito agreed with the Court that Pennsylvania’s consent-by-registration statute does not violate the Due Process Clause of the Fourteenth Amendment as applied to Norfolk Southern—or, as he described it, “a large out-of-state corporation with substantial operations in [the] State.”¹⁴¹ In reference to the traditional bases of personal jurisdiction, Justice Alito pointed out that the Court has “never held that a State’s assertion of jurisdiction unconstitutionally intruded on the prerogatives of another State when the defendant has consented to jurisdiction in the forum State.”¹⁴² Thus, after acknowledging that Norfolk Southern “had clear notice that Pennsylvania considered its registration as consent to general jurisdiction,” he shifted his focus to the company’s connections with the State.¹⁴³ That is, he too cited *International Shoe*, asserting that in this case, the suit does not violate “fair play and substantial justice,” indicating that his argument rests on more than Norfolk Southern’s mere consent to jurisdiction.¹⁴⁴ For instance, relying on arguments intimately associated with *International Shoe*’s minimum contacts test, Justice Alito posited that “Norfolk Southern’s ‘conduct and connection with [Pennsylvania] are such that [it] should reasonably anticipate being haled into court there.’”¹⁴⁵ That begs the question: Would his decision in *Mallory* have been different if Norfolk Southern’s conduct and connection with Pennsylvania were such that it should *not have* reasonably anticipated being haled into court there?

Although Justice Alito was comfortable upholding Pennsylvania’s consent-by-registration statute against the facts of the *Mallory* case, he made sure to note that this case “is not the end of the story for registration-based jurisdiction.”¹⁴⁶ Stressing the relevance of the dormant Commerce Clause, Justice Alito explained that the Supreme Court has “long

140. *Id.* at 141; *id.* at 148 (Alito, J., concurring).

141. *Id.* at 150 (Alito, J., concurring).

142. *Id.* at 156 (Alito, J., concurring).

143. *Id.* at 153 (Alito, J., concurring) (citation omitted).

144. *Id.* at 150 (Alito, J., concurring) (citation omitted).

145. *Id.* at 153 (Alito, J., concurring) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

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

recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests."¹⁴⁷ However, he added, as it relates to the Due Process Clause, "[r]equiring Norfolk Southern to defend against Mallory's suit in Pennsylvania . . . is not so deeply unfair that it violates . . . due process," indicating that, in his view, Norfolk Southern's "extensive operations in Pennsylvania" authorizes the State to assert authority over the company.¹⁴⁸ Ultimately, Justice Alito seems to base his decision on the fact that he could not identify a due process violation when considering Norfolk Southern's consent to general personal jurisdiction alongside the reality that it is "a large . . . corporation with substantial operations in [the] State."¹⁴⁹

C. Justice Barrett's Dissenting Opinion

While the dissenting Justices also considered Norfolk Southern's level of forum activity in connection with its adherence to Pennsylvania's corporate registration statute, they deemed it insufficient to establish valid general personal jurisdiction.¹⁵⁰ In fact, the dissent critiqued the plurality's reliance on "a factsheet downloaded from the internet" to assert Norfolk Southern's significant presence in Pennsylvania as valid grounds for general personal jurisdiction.¹⁵¹ The dissent argued that in doing so, the plurality departed from the principles articulated in *Daimler*.¹⁵² Specifically, the dissent explained that under *Daimler*, "[t]he established test . . . is whether the corporation is 'at home' in the State," clarifying that while the plurality accurately identified that "Norfolk Southern is such a 'part of the Pennsylvania Community,' and does so much business there," this alone does not warrant subjecting it to suits unrelated to the State.¹⁵³ Ultimately, the dissenting Justices reasoned that Norfolk Southern did not have enough forum activity—even in combination with its adherence to Pennsylvania's registration requirements—to subject the company to general personal jurisdiction.¹⁵⁴

147. *Id.* (Alito, J., concurring).

148. *Id.* at 153 (Alito, J., concurring) (citation omitted).

149. *Id.* at 150 (Alito, J., concurring).

150. *Id.* at 180 (Barrett, J., dissenting).

151. *Id.* at 179 (Barrett, J., dissenting).

152. *Id.* at 180 (Barrett, J., dissenting).

153. *Id.* at 179-80 (Barrett, J., dissenting) (citation omitted).

154. *Id.* (Barrett, J., dissenting).

IV. Practical Implications of the *Mallory* Decision

A. Interpretation and Application of Mallory in the Lower Courts

In the aftermath of the *Mallory* decision, defendants registered in states that mandate consent to general personal jurisdiction—but engaged in significantly less forum activity than that of Norfolk Southern—seem to have a compelling due process argument. For instance, because the Court gave considerable weight to Norfolk Southern’s level of forum activity, future litigants might successfully argue that applying *Mallory* to foreign defendants who have consented to general personal jurisdiction manifested by registering to do business in a state but engage in much less forum activity than the very extensive activities and presence of Norfolk Southern in the *Mallory* case would result in fundamental fairness issues that ultimately violate the Due Process Clause. Thus, as the *Mallory* decision failed to set forth a bright line rule, reviewing how lower courts are interpreting and applying the case can provide valuable insight into whether considerations of Norfolk Southern’s forum activity truly had a decisive effect on the outcome of the case and whether the due process argument carries any weight in practice.

First, lower courts interpreting the *Mallory* decision have been unanimously clear that an essential prerequisite to the application of the case is determining whether the statute at issue provides an explicit grant of general jurisdiction over registered foreign corporations.¹⁵⁵ As the U.S. District Court for the District of South Carolina succinctly put it:

[T]he Supreme Court’s ruling . . . is limited to the situation where a state’s business registration statute provides that a foreign corporation must consent to personal jurisdiction within the state as a condition of doing business. Otherwise, *Mallory* would require any foreign corporation registered to do business within a state, regardless of where it was incorporated or had its

155. See, e.g., *Sahm v. Avow Corp.*, 705 F. Supp. 3d 925 (E.D. Mo. 2023); *K&C Logistics, LLC v. Old Dominion Freight Line, Inc.*, 374 So. 3d 515 (Miss. 2023); *Jobe v. BNSF Ry. Co.*, No. 23-cv-01146-RM-MDB, 2024 WL 474405 (D. Colo. Jan. 30, 2024); *In re Abbott Lab’ys*, No. 22 C 2011, 2023 WL 8527415 (N.D. Ill. Dec. 8, 2023); *Smith v. Transamerica Corp.*, No. 3:23-CV-357-KHJ-MTP, 2024 WL 420889 (S.D. Miss. Feb. 5, 2024); *Espin v. Citibank, N.A.*, No. 5:22-CV-383-BO-RN, 2023 WL 6447231 (E.D.N.C. Sept. 29, 2023).

principal place of business and regardless of its contacts with a state, to submit to personal jurisdiction within the state. This plainly exceeds the very limited scope of *Mallory*.¹⁵⁶

Then the question that remains is: Where a statute *does* explicitly provide that a defendant “must consent to personal jurisdiction within the state,” is consent alone enough?¹⁵⁷ Or, does such a law only comport with due process when an out-of-state entity should reasonably anticipate being haled into court as a consequence of its activities and presence in the forum? Lower courts are divided, but when properly read, a proper application of *Mallory* should entail considerations of both the defendant’s consent to general personal jurisdiction and their contacts with the forum state.

The Second Circuit seems to endorse this approach, interpreting and applying *Mallory* in a manner that involves examining the defendant’s consent to general personal jurisdiction alongside their contacts with the forum. More specifically, in *Fuld v. Palestine Liberation Organization*,¹⁵⁸ the Second Circuit explicitly stated that “consent cannot be found based solely on a government decree pronouncing that activities unrelated to being sued in the forum will be ‘deemed’ to be ‘consent’ to jurisdiction there.”¹⁵⁹ Drawing from the plurality opinion in *Mallory*, the Second Circuit stated that it may be “fair and reasonable to infer the defendant’s [consent] to submit itself to a court’s authority” in situations where “a defendant accepts a benefit from the forum.”¹⁶⁰ In *Fuld*, however, there existed an “absence of any ‘substantial connection’ between ‘the defendants’ suit-related conduct . . . [and] . . . the forum.’”¹⁶¹ The Second Circuit continued to focus on *Mallory*’s general concern with a defendant’s level of forum activity when determining the validity of

156. *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. CV 2:18-2873-RMG, 2023 WL 6846676, at *5 (D.S.C. Oct. 17, 2023).

157. *Id.*

158. In this case, the defendants challenged the constitutionality of their consent to personal jurisdiction under the Fifth Amendment, but the Second Circuit stated that “the personal jurisdiction analysis is ‘basically the same’ under the Fifth Amendment’s Due Process Clause.” *Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 86 (2d Cir. 2023) (citing *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2d Cir. 2016)).

159. *Fuld*, 82 F.4th at 88 (citations omitted).

160. *Id.* (citation omitted).

161. *Id.* at 81 (citing *Waldman*, 835 F.3d at 335).

“consent” to personal jurisdiction, referencing the case to highlight how “[a] plurality of the Justices noted that [an] . . . ‘exchange’ between the defendant and the forum . . . ‘can signal consent to jurisdiction.’”¹⁶² The Second Circuit went on to point out that “the plurality referred repeatedly to this sort of ‘exchange,’” and how it “stressed the fundamental fairness . . . given the scale of the defendant’s operations in the state.”¹⁶³ Thus, the Second Circuit reasoned that *Mallory* did not apply to the case before it as the defendants “cannot be said to have accepted some in-forum benefit” even though they were deemed to have consented under the applicable statute.¹⁶⁴

Conversely, other lower courts seem to have a more radical understanding of *Mallory*, interpreting it to hold that consent through registration alone is enough, citing the case to hold that “[the] ‘minimum contacts’ or ‘at home’ analysis is not applicable where a party consents to a state’s jurisdiction.”¹⁶⁵ For instance, in *Lumen Technologies Service Group, LLC v. CEC Group, LLC*, the U.S. District Court for the District of Colorado seemed to view consent manifested by registering to do business in a foreign state as sufficient grounds for establishing general personal jurisdiction—regardless of the defendant’s contacts with that state.¹⁶⁶ This interpretation seems to wholly disregard the parts of the *Mallory* opinion (e.g., Part IV of the plurality opinion and Justice Alito’s partial concurrence) that suggest that the validity of consent-by-registration statutes under the Fourteenth Amendment turns on the defendant’s level of forum activity rather than their consent to general personal jurisdiction alone. By focusing solely on the defendant’s consent, the District of Colorado adopted a more drastic approach than the Second Circuit, leaving foreign corporations operating in states where consent to general personal jurisdiction is required for conducting business vulnerable to heightened exposure and significantly complicating their litigation strategies. Thus, at the heart of *Mallory* lies the question of whether consent, manifested by registering to transact business in a foreign state, by itself is sufficient to establish general personal jurisdiction.

162. *Id.* at 90 (citation omitted).

163. *Id.* at 95-96 (footnotes omitted) (citations omitted).

164. *Id.* at 96 (footnote omitted).

165. *Lumen Techs. Serv. Grp., LLC v. CEC Group, LLC*, 691 F. Supp. 3d 1282, 1289 (D. Colo. 2023) (citation omitted).

166. *Id.* at 1295-97.

B. Restoring Clarity

Consent-via-registration is not the mere flipping of a switch but is instead itself a significant type of contact with the forum. It *can* be enough to allow for general personal jurisdiction, but only in the context of significant other forum activities, as illustrated in *Mallory*. Accordingly, in order to restore clarity and uniformity within the lower courts, *Mallory* should be read to indicate that the proper analysis for determining the validity of state consent-by-registration statutes under the Fourteenth Amendment involves considering both the defendant's consent to general personal jurisdiction and their contacts with the forum state.¹⁶⁷ To be more specific, consent through registration as a condition of conducting business in a foreign state is not—*alone*—inherently determinative of a defendant's amenability to general personal jurisdiction; rather, the defendant's level of forum activity should be viewed as a necessary ingredient in the jurisdictional analysis. For instance, discussions within the *Mallory* opinion itself suggest that the validity of consent-by-registration statutes under the Fourteenth Amendment turns on the defendant's level of forum activity rather than merely asking whether a state statute requires foreign corporations to answer for any suit against it there.¹⁶⁸ Thus, when carefully considered, the appropriate framework for lower courts interpreting and applying *Mallory* should entail a hybrid approach that considers both the defendant's consent to general personal jurisdiction and their contacts with the forum state. This approach is consistent with *Mallory* and *Pennsylvania Fire* because it incorporates the principle from *Pennsylvania Fire* that consent-by-registration is constitutionally valid while reflecting *Mallory*'s consideration of the defendant's level of forum activity. By requiring both elements, this approach ensures that jurisdiction is based on meaningful contacts rather

167. This naturally prompts the question: What level of activity within the forum should be required for determining the validity of state consent-by-registration statutes? Given the argument that Norfolk Southern could have fallen under general personal jurisdiction in Pennsylvania under the pre-Goodyear/Daimler “doing-business” jurisdictional analysis that most lower courts formerly used for establishing general jurisdiction—even without needing to consider the “consent” argument and the special feature of Pennsylvania’s registration statute—it seems fitting that this should serve as the standard for the necessary level of contacts.

168. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 145 (2023); see also *id.* at 150 (Alito, J., concurring).

than formal consent alone, thereby adhering to both traditional jurisdictional principles and modern due process considerations.

While consent through registration may signify a *willingness* to subject oneself to the authority of a foreign state, it does not necessarily entail a deliberate submission to that state's jurisdiction—especially when doing so is merely a prerequisite to transacting business in that state in the first place.¹⁶⁹ In fact, that approach has not evaded scrutiny, as “[s]ome courts and commentators are rightly noting that mandating consent as the cost of doing business in a particular forum is consent in name only.”¹⁷⁰ For instance, commentators contend that a corporation's consent, manifested by registering to transact business in a foreign state, is not consent and that “[g]iven the seemingly facial incongruity of a mandatory provision being designated voluntary, registration-based consent fails under . . . the Due Process Clause.”¹⁷¹ Legal scholars further contend that courts which find general personal jurisdiction through consent-by-registration statutes are merely assuming that a foreign corporation's registration equals consent and that “these courts rely on little more than *ipse dixit*.”¹⁷²

Further, the very principles underlying personal jurisdiction seem to suggest that fairness and predictability are vital aspects of any court's assertion of personal jurisdiction over the parties before it.¹⁷³ Indeed, the Supreme Court has explicitly stated “that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”¹⁷⁴ Accordingly, by equating registration with an unequivocal consent to jurisdiction, courts run the risk of diluting the very aspects of fairness and predictability, given that these principles can only be realized by considering the nature and extent of a defendant's connections with the forum state.¹⁷⁵ The U.S. District Court

169. See *id.* at 164 (Barrett, J., dissenting) (arguing that consent-by-registration statutes allow states to merely manufacture of consent to personal jurisdiction).

170. Craig Sanders, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 Nw. U.L. Rev. 1323, 1323 (2017).

171. *Id.* at 1333 (footnote omitted).

172. Monestier, *supra* note 118, at 1379.

173. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (stating that the Due Process Clause and *International Shoe* ensure a level of predictability for defendants to foresee whether their conduct will expose them to a court's personal jurisdiction).

174. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (footnote omitted).

175. See, e.g., *id.* at 216 (“The Due Process Clause ‘does not contemplate that a state

for the District of Delaware took this approach in *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.* holding, “[j]ust as minimum contacts must be present so as not to offend ‘traditional notions of fair play and substantial justice,’ the defendant’s alleged ‘consent’ to jurisdiction must do the same.”¹⁷⁶ Thus, to comport with “traditional notions of fair play and substantial justice,”¹⁷⁷ consent, manifested by registering to transact business in a foreign state, should only be deemed valid where an out-of-state entity “should reasonably anticipate being haled into court” as a consequence of its activities and presence in the forum.¹⁷⁸

Put differently, when determining whether a foreign corporation’s registration in a state amounts to a valid agreement to answer for any suit against it there, its “[c]onsent [should be] inferred from [their] conduct rather than from [their] direct expression.”¹⁷⁹ For instance, an “exchange” between the defendant and the forum can signal consent to general personal jurisdiction because “by voluntarily using state procedures in order to reap the benefits [of] doing business in the state, the corporation has impliedly agreed to be subject to the jurisdiction of the court.”¹⁸⁰ Or, in the words of the U.S. District Court for the District of Connecticut, “consent may be implied under certain circumstances, but the implication must be predictable to be fair.”¹⁸¹ Thus, “registering and appointing an agent for service of process—do[es] not lead inexorably to the conclusion that a corporation has consented to jurisdiction,” but rather “obviates the need for a detailed minimum contacts analysis.”¹⁸²

In fact, this seems to be the very approach taken by both the plurality and Justice Alito in *Mallory* and should be the approach employed by lower courts going forward. For instance, the plurality acknowledged that “‘a variety of legal arrangements’ can signal consent to jurisdiction . . . and . . . can include . . . consent to suit in exchange ‘for access to [a State’s]

may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.’”) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

176. *AstraZeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549, 556 (D. Del. 2014) (quoting *Int’l Shoe Co.*, 326 U.S. at 316).

177. *Int’l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

178. *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (citations omitted).

179. Monestier, *supra* note 118, at 1394 (quoting BLACK’S LAW DICTIONARY 368 (10th ed. 2014)).

180. *Id.* at 1394.

181. *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011).

182. Monestier, *supra* note 118, at 1395, 1400.

markets,”¹⁸³ rather than solely focusing on whether or not Norfolk Southern’s registration amounted to consent to jurisdiction.¹⁸³ Additionally, after noting that Norfolk Southern is “a large . . . corporation with substantial operations in [the] State,” and that the company’s “conduct and connection with [Pennsylvania] are such that [it] should reasonably anticipate being haled into court there,” Justice Alito explicitly stated that “[r]equiring Norfolk Southern to defend against Mallory’s suit in Pennsylvania . . . is not so deeply unfair that it violates . . . due process.”¹⁸⁴ In other words, “[c]onsent may be fairly inferred when a prospective defendant ‘voluntarily invoke[s] certain [in-forum] benefits,’” as “the acceptance of the benefit implicitly signals the defendant’s agreement to appear in the forum’s courts.”¹⁸⁵ Thus, determining the validity of a corporation’s consent manifested through registration must implicate considerations beyond mere consent; the defendant’s forum activity, their connection to the forum state, and the foreseeability of being haled into court there are all factors that must be weighed in determining the validity of a state’s assertion of personal jurisdiction.

Moreover, the necessity of interpreting *Mallory* to demand a consent-contacts hybrid approach is underscored by the fact that “interpreting registration statutes to confer general jurisdiction on a court . . . promotes forum shopping.”¹⁸⁶ For example, by disregarding a defendant’s contacts with the forum state, the “[a]ssertion of general jurisdiction on th[e] basis [of registration to do business] promotes forum-shopping abuse by plaintiffs and may require a corporation to defend suit in a state where it has no other contacts on a cause of action unrelated to the forum.”¹⁸⁷ Accordingly, states that automatically interpret consent-by-registration statutes as amounting to consent to general personal jurisdiction will become “forum shoppers’ havens.”¹⁸⁸ That is, “a litigant [will have] every incentive to locate a forum—any forum—where the corporation has registered to do business and that regards such registration as consent to

183. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 141 n.8. (2023) (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

184. *Mallory*, 600 U.S. at 150, 153 (Alito, J., concurring) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

185. *Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 95 (2d Cir. 2023) (citing *Mallory*, 600 U.S. at 148 (Jackson, J., concurring)).

186. Monestier, *supra* note 118, at 1409.

187. Pierre Riou, Note, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741, 745 (1995).

188. Monestier, *supra* note 118, at 1410.

all-purpose jurisdiction.”¹⁸⁹ These complexities also give rise to federalism issues, as inconsistent interpretations of consent-based jurisdiction statutes across states can lead to conflicts and confusion, further highlighting the need for a uniform approach to interpreting this due process issue. Thus, as “forum shopping is considered an undesirable and abusive tactic,” lower courts can avoid such a result by embracing a uniform consent-contacts hybrid approach.¹⁹⁰

Ultimately, “[c]ommentators, much like the courts, are split on whether registration-based consent should satisfy the general jurisdiction analysis.”¹⁹¹ However, a hybrid approach that considers consent in combination with the nature and extent of a defendant’s contacts with the forum state is essential for restoring a degree of uniformity and predictability within the lower courts when it comes to corporations transacting business in states utilizing consent-by-registration statutes. For example, there are instances where “a corporation will register to do business in a certain state but never do business there,” illustrating the importance of interpreting *Mallory* to require an approach that considers both the defendant’s consent and contacts because “asserting general jurisdiction over a corporation in these circumstances can appear to be an arbitrary ‘gotcha’ in cases where there is no other conceivable connection between the defendant and the state purporting to assume jurisdiction.”¹⁹² A consent-contacts hybrid approach can ensure the establishment of a framework that will allow potential defendants to foresee whether their conduct might subject them to the personal jurisdiction of courts in a foreign state.

Conclusion

The proposition that consent through registration alone amounts to consent, which in turn equals amenability to general personal jurisdiction in potentially all fifty states, cannot survive a due process analysis after *Mallory*. As the *Mallory* decision itself suggests, fairness requires a comprehensive assessment of the defendant’s connection with the forum state, rather than solely focusing on consent through registration. Thus,

189. *Id.* (footnote omitted).

190. Markus Petsche, *What’s Wrong with Forum Shopping - An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT’L L. 1005, 1006 (2011).

191. Sanders, *supra* note 170, at 1341.

192. Monestier, *supra* note 118, at 1405-06.

restoring clarity in the realm of personal jurisdiction after *Mallory* requires lower courts to recognize that fairness and predictability—the very principles that underlie a court’s valid assertion of personal jurisdiction—demand a more comprehensive analysis—one that accounts for the totality of the circumstances, including the defendant’s forum activity. By embracing a consent-contacts hybrid approach, lower courts can better navigate the complexities of personal jurisdiction by re-establishing a level of uniformity that would result in aspects of fairness and predictability to be restored for all parties involved.

